

DISCIPLINE DECISION

IN THE MATTER OF A DISCIPLINE HEARING HELD PURSUANT TO THE MOTOR VEHICLE DEALERS ACT 2002, S.O. 2002, C.30, Sch. B

BETWEEN:

REGISTRAR, *MOTOR VEHICLE DEALERS ACT, 2002*
("OMVIC")

- AND -

2343654 ONTARIO INC o/a 401DIXIE NISSAN/401 DIXIE INFINITY

- AND -

ALI FAHEEM

Date of Hearing: November 21, 2019

Date of Decision: December 17, 2019

Findings:

The decision of the Chair of the Discipline committee to reject the Joint Submission on Penalty (JSOP) is overturned for reasons set out below.

Introduction

This matter proceeded before a Panel of the Discipline Committee pursuant to Section 17 of the Motor Vehicle Dealers Act 2002.

The matter was referred to the discipline committee by the Chair of the Discipline Committee (The Chair) pursuant to Rules of Practice of the Discipline Committee section 1.07 (3): Where the Chair has concerns as to whether the proposed disposition is in the public interest, the Chair shall assign a Panel to consider it along with any written submissions of the Parties.

On August 9, 2019, a joint motion from the parties (Registrar and the Registrant) requesting a written hearing was received by the Panel. The Panel granted the motion and directed the parties to make their submissions in writing within 30 days of the date of that motion order (August 26, 2019). On September 25, 2019 and October 7, 2019, the parties were granted extensions of time to provide their written submissions which extended the deadline to October 14, 2019 for the parties to provide their joint written submissions.

Due to these delays, and other commitments of the panel members, the Panel's deliberations were delayed until November 21, 2019.

The purpose of this hearing was to determine whether or not the JSOP should have been rejected, and whether or not the Chair considered all of the circumstances and current jurisprudence with respect to this matter in rejecting the JSOP.

OMVIC (the Registrar/Andrea Korth) was represented by Vlad Bosis and, and the registrant Ali Faheem/2343654 ONARIO INC o/a 401 Dixie NISSAN-DIXIE INFINITI was self-represented. The parties to this written hearing made joint submissions.

The Panel consisted of Debra Mattina (Chair), Stuart Sherman (Vice-Chair), and Chris Pinelli (Vice-Chair).

The Evidence: The panel marked the submissions as if they were a book of documents as Exhibit # 1 with the attached table of contents designating the respective tabs within the book of documents.

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CONSIDERATIONS AND REASONS:

1. The Panel accepts, as "settled law", that they are not bound by previous decisions to accept a joint submission on penalty.
2. The panel notes that there are accepted principles for consideration in determining penalties in disciplinary actions: and notes which specifics of the JSOP address those principles

Public Protections/Public Confidence - *Fine, Reviewing advertising regulations, offering OMVIC course to present and future staff*

Specific Deterrence - *Fine and costs of providing OMVIC training, damage to reputation finding on the website*

General Deterrence - *Fine, costs of providing OMVIC training, damage to reputation finding on the website*

Remediation - *Courses provided to educate sales staff on rules and regulations*

The panel recognizes that all of these elements were addressed in the JSOP through the fine, the agreement that all sales staff will review the OMVIC advertising webinar and in the agreement that the dealer will offer all current and future sales staff the complete OMVIC course at the dealers expense.

