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STATE OF CALIFORNIA  
NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of )  
)  
WILLIAM L. HUGHSON CO., INC., )  
dba HUGHSON FORD SALES, a )  
California corporation, )  
)  
Appellant, ) Appeal No. A-48-73  
)  
vs. ) FILED: July 11, 1974  
)  
DEPARTMENT OF MOTOR VEHICLES )  
OF THE STATE OF CALIFORNIA, )  
)  
Respondent. )

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Time and Place of Hearing: June 12, 1974, 11:15 a.m.  
State Building, Room 1202  
350 McAllister Street  
San Francisco, CA 94102

For Appellant: E. Conrad Connella  
Connella & Sherburne  
Central Tower Building, Suite 1700  
703 Market Street  
San Francisco, CA 94103

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

FINAL ORDER

William L. Hughson Co., Inc., doing business as Hughson Ford  
Sales, a California corporation, enfranchised as a new car dealer,

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 decision of the hearing officer, found that appellant: (1) failed in 8 instances to give written notice to the department within 3 days after transfer of vehicles; (2) failed in 53 instances to mail or deliver reports of sale (with documents and fees) to the department within 20 days; (3) in one instance falsely reported true date of sale in application for registration; (4) in 4 instances charged purchasers of vehicles excessive registration fees; (5) in one instance disconnected, turned back or reset an odometer to reduce the mileage indicated on the odometer.

In addition, the director adopted the following findings of the hearing officer: appellant introduced evidence which established that its average sales volume is 300 to 400 vehicles per month, including new and used passenger cars and trucks; there are a total of 110 employees, including 25 salesmen; the original owners of the corporation sold their stock to several of their employees, who are now operating the corporation.

The director, adopting the hearing officer's proposed decision, imposed the following penalty:

For the 3-day notice violations, 15 days' suspension with 10 days stayed; for the 20-day reporting violations, 15 days'

suspension with 10 days stayed; for the odometer violation, 15 days' suspension with 10 days stayed; for the false reporting of true date of sale, 15 days' suspension with 10 days stayed; for the overcharges, 5 days' suspension with 4 days stayed; all suspensions to run concurrently for an actual 5 days' suspension with one year's probation on the usual terms and conditions.

In sum and substance, the major points of appellant which require our attention on this appeal are threefold: (1) the findings regarding the odometer violation (Finding VII) are not supported by the weight of the evidence; (2) the accusation and findings regarding the false reporting of the true date of sale (Finding V) are deficient in that they omit any reference to the element of "knowledge" and the violation was in fact a product of "clerical error"; and (3) the determination of penalty with regard to the findings of late reporting and charging excessive registration fees (Findings III, IV and VI) is not commensurate with these findings.<sup>1/</sup>

We will consider the matters raised by this appeal in their respective order.

1. THE FINDINGS REGARDING THE ODOMETER VIOLATIONS (FINDING VII) ARE NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

Consideration of this assigned error requires a summary of the

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<sup>1/</sup> In furtherance of its desire to augment the record as contained in its notice of appeal, appellant made an offer of proof to the board pursuant to §573, Title 13, Subchapter 2, Article 3, and §3054(e) Vehicle Code. Appellant's showing that there was relevant evidence which in the exercise of reasonable diligence could not have been produced at the hearing was deemed insufficient. Accordingly, the request for augmentation of the record was denied.

significant evidence. On March 28, 1972, the appellant purchased from Jones Minto Ford a 1970 Ford, license number 762BDA. As evidenced by used car wholesale purchase orders maintained in the files of appellant and Jones Minto Ford, both of these documents reflect the mileage of the vehicle on the date of purchase as 43,846. A "get ready purchase order" of appellant's, dated March 29, 1972, ordered from Mark Morris Tire Company one recapped tire for the Ford (license number 762BDA) and reflects the mileage of the vehicle at that time as 32,545. This document was signed by Loschy, appellant's used car manager. An invoice from Mark Morris Tire Co. to appellant dated March 29, 1972, also reflects the mileage of the vehicle as 32,545. An internal document of appellant, apparently executed on March 31, 1972, records a sale of this vehicle by N. Javier to one Arthur R. Palou on March 29, 1972, and cross-references the purchase order for the recapped tire. The factual information, as set out above, was corroborated by affidavits and there was no contest that the odometer of the Ford in question had in fact been turned back.

On behalf of the appellant, Napoleon Javier, sales manager and vice president of appellant corporation, testified that he was personally involved in the sale of the 1970 Ford, license number 762BDA, which was the vehicle involved in the odometer turn-back. According to Javier, he sold a 1970 Ford, license number 889ARH, to his friend, a Mr. Palou, for shipment to the Philippines. This car had 34,456 miles on the odometer and the purchase price was \$3,004.94.

