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June 5, 1974

New Car Dealers Policy and Appeals Board
P. O. Box 1828
Sacramento, California 95809

Attention: Leonard Reiss
Executive Secretary

RE: R. L. Niello Co., Inc. dba Niello Volkswagen
vs. Department of Motor Vehicles
Appeal No. A-49-74

Gentlemen:

The Appellant in this matter has elected to withdraw his appeal. Accordingly, there is submitted herewith for filing appropriate form of Notice of Withdrawal of Appeal reflecting service of a copy thereof upon the Department of Motor Vehicles. Please file the original and return the file stamped copies to this office.

Very truly yours,

DILLON & CAVANAUGH

By Bartley W. Cavanaugh Jr

BWC:kr

Encls.

P. O. Box 1828
2415 First Avenue
Sacramento, CA 95809
(916) 445-1888

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of WES BEHEL VOLKSWAGEN, A California corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-50-74 FILED: May 31, 1974

Time and Place of Hearing:	May 8, 1974, 1:30 p.m. 1020 "N" Street, Room 102 Sacramento, CA 95814
For Appellant:	Marvin G. Giometti, Esq. Attorney at Law Barbieri, Giometti, Scott & Steiner 111 Sutter San Francisco, CA 94104
For Respondent:	R. R. Rauschert, Legal Adviser Department of Motor Vehicles By: Karl S. Engeman Legal Counsel

FINAL ORDER

Wes Behel Volkswagen, 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 Section 11500 et seq. Government Code.

The Director of Motor Vehicles, adopting the proposed decision of the hearing officer found that appellant: (1) failed in thirteen instances to give written notice to department within three days after transfer of vehicles; (2) appellant failed in 251 instances to mail or deliver reports of sale (with documents and fees) to department within 20 days; (3) in 32 instances charged purchasers of vehicles excessive registration fees.

In addition, the director found, in essence, the following: (A) On or about 21 March 1972, all overcharges were correctly refunded with two exceptions: (1) in one case only $9.00 was refunded of the $11.00 due. (2) In another case, $8.00 was refunded but only $5.00 was due. (B) The late reporting violations were caused principally by an employee placed in charge of all "DMV" work. This employee had been properly instructed regarding the manner in which she was to comply with the department requirements respecting said documents and other items by her supervisor. Her supervisor believed in good faith that said employee was properly carrying out her duties and functions regarding compliance with the department's said requirements. There was evidence of some delays in giving the department required notices but, for a considerable period of time,

it was believed that the delays were due to faulty mail service. Said employee left appellant's employ in September 1971 at about which time she returned to appellant's office a sack of documents containing reports, notices and the matters which she had not in fact forwarded to the department or completed. The supervisor was completely stunned by the amount of documents involved and it took the supervisor a period of time to rectify the situation. (C) A new capable replacement has been employed and is being carefully supervised to insure compliance with all laws. (D) Appellant employs 40-50 people and its average balance for 1971 was $88,344. If suspended, ten salesmen, two managers and other clerical help will be terminated and appellant will operate with a skeleton force. Wes Behel has been in the automobile business for 18 years and has no record of prior disciplinary proceedings. The violations were due to negligence and not to gross lack of care or supervision. The supervisor had been completely misled by the "DMV girl" and believed at all times that said employee was following all legal requirements as she had been directed to do. Appellant's representatives cooperated fully with department in rectifying its mistakes.

The director, modifying the hearing officer's proposal, promulgated a decision imposing a penalty of 15 days' suspension with 10 days stayed for a probationary period of one year on the usual terms and conditions.

Although the appellant in its notice of appeal requested to augment the record in pursuance of paragraph 3054(e) Vehicle Code, no evidence was proferred nor any offer of proof made. Accordingly, the appropriateness of the penalty imposed by the Director of Motor Vehicles is the only issue this appeal presents for our consideration.

At the outset, we observe that appellant in its briefs and in argument before this board agrees with our holding that "a corporate licensee is responsible for all acts of its officers, agents and employees acting in the scope of their employment. A contrary rule would, of course, preclude meaningful license discipline." (Imperial Motors v. Department of Motor Vehicles, A-28-72; Bishop-Hansel Ford v. Department of Motor Vehicles, A-39-73; Main Toyota v. Department of Motor Vehicles, A-37-73.) Predicated on this axiomatic conclusion, we have no hesitancy in affirming the findings of fact and conclusions of law in this case. Nor do we have any reservations with respect to the need here for license disciplinary action. Under the circumstances presented, however, the penalty imposed does give us pause.

There is no contest in the record before us regarding the derelictions and negligence of the "DMV girl" whose actions in keeping a large amount of "DMV" work at her home resulted for the most part in appellant's present predicament. We are

also satisfied that the degree of supervision of the "DMV girl" by appellant's business manager was less than acceptable, particularly after her suspicions were aroused that perhaps delays were not being caused by faulty mail service.

Nevertheless, we are confronted with the findings of fact of the hearing officer who took great pains to set forth in detail the appellant's evidence in mitigation and extenuation of the violations. The hearing officer found, and the director concurred in, the findings that the "DMV girl" had been properly instructed by her supervisor, that the supervisor had been completely misled by the conduct of this employee, that the failures and omissions were the result of negligence at most, and were not due to a gross lack of care or supervision, and that the supervisor believed at all times that said employee was following all legal requirements as she had been directed to do. Significantly, we have the finding that the supervisor believed <u>in good faith</u> that the employee was properly carrying out her duties and functions regarding compliance with the department's requirements. (Emphasis added.) In our view, this specific and express finding by both the hearing officer and director that the supervisor acted in good faith, along with the other mitigating factors in this case, serves to militate against our affirming the entire penalty imposed by the director.

In the special circumstances presented by this appeal, and particularly in view of the finding that the supervisor's conduct,

imputable to the appellant, was in good faith, we are constrained to hold that a penalty involving an actual shutdown of business for more than one day is inappropriate.[1/]

Having independently weighed all of the evidence in light of the whole record, all of the findings of fact and determination of issues are affirmed.

In light of our foregoing discussion with regard to the penalty imposed, pursuant to Sections 3054(f) and 3055 Vehicle Code, the New Car Dealers Policy and Appeals Board amends the decision of the Director of Motor Vehicles as follows:

WHEREFORE, THE FOLLOWING ORDER IS HEREBY MADE:

The vehicle dealer's license, certificate and special plates (D-598) heretofore issued to appellant, Wes Behel Volkswagen, a California corporation, are suspended for a period of fifteen (15) days; provided, however, that fourteen (14) days of the said fifteen-day period of suspension is stayed for a period of one year from the effective date of this final order during which time the appellant shall be placed on probation to the Director of Motor Vehicles upon the following terms and conditions:

1/ In reaching our conclusion herein, we are not unmindful of the more severe penalties we affirmed in the cases of Bob Frink Chevrolet, Inc., v. Department of Motor Vehicles, A-46-72 and Worthington Motors v. Department of Motor Vehicles, A-40-73, both of which involved wrongful acts of employees. The foregoing cases, however, presented more aggravating circumstances in the form of significantly larger numbers of late reports or numerous instances of false reporting. As we have noted time and again, each case must be decided on its own merits.

Appellant, and its officers, directors and stockholders shall comply with the laws of the United States, the State of California and its political subdivisions, and with the rules and regulations of the Department of Motor Vehicles.

If appellant, or any of appellant's officers, directors or stockholders, is convicted of a crime, including a conviction after a plea of nolo contendere, such conviction shall be considered a violation of the terms and conditions of probation.

In the event appellant shall violate any of the terms and conditions above set forth during the period of the stay, then the Director of Motor Vehicles after providing appellant due notice and an opportunity to be heard may set aside the stay and impose the stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and appellant's license fully restored.

This Final Order shall become effective June 28, 1974.

THOMAS KALLAY

WINFIELD J. TUTTLE

PASCAL B. DILDAY

AUDREY B. JONES

ROBERT A. SMITH

MELECIO H. JACABAN

A-50-74

Appellant, and its officers, directors and stockholders shall comply with the laws of the United States, the State of California and its political subdivisions, and with the rules and regulations of the Department of Motor Vehicles.

If appellant, or any of appellant's officers, directors or stockholders, is convicted of a crime, including a conviction after a plea of nolo contendere, such conviction shall be considered a violation of the terms and conditions of probation.

In the event appellant shall violate any of the terms and conditions above set forth during the period of the stay, then the Director of Motor Vehicles after providing appellant due notice and an opportunity to be heard may set aside the stay and impose the stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and appellant's license fully restored.

This Final Order shall become effective_____.

THOMAS KALLAY

WINFIELD J. TUTTLE

PASCAL B. DILDAY

AUDREY B. JONES

ROBERT A. SMITH

MELECIO H. JACABAN

A-50-74

Appellant, and its officers, directors and stockholders
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If appellant, or any of appellant's officers, directors
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probation.

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the terms and conditions above set forth, then at the end
of the one-year period, the stay shall become permanent and
appellant's license fully restored.

This Final Order shall become effective _____.

AUDREY B. JONES

ROBERT A. SMITH

MELECIO H. JACABAN

THOMAS KALLAY

WINFIELD J. TUTTLE

PASCAL B. DILDAY

Appellant, and its officers, directors and stockholders all comply with the laws of the United States, the State California and its political subdivisions, and with the ıles and regulations of the Department of Motor Vehicles.

If appellant, or any of appellant's officers, directors r stockholders, is convicted of a crime, including a con- viction after a plea of nolo contendere, such conviction shall be considered a violation of the terms and conditions of probation.

In the event appellant shall violate any of the terms and conditions above set forth during the period of the stay, then the Director of Motor Vehicles after providing appellant due notice and an opportunity to be heard may set aside the stay and impose the stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and appellant's license fully restored.

This Final Order shall become effective _____.

Thomas Kallay

THOMAS KALLAY

WINFIELD J. TUTTLE

PASCAL B. DILDAY

AUDREY B. JONES

ROBERT A. SMITH

MELECIO H. JACABAN

Appellant, and its officers, directors and stockholders shall comply with the laws of the United States, the State of California and its political subdivisions, and with the rules and regulations of the Department of Motor Vehicles.

If appellant, or any of appellant's officers, directors or stockholders, is convicted of a crime, including a conviction after a plea of nolo contendere, such conviction shall be considered a violation of the terms and conditions of probation.

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THOMAS KALLAY

WINFIELD J. TUTTLE

PASCAL B. DILDAY

AUDREY B. JONES

ROBERT A. SMITH

Melecio N. Jacaban

MELECIO H. JACABAN

A-50-74

Appellant, and its officers, directors and stockholders shall comply with the laws of the United States, the State of California and its political subdivisions, and with the rules and regulations of the Department of Motor Vehicles.

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In the event appellant shall violate any of the terms and conditions above set forth during the period of the stay, then the Director of Motor Vehicles after providing appellant due notice and an opportunity to be heard may set aside the stay and impose the stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and appellant's license fully restored.

This Final Order shall become effective _____.

THOMAS KALLAY

WINFIELD J. TUTTLE

PASCAL B. DILDAY

AUDREY B. JONES

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A-50-74

Appellant, and its officers, directors and stockholders shall comply with the laws of the United States, the State of California and its political subdivisions, and with the rules and regulations of the Department of Motor Vehicles.

If appellant, or any of appellant's officers, directors or stockholders, is convicted of a crime, including a conviction after a plea of nolo contendere, such conviction shall be considered a violation of the terms and conditions of probation.

In the event appellant shall violate any of the terms and conditions above set forth during the period of the stay, then the Director of Motor Vehicles after providing appellant due notice and an opportunity to be heard may set aside the stay and impose the stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and appellant's license fully restored.

This Final Order shall become effective _____.

THOMAS KALLAY

Winfield J. Tuttle

WINFIELD J. TUTTLE

PASCAL B. DILDAY

AUDREY B. JONES

ROBERT A. SMITH

MELECIO H. JACABAN

A-50-74

P. O. Box 31
Sacramento, CA 95801
(916) 445-1888

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of LEE WHITE TOYOTA, A California corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-51-74 FILED: December 2, 1974

Time and Place of Hearing: September 11, 1974, 10:30 a.m.
State Building, Room B-109
1350 Front Street
San Diego, CA 92101

For Appellant: Douglas F. Olins, Esq.
Greer, Popko, Miller & Foerster
1568 Sixth Avenue
San Diego, CA 92101

For Respondent: R. R. Rauschert, Chief, Legal Section
Department of Motor Vehicles
By: Henry J. Ahler
Legal Counsel

FINAL ORDER

Lee White Toyota, 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 dealer's license by the Department of Motor Vehicles following proceedings pursuant to Section 11500 et seq. Government Code.

The Director of Motor Vehicles, adopting the proposed decision of the hearing officer, found that appellant: (1) failed in 12 instances to give written notice to the department within three days after transfer of vehicles; (2) failed in 16 instances to mail or deliver reports of sale (with documents and fees) to the department within 20 days; and (3) in 33 instances charged purchasers of vehicles excessive registration fees.

In addition, the director made the following findings: (A) On April 15, 1971, a warning letter was mailed to appellant advising that its reporting practices did not meet acceptable standards. (B) The owner of appellant corporation, soon after opening its business in San Diego, became heavily involved in a lawsuit with his former partners in another automobile business in Huntington Beach that threatened him with bankruptcy. He was obliged to spend most of his time in Orange County defending that suit, which was not terminated until the spring of 1973. During his absence from activity in appellant's affairs, he relied upon a series of managers and employees, as a consequence of which the appellant's responsibilities under the Vehicle Code were not fulfilled. Appellant has now, however, assumed full management of the business and appears to have adequately addressed his attention to the licensure requirements. Refunds for overcharges of fees were made by appellant in each of the 33 instances set forth in

the above findings, 12 of them in May and June, 1972, and the remaining 21 in July, 1973. At the president's order, appellant reviewed its own records to discover from 150 to 200 additional customers who were overcharged for fees due the State. Appellant mailed checks to these latter persons addressed to the addresses appearing upon appellant's records, but approximately 55 were returned by the Post Office for failure of delivery. Approximately 10 additional checks have not been returned to appellant, but remain uncashed.

The director imposed a 15-day suspension with 12 days stayed for a 3-year period of probation under the usual terms and conditions.

The sole issue raised by this appeal is whether the penalty provided for in the decision of the Director of Motor Vehicles is commensurate with the findings. 1/

We have duly considered the administrative record and the briefs and arguments of both parties. Further, we have carefully weighed the accusation in light of all the circumstances and the evidence of record both in aggravation and mitigation of the violations found to have been established. In our view, the penalty in this case is not deemed to be commensurate with the

1/ In its notice of appeal, appellant indicated a desire to augment the record. Having neither made such request nor offer of proof at the appellate hearing, we consider this request to have been abandoned.

findings and should be modified.

Pursuant to Section 3054(f) and 3055 Vehicle Code, the New Motor Vehicle Board amends the decision of the Director of Motor Vehicles as follows:

WHEREFORE THE FOLLOWING ORDER IS MADE:

The vehicle dealer's license, certificate and special plates (D-4380) heretofore issued to appellant, Lee White Toyota, a California corporation, are suspended for a period of fifteen (15) days; provided that the entire fifteen (15) day period of suspension is stayed for a period of one year from the effective date of this final order during which time the appellant shall be placed on probation to the Director of Motor Vehicles upon the following terms and conditions:

Appellant, and its officers, directors and stockholders shall comply with the laws of the United States, the State of California and its political subdivisions, and with the rules and regulations of the Department of Motor Vehicles.

If appellant, or any of appellant's officers, directors or stockholders, is convicted of a crime, including a conviction after a plea of nolo contendere, such conviction shall be considered a violation of the terms and conditions of probation.

In the event appellant shall violate any of the terms and conditions above set forth during the period of the stay, then the Director of Motor Vehicles after providing appellant due notice and an opportunity to be heard may set aside the stay and impose the

stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and appellant's license fully restored.

This Final Order shall become effective January 2, 1975.

WINFIELD J. TUTTLE

AUDREY B. JONES

PASCAL B. DILDAY

ROBERT A. SMITH

JOHN B. VANDENBERG

D I S S E N T

Appellant stipulated at the hearing before the Hearing Officer the truth of all the charges; therefore, we need not consider the verity of the facts set forth in the accusation. Appellant's appearance and presentation at the hearing were singly directed toward the mitigation of the penalty to be assessed against it. The record shows that the Hearing Officer made his findings after a full dressed presentation was made by the Appellant and Respondent. Witnesses testified on behalf of both parties, thereby providing the Hearing Officer the opportunity to afford due credence, and evaluate the testimony, and the witnesses. Thereafter, the Hearing Officer made his decision which was submitted to the Director of Motor Vehicles who adopted the proposed decision in its entirety.

Appellant appeals from the Director's Decision to this board. In examining the credibility and sufficiency of the testimony and witnesses, this board must accept as true all evidence tending to establish the correctness of the decision as made, as well as all inferences which might reasonably have been thought by the Hearing Officer to lead to his conclusions. The cold record cannot give the look or manner of the witnesses, their hesitations, their doubts, their variations of language, their precipitancy, their calmness or consideration. A witness may convince a person who hears him testify that he is disingenuous and untruthful, and yet his testimony, when read or presented through the verbiage of his counsel from his appeal brief, or orally, may convey a most favorable impression . There are many factors aiding in a reasonable conclusion which are presented to the Hearing Officer in the first instance and not available to one going over the cold, platonic record. There is what might be the "feel" of the case. This embraces a consideration of the witnesses, the manner in which they testify, and their general attitude and demeanor at the time of the hearing. This board has no opportunity to observe the appearance, general bearing and demeanor of the witnesses, and thus is deprived of an important aid in the determination of the value and weight to be given the testimony. The decision should be changed only after members of the board, from reading the records and transcripts, suggest that there has been bias, prejudice, corruption or a finding which is so harsh and unjust that it invokes a traumatic disturbance to their conscious minds. Appellant contends

that for approximatley three and one-half years, litigation in Orange County consumed "five days a week" of his time; therefore, was unable to conduct his business properly. This is such an affront to reasonable logic that its attempted digestibility would make one retch. This was the crux and most cogent argument for mitigation urged by the Appellant. This board should consider the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference.

This board has, and is serving an important and constructive purpose and service to the general public and new car dealers. To establish a precedence of aberrating the Director's decisions may exacerbate the legislative and public opinion and frustrate and/or affect the proposed function of the Department of Motor Vehicles in matters within its jurisdiction.

For reasons stated above, I cannot concur with the majority opinion; I would affirm the Director's decision in its entirety.

JOHN ONESIAN

C O N C U R R I N G O P I N I O N

I concur with the decision reached by the majority of the board.

I find no support in the statutes or the decisional law promulgated by this board for the view expressed in the dissent that it is only upon a finding of bias, prejudice or corruption that this board can change the penalty imposed by the Department.

It is settled that §3054(d) of the Vehicle Code requires the board to use its independent judgment when reviewing the evidence. Under this rule the board is mandated to resolve conflicts in the evidence, draw reasonable inferences and make its own determination regarding the credibility of witnesses. (Park Motors, Inc. v. Department of Motor Vehicles, A-27-72.)

It is wholly inappropriate to suggest, as the dissent does, that this board abdicate from its responsibility, imposed by the Legislature, to exercise its independent judgment. I am at a loss to understand how the board's exercise of its independent judgment in reviewing the Department's decisions would have an adverse affect on legislature and public opinion, or how it would frustate the workings of the Department of Motor Vehicles. If, on the one hand, the Legislature desired to foreclose an independent review of the Department's decisions this board need not have been vested with its power of independent review. On the other hand, if this board is vested of such power, and I have no doubt whatsoever that it is, it ought to exercise it without fear or consideration of the effects of its decisions upon legislative and public opinion.

The dissent is also in error when it adverts to the rule which obtains in the appellate courts of this State that, on appeal, evidence is to be viewed in the light most favorable to the prevailing party. This board is not an appellate court; as noted, it must exercise its independent judgment in reviewing the evidence. Thus, the board was free to conclude, as it did, that the evidence before

it warranted a reduction of the penalty. To suggest, as the dissent does, that the only person who can or should modify the penalty is the one who has viewed the witnesses, is to call into question not only the entire statutory scheme which created this board but it is also an implicit, if wholly unfounded, condemnation of widely accepted and constitutionally sound practices before the administrative tribunals of our State and country.

In my view, the decision reached by the board in this case is wholly appropriate and is based, as usual, upon a full review of the record. It is, therefore, a decision which comports with the requirements imposed upon the board by statute and decisional law.

THOMAS KALLAY

A-51-74

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This board has, and is serving an important and constructive purpose and service to the general public and new car dealers. To establish a precedence of aberrating the Director's decisions may exacerbate the legislative and public opinion and frustrate and/or affect the proposed function of the Department of Motor Vehicles in matters within its jurisdiction.

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I find no support in the statutes or the decisional law promulgated by this board for the view expressed in the dissent that it is only upon a finding of bias, prejudice or corruption that this board can change the penalty imposed by the Department.

stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and appellant's license fully restored.

This Final Order shall become effective _____.

Audrey B. Jones

WINFIELD J. TUTTLE

AUDREY B. JONES

PASCAL B. DILDAY

ROBERT A. SMITH

JOHN B. VANDENBERG

D I S S E N T

Appellant stipulated at the hearing before the Hearing Officer the truth of all the charges; therefore, we need not consider the verity of the facts set forth in the accusation. Appellant's appearance and presentation at the hearing were singly directed toward the mitigation of the penalty to be assessed against it. The record shows that the Hearing Officer made his findings after a full dressed presentation was made by the Appellant and Respondent. Witnesses testified on behalf of both parties, thereby providing the Hearing Officer the opportunity to afford due credence, and evaluate the testimony, and the witnesses. Thereafter, the Hearing Officer made his decision which was submitted to the Director of Motor Vehicles who adopted the proposed decision in its entirety.

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WINFIELD J. TUTTLE

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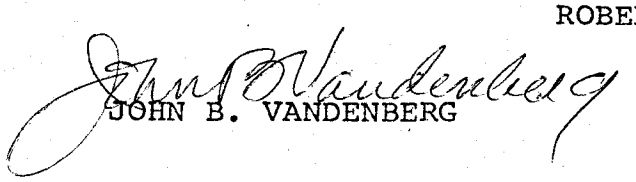
PASCAL B. DILDAY

ROBERT A. SMITH



JOHN B. VANDENBERG

D I S S E N T

Appellant stipulated at the hearing before the Hearing Officer the truth of all the charges; therefore, we need not consider the verity of the facts set forth in the accusation. Appellant's appearance and presentation at the hearing were singly directed toward the mitigation of the penalty to be assessed against it. The record shows that the Hearing Officer made his findings after a full dressed presentation was made by the Appellant and Respondent. Witnesses testified on behalf of both parties, thereby providing the Hearing Officer the opportunity to afford due credence, and evaluate the testimony, and the witnesses. Thereafter, the Hearing Officer made his decision which was submitted to the Director of Motor Vehicles who adopted the proposed decision in its entirety.

stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and appellant's license fully restored.

