



## ■ FUTURE MEETINGS

January 27 in Arcadia.  
February 24 in Albany.  
March 24 in Arcadia.  
April 27 in Los Angeles.  
May 19 in Cypress.  
June 23 in Sacramento.  
July 27 in Del Mar.

## NEW MOTOR VEHICLE BOARD

*Executive Secretary:*  
**Sam W. Jennings**  
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Pursuant to Vehicle Code section 3000 *et seq.*, the New Motor Vehicle Board (NMVB) licenses new motor vehicle dealerships and regulates dealership relocations and manufacturer terminations of franchises. It reviews disciplinary action taken against dealers by the Department of Motor Vehicles (DMV). Most licensees deal in cars or motorcycles.

NMVB is authorized to adopt regulations to implement its enabling legislation; the Board's regulations are codified in Chapter 2, Division 1, Title 13 of the California Code of Regulations (CCR). The Board also handles disputes arising out of warranty reimbursement schedules. After servicing or replacing parts in a car under warranty, a dealer is reimbursed by the manufacturer. The manufacturer sets reimbursement rates which a dealer occasionally challenges as unreasonable. Infrequently, the manufacturer's failure to compensate the dealer for tests performed on vehicles is questioned.

## ■ MAJOR PROJECTS

**Protest/Petition Actions.** In *Rasic Investments, Inc., dba Harbor Mitsubishi, et al. v. Mitsubishi Motor Sales of America, Inc., et al.*, Petition No. P-270-93, and *Mitsubishi Motor Sales of America, Inc., v. Rasic Investments, et al.*, Petition No. P-280-94, NMVB considered, among other things, whether a petitioner could bring an action before the Board after it unsuccessfully litigated the matter in superior court, and whether the Board could make any ruling which would change a judgment entered by a court. On October 12, NMVB noted that the petitioners were seeking to raise a claim in the administrative petition which could have been raised in the superior court proceeding; the Board accordingly held that petitioners may not attempt to pursue an action before the Board after they lost in court. The Board also determined that it does not have jurisdiction to

make any ruling which would change a judgment entered by a superior court.

In *JMC Motors, dba Alhambra Mazda/Pontiac/Oldsmobile/GMC Truck v. General Motors Corporation, Oldsmobile Motor Division*, Petition No. P-274-93, GMC notified JMC on May 24, 1993, that it intended to terminate JMC's Oldsmobile franchise, effective 90 days from receipt of the notice; however, on August 24, 1993, GMC agreed to continue the franchise relationship if JMC's retail sales averaged 29 new Oldsmobile automobiles per month during the period from August 24, 1993 to November 24, 1993. During the three-month period, JMC's Oldsmobile sales averaged 12.67 per month, and GMC terminated JMC's franchise. On December 10, 1993, JMC filed a petition with NMVB pursuant to Vehicle Code section 3050(c). GMC responded by contending that the proper procedural mechanism to challenge a termination of a franchise is a protest under section 3060, not a petition pursuant to section 3050(c), and that JMC's submission to the Board came after the statutory time period for filing a protest had elapsed.

A May 12, 1994 hearing was held before Administrative Law Judge (ALJ) Michael Sieving, who submitted his proposed decision to NMVB. On August 25, 1994, NMVB decided to remand that matter to the ALJ with specific instructions, including the instruction to take additional evidence on the sole issue of JMC's compliance with GMC's August 24, 1993 condition for the continuation of the franchise. On October 6, ALJ Sieving concluded that the documentary evidence established that JMC sold an average of 12.67 Oldsmobiles each month during the three-month period in question, and that JMC therefore failed to comply with GMC's condition. Accordingly, ALJ Sieving recommended that JMC's petition be dismissed and that there be no further proceedings in this matter before the Board; on October 12, NMVB adopted the ALJ's recommendation.

In *Ed-West Company dba Costa Mesa Honda v. American Honda Motor Company*, Protest No. PR-1417-94, NMVB considered whether in the criminal convictions of the two principals of Costa Mesa Honda, wherein they were convicted of defrauding Honda, are sufficient to substantiate a termination of a franchise. Vehicle Code section 3061 sets forth seven factors which NMVB must take into consideration when determining whether good cause has been established for terminating or refusing to continue a franchise; these factors are the amount of business transacted by the franchisee, as compared to the business available to the franchisee; the investment necessarily made and obligations incurred by the franchisee to

perform its part of the franchise; the permanency of the investment; whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted; whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public; whether the franchisee failed to fulfill its warranty obligations; and the extent of the franchisee's failure to comply with the terms of the franchise.

