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NEW CAR DEALERS POLICY & APPEALS BOARD

STATE OF CALIFORNIA

MAIN TOYOTA, INC.,)
a California corporation,)
)
Appellant,) Appeal No. A-37-73
)
vs.) Filed: August 9, 1973
)
DEPARTMENT OF MOTOR VEHICLES)
OF THE STATE OF CALIFORNIA,)
)
Respondent.)
_____)

Time and Place of Hearing: July 11, 1973, 10:00 a.m.
Room 133, Resources Building
1416 Ninth Street
Sacramento, California

For Appellant: Louis L. LaRose
Attorney at Law
104 North Stevenson Street
Visalia, CA 93277

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

FINAL ORDER

Main Toyota, Inc., 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 16 instances to give written notice to the department within 3 days after transfer of vehicles;
- (2) failed in 3 instances to mail or deliver reports of sale of used vehicles (with documents and fees) to the department within 20 days;
- (3) failed in 15 instances to mail or deliver reports of sale of new vehicles (with documents and fees) to the department within 10 days;
- (4) in 2 instances falsely reported the true date of sale in applications for registration;
- (5) filed with the department a false certificate of non-operation;
- (6) in 8 instances falsely reported to the department the first date of operation of vehicles;
- (7) in 32 instances charged purchasers of vehicles excessive registration fees; and
- (8) the evidence produced at the hearing left doubt that appellant in 2 instances disconnected, turned back or reset odometers, thereby finding such allegations in the accusation to be not true (Finding XI).

The director further found appellant made the following showing: (1) that it had refunded all those excess registration fees described in the findings; (2) that other violations of law committed by appellant were due in part to its failure to receive current report of sale books from the department and in part to the institution of a new accounting system in its

business after it changed its identity to a corporation;
(3) it had no prior record of disciplinary action before the department; and (4) it is a large, successful Toyota new car franchise, employing approximately 50 people on a full time basis.

For each failure to give 3-day notice, 5 days' suspension; for each used car report of sale dereliction, 5 days' suspension; for each false report of true date of sale, 15 days' suspension; for false certificate of non-operation, 30 days' suspension; for false reports of first date of operation, 30 days' suspension; for charging excessive registration fees, 30 days' suspension. It was provided that all suspensions were to run concurrently, thereby resulting in a total period of 30 days' suspension. The director further ordered that 25 days of the suspension be stayed for a period of one year, subject to the condition that appellant obey all the laws of the United States, the State of California and its political subdivisions and obey all rules and regulations of the Department of Motor Vehicles.

The main thrust of this appeal is four-fold. Specifically, appellant argues that the 3-day notice violations lack evidentiary support; that the sanctions imposed for the remaining 3-day notice violations -- which the appellant recites as 5 in number -- are not commensurate with the findings; that Finding VIII,

concerned with the false certificate of non-operation, is not supported by the evidence, and that the full penalty as provided in the decision is not commensurate with the findings.

We consider each of these arguments in order:

DOES FINDING IV AS IT RELATES TO FAILURE IN 9 INSTANCES TO GIVE WRITTEN NOTICE TO THE DEPARTMENT WITHIN THREE DAYS AFTER TRANSFER OF VEHICLES LACK EVIDENTIARY SUPPORT?

The 9 instances which appellant cites in connection with this assertion on appeal concern the dealer notices identified in Exhibit A to the accusation as numbers 1, 19, 26, 27, 28, 30, 31, 33 and 36.

To establish the allegation of failing to give the requisite 3-day notices, the department introduced the declaration of Mr. Pratt, which was received without objection. In this declaration, Mr. Pratt set forth the nature of his duties as a departmental intermediate clerk, the manner in which documents are received and filed, the fact that he prepared a summary of the data relevant to this case (Exhibit A to the accusation) and that he prepared 43 folders -- numbered to correspond with items listed on Exhibit A -- each folder containing the original or photostatic copies of documents relating to the sale and transfer of the respective vehicles. Each of numbered items cited by appellant refer to correspondingly numbered manila folders which were received in

evidence without objection. Each folder contained the dealer notices relating to the transactions alleged as violations, among which are the 9 instances here under appellate attack. The dealer notices in these sales reflect the "date first sold" and the department's stamp showing the date of receipt by the department. In each instance, including the 9 here in question, the elapsed time between the two dates exceeded 3 days.

