

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of)
)
MIDWAY FORD SALES, a)
California corporation,)
)
Appellant,) Case No. A-11-70
)
vs.) Filed:
)
DEPARTMENT OF MOTOR VEHICLES,) January 12, 1971
)
Respondent.)
_____)

Time and Place of Hearing:

December 9, 1970, 2:00 p.m.
2415 First Avenue
Sacramento, CA 95818

For Appellant:

Getz, Aikens & Manning
By: George E. Leaver
Attorney at Law
6435 Wilshire Boulevard
Los Angeles, CA 90048

For Respondent:

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

FINAL ORDER

In the Decision ordered May 28, 1970, by the Director of Motor Vehicles, pursuant to Chapter 5, Part 1, Division 3, Title 2, Government Code, it was found that appellant: (1) Failed in 84 instances to file with respondent written notices of

the transfer of interest in certain motor vehicles before the end of the third business day after transferring the vehicles; (2) wrongfully and unlawfully failed in 50 instances to mail or deliver to respondent the report of sale of used vehicles together with such other documents and fees required to transfer the registration of the vehicles within the 20-day period allowed by law; (3) wrongfully and unlawfully failed in 46 instances to mail or deliver to respondent the application for registration of new motor vehicles together with other documents and fees required to register the vehicle within the 10-day period allowed by law; (4) reported to respondent in 6 instances a date of sale other than the true date of sale of certain vehicles and thereby made false statements or concealed material facts in the application for registration of the vehicles; (5) reported to respondent a date other than the true date for the first date of operation of certain vehicles, thereby making false statements or concealing material facts in the application for registration of the vehicle; (6) in 18 instances, included as an added cost to the selling price of vehicles, registration fees in excess of the fees due and payable to the State; (7) in two instances, employed as a vehicle salesman one not licensed as a vehicle salesman.

It was further found that: (1) The variances between the true dates of sale and the reported dates of sale were minimal, generally two to four days; (2) the general practice of the appellant in selling vehicles and writing reports of sale was to write a purchase order and take a deposit from the customer, after which physical delivery of the vehicle was made in several days, and the report of sale was written on and as of the date of physical delivery; (3) all overcharges for registration fees were refunded by appellant and appellant has taken corrective action to reduce the possibility of registration fee overcharges.

The original penalty imposed by respondent suspended appellant's license, certificate and special plates for a period of 30 days. Upon reconsideration, the Director of Motor Vehicles modified the penalty by staying the execution of 20 days of the order of suspension. Appellant was placed on probation for a period of two years under the condition that it strictly comply with all laws of the United States, the State of California and the political subdivisions thereof and the rules and regulations of the Department of Motor Vehicles and should the Director of Motor Vehicles determine that appellant violated its probation, he was given the power to terminate the stay and impose the suspension or otherwise modify his order. In the event appellant faithfully

kept the terms and conditions imposed for the period of two years, the stay was to have become permanent and appellant was to have been restored to all of its license privileges.

An appeal was filed with this board pursuant to Chapter 5, Division 2 of the Vehicle Code, alleging that:

(1) Finding IX of the Director of Motor Vehicles that appellant employed two persons as vehicle salesmen who were not licensed as such is not supported by the evidence; and (2) that part of the penalty imposing an actual 10-day suspension is too harsh and severe. Appellant asks that we reverse Finding IX and also order a stay of the entire suspension.

I. DID APPELLANT EMPLOY PERSONS AS SALESMEN WHO WERE NOT LICENSED AS SALESMEN PURSUANT TO THE VEHICLE CODE?

Finding IX of the Director of Motor Vehicles recites:

"Respondent employed the services of Joe Abrego and Janice Fortune to present prospective customers, one each, at the premises of appellant upon the promise that if sales were made to such prospects, a sum of money would be paid by the appellant to said Abrego and Fortune. Each said individual presented one prospective customer and a motor vehicle was sold to each of the prospects. Appellant paid the sum of \$35 to Abrego for his services and the sum of \$50 to Fortune for her services. Neither Abrego or Fortune participated in negotiating the prospective sales in any way beyond the mere introduction of the sales prospects to an agent of the appellant. Neither Abrego or Fortune were licensed as a vehicle salesman, pursuant to the provisions of the Vehicle Code of California (commencing with Section 11800), nor was a license for each of them displayed on the premises of appellant."

