

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of )  
 )  
FLETCHER CHEVROLET, INC., )  
a California Corporation, )  
 )  
Appellant, )  
 )  
vs. )  
 )  
DEPARTMENT OF MOTOR VEHICLES, )  
 )  
Respondent. )  
\_\_\_\_\_ )

Case No. A-4-69  
Filed and Served:  
January 5, 1970.

Time and Place of Hearing: December 10, 1969, 1:30 P.M.  
3500 South Hope Street  
Los Angeles, California

For Appellant: Getz, Aikens & Manning  
By DeWitt Manning and  
Walter F. Bruder, Jr.  
6435 Wilshire Boulevard  
Los Angeles, CA 90048

For Respondent: Honorable Thomas Lynch  
Attorney General

Michael J. Smolen  
Deputy Attorney General

FINAL ORDER

In the decision ordered July 23, 1969, by the Director of Motor Vehicles pursuant to Chapter 5, Part 1, Division 3, Title 2 of the Government Code, it was found that appellant: (1) failed in 25 instances to file with respondent written notice of sale before the end of the third business day after transferring the vehicles; (2) wrongfully and unlawfully failed

in 71 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 twenty-day period allowed by law; (3) wrongfully and unlawfully failed in 65 instances to mail or deliver to respondent the application for registration of a new vehicle together with other documents and fees required to register the vehicles within the ten-day period allowed by law; (4) reported to respondent in one instance a date of sale other than the true date of sale and did thereby make false statements or conceal material facts in the application for registration of the vehicles; (5) filed with respondent in two instances a false certificate of non-operation of a vehicle and did thereby make a false statement or conceal a material fact in the application for registration of the vehicle; and (6) reported to respondent in two instances a date of sale other than the true date of sale for the first date of operation of the vehicle and did thereby make false statements or conceal material facts in the application for registration of such vehicles.

Appellant introduced evidence at the administrative hearing to prove that: (1) a former business manager was discharged from appellant's employment for cause around April 1, 1967, and replaced by an experienced business manager

after which reporting to the department was improved;

- (2) appellant sells about 375 motor vehicles per month;
- (3) business hours extend through 12 to 14 hours daily, seven days a week;
- (4) reports of sale of motor vehicles have been written by many different employees of appellant;
- (5) subsequent to being served with the accusation, managerial meetings were held by the appellant with a view to improving procedures in reporting to the department;
- (6) commencing in February 1967, appellant engaged a contract service to assist in reporting to the department; and
- (7) commencing on May 20, 1969, appellant adopted a strict control over its serially numbered reports of sale and the control system has reduced the number of misuses dramatically.

The penalty imposed suspended appellant's license, certificate and special plates for a period of 20 days, with the execution of the suspension order stayed for three years. It was further ordered that the Director of Motor Vehicles may, during the 3-year period, in his discretion and without a hearing, vacate the stay order and reimpose the suspension, or a portion thereof, upon evidence satisfactory to him that cause for disciplinary action has occurred. If such action is not taken by the Director during the 3-year period, the stay is to become permanent.

An appeal was filed with this Board pursuant to Chapter 5, Division 2, of the Vehicle Code alleging that: (1) the hearing

officer wrongfully restricted appellant from producing evidence to support its contention that in many instances delay in submitting reports of sale of vehicles was caused by circumstances beyond appellant's control; (2) the part of the order that permits the director to vacate the stay order and impose the order of suspension without a hearing violates due process of law; and (3) the penalty is unduly harsh and severe in its entirety in view of abundant and substantial evidence of mitigation.

I. WAS EVIDENCE IMPROPERLY EXCLUDED DURING THE PROCEEDINGS BEFORE THE OFFICE OF ADMINISTRATIVE PROCEDURE?

Appellant took the position there are instances when tardiness in submitting reports of sale to the Department of Motor Vehicles is caused by circumstances beyond appellant's control. At the administrative hearing, appellant made an offer of proof to show that 45% of its retail automotive sales were transacted with the buyer electing to obtain outside financing; i. e., financing through sources unrelated to the dealer. Appellant also made an offer of proof that, in many instances, the late report of sale was occasioned by documents of title of the vehicle being in transit to or in the hands of the Department of Motor Vehicles. Appellant contended that the outside financing and title in transit situations placed timely reporting to the department beyond its control and

that the offered evidence was improperly excluded.

The record on appeal does not support appellant's contention that the evidence was improperly excluded at the administrative hearing. The delays in reporting were not caused by circumstances beyond appellant's control. On the contrary, the delays were caused by circumstances created by appellant. Moreover, in its offers of proof, appellant neglected to designate items in the accusation to which its offers related. Thus, the evidence was properly excluded, not only because it was irrelevant, but, also, the offers of proof were deficient.

