[Cite as *Brown Motor Sales Co. v. Hyundai Motor Am.* , 2011-Ohio-5053.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Brown Motor Sales Co. dba Brown Hyundai, Appellant-Appellant, v. Hyundai Motor America, Appellee-Appellee.	:	No. 10AP-725 (C.P.C. No. 10CVF-02-2816) (REGULAR CALENDAR)

D E C I S I O N

Rendered on September 30, 2011

Stockamp & Brown, LLC, David A. Brown, Deanna L. Stockamp, *Stephen D. Brown*, and *Michael R. Szolosi, Jr.*; *Law Offices of William R. Lindsley, LLC*, and *William R. Lindsley*, for appellant.

Baker Hostetler LLP, Elizabeth A. McNellie, and *Kristopher J. Armstrong*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by appellant, Brown Motor Sales Co., dba Brown Hyundai, from a judgment of the Franklin County Court of Common Pleas affirming an order of the Ohio Motor Vehicle Dealers Board ("board"), which adopted a hearing examiner's report and recommendation finding that appellee, Hyundai Motor America ("HMA"), had good cause to terminate a franchise agreement.

{¶2} HMA, a manufacturer of Hyundai products, is a franchisor as defined by R.C. 4517.01(X). Appellant, a Hyundai dealer in the Toledo area, is a franchisee as defined by R.C. 4517.01(W). HMA and appellant are parties to a dealer's sales and service agreement (hereafter "the Dealer Agreement"). On February 13, 2008, HMA issued a notice to appellant to cure deficiencies in its dealership operations in various areas, including sales, customer satisfaction, and management pursuant to the terms of the Dealer Agreement.

{¶3} On March 25, 2009, HMA sent appellant a notice of failure of performance and notice of termination. The termination letter cited appellant's failure to meet HMA's "Cure Program" objectives, as well as a "sharp and continued decline" in vehicle sales between 2001 and 2007. The letter further stated that appellant's "failure to meet its sales performance obligations under the Agreement constitutes a substantial, material breach of the Agreement and is grounds for termination of the Agreement pursuant to Paragraph 16.B.3."

{¶4} On June 24, 2009, counsel for appellant filed with the board a protest of the proposed termination pursuant to R.C. 4517.54. On July 29, 2009, Taylor Hyundai Corporation ("Taylor Hyundai") and Stephen D. Taylor filed a motion to intervene as interested parties to the protest. A board hearing examiner subsequently granted the motion to intervene.

{¶5} The matter came for hearing before a board hearing examiner on November 9, 2009. The hearing examiner issued a report and recommendation on January 15, 2010, setting forth the following findings of fact. Appellant has been selling Hyundai vehicles since 1989, and Robb Brown has been the operator of the dealership

since 2005. Appellant's Toledo dealership is located in the vicinity of a number of other automobile dealerships and retail stores. Appellant sells Pontiac and Mazda vehicles from the same location as the Hyundai dealership; appellant also sells Honda vehicles from a separate location. Appellant and HMA operate pursuant to the written Dealer Agreement.

{¶6} During the hearing, Bryan O'Malley, HMA's regional general manager for the central region, testified that he is responsible for coordinating retail sales, parts, service, customer satisfaction, and related responsibilities for 173 dealers in the central region. According to O'Malley, the most important task of a dealer is to sell vehicles, and a dealer is evaluated based upon sales efficiency and lost sales within its primary market area ("PMA"). While dealers are usually evaluated under a regional standard in comparison to other dealers within the state, dealers may also be evaluated under a national standard.

{¶7} Sales efficiency is a ratio, expressed as a percentage. In considering a dealership's sales efficiency, a comparison is made of the dealership's total sales against the sales expected from the dealership's PMA based on the average brand penetration. HMA calculated appellant's sales efficiency utilizing a national average. Beginning around 2006, appellant received periodic notices from HMA that its dealership had failed to perform adequately with respect to sales of new Hyundai vehicles.

