

2415 First Avenue
P. O. Box 1828
Sacramento, CA 95809
(916) 445-1888

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY AND APPEALS BOARD

In the Matter of)	
)	
WEBER AND COOPER LINCOLN-MERCURY,)	
A California Corporation,)	
)	
Appellant,)	Appeal No. A-20-71
)	
v.)	Filed: August 15, 1972
)	
DEPARTMENT OF MOTOR VEHICLES,)	
)	
Respondent.)	

Time and Place of Hearing:

July 19, 1972, 9:00 a.m.
City Council Chambers
City Hall
625 E. Santa Clara Street
Ventura, California

For Appellant:

DeWitt Blase
Heily, Blase, Ellison &
Muegenburg
220 South A Street
Oxnard, CA 93030

For Respondent:

Honorable Evelle J. Younger
Attorney General
By: Jeffrey S. Wohlner
Deputy Attorney General

FINAL ORDER

An appeal was taken to this board by Weber and Cooper
Lincoln-Mercury, hereinafter referred to as "appellant",

from a decision of the Director of Motor Vehicles imposing a 10-day suspension, stayed for a period of one year, during which time appellant would be on probation and subject to the condition that it obey all laws and regulations governing commerce in motor vehicles. Proceeding via the Administrative Procedure Act (Section 11500 et seq. Government Code), the director found that appellant had: (1) overcharged customers registration and vehicle license fees in six instances; (2) failed in one instance to have a salesman's license properly displayed; (3) advertised motor vehicles without including in the advertisement the license number or vehicle identification number; and (4) advertised prices of motor vehicles that excluded freight costs.

In mitigation, the director found that appellant had: (1) refunded all of the overcharges and imposed more effective controls to avoid repetition of such violations; (2) desisted from placing advertisements of the type found to be in violation of the law immediately after being advised of their illegality; and (3) been very cooperative in all respects with investigators of the Department of Motor Vehicles.

Appellant not only contends that the penalty imposed by the director is excessive, but also maintains that some of the findings are not supported by the evidence. We dispose

of the evidentiary questions first and then direct our attention to the appropriateness of the penalty.

At the outset, we reject the assertion of the department's counsel on appeal that the board is bound by the substantial evidence rule. In *Holiday Ford v. Department of Motor Vehicles*, A-1-69, we said: "We are persuaded that Section 3054 Vehicle Code compels the application of the independent judgment rule rather than the substantial evidence rule." Pursuant to this rule, we are called upon to resolve conflicts in the evidence in our own minds, draw such inferences as we believe to be reasonable and make our own determinations regarding the credibility of witnesses whose testimony appears in the transcript of the administrative proceedings.

IS THE DIRECTOR'S FINDING THAT APPELLANT VIOLATED SECTION 11713(h) VEHICLE CODE BY NOT HAVING DISPLAYED AT THE DEALERSHIP A LICENSE AUTHORIZING A SALESMAN TO SELL MOTOR VEHICLES SUPPORTED BY THE WEIGHT OF THE EVIDENCE?

Appellant was charged with hiring one Almquist during 1969 as a vehicle salesman when Almquist was not licensed as such. Appellant was also charged with not having Almquist's license displayed at appellant's premises. However, the director found, "It was not established that said Steven Joseph Almquist was not then licensed as a vehicle salesman." The director did find that no license authorizing Almquist to act as a vehicle salesman was displayed at appellant's premises during the period

of employment but that a "suspense receipt" issued to Almquist was displayed.

The department produced no evidence that Almquist's license was not properly posted but apparently assumed that, because it believed that Almquist was not licensed, it necessarily followed that his license would not be posted on the premises. In view of its apparent inability to meet its burden of proof, a similar finding should have, in our opinion, been made concerning the posting of the license when it was found that there was insufficient evidence to support the charge that Almquist was not licensed.

The department apparently based the "no posting" finding on the fact that a suspense receipt issued to Almquist was posted on appellant's premises. While a finding may be based upon an inference (People v. Berti, 178 Cal.App.2d 872; Bauman v. Harrison, 46 Cal.App.2d 84), an inference must be reasonably and logically drawn and may not be based only on imagination, speculation, supposition, surmise, conjecture or guesswork. (Cothran v. Town Council of Los Gatos, 209 Cal.App. 2d 645.) We believe it to be no more than speculation or guesswork to find from the facts before us that a vehicle salesman's license issued to Almquist was not posted on appellant's premises.