3. In schedule "C" of the submissions an email sent by David Dailly, (Manager, Discipline/Appeals Committee) to Andrea Korth, (Registrar), sets out the Chair's reason for rejecting the "agreed upon penalty as it may not be in the public interest". In that document both the Registrar and the Registrant were invited to participate in a teleconference to provide them with an opportunity to explain to the Chair the "rationale behind the penalty"
4. In schedule D, Ms. Korth responded to Mr. Dailly setting out the Registrars' position with regard to the Registrants' prior history of issues with OMVIC in both 2014 and 2015. In 2014 the issue with this dealership was unregistered sales persons; which in the Registrars' opinion was not relevant to the current matter. The second matter occurred in 2015 and was relevant to the settlement discussions as the Notice of Complaint (NOC) was issued for the same reasons as the current NOC. Ms. Korth acknowledges that despite the two previous incidences that there was no evidence that in the intervening years (2015 -2018) the dealer continued to have non-compliance issues. Ms. Korth also explained that the current advertising issue came to light when an OMVIC representative discovered breaches to the all-in pricing regulations in 2018. Ms. Korth explained that when the dealer was contacted, he acknowledged the issue and corrected it within a couple of days. In a follow up by OMVIC's representative, it was discovered that one (1) ad out of the entire lineup of this large dealerships' ads continued to breach the all-in pricing regulation. Subsequently a notice of complaint was issued with respect to that one advertisement. Ms. Korth recognized that the dealer history was an aggravating factor (in negotiating a penalty) but explained that OMVIC accepted the dealer's explanation that the one advertisement was an oversight. Ms. Korth also points out that the manager, Ali Faheem, was not the manager at the time of the previous decision. Ms. Korth also advised that she had recently been contacted by the dealer, who was going to require all managers at the dealership to successfully complete the OMVIC certification course, which goes beyond the requirements of the proposed JSOP.

5. In an email dated June 25, 2019, Mr. Dailly sets out the Chairs' response to Ms. Korths' explanations: the Chair advises that he believes the discipline issues are definitely related, though the behaviour may be different, both circumstances demonstrate a contravention on Section 9 of the Code of Ethics. The Chair believes it is apparent that the dealer only corrected the behaviour after OMVIC's representative found non-compliance in 2018. The Chair opined that given the dealer's history, the dealer would have established policies "to prevent this type of non-compliance from ever occurring again." The Chair recognized that although the manager had changed between the 2014 and the 2018 breach, his position was that the dealer (controlling mind) had not, and that the penalty must be sufficient to catch the attention of the dealer in order to effect a permanent change in behaviour. For these reasons the Chair rejected the JSOP and assigned a panel to hear the case.

6. With respect, the panel rejects the position of the Chair on these points:

a) The Code of Ethics Section 9, referenced by the Chair is found at: s. 9.(2) "In carrying on a business, a registrant shall act with honesty, integrity and fairness. O. Reg. 332/08" While the Panel understands the reference to this section of the Code of Ethics, the Chair falls short in his explanation as to how, these two different matters are related to each other when the behaviour and circumstances are arguably quite different. The 2014 matter related to the employment of unregistered sales persons. The 2015 matter was relevant to the issue of all-in pricing, and as such Ms. Korth explained it was treated as an aggravating factor in the settlement negotiations. The 2018 matter is with regard to one advertisement which failed to advertise all in pricing. While there is evidence before the panel that in November 2018 there were multiple breaches with respect to all-in pricing advertisements, the evidence reflects that as soon as the breaches were identified by OMVIC, the dealer corrected the behaviour voluntarily. The subsequent advertisement which led to the 2018 Notice of Complaint (NOC) was a single breach, which the Registrar accepted as an oversight by the dealer after the dealer had corrected the other advertising breaches. The Chair draws the conclusion that the dealer only corrected the advertisements after OMVIC's representative found non-compliance in 2018. While that may be true, there is no evidence before the panel that the advertisement which is the subject of this NOC is anything more than an oversight, as accepted by the Registrar and considered in arriving at the JSOP. The Chair did not provide the Panel with his reasons to draw the conclusion that "while the circumstances may be different, the behaviour is the same."

b) The Panel believes the Chair erred in drawing the conclusion "that given the dealer's history, the dealer would have established policies to prevent this type of non-compliance from ever occurring again." There is no evidence before the Panel that either supports or contradicts the Chairs' opinion on this matter. The dealer may well have implemented policies regarding the hiring of unregistered sales persons, and he may have implemented policies with respect to all-in-advertising but that information was not put before us and the Panel received no evidence that the Chair requested those policies before arriving at his conclusion that they do not exist.

