BEFORE THE

DEPARTMENT OF COMMERCE

OF THE STATE OF UTAH

IN THE MATTER OF THE PROTEST OF THE ESTABLISHMENT OF A MITSUBISHI AUTOMOBILE FRANCHISE IN DAVIS COUNTY	:	**ORDER**
MITSUBISHI MOTOR SALES OF AMERICA, INC. RESPONDENT	:	
GARFF ENTERPRISES d/b/a KEN GARFF MITSUBISHI DOWNTOWN PROTESTER	:	Case No. NMVFA 99-002

ORDER

The Findings of Fact, Conclusions of Law and Recommended Order in this matter are ratified and adopted by the Executive Director of the Department of Commerce and it is

ORDERED that the protest heretofore filed by Garff Enterprises, Inc. d/b/a Ken Garff Mitsubishi Downtown against Mitsubishi Motor Sales of America, Inc. awarding a franchise to Sam Barber and Chuck Barber should be and the same is hereby dismissed.

SO ORDERED this the 21st day of April, 2000.

/s/ Douglas C. Borba
DOUGLAS C. BORBA, Executive Director
Utah Department of Commerce

NOTICE OF RIGHT TO APPEAL

Judicial review of this Order may be obtained by filing a Petition for Review with the District Court within 30 days after the issuance of this Order on Review. Any Petition for Review must comply with the requirements of Sections 63-46b-14 and 63-46b-15, Utah Code Annotated. In the alternative, but not required in order to exhaust administrative remedies, reconsideration may be requested pursuant to *Bourgeous v. Department of Commerce, et al.*, 1999 UT App 146 (Utah App. May 6, 1999) within 20 days after the date of this Order pursuant to Section 63-46b-13.

CERTIFICATE OF MAILING

I certify that on the 21st day of April, 2000, the undersigned mailed a true and correct copy of the foregoing Order on Review by certified mail, properly addressed, postage prepaid, to:

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/s/ Michael R. Medley
MICHAEL R. MEDLEY, Department Counsel
Utah Department of Commerce

BEFORE THE

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IN THE MATTER OF THE PROTEST OF THE ESTABLISHMENT OF A MITSUBISHI AUTOMOBILE FRANCHISE IN DAVIS COUNTY	**FINDINGS OF FACT, CONCLUSIONS OF LAW and RECOMMENDED ORDER**
MITSUBISHI MOTOR SALES OF AMERICA, INC. RESPONDENT	Case No. NMVFA 99-002
GARFF ENTERPRISES d/b/a KEN GARFF MITSUBISHI DOWNTOWN PROTESTER	

INTRODUCTION

This matter came on for hearing upon a protest filed by or on behalf of Garff Enterprises d/b/a Ken Garff Mitsubishi Downtown (hereafter "Garff") protesting the notice of Mitsubishi Motor Sales of America, Inc. (hereafter "Mitsubishi") of its intent to award another franchise to Barber Brothers at Woods Cross, Utah, a distance of less than ten (10) miles from the location of the Mitsubishi franchise owned by Garff.

FINDINGS OF FACT

1. On or about July 26, 1999, Mitsubishi notified Garff of its intent to enter into a Dealer Sales and Service Agreement with Chuck Barber and Sam Barber ("Barber Brothers") for

a proposed Mitsubishi franchise to be located at 2023 S. 625 West, Woods Cross, Utah.

2. On or about August 23, 1999, the Executive Director of the Utah Department of Commerce received a letter dated August 20, 1999, from Garff protesting the proposed award by Mitsubishi to Barber Brothers and requesting a hearing. The protest was referred to the Department counsel who serves as hearing officer for the New Automobile Franchise Act Advisory Board ("Board").

3. On August 24, 1999, the Department counsel notified the parties that the protest had been set for hearing on October 14, 1999.

