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STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of)
)
ROBERT EUGENE SYKES, dba)
FAMILY FUN-MOBILIVEN,)
)
Appellant,) Appeal No. A-41-73
)
vs.) Filed: November 1, 1973
)
DEPARTMENT OF MOTOR VEHICLES)
OF THE STATE OF CALIFORNIA,)
)
Respondent.)
_____)

Time and Place of Hearing:

September 12, 1973, 10:30 a.m.
State Building, Room 1157
350 McAllister Street
San Francisco, California

For Appellant:

Robert L. Mezzetti
Mezzetti and Testa
Attorneys at Law
300 South First, St., Suite 210
San Jose, CA 95113

For Respondent:

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

FINAL ORDER

Robert Eugene Sykes, dba Family Fun Mobiliven, hereinafter referred to as "appellant" appealed to this board from a decision of the Director of Motor Vehicles in Case No. RD-73,

entitled "In the Matter of the Statement of Issues Against Robert Eugene Sykes, dba Family Fun Mobiliven". In this decision, the director adopted the proposed decision of the hearing officer and denied appellant's application to be licensed as a new car dealer on the following findings:

- A. From about March 26, 1968, to about February 21, 1970, appellant was an officer of Bay Area Auto Auction, Inc., a California corporation with dealer's license and special plates (D-8565). While engaged in said business, appellant submitted 61 checks to the department for fees due the State, which checks were dishonored or payment was refused on presentation.
- B. From about September 14, 1966, to about February 14, 1969, appellant was doing business in California as Motorama Liquidators with dealer's license and special plates (D-574). While operating said business:
- (1) Appellant in 3 instances failed to give written notice to the department within 3 days after transfer of vehicles.
 - (2) Appellant in 7 instances failed to mail or deliver reports of sale (with documents and fees) to the department within 20 days.
- C. From about December 21, 1962, to about December 4, 1969, appellant was an officer of Sy-Be, Inc., doing business in California as Bob Sykes Dodge, with dealer's license

and special plates (D-3558). While engaged in such business:

- (1) Appellant in 4 instances failed to give written notice to the department within 3 days after transfer of vehicles.
- (2) Appellant in 7 instances failed to mail or deliver reports of sale (with documents and fees) to the department within 20 days.
- (3) Appellant in one instance falsely reported true date of sale in applications for registration.
- (4) Appellant in 6 instances charged purchasers of vehicles excessive registration fees.

D. From about November 1, 1968, to about May 20, 1969, appellant was an officer of Imelda Corporation, Inc., doing business in California as World Imports under dealer's license and special plates (D-4537). While engaged in said business:

- (1) Appellant in 17 instances failed to give written notice to the department within 3 days after transfer of vehicles.
- (2) Appellant in 24 instances failed to mail or deliver reports of sale (with documents and fees) to the department within 20 days.
- (3) Appellant in 2 instances falsely reported true date of sale in applications for registration.

- (4) Appellant in one instance filed with the department a false certificate of non-operation.
- (5) Appellant in 5 instances charged purchasers of vehicles excessive registration fees.
- (6) Appellant submitted 6 checks to the department for fees due the State, which checks were dishonored or refused payment on presentation.

The proposed decision also contained special findings which were adopted by the director as follows:

1. Respondent [appellant] is approximately 46 or 47 years of age, is married and has three children. Prior to becoming licensed by the department as heretofore set forth, his only known occupation was that of a professional football player.
2. Although legally responsible, as a licensee, for that conduct previously set forth in the Second through the Fifth Cause of Action herein, it was not established that respondent was personally involved in each of said activities.
3. In April of 1972 the department issued an unrestricted motor vehicle salesman's license to respondent [appellant]. Such was issued without objection and respondent [appellant] has incurred no known violations of law thereunder.

4. Since the time of the issuance of the above license to the date of the present hearing (January 23, 1973), respondent's [appellant's] services have been retained by a dealership in Santa Clara, California. This business deals primarily with recreational vehicles, both new and used.