We reverse that portion of Finding of Fact V of the director's decision which finds that Almquist's license was not displayed on appellant's premises during Almquist's period of employment and we reverse in its entirety Determination of Issues II.

IS THE DIRECTOR'S FINDING THAT APPELLANT VIOLATED SECTION 11713(a) VEHICLE CODE AS IMPLEMENTED BY 13 CAL. ADM. CODE 432.01 BY USING STOCK NUMBERS TO IDENTIFY VEHICLES IN ADVERTISEMENTS SUPPORTED BY THE WEIGHT OF THE EVIDENCE?

The director found that appellant had advertised motor vehicles for sale in a newspaper and identified the vehicles by stock numbers rather than license numbers or vehicle identification numbers. Appellant does not attack the finding. The director further found that appellant believed, at the time the advertisements were published, that stock numbers satisfied the requirements of the law.

We do not believe that the manner in which appellant used stock numbers in advertisements to identify vehicles constituted misleading or inaccurate advertising as those terms were used in Section 11713(a) Vehicle Code at the time the publications occurred.^{1/} In each of the advertisements bearing a stock number, the vehicles were described by make, year and manufacturer's

1/ At the relevant time, Section 11713(a) read as follows:

"11713. It shall be unlawful and a violation of this code for the holder of any license issued under this article:

"(a) To intentionally publish or circulate any advertising which is misleading or inaccurate in any material particular."

model and some physical characteristics of each vehicle were given. The stock number was clearly legible in the advertisements.

To run afoul of Section 11713(a) Vehicle Code, an advertisement must have been either "misleading" or "inaccurate". Turning to Webster's New International Dictionary -- Second Edition -- Unabridged for edification as to the meanings of the crucial words, we find the word "mislead" defined as, "1. To lead into a wrong way or path; to lead astray; to cause to err; to deceive." The word "accurate" is defined as, "1. In exact or careful conformity to truth or to some standard of requirement, esp. as the result of care; free from failure, error or defects; exact as accurate calculator; accurate knowledge." "Inaccurate" is defined as, "Not accurate; inexact: hence, incorrect; erroneous."

We do not perceive how, under these circumstances, the prospective purchaser of an automobile could be misled or in any way led astray or deceived. There is no contention made by the department and certainly the administrative record provides no basis for a contention that appellant switched stock numbers for the purpose of confusing buyers. There is likewise no contention and no basis for a contention that the stock numbers were inaccurate. Thus, it clearly appears to us that a prospective customer would have no difficulty in

identifying at the dealer's premises the vehicles described in the advertisements.

Neither do we believe that appellant's advertisements ran afoul of 13 Cal. Adm. Code 432.01.^{2/} The purpose of that regulation, which was adopted by the Director of Motor Vehicles to implement Section 11713(a) Vehicle Code, is stated in the text of the regulation itself: "...so that a prospective purchaser may recognize it as the vehicle advertised for sale." We view that phraseology as qualifying the requirement of the regulation that an advertisement must contain either the vehicle's identification number or license number. In other words, if the advertisement reasonably permits a prospective purchaser to identify the advertised vehicle through means other than the use of a license number or an identification number, such advertisement does not conflict with Regulation 432.01. As we previously stated, we have no doubt that a prospective purchaser could reasonably identify any of the vehicles in the advertisements complained of by the department.

We find that the weight of the evidence does not support

^{2/} "432.01. Identity of Vehicle. Any specific vehicle advertised for sale by a dealer shall be identified by either its vehicle identification number or license number so that a prospective purchaser may recognize it as the vehicle advertised for sale."

the finding that appellant violated Section 11713(a) Vehicle Code and 13 Cal.Adm. Code 432.01 and, accordingly, we reverse the Director's Determination of Issues III.

DOES THE WEIGHT OF THE EVIDENCE SUPPORT THE FINDING THAT APPELLANT VIOLATED SECTION 11713(a) and 13 CAL.ADM. CODE 433.00 BY ADVERTISING THE COST OF VEHICLES WHEN SUCH COST SPECIFICALLY EXCLUDED THE COST OF FREIGHT FROM THE ADVERTISED COST OF THE VEHICLE?

