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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Appeal of FILLMORE MOTORS, INC., Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-77-77

Time and Place of Hearing: February 9, 1978, 10:00 a.m.
722 Capitol Mall, Room 4061
Sacramento, California 95814

For the Appellant: Lyman R. Smith, Esq.
Romney, Smith & Drescher
137 N. 10th Street
Santa Paula, California 93060

For the Respondent: Alan Mateer, Esq., Chief Counsel
Department of Motor Vehicles
2415 First Avenue
Sacramento, California 95818

FINAL ORDER

I. Procedural Background

Appellant Fillmore Motors ("Fillmore") 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 section 11705, to suspend or revoke appellant's dealer license and special plates. The Department adopted the decision of the hearing officer and the recommendation that Fillmore's license be suspended for a total of 161 days with that suspension stayed for a probationary period of two years with 15 days actual suspension imposed. Fillmore has appealed from this decision of the Department.

II. Facts

The findings upon which the Department imposed discipline upon Fillmore are as follows:

1. Five instances of violation of Civil Code section 2982, et seq., in failing to comply with the requirements of a conditional sales contract and refusing to refund a down-payment;

2. During the period August 8 to August 19, 1975, publishing misleading ads, relating to six vehicles;

3. Four occasions misrepresenting vehicles as later model years than they were in fact (a 1971 as a 1972 and three 1973's as 1974's);

4. On two occasions selling advertised vehicles at higher than the advertised price without disclosing to the purchaser the advertised price;

5. On one occasion refusing to sell a vehicle at the advertised price;

6. Selling a used vehicle as new on one occasion;

7. On two occasions advertising cars not available at the dealership;

8. On two occasions advertising vehicles without including a license or vehicle identification number;

9. On two occasions representing in advertisements that vehicles had only one prior owner when in fact those vehicles had more than one prior owner;

10. One occasion of submitting a false certificate of non-operation to the Department;

11. One instance of reporting a false date of first operation to the Department;

12. Two occasions of submitting checks to the Department for which there were insufficient funds;

13. Two occasions of failing to report transfer of title within 20 days to the Department;

14. One occasion of failing to give written notice of transfer to the Department within 5 days;

15. One instance of operating a temporary branch at Dodger Stadium without a license; and

16. One occasion employing an unlicensed salesman.

The violations listed in subparagraphs 1 and 15 relate solely to recreational vehicles. Two of the four model year misrepresentations in paragraph 3 relate to recreational vehicle transactions.

Appellant bases his appeal on the statutory grounds that: the decision is not supported by the findings; the findings are not supported by the weight of the evidence; and the penalty as provided by the decision of the Department is not commensurate with the findings. Appellant does admit, however, having made

numerous errors and committing some wrongdoing. Appellant contends that the basis for the problem was its inexperience and "spread too thin" management. Appellant therefore suggests that a meaningful suspension be imposed but stayed and that it be supervised by the Department during the period of the stay so that deficiencies at the dealership may be corrected. In the alternative, appellant suggests a monetary penalty with a similar probationary period. It is clear from appellant's argument that the thrust of its appeal is that the determination of penalty is not commensurate with the findings as made.

The decision promulgated by the Department provides a total of 125 days suspension for violations not involving recreational vehicles, and a total of 36 days suspension for violations involving recreational vehicle transactions. It is unclear what portion of the resulting two year probation period and the 15 day suspension is attributable to violations of the Vehicle Code relating to recreational vehicles.

III. Law and Discussion

Vehicle Code section 3051 provides in its relevant part: ". . . the provisions of this chapter shall not apply to transactions involving . . . recreational vehicles as defined in section 18010.5 of the Health and Safety Code. . . ."

As noted the violations in subparagraphs 1, 3, and 15 above are violations relating to recreational vehicle transactions.

