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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Appeal of)	
VALLEYWOOD CHEVROLET, INC.,)	
Appellant,)	Appeal No. A-83-78
vs.)	FILED: October 3, 1978
DEPARTMENT OF MOTOR VEHICLES)	
OF THE STATE OF CALIFORNIA,)	
Respondent.)	

Time and Place of Hearing: 10:00 a.m., May 9, 1979
Santa Monica City Council
Chambers, City Hall
1685 Main Street
Santa Monica, CA 90401

For Appellant: Brian R. Silver
816 Brown Street
Napa, CA 94558

For Respondent: Nancy L. Rasmussen
P.O. Box 1828
Sacramento, CA 95809

FINAL ORDER

Valleywood Chevrolet, Inc., a corporation doing business in the State of California, enfranchised as a new car dealer, hereinafter referred to as "appellant", appealed to this board from a disciplinary action taken against its corporate license by the Department of Motor Vehicles following proceedings pursuant to Section 11500 et. seq. of the California Government Code.

The Director of Motor Vehicles, adopting the proposed decision of the hearing officer, found that:

- (1) On six separate occasions between the months of January and August of 1977, appellant advertised vehicles for sale at a given price in the Napa Register and, subsequently, sold those vehicles for an amount exceeding the advertised price without disclosing the advertised price to the purchaser.
- (2) Appellant included, as an added cost to the selling price of 18 separate vehicles, licensing or transfer fees in excess of the fees due and paid to the state.
- (3) During the period in which the advertised vehicles were sold at a price in excess of that advertised, appellant had no system whereby it was made known to individual salespersons that a vehicle had been advertised at a set price. Appellant sells approximately 1,000 vehicles per year and employs 40 people. The practice was for the sales manager to select vehicles from the inventory which he wished to advertise, and telephone the newspaper giving the vehicle identification and the price. No follow up was had to inform the salespersons. They were expected to learn of the vehicles advertised and their price from the Napa Register which would be available in the afternoon. Appellant has now corrected that procedure. Currently the proposed advertisements are discussed with the salespersons at a meeting before the advertisements appear. Tear sheets of the advertisement are given to each salesperson and no vehicle is to be sold over the advertised price.
- (4) The evidence did not establish that appellant had any intent not to sell the vehicles at the advertised price within the meaning of Section 11713(a), California Vehicle Code. The evidence did not establish that appellant refused to sell vehicles at the advertised price within the meaning of Section 11713.1(c), California Vehicle Code. The misrepresentation of the true selling price does constitute fraud within the broad meaning given that term by Section 11705, California Vehicle Code. The fact that the purchaser paid more than the advertised price resulted in a loss to the purchasers.

- (5) Licensing and transfer fees were determined by appellant's DMV clerk. All fees collected were promptly sent to the department. When a bundle sheet was returned indicating error, appellant's practice was to make refund to the customer at the end of the calendar quarter in which it received the refund from the department. This practice resulted in excessive delay in making refunds in some instances. The overcharges . . . were refunded to the customers during the period beginning September 14, 1977, and ending October 4, 1977. Appellant's current practice is to make refunds as soon as an apparent overcharge is discovered.

Pursuant to these findings, the Director of Motor Vehicles adopting the proposed decision of the hearing officer determined that:

- (1) Cause for discipline of appellant exists pursuant to Section 11705(a)(14), California Vehicle Code, and Section 11705(a)(10), California Vehicle Code, in conjunction with Section 11713(g) of said code.
- (2) No cause for discipline exists against appellant pursuant to Section 11705(a)(10), California Vehicle Code, in conjunction with Section 11713(a) or Section 11713.1(c) or Section 11713.1(a) of said code.

Based upon the above determinations of issues, the Director of Motor Vehicles issued the following order:

"The dealer's license and special plates heretofore issued to Valleywood Chevrolet, Inc., are hereby suspended for five (5) days provided, however, that the effectiveness of said order of suspension shall be stayed for a period of one (1) year from the effective date of this decision, during which time (appellant) shall be placed on probation to the Director of Motor Vehicles of the State of California upon the following terms and conditions:

(Appellant) shall obey all the laws of the State of California and all rules and regulations of the Department of Motor Vehicles governing the exercise of his privileges as a licensee.

