STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-09-02

Ford Motor Company,

Petitioner

DECISION AND ORDER

v.

Mathew Dunlap and
Darling's,

Respondents

This matter is before the Court on (1) Ford Motor Company's appeal, pursuant to M.R Civ. P. 80C, of the May 12, 2008 and June 23, 2008 orders of the Maine Motor Vehicle Franchise Dealer Board (the "Board") in favor of Darling's; (2) Ford Motor Company's independent claim seeking a declaration that 10 M.R.S.A. § 1189-B(2) is unconstitutional because it impermissibly usurps the function of the jury and violates Ford's right to a jury trial; (3) Darling's cross-appeal, pursuant to Rule 80C, of portions of the Board's May 12 and June 23 orders; and (4) Darling's appeal of the Board's February 15, 2007 and November 28, 2007 orders dismissing Count IX of Darling's Complaint and denying Darling's motion to reconsider the dismissal, respectively. Secretary of State Matthew Dunlap has addressed two points raised in Ford's appeal: whether the Board's decision was affected by bias and whether 10 M.R.S. § 1189-B(2) is unconstitutional.

Factual and Procedural Background

Darling's, a Ford dealership, commenced the underlying action against Ford when it filed its July 24, 2006, Complaint with the Board. The Complaint and its subsequent amendment included Counts IX and X, the two counts at issue in the parties' appeals.

In Count IX, Darling's challenges the Board's decision on Darling's request for the imposition of civil penalties due to Ford's alleged unlawful "charge back"[1] of five payments for warranty work after the statutory deadline for the review of such claims, which deadline is set forth in 10 M.R.S. § 1176. The Board dismissed Count IX after concluding that Darling's lacked standing to seek the imposition of penalties because Ford paid the five disputed payments prior to suit. More specifically, the Board determined that Darling's did not suffer damage as a result of the "charge-backs" because the claims had been paid.

Citing another case involving Darling's and Ford in which the court concluded that sections 1173 and 1176 of Title 10 do not require a dealer to suffer damages in order to file a claim with the Board, Darling's filed a motion seeking reconsideration of the order dismissing Count IX. *See Darling's v. Ford Motor Co.*, KENSC-AP-06-31 (Me. Super. Ct., Ken. Cty., August 29, 2007) (Studstrup, J.). The Board denied Darling's motion to reconsider on November 28, 2007, and wrote, "Count IX of the pending Complaint alleged a violation of § 1176. The Decision of the Superior Court was based upon its reading of § 1173." (R. at 1533). Darling's has appealed from the Board's dismissal of Count IX and its denial of the motion to reconsider the dismissal.

In Count X of the Complaint, Darling's alleged that Ford violated 10 M.R.S. § 1174(3)(B) when it terminated the cash bonus payments to dealers under its "Blue Oval Certified" program ("BOC"). According to Darling's Complaint, Ford's termination of the payments constitutes a substantial modification of the franchise that was instituted without providing Darling's with advance notice by certified mail, as required under the statute. Ford's BOC was a customer-satisfaction incentive program introduced by Ford in 2000. The program featured a cash bonus to dealers of 1.25% of the manufacturer's suggested retail price on each vehicle that the dealer sold. Dealers could qualify for BOC certification, and thus receive the BOC cash bonus, by meeting objective standards established by Ford. Darling's was a BOC Dealer at the beginning of the program and never lost that status.

Ford discontinued the BOC effective April 1, 2005. Prior to the termination date, on August 12, 2004, Ford issued an Electronic Field Communication ("EFC") (meaning it posted a message on its

[1] The term "charging-back" refers to "Ford's practice of approving and paying warranty claims by Darling's within the timeframes established in section 1176, but subsequently auditing paid claims at a later date and charging-back Darling's for claims Ford deems unsuitable." *Darlings v. Ford Motor Co.*, 2006 ME 22, ¶ 2, 892 A.2d 461, 462.

dealer-accessible web site) alerting dealers to a broadcast on Ford's Fordstar television network,[2] to be held on August 20, 2004. The August 12 EFC stated that the broadcast was regarding, among other things, the 2005 BOC. On August 18, 2004, a Ford representative sent an email to John Darling and others urging them to watch the August 20 broadcast.