The specific exclusion of transactions involving recreational vehicles from the jurisdiction of the Board precludes the Board from considering the decision of the Department as it relates to recreational vehicles. The Board is, however, charged with considering all other matters raised by this appeal. To the extent that the record does not contain a finding allocating the penalty between the recreational vehicle violations and the other violations properly before the Board, the decision regarding the penalty is not supported by the findings (Veh. Code § 3054, subparagraph (c)). The effect of the absence of such a finding is to preclude a meaningful review of the penalty assessed for violations of the Vehicle Code which fall within the jurisdiction of the Board. Accordingly, the decision is reversed and the matter is remanded to the Department with the direction that the Department make and enter a finding which reflects the penalty which is based on violations of the Vehicle Code over which the Board has jurisdiction. The Department is further directed to enter a decision assessing a penalty, if appropriate, which is based on violations of the Vehicle Code over which the Board has jurisdiction.

Nothing in this decision shall be construed to have deprived the Department of its statutory right and obligation to assess an appropriate penalty for violations of the Vehicle Code to the extent such violations relate to recreational vehicles. As noted, the Board has no jurisdiction to review the decision of the Department concerning such violations.

This final order shall become effective April 18, 1978.

MELECIO H. JACABAN

ELVIRA ARMAN-REED

JOHN B. OAKLEY

JOSEPH TREJO

RUDY A. PEREZ

KATHLEEN O. TURNER

FLORENCE POST

JOHN B. VANDENBERG

A-77-77

OF THE STATE OF CALIFORNIA

DEPT. OF MOTOR VEHICLES
MAY 18 1977
BY M. DIXON

In the Matter of the Accusation of FILLMORE MOTORS, INC., A Corporation, Respondent.	CASE NO. D-1729 L-12239

PROPOSED DECISION

This matter came on regularly for hearing and was heard before Jerome Schwimmer, Administrative Law Judge of the Office of Administrative Hearings, at Santa Paula, California, on December 6, 7, 8, 9 and 10, 1976 and February 14, 1977. Complainant was represented by Alan Mateer, Counsel. The respondent was represented by Lyman R. Smith, Attorney at Law. Oral and documentary evidence was introduced at the hearing. Written argument was thereafter submitted by the parties and marked respectively for identification as exhibit 30 for complainant and exhibit E for respondent. The matter now stands submitted for decision, and it is found as follows:

I

Complainant J. G. Holmes made the First Amended Accusation herein upon his information and belief and in his official capacity as Chief, Division of Compliance, Department of Motor Vehicles.

II

At all times mentioned herein, respondent Fillmore Motors, Inc., a corporation, was doing business in the State of California operating the business under a dealer's license and special plates (D&TR-9705) issued by the Department. Said license and special plates are in full force and effect.

III

Schedules A and B attached to the First Amended Accusation herein are incorporated by this reference and made a part hereof.

Respondent upon transferring the vehicle listed as item 10 in said Schedule A failed to give written notice to the Department before the end of the fifth calendar day after such transfer. It is further found that such failure was intentional.

V

Respondent failed to mail or deliver the reports of sale of the vehicles, together with other documents and fees required to transfer the registration of the vehicles described as items 7 and 10 in said Schedule A within the twenty (20) day period allowed by law. Said failure, in the case of each said vehicle, is found to have been intentional.

VI

Respondent knowingly filed with the Department a false certificate of non-operation for the vehicle listed as item 8 in said Schedule A and did thereby make a false statement and conceal a material fact in the application for registration of such vehicle, in that said vehicle had previously been sold by respondent and driven by the purchaser from respondent's premises and upon the highways, all of which was known to respondent.

VII

Pursuant to stipulation, it is found that on or about November 9, 1974, respondent acted as a vehicle dealer by negotiating the sale of the vehicle described as item 11 in said Schedule A at the recreational vehicle show at Dodger Stadium, Chavez Ravine, Los Angeles, California, without first having obtained a license or temporary permit for said location.

VIII

Pursuant to motion of complainant, paragraph VIII of the First Amended Accusation is dismissed, and no findings are made with respect to the allegations thereof.

IX

Paragraph IX of the First Amended Accusation was heretofore

dismissed on motion of complainant, and no findings are made with respect to the allegations thereof.

X

Respondent knowingly reported to the Department a false date for the first date of operation for the vehicle listed as item 10a in said Schedule A and did thereby make a false statement and conceal a material fact in the application for registration of said vehicle, with full knowledge of the falsity thereof, and with the intent to conceal the same.

XI

Pursuant to motion of complainant, paragraph XI of the First Amended Accusation is dismissed, and no findings are made with respect to the allegations thereof.

