

**BEFORE THE DIRECTOR
DEPARTMENT OF CONSUMER AFFAIRS
BUREAU OF AUTOMOTIVE REPAIR
STATE OF CALIFORNIA**

In the Matter of the First Amended
Accusation Against:

**NATIONAL CITY SMOG CHECK,
MICHELLE T. HUYNH, Owner**

Automotive Repair Dealer Registration No.
ARD 261929
Smog Check-Test Only License No.
TC 261929,

and

KENNY N. HUYNH

Smog Check Inspector License No. EO
151008
Smog Check Repair Technician License
No. EO 151008 (formerly Advanced
Emission Specialist Technician License
No. EA 151008)

and

JUAN CARLOS PEREZ

Smog Check Inspector License No.
EO 632204
Smog Check Repair Technician License
No. EI 632204 (formerly Advanced
Emission Specialist Technician License
No. EA 632204)

Respondents.

Case No. 79/15-98

OAH No. 2015050118


DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby accepted and adopted by the Director of Consumer Affairs as the Decision in the above-entitled matter, except that, pursuant to Government Code section 11517(c)(2)(C), the typographical error in the Proposed Decision is corrected as follows:

Page 13, last paragraph, first sentence: The word "competed" is corrected to "completed".

This Decision shall become effective June 24, 2016.

DATED: May 18, 2016



TAMARA COLSON
Assistant General Counsel
Department of Consumer Affairs

BEFORE THE
BUREAU OF AUTOMOTIVE REPAIR
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the First Amended
Accusation Against:

Case No. 79/15 98

NATIONAL CITY SMOG CHECK,
MICHELLE T. HUYNH, owner

OAH No. 2015050118

Automotive Repair Dealer Registration No.
ARD 261929
Smog Check-Test Only License No.
TC 261929,

and

KENNY N. HUYNH

Smog Check Inspector License No. EO
151008
Smog Check Repair Technician License
No. EO 151008 (formerly Advanced
Emission Specialist Technician License
No. EA 151008)

and

JUAN CARLOS PEREZ

Smog Check Inspector License No.
EO632204
Smog Check Repair Technician License
No. EI 632204 (formerly Advanced
Emission Specialist Technician License
No. EA 632204)

Respondents.

PROPOSED DECISION

Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California, on January 19, 2016.

Nicole Trama, Deputy Attorney General, Department of Justice, State of California, represented complainant, Patrick Dorais, Chief, Bureau of Automotive Repair (the Bureau or BAR), Department of Consumer Affairs, State of California.

Michelle T. Huynh, respondent, appeared on behalf of herself and National City Smog Check as its owner, and respondent Kenny N. Huynh appeared on his own behalf.

The matter was submitted on January 19, 2016.

FACTUAL FINDINGS

Jurisdictional Matters

1. On March 12, 2015, complainant signed the Accusation in Case No. 79/15-98. That Accusation named National City Smog Check, Michelle T. Huynh, owner; Kenny N. Huynh (Michelle T. Huynh's husband and employee of National City Smog Check) and Juan Carlos Perez (another employee) as respondents in this disciplinary action. The Accusation alleged 17 different causes for discipline including 11 directed to Michelle T. Huynh, owner, four directed to Kenny Huynh, and two directed to Juan Carlos Perez.

On December 22, 2015, complainant signed the First Amended Accusation in Case No. 70/15-98. The First Amended Accusation included 18 different causes for discipline including 11 directed to Michelle T. Huynh, owner, five directed to Kenny Huynh, and two directed to Juan Carlos Perez.

Prior to the hearing on this matter respondent Juan Carlos Perez entered into a stipulated settlement with the Bureau of Automotive Repair for the two causes of discipline directed to him. Accordingly, only those 16 causes of discipline directed to Michelle Huynh and Kenny Huynh remain at issue in this hearing.

License History

2. In 2007 the Bureau issued Advanced Emission Specialist (EA) Technician License No. 151008 to Kenny N. Huynh. That license was cancelled on November 15, 2012. Under California Code of Regulations, title 16, Section 3340.28, subdivision (e), the cancelled license was replaced with, and renewed as, Smog Check Inspector (EO) License No. 151008 and Smog Check Repair Technician (EI) License No. 151008, effective November 15, 2012. Unless revoked, the EO License expires on February 28, 2017, and the EI License expired on February 28, 2015.

On January 21, 2011, the Bureau issued Citation No. M2011-0834 to respondent Kenny Huynh for violations of Health and Safety Code section 44032 for the issuance of a certificate of compliance to an undercover vehicle with the ignition timing adjusted beyond the specifications and failure to perform a required low-pressure fuel evaporative test on the undercover vehicle on December 8, 2010. Respondent Kenny Huynh successfully completed a 16-hour training course on August 9, 2011, as required by the Bureau as a result of this citation.

On April 28, 2011, the Bureau issued Citation No. M2011-1282 to respondent Kenny Huynh for violations of Health and Safety Code section 44032 for the issuance of a certificate of compliance to an undercover vehicle with a missing evaporator canister on April 7, 2011. Respondent Kenny Huynh successfully completed a 16-hour training course on August 9, 2011, as required by the Bureau as a result of this citation.

3. On May 12, 2010, the Bureau issued Automotive Repair Dealer Registration number ARD 261929 to Michelle T. Huynh doing business as National City Smog Check. Unless revoked, that registration expires on April 30, 2016. On June 2, 2010, the Bureau issued Smog Check, Test Only, Station License number TC 261929 to Michelle T. Huynh doing business as National City Smog Check. Unless revoked, that license expires on April 30, 2016. On February 26, 2014, National City Smog Check was certified as a STAR Station. The STAR Station certification will remain active unless revoked, cancelled, or invalidated, or licenses become delinquent.

On January 21, 2011, the Bureau issued Citation No. C2011-0833 to respondent Michelle Huynh for violations of Health and Safety Code section 44012, subdivision (f), because her employee issued of a certificate of compliance to an undercover vehicle with the ignition timing adjusted beyond the specifications and failure to perform a required low-pressure fuel evaporative test on the undercover vehicle on December 8, 2010. As a result of this citation the Bureau assessed civil penalties totaling \$1,500 against Michelle Huynh, which she paid on March 29, 2012.

On April 28, 2011, the Bureau issued Citation No. C2011-1281 to respondent Kenny Huynh for violations of Health and Safety Code section 44012, subdivision (f), for the issuance of a certificate of compliance to an undercover vehicle with a missing evaporator canister on April 7, 2011. As a result of this citation the Bureau assessed a civil penalty \$1,500 against Michelle Huynh, which she paid on March 29, 2012.

Factual Background

4. California's smog check inspection program requires vehicle owners to present their vehicles for smog check inspections at various times as required by law. Licensed smog check technicians at licensed smog check stations conduct mandated smog check inspections.

A smog check inspection consists of a three-part test. The emission sample test analyzes tail pipe emissions obtained while the vehicle's engine is running; the visual inspection requires a smog check technician to verify the presence of required emission control systems and components; the functional test requires a technician to physically test certain emission system components.

A computer-based analyzer – known as an Emissions Inspection System (EIS) – is used to conduct a smog check inspection. The EIS samples exhaust gasses during the emission sample test phase, and the EIS accepts data entered by the smog check technician to document the results of the visual inspection and functional testing. If a vehicle passes all three parts of the smog inspection, the EIS notifies the Department of Motor Vehicles of that fact, and an electronic certificate of compliance is issued. Whether or not a vehicle passes the inspection, the EIS prints a Vehicle Inspection Report (VIR) concerning the results of the inspection. Data obtained during the inspection is stored on the EIS's hard drive and in a statewide Vehicle Identification Database (VID) that contains the dates and times of all smog check inspections, the identity of the vehicles tested (license plates and vehicle identification numbers), emissions readings, the identity of the technicians performing the testing, and the identifying numbers on the electronic certificate of compliance issued after a successful inspection. BAR employees have access to the VID and use the information stored there when conducting investigations.

5. The Bureau is aware of several methods used to circumvent a legitimate smog check inspection in order to obtain a certificate of compliance for a vehicle that might not have passed a properly conducted smog check inspection.

One method is known as "clean piping." Clean piping involves the use of an exhaust emission sample from a vehicle that is not the subject of the smog check inspection that will pass the exhaust emission phase of the emission testing instead of using an exhaust sample from the vehicle actually being tested. Clean piping involves fraud.

6. STAR Certification is the bureau's voluntary certification program that applies to a registered Automotive Repair Dealer that is also a licensed smog check test-and-repair station or a test-only station. To become STAR Certified, a licensee must apply for certification and meet the inspection-based performance standards. (Health & Saf. Code, § 44014.2; Cal. Code Regs, tit. 16, § 3340.1.) When a smog station holds a STAR Certification, that station has the exclusive authority to inspect certain types of "directed" and "gross polluting" vehicles. (Health & Saf. Code, § 44014.2, subd. (a); Cal. Code Regs, tit. 16, § 3340.41, subd. (f); 3392.5.1, subd. (c).)

Eligibility for STAR Certification is dependent upon a number of inspection-based performance standards, including the STAR Follow-up Pass Rate (FPR) scores of Smog Check Inspectors and the station. If an EO licensee (Smog Check Inspector) has an FPR score that is too low, then the use of that licensee's license number to conduct inspections in the EIS at a station will impact the station's eligibility for STAR Certification.

The Bureau's Investigation and Evidence

THE UNDERCOVER OPERATION WITH THE 1988 TOYOTA CAMRY

7. Jesse Reyes works as a Program Representative I for the Bureau and has held that position for 21 years. His responsibilities include investigating consumer complaints, identifying fraudulent business practices, performing audits on stations, and preparing formal reports of his investigations. Prior to working for the Bureau Mr. Reyes worked for 20 years in the general automotive field and about 10 years as a licensed smog technician.

In early 2014, Mr. Reyes initiated an investigation of National City Smog Check for the Bureau as the result of an anonymous consumer complaint that Kenny Huynh was utilizing the license number and access code to EIS of another technician. Mr. Reyes conducted an investigation of National City Smog Check and at the conclusion of his investigation he drafted a report summarizing his investigation.

8. On May 6, 2014, Mr. Reyes performed an inspection of National City Smog Check and identified the equipment on-site and verified that only one technician working at National City Smog Check had access to the EIS analyzer, and that technician was Juan Perez. On that date Juan Perez was present at the station, and Kenny Huynh was also present and introduced himself as the manager. Mr. Reyes issued an inspection report at the end of his inspection and warned Kenny Huynh that Mr. Reyes would inspect the station at a later date.

9. Andrew Nyborg is a Program Representative for the Bureau and has held that position for nine years. During that time he worked for three years in the Bureau's documentation lab where he would inspect, test, verify and alter conditions, and document his work on undercover vehicles for use in undercover operations for the Bureau. On March 27, 2014, he began documentation of a 1988 Toyota Camry for use in undercover operations. After testing and documenting the 1988 Toyota Camry to determine that the vehicle passed all inspections, Mr. Nyborg then introduced a defect by adjusting the ignition timing to make it 20 degrees before top dead center (BTDC), when the specifications for the vehicle dictate that the proper ignition timing is 10 degrees BTDC. After introducing this defect, Mr. Nyborg also applied a tamper indicator, a glue substance, to the part where the ignition timing can be adjusted. If the glue tamper indicator is broken after the car is returned from an undercover operation, the broken glue would indicate that the ignition timing had been adjusted. Mr. Nyborg documented all of his work on the 1988 Toyota Camry, including documentation by photographs.

10. On May 20, 2014, Mr. Reyes initiated an undercover operation at National City Smog Check with the assistance of an undercover operator named Marlen Zamora. On May 19, 2014, Mr. Reyes received custody of a 1988 Toyota Camry undercover vehicle prepared by Program Representative, Andrew Nyborg, for use in the undercover operation. Upon receipt of the 1988 Toyota Camry Mr. Reyes inspected the vehicle and verified that the ignition timing on the vehicle had been adjusted to 20 degrees BTDC, which is 10 degrees

advanced from the required timing specifications for that vehicle. Mr. Reyes also verified that tamper indicators were in place on the 1988 Toyota Camry to show if any adjustments would be made to the ignition timing during the undercover operation. Mr. Reyes photographed the 1988 Toyota Camry to document its condition prior to the undercover operation. Mr. Reyes also turned on the video recording devices located inside 3 different locations of the 1988 Toyota Camry prior to Ms. Zamora taking the vehicle to National City Smog Check.

11. On May 20, 2014, Ms. Zamora took possession of the 1988 Toyota Camry from Mr. Reyes to perform the undercover operation at National City Smog Check. Ms. Zamora has worked as an undercover operator for the Bureau for over 10 undercover operations. Prior to taking the vehicle from Mr. Reyes she observed him reach into the trunk of the 1988 Toyota Camry to turn on the video recording devices located in the vehicle.

On May 20, 2014, Ms. Zamora took the 1988 Toyota Camry to National City Smog Check to request a smog inspection on the vehicle. When she arrived she met Kenny Huynh at the station and asked to get the vehicle tested. Mr. Huynh asked her if someone had referred her to the station and she responded that her father had done so. Ms. Zamora signed a work order provided to her by Kenny Huynh for a smog inspection at the price of \$60. She signed the work order under the name "Marlen Aguayo," but she did not receive a copy of that document.

After the smog inspection on the 1988 Toyota Camry was complete, Kenny Huynh came into the office of the station where Ms. Zamora was waiting. According to Ms. Zamora, Kenny Huynh said to her "your car failed, but since I know your Dad, I passed it, you tell your Dad to make sure his mechanic adjusts the timing, cause it was at 16 and it needs to be at 10 to pass." Ms. Zamora then paid Kenny Huynh \$60 and received a copy of an invoice and a Vehicle Inspection Report (VIR) indicating that the 1988 Toyota Camry had passed all aspects of the smog inspection and that Juan Perez was the technician who performed the tests. While she was exiting the station after the inspection, Ms. Zamora observed a Hispanic male arrive at the station. Prior to her departure from the station, the only individual she saw at the station was Kenny Huynh.