This Final Order shall become effective _____.

WINFIELD J. TUTTLE

AUDREY B. JONES

PASCAL B. DILDAY

ROBERT A. SMITH

JOHN B. VANDENBERG

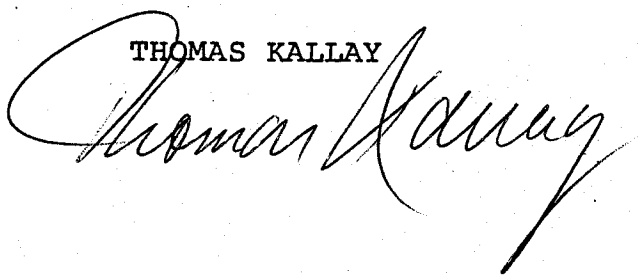
D I S S E N T

Appellant stipulated at the hearing before the Hearing Officer the truth of all the charges; therefore, we need not consider the verity of the facts set forth in the accusation. Appellant's appearance and presentation at the hearing were singly directed toward the mitigation of the penalty to be assessed against it. The record shows that the Hearing Officer made his findings after a full dressed presentation was made by the Appellant and Respondent. Witnesses testified on behalf of both parties, thereby providing the Hearing Officer the opportunity to afford due credence, and evaluate the testimony, and the witnesses. Thereafter, the Hearing Officer made his decision which was submitted to the Director of Motor Vehicles who adopted the proposed decision in its entirety.

it warranted a reduction of the penalty. To suggest, as the dissent does, that the only person who can or should modify the penalty is the one who has viewed the witnesses, is to call into question not only the entire statutory scheme which created this board but it is also an implicit, if wholly unfounded, condemnation of widely accepted and constitutionally sound practices before the administrative tribunals of our State and country.

In my view, the decision reached by the board in this case is wholly appropriate and is based, as usual, upon a full review of the record. It is, therefore, a decision which comports with the requirements imposed upon the board by statute and decisional law.

THOMAS KALLAY



A-51-74

P. O. Box 31
2415 First Avenue
Sacramento, CA 95801
(916) 445-1888

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of SAVAGE PONTIAC CENTER, INC., a California corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-52-74 FILED: October 28, 1974

Time and Place of Hearing: August 14, 1974, 11:20 a.m.
City Council Chamber, City Hall
1685 Main Street
Santa Monica, CA

For Appellant: George E. Leaver
Getz, Aikens & Manning
Attorneys at Law
5900 Wilshire Blvd., Suite 770
Los Angeles, CA 90036

For Respondent: R. R. Rauschert, Chief, Legal Section
Department of Motor Vehicles
By: Leo Bingham
Legal Counsel

FINAL ORDER

Savage Pontiac Center, Inc., a California corporation, 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 Section 11500 et seq. Government Code.

The Director of Motor Vehicles, adopting the proposed decision of the hearing officer found that appellant: (1) failed in 31 instances to mail or deliver the reports of sale of new vehicles (together with documents and fees) to the department within 20 days; and (2) appellant in 21 instances charged purchasers of vehicles excessive registration fees. In addition, the director further found: (a) On January 6, 1969, and on April 19, 1971, letters of warning were sent to the appellant by the Department of Motor Vehicles as to reporting violations of the same type as are the subject of the accusation; (b) corrective measures have been instituted to prevent further delinquent filings, restitution has been made of all overcharges; and (c) appellant has been in the automotive business for many years with no prior disciplinary action.

The director, adopting the hearing officer's proposed decision, imposed a penalty of ten (10) days' suspension for each cause of disciplinary action, to run concurrently, with 5 days stayed for a one-year period of probation on the usual terms and conditions.

BASIS OF APPEAL

Appellant bases his appeal on the following specific contentions:

1. It was mislead by employees of the DMV regarding the need for representation by counsel; consequently, it was represented by Peter Savage, a layman, who was confused, unprepared, and inexperienced in matters regarding admission of evidence, all of which resulted in a denial of due process;
2. The appellant was prejudiced by the improper admission in evidence of the letter of April 1971;
3. That Finding VI, regarding warning letters of the "same type" of violations is not supported by the evidence as neither warning letter contained any reference to overcharge violations (Section 11713(g) Vehicle Code); and
4. Because of the strong evidence in mitigation, the penalty is too harsh and the entire suspension should be stayed.

This appeal came on for hearing on August 14, 1974. At that time, appellant made an offer of proof to obtain the board's permission to augment the record with evidence relevant to its allegation of denial of due process. Before ruling on the matter of augmentation, the board directed that both sides file briefs and continued the case accordingly.

Subsequently, both parties indicated to the board that in lieu of filing briefs, they were formalizing a stipulation in an

attempt to appropriately resolve the issue raised by appellant at the hearing. Consequently, at its meeting of September 11, 1974, the board made a determination to accept and consider a stipulation in lieu of briefs. A "Stipulation for Reversal" was executed and filed with the board on September 30, 1974. The essence of that stipulation is hereinafter set forth:

> "IT IS HEREBY STIPULATED, by and between the Appellant... and the Department of Motor Vehicles,...that the Decision of the Director herein appealed from be reversed... in that there was relevant evidence which in the exercise of reasonable diligence could not have been produced on behalf of the Appellant at the hearing.
>
> "IT IS FURTHER STIPULATED that the reversal shall be without prejudice to refiling and resetting of the accusation by the department against Appellant."

The board, accepting the stipulation and after duly considering its contents, deems it to be an appropriate basis for exercising its authority pursuant to Section 3054(e) of the California Vehicle Code.

WHEREFORE THE FOLLOWING ORDER IS HEREBY MADE:

The decision of the director, in its entirety, is hereby reversed without prejudice. The case is remanded to the director for new or additional proceedings or such other action or disposition as the director in the exercise of his discretion deems appropriate.

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

THOMAS KALLAY

ROBERT A. SMITH

PASCAL B. DILDAY

JOHN ONESIAN

WINFIELD J. TUTTLE

AUDREY B. JONES

JOHN B. VANDENBERG

MELECIO H. JACABAN

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

THOMAS KALLAY

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MELECIO H. JACABAN

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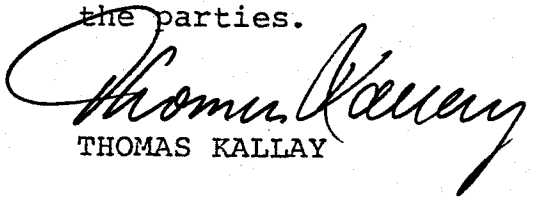

THOMAS KALLAY

WINFIELD J. TUTTLE

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JOHN ONESIAN

MELECIO H. JACABAN

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MELECIO H. JACABAN

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THOMAS KALLAY

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WINFIELD J. TUTTLE

Audrey B Jones
AUDREY B. JONES

JOHN B. VANDENBERG

MELECIO H. JACABAN

NEW MOTOR
OCT 2 8 1974
VEHICLE BOARD

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

THOMAS KALLAY

WINFIELD J. TUTTLE

ROBERT A. SMITH

AUDREY B. JONES

PASCAL B. DILDAY

JOHN B. VANDENBERG

JOHN ONESIAN

MELECIO H. JACABAN

NEW MOTOR
OCT 23 1974
VEHICLE BOARD

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

THOMAS KALLAY

ROBERT A. SMITH

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WINFIELD J. TUTTLE

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MELECIO H. JACABAN

P. O. Box 31
2415 First Avenue
Sacramento, CA 95801
(916) 445-1888

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of ELMER J. DREW and JOSEPH C. DREW, dba DREW FORD, A Partnership, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-53-74 FILED: September 12, 1974

Time and Place of Hearing: August 14, 1974, 10:15 a.m.
City Council Chambers, City Hall
1685 Main Street
Santa Monica, CA

For Appellant: George E. Leaver
Getz, Aikens & Manning
Attorneys at Law
5900 Wilshire Blvd., Suite 770
Los Angeles, CA 90036

For Respondent: R. R. Rauschert, Legal Adviser
Department of Motor Vehicles
By: Leo Bingham
Legal Counsel

FINAL ORDER

Drew Ford, a partnership, enfranchised as a new car dealer, hereinafter referred to as "appellant", appealed to this board

from a disciplinary action taken against the dealer's license by the Department of Motor Vehicles following proceedings pursuant to Section 11500 et seq. Government Code.

The Director of Motor Vehicles, adopting the proposed decision of the hearing officer, found that appellant: (1) failed in 18 instances to give written notice to the department within three days after transfer of vehicles; (2) failed in 176 instances to mail or deliver reports of sale (with documents and fees) to the department within 20 days; (3) failed in 25 instances to mail or deliver reports of sale (with documents and fees) to the department within 30 days; (4) failed in 53 instances to mail or deliver reports of sale (with documents and fees) to the department within 40 days; and (5) in 38 instances charged purchasers of vehicles excessive registration fees.

In addition, the director adopting the hearing officer's proposed decision made the following findings which, essentially, sum up the evidence presented by the appellant:

A. Subsequent to a meeting between the appellant, Elmer Drew, along with six of his employees and two representatives from the department, appellant was warned by letter dated December 12, 1967 of the need for improving its compliance with the reporting requirements of the department, including among other things late submission of transfer applications, and failure to submit or late submission of dealer notices under Vehicle Code Section 5901.

B. Appellant, Elmer J. Drew, has been in business for forty (40) years in La Mesa at eight (8) different locations with no prior disciplinary actions having been brought against his license. The meeting with department investigators resulting in the warning letter set out in A above being the only failure to comply with the Vehicle Code on his record.

C. In 1970, Elmer Drew turned over active management of the dealership to his partner and son, Joseph C. Drew. Joseph was apparently unable and unready to handle the job due to his inexperience and the increase of total sales by six to eight hundred units in 1971 and 1972. During this period most of the violations in (1) through (5) above occurred.

D. Due to inefficient management and untrained or negligent clerical help, the hundreds of violations set forth in Schedules A and B occurred. In August of 1972, and prior to the date of the accusation herein, appellant hired Ernest (Pat) Grace, a former dealer and president of the San Diego Motor Car Dealer's Association, as manager, to clean up the mess.

E. It took from August 1972 to approximately May 1973 to establish a reasonably efficient system of paper flow to bring the dealership in compliance. It was necessary to fire the business manager, change the sales manager, fire the transfer clerk and hire another. At the present time appellants have separate clerks for new and used cars, a day-to-day log, a new car log, a Department of

Motor Vehicles refund log, make refunds on a daily basis, recap daily sales and monthly sales and have three checks on salesmen. All overcharges mentioned herein have been refunded and since May of 1973 appellants have made 1,000 sales with only 9 or 10 misuses.

The director, adopting the proposed decision of the hearing officer, imposed a penalty of 15 days' suspension with 12 days stayed for a period of one-year's probation under the usual terms and conditions. The appropriateness of the penalty is the only issue presented by this appeal. Appellant contends that an actual suspension of 3 days is too harsh and severe and requests that under all of the circumstances of this case, it be reduced to an actual suspension of one (1) day, with fourteen (14) days stayed for a one-year's probationary period.

While we strongly adhere to the rule that each case must be decided on its own merits (Main Toyota v. Department of Motor Vehicles, A-37-73), in determining propriety of penalty in this case we cannot disregard the director's decision and our affirming action in Dick Grihalva Chevrolet v. Department of Motor Vehicles, A-45-73. 1/

A distinction the department attempts to draw between this case and Grihalva v. Department of Motor Vehicles supra is predicated on a warning letter sent to the appellant in December 1967

1/ In Grihalva, A-45-73, a case significantly similar to the case at hand, the penalty imposed by the director and affirmed by the board provided for a 15-day suspension with 14 days stayed for a one-year period of probation.

and signed by the department's deputy director. Whether a warning letter signed by the deputy director is more aggravating in nature than the department's routine letter is a determination we need not make. The letter in question is dated December 1967 and the earliest violation in the accusation resulted from a transaction in June 1971. In our view, because of the many years which elapsed between the two dates, either of two conclusions may be validly reached. On the one hand, as the department would have it, corrective action following receipt of the letter was either deficient or non-existent. On the other hand, however, full and timely corrective action may have been taken and the present violations may well have resulted from new operational and personnel deficiencies. Therefore, in considering all the facts and circumstances in this case, we accord the 1967 letter whatever weight it deserves.

We have before us a case of a dealer who has been in business for forty (40) years in eight (8) different locations with no prior license disciplinary action. Further, he has taken drastic and apparently effective measures to correct deficiencies to insure compliance with the law. Since May of 1973, his "DMV" record has been exemplary. There is no contest as to any of these facts which are contained in the director's findings and which we consider weigh heavily in favor of the appellant.

In light of all the circumstances, actual closing of the appellant's business for a period in excess of one day is not deemed commensurate with the findings.

All of the findings of fact and determination of issues are affirmed. With regards to penalty, for the reasons stated, the New Motor Vehicle Board, pursuant to Sections 3054(f) and 3055 Vehicle Code, amends the decision of the Director of Motor Vehicles as follows:

WHEREFORE, THE FOLLOWING ORDER IS HEREBY MADE:

The vehicle dealer's license, certificate and special plates (D-993) heretofore issued to appellant, Elmer J. Drew and Joseph C. Drew, doing business as Drew Ford, a partnership, are suspended for a period of fifteen (15) days; provided, however, that fourteen (14) days of the said fifteen-day period of suspension is stayed for a period of one year from the effective date of this final order during which time the appellant shall be placed on probation to the Director of Motor Vehicles upon the following terms and conditions:

Appellant, and all of its partners shall comply with the laws of the United States, the State of California and its political subdivisions, and with the rules and regulations of the Department of Motor Vehicles.

If appellant, or any of its partners, is convicted of a crime, including a conviction after a plea of nolo contendere, such conviction shall be considered a violation of the terms and conditions of probation.

In the event appellant shall violate any of the terms and conditions above set forth during the period of the stay, then the

Director of Motor Vehicles after providing appellant due notice and an opportunity to be heard may set aside the stay and impose the stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and appellant's license fully restored.

This Final Order shall become effective October 11, 1974.

WINFIELD J. TUTTLE

MELECIO H. JACABAN

ROBERT A. SMITH

PASCAL B. DILDAY

THOMAS KALLAY

JACK B. VANDENBERG

W. H. "HAL" McBRIDE

A-53-74

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A-53-74

P. O. Box 31
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Sacramento, CA 95801
(916) 445-1888

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of OGNER VOLKSWAGEN, INC., A California corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-54-74 FILED: September 12, 1974

Time and Place of Hearing: August 14, 1974, 1:30 p.m.
City Council Chambers, City Hall
1685 Main Street
Santa Monica, CA 90401

For Appellant: Harold J. Tomin, Esq.
Goldman, Gilbert, Freedman,
Billet, Tomin & Alberghetti
1900 Avenue of the Stars, Suite 1949
Los Angeles, CA 90067

For Respondent: R. R. Rauschert, Chief, Legal Section
Department of Motor Vehicles
By: Henry J. Ahler
Legal Counsel

FINAL ORDER

Ogner Volkswagen, 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 Section 11500 et seq. Government Code.

The Director of Motor Vehicles determined not to adopt the proposed decision of the hearing officer and, after proceedings held pursuant to Section 11517 Government Code, found that appellant in five (5) instances set back odometers to reduce the mileage indicated on the odometers.

In addition, the director made findings which are set forth herein in detail as they fairly sum up the evidence of record and provide the factual posture for this appeal. The additional findings are as follows:

A. Respondent [appellant], by and through its agents and employees, caused odometer setbacks to have been made with respect to each of the five automobiles which are described in Findings III through VII. In each of said odometer setbacks it was intended to reduce the number of miles which were indicated on the respective odometers so as to make the subject automobiles more saleable.

B. Respondent [appellant's] evidence established the following:

(1) Neither Stanley S. Ogner, respondent's [appellant's] president, nor any other corporate officers participated in the above-described odometer setbacks;

(2) Said corporate president embarked upon an investigation within his company immediately after these setbacks were disclosed to him by employees of the

Department of Motor Vehicles. Such investigation did not uncover the precise circumstances attending the five subject setbacks; however, such investigation did lead to certain controls being imposed upon respondent's [appellant's] personnel so as to prevent such setbacks in the future;

(3) Said corporate president has recently replaced the following employees of respondent [appellant]: general manager, new car manager, used car manager, shop foreman, service manager, and officer manager; each of said discharges was in part due to the administrative problems which were related to the said odometer setbacks;

(4) Said corporate president has instituted a policy whereby an employee's demonstrator is replaced and put up for sale when its odometer reading reaches 6,000 miles;

(5) Said corporate president has been engaged in the sale of motor vehicles since December 1950; he was a Chrysler dealer for approximately ten years; he has been a dealer or a corporate officer of a dealer for Volkswagen since 1960; he enjoys a high standing with Volkswagen Pacific, Inc. and with some of his colleagues in the automobile business;

(6) No lawsuits or accusations have ever been filed against said corporate president, or any corporation with which he was associated, concerning any business transaction related to the sale of automobiles.

(7) Throughout the entire period in which the five subject odometer setbacks occurred, Stanley S. Ogner was under severe emotional strain as a result of massive family problems; although Stanley S. Ogner was physically present at the dealership during most normal working hours, his attention to respondent's [appellant's] business was substantially diverted by such problems.

By way of clarification, all of the findings of the director were identical to those proposed by the hearing officer with the exception of B(7) above. This latter finding was a result of the director's receipt and consideration of additional evidence which had not been presented or alluded to at the time of the original administrative hearing. 1/

The penalty proposed by the hearing officer provided for a suspension of 25 days with 5 days stayed for one year. The director,

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1/ On August 8, 1973, appellant was advised by the director that the proposed decision of the hearing officer would not be adopted. Appellant filed additional evidence and written argument and, on January 18, 1974, presented oral argument before the director. The additional evidence consisted of two doctors' statements and supporting hospital documentation establishing that during the period the violations occurred, Ogner was beset by severe family problems involving illness of his two daughters.

however, determined not to adopt the proposed penalty and ordered revocation, stayed, with 15 days actual suspension and a one-year period of probation on the usual terms and conditions.

We deem only two issues raised by this appeal to be of sufficient merit to warrant discussion; i. e., the sufficiency of findings in mitigation and the propriety of penalty.

As to the first issue, appellant asserts error predicated on a contention that the record before the hearing officer and the director would have supported additional findings in mitigation. Our observations and conclusions in Bob Frink Chevrolet, Inc. v. Department of Motor Vehicles, A-46-73, are dispositive of this allegation. In that case we stated:

> "...Section 3054, subsection (d) Vehicle Code, requires the board to use the independent judgment rule when reviewing the evidence (Thiel Motors, Inc. v. Department of Motor Vehicles, A-33-72, and cited cases). 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. Here, as in Bob Frink Chevrolet, Inc. supra, we note that the record provides no basis upon which to conclude that either the hearing officer or the director abused his discretion by not including in his findings of fact mitigation which appellant contends should have been reduced to formal findings.

We next turn to the matter of appropriateness of penalty,

with particular attention accorded to the evidence concerning the family problems of Stanley Ogner, appellant's president. Without question, Ogner was besieged by personal problems of serious magnitude during the years 1969 and 1970, evoking an appreciable sympathetic atmosphere in which to consider this appeal. Nevertheless, we are confronted with determining what mitigating impact, if any, Ogner's family plight had upon the activities and responsibility of the appellant corporation.

We find that, between family problems and appellant's business, the only connection warranting our consideration is contained in a self-serving declaration of Ogner to the effect that had his attention to business not been diverted by personal problems the odometer setbacks would not have occurred. We are constrained to observe, however, that there is no evidentiary basis in the record to support a conclusion that had Ogner not had any family problems the same odometer violations would not have occurred.

At the original administrative hearing, it was established that during the years 1969 and 1970 appellant prospered, sales and operation were good and a subsequent departmental audit found that compliance with the code was exemplary -- with the exception of the 5 odometer setbacks. No mention was made before the hearing officer of any family problems contributing to the violations. To the contrary, Ogner testified that he entrusted his department heads to enforce his policies of compliance with the law and "probably did not" ever personally check the demonstrator records. Further, Ogner

testified at the hearing that an internal investigation failed to reveal how the violations occurred but did reveal appellant "had some very poor controls in effect". Pressed by appellant's own counsel, Ogner went so far as to admit that no controls were in effect relating to odometer resets governing demonstrators.

In view of all of the foregoing, arriving at a conclusion that Ogner's family problems constitute relevant substantial evidence in mitigation of appellant's derelictions would require us to indulge in conjecture and speculation. This we decline to do.

Having duly considered the paramount matter of mitigation presented by this appeal, we reiterate the requirement that a corporation be subject to license discipline for the negligent or wrongful acts of its officers, agents or employees (Bob Frink Chevrolet, Inc. v. Department of Motor Vehicles supra). As we stated in Imperial Motors v. Department of Motor Vehicles, A-20-72:

> "A corporate licensee is responsible for all acts of its officers, agents and employees acting in the course and scope of their employment. A contrary rule would, of course, preclude meaningful license discipline." (See also Bishop-Hansel Ford v. Department of Motor Vehicles, A-39-73; Main Toyota, Inc. v. Department of Motor Vehicles, A-37-73.)

With the responsibility of the appellant corporation fixed under the foregoing rule, we nevertheless are required to decide each case on its own merits (Main Toyota, Inc. v. Department of Motor Vehicles supra). In the instant case, as supported by the

evidence of record and the director's findings, we have a dealership with an otherwise excellent record, corporate officers who had no participation in the odometer setbacks (although those actually culpable could not be identified), and the initiation of definitive and effective corrective measures and policies. In light of these and all the other circumstances in this case, we view an actual suspension of fifteen (15) days to be harsh. An actual suspension of seven (7) days, coupled with a revocation, stayed, with a one-year period of probation gives sufficient notice to all concerned that license discipline is a matter of serious import. Further, such modification of penalty will not be inimical to the public welfare.

All the findings of fact and determination of issues are affirmed. For the reasons stated, the New Motor Vehicle Board, pursuant to Sections 3054(f) and 3055 Vehicle Code, amends the decision of the Director of Motor Vehicles as follows:

WHEREFORE, THE FOLLOWING ORDER IS HEREBY MADE:

The vehicle dealer's license, certificate and special plates (D-137) heretofore issued to appellant, Ogner Volkswagen, Inc. are, and each is, hereby revoked; provided, however, that the effectiveness of said order of revocation shall be stayed for a period of one year from the effective date of this final order, during which time the appellant shall be placed on probation to the Director of the Department of Motor Vehicles upon the following terms and conditions:

The vehicle dealer's license, certificate and special plates (D-137), heretofore issued to appellant, Ogner Volkswagen, Inc.,

are suspended for a period of seven (7) days.