XII

On or about July 13, 1973, respondent employed and delegated the duties of a vehicle salesman to Richard Washburn who was not then licensed as a vehicle salesman pursuant to Vehicle Code Section 11800, et seq.

XIII

Respondent submitted to the Department for fees due the state check No. 8269 in the amount of $3.00 dated February 9, 1973 and check No. 3833 in the amount of $267 dated March 28, 1974. Thereafter the Department in the course of business presented the checks to the banks upon which drawn and the banks refused payment thereon. The said amounts have since been paid to the Department by respondent.

XIV

Pursuant to motion of complainant, paragraph XIV of the First Amended Accusation is dismissed and no findings are made with respect to the allegations thereof.

XV

Pursuant to motion of complainant, paragraph XV of the First Amended Accusation is dismissed and no findings are made with respect to the allegations thereof.

XVI

Pursuant to motion of complainant, paragraph XVI of the First Amended Accusation is dismissed and no findings are made with respect to the allegations thereof.

XVII

On or about April 29, 1974, in connection with the sale of the vehicle listed as item 5 in said Schedule A, respondent caused the purchaser thereof to sign a purchase order, within the meaning of Civil Code Section 2981(k), and respondent received a down payment of one thousand dollars in connection therewith. A copy of said purchaser order was not given to the purchaser, contrary to Civil Code Section 2982(a).

XVIII

On April 29, 1974, in the said purchase order referred to in finding XVII above, respondent represented the vehicle listed as item 5 in said Schedule A for sale at a total price of $12,900.00, exclusive of sales tax, vehicle registration fees and finance charges. Respondent thereafter refused, on demand, to sell the vehicle at the said price, refused to return the said down payment and persuaded the purchaser to purchase the vehicle at a higher price.

XIX

For the limited purpose of showing prior notice, it is found that respondent was apprised, by letter from the Department dated February 11, 1969, that past newspaper automobile advertisements of respondent were considered misleading or inaccurate and in violation of law.

XX

On motion of complainant, paragraph XX of the First Amended Accusation is dismissed and no findings are made with respect to the allegations thereof.

XXI

In connection with the sale of the vehicle described as item 4 in said Schedule A, respondent falsely and fraudulently

model, whereas in truth and in fact said vehicle was a 1971 model, and respondent thereby caused the purchaser to suffer loss or damage. The said purchaser would not have purchased the vehicle if he had known that it was, in fact, a 1971 model.

XXII

On February 1, 1973, in the Ventura County Star Free Press, respondent advertised the vehicle listed as item 2 in said Schedule A for sale at a total price of $1,975 exclusive of sales tax, vehicle registration fees and finance charges and it is further found that respondent intended the vehicle to be so advertised, and that the said advertisement was untrue and misleading in that respondent did not intend to sell the said vehicle at the said advertised price. On February 7, 1973 and while the said advertised price was still effective, respondent sold the advertised vehicle for a total price of $3,000 exclusive of sales tax, vehicle registration fees and finance charges, without disclosing the advertised price to the purchaser, thereby causing the purchaser to suffer loss and damage.

XXIII

On April 5, 1973 and April 7, 1973, in the Ventura County Star Free Press, respondent advertised the vehicle described as item 3 in said Schedule A for sale at a total price of $1,999.00 exclusive of sales tax, vehicle registration fees and finance charges and it is further found that respondent intended the said vehicle to be so advertised, and that the said advertisement was untrue and misleading in that respondent did not intend to sell the vehicle at the advertised price. On April 7, 1973, and while the advertised price was still effective, respondent sold the advertised vehicle for a total price of $2,150.00 exclusive of sales tax, vehicle registration fees and finance charges without disclosing the advertised price to the purchaser, thereby causing the purchaser to suffer loss and damage.

It is found that the allegati ; of paragraph XXIV of the First Amended Accusation, as amended on December 10, 1976, were not established by the evidence. Complainant's motion, set forth in its written argument, exhibit 30 for identification herein, to further amend said paragraph XXIV to conform to proof is denied.