4. On August 26, 1999, the attorney for Garff advised the Department counsel that an agreement had been reached with Barber Brothers and was awaiting Mitsubishi approval. Based upon this representation, the hearing was canceled subject to being rescheduled if the protest was not dismissed before October 14, 1999. This conversation was followed by a letter from Garff's attorney dated September 16, 1999 in which he acknowledged that he was authorized by Garff, Mitsubishi, and Barber Brothers to request that the hearing be stricken and rescheduled in November if the settlement was not consummated by October 18, 1999.

5. On October 4, 1999, the attorney for Mitsubishi advised the Department counsel that the settlement negotiations had failed, and on October 21, 1999, the hearing was rescheduled for adjudication on December 13, 1999.

6. On November 9, 1999, the attorney for Garff contacted the Department counsel with the information that it appeared that the settlement between Garff and Barber Brothers would be concluded. Garff's attorney was advised that the case would not be removed from the hearing docket until the Department counsel had a request for dismissal of the protest in hand.

7. On or about December 1, 1999, the attorneys for both Garff and Mitsubishi called the Department counsel and stated that a settlement which would moot the protest was imminent, as a buy-sell agreement was in the final stages of being drafted, but that the parties needed additional time to work out certain details in the complicated transaction. Based upon these representations and the request of Garff's attorney, reluctantly conceded to by Mitsubishi's attorney, the Department counsel notified the Board that the hearing scheduled for December 13, 1999 would have to be canceled and once again reset if the deal should not materialize.

8. On December 20, 1999, the Department counsel was again notified that settlement negotiations had been terminated. A new hearing date of January 24, 2000 was set but had to be changed as the date was in conflict with the ability of quorum of the Board to attend. A further proposed date of February 9, 2000 also was unacceptable due to a lack of a quorum. Finally the matter was reset for the earliest date at which a quorum of the Board as well as the attorneys would be available, and on January 25, 2000, notice of the setting for the hearing to be held on March 28, 2000 was issued.

9. The hearing in this matter commenced at 9:00 A. M. on March 28, 2000 before a quorum of the Board consisting of Klarice A. Bachman, Chair; Brad Brown; John Mecham; Don Page; and Jewel Lee Kenley. Board member Michelle Mitchell was not present. Garff was represented by Michael W. Spence and Mark W. Pugsley. Mitsubishi was represented by James R. Hermsen.

10. Except for a period of 30 minutes for lunch, arguments and testimony continued until both sides rested at approximately 7:30 P.M. For the reasons stated hereinafter it is unnecessary to discuss the testimony and documentary evidence except to characterize it as extremely compelling on both sides, with both parties more than ably represented by their respective counsel.

11. Following the departure of the parties and witnesses from the room at the close of the hearing, the Board decided that it would prefer to immediately commence a preliminary deliberation session while all of the issues and facts were fresh in their minds. The Department counsel then proceeded to ask each Board member in turn to list what that member felt were the most important facts presented during the hearing, and how that member generally felt those facts fell in relation to the five areas into which the Board was required to delve.

12. After this preliminary review of the facts, the Board instructed the Department counsel to prepare a finding of facts incorporating their collective findings, and to attempt to apply those findings to the franchise law applicable to the case. It was anticipated that the Board would then assemble at a future date, after having had the opportunity to review the documentary evidence prepared by the expert witnesses, to review and discuss the draft prepared by the Department counsel. At that time it was the intent of the Board to direct whatever changes

deemed necessary in the proposed finding to accurately reflect their respective views, and attempt to reach a determination upon what recommendation should be submitted to the Executive Director for his consideration and either acceptance or rejection.

13. On April 7, 2000, the Department counsel received a letter via facsimile from Robert H. Garff, the CEO of Garff, which had also been copied by facsimile to Mitsubishi's attorney. The Department counsel then sent a copy of the letter via facsimile to Garff's attorney along with a cover letter advising that the letter would not be disseminated to the Board, as requested, and expressing concern with a portion of the letter.

14. The second grammatical paragraph of the letter started: "To my knowledge, the Board has not yet reached a final decision. However, I have heard rumors that several Board Members believe that . . . "

15. Upon receipt of the letter, the Department counsel immediately conferred with the Executive Director and the Board chair, who is also the Deputy Director of the Department and the Executive Director's designee on the Board. The conferees were extremely perplexed at the implications contained in the letter that the sanctity of the deliberation process had been breached.

