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NEW CAR DEALERS POLICY & APPEALS BOARD

STATE OF CALIFORNIA

DOWNTOWN FORD SALES,)
A California corporation,)
)
Appellant,) Appeal No. A-47-73
)
vs.) Filed: April 3, 1974
)
DEPARTMENT OF MOTOR VEHICLES)
OF THE STATE OF CALIFORNIA,)
)
Respondent.)
_____)

Time and Place of Hearing: March 13, 1974, 11:00 a.m.
1020 "N" Street, Room 102
Sacramento, CA 95814

For Appellant: Sy Dennis, Jr., Esq.
Attorney at Law
Suite 210, 930 G Street
Sacramento, CA 95814

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

FINAL ORDER

Downtown Ford Sales, 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 on seven different days caused to be published in a newspaper advertisements which were misleading in that the advertisements used headings "New Car Invoice Sale" or "Invoice Sale" and "New Car" when one or more of the vehicles to which the headings referred were in fact demonstrators. Further findings of the director pertinent to this decision found that in the small type which more particularly described the vehicles which were advertised, the word "demonstrator" did appear where the vehicle was in fact a demonstrator; the overall appearance of the advertisements was that the vehicles listed in that section of the advertisements were new vehicles; that true facts could only be ascertained by reading the fine print descriptions; and that appellant in the exercise of reasonable care should have known that the advertisements were misleading but did not exercise that care.

The director determined that a cause for discipline existed pursuant to Section 11713(a) of the Vehicle Code and Section 432.00 of Title 13, California Administrative Code, and imposed the following penalty:

Suspension of the dealer's license, certificate and special

plates for a period of two (2) days, with the entire suspension stayed for a period of one year, during which time the appellant would be on probation, under the usual terms and conditions.

Appellant filed no briefs in this case but in oral argument stated that the basis of his appeal was two-fold: first, that the findings are not supported by the evidence and that the decision is not supported by the findings; and, second, that the penalty is excessive.

In light of our decision herein, we need only address the first basis of appeal. In our view, the sole issue controlling the resolution of this appeal is whether the advertisements were misleading.

The section of the California Administrative Code, Section 432.00 of Title 13, which concerns itself with automobile dealers advertising regulations and implements Section 11713 of the Vehicle Code states in pertinent part: "...in cases where a vehicle may be registered as a new vehicle with the department, but in fact is a demonstrator... it shall not be advertised as a new vehicle."

With full cognizance of the provisions of Section 11713(a) Vehicle Code and the pertinent provisions of Section 432.00 California Administrative Code supra, we have carefully scrutinized the advertisements in question and conclude none were misleading. Had the word "demonstrator" been omitted

from the description of the respective vehicles, we would have no hesitancy in finding that the advertisements were misleading and constituted the malfeasance within the contemplation of the Vehicle Code, as implemented. However, such is not the case here and to reiterate the findings of the director in his decision, "The word demonstrator did appear where the particular vehicle was in fact a demonstrator."

Because of the foregoing, we do not perceive that any of the advertisements when considered in their entirety could leave any impression other than that several of the vehicles listed were demonstrators. Consequently, and in the circumstances of this case, we reject respondent's argument that the yardstick to be applied is that of "general impression". Perhaps, in other cases involving omission or erroneous or equivocal representations such a guideline would be the proper one. In the instant case, however, the issue before us requires resolution on a more specific basis; i. e., did the advertisements in fact contain misleading information. We find that they did not. The specific disclosure that certain advertised vehicles were demonstrators removed the "misleading" element and effectively absolved the dealer from license discipline liability. This is not to say, however, that whoever composed or inserted the advertisements containing inconsistent information exercised the best judgment, but this shortcoming

cannot be equated to actions in violation of the Vehicle Code.

One other aspect of respondent's position merits brief comment. As we already know, if a reader was interested in a particular vehicle listed in any one of the advertisements and it was a demonstrator, it was clearly so identified. Respondent argues that this should have no substantial impact on the issue before us because the word "demonstrator" was in small print. We disagree. From our examination of the advertisements, we find that most of the information concerning all of the advertised vehicles (i.e., the description, accessories, identification number, etc.) was printed in the same size type as the word "demonstrator". The significance of this lies in the fact that the respondent did not at any stage of the proceedings in this case offer or produce evidence of a standard for the size of type in which the word "demonstrator" was required to be set when used in an advertisement such as the one before us. Moreover, respondent's emphasis on the fact that the word "demonstrator" was in small print creates a strong inference that had the size of the type used been larger, no violations would have occurred. We prefer, however, not to attach any weight to this inference and base our decision on our findings and conclusion that none of the advertisements were in fact misleading.

For the reasons stated, we do not find sufficient evidence

to support the findings of the director.

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

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

JOHN ONESIAN

AUDREY B. JONES

W. H. "HAL" McBRIDE

GILBERT D. ASHCOM

ROBERT A. SMITH

PASCAL B. DILDAY

MELECIO H. JACABAN

A-47-73

to support the findings of the director.

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

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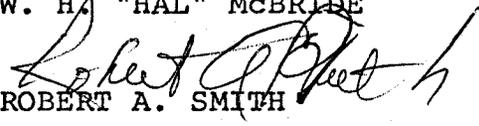
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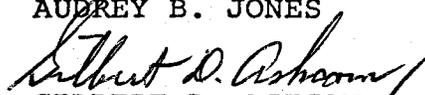
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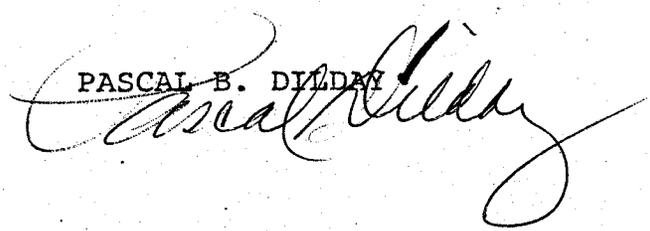
W. H. "HAL" McBRIDE

GILBERT D. ASHCOM

ROBERT A. SMITH

PASCAL B. DILLON

MELECIO H. JACABAN

A large, stylized handwritten signature in black ink, appearing to read 'Pascal B. Dillon', is written over the typed name 'PASCAL B. DILLON'.

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