Appellant, and its officers, directors and stockholders shall comply with the laws of the United States, the State of California and its political subdivisions, and with the rules and regulations of the Department of Motor Vehicles.

If appellant, or any of appellant's officers, directors or stockholders, is convicted of a crime, including a conviction after a plea of nolo contendere, such conviction shall be considered a violation of the terms and conditions of probation.

In the event appellant shall violate any of the terms and conditions above set forth during the period of the stay, then the Director of Motor Vehicles, after providing appellant due notice and an opportunity to be heard, may set aside the stay and impose the stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and appellant's license fully restored.

This Final Order shall become effective October 11, 1974.

WINFIELD J. TUTTLE

PASCAL B. DILDAY

THOMAS KALLAY

ROBERT A. SMITH

MELECIO JACABAN

W. H. "HAL" McBRIDE

JACK B. VANDENBERG

A-54-74

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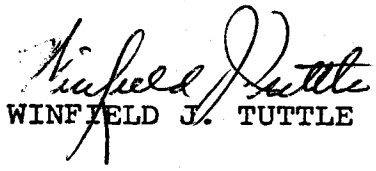

WINFIELD J. TUTTLE

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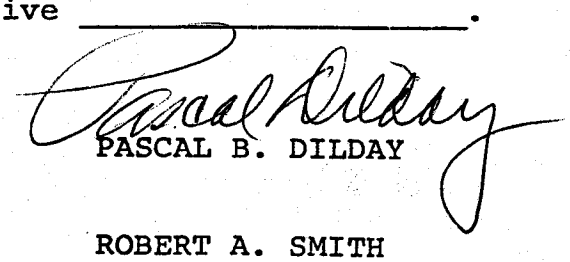

PASCAL B. DILDAY

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ROBERT A. SMITH

MELECIO JACABAN

W. H. "HAL" McBRIDE

Jack B. Vandenberg

JACK B. VANDENBERG

A-54-74

2415 First Avenue
P. O. Box 31
Sacramento, CA 95801
(916) 445-1888

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Appeal of KING DODGE SALES, INC., dba KING DODGE, A Delaware Corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-55-74 FILED: July 25, 1975

Time and Place of Hearing:	10:30 a.m., June 11, 1975 Room 114, 1220 N Street Sacramento, CA 95814
For Appellant:	Harold C. Wright Brown, Wright & Kucera A Law Corporation 2600 El Camino Real, Suite 411 Palo Alto, CA 94306
For Respondent:	Honorable Evelle J. Younger Attorney General By: Steve Egan Deputy Attorney General

FINAL ORDER

King Dodge Sales, a Delaware 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 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. Appellant failed in 56 instances to give written notice to the department before the end of the third business day after transferring the vehicles.
2. Appellant failed in 235 instances to mail or deliver the report of sale of vehicles, together with other documents and fees required to transfer the registration within the 20-day period allowed by law.
3. Appellant failed in 26 instances to mail or deliver the report of sale of the vehicles, together with other documents and fees required to transfer the registration of the vehicles, within the 30-day period allowed by law, having previously paid to the department the $3.00 forfeiture fee as provided for in Section 4456.5(a) of the Vehicle Code.
4. Appellant employed and delegated the duties of a vehicle salesman to Daniel A. Lopez from April 14, 1974, to September 24, 1974, who had not been licensed as such pursuant to the Vehicle Code and whose license was not displayed on appellant's premises.
5. Appellant caused advertisements to be published in the Sacramento Bee on or about August 11, 1972, October 8, 1972, November 10, 1972, and November 12, 1972, which were misleading in that appellant advertised specific

vehicles without identifying them by either vehicle identification number or license number so that prospective purchasers could recognize them as the vehicle advertised for sale.

6. Appellant caused advertisements to be published in the Sacramento Bee on October 8, 1972, November 10, 1972, and November 12, 1972, which were misleading in that the vehicles pictured in connection with such advertisements were not available for purchase with the equipment as depicted at the advertised price of such vehicle.

7. Appellant in 48 instances charged purchasers of vehicles excessive registration fees.

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

8. Appellant is a high volume dealership. Its gross sales volume was over $5,000,000 in 1971 and exceeded $7,000,000 in 1972. Vehicle sales average approximately 200 units per month. Chrysler Corporation owns 75% of the stock, with the balance owned by Appellant's president Gene Acherman. Mr. Acherman is in general overall charge of day-to-day operation of the business. The responsibilities of a dealer with respect to timely reporting of transactions is well known to Appellant. It had a

procedure for processing its Department of Motor Vehicles work which would have effected compliance had it been properly implemented. Appellant's problem seems to have been an absence of the type of staff supervision necessary to insure that proper and prescribed procedures were followed. The result was a high incidence of late filings and incorrect or incomplete filings. Fee overcharges that should have been detected were overlooked and not detected and corrected until brought to Appellant's attention by the Department's selective audit. Mr. Acherman does intend to have Appellant operate in compliance with the requirements, however, this can be done only if adequate manpower and supervision are assigned to the task.

9. With respect to the unlicensed salesman, appellant's general manager, who hired Mr. Lopez, was aware of the established policy of appellant that no salesman was to be allowed on the floor unless he was properly licensed. For some reason not explained in the evidence, the policy was not followed with respect to Lopez. When this omission was brought to the attention of appellant's president on September 24, 1972, Lopez was immediately sent to the Department office where his license was issued that day.

10. Appellant does a great deal of advertising and makes use of the services of an advertising firm for this purpose. Appellant cannot remove from itself responsibility for its advertising by employing an independent advertising firm. Advertisements were published for inadequately identified vehicles where no price was shown because Mr. Acherman believed, in error, that identification was not necessary if no price was advertised. The advertisement for the Dodge Sport Coupe depicted a vehicle with special roof and wheels that was not available at the advertised price of $2388. The use of the words "Special Wheels and Roof Trim Optional" did not correct the misleading nature of the advertisement in that to the uninformed the overall impression of the advertisement was that the vehicle shown could be had for $2388. Appellant's violation with respect to the advertisements resulted from error in judgment and in the applicable law. These misconceptions were apparently shared by the advertising firm. Appellant did have an after the fact procedure for attempting to correct discussed errors in that the newspaper which published the offending copy was requested to write a letter of correction which appellant then posted in its showroom. Appellant had no adequate procedure for reviewing agency prepared copy before it was published. It is found, however, that appellant did not engage in

any scheme or design of publication of misleading advertising.

PENALTY

The director, adopting the proposed decision of the hearing officer, suspended appellant's dealer license, certificate and special plates for 5 days with 3 days stayed for one year on the usual probationary terms.

BASIS OF APPEAL

Appellant predicates its appeal on the grounds that: (1) the department has proceeded without or in excess of its jurisdiction; (2) the department has proceeded in a manner contrary to the law; (3) the decision is not supported by the findings; (4) the facts are not supported by the weight of the evidence; (5) the determination of penalty, as provided in the decision of the department, is not commensurate with the findings.

As to the first issue, appellant asserts that the findings of the director are inadequate, in particular, because appellant introduced substantial evidence concerning the department's use of certain documents and that the hearing officer made no findings relative to specific defenses raised at that hearing. Our observations and conclusion in Thiel Motors, Inc. vs. Department of Motor Vehicles, A-33-72, are dispositive of this issue. In that case, we stated:

"Section 3054, subsection (d), Vehicle Code, requires us [the board] to use the independent judgment rule when reviewing the evidence."

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 as to facts offered in mitigation and defense. Further, we have considered the legal arguments propounded by appellant in his brief and find them to be without merit.

Having independently weighed all the evidence in light of the whole record, we determine that all of the findings, as found by the director, are supported by the evidence. We further find that the department has not exceeded its jurisdiction nor has it proceeded in a manner contrary to law. Accordingly, all of the Findings of Fact and Determination of Issues relative thereto are affirmed.

Having carefully and fully considered and weighed all of the matters established by the appellant in mitigation and defense in this case, we find the penalty to be entirely commensurate with the findings.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This Final Order shall become effective August 25, 1975.

THOMAS KALLAY

ROBERT A. SMITH

MELECIO H. JACABAN

AUDREY B. JONES

PASCAL B. DILDAY

WINFIELD J. TUTTLE

JOHN D. BARNES

JOHN B. VANDENBERG

A-55-74

This Final Order shall become effective_____.

THOMAS KALLAY

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Audrey B. Jones

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A-55-74

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THOMAS KALLAY	ROBERT A. SMITH
MELECIO H. JACABAN	AUDREY B. JONES
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JOHN D. BARNES	JOHN B. VANDENBERG

A-55-74

This Final Order shall become effective Thomas Kallay.

THOMAS KALLAY ✓

MELECIO H. JACABAN

PASCAL B. DILDAY

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King Dodge vs DMV
New Motor Vehicle Bd.

A-55-74

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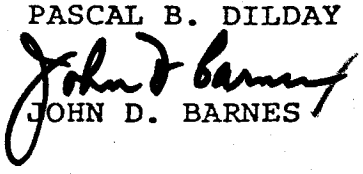

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A-55-74

GETZ, AIKENS & MANNING
ATTORNEYS AT LAW
SUITE 770
5900 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90036
TELEPHONE (213) 937-4730

DE WITT M. MANNING
CAMERON B. AIKENS (1916-1966)
GEORGE E. LEAVER
JOSEPH E. BERBERICH
WALTER F. BRUDER, JR.
CAROL A. DOCAN

OF COUNSEL
A. J. GETZ

August 27, 1974

Leonard Reiss, Executive Secretary
New Car Dealers Policy and Appeals
Board
Department of Motor Vehicles
P. O. Box 1828
Sacramento, California 95809

Re: Accusation Against Ladin Buick

Dear Mr. Reiss:

Enclosed please find Notice of Abandonment and Withdrawal of Appeal which we wish filed in behalf of Ladin Buick.

Very truly yours,

George E. Leaver

GEL/sp

Enc.

GETZ, AIKENS & MANNING
ATTORNEYS AT LAW
SUITE 770
5900 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90036
TELEPHONE (213) 937-4730

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GEORGE E. LEAVER
JOSEPH E. BERBERICH
WALTER F. BRUDER, JR.
CAROL A. DOCAN

OF COUNSEL
A. J. GETZ

June 14, 1974

New Car Dealers Policy and Appeals Board
Department of Motor Vehicles
P.O. Box 1828
Sacramento, California 95809

Attention: Mr. Leonard Reiss, Executive Secretary

Re: Accusation of Marck Motors
Case No. D-1316

Dear Mr. Reiss:

Enclosed please find Marck Motors' Abandonment and Withdrawal of the above-referenced Appeal, a copy of which has been served on the Department.

Very truly yours,

GEORGE E. LEAVER of
GETZ, AIKENS & MANNING

GEL:jrf
Enclosure

P. O. Box 31
2415 First Avenue
Sacramento, CA 95801
(916) 445-1888

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of JOHN STEGEMANN, INC., a California corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-58-74 FILED: November 6, 1974

Time and Place of Hearing: 1021 "O" Street, Room A-2
Sacramento, CA 95814

For Appellant: Conrad L. Cox, Esq.
Bell, Cox & Mannon
Attorneys at Law
P. O. Box 419
Ukiah, CA 95482

For Respondent: R. R. Rauschert, Chief
Legal Section
Department of Motor Vehicles
By: Henry J. Ahler
Legal Counsel

FINAL ORDER

John Stegemann, 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 Section 11500 et seq. Government Code.

The Director of Motor Vehicles, adopting the proposed decision of the hearing officer, found that: (1) it was not established by a preponderance of the evidence that appellant, by and through its employees, disconnected, turned back or reset an odometer or caused the same to be done; and (2) appellant submitted to the department in payment for obligations and fees due the state, nine checks, totalling $2,037.00, which checks were dishonored or payment refused by the banks upon which they were drawn.

The director additionally found that appellant established the following facts by way of mitigation:

1. Beginning in February, 1973, and up to and through October, 1973, John Stegemann, president and holder of 50% of outstanding shares of appellant corporation, negotiated with Motors Holding Division, a subsidiary of General Motors Corporation, for a joint stockholder relationship which would result in the injection of fresh capital for a newly constituted Delaware corporation doing business as John Stegemann, Inc.
2. Pursuant to said negotiations, appellant corporation assigned its hold-back funds, held by General Motors Corporation, on June 4, 1973, to Savings Bank of Mendocino County, said assignment resulting in an

immediate credit of from $18,000 - $32,000.

3. Pursuant to a verbal agreement, the assistant vice president of said bank agreed not to debit appellant corporation's account for the full amount in order to avoid payment of a high interest rate. As a result, the aforenoted checks were written with insufficient funds in appellant corporation's account.

4. All monies due and owed the Department of Motor Vehicles have now been paid by appellant corporation, including penalties.

The director, adopting the proposed decision of the hearing officer, imposed a penalty providing for revocation of the appellant's license, certificate and special plates, with the revocation stayed for a period of one year's probation and with actual suspension for a period of 5 days.

Appellant predicates its appeal on the grounds that: (1) the hearing officer abused his discretion as the decision is not supported by the findings and the findings are not supported by the weight of the evidence; (2) Section 11705(13) California Vehicle Code, which appellant was found to have violated, is unconstitutional; and (3) the penalty is not commensurate with the findings. In its notice of appeal, appellant indicated a desire to augment the record "by producing evidence not available at the hearing through reasonable diligence".

We will turn our attention first to the matter of appellant's

request to augment the record. At the hearing before this board, appellant, through counsel, made an offer of proof which in essence followed the affidavit filed as an exhibit to the notice of appeal.

In its offer of proof, appellant contended that if augmentation were permitted, it could show it had good cause to believe sufficient funds were on deposit to cover the checks, that the bank exercised its right of set-off without notice; and that if the bank had known the date upon which new capital would have been available, it would not have exercised its right of set-off. Further, the offer of proof hinted at "lack of due process" by a recitation that appellant was not represented at the administrative hearing by an attorney and was not fully cognizant of its rights to subpoena witnesses.

As to the issue of "due process", the record clearly establishes that appellant was advised of its rights to be represented by counsel, but elected not to do so. Additionally, there is no indication in this case that the department failed in its obligation to properly advise the appellant in this respect or that appellant was in any way misled or misconstrued its rights. Concededly, Mr. Stegemann, who appeared for appellant at the administrative hearing, was not an attorney, but there is no requirement that "a defendant, as a prerequisite to defending himself, demonstrate either the acumen or learning of an attorney." (Borror v. Department of Investment (1971), 15 Cal.App.3d 531.)

We are satisfied that appellant understood the nature and full

implications involved in this case. There is no basis for concluding that appellant was not accorded a full and fair hearing or was denied due process of law. (Underwood Ford Mercury, Inc. v. Department of Motor Vehicles, A-43-73.)

As to matters which appellant requested to establish by way of augmentation proceedings, evidence in support thereof was available for presentation at the time of the administrative hearing. There was no showing before this board that such evidence could not have been produced with the exercise of reasonable diligence. Accordingly, we deem our denial of the request to augment the record to have been proper. (Section 3054(e) Vehicle Code.)

Even assuming that appellant has been permitted to produce additional evidence, the administrative record clearly establishes that: (1) the bank returned the checks in question because there were insufficient funds on deposit to cover them; and (2) that the date of consummation of the transaction which would have supplied new capital was uncertain and delayed for many reasons to the point where the bank decided to "get Mr. Stegemann's attention" by dishonoring appellant's checks. What action the bank would have taken regarding set-off (new matter raised by the offer of proof) would now be of little probative value, predicated on pure conjecture, and could only be viewed retrospectively with regard to a "fact accomplished". To put this matter finally to rest, we need but allude to appellant's oral argument before this board wherein it conceded that it had issued "bad checks" and

pleaded a cause for modification of penalty.

Before turning to the matter of penalty, two other issues raised by this appeal merit brief comment.

Appellant contends that, based on the posture of the evidence, the hearing officer abused his discretion by determining that appellant violated Section 11705(13) Vehicle Code. We observe that the mere fact that appellant might weigh the evidence differently and disagree with the findings of fact and determination of issues in a proposed decision, does not, absent anything more, make out a case of abuse of discretion by the hearing officer. Moreover, it is the decision of the director which is the basis of this appeal and not the proposed decision of the hearing officer. Suffice it to say, the director adopted the proposed decision and there is no indication that he abused his discretion in any way. This assignment of error is deemed to be devoid of merit.

Should there be any reservations as to the propriety of our disposition of the foregoing allegation of error, we need but revert to our holding in Thiel Motors v. Department of Motor Vehicles, A-33-72 (also compare Ogner Volkswagen, Inc. v. Department of Motor Vehicles, A-54-74) wherein we refer to Section 3054, subsection (d), of the Vehicle Code. That section requires 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 (citing Park Motors, Inc. v. Department of Motor Vehicles, A-27-72; Weber and Cooper v. Department of Motor Vehicles, A-20-71). Applying this rule, we are satisfied that the decision is supported by the findings and that the findings are supported by the weight of the evidence in the light of the whole record reviewed in its entirety. All of the findings of fact and determination of issues are therefore affirmed.

Regarding the constitutionality of Section 11705, we consider our comments in Suburban Ford v. Department of Motor Vehicles, A-35-73, to be dispositive of this issue.

> "The weight of authority supports the position that the power to determine the constitutionality of legislation is not committed to administrative agencies. (See Public Utility Commission v. U. S. (1918), 355 U.S.534, 539; Panitz v. District of Columbia (DC Cir 1940) 112 F2d 39, 42; 3 Davis, Administrative Law Treatise, §20.04 (1958)."

(See also Cal. Admin. Agency Practice, Sec. 2.28.)

Accordingly, in this case, as in Suburban Ford v. Department of Motor Vehicles, supra, we make no findings or determinations concerning the constitutionality of the cited section of the Vehicle Code.

As to the appropriateness of penalty, we have very carefully considered all of the evidence of record and the matters in mitigation and extenuation. Clearly, appellant was in deep financial

difficulty and was issuing checks anticipating overdrafts. In these circumstances, we view with most serious concern appellant's remissness in properly discharging its business and financial obligations which resulted in the dishonored checks and violations of the Vehicle Code. Consequently, any reduction or modification of the penalty imposed by the decision of the director would be totally unwarranted.

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.[1/]

This Final Order shall become effective December 6, 1974.

WINFIELD J. TUTTLE	AUDREY B. JONES
THOMAS KALLAY	PASCAL B. DILDAY
ROBERT A. SMITH	MELECIO H. JACABAN
JOHN ONESIAN	JOHN B. VANDENBERG

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A-58-74

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John B. Vandenberg

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Audrey B Jones

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A-58-74

2415 First Avenue
P. O. Box 31
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Appeal of CAMINO DATSUN A California Corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-59-74 FILED: July 30, 1975

Time and Place of Hearing: 10:30 a.m., July 9, 1975
The Center for Legal Advocacy
3200 Fifth Avenue
Sacramento, California

For Appellant: Harold C. Wright
Brown, Wright & Kucera
A Law Corporation
2600 El Camino Real, Suite 411
Palo Alto, CA 94306

For Respondent: Honorable Evelle J. Younger
Attorney General
By: Harold W. Teasdale
Deputy Attorney General

FINAL ORDER

Camino Datsun, 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 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. Appellant failed in 227 instances to mail or deliver the report of sale of vehicles, together with other documents and fees required to transfer the registration of vehicles, within the 20-day period allowed by law.
2. Appellant failed in 141 instances to mail or deliver the report of sale of vehicles, together with other documents and fees required to transfer the registration of vehicles, within the 30-day period allowed by law, having previously paid to the department the $3.00 forfeiture fee provided for in Vehicle Code Section 4456.5(a).
3. Appellant in 24 instances included as an added cost to the selling price of the vehicle additional registration fees in excess of the fees due and paid to the state.
4. On or about August 6, 1972, appellant sold and delivered to Mark Harland a 1968 Chevrolet which appellant misrepresented to be a 1969 year model, thereby causing Mark Harland to suffer a loss on the transaction.
5. On April 13, 1971, a department warning letter was forwarded to the appellant advising it that its compliance with the vehicle registration laws did not meet acceptable standards. The evidence established, however, that said warning letter was not in fact brought to the attention of

anyone in the management working for appellant.

6. Appellant advertised in the San Jose Mercury and San Jose News a Datsun for a sale price of $1,725.00 from December 1, 1972, to December 17, 1972. The evidence failed to establish to the necessary degree of certainty that the appellant did not intend to sell the vehicle for that price.

7. Appellant advertised in the San Jose Mercury and San Jose News a Datsun for a sale price of $1,625, on or about February 14, 1973. The evidence failed to establish to the necessary degree of certainty that the appellant did not intend to sell the vehicle for that price.

8. On or about December 7, 1972, appellant caused Gary T. Dawes to suffer a loss of approximately $475.00 through fraudulent representations made in connection with the sale of a Datsun.

9. On or about February 14, 1973, appellant caused Morris W. Marshall to suffer a loss of approximately $525.00 through fraudulent representation in connection with the sale of a Datsun.

10. On February 21, 1973, appellant advertised for sale in the San Jose Mercury and San Jose News, a Datsun, VIN LB110478569, which had been sold more than 48 hours earlier.

11. On December 17, 1974, appellant advertised for sale in the San Jose Mercury and San Jose News, a Datsun, VIN PL510415354, which had been sold more than 48 hours earlier.

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

Appellant introduced evidence which established the following:

1. In 1972 appellant sold 4,589 new and used vehicles, gross sales from all its operations of $13,657,701. Approximately 85 persons are employed.
2. During the time the advertisements were run in the newspapers as found in Paragraphs 10 and 11 above, human errors had developed in appellant's system of keeping current inventory records, so that the advertised vehicles were lost track of.
3. On the sale of the 1968 Chevrolet as found in Paragraph 4 above, appellant's immature records incorrectly listed it as a 1969 model.
4. In connection with the sales referred to in Paragraphs 4, 8 and 9 above, appellant made prompt appropriate refunds to the customers involved after the Department of Motor Vehicles' investigation revealed the facts.
5. Appellant was very cooperative with the department and its investigators during all phases of their investigation.

The director, adopting the proposed decision of the hearing officer, imposed a penalty as follows:

For the 20-day notice violation, 10 days' suspension; for failure to report in 30 days, 10 days' suspension; for the overcharges, 5 days' suspension; for the misrepresentation as to year of automobile, one-day suspension; for fraudulent representation made in connection with the sale of Datsun, VIN PL510415354, a 15-day suspension; for fraudulent representation made in connection with the sale of Datsun VIN LB110478569, a 15-day suspension; for the violations of advertising for sale of two automobiles which had been sold more than 48 hours earlier, 5 days' suspension each. All the forementioned periods of suspension to run concurrently, for a total period of suspension of 15 days; provided, however, that 10 days of said period of suspension is stayed for a period of one year under the usual terms and conditions of probation.

