

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 aforementioned 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." (Borrer 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

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THOMAS KALLAY

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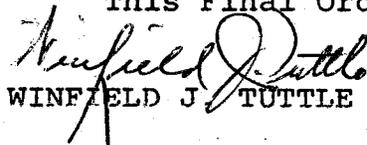
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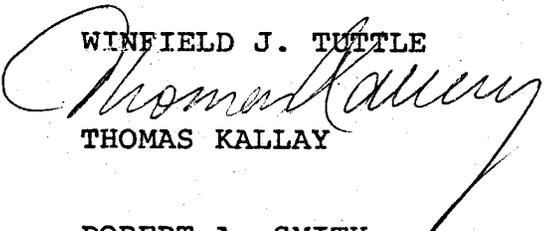
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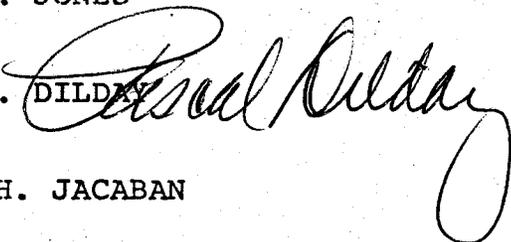
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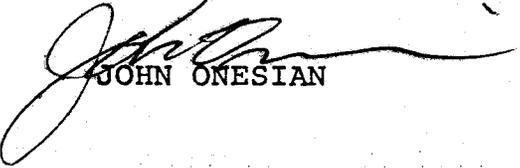
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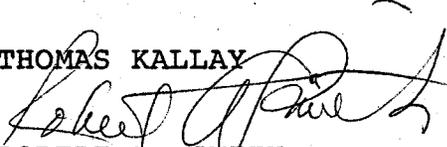
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