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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of)
)
ALMADEN VOLKSWAGEN,)
A California corporation,)
)
Appellant,) Appeal No. A-60-74
)
vs.) FILED: July 21, 1975
)
DEPARTMENT OF MOTOR VEHICLES)
OF THE STATE OF CALIFORNIA,)
)
Respondent.)
_____)

Time and Place of Hearing: March 12, 1975, 10:30 a.m.
Federal Building, Room 12138
450 Golden Gate Avenue
San Francisco, CA 94102

For Appellant: Donald McNeil, Esq.
Ruffo, Ferrari & McNeil
101 Park Center Plaza, Suite 1300
San Jose, CA 95113

For Respondent: Honorable Evelle J. Younger
Attorney General of the
State of California
By: Robert E. Murphy
Deputy Attorney General

FINAL ORDER

Almaden Volkswagen, 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.

FINDINGS OF DIRECTOR OF MOTOR VEHICLES

The director, adopting the proposed findings of the hearing officer, found:

1. Appellant failed in 22 instances to give written notice to the department before the end of the third business day after transferring the vehicles.
2. Appellant failed in one instance to give written notice to the department before the end of the fifth day of business after transferring of a vehicle.
3. Appellant failed in 247 instances to mail or deliver reports of sale (together with documents and fees) to the department within the 20-day period allowed by law.
4. Appellant failed in 5 instances to mail or deliver reports of sale of vehicles together with other documents and fees required within the 30-day period allowed by law.
5. Appellant in 23 instances charged purchasers of vehicles excessive registration fees.

6. In a prior case (D-1182) dated November 12, 1971, entitled "In the Matter of the Accusation of Almaden Volkswagen, A California Corporation, Respondent," the Director's Decision contained the following terms:
 - (a) Respondent [Appellant] was granted a probationary vehicle dealer's license for a period of one year from and after the effective date of the decision, to wit, March 27, 1972.
 - (b) That most of the violations alleged in the current accusation against appellant accrued during the above-mentioned probationary period.

The hearing officer made additional findings, which were adopted by the director, as follows:

1. The above charges resulted from a pre-announced review-audit by the department which was conducted on June 25 through June 27, 1973.
2. Such review covered transactions during the year 1972 in which approximately 800 vehicles were sold. Of said sales some 65 were selected at random for this audit.
3. Further, this was a routine probationary-license review and encompassed a search for such violations as those pertaining to contract, vehicle equipment, safety equipment, advertising, consumer complaints and the like. No such violations were found. In fact, the dealer jackets were in excellent order, the contracts were

all complete and in good shape and all of the records reviewed were in proper condition except for the month of December of 1972. Further, the departmental investigators checked with three customers with respect to overcharges by the respondent [appellant] and in each of these instances determined that said customers had been voluntarily repaid by the respondent [appellant]. In this latter regard it was the policy of respondent [appellant] to make such refunds immediately upon determining that such overcharges had been made and, with respect to the twenty-three items, set forth in charge VIII of the Accusation, all of these excess charges were likewise remitted by respondent [appellant].

4. Many of the violations were directly attributable to internal management operations of the respondent [appellant]. Such problems were, at least in part, due to the lack of definite guidelines and policies by reason of the absence of the owner of some 95% of the stock of this corporate respondent [appellant]. This person was also the president of the corporation. While he made periodic appearances at the place of business such was not adequate to rectify said problems.
5. Approximately June 30, 1974 the respondent [appellant] went out of business by reason of change of ownership. At that time there were no pending vehicle transactions.

subsequently, on July 2 or 3, 1974 the respondent [appellant] surrendered its license at the request of an investigator from the Department.

6. One David A. Griffith joined the respondent [appellant] firm in February of 1972 as a business manager and by December of 1972 was promoted to its vice-president. This person made a conscientious and commendable effort to inject order into the business. However, because of his relative inexperience he was unable to cope with all situations at all times even though he was fully aware that the respondent [appellant] corporation had its previous license revoked and a probationary license issued. Currently this person is the owner and general manager of Olympic Volkswagen located in Port Angelus in the State of Washington. Said business is not associated with the corporate respondent's [appellant's] officers, directors or stockholders. Mr. Griffith was fully cooperative with the departmental investigators and promised to immediately rectify any and all violations. Mr. Griffith may, at some indefinite time in the future, desire to return to California and again be associated with vehicle sales.

PENALTY

The director, adopting the proposed decision of the hearing officer, imposed as a penalty the revocation of appellant's dealer license and special plates No. D-3702.

