

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Appeal of)
)
POMONA CHRYSLER-PLYMOUTH, INC.,) Appeal No. A-85-79
)
Appellant,) FILED: March 27, 1980
)
vs.)
)
DEPARTMENT OF MOTOR VEHICLES OF)
THE STATE OF CALIFORNIA,)
)
Respondent.)

Time and Place of Hearing:

10:15 a.m., March 27, 1980
9901 La Cienega Boulevard
Pilot's Room
Los Angeles, CA 90045

For Appellant:

Lewis W. Boies, Jr.
Boies and O'Rourke
11777 San Vicente Boulevard
Suite 777
Los Angeles, CA 90049

For Respondent:

Doris N. Jaffe, Staff Counsel
Department of Motor Vehicles
Legal Office
3500 South Hope Street
Room 236
Los Angeles, CA 90007

FINAL ORDER

Pomona Chrysler-Plymouth, 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 its license by the Department of Motor Vehicles

following proceedings pursuant to section 11500 et. seq. of the California Government Code.

The Director of Motor Vehicles, adopting the proposed decision of the Administrative Law Judge, found that:

(1) Appellant included, as an added cost to the selling price of the vehicles, fees in excess of the fees due and paid to the state on eight separate instances.

(2) In connection with the sale of four separate vehicles appellant fraudulently represented the vehicles as new vehicles. Appellant did not disclose to the purchasers that the vehicles had been previously sold at retail and operated on the public highways and were therefore used vehicles within the purview of Vehicle Code section 665. Appellant's fraudulent representations caused the purchasers to suffer loss or damage.

(3) On three separate occasions, appellant sold vehicles for prices which exceeded the advertised prices of those vehicles as they appeared in newspaper ads.

(4) Appellant advertised a free "CB Radio 23 Channel transceiver with the purchase of a new van" which advertisement was false or misleading, and which was known or should have been known to be false or misleading, in that in connection with the sale of five separate vehicles free CB radios were not included with the purchased vehicles.

(5) Appellant advertised a vehicle for sale more than 48 hours after the vehicle had been sold. The advertising of this particular vehicle was clearly through inadvertence on the part of either appellant's sales manager or personnel of the newspaper where the ad appeared. Therefore, it was

determined that there was not sufficient cause for imposition of a penalty.

(6) It was not established that in connection with the sale of one vehicle, appellant failed to return the down payment without demand when the buyer was unable to secure a loan on the conditions stated in the sales contract. The buyer was in need of a vehicle and purchased a less costly one when he was unable to finance his first choice. The down payment was applied to the purchase of the second vehicle. (Paragraph 7 below)

(7) It was not established that in connection with the sale of one vehicle appellant caused the purchaser to suffer loss or damage by reason of fraud or deceit, in that it was not established that appellant unduly influenced the purchaser to contract for and take delivery of the vehicle after fraudulently representing to the purchaser that the rescission of the purchaser's earlier contract would result in the loss of all or part of the purchaser's down payment unless the down payment was applied toward the purchase of another vehicle.

(8) Appellant, by and through its salesmen, fraudulently represented a vehicle to be a dealer demonstrator instead of disclosing to the purchaser that the vehicle had previously been sold at retail and operated on the public highways. Had the purchaser known that the vehicle was not new, she would not have purchased it.

(9) Instead of reporting the sale of a vehicle properly, appellant, by and through its agents, altered the vehicle

identification number on the Report of Sale Used Vehicle and used the Report of Sale to report the sale of a different vehicle, thereby avoiding the registration fees due pursuant to Vehicle Code sections 4456(c)(2) and 9250; evading the weight fees due pursuant to Vehicle Code sections 4456(c)(2) and 9400; and evading the license fees due pursuant to Vehicle Code section 4456(c)(2) and Revenue and Taxation Code sections 10751, et seq.