On August 20, 2004, Ford conducted the scheduled Fordstar broadcast during which Ford announced that the BOC would be terminated after March 31, 2005. John Darling, the president and majority shareholder of Darling's, is relatively sure that someone at Darling's watched the broadcast. In addition, he was aware at the time that "they were changing the program." Between August 20, 2004 and March 31, 2005, the termination of the BOC program was announced in another EFC and in various trade magazines. However, Ford has never notified Darling's by certified mail of the termination of BOC.

Following a hearing on Darling's Complaint, the Board concluded that Ford's failure to send notice by certified mail constituted a violation of 10 M.R.S. § 1174(3)(B). Section 1174(3)(B) provides that it is unlawful for a manufacturer to threaten or attempt to modify a franchise if the modification substantially and adversely affects the motor vehicle dealer's rights, obligations, investment or return on investment without giving 90 days' written notice by certified mail of the proposed modification to the dealer. *See* 10 M.R.S. §1174(3)(B). In its decision, the Board concluded that the termination of the BOC constituted a substantial modification adversely affecting Darling's, and that Ford failed to provide proper notice of the termination. Ford appeals from the Board's decision on both issues.

As part of its decision on Count X, the Board found that Darling's sustained damages over a nine-month period. The Board determined that Darling's lost $214,723.08 in cash bonus payments in the first 9 months following April 1, 2005, and also concluded that Darling's earned $68,875.00 from other promotional programs during that time period. Therefore, the Board awarded Darling's $143,223.08 ($214,723.08 - $68,875) in damages on Count X. According to Darling's, the Board unnecessarily limited Darling's damages to the notice and adjudication periods of the statute.[3]

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[2] Ford issued, via its "Fordstar" network, television broadcasts containing pertinent company-related news. Announcements of upcoming Fordstar broadcasts would be made via the Site.

[3] Under § 1174(3)(B), a dealer must provide 90 days written notice of termination, and the Board must hear and decide all matters pending before it within 180 days of commencement of any action challenging the termination. *See* 10 M.R.S. § 1174(3)(B).

The Board also addressed the civil penalty to be imposed on Ford as the result of Ford's failure to comply with the applicable notice requirements. Darling's argued that because Ford never provided the required notice, Ford repeatedly violated the statute and, therefore, the Board should assess multiple penalties against Ford. The Board rejected Darling's argument and concluded that Ford's failure to provide notice by certified mail constituted one violation. The Board thus imposed a penalty of $10,000, the maximum permitted under the statute for a violation.

Darling's appeals from the Board's decision on Count X regarding the damage calculation, and the civil penalty.

Discussion

When a party appeals from a decision of an administrative or regulatory agency or board pursuant to M.R. Civ. P. 80C, the court reviews the agency or board decision for errors of law, abuse of discretion or findings of fact unsupported by the record. *Centamore v. Dep't of Human Servs.*, 664 A.2d 369, 370 (Me. 1995). When "reviewing an administrative agency decision, the issue before the court is not whether it would have reached the same conclusion as the agency, 'but whether the record contains competent and substantial evidence that supports the result reached.'" *Seider v. Bd. of Exam'rs of Psychologists*, 2000 ME 206, ¶ 8, 762 A.2d 551, 555 (quoting *CWCO, Inc. v. Superintendent of Ins.*, 1997 ME 226, ¶ 6, 703 A.2d 1258, 1261). "Substantial evidence is evidence that a reasonable mind would accept as sufficient to support a conclusion." *York v. Town of Ogunquit*, 2001 ME 53, ¶ 6, 769 A.2d 172, 175. The court may not substitute its own judgment for that of the board. *See id.; Brooks v. Cumberland Farms, Inc.* 1997 ME 203, ¶ 12, 703 A.2d 844, 848. In an action challenging a decision of the board, the party seeking to overturn the board's decision has the burden of persuasion. *See Sawyer Envtl. Recovery Facilities, Inc. v. Town of Hampden*, 2000 ME 179, ¶ 13, 760 A.2d 257, 260.