If the Director of the Department of Motor Vehicles shall determine, after giving (appellant) notice and opportunity to be heard, that a violation of probation has occurred, the

Director may terminate the stay and impose the suspension or otherwise modify the order. In the event (appellant) shall faithfully keep the terms of the condition imposed for the period of one (1) year, the stay shall become permanent and (appellant) shall be fully restored to all licensed privileges."

Appellant raises three issues on appeal, as follows:

- (1) The evidence did not support the finding that Valleywood charged licensing and transfer fees in excess of the fees due and paid the state.
- (2) The finding that there was "excessive delay" in the refund of fees was beyond the scope of the accusation and was contrary to the evidence and the law.
- (3) The finding of misrepresentation and fraud is unsupported by any evidence whatsoever.

The decision of the Board is directed primarily toward the merits of appellant's first and third contentions.

Appellant stipulated at the hearing that the fees alledged in the accusation as the fees due the department were the amounts determined by the department to be the correct fees, but appellant disputed the accuracy of the computations. Appellant argues that the department failed to meet its burden of proof on the accusation of the alledged overcharges inasmuch as no evidence was introduced to show that the amounts determined by the department to be due were correct, nor was there any evidence to show that the amounts determined by Valleywood to be due were incorrect. The department replies that their investigator testified that he knew nothing which would indicate that the department's computations were incorrect. The department further argues that appellant introduced no evidence as to how it made its fee calculations,

nor any evidence whatsoever to support its argument that the department's figures were wrong. The department relies upon Evidence Code Section 664 to support its contention that the burden of proving the inaccuracy of the department's computations shifted to appellant. This section provides in relevant part "It is presumed that official duty has been regularly performed."

The Board agrees with appellant that this argument is contrary to the presumption of innocence that applies to every accusatory proceeding. Evidence Code Section 664 may not be used to establish the truth of facts upon which an allegation is based. The department sought to prove that Valleywood charged fees in excess of what were due and paid to the state. In so alledging it is not sufficient that the department simply compare its own computation of fees due to those computed by Valleywood, and demonstrate that Valleywood charged fees in excess of those determined to be due by the department, thereby shifting the burden of proving the inaccuracy of these computations to Valleywood. In order to support an accusation such as this, the department has a duty to prove that its computations were correct and that Valleywood's were in excess of the amount actually due. The department has introduced no such evidence to support the accuracy of its computation of the fees. The finding of the hearing officer that Valleywood charged fees in excess of those due and paid to the state is, therefore, not supported by the evidence.

Accordingly, the Board pursuant to Section 3054(d) of the Vehicle Code, determining that there is no evidence to support a violation of Section 11713(g), sets this finding aside.

In view of the Board's decision regarding appellant's first contention, it is unnecessary to consider appellant's second contention that the finding of "excessive delay" in the refund of fees was beyond the scope of the accusation and contrary to the evidence and the law.

With respect to appellant's third contention that the finding of misrepresentation and fraud is unsupported by any evidence whatsoever, appellant argues that in his proposed decision the administrative law judge found that Valleywood's advertising was not untrue, deceptive, or misleading, but then erroneously held that "the misrepresentation of the true selling price" constituted fraud within the provisions of Vehicle Code Section 11705(a)(14). Appellant argues that no misrepresentation was shown to have been made to the purchasers involved in these transactions. In fact, there was no evidence whatsoever concerning any representation which may have been made to these purchasers. The department apparently relies upon the inference that appellant's salesman told each purchaser the selling price and that appellant's representation that the selling price was "X" dollars was false when the advertised price was actually lower than "X". None of the six purchasers involved in these transactions were called to give testimony regarding any representations

made to them by appellant's salesmen, nor was any evidence introduced to show the nature of these transactions or the time frame in which they took place. It has not been established that any or each of these transactions occurred solely on the days that the advertisements were published, and it is, therefore, entirely possible that any representations which might have been made regarding the prices of these vehicles could have occurred prior to the effective date of the advertisements. In any event, the department has failed to carry its burden of proving a violation of Section 11705(a)(10) and Section 11705(a)(14). The hearing officer's determination that these vehicle code sections have been violated is not supported by the findings. The Board, therefore, pursuant to Section 3054(c) of the Vehicle Code sets these determinations aside.

For the above stated reasons, and pursuant to Vehicle Code Section 3055, the Board does not find sufficient evidence to support the findings of the Director. The decision of the Director of Motor Vehicles is hereby reversed in its entirety.

This Final Order shall become effective when served upon the parties.



FLORENCE S. POST
President
New Motor Vehicle Board