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STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of)	
)	
BOB FRINK CHEVROLET, INC.,)	
A California corporation,)	
)	
Appellant,)	Appeal No. A-46-73
)	
vs.)	FILED: March 8, 1974
)	
DEPARTMENT OF MOTOR VEHICLES)	
OF THE STATE OF CALIFORNIA,)	
)	
Respondent.)	

Time and Place of Hearing: February 13, 1974, 1:30 p.m.
Auditorium (First Floor)
2570 - 24th Street
Sacramento, CA 95818

For Appellant: Jack W. Urch, Esq.
Attorney at Law
2131 Capitol Ave., Suite 300
Sacramento, CA 95816

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

FINAL ORDER

Bob Frink Chevrolet, Incorporated, a California 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 five instances to give written notice to the department within three days after transfer of vehicles;
- (2) failed in 424 instances to mail or deliver reports of sale of new vehicles (with documents and fees) to the department within 20 days;
- (3) failed in three instances to mail or deliver reports of sale of new vehicles (with documents and fees) to the department within 30 days;
- (4) in ten instances falsely reported true date of sale in application for registration;
- (5) in three instances filed with the department false certificates of non-operation; and
- (5) in 38 instances charged purchasers of vehicles excessive registration fees.

In addition, the following facts in mitigation were found:

- (1) appellant has no prior record of disciplinary action before the department;
- (2) appellant has paid all fees and penalties due the department for registration of those vehicles involved in the accusation;
- (3) appellant has refunded all excess registration fees described in the accusation; and
- (4) appellant has replaced all personnel responsible for its acts which led to the filing of this accusation, and has engaged others to insure that all reports required shall be submitted to the

department within the time demanded by law.

The director, modifying the hearing officer's proposal, imposed the following penalty:

One day's suspension for the three-day notice violations of failing to report sales within 20 days; one day's suspension for the violations of failing to report sales within 30 days; five days' suspension for reporting false dates of sale; three days' suspension for filing false certificates of non-operation; all suspensions to run concurrently for a total of five days' suspension.

The major thrust of this appeal is threefold. First, the appellant contends that he was deprived of a fair and impartial hearing; second, that the corporation should not be subjected to license discipline for the negligence or malfeasance of its employees; and, third, that the punishment is too harsh and denies "equal treatment with other licensees similarly situated."

We will address each of these contentions briefly.

Appellant's assertion that it was deprived of a fair and impartial hearing is predicated on the proposed decision of the hearing officer recommending an inordinate penalty suspending appellant's license for 2,120 days and on the failure of the

hearing officer to include in his findings of fact all of the mitigating circumstances appellant would have included. Based on this, appellant concludes that the hearing officer was either biased, prejudiced or not sufficiently competent to understand the "realities" of the case, any one of which grounds deprived him of a fair and impartial hearing.

In our view, appellant's conclusion is purely hypothesis and lacks evidentiary basis. Moreover, the posture of this case is such that it permits us to render a decision without any reservations in this area of appeal. With regard to the proposed penalty of 2,120 days' suspension, this was reduced by the director in his decision to a total of five days' suspension.^{1/}

It is not the hearing officer's proposal but the director's decision which is before us on appeal and we will comment on the appropriateness of the penalty contained therein in our subsequent discussion.

As to the findings of fact and hearing procedures, we are completely satisfied that no error was committed. The reporter's transcript establishes that at the administrative hearing, appellant, by stipulation, admitted to the truth of all the factual matters set forth in the accusation. During oral argument before this board, the appellant unequivocally stated

^{1/} In the brief filed by the respondent, the penalty proposed by the hearing officer was interpreted to be a total suspension of only 45 days. In light of the director's action on the penalty, no useful purpose would be served to discuss or attempt reconciliation of the two viewpoints.

that no factual matters regarding the accusation were being contested nor was it contended that the hearing procedures were unfair or that they in any way denied him any rights so as to create a fair risk of prejudice.