XXV

On January 10, 1975 in the Ventura County Star Free Press respondent advertised various new 1974 Ford Mustangs for sale at dealer's invoice price exclusive of sales tax, vehicle registration fees and finance charges. On January 16, 1975, respondent refused to sell one of the advertised vehicles at the advertised total price when request so to do by one Jeff Cole. The said Jeff Cole was then an employee and agent of the Ventura County District Attorney's Office assigned to investigate alleged consumer fraud, was then acting in that capacity and had no present intent to purchase the said vehicle.

XXVI

On or about August 14, 1975 through August 19, 1975, respondent caused an advertisement for six specifically described vehicles to be published in the Press-Courier, which advertisement stated a price certain and the additional words "or take over payments". The said advertisement, published as aforesaid, was false and misleading and was known or should have been known to respondent to be false and misleading in that the use of said phrase implied, and a purchaser could reasonably infer therefrom, that said vehicles had been repossessed and that the purchaser could take over the payments contracted for by a prior owner, which, in fact, was not true.

XXVII

Pursuant to stipulation, it is found true that from April 12, 1973 through April 16, 1973, in the Ventura County Star Free Press, respondent advertised the vehicle described as item 3 in said Schedule A for sale, which vehicle was not actually for sale

respondent on April 8, 1973.

XXVIII

On February 20, 1975, in the Ventura County Star Free Press, respondent advertised the vehicle described as item 13 in said Schedule A for sale at the premises of respondent, when said vehicle was not, in fact, available for sale at the premises of respondent in Fillmore, but was then, in fact, located at a dealership in Ventura.

XXIX

On August 31, 1973, in the Ventura County Star Free Press, respondent advertised specific vehicles for sale without identifying the vehicles by either their vehicle identification number or license number. (Complainant's motion to amend paragraph XXIX of the First Amended Complaint in this connection to charge a violation of Title 13, California Administrative Code, Section 432.01 is granted.) Said advertisement was false and misleading in that it implied that said advertised vehicles were new vehicles, whereas in truth and in fact said vehicles were used vehicles within the meaning of Vehicle Code Section 665, and it is found that said advertisement was designed by respondent with the intent to mislead the public.

XXX

On August 24, 1973, in the Ventura County Star Free Press, respondent advertised specific vehicles for sale without identifying the vehicles by either their vehicle identification number or license number. (Complainant's motion to amend paragraph XXX of the First Amended Accusation is granted.) Said advertisement was false and misleading in that it implied that said vehicles were new vehicles, whereas in truth and in fact said vehicles were used vehicles within the meaning of Vehicle Code Section 665, and it is found that respondent intended to mislead the public by said advertisement.

On November 23, 1973, in the Ventura County Star Free Press, respondent advertised two motor homes, a Commander, vehicle identification number 2539 and a Pace Arrow, vehicle identification number 3166, for sale as brand new motor homes and said advertisement implied that said vehicles were brand new 1974 models. Said advertisement was false and misleading and was intended by respondent to mislead the public, in that said vehicles were in fact new 1973 models.

XXXII

On October 4, 1974 in the Oxnard Press-Courier and in the Ventura County Star Free Press, respondent advertised and thereby represented that the vehicle listed as item 9 in said Schedule A was a new vehicle, whereas in truth and in fact said vehicle was a used vehicle within the meaning of Vehicle Code Section 665. In this connection, it is found that respondent intended to mislead the public by said advertisements.

XXXIII

On December 22, 1974, December 26 through 29, 1974, January 9 through 12, 1975 and January 17 through 19, 1975, respondent caused an advertisement for a 1970 Pontiac, California license number 613CCQ to be published in the Ventura County Star Free Press which stated that the said vehicle had been previously owned by only one person, and said advertisements were false and misleading and so intended by respondent in that said vehicle had, in fact, been owned by more than one previous owner.

XXXIV

On January 22, 1975 and continuing through January 26, 1975, respondent caused an advertisement for a 1974 Pinto, California license number 181KPT to be published in the Ventura Star Free Press which stated that said vehicle had been previously owned by only one person, and that said advertisement was false and misleading and so intended by respondent, in that said vehicle

XXXV

On motion of complainant, paragraph XXXV of the Accusation is dismissed and no findings are made with respect to the allegations thereof.