I. Count IX

Darling's contends that the Board erred when it dismissed Count IX of Darling's Complaint because Darling's lacked standing to seek the imposition of civil penalties for Ford's warranty "charge-backs." In Count IX, Darlings sought the imposition of penalties pursuant to 10 M.R.S. § 1171-B(3), which provides in relevant part:

> If the board determines after a proceeding conducted in accordance with this chapter that a manufacturer or distributor is violating or has violated any provision of this chapter or any rule or order of the board issued pursuant to this chapter, the board shall levy a civil penalty of not less than $ 1,000 nor more than $ 10,000 for each violation. . . .

Id. Because the Law Court has previously determined that the warranty "charge-backs" violate the warranty provisions set forth in 10 M.R.S. § 1176,[4] Darling's argued that the imposition of civil penalties was warranted.

In response to a motion to dismiss filed by Ford, the Board observed that "Darling's dismissed its actions in the Small Claims Court after Ford paid" the five disputed warranty charge-backs. Noting that Ford paid the claims, and recognizing that Darling's was seeking the imposition of civil penalties due to Ford's failure to pay the claims, the Board concluded that it could "grant Darling's no further relief under § 1176 of the act," and "Darling's therefore lacks standing to seek further relief." The Board thus dismissed Count IX.

On appeal, Darling's contends that it need not suffer personal damage in order to seek the imposition of civil penalties under section 1171-B(3). The Court agrees. Although Ford correctly notes that standing to bring claims in state and federal courts typically requires an injury personal to the claimant,[5] section 1171-B(3) does require an individualized injury,[6] and the cases cited by Ford do not compel a contrary conclusion.[7]

The Board's enabling statute expressly provides that the Board "[s]hall review written complaints filed . . . by persons complaining of conduct governed by" the Maine Dealer Act. 10 M.R.S. § 1188(1). The Board is further required to "issue written decisions and may issue orders to a franchisee or franchisor in violation of" the statute. 10 M.R.S. § 1188(2). In connection with such a complaint, the Board may also "levy a civil penalty pursuant to" section 1171-B(3). 10 M.R.S. § 1188(3). Neither sections 1171-B(3) and 1188, nor the Dealer Act generally, requires that "persons complaining of

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[4] *See Darling's v. Ford Motor Co.*, 2006 ME 22, 892 A.2d 461.

[5] *See* Ford's Opp. at 2-7 (citing, *inter alia*, *Halfway House, Inc. v. City of Portland*, 670 A.2d 1377, 1379 (Me. 1996); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998); and *Cmty. Hous. of Maine v. Martinez*, 146 F. Supp.2d 36, 41 (D. Me. 2001)).

[6] *See Darling's v. Ford Motor Co.*, KENSC-AP-06-31 at 3 which is in accord.

[7] For example, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) and *Friends of the Earth v. Laidlaw Servs., Inc.*, 528 U.S. 167, 187 (2000), involved the requirements for Article III standing to bring suit in federal court. Neither of the cases addressed the issue presented in this case - standing to file a citizen complaint to a state-created regulatory board for a violation of a statute. Indeed, Ford acknowledged the different nature of the issue in this case when it wrote that "[s]tatutes can provide rights and entitlements that may, if deprived, confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of the statute." Ford's Opp. at 6. Given that the Article III standing requirements relate to the federal courts' jurisdiction over particular claims, *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 101 (1998), the requirements do not control this case. Here, the Board is a creature of the Maine Legislature and the Legislature, through the Board's enabling statute, expressly outlined the scope of the Board's jurisdiction. In doing so, the Legislature was free to dictate who could seek redress from the Board and it authorized the Board to consider complaints filed by "persons complaining of conduct governed by" the Dealer Act. *See* 10 M.R.S. § 1188(1).

conduct governed" by the Act suffer a personalized injury. Rather, the Board is authorized and, indeed, required to review any such complaints and determine whether there has been a violation of the Act, regardless of injury to the complainant.