{¶8} As part of his responsibilities, O'Malley is involved in HMA's "Cure Program." The Cure Program is designed to improve the worst-performing dealers, and to provide those dealers with the opportunity to cure deficient performance primarily with respect to sales. For the Cure Program selection criteria, HMA calculates dealership

sales efficiency percentages based upon national and regional segmented averages. As a result of appellant's low sales efficiency numbers over several years, HMA placed appellant in its Cure Program for 2007. Appellant was again required to participate in the program in 2008. HMA reminded appellant in 2008 that the Dealer Agreement could be terminated if its performance did not improve.

{¶9} There are three potential outcomes to the Cure Program: graduation, continuation, or termination. Hugh Beattie, HMA's national manager of market representation for the central region, testified that appellant was the first dealer to be terminated following participation in the Cure Program.

{¶10} From 2007 to 2008, appellant's new vehicle sales increased from 246 to 298, correlating to an improvement in sales efficiency, using a national average, from 32 percent to 48 percent. During this time, appellant's sales efficiency was above average as compared to district CED dealers; appellant also hired a new general sales manager and improved with respect to its customer satisfaction scores, parts and service, and stocking vehicle inventory. Despite these improvements during the 2008 Cure Program, HMA determined that appellant's sales efficiency numbers did not improve to an appropriate level. By letter dated March 25, 2009, HMA notified appellant of its intent to terminate the franchise agreement.

{¶11} Based upon the evidence presented, the hearing examiner concluded that HMA demonstrated good cause to terminate the franchise agreement, and therefore recommended that appellant's protest be denied. Appellant filed objections to the hearing examiner's report, arguing: (1) the hearing examiner disregarded evidence favorable to appellant under the "good cause" factors; (2) HMA's national segmented average

standard is unreasonable when applied to appellant because of domestic manufacturing bias; and (3) HMA should not be permitted to terminate appellant in violation of the Cure Program policy. The board declined to further deliberate on the matter and, as a consequence, the recommendation of the hearing examiner was approved by operation of law. Appellant received notice of that determination by letter dated February 18, 2010.

{¶12} Appellant filed a notice of appeal with the Franklin County Court of Common Pleas, arguing that (1) the reliable, probative, and substantial evidence demonstrated that appellant made "substantial progress" during the 2008 Cure Program period, and (2) the board erred by failing to follow R.C. 4517.55(A) and ignoring evidence favorable to appellant under the statutory "good cause" factors. The trial court issued a decision and entry on July 6, 2010, finding there was reliable, probative, and substantial evidence to support the board's determination that good cause existed to terminate the franchise agreement, and that the board's approval of the report was in accordance with law.

{¶13} On appeal, appellant sets forth the following single assignment of error for this court's review:

> The Trial Court erred as a matter of law by misinterpreting the inherently ambiguous phrase "substantial progress" found in a provision of Hyundai Motor America's ("HMA") Dealership Sales and Service Agreement that prohibits HMA from involuntarily terminating a dealership that makes "substantial progress" during a six month Cure Program period.

{¶14} At the outset, we note the applicable standards of review for a court of common pleas and for an appellate court in considering administrative decisions by a licensing board. In the present case, the trial court "was required to affirm the board's

order if a consideration of the record established that reliable, probative, and substantial evidence supported the order and if the order was in accordance with law." *Gen. Motors Corp. v. Monte Zinn Chevrolet Co.* (2000), 136 Ohio App.3d 157, 164, citing R.C. 119.12. The court of common pleas "should generally defer to administrative resolution of evidentiary conflicts," and "as long as there is reliable, probative, and substantial evidence that supports the board's findings, the common pleas court may not substitute its judgment as to disputed facts." *Monte Zinn* at 164, citing *Gen. Motors Corp. v. Joe O'Brien Chevrolet, Inc.* (1997), 118 Ohio App.3d 470, 482-83.

{¶15} In contrast, "[t]he responsibility of this court in a R.C. 119.12 appeal is to determine whether the trial court abused its discretion when it reviewed the administrative order * * * and to conduct a plenary review to determine whether the administrative decision is in accordance with law." *Monte Zinn* at 164, citing *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471, 1993-Ohio-182.