XXXVI

In connection with the sale of the vehicle listed as item 1 in said Schedule B, respondent represented the said vehicle to be a 1974 model, whereas in truth and in fact said vehicle was a 1973 model and this fact was known or should have been known to respondent. Based upon the said representation of respondent, the purchaser of said vehicle believed that he was purchasing a 1974 model vehicle and thereby suffered loss and damage.

XXXVII

In connection with the sale of the vehicle listed as item two in said Schedule B, respondent caused to be executed a conditional sales contract which did not contain all of the agreements of the buyer and the seller, in that the conditional sales contract did not set forth the agreed upon condition that the sale of said vehicle was subject to the purchaser, Kay Hattori, obtaining a loan from a third party at an interest rate acceptable to her.

XXXVIII

Further in connection with the sale of said vehicle listed as item 2 in Said Schedule B, respondent refused to refund the said purchaser's down payment when the pending conditional sales contract was not executed.

XXXIX

Further in connection with the sale of the said vehicle listed as item 2 in said Schedule B, respondent caused the said purchaser to suffer loss and damage by reason of respondent's acts and omissions as hereinabove set forth in findings XXXVII and XXXVIII.

Respondent has suffered no pr. disciplinary action.

* * * * *

The following determination of issues is made pursuant to the foregoing findings of fact:

I

Based on the findings in paragraph IV above, respondent violated Vehicle Code Section 5901 and respondent's license is subject to disciplinary action pursuant to the provisions of Vehicle Code Section 11705(a)(8).

II

Based on the findings in paragraph V above, respondent violated Vehicle Code Section 4456 and its license is subject to disciplinary action pursuant to Vehicle Code Section 11705(a)(8) with respect to each of the described vehicles.

III

Based on the findings in paragraph VI above, respondent violated Vehicle Code Section 20 and respondent's license is subject to disciplinary action pursuant to Vehicle Code Section 11705(a)(3).

IV

Based on the findings in paragraph VII above, it is determined that respondent did not come within the exception of Vehicle Code Section 11709(b), and that his license is subject to disciplinary action for failing to secure a branch license under the provisions of Vehicle Code Section 11700 et seq.

V

Based on the findings in paragraph X above, respondent violated Vehicle Code Section 20 and respondent's license is thereby subject to disciplinary action pursuant to Vehicle Code Section 11705(a)(3).

VI

Based on the findings in paragraph XII above, respondent violated Vehicle Code Section 11713(h) and respondent's license

Code Sec[illegible]n 11705(a)(10).

VII

Based on the findings in paragraph XIII above, respondent's license is subject to disciplinary action pursuant to Vehicle Code Section 11705(a)(13).

VIII

Based on the findings in paragraphs XVII and XVIII above, respondent violated Civil Code Section 2982(a) thereby subjecting its license to disciplinary action under Vehicle Code Section 11705(a)(12), and respondent further violated Vehicle Code Sections 11713(a) and 11713.1(c) thereby subjecting its license to disciplinary action under Vehicle Code Section 11705(a)(10).

IX

Based on the findings in paragraph XXI above, respondent's license is subject to disciplinary action pursuant to Vehicle Code Section 11705(a)(14).

X

Based on the findings in paragraph XXII above, respondent violated Vehicle Code Section 11713(a) and the respondent's license is thereby subject to disciplinary action pursuant to Vehicle Code Sections 11705(a)(10) and 11705(a)(14).

XI

Based on the findings in paragraph XXIII above, respondent violated Vehicle Code Section 11713(a) and respondent's license is thereby subject to disciplinary action pursuant to Vehicle Code Sections 11705(a)(10) and 11705(a)(14).

XII

Based on the findings in paragraph XXIV above, cause was not established for disciplinary action against respondent's license.

XIII

Based on the findings in paragraph XXV above, respondent violated Vehicle Code Section 11713(a) and respondent's license is

thereby subject to disciplinary action pursuant to Vehicle Code Section 11705(a)(10).

XIV

Based on the findings in paragraph XXVI above, respondent violated Vehicle Code Section 11713(a) and respondent's license is thereby subject to disciplinary action pursuant to Vehicle Code Section 11705(a)(10).

XV

Based on the findings in paragraph XXVII above, respondent violated Vehicle Code Section 11713(c) and respondent's license is subject to disciplinary action pursuant to Vehicle Code Section 11705(a)(10).

