

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of)
)
PASADENA MOTORS,)
a California Corporation,) Case No. A-8-70
)
Appellant,) Filed and Served:
)
vs.) 28 September 1970
)
DEPARTMENT OF MOTOR VEHICLES,)
)
Respondent.)
_____)

Time and Place of Hearing: August 26, 1970, 1:00 P.M.
100 North Garfield
Pasadena, California

For Appellant: Kadison, Pfaelzer, Woodard & Quinn
By: Joseph A. Murray, Jr.
Attorney at Law
611 West Sixth Street
Los Angeles, CA 90017

For Respondent: Honorable Thomas Lynch
Attorney General
By: Mark Leicester
Deputy Attorney General

FINAL ORDER

In the decision ordered March 9, 1970, by the Director of Motor Vehicles pursuant to Chapter 5, Part 1, Division 3, Title 2 of the Government Code, it was found that appellant: (1) failed in 3 instances to timely give respondent written notice of the transfer of the interest in certain vehicles as required by Section 5901 V.C.; (2) wrongfully and unlawfully failed in 55 instances to mail or deliver to respondent the report of

sale of used vehicles together with such other documents and fees required to transfer registration of the vehicles within the 20-day period allowed by law; (3) wrongfully and unlawfully failed in two instances to mail or deliver to respondent the report of sale of new vehicles together with such other documents and fees required to transfer registration of the vehicles within the 10-day period allowed by law; (4) filed in one instance with respondent a false certificate of non-operation; (5) reported in three instances a date of sale other than the true date of sale on certain motor vehicles; and (6) upon transferring those vehicles described as items 41 through 51 in Exhibit B of the Accusation, "The Department of Motor Vehicles did not ever receive the three-day written notice contemplated by Section 5901, Vehicle Code of California."

It was found by respondent that appellant introduced evidence by way of defense and mitigation of the charges set forth in the Accusation but, with one exception that appellant did not significantly defend or mitigate the charges. The exception relates to the finding that the Department did not ever receive the three-day written notice required by Section 5901 V.C. with respect to the vehicles identified as items 41 through 51 in Exhibit B of the Accusation. In the determination of issues, violation of Section 5901 V.C. was found with respect to three vehicles but no violation thereof was determined to have occurred with respect to the eleven vehicles described

as said items 41 through 51.

The following findings in aggravation were made by respondent:

"The Department's audit of appellant was commenced on October 28, 1968, and ended November 26, 1968. The review covered the period January 1, 1967, through June 30, 1968, and considered the sales of 2,962 vehicles. The review determined 129 apparent violations of law and rules, not all of which were charged against appellant. All of the 1967 violations were not charged and 24 violations discovered on dates subsequent to June 30, 1968, were added, with the most recent date of sale charged being December 15, 1968.

"Subsequent to December 15, 1968, and through November 26, 1969, a review of the records of the Department of Motor Vehicles indicated that appellant had been involved in 123 misuses involving new vehicle reports of sale and 893 misuses involving used vehicle reports of sale."

It was further found by respondent that appellant had violated the terms of probation set forth in the order of the Director of Motor Vehicles dated November 20, 1967, and that grounds exist to set aside the stay, or a portion thereof, of the suspension of appellant's license, certificate and special plates provided therein.

In the order, respondent modified its order of November 20, 1967, to provide for a suspension of the appellant's license, certificate and special plates for a period of 180 days, with 150 days of the suspension stayed for a period of three years from the effective date of the decision. During the three years, appellant is to remain on probation to respondent and is to obey all laws of the Department of Motor Vehicles

governing the exercise of the license to sell automobiles. The order also provides that if, after giving appellant notice and opportunity to be heard, the Director should determine during the three-year probationary period that a violation of probation has occurred, he may vacate the stay order and impose a suspension or otherwise modify the order. Should appellant faithfully abide by the probationary terms for the three-year period, the order provides that the stay shall become permanent and appellant shall be fully restored to all license privileges.

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

Appellant has not claimed that the findings of respondent are not supported by the weight of the evidence. However, before considering the issues raised in this appeal, we feel we must comment upon the findings, determination of issues and order as they relate to the vehicles described as items 41 through 51 in Exhibit B of the Accusation. As heretofore stated, although there is a finding of fact that the three-day notice required by Section 5901 V.C. was not received by the Department, and that appellant introduced evidence by way of "defense and mitigation" with reference thereto, there was no determination made in the determination of issues that Section 5901 V.C. was violated with respect to the transfer of those vehicles. Absent such a determination, we conclude

that the penalty ordered was not predicated upon the findings related to those transactions.

