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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Petition of)
SOLANO VOLKSWAGEN, a California)
Corporation, dba OLIVER VOLKSWAGEN;) Petition No. P-64-80
OLIVER HINDLEY; ARTHUR W. ROEGNER,)
JR.; AUCKLAND ENTERPRISE, a)
California Limited Partnership,)
Petitioners,)
vs.)
VOLKSWAGEN OF AMERICA, INC.,)
Respondent.)

PROPOSED DECISION

1. Petitioner Solano Volkswagen Inc., dba Oliver Volkswagen (Solano) is located at 515 Tuolumne Street, Vallejo, California. Petitioner Oliver Hindley (Hindley) is the sole shareholder of Solano.

2. On April 11, 1980, Solano and Hindley entered into an agreement with petitioner Arthur W. Roegner, Jr., (Roegner) for

the purchase by Roegner of all of the assets of Solano. Since Solano is a franchisee of Volkswagen of America, Inc. (VOA), the agreement was subject to VOA's approval.

3. Application for approval of the transfer was made to VOA on April 18, 1980. On April 25, 1980, Hindley was notified that VOA rejected the application because VOA determined that Roegner did not have the qualifications to be a VOA franchisee.

4. A petition, pursuant to Vehicle Code Section 3050 (c)^{1/}, was filed with the New Motor Vehicle Board (Board) on May 12, 1980, by Solano, Hindley, Roegner, and Auckland Enterprise (Auckland), a California limited partnership. Roegner had entered into the purchase agreement as the prospective general partner of Auckland.

5. The petition filed with the Board requested that the Board consider whether VOA had unreasonably withheld its consent to the transfer of Solano to Roegner and Auckland.

6. An unsuccessful effort to resolve the disputed issues was made at a non binding arbitration hearing.

7. The Board first considered the matter at its meeting of July 9, 1980, and ordered a hearing to be held.

8. A hearing was held on July 23, 24, and 25, 1980, before Anthony M. Skrocki, an Administrative Law Judge for the Board.

1. Unless otherwise indicated all references to code sections are to the California Vehicle Code.

9. Solano, Hindley, Roegner, and Auckland were represented by Sidney I. Pilot of the law firm of Pilot & Spar. VOA was represented by Richard L. Ackerman of the law firm of Herzfeld & Rubin.

PRELIMINARY MATTERS

A. AMENDMENT OF PETITION

10. At the hearing, it was stipulated by counsel for the parties that the petition was deemed amended, and resubmitted and limited to the reasonableness of the refusal of VOA to approve Roegner, only, and not Auckland or any of the other individuals comprising the limited partnership. It was further stipulated that the sole issue before the Board was the evaluation of Roegner by VOA and the reasonableness of its determination that Roegner was unacceptable.

B. BURDEN OF PROOF

11. Transfer of ownership of Oliver Volkswagen to Roegner without the prior consent of VOA could have given rise to an attempted termination of the franchise by VOA. Had an unauthorized transfer occurred and had VOA attempted to terminate the franchise, VOA would have been required to establish good cause for the termination pursuant to Section 3066.

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12. Here, however, there is no attempted termination by VOA, but rather an attempt by Hindley and Roegner to act within the terms of the franchise agreement and relevant statutes. Based on these facts, it could be argued that the burden of proving that the withholding of consent of VOA was reasonable should be on VOA. However, there is no statutory guideline specifically providing for resolution of the problem when the issue is raised in a non-termination setting.

13. It is determined that the burden of proving that VOA acted unreasonably in withholding its approval of the transfer to Roegner should be on the party so contending, herein, the petitioners, Solano and Roegner.

14. It was stipulated that Hindley desires to sell his dealership to Roegner, and Hindley believes the price is fair and equitable.

ISSUES PRESENTED

15. Petitioners contend that VOA was unreasonable in withholding approval of Roegner in that:

- 1) VOA's determination that Roegner does not have the requisite good character to be a Volkswagen franchisee is unreasonable; and
- 2) VOA's determination that Roegner does not have the requisite competence to successfully operate a dealership is unreasonable.

FACTS RELATING TO VOA'S DETERMINATION THAT
ROEGNER DOES NOT HAVE THE REQUISITE GOOD
CHARACTER TO BE A VOLKSWAGEN FRANCHISEE.

16. VOA did not make its determination that Roegner was not qualified to be a franchisee based upon any of the information contained in Roegner's application to VOA.