{¶16} R.C. 4517.54(A) states in part: "Notwithstanding the terms, provisions, or conditions of an existing franchise, no franchisor shall terminate, cancel, or fail to continue or renew a franchise except for good cause." The burden is upon the franchisor to establish good cause. *Monte Zinn* at 160, citing R.C. 4517.58(C).

{¶17} R.C. 4517.55(A) sets forth the circumstances constituting "good cause" to terminate a franchise, and provides as follows:

> In determining whether good cause has been established by the franchisor for terminating, cancelling, or failing to continue or renew a franchise, the motor vehicle dealers board shall take into consideration the existing circumstances, including, but not limited to:

> (1) The amount of retail sales transacted by the franchisee during a five-year period immediately preceding such notice as compared to the business available to the franchisee;
>
> (2) The investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise;
>
> (3) The permanency of the franchisee's investment;
>
> (4) Whether it is injurious or beneficial to the public interest for the franchise to be modified or replaced, or the business of the franchisee disrupted;
>
> (5) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee, and is rendering adequate service to the public;
>
> (6) Whether the franchisee fails to fulfill the warranty obligations of the franchisor required to be performed by the franchisee;
>
> (7) The extent and materiality of the franchisee's failure to comply with the terms of the franchise and the reasonableness and fairness of the franchise terms;
>
> (8) Whether the owners of the new motor vehicle dealer had actual knowledge of the facts and circumstances upon which termination, cancellation, discontinuance, or nonrenewal is based;
>
> (9) Whether the proposed termination, cancellation, discontinuance, or nonrenewal constitutes discriminatory enforcement of the franchise agreement.

{¶18} This court has previously noted that "[t]he non-limiting language of R.C. 4517.55(A) makes apparent that the list included in R.C. 4517.55(A) is not exhaustive, and all 'existing circumstances' must be taken into account in determining whether good cause exists." *Mack Trucks, Inc. v. Motor Vehicle Dealers Bd.*, 10th Dist. No. 05AP-768, 2006-Ohio-2748, ¶19. Further, "R.C. 4517.55 does not require express consideration of

each of the enumerated circumstances, and any one factor is sufficient to support a good cause determination." See also *Monte Zinn* at 165 ("There is no language in R.C. 4517.55 that indicates that more than one factor must weigh in favor of a good cause determination before a franchise may be terminated.").

{¶19} As noted under the facts, the parties operated pursuant to a Dealer Agreement. Under paragraph 10.B.1 of the Dealer Agreement, a dealer "agrees to use its best efforts to effectively promote and sell Hyundai Products to Customers in DEALER's primary market area." The term "primary market area" is defined under paragraph 10.B.4 as the "geographic area which HMA will designate from time to time for the sole purpose of evaluating DEALER's performance of its sales and service obligations hereunder."

{¶20} Paragraph 10.E of the Dealer Agreement provides for evaluation of the dealer's sales performance, and states in pertinent part as follows:

> HMA will evaluate DEALER's sales performance at least annually and agrees to review such evaluations with DEALER so that DEALER may take prompt action if necessary to improve its sales performance to such satisfactory levels as HMA may reasonably require. HMA will provide DEALER with a copy of such evaluation upon request. HMA may, at its discretion, evaluate DEALER's sales performance based on one or more of the following criteria:
>
> 1. Achievement of fair and reasonable sales objectives as HMA may establish at its discretion;
>
> 2. A comparison of sales and/or registrations of Hyundai Motor Vehicles to sales and/or registrations of other line makes: (i) in DEALER's primary market area; (ii) in HMA's Region or any area thereof as HMA may reasonably establish; or (iii) nationally;

> 3. The trend of DEALER's sales performance over a reasonable period of time;
>
> 4. The manner in which DEALER has conducted its sales operations, including advertising, sales promotions and Customer relations;
>
> * * *
>
> 6. Significant local conditions that may have affected DEALER's performance.