BASIS OF APPEAL

Appellant bases his appeal on the following specific intentions:

1. The department proceeded without or in excess of its jurisdiction;
2. The department's procedure in the matter is contrary to law;

3. The decision is not supported by the findings;
4. The findings are not supported by the weight of the evidence in light of the whole record reviewed in its entirety, including any and all relevant evidence adduced at any hearing of the board;
5. The determination of penalty, as provided in the decision of the department, is not commensurate with the findings.

This appeal came on for hearing on July 9, 1974. We deem only two issues raised by this appeal to be of sufficient merit to warrant discussion; i. e., the sufficiency of the findings and the propriety of penalty.

As to the first issue, appellant contends that the findings of the hearing officer, and as adopted by the director, are deficient in that they are mere recitals of the statutory language of the pleadings and contain no formal findings of fact. Appellant feels that these recitals do not give sufficient weight to the evidence presented by it in mitigation and rebuttal of the accusations. We agree with the department that the findings comply with the requirements of law. However, we do feel that a more detailed or expanded finding of fact would be a benefit to this board as well as to the appellant.

Further, we are required, by Section 3054, subsection (d), Vehicle Code, to use the independent judgment rule when reviewing

the evidence presented at a hearing (Thiel Motors, Inc. vs. Department of Motor Vehicles, A-33-72, and Ogner Volkswagen vs. Department of Motor Vehicles, A-54-74). Pursuant to this mandate, we have independently reviewed the administrative transcript, and our decision is based upon such review. Any failures, if such did eixst, of the director or hearing officer to make specific findings of fact as to any factors in mitigation or in defense, are thereby obviated. Accordingly, we find that appellant's contention is without merit, as the decision and the findings are supported by the weight of the evidence in the whole record.

With regard to the penalty imposed by the director, the board takes notice of appellant's extremely high sales volume. In spite of the nearly 9,000 vehicle sales in 1971 and 1972, the department found no 3-day late reporting violations. The hearing officer found no intentional violations, either in the technical or in the advertising allegations. Also, neither the appellant nor its officers have had prior disciplinary action taken against them. Having duly and carefully considered and weighed the evidence presented during the hearing, the board is disposed to reduce the penalty imposed by the director.

Pursuant to Section 3054, subsection (f) and Section 3055 of the Vehicle Code, the New Motor Vehicle Board amends the decision of the Director of Motor Vehicles as follows:

WHEREFORE, the following order is hereby made:

The vehicle dealer's license, certificate and special plates (D-3592) heretofore issued to appellant, Camino Datsun, Inc., are hereby suspended for the following periods:

1. For the violations set forth in Finding III, 5 days, with 4 days stayed.
2. For the violations set forth in Finding IV, 5 days, with 4 days stayed.
3. For the violations set forth in Finding V, 5 days, with 5 days stayed.
4. For the violations set forth in Finding VII, one day, with one day stayed.
5. For the violations set forth in Finding XI, 10 days, with 8 days stayed.
6. For the violations set forth in Finding XII, 10 days, with 8 days stayed.
7. For the violations set forth in Finding XIII, 5 days, with 5 days stayed.
8. For the violations set forth in Finding XIV, 5 days, with 5 days stayed.

All the aforementioned periods are to run concurrently, for a total period of suspension of 10 days, provided; however, that 8 days of said suspension is stayed for a period of one year from the effective date of this Final Order, during which time the appellant shall be placed on probation to the Director of Motor

Vehicles upon the following terms and conditions:

Appellant shall comply with the laws of the United States, the State of California and its political subdivisions, and with the rules and regulations of the Department of Motor Vehicles.

If the appellant is convicted of a crime, including a conviction after a plea of nolo contendre, such conviction shall be considered a violation of the terms and conditions of probation.

In the event appellant shall violate any of the terms and conditions above set forth during the period of the stay, then the Director of Motor Vehicles, after providing appellant due notice and an opportunity to be heard, may set aside the stay and impose the stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and the appellant's license fully restored.

This Final Order shall become effective August 29, 1975.

JOHN ONESIAN

PASCAL B. DILDAY

AUDREY B. JONES

ROBERT A. SMITH

JOHN B. VANDENBERG

WINFIELD J. TUTTLE

A-59-74

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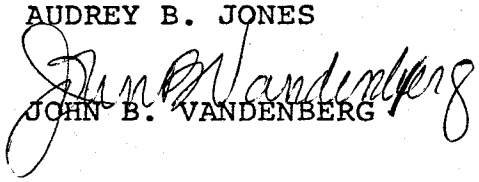

JOHN B. VANDENBERG

WINFIELD J. TUTTLE

A-59-74

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A-59-74

Camino Datsun VS DMV

P. O. Box 31
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(916) 445-1888

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of ALMADEN VOLKSWAGEN, A California corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-60-74 FILED: July 21, 1975

Time and Place of Hearing: March 12, 1975, 10:30 a.m.
Federal Building, Room 12138
450 Golden Gate Avenue
San Francisco, CA 94102

For Appellant: Donald McNeil, Esq.
Ruffo, Ferrari & McNeil
101 Park Center Plaza, Suite 1300
San Jose, CA 95113

For Respondent: Honorable Evelle J. Younger
Attorney General of the
State of California
By: Robert E. Murphy
Deputy Attorney General

FINAL ORDER

Almaden Volkswagen, 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 dealer's license by the Department of Motor Vehicles following proceedings pursuant to Section 11500 et seq. Government Code.

FINDINGS OF DIRECTOR OF MOTOR VEHICLES

The director, adopting the proposed findings of the hearing officer, found:

1. Appellant failed in 22 instances to give written notice to the department before the end of the third business day after transferring the vehicles.
2. Appellant failed in one instance to give written notice to the department before the end of the fifth day of business after transferring of a vehicle.
3. Appellant failed in 247 instances to mail or deliver reports of sale (together with documents and fees) to the department within the 20-day period allowed by law.
4. Appellant failed in 5 instances to mail or deliver reports of sale of vehicles together with other documents and fees required within the 30-day period allowed by law.
5. Appellant in 23 instances charged purchasers of vehicles excessive registration fees.

6. In a prior case (D-1182) dated November 12, 1971, entitled "In the Matter of the Accusation of Almaden Volkswagen, A California Corporation, Respondent," the Director's Decision contained the following terms:

   (a) Respondent [Appellant] was granted a probationary vehicle dealer's license for a period of one year from and after the effective date of the decision, to wit, March 27, 1972.

   (b) That most of the violations alleged in the current accusation against appellant accrued during the above-mentioned probationary period.

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

1. The above charges resulted from a pre-announced review-audit by the department which was conducted on June 25 through June 27, 1973.
2. Such review covered transactions during the year 1972 in which approximately 800 vehicles were sold. Of said sales some 65 were selected at random for this audit.
3. Further, this was a routine probationary-license review and encompassed a search for such violations as those pertaining to contract, vehicle equipment, safety equipment, advertising, consumer complaints and the like. No such violations were found. In fact, the dealer jackets were in excellent order, the contracts were

all complete and in good shape and all of the records reviewed were in proper condition except for the month of December of 1972. Further, the departmental investigators checked with three customers with respect to overcharges by the respondent [appellant] and in each of these instances determined that said customers had been voluntarily repaid by the respondent [appellant]. In this latter regard it was the policy of respondent [appellant] to make such refunds immediately upon determining that such overcharges had been made and, with respect to the twenty-three items, set forth in charge VIII of the Accusation, all of these excess charges were likewise remitted by respondent [appellant].

4. Many of the violations were directly attributable to internal management operations of the respondent [appellant]. Such problems were, at least in part, due to the lack of definite guidelines and policies by reason of the absence of the owner of some 95% of the stock of this corporate respondent [appellant]. This person was also the president of the corporation. While he made periodic appearances at the place of business such was not adequate to rectify said problems.

5. Approximately June 30, 1974 the respondent [appellant] went out of business by reason of change of ownership. At that time there were no pending vehicle transactions.

subsequently, on July 2 or 3, 1974 the respondent [appellant] surrendered its license at the request of an investigator from the Department.

6. One David A. Griffith joined the respondent [appellant] firm in February of 1972 as a business manager and by December of 1972 was promoted to its vice-president. This person made a conscientious and commendable effort to inject order into the business. However, because of his relative inexperience he was unable to cope with all situations at all times even though he was fully aware that the respondent [appellant] corporation had its previous license revoked and a probationary license issued. Currently this person is the owner and general manager of Olympic Volkswagen located in Port Angelus in the State of Washington. Said business is not associated with the corporate respondent's [appellant's] officers, directors or stockholders. Mr. Griffith was fully cooperative with the departmental investigators and promised to immediately rectify any and all violations. Mr. Griffith may, at some indefinite time in the future, desire to return to California and again be associated with vehicle sales.

PENALTY

The director, adopting the proposed decision of the hearing officer, imposed as a penalty the revocation of appellant's dealer license and special plates No. D-3702.

BASIS OF APPEAL

Appellant contends:

1. The department has proceeded in excess of its jurisdiction;
2. The department has proceeded in a manner contrary to law;
3. The decision is not supported by the findings;
4. The findings are not supported by the weight of the evidence in the light of the whole record reviewed in its entirety; and
5. The determination of penalty as provided in the decision of the department is not commensurate with the findings.

It must first be noted that the appellant does not take issue with the findings of fact as set forth by the hearing officer and adopted by the Director of Motor Vehicles. Appellant's only assertion is that the penalty imposed of revocation of the license is not justified in light of the facts offered in mitigation thereof and the fact that the appellant had gone out of business and surrendered his license to the Department of Motor Vehicles prior to the time the department had initiated administrative action against the appellant's license for said violations.

We were not persuaded that the penalty imposed was too severe in light of the mitigating arguments made by appellant. One would expect that, having been placed on probation, a licensee would exercise an extremely high degree of care in its dealing with the public and in its internal procedures in order to comply with the

requirements imposed by the California Vehicle Code. The penalty of revocation imposed in this case is fully justified by petitioner's conduct combined with the fact that the conduct occurred during a probationary period.

In its opening brief and in its argument before the board, appellant argued that the department lacked jurisdiction to take action against appellant's license once appellant had surrendered same to the Department of Motor Vehicles. The board, after considering the oral argument on this issue, directed both the counsel for the department and for the appellant to submit additional briefs on the issue of the Department of Motor Vehicles' jurisdiction over a licensee after same had surrendered its license to the department. After reviewing these subsequent briefs, we were not persuaded by appellant's argument that Vehicle Code Section 11721(c), which provides that the surrender of a license or the cessation of business shall not prevent the filing of an accusation for revocation or suspension of a surrendered license, is unconstitutional. As stated in the brief filed by the Department of Motor Vehicles, California Vehicle Code Section 11721(c)[1/] gives the department the power to file an accusation for revocation or suspension of a surrendered license.

Regarding the constitutionality of §11721(c), we consider our holding in Suburban Ford vs. Department of Motor Vehicles (A-35-73)

1/ Erroneously referred to in respondent's brief filed with the New Motor Vehicle Board on April 9, 1975 as Vehicle Code §11703.

to be dispositive of the issue.

> "The weight of authority supports the position that the power to determine the constitutionality of legislation is not committed to administrative agencies. (See Public Utility Commission v. U.S. (1918) 355 U.S. 534, 539; Panitz v. District of Columbia (DCCir 1940) 112 F.2d 39, 42; 3 Davis, Administrative Law Treatise, §20.04 (1958)." (See also Cal. Admin. Agency Practice, Section 2.28.)

Accordingly, in this case, as in Suburban Ford vs. Department of Motor Vehicles, supra, we make no findings or determinations concerning the constitutionality of the cited section of the Vehicle Code.

As to the appropriateness of the penalty, we have carefully considered all of the evidence contained in the record which constituted matters in mitigation and extenuation. Clearly, appellant had committed numerous violations of the Vehicle Code during a period of probation imposed for prior violations. In these circumstances, we view with most serious concern appellant's neglect in properly discharging its legal obligation in the conduct of its business. Consequently, any reduction or modification of the penalty imposed by the decision of the director would be totally unwarranted. We find the penalty to be entirely appropriate and commensurate with the findings.

We wish to express, however, that if Mr. David Griffith[2/] wishes to apply for a license to sell motor vehicles in the State of California, this decision should in no way impair his ability to obtain a license.

2/ David A. Griffith joined Almaden Volkswagen in February of 1972 as business manager and by December of 1972 was promoted to its vice president.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This Final Order shall become effective August 21, 1975.

THOMAS KALLAY

ROBERT A. SMITH

MELECIO H. JACABAN

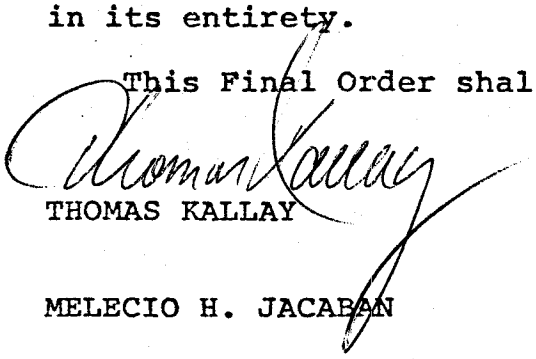
JOHN B. VANDENBERG

JOHN D. BARNES

A-60-74

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This Final Order shall become effective_____.



THOMAS KALLAY

ROBERT A. SMITH

MELECIO H. JACABAN

JOHN B. VANDENBERG

JOHN D. BARNES

A-60-74

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This Final Order shall become effective_____.

THOMAS KALLAY

ROBERT A. SMITH

Melecio H. Jacaban

MELECIO H. JACABAN

JOHN B. VANDENBERG

JOHN D. BARNES

A-60-74

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This Final Order shall become effective_____.

THOMAS KALLAY

ROBERT A. SMITH

MELECIO H. JACABAN

JOHN B. VANDENBERG

JOHN D. BARNES

A-60-74

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This Final Order shall become effective_____.

THOMAS KALLAY

ROBERT A. SMITH

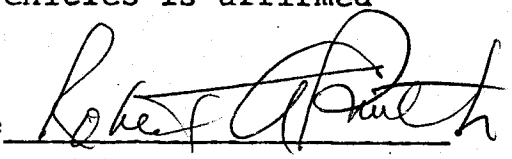
MELECIO H. JACABAN

JOHN B. VANDENBERG

JOHN D. BARNES

A-60-74

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This Final Order shall become effective 

THOMAS KALLAY

ROBERT A. SMITH

MELECIO H. JACABAN

JOHN B. VANDENBERG

JOHN D. BARNES

A-60-74

2415 First Avenue
P. O. Box 31
Sacramento, CA 95801
(916) 445-1888

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Appeal of SAN LEANDRO DATSUN, A California Corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-61-74 FILED: July 25, 1975

Time and Place of Hearing: 1:30 p.m., July 9, 1975
The Center for Legal Advocacy
3200 Fifth Avenue
Sacramento, California

For Appellant: Harold C. Wright
Brown, Wright & Kucera
A Law Corporation
2600 El Camino Real, Suite 411
Palo Alto, CA 94306

For Respondent: Honorable Evelle J. Younger
Attorney General
By: Matthew Boyle
Deputy Attorney General

FINAL ORDER

San Leandro Datsun, a California corporation, 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. Appellant failed in 13 instances to give written notice to the department within three days after transfer of vehicles.
2. Appellant failed in 49 instances to mail or deliver report of sale (with documents and fees) to the department within 20 days.

   (With respect to #2 above, it was further found that in 19 instances incomplete documents were reported to the department within said 20-day period but because said documents were incomplete same were returned by the department field office to permit the dealer to complete the documents or supply the missing material and return same to the department. In all instances, said documents were subsequently returned to the department after the 20-day period. Appellant offered evidence about the return of said documents to the dealer in the first instance as evidence in mitigation; however, the hearing officer found said evidence is, in fact, evidence in aggravation, in that it showed the submission of the documents in improper form or in incomplete form by the

dealer, from which an inference of carelessness may be drawn.)

3. Appellant in 31 instances charged purchasers of vehicles excessive registration fees.

(With respect to #3 above, appellant in 10 instances, which were originally listed in the accusation as violations for excessive registration fees, sold vehicles pursuant to an agreed cash price representing the total amount of the sale. No security agreements were involved in any of such sales. Appellant used the total agreed price to the customer in which to "back into" to determine the sales tax and license and registration fees, then subtract the same from the gross selling price to produce a net sales price, plus taxes and fees. Appellant did not, therefore, as to such items include any added cost to the selling price of the vehicles. In several instances, had the price of the dealer-installed accessories been included by the dealer in the figure reported to the department on the application for registration of new vehicles, it was stipulated that the department's rating would have been the same as the dealer's at the time the contract of sale was entered into by the parties. The correct fees were collected by the dealer when including the price of the dealer-installed accessories; but the dealer reported incorrect

fees in that they were not based on the full retail price to the customer; i. e., the base figure reported to the department did not include the dealer-installed accessories. In 5 instances of overcharge, the dealer had no explanation for the fee overcharges other than that they were determined by an employee erroneously.

Appellant, upon being advised by the department representative of having overcharged the purchasers, refunded all overcharges designated by the department representative, including those involving gross sales and in one instance paid back to the purchaser the same overcharges twice at the request of such department representative.)

4. The appellant proved the following additional and mitigating facts:

   (a) With respect to Nos. 1 and 2 above, a large number of the items transferred in said findings were during the months of January, February and March 1973. During these months of each year, the department is heavily engaged in handling registration and licensing fees for the current calendar year and the department nevertheless carries on with the processing of dealer transactions, producing a larger volume of business at that time of year than in the remainder of the year. The dealers are also subject to defective mail service in

attempting to comply with Vehicle Code Section 5901; however, the department gives the dealers five additional mailing days to the time set by said section.

(b) Appellant has been owned and operated and managed by Donald Carlson and his son Richard Carlson. Donald Carlson entered the automobile business when he was going to high school. In 1971, he began to limit his activities which included Department of Motor Vehicles work. The business was thereafter mainly operated by Richard Carlson, Vice-President of the company and 28 years of age. He has been in the automobile business for about seven years. His father, Donald Carlson, is president of the company. Richard Carlson did indicate that he knew appellant was overcharging customers as herein above set forth in Finding 3 but he readily reimbursed any customer who complained thereof and fully followed all requests of department representatives to render any customer whole. Said Carlsons and appellant's employees fully cooperated with department representatives at all times. Appellant has operated the same location since 1959. Appellant is endeavoring through its employees to properly rate its vehicles, to

correctly report the registration fees due thereon and to limit its collection from customers to only such fees as are properly due. Also, appellant's employees are now paying close heed to the requirements of Section 5901 and 4456 of the Vehicle Code. Appellant's records show that its average monthly payroll in 1973 is about $24,630.11 and that its overhead in 1973 was about $41,755.82. In 1973 appellant had 23 employees including 5 salesmen; in 1972 appellant had 4 salesmen. Appellant's records show that it paid more fees to the department than it collected from customers.

The director, adopting the proposed decision of the hearing officer, imposed a penalty of 60 days' suspension with 53 days stayed for one year probationary period on the usual terms and conditions. Neither the hearing officer nor the department, in adopting the proposed decision, specifically delineated penalties for each violation.

BASIS OF APPEAL

Appellant predicates its appeal on the grounds that:

1. The findings are inadequate.
2. That the decision does not reflect appellant's testimony and other direct evidence in defense and in mitigation of the charges of late dealer notices, late

transfers, and overcharged Department of Motor Vehicle fees.

3. That the penalty is excessive.

We will turn our attention first to appellant's contention that the findings adopted by the director were inadequate. While we concur with the department that the findings are legally adequate and are supported by an extensive body of case law, we feel that the order adopted by the department should specify the penalty assessed for each violation. Not only does a detailed penalty help this board in reviewing the record, it also serves as a guide to the appellant in its attempt to comply with the decision and to make the necessary changes in his operation so that similar types of violations are not reoccurring.

As to the second issue on appeal; i. e., that the decision does not reflect the appellant's testimony and other direct evidence in defense and mitigation of the charges, our observations and conclusions in Bob Frink Chevrolet, Inc. vs. Department of Motor Vehicles, A-46-73, are dispositive of the issue. In that case, we stated:

> "...Section 3054, subsection (d), Vehicle Code, requires the board to use the independent judgment rule when reviewing the evidence (Thiel Motors, Inc. vs. Department of Motor Vehicles, A-33-72, and cited cases). 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.

We turn next to the matter of the appropriateness of penalty. After a complete review of the record and after receiving oral argument and answers to questions asked by board members at the hearing on this appeal, any assertion that the acts or omissions of the appellant which served as a basis for the violations found by the department are wilful, cannot be sustained. This especially applies to the inference that could be drawn from statements in the decision about Richard Carlson's knowledge concerning overcharges in light of the testimony given by Mrs. Ruby DeSmith and by Mr. Carlson.

We take note of the fact that the instances, which served as the basis for the accusation, were technical violations only, that no wilful intent was found, that the appellant has an otherwise excellent record and has initiated definite and effective corrective measures and policies. In light of these and all other circumstances in this case, we view a 60-day suspension with 53 days stayed for one year to be harsh. A 10-day suspension with 9 days stayed for one year period of probation gives sufficient notice to all concerned that license discipline is a matter of serious import. Further, such modification of penalty will not be inimical to the public welfare.

All the Findings of Fact and Determinations of Issues are affirmed except as to the hearing officer's Finding VI(b) and to any inference of willfulness on the part of Mr. Richard Carlson. With regards to penalty, for the reasons stated, the New Motor Vehicle Board, pursuant to Section 3054(f) and 3055 of the Vehicle Code, amends the Decision of the Director of Motor Vehicles as follows:

WHEREFORE, the following order is hereby made:

The vehicle dealer's license, certificate and special plates (D-7721) heretofore issued to appellant, San Leandro Datsun, a corporation, are suspended for a period of 10 days; provided, however, that 9 days of the said 10-day period of suspension is stayed for a period of one year from the effective date of this Final Order during which time the appellant shall be placed on probation to the Director of Motor Vehicles upon the following terms and conditions:

Appellant shall comply with the laws of the United States, the State of California and its political subdivisions, and with the rules and regulations of the Department of Motor Vehicles.

If the appellant is convicted of a crime, including a conviction after a plea of nolo contendre, such conviction shall be considered a violation of the terms and conditions of probation.

In the event appellant shall violate any of the terms and conditions above set forth during the period of the stay, then the

Director of Motor Vehicles, after providing appellant due notice and an opportunity to be heard, may set aside the stay and impose the stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and the appellant's license fully restored.

This Final Order shall become effective August 25, 1975.