17. VOA has no written standards or guidelines that establish its requirements that must be met in order to obtain its approval to be a franchisee. VOA does, however, evaluate applicants for franchises by considering whether the applicant has what VOA referred to as the three C's: Character, Capacity, and Capital.^{2/}

18. VOA did not refuse to approve the transfer to Roegner because of any problem with Roegner's personal reputation. VOA rather contended that its decision was influenced by Roegner's professional reputation.

19. One of VOA's concerns in respect to Roegner's character pertained to a bankruptcy that was filed by Roegner in 1970.

20. VOA conceded that bankruptcy does not have an effect upon an individual's character but rather relates more to the individual's ability to carry on his business affairs.

2. Based on a stipulation at the hearing, it was agreed that the amount or source of Roegner's capital was not the basis of VOA's rejection of his application. Roegner must still meet VOA's reasonable capital requirements.

21. Roegner's bankruptcy was due to a combination of marital problems as well as a decline in economic conditions in the San Fernando Valley, where in 1972, he was the proprietor of a used-car operation. Despite having been discharged in bankruptcy, Roegner paid off all of his creditors subsequent to the discharge.

22. VOA also contends that Roegner's discharge from his employment at Transocean Motors in 1976 reflected adversely upon his professional character.

23. Roegner had been employed at Transocean Motors from 1972 thru 1976. Under his agreement with the owner, Roegner was receiving a reduced salary in consideration for Roegner's right to charge part of his personal and living expenses against the company's travel and entertainment account.

24. Roegner and the majority shareholder in Transocean had a falling out as a result of Roegner's charges against the travel and expense account and Roegner was subsequently terminated. During its evaluation of Roegner, VOA learned that the majority owner of Transocean Motors did not consider Roegner eligible for rehire.

25. VOA was also concerned about the circumstances surrounding Roegner's obtaining a letter of intent from VOA to become the Volkswagen dealer in Pleasanton while Roegner was a 10% shareholder in Fresno Volkswagen. VOA was concerned that:

- a) Roegner did not reveal such information to the majority shareholder of Fresno Volkswagen; and
- b) he allegedly violated the provisions of the letter of intent issued by VOA.

26. Fresno Volkswagen was operated by Roegner who was a 10% shareholder and general manager. The other 90% was owned by William Cruikshank and his associates (Cruikshank) from whom Cruikshank held a proxy.

27. After Roegner satisfied himself that he could not acquire majority ownership of Fresno Volkswagen, Roegner contacted the VOA regional manager at that time, Henry Braner, (Braner) and informed Braner that Roegner was looking for a dealership for himself. In September, 1978, VOA, through Braner, informed Roegner that the Pleasanton point was available and in September, 1978, VOA issued a letter of intent to Roegner.

28. Roegner did not immediately tell Cruikshank of the Pleasanton letter of intent because Roegner was concerned that he would be terminated by Cruikshank. Roegner was not certain that he would be able to obtain the financing and make the necessary arrangements for the franchise at Pleasanton. Since there were no existing facilities, Roegner was required to find land and erect a building. The cost of such a project might have prevented the awarding of the franchise as Roegner was short of capital.

29. In November, 1978, the problem of land and structure availability was solved for Roegner when Vorelco (A VOA-connected realty entity) agreed to construct a facility and lease the land and building to Roegner. At that time, Roegner determined that the franchise would be a viable enterprise. Although the new facility would not be ready until mid 1980, Roegner notified Cruikshank

approximately in November or the first of December, 1978, that the Pleasanton point was available to him.

30. Cruikshank believed that Roegner had taken advantage of a corporate opportunity that properly belonged to Fresno Volkswagen. For this reason, and the allegedly unsatisfactory sales performance and profitability at Fresno Volkswagen, Cruikshank sought to terminate Roegner.

31. The testimony from the VOA representative was to the effect that VOA had determined that Roegner had not informed Cruikshank prior to obtaining the letter of intent for Pleasanton. However, none of the VOA personnel had informed Cruikshank that Roegner was either applying or had been awarded the letter of intent for the Pleasanton point.

32. VOA had previously approved persons who obtained Volkswagen franchises without informing their majority partners.

33. VOA's records indicated that Cruikshank had been notified by Roegner in November or December of 1978 concerning Roegner's applying for the Pleasanton point.

34. The September 12, 1978 letter of intent issued to Roegner for the Pleasanton point required Roegner to divest himself of his 10% interest in Fresno Volkswagen. The letter of intent limited Roegner to providing single-line representation in the Pleasanton area for Volkswagen.