Consistent with this analysis, in the Dealer Act, the Legislature expressly distinguished the prerequisites to an action for civil penalties and an action for damages. While section 1171-B(3) governs the imposition of civil penalties, section 1173 confers a private right of action upon any "franchisee or motor vehicle dealer who suffers financial loss of money or property . . . or who has been otherwise adversely affected" as a result of a violation of the Act. 10 M.R.S. § 1173. Pursuant to section 1173, a franchisee or dealer who has been so harmed "may bring an action for damages and equitable relief." *Id.* A person who seeks relief under § 1173, therefore, must demonstrate personal harm. The is no such requirement when one seeks the imposition of civil penalties under section 1171-B(3). *See* 10 M.R.S. § 1171-B(3). Insofar as the authorized actions are designed to achieve different objectives (i.e., the private cause of action is to compensate a party for its loss, and the action for civil penalties is to compel compliance with the statutory requirements), the distinction is understandable. The Court is, therefore, convinced that one is not required to demonstrate an individualized injury in order to seek the imposition of civil penalties for a violation of the statute. Otherwise, a party could unreasonably refuse to pay a warranty claim, require the aggrieved party to commence an action before the Board, but avoid a civil penalty as long as it pays the claim before the Board considers the matter. Such a result would be contrary to the Legislature's intent and sound public policy. Accordingly, the Court concludes that Darling's had standing to request the imposition of civil penalties regardless of whether it suffered ongoing harm as a result of the alleged violations. Therefore, the Board erred, as a matter of law, when it dismissed that claim.

II. Count X

A. Sufficiency of Notice Under 10 M.R.S. § 1174.

Ford first challenges the Board's determination that Ford violated section 1174 by failing to provide Darling's with written notice by certified mail of the termination of the BOC. Section 1174(3)(B) provides that it shall be unlawful for any "[m]anufacturer, distributor, wholesaler . . ." to:

> . . . do any . . . act prejudicial to the dealer by . . . threatening or attempting to modify a franchise during the term of the franchise or upon its renewal, if the modification substantially and adversely affects the motor vehicle dealer's rights, obligations, investment or return on investment, *without giving 90 days' written notice by certified mail of the proposed modification to the motor vehicle dealer,* unless the modification is

> required by law or board order. Within the 90-day notice period, the motor vehicle dealer may file with the board and serve notice upon the manufacturer a protest requesting a determination of whether there is good cause for permitting the proposed modification. The manufacturer has the burden of proving good cause. The board shall promptly schedule a hearing and decide the matter within 180 days from the date the protest is filed. Multiple protests pertaining to the same proposed modification must be consolidated for hearing. The proposed modification may not take effect pending the determination of the matter.

10 M.R.S. § 1174. (emphasis added)

The record plainly establishes that Ford has never notified Darling's of the termination of the BOC by certified mail. Despite the express language of the statute, which requires written notice by certified mail, Ford contends that the Board erred as a matter of law when it concluded that Ford violated section 1174(3)(B). According to Ford, because Darling's had both constructive and actual notice of the termination of the BOC prior to April 1, 2005, the purpose of the notice requirement was fulfilled, and the Board's decision is improperly based on a "technical deficiency in notice." *See* Ford's Brief at 21-25. Ford further argues that because Darling's knew about the termination well in advance of the date on which the program was discontinued, Darling's was not prejudiced by any deficiency in the notice. In the absence of any such prejudice, Ford contends, Darling's "has no claim here and the Board's decision must be reversed." *Id.* at 28.

In support of its argument, Ford cites cases in which the Law Court concluded that strict compliance with statutory notice requirements is not always necessary. For example, in *Fleming v. Dep't of Corrections*, 2002 ME 74, ¶ 10, 795 A.2d 692, 695, the Law Court concluded that a complainant's failure to serve the defendant with an 80C appeal in the statutorily described manner "is not necessarily fatal when it does not prejudice the party receiving the notice, and a court may disregard nonprejudicial failure to comply with strict notice requirements." *Id.* The Court thus concluded that dismissal of the complaint was not warranted where the record demonstrated that the defendants had notice of the complaint despite the technical deficiency. *Id.* Similarly, in *Town of Ogunquit v. Dep't of Public Safety*, 2001 ME 47, ¶ ¶ 10-14, 767 A.2d 291, the Law Court held that failure to serve a petition for administrative review by certified mail, as required by Maine's Administrative Procedures Act, did not require dismissal of the petition where the defendant had actual notice of the claim. *Id.*

