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NEW CAR DEALERS POLICY & APPEALS BOARD

STATE OF CALIFORNIA

IMPERIAL MOTORS, a California Corporation,)
)
)
 Appellant,) No. A-28-72
)
 vs.) Filed: March 5, 1973
)
 DEPARTMENT OF MOTOR VEHICLES,)
)
 Respondent.)

Time and Place of Hearing: November 15, 1972, 10:15 a.m.
City Council Chambers
3200 Tahquitz-McCallum Way
Palm Springs, California

For Appellant: George E. Leaver
Getz, Aikens & Manning
Suite 770, 5900 Wilshire Blvd.
Los Angeles, CA 90036

For Respondent: R. R. Rauschert, Legal Adviser
Department of Motor Vehicles
By: Alan Mateer
Staff Counsel

FINAL ORDER

Imperial Motors, hereinafter referred to as "appellant",
filed an appeal with this board from a decision of the Director
of Motor Vehicles suspending appellant's license to operate

as a vehicle dealer for a period of 15 days and placing appellant on probation for a period of one year.

The Director of Motor Vehicles found that appellant had (1) failed in 59 instances to give to the department timely written notice after transferring an interest in certain motor vehicles; (2) failed in 44 instances to mail or deliver to the department timely reports of sale for certain used vehicles together with other documents and fees required to transfer registration of the vehicles; (3) failed in 18 instances to mail or deliver timely to the department the application for registration of certain new motor vehicles together with other documents or fees required to register the vehicles; (4) reported to the department in 13 instances a date of sale other than the true date of sale; (5) filed with the department in 6 instances false certificates of non-operation; (6) reported to the department in 5 instances a date other than the true date for the first date of operation of certain vehicles; (7) overcharged customers for vehicle license fees in 3 instances; and (8) disconnected, turned back or reset the odometer, in order to reduce the mileage thereon, on one vehicle.

With reference to the charges in excess of registration and vehicle license fees due or paid, the director found that the amounts of such overcharges were \$1.00, \$5.00, and

\$39.00 for a total of \$45.00. However, we concur with appellant's argument that the finding of a \$39.00 overcharge was erroneous in that the amount overcharged was, in fact, \$3.00. At the hearing before this board, counsel for each party stipulated that the facts giving rise to the finding of the \$39.00 overcharge were identical with the facts before us in *Miller Imports, Inc. v. Department of Motor Vehicles*, A-22-72.

In Miller we held that a dealer did not violate Section 11713(g) Vehicle Code when passing on to a purchaser registration and license fees that the dealer had paid, prior to the sale, to one other than the State. At page 2 of our final order, we said:

"We find no ambiguity in the statute [Section 11713(g) Vehicle Code] under discussion. It clearly makes unlawful the passing on to buyers costs of registration and vehicle license fees that are not due the State but it also provides for an exception; i. e., the dealer may pass on such costs when he has paid the fees prior to the sale. The exception is equally clear and there is no room for transposing a phrase as respondent [Department of Motor Vehicles] seeks to do."

Accordingly, we find that appellant overcharged its customers a total of \$9.00 for registration and vehicle license fees rather than \$45.00 as found by the director.

Having disposed of the only question of law raised by the appeal and noting that the facts are not in dispute, we direct our attention to the appropriateness of the discipline imposed by the director.

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

The department argues that this board may not reduce the penalty unless it is excessive as a matter of law. This argument is not deserving of extended discussion. We have considered our penalty-fixing powers on a number of previous occasions (Holiday Ford v. Department of Motor Vehicles, A-1-69; Bill Ellis, Inc. v. Department of Motor Vehicles, A-2-69; Ralph's Chrysler Plymouth v. Department of Motor Vehicles, A-3-69) and have concluded that the statutes governing this board do not require that, in reviewing the penalty, we are to limit our considerations to a determination of whether or not there has been an abuse of discretion. In Bill Ellis, Inc. v. DMV, supra, we stated:

"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."

This is not to say that we may freely substitute our penalty views for that of the director, willy-nilly. Obviously, the director's determination must be given respectful consideration and weight, just as the director affords such consideration and weight to the proposals of the hearing officer.