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35. The area in which the proposed new Volkswagen facility was to be located in Pleasanton was in a brand new shopping center area with sufficient room for other dealers or for the creation of an auto center.

36. When Cruikshank became aware of the availability of other space, Cruikshank asked Roegner to investigate what other franchises might be available in the auto center.

37. As a result of Cruikshank's request, Roegner made inquiries as to what other franchise opportunities might exist and even explored the possibility of establishing a dual franchise at the Volkswagen facility using part of the Volkswagen facility for BMW. Roegner would not have been able to establish a dual BMW facility with Volkswagen without VOA's approval.^{3/}

38. VOA, by the terms of its letter of intent, also required Roegner to divest himself of his 10% interest in Fresno Volkswagen. Roegner, however, had written to Cruikshank informing Cruikshank that Roegner desired to, if possible, be the majority shareholder at the Pleasanton facility and retain his 10% interest in Fresno Volkswagen. Roegner hoped to eventually sell the 10% interest to his son and would not have been able to retain his 10% ownership interest in Fresno Volkswagen and obtain the Pleasanton franchise without the express approval of VOA.

3. VOA maintains that its refusal to extend Roegner's letter of intent was partially based on Roegner's inquiries concerning the dualing of an additional franchise with Volkswagen. VOA considered these inquiries as a violation of the terms of the letter of intent which required single-line representation in the Pleasanton area.

39. In March, 1979, VOA refused to extend Roegner's letter of intent for the Pleasanton point. This was done because of the information that VOA had obtained pertaining to the letter Roegner had written to Cruikshank in regard to the possibility of a BMW franchise and the possibility of Roegner's retaining his 10% ownership in Fresno Volkswagen. However, it was subsequent to the refusal to extend the letter of intent that Roegner was approved by VOA to become a 20% shareholder in Fresno Volkswagen.

THE FOLLOWING PARAGRAPHS OUTLINE ROEGNER'S
COMMUNITY ACTIVITIES

40. Roegner has participated in the following activities and received the awards indicated: 1) 1953-1954 Pasadena Junior Chamber of Commerce Merit Award for Public Relations, City of Pasadena; 2) 1955-1956 United States Junior Chamber of Commerce Spark Plug Award for work on charity drives; 3) 1958 United States Air Force Association Man of the Year, Fresno City and County Chamber.

41. While in Pasadena, Roegner was treasurer of the Pasadena Motor Car Dealers Association.

42. Roegner was also a member of the North Fresno Rotary and was a director of the Fresno County and City Chamber of Commerce. In 1978, he received the Fresno City and County Chamber of Commerce Award and Certificate of Appreciation for outstanding service and leadership.

43. While in Fresno, Roegner was a member of the Fresno Auto Dealers Association and during the years 1977, 1978 served as secretary-treasurer. He served as vice president for the 1978-1979 period and was the president-elect of the Fresno Auto Dealers Association when he left Fresno at the end of 1979.

44. VOA was not aware that Roegner was president elect of the Fresno Motor Car dealers Association prior to leaving Fresno.

45. Mr. Fleming, vice president and general manager of Slavich Brothers Mercedes-Benz in Fresno, and Mr. Coryell, general manager of the Fresno Bee with whom Roegner served as a director on the Fresno City and County Board of Directors of the Chamber of Commerce, testified as to Roegner's reputation for honesty, integrity, and good character in the community and as an auto dealer. There were also declarations of Fresno new motor vehicle dealers attesting to the good character and competence of Roegner.

46. VOA did not inform Roegner that they were concerned about his professional reputation prior to their decision to reject his application.

FACTS PERTAINING TO VOA'S DETERMINATION THAT
ROEGNER DOES NOT HAVE THE REQUISITE COMPETENCE
TO BE A VOLKSWAGEN FRANCHISEE.

47. Roegner is 53 years of age, and is presently sales manager of Oliver Volkswagen in Vallejo.

48. Roegner started in the automobile sales industry in 1950 at Foothill Lincoln-Mercury (Foothill) in Pasadena as a used car

salesman. Roegner progressed from a used car salesman to used car manager to new car salesman to new car sales manager to general sales manager and acting general manager of Foothill. Roegner was also general manager of Foothill Distributing Company before he left Foothill in 1963.

49. While at Foothill, Roegner received the following awards: 1) 1957 Lincoln-Mercury Regional Circle Award for outstanding salesmanship in the area west of the Mississippi; 2) 1958-Lincoln-Mercury Inner Circle Award, (one of twelve given in the country); and 3) 1960 Lincoln-Mercury Sales Council Five-Star Sales Management Award (given to the five outstanding sales managers in the country).