After completing the smog check at National City Smog Check, Ms. Zamora returned the 1988 Toyota Camry, the VIR, and invoice to Mr. Reyes. She observed him go into the trunk of the car to turn off the video recording equipment in the vehicle.

12. During the undercover operation with Ms. Zamora, Mr. Reyes followed Ms. Zamora to National City Smog Check in another vehicle and parked on the street where he had a clear visual path to the two smog check bays at the facility. Mr. Reyes watched the smog check inspection on the 1988 Toyota Camry. He observed Kenny Huynh get into the 1988 Toyota Camry and drive it into the testing bay but then lost sight of him until Kenny Huynh drove the car out of the testing bay. He observed that after Kenny Huynh drove the vehicle out of the testing bay after the smog test was completed, Juan Perez then arrived for work at the station that day. Mr. Reyes also observed the video recordings taken from the

three locations in the car (on the dash to observe the driver, under the hood, and at the gas cap area) during the inspection at National City Smog. That video was played at the hearing as well. The video showed Kenny Huynh performing the smog inspection on the 1988 Toyota Camry. Juan Perez was not present on any of the video footage. Mr. Reyes confirmed that the VIR provided to him by Ms. Zamora on the 1988 Toyota Camry from National City Smog Check indicated that Juan Perez performed the smog check on the vehicle and his license number was used in the EIS to perform the smog inspection.

13. After Ms. Zamora returned the 1988 Toyota Camry to Mr. Reyes after the undercover operation at National City Smog on May 20, 2014, Mr. Reyes inspected the Toyota Camry. He confirmed that the ignition timing remained 20 degrees BTDC as it was set by Mr. Nyborg, and the glue tamper indicator remained intact showing that the ignition timing had not been adjusted during the undercover operation. Mr. Reyes documented his findings on the 1988 Toyota Camry after the undercover inspection, including by photographic means. Thereafter, the 1988 Toyota Camry was returned to Mr. Nyborg.

14. On May 27, 2014, Mr. Nyborg performed another smog inspection on the 1988 Toyota Camry and again it failed the inspection because the ignition timing was still 20 degrees BTDC and the specification for that vehicle requires that the ignition timing be 10 degrees BTDC. Mr. Nyborg also observed that the tamper indicator was still intact showing that no person had attempted to adjust the ignition timing. Mr. Nyborg documented his inspection on May 27, 2014, with photographs and the VIR documents from the smog inspection showing that the vehicle failed.

THE VIDEO SURVEILLANCE OF JUNE 11, 2014.

15. On June 11, 2014, Bureau Program Representative Jesse Reyes conducted video surveillance of National City Smog Check's operations. Mr. Reyes set up a video recording device on a vehicle and parked that vehicle in an area where the video surveillance had a clear view of the bay entrances of National City Smog Check. Mr. Reyes made sure that the video recording device clock in the vehicle was synced with the Vehicle Information Database (VID) clock. Mr. Reyes recorded from that video surveillance on the parked vehicle from 6:46 a.m. to 11:07 a.m. while the car was parked in an undisclosed location. When Mr. Reyes returned to the vehicle he observed a red Honda parked in front of the bay entrance to the station with Kenny Huyhn working under the hood of the red Honda, and that Juan Perez was present at the station. Mr. Reyes also took photographs of the station showing the red Honda parked in front of the bay entrance and Juan Perez present in the station. According to Mr. Reyes it appeared that Kenny Huynh was performing automotive repair on the red Honda.

After he concluded the video surveillance Mr. Reyes inspected the National City Smog Check station. During the inspection he observed that the red Honda was still parked in front of the station with the hood raised in the open position. Mr. Reyes was greeted by Kenny Huynh at the station, who informed Mr. Reyes that the red Honda belonged to his father-in-law and that Mr. Huynh was replacing the valve cover gasket in the red Honda.

Mr. Reyes inspected the station's equipment, records, and EIS equipment, and obtained the records for and a list of all the smog inspections conducted at the station during the video surveillance on June 11, 2014. Mr. Reyes confirmed during his inspection that Juan Perez is the only technician employed by National City Smog Check and the only technician authorized to use the EIS analyzer equipment. Mr. Reyes also confirmed that Juan Perez drove a silver Honda with tinted windows into work that day. During his inspection Mr. Reyes met Michelle Huynh for the first time. Mr. Reyes documented his inspection and obtained signatures of Kenny and Michelle Huynh on the report before leaving the station.

16. The June 11, 2014, video surveillance recording was played during the hearing. The video surveillance showed Kenny Huynh place the station's EIS emissions tailpipe probe into the tailpipe of a 1998 BMW after he drove the 1998 BMW into the bay entrance. The EIS records from the station indicate that Juan Perez's EIS license number and access code was entered into the station's equipment to perform the smog inspection on the 1998 BMW. However, Juan Perez was not present on the video surveillance, which showed that Kenny Huynh performed the smog inspection. The video surveillance showed Juan Perez arriving at the station later that day after the smog inspection of the 1998 BMW had been completed. A certificate of compliance was issued for the 1998 BMW.

The video surveillance further showed that later that day Kenny Huynh placed the station's EIS emissions tailpipe probe into the tailpipe of a blue Honda after he drove the blue Honda into the bay entrance. There was no record in EIS or otherwise that a blue Honda was ever tested for smog inspection on June 11, 2014. After Kenny removed the EIS emissions tailpipe probe from the blue Honda and drove it out of the bay, Kenny's father-in-law drove his red Honda Accord into the bay entrance, and Kenny Huynh placed the tailpipe probe into the tailpipe of the red Honda Accord. About five minutes later the video shows that while the red Honda Accord was in the smog testing bay, Juan Perez drives by in his silver Honda with tinted windows to arrive at work for the day. About one minute later, Kenny Huynh removed the EIS emissions tailpipe probe from the tailpipe of the red Honda Accord. About 10 minutes thereafter Juan Perez moved the red Honda Accord further into the smog testing bay and then placed the EIS emissions tailpipe probe into the tailpipe of the red Honda Accord. Correlation of the time marks of the VID and the video recording show that the red Honda Accord was in the smog inspection bay with the tailpipe probe inserted into the tailpipe during the time period that the smog inspection and EIS records from National City Smog indicate that a 1989 Toyota Corolla was purportedly tested. A certificate of compliance was issued for the 1989 Toyota Corolla. The EIS records from the station indicate that Juan Perez's EIS license number and access code was entered into the station's equipment to perform these smog inspections. The EIS records indicate that Juan Perez certified under penalty of perjury that he had tested and inspected each vehicle as required by law and that each vehicle met California's applicable clean air statues and regulations. A certificate of compliance was never issued for the red Honda Accord on June 11, 2014, according to the station and VID records.

In fact, Juan Perez did not test the 1989 Toyota Corolla at all, and neither did Kenny Huynh. Instead, Juan Perez's license number and access code were used for the EIS

equipment to “clean pipe” for the 1989 Toyota Corolla, which did not appear to be present at the station during the time of testing, by using emission samples from the red Honda Accord. The video evidence demonstrated that Kenny Huynh was overseeing and directing Juan Perez’s work in the station during that clean piping incident.

THE VIDEO SURVEILLANCE OF JUNE 25, 2014.

17. On June 25, 2014, Mr. Reyes conducted another undercover video surveillance of National City Smog Check. Again, he set up a video recording device on a vehicle and parked that vehicle in an area where the video surveillance had a clear view of the bay entrances of National City Smog Check. Mr. Reyes made sure that the video recording device clock in the vehicle was synced with the Vehicle Information Database (VID) clock. Mr. Reyes recorded from that video surveillance on the parked vehicle from 6:51 a.m. to 4:17 p.m. while the car was parked in an undisclosed location.

The video surveillance from June 25, 2014, was shown at the hearing. The video showed that Kenny Huynh conducted a smog inspection on a 2004 Toyota Sienna by placing the EIS emissions tailpipe probe into the 2004 Toyota Sienna while it was in the service bay of National City Smog Check. Juan Perez was not seen at all on the video recording made during the time that the 2004 Toyota Sienna was being smog inspected. Records taken from the VID for vehicles smog inspected at National City Smog Check on June 25, 2014, show that the 2004 Toyota Sienna was tested twice, but the first test was aborted. Those documents also establish that Juan Perez was listed as the technician performing those smog inspections by use of his license and access code into the EIS, but the video recording shows that Kenny Huynh performed those smog inspections instead of Juan Perez.

Mr. Nyborg testified that he reviewed the documentation regarding the testing of the 2004 Toyota Sienna on June 25, 2014. He stated that the first smog inspection, which was aborted, on the 2004 Toyota Sienna was entered into EIS as an Acceleration Simulation Mode (ASM) test, which requires the use of a dynamometer to perform the test. However, the 2004 Toyota Sienna has traction control that will not allow the use of a dynamometer. Accordingly the test must be performed using two speed idle (TSI) instead of ASM so that the use of a dynamometer is not necessary to perform the test. According to Mr. Nyborg, the required use of TSI is the reason that the first smog inspection test was aborted on the 2004 Toyota Sienna because it would not have been possible to perform the test when the EIS was set to the ASM mode.

Respondents’ Evidence

TESTIMONY OF MICHELLE T. HUYNH

18. Michelle Huynh is the wife of Kenny Huynh and is a registered nurse and employed full-time at Kaiser Permanente Hospital. She has held that position for the five years working eight hours per day in the Urology department of the hospital. She stated that she opened National City Smog Check and obtained a license to operate it because her

husband “had a license many years before” and he did not want to be the owner. She only occasionally goes to National City Smog Check on Saturdays when she is not working as a nurse. According to Michelle Huynh the last time she went to the station was three months ago and prior to that she would go there about twice a month. The only information Michelle Huynh receives regarding oversight of employees and operations of National City Smog Check comes exclusively from her husband when they are at home together. She relies on him to manage all activities at the station, including employee oversight, finances, and day-to-day operations. Michelle Huynh stated that as a licensed owner of National City Smog Check she is not required to understand or know of the operations of the station, but she only has to hire someone to do so.

Michelle Huynh was not present at National City Smog Check during the undercover operation on May 20, 2014, or during the video surveillance taken on June 11, 2014, and June 25, 2014. The only information she has regarding the activities at National City Smog Check on those dates comes from her husband. Mrs. Huynh testified that her husband never used Juan Perez’s license number and access code to perform smog inspections at the station because her husband told her that he never did so. She stated that Juan Perez was frequently late to arrive to work and as a result, customers were frequently waiting. Kenny Huynh informed her that on one occasion he had used Juan Perez’s license number and access code to start a smog inspection on a 2004 Toyota Sienna on June 25, 2014, because Juan was late for work. However, according to Michelle Huynh, Kenny Huynh aborted that smog inspection because he knew it was wrong to use Juan Perez’s information in EIS.

Michelle Huynh believes that the causes of discipline brought against her and her husband in this matter are personal attacks on her and her husband, and that the Bureau is responsible to some degree for the accusations in this matter because of “the dysfunction in the STAR program.” Mrs. Huynh submitted a letter written “To whom it may concern,” which was admitted into evidence. The letter states in part:

Please understand we are not denying what was wrongdoing and definitely should never be repeated. We accept all responsibility and should be held accountable for the wrongful act that has been done nor can it be reverse, but can be change for the better. We are writing this to ask for your compassion and forgiveness. This act was not done intentionally. We can learn from our bad legacy and change/improve for the future to come.

When asked what she meant by “we are not denying what was wrongdoing” she stated that she does not deny or admit any of the allegations in the accusation, but that “these things were not done intentionally.”

TESTIMONY OF KENNY HUYNH

19. Kenny Huynh was first licensed as a smog technician by the Bureau in 2006 after he took an eight month program training him on how to be a smog technician. Mr. Huynh stated that he first received his access code to perform smog inspections in 2010 after he had been laid-off from his position working in medical supply for Cardinal Health in 2009. He worked for Cardinal Health from 2000 to 2009. Although he had a smog technician license in 2006, Mr. Huynh never performed a smog inspection until after he received his access code in 2010 after taking and passing an examination given by the Bureau. Mr. Huynh stated that in 2010 when he first started conducting smog inspections he "did not know even how to control the cars," and he "did not know what [he] was doing." He stated that he received previous citations because he was a new technician and had insufficient training to perform smog inspections. He blamed the Bureau for his insufficient training. Mr. Huynh now believes that he is competent to perform smog inspections as a result of the training he received after he was required to do so by the Bureau as a result of his previous citations. He completed that training in August 2011.

Kenny Huynh is not the owner of National City Smog Check because he wanted his wife to be part of the ownership of the station. In response to the question of why he is not a partial-owner of the station, he stated that he "wants his wife to be involved." He said he never had any intention of having his name on the ownership application for National City Smog Check, and ownership does not require that the owner be a mechanic or smog check technician. He admitted that the owner of a licensed smog check facility needs to be responsible to the Bureau to "make sure everything is up to snuff." In response to the question of what Michelle Huynh does at the station, he stated that she "cleans the toilets and organizes paperwork" and "cleans-up." Mr. Huynh admitted that Michelle Huynh gets all of her information regarding the operation and activities of National City Smog Check from him. Mr. Huynh is responsible for hiring all employees of National City Smog Check and running all operations.

Mr. Huynh stated that National City Smog Check is currently a STAR certified station. Mr. Huynh's smog check inspector FPR score was too low to maintain the STAR certification for National City Smog Check. In order to avoid losing the STAR certification, he hired Juan Perez to work at the station as a smog inspector because Juan Perez's FPR score was sufficiently high. Mr. Huynh hired Juan Perez in February 14, 2014. Juan Perez worked at the station until October 14, 2014. Mr. Huynh noted that Mr. Perez had punctuality and attitude issues around April or May of 2014, but that he did not terminate Juan Perez because he needed him because of the STAR program. In October 2014 Mr. Huynh hired another smog technician with a sufficiently high FPR score who worked for the station from October 2014 to October 2015. Since October 2015 Mr. Huynh has been the only smog technician at National City Smog Check and he is the only person performing smog inspections at the station since October 2015.