16. Three possibilities were noted to exist:

a. A Board member had discussed the preliminary deliberations of the Board with non-members in violation of the instructions that the deliberative process and the means of reaching a recommendation would be retained within the Board, Department counsel, and Executive Director;

b. A party or parties unknown had been eavesdropping on the deliberative proceedings, either in person or through the utilization of recording devices left in the hearing room; or

c. Some person, or persons, unknown was generating unfounded gossip which was being passed off as factual based upon personal knowledge.

17. The members constituting this Board were selected and asked to serve due to their diligence, honesty, integrity, and possession of a dedication to public service making them willing to take on a no-win task at great personal sacrifice and risk to their relationships within the

regulated industries to which they also belong. Each Board member was promised upon taking this responsibility that they would be insulated from pressure and protected from knowledge of any opinion expressed by them in a case to the best ability of the Department to guarantee such assurances.

18. The letter from Garff indicated that the Department had failed in its responsibility to protect the Board members, and the Department counsel was instructed to investigate the letter and determine the source of the alleged "rumors" and whether the deliberations were so compromised and tainted as to render further proceedings in this matter impossible.

19. Six people were present in the deliberation room and, along with the Executive Director to whom a cursory report was given the following day, should have constituted the full extent of any knowledge about the proceedings following the close of the presentation of the case.

20. The Department counsel individually contacted each Board member and read each member only that portion of the Garff letter quoted above, and then asked them if they had any knowledge of how that statement could have originated. Two of the Board members stated that they had had a discussion between themselves at a meeting the day following the deliberations, which each said was not subject to having been overheard. Both of these members also had a conversation with the Department counsel on the same day. A full polling of the Board revealed that there had only been one conversation between a Board member and an outside party in which the Garff/Mitsubishi hearing was even mentioned.

21. The Department counsel contacted the outside party with whom one of the Board members had spoken subsequent to the hearing and was told that the conversation occurred on April 5, 2000, eight days after the hearing. The outside party stated that the only reference to the hearing was the Board member's statement that making decisions in these matters was really hard and the member wished that the member had never agreed to serve on the Board. It would have been impossible for this conversation, even if inaccurately reported, to have been the foundation for the "rumors" for the reasons set forth hereinafter.

22 Garff's attorney contacted the Department counsel a few days after the Garff letter was sent to him. He stated he had just returned to town and saw the letter and cover letter from

the Department counsel. The attorney stated that on Thursday, March 30, 2000, he was at a luncheon meeting in Mesquite, Nevada, when he was separately approached by three Utah automobile dealers concerning the Garff/Mitsubishi hearing. Two of the dealers were from Washington County and the third was from Utah County. None of them have any connection with the Department or the Board except insofar as they are a regulated industry.

23. Garff's attorney reported that he was informed by each of these dealers that the case was over and Garff had lost. The attorney stated he was shocked and dismayed that a decision would have been made so rapidly, and that he was not informed before it was known on the street. He stated that he had not attempted to ascertain the source of the information being imparted to him by the dealers, and did not pass the information on to his client.

24. Garff's attorney further informed the Department counsel that his client subsequently contacted him with the same information, the source being one of the Washington County dealers. The attorney further expressed shock and dismay at the reported utilization of scurrilous names allegedly used by the Board to describe his client during the deliberations.

25. It can be categorically stated that no such names or descriptions as reported to the Department counsel were ever used by anyone in the deliberation process in the presence of the Department counsel who was at all times sitting directly opposite and facing the middle of the deliberating Board. As is the case with most gossip, the rumormonger inventing alleged knowledge has the ability to manipulate and put his or her own spin on the story without any regard for truth or accuracy, for whatever personal or business reasons, and without much fear of being found out and called to account.

26. The "rumors", whether made up or heard and intentionally or inadvertently garbled in transmission, inspired Garff to write the April 7, 2000 letter against his attorney's advice. The letter was not disseminated beyond the Department counsel and the Mitsubishi attorney, so no harm was done by the letter which served the unintended office of bringing a theretofore unknown problem to the attention of the Department.