Appellant contends that it did not "employ" either Abrego or Fortune as a salesman and cites Val Strough Chevrolet vs. Bright, 269 Cal.App.2nd 855, as authority for this contention. Appellant argues that Val Strough holds that the word "employ", as used in Section 11713(h) vehicle Code (formerly 11713(i)), must be interpreted in the traditional sense; i. e., the usual attributes of an employer-employee relationship must exist. The record does not reveal that the employer-employee relationship existed in the traditional sense. If appellant's contention is correct, respondent's finding that appellant employed Abrego and Fortune is not supported by the evidence. One question before us, therefore, is whether or not the Legislature has given a broader meaning to the word "employ" in regard to the provisions of the Vehicle Code pertinent to the issue before us. The other question concerns the ruling of the court in Val Strough.

Appellant's interpretation of Val Strough is erroneous. The Val Strough case involved an appeal by the Director of Motor Vehicles from a judgment of the superior court directing him to set aside an order suspending the dealer license of Val Strough Chevrolet Co. Val Strough had employed a licensed automobile salesman named Thompson. A.G.E., a discount house which transacted business in the area, offered a financing plan for purchasers of new cars and, in order to increase its finance business, the discount house advertised that it could

arrange for its customers to buy any make of new automobile of the customer's choice at a favorable price when financing of the purchase price was arranged through the discount house by the customer. Whenever the discount house had a customer who wished to purchase a Chevrolet, the discount house referred the customer to Val Strough's salesman, Thompson, at Val Strough's place of business. If the customer purchased a car from Val Strough, the salesman, Thompson, paid the discount house \$50.00 from his own funds. Val Strough knew of the practice and had obtained legal advice with respect to it. Val Strough had a custom of paying for "creative business" obtained by its salesmen. "Creative business" was defined as business from a person who had not previously purchased a car from Val Strough and who did not come to Val Strough as a result of its regular advertising or established reputation. The discount house's referral of customers to Thompson was treated as "creative business" which resulted in Val Strough paying Thompson \$25.00 over his regular commission for each car sold in that fashion. Although Val Strough knew of Thompson's practice with respect to paying the discount house, there was no agreement or arrangement between Val Strough and the discount house, other than Thompson's arrangement. Val Strough did nothing to discourage this arrangement.

In the administrative proceedings, the Department had found that the discount house was an unlicensed salesman,

as defined in Section 675 Vehicle Code, and that Val Strough had employed the discount house within the meaning of Section 11713(i) (now Section 11713(h)) Vehicle Code. The superior court reversed the Department, holding that that finding was not supported by the evidence.

The appellate court sustained the trial court, observing that the trial judge properly exercised his power to evaluate all of the evidence in the record and to draw therefrom whatever inferences he deemed proper. The appellate court found that there was substantial evidence to support the finding of the trial court. So long as the inferences drawn were reasonable and supported by the record, the appellate court concluded that it must affirm the trial court's judgment. Accordingly, the appellate court found that, although the evidence was reasonably susceptible to different inferences, it must sustain the inferences drawn by the trial court, even though the trial court had reached an opposite conclusion from the one arrived at by the Department. In this regard, it observed, at page 861:

"The record reflects none of the usual attributes of an employer-employee relationship. There was no agreement or understanding between respondent and A.G.E. as to any services to be rendered or compensation to be paid. Likewise, there is not the slightest evidence that Val Strough exercised any control, or had the right to control, the conduct and activities of A.G.E. The strong emphasis of A.G.E.'s display advertising was upon the favorable financing it could arrange for new car buyers. There was no suggestion in any of the

advertising that any particular make of car be purchased. When a customer made inquiry of A.G.E. in response to its advertising concerning financing, if the customer was interested in a Chevrolet automobile, he was referred to Lon Thompson, respondent's salesman. Thereafter all of the negotiations concerning the purchase of the vehicle took place at respondent's place of business and A.G.E. came back into the picture only after the sale had been arranged between respondent and the customer, and then only with respect to financing the customer's purchase. A.G.E. had no cars for sale on its premises, nor did it take part in any of the negotiations looking toward the sale or purchase of new cars. This evidence, therefore, supports the inference that A.G.E. was not acting for respondent and was not employed by the respondent as a vehicle salesman within the meaning of Section 675, Subdivision (a)(1) of the Vehicle Code."