20. With regard to the undercover operation using the 1989 Toyota Camry, Kenny Huynh testified that he helped conduct the smog inspection on that vehicle and that Juan

Perez had entered his license number and access code into the EIS machine while Kenny Huynh drove the car into the bay. Mr. Huynh stated that he helped Juan Perez with the work flow at the station. Mr. Huynh admitted that he "did the ASM test" and he checked the timing on the 1989 Toyota Camry as part of the smog inspection and Juan Perez did not do this part of the inspection. Mr. Huynh stated that the timing light showed that the ignition timing on the 1989 Toyota Camry was 20 degrees BTDC, but that he did not believe that this measurement was correct. Later in his testimony, Mr. Huynh stated that he tested the 1989 Toyota Camry and that the ignition timing was 10 degrees BTDC. Mr. Huynh stated that he does not recall ever telling Ms. Zamora that the vehicle failed the smog inspection but that he passed it anyway because he knew her father.

Clarifying his earlier testimony that he helped Juan Perez perform the smog inspection on the 1989 Toyota Camry, he later testified that he performed the entire inspection other than portions of the visual test on that vehicle, and Juan Perez simply entered his license number and access code into the EIS machine for the inspection and performed some of the visual inspection. When asked how to explain Ms. Zamora's testimony that she saw Juan Perez arriving for work that day after the smog inspection was completed on the 1989 Toyota Camry, Mr. Huynh stated that Juan Perez had already been in the station prior to Ms. Zamora seeing him arrive in his car. He claimed that Juan Perez was merely moving his car to another parking spot when Ms. Zamora saw him arrive at the station and that he had previously entered the station through the back door where Ms. Zamora could not see him.

21. With regard to the June 11, 2014, video surveillance of National City Smog Check and the clean-piping allegations, Mr. Huynh stated that he asked Juan Perez to perform a smog inspection on his father-in-law's red Honda Accord. Kenny Huynh testified that he then walked away from the testing bay to assist a customer. During that time period, Mr. Huynh claims that Juan Perez used the red Honda Accord to "clean pipe" for the 1989 Toyota Corolla without Kenny Huynh's knowledge. Mr. Huynh admitted that his father's red Honda Accord had been smog inspected in April 2014 because that was when the vehicle registration for that red Honda Accord was due. Mr. Huynh stated that he assumed that his father-in-law wanted to have another smog inspection of that vehicle because his father-in-law was going to sell the car, but he did not really know why. Mr. Huynh testified that his father-in-law still owns the red Honda Accord and has not sold that vehicle. In response to the question of why Mr. Huynh had performed a "tail pipe test" by inserting the EIS tailpipe probe into the tailpipe of the red Honda Accord before it was smog inspected, Mr. Huynh stated that he wanted to know if the vehicle had oil leaking to the spark plugs.

With regard to the June 11, 2014, video surveillance of National City Smog Check and testing of the 1998 BMW, Mr. Huynh stated that that Juan Perez was at the station that morning during the testing of the 1998 BMW and that Mr. Perez had entered his license number and access code into the EIS machine for that smog inspection. Mr. Huynh admitted that he "started" the smog inspection on the 1998 BMW after Mr. Perez entered that information into the EIS. Mr. Huynh then stated that he performed the smog inspection and Mr. Perez merely entered the numbers into the EIS machine. Mr. Huynh stated that Mr.

Perez is never seen on the video surveillance for this smog inspection because he was in the back of the station and entered through the back door. Mr. Huynh believes that Juan Perez was in the station during this smog inspection despite the video recording showing Mr. Perez arriving to work at the station hours after this smog inspection was completed.

22. With regard to the June 25, 2014, video surveillance of National City Smog Check and the 2004 Toyota Sienna, Mr. Huynh admitted that Mr. Perez was late for work that day and a customer driving the 2004 Toyota Sienna was waiting for his smog inspection. He stated that he called Mr. Perez and Mr. Perez gave him his license number and access code for the EIS machine to "start up the machine." Mr. Huynh admitted to doing so, but stated that he knew it was wrong to conduct the smog inspection for Mr. Perez so he aborted the test. Thereafter, he claims that Juan Perez arrived at the station and conducted the smog inspection on the 2004 Toyota Sienna.

Evaluation

23. The Bureau's documentation concerning both of the video surveillance operations of National City Smog Check's operations, documentation and testimony regarding the undercover operation with the 1988 Toyota Camry, and the testimony concerning the manner and techniques related to clean piping produced in this proceeding were comprehensive and reliable.

24. Kenny Huynh admitted to conducting at least portions of smog inspections at National City Smog Check while Juan Perez's license number and access code were used in the EIS machine. The evidence demonstrated that Kenny Huynh was conducting smog inspections utilizing Juan Perez's license number and access code when Juan Perez was not yet at the station. Mr. Huynh did so with the undercover 1988 Toyota Camry, the 1998 BMW, and the 2004 Toyota Sienna.

With regard to the 1988 Toyota Camry, Mr. Huynh's explanation that Juan Perez was inside the station prior to Ms. Zamora's arrival and that Juan Perez simply went out the back door to re-park his car so that it appeared that he was arriving at the station after the smog inspection was completed on the undercover vehicle was not credible. Ms. Zamora's testimony that Kenny Huynh told her that the undercover vehicle failed inspection, but that he passed it because he knew her father, was credible and reliable. Ms. Zamora had no interest in the outcome of this matter and she demonstrated no bias. While Mr. Huynh did provide Ms. Zamora with a cost estimate of the smog inspection services, and obtained her signature on that document, the evidence established that he failed to provide Ms. Zamora with a copy of that document.

With regard to the 1998 BMW and the 2004 Toyota Sienna, Mr. Huynh's explanation that Juan Perez again entered the building from the back door and could not be seen on the video recordings, despite the fact that he is seen on the video recordings arriving for work after these smog inspections were completed, was not credible. Mr. Nyborg's explanation regarding the aborted smog inspection for the 2004 Toyota Sienna was more plausible than

Mr. Huynh's assertion that he aborted that inspection because he knew that using Juan Perez's license number and access code was wrong.

25. With regard to the clean-piping allegations, Mr. Huynh's testimony regarding why his father-in-law's vehicle was undergoing a smog inspection and why he did a tail pipe test was less plausible than the alternative explanation. The alternative and more plausible explanation is that the red Honda Accord was being used for clean piping with Mr. Huynh's knowledge, and Mr. Huynh conducted a tail pipe test to determine if the red Honda Accord would pass the smog inspection.

26. Michelle Huynh admitted that her only oversight of the activities and operations of National City Smog Check came directly from reports from Kenny Huynh. She was rarely present at the station. When she was present at National City Smog Check, she only cleaned the station and had no substantive oversight of the operations.

27. Kenny Huynh's activities in clean piping vehicles during smog check inspections, in issuing a certification of compliance for the undercover vehicle that did not comply with required specifications, as well as utilizing the license number of Juan Perez to conduct smog inspections, violated the Motor Vehicle Inspection Program and many of the regulations enacted under that program, and his misconduct involved dishonesty and fraud that resulted in injury to residents of California. As the licensed owner of National City Smog Check, Michelle Huynh is responsible for the actions of Kenny Huynh and for his violations.

Disciplinary Considerations

28. The Bureau enacted disciplinary guidelines that are found at California Code of Regulations, title 16, section 3395.4. These guidelines provide a range of recommended sanctions for various violations. The Bureau requests that administrative law judges consider factors in aggravation and mitigation when considering a final penalty.

29. In this matter, factors in aggravation included Mr. Huynh's outright fraud and Mrs. Huynh's failure to oversee the activities and operations of National City Smog Check. Additionally, Mr. Huynh has had previous citations from the Bureau. Mr. and Mrs. Huynh provided scant evidence of rehabilitation and both blamed the Bureau for the allegations.

For the violations established in this matter, the disciplinary guidelines recommend a maximum sanction of revocation and a minimum sanction of a revocation, stayed, with an actual suspension and period of probation. The revocation of both Kenny Huynh's license and Michelle Huynh's ARD registration is the most appropriate measure of discipline.

Costs of Investigation and Prosecution

30. A certification of costs of investigation was signed by William D. Thomas, Program Manager II. The certification stated that Mr. Thomas reviewed Bureau records

“which reflect that the attachments of costs and fees that have been incurred by the agency in connection with the investigation and prosecution of Accusation Number 79/15-98 as of January 6, 2016.” The attachment stated that 343 hours of Program Representative I time was incurred in the investigation and was billed at rates ranging from \$70.30 to \$73.20 per hour, and that 17 hours of Program Representative II time was incurred and billed at rates ranging from \$75.30 to \$77.87 per hour. The attachment stated that there was \$200 in “operator fees.” Costs of enforcement totaled \$25,923.29.

Neither the certification nor the attachment contained facts sufficient to support any finding regarding the Bureau’s actual costs incurred or the reasonableness of investigative services. The certification Mr. Thomas signed did not describe the general tasks performed or the time spent on each task.

An award for investigative costs cannot be issued because inadequate evidence was provided to support an award.

31. A certification of prosecution costs was signed by the deputy attorney general who prosecuted this action. The declaration stated that the deputy requested a billing summary for the case that was maintained by the Department of Justice. That billing summary was produced, and it was attached to the deputy’s declaration. In contrast to the attachment to Mr. Thomas’s certification, the billing summary contained each date on which legal services were provided, the nature of the task performed that day, the time spent that day performing a particular task, and the billing rate of the persons providing legal services. The billing rate for attorney services was \$170 per hour. The billing rate for paralegal services was \$120 per hour. These are reasonable rates. The time spent in the prosecution of the matter was reasonable given the complexity of the case and the volume of documents that had to be reviewed. The billing summary documented enforcement costs of \$14,965. The declaration and attachment supported an award of enforcement costs of \$14,965.

32. The evidence supports an order directing respondent Michelle Huynh, as the owner and operator of National City Smog Check, to pay total costs of investigation and enforcement in the amount of \$14,965.

LEGAL CONCLUSIONS

The Burden and Standards of Proof

1. Absent a statute to the contrary, the burden of proof in a license disciplinary proceeding is on the party filing the accusation, which is ordinarily the agency. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.)

2. Although an applicant for an advanced emission specialist technician license must complete certain coursework (Cal. Code Regs., tit. 16, § 3340.28, subd. (b)(3)) and pass an examination (Cal. Code Regs., tit. 16, § 3340.29), such requirements are not similar to the

extensive educational, training and testing requirements necessary to obtain a professional license. An advanced emission specialist technician license and an automotive repair dealership are nonprofessional or occupational licenses, and proceedings to revoke such licenses are governed by the preponderance of evidence standard of proof. (*Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-917.)

Statutes and Regulations

3. Health and Safety Code section 44015 provides in part:

(a) A licensed smog check station shall not issue a certificate of compliance, except as authorized by this chapter, to any vehicle that meets the following criteria:

(1) A vehicle that has been tampered with.

[¶] . . . [¶]

(b) If the vehicle meets the requirements of Section 44012, a smog check station licensed to issue certificates shall issue a certificate of compliance or a certificate of noncompliance.

[¶] . . . [¶]

4. Health and Safety Code section 44072.10 provides in part:

(c) The department shall revoke the license of any smog check technician . . . who fraudulently certifies vehicles or participates in the fraudulent inspection of vehicles. A fraudulent inspection includes, but is not limited to, all of the following:

(1) Clean piping, as defined by the department

5. Business and Professions code section 9884.7, subdivision (a), states, in pertinent part:

The director, where the automotive repair dealer cannot show there was a bona fide error, may deny, suspend, revoke, or place on probation the registration of an automotive repair dealer for any of the following acts or omissions related to the conduct of the business of the automotive repair dealer, which are done by the automotive repair dealer or any automotive technician,

employee, partner, officer, or member of the automotive repair dealer.

(1) Making or authorizing in any manner or by any means whatever any statement written or oral which is untrue or misleading, and which is known, or which by exercise of reasonable care should be known, to be untrue or misleading.

[¶] . . . [¶]

(3) Failing or refusing to give a customer a copy of any document requiring his or her signature, as soon as the customer signs the document.

(4) Any other conduct that constitutes fraud.

[¶] . . . [¶]

(6) Failure in any material respect to comply with the provisions of this chapter or regulations adopted pursuant to it.

6. Business and Professions code section 9884.9 requires an automotive repair dealer to obtain the signature of a customer on a written estimated price for work to be done in the licensed facility.

7. California Code of Regulations, title 16, section 3340.24, subdivision (c), provides:

The bureau may suspend or revoke the license of or pursue other legal action against a licensee, if the licensee falsely or fraudulently issues or obtains a certificate of compliance or a certificate of noncompliance.

8. California Code of Regulations, title 16, section 3340.30, subdivision (a), requires a licensed smog technician to “[i]nspect, test and repair vehicles, as applicable, in accordance with section 44012 of the Health and Safety Code, section 44035 of the Health and Safety Code, and section 3340.42 of this article.”

9. California Code of Regulations, title 16, section 3340.41, subdivision (b), provides:

No person shall enter into the emissions inspection system any access or qualification number other than as authorized by the bureau, nor in any way tamper with the emissions inspection system.

10. California Code of Regulations, title 16, section 3340.41, subdivision (c), provides:

No person shall enter into the emissions inspection system any vehicle identification information or emission control system identification data for any vehicle other than the one being tested. Nor shall any person knowingly enter into the emissions inspection system any false information about the vehicle being tested.

11. California Code of Regulations, title 16, section 3340.42, sets forth specific emissions test methods and procedures that apply when conducting a smog check inspection in California.