Although the Court recognizes that there are circumstances in which failure to comply strictly with statutory notice requirements may be excused in the absence of prejudice to the party entitled to the

notice, the cases upon which Ford relies are distinguishable in one critical respect. Unlike the *Fleming* and *Town of Ogunquit* cases, which involved procedurally related notice provisions, this case involves the notice necessary to change the contractual relationship between two parties. In other words, compliance with the notice requirement at issue in this case is a necessary prerequisite to a modification of the parties' substantive contractual rights. Indeed, the failure to comply with the notice requirement of § 1174(3)(B) constitutes unlawful conduct.

Where the notice is a necessary prerequisite to a change in the legal relationship between or among individuals, the Law Court has found that a party must comply with the prescribed notice requirements. In *Bell v. Walton*, 2004 ME 146, 861 A.2d 687, the Law Court determined that strict compliance with the statutory written notice requirement was necessary in order to effectuate a member's withdrawal from a limited liability company. In addressing the appellant's contention that strict compliance was not necessary despite the express language of the statute, the Law Court wrote, "[m]indful that [the applicable statute] is unambiguous, and that the limited liability company is a creature of statute, there is no apparent reason to engraft a judicially created doctrine--i.e., constructive notice of withdrawal--upon the statutory scheme." *Id.* ¶ 11, 861 A.2d at 689 (citation omitted). Similarly, in this case the statute is unambiguous, the substantive right was created by statute, and the circumstances of this case do not warrant a deviation from the statute's requirements. In short, the notice provision in this matter is fundamentally different from the notice requirement in the cases upon which Ford relies.

Finally, Ford's contention the Board's decision is erroneous because the Legislature's intent was satisfied despite Ford's failure to comply with the statute is unavailing. Legislative intent is neither relevant nor an appropriate area of inquiry when the language of a statute is unambiguous. *Kimball v. Land Use Regulation Comm'n*, 2000 ME 20, ¶¶18-19, 745 A.2d 387 at 392. Here, the language of the statute is clear and unequivocal: it is unlawful for a manufacturer such as Ford to modify substantially a franchise without providing 90-days' written notice by certified mail.[8]

[8] Even if legislative intent were relevant here, the Legislature's apparent desire to "provide the dealer with adequate notice to respond to the proposed modification" neither contradicts the certified mail requirement nor suggests that another unspecified form of notice would suffice under the statute. In fact, given that the Legislature amended the statute in 2003 in order to require notice by certified mail – the statute previously required 60 days written notice (*see* 10 M.R.S. § 1174(3)(B) (1997)) - the legislative history suggests that the certified mail requirement was a deliberate attempt by the Legislature to establish an exclusive means of providing the necessary notice.

In sum, to the extent that the termination of Ford's BOC required notice under section 1174(3)(B), the Board's determination that Ford's failure to comply with the statute's notice requirement constituted a violation of the statute was not erroneous.

B. The Board's Conclusion that the Termination of BOC Constituted a Modification of the "Franchise."

Ford also argues that the Board erred when it determined that the BOC was included within the parties' franchise agreement. As explained above, under section 1174(3)(B), a manufacturer may not "do an[] . . . act prejudicial to the dealer by . . . threatening or attempting to *modify a franchise during the term of the franchise* or upon its renewal, if the modification substantially and adversely affects the motor vehicle dealer's rights, obligations, investment or return on investment, without" proper notice. 10 M.R.S. § 1174(3)(B) (emphasis added). "Franchise" is defined as

> an oral or written arrangement for a definite or indefinite period in which a manufacturer, distributor or wholesaler grants to a motor vehicle dealer a license to use a trade name, service mark or related characteristic, and in which there is a community of interest in the marketing of motor vehicles or services related thereto at wholesale, retail, leasing or otherwise.

