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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 Hoechlings) 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 separate 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

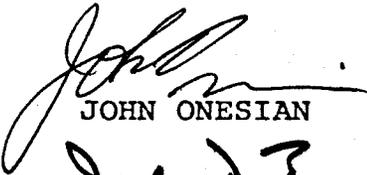
JOHN B. VANDENBERG

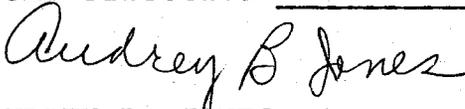
WINFIELD J. TUTTLE

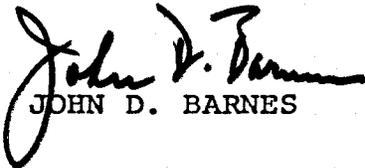
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