

2415 First Avenue  
P. O. Box 1828  
Sacramento, CA 95809

Telephone: (916) 445-1888

STATE OF CALIFORNIA  
NEW CAR DEALERS POLICY & APPEALS BOARD

MONDAY INVESTMENTS, INC., )  
dba DON MONDAY BUICK, )  
 )  
Appellant, ) No. A-34-73  
 )  
vs. ) Filed: May 30, 1973  
 )  
DEPARTMENT OF MOTOR VEHICLES )  
OF THE STATE OF CALIFORNIA, )  
 )  
Respondent. )  
 )

---

Time and Place of Hearing: May 9, 1973, 10:30 a.m.  
City Council Chambers  
City Hall  
1685 Main Street  
Santa Monica, California

For Appellant: John A. Wellcome  
Attorney at Law  
Heily, Blase, Ellison &  
Wellcome  
220 South A Street  
Oxnard, CA 93030

For Respondent: R. R. Rauschert, Legal Adviser  
Department of Motor Vehicles  
By: Alan Mateer  
Staff Counsel

FINAL ORDER

This case concerns certain advertising practices of Don Monday Buick, hereinafter referred to as "appellant". The

Director of Motor Vehicles, proceeding via the Administrative Procedure Act, found that appellant had violated Section 11713(a) Vehicle Code <sup>1/</sup> as implemented by departmental regulations, namely 13 Cal. Adm. Code §432.01, <sup>2/</sup> by identifying vehicles in advertisements by only the last four digits of the vehicles' identification numbers, rather than the complete identification numbers, and 13 Cal. Adm. Code §432.00, <sup>3/</sup> by advertising new prior-year model vehicles without identifying them as prior-year models.

The director ordered appellant's license be suspended for a period of 23 days with 20 days stayed for one year subject to the condition appellant obey all laws of the United States, the State of California and its political sub-divisions and obey all

---

1/ This section provides it is unlawful for a vehicle dealer --

"To make or disseminate or cause to be made or disseminated before the public in this state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, any statement which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading; or to so make or disseminate or cause to be so disseminated any such statement as part of a plan or scheme with the intent not to sell any vehicle or service so advertised at the price stated therein, or as so advertised."

2/ Regulation 432.01 provides as follows:

"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."

3/ Regulation 432.00 provides, in relevant part, as follows:

"When a prior-year model is advertised as a new vehicle, the fact that it is a prior-year model shall also be advertised."

rules and regulations of the Department of Motor Vehicles.

On appeal, appellant contends that the finding of a violation of Section 432.01 is not supported by substantial evidence; that Section 432.00 is beyond the purview of the applicable statute and is, therefore invalid; that there is no evidence in the record that the statements objected to by the department were misleading; that there was a complete lack of findings of fact to support a violation of Section 11713 Vehicle Code; and that the penalty is excessive.

Appellant does not dispute that it advertised prior-year models without revealing that fact in the advertisement. Neither does appellant dispute that it used only partial vehicle identification numbers in its advertisements.

IS THE DIRECTOR'S FINDING THAT APPELLANT VIOLATED REGULATION 432.01 BY USING THE LAST FOUR DIGITS OF THE VEHICLE IDENTIFICATION NUMBERS TO IDENTIFY VEHICLES IN ADVERTISEMENTS SUPPORTED BY THE WEIGHT OF THE EVIDENCE?

We were faced with an analogous situation in Weber and Cooper Lincoln-Mercury v. Department of Motor Vehicles, A-20-71. There, appellant used the stock numbers it assigned to vehicles in its inventory as the method of identifying those vehicles in its advertisements and the director found this practice to be in violation of Regulation 432.01. On appeal, we reversed, on the basis that the evidence failed to support such findings.

We pointed out that, in each of the advertisements bearing

a stock number, the vehicles were also described by make, year, model and physical characteristics. We concluded that a prospective automobile purchaser would not be led astray or deceived by the identification method used and that Section 11713(a) had not been violated. (There was no evidence that the stock numbers had been switched for the purpose of confusing buyers or that the stock numbers were inaccurate.)

