

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of)
)
PADRE DODGE,)
a California Corporation,) Case No. A-7-70
)
Appellant,) Filed and Served:
)
vs.) July 1, 1970
)
DEPARTMENT OF MOTOR VEHICLES,)
)
Respondent.)
_____)

Time and Place of Hearing: June 10, 1970, 11:00 A.M.
1350 Front Street
San Diego, California

For Appellant: Richard T. Hilmen, Jr.
Attorney at Law
3104 Fourth Avenue
San Diego, California

For Respondent: Honorable Thomas Lynch
Attorney General
By: Robert J. Polis
Deputy Attorney General

FINAL ORDER

In the decision ordered January 30, 1970, the Director of Motor Vehicles, pursuant to Chapter 5, Part 1, Division 3, Title 2 of the Government Code, found that on November 16, 1968, and May 1, 2 and 3, 1969, appellant caused to be published in

a newspaper advertisements for the sale of specific motor vehicles without identifying those vehicles by either the vehicle license number or the vehicle identification number.

At the administrative hearing, appellant introduced evidence to prove that: (1) At the time of the alleged violations, regulations requiring the identification of vehicles by license number or by vehicle identification number had been in existence for only a short time. (2) Appellant was confused with reference to what was required, by way of identification of vehicles, although appellant had received a written communication from the Department of Motor Vehicles which set forth, verbatim, the relevant portion of the applicable regulation. (3) Appellant did use the last four numbers of the vehicle identification number in its advertisements. (4) Because of an occasional mixup between appellant's employees and the newspaper publishing the ads, there were a few instances where neither license number nor identification number was used in describing used automobiles in advertisements published by appellant. (5) In the past, appellant's advertising had caused respondent to write letters instructing appellant to change its advertising practices, and appellant had corrected its advertising according to the specific instructions of respondent, e. g. by discontinuing use of its stock numbers.

The Decision of the Director of Motor Vehicles found that appellant's advertising practices with reference to

vehicle identification were in violation of Section 11713(a) Vehicle Code and 13 Cal. Adm. Code 432.01. Pursuant to these findings, the Director suspended appellant's license, certificate and special plates for a period of twenty days, and stayed execution of the suspension of the license, certificate and special plates upon the condition that no subsequent determination be made, after hearing, that cause for disciplinary action has occurred within three years from the effective date of the Decision. The order further provided that, should a subsequent determination be made by the Director that cause for disciplinary action occurred before the expiration of three years from the effective date of the Decision, the Director may, in his discretion, vacate the stay order and impose the suspension. If no such determination is made, the stay will become permanent.

An appeal was filed with this Board pursuant to Chapter 5, Division 2 of the Vehicle Code.

I. ARE THE FINDINGS OF THE RESPONDENT SUPPORTED BY THE WEIGHT OF THE EVIDENCE IN LIGHT OF THE WHOLE RECORD REVIEWED IN ITS ENTIRETY?

Appellant contends that the findings are not supported by the weight of the evidence in that: (1) There was no evidence offered by either party in support of the finding that a prospective purchaser was unable to identify any of the vehicles advertised as those offered for sale. (2) No evidence was

offered by the respondent, before it rested, to prove that the numbers used by appellant in its advertising were not vehicle identification numbers.

We agree that the administrative record is devoid of any direct evidence that specific prospective purchasers were misled by appellant's advertising. However, 13 Cal. Adm. Code 432.01, adopted by the Director of Motor Vehicles to implement Section 11713(a) Vehicle Code provides as follows:

"Any specific vehicle advertised for sale by a dealer shall be identified by either its vehicle identification number or license number so that a prospective purchaser may recognize it as the vehicle advertised for sale."

Neither this regulation nor the statute it implements requires direct evidence that one or more specific persons were misled by appellant's advertising. The language "...so that prospective purchasers may recognize it as the vehicle advertised for sale..." is merely explanatory, stating the purpose of the requirement that vehicles advertised for sale by a dealer must be identified by either the vehicle license number or the vehicle identification number, and does not qualify the mandatory requirements of the regulation prescribing the manner in which the vehicles must be described in order to satisfy the provisions of Section 11713(a) Vehicle Code.