27. After interviewing all primary sources for leaks, the Department counsel concluded that further investigation would be unproductive unless the "rumors" could be tracked back to the originating source who would admit that they were complete fabrications. It was the Department

counsel's judgment call that getting someone to make such an admission would be so infinitesimal as to be unworthy of further pursuit.

28. Although the "rumors", as reported in Robert H. Garff's letter, do not bear any close resemblance to the actual happenings during the preliminary deliberations conducted in the hearing room, the letter could conceivably be based upon matters which in fact transpired. The matter of the willingness of both Garff and Barber to ignore the ten mile radius for a protest when it would benefit their own personal interest was in fact mentioned by the Board.

29. Consideration of a "waiver" of the ten mile protest zone as an issue was quickly discarded by the Board as irrelevant, and no member cited the negotiations and attempted agreements between Garff and Barber Brothers as being a factor in the case worthy of mention. The Board felt this was, in actuality, a dealer versus dealer case with both sides equally willing to negotiate the ten mile protest rights, which would therefore neither help nor hurt either side.

30. Garff's letter further indicates that the "rumors" had the Board finding against him on the basis of the November 12, 1998 letter from Garff to Mitsubishi to "confirm and acknowledge . . . (Mitsubishi's intent) to have at least three Dealers in the Salt Lake City Metro Market area." This portion of the "rumors" is unmitigated hogwash and results from a garbled transmission, an intentional effort by a party or parties unknown to undermine the Board as a whole, or create ill will toward an individual member or members of the Board, or perhaps gossip passed on as fact in an attempt to somehow curry favor with Garff.

31. In reviewing the facts considered to be important in the case, the above referenced letter from Garff to Mitsubishi was mentioned by two Board members. One member stated that the letter was evidence that Garff was aware of the intent to establish a third dealer point prior to Garff committing to taking a dealership, which merely reflects the testimony adduced from Robert H. Garff during the hearing. A second Board member was concerned about the three dealer point letter because that member felt that it showed bad faith on the part of Mitsubishi in forcing Garff to produce the letter before being awarded a franchise. That member further pointed out that Garff's letter only acknowledged - but did not agree to - the intention of Mitsubishi to establish, at an unspecified future date and undisclosed location, a third dealer point. The other three Board members did not feel the letter was entitled to be assigned any probative value whatsoever.

32. The conclusions drawn by the Department counsel from his investigation left him in much the same place as that from which he started. There is enough valid information in the "rumor" passed on to Robert H. Garff to indicate that at least a portion of the deliberations were either overheard or reported - albeit misreported, misinterpreted, and twisted - at the pleasure of and to suit the purpose of the purveyor. The bottom line remains that the deliberations were not confidential and have been compromised to an unknown and probably unknowable extent.

CONCLUSIONS OF LAW

1. Without knowing the source and extent of the information wrongfully given or obtained from the deliberation proceedings in this matter, the only safe assumption that can be drawn is that the Board has been utterly and completely compromised, and any recommendation it might make would be tainted and justifiably suspect.

2. It would be an unconscionable act by the Department to request the Board to continue deliberation in this matter without receipt of an ironclad assurance that their opinions and participatory input would be protected from general knowledge within the regulated industries in which they must live and do business. Such an assurance cannot be forthcoming in the case at bar.

3. If the expertise based opinions and uncontrived, freely offered insight during the course of give-and-take, freewheeling, closed-door and sacrosanct deliberation protected from prying eyes and ears, leading to a recommendation to the Executive Director, should become common knowledge within the industry, it would create a chilling effect upon the ability of the Board to function in the manner in which it must in order to meet its legislative mandate.

