

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of)	
)	
BILL ELLIS, INC., A California Corporation,)	Case No. <u>A-2-69</u>
)	
Appellant,)	Filed and Served:
)	
vs.)	
)	<u>10 October 1969</u>
DEPARTMENT OF MOTOR VEHICLES,)	
)	
Respondent.)	
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Time and Place of Hearing: September 24, 1969, 1:30 P.M.
3500 South Hope Street
Los Angeles, California

For Appellant: Getz, Aikens & Manning
By George E. Leaver
6435 Wilshire Boulevard
Los Angeles, CA 90048

For Respondent: Honorable Thomas Lynch
Attorney General

Michael J. Smolen
Deputy Attorney General

FINAL ORDER

In the decision ordered June 30, 1969, by the Director of Motor Vehicles pursuant to Chapter 5, Part 1, Division 3, Title 2 of the Government Code, it was found that the parties to the proceedings had stipulated that appellant: (1) failed in 242 instances to file with respondent written notices of sale before the end of the third business day after transferring

the vehicles; (2) wrongfully and unlawfully failed in 24 instances to mail or deliver to respondent the report of sale of used vehicles together with such other documents and fees required to transfer the registration of the vehicles within the twenty-day period allowed by law; (3) wrongfully and unlawfully failed in 134 instances to mail or deliver to respondent the application for registration of a new vehicle together with other documents and fees required to register the vehicles within the ten-day period allowed by law; (4) reported to respondent in 10 instances a date of sale other than the true date of sale and did thereby make false statements or conceal material facts in the application for registration of the vehicles; (5) filed with respondent in 1 instance a false certificate of non-operation of a vehicle and did thereby make a false statement or conceal a material fact in the application for registration of the vehicle; and (6) reported to respondent in 6 instances a date of sale other than the true date of sale for the first date of operation of the vehicle and did thereby make false statements or conceal material facts in the application for registration of such vehicles.

It was found that the violations designated above as (4) through (6) were made without any intent to deceive or defraud; that appellant inherited numerous difficulties when it

purchased the business in 1965; that appellant has eliminated a significant amount of difficulties by inaugurating an acceptable program of bookkeeping and review and that appellant made significant efforts to correct its procedures to prevent reoccurrences when errors were brought to the attention of management.

The penalty imposed suspended appellant's license, certificate and special plates for a period of sixty days; stayed the execution of the suspension order and placed appellant on probation for a period of two years under the conditions that it: (1) employ and retain competent personnel for the purpose of accurately and promptly preparing and keeping all necessary books and records required in the operation of its business and submit complete and accurate reports to respondent; (2) abide by all laws and regulations. It was further ordered that the Director of Motor Vehicles may, in his discretion and without a hearing, vacate the stay order and impose the suspension order should he determine upon evidence satisfactory to him that cause for disciplinary action has occurred during the probationary period.

An appeal was filed with this Board pursuant to Chapter 5, Division 2 of the Vehicle Code asserting that: (1) the penalty is too harsh and severe in its entirety, and (2) the part of the order that permits the Director to vacate the stay order

and impose the order of suspension without a hearing violates the due process clause of the state and federal constitutions.

Respondent calls into question, through its brief and during oral argument, the scope of the Board's penalty review. It argues that we can interfere with the penalty "...only if there is an arbitrary, capricious or patently abusive exercise of discretion." It also informs us that its conclusions were reached by examining the scope of review vested in courts and other appeal boards reviewing determinations of administrative agencies.

I. WHAT IS THE PROPER SCOPE OF REVIEW BY THIS BOARD ON THE ISSUE OF PENALTY?

Respondent's arguments ignore fundamental rules of statutory construction. By saying the "abuse of discretion" rule controls this Board, it reads into the statutes something that isn't there. "There can be no intent in a statute not expressed in its words and there can be no intent upon the part of the framers of such a statute which does not find expression in their words." (Ex parte Goodrich 160 Cal. 410.) Respondent does not point to any statutory language susceptible of the interpretation it seeks to impose upon this Board. Our attention is called to applicable statutes but respondent directs us to no language therein suggesting we can interfere with the penalty only when, as a matter of law, it is too harsh. Failing to find statutory language supporting its position, respondent resorts to the use of extrinsic aids. It ignores