Respondent's arguments concerning our penalty-fixing powers appear to be directed at both the wisdom of the relevant statutes and their constitutionality as we

interpret them. We observe that the wisdom of a statute is the responsibility of the Legislature, not the administrative agency charged with enforcing it. (Ex parte O'Shea, 11 Cal.App. 568; Watson v. State Division of Motor Vehicles, 212 Cal. 279; Comfort v. Comfort, 17 Cal.2d 736.) Our research has uncovered no foundation for respondent's contention that the clear language of Section 3054 Vehicle Code raises "...serious constitutional issues..." The only case cited by respondent in support of its constitutional argument, Allen v. California Board of Barber Examiners, 25 Cal.App.2d 1014, is not in point.

In this case, there are a number of factors which have led us to the conclusion that requiring appellant to cease the business of buying and selling automobiles for 15 days is not commensurate with the wrongful acts committed by appellant, and that a lesser penalty of a 10-day cessation will adequately serve the public interest.

Appellant's owner, Kay Olesen, has been an automobile dealer for many years. He has had, and continues to have, two dealerships, one in Indio for 26 years and another in Cathedral City for 15 years. He had never, prior to the commencement of the proceedings in this case, received a written complaint from the Department of Motor Vehicles.

The evidence shows that repeat business has been a

mainstay of both outlets. An environment permitting unethical practices upon customers is not conducive to repeat business.

There is no evidence that appellant's owner or top management were involved in or condoned the wrongful acts. Company policy precluded odometer work, and the evidence preponderates to the view that the odometer tampering was an isolated incident engaged in by a salesman who had been discharged sometime before the odometer tampering came to light.

With reference to the untimely and false reporting to the department, the evidence shows that the culpability on the part of the owner and top management consisted of negligence in supervision. When the wrongful reporting came to the owner's attention, he took corrective action.

However, a corporate licensee is responsible for all acts of its officers, agents and employees acting in the course and scope of their employment. A contrary rule would, of course, preclude meaningful license discipline. Here, the wrongful conduct of those responsible for management was negligent supervision over a short period of time.

We note that the hearing officer, who had the opportunity to observe the demeanor and attitude of the witnesses, proposed that no actual suspension be imposed. We do not concur with his proposal. As we said in *Berkey-Lee v. DMV*, A-23-72:

"To impose no actual suspension on an automobile dealer who has unlawfully tampered with an odometer would, in our opinion, undermine public confidence in an industry that has made commendable strides towards achieving the dignity it deserves. Further, no actual suspension in a case of this kind would suggest to the wrongdoer, as well as other licensees who may have an inclination toward facilitating the sale of automobiles through wrongful means, that the risks involved do not outweigh the benefits."

Appellant's other violations were also of a serious nature.

In our view, a 10-day actual suspension is adequate discipline to show the need to meticulously follow the laws governing the operation of the licensed business. We, therefore, amend paragraph 2 at page 2 of the Director's Decision as follows:

2. The foregoing suspensions shall run concurrently for a total suspension of fifteen (15) days; provided, however, that five days of said 15 days are hereby stayed.

The remainder of the order is hereby affirmed.

This Final Order shall become effective March 26, 1973.

GILBERT D. ASHCOM

AUDREY B. JONES

ROBERT B. KUTZ

WINFIELD J. TUTTLE

D I S S E N T

We dissent as to the penalty fixed by the majority. In our view, the wrongful acts do not call for shutting down the dealership for 10 days. The mitigating factors recited by the majority clearly indicate that a license suspension of substantially less than 10 days is all that the facts of this case call for.

PASCAL B. DILDAY

MELECIO H. JACABAN

ROBERT A. SMITH

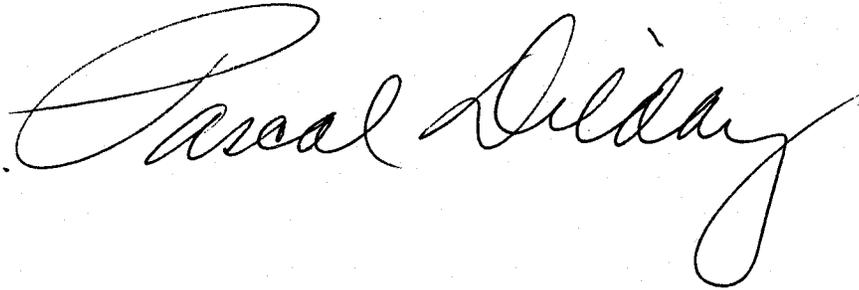
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Albert D. Ashcom

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A handwritten signature in black ink, appearing to be "Robert A. Fine", written in a cursive style.