JOHN ONESIAN

ROBERT A. SMITH

AUDREY B. JONES

JOHN B. VANDENBERG

WINFIELD J. TUTTLE

PASCAL B. DILDAY

A-61-74

Director of Motor Vehicles, after providing appellant due notice and an opportunity to be heard, may set aside the stay and impose the stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and the appellant's license fully restored.

This Final Order shall become effective_____.

JOHN ONESIAN

Audrey B. Jones

AUDREY B. JONES

ROBERT A. SMITH

JOHN B. VANDENBERG

WINFIELD J. TUTTLE

PASCAL B. DILDAY

A-61-74

Director of Motor Vehicles, after providing appellant due notice and an opportunity to be heard, may set aside the stay and impose the stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and the appellant's license fully restored.

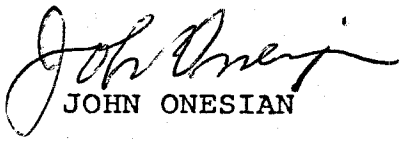
This Final Order shall become effective _____.

JOHN ONESIAN	ROBERT A. SMITH
AUDREY B. JONES	JOHN B. VANDENBERG
WINFIELD J. TUTTLE	PASCAL B. DILDAY

A-61-74

Director of Motor Vehicles, after providing appellant due notice and an opportunity to be heard, may set aside the stay and impose the stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and the appellant's license fully restored.

This Final Order shall become effective_____.



JOHN ONESIAN

ROBERT A. SMITH

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JOHN B. VANDENBERG

WINFIELD J. TUTTLE

PASCAL B. DILDAY

A-61-74

Director of Motor Vehicles, after providing appellant due notice and an opportunity to be heard, may set aside the stay and impose the stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and the appellant's license fully restored.

This Final Order shall become effective_____.

JOHN ONESIAN

ROBERT A. SMITH

AUDREY B. JONES

JOHN B. VANDENBERG

WINFIELD J. TUTTLE

PASCAL B. DILDAY

Pascal Dilday

San Leandro Datsun vs DMV

A-61-74

Director of Motor Vehicles, after providing appellant due notice and an opportunity to be heard, may set aside the stay and impose the stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and the appellant's license fully restored.

This Final Order shall become effective_____.

JOHN ONESIAN

ROBERT A. SMITH

AUDREY B. JONES

JOHN B. VANDENBERG

WINFIELD J. TUTTLE

PASCAL B. DILDAY

A-61-74

Director of Motor Vehicles, after providing appellant due notice and an opportunity to be heard, may set aside the stay and impose the stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and the appellant's license fully restored.

This Final Order shall become effective_____.

JOHN ONESIAN

ROBERT A. SMITH

AUDREY B. JONES

JOHN B. VANDENBERG

WINFIELD J. TUTTLE

Winfield J. Tuttle

PASCAL B. DILDAY

A-61-74

2331 Burnett Way
P. O. Box 31
Sacramento, CA 95801
(916) 445-1888

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Appeal of ARNOLD WIEBE BUICK-PONTIAC-GMC, INC., Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-62-75 FILED: October 3, 1975

Time and Place of Hearing:	10:30 a.m., September 10, 1975 Room 4061, 722 Capitol Mall Sacramento, CA 95814
For Appellant:	Marc A. Stefano Attorney at Law 222 West Shaw, Suite 302 Fresno, CA 93704
For Respondent:	Honorable Evelle J. Younger Attorney General By: Edna Walz Deputy Attorney General

FINAL ORDER

Arnold Wiebe Buick-Pontiac-GMC, 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 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. Appellant failed, in 63 instances, to give written notice to the department within 3 days after transfer of vehicles.
2. Appellant failed, in 562 instances, 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 within the 20-day period allowed by law.
3. Appellant reported to the department a false date of sale, in 2 instances, and did thereby make a false statement or conceal a material fact in the application for registration of such vehicles.
4. On or about October 16, 1972, to on or about March 15, 1973, appellant employed or delegated the duties of a vehicle salesman to Rocksy Jude Radcliff, who had not been licensed and whose license was not displayed on appellant's premises.
5. Appellant, in 41 instances, included as an added cost to the selling price of vehicles, additional licensing or transfer fees in excess of the fees due and paid to the state.
6. Between August 24, 1972 and November 14, 1972, appellant had in its possession, for resale, a 1970 Opel automobile, license no. 001BCL. The preponderance of the evidence and the reasonable inferences to be made therefrom established that the odometer was set back by appellant's

employee or employees to reduce the mileage indicated by approximately 10,000.

In addition, the director, adopting the hearing officer's proposed decision, made the following findings:

1. The reporting deficiencies above found were, in part, the result of appellant's employment of inexperienced people and numerous employee turnovers that occurred during the period of time herein involved. Appellant has since employed more knowledgeable and experienced personnel for performance of the reporting function.
2. The false dates of sale reported in connection with the 2 vehicles in question resulted from an unauthorized delivery of used cars from an unlicensed dealer by appellant's sales manager, since dismissed, and the subsequent discovery by appellant of such delivery and ratification of the two sales.
3. The use of an unlicensed vehicle salesman resulted from appellant's sales manager's belief that because he was the manager, he need not be licensed. Upon his being informed by department representatives that the law required that he be licensed, Rocksy Jude Radcliff made application for and has since received the license.
4. Appellant's overcharges have been refunded and appellant has instructed its employees to avoid overcharging.
5. Appellant has issued orders to its employees prohibiting rollbacks and notifying them that they will be discharged if caught doing it.

6. During the period March, 1972 to January, 1973, appellant corporation was not under the direct supervision and control of its president, Arnold Wiebe. President Wiebe's time and attention were occupied during this period of time with matters related to the kidnapping of his daughter and the trial of those charged with the crime.

The director, adopting the hearing officer's proposed decision, imposed a penalty of 30 days' suspension with 26 days stayed for a period of one year's probation under the usual terms and conditions.

The two issues raised by the appellant on appeal are that, 1) the circumstances contained evidence in mitigation of the charges, and 2) the penalty is excessive.

Appellant contends that the decision of the director does not reflect the evidence presented in mitigation of the charges. In particular, appellant points to the circumstances surrounding the kidnapping of Arnold Wiebe's daughter and the resultant impact upon the dealership by Mr. Wiebe's absence and lack of attention thereto.

In Bob Frink Chevrolet, Inc. vs. the Department of Motor Vehicles, A-46-73, the board made the following observation:

> "...Section 3050, subsection (d), Vehicle Code, requires the board to use the independent judgment rule when reviewing the evidence (Thiel Motors, Inc. vs. Department of Motor Vehicles, A-33-72, and cited cases). 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 factor."

It should be noted that the hearing officer found, and the director adopted the finding, that the dealership was not under

the direct supervision and control of Mr. Wiebe during the period of his daughter's kidnapping. Thus, this evidence in mitigation was considered in arriving at the penalty imposed.

With regard to the severity of the penalty imposed by the director, the board is compelled to consider all the aspects of appellant's conduct. Appellant had received two warning letters prior to the filing of the present accusation. Over 1,500 late transfers occurred in the interim (3 years) between the dates of these letters. The appellant had not established, at the time of the administrative hearing before the Department of Motor Vehicles, procedures to record or control the number of late transfer violations.

Even though the evidence does not indicate that Arnold Wiebe had any personal knowledge of, or in any manner condoned, the odometer tampering, he must, nevertheless, assume full responsibility for the acts of his employees and for vehicles in his possession and control. The director, adopting the findings of the hearing officer, found that the preponderance of the evidence and the reasonable inferences to be drawn therefrom indicated that the appellant's employees were involved in the odometer tampering. The board finds sufficient evidence in the record to support this finding.

The above-mentioned violations, as well as the other violations found by the hearing officer and adopted by the director, indicate a careless disregard for the applicable laws regulating motor vehicle sales. The board, therefore, finds that the penalty imposed is entirely appropriate. Any reduction or modification of the penalty would be totally unwarranted.

Having weighed all the evidence in light of the whole record reviewed in its entirety, we determine that all of the findings, as found by the director, are supported by the evidence. The evidence in mitigation was duly considered and the penalty imposed is not excessive. Accordingly, all the Findings of Fact and Determination of Issues relating thereto are affirmed.

This final order shall become effective November 3, 1975.

JOHN ONESIAN

MELECIO H. JACABAN

WINFIELD J. TUTTLE

JOHN B. VANDENBERG

JOHN D. BARNES

A-62-75

Having weighed all the evidence in light of the whole record reviewed in its entirety, we determine that all of the findings, as found by the director, are supported by the evidence. The evidence in mitigation was duly considered and the penalty imposed is not excessive. Accordingly, all the Findings of Fact and Determination of Issues relating thereto are affirmed.

This final order shall become effective_____.

JOHN ONESIAN

MELECIO H. JACABAN

WINFIELD J. TUTTLE

Winfield J. Tuttle

JOHN B. VANDENBERG

JOHN D. BARNES

A-62-75

Having weighed all the evidence in light of the whole record reviewed in its entirety, we determine that all of the findings, as found by the director, are supported by the evidence. The evidence in mitigation was duly considered and the penalty imposed is not excessive. Accordingly, all the Findings of Fact and Determination of Issues relating thereto are affirmed.

This final order shall become effective _____.

Melecio H. Jacaban

JOHN ONESIAN

MELECIO H. JACABAN

WINFIELD J. TUTTLE

JOHN B. VANDENBERG

JOHN D. BARNES

A-62-75

Having weighed all the evidence in light of the whole record reviewed in its entirety, we determine that all of the findings, as found by the director, are supported by the evidence. The evidence in mitigation was duly considered and the penalty imposed is not excessive. Accordingly, all the Findings of Fact and Determination of Issues relating thereto are affirmed.

This final order shall become effective_____.

JOHN ONESIAN

MELECIO H. JACABAN

WINFIELD J. TUTTLE

JOHN B. VANDENBERG

JOHN D. BARNES

A-62-75

Having weighed all the evidence in light of the whole record reviewed in its entirety, we determine that all of the findings, as found by the director, are supported by the evidence. The evidence in mitigation was duly considered and the penalty imposed is not excessive. Accordingly, all the Findings of Fact and Determination of Issues relating thereto are affirmed.

This final order shall become effective_____.

JOHN ONESIAN

MELECIO H. JACABAN

WINFIELD J. TUTTLE

JOHN B. VANDENBERG

JOHN D. BARNES

A-63-75

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A-63-75

2331 Burnett Way
P. O. Box 31
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(916) 445-1888

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Appeal of HUBACHER CADILLAC, INC., a Delaware Corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-63-75 FILED: October 10, 1975

Time and Place of Hearing: 1:30 p.m., September 10, 1975
Room 4061, 722 Capitol Mall
Sacramento, CA 95814

For Appellant: David A. Riegels, Esq.
Diepenbrock, Wulff, Plant & Hannegan
455 Capitol Mall, Suite 800
Sacramento, CA 95814

For Respondent: Honorable Evelle J. Younger
Attorney General
By: Frank A. Iwama
Deputy Attorney General

FINAL ORDER

Hubacher Cadillac, Inc., a Delaware corporation, 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 April 15, 1973, appellant caused to be published in the Sacramento Union, a newspaper of general circulation in the Sacramento, California, area, an advertisement containing the following:

> "During the month of April ... all '73 Demonstrators have been placed on sale."
>
> "Save up to $1400 from window sticker prices."

Subsequently, Department Investigator Stanley Scott contacted appellant's president, Elmer Hubacher, and notified him that the Department of Motor Vehicles considered the advertisement to be misleading.

(2) On Wednesday, November 14, 1973, appellant caused to be published in the Sacramento Bee, a newspaper of general circulation, an advertisement containing the following:

> "Demonstrator Sale Save $1600."
>
> "Save $1600 off the sticker price of the below listed 1973 Cadillac Demonstrators - all carry original factory warranty - plus an extended 24,000 mile warranty on all power-train components."

The advertisement was placed by appellant corporation without the personal knowledge of its president, Elmer Hubacher.

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

1. A demonstrator is a vehicle used by the dealership to demonstrate such vehicles to prospective customers.

2. A demonstrator is not a new vehicle.

3. The "sticker price" mentioned in the advertisements was intended by the appellant to be the price specified in the "label" required by Federal law to be attached to a new automobile by the manufacturer disclosing price information.

4. The purchase of a demonstrator for $1,400 or $1,600 off the "sticker price" does not constitute a savings of $1,400 or $1,600. The reduction in each case results in a sales price which approximates the market value of the used vehicle (demonstrator).

The director also adopted the hearing officer's determinations of the issues, as follows:

1. Appellant, through its agents and employees, has violated Section 11713(a), Vehicle Code, in the particulars set forth in the Findings of Fact.

2. Cause for suspension of the license, certificate and special plates has been established under Section 11705(10), Vehicle Code.

3. Cause has not been established under Section 11721(c) Vehicle Code.

4. A probationary order would be appropriate under the circumstances.

The director, adopting the hearing officer's proposed decision, imposed a penalty of five days' suspension with five days' stayed for a period of one year's probation under the usual terms and conditions.

Appellant raises four issues on appeal, as follows:

1. The director's decision is not supported by the evidence.
2. The director exceeded his authority in finding two violations when only one violation of the Vehicle Code was alleged.
3. The penalty is excessive.
4. The decision violates appellant's rights under the First and Fourteenth Amendments.

The decision of the board is directed primarily toward the merits of the appellant's first contention.

The department argues that the specified savings of $1,400 or $1,600 reflect the fair market value of the Cadillacs as used cars and, therefore, any comparison to the "savings off the sticker price" is misleading. The department further contends that "save" always implies savings off the market price and that it is misleading to use "save" in conjunction with the "sticker price" of a demonstrator, which is by definition, a used vehicle.

Appellant emphasizes that the ad clearly referred to the vehicles as demonstrators, and that such a comparison of the demonstrator price and the "sticker price" is one which the reasonable consumer would make; hence, such a comparison is reasonable and not misleading to the ordinary consumer. The appellant asserts that the advertisements simply indicate that the consumer can save $1,400 or $1,600 by buying a demonstrator rather than a comparable new car.

Though the respondent, at the administrative hearing, argued that the standard to be applied to misleading advertising is whether the "ignorant, unthinking, and credulous" would be misled, respondent's appeal brief (page 14) indicates that the test is greater than the "ignorant, unthinking, and credulous", but something less than the "reasonable man" standard which is advanced by the appellant.

No case law has developed under Vehicle Code Section 11713 as to the proper test to be applied to misleading advertising. Respondent would now have the board adopt the "likelihood of confusion" test that has been applied to Section 17500 of the California Business and Professions Code and which, respondent argues, by analogy should apply to Vehicle Code Section 11713 because of the similarity of language in the two sections.

The board has carefully considered the advertisements which are the subject of this accusation. In arriving at their decision, the board evaluated the advertisements in the light of the above-mentioned arguments. The board finds that the subject advertising did not mislead and is not misleading. This finding is the same, using either the standard advocated by the respondent (i.e., the "likelihood of confusion" test) or by the appellant (i.e., the "reasonable man" test). A purchaser would very likely read the ads and find it advantageous to purchase a demonstrator, rather than the comparable new car. The "sticker price" would be very relevant to the prospective purchaser of a demonstrator and would not be misleading.

While it is not material to this decision, the board further finds no wilfullness or intent to publish misleading advertisements on the part of the appellant. With regard to appellant's contention that the director exceeded his scope of authority in finding two violations when only one violation was charged, the board finds that the appellant was fully apprised of the charges against it by virtue of paragraphs 3, 4 and 5 of the accusation. The language of the accusation gave the appellant sufficient written notice of the charges involved, and to that extent, allowed appellant to prepare an adequate defense, as required by Section 11507 of the Government Code.

In view of its holdings on the above issues, the board does not reach the constitutional issues raised by the appellant.

For the reasons stated, we do 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 be come effective when served upon the parties.

JOHN ONESIAN

MELECIO H. JACABAN

WINFIELD J. TUTTLE

JOHN B. VANDENBERG

JOHN D. BARNES

A-63-75

While it is not material to this decision, the board further finds no wilfullness or intent to publish misleading advertisements on the part of the appellant. With regard to appellant's contention that the director exceeded his scope of authority in finding two violations when only one violation was charged, the board finds that the appellant was fully apprised of the charges against it by virtue of paragraphs 3, 4 and 5 of the accusation. The language of the accusation gave the appellant sufficient written notice of the charges involved, and to that extent, allowed appellant to prepare an adequate defense, as required by Section 11507 of the Government Code.

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Melecio H. Jacaban

JOHN ONESIAN

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A-63-75

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In view of its holdings on the above issues, the board does not reach the constitutional issues raised by the appellant.

For the reasons stated, we do 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.

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WINFIELD J. TUTTLE

JOHN B. VANDENBERG

JOHN D. BARNES

A-63-75

ATTORNEYS AT LAW
124 SOUTH ISABEL STREET
GLENDALE, CALIFORNIA 91205
245-1846 - 240-4812

FILED
New Motor Vehicle Board
Date June 30, 1975
By Jacqueline A. Powell

Attorneys for Respondent

STATE OF CALIFORNIA

DEPARTMENT OF MOTOR VEHICLES

In the Matter of the Accusation of NARDUCCI LINCOLN MERCURY, INC., a corporation, Respondent.	Case no. D 1539 WITHDRAWAL OF NOTICE OF APPEAL AND REQUEST FOR HEARING

TO: THE NEW MOTOR VEHICLE BOARD, formerly known as THE NEW CAR DEALER'S POLICY AND APPEALS BOARD

AND TO: THE DEPARTMENT OF MOTOR VEHICLES THROUGH ITS ATTORNEYS, THE LEGAL SERVICE OF THE DEPARTMENT OF MOTOR VEHICLES

YOU, AND EACH OF YOU, are hereby notified that by reason of a stay order issued by the Director of the Department of Motor Vehicles staying the effective date of his decision to July 3, 1975, the Notice of Appeal and Request for Hearing mailed by the Respondent to the New Motor Vehicle Board by registered mail, return receipt requested on May 30, 1975, is hereby withdrawn without prejudice to file a new Notice of Appeal and Request for Hearing.

DATED: June 11, 1975.

CALABRO, CALABRO, CALABRO & CALABRO

By: A. A. Calabro
ALFRED A. CALABRO
Attorneys for Respondent

1b

2331 Burnett Way
P. O. Box 31
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(916) 445-1888

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Appeal of NARDUCCI LINCOLN-MERCURY, INC., a corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES, Respondent.	Appeal No. A-65-75 FILED: May 28, 1976

Time and Place of Hearing:	1:30 p.m. April 7, 1976 722 Capitol Mall Sacramento, CA 95814
For Appellant:	Alfred A. Calabro, Esq. Calabro, Calabro, Calabro & Calabro 124 South Isabel Street Glendale, CA 91205
For Respondent:	Honorable Evelle J. Younger Attorney General By: John J. Crimmins Deputy Attorney General

FINAL ORDER

Narducci Lincoln Mercury, Inc., a corporation, enfranchised as a new motor vehicle 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.

FINDINGS OF DIRECTOR OF MOTOR VEHICLES

The Director of Motor Vehicles, adopting the proposed decision of the hearing officer in its entirety, and after denying appellant's petition for reconsideration, found:

1. Appellant failed, in 17 instances, to give written notice to the department before the end of the 3rd business day after transferring a vehicle.
2. Appellant failed, in 11 instances, to give written notice to the department before the end of the 5th day after transferring a vehicle.
3. Appellant failed, in 3 instances, 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, within the 20-day period allowed by law.
4. Appellant failed, in 7 instances, 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, within the 30-day period allowed by law.
5. Appellant, in 3 instances, included as an added cost to the selling price of the vehicles, additional licensing or transfer fees in excess of the fees due and paid to the state.

Appellant refunded the excess to the purchasers sometime subsequent to the department's audit.

6. Appellant, in one instance, by means of a conditional sale contract, violated the law in that the conditional sale contract did not contain an accurate reflection of the amounts to be paid to the Department of Motor Vehicles for licensing and registration of the vehicle.

7. Appellant represented a vehicle as a used vehicle to the purchaser, Mr. Hepner, but the contract erroneously identified the car as a new vehicle. The automobile was purchased by Hepner with 17,000 recorded miles and the purchaser purchased same with the understanding that the vehicle was a used demonstrator. The purchaser received a settlement for various repairs and is pleased with his purchase.

8. Appellant represented a vehicle to the purchasers (the Hoechlins) as a new vehicle, when in fact the vehicle was a used vehicle under law, and the appellant knew this to be the case.

9. Appellant, in one instance, caused to be published an advertisement that a vehicle could be returned within 72 hours for a 100% money-back guarantee. On or about January 19, 1973, appellant sold the aforementioned vehicle to Thelma Reeder. Within the time and conditions prescribed, the purchaser attempted to exercise the guarantee but was flatly refused. Appellant's

refusal was a flagrant breach of good faith and trust, and was itself an act of fraud. In aggravation, appellant's sale of the vehicle in the condition in which it was sold, was at least an act of bad faith, if it was not in itself a seperate act of fraud. The fact that the appellant acquiesced to a rescission at the hearing does not adequately ameliorate the situation.

10. The violations covered by findings 1 to 5 are chargeable to the use of an outside Department of Motor Vehicle service. The situation has been rectified by employing competent staff personnel.

The director adopted the hearing officer's proposed findings, proposed decision, and proposed penalty as follows: With regard to Findings 1 through 6, 5-day suspension for each finding. Finding 7 is dismissed. Finding 8, 10-day suspension. Finding 9, 45-day suspension. Suspensions to run concurrently, provided all but 10 days of suspension shall be stayed and appellant placed on probation for a period of three years upon the usual terms and conditions.

Appellant raises thirteen issues on appeal:

"1. The decision is not supportive by the findings.

"2. The findings are not supportive by the weight of the evidence.

"3. The determination or penalty as provided in the decision of the Department is not commensurate with the findings.

"4. The penalty is excessive.

"5. The penalty is not commensurate with penalties imposed in other cases assuming, but not admitting, that any of the findings are true.

"6. The Department has proceeded in excess of its jurisdiction.

"7. The Department has proceeded in a manner contrary to the law.

"8. Representatives of the Department of Motor Vehicles conducted an illegal search and seizure of the premises of the Respondent.

"9. Employees of the Respondent were not warned of their constitutional rights by representatives of the Department in the conduct of their investigation.

"10. Evidence was received by the Hearing Officer over the objection of the Respondent which had been illegally obtained in violation of the search and seizure provisions of the California and United States Constitutions and in violation of the rights of individuals to be warned of their constitutional rights by state employees in the conduct of an investigation.

"11. That the Respondent herein has been deprived of due process of law guaranteed to Respondent under the Constitution of the United States of America and the State of California.

"12. Respondent has been deprived of due process of law from the manner and procedure in which the administrative hearing was conducted and also resulting from the decision herein.