Our examination of the law applicable to the manner in which notice may be given to the Department under Section 5901 V.C. leads to the conclusion that clarification through appropriate legislation is indicated. Specifically, we find an apparent hiatus in the law with respect to whether personal service by a licensee upon an employee of the Department at one of its field offices of the notice specified by Section 5901 V.C. satisfies the section, in the light of the provisions of Section 22 V.C. (which provides for the manner of giving notice by the Department), Section 23 V.C. (which provides for the time when notice by personal delivery and notice by mail is complete), Section 5901 V.C. (which provides, in part, that the notice required by that section "shall be upon an appropriate form" provided by the Department), and of the instructions in the form presently provided by the Department, that the notice shall be mailed to the Department addressed to a specified post office box in Sacramento.

In this case respondent introduced the affidavit of a clerk employed by it in Sacramento who had, as one of his official duties, the task of checking the master files of the Division of Registration of the Department. The affidavit declared that he had searched the Department's master files, placed documents relative to this case in manila exhibit folders

and summarized the results of his search in Exhibits A and B. When he failed to find a document in the master files pertaining to a specific item in Exhibits A or B, he placed the word "not" in the appropriate column. An inspection of Exhibit B of the Accusation in this case discloses the word "not" in the column entitled "DEALER NOTICE OF REPORT OF SALE RECEIVED" pertaining to items 41 through 51. There is no assertion by this affiant that he inspected any records other than the respondent's master files in Sacramento, California. This affidavit also discloses that the "Dealer Notice of Report of Sale" forms are included in the Report of Sale books that respondent furnishes to licensed automobile dealers.

The uncontroverted evidence introduced by appellant established that the completed Report of Sale books concerning the transactions involving items 41 through 51, Exhibit B, were "...taken to the DMV office" and left there. (R.T. 57, lines 1-12; R.T. 59, line 22 to R.T. 61, line 10.) The finding that the dealer's notice of report of sale for the 11 transactions in question were not received by the Department is not supported by the weight of the evidence.

Section 5901 V.C. requires that a licensed dealer "...give written notice of the transfer to the Department upon an appropriate form provided by it..." when transferring a vehicle subject to registration. This section does not, however, preclude personal delivery nor does it preclude

delivery to a field office of the Department of Motor Vehicles. It does not provide how the required notice shall be given, although it directs what form shall be used. The general provisions of Sections 22 and 23 V.C. do not fill the void (unless Section 23 V.C. is interpreted to permit personal service on the Department at a field office.) Usually, of course, any notice requirement will be deemed satisfied by personal service, but this is not to say that personal service at a branch office or upon a subordinate employee of a large organization will be deemed to be adequate service upon the organization.

As we have stated, the reverse side of the dealer notice informs the dealer, among other things, that he is to mail the notice not later than the end of the third business day of the dealer. A post office box in Sacramento is also set forth on the reverse side of this form. We are cognizant of a brochure entitled "Dealer's Handbook" which is prepared and distributed by respondent. This publication also directs, at Page 8, that the dealer's notice is to be mailed to the Department headquarters in Sacramento not later than the third business day of the dealer following the date of sale. However, no regulation adopted by respondent pursuant to the Administrative Procedure Act (Government Code 11371 et. seq.) supports the proposition that mailing of the dealer's notice

to department headquarters is the exclusive means and place of notifying the respondent.

Section 1651 V.C. authorizes the respondent to "... adopt and enforce rules and regulations as may be necessary to carry out the provisions of this Code relating to the Department." This section also requires that such rules and regulations be adopted, amended and repealed pursuant to the Administrative Procedure Act. Neither the information on the reverse side of the form nor the information in the Dealer's Handbook meets this statutory requirement. We do have serious doubt that the Department is empowered to adopt such a regulation under the language of the existing statutes and, therefore, remedial legislation may be necessary.

Although the evidence established that written notices pertaining to items 41 through 51, in Exhibit B, were received within the three-day period at a field office of the Department, this does not require modification of the penalty because there was no reference in the determination of issues to items 41 through 51, in Exhibit B, of the Accusation. We need not, and do not, decide whether or not the failure of appellant to mail the notices to respondent at the post office box in Sacramento specified in the notice form might have constituted grounds for disciplinary action.

This brings us to a consideration of the issues raised by appellant.

