

2415 First Avenue  
P. O. Box 1828  
Sacramento, CA 95809  
(916) 445-1888

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

UNDERWOOD FORD MERCURY, INC., dba )  
UNDERWOOD FORD MERCURY, )  
An Oregon corporation, )  
 )  
Appellant, ) Appeal No. A-43-73  
 )  
vs. ) FILED: April 3, 1974  
 )  
DEPARTMENT OF MOTOR VEHICLES )  
OF THE STATE OF CALIFORNIA, )  
 )  
Respondent. )  
 )

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Time and Place of Hearing: March 13, 1974, 1:30 p.m.  
1020 "N" Street, Room 102  
Sacramento, CA 95814

For Appellant: Harold A. Irish, Esq.  
Attorney at Law  
45090 Main Street  
Mendocino, CA 95460

For Respondent: R. R. Rauschert, Legal Adviser  
Department of Motor Vehicles  
By: Karl Engeman  
Legal Counsel

FINAL ORDER

Underwood Ford-Mercury, Inc., doing business as Underwood-Ford Mercury, an Oregon corporation, 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, adopting the proposed findings of the hearing officer, found that appellant had: (1) failed in nine instances to give written notice to the department within three days after transfer of vehicles; (2) failed in six instances to mail or deliver reports of sale of new vehicles (with documents and fees) to the department within 20 days; and (3) in 40 instances charged purchasers of vehicles excessive registration fees.

The director further found as follows: (1) appellant's employees also undercharged with respect to said registration fees so that this account was actually short approximately \$500; (2) upon notifying appellant of said overcharges, all refunds were promptly made to its customers within two weeks of such notification; (3) such overcharges were the result of the salesman (sic) not carefully consulting the charts with respect to these fees and the lack of a "double check" concerning the amounts charged; (4) as to the late notice and late transfer situations, appellant will adjust its operations to make certain that its salesmen do not retain all paperwork for completion of a sale -- but will submit the required motor vehicle forms to the company office in advance of the other paperwork; (5) appellant has since retained the services of another clerk to assist in processing the company business; (6) the representative of appellant admitted he was not fully

cognizant of the seriousness of the situation, nor that some of the violations constituted misdemeanors; nor that incidents such as to those related tend to destroy the integrity of the department's records, which records are often referred to by law enforcement authorities. Said representative indicated, essentially, that it "...will never happen again. You can bet on it."; and (7) appellant has incurred no known prior violations.

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

For the three-day reporting violations, 10 days' suspension;  
for the 20-day reporting violations, 10 days' suspension;  
for the fee overcharge violations, 10 days' suspension;  
all suspensions to run concurrently for a total suspension of 30 days with the entire period stayed for one year under the usual terms and conditions of probation.

The main thrust of this appeal is grounded in the contention that the appellant was denied a fair hearing in two respects. First, the hearing officer failed to advise the appellant of its right to be represented by counsel. And, second, that the accusation is defective.<sup>1/</sup> Only the first of these contentions

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<sup>1/</sup> In his notice of appeal to this board, appellant indicated a desire to augment the record. Appellant neither made such request nor made an offer of proof at the appellate hearing. Accordingly, we consider the request as having been abandoned. In any event, a review of the offer of proof contained in the formal notice of appeal establishes that appellant did not set forth the requisite grounds for augmentation; i. e., that there is relevant evidence which in the exercise of reasonable diligence could not have been produced or which was improperly excluded at the hearing. (Section 3054(e) Vehicle Code. Sections 568(d)(e) and 573, Title 13, California Administrative Code).

merits any extended discussion.