Immediate registration was necessary as the Philippine Government levied a tax if the car was not used in the United States 90 days prior to shipment. On March 20 a messenger was sent to Sacramento to register the vehicle but did not do so because he was advised by Loschy not to effect registration as the car had been sold to someone else. Although the "pink slip" had been made out to Palou, it was voided and a duplicate "pink slip" was made out for the purchaser. Loschy advised him not to worry as he had an exact replacement car.

On March 28, 1972, the replacement car, license number 762BDA, was purchased and it had mileage of 43,846 miles. According to Javier, on the night of March 28, Palou came to his home for dinner and was offered the car at \$2,850 because of the mileage. Palou inspected the car and took possession of it that night on the condition that it would be stored at Hughson Ford for 90 days and then shipped to him in the Philippines. Javier was to pay appellant for the car and Palou was to reimburse Javier by making payment to Javier's mother in the Philippines. Palou drove off with the car that night and it was stored at Hughson Ford the next morning, March 29, at which time, according to Javier, "The car already belonged to him [Palou] fully registered with the pink slip." Palou drove the car on weekends and it remained at Hughson Ford for about 4 months before it was shipped.

Sometime after his return from the Philippines, Javier was

surprised when a Department of Motor Vehicles investigator showed him that on March 29, 1972, a tire had been installed on the car (license number 762BDA) at Mark Morris Tire Co. and that there was a discrepancy in the mileage. At that time the car had already been shipped and he had no knowledge of how the mileage got to be 32,545 miles.

At the time he examined the affidavits received in evidence at the administrative hearing, it was apparent to him that the sale to Palou was consummated on March 28 and that the Mark Morris Tire Co. document showing the reduced mileage was dated March 29, the day after. "What the man [Palou] would do with the car after he owned it, he does not know and could not say."

Included in the affidavits referred to by Javier were those of Loschy and appellant's general manager, Tholin. These affidavits establish that Loschy, in company with Tholin, personally went to the Mark Morris Tire Co. on the afternoon of March 29 to verify the odometer reading of the Ford as that reflected on the tire invoice; i. e., 32,545 miles. Both Loschy and Tholin were part owners of appellant corporation and both terminated their employment with appellant in April 1972.

According to Javier, both Loschy and Tholin wanted him out as a part owner but Ford Motor Company insisted that, as a top producer, he remain. During the years he worked with Loschy at Hughson Ford, Loschy made life very difficult for him by impeding

his sales in many ways.

Hellman, appellant's president and major stockholder, corroborated Javier's statement that the other owners were jealous of him (Javier) because of the large amount of money he was making, Loschy and Tholin in particular, and there was considerable animosity. The first he heard about the odometer matter was when Javier told him about the department's investigators. He knew nothing about who was responsible for the alleged violation.

Section 3054(d) Vehicle Code requires us to use the independent judgment rule when reviewing the evidence. Pursuant to this rule, we are called upon to weigh the evidence, to resolve conflicts in our own minds, draw such inferences we believe to be reasonable and make our own determination regarding the credibility of witnesses and testimony in the transcript of the administrative proceedings. (Ruffner Trailers, Inc. v. Department of Motor Vehicles, A-36-74, and cases cited.)

Counsel for the respondent, in argument at the administrative hearing, aptly summed up the problem which, in connection with this accusation, seemingly has been present right from the beginning. He observed, "Now the only mystery remaining is: who spun the odometer?"

Without question, under the theory of agency, if Javier turned back the odometer himself or arranged or conspired to have it accomplished, the responsibility rests with the appellant. However,

the posture of the evidence in this case makes it difficult for us to reach the respondent's "inescapable conclusion" that it was Javier who was culpable.

Javier's testimony is to the effect that he sold the car to Palou on the night of March 28 and that the car was in Palou's possession until it was returned to Hughson Ford sometime during the morning of March 29. Whether or not a sale under the definition of §5901 Vehicle Code was consummated on the night of March 28 need not be decided for if Palou, on his own, turned back or had someone turn back the odometer while the car was in his possession, such wrongful action cannot properly be imputed to appellant. There is no evidence that Palou was an officer, employee or agent of the appellant corporation. Further, Javier's testimony regarding Palou's possession stands unrefuted and there is nothing to establish that a conspiracy existed between the two.