c) While the panel accepts the principles of disciplinary penalties, as outlined in paragraph 2 above, the panel is also aware that with any given circumstance there is a range of penalties available. The Panels' function during the penalty phase of a hearing is to determine if the proposed penalty falls within an accepted range of penalties with respect to similar fact scenarios. The Panel does not disagree that repeat offenders

should be subject to harsher penalties. In point of fact the Panel supports such practices in principle. The Panel acknowledges that under different circumstances it might well be supportive of rejecting a JSOP, if in our opinion and supported by the jurisprudence of the day, we could find that not only did the JSOP not support the public interest, it also brought the administration of justice into disrepute. That did not occur in this case.

With respect to the matter before the Panel, and in answer to the two questions: Does the proposed penalty protect the public? Does the requested order bring the administration of justice into disrepute?

The Panel acknowledged the elements of the JSOP which speak to the protection of the public in paragraph 2.

The answer to the second question is much more complicated. Exactly when does a proposed penalty begin to bring the administration of justice into disrepute?

Arguably, it is when a penalty is so disproportionate to the circumstances that it was inconceivably lenient or alternately much too harsh. In the case before the panel, that threshold was not breached.

The penalty falls within the current range of penalties being applied in similar circumstances with similar fact findings. The Panel was guided by the case law submitted by the Registrar in determining the range of penalties. (REGISTRAR, MOTOR VEHICLE DEALERS ACT, 2002 AND 1681230 ONTARIO INC o/a WINDSOR CHRYSLER AND JOSEPH DIEMER, REGISTRAR, MOTOR VEHICLE DEALERS ACT, 2002 AND 1511905 ONTARIO INC o/a GUELPH VOLKSWAGEN AND JASON CHOW)

As noted earlier, the Panel acknowledges that it is not bound by the penalty decisions in these cases, but rather reviews them in an attempt to ascertain ranges of penalties. While the Panel is of the opinion that the penalty agreed to in the JSOP falls at the lower end of the spectrum for such offences, particularly in the panel's opinion if it related to a blatant repeat offender. In this particular case though, the Panel accepts the Registrar and the Dealers' joint submission that the offense was one of oversight rather than deliberate disregard for the regulations.

The Panel does not disagree with the Chair that a "penalty must be sufficient to catch the attention of the dealer in order to effect a permanent change in behaviour". The panel would endorse such a practice in the imposition of penalties at hearings where the Registrant is a repeat offender. In point of fact, the panel would encourage negotiators of Joint Submissions on Penalty to consider prior history as a significant factor when negotiations are occurring.

7. The panel accepts as set out in paragraph 17 (page 25 of the parties' submission) (Law Society of Upper Canada v. Henderson, [2014] L.S.D.D. No. 249). that "A joint submission should not be rejected unless it is contrary to the public interest and the sentence would bring the administration of justice into dispute." It also accepts, as set out in paragraph 19 (same decision), "Only truly unreasonable or "unconscionable" joint submissions should be rejected"