By way of background, the respondent filed its accusation against the appellant on 21 March 1973 together with a written "Statement to Respondent [Appellant]". This statement contained the following language: "If you file any Notice of Defense within the time permitted, a hearing will be had upon the charge made in the accusation. You may, but need not, be represented by counsel at any or all stages of these proceedings." (Emphasis added.) On 27 March 1973, appellant acknowledged receipt of the foregoing documents and requested a hearing to present a defense to the charges in the accusation. On 11 April 1973, the respondent notified the appellant in writing of the time and place of hearing, 26 June 1973, and advised: "You may be present at the hearing; may be represented by counsel of your choice, but need not be represented by counsel if you so desire...." (Emphasis added.) The administrative hearing was held as scheduled and at that time Mr. Underwood confirmed to the hearing officer that, as president of appellant corporation, he would represent the corporation, Underwood Ford-Mercury, Inc. The hearing officer then briefly explained some of the procedures, the burden of proof, the rights to cross-examine, testify and present evidence on behalf of the corporation and offered assistance to the extent possible.

With the foregoing predicate which establishes ample time

between notice and hearing, we can only conclude that with knowledge of its rights to be represented by counsel, the appellant made an informed and conscious decision not to employ counsel and to be represented by Mr. Underwood, appellant's president. It follows that appellant, having made this election, waived its right to be otherwise represented.

In this appeal, appellant contends that prejudicial error was committed when the hearing officer failed to advise Mr. Underwood during the hearing of appellant's right to be represented by counsel, citing the case of Borrer vs. Department of Investment (1971) 15 Cal.App.3d 531. We interpret Borrer vs. Department of Investment supra as supporting our conclusion that the contention of appellant is without merit. In Borrer, the court noted that in proceedings held pursuant to the Administrative Practices Act, there is a statutory requirement that a party be advised of his right to be represented by counsel. In the case before us, the department did comply with this statutory requirement. The court went on to hold, however, that there is no constitutional requirement that the hearing officer advise the party that he is entitled to counsel and that if he cannot afford one, one will be furnished.<sup>2/</sup> (Emphasis added.) This holding is diametrically opposite to the position appellant would now have us sustain so as to find error.

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<sup>2/</sup> In a proceeding to revoke or suspend a license, it has been held in this state that such proceeding is neither criminal nor quasi-criminal in nature. (Borrer vs. Department of Investment supra and cited cases.)

It is important to note at this juncture that at no stage of the proceedings was appellant ever denied the right to be represented by counsel, either by the department or the hearing officer.

What then of the adequacy of Underwood's representation of appellant? We could dispose of this summarily by stating that appellant, having made its election, cannot now be heard to complain. We prefer not to do so, however, and examine this matter in some depth.

There is no question but that Underwood did not have the expertise of an attorney in connection with the technicalities involved in the admission of evidence. This, however, is not controlling for in Borror the court observed that "...even in a criminal case, the trial judge is not required to demand that a defendant, as a prerequisite to defending himself, demonstrate either the acumen or learning of an attorney." In view of the election made regarding representation, any objections to the evidence which were available are considered to have been waived.

The real crux of the matter here is whether Underwood lacked an understanding of the proceedings to the extent that the rights of the appellant were so prejudiced as to impel the conclusion that there was a denial of a fair hearing and due process. To resolve this matter, we have considered the administrative record by its four corners.

First, we are satisfied that the accusation was not defective and sufficiently apprised the appellant of the prohibited conduct (Morrison vs. State Board of Equalization (1969) 1 Cal.3d 214, 231). Second, as to understanding the nature of the accusation, it is evident that Underwood acted neither out of ignorance nor misapprehension. As a dealer of long experience, he demonstrated at the administrative hearing that he was fully cognizant and conversant with late reports and overcharges. By way of defense, he presented an explanation as to how the violations occurred and, in mitigation, testified at length as to the corrective measures which appellant instituted to prevent recurrence of the types of violations involved. As to the effectiveness of the representation, we obliquely observe that the penalty proposed by the hearing officer and adopted by the director, while imposing a 30-day suspension, does not, because of the "stay" require a shut-down of business for even one day. Third, with regard to appellant's understanding of the nature of the penalties involved in this case, the accusation itself recites that by the facts alleged therein, the acts or omissions of appellant [respondent] constitute grounds for revocation or suspension action. Further, and we consider this of singular importance, neither Underwood nor counsel has at any time indicated that appellant was unaware of the penalties which could be imposed in this case. The court's observation in Borror is most pertinent and dispositive

of this matter:

"It is inconceivable that a licensee is not aware of the sanctions...for violations...and the penalties were in the prayer in the accusation."