10 M.R.S. § 1171(6).

Before the Board, Ford maintained that the BOC was not part of the franchise agreement between Ford and Darling's. The Board rejected Ford's argument, and reasoned:

> The word franchise is defined in the statute as an oral and written arrangement in which a manufacturer licenses a new car dealer to use a trade name and where there is a community of interest in the marketing of motor vehicles. *But the legislature used the word franchise more than 60 times in chapter 204. In short, the term franchise covers the entire business relationship between the manufacturer and the dealer.* This Board finds that when Ford ended the BOC it modified Darling's franchise under 1174(3)B.

R. at 1626, ¶ 5. (emphasis added).[9]

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[9] In footnote 1 of its decision, the Board further explained the significance of the Legislature's many uses of the word "franchise." In that footnote, the Board noted that "franchise"

> appears at least once as a verb. [10 M.R.S.A. §] 1182-A. As a noun franchise is used to mean the parties' arrangement, 1171(6), 1174(3)(C, I and R), the written franchise agreement, 1174(3)(B), 1174(3)(P) and 1174(3)(Q)(2), and 1178 and 1183, the business entity operated by the dealer 1174(3)(M) and 1174(3)(Q), the real estate occupied by the dealer, 1174(3)(I) and 1174-A. Franchise is used as another word for the parties' arrangement or agreement in sub paragraph (A), (B), (O), (P), of section 1174(3) and 1178. Finally, the word franchise is also used to characterize the parties' relationship, sub paragraphs (Q), (R), and (S) of section 1174.

(R. at 1626).

Ford maintains that the Board's decision in this regard was error because the BOC was an incentive program, and its termination did not constitute a modification of the "franchise," much less a modification substantial enough to trigger section 1174(3)(B). *See* Ford's Brief at 31-34. Ford contends that the definition of "franchise" contained in section 1171(6) "goes to the core of the business." In support of this argument, Ford asserts that implicit the Legislature's adoption of a provision (i.e., § 1174) to address the process by which a party can modify a franchise is the fact that not all agreements between and among the parties identified in § 1174 are included within the franchise. That is, if all agreements between and among said parties constituted or were part of the franchise, the Legislature presumably would have made the notice a precondition for the modification of all agreements between parties to a franchise agreement. Instead, the Legislature limited application of the notice provision of § 1174 to modification of a specific agreement - a franchise. Ford thus contends that the BOC was an agreement separate from the franchise agreement and, therefore, section 1174's notice provision doe not apply.

In response, Darling's notes that the statutory definition of "franchise" includes the parties' oral and written "arrangement." 10 M.R.S. § 1171(6). According to Darling's, "arrangement" is a broad term and, in light of the significant and unique nature of Ford's BOC and the participation criteria for the program, the termination of that program did in fact modify the parties' franchise.

The question is thus whether franchise includes only those agreements that go to the "core" of the business as Ford argues, or all written or oral "arrangements" between the parties as Darling's suggests. The parties' arguments, which include different interpretations of the statute, reveal that the statute is reasonably susceptible of more than one meaning. A statute is ambiguous if it is "reasonably susceptible of different interpretations." *Batchelder v. Realty Res. Hospitality, LLC*, 2007 ME 17, ¶ 17, 914 A.2d 1116, 1123. The statute is, in other words, ambiguous. In *Maine Assoc. of Health Plans v. Superintendent of Ins.*, 2007 ME 69, ¶42, 923 A.2d 918, 927, the Law Court observed that "[i]f the meaning of a statute is ambiguous, we will uphold the agency's interpretation in its field of expertise 'unless the statute plainly compels a contrary result.'" (citing, *Hannun v. Bd. Of Envtl. Prot.*, 2006 ME 51, ¶ 9, 898 A.2d 392, 396). The Court is to uphold the agency's interpretation as long as the interpretation is reasonable." *Cobb v. Bd. Of Counseling Prof'ls Licensure*, 2006 ME 48, ¶ 13, 896 A.2d 271, 275.

In this case, the Board interpreted the statute more broadly than the interpretation urged by Ford. That is, the Board concluded that the notice requirement of § 1174 applied to the BOC and, thus determined that the BOC was within the scope of the parties' franchise agreement. Given the deference that is to be afforded an agency's findings, the Court would ordinarily simply affirm the Board's conclusions in this regard. However, because the Board's interpretation of an ambiguous statute and the determination of whether the termination of a program constitutes the termination of a franchise are factual questions,[10] pursuant to 10 M.R.S. § 1189-B, further proceedings are required.