I. DID RESPONDENT PROCEED IN A MANNER CONTRARY TO LAW?

Appellant argues that respondent proceeded contrary to both the letter and spirit of the law by making "Findings In Aggravation" based upon evidence which was without probative value and incompetent and by failing to give proper weight to certain mitigating factors.

We are of the firm opinion that the evidence in question is probative. It consists of the testimony of a witness called by respondent and examined as to the number of violations by appellant occurring subsequent to December 15, 1968, the date of the last violation charged in the Accusation. The witness testified that he was an employee of the Department of Motor Vehicles and received a report "...sent to me from Sacramento" approximately two days prior to the day the testimony was elicited. This report disclosed that, subsequent to the date of the last transaction charged in the Accusation, appellant failed in 123 instances to timely submit Reports of Sale on new vehicles within the 10-day period provided by law and, further, failed to timely submit Reports of Sale on used vehicles in 893 instances within the 20-day period provided by law. This evidence was offered in rebuttal to the evidence produced by appellant for the purpose of mitigating the charges filed against it.

Keith Conway, president of appellant corporation, had testified, as part of appellant's defense, as to certain

steps taken subsequent to the audit which resulted in the accusation, which were intended to provide safeguards to prevent a reoccurrence of violations of the pertinent statutes and regulations. We are unaware of better means of rebutting this testimony than by producing evidence that the measures appellant adopted for this purpose had failed to achieve the desired result as demonstrated by a later audit of appellant's records.

The evidence of violations after December 15, 1968, also was relevant with respect to fixing penalty for the appellant's alleged violation of the probationary order of November 20, 1967. The accusation charged, and the Director found that appellant was on probation to the Department of Motor Vehicles at the time the violations found in the case before us occurred, and that the violations charged in the accusation were in violation of the terms of probation. In the decision issued by the Director of Motor Vehicles on November 20, 1967, cause for disciplinary action against appellant was found to exist and a 180-day suspension of appellant's license, certificate and special plates was imposed. However, the order of suspension was stayed and appellant was placed on probation for a period of three years under the condition that appellant "shall at all times obey and comply with all of the laws of the United States and of the State of California and all other state,

county, municipal and local laws and ordinances to which he may be subject, and shall obey and comply with all of the rules and regulations of the Department of Motor Vehicles governing his exercise of the privileges to be granted under said license."

Pursuant to this probationary order, respondent was empowered to vacate the stay order and impose a suspension, or a portion thereof, based upon evidence satisfactory to respondent that appellant had violated the terms of the probation. There was no requirement that respondent observe the formalities of the Administrative Procedure Act before modifying this order. The fact that respondent elected to give appellant the benefit of an administrative hearing for a portion of the violations occurring subsequent to respondent's order of November 20, 1967, does not preclude respondent from considering evidence of other violations, occurring subsequent to that order, as a basis for modifying the probationary order.

Appellant's attack on the competency of this evidence is based upon an assertion that the evidence was of "...the most gross form of hearsay evidence" and the admission of the evidence deprived appellant of due process of law. It is a fundamental rule that hearsay admitted in an administrative proceeding which would be objectionable if offered in a judicial proceeding may be relied upon for limited purposes only and

will not support a finding. (Subdivision (c) of Section 11513 Government Code.) However, the limitation arises only if the complaining party makes appropriate and timely objection to its introduction (Savelli v. Board of Medical Examiners, 229 Cal. App. 2d 124; Kirby v. Alcoholic Beverage Control Appeals Board, 8 Cal. App. 3d 1009). An examination of the administrative record shows that appellant had abundant opportunity to require by timely objection a proper foundation for the admission of this hearsay evidence, or in the absence thereof, to restrict the effect of the admission of the evidence by making a motion to strike such evidence or to develop the nature of the hearsay as admissible or inadmissible in a judicial proceeding by appropriate cross examination. Appellant failed to pursue any of these courses.

Appellant argues on appeal that it did not object to the admission of the evidence in question because the hearing officer characterized it as hearsay and, therefore, an objection by appellant would have been redundant. The argument that appellant can use a certain statement of the hearing officer in lieu of a proper objection is without merit.

While the hearing officer did state, "Well, you are giving us hearsay information then.", (R.T. 74, line 11) he did not characterize the testimony as being hearsay inadmissible in a judicial proceeding. The evidence in question may very well have

been admissible in a judicial proceeding under an exception to the hearsay rule; e.g., as business or official records. Had objection been made, respondent would then have had the opportunity to lay proper foundation for its admissibility under the exception. Thus, a statement by the hearing officer that evidence was hearsay cannot be considered a commitment that such evidence would be treated as inadmissible in a judicial proceeding. Quite to the contrary, the hearing officer might well have pointed out that this evidence was hearsay in order to alert appellant to its right to object, or to examine the witness to determine whether or not the evidence was admissible in a judicial proceeding as an exception to the hearsay rule. Appellant did not examine the witness, on voir dire or cross examination. Had such examination been made, perhaps it would have afforded grounds for imposition of the limitation applicable to hearsay inadmissible in a judicial proceeding.

