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STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of)
)
SUBURBAN MOTORS, INC., dba)
SUBURBAN FORD,)
)
Appellant,) Appeal No. A-35-73
)
vs.) Filed: November 19, 1973
)
DEPARTMENT OF MOTOR VEHICLES)
OF THE STATE OF CALIFORNIA,)
)
Respondent.)
_____)

Time and Place of Hearing: September 12, 1973, 1:30 p.m.
State Building, Room 1157
350 McAllister Street
San Francisco, California

For Appellant: John B. Wagaman
Attorney at Law
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Carmichael, CA 95608

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

FINAL ORDER

Suburban Motors, Inc., dba Suburban Ford, hereinafter referred to as "appellant", appealed to this board from a disciplinary action taken against the corporate license by the Department of Motor Vehicles following proceedings pursuant to Section 11500 et seq. Government Code.

The Director of Motor Vehicles found that appellant had:

- (1) failed in four instances to give written notice to the department within three days after transfer of vehicles;
- (2) failed in 431 instances to mail or deliver reports of sale of vehicles (with documents and fees) to the department within 20 days;
- (3) failed in three instances to mail or deliver reports of sale of vehicles (with documents and fees) to the department within 30 days;
- (4) in 158 instances charged purchasers of vehicles excessive registration fees.

The director further found that the acts described in findings (1), (2), (3) and (4) above were performed by employees or officers of appellant within the course of his or her employment; that appellant retails nearly five thousand cars a year, including over two thousand used ones. In mitigation, appellant produced evidence that it had promptly refunded the overcharges; that the business manager and the "DMV Girl" employed by appellant had jointly decided to ignore discrepancies of three dollars or less between the fees charged to the customers and those determined by the department, on the theory that overcharges and undercharges more or less balanced each other; that there had been no complaints; that this practice has been stopped so that refunds are made in all instances in which the fee charged to the buyer exceeds that determined by the department; that measured against

appellant's overall operation, the practice of ignoring small overcharges could not and did not stem from a desire to make a few extra dollars but represented an effort toward greater efficiency; that the delays in forwarding documents to the department were caused by a variety of factors including overwork, and a desire to wait for credit or title clearances or for the completion of repairs; that in many cases, the delays amounted to just a few days beyond the statutory limits; and that appellant is conscientiously trying to do what it can, including employment of sufficient help, to process all documents within the time prescribed by law.

The director, adopting the proposed decision of the hearing officer, imposed the following penalty:

Revocation of dealer's license, certificate and special plates, with a stay for one year and one year's probation on the usual terms and conditions, plus a three-day actual suspension.

Appellant has appealed to this board on the grounds that the findings are not supported by the weight of the evidence; that the decision is not supported by the findings; and that the penalty is not commensurate with the findings.

The main thrust of appellant's argument in support of his appeal appears, in essence, to be three-fold: first, Sections 4456 and 4456.5 of the Vehicle Code are so vague and uncertain as to be unenforceable and unconstitutional; second, that the tender to the department of a check in the amount of

\$1,305.00 intended as and for the \$3.00 forfeiture fee specified in Section 4456.5 Vehicle Code for each of the violations of Sections 5901, 4456 and 5753 Vehicle Code precludes imposition of any further penalties for these offenses; and, third, appellant corporation is not responsible for the acts of its employees or officers.

Before addressing the issues raised by this appeal, two collateral matters require brief discussion.

Pursuant to Section 3054(e) Vehicle Code and 568(e) of the department's regulations, appellant requested and was granted the right to augment the record. In pursuance thereof, the appellant introduced in evidence a form entitled "Report of Deposit Fees" used by the department when returning incomplete applications for registration. The particular documentary evidence introduced was furnished by appellant's "DMV Girl" from a file that had been returned to the appellant in August 1973. The form recites in pertinent part that it, together with attached documents and items checked, "Must be returned to the Department of Motor Vehicles within 60 days. Credit for fees deposited will then be allowed."

During his offer of proof, counsel for appellant represented that the use of the form by the department first came to his attention during a discussion with appellant's "DMV girl" after the administrative hearing. Counsel further explicitly stated that the evidence was offered only on the

general issue of whether or not Section 4456 Vehicle Code is vague and uncertain and not on any other issue. Counsel for the department stipulated that the document in question was attached to any transfer items returned by the field offices of the Department of Motor Vehicles until sometime in August 1973, when the words on the form "within 60 days" were deleted. Further reference to this augmenting evidence will be made in our discussion of the issue of vagueness and uncertainty of Sections 4456 and 4456.5 Vehicle Code.

The second collateral matter concerns the finding of the hearing officer that on October 24, 1972, the appellant tendered to the department \$1,305.00, representing a \$3.00 forfeiture fee for each of the late reporting violations except the three 30-day violations for which \$3.00 was previously paid. At the close of the administrative proceeding, the hearing officer permitted both sides to submit written argument. Attached to appellant's [respondent's] answering argument was appellant's check, dated October 24, 1972, in the amount of \$1,305.00, made out to the Department of Motor Vehicles. (Note: the original check, unnegotiated, is presently filed as part of the entire administrative record.)