To carry the matter of the inconclusiveness of the evidence further, let us consider the affidavit of Loschy. He stated that, after being informed of the car's delivery to Javier's home on March 28, he did not see the car until the afternoon of March 29 at Mark Morris Tire Co. where he observed the reduced mileage. Yet Exhibit "4", a "get ready purchase order" for the recapped tire dated March 29 and bearing Loschy's signature, shows the mileage as 32,545. This evidence was relied on heavily by the respondent to show that no sale had been made because the car was being made

ready to sell and a recapped tire was to be put on by Mark Morris Tire Co. The inconsistency which manifests itself here is how did Loschy know when he prepared the "get ready purchase order" that the mileage on the car was 32,545 if he didn't see the car until sometime later that day. Moreover, if Loschy knew that the mileage was 32,545 at the time he prepared the "get ready purchase order" for Mark Morris, why then was it necessary for him to go to the tire company, read the odometer and verify the lowered mileage? We weigh this evidence bearing in mind that there was considerable animosity between Javier and Loschy and Tholin.

What this all adds up to in our view is that the evidence points the finger of suspicion at several individuals; but evidence which merely creates suspicion, however strong that suspicion might be, is insufficient to support a finding. In our view the case presented by the department as to the odometer violation is not free of substantial doubt. Clear and convincing evidence is not contained in the record before us proving any violation by the appellant of Section 11713(n) Vehicle Code. Therefore, we conclude that the weight of the evidence fails to support Finding of Fact VII. Accordingly, Finding of Fact VII is reversed.

2. THE ACCUSATION AND FINDINGS REGARDING THE FALSE REPORTING OF THE TRUE DATE OF SALE (FINDING V) ARE DEFICIENT IN THAT THEY OMIT ANY REFERENCE TO THE ELEMENT OF "KNOWLEDGE".

The accusation which resulted in this finding concerns the report

of sale submitted to the respondent in connection with the sale of the 1970 Ford license number 762BDA sold to Palou on or about March 28, 1972. The report of sale in evidence shows the date sold as "3/20/72". To support its case, respondent also introduced in evidence a statement of facts to authorize Hughson Ford to pick up the title and registration of the said vehicle and a power of attorney, all dated March 20, 1972. The circumstances surrounding this sale have been previously set forth.

On examination by the hearing officer, Javier explained that the sale of the first Ford to Palou (license number 889ARH) was rescinded. Since the second car was not bought from Jones Minto Ford until March 28, the report of sale showing a sale to Palou on March 20 clearly was error and a mixup due to the confusion brought about by the two sales and the rescission of one because of a prior sale. Even though the power of attorney and certificate for the second car were dated March 20, these dates were the result of clerical inadvertence. The clerk must have used the same registration papers for the first car as the second. To support this, Javier offered a check drawn by Palou dated March 22, 1972, made out to the Department of Motor Vehicles in the amount of \$23.00 for registration fees for the first car.

There was no contest that the purchase date of the 1970 Ford (license number 762BDA) by appellant was March 28, 1972. The record of transcript contains no evidence, however, tending to refute Javier's contentions of "inadvertence" and "clerical error".

The statute with which we are here concerned is §11705(3) of the Vehicle Code which reads in pertinent part:

"Has...knowingly made any false statement, or knowingly concealed any material fact in any application for registration of a vehicle..." 2/ (Underscoring supplied.)

Appellant's preliminary contention here is that the pleadings are defective since the accusation charges no violation of any section of the code. Appellant fails to take cognizance, however, of Paragraph VIII of the accusation which recites that by reason of the facts alleged in the preceding paragraph (which includes the false statement accusation) appellant [respondent] has been guilty of acts or omissions or both constituting grounds for revocation or suspension of the license, certificate and special plates under §11705 of the Vehicle Code. We consider this contention to be devoid of merit as suspension or revocation action may be predicated not only on violations but for any of the acts proscribed in §11705 Vehicle Code. Knowingly making a false statement is one of the acts proscribed in §11705 Vehicle Code.

This brings us to the first major contention; i. e., that the accusation is defective in that it failed to charge that the false reporting was knowingly made. We can dispose of this asserted error readily by reference to footnotes 4 and 5, §11503 Government Code, and cited cases, which hold that the primary objective of an

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2/ Appellant's brief makes reference only to §20 Vehicle Code which states that, "It is unlawful to...knowingly make any false statement or knowingly conceal any material fact in any document filed..." (Underscoring supplied.)

accusation is to give fair notice to an accused rather than to adhere strictly to the technical rules of pleading. Clearly, appellant in this case was fully apprised of the accusation and presented a defense to this charge. Even assuming arguendo that the accusation was defective, no objection was made at the hearing and appellant proceeded with its defense. This constituted a waiver and appellant may not now be heard to complain. (Footnote 7, §11503 Government Code; 1 Davis, Administrative Law §8.04.)

We turn now to address the second part of this asserted error, that the findings of the hearing officer are defective as they omit the language of the statute that the act was done "knowingly".

