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STATE OF CALIFORNIA
NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of)
)
BILL BARRY PONTIAC,)
a California corporation,)
)
Appellant,) Appeal No. A-42-73
)
vs.) FILED: December 11, 1973
)
DEPARTMENT OF MOTOR VEHICLES)
OF THE STATE OF CALIFORNIA,)
)
Respondent.)
_____)

Time and Place of Hearing: November 14, 1973, 10:30 a.m.
Board Room, Port of Long Beach
Administration Building
925 Harbor Plaza
Long Beach, CA

For Appellant: Frank C. Aldrich
Attorney at Law
100 Oceangate, Suite 1010
Long Beach, CA 90802

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

FINAL ORDER

Bill Barry Pontiac, Inc., dba Bill Barry Pontiac, herein-
after 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, adopting the proposed decision of the hearing officer, found that appellant had:

(1) failed in 79 instances to give written notice to the department within three days after transfer of vehicles; (2) failed in 176 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 four instances charged purchasers of vehicles excessive registration fees; (5) in one instance falsely advertised a vehicle as having power brakes when, in fact, the vehicle was not so equipped; further, the vehicle had been sold four days previous to the particular advertisement alleged; (6) in two instances advertised vehicles for sale when in fact they had been previously sold, one three days before and one four days before; and (7) in seven instances charged a \$15 Documentary Fee without including such fee in the cash price of the vehicles.

The director, adopting the proposed decision of the hearing officer, imposed suspension penalties as follows: for late notices of sale, 5 days' suspension; for late reports of sale not filed within 20 days, 10 days' suspension; for late reports of sale not filed within 30 days, 15 days' suspension; for

charging excessive registration fees, 5 days' suspension; for false advertising of a sold vehicle, 5 days' suspension; for advertising two sold vehicles, 5 days' suspension; for failure to include "Documentary Fees" in the cash price, 10 days' suspension. The penalty provides for all suspensions to run concurrently for a total of 15 days' suspension with 10 days stayed for a probationary period of one year on the usual terms and conditions.

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. vs. Department of Motor Vehicles, A-27-72; citing Holiday Ford vs. Department of Motor Vehicles, A-1-69; and Weber and Cooper vs. 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. We find that the department has not proceeded without or in excess of its jurisdiction nor has it proceeded in a manner contrary to the law. Accordingly, all of the Findings of Fact and Determination of Issues relating thereto are affirmed.

As one of the issues on appeal, appellant, citing Ralph Williams Ford vs. New Car Dealers Policy and Appeals Board (106 Cal.Rptr. 340), contends that the language in Section 4456.5 Vehicle Code limits the penalty to a \$3 forfeiture for failure to file notices and reports of sale within the time prescribed. Thus, appellant continues, license disciplinary action as punishment for failure to make timely reports has been eliminated and the accusation is therefore insufficient to support such action.

The language quoted by the appellant is as follows:

"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 by the dealer."

The question raised is not one of novel impression as this board recently commented on almost this very same issue in its final order in Suburban Ford, Inc. vs. Department of Motor Vehicles, Appeal No. A-35-73. There, after referring to our holding in Coberly Ford vs. Department of Motor Vehicles, A-25-72, in which we reviewed the legislative history requiring timely and accurate reporting and citing Evilsizor vs. Department of Motor Vehicles (1967), 25 Cal.App.2d 216, we stated:

"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'. (Under-scoring 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."

In the instant case, the three dollar (\$3) forfeiture payment provided by this section was never paid in any instance with the exception of three items to the accusation. In those three sales, reports were not filed within 40 days and none were made the subject of a violation of Section 5901 Vehicle Code (i.e., failing to file a notice within three days) thereby obviating any concern with Section 4456(c)(3) Vehicle Code.

While the factual posture in the Suburban Ford case raised the question in terms of timeliness of payment of the \$3 forfeiture, nevertheless, the essence of our position was a rejection of any interpretation of 4456.5 Vehicle Code which would preclude further license disciplinary action, when appropriate under the code. We adhere to our previous

holding and attach no merit to appellant's contention that the only penalty which may be imposed for failure to file timely notices and reports of sale is a three dollar (\$3) forfeiture payment.

Having duly and carefully considered and weighed all the matters presented by the appellant in mitigation and extenuation in this case, we are disposed to reduce the penalty imposed by the decision of the director.

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 Vehicle Dealer's license, certificate and special plates (D-2600) heretofore issued to appellant, Bill Barry Pontiac, Inc., a California corporation, are suspended for the following periods:

1. For the violations set forth in Finding III, five (5) days.
2. For the violations set forth in Finding IV, ten (10) days.
3. For the violations set forth in Finding V, fifteen (15) days.
4. For the violations set forth in Finding VI, five (5) days.

5. For the violation set forth in Finding VII, five (5) days.

6. For the violations set forth in Finding VIII, five (5) days.

7. For the violations set forth in Finding IX, ten (10) days.

All the aforementioned periods of suspension to run concurrently, for a total period of suspension of fifteen (15) days; provided, however, that twelve days of said fifteen-day period of suspension is stayed for a period of one year from the effective date of this final order, during which time the appellant shall be placed on probation to the Director of Motor Vehicles upon the following terms and conditions:

Appellant, and its officers, directors and stockholders shall comply with the laws of the United States, the State of California and its political subdivisions, and with the rules and regulations of the Department of Motor Vehicles.

If appellant, or any of appellant's officers, directors or stockholders, is convicted of a crime, including a conviction after a plea of nolo contendere, such conviction shall be considered a violation of the terms and conditions of probation.

In the event appellant shall violate any of the terms and conditions above set forth during the period of the stay, then the Director of Motor Vehicles after providing appellant

due notice and an opportunity to be heard may set aside the stay and impose the stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and appellant's license fully restored.

This Final Order shall become effective January 3, 1974.

GILBERT D. ASHCOM

MELECIO H. JACABAN

AUDREY B. JONES

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WINFIELD J. TUTTLE

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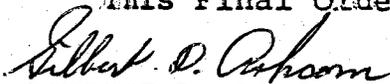
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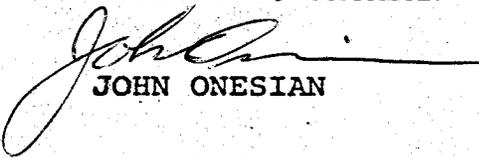
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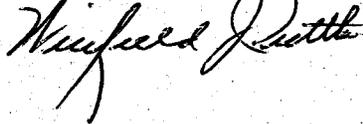
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