4. In the case at bar, given the information already being spread as fact, it must be assumed that the small community of Utah new vehicle dealers believe that they know what went on during the deliberations conducted in the privacy of the hearing room. Without regard to the correctness or incorrectness of the gossip being spread, its existence has the potential to place the Board members, or any of them, in the untenable position of becoming a target of retaliation within their business community in which they must operate. Even more chilling, based upon the gossip being promulgated on the street, is the distinct possibility of a Board member being

subjected to vindictiveness for a position attributed to him or her by an insidious rumormonger with a personal agenda, when in fact that member's actual position was diametrically opposed to the one alleged.

5. The "rumors" on the street that Garff lost this hearing must be widely believed to be true to have prompted the April 7 letter written by Garff, which would be considered highly improper but for the extenuating circumstances of the complete falsehood of slurs made against him which, if based on fact, would be even more improper and would certainly justify his action.

6. The truth or falseness of the rumors being spread regarding this matter is no longer an issue, as they have already destroyed the ability of this Board in this case to continue its deliberations and make a recommendation free from external influences or the perception of outside influence. Since Garff has already lost the protest according to rumor, should a final recommendation be to uphold its protest the issue on the street and from Mitsubishi would be "Who got to the Board?" If the street rumor became a self-fulfilling prophecy with Mitsubishi prevailing, then it would only give credence to the repugnant "rumor" in all of its ramifications.

7. The Board is made up of an outstanding group of hand-picked individuals possessing unimpeachable honesty and with the intestinal fortitude to make tough decisions, as any decisions in matters brought before this Board must necessarily be. To ask the Board members to continue deliberation in this case when, no matter what the ultimate recommendation, they would be placed in the position of having their personal integrity subjected to question for merely performing a thankless task would be unacceptable and unjust.

8. The initial deliberations conducted by the Board on the evening of March 28, 2000, were for the sole purpose of providing the Department counsel with guidance to assist him in attempting to draft a proposed recommendation, or several alternative recommendations as the facts might allow, for further consideration and discussion by the Board before any final recommendation would be submitted to the Executive Director for his consideration. The guide used for deliberation was the five elements of evidence set forth in the statute, and each board member was in turn asked to state his or her view of the important facts and whether, in their preliminary opinion, such facts favored Garff, Mitsubishi, or were a wash.

9. The violation of the deliberative process has effectively removed the Board from

the decision making process in this case unless it would be possible for the Executive Director to utilize their initial fact finding - done prior to the commencement of the "rumors" - as a recommendation or at least as diverse expert opinions from which he might educate and inform himself in a manner sufficient to enable him to render a fair and impartial decision based solely upon the evidence adduced at the hearing.

10. If the initial findings of fact made by the Board during its preliminary deliberations on March 28, 2000 were conclusive on the five elements of evidence required to be considered pursuant to UTAH CODE ANN. §13-14-306, it would be a simple exercise for the Executive Director to accept the consensus findings as a recommended action and enter an order accordingly. A review of the fact finding by the five Board members as recorded in the minutes of the hearing officer does not provide guidance, considering the divergent views on the determinative issues, sufficient for acceptance as a recommendation upon which the Executive Director could base a decision with any degree of confidence.

11. Although any hearings under the act are required to be held before a quorum of the Board [UTAH CODE ANN. §13-14-107(2)(a)], there is no requirement that a recommendation be made to the Executive Director by the Board. Since the Board is advisory only, it would appear that the statute might allow the Executive Director the authority to independently review the record and make a determination based upon such review. This process, even if permissible, would require a considerable period of time in order to have approximately ten hours of testimony transcribed and then reviewed with the other evidence by the Executive Director.

12. An additional restriction on an independent review by the Executive Director is imposed by UTAH CODE ANN. §13-14-304(4) which provides that:

> (a) Any hearing ordered under Subsection (1) shall be conducted no later than 120 days after the application for hearing is filed. **A final decision on the challenge shall be made by the board no later than 30 days after the hearing.**
>
> (b) **Failure to comply with the time requirements of Subsection (4)(a) is considered a determination that the franchisor acted with good cause** or, in the case of a protest of a proposed establishment or relocation of a dealer, that good cause exists for permitting the proposed additional or relocated new motor vehicle dealer, **unless**:

(i) **the delay is caused by acts of the franchisor** or the additional or relocating franchisee; or

(ii) **the delay is waived by the parties**. (Emphasis added).