{¶21} Section 16 of the Dealer Agreement sets forth grounds for termination of the agreement. Paragraph 16(B)(3) states:

> If, upon evaluation of DEALER's performance pursuant to paragraphs 10(E), 11(D) and/or 12(F) herein, HMA determines that Dealer has failed to perform adequately its sales, service or parts responsibilities or to provide adequate dealership facilities, HMA will endeavor to review promptly with DEALER the nature and extent of such failure(s). As soon as practicable thereafter, HMA will notify DEALER in writing of DEALER's failure of performance and will grant DEALER 180 days from the date of such notice to correct such failure(s). If DEALER fails or refuses to correct such failure(s) or has not made substantial progress towards remedying such failure(s) at the expiration of such period, HMA may terminate this Agreement upon sixty (60) days notice or such other notice as may be required by law.

{¶22} During the hearing, a copy of the HMA Cure Program was admitted into evidence. Under the Cure Program, "[d]ealer sales efficiency is the instrument for evaluating sales efficiency," with sales efficiency "expressed as a percent of a dealer's sales compared to an average expected penetration percent of Hyundai registrations in the dealer's PMA." Further, "[t]he Sales Efficiency report will determine the dealer's progress toward the sales standard." According to the Cure Program guidelines, "[a]ll standards are essential but, sales deficiency is the primary driver of selection to Cure

status." The time period for a dealer to correct deficiencies, pursuant to the Dealer Agreement, is 180 days. Dealers involved in the Cure Program are to receive formal notification of the program and its implications to their Dealer Agreement.

{¶23} The Cure Program document further states in part:

> The dealers will be ranked by Sales Efficiency (percent) during the Cure period. The dealers will fall into one of the three categories for primary positioning of next-steps. The best performers will graduate from the Cure program. Those who improve but have a long way to-go, will continue; those who do not show improvement, appear to be disengaged, and evidence no tangible effort, will be advanced to the termination process complying with appropriate state laws. Next-steps action will be determined by the dealer's position within a category.
>
> Consideration will be given to region's recommendation in the summary report, dealer's progress in Sales Efficiency compared to percent attained before the cure period, and dealer's improvement in other standards areas.

{¶24} While we address appellant's more specific arguments infra, the primary issue on appeal is whether the trial court abused its discretion in finding there was reliable, probative, and substantial evidence to support the board's determination that HMA established good cause, under R.C. 4517.55, to terminate the dealer franchise. As noted under the facts, HMA expressed concern with respect to appellant's sales performance beginning around 2006. Specifically, in a letter from HMA to Robb Brown, dated April 17, 2006, HMA noted that appellant "has developed a trend of poor sales performance against standard," and that appellant's sales performance from January 3, 2005 through January 2, 2006 represented a "70.7% sales efficiency rating and falls f[a]r short of a minimal standard of performance." HMA again expressed concern in a letter

dated March 7, 2007, noting a 47.73 percent sales efficiency rating for 2006, a rating falling "far short of accomplishing a minimal standard of performance."

{¶25} In a letter dated April 24, 2007, HMA provided appellant "formal notice that your dealership has failed to meet its obligations under your Hyundai Dealer Sales and Service Agreement," stating that HMA had "established your minimum sales objective as achieving and maintaining a Sales Efficiency Rating that is no less than 100% of National average." In a letter to appellant dated August 1, 2008, HMA cited the fact that appellant, during the first three months of the 2008 Cure Program, had "not been able to achieve 100% of the established objective which is our desired goal." In a September 12, 2008 letter to appellant, HMA acknowledged that appellant's sales performance reflected an improvement over the 2007 Cure Period sales realization, but noted that the sales figures for 2008 "falls considerably short of your objective" (representing 64.2 percent of the objective).