the rule that such aids should be used only when the intent of the Legislature cannot be ascertained from a plain reading of the statutes. "It is a cardinal rule, applicable to the interpretation of statutes, that, in order to ascertain the intent of the Legislature in enacting the same, recourse must be first had to the language of the statute itself and that, if the words of the enactment, given their ordinary signification, are reasonably free from ambiguity and uncertainty, the courts will look no further to ascertain its meaning." (People v. Stanley 193 Cal. 428.) Respondent has not, either in its brief or during oral argument, presented us with an analysis of the statutes circumscribing the Board's appellate powers, nor has it brought to our attention any ambiguous language, and we find none, which would authorize going beyond the plain words of the applicable statutes to determine their meaning.

The cases cited by respondent to support its position that this Board is bound by the "abuse of discretion" rule fall far short of so doing. Respondent cites the case of Brown vs. Gordon, 240 Cal. App. 2d 659, and informs us that this case "...clearly sets forth the controlling law in the area of reviewing penalties by an administrative agency." This statement is erroneous. The court said, "It is well settled that in a mandamus proceeding to review an administrative order, the determination of penalty by the administrative body will not be disturbed unless there is a clear abuse

of discretion" (emphasis added).

Respondent cites Kramer vs. Board of Accountancy, 200 Cal. App. 2d 163, as authority for the proposition that "... the penalty imposed is subject to judicial review only where a clear abuse of discretion is shown." It also argues that the "abuse of discretion" rule is applicable to a case on appeal to the Alcoholic Beverage Control Appeals Board and cites Martin v. Alcoholic Beverage Control Appeals Board, 52 Cal. 2d 287. Kramer is a proceeding in administrative mandamus and Martin is a case before the Alcoholic Beverage Control Appeals Board. A most cursory comparison of Code of Civil Procedure Section 1094.5 (concerning administrative mandamus) and Article 4, Chapter 1.5, Division 9 of the Business and Professions Code (concerning Alcoholic Beverage Control Appeals Board) with the statutes applicable to the appellate powers of this Board will demonstrate the irrelevancy of these cases to our penalty determining powers.

Having found no ambiguous language in the statutes circumscribing our scope of penalty review, we confine ourselves to those statutes to determine the scope of such review vested in this Board.

The relevant portion of Section 3054 V.C. reads as follows:

"3054. The board shall have the power to reverse or amend the decision of the department if it determines that any of the following exist:

* * *

"(f) The determination or penalty, as provided in the decision of the department is not commensurate with the findings."

The quoted portion of this statute authorizes the Board to reverse or amend the penalty portion of the decision of the department when the Board "determines" that the penalty is inappropriate to the circumstances of the case as established by the findings of the respondent. Should the Board determine that the penalty is inappropriate, in its discretion, it may reverse and remand to the department pursuant to Section 3056 V.C. for refixing of penalty, or it may substitute its judgment on the issue for that of the department and amend the penalty.

Had the Legislature intended to limit this Board's scope of penalty review to cases involving a clear showing of abuse of discretion, it would have omitted subsection (f) from Section 3054 V.C. It is significant that there is no comparable provision in Business and Professions Code Section 23084 which defines the scope of review of Alcoholic Beverage Control Board, and none is to be found in Section 1094.5 of the Code of Civil Procedure. Furthermore, had the Legislature not intended that this Board have the power to substitute its judgment for that of the department on the matter of penalty, it would have omitted the word "amend" from the first sentence of Section 3054 V.C. This omission would have required the Board to remand to the department pursuant to Section 3056 V.C. for penalty redetermination. Here again, it is significant that the word "amend" contained in Section 3054 V.C., is absent from Business and Professions Code Sections 23084

and 23085 and from Code of Civil Procedure Section 1094.5. Moreover, in both of the last mentioned sections, the Legislature has specifically stated that the order "shall not limit or control in any way the discretion ..." vested in the agency. No such language is to be found in the pertinent statutes governing this Board.

We are firmly of the opinion that Section 3054 V.C. empowers this Board to reverse the penalty fixed by the department, without finding an abuse of discretion, and remand the case to the department for penalty redetermination or, in the alternative and in its discretion, exercise its independent judgment and amend the penalty accordingly.