For our purposes, we need not decide whether the check

was properly received as evidence^{1/} nor whether tender was made to the department.^{2/} We are satisfied to rest on the fact that the offer of the check in the sum of \$1,305.00 as the \$3.00 forfeiture fee for the late reporting violations was untimely and consequently must be rejected. This aspect of the case will be further considered in our discussion of the issues raised by the appeal.

This appeal raises the question of whether the findings are supported by the weight of the evidence in light of the whole evidence and whether the decision is supported by the findings. These questions are considered simultaneously as appellant's arguments with respect to each are interrelated and overlap in many substantive aspects. As indicated previously, appellant's arguments are addressed to the vagueness and uncertainty of Section 4456 and 4456.5 Vehicle Code, the effect of the tender of payment of the \$3.00 forfeitures on additional penalty action and the lack of culpability of the corporation for acts of its employees.

The last of these contentions may be disposed of as being without merit by our observation in *Zar Motors v. Department of Motor Vehicles*, A-17-71, that it is well settled that the

1/ In analogous situations under statutes providing for review of records as certified, the courts will not consider evidence in arguments. (*NLRB v. Crown Can Co.*, 138 F.2d, 263 (8th Cir. 1943); certiorari denied, 321 U. S. 769 (1944).)

2/ A hearing officer assigned to conduct an administrative hearing is deemed an officer of the Office of Administrative Hearings and not of the agency to which he is assigned. (Govt.Code §11370.3.)

revocation or suspension of a license is not penal in nature (citing Meade v. State Collection Agency Board, 181 Cal.App.2d 774) and by our holding in Imperial Motors v. Department of Motor Vehicles, A-18-72 wherein we stated:

"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." (See also Bishop-Hansel Ford v. Department of Motor Vehicles, A-39-73; Main Toyota, Inc. v. Department of Motor Vehicles, A-37-73; cf. Rich Motor Company v. Department of Motor Vehicles, A-16-71.)

Turning next to the question of vagueness and uncertainty of Sections 4456 and 4456.5 of the Vehicle Code, appellant in actuality, raises the issue of the constitutionality of the statute. The weight of authority supports the position that the power to determine the constitutionality of legislation is not committed to administrative agencies. (See Public Utility Commission v. U.S. (1918) 355 U.S. 534, 539; Panitz v. District of Columbia (DCCir 1940) 112 F.2d 39, 42; 3 Davis, Administrative Law Treatise, §20.04 (1958); cf. Rubin v. Board of Directors (1940), 16 C.2d 119.) Accordingly, we make no findings or determinations concerning the constitutionality of the cited sections of the Vehicle Code. Nevertheless, in order to determine if the evidence supports the findings, it is necessary that we consider the interpretation, intent and clarity of the questioned legislation.

At the outset it is pertinent to observe that statutes

must be given a fair and reasonable interpretation with due regard to the language used and the purpose to be accomplished (45 Cal.Jur.2d §113); statutes must be given a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers -- one that is practical rather than technical, that will lead to a wise policy rather than mischief or absurdity (45 Cal.Jur.2d §116); and a statute must be construed so as to harmonize its various parts or sections without doing violence to the language, spirit or purpose of the act (45 Cal.Jur.2d §118; Merrill v. Department of Motor Vehicles (1969) 71 Cal.2d 907.)

In Coberly Ford v. Department of Motor Vehicles, A-25-72, citing numerous cases previously heard on appeal, we reviewed in detail some of the history of the legislation requiring timely and accurate reporting, the importance of compliance therewith and the dire consequences to the public resulting from non-compliance with such requirements. The culmination of all of this is contained in Sections 4456, 4456.5 and 5901^{3/} Vehicle Code, the scheme of which is to assure that title documents are handled in an orderly manner so that ownership of motor vehicles is a matter of public record within a reasonable time. (Evilsizor v. Department of Motor Vehicles (1967) 25 Cal.App.2d 216.)

3/ Section 5901 of the Vehicle Code is the section which requires written notice to the department within three days of transfer of a vehicle.

As we read sections 4456 and 4456.5, the language is certain and unambiguous that the basic intent is to give the dealer a 20-day period in which to collect and submit to the department the various documents needed to register or transfer title along with the fees and penalties, if any, that are required for licensing and registration. If the dealer needs additional time, Section 4456.5(a) provides that he "shall, upon payment of a forfeiture fee of three dollars (\$3) to the department, be allowed an additional 10 days to present to the department an application and documents in acceptable form." (Underscoring supplied.) Paragraph (b) of Section 4456.5 then goes on to state that following payment of the three dollar (\$3) forfeiture fee and upon a showing of diligent effort within such 30 days to obtain requisite information or documents to enable transfer, the dealer shall be allowed an additional 10 days to file, thus extending his total filing time to 40 days.

It is clear, when read in context, that the payment of the three dollar (\$3) forfeiture fee, provided for in subparagraph (a), is a condition precedent to obtaining the 10-day extension to the basic 20-day filing period. Payment of the forfeiture fee therefore must be timely.