Appellant now argues that without the testimony of the purchasers or their affidavits received in evidence, the notices of sale standing alone, in each instance, resulted in a failure of proof and constitutes reversible error.

We have been confronted with this issue before. Dispositive of appellant's argument is the view which we expressed in the matter of Pomona Valley Datsun vs. Department of Motor Vehicles, Appeal No. A-31-72, wherein we stated:

"In our view, it is entirely proper for the department to rely on the date of sale entered by the dealer on the notice of sale and report of sale. The entry by the dealer of a certain date of sale creates a permissible inference that such date is the true date of sale. 'An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.' (Section 600(b) Evidence Code.) Is it not logical and reasonable to deduce that a licensed automobile dealer would avoid subjecting himself to both criminal and administrative sanctions (filing a false document - Section 20) by submitting to his licensor correct information on a document that the law requires? We firmly believe that such a deduction is permissible."

We adhere to the views expressed in Pomona Valley Datsun, and we fail to find in the administrative record evidence to dispel the inference that the date of sale entered by appellant was the actual date of sale. It follows, as respondent observed, that it was unnecessary for the department to call as witnesses the purchasers of the vehicles or to introduce their affidavits in evidence in order to establish the dates of sale. Accordingly, the 9 violations contained in Finding IV with which we are here concerned were sufficiently proved and the appellant's assertion of error is deemed to be without merit.

WERE THE SANCTIONS IMPOSED FOR THE REMAINING 3-DAY NOTICE VIOLATIONS COMMENSURATE WITH THE FINDINGS?

Appellant argues that after setting aside 9 instances of failure to notify within 3 days the sanctions for the remaining 5 violations are not commensurate with such findings. We cannot help but observe that appellant fails to account for 2 additional instances contained in the findings, as the violations under this accusation totaled 16 and not 14. We will concede that this miscalculation is of minor consequence.

The weakness of appellant's position here is that it is predicated on the validity and correctness of his contention in the assignment of error heretofore discussed.

Having resolved that issue adversely to the appellant, it must follow that his contention here must also fall. All 16 instances of failure to file notices within 3 days were adequately proved to support Finding IV. Consequently, at this point, we find that the sanctions imposed therefor were commensurate with the findings.

IS FINDING VIII, WHICH FINDS THAT APPELLANT FILED WITH THE DEPARTMENT A FALSE CERTIFICATE OF NON-OPERATION, SUPPORTED BY THE WEIGHT OF THE EVIDENCE?

To properly consider this question, it is necessary to briefly summarize the pertinent evidence of record.

Finding VIII arises out of a sale of a 1960 Austin Healy by the appellant to one Larry King, who was appellant's sales manager at the time. The vehicle involved is identified as Item 41. The documents properly received in evidence consisted of: (1) a "Dealer Notice" reflecting a sale to King on "3-26-70", date stamped "Mar 30-'70", when it was received by the department; (2) a certificate of non-operation of the vehicle "as a result of storage" from "5-21-69" to "7-19-70" signed "Main Toyota, Inc. by Geri Galloway" (Miss Galloway was appellant's bookkeeper and "DMV" girl at that time); and (3) a report of sale, temporary identification, dealers book copy of the report of sale, all showing dates sold as "3-26-70" and an attached paper plate, all of which were marked "Void".

Through King's affidavit received in evidence and his testimony at the hearing, it was established that King purchased the vehicle from Main Toyota, Inc. on March 26, 1970, operated it for about 60 days and then sold it to Mike Ward. He purchased the car for about \$100 and while he owned it, he "almost rebuilt it." Part of this work was done at Main Toyota, Inc. and part at his house. When he moved the car to his house, "It had the paper tag, and the paper in the windshield, report of sale." When he sold the car to Ward in April or May "or possibly in June" and asked for the papers, the vehicle had not been transferred and he was ordered to return his papers. He then took the title documents from the previous owner and gave them to Ward. King denied that he prepared the certificate of non-operation, nor did he know who did. As to the voided documents, he could not state with certainty whether they were his acts or not.