The rule is discussed at length in Kirby v. Alcoholic Beverage Control Appeals Board, supra, at pages 1018 to 1020.

Appellant argues on appeal that it was denied due process of law in that the administrative hearing was not conducted impartially. This contention is based on the theory that evidence produced by appellant to mitigate the charges was not considered by the hearing officer to be of a mitigating nature. The hearing officer considered much of the evidence

as merely explanatory of some of the difficulties faced by one licensed to sell automobiles and he also concluded that all of these difficulties are "...controllable by the licensee with the necessary effort and care."

We agree that the difficulties experienced by the appellant are matters within the control of the appellant. Appellant elected to sell motor vehicles without assurance that titling documents would be in its possession within the 10- or 20-day period allowed by law. Mr. Keith Conway, appellant's president, testified that when appellant sells a car, it isn't known whether appellant has received title to the car or not; that a car is up for sale when paid for by appellant and in its possession, and that he makes no attempt to hold vehicles from resale until clear title is obtained (R.T. 68, lines 1-20). As we said in *Fletcher Chevrolet, Incorporated v. Department of Motor Vehicles*, A-4-69, "If the appellant wishes to avoid disciplinary action by the Department based on untimely filing of Reports of Sale, it is incumbent upon appellant to pursue business practices which do not preclude following the above cited rules and regulations."

There is no basis in the administrative record to support the contention that the hearing officer or the Director of Motor Vehicles acted other than impartially and, therefore, the argument that appellant was denied due process of law

on this ground must fail.

II. IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES
COMMENSURATE WITH HIS FINDINGS?

Appellant contends that the penalty imposed is harsh in that: (1) the number of violations are minimal compared to the overall record, (2) as a practical matter, violations of Sections 5901 and 4456 V.C. are unavoidable and, (3) no one was injured by the failure of appellant to comply with the rules.

Appellant's arguments reveal an attitude toward the law regulating its business which accounts for its present difficulties and promises little for avoidance of future violations. In advancing these arguments now, appellant obviously places little or no importance upon the circumstance that appellant was under a probationary order issued by the Director of Motor Vehicles at the time the violations in this case occurred. It had previously been disciplined for similar violations but the Director of Motor Vehicles saw fit to afford appellant the privilege of probation. Appellant abused this privilege by continuing business practices which placed it in a position of being unable to comply with the conditions of probation. We do not agree that the untimely filing of 63 documents required by statute and the filing of incorrect data in four instances can be characterized as "minimal."

With regard to the contention that violations of Sections 5901 and 4456 V.C. are unavoidable as a practical matter, we said in *Fletcher Chevrolet, Inc. v. Department of Motor Vehicles*, A-4-69, at pages 9-10:

"This Board recognizes that strict compliance with the 10- and 20-day rules may be inconvenient or even difficult in some situations. However, the Legislature and the department have established these rules, and it is not the function of this Board, sitting in its appellate capacity, to modify them.

"That power resides in the Legislature and the department."

We might add that it is certainly not the function of a licensee to ignore these rules.

At page 11 on its Opening Brief, appellant argues "...although the Three Dollar (\$3.00) misuse fee may not be sufficient penalty where the violation is due to wilful misconduct, it is sufficient penalty where circumstances are beyond appellant's, or any other dealer's, control." We were confronted with a similar argument in *Ralph's Chrysler-Plymouth v. Department of Motor Vehicles*, A-3-69, and disposed of it by holding that the argument "...does violence to the legislative scheme created for the express purpose of assuring that documents of title to motor vehicles are handled in an orderly manner to the end that transfers of ownership of motor vehicles become a matter of public record in a reasonable time."

