

P. O. Box 31
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(916) 445-1888

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of)
)
LEE WHITE TOYOTA,)
A California corporation,)
)
Appellant,) Appeal No. A-51-74
)
vs.) FILED: December 2, 1974
)
DEPARTMENT OF MOTOR VEHICLES)
OF THE STATE OF CALIFORNIA,)
)
Respondent.)
_____)

Time and Place of Hearing: September 11, 1974, 10:30 a.m.
State Building, Room B-109
1350 Front Street
San Diego, CA 92101

For Appellant: Douglas F. Olins, Esq.
Greer, Popko, Miller & Foerster
1568 Sixth Avenue
San Diego, CA 92101

For Respondent: R. R. Rauschert, Chief, Legal Section
Department of Motor Vehicles
By: Henry J. Ahler
Legal Counsel

FINAL ORDER

Lee White Toyota, 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 dealer's 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 12 instances to give written notice to the department within three days after transfer of vehicles; (2) failed in 16 instances to mail or deliver reports of sale (with documents and fees) to the department within 20 days; and (3) in 33 instances charged purchasers of vehicles excessive registration fees.

In addition, the director made the following findings:

(A) On April 15, 1971, a warning letter was mailed to appellant advising that its reporting practices did not meet acceptable standards. (B) The owner of appellant corporation, soon after opening its business in San Diego, became heavily involved in a lawsuit with his former partners in another automobile business in Huntington Beach that threatened him with bankruptcy. He was obliged to spend most of his time in Orange County defending that suit, which was not terminated until the spring of 1973. During his absence from activity in appellant's affairs, he relied upon a series of managers and employees, as a consequence of which the appellant's responsibilities under the Vehicle Code were not fulfilled. Appellant has now, however, assumed full management of the business and appears to have adequately addressed his attention to the licensure requirements. Refunds for overcharges of fees were made by appellant in each of the 33 instances set forth in

the above findings, 12 of them in May and June, 1972, and the remaining 21 in July, 1973. At the president's order, appellant reviewed its own records to discover from 150 to 200 additional customers who were overcharged for fees due the State. Appellant mailed checks to these latter persons addressed to the addresses appearing upon appellant's records, but approximately 55 were returned by the Post Office for failure of delivery. Approximately 10 additional checks have not been returned to appellant, but remain uncashed.

The director imposed a 15-day suspension with 12 days stayed for a 3-year period of probation under the usual terms and conditions.

The sole issue raised by this appeal is whether the penalty provided for in the decision of the Director of Motor Vehicles is commensurate with the findings. ^{1/}

We have duly considered the administrative record and the briefs and arguments of both parties. Further, we have carefully weighed the accusation in light of all the circumstances and the evidence of record both in aggravation and mitigation of the violations found to have been established. In our view, the penalty in this case is not deemed to be commensurate with the

^{1/} In its notice of appeal, appellant indicated a desire to augment the record. Having neither made such request nor offer of proof at the appellate hearing, we consider this request to have been abandoned.

findings and should be modified.

Pursuant to Section 3054(f) and 3055 Vehicle Code, the New Motor Vehicle Board amends the decision of the Director of Motor Vehicles as follows:

WHEREFORE THE FOLLOWING ORDER IS MADE:

The vehicle dealer's license, certificate and special plates (D-4380) heretofore issued to appellant, Lee White Toyota, a California corporation, are suspended for a period of fifteen (15) days; provided that the entire fifteen (15) 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 2, 1975.

WINFIELD J. TUTTLE

AUDREY B. JONES

PASCAL B. DILDAY

ROBERT A. SMITH

JOHN B. VANDENBERG

D I S S E N T

Appellant stipulated at the hearing before the Hearing Officer the truth of all the charges; therefore, we need not consider the verity of the facts set forth in the accusation. Appellant's appearance and presentation at the hearing were singly directed toward the mitigation of the penalty to be assessed against it. The record shows that the Hearing Officer made his findings after a full dressed presentation was made by the Appellant and Respondent. Witnesses testified on behalf of both parties, thereby providing the Hearing Officer the opportunity to afford due credence, and evaluate the testimony, and the witnesses. Thereafter, the Hearing Officer made his decision which was submitted to the Director of Motor Vehicles who adopted the proposed decision in its entirety.