On October 2, 1970, and October 9, 1970, appellant caused to be published advertisements in a newspaper wherein certain vehicles at a certain price "plus tax, freight and license" were advertised. The quoted language was in the immediate proximity of the dollar figure and was of sufficient size type to be readily legible.

The department believes that the advertising of a price which does not include freight costs is misleading or inaccurate, as those terms were used in Section 11713(a) Vehicle Code at the time the advertisements were published, notwithstanding the fact the advertisement clearly shows that freight costs, among others, are extra.

Appellant argues that there was no evidence introduced at the administrative hearing which would indicate that the advertisements were misleading. Further, appellant points out that manufacturers of automobiles advertise on a national scale showing a dollar figure for the vehicle "plus destination

charges". He argues that this is merely another way of saying "plus freight". We dismiss the latter argument on the grounds that the relevant statute is controlling rather than the conduct of manufacturers.

We believe the question before us must be answered in the negative because the evidence fails to show that the advertisements are misleading or inaccurate. The advertisements show that the cost of fees and taxes due the state and the cost of freighting must be added to the price of the vehicle to arrive at the total cost. Certainly this does not lead astray, cause to err or deceive. This is not a situation where the word "freight" is of a size type smaller than the surrounding words nor is the word "freight" obscured in a remote part of the advertisement. Further, there is nothing on the face of the advertisement or in the administrative record to suggest that the advertising was not accurate or was incorrect or erroneous.

Because we hold that the advertisements in question do not violate the relevant statute, it follows that we find that they also do not run afoul of the implementing regulation, 13 Cal. Adm. Code 433.00. Regulations can only "...implement, interpret or make specific the law enforced or administered..." (Sections 11371 and 11374 Government Code); they may not alter or enlarge the terms of a legislative enactment. (Whitcomb Hotel v.

California Employment Commission, 24 Cal.2d 753; Morris v. Williams, 67 Cal.2d 733.)

The Director's Determination of Issues IV is hereby reversed on the grounds that the weight of the evidence does not support a finding that the advertisements violated Section 11713(a) Vehicle Code and 13 Cal. Adm. Code 433.00.

PENALTY

In determining the appropriate penalty to be imposed in this case, we have for our consideration only the six instances of overcharging for registration and vehicle license fees. The facts are undisputed. The excess fees ranged from \$1 to \$13 for a total of \$34. The director found that refunds were promptly made in each instance following discovery of an overcharge and that appellant had instituted effective controls to avoid repetition of such violations in the future.

With reference to the finding that appellant made refunds promptly in each of the six instances, it is significant that refunds were not made in those instances, according to appellant's president, until after appellant had been served with the accusation. (A.T. 95:5-8.)^{3/} The six purchases occurred during

^{3/} "A.T." refers to the transcript of the proceedings before an officer of the Office of Administrative Hearings. The numbers refer to the corresponding page and line numbers in the transcript.

a period from August 4, 1969, to February 21, 1970, and the accusation was filed February 10, 1971. Under these circumstances, we find it difficult to find the element of promptness. We believe it reasonable to infer that appellant's accounting procedures were so haphazard or ill-supervised that no reimbursements would have been forthcoming in the six instances had appellant not come under the scrutiny of the enforcement authority.

Pursuant to Sections 3054(f) and 3055 Vehicle Code, the New Car Dealers Policy and Appeals Board amends the decision of the Director of Motor Vehicles as follows:

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The dealer's license, certificate and special plates (D-6200) heretofore issued to appellant, Weber and Cooper Lincoln-Mercury, a California corporation, is hereby suspended for a period of three (3) days; provided, however, execution of said order of suspension is hereby stayed and appellant placed on probation for a period of thirty (30) days under the following terms and conditions:

1. Appellant shall strictly comply with all provisions of the Vehicle Code and the regulations of the Department of Motor Vehicles governing the sales and transfers of motor vehicles in the State of California.

If and in the event the Director of Motor Vehicles should

determine, after giving appellant notice and opportunity to be heard, that a violation of probation has occurred, the director may terminate the stay and impose suspension or otherwise modify the order. In the event appellant faithfully keeps the terms of the condition imposed for the period of thirty (30) days, the stay shall become permanent and appellant shall be restored to all license privileges.