5. In such capacity respondent [appellant] acts as, and has all the authority of, a general manager.

Section 3054, subsection (d), requires us to use the independent judgment rule when reviewing the evidence. 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 determination regarding the credibility of witnesses' testimony in the transcript of the administrative proceedings (Park Motors, Inc. v. Department of Motor Vehicles, A-27-72, citing Holiday Ford v. Department of Motor Vehicles, A-1-69, and Weber and Cooper v. Department of Motor Vehicles, A-20-71.)

Having weighed all the evidence in the light of the whole record reviewed in its entirety, we determine that all of the findings, as found by the director, are supported by the evidence. Accordingly, all of the Findings of Fact and Determination of Issues relating thereto are affirmed.

In view of our determination herein, we find it appropriate to comment only briefly on the matters stated to be the basis

of appeal in appellant's opening brief. Appellant contends that the evidence does not support the findings in four specific areas: First, it is contended that the appellant was not personally in charge of reporting sales; that this was the responsibility of others; and that personnel handling this aspect of the business were inexperienced. This board has consistently held that "a corporate licensee is responsible for all the acts of officers, agents and employees acting in the course and scope of their employment. A contrary view would, of course, preclude meaningful license discipline". (Main Toyota, Inc., v. Department of Motor Vehicles, A-37-73; Imperial Motors v. Department of Motor Vehicles, A-28-72.) The same results would obtain in a partnership.

As to employment of inexperienced personnel, we have heretofore considered this as mitigation and not a matter of defense and we have thus considered such evidence in the case before us. (Diener Motors v. Department of Motor Vehicles, A-15-71; Main Toyota v. Department of Motor Vehicles, A-37-73.)

Secondly, it is contended that the checks issued by Bay Area Auto Auction, Inc., were dishonored because Barclay's Bank closed out appellant's account without his knowledge or consent and while sufficient funds were on deposit. Further, full restitution was made.

Section 11705 Vehicle Code proscribes as a violation the following conduct where a licensee "has submitted check...to the department...and it is thereafter dishonored or refused payment upon presentation."

The reason why Barclay's Bank closed appellant's account is highly speculative as the evidence does not establish that the bank's action in doing so was wrongful or without just cause. The hearing officer found against the appellant as to these checks and having exercised our independent judgment in evaluating the evidence, we conclude that the findings are supported by the evidence.

The third contention is that it was nearly impossible to determine exact registration fees; that customers were advised to ask for refunds if overcharged; and that all refunds were made.

We view appellant's claim of inability to determine exact registration fees to be without merit. The fact that refunds were made is a matter in mitigation but not of defense. As to the advice to customers to claim refunds, we adhere to our past holdings that the duty to make refunds rests with the dealer and the onus is not on the customer to obtain a refund of an overcharge. (Main Toyota, Inc. v. DMV supra; Pomona Valley Datsun v. DMV, A-31-72.)

Lastly, it is contended that three checks issued by Imelda Corporation, Inc., were returned by the Bank of America

without the knowledge or consent of the appellant (Finding in Para. D(6) supra). As to these three checks, appellant explained that the money's on deposit were used to offset appellant's indebtedness. Again, we are left to speculate as to evidence of wrongdoing or unjustifiable actions by the Bank of America. Of significance is the fact that this same finding includes three other checks issued by appellant but drawn on the Crocker-Citizens Bank in the sum total of \$1,586.00, which were dishonored and refused payment when presented by the department. Neither the evidence of record nor any matter raised by this appeal touches upon the reason for their return. The hearing officer determined the issue here adversely to the appellant and in our independent evaluation of the evidence, we conclude that the evidence supports the findings in their entirety.

An issue alluded to in appellant's opening brief, but argued vigorously at the hearing before this board, requires discussion. The issue, as stated, is that appellant has been denied due process. This is predicated on the allegation that with respect to the adoption of the hearing officer's proposed decision, the director relied on the review and recommendation of the staff counsel who prosecuted the case at the administrative hearing and, thereby, relinquished his duty to independently decide the case upon the record.

In his argument, appellant capsulized the facts and circumstances underlying the present appeal which contains reference to a previous case in which the department refused him a vehicle dealers license, Case RD-56. Since the appeal in that case was dismissed by this board on the basis of lack of jurisdiction (In the Matter of Sykes, dba Family Fun Mobiliven, A-21-72) under normal circumstances, we would not consider it at this time. However, the case is so intertwined with the present appeal and the assertion of lack of due process that it cannot properly be disregarded.