American Honda Motor Company (Honda) argued that the criminal convictions of the two Costa Mesa Honda principals are sufficient in and of themselves to substantiate a termination of the franchise. On October 11, ALJ Douglas Drake issued a proposed decision which agreed with Honda's position, stating that "[i]t is injurious to the public welfare to have felons convicted of defrauding their franchisor operating a Honda dealership," and that "it is a complete breach of the franchise agreement for the principals of the franchise to be convicted of the federal felony of defrauding their franchisor." On October 12, NMVB adopted the ALJ's decision, thus allowing Honda to terminate the franchise of Costa Mesa Honda.

*Mathew Zaheri Corporation, dba Hayward Mitsubishi, v. Mitsubishi Motor Sales of America, et al.*, Petition No. P-233-92 and Protest No. PR-1254-92, is a complex matter which involves a number of issues stemming from Mathew Zaheri's claim that Mitsubishi unfairly charged back to Zaheri over \$137,000 in warranty claims over a two-year period. The dispute between Zaheri and Mitsubishi has been pending in both state and federal court for several years; in 1993, the First District Court of Appeal dismissed Zaheri's civil complaint against Mitsubishi on the basis that the plaintiffs failed to exhaust their administrative remedies before NMVB. [13:4 CRLR 201]

On October 12, NMVB adopted ALJ Douglas Drake's decision finding that Mitsubishi unfairly charged back over \$57,000 of those claims; according to the Board's decision, the error was made because Mitsubishi's auditors failed to take into consideration a modification made to Mitsubishi's Warranty Policy and Procedures Manual. However, NMVB also found that Zaheri had engaged in "massive warranty fraud," and that it claimed reimbursements for work not done and parts not used in somewhere between 50 and



2,000 claims; according to the Board, the fraud committed by Zaheri was so sophisticated that Mitsubishi is unable to quantify the total dollar amounts involved. Accordingly, the Board denied Zaheri's petition and protest, and awarded costs and reasonable attorneys' fees against Zaheri in favor of Mitsubishi.

**NMVB Proposes Fee Increase.** On December 9, NMVB published notice of its intent to amend section 553, Title 13 of the CCR, in order to raise its original and renewal licensing fees from \$300 to \$350; the action would also increase from \$0.45 to \$0.55 the amount paid per vehicle distributed by a manufacturer or distributor in California, and increase from \$300 to \$350 the minimum distribution fee to be paid by each manufacturer. According to the Board, the fees it currently collects are insufficient to fully fund the Board's activities and have resulted in the creation of a substantial deficit in the New Motor Vehicle Board Account in the State Transportation Fund; the Board also contends that the current fee assessment amount is unreasonably low in light of the amount of the deficit. At this writing, no public hearing is scheduled; the Board will receive public comments on the proposal until January 23.

**Rulemaking Update.** On October 21, the Office of Administrative Law (OAL) approved NMVB's amendments to section 585 and adoption of new section 593.1, Title 13 of the CCR, regarding the duties and procedures which the NMVB Executive Secretary must follow in accepting and filing protests; however, OAL disapproved the Board's proposed amendments to section 598, Title 13 of the CCR, on the basis that the changes did not satisfy the clarity standard of the Administrative Procedure Act. [14:4 CRLR 194; 14:2&3 CRLR 212; 14:1 CRLR 163] Specifically, OAL found that the proposed amendments are unclear in that they conflict with the Board's description of their effect; persons affected could interpret the text of the regulation to have more than one meaning; and the regulation uses language incorrectly. Accordingly, NMVB revised the language of the proposed changes to section 598 and resubmitted the rulemaking file to OAL; on December 12, OAL approved the changes.

