



REGULATORY AGENCY ACTION

\$25,000 in 1984. The horse won, and ten days later it came to the stewards' attention that the horse had in fact earned \$25,100 in 1984. Within one day of the receipt of this information, the stewards conducted an investigation and disqualified the horse. A hearing was subsequently conducted by Commissioner Felton of the CHRB as referee, who upheld the stewards' decision. Based on section 1754, Title 4, California Code of Regulations, which requires any protest or complaint against a horse to be made within 72 hours of the race, the horse's owner petitioned for a writ of mandate under Code of Civil Procedure section 1094.5, but the trial court denied the petition.

The Court of Appeal affirmed. It held that the CHRB had acted within a reasonable time in disqualifying the horse, since it was acting under Title 4, CCR, section 1750 (inquiry into complaints by stewards), and section 1592 (disqualification of ineligible horses), to which the 72-hour limitation of section 1754 does not apply. The court further held the CHRB did not engage in surreptitious rulemaking in violation of the Administrative Procedure Act in disqualifying the horse, and that its decision was supported by substantial evidence.

RECENT MEETINGS:

At its August 26 meeting in La Jolla, the CHRB passed a measure requiring that official programs include an indicator as to which horses are currently receiving Lasix medication or have recently been taken off Lasix medication.

FUTURE MEETINGS:

December 16 at Los Angeles.

NEW MOTOR VEHICLE BOARD

Executive Officer: Sam W. Jennings
(916) 445-1888

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. Most licensees deal in cars or motorcycles.

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 manu-

facturer's failure to compensate the dealer for tests performed on vehicles is questioned.

The Board consists of four dealer members and five public members. The Board's staff consists of an executive secretary, three legal assistants and two secretaries.

On August 22, Governor Deukmejian removed automobile dealer Eminiano Reodia from the Board after he failed to explain the suspension of his automobile seller's license by the Department of Motor Vehicles. The Governor had appointed Reodia to the NMVB in 1983.

MAJOR PROJECTS:

Regulations for Third Party Dispute Resolution Certification Program Adopted. The Office of Administrative Law has approved amendments to the NMVB's regulations, which appear in Title 13, California Code of Regulations. These regulations have been adopted pursuant to the passage of AB 1367 (Tanner), which amends the existing statute requiring the NMVB to administer the collection of manufacturers' fees to fund the Bureau of Automotive Repair's (BAR) Certification Program for Qualified Third Party Dispute Resolution Processes. (See *supra* LEGISLATION; see also CRLR Vol. 8, No. 3 (Summer 1988) p. 123 for background information.)

New regulatory section 553.50 requires every new motor vehicle manufacturer to file a statement containing specified information by May 1 of each year. Section 553.60 sets forth a presumption of liability if the information required by section 553.50 is not received by the Board within the applicable time period, or it is determined by the Board that the information received is substantially inaccurate. Finally, section 553.70 assesses the fee for each vehicle by dividing the dollar amount necessary to fund BAR's certification program by the number of new motor vehicles sold, leased, or otherwise distributed in California during the preceding calendar year.

LEGISLATION:

AB 582 (Harris), as amended, regulates advertisements for the sale of new motor vehicles by motor vehicle brokers. Under existing law, it is unlawful for a licensed vehicle dealer to advertise or offer for sale any vehicle not actually on the dealer's premises or available to the dealer from the manufacturer or distributor. As specified, this bill makes it lawful to advertise or offer for sale any vehicle, if the advertising dealer has an

enforceable right of delivery of the vehicle from another dealer who has a similar right with the manufacturer or distributor of the vehicle. AB 582 was signed by the Governor on September 30 (Chapter 1583, Statutes of 1988).

AB 4020 (Sher), as amended on August 2, proscribes specified acts by a vehicle dealer licensed under the Vehicle Code relating to advertisements for the sale of vehicles. The bill requires specified information to be disclosed in those advertisements, and makes related changes regarding supplemental price stickers. AB 4020 was also signed by the Governor on September 30 (Chapter 1584, Statutes of 1988).

The following is a status update of bills discussed in CRLR Vol. 8, No. 3 (Summer 1988) at pages 123-24:

AB 1367 (Tanner) amends section 9889.75 of the Business and Professions Code, which requires the NMVB to establish and administer the collection of fees for the purpose of funding BAR's Certification Program for Qualified Third Party Dispute Resolution Processes. Manufacturers are required to file a statement with the NMVB which reports the number of new motor vehicles distributed by the manufacturer which were sold, leased, or otherwise distributed in California during the preceding calendar year. This bill also requires the NMVB to adopt regulations to implement section 9889.75, to include a formula for calculating the fee to be collected for each motor vehicle and the total amount of fees to be collected from each manufacturer. (See *supra* MAJOR PROJECTS for related discussion.) This bill was signed by the Governor on June 23 (Chapter 203, Statutes of 1988).

AB 3659 (Duplisseea), as amended August 17, requires specified information to be disclosed in advertisements for the sale of vehicles. This bill also provides a definition of the term "manufacturer's suggested retail price" for purposes of those advertisements. On September 13, this bill was signed by the Governor (Chapter 843, Statutes of 1988).

AB 4513 (Tanner), as amended April 20, revises the definition of "motor vehicle" for the purpose of warranties, to include the chassis and that portion of a motorhome devoted to its propulsion. This bill also defines "motorhome" for warranty purposes. AB 4513 was signed by the Governor on August 29 (Chapter 697, Statutes of 1988).

