

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

STATE OF CALIFORNIA  
NEW MOTOR VEHICLE BOARD

In the Matter of the Appeal of )  
)  
SAN LEANDRO DATSUN, )  
A California Corporation, )  
)  
Appellant, )  
)  
vs. )  
)  
DEPARTMENT OF MOTOR VEHICLES )  
OF THE STATE OF CALIFORNIA, )  
)  
Respondent. )  
\_\_\_\_\_ )

Appeal No. A-61-74

FILED: July 25, 1975

Time and Place of Hearing:

1:30 p.m., July 9, 1975  
The Center for Legal Advocacy  
3200 Fifth Avenue  
Sacramento, California

For Appellant:

Harold C. Wright  
Brown, Wright & Kucera  
A Law Corporation  
2600 El Camino Real, Suite 411  
Palo Alto, CA 94306

For Respondent:

Honorable Evelle J. Younger  
Attorney General  
By: Matthew Boyle  
Deputy Attorney General

FINAL ORDER

San Leandro Datsun, a California corporation, enfranchised as a new car dealer, hereinafter referred to as "appellant", appealed to this board from a disciplinary action taken against its corporate

license by the Department of Motor Vehicles following proceedings pursuant to Section 11500 et seq. of the California Government Code.

The Director of Motor Vehicles, adopting the proposed decision of the hearing officer, found that:

1. Appellant failed in 13 instances to give written notice to the department within three days after transfer of vehicles.
2. Appellant failed in 49 instances to mail or deliver report of sale (with documents and fees) to the department within 20 days.

(With respect to #2 above, it was further found that in 19 instances incomplete documents were reported to the department within said 20-day period but because said documents were incomplete same were returned by the department field office to permit the dealer to complete the documents or supply the missing material and return same to the department. In all instances, said documents were subsequently returned to the department after the 20-day period. Appellant offered evidence about the return of said documents to the dealer in the first instance as evidence in mitigation; however, the hearing officer found said evidence is, in fact, evidence in aggravation, in that it showed the submission of the documents in improper form or in incomplete form by the

dealer, from which an inference of carelessness may be drawn.)

3. Appellant in 31 instances charged purchasers of vehicles excessive registration fees.

(With respect to #3 above, appellant in 10 instances, which were originally listed in the accusation as violations for excessive registration fees, sold vehicles pursuant to an agreed cash price representing the total amount of the sale. No security agreements were involved in any of such sales. Appellant used the total agreed price to the customer in which to "back into" to determine the sales tax and license and registration fees, then subtract the same from the gross selling price to produce a net sales price, plus taxes and fees. Appellant did not, therefore, as to such items include any added cost to the selling price of the vehicles. In several instances, had the price of the dealer-installed accessories been included by the dealer in the figure reported to the department on the application for registration of new vehicles, it was stipulated that the department's rating would have been the same as the dealer's at the time the contract of sale was entered into by the parties. The correct fees were collected by the dealer when including the price of the dealer-installed accessories; but the dealer reported incorrect

fees in that they were not based on the full retail price to the customer; i. e., the base figure reported to the department did not include the dealer-installed accessories. In 5 instances of overcharge, the dealer had no explanation for the fee overcharges other than that they were determined by an employee erroneously.

Appellant, upon being advised by the department representative of having overcharged the purchasers, refunded all overcharges designated by the department representative, including those involving gross sales and in one instance paid back to the purchaser the same overcharges twice at the request of such department representative.)

4. The appellant proved the following additional and mitigating facts:

- (a) With respect to Nos. 1 and 2 above, a large number of the items transferred in said findings were during the months of January, February and March 1973. During these months of each year, the department is heavily engaged in handling registration and licensing fees for the current calendar year and the department nevertheless carries on with the processing of dealer transactions, producing a larger volume of business at that time of year than in the remainder of the year. The dealers are also subject to defective mail service in

attempting to comply with Vehicle Code Section 5901; however, the department gives the dealers five additional mailing days to the time set by said section.

- (b) Appellant has been owned and operated and managed by Donald Carlson and his son Richard Carlson. Donald Carlson entered the automobile business when he was going to high school. In 1971, he began to limit his activities which included Department of Motor Vehicles work. The business was thereafter mainly operated by Richard Carlson, Vice-President of the company and 28 years of age. He has been in the automobile business for about seven years. His father, Donald Carlson, is president of the company. Richard Carlson did indicate that he knew appellant was overcharging customers as herein above set forth in Finding 3 but he readily reimbursed any customer who complained thereof and fully followed all requests of department representatives to render any customer whole. Said Carlsons and appellant's employees fully cooperated with department representatives at all times. Appellant has operated the same location since 1959. Appellant is endeavoring through its employees to properly rate its vehicles, to

correctly report the registration fees due thereon and to limit its collection from customers to only such fees as are properly due. Also, appellant's employees are now paying close heed to the requirements of Section 5901 and 4456 of the Vehicle Code. Appellant's records show that its average monthly payroll in 1973 is about \$24,630.11 and that its overhead in 1973 was about \$41,755.82. In 1973 appellant had 23 employees including 5 salesmen; in 1972 appellant had 4 salesmen. Appellant's records show that it paid more fees to the department than it collected from customers.