12. California Code of Regulations, title 16, section 3373 states as follows:

No automotive repair dealer or individual in charge shall, in filling out an estimate, invoice, or work order, or record required to be maintained by section 3340.15(e) of this chapter, withhold therefrom or insert therein any statement or information which will cause any such document to be false or misleading, or where the tendency or effect thereby would be to mislead or deceive customers, prospective customers, or the public.

13. Health and Safety Code section 44012 provides in part:

The test at the smog check stations shall be performed in accordance with procedures prescribed by the department and may require loaded mode dynamometer testing in enhanced areas, two-speed idle testing, testing utilizing a vehicle's onboard diagnostic system, or other appropriate test procedures as determined by the department in consultation with the state board. The department shall implement testing using onboard diagnostic systems, in lieu of loaded mode dynamometer or two-speed idle testing, on model year 2000 and newer vehicles only, beginning no earlier than January 1, 2013. However, the department, in consultation with the state board, may prescribe alternative test procedures that include loaded mode dynamometer or two-speed idle testing for vehicles with onboard diagnostic systems that the department and the state board determine exhibit operational problems. The department shall ensure, as appropriate to the test method, the following:

(a) Emission control systems required by state and federal law are reducing excess emissions in accordance with the standards adopted pursuant to subdivisions (a) and (c) of Section 44013.

[¶] . . . [¶]

(f) A visual or functional check is made of emission control devices specified by the department, including the catalytic converter in those instances in which the department determines it to be necessary to meet the findings of Section 44001. The visual or functional check shall be performed in accordance with procedures prescribed by the department.

(g) A determination as to whether the motor vehicle complies with the emission standards for that vehicle's class and model-year as prescribed by the department. . . .

14. Health and Safety Code section 44032 provides:

No person shall perform, for compensation, tests or repairs of emission control devices or systems of motor vehicles required by this chapter unless the person performing the test or repair is a qualified smog check technician and the test or repair is performed at a licensed smog check station. Qualified technicians shall perform tests of emission control devices and systems in accordance with Section 44012.

15. Health and Safety Code section 44059 provides in part:

The willful making of any false statement or entry with regard to a material matter in any . . . certificate of compliance . . . or application form . . . constitutes perjury and is punishable as provided in the Penal Code.

16. Health and Safety Code section 44072.2 provides in part:

The director may suspend, revoke, or take other disciplinary action against a license as provided in this article if the licensee, or any partner, officer, or director thereof, does any of the following:

(a) Violates any section of this chapter [the Motor Vehicle Inspection Program (Health and Saf. Code § 44000, et seq.)] and the regulations adopted pursuant to it, which related to the licensed activities.

- (b) Is convicted of any crime substantially related to the qualifications, functions, or duties of the license holder in question.
- (c) Violates any of the regulations adopted by the director pursuant to this chapter.
- (d) Commits any act involving dishonesty, fraud, or deceit whereby another is injured

Cause Exists to Discipline Respondent Michelle Huynh's License

17. A preponderance of the evidence established cause to discipline respondent Michelle Huynh's license under Business and Professions Code section 9884.7, subdivision (a)(1). Ms. Huynh's employee, Kenny Huynh, failed to comply with the provisions of the Motor Vehicle Inspection Program and related regulations when he issued a certificate of compliance for the 1988 Toyota Camry when in fact the vehicle had the ignition timing set to 20 degrees BTDC, which is outside of the specified requirement of 10 degrees BTDC. (*Arenstein v. California State Bd. of Pharmacy* (1968) 265 Cal.App.2d 179, 192 ["If a licensee elects to operate his business through employees he must be responsible to the licensing authority for their conduct in the exercise of his license and he is responsible for the acts of his agents or employees done in the course of his business in the operation of the license".])

18. A preponderance of the evidence established cause to discipline respondent Michelle Huynh's licenses under Business and Professions Code section 9884.7, subdivision (a)(3), for the failure to give Ms. Zamora a copy of the work order requiring her signature as soon as Ms. Zamora signed the document.

19. A preponderance of the evidence established cause to discipline respondent Michelle Huynh's license under Business and Professions Code section 9884.7, subdivision (a)(4). Ms. Huynh's employee, Kenny Huynh, committed acts constituting fraud when he knowingly issued a certificate of compliance for the undercover 1988 Toyota Camry despite having an ignition timing set outside of specifications.

20. A preponderance of the evidence failed to establish cause to discipline respondent Michelle Huynh's license under Business and Professions Code section 9884.7, subdivision (a)(6) based upon Ms. Huynh's employee, Kenny Huynh, failing to provide a written estimated price for the smog inspection to Ms. Zamora when she was conducting the undercover operation. The evidence established that Mr. Huynh did provide Ms. Zamora with a written cost estimate of \$60 for the smog inspection and required her signature on that document. His failure to provide her with a copy of that document after her signature is not alleged as the basis for this cause for discipline.

21. A preponderance of the evidence established cause to discipline respondent Michelle Huynh's license for violations of the Motor Vehicle Inspection Program under Health and Safety Code section 44072.2, subdivision (c). Ms. Huynh's employee Kenny Huynh failed to perform the emission control test on the undercover 1988 Toyota Camry in accordance with procedures prescribed by the Department in violations of California Code of Regulations, title 16, section 3340.35, subdivision (c), and California Code of Regulations, title 16, section 3340.42.

22. A preponderance of the evidence established cause to discipline respondent Michelle Huynh's license for violations of the Motor Vehicle Inspection Program under Health and Safety Code section 44072.2, subdivision (a). Ms. Huynh's employee Kenny Huynh failed to perform the emission control test on the undercover 1988 Toyota Camry in accordance with procedures prescribed by the Department in violations of California Code of Regulations, title 16, section 44012.12, subdivision (f), and California Code of Regulations, title 16, section 44015, subdivisions (a)(1) and (b).

23. A preponderance of the evidence established cause to discipline respondent Michelle Huynh's license under Business and Professions Code section 9884.7, subdivision (a)(1). Ms. Huynh's employee Kenny Huynh utilized "clean piping" by using the red Honda Accord to obtain a certificate of compliance for the 1989 Toyota Corolla when that vehicle had never been inspected, and because her employee Kenny Huynh utilized Juan Perez's license number and access code to perform smog inspections on the 1998 BMW and the 2004 Toyota Sienna.

24. A preponderance of the evidence established cause to discipline respondent Michelle Huynh's license under Business and Professions Code section 9884.7, subdivision (a)(4). Ms. Huynh's employee, Kenny Huynh, committed acts constituting fraud when utilized "clean piping" by using the red Honda Accord to obtain a certificate of compliance for the 1989 Toyota Corolla when that vehicle had never been inspected, and because her employee Kenny Huynh utilized Juan Perez's license number and access code to perform smog inspections on the 1998 BMW and the 2004 Toyota Sienna.

25. A preponderance of the evidence established cause to discipline respondent Michelle Huynh's license for violations of the Motor Vehicle Inspection Program under Health and Safety Code section 44072.2, subdivision (a). Ms. Huynh's employee Kenny Huynh made false or misleading records with respect to the 1998 BMW, the 2004 Toyota Sienna by issuing certificates of compliance indicating that Juan Perez performed the smog inspection when in fact Kenny Huynh did so, and by issuing a certificate of compliance for the 1989 Toyota Corolla through clean piping, all in violation of California Code of Regulations, title 16, section 3373.

26. A preponderance of the evidence established cause to discipline respondent Michelle Huynh's license for violations of the Motor Vehicle Inspection Program under Health and Safety Code section 44072.2, subdivision (a). Ms. Huynh's employee Kenny Huynh failed to perform complete smog inspections on the 1998 BMW, the 2004 Toyota

Sienna, and 1989 Toyota Corolla in violation of California Code of Regulations, title 16, section 44012; and because her employee Kenny Huynh failed to perform visual or functional checks on the emission control devices in accordance with the procedures prescribed by the department for the 1998 BMW, the 2004 Toyota Sienna, and 1989 Toyota Corolla in violation of California Code of Regulations, title 16, section 44012, subdivision (f); and because her employee Kenny Huynh willfully made false entries for electronic smog certificates of compliance for the 1998 BMW, the 2004 Toyota Sienna, and 1989 Toyota Corolla.

27. A preponderance of the evidence established cause to discipline respondent Michelle Huynh's license for violations of the Motor Vehicle Inspection Program under Health and Safety Code section 44072.2, subdivision (c). Ms. Huynh's employee Kenny Huynh failed to conduct the required smog inspections for the 1998 BMW, the 2004 Toyota Sienna, and 1989 Toyota Corolla in accordance with the Bureau's specifications and issued electronic smog certificates of compliance for those vehicles in violation of California Code of Regulations, title 16, section 3340.35, subdivision (c), and California Code of Regulations, title 16, section 3340.42.

Cause Exists to Discipline Respondent Kenny Huynh's Licenses

28. A preponderance of the evidence established cause to discipline respondent Kenny Huynh's licenses for violations of the Motor Vehicle Inspection Program under Health and Safety Code section 44072.2, subdivision (c). Mr. Huynh made false entries for electronic certification of compliance and false emissions control system identification into the EIS machine for the 1988 Toyota Camry in violation of California Code of Regulations, title 16, section 3340.41, subdivision (c); and because he failed to perform the complete smog inspection pursuant to the procedures prescribed by the department for the 1988 Toyota Camry in violation of Health and Safety Code, sections 44012; 44012, subdivision (f); 44015, subdivision (b); and 44032.

29. A preponderance of the evidence established cause to discipline respondent Kenny Huynh's licenses for violations of the Motor Vehicle Inspection Program under Health and Safety Code section 44072.2, subdivision (c). Mr. Huynh failed to inspect and test the 1988 Toyota Camry as the designated license smog check inspector in accordance with the Health and Safety Code in violation of California Code of Regulations, title 16, sections 3340.30, subdivision (a).

30. A preponderance of the evidence established cause to revoke respondent Kenny Huynh's licenses for violations of the Motor Vehicle Inspection Program under Health and Safety Code sections 44072.10, subdivision (c) and 44072.2, subdivision (a). Mr. Huynh failed to comply with the Health and Safety Code, sections 44012; 44012, subdivision (f); 44015, subdivision (b); and 44032 when he failed to perform complete smog inspections pursuant to the procedures prescribed by the department for the 1998 BMW and the 2004 Toyota Sienna.

31. A preponderance of the evidence established cause to discipline respondent Kenny Huynh's licenses for violations of the Motor Vehicle Inspection Program under Health and Safety Code sections 44072.10, subdivision (c) and section 44072.2, subdivisions (a) and (c). Mr. Huynh failed to comply with California Code of Regulations, title 16, sections 3340.30, subdivision (a); 3340.41, subdivision (b); and 3340.42 for failure to perform complete smog inspections pursuant to the procedures prescribed by the department for the 1998 BMW and the 2004 Toyota Sienna, including by entering into the EIS machine the access code and qualification number of Juan Perez.

32. A preponderance of the evidence established cause to discipline respondent Kenny Huynh's licenses for violations of the Motor Vehicle Inspection Program under Health and Safety Code section 44072.2, subdivision (a) and (d). Mr. Huynh aided and abetted another licensee, Juan Perez, in the clean-piping of the 1989 Toyota Corolla by use of the red Honda Accord.

Rehabilitation

33. California Code of Regulations, title 16, section 3395, subdivision (a), provides:

(a) When considering the denial of a license or a registration under Section 480 of the Business and Professions Code, the bureau, in evaluating the rehabilitation of the applicant, will consider the following criteria:

(1) The nature and severity of the act(s) or crime(s) under consideration as grounds for denial.

(2) Evidence of any act(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for denial which also could be considered as grounds for denial under Section 480 of the Business and Professions Code.

(3) The time that has elapsed since commission of the act(s) or crime(s) referred to in subdivision (1) or (2).

(4) The extent to which the applicant has complied with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against the applicant.

(5) Evidence, if any, of rehabilitation submitted by the applicant.

34. Respondent Kenny Huynh has on multiple occasions used the access code and license number of Juan Perez to conduct smog inspections, he intentionally provided a

certificate of compliance to the 1988 Toyota Camry when he knew that it did not pass inspection, and he has also directed the clean-piping of the 1989 Toyota Corolla, extremely serious misconduct. Respondent Michelle Huynh knowingly delegated all oversight for activities at National City Smog Check to Kenny Huynh. Both Kenny Huynh and Michelle Huynh had multiple previous citations for violations of the Motor Vehicle Inspection Program under Health and Safety Code. Only about two years has passed since the misconduct at issue. Respondents Michelle Huynh and Kenny Huynh both expressed no remorse, but instead blamed the Bureau for their situation. No evidence or rehabilitation was submitted by either Michelle or Kenny Huynh.

The Appropriate Measure of Discipline

35. The record in this matter supports the revocation of both respondents Michelle Huynh and Kenny Huynh's licenses. The disciplinary guidelines maximum penalty of revocation is appropriate given the seriousness nature of the misconduct and the multiple violations of the Motor Vehicle Inspection Program.

Costs of Investigation and Enforcement

36. Business and Professions Code section 125.3 provides in part:

(a) . . . in any order issued in resolution of a disciplinary proceeding before any board within the department . . . the board may request the administrative law judge to direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of investigation and enforcement of the case.

37. A preponderance of the evidence established that the Bureau's reasonable costs of investigation and enforcement total \$14,965.

ORDER

Advanced Emission Specialist (EA) Technician License No. 151008 issued to Kenny N. Huynh is revoked.


Smog Check Inspector (EO) License No. 151008 issued to Kenny N. Huynh is revoked.

Smog Check Repair Technician (EI) License No. 151008 issued to Kenny N. Huynh is revoked.

Automotive Repair Dealer (ARD) Registration No. 261929 issued to Michelle T. Huynh, owner of National City Smog Check is revoked.

Michelle T. Huynh, owner of National City Smog Check, shall pay a total of \$14,965 to the Bureau of Automotive Repair for the Bureau's reasonable costs of investigation and enforcement.

DATED: February 17, 2016

DocuSigned by:

73AD8C82D0DE42D...