SB 2863 (Doolittle), as amended on May 5, would have provided that any



vehicle required to be identified pursuant to a specified provision of the Vehicle Code does not come within the meaning of "goods" for purposes of the Unruh Act, but comes within the meaning of "motor vehicle" for purposes of the Rees-Levering Act. On September 30, this bill was vetoed by the Governor.

RECENT MEETINGS:

In *Pittsburg Ford, Inc. v. Department of Motor Vehicles of the State of California*, No. A-98-86 (May 12, 1988), a bare majority of the NMVB reversed its earlier decision to revoke Pittsburg Ford, Inc.'s (PFI) occupational license, and instead placed its license on probation for a term of five years, subject to a seven-day actual suspension and the standard terms and conditions of probation which are normally imposed by the Department of Motor Vehicles (DMV).

The case began on April 10, 1986, when the DMV filed a formal accusation against PFI for alleged violations of the California Vehicle Code and Title 13 of the California Code of Regulations. An administrative law judge reviewed the matter and submitted a proposed decision to the Director of the DMV. PFI filed an appeal with the NMVB pursuant to section 3052 of the California Vehicle Code.

On February 23, 1987, and following an evidentiary hearing and oral argument, the NMVB issued a Final Order which contained findings of fact. Specifically, the Board determined that the president of PFI had actual knowledge of the fraudulent practice of altering invoices which had been going on for a two-year period at the dealership. The NMVB also found that it was common knowledge among the employees of PFI that invoices were being systematically altered and fraudulently used to consummate sales. The Board's Final Order also contained a finding that PFI had used the altered invoices in connection with the sale of fifteen vehicles to U.S. Fleet Leasing, Inc. As a result of its findings, the NMVB decided to revoke PFI's occupational license and special plates, and gave the owners of PFI one year to dispose of their interests in the dealership.

After issuance of the Board's final order, PFI filed a petition for writ of administrative mandamus in Sacramento County Superior Court. On October 27, 1987, the court issued its decision and held that the NMVB's findings on PFI's intentional fraud and its assessment of the revocation penalty were supported

by the record. The court did, however, hold that the NMVB erred in including in its Final Order the finding with respect to the sales to U.S. Fleet Leasing, Inc., which were not originally charged by the DMV in its accusation. Accordingly, the court remanded the matter to the NMVB for the purpose of reconsidering the penalty to be imposed without considering the uncharged violations.

On April 14, 1988, in a 5-4 decision, the Board decided not to revoke PFI's license. The majority suspended PFI's license for seven days, placed it on probation for five years, and imposed as one term of probation that PFI retain an automotive advisory service to conduct a regular review of the transactions, advertising, and personnel conduct of the dealership.

In a harshly-worded concurring and dissenting opinion issued May 12, the four-member minority (consisting of Board members Post, Ricchiazzi, Mazeika, and Vandenberg) chastised the majority for unjustifiably reversing the revocation decision. The minority pointed out that the full Board had, based upon an evidentiary hearing, previously made specific findings that PFI engaged in "intentional fraud, which continued over a long period of time as a part of a deliberate premeditated scheme, done with full knowledge of the dealer principal, condoned by the dealer principal, participated in by the dealer principal, and resulting in loss to members of the public." After remand by the superior court, the Board did not change these findings, which were not disturbed and were in fact expressly upheld by the court. According to the minority, "[t]he penalty imposed by the Board is nothing more than slap on the hand.... The Majority decision communicates the message to the industry and the public that the Board protects its own, not the taxpayers. It creates a tarnished precedent for future cases before the Board."

In addition to its criticism that the reduction in penalty was unjustified, the minority expressed "concerns as to the propriety of the conduct of certain of our colleagues in the decision of this case." The minority complained that an unidentified Board member who participated in the case had refused to recuse himself following a DMV motion for recusal, on grounds that the Board member was biased against the Department because it had filed accusations against his occupational license. The minority stated that "the issue is not whether the Board member was in fact

capable of rendering an impartial decision, but whether his decision will be perceived to have been impartial and unbiased."

The minority also lamented the fact that several Board members who participated in the April 14, 1988 decision to reverse the revocation were not present on January 13, 1987, when the Board had taken evidence and heard oral argument on the case; nor did they request or have the opportunity to review the original record of proceedings. Because the court did not disturb the Board's earlier fraud findings, the minority believed that these Board members should have deferred to the decision of those members who were present at the evidentiary hearing, rather than participating in reversing it. According to the minority, "[a]n individual's decision, not being based on the record, leads one to conclude that his decision was personally motivated." The minority also implied that a Board member had received ex parte information about the case, and had refused to recuse him/herself.

FUTURE MEETINGS:

To be announced.

BOARD OF OSTEOPATHIC EXAMINERS

Executive Director: Linda Bergmann (916) 322-4306

In 1922, California voters approved a constitutional initiative which created the Board of Osteopathic Examiners (BOE). BOE regulates entry into the osteopathic profession, examines and approves schools and colleges of osteopathic medicine and enforces professional standards. The 1922 initiative, which provided for a five-member Board consisting of practicing osteopaths, 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.

The Board's licensing statistics as of September 1988 include the issuance of 1,330 active licenses and 498 inactive licenses to osteopaths.

On August 27, Governor Deukmejian reappointed Bryn Henderson, a physician from Orange, and Kenneth Stahl, a physician from Irvine, to the Board.

MAJOR PROJECTS:

1989 Exam Schedule. At its June 18 meeting in Pomona, the BOE announced its 1989 exam schedule. Oral practical examinations will be administered on