10 M.R.S. § 1189-B provides:

> A party appealing an order of the board to the Superior Court shall indicate in the appeal whether it is an appeal on issues of law or on factual matters.
>
> 1. Appeal as matter of law. An order or decision may be appealed solely on the basis that the board made an error of law. An order or decision appealed may not be set aside or vacated except for an error of law. Additional evidence may not be heard or taken by the Superior Court on an appeal made under this section.
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> 2. Appeal involving factual matters. A party to a decision by the board may appeal to the Superior Court for a hearing on the merits of the dispute. In any such hearing before the Superior Court, all findings of fact of the board are presumed to be correct unless rebutted by clear and convincing evidence.
>
> A copy of the decision, certified as true and accurate by the chair must be admitted into evidence in any appeal hearing. There is a right to trial by jury in any action brought in Superior Court under this section. An appeal for hearing is subject to the provisions of section 1173.

Id.

As the plain language of § 1189-B demonstrates, the Legislature authorized a subsequent hearing, with a heightened standard of proof, on the Board's determinations. In this respect, the Court does not act as a strict appellate court. It is, rather, a court of origin on both issues of law and fact. *See, Enerquin Air, Inc. v. State Tax Assessor*, 670 A.2d 926, 928 (Me. 1996).

Here, Ford contends that it is entitled to a de novo jury trial. In response, Darling's and the State contend that Ford has waived any right to a jury trial because it did not specifically elect a jury trial on factual matters when it filed its appeal. According to the State and Darling's, Ford was obligated to

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[10] *See, Ford New Holland, Inc. v. Thompson Machine, Inc., et al.*, CV-91-622 (Me. Super. Ct., Cumb. Cty., December 24, 1992) (Lipez, J.); *C.B. Kenworth, Inc. v. General Motors Corp.*, 706 F. Supp. 952, 955 (D. Me. 1988) (Carter. J.).

request *either* an appeal on issues of law *or* an appeal on factual matters. In other words, the State and Darling's maintain that Ford cannot pursue an appeal on both issues of law and factual matters.

In support of their argument, the State and Darling's note that section 1189-B provides that a party "shall indicate in the appeal whether it is an appeal on issues of law or on factual matters." They maintain that by use of the word "or", the Legislature intended for an aggrieved party to elect whether to challenge the Board's legal conclusions or the Board's factual determinations. The Court is unconvinced that the Legislature intended to require such an election.

Preliminarily, the Court notes that the Legislature anticipated that on occasion, for practical reasons and to promote common sense statutory construction, the words "or" and "and" should be viewed as interchangeable. In its "Rules of Construction", the Legislature specifically provided that "[t]he words 'and' and 'or' are convertible as the sense of a statute may require." 1 M.R.S. § 71(2). Simply stated, the Court can discern no rational justification to require a party that might be aggrieved by the Board's decision on legal issues *and* factual matters to assess the relative merit of its arguments, and limit the grounds of its appeal. That is, given that the Legislature clearly provided for appeals on legal and factual grounds, the Court perceives no reason to prevent a party from citing both grounds in the same case. The central purpose of the requirement that an appellant "indicate in the appeal whether it is an appeal on issues of law or on factual matters" is to notify the other parties of the nature of the appellate issues. It was not to require a party to elect only one basis for an appeal. In this way, section 1189-B is consistent with 5 M.R.S. § 11006 and M.R. Civ. P. 80C, which govern the Court's review of administrative proceedings, and contemplate a review on both legal issues and factual matters.

