

1401 - 21st Street, Suite 407
P. O. Box 31
Sacramento, CA 95801
(916) 445-1888

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Appeal of)
)
LYONS BUICK-OPEL, GMC, INC.,)
)
Appellant,) Appeal No. A-73-76
)
v.) FILED: July 14, 1977
)
DEPARTMENT OF MOTOR VEHICLES,)
STATE OF CALIFORNIA)
)
Respondent.)
_____)

Time and Place of Hearing: June 24, 1977, 9:00 a.m.
Room 4061, 722 Capitol Mall
Sacramento, CA 95814

For Appellant: James G. Lewis, Esq.
606 So. Olive Street
Suite 1414
Los Angeles, CA 90014

For Respondent: Alan Mateer, Esq.
Chief Counsel, DMV
2415 First Avenue
Sacramento, CA 95818

FINAL ORDER

I. Procedural Background

Appellant, Lyons Buick-Opel, GMC, Inc., ("Lyons") is a corporation licensed to do business as a new motor vehicle dealer in California. The hearing officer found that the

Department of Motor Vehicles ("Department") established grounds, pursuant to Vehicle Code §11705, to suspend or revoke appellants dealers license and special plates. The Department adopted the decision of the hearing officer and the recommendation that Lyons license and special plates be revoked, with the effectiveness of that revocation stayed for a probationary period of one year on the condition that Lyons suffer an actual suspension of 20 days, and obey all laws of the State of California governing the exercise of its privileges as a licensee. Lyons has appealed from this decision of the Department.

II. Facts

The following catalogues the findings upon which the Department imposed discipline: 7 instances of overcharging transfer fees; 4 instances selling used vehicles as new; 5 instances of selling used vehicles as demonstrators; 1 instance of failure to return a downpayment without demand when the buyer was unable to secure a loan on the conditions stated in the conditional sales contract; deceit (informing a consumer that it was illegal to rescind a contract); 2 instances of employing unlicensed salesmen; 5 instances of selling advertised vehicles at higher than the advertised price without disclosing to the purchaser the advertised price; 3 instances of advertising a vehicle over 48 hours after the sale

of that vehicle; 1 instance of advertising a vehicle with no intent to sell that vehicle at the advertised price; 4 instances of false statements to the Department of Motor Vehicles; failure to report transfer of title within 20 days on 2 instances; 2 instances of failure to affix the operating copy of the report of sale to a vehicle; 1 instance of failure to report transfer of a vehicle within 40 days; 6 instances of unauthorized use of dealer plates; and advertising during the period July 25, 1975 to August 24, 1975, without including a license or vehicle identification number. Appellant bases his appeal on the contention that the penalty as provided in the decision of the Department is not commensurate with the findings.

Appellant contends that the violations occurred because of employee inexperience following the opening of the dealership. This inexperience, however, may be considered "...as mitigation and not a matter of defense..."^{1/} (emphasis added).

Appellant has taken corrective action by affixing a sticker to each unwind to alert the potential purchaser and the salesman to the fact that the vehicle has been previously sold. This new sticker would seem to be of little effect where appellant's president indicates that the explanation provided

^{1/}Family Fun-Mobiliven v. DMV, A-41-73 at 6.

to the purchaser is that "...it may be considered a new car from the Buick Motor Division, it's a used car in the eyes of the Department of Motor Vehicles..." (emphasis added). It is, of course, not the Department of Motor Vehicles that defines a new or used car but the legislature in Vehicle Code §665.

In the matter of the advertising violations appellant asserts that he had a policy of ordering a like model for a customer at the advertised price if the specifically advertised car was previously sold. The stipulation of counsel at the hearing, however, indicates only that appellant has advertised on occasion that advertised cars will be ordered if they are not available. This does not indicate a standard policy at the dealership. Appellants argument that one of the vehicles charged as being sold at over the advertised price was actually sold at the advertised price because of an "over-allowance" on a trade-in fails because even with the "over-allowance" the vehicle sold at a price higher than the advertised price.

Appellant contends that three of the seven overcharges were refunded prior to the hearing in this matter. One purchaser who appeared at the hearing did not even know that he was entitled to a refund of the \$45 he was overcharged in transfer fees. There is apparently no system in effect at

Lyons to refund overcharges since the president of the corporation has never so instructed the employees, but merely takes for granted that it is done.

The remainder of the violations appellant refers to as "technical violations" and offers in mitigation the high volume of business then being conducted by the dealership.

III. Law and Discussion

Whether a purchaser "considers" a vehicle to be new; has no problems with the vehicle; gets a new vehicle warranty; or is allowed a factory rebate has no relevance to the issue of whether a vehicle is new or used. Vehicle Code §665 specifically defines "...a vehicle that has been sold and operated on the highways of this state, or has been registered with the Department..." as a "used vehicle". The fact that appellant is more inclined to take an unwind vehicle and make it a demonstrator, combined with the admitted ease with which a salesman could mistake a vehicle known to be in demonstrator service as never having been sold, indicates that the appellant should have taken early and effective steps to prevent misrepresentations as to the identity of vehicles as new, used or demonstrators. The numerous "technical violation" to which the appellant refers are more than mere "paperwork" requirements of the Department of Motor Vehicles. The Board has taken the

view that meeting such responsibilities is indispensable to the "...orderly management of documents related to the ownership of motor vehicles and that such management is a matter of importance to the public welfare."^{2/} Without timely and accurate compliance with the reporting requirements of the Vehicle Code the opportunity for injury to the public is rife since these violations prevent the consumer and the Department from obtaining sufficient information to recognize the possibility of unfair dealing or misrepresentation.

The appellant correctly points out that the goal of an administrative proceedings is not primarily to punish the wrongdoer but rather to protect the public. In relying upon Coberly Ford v. DMV, A-25-72 as mitigating the penalty appellant erroneously stresses the numbers of violations without regard to the type of violations involved. In Coberly Ford, unlike this appeal, there were no allegations that the reporting violations led to misrepresentation, false advertising or fraud. In this appeal the violation of the "technical" requirements of the Vehicle Code by failing to affix operating copies of the report of sale to the vehicle; false reports of the first date of operation of the vehicles; unlawful use of dealer plates; and failure to timely report the transfer of vehicles made possible the continued misrepresentation to

^{2/} Coberly Ford v. DMV, Appeal No. A-25-72 at 5.

purchasers. Despite the alleged "corrective action" appellant continues to obfuscate the true nature of an unwind/demonstrator by explaining it is only "used" to the Department.

Considering the variety of offenses, and particularly the incidence of deceit and misrepresentation practiced upon the public, the penalty awarded is inadequate. Accordingly the penalty is modified, pursuant to Vehicle Code §3055 to the extent that the probationary period shall be for a period of two years, and the actual suspension of dealer license and special plates shall be for 25 days.

The decision of the Director is affirmed as modified.

This final order shall become effective August 12, 1977.

THOMAS KALLAY

JOHN D. BARNES

JOHN B. VANDENBERG

AUDREY B. JONES

JOHN B. OAKLEY

ELVIRA ARMAN-REED

A-73-76