{¶26} The March 25, 2009 termination letter indicated that appellant's 2008 sales efficiency level of 48.85 percent was "well below that which was established as a reasonable market penetration standard in accordance with Section 10.E.2 of the Agreement." The letter further cited appellant's "sharp and continued decline in sales commencing in calendar year 2001," listing the following sales efficiency levels over a seven-year period: 50.34 percent for 2001; 41.93 percent for 2002; 37.12 percent for 2003; 35.82 percent for 2004; 53.14 percent for 2005; 36.23 percent for 2006; and 32.58 percent for 2007. The letter noted that "[t]his declining sales performance has been brought to your attention on numerous occasions." The termination letter stated that appellant had "failed to 'vigorously develop its' PMA, as required by Paragraph 10.B.4 of

the Standard Provisions of the Dealer Agreement," and that appellant's "failure to meet its sales performance obligations under the Agreement constitutes a substantial, material breach of the Agreement and is grounds for termination of the Agreement pursuant to Paragraph 16.B.3."

{¶27} On appeal, appellant argues that the board and the trial court misinterpreted the phrase "substantial progress" in Section 16(B)(3) of the Dealer Agreement to mean that the dealer must have shown more than "some modest improvement" in its sales performance during the 2008 Cure Period in order to avoid termination. Appellant argues that the term "substantial progress" is not defined in the Dealer Agreement, but that HMA operates a Cure Program in order to maintain a fair and consistent interpretation of the dealer's contractual responsibilities. Appellant contends that HMA's Cure Program defines substantial progress by means of the three potential outcomes, i.e. (1) graduation from the program, (2) continuation with the program, or (3) termination for those dealers who do not show improvement, appear to be disengaged, and show no tangible effort. According to appellant, substantial progress under the Cure Program is specified to mean "any" improvement by an engaged dealer showing tangible effort, and appellant maintains it was not actually required to meet HMA's unilaterally established sales efficiency objective.

{¶28} In response, HMA contends that appellant did not argue before the board that the term "substantial progress" in the Dealer Agreement should be defined under the provisions of the Cure Program to mean "any improvement." Rather, HMA notes, appellant argued more broadly that its improvement during the 2008 Cure Program demonstrated it was "an engaged, conscious, dealer whose performance was improving

under Hyundai's own Cure Program," and that such improvement was sufficient to show that HMA lacked good cause to terminate its agreement. HMA notes that appellant argued for the first time, in its appeal to the trial court, that HMA's Cure Program defined the phrase "substantial progress" to mean "any improvement" during the Cure Period. HMA further contends that R.C. 4517.55 sets the standard by which the board determines whether "good cause" exists for termination of a franchise, and involves a weighing of various considerations; HMA maintains that compliance with the Cure Program or the Dealer Agreement is, at most, an existing circumstance that could be, and was, considered and weighed by the board.

{¶29} The record supports HMA's contention that appellant did not argue before the board that the term "substantial progress" was defined by HMA's Cure Program to mean "any" improvement. Nor do we find persuasive appellant's contention that either the board or the trial court erred in failing to construe "substantial progress" as synonymous with any improvement, no matter how nominal. Appellant's construction does not comport with the ordinary meaning of "substantial," which includes "of ample or considerable amount, quantity," or "of real worth, value, or effect." The Random House Dictionary of the English Language (2nd ed.1987) 1897.

{¶30} Appellant also contends that reliable, substantial, and probative evidence demonstrates it made substantial progress during the 2008 Cure Program. Appellant cites evidence that it increased its annual new vehicle sales from 246 in 2007 to 298 in 2008, which correlates to an improvement in sales efficiency from 32 percent to 48 percent. Appellant also contends it led the district for year-over-year growth from 2007 to 2008 at 109 percent. Finally, appellant points to evidence that it retained a new general

sales manager, made improvements with respect to its parts and service unit, and improved in the area of vehicle inventory stocking.

{¶31} During the administrative hearing, the hearing examiner heard testimony from Beattie, HMA's national manager of market representation for the central region, and O'Malley, HMA's regional general manager of the central region, with respect to HMA's expectations for a dealership's sales efficiency. Beattie testified that HMA is "looking for 100 percent from every dealer," which "is simply the average of every PMA in the country." (Tr. 194.) According to Beattie, appellant had the lowest sales efficiency in Ohio.