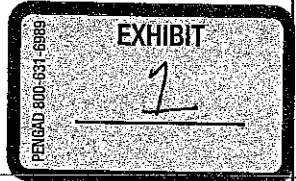
DEBRA D. NYE-PERKINS
Administrative Law Judge
Office of Administrative Hearings

1 KAMALA D. HARRIS
Attorney General of California
2 JAMES M. LEDAKIS
Supervising Deputy Attorney General
3 NICOLE R. TRAMA
Deputy Attorney General
4 State Bar No. 164015
110 West "A" Street, Suite 1100
5 San Diego, CA 92101
P.O. Box 85266
6 San Diego, CA 92186-5266
Telephone: (619) 645-2143
7 Facsimile: (619) 645-2106
Attorneys for Complainant
8

9 **BEFORE THE**
DEPARTMENT OF CONSUMER AFFAIRS
10 **FOR THE BUREAU OF AUTOMOTIVE REPAIR**
11 **STATE OF CALIFORNIA**

12 In the Matter of the Accusation Against:
13 **NATIONAL CITY SMOG CHECK,**
MICHELLE T. HUYNH, OWNER
14 **1534 National City Blvd.**
National City, CA 91950
15 **Automotive Repair Dealer Registration No.**
16 **ARD 261929**
Smog Check-Test Only Station License No.
17 **TC 261929,**
18 **KENNY N. HUYNH**
1008 Via Sinuoso
19 **Chula Vista, CA 91910**
20 **105 W. 18th Street**
National City, CA 91950
21 **Smog Check Inspector License No. EO**
22 **151008**
Smog Check Repair Technician License No.
23 **EI 151008 (formerly Advanced Emission**
24 **Specialist Technician License No. EA**
151008),
25 **and**
26
27
28

Case No. 79/15-98
FIRST AMENDED ACCUSATION



1 **JUAN CARLOS PEREZ**
2 700 North First Street
3 El Cajon, CA 92021

4 **Smog Check Inspector License No. EO**
5 **632204**
6 **Smog Check Repair Technician License No.**
7 **EI 632204 (formerly Advanced Emission**
8 **Specialist Technician License No. EA**
9 **632204)**

10 Respondents.

11 Complainant alleges:

12 **PARTIES**

13 1. Patrick Dorais (Complainant) brings this First Amended Accusation solely in his
14 official capacity as the Chief of the Bureau of Automotive Repair, Department of Consumer
15 Affairs.

16 **Automotive Repair Dealer Registration of Respondent Michelle T. Huynh**

17 2. On May 12, 2010, the Bureau of Automotive Repair issued Automotive Repair
18 Dealer Registration Number ARD 261929 to Michelle T. Huynh (Respondent Owner), owner of
19 National City Smog Check. The Automotive Repair Dealer Registration was in full force and
20 effect at all times relevant to the charges brought herein and will expire on April 30, 2016, unless
21 renewed.

22 **Smog Check Test Only Station License of Respondent Michelle T. Huynh**

23 3. On June 2, 2010, the Bureau of Automotive Repair issued Smog Check-Test Only
24 Station License Number TC 261929 to Michelle T. Huynh (Respondent Owner), owner of
25 National City Smog Check. The Smog Check-Test Only Station License was in full force and
26 effect at all times relevant to the charges brought herein and will expire on April 30, 2016, unless
27 renewed.

28 **Smog Check Licenses of Respondent Kenny N. Huynh**

4. In 2007, the Director issued Advanced Emission Specialist Technician License
Number EA 151008 to Kenny N. Huynh (Respondent Manager). Respondent Manager's

1 advanced emission specialist technician license was due to expire on February 28, 2013.
2 Pursuant to California Code of Regulations, title 16, section 3340.28, subdivision (e), the license
3 was renewed, in accordance with Respondent Manager's election, as Smog Check Inspector
4 License Number EO 151008 and Smog Check Repair Technician License Number EI 151008,
5 effective November 15, 2012.¹ Respondent Manager's Smog Check Repair Technician License
6 Number EI 151008 expired on February 28, 2015, and has not been renewed. Respondent
7 Manager's Smog Check Inspector License Number EO 151008 will expire on February 28,
8 2017, unless renewed

9 **Smog Check Licenses of Respondent Juan Carlos Perez**

10 5. On June 24, 2010, the Director issued Advanced Emission Specialist Technician
11 License Number EA 632204 to Juan Carlos Perez (Respondent Perez). Respondent Perez's
12 advanced emission specialist technician license was due to expire on June 30, 2014. Pursuant to
13 California Code of Regulations, title 16, section 3340.28, subdivision (e), the license was
14 renewed, in accordance with Respondent Perez's election, as Smog Check Inspector License
15 Number EO 632204 and Smog Check Repair Technician License Number EI 632204, effective
16 June 2, 2014. Respondent Perez's smog check licenses will expire on June 30, 2016, unless
17 renewed. On September 9, 2015, the Director issued a Decision and Order in Accusation Case
18 No. 79/15-98 effective October 8, 2015, wherein Respondent Perez's licenses were revoked;
19 however, the revocation was stayed and Respondent Perez was placed on probation for a period
20 of three years with certain terms and conditions.

21 **JURISDICTION**

22 6. This Accusation is brought before the Director of Consumer Affairs (Director) for
23 the Bureau of Automotive Repair, under the authority of the following laws. All section
24 references are to the Business and Professions Code (Code) unless otherwise indicated.

25
26 ¹ Effective August 1, 2012, California Code of Regulations, title 16, sections 3340.28,
27 3340.29, and 3340.30 were amended to implement a license restructure from the Advanced
28 Emission Specialist Technician (EA) license and Basic Area (EB) Technician license to Smog
Check Inspector (EO) license and/or Smog Check Repair Technician (EI) license.

1 7. Code section 22, subdivision (a), states:

2 “Board” as used in any provision of this Code, refers to the board in which
3 the administration of the provision is vested, and unless otherwise expressly
4 provided, shall include “bureau,” “commission,” “committee,” “department,”
5 “division,” “examining committee,” “program,” and “agency.”

6 8. Code section 118, subdivision (b) states:

7 The suspension, expiration, or forfeiture by operation of law of a license
8 issued by a board in the department, or its suspension, forfeiture, or cancellation by
9 order of the board or by order of a court of law, or its surrender without the written
10 consent of the board, shall not, during any period in which it may be renewed,
11 restored, reissued, or reinstated, deprive the board of its authority to institute or
12 continue a disciplinary proceeding against the licensee upon any ground provided
13 by law or to enter an order suspending or revoking the license or otherwise taking
14 disciplinary action against the licensee on any such ground.

15 9. Code section 477 provides, in pertinent part, that “Board” includes “bureau,”
16 “commission,” “committee,” “department,” “division,” “examining committee,” “program,” and
17 “agency.” “License” includes certificate, registration or other means to engage in a business or
18 profession regulated by the Code.

19 10. Code section 9884.5 provides in pertinent part that a registration that is not
20 renewed within three years following its expiration shall not be renewed, restored, or reinstated
21 thereafter, and the delinquent registration shall be canceled immediately upon expiration of the
22 three-year period.

23 11. Code section 9884.7 provides that the Director may revoke an automotive repair
24 dealer registration.

25 12. Code section 9884.13 provides, in pertinent part, that the expiration of a valid
26 registration shall not deprive the Director of jurisdiction to proceed with a disciplinary proceeding
27 against an automotive repair dealer or to render a decision temporarily or permanently
28 invalidating, suspending, or revoking a registration.

 13. Code section 9889.1 provides, in pertinent part, that the Director may suspend or
 revoke any license issued under Articles 5 and 6 (commencing with section 9887.1) of the
 Automotive Repair Act.

1 14. Code section 9889.7 provides, in pertinent part, that the expiration or suspension
2 of a license by operation of law or by order or decision of the Director or a court of law, or the
3 voluntary surrender of a license shall not deprive the Director of jurisdiction to proceed with any
4 disciplinary proceedings.

5 15. Health and Safety Code (H & S Code) 44001 states:

6 (a) The Legislature hereby finds and declares that California has been
7 required, by the amendments enacted to the Clean Air Act in 1990, and by
8 regulations adopted by the Environmental Protection Agency, to enhance
9 California's existing motor vehicle inspection and maintenance program to meet
10 new, more stringent emission reduction targets. Therefore, the Legislature
11 declares that the 1994 amendments to this chapter are adopted to implement
12 further improvements in the existing inspection and maintenance program so that
13 California will meet or exceed the new emission reduction targets.

14 (b) The Legislature further finds and declares all of the following:

15 (1) California is recognized as a leader in establishing performance
16 standards for its air quality programs and those standards have been adopted by
17 many other states and countries.

18 (2) Studies show that a minority of motor vehicles produce a
19 disproportionate amount of the pollution caused by vehicle emissions. Those
20 vehicles are referred to as gross polluters.

21 (3) The concept of periodic testing alone does not act as a
22 sufficient deterrent to tampering, or as a sufficient incentive for vigilant vehicle
23 maintenance by a significant percentage of motorists. Gross polluters continue to
24 be driven on the roadways of California.

25 (4) (A) New technology, known as remote sensing, offers great
26 promise as a cost-effective means to detect vehicles emitting excess emissions as
27 the vehicles are being driven. This type of detection offers many valuable
28 applications, especially its use between scheduled tests, as an inexpensive,
random, and pervasive means of identifying vehicles which are gross polluters
and targeting those vehicles for repair or other methods of emission reduction.

 (B) Another new technology, the development of emissions
profiles for motor vehicles, allows the motor vehicle inspection program to
accurately identify both high- and low-emitting vehicles. This technology may
allow the full or partial exception of certain vehicles from biennial certification
requirements to the extent determined by the department.

 (5) California continues to seek strict adherence to federal and state
performance standards and to results-based evaluations that meet the state's
unique circumstances, and which consist of all of the following:

 (A) Acceptance of the shared obligation and personal
responsibility required to successfully inspect and maintain millions of motor

1 vehicles. Specifically, that obligation begins with this chapter, and extends
2 through those regulators charged with its implementation and enforcement.
3 Through the enactment of the 1994 amendments to this chapter, the Legislature
4 hereby recognizes and seeks to encourage, through a number of innovative and
5 significant steps, the critical role that each California motorist must play in
6 maintaining his or her vehicle's emission control systems in proper working
7 order, in such a way as to continuously meet mandated emission control standards
8 and ensure for California the clean air essential to the health of its citizens, its
9 communities, and its economy.

6 (B) A focus on the detection, diagnosis, and repair of broken,
7 tampered, or malfunctioning vehicle emission control systems.

8 (C) Flexibility to incorporate and implement future new
9 scientific findings and technological advances.

9 (D) Consideration of convenience and costs to those who are
10 required to participate, including motorists, smog check stations, and technicians.

10 (E) An enforcement program which is vigorous and effective
11 and includes monitoring of the performance of the smog check test or repair
12 stations and technicians, as well as the monitoring of vehicle emissions as
13 vehicles are being driven.

13 (c) The Legislature further finds and declares that California is, as of
14 the effective date of this section, implementing a number of motor vehicle
15 emission reduction strategies far beyond the effort undertaken by any other state,
16 including all of the following:

16 (1) California certification standards exceed those of the other 49
17 states, increasing the cost of a new car to a California consumer by one hundred
18 fifty dollars (\$150) or more.

18 (2) State board regulations mandate increasing availability for sale
19 of low-emission, ultra-low emission, and zero-emission vehicles, including, by
20 2003, 10 percent zero-emission vehicles.

20 (3) Effective in 1996, state board regulations mandate the
21 reformulation of gasoline for reduced emissions, at an estimated increased
22 production cost of 5 to 15 cents per gallon due to refinery modifications and
23 higher production costs.

22 (4) Cleaner diesel fuel regulations, more stringent than federal
23 standards, took effect in California in October 1993, increasing diesel fuel costs
24 by 4 to 6 cents per gallon.

24 (5) California law provides for vehicle registration surcharges of
25 up to four dollars (\$4) per vehicle in nonattainment areas for air quality-related
26 projects.

26 (6) California law taxes cleaner fuels at one-half the rate of
27 gasoline and diesel fuel.

27 (7) California law provides tax credits for the purchase of low-
28 emission vehicles.

1 (8) California requires smog checks and repairs whenever a vehicle
2 changes ownership, some 3 million vehicles annually, in addition to the regular
3 biennial tests.

4 (9) Low-value vehicles are discouraged from entering California
5 due to the imposition of a three hundred dollar (\$300) smog impact fee on
6 vehicles that are not manufactured to California certification standards.

7 (10) California imposes sales taxes on motor vehicle fuels and
8 dedicates most of those revenues to mass transit. This increases the cost of fuels
9 by seven cents (\$.07) per gallon.

10 (11) Transportation sales taxes in most urban counties also
11 generate substantial funding for transit and other congestion-reduction measures,
12 costing the average urban California resident fifty dollars (\$50) to one hundred
13 dollars (\$100) annually, which would be the equivalent of another 8 to 16 cents
14 per gallon of fuel.

15 16. H & S Code section 44002 provides, in pertinent part, that the Director has all the
16 powers and authority granted under the Automotive Repair Act for enforcing the Motor Vehicle
17 Inspection Program.

18 17. H & S Code section 44072.2 states:

19 The director may suspend, revoke, or take other disciplinary action against
20 a license as provided in this article if the licensee, or any partner, officer, or
21 director thereof, does any of the following:

22 (a) Violates any section of this chapter and the regulations adopted
23 pursuant to it, which related to the licensed activities.

24 (b) Is convicted of any crime substantially related to the qualifications,
25 functions, or duties of the licenseholder in question.

26 (c) Violates any of the regulations adopted by the director pursuant to this
27 chapter.

28 (d) Commits any act involving dishonesty, fraud, or deceit whereby
another is injured.

(e) Has misrepresented a material fact in obtaining a license.

(f) Aids or abets unlicensed persons to evade the provisions of this
chapter.