50. Roegner left Foothill because he was informed by the owner that the dealership was family owned and there was no chance for Roegner to share in its ownership.

51. From 1963 to 1970, Roegner operated his own used car dealership in Pasadena.

52. From 1970 to 1972, Roegner left the automobile business.

53. In 1972, Roegner was hired at Transocean Motors, a Volkswagen dealership, as general manager. In 1973 or 1974, he acquired 20% of the stock and also became the operating principal.

54. When Roegner arrived at Transocean in 1972, Transocean had incurred a loss of over \$300,000 in the preceding three years. Transocean was also \$150,000 out of trust. When Roegner left, three years later, Transocean enjoyed a profit in excess of \$400,000 and was no longer out of trust.

55. Between 1952 and 1962, Roegner attended most of the Ford management schools held in California and Detroit. Between 1973 and 1979, he attended most of Volkswagen's management schools.

56. Upon leaving Transocean, Roegner contacted the regional manager for VOA and informed him that he was looking for a dealership in which to purchase an interest. Roegner was invited to VOA's office in Culver City and was informed that the Fresno dealership was available and that the VOA regional manager had a close personal friend (Cruikshank) willing to finance the operation. It was proposed that Cruikshank and a group of seven or eight other investors would own 90% and Roegner would own the other 10%. Cruikshank controlled the 90% interest.

57. Prior to the establishment of Fresno Volkswagen, Roegner traveled to Fresno and inspected the proposed facilities. Upon his return, he informed VOA and Cruikshank that the facility was not good. Roegner was informed that he would not be approved for Fresno without taking the particular facility designated by VOA.

58. The Fresno Volkswagen facility was subleased to Fresno Volkswagen by VOA.

59. Roegner was approved by VOA to be a 10% owner and the general manager of Fresno Volkswagen. He remained so from October, 1976 thru June, 1979, and was the operating principal who

was responsible for all phases of the operations. Cruikshank, the majority partner with ultimate control, did not participate in the operation of Fresno Volkswagen and was in Fresno only 5 or 6 times during the entire period.

60. Cruikshank is a multi-millionaire attorney located in Beverly Hills and has interests in several other auto dealerships in California including other Volkswagen dealerships.

61. After Roegner joined the Fresno Motor Car Dealers Association, he learned from his fellow dealers that practically all of them had previously been offered the Fresno Volkswagen point and all had rejected it because the rent was too high, the facilities were too small, and they believed that too much money was needed to make the point viable.

62. The present VOA San Francisco Regional Manager, John C. Dawson (Dawson) was sent to Fresno to assist in reopening the Fresno dealership in October or November of 1976. This was not normally done, but Dawson was sent by his former supervisor who was a personal friend of Cruikshank.

63. The Fresno dealership was very difficult to reopen in that it had been closed for several months and the reputation of the prior dealer was not what VOA had desired. The facilities were also inadequate.

64. Due to the prior dealer's poor service performance, there were 33 or 34 independent Volkswagen repair shops within a 2 or 3 mile radius of the Fresno Volkswagen facility.

65. Upon Roegner's arrival, the Fresno Volkswagen facilities consisted of a former Abbey Rent Building and there was nothing in the service shop whatsoever. The building was bare with no hoist and no lines for technicians. The used car lot was a former gas station next door and the entire facility was a mile or two from the Fresno Auto Row. It was also located between 2 signals with a traffic flow of approximately 50 miles per hour. The used car lot was situated in front of a bus stop so that there was no parking available in front of the lot.

66. In addition to facility problems, Cruikshank, the person who was to supply the necessary funding never met Volkswagen standards for owner's equity. This made Roegner's task more difficult. In January, 1979, when Dawson arrived at his new assignment as VOA San Francisco Regional Manager, the problems of under-capitalization at Fresno Volkswagen still existed.^{4/}

67. Cruikshank had assured Roegner that there would be adequate financing available, but Roegner never had sufficient working capital to adequately operate.

68. In addition to the above, Roegner had difficulty obtaining Volkswagen vehicles that were readily saleable. He had been informed that his initial allocation for Fresno Volkswagen in September, 1976, was to be 23 Rabbits and 4 Dashers. However, the allocation he received consisted of 27 Dashers and possibly 3 Rabbits. As the Dashers were not readily marketable, he returned all of the Dashers to VOA.