This Final Order shall become effective August 28, 1972.

AUDREY B. JONES

ROBERT B. KUTZ

GILBERT D. ASHCOM

PASCAL B. DILDAY

JOHN ONESIAN

WINFIELD J. TUTTLE

determine, after giving appellant notice and opportunity to be heard, that a violation of probation has occurred, the director may terminate the stay and impose suspension or otherwise modify the order. In the event appellant faithfully keeps the terms of the condition imposed for the period of thirty (30) days, the stay shall become permanent and appellant shall be restored to all license privileges.

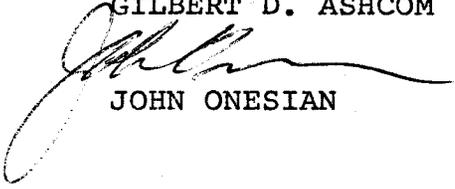
This Final Order shall become effective _____.

AUDREY B. JONES

ROBERT B. KUTZ

GILBERT D. ASHCOM

PASCAL B. DILDAY


JOHN ONESIAN

WINFIELD J. TUTTLE

determine, after giving appellant notice and opportunity to be heard, that a violation of probation has occurred, the director may terminate the stay and impose suspension or otherwise modify the order. In the event appellant faithfully keeps the terms of the condition imposed for the period of thirty (30) days, the stay shall become permanent and appellant shall be restored to all license privileges.

This Final Order shall become effective _____.

AUDREY B. JONES

ROBERT B. KUTZ

GILBERT D. ASHCOM

PASCAL B. DILDAY



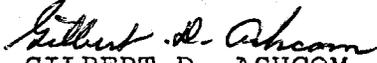
JOHN ONESIAN

WINFIELD J. TUTTLE

determine, after giving appellant notice and opportunity to be heard, that a violation of probation has occurred, the director may terminate the stay and impose suspension or otherwise modify the order. In the event appellant faithfully keeps the terms of the condition imposed for the period of thirty (30) days, the stay shall become permanent and appellant shall be restored to all license privileges.

This Final Order shall become effective _____.

AUDREY B. JONES


GILBERT D. ASHCOM

ROBERT B. KUTZ

PASCAL B. DILDAY

JOHN ONESIAN

WINFIELD J. TUTTLE

determine, after giving appellant notice and opportunity to be heard, that a violation of probation has occurred, the director may terminate the stay and impose suspension or otherwise modify the order. In the event appellant faithfully keeps the terms of the condition imposed for the period of thirty (30) days, the stay shall become permanent and appellant shall be restored to all license privileges.

This Final Order shall become effective _____.

AUDREY B. JONES

ROBERT B. KUTZ

GILBERT D. ASHCOM

PASCAL B. DILDAY

JOHN ONESIAN

WINFIELD J. TUTTLE



determine, after giving appellant notice and opportunity to be heard, that a violation of probation has occurred, the director may terminate the stay and impose suspension or otherwise modify the order. In the event appellant faithfully keeps the terms of the condition imposed for the period of thirty (30) days, the stay shall become permanent and appellant shall be restored to all license privileges.

This Final Order shall become effective _____.

AUDREY B. JONES



ROBERT B. RUTZ

GILBERT D. ASHCOM

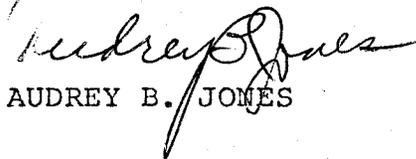
PASCAL B. DILDAY

JOHN ONESIAN

WINFIELD J. TUTTLE

determine, after giving appellant notice and opportunity to be heard, that a violation of probation has occurred, the director may terminate the stay and impose suspension or otherwise modify the order. In the event appellant faithfully keeps the terms of the condition imposed for the period of thirty (30) days, the stay shall become permanent and appellant shall be restored to all license privileges.

This Final Order shall become effective _____.


AUDREY B. JONES

ROBERT B. KUTZ

GILBERT D. ASHCOM

PASCAL B. DILDAY

JOHN ONESIAN

WINFIELD J. TUTTLE