

P. O. Box 31
2415 First Avenue
Sacramento, CA 95801
(916) 445-1888

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of)
)
OGNER VOLKSWAGEN, INC.,)
A California corporation,)
)
Appellant,) Appeal No. A-54-74
)
vs.) FILED: September 12, 1974
)
DEPARTMENT OF MOTOR VEHICLES)
OF THE STATE OF CALIFORNIA,)
)
Respondent.)
_____)

Time and Place of Hearing:

August 14, 1974, 1:30 p.m.
City Council Chambers, City Hall
1685 Main Street
Santa Monica, CA 90401

For Appellant:

Harold J. Tomin, Esq.
Goldman, Gilbert, Freedman,
Billet, Tomin & Alberghetti
1900 Avenue of the Stars, Suite 1949
Los Angeles, CA 90067

For Respondent:

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

FINAL ORDER

Ogner Volkswagen, Inc., 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 determined not to adopt the proposed decision of the hearing officer and, after proceedings held pursuant to Section 11517 Government Code, found that appellant in five (5) instances set back odometers to reduce the mileage indicated on the odometers.

In addition, the director made findings which are set forth herein in detail as they fairly sum up the evidence of record and provide the factual posture for this appeal. The additional findings are as follows:

- A. Respondent [appellant], by and through its agents and employees, caused odometer setbacks to have been made with respect to each of the five automobiles which are described in Findings III through VII. In each of said odometer setbacks it was intended to reduce the number of miles which were indicated on the respective odometers so as to make the subject automobiles more saleable.
- B. Respondent [appellant's] evidence established the following:
 - (1) Neither Stanley S. Ogner, respondent's [appellant's] president, nor any other corporate officers participated in the above-described odometer setbacks;
 - (2) Said corporate president embarked upon an investigation within his company immediately after these setbacks were disclosed to him by employees of the

Department of Motor Vehicles. Such investigation did not uncover the precise circumstances attending the five subject setbacks; however, such investigation did lead to certain controls being imposed upon respondent's [appellant's] personnel so as to prevent such setbacks in the future;

- (3) Said corporate president has recently replaced the following employees of respondent [appellant]: general manager, new car manager, used car manager, shop foreman, service manager, and officer manager; each of said discharges was in part due to the administrative problems which were related to the said odometer setbacks;
- (4) Said corporate president has instituted a policy whereby an employee's demonstrator is replaced and put up for sale when its odometer reading reaches 6,000 miles;
- (5) Said corporate president has been engaged in the sale of motor vehicles since December 1950; he was a Chrysler dealer for approximately ten years; he has been a dealer or a corporate officer of a dealer for Volkswagen since 1960; he enjoys a high standing with Volkswagen Pacific, Inc. and with some of his colleagues in the automobile business;

- (6) No lawsuits or accusations have ever been filed against said corporate president, or any corporation with which he was associated, concerning any business transaction related to the sale of automobiles.
- (7) Throughout the entire period in which the five subject odometer setbacks occurred, Stanley S. Ogner was under severe emotional strain as a result of massive family problems; although Stanley S. Ogner was physically present at the dealership during most normal working hours, his attention to respondent's [appellant's] business was substantially diverted by such problems.

By way of clarification, all of the findings of the director were identical to those proposed by the hearing officer with the exception of B(7) above. This latter finding was a result of the director's receipt and consideration of additional evidence which had not been presented or alluded to at the time of the original administrative hearing. 1/

The penalty proposed by the hearing officer provided for a suspension of 25 days with 5 days stayed for one year. The director,

1/ On August 8, 1973, appellant was advised by the director that the proposed decision of the hearing officer would not be adopted. Appellant filed additional evidence and written argument and, on January 18, 1974, presented oral argument before the director. The additional evidence consisted of two doctors' statements and supporting hospital documentation establishing that during the period the violations occurred, Ogner was beset by severe family problems involving illness of his two daughters.

however, determined not to adopt the proposed penalty and ordered revocation, stayed, with 15 days actual suspension and a one-year period of probation on the usual terms and conditions.