Appellant is, in effect, contending that the degree of discipline imposed upon it for failing to abide by applicable laws and regulations should be minimized, notwithstanding the fact appellant's failure to comply with such laws and regulations results from business practices it and some other dealers have elected to pursue. We cannot agree with this contention. Section 5901 V. C. provides that a sale of a motor vehicle occurs when the purchaser has paid the purchase price or, in lieu thereof, has signed a purchase contract or security agreement and has taken possession of the vehicle. Pursuant to Section 4456 V.C. and a regulation of the Department of Motor Vehicles (13 Cal. Adm. Code 410.00), the report of sale of vehicles must be completed by the dealer and purchaser at the time of sale and the form delivered or mailed to the Department of Motor Vehicles within 10 days for a new vehicle and 20 days for a used vehicle. Permissible deviations from this law are two

in number and the only one relevant to this case is 13 Cal. Adm. Code 410.01(b).

This rule stays the commencement of the period of time for reporting the sale of a used vehicle where the document of title to the vehicle is being processed by the department for transfer of ownership or renewal of license. Under this rule, the commencement of the 20-day period is stayed until the department has reissued the document of title. The dealer is enabled to sell a trade-in even though the document of title is being processed by the department and not in the dealer's possession. However, the rule does not, in any way, absolve the dealer from his responsibility of making such arrangements as are necessary to obtain the document of title promptly upon its issuance by the department and of processing the report of sale of the vehicle within the twenty-day period which commences to run when the document is issued by the department.

If the appellant wishes to avoid disciplinary action by the department based on untimely filing of reports of sale, it is incumbent upon appellant to pursue business practices which do not preclude following the above cited rules and regulations. Appellant concedes it is possible to avoid the delay caused by outside financing. Indeed, appellant urges in mitigation that it has recently developed a procedure for avoiding delay in reporting although the buyer insists upon obtaining his own

financing. This demonstrates that it was within the power of the appellant to comply at the time of its violations.

With reference to appellant's contention that it is precluded from filing timely reports of sale because the document of title is in transit or is in the hands of the department, again it is the business practice of appellant that creates the circumstances precluding it from timely filing. Appellant takes note of the regulation of the department (13 Cal. Adm. Code 410.01(b) ) which provides that, where title is in transit or in the hands of the Department of Motor Vehicles, the 20-day period is stayed until the department reissues the certificate of title which enables recordation of the sale. It concedes that this regulation is of benefit to dealers, however, appellant contends it does not protect the dealer from untimely reporting in all situations. Appellant gives as an example the situation where the person to whom title was issued moves without delivering the document of title to the dealer and leaves no forwarding address. We are aware that there are circumstances which place obtaining the certificate of ownership beyond the control of the dealer, however, all examples given by appellant contain the same element; i. e., appellant created such circumstances. Appellant elects to sell vehicles without assurance that the certificate of ownership will be in its possession within the 20-day period.

Appellant has made efforts to eliminate deficiencies in its reporting procedures. Evidence of these efforts was properly admitted at the administrative hearing because such evidence was truly of a mitigating nature. The evidence should have been and was considered in determining severity of penalty. Evidence that delays in reporting sales of vehicles occurred because of such things as outside financing being obtained by the buyer or the document of title in transit or in the hands of the department is not evidence of a mitigating nature. Such circumstances merely explain the cause of untimely reporting, but are not exculpatory and hence are not relevant to the issue of penalty.

We turn now to the deficiency in the offer of proof. Appellant made an offer to show that 45% of its retail sales are transacted with financing obtained by the buyer, independently of the appellant. However, it made no offer to show that any of the vehicles specified in the accusation were purchased from appellant, with the buyer obtaining independent financing, much less that the obtaining of such financing delayed submission of report of sale. Appellant urges that we take a percentage, which it claims represents the volume of retail sales financed by the buyer through sources unrelated to appellant, and apply that percentage to the number of reports of sale identified in the accusation as not timely filed. We apparently are asked to conclude that the product of this computation would represent

the number of reports of sale untimely filed due to outside financing. The hearing officer properly rejected this approach. Appellant attempted to deal in a hypothetical formula when it should have offered to show which vehicles listed in the accusation actually fell in the "delay through outside financing" category. Appellant could have determined from its own records precisely which items in the accusation, if any, fell within this category.

Appellant's offer to prove that untimely reports of sale occurred by reason of the fact that documents of title to vehicles were in the hands of the department or in transit, was similarly deficient in that the offer failed to identify any of the vehicles specified in the accusation as falling within this category. Appellant maintained that "on occasion" it could not forward the documents of title to the department within the 20-day period notwithstanding 13 Cal. Adm. Code 410.01(b), but it failed to connect the occasions with the ones charged in the accusation. We do note the uncontroverted testimony produced at the administrative hearing that department records reveal the accusation contained no vehicles involving title in transit.

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

this Board, sitting in its appellate capacity to modify them.

That power resides in the Legislature and the department.