Appellant's contention that the penalty imposed in this case is especially harsh because no one was injured by the

failure of appellant to comply with the rules is likewise without merit. It entirely disregards the rights of innocent purchasers of motor vehicles and the need for accurate and timely public recordation of interests in motor vehicles. We are not involved with a case wherein a party is seeking recovery for damages in a civil matter. We are involved with determining whether one granted authority by the State of California to carry on a particular business should or should not be afforded the opportunity of pursuing that business. We find nothing in the law which requires respondent to make a showing of specific injury to a particular buyer before it can find a violation of the statutes involved in this case. We discussed at some length in *Bill Ellis, Inc. v. Department of Motor Vehicles*, A-2-69, the need for accurate and timely compliance on the part of licensed dealers with the laws governing the registration of motor vehicles and we concluded, at page 12, that the Legislature must have been firmly of the opinion that meeting "...the reporting requirements 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." Moreover, in our view, the evidence did show substantial injury to those buyers who, by reason of appellant's failure to assure availability of valid title to vehicles it sold, were placed in jeopardy of losing the vehicles they had purchased from appellant in good

faith. In one instance, appellant failed to obtain title to a car it sold in June 1968 until April 1969. There would seem to be a reasonable inference that that buyer was worried, upset, vexed and frustrated during this long period of uncertainty, to say nothing of being exposed to possible liability for conversion of the vehicle. Unfortunately automobile dealers, like other business concerns, can and do suffer financial failure. Had appellant failed in the instance cited, the buyer would have lost \$1500.00, the payoff due the Colorado Bank which, as appellant finally learned, was the legal owner of the vehicle in question.

Appellant informs us that a 30-day suspension will cause it to suffer "economic bankruptcy" and that the registration laws "...are not designed nor intended to force out of business those who innocently are unable to comply with such laws."

We have already pointed to the fallacy of the "innocent" and "unable" arguments, and dispose of this contention by pointing out it is most doubtful that the affluence, or lack thereof, of a licensee is a proper matter to consider when fixing penalty. Does appellant seriously suggest that on a given set of facts, a licensee who could afford a given period of suspension should be subject to license suspension, but that the penalty should not apply if the licensee were less well financed? In any event, the administrative record is entirely

devoid of evidence of appellant's financial status and that argument must be rejected.

The penalty imposed by respondent is just and reasonable in light of the findings. Appellant had an opportunity to demonstrate its ability and willingness to pursue practices which would assure adherence to applicable statutes and regulations; appellant failed to do so. The evidence in this case shows substantial indifference on the part of appellant to the terms of its probation and failure or refusal to comprehend its responsibilities to the public under our law. The former penalty imposed by the Director of Motor Vehicles did not succeed in impressing upon appellant the fact that a licensee's disregard of the public interest cannot be tolerated. The suspension of its authority to sell automobiles was not only reasonable but also most appropriate to the circumstances of the case.

The Decision of the Director of Motor Vehicles is affirmed.

This Final Order shall be effective when served upon the parties. The thirty (30) day suspension ordered under paragraph 1, commencing at page 6 of the Director's Decision of March 9, 1970, shall commence on the fourteenth (14th) day following the effective date of this order, or on such earlier date as may be fixed by the Director of Motor Vehicles.

WARREN BIGGS, President

PASCAL B. DILDAY

RALPH L. INGLIS

MELECIO H. JACABAN

ROBERT B. KUTZ

ROBERT D. NESEN

WINFIELD J. TUTTLE

Pasadena Motors vs. Department of Motor Vehicles

Appeal No. A-8-70

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Pasadena Motors vs. Department of Motor Vehicles

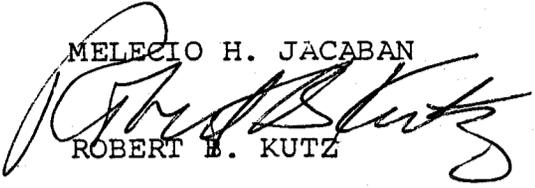
Appeal No. A-8-70

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WARREN BIGGS, President

PASCAL B. DILDAY

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RALPH L. INGLIS

MELECIO H. JACABAN

ROBERT B. KUTZ

ROBERT D. NESEN

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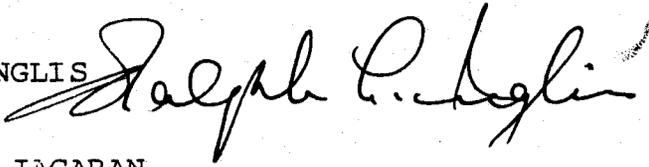
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PASCAL B. DILDAY

RALPH L. INGLIS

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MELECIO H. JACABAN

ROBERT B. KUTZ

ROBERT D. NESEN

WINFIELD J. TUTTLE

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MELECIO H. JACABAN

ROBERT B. KUTZ

ROBERT D. NESEN

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WINFIELD J. TUTTLE

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