(g) Fails to make and keep records showing his or her transactions as a
licensee, or fails to have those records available for inspection by the director or
his or her duly authorized representative for a period of not less than three years
after completion of any transaction to which the records refer, or refuses to
comply with a written request of the director to make the records available for
inspection.

(h) Violates or attempts to violate the provisions of this chapter relating to
the particular activity for which he or she is licensed.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

18. H & S Code section 44072.4 states:

The director may take disciplinary action against any licensee after a hearing as provided in this article by any of the following:

(a) Imposing probation upon terms and conditions to be set forth by the director.

(b) Suspending the license.

(c) Revoking the license.

19. H & S Code section 44072.6 provides, in pertinent part, that the expiration or suspension of a license by operation of law, or by order or decision of the Director, or a court of law, or the voluntary surrender of the license shall not deprive the Director of jurisdiction to proceed with disciplinary action.

20. H & S Code section 44072.7 provides that all accusations against licensees shall be filed within three years after the act or omission alleged as the ground for disciplinary action, except that with respect to an accusation alleging a violation of subdivision (d) of Section 44072.2, the accusation may be filed within two years after the discovery by the Bureau of the alleged facts constituting the fraud or misrepresentation prohibited by that section.

21. H & S Code section 44072.8 states:

When a license has been revoked or suspended following a hearing under this article, any additional license issued under this chapter in the name of the licensee may be likewise revoked or suspended by the director.

22. H & S Code section 44072.10 states, in pertinent part:

....

(c) The department shall revoke the license of any smog check technician or station licensee who fraudulently certifies vehicles or participates in the fraudulent inspection of vehicles. A fraudulent inspection includes, but is not limited to, all of the following:

(1) Clean piping², as defined by the department.

....

² Clean-piping” is a method used to fraudulently certify vehicles that will not pass a Smog Check test on their own and/or, are not present for testing. To “Clean Pipe” the Technician uses a “clean” exhaust gas sample that will pass the Smog Check emission test, while entering data into the EIS for the vehicle to be fraudulently certified.

1 establishes an independent basis for a board to impose discipline upon a licensee,
2 and that the amendments to this section made by Senate Bill 797 of the 2007-08
3 Regular Session do not constitute a change to, but rather are declaratory of,
4 existing law.

5 26. Code section 493 states:

6 Notwithstanding any other provision of law, in a proceeding conducted by
7 a board within the department pursuant to law to deny an application for a license
8 or to suspend or revoke a license or otherwise take disciplinary action against a
9 person who holds a license, upon the ground that the applicant or the licensee has
10 been convicted of a crime substantially related to the qualifications, functions, and
11 duties of the licensee in question, the record of conviction of the crime shall be
12 conclusive evidence of the fact that the conviction occurred, but only of that fact,
13 and the board may inquire into the circumstances surrounding the commission of
14 the crime in order to fix the degree of discipline or to determine if the conviction is
15 substantially related to the qualifications, functions, and duties of the licensee in
16 question.

17 27. Code section 9884.7 states, in pertinent part:

18 (a) The director, where the automotive repair dealer cannot show there
19 was a bona fide error, may deny, suspend, revoke, or place on probation the
20 registration of an automotive repair dealer for any of the following acts or
21 omissions related to the conduct of the business of the automotive repair dealer,
22 which are done by the automotive repair dealer or any automotive technician,
23 employee, partner, officer, or member of the automotive repair dealer.

24 (1) Making or authorizing in any manner or by any means
25 whatever any statement written or oral which is untrue or misleading, and which
26 is known, or which by the exercise of reasonable care should be known, to be
27 untrue or misleading.

28

(3) Failing or refusing to give to a customer a copy of any
document requiring his or her signature, as soon as the customer signs the
document.

(4) Any other conduct that constitutes fraud.

. . . .

(6) Failure in any material respect to comply with the provisions of
this chapter or regulations adopted pursuant to it.

. . . .

29 28. Code section 9884.9 states, in pertinent part:

30 (a) The automotive repair dealer shall give to the customer a written
31 estimated price for labor and parts necessary for a specific job. No work shall be
32 done and no charges shall accrue before authorization to proceed is obtained from
33 the customer. No charge shall be made for work done or parts supplied in excess

1 of the estimated price without the oral or written consent of the customer that
2 shall be obtained at some time after it is determined that the estimated price is
3 insufficient and before the work not estimated is done or the parts not estimated
4 are supplied. Written consent or authorization for an increase in the original
5 estimated price may be provided by electronic mail or facsimile transmission
6 from the customer. The bureau may specify in regulation the procedures to be
7 followed by an automotive repair dealer if an authorization or consent for an
8 increase in the original estimated price is provided by electronic mail or facsimile
9 transmission. If that consent is oral, the dealer shall make a notation on the work
10 order of the date, time, name of person authorizing the additional repairs, and
11 telephone number called, if any, together with a specification of the additional
12 parts and labor and the total additional cost, and shall do either of the following:

13 (1) Make a notation on the invoice of the same facts set forth in the
14 notation on the work order.

15 (2) Upon completion of the repairs, obtain the customer's signature
16 or initials to an acknowledgment of notice and consent, if there is an oral consent
17 of the customer to additional repairs, in the following language:

18 "I acknowledge notice and oral approval of an increase in the original
19 estimated price.

20 _____
21 (signature or initials)"

22 Nothing in this section shall be construed as requiring an automotive
23 repair dealer to give a written estimated price if the dealer does not agree to
24 perform the requested repair.

25

26 29. H & S Code section 44012 states:

27 The test at the smog check stations shall be performed in accordance with
28 procedures prescribed by the department and may require loaded mode
dynamometer testing in enhanced areas, two-speed idle testing, testing utilizing a
vehicle's onboard diagnostic system, or other appropriate test procedures as
determined by the department in consultation with the state board. The
department shall implement testing using onboard diagnostic systems, in lieu of
loaded mode dynamometer or two-speed idle testing, on model year 2000 and
newer vehicles only, beginning no earlier than January 1, 2013. However, the
department, in consultation with the state board, may prescribe alternative test
procedures that include loaded mode dynamometer or two-speed idle testing for
vehicles with onboard diagnostic systems that the department and the state board
determine exhibit operational problems. The department shall ensure, as
appropriate to the test method, the following:

(a) Emission control systems required by state and federal law are
reducing excess emissions in accordance with the standards adopted pursuant to
subdivisions (a) and (c) of Section 44013.

1 (b) Motor vehicles are preconditioned to ensure representative and
2 stabilized operation of the vehicle's emission control system.

3 (c) For other than diesel-powered vehicles, the vehicle's exhaust emissions
4 of hydrocarbons, carbon monoxide, carbon dioxide, and oxides of nitrogen in an
5 idle mode or loaded mode are tested in accordance with procedures prescribed by
6 the department. In determining how loaded mode and evaporative emissions
7 testing shall be conducted, the department shall ensure that the emission reduction
8 targets for the enhanced program are met.

9 (d) For other than diesel-powered vehicles, the vehicle's fuel evaporative
10 system and crankcase ventilation system are tested to reduce any nonexhaust
11 sources of volatile organic compound emissions, in accordance with procedures
12 prescribed by the department.

13 (e) For diesel-powered vehicles, a visual inspection is made of emission
14 control devices and the vehicle's exhaust emissions are tested in accordance with
15 procedures prescribed by the department, that may include, but are not limited to,
16 onboard diagnostic testing. The test may include testing of emissions of any or all
17 of the pollutants specified in subdivision (c) and, upon the adoption of applicable
18 standards, measurement of emissions of smoke or particulates, or both.

19 (f) A visual or functional check is made of emission control devices
20 specified by the department, including the catalytic converter in those instances in
21 which the department determines it to be necessary to meet the findings of
22 Section 44001. The visual or functional check shall be performed in accordance
23 with procedures prescribed by the department.

24 (g) A determination as to whether the motor vehicle complies with the
25 emission standards for that vehicle's class and model-year as prescribed by the
26 department.

27 (h) An analysis of pass and fail rates of vehicles subject to an onboard
28 diagnostic test and a tailpipe test to assess whether any vehicles passing their
onboard diagnostic test have, or would have, failed a tailpipe test, and whether
any vehicles failing their onboard diagnostic test have or would have passed a
tailpipe test.

(i) The test procedures may authorize smog check stations to refuse the
testing of a vehicle that would be unsafe to test, or that cannot physically be
inspected, as specified by the department by regulation. The refusal to test a
vehicle for those reasons shall not excuse or exempt the vehicle from compliance
with all applicable requirements of this chapter.

30. H&S Code section 44013 states, in pertinent part:

(a) (1) The department, in cooperation with the state board, shall prescribe
maximum emission standards to be applied in inspecting motor vehicles under
this chapter.

(2) In prescribing the standards, the department shall undertake studies
and experiments which are necessary and feasible, evaluate available data, and
confer with automotive engineers.

1 (3) The standards shall be set at a level reasonably achievable for each
2 class and model of motor vehicle when operating in a reasonably sound
3 mechanical condition, allowing for the effects of installed motor vehicle pollution
4 control devices and the motor vehicle's age and total mileage.

5 (4) The standards shall be designed so that motor vehicles failing the
6 test specified in Section 44012 will be operated, as soon as possible, with a
7 substantial reduction in emissions, and shall be revised from time to time as
8 experience justifies.

9

10 (c) Notwithstanding any other provision of this chapter, the maximum
11 emission standards and test procedures prescribed in subdivisions (a) and (b) for a
12 motor vehicle class and model-year shall not be more stringent than the emission
13 standards and test procedures under which that motor vehicle's class and model-
14 year was certified. Emission standards and test procedures prescribed by the
15 department shall ensure that not more than 5 percent of the vehicles or engines,
16 which would otherwise meet the requirements of this part, will fail the inspection
17 and maintenance test for that class of vehicle or engine.

18

19 31. H & S Code section 44015 states, in pertinent part:

20 (a) A licensed smog check station shall not issue a certificate of
21 compliance, except as authorized by this chapter, to any vehicle that meets the
22 following criteria:

23 (1) A vehicle that has been tampered with.

24

25 (b) If a vehicle meets the requirements of Section 44012, a smog check
26 station licensed to issue certificates shall issue a certificate of compliance or a
27 certificate of noncompliance.

28

32. H & S Code section 44032 states:

No person shall perform, for compensation, tests or repairs of emission
control devices or systems of motor vehicles required by this chapter unless the
person performing the test or repair is a qualified smog check technician and the
test or repair is performed at a licensed smog check station. Qualified technicians
shall perform tests of emission control devices and systems in accordance with
Section 44012.

33. H & S Code section 44059 states:

The willful making of any false statement or entry with regard to a
material matter in any oath, affidavit, certificate of compliance or noncompliance,

1 or application form which is required by this chapter or Chapter 20.3
2 (commencing with Section 9880) of Division 3 of the Business and Professions
3 Code, constitutes perjury and is punishable as provided in the Penal Code.

4 REGULATORY PROVISIONS

5 34. California Code of Regulations, title 16 (CCR), section 3340.24 states in pertinent
6 part:

7

8 (c) The bureau may suspend or revoke the license of or pursue other legal
9 action against a licensee, if the licensee falsely or fraudulently issues or obtains a
10 certificate of compliance or a certificate of noncompliance.

11 35. CCR section 3340.30 states, in pertinent part:

12 A licensed smog check inspector and/or repair technician shall comply
13 with the following requirements at all times while licensed:

14 (a) Inspect, test and repair vehicles, as applicable, in accordance with
15 section 44012 of the Health and Safety Code, section 44035 of the Health and
16 Safety Code, and section 3340.42 of this article.

17

18 36. CCR section 3340.35 states, in pertinent part:

19

20 (c) A licensed station shall issue a certificate of compliance or
21 noncompliance to the owner or operator of any vehicle that has been inspected in
22 accordance with the procedures specified in section 3340.42 of this article and has
23 all the required emission control equipment and devices installed and functioning
24 correctly. The following conditions shall apply:

25 (1) Customers shall be charged the same price for certificates as
26 that paid by the licensed station; and

27 (2) Sales tax shall not be assessed on the price of certificates.

28

37. CCR section 3340.41 states, in pertinent part:

. . . .

(b) No person shall enter into the emissions inspection system any
access or qualification number other than as authorized by the bureau, nor in any
way tamper with the emissions inspection system.

(c) No person shall enter into the emissions inspection system any
vehicle identification information or emission control system identification data
for any vehicle other than the one being tested. Nor shall any person knowingly
enter into the emissions inspection system any false information about the vehicle
being tested.

1
2 38. Regulations, section 3340.42 states:

3 Smog check inspection methods are prescribed in the Smog Check
4 Manual, referenced by section 3340.45.

5 (a) All vehicles subject to a smog check inspection, shall receive one
6 of the following test methods:

7 (1) A loaded-mode test shall be the test method used to inspect
8 1976 - 1999 model-year vehicle, except diesel-powered, registered in the
9 enhanced program areas of the state. The loaded-mode test shall measure
10 hydrocarbon, carbon monoxide, carbon dioxide and oxides of nitrogen emissions,
11 as contained in the bureau's specifications referenced in subsection (a) of Section
12 3340.17 of this article. The loaded-mode test shall use Acceleration Simulation
13 Mode (ASM) test equipment, including a chassis dynamometer, certified by the
14 bureau.

15 On and after March 31, 2010, exhaust emissions from a vehicle
16 subject to this inspection shall be measured and compared to the emissions
17 standards shown in the Vehicle Look-up Table (VLT) Row Specific Emissions
18 Standards (Cutpoints) Table, dated March 2010, which is hereby incorporated by
19 reference. If the emissions standards for a specific vehicle are not included in this
20 table then the exhaust emissions shall be compared to the emissions standards set
21 forth in TABLE I or TABLE II, as applicable. A vehicle passes the loaded-mode
22 test if all of its measured emissions are less than or equal to the applicable
23 emission standards specified in the applicable table.