- II. DOES THAT PORTION OF THE PENALTY THAT PERMITS THE DIRECTOR OF MOTOR VEHICLES TO VACATE HIS STAY ORDER AND IMPOSE THE SUSPENSION UPON EVIDENCE SATISFACTORY TO HIM AND WITHOUT GIVING APPELLANT NOTICE AND OPPORTUNITY TO BE HEARD PRIOR TO TAKING SUCH ACTION VIOLATE DUE PROCESS OF LAW?

The penalty imposed in this case does not invade any of the appellant's constitutional rights. This issue was before us and decided in *Bill Ellis, Inc. vs. Department of Motor Vehicles*, a-2-69, wherein we said, in part:

"Due process of law contemplates adequate notice and an opportunity to be heard; it does not require relitigation of issues finally determined after observance of due process. 'Due process contemplates that somewhere along the line a fair trial be had -- not that there be two or three fair trials.' (*Hohrieter v. Garrison*, 81 Cal. 2d 384; *Kramer vs. State Board of Accountancy*, 200 Cal. 2d 163.) 'Due process insists upon the opportunity for a fair trial, not a multiplicity of such opportunities.' (*Dami v. Department of Alcoholic Beverage Control*, 1 Cal. Rptr. 213.) 'Due process of law under the state constitution and due process of law under the federal constitution mean the same thing.' (*Gray vs. Hall*, 203 Cal. 306.)"

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

In *Bill Ellis, Inc.*, supra, the proper scope of review by this Board on the issue of penalty was discussed. We said:

"We are firmly of the opinion that Section 3054 V.C. empowers this Board to reverse the penalty fixed by the department, without finding an abuse of discretion, and remand the case to the department for penalty redetermination or, in the alternative and in its discretion, exercise its independent judgment and amend the penalty accordingly."

We conclude that the penalty imposed by the Director of Motor Vehicles in the case before us is unduly severe in its

entirety. We are not unmindful that we stressed in Bill Ellis, Inc., supra, the importance of dealers making timely and accurate reports to the Department of Motor Vehicles. We pointed out that the Legislature indicated a firm opinion that compelling dealers to meet reporting requirements is a matter of importance to the public welfare. As further evidence of the Legislature's views in this regard, we point out that failing to make timely reports of sale (pursuant to Section 4456 Vehicle Code and 13 Cal. Adm. Code 410.00 and 410.01) constitutes an infraction and is punishable upon first conviction by a fine not exceeding \$50.00, punishable for a second conviction within a period of one year by a fine not exceeding \$100.00, and punishable for a third or any subsequent conviction within a period of one year by a fine not exceeding \$250.00. These fines may be levied by the court in addition to the \$3.00 misuse fee levied by the department. Failing to submit the notice of sale within the three-day period required by Section 5901 V.C. is looked upon by the Legislature with even more seriousness. This failure constitutes a misdemeanor and is punishable by incarceration for a period not to exceed six months or by a fine not exceeding \$500.00 or by both such fine and incarceration. (See Sections 40000 and 42001 Vehicle Code.)

This Board, sitting in its appellate capacity, is bound by the record produced at the administrative hearing. According to that record, the ratio of reporting delinquencies to total

sales is small and substantial efforts on the part of appellant to eliminate such delinquencies have been made. We do not believe, that this appellant's misconduct, as enumerated in the director's decision, was of such graveness that it should face a suspension of license for 20 days.

Furthermore, on the facts before us, it is our opinion that three years is an excessive time for the appellant to labor under the stay order. The Director of Motor Vehicles found that appellant has taken steps to correct its reporting deficiencies. It should not require a period of three years to determine whether or not such steps will be remedial. If appellant does not eliminate its delinquencies within a one-year period, stringent action should be taken by the department to compel compliance. On the other hand, if appellant's new procedures or modifications thereof do correct the delinquencies, it should not be required to operate for longer than one year in jeopardy of license suspension under the director's order herein.

Pursuant to Section 3054 V.C., 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 dealer's license, certificate and special plates (D-1964) issued to Fletcher's Chevrolet, Inc., a California corporation, are each suspended for ten (10) days, with execution of said

suspension stayed for one (1) year upon the condition that should the Director of Motor Vehicles, at any time during the period of the stay, determine upon evidence satisfactory to him that cause for disciplinary action occurred, he may in his discretion and without a hearing vacate the stay and reimpose the suspension or a portion thereof, and that should no such determination be made, the stay shall become permanent.

*Gilbert D. Ashcom*  
GILBERT D. ASHCOM, Vice-President

*Warren Biggs*  
WARREN BIGGS  
*Pascal B. Dilday*  
PASCAL B. DILDAY

*Ralph E. Inglis*  
RALPH E. INGLIS

*Melecio H. Jacaban*  
MELECIO H. JACABAN

*Audrey B. Jones*  
AUDREY B. JONES