In Weber and Cooper, we also noted that the purpose of Regulation 432.01 is stated in the text of the regulation itself; i.e., "...so that a prospective purchaser may recognize it as the vehicle advertised for sale." We then stated, "We view that phraseology as qualifying the requirement of the regulation that an advertisement must contain either the vehicle's identification number or license number. In other words, if the advertisement reasonably permits a prospective purchaser to identify the advertised vehicle through means other than through the use of a license number or an identification number, such advertisement does not conflict with Regulation 432.01."

We find the manner in which this appellant identified vehicles in its advertisements falls within the Weber and Cooper rule. In each instance, the last four digits of the vehicle identification number were given. The make of the vehicle (Buick) was given as was the model (Estate Wagon or Skylark). In each instance the vehicle was described as "new".

In our view, a reasonable buyer, having the descriptive information contained in the advertisements, should be able to readily identify the particular vehicle.

Counsel for the department concedes that the chances of finding the same make and model vehicle with the same last four digits of the vehicle identification number at the same dealership are "slim". With this, we heartily concur. However, respondent urges that by omitting that part of the vehicle identification number which appellant omitted from its advertisements, a knowledgeable person reading the advertisement could not ascertain the fact that the vehicles were prior-year models, all of which made the advertisements misleading in that respect, regardless of the fact that the vehicle could be identified by the last four digits. This is true. The omitted numbers did include those which Buick uses as a designation of the year model. However, few people other than those in the industry and, perhaps, in the Department of Motor Vehicles would be aware of the significance of that part of the Buick identification number that reflects the year model. It is also true that enforcement of Section 11713(a) on the facts of this case would have been enhanced had the full number, revealing the year model, been put into the advertisements, because appellant's competitors could have ascertained from the number that appellant was advertising prior-year model vehicles without revealing that fact in the advertisements in a manner that the average citizen could understand.

However, Section 432.01 was not intended to proscribe advertising practices which mislead in that manner; Section 432.01 is concerned with identification of the vehicle from the advertisement. To the extent that respondent's argument is valid, the concealment from the expert of the year model of the vehicle by deletion of the first part of the identification numbers would be in violation of Section 11713(a), not Section 432.01.

We, therefore, amend Determination of Issues I to read as follows:

"The dealer's license, certificate and special plates (D-6912) heretofore issued to respondent [appellant] Monday Investments, Inc., dba Don Monday Buick are subject to disciplinary action pursuant to the provisions of Section 11713(a) of the California Vehicle Code as implemented by Section 432.00 of Title 13 of the California Administrative Code, in conjunction with Section 11705(a)(9) of the California Vehicle Code by reason of the facts found in Finding IV and V."

We delete in its entirety Determination of Issues III.

IS REGULATION 432.00 BEYOND THE PURVIEW OF THE APPLICABLE STATUTES?

Appellant would have us regard Regulation 432.00 as merely an opinion of the department having no legal force or effect. Appellant contends that the regulation extends the scope of the statute and, therefore, is not valid. We disagree.

The Legislature has not seen fit to identify and legislate on all forms of deceptive advertising. It has decreed, as far as motor vehicle advertising is concerned, that any advertising that is either untrue or misleading is objectionable and has delegated to the Director of Motor Vehicles, via Section 1651 Vehicle Code, the authority to adopt regulations identifying kinds of advertising which, in the director's judgment, are either untrue or misleading.

Section 432.00 is entirely appropriate and carries out the purpose of an administrative regulation, namely, of implementing, interpreting, making specific or otherwise clarifying the provisions of a statute. Section 432.00 is consistent and not in conflict with the statute and is reasonably necessary to effectuate the purpose of the statute. (*Rosas v. Montgomery*, 10 Cal.App.3d 77.)