By way of defense, Miss Galloway, who signed the certificate of non-operation, testified that King probably furnished the information but could not swear to it. Mr. Salierno, president of appellant corporation, testified that he knew nothing about the certificate of non-operation but, in his opinion, it bore the handwriting of King. In January 1971, King's employment with Main Toyota was terminated at which time he had a disagreement with King over a bonus. King used profane

language, insinuated "he was a crook", and in effect, stated he was going to make trouble.

Mike Ward, on behalf of the appellant, testified that he purchased the Austin Healy from King about 30 to 45 days prior to the date he resold it, which was on September 10, 1970. However, he could not fix the date of the purchase from King with certainty nor could he state that it had not occurred in April or May without seeing his cancelled check which he did not have time to find.

Appellant now argues that King was impeached by the testimony of Mike Ward and that no evidence was produced which in any way tied Mr. Salierno, the corporation president, into the false certificate of non-operation transaction. Further, by innuendo in his argument, appellant would have us conclude that King's testimony should be disregarded as being without probative value because he was "a disgruntled ex-employee" of appellant and because his testimony was not believed at the hearing to prove the odometer violations (Finding XI).

We find no merit in appellant's contention that King was impeached by Ward's testimony. Concededly, the evidence of record establishes an apparent conflict regarding the date in 1970 when Ward purchased the Austin Healy. Either it was in April, May or possibly June, according to King, or it

was in July or August, according to Ward, who, without reference to his check, could not rule out that the purchase may have been made in April or May. Patently, from the posture of such evidence, we cannot reach a conclusion that Ward's testimony establishes that King testified falsely. The consistent fact that was established, however, regardless of whether the transaction took place in any of the months mentioned, is that Ward purchased the Austin Healy from King, who was then the owner. The crux of the violation with which we are here concerned centers not on when King sold the vehicle but on when he purchased it and the nature and extent of his operation of the vehicle thereafter. The dealer notice on file with the department established that appellant sold the vehicle to King on March 26, 1970. King testified that subsequently, with a paper tag and report of sale affixed, he moved the vehicle to his house. This evidence stands uncontradicted and establishes the falsity of the certificate of non-operation filed with the department which recites that the vehicle was in the dealer's control "as a result of storage" from "5-21-69" to "7-29-70".

As to King's hostility towards the appellant, it is only necessary to observe that this was generated in January 1971, long after the events occurred and the documentation filed

with the department which formed the basis for the violation found in Finding VIII.

We next turn to the contention that King's testimony in connection with Finding VIII should be disregarded because the hearing officer evidently did not believe his testimony in connection with Finding XI, which was concerned with two instances of odometer tampering. The department's case as to those allegations was based in part on the testimony of King. At the hearing, appellant offered evidence by way of defense. The findings of both the hearing officer and director (Finding XI) recite that the evidence produced "leaves doubt" and found the accusation "to be not true".

Absent any contrary indications, such findings do no more than determine that the evidence preponderated in favor of appellant. There is no basis whatsoever for concluding that they branded King's testimony as false. Even assuming, but without conceding, that King testified falsely as to odometer tampering, nevertheless, the balance of his testimony could be accepted if believed to be true (Witkin, California Evidence (2nd Ed.) Sec. 1125). Such may have been the case here, but we need not speculate in light of the posture of the evidence and the findings of both the hearing officer and the director with respect to the filing of the false certificate of non-operation.

With respect to appellant's contention that no evidence was presented to tie Mr. Salierno, the corporation president, to the wrongful act of filing a false certificate of non-operation, the short answer is that the decision imposes sanctions against the corporate entity and not against Mr. Salierno either as an individual or in his corporate capacity. We also view as relevant to this issue our holding in Imperial Motors vs. Department of Motor Vehicles, A-28-72, wherein we said:

"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."