In short, contrary to Darling's argument, section 1189-B does not require an aggrieved party to elect whether to pursue an appeal on legal issues or factual matters. Ford is, therefore, entitled to a trial as authorized by 10 M.R.S. § 1189-B(2). Because the Court will in this Decision and Order remand the matter to the Board to address Darling's claim for civil penalties, the Court will stay further action on Ford's appeal. Accordingly, the Court will defer action on the parties' arguments as to the nature of the trial, including Ford's constitutional challenge, and the legal standard that will govern the appeal until after the conclusion of the administrative proceeding.[11]

[11] Given the Court's conclusion that Ford is entitled to a trial on factual matters, and given that as explained above the determination of whether the termination of the BOC constitutes a termination of the franchise is a factual question, the Court will not address in this Decision and Order Darling's substantive contention that the termination of the BOC constitutes a

III. Board Bias

In addition to its substantive arguments, Ford also challenges the objectivity of the Board. In particular, Ford contends that the Board's decision was biased as a result of the participation of two Board members – Darwin Morrison, Jr., and H. William Sowles.

In essence, Ford argues that Mr. Morrison and Mr. Sowles are principals of new vehicle dealers and "have a financial or pecuniary interest in broadly interpreting 10 M.R.S.A § 1174 and other relevant statutes in favor of dealers, in order to enhance the security and value of the dealerships in which they have ownership interests." Ford Brief at 48. In addition, Ford asserts that because Messrs. Morrison and Sowles have been officers of the Maine Automobile Dealers Association, which promotes the interest of Maine dealers and of which association John Darling has served as an officer, Mr. Morrison and Mr. Sowles had an impermissible conflict of interest.

In response, both Darling's and the State point to the Board's enabling statute, which prescribes the Board's composition and requires the presence of franchise dealers on the Board. *See* 10 M.R.S. § 1187. They also cite a federal case in which the court concluded that the statue, including the statutorily prescribed membership of the Board, is constitutional. *See Alliance of Automobile Mfrs. v. Gwadowsky*, 353 F. Supp. 2d 97, 103 (D. Me. 2005). Darling's and the State thus contend that in order to establish the bias necessary to invalidate the Board's determinations, Ford is required to demonstrate a bias or conflict personal to Messrs. Morrison and Sowles, rather than rely upon their status as car dealers. According to the State, "[a]n interest of the nature necessary to disqualify a board member acting in an adjudicatory capacity must be more than a general philosophical, political or social inclination. It must be direct, definite, and capable of demonstration; not remote, uncertain, contingent, or unsubstantial or merely speculative or theoretic." State's Brief at 3 (citing *In re Maine Clean Fuels*, 310 A.2d 736, 751 (Me. 1973)).

First, the record is devoid of any evidence to support Ford's contention that the subject members are motivated to interpret 10 M.R.S. § 1174 broadly merely due to their status as new vehicle dealers. In fact, the expertise of members of the adjudicatory boards or panels is an essential element of

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termination of the franchise. That issue will be a subject of the trial. Similarly, the Court will not comment on the parties' challenge to the damage calculation, or Ford's objection to the award of attorney's fees. The damages to which Darling's might be entitled involve factual issues that will likely be subject of a trial. Darling's claim for attorney's fees, and Ford's objection thereto, are pertinent only if Darling's prevails on its substantive claim.

administrative proceedings. To provide that expertise, the members of the various boards will undoubtedly have some connection to or history with the industry that they help regulate. If one's status, title or role in an industry, without more, was sufficient to disqualify one from participating in the administrative process, challenges would likely be numerous and the expertise of the decision-making bodies limited or non-existent. Furthermore, in not only is the alleged bias of the new vehicle dealers not as apparent as Ford suggests, but the Court can conceive of factors (e.g., competitive advantage) that suggest that a dealer might be biased against another dealer that is in a dispute with a manufacturer.

To establish bias to disqualify a Board member and thus invalidate the proceedings, Ford must demonstrate that a member or members of the Board had a particular bias or prejudice against Ford. Ford has not done so in this case. Accordingly, Ford's challenge on to the objectivity of the Board fails.

Conclusion

Based on the foregoing analysis, the Court orders:

1. The Board's decision regarding Darling's request for the imposition of civil penalties, which decision is the subject of Count IX, is vacated. The issue is remanded to the Board for further proceedings consistent with this Decision and Order.

2. Darling's Motion for Reconsideration is dismissed as moot.

3. Further proceedings in this matter are stayed pending completion of the administrative proceedings regarding Darling's claim for the imposition of civil penalties.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 7/10/09

Justice, Maine Business and Consumer Court