(10) In connection with the sale of a vehicle, appellant, by and through its agents altered the Report of Sale Used Vehicle to reflect a false date of sale thereby unlawfully evading administrative service fees due pursuant to Vehicle Code sections 4456.1(a) and 4456.1(c)(1); unlawfully evading registration fee penalties due pursuant to Vehicle Code sections 4456(c)(2), 9552, 9553, and 9554; unlawfully evading weight fee penalties due pursuant to Vehicle Code sections 4456(c)(2), 9552, 9553, and 9554; and unlawfully evading license fee penalties due pursuant to Vehicle Code section 4456(c)(2) and Revenue and Taxation Code sections 10853, and 18054.

(11) Appellant presently has one of the lowest complaint ratios among the Chrysler-Plymouth dealers in Southern California, Arizona, and Nevada. Appellant employs 23 salespersons and 80 additional employees. The sales people are paid on commission based on the gross sale of each vehicle. The evidence indicates that a good portion of the violations herein described resulted from avarice on the part of the sales personnel. The owner and sole shareholder of the appellant corporation may not have knowingly

permitted these violations, and full restitution has been made by appellant in the form of money and CB radios.

(12) The evidence demonstrates sincere and effective efforts by appellant to prevent future reoccurrences of violations. Appellant has completely reorganized the sales procedure for rollback vehicles. Each vehicle in stock is photographed, each ad is posted in a conspicuous location in the dealership and the managers take positive action to make the sales personnel aware of all advertisements. Moreover, appellant has retained the professional services of an independent firm which regularly audits and advises appellant's employees in the conduct of the licensed business.

The Director, adopting the proposed decision of the Administrative Law Judge, imposed a penalty of 123 days suspension (with all suspensions running concurrently amounting to a total of thirty (30) days suspension). However, the order of suspension was to be stayed for a period of two (2) years from the effective date of the decision, during which time the appellant was to be placed on probation to the Director, subject to certain terms and conditions including the suspension of the dealer's license and special plates for a period of three (3) days.

Appellant raises five issues on appeal, as follows:

1. The Department has proceeded without and in excess of its jurisdiction;
2. The Department has proceeded in a manner contrary to law;

3. The decision is not supported by the findings;
4. The findings are not supported by the weight of the evidence in the light of the whole record, viewed in its entirety, including relevant evidence adduced at the hearing of the Board;
5. The determination or penalty as provided in the decision of the Department, is not comensurate with the findings.

Having reviewed the record, and having heard oral arguments from both sides regarding the accusation, the findings, and the imposition of a penalty, the Board is impressed with two significant circumstances bearing upon this case. In the first instance, it is clear that sufficient ambiguity exists regarding the fees to be charged pursuant to the sale of rollback vehicles to cause the Board to believe that any overcharging may well have been the result of mere inadvertance or confusion on the part of appellant's personnel. Indeed, the Department acknowledges that ambiguities existed regarding the appropriate amounts to be charged on the sale of rollback vehicles, but argues that a memo was issued which purportedly clarified this situation prior to the violations described in this action. Such argument is not persuasive in light of the continued uncertainty regarding this issue evidenced at the oral arguments before the Board. The Department has been unable to state with clarity the proper procedure for charging fees on the sale of rollback vehicles, and it has been unable to state with certainty whether or not such overcharges, when discovered, were promptly returned to the dealership for purposes of enabling the dealership to reimburse

customers. Appellant claims not to have been reimbursed by the Department for the fees which it overcharged customers and yet claims to have reimbursed all customers involved after being provided with a list of such customers by the Department. The Department offers no rebuttal to this contention other than to argue the unreasonableness of a seven month delay in returning the fees to customers. In view of the rather confused and apparently fluctuating state of the information available to appellant regarding fees to be charged on rollback vehicles, it may well have been excusable for appellant to postpone returning fees until it was either reimbursed by the Department or provided with specific instructions regarding the amount to be returned to specific customers.