XVI

Based on the findings in paragraph XXVIII above, respondent violated Vehicle Code Section 11713(b) and the respondent's license is thereby subject to disciplinary action pursuant to Vehicle Code Section 11705(a)(10).

XVII

Based on the findings in paragraph XXIX above, respondent violated Title 13, California Administrative Code, Section 432.01, now codified as Vehicle Code Section 11713.1(a) and respondent's license is thereby subject to disciplinary action pursuant to Vehicle Code Section 11705(a)(10), and respondent's license is further subject to disciplinary action pursuant to Vehicle Code Sections 11713(a) and 11705(a)(10).

XVIII

Based on the findings in paragraph XXX above, respondent violated Title 13, California Administrative Code, Section 432.01, now codified as Vehicle Code Section 11713.1(a) and respondent's license is thereby subject to disciplinary action pursuant to Vehicle Code Section 11705(a)(10).

XIX

Based on the findings in paragraph XXXI above, respondent

Code Section 432.00, then in effect and now superseded by Title 13, California Administrative Code Section 405.01 and respondent's license is thereby subject to disciplinary action.

XX

Based on the findings in paragraph XXXII above, respondent violated Vehicle Code Sections 11713(a) and 11713(d) and respondent's license is thereby subject to disciplinary action pursuant to Vehicle Code Section 11705(a)(10).

XXI

Based on the findings in paragraph XXXIII above, respondent violated Vehicle Code Section 11713(a) and its license is subject to disciplinary action thereby pursuant to Vehicle Code Section 11705(a)(10).

XXII

Based on the findings in paragraph XXXIV above, respondent violated Section 11713(a) and respondent's license is thereby subject to disciplinary action pursuant to Vehicle Code Section 11705(a)(10).

XXIII

Based on the findings in paragraph XXXVI above, respondent's license is subject to disciplinary action pursuant to Vehicle Code Section 11705(a)(14).

XXIV

Based on the findings in paragraphs XXXVII, XXXVIII and XXXIX above, respondent violated Civil Code Sections 2982(a) and 2982.7 and respondent's license is thereby subject to disciplinary action pursuant to the provisions of Vehicle Code Section 11705(a)(12).

* * * * *

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The dealer's license and special plates (D&TR9705) heretofore issued to respondent Fillmore Motors, Inc., a corporation,

for discipline as set forth in paragraphs VIII, IX, X, XI, XIII, XXIII and XXIV of the determination of issues herein, and said license and special plates are in addition hereby suspended for five (5) days as to each of the causes for discipline as set forth in paragraphs I, II, III, V, XIV, XV, XVII, XVIII, XIX and XX of the determination of issues herein and said license and special plates are in addition hereby suspended for one (1) day as to each of the causes for discipline as set forth in paragraphs IV, VI, VII, XVI, XXI and XXII of the determination of issues herein, all said penalties to run consecutively; provided further, however, that the foregoing order is stayed as to all of its provisions, and respondent is placed on probation for a period of two (2) years upon the following terms and conditions, to-wit:

1. Said license and special plates are suspended for a period of fifteen (15) days, and respondent shall wholly refrain from doing business under its said dealer's license or special plates for said period of fifteen (15) days from and after the effective date of the decision herein.

2. Respondent shall obey all the laws of the United States, the State of California, or its subdivisions, and the rules and regulations of the Department of Motor Vehicles now or hereafter in effect.

3. Any license issued to respondent during a period of two (2) years shall be issued as a probationary license and then only if it is determined that respondent has fully complied with the terms and conditions hereof and that no cause for refusal to issue, suspend or revoke has intervened or exists.

Should the Director of Motor Vehicles at any time during the existence of said probationary license or the renewal thereof determine upon satisfactory evidence that respondent has violated

issued, he may in his discretion and after notice and hearing, vacate the stay order and reimpose the stayed portion of the penalty; and if no such determination is made, the stay shall become permanent.

I hereby submit the foregoing which constitutes my Proposed Decision in the above-entitled matter and recommend its adoption as the decision of the Department of Motor Vehicles.

JEROME SCHWIMMER
Administrative Law Judge
Office of Administrative Hearings

DATED: April 25, 1977
JS:mh