## LITIGATION

In *University Chrysler-Plymouth, Inc., v. Chrysler Corporation*, 28 Cal. App. 4th 386 (Aug. 19, 1994, as modified on Sept. 16, 1994), plaintiff University Chrysler-Plymouth (University) challenged, among other things, Chrysler's opening of a competing Chrysler-Plymouth dealership in the Kearny

Mesa area of San Diego. Among other things, the Fourth District Court of Appeal held that Business and Professions Code section 3050 gives NMVB the power to consider any matter concerning the activities or practices of any manufacturer; accordingly, the court held that University's failure to exhaust its administrative remedy before NMVB barred any proceeding in superior court. [14:4 CRLR 195] On December 15, the California Supreme Court denied University's petition for review; however, the court also directed that the Fourth District's decision not be published in the *Official Appellate Reports*.

## FUTURE MEETINGS

To be announced.

## OSTEOPATHIC MEDICAL BOARD OF CALIFORNIA

*Executive Director:*  
*Linda Bergmann*  
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In 1922, California voters approved a constitutional initiative which created the Board of Osteopathic Examiners; 1991 legislation changed the Board's name to the Osteopathic Medical Board of California (OMBC). Today, pursuant to Business and Professions Code section 3600 *et seq.*, OMBC regulates entry into the osteopathic profession, examines and approves schools and colleges of osteopathic medicine, and enforces professional standards. The Board is empowered to adopt regulations to implement its enabling legislation; OMBC's regulations are codified in Division 16, Title 16 of the California Code of Regulations (CCR). The 1922 initiative, which provided for a five-member Board consisting of practicing doctors of osteopathy (DOs), was amended in 1982 to include two public members. The Board now consists of seven members, appointed by the Governor, serving staggered three-year terms.

In October, Governor Wilson appointed Ernestina Agresti, DO, an osteopathic physician from Roseville, to OMBC; Dr. Agresti's appointment leaves OMBC functioning with two vacancies—one public member position and one professional position.

## MAJOR PROJECTS

**OMBC's Budget Difficulties Continue.** OMBC's fiscal crisis—which required it to shut down its enforcement program in 1994—has not abated. [14:4 CRLR 196; 14:2&3 CRLR 213] Although the tax and

registration fee increase authorized by AB 3732 (Takasugi) (Chapter 895, Statutes of 1994) will provide the Board with additional funds, the Board remains committed to recapturing reserve fund moneys misappropriated by the legislature. OMBC President Ronald Kaldor has proposed a course of action based on that taken by the Medical Board of California (MBC), which was recently the beneficiary of a court judgment requiring the restoration to MBC of \$2.6 million in reserve funds misappropriated by the legislature [14:2&3 CRLR 72-73]; OMBC hopes to have the \$500,000 in reserve funds taken from it by the legislature returned based upon MBC's judgment, as the Board is without the funds to pursue its own lawsuit. Additionally, OMBC has submitted a budget change proposal to the Department of Finance, seeking additional funds for the 1995-96 fiscal year, which begins on July 1.

**Board Adopts Fee Increase, Other Regulatory Changes.** Also on October 14, OMBC published notice of its intent to adopt several amendments to its regulations in Title 16 of the CCR, including the following:

- **Appendix of forms.** OMBC's existing regulations include an appendix of forms for use in communication with the Board on various matters; however, the forms are no longer in use and are outdated. OMBC's proposed amendments to sections 1609, 1610(a), 1646(a), 1651, 1669(a), 1673(b) and (c), 1678(a), and 1681(a) would delete the references to such forms and the appendix containing the forms themselves.

- **Biennial tax and registration fee.** Business and Professions Code section 2456.1 was recently amended to require OMBC to have a biennial tax and registration fee; OMBC's proposed amendments to sections 1630, 1635(a), 1636, and 1647 would delete all references to an annual tax and replace them with references to a biennial tax and registration system.

- **CME deficiency as basis for non-renewal of license.** Existing regulations require 150 hours of continuing medical education (CME) over a three-year period (or a proration thereof) for the purpose of annual license renewal; a physician may make up any CME deficiency in the year following license renewal. OMBC's proposed amendments to section 1641 would eliminate this make-up period and provide that a license will not be renewed if there is a CME deficiency at the time of biennial renewal.

- **New fees for forfeited certificates.** Section 1650 relates to the restoration of a forfeited certificate and refers to the appendix and required forms as well as the annual fee; the Board's proposed changes