13. The statute cited above refers to the "board" as being the entity charged with making the decision, but is apparent from reading this section in conjunction with the 1998 amendments, making the Board advisory only, that the use of "board" is a holdover from the previous enactment and must be read in proper context as meaning the Executive Director, who has the exclusive authority to make a binding decision. With this proviso, it would be impossible for the review to be completed within the mandatory 30 days set by the statute.

14. The statute provides for an extension of the time limitation for rendering a decision if the delay is caused by the franchisor or is waived by the parties. In this case the hearing was initially set for October 14, 1999. This date was extended at the request of Garff with the concurrence of Mitsubishi due to settlement negotiations. When no agreement was reached, the hearing was rescheduled for December 13, 1999, still within 120 days. Garff subsequently sought a further continuance of the hearing upon a representation that a settlement was imminent. Mitsubishi was opposed to the continuance but acquiesced upon the understanding that there would be no further delays in getting the matter to a hearing if the settlement was not finalized. Upon termination of these settlement negotiations, the earliest available date at which both the attorneys and quorum of the Board were available was the March 28, 2000 hearing date.

15. The law requires a hearing within 120 days of protest. In this case, but for the allowance of continuances at the instance of Garff, this case would have had to have been heard no later than December 21, 1999, with a decision rendered no later than January 20, 2000. Due to concessions to Garff the hearing did not finally take place until well past the mandated deadline, and Mitsubishi has made it clear that no further extensions would be granted.

16. Even if the parties were willing to waive the time strictures of the statute to permit the Executive Director time in which to fully verse himself on the issues, without further evidentiary proceedings this would not be possible. During the hearing lengthy and detailed reports prepared by the experts of the parties were admitted with only summary explanations, since the expertise of the Board did not require additional elucidation. Unfortunately, the

Executive Director does not possess a background in the automotive industry or special expertise to assist him in understanding the reports so readily understood by the experts on the Board.

17. Even with a transcript and the documents introduced at the hearing, the Executive Director would be unable to ask clarifying questions, observe the demeanor of the witnesses, or rely on his non-existent expertise in the automotive industry. A reconvening of the hearing presided over by the Executive Director could possibly address these issues, but this would be proscribed by law since all adjudicative proceedings must be conducted by the advisory board [UTAH CODE ANN. §13-14-107(2)(a)] and there are no provisions in the law for a substitution of Board members except for those disqualified for conflict of interest [UTAH CODE ANN. §13-14-103(5)(a)].

18. For both practical and legal reasons the hearing cannot be stricken and commenced again from the beginning. Practically, this was an informal proceeding which would be tried *de novo* in District Court on appeal, so the effect of a re-hearing would be to just add another costly and time consuming proceeding. Legally, the applicable statutes do not allow for a substituted Board. With the New Automobile Franchise Advisory Board disqualified, there is no method to proceed with a new hearing.

19. The Executive Director is in a paradoxical situation. By law he is required to make a decision and, at the same time, is rendered incapable of making the decision by the same law. The Executive Director has three options for the mandated decision in this case: he may either uphold the Garff protest, deny the Garff protest, or determine that he cannot rule and dismiss the action.

20. The Executive Director is of the opinion that under the circumstances the only fair, equitable, and proper decision is to attempt to put the parties back into the position they held when Mitsubishi awarded Barber Brothers a franchise, which in turn invested Garff with a protest right under the act. Therefore, the protest should be dismissed in order to place the parties in the position they occupied on July 26, 1999 and allow them to proceed *ab initio*.

RECOMMENDED ORDER

ORDERED that the protest heretofore filed by Garff Enterprises, Inc. d/b/a Ken Garff

Mitsubishi Downtown against Mitsubishi Motor Sales of America, Inc. awarding a franchise to Sam Barber and Chuck Barber should be and the same is hereby dismissed.

Dated this the 21st day of April, 2000.

/s/ Michael R. Medley
MICHAEL R. MEDLEY, Department Counsel
Utah Department of Commerce