"13. That evidence was accumulated by the DEPARTMENT OF MOTOR VEHICLES in violation of the constitutional rights of the respondent and permitted to be introduced into evidence over the objection of the respondent."

The board does not address itself to the constitutional issues raised by the appellant. The board finds that the first three bases for appeal are dispositive in this case and we therefore do not examine appellants remaining contentions.

The board does not comment on the findings of the director, except as such findings relate to the Reeder transaction. This portion of the accusation relates to an alleged failure of the appellant to honor the terms of a 72 hour, 100 percent money back guarantee. For reasons, some of which are stated hereinafter, the board finds that the evidence produced and presented at the board's hearing does not sustain the findings and determinations of the director.

Mrs. Reeder testified at various times throughout the administrative hearing and the record discloses many discrepancies in her testimony. Mrs. Reeder was inconsistent and vague about the precise times at which she was present at the appellant's dealership. This witness was also unclear about the events

occurring during these trips to the dealership and whether a sufficiently clear demand for 100 percent refund was made within the appropriate 72 hour period. Counsel for the department, at the hearing before the board, totally failed to explain or clarify these matters.

The record discloses that Rayno Narducci, John McCrocklin, and Herb Werden testified on behalf of the appellant. The substance of their testimony was to the effect that Mrs. Reeder did not demand her money back until approximately one week after the sale. Contradicting Mrs. Reeder's testimony, Mr. McCrocklin and Mr. Werden testified that Mrs. Reeder only wanted the vehicle fixed and that Mrs. Reeder left the dealership each time after minor repairs were made.

Mr. Narducci testified that he was unaware of the problems experienced by Mrs. Reeder and that had he known he would have personally rectified the matter to the customer's satisfaction. In this same vein, Mr. Narducci took all steps necessary to satisfy the customers involved in the Hoechlin and Hepner transactions. Complete restitution was made to the Hoechlins, and Mr. Hepner received an equitable settlement with which he was totally satisfied.

Even after prodding by board members, counsel for the department was unable to provide the board with insight into the ambiguities and contradictions contained in the record before the board. Said counsel stated that the department was not concerned with any of the alleged violations other than the Reeder matter.

After independently reviewing the evidence presented in the administrative record viewed in its entirety, and based upon the oral argument before the board, we are unable to sustain the finding of the director in the Reeder transaction. The penalty is not supported by a preponderance of the evidence.

Pursuant to Section 3054 and 3055 of the Vehicle Code, the New Motor Vehicle Board amends the decision of the Director of Motor Vehicles as follows:

WHEREFORE THE FOLLOWING ORDER IS MADE:

The vehicle dealer's license, certificate and special plates (D-5258) heretofore issued to appellant, Narducci Lincoln-Mercury Inc., be and the same are hereby suspended for a period of five (5) days; provided, however, that the effectiveness of five (5) days 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 the appellant shall be placed on probation to the Director of the Department 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 insofar as said laws, rules and regulations govern the exercise of its privileges as a licensee.

If and in the event the Director 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 stayed portion of the suspension or otherwise modify the order. In the event the appellant shall faithfully keep the terms of the conditions imposed for the period of one year, the stay shall become permanent and the appellant shall be fully restored to all of its license privileges.

This Final Order shall become effective June 28, 1976.

JOHN ONESIAN

AUDREY B. JONES

JOHN D. BARNES

JOHN B. VANDENBERG

WINFIELD J. TUTTLE

A-65-75

If and in the event the Director 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 stayed portion of the suspension or otherwise modify the order. In the event the appellant shall faithfully keep the terms of the conditions imposed for the period of one year, the stay shall become permanent and the appellant shall be fully restored to all of its license privileges.

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A-65-75

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A-65-75

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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Appeal of CARL A. DeGREEF, INC., dba RIVIERA MOTORS, a California corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA Respondent.	Appeal No. A-66-75 FILED: May 28, 1976

Time and Place of Hearing: 10:30 a.m. April 7, 1976
722 Capitol Mall, Room 4061
Sacramento, CA 95814

For Appellant: Harold C. Wright, Esq.
Brown, Wright & Kucera
2600 El Camino Real, Suite 411
Palo Alto, CA 94306

For Respondent: Honorable Evelle J. Younger
Attorney General
By: Matthew P. Boyle
Deputy Attorney General

FINAL ORDER

Carl H. DeGreef, Inc., a California corporation, enfranchised as a new motor vehicle dealer, hereinafter referred to as "appellant", appealed to this board from a disciplinary action taken against the dealer's license by the Department of Motor Vehicles following proceedings pursuant to Section 11500 et seq. of the Government Code.

FINDINGS OF DIRECTOR OF MOTOR VEHICLES

Initially, the director did not adopt the hearing officer's proposed decision. After independently reviewing the administrative record, the director adopted the proposed findings of the hearing officer in their entirety and found:

1. Appellant failed, in 5 instances, 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 within the 20 day period allowed by law.
2. Appellant failed, in 2 instances, 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 within the 30 day period allowed by law.
3. Appellant, in 41 instances, included it as an added cost to the selling price of vehicles additional licensing or transfer fees in excess of the fees due in paid to the state. Appellant has made efforts to reimburse the purchasers.
4. Appellant's employees, in 5 instances, disconnected, turned back, or reset the odometer, or caused the same to be done, to reduce the mileage indicated on the odometer gauge.

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

1. Carl H. DeGreef, is president of the appellant, a corporation. The evidence fails to establish that Carl H. DeGreef was an active party to the odometer "spinbacks". The evidence does establish that he failed to exercise the supervision necessary to prevent "spinbacks" by his employees.
2. Appellant has adopted office procedures designed to minimize reporting deficiencies.
3. Carl H. DeGreef, and his wife own 98% of the shares of the appellant corporation.

The Director adopted the hearing officer's proposed decision and imposed the following penalty:

1. For the violations related to late transfers and overcharges, a penalty of five days suspension with five days stayed for a period of five years probation under the usual terms and conditions.
2. For the violations related to odometer tampering, the dealer's license was revoked with revocation stayed for a period of five years probation. A 10-day actual suspension was imposed.

The appellant's appeal is predicated primarily upon three grounds: First, the findings are not supported by the weight of the evidence in light of the record; second, the determination of the penalty is not commensurate with the findings; third, the department has proceeded in a manner contrary to the law.

Appellant does not seriously contest the substantive determinations made by the hearing officer with regard to the late transfers, overcharges, and odometer tampering. The evidence in the record clearly supports the findings that the events and transactions did occur. Therefore, appellant's appeal on this basis is without merit.

The appellant's second ground of appeal is based upon the penalty imposed for the above mentioned violations, particularly the penalty imposed for the odometer violations. The odometer tampering is undoubtedly the most serious offense in this accusation. The duties and responsibilities of a new motor vehicle dealer necessitate a high degree of care in dealing with the public. These responsibilities also require sufficient internal procedures to comply with the standards imposed by the California Vehicle Code. The director imposed a penalty which revoked the appellant's license, however, this revocation was stayed for a period of five years, during which the appellant was placed on probation. The appellant's license was actually suspended for a period of ten days.

After independently reviewing the record in its entirety, we are not persuaded that the penalty imposed was not commensurate with the findings. On the contrary, the penalty imposed in this case is fully justified by the appellant's conduct during the period in question.

The primary basis for the appellant's appeal relates to alleged unconstitutional and unconscionable delay in reaching an administrative resolution of this case. The board, pursuant to Section 3054(b) and Section 3055 Vehicle Code, may inquire into whether or not the department has proceeded in a manner contrary to law and if it finds the department has so proceeded, it may amend, modify, or reverse the penalty imposed by the department.

In its opening brief and its argument before the board, the appellant stressed that one of the purposes of an administrative action is to avoid the delays which are experienced in a normal civil court procedure by providing a forum for expedient resolution of such matters. (1 K. Davis, Administrative Law Treatise, Section 8.08 at 549.) This objective would be totally frustrated by unnecessary, unexplained, and unwarranted delays in the resolution of an administrative action.

The Department of Motor Vehicles is not required to render its decision within a specific period of time. However, this is not to say that the department has an unlimited time in which to render its decision. "Many enactments do not contain any specific time provision. In these cases, an agency would have a reasonable time in which to file its decision. What constitutes a reasonable time depends on the complexity and nature of the case." California Administrative Agency Practice (California C. E. B. 1970, at p. 212). Thus, the department must render its decision within a "reasonable time".

The following chronological summary will indicate the unexplained delays which occurred in the instant case. The accusation was filed on May 16, 1973. The administrative hearing was held September 12-19, 1973. At the close of the hearing, the department represented that it proposed to order the hearing transcript prior to preparing its opening argument. The hearing reporter submitted his cost estimate for preparation of the record on September 19, 1973, but the department failed to order the record. On October 30, 1973, appellant learned that the department had neither requested the record nor filed its opening argument, as established in the hearing officer's timetable. A new timetable was established and the department was to file its opening argument by November 28, 1973. The department did not filed its opening argument until January 29, 1974. Appellant filed a reply on February 27, 1974 and the department closed on March 19, 1974.

The hearing officer submitted his proposed decision to the department on June 19, 1974. Five months later, on November 18, 1974, the department filed that decision, together with a "Notice of Rejection of Proposed Decision". Appellant filed a written argument in opposition to the proposed decision of December 2, 1974. On March 31, 1975, appellant requested a hearing and an opportunity to present new evidence. The department responded to this letter on April 15, 1975, indicating that the proposed decision was still under consideration by the director. Appellant submitted several more letters in June and August, 1975, urging the director to

render a decision. The director's decision was finally filed on September 5, 1975. This decision contradicted the November 18, 1974, rejection of proposed decision, and adopted the original proposed decision of the hearing officer.

The appellant contends that the delay had significant detrimental effects upon the operation of the dealership. Until the decision was rendered, the appellant could not determine whether or not the license would be revoked unconditionally, as was intimated in the original notice of rejection of the decision of the hearing officer. Nissan Motor Company would not refranchise the appellant until certain improvements were made, and these improvements could not be made until it was determined whether or not the license would be revoked. During the intervening period of time, the DeGreefs have been divorced and Carl DeGreef has forfeited his community property interest in the dealership. During oral argument, counsel for the appellant indicated that Mrs. DeGreef was presently the dealer of record, however, negotiations were underway which would transfer the dealership within the week following the board's hearing.

It is clear that significant delay has been encountered. The administrative hearing was held September 12-19, 1973, but the decision was not rendered until September 5, 1975. Despite repeated attempts by the appellant to secure a decision, a decision was not rendered for two years following the date of the administrative hearing. Furthermore, no explanation was given for

this extended delay, with the possible exception of a change in the department's directorship.

The board is of the opinion, and we so hold, that this two-year delay was unnecessary, largely unexplained, and therefore was unreasonable. We believe that the two-year delay should be considered in arriving at an appropriate penalty. Consequently, the five year stay imposed by the department should be reduced by the amount of the delay, resulting in a three year stay of revocation and probation.

Pursuant to Section 3054 and Section 3055 of the Vehicle Code, the New Motor Vehicle Board modified the decision of the Director of Motor Vehicles as follows:

WHEREFORE THE FOLLOWING ORDER IS MADE:

The vehicle dealer's license, certificate, and special plates (D-4855 and TR-408) heretofore issued to appellant, Carl H. DeGreef, Inc., dba Riviera Motors, be and the same are hereby suspended and revoked as provided in the Director's Decision (D-1354) filed on September 4, 1975: provided, however, that this order of revocation shall be stayed for a period of three years from the effective date of this decision, during which time the appellant shall be placed on probation to the Department 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 insofar as said laws, rules and regulations govern the exercise of its privileges as a licensee.

If and in the event the Director 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 stayed portion of the suspension or revocation, or otherwise modify the order. In the event the appellant shall faithfully keep the terms of the conditions imposed for the period of three years, the stay shall become permanent and the appellant shall be fully restored to all of its license privileges.

This Final Order shall become effective June 28, 1976.

JOHN ONESIAN

AUDREY B. JONES

JOHN D. BARNES

JOHN B. VANDENBERG

WINFIELD J. TUTTLE

A-66-75

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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Appeal of PARAMOUNT CHEVROLET CO., a California corporation, Appellant, v. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-67-75(2) FILED: August 5, 1977

Time and Place of Hearing:	9:00 a.m., July 13, 1977 City Council Chambers City Hall 1685 Main Street Santa Monica, CA 90401
For Appellant:	Herbert D. Pearlson, Esq. Pearlson & Pearlson 9744 Wilshire Blvd., Suite 203 Beverly Hills, CA 90212 Of Counsel: Bernard W. Minsky, Esq.
For Respondent:	Alan Mateer, Esq. Chief Counsel Department of Motor Vehicles 2415 First Avenue Sacramento, CA 95818

FINAL ORDER

Appellant, Paramount Chevrolet Company ("Paramount") is a corporation licensed to do business as a new motor

vehicle dealer in California. A hearing officer found that grounds were established, pursuant to Vehicle Code §11705, to suspend or revoke appellant's dealer license and special plates. The Department of Motor Vehicles ("Department") adopted the findings of the hearing officer as well as the recommendation that appellant's license be suspended for a period of 15 days with 12 days of that suspension stayed for a period of one years probation. Paramount appealed from this decision of the Department. By its order of February 24, 1976, the Board affirmed the decision of the Director of Motor Vehicles in its entirety. Paramount then petitioned the Superior Court for the County of Los Angeles for a writ of mandamus under Code of Civil Procedure §1094.5 to set aside the decision of the Department of Motor Vehicles and the Board's final order. The Superior Court, by judgment entered April 28, 1977, found that with one exception the evidence supported the Board's findings and that the findings supported the Board's determinations and that the penalty assessed by the Board did not constitute an abuse of discretion. The court found that with respect to item 9 of Schedule A no violation of the Rees-Levering Act existed. Judgment was entered granting a preemptory writ of mandate remanding the proceedings to respondent New Motor Vehicle Board to reassess

the penalty in light of the courts findings of fact and conclusions of law

Pursuant to the request of Paramount, further argument concerning the penalty was heard by the Board at its regularly scheduled meeting July 13, 1977, in Santa Monica.

Prior decisions (Tom Coward Ford vs. Department of Motor Vehicles, Appeal No. A-71-76), and intervening legislation, particularly Vehicle Code §11707, indicates that the penalty originally assessed is not commensurate with the findings. Accordingly, the decision of the Department is reversed, and the Department is directed to reconsider the matter in light of this order and existing law, including but not limited to Vehicle Code §11707.

The decision of the Director is reversed.

This Final Order shall become effective August 12, 1977.

THOMAS KALLAY

JOHN D. BARNES

JOHN B. VANDENBERG

JOHN B. OAKLEY

ELVIRA ARMAN-REED

A-67-75

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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Appeal of PARAMOUNT CHEVROLET CO., a California corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-67-75 FILED: February 24, 1976

Time and Place of Hearing: 10:30 a.m., January 14, 1976
City Council Chambers
City Hall
1685 Main Street
Santa Monica, CA 90401

For Appellant: Herbert D. Pearlson, Esq.
Pearlson & Pearlson
404 N. Roxbury Drive, Suite 613
Beverly Hills, CA 90210

For Respondent: Honorable Evelle J. Younger
Attorney General
By: Richard M. Radosh
Deputy Attorney General

FINAL ORDER

Paramount Chevrolet Company, a California corporation, enfranchised as a new motor vehicle 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.

After independently reviewing the transcript, the director adopted the proposed findings of the hearing officer in their entirety and found:

1. Appellant failed, in one instance, to give written notice to the department within 3 days of the transfer of the vehicle.
2. Appellant failed, in 308 instances, 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, within the 20-day period allowed by law.
3. Appellant failed, in 21 instances, to mail or deliver the reports of sale of vehicles, together with other documents and fees required to transfer the registration of the vehicles, within the 30-day period allowed by law, having previously paid to the department the $3.00 forfeiture fee.
4. Appellant, in two instances, included as an added cost to the selling price of vehicles, additional licensing or transfer fees in excess of the fees due and paid to the state.
5. Appellant, in 4 instances, delivered vehicles to

purchasers without delivering to them a fully executed copy of the Conditional Sales Contract which contained in a single document all of the agreements of the parties, including any loans appellant had agreed to assist its purchasers to obtain from third parties, the amount of such loan, the finance charges, the total thereof, the number of installments scheduled to repay such loans, and the amount of each installment.

6. Evidence was insufficient to support the contention that appellant did not deliver to Frank Moreno a fully executed copy of the credit application.

7. Appellant failed, in one instance, to refund down payment on an unexecuted Conditional Sales Contract.

8. Evidence did not establish that an advertised vehicle was not intended for sale.

9. Appellant, in one instance, advertised a vehicle for sale when such vehicle was not actually for sale on the licensed premises.

10. Appellant, on April 28, 1972, advertised a vehicle for sale at a total price which did not include all costs to the purchaser, except sales tax, vehicle registration fees, and finance charges.

11. Appellant, in June and July 1972, advertised a vehicle for sale at a total price which did not include all costs to the purchaser, except sales tax, vehicle

registration fees, and finance charges.

12. Appellant, in one instance, advertised a vehicle for sale which vehicle had been sold more than 48 hours before the date of the advertisement.

13. On February 13, 1969, and on April 7, 1971, the department in writing informed appellant of reporting violations and requested that corrective measures be taken.

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

1. Appellant is a large volume new car dealer selling approximately 4,000 cars per year. It has been in the auto business since 1937. There are approximately 120 employees.

2. In September 1973, appellant hired a new office manager experienced in auto sales office management. The new office manager in turn hired a new but experienced DMV clerk in July 1974. Both were specifically employed and directed to reduce the number of reporting violations.

3. Appellant blames the late reporting in part on the ~~failure of lending agencies to properly remit title~~ documents following payoffs by appellant thereby preventing filing reports of sale within the proper time.

4. The violations of the Rees-Levering Act as to conditional sales contracts were occasioned by buyers who wanted the used car immediately but wanted to arrange for their own financing through credit unions and consumer loan agencies. These sales frequently occurred on weekends when such agencies were not open. On other occasions the loan application had to be referred to a loan committee and several days lapsed before approval was granted. In the interim, appellant and buyer executed a one-payment conditional sales agreement pending the placing and processing of permanent financing.

5. Appellant has revised his advertising policies to conform with advertising price regulations.

6. Appellant refunded the $300 down payment referred to in Finding of Fact VII, but not until the purchaser had filed a small claims court action.

The director, adopting the hearing officer's proposed decision, imposed a penalty of 15 days' suspension with 12 days stayed for a period of one year's probation under the usual terms and conditions. This results in an actual suspension of 3 days.

The appellant based his appeal on the following specific contentions:

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

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

3. The decision is not supported by the findings.

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

5. The determination or penalty, as provided in the decision from the department, is not commensurate with the findings.

6. Amendment, modification, or reversal of the decision.

We deem only three issues raised by this appeal to be of sufficient merit to warrant discussion: (1) the decision is not supported by the findings; (2) the findings are not supported by the weight of the evidence in light of the whole record reviewed in its entirety, including any and all relevant evidence adduced at any hearing of the board; and (3) the determination or penalty, as provided in the decision from the department, is not commensurate with the findings.

In its notice of appeal, appellant indicated a desire to augment the record by producing evidence at the board's hearing which in the exercise of reasonable diligence could not have been produced or which was improperly excluded at the administrative hearing.

The appellant was allowed to augment the record by introducing additional oral testimony at the board's hearing. This testimony related to matters largely outside the scope of the present inquiry, as it dealt primarily with personal problems and management difficulties occurring after the date of the department's accusation. Though the board considered these matters, the nature and relevancy of this additional evidence in mitigation is insufficient to justify a modification of the Decision of the Director of Motor Vehicles.

With regard to appellant's contention that the decision of the director is not supported by the findings, and that the findings are not supported by the weight of the evidence, the board has independently reviewed the evidence in light of the entire record. Pursuant to the legislative mandate of Section 3054(d) of the Vehicle Code, the board has utilized its independent judgment to analyze the evidence presented and to arrive at its determination. Applying this rule, the board is satisfied that the decision is supported by the findings and that the findings are supported by the weight of the evidence in light of the whole record reviewed in its entirety. All of the findings of fact and determination of issues are therefore affirmed.

As to the appropriateness of the penalty, we have very carefully considered all the evidence in the record and the matters in mitigation. The appellant has committed numerous

violations of the Vehicle Code and has indicated a lack of concern, until very recently, over the proper discharge of its legal obligations as a licensed new motor vehicle dealer. Any reduction or modification of the penalty would be totally unwarranted.

The Decision of the Director of Motor Vehicles is affirmed in its entirety.

This Final Order shall become effective March 26, 1976.

JOHN ONESIAN

MELECIO H. JACABAN

AUDREY B. JONES

JOHN D. BARNES

JOHN B. VANDENBERG

A-67-75

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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Appeal of SENATOR FORD, INC., a corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-68-75 FILED: April 8, 1976

Time and Place of Hearing:	10:30 a.m. February 18, 1976 722 Capitol Mall Sacramento, CA 95814
For Appellant:	James Quirk, Esq. 1722 J Street, Suite 3 Sacramento, CA 95814
For Respondent:	Honorable Evelle J. Younger Attorney General By: Carol Hunter Deputy Attorney General

FINAL ORDER

Senator Ford, Inc., a corporation, enfranchised as a new car dealer, hereinafter referred to as "appellant", appealed to this board from a disciplinary action taken against the dealer's license by the Department of Motor Vehicles following proceedings pursuant to Section 11500 et seq. of the Government Code.

FINDINGS OF DIRECTOR OF MOTOR VEHICLES

Initially, the director did not adopt the hearing officer's proposed decision. After independently reviewing the administrative record, the director adopted the proposed findings of the hearing officer in their entirety and found:

1. Appellant failed, in one instance, to give written notice to the department before the end of the third business day after transferring the vehicle.
2. Appellant failed, in three instances, to give written notice to the department before the end of the fifth day after transferring the vehicles.
3. Appellant failed, in 449 instances, to mail or deliver the reports of sale of vehicles, together with other documents and fees required to transfer the registration of the vehicles within the 20-day period allowed by law.
4. Appellant, in 35 instances, included as an added cost to the selling price of the vehicle additional licensing or transfer fees in excess of the fees due and paid to the state.
5. Appellant, in one instance, arranged through an independent finance agency for a loan on behalf of a customer which was used as payment in connection with such vehicle purchase without reflecting the loan transaction on the conditional sale contract, thereby violating Civil Code Section 2982(a).

6. Appellant, in one instance, obtained signatures of the buyers of the vehicles on a conditional sale contract which did not include in a single document true and complete agreement of the parties and thereafter made delivery of the vehicle in violation of Civil Code Section 2982(a).