8. The threshold for rejecting a joint submission sets a very high bar. It does so for a number of purposes. Parties negotiating a joint submission consider multiple circumstances, both mitigating and aggravating. In addition to the public protection mandate, the issues of time, costs, resources, witnesses and other such factors are typically all considered in the negotiation of the JSOP. Ms. Korths' email (schedule D) clearly identifies that past behaviour was considered as an aggravating factor during the negotiation of the JSOP. The considerations of the parties during negotiation are considered confidential to the mediation process. When a JSOP is submitted for approval, adjudicators generally have no knowledge of what transpired within the give and take of the negotiations. Despite the disclosure in the email from Ms. Korth, the Chair appears to have determined that prior history was not considered in this case.
9. Furthermore, the Chair appears not to have considered the arguments made by Ms. Korth in respect to why the Registrar is of the opinion that the one advertisement was a probable oversight. The Chair does not address it in his reasons. Neither does the Chair give reasons for rejecting the Registrar's opinion that context is important to the situation.
10. While the Panel agrees that in disciplinary matters, penalties cannot be so low as to be considered a cost of doing business, and therefore not effective in establishing the primary purposes of penalties (public protection, specific and general deterrence, and remediation), the Panel accepts and endorses that the parties ability to negotiate settlements should not be interfered with lightly.
11. The Panel rejects the opinion of the Chair that the JSOP in this case fails to meet the public interest, and the Panel also notes that it does not bring the administration of justice into disrepute.
12. The Panel accepts that the facts, as set out in the ASF, do support the allegation that the pricing set out in the dealers advertisement was not all inclusive and therefore was contrary to section 36(7) of the Ontario Regulation 333/08, sections 4 and 9 of the Code of Ethics, as well as the Dealers terms and conditions of Registration. This specifically relates to the advertisement of a 2015 Nissan Sentra (Stock #R1846A).
13. At the request of the joint submission from the Registrar and Registrant, the panel was asked to issue the order as set out in the Agreed Statement of Fact and the Joint Submission on Penalty. The Panel took note during its deliberations that the dates set out within the submissions were no longer current. The Panel provided the opportunity for the parties to make submissions with respect to those dates. Having received a joint submission regarding the dates, the panel issues the order as it was originally presented to the Chair but with the dates altered to reflect future dates in order to permit opportunity for the Dealer to come into compliance with the terms of the order within the specified timelines.

Order:**Agreed Statement of Facts and Penalty**

2343654 Ontario Inc o/a 401 Dixie Nissan/401 Dixie Infiniti and Ali Faheem have breached the following:

Section 4(2) of the Code of Ethics, Regulation 332/08
 Section 9(1) of the Code of Ethics, Regulation 332/08

Faheem has breached the following:
 Section 6(2) of the Code of Ethics, Regulation 332/08

SUMMARY OF AGREEMENT

1. The parties to this proceeding agree that:2343654 Ontario Inc o/a 401 Dixie Nissan/401 Dixie Infiniti (the Dealer) was first registered as a motor vehicle dealer in about November 2012. Ali Faheem ("Faheem") was first registered as a motor vehicle salesperson in about April 2000. Since around August 2015 Faheem has been a General Manager, as well as the person in charge, of the Dealer.
2. On or about October 29, 2012, the Dealer executed terms and conditions of registration. As per condition 6, the Dealer agreed to comply with the Code of Ethics.

OMVIC publications

3. In the spring of 2013, OMVIC issued a Dealer Standards publication reminding dealers to the requirement for dealers to advertise all inclusive vehicle prices ("all-in pricing")
4. OMVIC further issued the following Dealer Standard publications reminding dealers of their all-in pricing obligations:
 - a. Fall 2013
 - b. Issue #1
 - c. Issue #2
 - d. Issue #3 2014
 - e. Issue #4 2014
 - f. Issue #3 2015
 - g. Issue #1 2016
 - h. Issue #2 2016
 - i. Issue #3 2016
 - j. Issue #4 2016
 - k. Issue #3 2017

5. Furthermore, OMVIC issued the following dealer bulletins which also reminded dealers of their all-in pricing advertising obligations:
 - l. April 2013
 - m. June 2014 (2 publications)
 - n. April 2015
 - o. July 2017
 - p. August 2017

Prior Discipline Decisions

6. On or about December 10, 2014, the Registrar issued a Notice of Complaint against the Dealer for, *Inter alia*, failure to comply with the all in price advertizing requirements,
7. On or about February 12, 2015, the Discipline Committee issued an Order against the Dealer, pursuant to a negotiated resolution of the above referenced Notice. As per condition 2 of the Order, the General Manager was to successfully complete the Automotive Certification Course (the "course"). As per condition 4 of the Order, the Dealer was to comply with the Act and Standards of Business Practice, as may be amended from time to time.
8. Faheem was not employed with the Dealer at this time.