Appellant appeals from the Director's Decision to this board. In examining the credibility and sufficiency of the testimony and witnesses, this board must accept as true all evidence tending to establish the correctness of the decision as made, as well as all inferences which might reasonably have been thought by the Hearing Officer to lead to his conclusions. The cold record cannot give the look or manner of the witnesses, their hesitations, their doubts, their variations of language, their precipitancy, their calmness or consideration. A witness may convince a person who hears him testify that he is disingenuous and untruthful, and yet his testimony, when read or presented through the verbiage of his counsel from his appeal brief, or orally, may convey a most favorable impression. There are many factors aiding in a reasonable conclusion which are presented to the Hearing Officer in the first instance and not available to one going over the cold, platonic record. There is what might be the "feel" of the case. This embraces a consideration of the witnesses, the manner in which they testify, and their general attitude and demeanor at the time of the hearing. This board has no opportunity to observe the appearance, general bearing and demeanor of the witnesses, and thus is deprived of an important aid in the determination of the value and weight to be given the testimony. The decision should be changed only after members of the board, from reading the records and transcripts, suggest that there has been bias, prejudice, corruption or a finding which is so harsh and unjust that it invokes a traumatic disturbance to their conscious minds. Appellant contends

that for approximately three and one-half years, litigation in Orange County consumed "five days a week" of his time; therefore, was unable to conduct his business properly. This is such an affront to reasonable logic that its attempted digestibility would make one retch. This was the crux and most cogent argument for mitigation urged by the Appellant. This board should consider the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference.

This board has, and is serving an important and constructive purpose and service to the general public and new car dealers. To establish a precedence of aberrating the Director's decisions may exacerbate the legislative and public opinion and frustrate and/or affect the proposed function of the Department of Motor Vehicles in matters within its jurisdiction.

For reasons stated above, I cannot concur with the majority opinion; I would affirm the Director's decision in its entirety.

JOHN ONESIAN

C O N C U R R I N G O P I N I O N

I concur with the decision reached by the majority of the board.

I find no support in the statutes or the decisional law promulgated by this board for the view expressed in the dissent that it is only upon a finding of bias, prejudice or corruption that this board can change the penalty imposed by the Department.

It is settled that §3054(d) of the Vehicle Code requires the board to use its independent judgment when reviewing the evidence. Under this rule the board is mandated to resolve conflicts in the evidence, draw reasonable inferences and make its own determination regarding the credibility of witnesses. (Park Motors, Inc. v. Department of Motor Vehicles, A-27-72.)

It is wholly inappropriate to suggest, as the dissent does, that this board abdicate from its responsibility, imposed by the Legislature, to exercise its independent judgment. I am at a loss to understand how the board's exercise of its independent judgment in reviewing the Department's decisions would have an adverse affect on legislature and public opinion, or how it would frustate the workings of the Department of Motor Vehicles. If, on the one hand, the Legislature desired to foreclose an independent review of the Department's decisions this board need not have been vested with its power of independent review. On the other hand, if this board is vested of such power, and I have no doubt whatsoever that it is, it ought to exercise it without fear or consideration of the effects of its decisions upon legislative and public opinion.

The dissent is also in error when it adverts to the rule which obtains in the appellate courts of this State that, on appeal, evidence is to be viewed in the light most favorable to the prevailing party. This board is not an appellate court; as noted, it must exercise its independent judgment in reviewing the evidence. Thus, the board was free to conclude, as it did, that the evidence before

it warranted a reduction of the penalty. To suggest, as the dissent does, that the only person who can or should modify the penalty is the one who has viewed the witnesses, is to call into question not only the entire statutory scheme which created this board but it is also an implicit, if wholly unfounded, condemnation of widely accepted and constitutionally sound practices before the administrative tribunals of our State and country.

In my view, the decision reached by the board in this case is wholly appropriate and is based, as usual, upon a full review of the record. It is, therefore, a decision which comports with the requirements imposed upon the board by statute and decisional law.

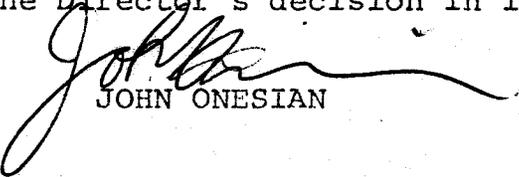
THOMAS KALLAY

A-51-74

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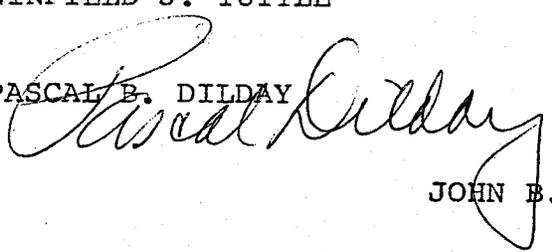
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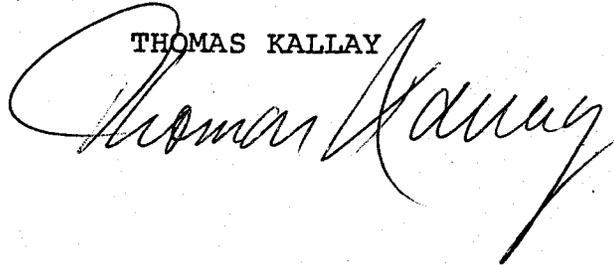
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THOMAS KALLAY

A handwritten signature in cursive script, appearing to read "Thomas Kallay", written in dark ink. The signature is fluid and somewhat stylized, with a large initial 'T' and a long, sweeping tail.

A-51-74