BASIS OF APPEAL

Appellant contends:

1. The department has proceeded in excess of its jurisdiction;
2. The department has proceeded in a manner contrary to law;
3. The decision is not supported by the findings;
4. The findings are not supported by the weight of the evidence in the light of the whole record reviewed in its entirety; and
5. The determination of penalty as provided in the decision of the department is not commensurate with the findings.

It must first be noted that the appellant does not take issue with the findings of fact as set forth by the hearing officer and adopted by the Director of Motor Vehicles. Appellant's only assertion is that the penalty imposed of revocation of the license is not justified in light of the facts offered in mitigation thereof and the fact that the appellant had gone out of business and surrendered his license to the Department of Motor Vehicles prior to the time the department had initiated administrative action against the appellant's license for said violations.

We were not persuaded that the penalty imposed was too severe in light of the mitigating arguments made by appellant. One would expect that, having been placed on probation, a licensee would exercise an extremely high degree of care in its dealing with the public and in its internal procedures in order to comply with the

requirements imposed by the California Vehicle Code. The penalty of revocation imposed in this case is fully justified by petitioner's conduct combined with the fact that the conduct occurred during a probationary period.

In its opening brief and in its argument before the board, appellant argued that the department lacked jurisdiction to take action against appellant's license once appellant had surrendered same to the Department of Motor Vehicles. The board, after considering the oral argument on this issue, directed both the counsel for the department and for the appellant to submit additional briefs on the issue of the Department of Motor Vehicles' jurisdiction over a licensee after same had surrendered its license to the department. After reviewing these subsequent briefs, we were not persuaded by appellant's argument that Vehicle Code Section 11721(c), which provides that the surrender of a license or the cessation of business shall not prevent the filing of an accusation for revocation or suspension of a surrendered license, is unconstitutional. As stated in the brief filed by the Department of Motor Vehicles, California Vehicle Code Section 11721(c)^{1/} gives the department the power to file an accusation for revocation or suspension of a surrendered license.

Regarding the constitutionality of §11721(c), we consider our holding in *Suburban Ford vs. Department of Motor Vehicles* (A-35-73)

^{1/} Erroneously referred to in respondent's brief filed with the New Motor Vehicle Board on April 9, 1975 as Vehicle Code §11703.

to be dispositive of the issue.

"The weight of authority supports the position that the power to determine the constitutionality of legislation is not committed to administrative agencies. (See Public Utility Commission v. U.S. (1918) 355 U.S. 534, 539; Panitz v. District of Columbia (DCCir 1940) 112 F.2d 39, 42; 3 Davis, Administrative Law Treatise, §20.04 (1958)."
(See also Cal. Admin. Agency Practice, Section 2.28.)

Accordingly, in this case, as in Suburban Ford vs. Department of Motor Vehicles, supra, we make no findings or determinations concerning the constitutionality of the cited section of the Vehicle Code.

As to the appropriateness of the penalty, we have carefully considered all of the evidence contained in the record which constituted matters in mitigation and extenuation. Clearly, appellant had committed numerous violations of the Vehicle Code during a period of probation imposed for prior violations. In these circumstances, we view with most serious concern appellant's neglect in properly discharging its legal obligation in the conduct of its business. Consequently, any reduction or modification of the penalty imposed by the decision of the director would be totally unwarranted. We find the penalty to be entirely appropriate and commensurate with the findings.

We wish to express, however, that if Mr. David Griffith^{2/} wishes to apply for a license to sell motor vehicles in the State of California, this decision should in no way impair his ability to obtain a license.

2/ David A. Griffith joined Almaden Volkswagen in February of 1972 as business manager and by December of 1972 was promoted to its vice president.

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

This Final Order shall become effective August 21, 1975.

THOMAS KALLAY

ROBERT A. SMITH

MELECIO H. JACABAN

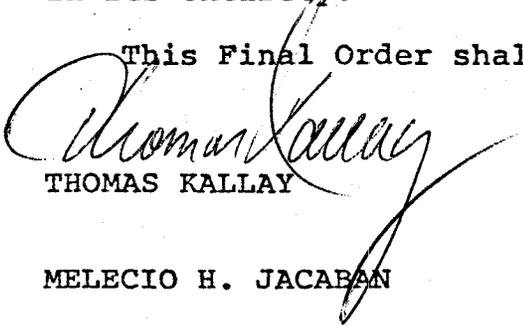
JOHN B. VANDENBERG

JOHN D. BARNES

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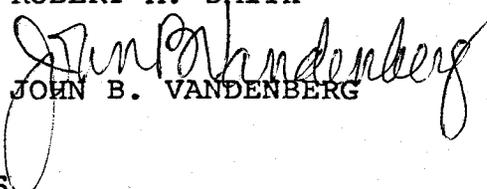
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