For the reasons stated and having duly considered all the pertinent evidence of record, we conclude that Finding VIII is supported by the weight of the evidence.

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

We answer this question in the affirmative.

In mitigation of its culpability, appellant argued, in essence, that its failure to submit timely reports resulted from the department's delay in issuing to it 1970 Report of Sale Books; that its president, Mr. S. Pete Salierno, while effecting a change of entity from a sole proprietorship to a corporation, acted in good faith at

all times under the instructions and guidance of Win Martin, a department investigator; that significant factors contributing to its problems stemmed from a heavily backlogged workload, employment of inexperienced personnel, a changeover in bookkeepers and conversion to computerized accounting; and that all overcharges were refunded.

According to his own testimony, Mr. Salierno first became a car dealer in 1960. He became a new car dealer in 1965, selling vehicles as sole proprietor of Main Auto Sales under a Toyota franchise, and continued to do business as such until he incorporated in April 1969, when he became president of Main Toyota, Inc.

It is apparent from this history of experience as a car dealer that Mr. Salierno was not a novice in the automobile business and we can safely assume that he was cognizant of the laws and regulations which required him to make timely reports of sales to the Department of Motor Vehicles. Yet in January 1970, aware that he had not received his 1970 Report of Sale Books and would not be able to comply with the reporting requirements, his corporation continued to sell and deliver new vehicles.

Although Win Martin, the department's investigator, knew of appellant's dilemma and was duly concerned, there is no evidence that he either advised Mr. Salierno to sell

new cars in January or use the 1969 Report of Sale Books in connection with these sales. To the contrary, Win Martin testified at the hearing, "You can't trip out a vehicle in 1970 on a 1969 Report of Sale Book legally." We find that Win Martin did, in fact, advise Mr. Salierno to write up his January sales in the current 1970 Report of Sale Books and that there would be a penalty. However, this advice was given after the January sales were made, after the reports were delinquent subjecting appellant to license discipline, and after the current 1970 books were obtained. Mr. Salierno had yet to initiate proper paperwork to originate title for the cars he had already sold. In these circumstances, the advice can only be construed as an effort on the part of Win Martin to help Mr. Salierno effect corrective action, and not as official condonation of his derelictions.

We have expressed our views on numerous occasions regarding the seriousness of delinquent reporting of sales to the Department of Motor Vehicles and the degree of responsibility to which a dealer must be held. (Coberly Ford v. Department of Motor Vehicles, A-25-72; Mission Pontiac v. Department of Motor Vehicles, A-6-70; and Bill Ellis, Inc. v. Department of Motor Vehicles, A-2-69.) It is clearly evident that the appellant did not meet its responsibilities and must be held to account.

Even if we found some mitigation in connection with the failure to make timely reports of the January sales, the record establishes that, subsequent to receipt of the 1970 Report of Sale Books, yet another 9 violations occurred. As the suspensions were ordered to run concurrently, these alone would tend to support the penalty imposed by the director.

We turn next to the other mitigating factors advanced by the appellant to ameliorate its position.

Appellant presented numerous witnesses to demonstrate the difficulties encountered in connection with the changeover in structure and in bookkeeping. We entertain no doubt that appellant's accounts were in a sorry state of affairs, but this was not due to the changeover in structure. According to Mr. J. M. Kimball, a certified public accountant who testified for appellant, there was no accounting problem and there was very little "work involved in changing the entity from Main Auto to Main Toyota, Inc." Although changing to computerization presented difficulties, there were a lot of other problems. Neither inventories nor accounts payable could be reconciled. "...several hundred thousand dollars of liabilities and notes, we had lost -- they had control of the amounts due and dates of payment due -- had been lost." As Miss Gonzales, appellant's bookkeeper summed it up, "The entire records of the corporation were very far behind. The accounts were not

balanced and the work was no up-to-date ... the books were in a terrible mess ... it took all of 1970 and part of '71 to get the asset and liability accounts balanced."