The evidence clearly established that appellant, an entity licensed by respondent to sell motor vehicles, did publicly advertise specific vehicles without properly identifying such

vehicles. Whether any specific prospective customer was or was not, in fact, misled thereby is immaterial.

Absent a license number or a vehicle identification number in the advertisement, there is certainly an inference that a prospective buyer could not identify the vehicle advertised for sale and he would, therefore, be misled by the advertisement. There being no requirement that respondent prove by direct evidence that specific prospective purchasers were misled as a result of appellant's advertising policies and, inasmuch as an inference from facts based upon substantial evidence is sufficient to support a finding (Evidence Code Section 600), the finding of the Director that prospective buyers were not able to identify vehicles as those for sale is supported by the weight of the evidence.

Turning to appellant's contention that respondent failed to prove, before it rested, that four digits do not constitute an identification number, appellant does not argue that this element was never proven but does contend that proof came untimely; i.e., after respondent rested, and, further, that respondent, rather than the hearing officer, should have developed the evidence meeting respondent's burden of proof. Appellant contends its motion to dismiss should have been granted based upon the failure of respondent to prove its case before resting.

O'Mara vs. State Board of Pharmacy, 246 Cal.App.2d 8, 54 Cal.Rptr. 324, clearly negates the contentions of appellant in this regard. There, the State Board of Pharmacy, in a proceeding conducted pursuant to the Administrative Procedure Act (Government Code 11500, et. seq.) did not prove that drugs used by respondent-pharmacist to refill a prescription were, in fact, the drugs called for by the prescription. Respondent made a motion for nonsuit, at the time the Board initially rested its case, based upon this premise. The motion was denied. In discussing respondent's contention that it was error to deny the motion, the district court of appeals said:

"...the law is clear that the hearing officer had no authority to grant such a motion in any event. It was squarely decided in Frost v. State Personnel Board, 190 Cal.App.2d 1, 5-6, 11 Cal.Rptr. 718, and Kramer v. State Board of Accountancy, 200 Cal.App.2d 163, 175, 19 Cal.Rptr. 226, that a hearing officer may not entertain a motion for nonsuit, but must proceed with the taking of evidence until all of the testimony to be offered by all the parties has been received. When appellant testified in his own behalf, he stated without reservation that the drugs supplied were the drugs prescribed.

"At the time the Board initially rested, it had not yet necessarily concluded its case in chief. Government Code section 11513, subparagraph (b), which governs the conduct of administrative hearings, provides:

"(b) Each party shall have these rights: to call and examine witnesses; to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him to testify; and to rebut the evidence against him. If respondent does not testify in his own behalf he may be called and examined as if under cross-examination.' (Emphasis added.)

"(3) In his reply brief appellant invites us to speculate as to what the result would have been if he had chosen not to testify and had declined to answer questions propounded to him when called by the Board on the ground that his answers thereto might subject him to prosecution upon criminal charges. We need not consider any such hypothetical questions since appellant in fact did exercise his right to testify and in so doing he removed any possible doubt that might have existed as to the nature of the drugs he had supplied. He very effectively eliminated the need, if any there was, for the Board to offer any further evidence on this issue."

In the case before us, there is abundant evidence, conclusively proving that four digits do not constitute a vehicle identification number. James H. Robinson, an adverse witness called by appellant, was asked by appellant how he determined that four digits in an exhibit introduced by respondent was not a proper identification number. The witness replied:

"I went to the National Auto Theft Bureau Book and determined that if in fact this was a number, this was what we call a line number or a manufacturing number -- the number that this vehicle appeared on the line, is not complete, it is not a complete identification number in that I could not determine the year, the model, make, or the manufacturer, by the elimination of the front numbers and digital numbers and so on." (R.T. 26, lines 20-26.)

Further testimony elicited from this witness is as follows:

"Q Now these in fact are the last four numbers of the serial number?

"A If in fact it is a serial number. I did not physically inspect this vehicle.