To begin, we are cognizant of the liberal rules regarding findings. As stated in 2 Cal.Jur.III §227, findings "...may be general as long as they satisfy the requirements of making intelligent review possible...and apprising the parties of the basis for administrative action". We are also cognizant of the rule permitting implied findings, 2 Cal.Jur.III §228 (See also Cal.Admin. Agency Practice CEB §§423, 424, 425, 427). However, an administrative agency has a duty to find on all of the issues that are properly and adequately raised by the evidence, 2 Cal.Jur.III §223.

In the case before us the appellant presented an affirmative defense of what amounted to mistake of fact predicated on "inadvertence" and "clerical error". Whether appellant knowingly made a false statement was thus clearly raised in issue.<sup>3/</sup> Accordingly,

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<sup>3/</sup> We are not here concerned with the issue of appellant's responsibility as a corporation for the acts of its officers, employees or agents.

it was essential that a specific finding be made that the act was done knowingly; i. e., "with knowledge; consciously; willfully; intentionally." (Black's Law Dictionary Revised Fourth Edition, Pg. 1012 and cited cases." In the absence thereof, an intelligent review of this finding is precluded. We are left to ponder whether in the decision the matter of knowledge was overlooked or considered to be a non-essential element of the "violation" constituting grounds for revocation or suspension. In the circumstances of this particular case, therefore, we find the omission to be error and the assertion that the finding is deficient to have merit. Accordingly, Finding of Fact V is reversed.

3. THE DETERMINATION OF PENALTY WITH REGARD TO THE FINDINGS OF LATE REPORTING AND CHARGING EXCESSIVE REGISTRATION FEES (FINDINGS III, IV, AND VI) IS NOT COMMENSURATE WITH THESE FINDINGS.

We have duly weighed all of the circumstances in this case in our consideration of the validity of this basis of appeal. We note the number of late reports and excessive fee violations in the accusation to be relatively few compared to the volume of business transacted by this dealership. Admittedly, there are some aggravating circumstances but it appears that overcharges were unintentional, due to oversight or clerical error, and the reporting violations were in large part the result of ignorance of the law and reliance by the appellant's president on employees whom he believed to be highly competent. While these reasons do

not excuse the acts of the appellant, we do find that they provide a basis for mitigation of the penalty.

Consequently, while we agree that the penalty should include suspension, we would modify it by reducing the period for each of Findings III and IV, separately and severally considered, from 15 days to 5 days, and further modify the penalty by staying the entire period of suspension of 5 days for each of Finding III, IV and VI (to run concurrently for a total suspension of 5 days) for one year. As thus modified, we deem the penalty to be commensurate with the findings.

For the reasons stated, Findings of Fact V and VII and Determination of Issues (d) are reversed. Findings of Fact III, IV and VI and Determination of Issues (a), (b) and (c) are affirmed.

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-6) heretofore issued to appellant, William L. Hughson Co., Inc., dba Hughson Ford Sales, a California corporation, is suspended for a period of 5 days as to each of Findings III, IV and VI, each separately and severally considered, said suspensions to run

concurrently for a total suspension of five (5) days; provided further, that the entire suspension of five (5) days 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 August 9, 1974.

PASCAL B. DILDAY

W. H. "HAL" McBRIDE

ROBERT A. SMITH

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D I S S E N T

We dissent as to penalty. The transcript of the record reveals a consistent callous attitude on the part of the appellant herein as to its responsibility for complying with all laws that relate to its operation of the business and under which it is a licensed dealer in the State of California. At the administrative hearing, appellant's president testified inter alia that he operated the business for profit irrespective of what violations might occur; that he had 110 employees; that he did not review the rules and regulations sent by the department; nor was he familiar with the laws regulating his business; and that all documents relating to the handling of "DMV" work were passed onto his employees. Further, there is no indication that he made any personal effort to effect or insure corrective action.

It is our opinion that the total suspension herein should not have been stayed and that appellant should have been denied

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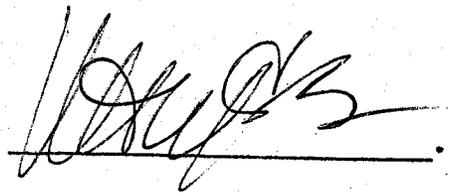
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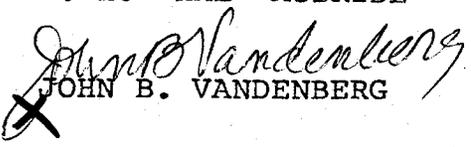
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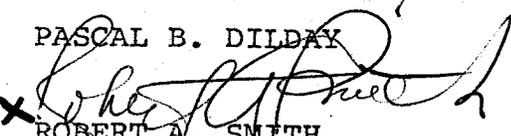
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*Audrey B. Jones*  
AUDREY B. JONES ✓

WINFIELD J. TUTTLE

A-48-73

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WINFIELD J. TUTTLE ✓

*Winfield J. Tuttle*

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