A reviewing body is obligated to undertake a two-pronged inquiry when reviewing the propriety of administrative regulations. It must first determine whether the regulation lies within the scope of authority conferred and, if so, it must determine whether the regulation is reasonably necessary to effectuate the purpose of the statute. (*Ralph's Grocery Company v. Reimel*, 69 Cal.2d 172; *Morse v. Williams*, 67 Cal.2d 733.) Regulation 432.00 clearly meets the two-pronged test of the *Ralph's* case.

Appellant makes no contention that there were any procedural irregularities in the adoption of Regulation 432.00 and we conclude our remarks on the issue by noting that a properly

adopted regulation has the force and effect of law. (Alta Dena Dairy v. County of San Diego, 271 Cal.App.2d 66.) Thus, unless some competent authority finds the regulation to be an unlawful exercise of administrative authority, it is as binding as the statute giving it birth.

IS PROOF THAT A MEMBER OF THE PUBLIC WAS ACTUALLY MISLED  
REQUISITE TO A FINDING OF A VIOLATION OF SECTION 11713(a)  
VEHICLE CODE?

Appellant contends that whether or not a statement is misleading is an issue of fact and that the department produced no evidence on the issue. Appellant cites no authority to support its proposition that the department had the burden of showing that someone was misled by appellant's advertising and overlooks case law to the contrary. (Ex parte O'Connor, 80 Cal.App. 647.) The burden on the department was to show that the advertisements ran afoul of the law; it had no burden to produce a member of the public that was actually misled thereby.

ALLEGATION OF DEFECTIVE FINDINGS

Appellant alleges that there is no finding of fact that appellant published "untrue or misleading" statements and that there is no finding that appellant published a misleading or untrue statement "...which is known, or which by the exercise of reasonable care should be known..." to be untrue or misleading.

An ancillary allegation is that no evidence was introduced by the department to show what was known or should have been known by appellant with reference to its advertising.

Focusing our attention on the allegation that the findings fail to set forth what appellant knew or should have known regarding its advertising, our first observation is that the findings of an administrative agency need not be stated with the formality required in judicial proceedings. The basic purposes of findings by an administrative agency are to aid the reviewing body in determining whether there is sufficient evidence to support the findings, to enable the court to examine the decision of the agency in order to determine whether the decision is based upon a proper principle, and to apprise the litigants in regard to the reason for the administrative action as an aid to them in deciding whether additional proceedings should be initiated and, if so, on what grounds. (Swars v. Council of City of Vallejo, 33 Cal.2d 867.)

In the case before us, certain findings of fact were made with reference to the manner in which appellant advertised vehicles for sale. From these findings, certain determinations of issues followed. These determinations recited that the facts as found violated designated sections of the Vehicle Code and the Administrative Code and that the appellant's license was subject to discipline. The clear implication from this is

that the facts as found constituted untrue or misleading advertising and that appellant either knew or should have known that its advertising was either untrue or misleading.

Directing our attention to the allegation that there was no evidence of what appellant knew or should have known regarding the condition of its advertising, we merely remark that this contention overlooks the fact that a dealership is responsible for knowing the statutes and regulations controlling the business and should have knowledge of the contents of its advertisements. An examination of appellant's advertisements in light of the controlling statute, as implemented by regulations, would have shown appellant that its advertisements were not in keeping with legal requirements.

#### PENALTY

In our view, appellant's practice of advertising prior-year model vehicles without specifying that they were prior-year models was a deliberate and planned artifice to mislead prospective purchasers into believing that the heavily discounted vehicles were 1972-year models when, in fact, they were 1971 models and to give appellant an unfair business advantage in a highly competitive enterprise. It is particularly significant that the advertisements concerning the 1971-year model vehicles are a part of the advertisements for the 1972 models and nowhere in the advertisements is there

any suggestion that the discounted vehicles are other than 1972 models also. Structuring advertisements in such a deceptive way was a flagrant disregard of a valid departmental regulation and fully merits the penalty imposed by the director.