We deem only two issues raised by this appeal to be of sufficient merit to warrant discussion; i. e., the sufficiency of findings in mitigation and the propriety of penalty.

As to the first issue, appellant asserts error predicated on a contention that the record before the hearing officer and the director would have supported additional findings in mitigation. Our observations and conclusions in *Bob Frink Chevrolet, Inc. v. Department of Motor Vehicles, A-46-73*, are dispositive of this allegation. In that case we stated:

"...Section 3054, subsection (d) Vehicle Code, requires the board to use the independent judgment rule when reviewing the evidence (*Thiel Motors, Inc. v. 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."

This rationale applies equally to any omission on the part of the director to make additional findings in mitigation. Here, as in *Bob Frink Chevrolet, Inc. supra*, we note that the record provides no basis upon which to conclude that either the hearing officer or the director abused his discretion by not including in his findings of fact mitigation which appellant contends should have been reduced to formal findings.

We next turn to the matter of appropriateness of penalty,

with particular attention accorded to the evidence concerning the family problems of Stanley Ogner, appellant's president. Without question, Ogner was besieged by personal problems of serious magnitude during the years 1969 and 1970, evoking an appreciable sympathetic atmosphere in which to consider this appeal. Nevertheless, we are confronted with determining what mitigating impact, if any, Ogner's family plight had upon the activities and responsibility of the appellant corporation.

We find that, between family problems and appellant's business, the only connection warranting our consideration is contained in a self-serving declaration of Ogner to the effect that had his attention to business not been diverted by personal problems the odometer setbacks would not have occurred. We are constrained to observe, however, that there is no evidentiary basis in the record to support a conclusion that had Ogner not had any family problems the same odometer violations would not have occurred.

At the original administrative hearing, it was established that during the years 1969 and 1970 appellant prospered, sales and operation were good and a subsequent departmental audit found that compliance with the code was exemplary -- with the exception of the 5 odometer setbacks. No mention was made before the hearing officer of any family problems contributing to the violations. To the contrary, Ogner testified that he entrusted his department heads to enforce his policies of compliance with the law and "probably did not" ever personally check the demonstrator records. Further, Ogner

testified at the hearing that an internal investigation failed to reveal how the violations occurred but did reveal appellant "had some very poor controls in effect". Pressed by appellant's own counsel, Ogner went so far as to admit that no controls were in effect relating to odometer resets governing demonstrators.

In view of all of the foregoing, arriving at a conclusion that Ogner's family problems constitute relevant substantial evidence in mitigation of appellant's derelictions would require us to indulge in conjecture and speculation. This we decline to do.

Having duly considered the paramount matter of mitigation presented by this appeal, we reiterate the requirement that a corporation be subject to license discipline for the negligent or wrongful acts of its officers, agents or employees (Bob Frink Chevrolet, Inc. v. Department of Motor Vehicles supra). As we stated in Imperial Motors v. Department of Motor Vehicles, A-20-72:

"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 v. Department of Motor Vehicles, A-39-73; Main Toyota, Inc. v. Department of Motor Vehicles, A-37-73.)

With the responsibility of the appellant corporation fixed under the foregoing rule, we nevertheless are required to decide each case on its own merits (Main Toyota, Inc. v. Department of Motor Vehicles supra). In the instant case, as supported by the

evidence of record and the director's findings, we have a dealership with an otherwise excellent record, corporate officers who had no participation in the odometer setbacks (although those actually culpable could not be identified), and the initiation of definitive and effective corrective measures and policies. In light of these and all the other circumstances in this case, we view an actual suspension of fifteen (15) days to be harsh. An actual suspension of seven (7) days, coupled with a revocation, stayed, with a one-year period of probation gives sufficient notice to all concerned that license discipline is a matter of serious import. Further, such modification of penalty will not be inimical to the public welfare.