7. Appellant, in one instance, delivered a vehicle to the purchaser without giving her a copy of the credit application she was required to sign, thereby violating Civil Code Section 2982(a).

8. Appellant, in one instance, represented to the purchasers, Jensen and Christine Kuan, that:

   (a) Said vehicle was a new car; (b) Said vehicle had never been sold before; (c) The purchasers would be provided with a new car warranty; (d) The base price of the vehicle was $5,341. Said representations were false or misleading in that: (a) Said vehicle had been previously sold and delivered to Michael and Lynn Warner on or about September 7, 1974; (b) The base price of the vehicle was $5,216. The purchasers did receive a new car warranty. These false and misleading representations were made by appellant's salesmen in a manner not warranted by the information available

to the salesman and constituted fraud. The purchasers did suffer injury as a result of the fraud.

9. Appellant, in relation to the vehicle described in Finding VIII, knowingly made a false statement that said vehicle was a new vehicle, when in fact said vehicle was a used vehicle within the meaning of Vehicle Code Section 665 in that said vehicle had been sold and delivered to Robert and Lynn Warner. Appellant offers no credible explanation of the attempt to register the vehicle as a new car sale to the Kuan's. Subsequently, appellant did file a corrected application showing the vehicle as used. The Kuan's did not learn until February 1975 that appellant's representations to them as to the vehicle being new were false. At that time, the appellant was well aware that the vehicle had been misrepresented. The appellant attempted to cover up its misrepresentation by prevailing upon Mrs. Kuan to make written acknowledgement that she knew the car was used when purchased. As an inducement to Mrs. Kuan to sign the false acknowledgment, appellant informed her that if she didn't do so appellant would not provide the free service and checkups which she was entitled to receive as purchaser of the vehicle. The

Kuan's refused to make the requested false statement and complained to Ford Motor Company in Michigan. Thereafter, the Kuan's were informed by Ford that they could return the vehicle and receive their money back.

10. Appellant has been in business since September 1971. Volume is approximately 300 units per month. It has had considerable difficulty in obtaining and retaining competent personnel to handle the Department of Motor Vehicles work. Turnover in that job has been frequent. Appellant has made efforts to improve that portion of its operation. When informed by the Department of Motor Vehicles auditor of the overcharges listed in Finding IV, refunds were promptly made. These overcharges were the result of employee error. Appellant uses a system whereby sales personnel calculate the fees during the evenings, weekends, or other periods when the DMV girl is not at work. Appellant now checks papers immediately upon return from the Department of Motor Vehicles and makes prompt refund of any overcharges discovered.

The director amended the hearing officer's proposed decision to provide for the penalty of 21 days' suspension, with 14 days stayed, for a period of one year's probation under the usual

terms and conditions. The hearing officer had imposed a 21-day suspension, with 14 days stayed, for a period of two years' probation. The penalty imposed by the director results in an actual suspension of seven days.

The appellant bases its appeal on all of the grounds stated in Vehicle Code Section 3054. However, the Board has determined that only one of these grounds is of sufficient merit to warrant consideration. This ground is that the penalty imposed by the director is not commensurate with the findings.

Appellant stipulated to the various late transfer violations, as well as the overcharges of license and transfer fees. Appellant offered evidence in mitigation of these charges which was uncontested and which demonstrated that the appellant has had difficulty in retaining qualified personnel to perform DMV work. DMV clerks have remained at the dealership for only three to six months, resulting in significant periods of time spent training new employees. These extended training periods have undoubtedly played a large part in the number of violations.

The Laggert transaction, upon which the three violations of the Rees-Levering Act were based, was never consummated. The Laggert's were unable to obtain financing through their credit union and the appellant unwound the sale shortly after delivery.

The circumstances surrounding the Kuan transaction are of serious import and remain unexplained. Employees of the appellant were found to have engaged in misrepresentations

which caused the purchasers of the vehicle to suffer harm.

It appears the late transfers, overcharges, conditional sale contract violations and the misrepresentation of the Kuan vehicle were occasioned by the conduct of certain employees of the appellant. A direct link to management was not established. However, it is clear that a corporation is subject to license discipline for the negligence or wrongful acts of the officers, agents or employees. As we noted in Imperial Motors vs. Department of Motor Vehicles, A-20-72:

> "A corporate licensee is responsible for all acts of its officers, agents and employees acting in the scope of their employment. A contrary rule would, of course, preclude meaningful license discipline."

We have duly considered the administrative record and the briefs and arguments of both parties. Further, we have carefully weighed the accusation in light of all of the circumstances and the evidence of record, both in aggravation and mitigation of the violations found to have been established. In our view, the penalty in this case is not deemed to be commensurate with the findings and should be modified. The board is of the opinion that the public welfare would not be served by a seven-day suspension. The circumstances surrounding the appellant's conduct are such that a seven-day suspension would be unduly harsh. A closure for a lesser period of time would be sufficient to demonstrate that the duties and responsibilities of a licensee are not to be taken lightly. A three-day closure would serve as a reminder to

all licensees of their responsibilities and obligations under the Vehicle Code.

Pursuant to Section 3054(f) and Section 3055 of the Vehicle Code, the New Motor Vehicle Board amends the decision of the Director of Motor Vehicles as follows:

WHEREFORE THE FOLLOWING ORDER IS MADE:

The vehicle dealer's license, certificate and special plates (D-150 and TR-2330) heretofore issued to appellant, Senator Ford, Inc., be and the same are hereby suspended for a period of twenty-one (21) days; provided, however, that the effectiveness of eighteen (18) days 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 the appellant shall be placed on probation to the Director of the Department 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 insofar as said laws, rules and regulations govern the exercise of its privileges as a licensee.

If and in the event the Director 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 stayed portion of the suspension

or otherwise modify the order. In the event the appellant shall faithfully keep the terms of the conditions imposed for the period of one year, the stay shall become permanent and the appellant shall be fully restored to all of its license privileges.

This Final Order shall become effective May 7, 1976.

JOHN ONESIAN

AUDREY B. JONES

JOHN B. BARNES

JOHN B. VANDENBERG

WINFIELD J. TUTTLE

A-68-75

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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Appeal of BILL ELLIS, INC., dba BILL ELLIS FORD, Appellant, v. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-69-76 FILED: April 8, 1977

Time and Place of Hearing:	March 9, 1977, 10:00 a.m. Council Chambers City Hall Santa Monica, CA
For Appellant:	Richard R. Beswick, Esq. Sprague, Milligan & Beswick 323 W. Court Street, Suite 402 San Bernardino, CA 92401
For Respondent:	Alan Mateer, Chief Counsel Department of Motor Vehicles By: Leo Bingham, Esq. Staff Counsel

FINAL ORDER

I. Procedural Background

Appellant, Bill Ellis, Inc., dba Bill Ellis Ford ("Ellis") is a corporation licensed to do business as a

new motor vehicle dealer in California. The hearing officer found that grounds were established, pursuant to Vehicle Code §11705, to suspend or revoke appellant's dealers license and special plates. The Department of Motor Vehicles ("Department") adopted the findings of the hearing officer as well as the recommendation that appellant's license be suspended for a period of 90 days, with all but 5 days stayed for a period of one year. Ellis has appealed from this decision of the Department.[1/]

II. Facts

The findings reflect that on 153 occasions Ellis failed to submit documents showing the transfer of ownership within the time required by the Vehicle Code.[2/] These violations can be categorized as follows:

A. Pre-1975 Offenses

1. On 104 occasions prior to January 1975 Ellis failed to submit documents showing the transfer of ownership of vehicles sold within 20 days of the date of sale;

2. On 11 occasions prior to 1975 Ellis, having paid a $3 forfeiture fee, failed to submit the documents showing the transfer of ownership within 30 days after the date of sale;

[1/] Appellant withdrew his motion to introduce additional evidence at the hearing before the Board. In lieu thereof appellant yielded a portion of his time to former California State Senator William E. Coombs for legal argument.

[2/] Vehicle Code §§4456, 4456.1, 4456.5. All citations are to the Vehicle Code.

B. Post-1975 Offenses

3. On 38 occasions subsequent to January 1, 1975, Ellis failed to submit the reports of sale, documents and fees showing the transfer of ownership in a timely manner.

C. Failure to Report Sales and Overcharges

4. In addition to the foregoing the hearing officer also found that in three instances Ellis had failed to notify the Department of a sale within 15 days of the date of sale; that in 11 instances he had overcharged fees to the purchaser, and that in 30 instances fees due to the Department were paid late.

Appellant focuses this appeal on the contention that under the Vehicle Code sections in existence prior to January 1, 1975, the Department had no authority to impose discipline for 115 incidents of late filing. Vehicle Code §4456.5[3] provided, in its salient portion, that "notwithstanding any other provision of this code, the three dollar ($3) forfeiture payment provided by this section shall constitute the sole cause of action arising from noncompliance with..." the requirement of filing documents to transfer registration within 20 days after a sale. This section was repealed and replaced by §4456.1 which expressly provides a separate cause

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[3] Effective 23 Nov 1970; repealed 1 January 1975.

of disciplinary action in addition to any obligations to pay an administrative service fee. Appellant contends that the Department erroneously applied §4456.1 retroactively.

Ellis also contends that the evidence does not support the findings of the three late reports of sale in that there are two dates stamped on the back of the notices of sale, one in black ink indicating 17 December 1973 and one in red ink showing the date of 31 May 1974. Admitting the 31 May date would be well over the five days required by statute, Ellis contends that the 17 December 1973 date was the actual date of receipt by the Department, and the late processing of these reports was due to Department delay.

All overcharges were refunded or attempts made to refund them on or about March 5, 1974. The Department investigation was carried out January 15 and 16, 1974.

Appellant contends that the penalty awarded by the Department was excessive in view of the technical nature of the violations charged, and the lack of evidence to support the findings that violations had occurred.

III. Law & Discussion

Vehicle Code §4456.5 provided that upon payment of a forfeiture fee of $3 to the Department a dealer would be allowed an additional ten days to present to the Department an application and documents in acceptable form. Conceding

that the $3 forfeiture fee on 11 items was timely paid, the Department, however, charged that Ellis did not submit documents within 30 days of the date of sale. The Board has already indicated in Suburban Ford v. DMV, A-35-73, at page 12 that "viewing this section as it applies to subparagraph 4, the timely payment of the $3 forfeiture fee only precludes licensee discipline for failing to file within 20 days but does not preclude action for failing to file within 30 or 40 days as the case may be". This section merely provides a 10-day extension upon performance of the statutory condition precedent of payment of a $3 forfeiture fee.

On the 104 occasions prior to 1975 that the Department charged Ellis with failing to report witin 20 days from the date of sale, there is no showing that the requisite $3 fee was paid to gain the ten day statutory extension. The only indication that this fee was paid on these transactions is an employee's testimony that she knew of no instances when the fees were not paid. Her testimony on this issue is not convincing since payment of the forfeiture fees was not solely her responsibility, and since none of the exhibits which substantiate the 104 late reports give any indication that the $3 fee was paid. This contrasts with Exhibit 6 documents relating to items 101-110 which note the payment of this fee. Since payment of this fee is a statutory condition to the dealers obtaining an additional 10 days in which to file

the required reports and documents, the burden of showing that this forfeiture fee was paid would fall on Ellis.

The amended accusation clearly shows the Department correctly limited the applicability of §4456.1 to those vehicles sold after its effective date of January 1, 1975.

In each of the three late reports of sale the Board notes that the black ink date of 17 December 1973 appears on both the front and back of the Notice of Transfer in close proximity to a black ink stamped "Bill Ellis Ford". The 31 May 1974 date appears in red only on the back of the Notice of Transfer. The 31 May 1974 date is in the record, under oath, as the date of receipt of those notices by the Department.

The Board is aware of the factors recited by appellant as reasons for the delay by the dealership in filing reports as required by the Vehicle Code. Due care on the part of appellant would have remedied these defects. This care would be expected when considering Ellis' prior two-year probationary period based on similar violations.[4/] In that action there were 400 instances of late filing of documents by Ellis. In addition, Appellant, in 17 instances, furnished false information to the Department. The Board indicated at that time that "... the exercise of due care on the part of appellant would have remedied the defects in appellant's reporting procedures ..."[5/] Were it not for this prior

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[4/] Appeal No. A-2-69

[5/] Appeal No. A-2-69 at 13.

offense we would be inclined to think a five day closure to be too severe. The Board, however, views the reoccurrence of these offenses most seriously. Considering this prior conduct we find that a five day closure is fair and reasonable. However, in light of the prior imposition of discipline, and the disregard of the reporting requirements of the Vehicle Code, which the repetition of such offenses demonstrates, the length of the probationary period is considered to be 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 under the same terms and conditions as imposed by the Department.

The Decision of the Director is affirmed as modified.

This Final Order shall become effective May 9, 1977.

THOMAS KALLAY

JOHN D. BARNES

AUDREY B. JONES

JOHN B. VANDENBERG

JOHN B. OAKLEY

A-69-76

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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

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

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.

ITEMS	FEES DUE DEPARTMENT	FEES CHARGED PURCHASER	EXCESS
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 jursidction.

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

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A-70-76

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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Appeal of TOM COWARD FORD, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-71-76 FILED: April 19, 1977

Time and Place of Hearing:	December 14, 1976, 9:00 a.m. 5855 W. Century Boulevard Los Angeles, CA 90045
For Appellant:	Ronald H. Gill, Esq. Nordman, Cormany, Hair and Compton 625 North A Street P. O. Box 1232 Oxnard, CA 93032
For Respondent:	Alan Mateer, Acting Chief, Legal Section, Department Motor Vehicles By: Houston N. Tuel, Jr. Staff Counsel

CORRECTED FINAL ORDER

Tom Coward Ford ("Tom Coward"), a California Corporation, enfranchised as a new car dealer was found by the hearing

officer to have maintained a system which, intentionally or not, repeatedly operated to defraud customers by representing used cars as new. The Department of Motor Vehicles ("Department") adopted the decision of the hearing officer, including the recommendation that Tom Coward's license be suspended for 30 days, all but seven days stayed for a probationary period of three years. Tom Coward has appealed from this decision of the Department.

The findings upon which the Department imposed discipline are as follows: Appellant, Tom Coward, in six instances fraudulently represented used vehicles as new: in two instances falsely represented used vehicles as new in application for registration; in one instance overcharged registration fees to a purchaser; in one instance falsely reported the date of sale to the Department; in two instances failed to give written notice of transfer to the Department within five days; in one instance failed to mail or deliver reports of sale to the Department within 20 days; and in one instance allowed improper use of dealer plates.

Upon the oral stipulation of the parties the Department agreed with Tom Coward that the penalty assessed is excessive.

The penalty as originally imposed by the Department is reversed. The Department is directed to reconsider the penalty in light of this order, and the aforesaid stipulation.

The Department is directed to take such further action as is specially enjoined upon it by law, including, but not limited to, performance of an appropriate audit of the appellant's business records for the period July 1, 1972, through December 31, 1973, to ensure the return of all registration fee overcharges.

This final order shall become effective when served upon the parties.

THOMAS KALLAY

JOHN B. VANDENBERG

MELECIO H. JACABAN

ELVIRA ARMAN-REED

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A-71-76

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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Appeal of Wm. L. MORRIS-- MOORPARK, A Corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-72-76 FILED: January 26, 1977

Time and Place of Hearing:	December 14, 1976, 9:30 a.m. 5855 W. Century Boulevard Los Angeles, CA 90045
For Appellant:	Joseph P. D. Kern, Esq. 533A Sespe Avenue Fillmore, CA 93015
For Respondent:	Alan Mateer, Chief Counsel Department of Motor Vehicles By: Benjamin F. Bucceri, Jr. Staff Counsel

FINAL ORDER

William L. Morris - Moorpark ("Morris"), a corporation licensed as a new motor vehicle dealer, was found by the hearing officer (Administrative Law Judge) to have placed advertisements in

violation of the terms of Vehicle Code section 11713.1(a)[1/] in "approximately" 25 instances. The Department of Motor Vehicles ("Department") adopted that finding as well as the recommendation that Morris' license be suspended for five days. In accordance with the recommendation, execution of the order was suspended for a probationary period of one year.[2/]

The finding of fact upon which the discipline imposed by the Department is predicated is in its entirety as follows:

"Between October 1, 1974 and April 1, 1975 respondent [Morris] caused certain advertisements for approximately 25 vehicles to be published in the Enterprise Sun and News, Simi Valley, California, News Chronicle, Thousand Oaks, California and the Ventura County Penny Saver Town Crier, Simi Valley, California, without identifying such vehicles by their complete vehicle identification numbers or license numbers."

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1. "It shall be unlawful and a violation of this code for the holder of any dealer's license issued under this article to do any of the following:

(a) To advertise any specific vehicle for sale without identifying such vehicle by either its vehicle identification number or license number."

All references are to the Vehicle Code.

2. Charles A. Ericksen, Chief Deputy Director, acted in lieu of Director Herman Sillas in this matter.

Neither the finding, nor the Department's position in this appeal, can be understood without a chronological exposition of the procedural and substantive background of this case.

The accusation, filed on October 9, 1975 charged that Morris had violated section 11713.1(a) between October 1, 1974 and April 1, 1975 by running advertisements ". . .without advertising [the] vehicles by their complete vehicle identification numbers or license number." (Emphasis added.) At the hearing, held on March 3, 1976, evidence was introduced which established that in the time period in question Morris had identified some vehicles only by the "production portion" of the vehicle identification number (VIN) rather than by the complete VIN. The Department's summary of the essentially undisputed facts is contained in its brief and is set forth below:

> "From approximately June 20, 1974, until approximately October of that year Appellant's [Morris'] advertising complied with the provisions of Vehicle Code Section 11713.1(a) because the vehicles were advertised with the full and complete vehicle identification number, that is, with the portion of the VIN number designating the make, model, body style and point of origin along with the production series. [Transcript references omitted.] However, in approximately October of 1974 Appellant began to advertise vehicles only by using the production series of the vehicle identification number, that is, that portion of the vehicle identification number distinguishing that vehicle from every other vehicle of like make, model, body style and point of origin.
>
> "On April 9, 1975, Roth met with Morris and Flury (Appellant's General Manager), to discuss the advertisements which are the subject of the current Accusation. At that time Mr. Morris made some reference to errors by the newspapers in advertisements of those vehicles. Investigator Roth then talked to

Sharon Morrissette at the Enterprise in Simi Valley. Morrissette had informed Roth that the ads were published just as they were referred to the Enterprise by the dealership. At the time of the April 1975 meeting Flury told Roth that he considered the numbers appearing in the advertisements to be the identification numbers on those vehicles. Flury admitted that the full vehicle identification number was not specified in some of the advertisements, and that the I.D. number that was set forth in the ads was, according to Flury, the complete vehicle identification number.

"Mr. Flury stated to Investigator Roth that the reason that the six digit production portion of the serial number was used was because he had run out of room in the ads to put the complete vehicle identification number in, and he felt that the last six digits were in fact the serial number of those vehicles."

It is conceded that The Department of Motor Vehicle Dealer Handbook ("Handbook"), published by the Department in 1972 and reissued in 1975, contained the following information:

"Section 432.01. Identity of Vehicle. Any specific vehicle advertised for sale by a dealer shall be identified by either its vehicle identification number or license number so that a prospective purchaser may recognize it as the vehicle advertised for sale. (Comment: It is acceptable to use the production portion of the vehicle identification number only when the vehicle is also described by year, make and model.)"

The Department's counsel explained at the hearing that the parenthetical "Comment" is not indicative either of the Compliance or Legal Division's interpretation of the regulation.

On March 19, 1976, after the conclusion of the hearing, the Department's counsel addressed the following letter to the Administrative Law Judge:

"Dear Judge Gallagher:

I have just been informed that the Division of Compliance of the Department of Motor Vehicles is formulating a new regulation which would, in effect, be supportive of respondent's position in the above-entitled matter. This proposed regulation will enable a dealer to advertise a specific vehicle by the use of the production series of the vehicle identification number, along with a description of the vehicle by year, make, model, and body style. In view of this development, complainant declines to submit written argument on this issue, and instead wishes that the matter be submitted at this time. However, it should be pointed out that the vehicles advertised without the full production series of numbers which were specified at the hearing still provide a ground for license discipline pursuant to the Vehicle Code.

Therefore, complainant recommends that a probationary period be imposed upon respondent's dealers license for those violations.

Very truly yours,

BENJAMIN F. BUCCERI, JR.
Legal Counsel"

The letter of March 19 was received as Exhibit 4 and forms a part of the record.[3/]

The Department's position in this appeal is as follows:

First, it contends that notwithstanding information contained in the Handbook, and the contemplated change in the regulations, Morris was required to list the "complete" VIN.

Second, the Department argues that the finding entered by the Administrative Law Judge implicitly supports the conclusion

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3. Both parties were afforded the opportunity following the hearing to submit briefs. Morris apparently declined to do so and Exhibit 4 was treated as the Department's request to submit the matter without a brief.

that Morris authorized advertisements where the identification was deficient even by the standard contained in section 432.01 of the Handbook and the comment thereto.

Section 11713.1(a) does not require a listing of the "complete" VIN. The obvious reason the legislature chose to rely alternatively on the VIN or the license numbers is expressed in section 432.01 of the Handbook: use of these designations enables the purchaser to identify a vehicle as the one advertised. However, there is no evidence before us that a vehicle can be identified only by use of a "complete" VIN; on the contrary, the Department concedes that the VIN's production portion, when coupled with year, make, model, and body style sufficiently identifies a vehicle. This concession is eminently reasonable and constitutes a sound construction of Section 11713.1(a). Accordingly, the Department's contention, and the finding, that Morris violated the law by not using the "complete" VIN is contrary to applicable law (Section 11713.1(a)), the Department's own regulations (Section 432.01) and the evidence; and the decision would therefore have to be reversed for this reason alone. (Sections 3054(b) and (d).)

The Department, however, also contends that Morris fell short of even the Handbooks' standard in several instances. The Department's position is stated to its best advantage in its opening brief:

"Even a cursory examination of the evidence shows that there were hundreds of advertised vehicles. 4/ Therefore, it is reasonable to infer, in the light of Exhibit 4, that the Judge's determination of the existence of violations for only 25 of these vehicles must have been for a reason other than that those 25 vehicles were advertised only with the production portion. That is, with respect to the 25 vehicles, advertisements for those vehicles were in violation because: (1) not even the full production portion of the I.D. Number was used [referring to an Exhibit], or (2) no identification was used whatsoever, or (3) there was no verbal descriptions of the cars' year, make, model and type. In light of this, a 5 day suspension stayed upon 1 year's probation is not only justified, but lenient." (Emphasis added.)