"Q You don't know whether or not it is?

"A It could very well be a stock number.

"Q And it could be a vehicle identification number?

"A Incomplete.

"Q But a vehicle identification number; it could be?

"A Incomplete." (R.T. 27, lines 11-20.)

Under direct examination by the respondent, this witness again testified that the last four digits could not be the entire identification or license number (R.T. 37, lines 18-22 to R.T. 38, lines 1-2). Again under direct examination by respondent, this witness answered in the negative the question as to whether or not a complete identification number could consist of four digits (R.T. 40, lines 5-6).

Joseph Calabrese, president of appellant corporation, was called by appellant as a witness. During cross-examination, the following exchange took place:

"Q Would it be fair to say, based on your years of experience, when you see a vehicle identification number, you know what it is?

"A Yes.

"Q Now, these advertisements that we've been speaking of, Exhibits A through D, now except for a couple of exceptions in Exhibit A, all of the ads of specific vehicles contain SER period, then a mark that indicates number, and then they're followed by four digits.

"A Yes.

"Q Now, in these ads, is that the vehicle identification number or only a part of it?

"A To the best of my knowledge, yes.

"Q Is the vehicle identification number merely a part of the number?

"A It is the last four digits of the number?

"Q So it is a part of the number?

"A Yes." (R.T. 52, line 15 to R.T. 53, line 4.)

Appellant calls our attention to the questioning by the hearing officer of witness Robinson as to the usual number of digits appearing in a vehicle identification number (R.T. 39, lines 10-12 and R.T. 40, lines 8-13). From this questioning, appellant argues that it must be concluded the hearing officer actually did not know whether the numbers used in appellant's ads were identification numbers or that the hearing officer was not satisfied with the proof presented by the respondent and deemed it necessary to develop the record himself. Appellant then contends that meeting respondent's burden of proof is not the function of the hearing officer.

These arguments of appellant fail for two reasons. First, the element of its case which respondent did not prove prior to initially resting was adequately proven before the matter stood submitted even without the testimony elicited by the hearing officer. Secondly, while we agree with appellant's assertion that the burden of proof is upon the party asserting the affirmative of an issue, we are aware of no rule, and have been referred to none, which precludes the hearing officer from eliciting testimony from a witness. In fact, we perceive it to be the duty of the hearing officer to discover, within

the framework of the administrative proceedings, all relevant facts to the end that the interests of the public, which are paramount in proceedings of this nature, shall be protected, and the truth ascertained. It is immaterial that the truth elicited favors one side or the other. There is no contention made, and certainly there is no basis in the record for one, that the hearing officer acted unfairly in pursuing his examination of witnesses.

We hold that the findings of the Director are supported by the weight of the evidence.

II. WAS THE DECISION OF THE DIRECTOR OF MOTOR VEHICLES SUPPORTED BY THE FINDINGS?

Appellant makes two contentions to support its position that the decision is not supported by the findings: (1) No finding was made that appellant published any advertisement with intent to mislead prospective customers. (2) There was no finding that using four digits in advertisements, rather than the entire vehicle identification number, related to a "material particular", as that term is used in Section 11713(a) Vehicle Code.

Section 11713(a) Vehicle Code provides that it is unlawful and a violation of the code for one licensed as an automobile dealer "to intentionally publish or circulate any advertising which is misleading or inaccurate in any material particular."

Appellant urges us to construe subsection (a) of Section

11713 V.C. to provide that it is violated only where the advertisement was published by the dealer with the specific intent to mislead prospective customers, or otherwise prevent them from recognizing the vehicle advertised. This argument might well be answered by reference to Section 665 Evidence Code: "A person is presumed to intend the ordinary consequences of his voluntary act," a presumption affecting the burden of proof (Section 660 Evidence Code). However, subsection (a) of Section 11713 V.C. does not, either standing alone or as implemented by the regulations, support the narrow construction contended by appellant. The element of intent is met if it is shown that the dealer or his agent knowingly placed or caused to be placed in the advertisement the material which was misleading or inaccurate, and knowingly caused such advertisement to be published. It need not be proven that the advertisement was specifically intended to mislead or deceive. It was the purpose of the Legislature to protect the public from the effects of misleading advertising, not to punish the dealers for guilty intent in causing the public to be misled.