Addressing the allegation that the hearing officer failed to make findings of fact covering all of the mitigation offered by the appellant at the administrative hearing, Section 3054, subsection (d), Vehicle Code, requires the board to use the independent judgment rule when reviewing the evidence. (Thiel Motors, Inc. vs. Department of Motor Vehicles, A-33-72, and cited cases.) Accordingly, our review takes into consideration all of the evidence presented at the hearing, thereby obviating any error, if such did exist, in the hearing officer's failure to make a finding of fact as to some mitigating factors.^{2/} In the circumstances of this case, we find appellant's contention that it was deprived of a fair and impartial hearing to be devoid of merit.

We turn next to the contention that the corporation should not be subjected to license discipline for the negligent or wrongful acts of its employees. We dispose of this contention by reference to our holding in Suburban Ford vs. Department of Motor Vehicles, A-35-73, to the effect that it is well settled

^{2/} The record provides no basis upon which to conclude that the hearing officer abused his discretion in omitting from his findings of fact mitigation which appellant contends should have been reduced to formal findings.

that the revocation or suspension of a license is not penal in nature (citing Zar Motors vs. Department of Motor Vehicles, A-17-71) and to our holding in Imperial Motors vs. Department of Motor Vehicles, A-28-72, 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 vs. Department of Motor Vehicles, A-39-73; Main Toyota, Inc., vs. Department of Motor Vehicles, A-37-73.)

During oral argument before the board, appellant sought to absolve the corporation from responsibility by attempting to place it at the lower supervisory levels. We can only observe that supervision extends upwards and at the top of the ladder is the dealer-corporation which must bear its burden for failing to exercise proper supervision. Accordingly, in considering mitigation, we can attach little weight to the argument that the dealer's problems resulted from "poor supervision."

Lastly, we must consider the appropriateness of the penalty of five days' suspension imposed by the director's decision.

We have no reason to reject appellant's argument that appellant has revamped its operation to insure that no violations will occur in the future. The penalty imposed, however, was for violations which occurred in the past when the appellant failed to insure compliance with the requirements of

the law. We have expressed our views on many occasions on the degree of responsibility to which a dealer must be held with particular regard to the seriousness of delinquent reporting, filing false dates of sale and false certificates of non-operation, and charging excessive registration fees.

While we recognize that some of the violations were most probably precipitated by appellant's employees, there is also evidence of record that appellant had been employing an experienced manager.

Further, we cannot overlook the fact that prior to the audit, the appellant's policy was to hold all "DMV" work until money was received from the finance companies. Such a practice provided the environment conducive to intentional contraventions of the requirements imposed by law for timely reporting, and the responsibility for resulting violations must rest squarely on the corporate entity. As we concluded in *Main Toyota vs. Department of Motor Vehicles*, supra, which language is pertinent to the instant case, "It is clearly evident that the appellant did not meet its responsibility and must be held to account." As for the contention that the punishment denies appellant "equal treatment with other licensees similarly situated", suffice it to say that each case must be decided on its own merits. We have applied this guideline axiomatically to the case at hand.

Having weighed all the evidence in light of the whole record reviewed in its entirety, we determine that all of the findings of the director are supported by the evidence. Accordingly, all of the findings of fact and determination of issues are affirmed.

Having duly and carefully considered and weighed all the matters presented by the appellant in mitigation and extenuation, we find the penalty 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 April 5, 1974.

WINFIELD J. TUTTLE

THOMAS KALLAY

GILBERT D. ASHCOM

MELECIO H. JACABAN

AUDREY B. JONES

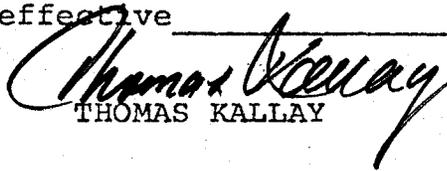
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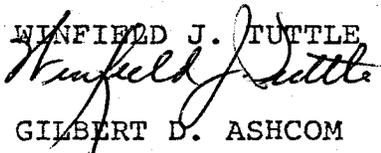
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