The court further observed that, although the language of Section 675(a)(2), Vehicle Code, is broad, the evidence did not establish that, as a matter of law, A.G.E.'s conduct fell within the scope of the statute. The appellate court, however, recognized that there was other evidence from which a contrary conclusion could have been reached, particularly the evidence which showed that the discount house had received compensation from Thompson for its referrals and that the trial court could have inferred therefrom that the discount house's advertising was a device to induce the sale of new cars. The court concluded that that inference was not compelled, however, and the contrary inference drawn by the trial court was reasonable and supported by the record.

In our view, the Val Strough decision does not preclude a finding on the record before us that appellant employed

Abrego and Fortune as salesmen. In Val Strough, the court did not hold that all of the usual attributes of the employer-employee relationship must exist to support that finding. On the contrary, the court in Val Strough not only recognized that the Legislature had given a broad meaning to the word "employ", but also that on the facts of Val Strough, the evidence did support the finding by the Department that the requisite employment existed.

In the case before us, appellant not only knew of the arrangement between its licensed salesmen and the referring parties, Abrego and Fortune, but it ratified the acts of the licensed salesmen by paying the fees directly to Abrego and Fortune. These facts, in our opinion, support the inference that appellant's licensed salesmen made the agreements with Abrego and Fortune on behalf of appellant and that Abrego and Fortune were acting for appellant when they referred prospective customers to the dealership rather than, as in Val Strough, acting only for a licensed salesman in the pursuit of his customer-developing activities.

This board takes notice of the records of the Department of Motor Vehicles showing that the acts giving rise to the finding that Val Strough Chevrolet Company hired an unlicensed salesman occurred during May 1964. Subsequent thereto, Section 11806(g) Vehicle Code (Stats. 1967, Ch. 1038), the predecessor to Section 11806(f) Vehicle Code, was enacted by the Legislature,

which provides that it is unlawful, and a cause for administrative disciplinary action against a licensed vehicle salesman, for a licensed salesman to enter into any agreement to pay a commission or fee to any person not licensed as a vehicle salesman. The enactment of this statute is further evidence of the Legislature's intent to preclude the participation of unlicensed persons in the business of selling cars for a commission or other remuneration. It would be anomalous to hold that it is unlawful for a licensed salesman to agree to compensate an unlicensed person for the referral of a prospective automobile buyer and, on the other hand, hold that it is lawful for a dealer to encourage, condone and ratify such unlawful acts of his salesmen. To accept the construction of the law urged upon us by appellant would sanction dealer conduct which aids and abets wrongful acts of his employees. Certainly the Legislature never intended such a result.

It was stipulated at the administrative hearing that Abrego and Fortune were not licensed as vehicle salesmen and appellant conceded during the hearing before this board that their acts brought them within the definition of a vehicle salesman (Section 675 Vehicle Code).

We hold that where, as here, a dealer has knowledge of an agreement between his salesman and an unlicensed person for the performance of any act which would bring such person within the meaning of Section 675 Vehicle Code, and the dealer

participates in the fulfillment of the agreement by compensating the unlicensed person for performing, he is subject to disciplinary action for violation of Section 11713(h) Vehicle Code. Accordingly, we affirm Finding IX of the Decision of the Director of Motor Vehicles.

II. IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES TOO HARSH AND SEVERE?

In previous cases we have reviewed the penalty-determining powers of this board and concluded that we may, without finding an abuse of discretion on the part of the respondent, find the penalty imposed is excessive, exercise our independent judgment and amend the penalty accordingly (Bill Ellis, Inc., vs. Department of Motor Vehicles, A-2-69; Fletcher Chevrolet, Inc., vs. Department of Motor Vehicles, A-4-69; Mission Pontiac Co. vs. Department of Motor Vehicles, A-6-70).