{¶32} O'Malley similarly testified that the sales efficiency numbers for appellant "are exceedingly low." (Tr. 24.) While an average expectation would be 100 percent sales efficiency, the numbers for appellant remained consistently under 50 percent, with the current 2009 figure under 25 percent. In a comparison of appellant to other Ohio dealers, appellant ranked "[a]t the bottom." (Tr. 27.)

{¶33} O'Malley acknowledged improvement during 2008, but testified that the improvement was "still well below acceptable levels." (Tr. 111.) In 2008, there was an approximately 50-unit increase in gross sales over 2007. That increase, however, did not impact the decision to terminate appellant "because sales efficiency did not improve to an appropriate level," as it was "still below 50 percent." (Tr. 27.) O'Malley noted that "a dealer could actually have sold more cars than a previous period but actually have done a worse job from a sales efficiency standpoint." (Tr. 139.) Further, while appellant made improvements in inventory and other areas, those categories did not have an impact on

HMA's evaluation of appellant's sales performance because "the true measure of the cure program" is sales efficiency. (Tr. 139.)

{¶34} At the end of the 2008 Cure Program, Beattie, O'Malley, and personnel at the national office had discussions regarding appellant's participation in the Cure Program, and HMA "saw a trend that did not seem to be abating." (Tr. 226.) The ultimate conclusion was that "this business plan and the prior business plan didn't get the dealership to where we need it to be." (Tr. 229.)

{¶35} HMA's expert, Sharif Farhat, who works for a consulting firm, reviewed a report measuring the performance of appellant with respect to sales effectiveness. Farhat noted that appellant achieved 48.9 percent sales effectiveness in 2008, which "was position 26 of 30 dealerships in the state." (Tr. 328.) Farhat testified that the performance of appellant is "below average, and it's a fairly significant amount of units over time." (Tr. 331.) Farhat opined that appellant "is a below-average performer. It's significantly below average for a long period of time. And it has a significant number of lost units, which I would conclude to mean * * * it's a material breech of its contractual responsibility." (Tr. 333.) According to Farhat, appellant's performance "doesn't appear to be a market issue." (Tr. 333.) He opined that "the opportunity was there, it just was not being captured." (Tr. 338.)

{¶36} With respect to the issue of sales efficiency, the hearing examiner cited evidence that appellant had demonstrated approximately 46.3 percent sales effectiveness for the period from 2004 through 2009 utilizing a national average, representing "the lowest sales effectiveness of all Ohio Hyundai dealers in business for the same period of time." (Hearing Examiner Report, at 9.) Over that time period, appellant lost, in terms of

sales opportunity, an average of 364 sales of Hyundai vehicles per year, "placing it one from the bottom for all Hyundai dealerships in the state of Ohio." (Hearing Examiner Report, at 10.)

{¶37} Appellant argued before the trial court that its sale of 52 more vehicles in 2008 than in the previous year was sufficient to conclude that Hyundai lacked good cause to terminate the franchise agreement. The trial court noted, however, that "this number is still less than half of what Hyundai expected an average dealer to achieve." Moreover, even with appellant's improved numbers, appellant still placed at the bottom for sales as compared to all Ohio Hyundai dealers. The court found that the board appropriately concluded that appellant did not sell an adequate number of vehicles compared to the market available to it for at least the five previous years. The trial court further found there was reliable, probative, and substantial evidence to support the board's conclusion that appellant failed to make substantial progress during the 2008 Cure Period, and thus HMA could terminate the franchise agreement based upon that material breach.