All the findings of fact and determination of issues are affirmed. For the reasons stated, the New Motor Vehicle Board, pursuant to Sections 3054(f) and 3055 Vehicle Code, 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-137) heretofore issued to appellant, Ogner Volkswagen, Inc. are, and each is, hereby revoked; provided, however, that the effectiveness of said order of revocation shall be 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 the Department of Motor Vehicles upon the following terms and conditions:

The vehicle dealer's license, certificate and special plates (D-137), heretofore issued to appellant, Ogner Volkswagen, Inc.,

are suspended for a period of seven (7) days.

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 October 11, 1974.

WINFIELD J. TUTTLE

PASCAL B. DILDAY

THOMAS KALLAY

ROBERT A. SMITH

MELECIO JACABAN

W. H. "HAL" McBRIDE

JACK B. VANDENBERG

A-54-74

are suspended for a period of seven (7) days.

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 _____.


WINFIELD J. TUTTLE

PASCAL B. DILDAY

THOMAS KALLAY

ROBERT A. SMITH

MELECIO JACABAN

W. H. "HAL" McBRIDE

JACK B. VANDENBERG

A-54-74

are suspended for a period of seven (7) days.

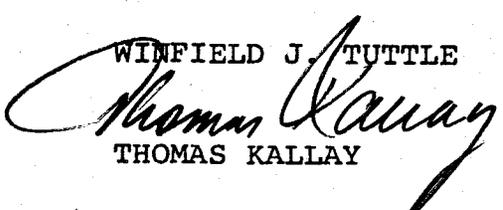
Appellant, and its officers, directors and stockholders shall comply with the laws of the United States, the State of California and its political subdivisions, and with the rules and regulations of the Department of Motor Vehicles.

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 _____.

WINFIELD J. TUTTLE


THOMAS KALLAY

MELECIO JACABAN

JACK B. VANDENBERG

PASCAL B. DILDAY

ROBERT A. SMITH

W. H. "HAL" McBRIDE

A-54-74

are suspended for a period of seven (7) days.

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 _____.

WINFIELD J. TUTTLE

PASCAL B. DILDAY

THOMAS KALLAY

ROBERT A. SMITH

Melecio N. Jacaban
MELECIO JACABAN

W. H. "HAL" McBRIDE

JACK B. VANDENBERG

A-54-74

are suspended for a period of seven (7) days.

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.

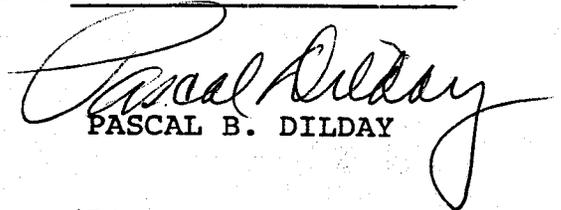
This Final Order shall become effective _____.

WINFIELD J. TUTTLE

THOMAS KALLAY

MELECIO JACABAN

JACK B. VANDENBERG


PASCAL B. DILDAY

ROBERT A. SMITH

W. H. "HAL" McBRIDE

A-54-74

are suspended for a period of seven (7) days.

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 _____.

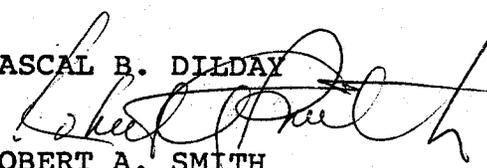
WINFIELD J. TUTTLE

THOMAS KALLAY

MELECIO JACABAN

JACK B. VANDENBERG

PASCAL B. DILDAY


ROBERT A. SMITH

W. H. "HAL" McBRIDE

A-54-74

are suspended for a period of seven (7) days.

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 _____.

WINFIELD J. TUTTLE

PASCAL B. DILDAY

THOMAS KALLAY

ROBERT A. SMITH

MELECIO JACABAN

W. H. "HAL" McBRIDE

JACK B. VANDENBERG



A-54-74

are suspended for a period of seven (7) days.

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 _____.

WINFIELD J. TUTTLE

PASCAL B. DILDAY

THOMAS KALLAY

ROBERT A. SMITH

MELECIO JACABAN


JACK B. VANDENBERG

W. H. "HAL" McBRIDE

A-54-74