The parties stipulated that the advertisements offered into evidence by the respondent were in fact published and that those exhibits were true copies of the material that was published. There was no suggestion that the advertisements found their way into the newspapers by accident, inadvertance

or without appellant's knowledge. On the contrary, appellant's president testified that he and appellant's used car manager prepared the advertisements (R.T. 50, lines 18-19). The evidence is uncontroverted that appellant intended to include only a part of the vehicle identification number in its advertisements and intended that such advertisements be published.

We dismiss as being without merit appellant's contention that the decision is not supported by the findings because there was no finding that the inaccuracies related to a "material particular". The matters which are included in the phrase "material particular" are set forth in 13 Cal. Adm. Code 430.01(a) through (d). Included there as subsection (b) is the language: "The vehicle to be sold." Section 432.01 clearly designates how the vehicle to be sold is to be identified in advertisements. In view of this regulatory scheme, it is unnecessary for the Director to make a specific finding that the publications in issue were defective in a "material particular". Such a "finding" would be a conclusion of law, based upon the ultimate facts which were included in the Director's findings.

We hold that the decision is supported by the findings.

III. IS THE PENALTY IMPOSED BY RESPONDENT COMMENSURATE WITH ITS FINDINGS?

Appellant urges that we should substantially reduce the penalty imposed, even though we hold that the findings are supported by the evidence and that the decision is supported by the findings.

Appellant argues that the penalty is extremely harsh and unjustified in view of: (1) the absence of several findings which appellant has urged are indispensable to proof of its violations, (2) the existence of mitigating circumstances and (3) "appellant's substantial compliance with the statutory scheme in conformance with prevailing community practices."

Appellant had been the focal point of much criticism by the Department of Motor Vehicles because of its advertising practices and had been specifically advised in writing of the provisions of 13 Cal. Adm. Code 432.01 by letter of October 25, 1968, from respondent's manager of Compliance Services (Respondent's Exhibit 2) but chose to place its own "interpretation" upon the clear language of the regulation and elected to place advertising material which did not conform to the law. Appellant's president testified that he was "confused" in 1968 concerning the proper interpretation of Section 432.01 (R.T. 55, line 18 to R.T. 56, line 15). He further testified that he attempted to alleviate his confusion by discussing the requirements of Section 432.01

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In our view, appellant flagrantly violated a valid regulation of the Department of Motor Vehicles which was clear and unequivocal and left no room for "construction" by appellant or its fellow-licensees. Appellant's arguments that it relied on community practices or the advice of employees of the press or of fellow-dealers are entirely unpersuasive.

The penalty imposed by the respondent is fair and reasonable in light of the circumstances of the case. It permits appellant the opportunity of continuing its business of selling motor vehicles, providing no further cause for disciplinary action occurs within the ensuing three years.

The Decision of the Director of Motor Vehicles is affirmed.

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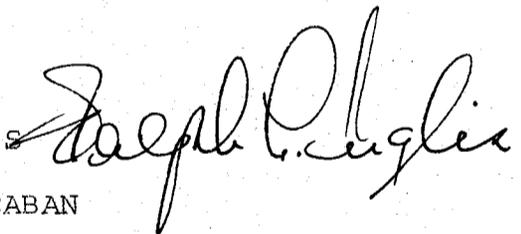
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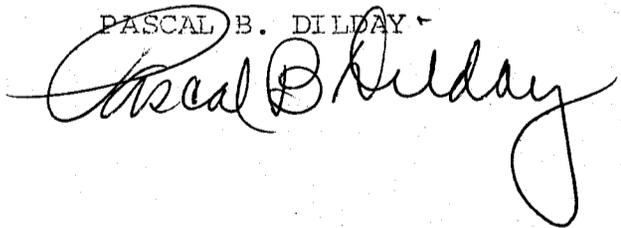
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