24 (2) A two-speed idle mode test shall be the test method used to
25 inspect 1976 - 1999 model-year vehicles, except diesel-powered, registered in all
26 program areas of the state, except in those areas of the state where the enhanced
27 program has been implemented. The two-speed idle mode test shall measure
28 hydrocarbon, carbon monoxide and carbon dioxide emissions at high RPM and
again at idle RPM, as contained in the bureau's specifications referenced in
subsection (a) of Section 3340.17 of this article. Exhaust emissions from a vehicle
subject to this inspection shall be measured and compared to the emission
standards set forth in this section and as shown in TABLE III. A vehicle passes
the two-speed idle mode test if all of its measured emissions are less than or equal
to the applicable emissions standards specified in Table III.

(3) An OBD-focused test, shall be the test method used to inspect
gasoline-powered vehicles 2000 model-year and newer, and diesel-powered
vehicles 1998 model-year and newer. The OBD test failure criteria are specified
in section 3340.42.2.

(b) In addition to subsection (a), all vehicles subject to the smog check
program shall receive the following:

(1) A visual inspection of emission control components and
systems to verify the vehicle's emission control systems are properly installed.

1 (2) A functional inspection of emission control systems as
2 specified in the Smog Check Manual, referenced by section 3340.45, which may
include an OBD test, to verify their proper operation.

3 (c) The bureau may require any combination of the inspection
4 methods in sections (a) and (b) under any of the following circumstances:

5 (1) Vehicles that the department randomly selects pursuant to
6 Health and Safety Code section 44014.7 as a means of identifying potential
operational problems with vehicle OBD systems.

7 (2) Vehicles identified by the bureau as being operationally or
8 physically incompatible with inspection equipment.

9 (3) Vehicles with OBD systems that have demonstrated operational
10 problems.

11 (d) Pursuant to section 39032.5 of the Health and Safety Code, gross
12 polluter standards are as follows:

13 (1) A gross polluter means a vehicle with excess hydrocarbon,
14 carbon monoxide, or oxides of nitrogen emissions pursuant to the gross polluter
15 emissions standards included in the tables described in subsection (a), as
16 applicable.

17 (2) Vehicles with emission levels exceeding the emission standards
18 for gross polluters during an initial inspection will be considered gross polluters
19 and the provisions pertaining to gross polluting vehicles will apply, including, but
20 not limited to, sections 44014.5, 44015, and 44081 of the Health and Safety Code.

21 (3) A gross polluting vehicle shall not be passed or issued a
22 certificate of compliance until the vehicle's emissions are reduced to or below the
23 applicable emissions standards for the vehicle included in the tables described in
24 subsection (a), as applicable. However, the provisions described in section 44017
25 of the Health and Safety Code may apply.

26 (4) This subsection applies in all program areas statewide to
27 vehicles requiring inspection pursuant to sections 44005 and 44011 of the Health
28 and Safety Code.

COST RECOVERY

39. Section 125.3 of the Code provides, in pertinent part, that the Bureau may request
the administrative law judge to direct a licentiate found to have committed a violation or
violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation
and enforcement of the case, with failure of the licentiate to comply subjecting the license to not
being renewed or reinstated. If a case settles, recovery of investigation and enforcement costs
may be included in a stipulated settlement.

FACTUAL ALLEGATIONS

UNDERCOVER OPERATION: 1988 Toyota Camry on May 20, 2014

1
2
3 40. Based on a report that Kenny N. Huynh (Respondent Manager) was performing
4 unauthorized smog check inspections using the license of Juan Carlos Perez (Respondent Perez)
5 at National City Smog Check, the Bureau of Automotive Repair (BAR) initiated an
6 investigation. On May 20, 2014, the Bureau conducted an undercover operation at Respondent
7 Owner's smog check-test only station, National City Smog Check. The Bureau's vehicle, a 1988
8 Toyota Camry, was modified to fail a proper smog inspection due to the adjustment of the
9 ignition timing to 20 degrees before top dead center (BTDC), which is ten degrees advanced
10 from the manufacturer's timing specification for the vehicle. Tamper indicators were placed to
11 detect corrections.

12 41. On May 20, 2014, the operator took the vehicle to National City Smog Check.
13 When Respondent Manager arrived, the operator went inside the office and requested a smog
14 inspection. Respondent Manager, without identifying himself, asked the operator if someone
15 referred her to the station. The operator replied that her father did and Respondent Manager had
16 her sign a work order for \$60.00. The operator signed the work order but never received a copy.
17 Respondent Manager said that it would take about 20 minutes to complete the smog inspection
18 and walked out of the office. The operator waited at the office. Later, Respondent Manager
19 returned to the office and told the operator that her car failed but he passed it because he knew
20 her father. Respondent Manager told the operator to tell her father to have the timing adjusted
21 from 16 to 10 for the car to pass. The operator paid Respondent Manager \$60.00 and was
22 provided a copy of invoice [REDACTED]. Respondent Manager also provided the operator a
23 copy of Vehicle Inspection Report (VIR) bearing Certificate of Compliance Number
24 [REDACTED] and Respondent Perez's name as the smog technician who had performed the smog
25 test at National City Smog Check.

26 42. On June 3, 2014, Bureau personnel re-inspected the vehicle after the smog test at
27 Respondent Owner's smog check-test only station. The condition of the vehicle had not changed;
28 the tamper indicators were still intact and undisturbed. Bureau personnel performed a vehicle

1 timing check procedure and verified that the ignition timing was still at 20 degrees BTDC. ASM
2 and TSI smog inspections were performed and the 1988 Toyota Camry failed the timing test.

3 **FIRST CAUSE FOR DISCIPLINE**
4 **Automotive Repair Dealer Registration**
5 **(Untrue or Misleading Statements)**

6 43. Respondent Owner has subjected her Automotive Repair Dealer Registration to
7 discipline under Code section 9884.7, subdivision (a)(1), in that on May 20, 2014, she made
8 statements which she knew or which by exercise of reasonable care she should have known were
9 untrue or misleading when her employee issued electronic Certificate of Compliance [REDACTED]
10 [REDACTED] for the 1988 Toyota Camry, certifying that the vehicle was in compliance with
11 applicable laws and regulations when, in fact, the vehicle had the ignition timing set to 20
12 degrees BTDC as set forth in paragraphs 40-42 above.

13 **SECOND CAUSE FOR DISCIPLINE**
14 **Automotive Repair Dealer Registration**
15 **(Failure to Provide Signed Copy of Document to Customer)**

16 44. Respondent Owner has subjected her Automotive Repair Dealer Registration to
17 discipline under Code section 9884.7, subdivision (a)(3), in that her employee failed to give to
18 the operator a copy of the work order requiring the operator's signature, as soon as the operator
19 signed the document as set forth in paragraphs 40-42 above.

20 **THIRD CAUSE FOR DISCIPLINE**
21 **Automotive Repair Dealer Registration**
22 **(Fraud)**

23 45. Respondent Owner has subjected her Automotive Repair Dealer Registration to
24 discipline under Code section 9884.7, subdivision (a)(4), in that her employee committed acts
25 constituting fraud by issuing electronic Certificate of Compliance [REDACTED] C for the 1988
26 Toyota Camry without performing a bona fide inspection of the emission control devices and
27 systems on the vehicle as set forth in paragraphs 40-42 above.

28 **FOURTH CAUSE FOR DISCIPLINE**
Automotive Repair Dealer Registration
(Violations of the Code)

46. Respondent Owner has subjected her Automotive Repair Dealer
Registration to discipline under Code section 9884.7, subdivision (a)(6), in that on May 20,

1 2014, Respondent Owner failed to comply with provisions of Code section 9884.9, subdivision
2 (a) when her employee failed to give to the customer a written estimated price for the smog
3 inspection as set forth in paragraphs 40-42 above.

4 **FIFTH CAUSE FOR DISCIPLINE**
5 **Smog Check-Test Only Station License**
6 **(Failure to Comply with Regulations)**

7 47. Respondent Owner has subjected her Smog Check Test-Only Station License to
8 discipline under H & S Code section 44072.2, subdivision (c), in that Respondent Owner failed
9 to comply with provisions of California Code of Regulations, Title 16, as set forth in paragraphs
10 40-42 above, and as follows:

11 a. **Section 3340.35, subdivision (c):** Respondent Owner's employee issued
12 an electronic smog certificate of compliance for the 1988 Toyota Camry referenced in
13 paragraphs 40-42, above, even though the vehicle had not been inspected in accordance with
14 section 3340.42.

15 b. **Section 3340.42:** Respondent Owner's employee failed to conduct the
16 required smog tests on the 1988 Toyota Camry referenced in paragraphs 40-42, above, in
17 accordance with the Bureau's specifications.

18 **SIXTH CAUSE FOR DISCIPLINE**
19 **Smog Check Station License**
20 **(Violations of the Motor Vehicle Inspection Program)**

21 48. Respondent Owner has subjected her Smog Check Test-Only Station License to
22 discipline under H & S Code section 44072.2, subdivision (a), in that as set forth in paragraphs
23 40-42, above, Respondent Owner failed to materially comply with the following provisions of
24 California Code of Regulations, Title 16:

25 a. **Section 44012:** Respondent Owner's employee failed to perform complete
26 smog tests on the 1988 Toyota Camry in accordance with test procedures prescribed by the
27 department.

28 b. **Section 44012, subdivision (f):** Respondent Owner's employee failed to
perform a visual or functional check on the emission control devices of the 1988 Toyota Camry
in accordance with procedures prescribed by the department.

1 c. **Section 44015, subdivision (a)(1):** Respondent Owner's employee issued
2 an electronic smog certificate of compliance for the 1988 Toyota Camry that was modified to fail
3 a proper smog inspection due to the adjustment of the ignition timing to 20 degrees BTDC.

4 d. **Section 44015, subdivision (b):** Respondent Owner's employee willfully
5 made false entries for electronic Certificate of Compliance [REDACTED], certifying that the
6 1988 Toyota Camry had met the requirements of H & S Code section 44012 when, in fact, it had
7 not.

8 **SEVENTH CAUSE FOR DISCIPLINE**

9 **Smog Check Inspector License
(Failure to Comply with Regulations)**

10 49. Respondent Manager has subjected his Smog Check Inspector License to
11 discipline under H & S Code section 44072.2, subdivision (c), in that Respondent Manager failed
12 to comply with California Code of Regulations, Title 16, section 3340.41, subdivision (c), by
13 entering false vehicle identification information or emissions control system identification into
14 the EIS on the 1988 Toyota Camry referenced in paragraphs 40-42, above:

15 a. **Section 44012:** Respondent Manager failed to perform complete smog
16 tests on the 1988 Toyota Camry in accordance with test procedures prescribed by the
17 department.

18 b. **Section 44012, subdivision (f):** Respondent Manager failed to perform a
19 visual or functional check on the emission control devices of the 1988 Toyota Camry in
20 accordance with procedures prescribed by the department.

21 c. **Section 44015, subdivision (b):** Respondent Manager willfully made false
22 entries for electronic Certificate of Compliance [REDACTED], certifying that the 1988 Toyota
23 Camry had met the requirements of H & S Code section 44012 when, in fact, it had not.

24 d. **Section 44032:** Respondent Manager failed to perform tests of the
25 emission control devices and systems on the 1988 Toyota Camry in accordance with section
26 44012 of that Code, in that he was not the designated qualified smog check technician authorized
27 to have access to the station's EIS.

28

1 **EIGHTH CAUSE FOR DISCIPLINE**

2 **Smog Check Inspector License**
3 **(Violations of Regulations)**

4 50. Respondent Manager has subjected his Smog Check Inspector License to
5 discipline under Health and Safety Code section 44072.2, subdivision (c), in that on May 20,
6 2014, as referenced in paragraphs 40-42, above, he violated sections of the California Code of
7 Regulations, Title 16, as follows:

8 a. **Section 3340.30, subdivision (a):** Respondent Manager failed to inspect
9 and test the 1988 Toyota Camry as the designated licensed smog check inspector in accordance
10 with Health and Safety Code sections 44012 and 44035, and section 3340.42, as detailed in
11 subparagraph (d), below.

12 b. **Section 3340.41, subdivision (b):** Respondent Manager fraudulently
13 issued electronic Certificate of Compliance [REDACTED] for the 1988 Toyota Camry by
14 entering into the emissions inspection system the access code and qualification number of
15 Respondent Perez, the only licensed smog inspector authorized by the bureau.

16 c. **Section 3340.41, subdivision (c):** Respondent Manager entered false
17 information into the EIS for electronic Certificate of Compliance [REDACTED] for the 1988
18 Toyota Camry by entering vehicle information indicating that the vehicle passed the inspection
19 when it did not.

20 d. **Section 3340.42:** Respondent Manager failed to conduct the required
21 smog tests on the 1988 Toyota Camry in accordance with the Bureau's specifications.

22 **FACTUAL ALLEGATIONS**

23 **UNDERCOVER SURVEILLANCE: June 2014**

24 51. During three days of BAR undercover surveillance, Respondent Manager and
25 Respondent Perez were video recorded on five separate occasions falsifying entries and smog
26 test results at National City Smog Check. On one occasion, Respondent Perez utilized the clean-
27 piping method to perform a smog check of a vehicle while under Respondent Manager's direct
28 supervision. On four occasions, Respondent Manager performed smog check inspections using

1 Respondent Perez's license and access code to operate the Emission Inspection System (EIS) or
2 BAR 97.

3 **Clean Piped 1989 Toyota Corolla on June 11, 2014**

4 52. On June 11, 2014, Juan Carlos Perez (Respondent Perez), a licensed smog
5 inspector technician at National City Smog Check, owned by Michelle T. Huynh (Respondent
6 Owner), issued a smog Certificate of Compliance for a 1989 Toyota Corolla, VIN
7 1NXAE92E1KZ054661, CA License 2NZZ091 (1989 Toyota Corolla) using the clean-piping
8 method. Video surveillance revealed the following:

9 53. On June 11, 2014, at 9:01 a.m., Respondent Manager's father in-law drove a 1991
10 red Honda Accord into National City Smog Check's smog inspection test bay. At approximately
11 9:01 a.m. Respondent Manager inserted an EIS analyzer's sample probe into the 1991 red Honda
12 Accord's tailpipe. At 9:05 a.m., Respondent Perez arrived for work at National City Smog
13 Check. At 9:06 a.m., Respondent Manager removed the EIS sample hose from the 1991 red
14 Honda Accord's tailpipe. At 9:17 a.m., Respondent Perez entered the 1991 red Honda Accord's
15 driver seat and drove the 1991 red Honda Accord further into the smog bay. Respondent Perez
16 then inserted the EIS analyzer's sample probe into the 1991 red Honda Accord's tailpipe. At
17 9:29 a.m., the 1991 red Honda Accord backed out and left the smog bay.