The Board would be acting pursuant to its power under subsection (f) of Section 3054 V.C. if it amended the penalty imposed in this case because the stipulated findings contained in the decision are not challenged in this appeal. Although Section 3055 V. C. is not brought directly into play by this appeal, we consider it inappropriate to terminate a discussion of the Board's scope of penalty review without a discussion of that section. "Legislative intent should be gathered from the whole act rather than from isolated parts or words." (45 Cal. Jur. 2d, Statutes 117.) We said in the case of *Holiday Ford vs. Department of Motor Vehicles A-1-69*:

"Turning to the issue of penalty, we are cognizant of the general rule that a reviewing court will not disturb the penalty imposed by the administrative agency unless there is a clear abuse of discretion. However, the

Legislature has given this board the power to deviate from the general rule. Section 3055 Vehicle Code provides as follows:

'The Board shall also have the power to amend, modify, or reverse the penalty imposed by the department.'

Section 3055 V.C. supplements the penalty determination powers given the Board under Section 3054(f) V.C. Whereas Section 3054(f) V.C. applies to situations wherein we do not disturb the findings of the department but believe the penalty not to be commensurate with the findings, Section 3055 V.C. empowers us to fix the penalty following a reversal of one or more, but not all, of the findings of the department.

However, we are of the opinion, for reasons hereafter stated, that the penalty imposed by the respondent is appropriate to the circumstances of the case as set forth in the findings, and, therefore, we neither remand for refixing of penalty, nor do we amend the penalty fixed by respondent.

II. DOES DUE PROCESS OF LAW PRECLUDE THE DIRECTOR OF MOTOR VEHICLES FROM VACATING HIS STAY ORDER AND INVOKING THE SUSPENSION ORDER DURING THE PROBATION PERIOD UPON EVIDENCE SATISFACTORY TO HIM WITHOUT GIVING APPELLANT NOTICE AND OPPORTUNITY TO BE HEARD PRIOR TO TAKING SUCH ACTION?

We answer this question in the negative; the penalty imposed in this case in no way invades any of the appellant's constitutional rights.

Due process of law contemplates adequate notice and an opportunity to be heard; it does not require relitigation of issues finally determined after observance of due process.

"Due process contemplates that somewhere along the line a

fair trial be had -- not that there be two or three fair trials." (Hohrieter v. Garrison, 81 Cal. 2d 384; Kramer vs. State Board of Accountancy, 200 Cal. 2d 163.) "Due process insists upon the opportunity for a fair trial, not a multiplicity of such opportunities." (Dami v. Department of Alcoholic Beverage Control, 1 Cal. Rptr. 213.) "Due process of law under the state constitution and due process of law under the federal constitution mean the same thing." (Gray vs. Hall, 203 Cal. 306.)

The appellant raises no questions concerning the propriety of the administrative proceedings conducted by the respondent pursuant to the Administrative Procedure Act. It does not contend that there were any substantive or procedural defects in those proceedings. Appellant asserts that its constitutional rights would be infringed if the respondent executed, without giving appellant another opportunity to be heard, a portion of the penalty order which respondent imposed following the administrative hearing. Appellant, in effect, is arguing due process of law affords more than one fair hearing before suffering the full impact of the penalty. The cases cited above adequately demonstrate that appellant seeks a procedural protection which neither the state nor federal constitutions afford.

Appellant does not question the power of the director to suspend appellant's license based upon the findings in his

decision. Section 11705 V.C. clearly confers such power. It follows that the director has the authority to temper the exercise of that power by granting probation and imposing reasonable conditions without affording the appellant further notice and hearing should he find a violation of those conditions to have occurred.

Appellant contends that, "Suspension or revocation by an administrative agency of a licensee's license without a prior hearing would violate due process except in cases where the action is justified by a compelling public interest. It cites the cases of Escobedo vs. State of California, 35 Cal. 2d 870 and Hough vs. McCarthy, 54 Cal. 2d 273, to support this position. This rule has no application to the issue before us because it involves a situation wherein a disciplinary action was taken by an administrative agency without any hearing whatsoever.

III. IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES COMMENSURATE WITH HIS FINDINGS?

The Legislature has enacted certain statutes requiring notice to the Department of Motor Vehicles of the sale of motor vehicles (Section 5901 V.C.) and the use of dealers' reports of sale forms (Section 4456 V.C.; regulations implementing Section 4456 V.C. are 13 Cal. Adm. Code 410.00 and 410.01.) The Legislature has charged the Director with the responsibility of enforcing these statutes and the regulations which he adopts (Sections 1650 and 1651 V.C.).

Timeliness and accuracy of reporting required data to the respondent is essential to the statutory duty of establishing and maintaining reliable records and determining fees due the state. In the absence of timely and accurate reporting, the difficulty of determining civil and criminal liability arising out of ownership and operation of the approximate 12,500,000 motor vehicles registered in California is greatly increased; the state's ability to accurately assess and collect fees is impaired and the rights of purchasers and others entitled to certificates of ownership and certificates of registration are placed in jeopardy.

The Legislature saw the necessity of compelling dealers to timely file with the respondent accurate data concerning the sale of motor vehicles and transfer of title to such vehicles as evidenced by Section 11705 V.C. This statute empowers respondent to suspend or revoke the license, certificate and special plates issued to a dealer for failing to file or improperly filing the required data. We cannot believe that the Legislature would vest in respondent the power to close the doors of a dealership, with all its economic ramifications, unless the Legislature was firmly of the opinion that compelling dealers to meet the reporting requirements is indispensable to the orderly management of documents related to the ownership of motor vehicles and that such management is a matter of importance to the public welfare.

In the case before us on appeal, appellant failed in 400 instances to timely file required documents with respondent and furnished respondent with false information in 17 instances. Appellant purchased the dealership during 1965 but untimely notices of sale and reports of sale were being received by the Department from appellant as late as September 1968. This Board is aware of the mitigating factors recited at Paragraph IX, page 3, of the Director's decision. We are also cognizant that there is no finding that appellant submitted to the Department of Motor Vehicles false data after December 1966. However, appellant has stipulated to repeated violations extending over a period of thirty months. Although respondent finds no intent to deceive or defraud on the part of appellant, the record demonstrates a long course of unlawful conduct which, at best, manifests a complete disregard of responsibility to appellant's customers, the rights of the public at large, and the orderly discharge of the respondent's duties in motor vehicle registration. The Board believes the exercise of due care on the part of appellant would have remedied the defects in appellant's reporting procedures within a reasonable length of time after the dealership was purchased.

The penalty imposed by respondent is fair and reasonable in the light of the findings. The penalty permits appellant to continue his business of selling motor vehicles. The

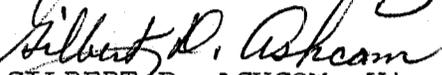
conditions of probation require only what the law and sound business practices already require; namely, obedience to all federal and state laws and rules and regulations of the Department of Motor Vehicles, maintenance of all necessary books and records required in the operation of appellant's business, submission of complete and accurate records and reports when and as required by the Department of Motor Vehicles, and employment of competent personnel for the purpose of keeping the necessary books and records.

Appellant argues, however, that the portion of the penalty authorizing the Director of Motor Vehicles to vacate the stay order and impose the order of suspension upon evidence satisfactory to the Director and without a hearing places appellant in the position of operating his business "...on the most tenuous of strings..." We do not believe the "string" to be tenuous. We will not presume the Director will act arbitrarily or capriciously or in any manner which would constitute an abuse of his discretion. Before vacating the stay order, the Director must find cause for disciplinary action and, before he can find such cause, he must have satisfactory evidence. Moreover, the Director is not required to vacate the stay order, even though he finds cause for doing so, but he may do so. These limitations, self-imposed by the Director, contemplate an orderly and conscientious examination of the evidence brought to his attention before

making any determination with reference to vacating the stay order. The Director's order affords appellant the opportunity of continuing its business of selling motor vehicles, evidencing a disposition which is entirely inconsistent with the suggestion that the Director may at some later date vacate the stay order and impose the suspension of the license without cause.

The decision of the Director of Motor Vehicles is affirmed.


ROBERT B. KUTZ, President


GILBERT D. ASHCOM, Vice-President


PASCAL B. DILDAY


MELECIO H. JACABAN


AUDREY B. JONES


ROBERT D. NESEN