We, therefore, affirm all facts found by the Director of Motor Vehicles; we affirm Determination of Issues I as amended by us; we affirm Determination of Issues II; we reverse Determination of Issues III; and we affirm in its entirety the Order of the Director of Motor Vehicles.

This order shall become effective June 13, 1973.

GILBERT D. ASHCOM

AUDREY B. JONES

ROBERT B. KUTZ

WINFIELD J. TUTTLE

D I S S E N T

I do not believe that the facts of this case warrant a cessation of appellant's business activities whatsoever, particularly in view of our holding that Regulation 432.01 was not violated. In my view, a 10-day suspended sentence stayed, as recommended by counsel for the department at the time of the administrative hearing, with a one-year probationary period would be sufficient to serve notice upon both appellant and the automobile retail industry that advertising of the nature herein discussed will not be tolerated.

PASCAL B. DILDAY

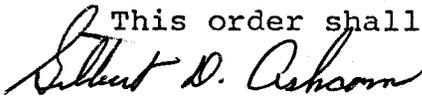
I concur with the comments of Mr. Dilday, except I would merely stay the entire 23-day suspension.

ROBERT A. SMITH

any suggestion that the discounted vehicles are other than 1972 models also. Structuring advertisements in such a deceptive way was a flagrant disregard of a valid departmental regulation and fully merits the penalty imposed by the director.

We, therefore, affirm all facts found by the Director of Motor Vehicles; we affirm Determination of Issues I as amended by us; we affirm Determination of Issues II; we reverse Determination of Issues III; and we affirm in its entirety the Order of the Director of Motor Vehicles.

This order shall become effective \_\_\_\_\_.



GILBERT D. ASHCOM

AUDREY B. JONES

ROBERT B. KUTZ

WINFIELD J. TUTTLE

D I S S E N T

I do not believe that the facts of this case warrant a cessation of appellant's business activities whatsoever, particularly in view of our holding that Regulation 432.01 was not violated. In my view, a 10-day suspended sentence stayed, as recommended by counsel for the department at the time of the administrative hearing, with a one-year probationary period would be sufficient to serve notice upon both appellant and the automobile retail industry that advertising of the nature herein discussed will not be tolerated.

PASCAL B. DILDAY

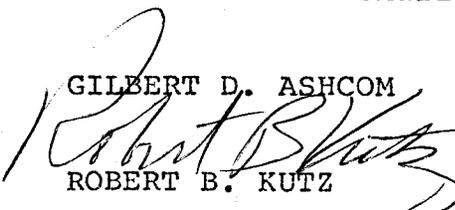
any suggestion that the discounted vehicles are other than 1972 models also. Structuring advertisements in such a deceptive way was a flagrant disregard of a valid departmental regulation and fully merits the penalty imposed by the director.

We, therefore, affirm all facts found by the Director of Motor Vehicles; we affirm Determination of Issues I as amended by us; we affirm Determination of Issues II; we reverse Determination of Issues III; and we affirm in its entirety the Order of the Director of Motor Vehicles.

This order shall become effective \_\_\_\_\_.

GILBERT D. ASHCOM

AUDREY B. JONES

  
ROBERT B. KUTZ

WINFIELD J. TUTTLE

D I S S E N T

I do not believe that the facts of this case warrant a cessation of appellant's business activities whatsoever, particularly in view of our holding that Regulation 432.01 was not violated. In my view, a 10-day suspended sentence stayed, as recommended by counsel for the department at the time of the administrative hearing, with a one-year probationary period would be sufficient to serve notice upon both appellant and the automobile retail industry that advertising of the nature herein discussed will not be tolerated.

PASCAL B. DILDAY

any suggestion that the discounted vehicles are other than 1972 models also. Structuring advertisements in such a deceptive way was a flagrant disregard of a valid departmental regulation and fully merits the penalty imposed by the director.

