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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Appeal of)
49er CHEVROLET, INC.,)
Appellant,) Appeal No. A-70-76
vs.) FILED: December 15, 1976
DEPARTMENT OF MOTOR VEHICLES)
OF THE STATE OF CALIFORNIA,)
Respondent.)

Time and Place of Hearing: 2:00 p.m., October 13, 1976
Room 4061, 722 Capitol Mall
Sacramento, CA 95814

For Appellant: Richard E. Wilmshurst
P. O. Box 65
Angels Camp, CA 95222

For Respondent: Alan Mateer, Esq.
Staff Counsel
Department of Motor Vehicles

FINAL ORDER

49er Chevrolet, 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 §11500 et seq. Government Code, the Director of Motor Vehicles adopting the proposed decision of the

hearing officer found that:

1. Respondent [Appellant] included as an added cost to the selling price of the vehicle sold to Mr. and Mrs. Herbert Johnson, and the vehicle sold to James and Emil Enzi, additional licensing or transfer fees in excess of the fees due and paid to the state.

<u>ITEMS</u>	<u>FEE DUE DEPARTMENT</u>	<u>FEE CHARGED PURCHASER</u>	<u>EXCESS</u>
Johnson Vehicle	\$3.00	\$107.00	\$104.00
Enzi Vehicle	3.00	64.00	61.00

2. At the time of the alleged violations, respondent [appellant] was on probation to the Director of Motor Vehicles pursuant to the decision in Case No. D-1431. The probationary period began March 6, 1974, and expired March 5, 1975, by terms of the decision.

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

1. Respondent [Appellant] corporation leases vehicles under the name The 49er Lease. There is no practical distinction between the dealership and the leasing entity although separate accounts are maintained.

2. The two vehicles specified were originally leased vehicles. One lease was to Hilmanofski of a Chevrolet pickup in September, 1973 at about \$155.00 monthly. The second lease was to Truelson/Cornwell beginning in May 1972 of a Chevrolet Station Wagon at about \$125.00 monthly.

3. The lessee of the Hilmanofski (later to be Johnson) vehicle on December 24, 1973 was billed \$95.00 for 1974 registration fees. On January 7, 1974 a check was sent by Hilmanofski for "Licensee Fee 1974" and a receipt was issued by The 49er Lease for \$95.00 for the 1974 license (fee).

4. The Truelson/Cornwell (later to be Enzi) vehicle incurred 1974 fees of \$52.00 and such amount was billed December 24, 1973 to the account. Evidence does not establish who paid the 1974 fee of \$52.00 to The 49er Lease.

5. Exhibit C establishes the Hilmanofski registration was transmitted to the department January 25, 1974. Exhibit D establishes January 29, 1974 as the date of transmittal of the Truelson/Cornwell registration.

6. Both lessees thereafter were unable to keep up their monthly rental payments. In fact, both accounts were delinquent when charged on December 24, 1973 for the 1974 fees. The vehicles were returned to The 49er Lease.

7. The Hilmanofski vehicle was sold in due course on March 25, 1974, to Herbert and Juanita Johnson. The Johnson couple was charged \$98.00 license fees and \$9.00 for filing and recording. Only \$3.00 was due the department.

8. The Truelson/Cornwell vehicle was sold April 28, 1974 to James Edward Enzi. He was charged \$55.00 license fees and \$9.00 for certificate of title. Only \$3.00 was due the department.

9. Following the re-sales, the Hilmanofski account was credited for \$95.00 and the Truelson/Cornwell account for \$52.00.

10. Both the Hilmanofski and Truelson/Cornwell lease agreements provided by Paragraph 8, in substantial part, "In addition to monthly rent, the Lessee agrees to pay as additional rental all cost, expenses, fees and charges incurred in connection with the titling, licensing and registration of the cars and title thereto ..."

11. Section 11713(g), Vehicle Code, prohibits a dealer "To include as an added cost to the selling price of a vehicle, an amount for licensing or transfer of title of the vehicle, an amount for licensing or transfer of title of the vehicle, which amount is not due to the state unless, prior to the sale, such amount has been paid by a dealer to the state in order to avoid penalties that would have accrued because of late payment of such fees."