It is clear that appellant's problems were of long-standing duration and not the result of a changeover in entity. Lack of competent personnel certainly was a contributing factor, but it only served to increase the need for maximum supervision and control by management. In this, appellant failed and cannot now be absolved from the results of its own shortcomings.

With respect to overcharges, these apparently came to light during the investigation of appellant sometime in early 1971. Under instructions from Mr. Kimball, Miss Gonzales either made refunds or credited the customers' accounts. Refunds were given a low priority because of the pressure of other work and they were made by Miss Gonzales "quite a bit later ... when its time came." The overcharges were maintained in a separate account as an accrued liability which was reflected on the monthly financial statement. The accusation in this case was filed on March 10, 1972, predicated on overcharges made in 1970. Refunds were not completed until May 1972.

We find no mitigation in the fact that all overcharges were refunded or credited and reiterate our views expressed in Pomona Valley Datsun, supra:

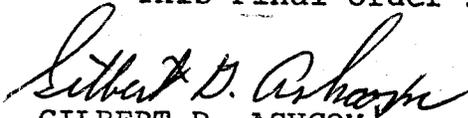
"...having violated the law by overcharging the customer, the licensee has absolutely no right to continue to use the overcharged amount in its business on the assumption the customer may return to the licensee for services or goods to offset the debt. The licensee must, upon discovering its erroneous overcharge, take immediate steps to refund the money it unlawfully extracted from its customers if it hopes to show mitigation in regard to penalty.... Appellant's showing in this regard is lacking."

One final matter raised by the appellant merits brief comment. Appellant argues that in *Midway Ford Sales v. Department of Motor Vehicles, A-11-70*, we stayed a 10-day suspension for similar violation which in its view was more aggravated in nature and number. Although we did stay a 10-day suspension, appellant overlooks the fact that our final order affirmed the director's decision which provided for a 30-day suspension with two years' probation, modifying only that portion which stayed the suspension for 20 days.

While we are ever mindful of the importance of consistency in imposing license discipline, suffice it to say that, in determining appropriate penalties, each case must be decided on its own merits, considering all the facts and circumstances and matters in mitigation. We have carefully and fully considered the entire record in this case and, as previously noted, have determined that the penalty imposed herein is commensurate with the findings.

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

This Final Order shall become effective _____.


GILBERT D. ASHCOM

AUDREY B. JONES

~~PASCAL B. DILLDAY~~

~~W. H. "HAL" McBRIDE~~

MELECIO H. JACABAN

ROBERT A. SMITH

WINFIELD J. TUTTLE

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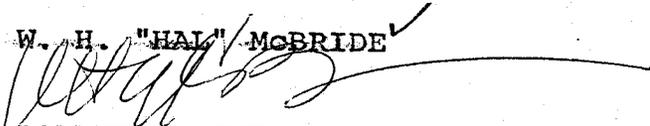
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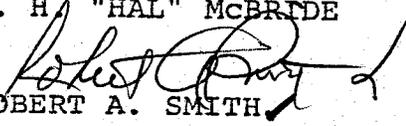
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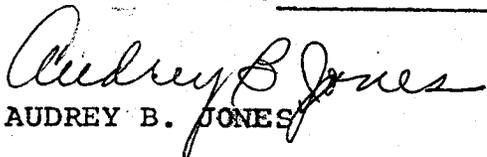
WINFIELD J. TUTTLE ✓



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

This Final Order shall become effective _____.

GILBERT D. ASHCOM


AUDREY B. JONES

PASCAL B. DILDAY

W. H. "HAL" McBRIDE

MELECIO H. JACABAN

ROBERT A. SMITH

WINFIELD J. TUTTLE

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

This Final Order shall become effective August 20, 1973 .

GILBERT D. ASHCOM

AUDREY B. JONES

PASCAL B. DILDAY

W. H. "HAL" McBRIDE

MELECIO H. JACABAN

ROBERT A. SMITH

WINFIELD J. TUTTLE