From all of the foregoing and in the circumstances of this case, we find that the appellant was accorded a full and fair hearing and was not denied due process of law. The appellant was twice advised in writing of its right to be represented by counsel, there was no requirement that such advice again be given by the hearing officer and this assertion of error is deemed to be without merit.

In view of our determinations herein regarding representation by counsel and due process, we need not address ourselves to other allegations of error in the admissibility of evidence.

Appellant further contends that the decision was contrary to law, arguing that the agency was required to include in its findings of fact the specific reasons or evidence in support thereof citing Henderling vs. Carleson, 36 Cal.App.3d 561. The case cited, Henderling vs. Carleson supra, is inapposite as it was a welfare case wherein both Federal and state law imposed such a requirement. We reject this assigned error as being without merit as we are aware of no authority which supports appellant's position in this case.

Appellant further argues that the hearing officer failed to consider matters of defense in the late reporting violations

in that in 1972 the Vehicle Code was amended to extend the period of reporting set forth in Section 5901 Vehicle Code from 3 days to 5 days. Suffice it to say, all of the Section 5901 violations occurred prior to the effective date of the amending legislation and even had it been in effect, the lapsed time between the true date of sale and receipt of the dealer notices in this case ranged from 9 to 16 days. As to considering extensions of the 20-day period for reports of sale on payment of a \$3.00 forfeiture, pursuant to Section 4456.5 Vehicle Code, there is no evidence that such fee was ever tendered or paid by the appellant nor was it ever so contended. This allegation of error is devoid of merit.

With one exception, we find that the weight of the evidence supports the findings and that the decision is supported by the findings. The exception, a matter raised by appellant, concerns an admission by the representative of the appellant that he lacked certain knowledge, phrased in Finding VI(6) as follows: "...nor that incidents such as to those related tend to destroy the integrity of the Department's records which records are often referred to by law enforcement authorities."

Appellant is correct when it avers that there is no evidence whatever to support the hearing officer's finding as quoted above. Accordingly, that portion of Finding VI(6) quoted

is reversed. We deem this reversal to have no impact on the findings as it is irrelevant to the findings of fact that appellant acted or omitted to act in violation of the sections set forth in the accusation. As to penalty, the adverse effect of the language set aside by our reversal is considered to be de minimus. Nevertheless, we have considered such reversal in our deliberations on the findings of fact, determination of issues and penalty as promulgated in the director's decision.

Except for that portion of Finding VI(6) which we reverse, all of the findings of fact and determination of issues are affirmed and we find the penalty to be appropriate and commensurate with the findings as modified.

With the exception of that portion of Finding VI(6) reversed, the Decision of the Director of Motor Vehicles is affirmed.

This order shall be effective May 3, 1974.

JOHN ONESIAN

WINFIELD J. TUTTLE

ROBERT A. SMITH

AUDREY B. JONES

GILBERT D. ASHCOM

PASCAL B. DILDAY

MELECIO H. JACABAN

A-43-73

D I S S E N T

I dissent. I would reverse the decision and remand the case for a rehearing on the grounds that the department has proceeded in a manner contrary to law. In my view, when it became evident that appellant's representative did not fully understand the proceedings, the hearing officer should have provided the appellant a further opportunity to retain counsel.

W. H. "HAL" McBRIDE

A-43-73

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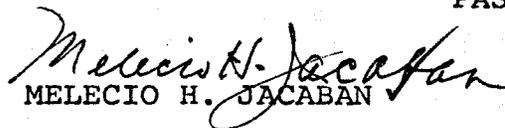
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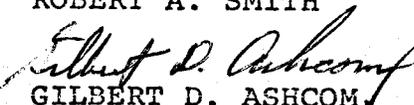
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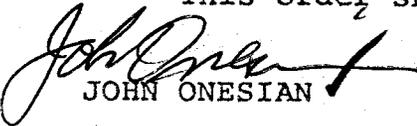
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