The primary purpose of proceedings to discipline new car dealer licensees is to protect the general public from wrongful acts of the licensee. There are, of course, circumstances under which this goal can be accomplished only by a revocation or suspension of the license. An actual suspension of the license may be necessary to impress upon the licensee that conduct inimical to the welfare of the general public and the regulated business will not be tolerated by the enforcing agency.

The penalty imposed upon appellant by the Director calls for actual suspension of its authority to sell automobiles for a period of ten days. Such an interruption of business might well force appellant to permanently close its doors. Even though the appellant might survive being closed for ten days, the economic consequences to appellant and its employees would be drastic. This is particularly true in the current economic climate.

We do not minimize the seriousness of the wrongful acts of appellant, nor do we in any way condone the intentional or negligent operation of an automobile dealership in such a way that violations occur such as those before us here. On the contrary, we wish to stress that automobile dealers must abide by all such laws and regulations in the conduct of their business. A dealer owes a solemn duty to the public to supervise the operation of his dealership in a manner calculated to insure compliance with all applicable laws and to achieve and maintain a high standard of business ethics. Appellant obviously has not discharged this duty. However, the Director of Motor Vehicles has found that appellant has taken steps to correct its wrongful practices. We believe that the public welfare will be adequately served if the opportunity to place its dealership in proper working order without an immediate suspension of its business activities is given appellant. Therefore, we shall modify the order by

providing for a stay of the license suspension during a substantial period of probation. In the event appellant is unable to develop and maintain business practices which strictly comply with the law, the Director of Motor Vehicles shall have the authority to suspend appellant's privilege of selling motor vehicles for 30 days, or a portion thereof.

WHEREFORE THE FOLLOWING ORDER IS HEREBY MADE:

The dealer's license, certificate and special plates of appellant, Midway Ford Sales, a California corporation, is hereby suspended for a period of thirty days; provided, the execution of said thirty-day suspension is hereby stayed and appellant is placed on probation for a period of two years under the following terms and conditions:

1. Appellant shall strictly comply with all of the provisions of the Vehicle Code and the regulations of the Department of Motor Vehicles governing dealers of motor vehicles in the State of California.
2. Appellant shall obey all laws of the United States, of the State of California, and the political subdivisions thereof and the rules and regulations of the Department of Motor Vehicles.
3. If, and in the event, the Director of Motor Vehicles should determine that a violation of probation has

occurred, the Director may terminate the stay and impose a suspension or otherwise modify the order

In the event appellant faithfully keeps the terms of the conditions imposed for a period of two years, the stay shall become permanent and appellant shall be restored to all of its licensed privileges.

This Final Order shall become effective January 29, 1971.

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WARREN BIGGS, President

ROBERT B. KUTZ

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PASCAL B. DILDAY

RALPH L. INGLIS

MELECIO H. JACABAN

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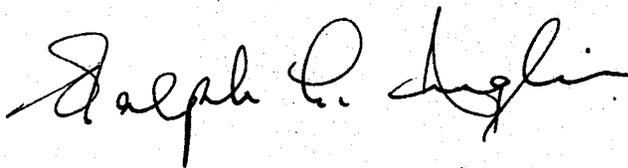
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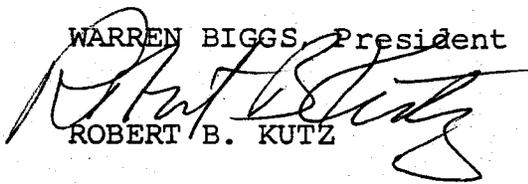
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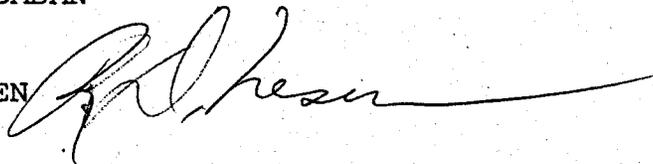
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