On or about July 30, 1970, appellant filed an application for a vehicle dealer's license which was refused by the department. In 1971, pursuant to the Vehicle Code, appellant was granted a hearing on a Statement of Issues identical to those in the instant case and the hearing officer made findings which were also identical to those now before us (Case RD-56). The proposed decision recommended the issuance of a 2-year probationary license, stating, "It would not be against the public interest to issue a probationary vehicle dealer's license to the respondent [appellant]." The director did not adopt this proposed decision but promulgated his own decision denying the license. This board as indicated supra dismissed the appeal from that decision as the case did not involve a new car dealer.

Subsequently, in 1972, appellant applied for a license as a new car dealer which was also refused. Appellant requested a hearing on a Statement of Issues and a second hearing officer made Findings of Fact and Determination of Issues identical to those in RD-56 with special findings (all as set forth supra) but recommended that the license be denied (Case RD-73). The director adopted that decision and it is the appeal therefrom that is now before us.

To make out its case in RD-73, the department introduced the record of transcript in RD-56 together with all accompanying documentation. Thus, we have before us for examination all of the information developed in both hearings. While the case RD-56 is not before us for review, we deem it relevant in determining the issue of whether the appellant was denied due process in the present case. The significant factors which tie both cases together are the sameness of the Statement of Issues, Findings of Fact and Determination of Issues and the fact that the same department staff counsel prosecuted both cases.

No evidence was presented by appellant in support of his argument, however, it was conceded by staff counsel, in both written and oral argument, that it was he who prepared the proposed decisions for the director. It is this action which appellant brands as improper. Appellant argues that it is a denial of due process when the prosecuting staff counsel considers the proposed decision and prepares the director's

decision, which, for all practical effect, is his recommendation as to what action should be taken by the director.

Appellant further urges, also without evidentiary support, that the director, acting solely on the representations and recommendations of the prosecuting staff counsel and without the record before him, thus, divested himself of his legal duty to independently review the record and render a decision.

We turn our attention first to Case No. RD-56 wherein the proposed decision was not adopted by the director and proceedings were had under Section 11517(c) of the Government Code. We find of record a "Notice Concerning Proposed Decision" filed November 21, 1971, advising appellant that the proposed decision was not adopted and that the department would itself decide the case. Appellant, therein was advised of his right to submit written or oral argument and was furnished the order contained in the proposed decision and the transcript of proceedings had before the hearing officer. We further find in the decision subsequently filed December 18, 1971, the recitation that the respondent [appellant] did submit written argument and that the decision was rendered after consideration of "the entire record, including the transcript and the written argument of respondent [appellant]."

The reply brief in the instant appeal admits that the department's director of compliance and staff counsel

recommended to the director that the proposed decision not be adopted. (Res. Reply Br. 2:23-25.) But, it goes on to recite that a transcript of the hearing was ordered by the director who, after its receipt, decided the case himself (Res. Reply Br. 2:26-27) and that the director advised staff counsel of his desire to deny the application and ordered that he draft the decision for his consideration and signature (Res. Reply Br. 30:2-4.)

Considering all of the circumstances and the evidence of record and considering Case No. RD-56 only as it bears on the present appeal, we are satisfied that the director acted in accordance with the procedures prescribed in Section 11517(c) of the Government Code and that he exercised his independent judgment in rendering the decision in that case.

We next focus our attention to the present appeal and Case No. RD-73 upon which it is predicated. Here, although appellant's arguments are essentially the same as previously indicated, it was emphasized in oral argument before the board that the record of transcript was not available to the director at the time of his decision.^{1/}

^{1/} The reporter certified the record of transcript June 15, 1973; the director's decision is dated April 2, 1973.

Examination of Section 11517(b) Government Code contains no language requiring the director to decide the case on the record when he adopts the proposed decision of the hearing officer. (Contra: Where the director does not adopt the proposed decision and he decides the case himself -- Section 11517(c) Government Code.)