Direct Correspondence with Dealer

9. By email dated November 19 2018, a representative of the Registrar reminded the Dealer of the all-in pricing advertising obligations.

Dealer non-compliance

10. On or before November 22, 2018, the Dealer advertised a 2015 Nissan Sentra (Stock #R2856A) with an advertised price of \$9,888. The advertisement went on to indicate, in a smaller font size and located significantly further away from the price, that the price did not include a \$399.99 administration fee. As such, the advertised vehicle price was not all-inclusive. This is contrary to section 36(7) of Regulation 333/08, sections 4 and 9 of the Code of Ethics, as well as the Dealer's terms and conditions of Registration.
11. As the person in charge of the Dealer, Faheem has failed to ensure the Dealer's advertisements are published in compliance with the Act and Regulations. As such, Faheem has personally breeched section 6 of the Code of Ethics.

By failing to comply with the following section of the Act:

Regulation 333/08

36. Advertising:

(7) If an advertisement indicated the price of a motor vehicle, the price shall be set out in a clear, comprehensible and prominent manner and shall be set out as the total of,

- (a) the amount that a buyer would be required to pay for the vehicle; and
- (b) subject to subsections (9) and (10), all other charges for inspection before delivery of the vehicle, fees, levies and taxes.

It is thereby agreed that the Dealer has breached sections 4(2) and 9(1) of the Code of Ethics, as set out in regulation 332/08:

Disclosure and marketing:

4(2) A registrant shall ensure that all representations, including advertising, made by or on behalf of the registrant in connection with trading motor vehicles, are legal, decent, ethical and truthful.

Professionalism

9.(1) In carrying on business, a registrant shall not engage in any act or omission that, having regard to all the circumstances, would reasonably be regarded as disgraceful, dishonourable, unprofessional or unbecoming of the registrant.

It is thereby agreed that Faheem has breached section 6(2) of the Code of Ethics, as set out in regulation 332/08:

Accountability

6.(2) A registered salesperson shall not do or omit to do anything that causes the registered motor vehicle dealer who employs or retains the salesperson to contravene this Regulation or any applicable law with respect to trading motor vehicles.

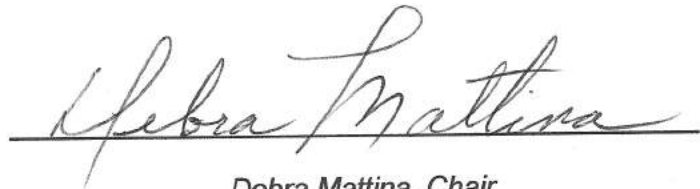
JOINT SUBMISSION ON PENALTY:

1. The Dealer agrees to pay a fine in the amount of \$2,000 no later than **February 1, 2020.**
2. The Dealer agrees to ensure all sales staff employed by the Dealer have reviewed the August 2017 OMVIC advertising webinar. The Dealer will provide OMVIC with written confirmation from said staff that this has occurred, no later than **February 1, 2020.**

3. The Dealer agrees to offer all current and future sales staff the opportunity to complete the course. Current sales staff will be offered the course no later than **February 1, 2020**. Future sales staff will be offered the course within 90 days of being retained in this capacity. The Dealer will incur all costs associated with this. It is understood between the parties this clause does not apply to sales staff who have completed the course after January 1, 2009, or who are otherwise required to do so pursuant to the Act.
4. The Dealer and Faheem agree to comply with the Act and Standards of Business Practice, as may be amended from time to time.

Date of Order: December 17, 2019

Ontario Motor Vehicle Industry Council
Discipline Panel

A handwritten signature in cursive script, reading "Debra Mattina", is written over a horizontal line.

Debra Mattina, Chair
Stuart Sherman, Vice Chair
Chris Pinelli, Vice Chair