Findings must rest on the evidence of record. (Vehicle Code § 3054(d).) The state of the record of this or any disciplinary proceedings is most unsatisfactory when, as here, the Department itself is forced to conjecture that there "must have been" evidence which supports the finding. Accordingly, we decline, as we must (Section 3054(d)), to affirm a decision where the finding upon which discipline is predicated is not supported by the evidence. 5/

The Department could have avoided its present predicament if it had moved to clarify, and make more specific, the finding upon which its decision rests. It may be that an examination of the record with such an objective in mind would have persuaded it that

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4. The Department concedes that approximately 500 advertisements were examined and found to comply with the standard approved by this opinion and already adopted by the Department.

5. At oral argument, counsel for the Department assured us that the offending advertisements "are there." Yet such assurances, advanced in good faith, are not enough. We cannot fulfill our statutory responsibility of an independent review of the Department's orders if we base our conclusions on the Department's assurances, and nothing more, that the facts upon which discipline is predicated are to be found somewhere in the record. In any event, our review of the record has disclosed only one advertisement without any VIN, complete or partial.

the prosecution of a dealer for (assertedly) 25 advertisements which (arguably) fell short of the statutory standard, when there was no suggestion of actual confusion or intent to deceive,[6/] is not required by the public or any other interest or policy. Such a conclusion would have been fortified by Morris' lengthy and spotless record as a dealer and by the Department's change of course, as exemplified by Exhibit 4, in the midstream of this prosecution.

The decision of the Department is reversed.

By /s/ Thomas Kallay
THOMAS KALLAY, MEMBER

We concur:

/s/ JOHN B. OAKLEY

/s/ JOHN B. VANDENBERG

/s/ ELVIRA A. REED

/s/ JOHN DAVID BARNES

/s/ MELECIO H. JACABAN

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6. Evidence of confusion and intent to deceive is not required to establish a violation of Section 11713.1(a). The complete absence thereof, however, when added to a record such as the one before us is normally a factor in deciding whether a prosecution should be instituted or, if already instituted, maintained throughout the course of an administrative appeal.

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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

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

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

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[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 indispensible 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 wrong-doer 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

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[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

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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Appeal of WILSHIRE VOLKSWAGEN, a California Corporation, Appellant, v. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA Respondent.	Appeal No. A-74-76 FILED: March 17, 1977

Time and Place of Hearing: January 12, 1977, 10:00 a.m.
Room 4061, 722 Capitol Mall
Sacramento, CA 95814

For Appellant: George E. Leaver, Esq.
Getz, Aikens & Manning
5900 Wilshire Blvd., Suite 770
Los Angeles, CA 90036

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

FINAL ORDER

I. Procedural Background

Appellant, Wilshire Volkswagen ("Wilshire") 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 appellant's dealers license and special plates. The Department adopted the decision of the hearing officer and the recommendation that Wilshire's license be suspended for 20 days all but three days, stayed for a probationary period of one year. Wilshire has appealed from this decision of the Department.

II. Facts

The findings upon which the Department has imposed discipline are as follows: Wilshire fraudulently represented four used vehicles as new,[1] and fraudulently represented four vehicles to be dealer demonstrators instead of disclosing to purchasers that the vehicles had been previously sold at retail. Appellant was also found to have overcharged license fees on three vehicles, failed to report the sale of one vehicle to the Department within 40 days, and displayed 10 vehicles without assigned license plates.

The main thrust of this appeal is Wilshire's contention that since there was no evidence of fraudulent intent by the dealer, nor damage to the consumer, discipline should not have been imposed. In support of its position, Wilshire points

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[1] "A 'used vehicle' is a vehicle that has been sold and operated on the highways of this state, or has been registered with the department ... or unregistered vehicles regularly used or operated as demonstrators in the sales work of a dealer ..." Vehicle Code §665.

to the systematic finalization of sales by its assistant sales manager, which it contends was designed to prevent any misunderstanding or misrepresentation, prior to the purchase of a vehicle from appellant. In accordance with its "system" Wilshire's salesman would "sell himself, the car and the company,"[2/] prepare a worksheet automobile sales agreement, and then refer the customer to an assistant sales manager. The assistant sales manager would fill out the contract and report of sale and finalize the purchase of the vehicle.

The flaw in the "system", pragmatically demonstrated by the record, is that the salesman had no way of knowing the prior history of a specific vehicle without access to the stock records. Since neither license plates nor reports of sale were placed on these vehicles as required, the customer could not have recognized that these vehicles were used. This "system" only invited explicit or implicit misrepresentation by the salesman, with the assistant sales manager merely finalizing the deal.

III. Law & Discussion

The term fraud or deceit as used in Vehicle Code §11705 includes "the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true" to induce another party

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[2/] Appellant Opening Brief, page 7, lines 25-26.

to enter into a contract.[3/] The assertion that there was no intent to deceive is therefore not dispositive of the existence of fraud. Fraud is a broad concept, which easily includes a "system" by which a purchaser is induced to enter a contract in reliance upon information which is not true, even where there is no specific intent to deceive. "Good faith" bargaining is precluded when the salesmen are permitted to make representations without knowing the history of the vehicle.

The Vehicle Code violations were established when the salesmen represented to the purchaser that a used vehicle he ultimately purchased was a new vehicle or demonstrator, and these vehicles were actually purchased without the misrepresentation having been dispelled. These misrepresentations were avoidable simply by requiring the salesman to check the vehicle stock card before negotiating with a prospective purchaser. The record, through customer testimony, clearly supports the finding that these misrepresentations had not been corrected prior to purchase.

Disciplinary grounds under §11713(a) and (d) are established without regard to whether damage or loss is suffered by the purchaser. Injury is shown, however, since the consumers suffered a loss in bargaining power and would not have purchased these vehicles at the price paid if they had known the truth.

3/ Civil Code §1572(2)

The Board, therefore, finds that the penalty as assessed by the Department of Motor Vehicles is commensurate with the findings and supported by the evidence.

The decision of the Department is sustained.

This final order shall become effective April 16, 1977.

THOMAS KALLAY

JOHN D. BARNES

JOHN B. VANDENBERG

AUDREY B. JONES

JOHN B. OAKLEY

ELVIRA ARMAN-REED

A-74-76

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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 BALBOA MOTORS, dba BALBOA DATSUN, Appellant, v. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-75-76 FILED: 1/11/78

Time and Place of Hearing:	September 14, 1977, 9:30 a.m. Room 4061, 722 Capitol Mall Sacramento, CA 95814
For Appellant:	Ernest S. Pierucci, Esq. Wright, Britton, Coder & Tuel 3190 Clearview Way, Suite 210 San Mateo, CA 94403
For Respondent:	Harry Towne, Esq. Staff Counsel, DMV 2415 First Avenue Sacramento, CA 95818

FINAL ORDER

I. Procedural Background

Appellant, Balboa Datsun ("Balboa") 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 appellant's dealers license and special plates. The Department adopted the decision of the hearing officer and the recommendation that Balboa's license be suspended for ten days all but three days stayed for a probationary period of one year. Balboa has appealed from this decision of the Department.

II. Facts

The findings upon which the Department imposed discipline are as follows: Balboa represented three used vehicles as new;[1/] and overcharged license fees due to the Department on one occasion.[2/] Appellant bases his appeal on all statutory grounds.[3/]

Appellant contends that discipline should not have been imposed since there was no evidence of fraudulent intent, nor of damage to the consumer. While admitting that a "mistake" was made in one transaction by representing a used vehicle as new, appellant seeks to negate the effect of this error by

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1/ "A 'used' vehicle is a vehicle that has been sold and operated on the highways of this state or has been registered with the department, ..." (Vehicle Code §665)

2/ Vehicle Code § 11713(g).

3/ Vehicle Code § 3054.

the fact it was later corrected. In the other two transactions appellant asserts that the use of a "used vehicle report of sale" was sufficient to notify the buyers that those vehicles were used vehicles, despite the fact that the contracts indicated they were new vehicles.[4/] Both purchasers testified that they had never been told the vehicles were used.

Regarding the single overcharge of licensing and transfer fees appellant contends that this was the result of dealer confusion engendered by the wording of then Vehicle Code § 11713(g). That section permitted a dealer to charge the subsequent purchaser licensing or transfer fees only when the dealer had paid those fees to the state in order to avoid penalties.

Appellant finally contends that the Board should consider in mitigation of the penalty appellant's 20 years in business without any prior disciplinary action; its employee handbook; its support of and cooperation with the city government of National City; and the immediate steps that were taken by appellant to correct the situation that led to these disciplinary proceedings.

4/ One contract was marked both new and used, Exhibit 5(t) and Exhibit 4(g).

III. Law and Discussion

Appellant's contention that the evidence is insufficient to support a finding of fraud is specious in that it completely misconceives the Vehicle Code sections which appellant has been found to have violated. The Department correctly points out that appellant was not accused of violating the Vehicle Code provision on fraud or deceit.[5/] Fraud need not have been committed in order for violations of Vehicle Code §§ 11713(a) and 11713(d) to have occurred. Appellant violated Vehicle Code §§ 11713(a) and (d) when it represented to the purchaser that a used vehicle was a new vehicle and when these vehicles were actually purchased without that misrepresentation having been dispelled.[6/] There is no "magic" that transforms a new vehicle into a used vehicle, nor is there any retransformation into a new vehicle by affording the buyer a new vehicle warranty. In Vehicle Code § 665 (see footnote 1) the legislature has explicitly set forth the conditions under which a vehicle is considered "used". The evidence shows that all three purchasers left the dealership under the erroneous impression that they had purchased new vehicles. This impression was created by appellant's description of the vehicles as being, in reality, new cars. Appellant's contention that when a vehicle is treated as new

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5/ Vehicle Code § 11705(a)(14).

6/ Wilshire Volkswagen v. DMV, Appeal No. A-74-76 at 4.

for purposes of warranty; and that when a vehicle looks, feels, drives, smells and has every other physical characteristic of a new car it is a new car, is tantamount to an admission that in all material respects the vehicles were in fact represented to these purchasers to be new.[7/]

Under Vehicle Code § 11713(g), as it read in 1975, the dealer was not permitted to pass on license and transfer fees to a subsequent purchaser on a rollback/unwind except where those fees had been paid to the state by the appellant to avoid penalties for late payment. The Board has indicated that § 11713(g) requires that both parts of the two-prong test be met, i.e. that the fees be paid to the state and that they be paid to avoid penalty.[8/] The fees in this case were paid pursuant to a sale and not to avoid a late penalty.

Appellant's contention that the evidence is insufficient to support the findings is completely unmeritorious. The record clearly establishes the occurrence of the acts constituting violations of the Vehicle Code.

Factors in mitigation of the penalty do not amount to a justification or an excuse for a wrongful act. They are, however, relevant to the determination of the appropriate administrative sanction to be imposed upon a licensee for Vehicle Code violations. It is a well established principle

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7/ Appellant's Closing Brief at 5; Appellant's Opening Brief at 11.

8/ 49'er Chevrolet v. DMV, Appeal No. A-70-76 at 7-8.

that administrative proceedings have as a primary purpose the protection of the public, not the punishment of the wrongdoer.[9/] Accordingly, in determining the penalty to be assigned for these Vehicle Code violations such factors as the appellant's 20 year history without disciplinary action, its community activities and especially its steps to prevent further Vehicle Code violations should be noted. (Appellant did take immediate steps to correct the practices which led to these violations.)

The Board has, on its own motion, canvassed its prior decisions and found that the most recent imposition of an actual three day closure was in a proceeding involving four used vehicles sold as new; four used vehicles sold as demonstrators; three license fee overcharges; one failure to report transfer within 40 days; and ten vehicles displayed without assigned license plates.[10/] An earlier Board decision upholding an actual three day closure involved 317 untimely notices of sale; one unlicensed salesman; one published advertisement improperly identifying a vehicle; one published advertisement depicting vehicles and equipment which were not available; and 48 license fee overcharges.[11/] In view of appellant's prompt remedial actions and his blameless record as a dealer, and in

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9/ Coberly Ford v. DMV, A-25-72 at 9; Ready v. Grady 243 Cal. App. 2d 113; Borror v. Dept. of Investment, 15 Cal. App. 3d 539.

10/ Wilshire Volkswagen v. DMV, Appeal No. A-74-76.

11/ King Dodge Sales, Inc. v. DMV, Appeal No. A-55-74.

light of the Board's prior decisions, the penalty is excessive.

The decision of the Department of Motor Vehicles is modified to provide that Balboa's license be suspended for ten days, and that all ten days be stayed for a probationary period of one year.

The decision of the Director is affirmed as modified.

This final order shall become effective 1/31/78.

THOMAS KALLAY

MELECIO H. JACABAN

JOHN B. OAKLEY

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KATHLEEN O. TURNER

JOSEPH TREJO

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A-75-76

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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Appeal of BOB CURTIS OLDSMOBILE, INC., Appellant, v. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-76-76 FILED: July 14, 1977

Time and Place of Hearing: June 24, 1977, 1:30 p.m.
Room 4061, 722 Capitol Mall
Sacramento, CA 95814

For Appellant: Harry I. Sky, Esq.
Hodge & Hodges
1801 Century Park East, Suite 1700
Los Angeles, CA 90067

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

FINAL ORDER

I. Procedural Background

Appellant, Bob Curtis Oldsmobile, Inc. ("Curtis") 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 appellant's dealer license and special plates. The Department adopted the decision of the hearing officer and the recommendation that Curtis' license and special plates be revoked with the effectiveness of that revocation stayed for a probationary period of two years upon the condition that the dealer license and special plates be suspended for ten days. Upon reconsideration the director of the Department modified the penalty imposed to the extent that the actual suspension of dealer license and special plates was reduced to seven days. Curtis has appealed from the decision of the Department imposing sanctions.

II. Facts

The findings upon which the Department imposed discipline are as follows: Curtis fraudulently represented a used vehicle as new on 1 occasion; on 7 occasions represented used vehicles as demonstrators; on 7 occasions overcharged fees; fraudulently represented to purchaser that recission of purchase would breach the contract; on one occasion made a false statement to the Department and on one occasion sold an advertised vehicle at higher than the advertised price. Appellant bases this appeal on the contention that: (1) the Department acted in excess of its jurisdiction; (2) the Department has proceeded in

a manner contrary to the law; (3) the findings are not supported by the weight of the evidence; and (4) the determination of penalty as provided by the Department is not commensurate with the findings.

Prior to Departmental review Curtis was placed on notice by the Attorney General that an investigation would be conducted. The Department initiated its review only after receiving a letter from the California Attorney General's office concerning Curtis' operation, as well as a consumer complaint. The ensuing review comported in all respects with administrative due process.

Curtis carried used vehicles on his inventory as demonstrators to take advantage of General Motors extended warranty and a difference in the flooring rate. These vehicles were not demonstrators but rental units, or loaners to preferred persons. To facilitate this use of these vehicles Curtis purchased personalized license plates, BCO-1 through BCO-14. Upon removing these vehicles from rental or loaner service the special plates were removed and the vehicle was placed on the dealer lot. A "shipping order", similar in appearance to the manufacturer's suggested retail price sticker required on all new cars, was placed in the windows of these vehicles. As a result of these practices salesmen had no way of knowing the specific history of these vehicles. A salesman could check with

the sales office to determine the history of the vehicle. However, appellant admits that salesmen could easily think that these vehicles were unregistered demonstrators, especially since the vehicle would be placed on the lot without plates. Mr. Curtis himself indicates that the unwound vehicles were "returned to our new car inventory."

Appellant now labels cars as "used" with a sticker to preclude salesmen or customers from mistaking previously sold or registered vehicles as a new vehicle. Appellant is still using the BCO plates although he intends to phase them out as having a tendency to obfuscate the true history of the vehicle.

Appellant contends that the overcharging of transfer fees was the result of a misinterpretation of the law. Appellant believed these fees could be prorated to the subsequent purchaser of a vehicle registered to Curtis to enable appellant to recoup fees paid. This mistaken belief was fostered by the advice of the dealership's "DMV girl" who had so informed Curtis. After the investigation, refunds of overcharges were made in two of the seven instances. However, at the time of the hearing refunds had not been made to the other five overcharged consumers.

III. Law and Discussion

Appellant raises the defense of entrapment as proper against an administrative body, especially one that has both trial and punitive powers. However, even while making this

argument, appellant concedes that entrapment did not occur in this case. Appellant additionally argues that an illegal search was conducted of his business. The facts wholly fail to support this contention. In this connection it should be noted that Curtis consented to all aspects of the review which necessarily included an examination of his books and records.

The use of "special" personalized plates, the placement of used vehicles on the new car lot and especially the placement of the "shipping orders" on the windows of these vehicles gave them the appearance of being new. The combination of these factors facilitated misrepresentation to the ultimate purchasers. If the salesmen were easily misled, the consumer was without doubt misled.

Curtis bases his argument in mitigation on the relatively short period of time he has been a dealer, as well as on the Department's intention to "get" him. Yet, Mr. Curtis himself was not a neophyte in the automobile business. He was the general manager of an automobile dealership prior to becoming a dealer himself. The fact that Mr. Curtis was personally involved in at least two of the transactions leading to this accusation, and in fact fostered the misrepresentation to those consumers, is of particular importance in determing that the penalty as assessed by the Department is appropriate.

The decision of the Director is affirmed.

This Final Order shall become effective August 12, 1977.

THOMAS KALLAY

JOHN D. BARNES

JOHN B. OAKLEY

ELVIRA ARMAN REED

JOHN B. VANDENBERG

A-76-76

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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

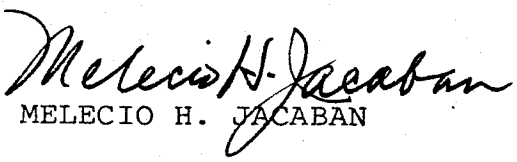
Vehicle Code section 3051 provides in its relevant part: ". . . the provisions of this chapter shall not apply to transactions involving . . . recreational vehicles as defined in section 18010.5 of the Health and Safety Code. . . ."

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

This final order shall become effective April 18, 1978.

MELECIO H. JACABAN

JOHN B. OAKLEY

RUDY A. PEREZ

FLORENCE POST

ELVIRA ARMAN REED

JOSEPH TREJO

KATHLEEN O. TURNER

JOHN B. VANDENBERG

This final order shall become effective April 18, 1978.

MELECIO H. JACABAN

ELVIRA ARMAN REED

JOHN B. OAKLEY

JOSEPH TREJO

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RUDY A. PEREZ

KATHLEEN O. TURNER

FLORENCE POST

JOHN B. VANDENBERG

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

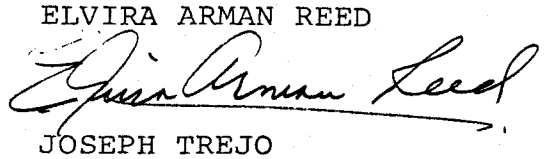
Florence Post

JOHN B. VANDENBERG

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

This final order shall become effective April 18, 1978.

MELECIO H. JACABAN

ELVIRA ARMAN REED

JOHN B. OAKLEY

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RUDY A. PEREZ

KATHLEEN O. TURNER

FLORENCE POST

JOHN B. VANDENBERG

This final order shall become effective April 18, 1978.

MELECIO H. JACABAN

ELVIRA ARMAN REED

JOHN B. OAKLEY

JOSEPH TREJO

Kathleen O. Turner

RUDY A. PEREZ

KATHLEEN O. TURNER

FLORENCE POST

JOHN B. VANDENBERG

This final order shall become effective April 18, 1978.

MELECIO H. JACABAN

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JOSEPH TREJO

RUDY A. PEREZ

KATHLEEN O. TURNER

FLORENCE POST

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FILED
DEPT. OF MOTOR VEHICLES
APR 24 1978
BY L. Hockman

STATE OF CALIFORNIA

DEPARTMENT OF MOTOR VEHICLES

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

DECISION AFTER REMAND

WHEREAS the New Motor Vehicle Board has remanded the above-entitled matter to the department for a reassessment of penalty in light of the Board's Order, a copy of which is attached hereto and by this reference incorporated herein; now therefore the Proposed Decision of the Administrative Law Judge, a copy of which is attached hereto and by this reference incorporated herein, is hereby adopted by the Director of Motor Vehicles of the State of California as her Decision in the above matter, except the order on pages 13, 14 and 15 of the Proposed Decision which is not adopted, and the following substituted therefor:

* * * * *

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The dealer's license and special plates (D & TR 9705) heretofore issued to respondent Fillmore Motors, Inc., a corporation, are hereby suspended for fifteen (15) days as to each of the causes for discipline as set forth in paragraphs VIII, IX, X,

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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 concurrently, provided further, however, that respondent is also 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.

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Should separate appeals be taken from this order as the order pertains to vehicles over which the New Motor Vehicle Board has jurisdiction and as it pertains to vehicles over which the New Motor Vehicle Board has declined to exercise its jurisdiction, then the fifteen (15) day suspension of respondent's license shall not be implemented until final disposition of both appeals.

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 any of the terms or conditions under which said license was issued, she may in her 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.

This DECISION AFTER REMAND shall become effective JUN 6 1978.

IT IS SO ORDERED 4-21-78.

Doris V. Alexis

DORIS V. ALEXIS
Director

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1401 - 21st Street, Suite 407
Sacramento, California 95814
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Appeal of LEONARD LOFANO, SR., LEONARD M. LOFANO, and RONALD D. LOFANO, a Partnership, dba LOFANO & SONS, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES, Respondent.	Appeal No. A-78-77 ORDER FOR DISMISSAL

TO: Bruce C. Smalheer, Esq., Attorney for Appellant
525 West Remington Drive, Suite 100, Sunnyvale, CA 94087

The Board, at its meeting of November 30, 1978, at San Francisco, California, dismissed the above entitled appeal for failure to file the administrative record within a reasonable period of time as required by the Board's regulations contained in the California Administrative Code, Title 13, Subchapter 2, Article 3, section 571.

Dated: December 1, 1978.

NEW MOTOR VEHICLE BOARD

By _____
SAM W. JENNINGS
Executive Secretary

cc Department of Motor Vehicles

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STATE OF CALIFORNIA
STD. 113 (REV. 8-72)
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STATE OF CALIFORNIA

DEPARTMENT OF MOTOR VEHICLES

FILED
DEPT. OF MOTOR VEHICLES
DEC 28 1978
J. Muñoz

In the Matter of the Accusation of LEONARD LOFANO, SR., LEONARD M. LOFANO, and RONALD D. LOFANO, A Partnership, dba LOFANO & SONS, Respondent	CASE NO. D-1848 ORDER IMPLEMENTING DECISION

WHEREAS, on November 30, 1978, the New Motor Vehicle Board in Appeal No. A-78-77 dismissed the Appeal in the above-entitled matter;

NOW, THEREFORE, IT IS ORDERED that the Decision become effective DEC 27 1978.

DATED: 12-22-78

Doris V. Alexis

DORIS V. ALEXIS
Director

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STATE OF CALIFORNIA
STD. 113 (REV. 8-72)
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