4. Under-capitalization consists of lack of owner's equity and lack of working capital.

69. VOA Allocates its vehicles based in part upon the sales rate of the dealership. Since Fresno Volkswagen had no established sales rate, it was not until 1979, that the sales rate increased sufficiently to enable Fresno Volkswagen to receive more vehicles.

70. Roegner estimated that in 1977, he could have sold at least another 100 vehicles, had they been available. In 1978, he could have sold at least another 150 and possibly 175 additional vehicles. Roegner estimated that in 1979, he could have sold an additional 50 to 75 vehicles had they been available.

71. Cruikshank attempted to replace Roegner in February of 1979, because he believed that Roegner was not doing the best possible job. However, the person Cruikshank designated to replace Roegner determined that he could do no better than Roegner and declined to accept the position. Roegner continued to operate the dealership under Cruikshank's majority control until June 1, 1979 when the dealership was sold.

72. In the September of 1978, Roegner applied for and received a letter of intent from VOA to operate the Pleasanton point. This approval was given even though VOA's representative at the hearing stated that in his opinion, Fresno Volkswagen was not performing up to expectations at that time. When VOA refused to extend the letter of intent, the reasons given did not include any allegations of poor performance by Fresno Volkswagen.

73. Fresno Volkswagen was eventually sold in June, 1979, to Herwaldt, an Oldsmobile dealer in Fresno.

74. When Fresno Volkswagen was capitalized, Cruikshank paid \$100 per share. Cruikshank realized \$2,000 per share when he sold the dealership to Herwaldt.

75. When Herwaldt purchased Fresno Volkswagen, Roegner stayed on as general manager and operating principal.

76. Herwaldt's agreement with Oldsmobile precluded Herwaldt from actively managing any other dealership.

77. It was about this time that VOA approved Roegner to become a 20% shareholder in Fresno Volkswagen.

78. VOA approved Roegner's increased ownership and continued management of Fresno Volkswagen with full knowledge of the following:^{5/}

- a) Roegner had been terminated by Transocean;
- b) Roegner had intended to retain his interest in Fresno while operating at Pleasanton;
- c) Roegner had made inquiries concerning the dualing of the proposed Pleasanton point;
- d) Fresno Volkswagen's sales performance.

5. These are the same facts which VOA is now attempting to rely upon as the basis for its refusal to approve the transfer of ownership of Solano to Roegner.

79. Herwaldt terminated Roegner on December 31, 1979 due to conflicts between Roegner and Mr. and Mrs. Herwaldt. Herwaldt was not satisfied with the days that Roegner was working at the dealership in that Roegner refused to work Saturdays and the dealership was not open on Sundays. The hiring and firing of Mrs. Herwaldt's brother caused a dispute between Roegner and Mrs. Herwaldt.

80. The following figures indicate the net before tax profits, as shown on Fresno Volkswagen's financial reports for the time during which Roegner was the general manager and operating principal:

<u>1976</u>	<u>1977</u>	<u>1978</u>	<u>1979</u>
\$9,171 ^{6/}	\$9,393	\$11,256	\$241,606 ^{7/}

81. Although the Fresno Market Area is the second largest market in the San Francisco region, Volkswagen has not penetrated the market well in comparison to the other markets in the San Francisco region. In spite of this fact, Fresno Volkswagen was 12th out of the 45 dealers in the San Francisco region in total sales in 1977. In 1978, Fresno Volkswagen was 17th, and in 1979, it was 11th.

6. This figure includes October and November, but not December.

7. This figure includes only the months of January thru October.

DETERMINATION OF ISSUES

It is determined that VOA has unreasonably withheld its consent to the transfer of the ownership or assets of Solano Volkswagen to Arthur W. Roegner, Jr. in that:

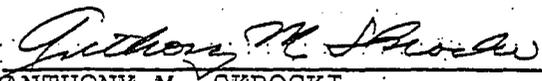
- 1) Petitioners have established that Arthur W. Roegner, Jr. is of requisite good character; and
- 2) Petitioners have established that Arthur W. Roegner, Jr. has the requisite competence to operate a Volkswagen dealership.

* * * * *

The following proposed decision is respectfully submitted:
Volkswagen of America, Inc., shall not withhold its consent to the transfer of Solano Volkswagen from Oliver Hindley to Arthur W. Roegner, Jr.

I hereby submit the foregoing which constitutes my proposed decision in the above-entitled matter, as a result of a hearing had before me on the above dates and recommend its adoption as the decision of the New Motor Vehicle Board.

Dated: September 29, 1980


ANTHONY M. SKROCKI,
Administrative Law Judge,
New Motor Vehicle Board