The hearing officer made the following observations, which were also adopted by the director:

1. Respondent [Appellant] argues that the lease agreements between The 49er Lease and Hilmanofski and Truelson/Cornwell provided that all payments should be considered rental payments. Respondent [Appellant] argues it faced a potential loss on both leases and the payment of 1974 fees was in accordance with the provisions of Section 11713(g) of the code. After the vehicles were sold to Johnson and Enzi, the Hilmanofski and Truelson/Cornwell delinquent accounts were credited with \$95.00 and \$52.00 respectively.

2. The complainant argued that respondent [appellant] has misinterpreted, deliberately or otherwise, the intent and meaning of Section 11713(g).

3. Prior to 1972, the section provided that such a fee could be charged a purchaser if "such amount has in fact been paid by the dealer prior to such sale."

4. In 1972, the Legislature amended the subsection to provide that such fee could not be charged unless "prior to the sale, such amount has been paid by a dealer to the state in order to avoid penalties that would have accrued because of the late payment of such fees".

5. Analysis indicates the Legislature was concerned with the reason or necessity involved when a dealer paid such fees. The amendment said the reason or necessity would have to be "in order to avoid penalties ... because of late payment ..."

6. The complainant argues that the 1972 amendment was intended to cover the instance when a dealer would come into sudden possession of a vehicle only a day or two before the delinquency date, the vehicle having been operated on public highways and being subject to fees.

7. Comparison of the existing Section 11713(g) and 11713(g) as it existed before the 1972 amendment leads to the conclusion that respondent's [appellant's] contention would only be valid at the earlier time. Under existing law and the facts of the case, it must be concluded there were no payments of fees as contemplated by

the statute. Therefore, it must be concluded that the later charges to Johnson and Enzi were violations of Section 11713(g). The later crediting of the Hilmanofski and Truelson/Cornwell accounts were only bookkeeping entries and were without significance.

8. If the respondent's [appellant's] contention is correct, there would have been no need for the 1972 amendment. Section 11713(g) was amended, however, and the purpose was to limit the exception.

The hearing officer made the following determination of issues, which were adopted by the director:

1. Evidence establishes violations of Section 11713(g) Vehicle Code and thereby constitutes grounds for discipline pursuant to Section 11705.

2. The probationary term expired March 5, 1975, in Case No. D-1413 and there is no longer existing jurisdiction to vacate the stayed suspension or otherwise modify the order therein.

The director, adopting the hearing officers proposed decision, imposed a penalty of 15 days suspension stayed for a period of 18 months under the usual terms and conditions.

Appellant predicates its appeal on the grounds that:

1. The department has proceeded without and in excess of its jurisdiction.

2. The decision is not supported by the findings.

3. The department has proceeded in a manner contrary to the law.

4. The findings are not supported by the weight of the evidence in the light of the whole record reviewed in its entirety including any and all relevant evidence adduced at any hearing of the board.

We have permitted the appellant to augment the record with evidence not included in the administrative record of the hearing officer, and note that our observation and conclusions in *Thiel Motors vs. Department of Motor Vehicles, A-33-72*, are dispositive of the evidentiary issue. That decision references Vehicle Code Section 3054 subsection (d) requiring us to use the independent judgment rule when reviewing evidence. Pursuant to this rule we are called upon to resolve conflicts in the evidence, draw such inferences as we believe to be reasonable and make our own determination regarding the credibility of witnesses testimony in the transcript of the administrative proceedings.

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.

The dispositive issue in this appeal is the interpretation of Vehicle Code Section 11713(g). Even assuming, *arguendo*, that 49er Chevrolet paid the licensing and transfer fees to the state because 49er Lease is the same business entity as 49er Chevrolet

49er Chevrolet has not met the second requirement of Vehicle Code Section 11713(g) in that the fees, as amply demonstrated by the findings, were not paid "to avoid penalties".

We find the penalty to be entirely appropriate and commensurate with the findings. The decision of the Director of Motor Vehicles is affirmed in its entirety.

This Final Order shall become effective January 14, 1977.

THOMAS KALLAY

JOHN B. VANDENBERG

JOHN D. BARNES

MELECIO H. JACABAN

AUDREY B. JONES

JOHN B. OAKLEY

A-70-76