We, therefore, affirm all facts found by the Director of Motor Vehicles; we affirm Determination of Issues I as amended by us; we affirm Determination of Issues II; we reverse Determination of Issues III; and we affirm in its entirety the Order of the Director of Motor Vehicles.

This order shall become effective \_\_\_\_\_.

GILBERT D. ASHCOM

AUDREY B. JONES

ROBERT B. KUTZ

WINFIELD J. TUTTLE



D I S S E N T

I do not believe that the facts of this case warrant a cessation of appellant's business activities whatsoever, particularly in view of our holding that Regulation 432.01 was not violated. In my view, a 10-day suspended sentence stayed, as recommended by counsel for the department at the time of the administrative hearing, with a one-year probationary period would be sufficient to serve notice upon both appellant and the automobile retail industry that advertising of the nature herein discussed will not be tolerated.

PASCAL B. DILDAY

any suggestion that the discounted vehicles are other than 1972 models also. Structuring advertisements in such a deceptive way was a flagrant disregard of a valid departmental regulation and fully merits the penalty imposed by the director.

We, therefore, affirm all facts found by the Director of Motor Vehicles; we affirm Determination of Issues I as amended by us; we affirm Determination of Issues II; we reverse Determination of Issues III; and we affirm in its entirety the Order of the Director of Motor Vehicles.

This order shall become effective June 13, 1973.

GILBERT D. ASHCOM

*Audrey B. Jones*  
AUDREY B. JONES

ROBERT B. KUTZ

WINFIELD J. TUTTLE

D I S S E N T

I do not believe that the facts of this case warrant a cessation of appellant's business activities whatsoever, particularly in view of our holding that Regulation 432.01 was not violated. In my view, a 10-day suspended sentence stayed, as recommended by counsel for the department at the time of the administrative hearing, with a one-year probationary period would be sufficient to serve notice upon both appellant and the automobile retail industry that advertising of the nature herein discussed will not be tolerated.

PASCAL B. DILDAY

any suggestion that the discounted vehicles are other than 1972 models also. Structuring advertisements in such a deceptive way was a flagrant disregard of a valid departmental regulation and fully merits the penalty imposed by the director.

We, therefore, affirm all facts found by the Director of Motor Vehicles; we affirm Determination of Issues I as amended by us; we affirm Determination of Issues II; we reverse Determination of Issues III; and we affirm in its entirety the Order of the Director of Motor Vehicles.

This order shall become effective \_\_\_\_\_.

GILBERT D. ASHCOM

AUDREY B. JONES

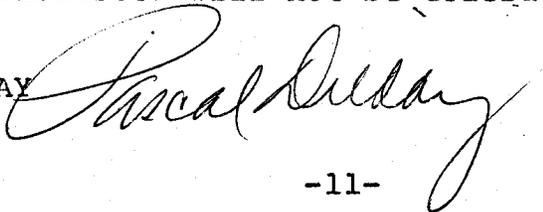
ROBERT B. KUTZ

WINFIELD J. TUTTLE

D I S S E N T

I do not believe that the facts of this case warrant a cessation of appellant's business activities whatsoever, particularly in view of our holding that Regulation 432.01 was not violated. In my view, a 10-day suspended sentence stayed, as recommended by counsel for the department at the time of the administrative hearing, with a one-year probationary period would be sufficient to serve notice upon both appellant and the automobile retail industry that advertising of the nature herein discussed will not be tolerated.

PASCAL B. DILDAY

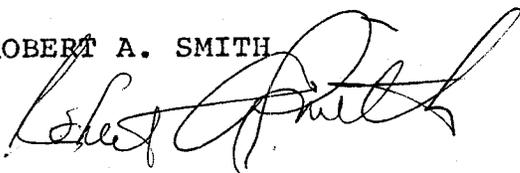


A-34-73

-11-

I concur with the comments of Mr. Dilday, except I would merely stay the entire 23-day suspension.

ROBERT A. SMITH

A handwritten signature in cursive script, appearing to read "Robert A. Smith", written over the typed name.