What then of appellant's contention that the statute is rendered uncertain by the department's use of a form requesting

return of rejected applications within 60 days? This is the form received by the board in augmentation of the record. We need only comment that this form was furnished to appellant's counsel by appellant's "DMV girl" who testified at length at the administrative hearing. She testified that she had almost 20 years of experience in handling transfers, titles and "DMV" work and had been employed by appellant in such capacity for almost 10 years. Regarding the late reports of sale, she testified that some involved delays in getting papers from former owners of a traded vehicle; some involved delays as a result of "unwinds" and some delays were due to heavy workload. Significantly, her testimony established that with the aid of notebooks (introduced in evidence), she had a set pattern for calculating when the 20-day period for filing was up and if there was error, she would take the report to the department and pay the fees and forfeitures.

Nowhere in the testimony of the "DMV girl" do we find any hint of an idea that she or anyone else in appellant's organization was misled by receipt of the department's form into believing that the filing periods provided for in Sections 4456 and 4456.5 Vehicle Code were extended to 60 days' nor do we find any representation by appellant during augmentation of the record that the department's form resulted in any confusion or uncertainty as to the reporting requirements

set forth in the Vehicle Code.

Weighing the total evidence, we attach minimal significance to the form offered solely on the general issue of whether or not Section 4456 Vehicle Code is vague and uncertain. The relevance of the form to any specific item in the accusation was neither raised nor established by the appellant and requires no discussion.

We turn next to the matter of the tender of the \$1,305.00 which appellant has represented to be the three dollar (\$3) forfeiture fees described in Section 4456.5 Vehicle Code. In light of our conclusion that under this section the forfeiture must be paid on or before expiration of the basic 20-day period and is a condition precedent to obtaining a 10-day extension, it follows, contrary to appellant's argument, that such fee may not be paid at any time. If we were to agree with appellant's contention, a dealer could completely avoid his responsibility for timely reporting and, as in this case, wait until the completion of the administrative hearing to pay the forfeiture and then assert complete immunity from license discipline. This would completely circumvent the clear intent and purpose of the reporting requirements of the Vehicle Code and would lead to absurdity. Such a result cannot obtain.

Appellant points to the language of Paragraph (c), Section 4456.5 Vehicle Code, which states that, "notwithstanding

any other provision of this code, the three dollar (\$3) forfeiture payment provided by this section shall constitute the sole cause of action arising from non-compliance with paragraphs (3) and (4) of subdivision (c) of Section 4456^{4/} by the dealer."

Viewing this section as it applies to subparagraph (4), the timely payment of the three dollar (\$3) forfeiture fee only precludes license discipline for failing to file within 20 days but does not preclude action for failing to file within 30 or 40 days as the case may be. If this provision were not included, a dealer could conceivably pay the three dollar (\$3) forfeiture fee on or before the 20th day, file within the 10-day extension period and still be in violation of the code for failing to file within 20 days.

As to the reference in the section to subparagraph (3), we agree that there exists some internal conflict in language. This is so because Section 4456.5 states that the three dollar (\$3) forfeiture fee can be paid only if the dealer has filed the 3-day notice (Ref. Sec. 5901 V.C.). It is evident, therefore, that payment of the three dollar (\$3) forfeiture fee could not be the sole cause of action for failure to file the 3-day

^{4/} Section 4456(c)(3) V.C. provides that: "The sale of the vehicle shall be reported to the department as required by Section 5901."

Section 4456(c)(4) V.C. provides that: "An application in proper form to register the vehicle or to effect transfer of ownership, together with required supporting documents, shall be made by the dealer to the department on behalf of the purchaser within 20 days of the sale."

notice. We are not confronted here, however, with the task of reconciling this language as appellant's tender of payment of forfeiture fees was untimely and the issue in this case with respect to Section 5901 V.C. becomes academic.

To avoid any misapprehension in this area, we take cognizance of the three instances wherein the three dollar (\$3) forfeiture fees were timely paid (Items 405, 406 and 407 of Ex. B to the accusation). However, these items were not made the subject of discipline for failure to file 3-day notices in violation of Section 5901 Vehicle Code but rather were charged as violations of Section 4456.5 for failure to file within 30 days. We note here that the record of transcript is devoid of evidence of diligent effort of any sort with respect to these items. Accordingly, and without further discussion, we deem appellant's added attack on the language of Section 4456.5(b) Vehicle Code, which permits an extension of filing time to 40 days on a showing of "diligent effort" to be without merit.

In light of the foregoing and the conclusions reached therein and having exercised our independent judgment, we find that the findings are supported by the weight of the evidence in light of the whole evidence and that the decision is supported by the findings.

Having duly considered all the evidence before us and having given due consideration to all the matters presented in extenuation and mitigation, we find the penalty imposed by

the Director of Motor Vehicles to be entirely appropriate and commensurate with the findings.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This Order shall become effective December 5, 1973.

PASCAL B. DILDAY

WINFIELD J. TUTTLE

W. H. "HAL" McBRIDE

AUDREY B. JONES

THOMAS KALLAY

ROBERT A. SMITH

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