The director, adopting the proposed decision of the hearing officer, imposed a penalty of 60 days' suspension with 53 days stayed for one year probationary period on the usual terms and conditions. Neither the hearing officer nor the department, in adopting the proposed decision, specifically delineated penalties for each violation.

#### BASIS OF APPEAL

Appellant predicates its appeal on the grounds that:

1. The findings are inadequate.
2. That the decision does not reflect appellant's testimony and other direct evidence in defense and in mitigation of the charges of late dealer notices, late

transfers, and overcharged Department of Motor Vehicle fees.

3. That the penalty is excessive.

We will turn our attention first to appellant's contention that the findings adopted by the director were inadequate. While we concur with the department that the findings are legally adequate and are supported by an extensive body of case law, we feel that the order adopted by the department should specify the penalty assessed for each violation. Not only does a detailed penalty help this board in reviewing the record, it also serves as a guide to the appellant in its attempt to comply with the decision and to make the necessary changes in his operation so that similar types of violations are not reoccurring.

As to the second issue on appeal; i. e., that the decision does not reflect the appellant's testimony and other direct evidence in defense and mitigation of the charges, our observations and conclusions in *Bob Frink Chevrolet, Inc. vs. Department of Motor Vehicles, A-46-73*, are dispositive of the issue. 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. vs. 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 and in defense of the charges.

We turn next to the matter of the appropriateness of penalty. After a complete review of the record and after receiving oral argument and answers to questions asked by board members at the hearing on this appeal, any assertion that the acts or omissions of the appellant which served as a basis for the violations found by the department are wilful, cannot be sustained. This especially applies to the inference that could be drawn from statements in the decision about Richard Carlson's knowledge concerning overcharges in light of the testimony given by Mrs. Ruby DeSmith and by Mr. Carlson.

We take note of the fact that the instances, which served as the basis for the accusation, were technical violations only, that no wilful intent was found, that the appellant has an otherwise excellent record and has initiated definite and effective corrective measures and policies. In light of these and all other circumstances in this case, we view a 60-day suspension with 53 days stayed for one year to be harsh. A 10-day suspension with 9 days stayed for 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 Determinations of Issues are affirmed except as to the hearing officer's Finding VI(b) and to any inference of willfulness on the part of Mr. Richard Carlson. With regards to penalty, for the reasons stated, the New Motor Vehicle Board, pursuant to Section 3054(f) and 3055 of the 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-7721) heretofore issued to appellant, San Leandro Datsun, a corporation, are suspended for a period of 10 days; provided, however, that 9 days of the said 10-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 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 the appellant 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 the appellant's license fully restored.

This Final Order shall become effective August 25, 1975.

JOHN ONESIAN

ROBERT A. SMITH

AUDREY B. JONES

JOHN B. VANDENBERG

WINFIELD J. TUTTLE

PASCAL B. DILDAY

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*Audrey B. Jones*  
AUDREY B. JONES

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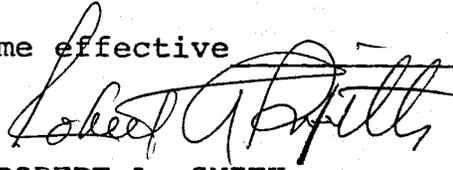
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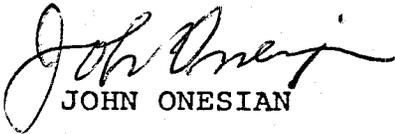
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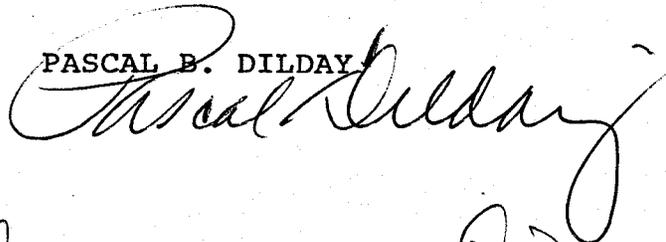
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*San Leandro Natsum VS DMV*

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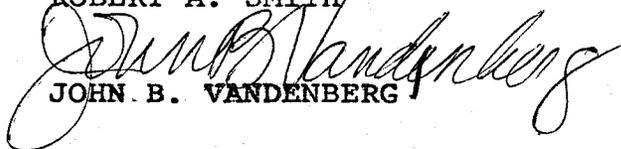
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