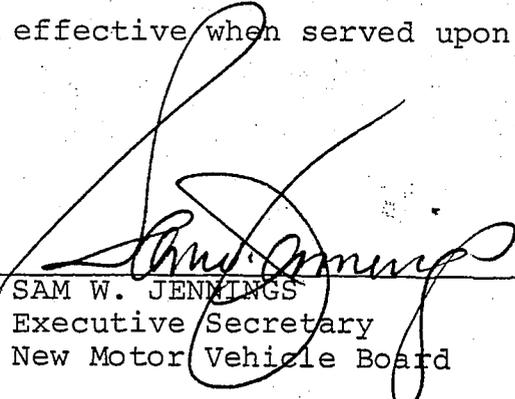
Secondly, as the Administrative Law Judge notes in her proposed decision which has been adopted by the Director, appellant has been in the retail automobile industry for approximately 28 years without disciplinary action prior to the filing of this accusation. In addition, appellant has one of the lowest complaint ratios of Chrysler-Plymouth dealerships in Southern California. In spite of the Department's contention that the investigation which led to this accusation resulted from a large volume of complaints being filed with the Department against appellant, the Department has been unable to produce any concrete evidence regarding any of these complaints. In fact, the Department has been unable to state with certainty whether any such complaints filed with the Department are even the subject of this disciplinary action.

The Administrative Law Judge has found that a good portion of the violations which are the subject of this disciplinary action resulted from avarice on the part of the sales personnel and that the owner and sole shareholder of the appellant corporation may not have knowingly permitted these violations. While the Board acknowledges that appellant may not escape liability for its actions by claiming ignorance or inadvertance, the Board agrees with the Administrative Law Judge that the evidence has demonstrated sincere and effective efforts by appellant to prevent future reoccurrences of violations. The Board notes that appellant has taken specific corrective action including reorganizing the sales procedure on rollbacks, improving the procedure whereby sales personnel are made aware of advertisements, and retaining the professional services of an independent firm to audit and advise appellant's employees in the conduct of its business.

In view of its position on the above issues, and the record in its entirety, the Board finds that while there is sufficient evidence of wrongdoing to warrant the imposition of a penalty, the mitigating circumstances described above, and the record, justify modification of the penalty imposed.

The decision appealed from is hereby modified to the extent that the condition requiring three (3) days suspension of appellant's dealer's license and special plates is eliminated.

The Final Order shall become effective when served upon the parties.

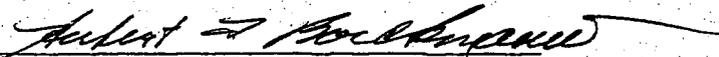

SAM W. JENNINGS
Executive Secretary
New Motor Vehicle Board

NEW MOTOR VEHICLE BOARD

1401 - 21st Street
Suite 407
Sacramento, CA 95814
(916) 445-1888



I hereby approve of the FINAL ORDER, filed March 27, 1980, by the New Motor Vehicle Board, in the matter of POMONA CHRYSLER-PLYMOUTH, INC. vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Appeal No. A-85-79. By such approval I authorize Sam W. Jennings, Executive Secretary of the New Motor Vehicle Board, to sign the FINAL ORDER.


HERBERT F. BOECKMANN, II
Member
New Motor Vehicle Board

APR 1 1980
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A handwritten signature in cursive script that reads "John B. Vandenberg".

JOHN B. VANDENBERG
Member
New Motor Vehicle Board

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A handwritten signature in cursive script that reads "Elvira Arman-Reed".

ELVIRA ARMAN-REED

Member

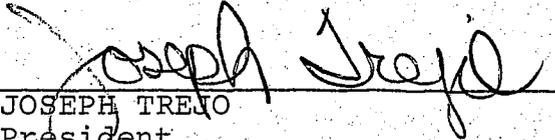
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JOSEPH TREVO
President
New Motor Vehicle Board

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A handwritten signature in cursive script that reads "Florence S. Post". The signature is written over a horizontal line.

FLORENCE S. POST
Member
New Motor Vehicle Board