It has been held that it is not a denial of due process of law where an agency adopts the proposed decision of a hearing officer without reviewing the record. (Stouneb v. Munro, 219 Cal.App.2d 302; Hohreiter v. Garrison, 81 Cal.App.2d 384, 396.) A recommended decision containing findings and conclusions may form a sufficient synopsis, at least when the statute authorizes the agency to delegate the hearing to a hearing examiner and "base its decision or award upon the report" of the examiner. (Taylor v. IAC (1940) 38 Cal.App.2d 75, 82. See also Bertch v. Social Welfare Dept. (1955) 45 Cal.2d 524, 529.) This procedure does not violate due process. (Hohreiter v. Garrison, supra.)

In the instant situation, Case No. RD-73, the director adopted the proposed decision of the hearing officer, thus, obviating the necessity that he have before him the record of transcript. (See also Davis Admin. Law Treatise, Vol. 2, §11.04.) However, we need not rest solely on this position because of the unusual manner in which the department

presented its case in RD-73. This was accomplished as previously indicated by introducing in evidence the entire transcript and documentation in Case RD-56 which the director had already considered in its entirety and which was available to him. The only other evidence presented during the hearing of Case No. RD-73 was some additional testimony by the appellant. This testimony was fully summarized by the hearing officer in his proposed decision. Consequently, even though the official record of transcript was not available for review by the director, for all intents and purposes, he did have the entire record upon which to render his decision and we are satisfied that he rendered his decision independently and in accordance with the provisions of Section 11517(b) of the Government Code.

In reaching this conclusion, we are buttressed by the presumption of regularity of administrative action. "The presumption of regularity supports the official acts of public officers and in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." (U.S. v. Chemical Foundation, 272 U.S. 1, 14-15, 47 S.Ct. 1.)

Although we take cognizance of the fact that the prosecuting staff counsel did prepare the decision for the director, in the circumstances which we have to consider, this amounted to no more than his recommendation regarding the decision. In the

absence of a showing of specific prejudice, we will not speculate error.

We feel it incumbent at this point to make one final observation. The Federal Administrative Procedure Act prohibits an employee or agent engaged in the performance of investigative or prosecuting functions in a case, or a factually related case, to participate or advise in the decision, recommended decision or agency review. This is discussed in Davis Administrative Law Treatise, Vol. 2, Sec. 13:05 at page 20, as "internal separation"; that is, the protection within the agency of the judging function, so that it will not become contaminated through the influence of those who are prosecuting or investigating. Some similar separation of functions if incorporated into the department's practice would avoid the "appearance of evil", which under circumstances different from the instant case, might lead us to a different result than that reached herein.

In light of the foregoing and for the reasons stated and having exercised our independent judgment, we find that the appellant has not been denied due process of law.

The decision of the Director of Motor Vehicles in Case No. RD-73 is affirmed.

This Final Order shall become effective when served upon the parties.

PASCAL B. DILDAY

AUDREY B. JONES

MELECIO H. JACABAN

ROBERT A. SMITH

WINFIELD J. TUTTLE

D I S S E N T

I dissent. Appellant has been licensed as a salesman and has successfully demonstrated his ability and capability to discharge the full responsibilities of a general manager of a new car dealership. I would agree with the findings of the hearing officer in Case RD-56 that it would not be against the public interest to issue a probationary vehicle dealers license to the appellant.

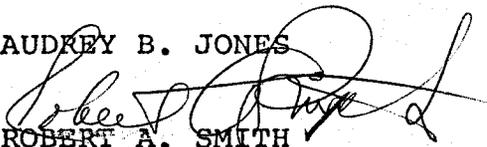
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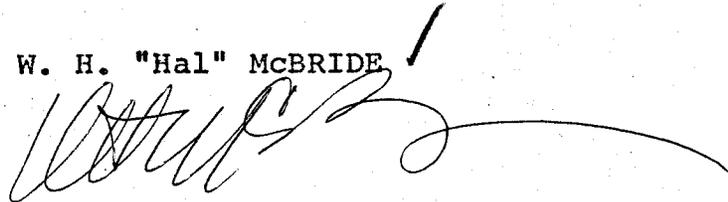
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A handwritten signature in black ink, appearing to be 'W. H. McBride', with a long horizontal flourish extending to the right.

A-41-73