{¶38} Appellant argued before the trial court, as it does on appeal, that it performed at 109 percent of the average of other Hyundai dealerships in its district during the Cure Period. The hearing examiner addressed and rejected appellant's claim that it would be more equitable to evaluate its performance on a district level. The hearing examiner noted that such an analysis "is not the standard that has been established by [HMA] pursuant to the Dealer * * * Agreement." (Hearing Examiner's Report and Recommendation, at 11.) Rather, the hearing examiner noted, the Dealer Agreement "specifically authorizes Respondent to evaluate Protestant based upon a national average." (Hearing Examiner's Report and Recommendation, at 14.)

{¶39} During the hearing, appellant presented arguments that a domestic bias existed with respect to the Toledo and Detroit metropolitan markets, as well as at the district level. The hearing examiner considered testimony by both parties' expert witnesses as to whether it was reasonable for HMA to evaluate appellant on a national basis. Appellant's expert, John Matthews, did not consider utilizing a national average "as being a fair standard." (Tr. 500.) Rather, he advocated a standard "based upon a more local average." (Tr. 507-08.) HMA's expert, Farhat, provided a contrary opinion, and opined that "the process used by Hyundai is appropriate to measure a dealer's sales performance." (Tr. 326.) The hearing examiner concluded that analyzing appellant's performance under a national standard was not unreasonable.

{¶40} The hearing examiner observed that another Toledo Hyundai dealer, Taylor Hyundai, sold a significantly higher number of Hyundai vehicles in 2008 and 2009 while "facing the same market conditions." (Hearing Examiner Report and Recommendation, at 14.) Specifically, during 2008 and through June 2009, Taylor Hyundai achieved a 139.36 percent and 167.80 percent sales effectiveness in those years, while appellant showed 48.85 percent sales effectiveness in 2008, and 25.45 percent sales effectiveness through June of 2009. The hearing examiner also noted that, in 2008, there were two Hyundai dealers within the central district (Taylor Hyundai and Mathews Hyundai) that achieved the national average of sales effectiveness, and that a Michigan dealer achieved a 99.5 percent sales effectiveness, thus confirming that "the national average is achievable in Toledo and District CED, yet was not met by Protestant." (Hearing Examiner Report and Recommendation, at 14.) The hearing examiner found that appellant's own expert "could not explain why Taylor Hyundai performs as well as it does

in the Toledo market * * * if the domestic manufacturing bias is as significant a factor as alleged by the Protestant." (Hearing Examiner Report and Recommendation, at 15.) Based upon the evidence presented, the hearing examiner concluded that appellant had "failed to establish that the standards that have been applied by [HMA] are unreasonable." (Hearing Examiner Report and Recommendation, at 15.) The trial court, upon review of the record, similarly concluded that "the application of a national standard was appropriate."

{¶41} The evidence presented at the hearing supports the board's determination that appellant did not sell an adequate number of vehicles when compared to the market available to it for at least the five previous years. R.C. 4517.55(A)(1). Appellant's sales efficiency, as observed by the trial court, was "significantly below the national standard continuously from 2004 to 2009." In addition to evidence that appellant consistently failed to meet sales expectations, the record also supports the board's finding that, despite improvement during the 2008 Cure Period, appellant's sales efficiency did not improve to an adequate level under the objectives established by HMA, i.e., that appellant failed to make substantial progress toward correcting performance deficiencies. As noted by the trial court, the improved sales efficiency percentage achieved by appellant in 2008 was still less than half the expected performance level of an average dealership, and appellant remained at the bottom for sales as compared to all Ohio Hyundai dealers. Finally, the record supports the board's determination that the standards applied by HMA, as well as the terms of the Dealer Agreement, were not unreasonable, and that it was appropriate for HMA to utilize a national standard in evaluating appellant's sales performance. R.C. 4517.55(A)(7).

{¶42} Here, the hearing examiner properly considered the statutory factors under R.C. 4517.55, and substantial evidence supports the board's findings that HMA had good cause to terminate the dealership franchise. Based upon this court's review, we conclude that the trial court did not abuse its discretion in finding that the board's order was supported by reliable, probative, and substantial evidence and was in accordance with law.

{¶43} Based upon the foregoing, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

FRENCH and DORRIAN, JJ., concur

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