18 54. Under Respondent Manager's supervision, Respondent Perez used the clean-
19 piping method to fraudulently certify that the 1989 Toyota Corolla passed a smog inspection.
20 Respondent Perez represented that he tested the 1989 Toyota Corolla from 9:15 a.m. to 9:28
21 a.m., when in reality he tested the 1991 red Honda Accord. While under Respondent Manager's
22 supervision, Respondent Perez used the "clean" exhaust from the 1991 red Honda Accord to
23 certify the exhaust of the 1989 Toyota Corolla. In reality, the 1989 Toyota Corolla was not even
24 present at Respondent Owner's testing bay during the smog test on record. Respondent Perez
25 certified to BAR that he had smog tested the 1989 Toyota Corolla and issued smog Certificate of
26 Compliance No. YH042312C for the 1989 Toyota Corolla, CA License 2NZZ091, when in fact
27 this was not true.

28

1 **Unauthorized Smog Check: 1998 BMW on June 11, 2014**

2 55. On June 11, 2014, Respondent Manager issued a smog Certificate of Compliance
3 for a 1998 BMW 3-Series, CA License 5HER943 (1998 BMW). According to the information
4 provided to BAR by Respondent Manager, Respondent Perez smog tested the 1998 BMW
5 between 8:37 a.m. and 8:52 a.m., on June 11, 2014. However, a BAR representative observed
6 and videotaped Respondent Manager using Respondent Perez's license and access code to
7 perform the unauthorized smog check inspection of the 1998 BMW.

8 56. The BAR representative also observed and recorded that between 8:37 a.m. and
9 8:52 a.m. (the time period that the smog inspection was performed), Respondent Owner's testing
10 bay was manned by Respondent Manager. Respondent Perez was not present as he had not even
11 arrived at work for the day. In fact, Respondent Perez did not arrive at National City Smog
12 Check until after Respondent Manager completed the smog inspection. Nevertheless,
13 Respondent Manager represented to BAR that Respondent Perez tested the 1988 BMW from
14 8:37 a.m. to 8:52 a.m., when in actuality it was Respondent Manager tested the 1998 BMW.
15 Respondent Manager used the license and access code of Respondent Perez to certify the 1998
16 BMW. Respondent Manager then certified to BAR that Respondent Perez had smog tested the
17 1998 BMW and issued passing smog Certificate of Compliance No. YH042311C for the 1998
18 BMW 3-Series, CA License 5HER943, when in fact this was not true.

19 **Unauthorized Smog Checks – 2004 Toyota Sienna on June 25, 2014**

20 57. On June 25, 2014, Respondent Manager attempted to issue a smog Certificate of
21 Compliance for a 2004 Toyota Sienna, CA License 5JKZ168. According to the information
22 provided to BAR by Respondent Manager, the 2004 Toyota Sienna was smog tested between
23 10:15 a.m. and 10:26 a.m., on June 25, 2014, by Respondent Perez. However, a BAR
24 representative videotaped and recorded Respondent Manager using Respondent Perez's license
25 and access code to perform an unauthorized smog check inspection on the 2004 Toyota Sienna.
26 Between 10:14 a.m. and 10:27 a.m., Respondent Owner's testing bay was manned by
27 Respondent Manager. Respondent Perez was not present as he had not even arrived a twork for
28 the day. In fact, Respondent Perez did not arrive at National City Smog Check until after

1 Respondent Manager attempted to perform the first smog inspection on the 2004 Toyota Sienna.
2 Respondent Manager represented that Respondent Perez tested the 2004 Toyota Sienna from
3 10:15 a.m. to 10:26 a.m., when in actuality it was Respondent Manager who tested the 2004
4 Toyota. Respondent Manager used the license and access code of Respondent Perez in
5 attempting to certify the 2004 Toyota Sienna. Respondent Manager certified to BAR that
6 Respondent Perez had attempted to perform an ASM test, which was aborted, on the 2004
7 Toyota Sienna, CA License 5JKZ168, when in fact this was not true.

8 58. After aborting the first test, Respondent Manager used Respondent Perez's license
9 and access code a second time to perform a smog check on the 2004 Toyota Sienna. Respondent
10 Manager represented that Respondent Perez tested the 2004 Toyota Sienna from 10:28 a.m. to
11 10:33 a.m., when in actuality it was Respondent Manager who tested the 2004 Toyota Sienna.
12 Between 10:28 a.m. and 10:36 a.m., Respondent Owner's test bay was manned by Respondent
13 Manager only and Respondent Perez had not even arrived at work yet. In fact, Respondent Perez
14 did not arrive at National City Smog Check until 10:49 a.m. Therefore, Respondent Manager
15 used the license and access code of Respondent Perez to certify the 2004 Toyota Sienna, when in
16 actuality, Respondent Perez was not even present at Respondent Owner's test bay during the
17 two-speed idle (TSI) test. Respondent Manager certified to BAR that Respondent Perez had
18 performed a TSI test on the 2004 Toyota Sienna, and issued smog Certificate of Compliance No.
19 YH288062C for the 2004 Toyota Sienna, CA License 5JKZ168, when in fact this was not true.

20 **NINTH CAUSE FOR DISCIPLINE**
21 **Automotive Repair Dealer Registration**
22 **(Untrue or Misleading Statements)**

23 59. Respondent Owner has subjected her Automotive Repair Dealer Registration to
24 discipline under Code section 9884.7, subdivision (a)(1), in that she made or authorized
25 statements which she knew or in the exercise of reasonable care should have known to be untrue
26 or misleading, as set forth in paragraphs 51-58 and follows:

27 a. Respondent Owner's employee certified under penalty of perjury on
28 Certificate of Compliance No. YH042311C that qualified smog check technician Respondent
Perez performed the test required on the emission control devices or systems of the 1998 BMW

1 3-Series, CA License 5HER943, when in fact, it was Respondent Manager who performed the
2 test required on the vehicle's emission control devices or systems.

3 b. Respondent Owner's employee certified under penalty of perjury on
4 Certificate of Compliance No. YH042312C that the 1989 Toyota Corolla, CA License 2NZZ091
5 had passed inspection and was in compliance with applicable laws and regulations when in fact,
6 Respondent Perez used the "clean-piping" method in order to issue the smog certificate of
7 compliance for the 1989 Toyota Corolla which had not been tested or inspected as required by H
8 & S Code section 44012. Respondent Perez never road tested the vehicle.

9 c. Respondent Owner's employee certified under penalty of perjury that
10 Respondent Perez was the only licensed smog technician employed by National City Smog
11 Check and that had access to EIS analyzer ES022542. In fact, it was Respondent Manager who
12 performed an aborted ASM test required on the emission control devices or systems of the 2004
13 Toyota Sienna, CA License 5JKZ168.

14 d. Respondent Owner's employee certified under penalty of perjury on
15 Certificate of Compliance No. YH288062C that qualified smog check technician Respondent
16 Perez performed the test required on the emission control devices or systems of 2004 Toyota
17 Sienna, VIN 5TDZA23C74S191053, CA License 5JKZ168 when in fact, it was Respondent
18 Manager who performed the test required on the vehicle's emission control devices or systems.

19 **TENTH CAUSE FOR DISCIPLINE**
20 **Automotive Repair Dealer Registration**
21 **(Fraud)**

22 60. Respondent Owner has subjected her Automotive Repair Dealer Registration to
23 discipline under Code section 9884.7, subdivision (a)(4), in that Respondent Owner committed
24 acts which constitute fraud by issuing electronic smog certificates of compliance for the three
25 vehicles referenced in paragraphs 51-58, above, without performing a bona fide inspection of the
26 emission control devices and systems on the vehicles by the designated licensed smog
27 technician, thereby depriving the People of the State of California of the protection afforded by
28 the Motor Vehicle Inspection Program (H & S Code section 44000, et seq.).

1 **ELEVENTH CAUSE FOR DISCIPLINE**
2 **Automotive Repair Dealer Registration**
3 **(Violations of the Motor Vehicle Inspection Program)**

4 61. Respondent Owner has subjected her Automotive Repair Dealer Registration to
5 discipline under H & S Code section 44072.2, subdivision (a), in that as set forth in paragraphs
6 51-58, above, Respondent Owner failed to materially comply with section 3373 of California
7 Code of Regulations, Title 16, when she made false or misleading records with respect to the
8 three vehicles by issuing smog certificates of compliance without performing bona fide
9 inspections, through her employee, of the emission control devices and systems on those
10 vehicles, thereby depriving the People of the State of California of the protections afforded under
11 the Motor Vehicle Inspection Program (H & S Code section 44000, et seq.).

12 **TWELFTH CAUSE FOR DISCIPLINE**
13 **Smog Check Station License**
14 **(Violations of the Motor Vehicle Inspection Program)**

15 62. Respondent Owner has subjected her Smog Check Test-Only Station License to
16 discipline under H & S Code section 44072.2, subdivision (a), in that as set forth in paragraphs
17 51-58, above, Respondent Owner failed to materially comply with the following provisions of
18 California Code of Regulations, Title 16:

19 a. **Section 44012:** Respondent Owner's employee failed to perform complete
20 smog tests on the three vehicles in accordance with test procedures prescribed by the department.

21 b. **Section 44012, subdivision (f):** Respondent Owner's employee failed to
22 perform visual or functional check on the emission control devices of the three vehicles in
23 accordance with procedures prescribed by the department.

24 c. **Section 44015, subdivision (b):** Respondent Owner's employee willfully
25 made false entries for electronic smog certificates of compliance certifying that the three vehicles
26 had met the requirements of H & S Code section 44012 when, in fact, they had not.

27 **THIRTEENTH CAUSE FOR DISCIPLINE**
28 **Smog Check Station License**
 (Failure to Comply with Regulations)

 63. Respondent Owner has subjected her Smog Check Test-Only Station License to
discipline under H & S Code section 44072.2, subdivision (c), in that as referenced in paragraphs

1 51-58, above, Respondent Owner failed to comply with provisions of California Code of
2 Regulations, Title 16, as follows:

3 a. **Section 3340.35, subdivision (c):** Respondent Owner's employee issued
4 electronic smog certificates of compliance for the three vehicles even though the vehicles had not
5 been inspected in accordance with section 3340.42.

6 b. **Section 3340.42:** Respondent Owner's employee failed to conduct the
7 required smog tests on the three vehicles in accordance with the Bureau's specifications.

8 **FOURTEENTH CAUSE FOR DISCIPLINE**

9 **Smog Check Inspector License
(Violation of Motor Vehicle Inspection Program)**

10 64. Respondent Manager has subjected his Smog Check Inspector License to
11 discipline under H & S Code section 44072.10, subdivision (c), and 44072.2, subdivision (a) in
12 that Respondent Manager failed to comply with the following sections of the Code as set forth in
13 paragraphs 51-58, above:

14 a. **Section 44012:** Respondent Manager failed to perform complete smog
15 tests on the 1998 BMW and 2004 Toyota Sienna in accordance with test procedures prescribed
16 by the department.

17 b. **Section 44012, subdivision (f):** Respondent Manager failed to perform
18 visual or functional check on the emission control devices in accordance with procedures
19 prescribed by the department.

20 c. **Section 44015, subdivision (b):** Respondent Manager willfully made false
21 entries for the electronic Certificates of Compliance, certifying that the vehicles met the
22 requirements of H & S Code section 44012 when, in fact, they had not.

23 d. **Section 44032:** Respondent Manager failed to perform tests of the
24 emission control devices and systems on the two vehicles in accordance with section 44012 of
25 that Code, in that he was not the designated qualified smog check technician authorized to have
26 access to the station's EIS machine.

27

28

1 **FIFTEENTH CAUSE FOR DISCIPLINE**

2 **Smog Check Inspector License**
3 **(Violations of Regulations)**

4 65. Respondent Manager has subjected his Smog Check Inspector License to
5 discipline under Health and Safety Code section 44072.10, subdivision (c) and 44072.2,
6 subdivision (a) and (c), in that he violated sections of the California Code of Regulations, Title
7 16, as set forth in paragraphs 51-58, above and as follows:

8 a. **Section 3340.30, subdivision (a):** Respondent Manager failed to inspect
9 1998 BMW and 2004 Toyota Sienna as the designated licensed smog check inspector in
10 accordance with Health and Safety Code sections 44012 and 44035, and section 3340.42, as
11 detailed in subparagraph (d), below.

12 b. **Section 3340.41, subdivision (b):** Respondent Manager falsely or
13 fraudulently issued electronic Certificates of Compliance by entering into the EIS the access
14 code and qualification number of Respondent Perez, the only licensed smog inspector authorized
15 by the bureau.

16 c. **Section 3340.42:** Respondent Manager failed to conduct the required
17 smog tests and inspections in accordance with the Bureau's specifications.

18 **SIXTEENTH CAUSE FOR DISCIPLINE**

19 **Smog Check Inspector License**
20 **(Aided and Abetted Clean-piping)**

21 66. Respondent Manager has subjected his Smog Check Inspector License to
22 discipline under Health and Safety Code section 44072.2, subdivision (a) and (d), in that he aided
23 and abetted another licensee in the clean-piping of the 1989 Toyota Corolla as set forth in
24 paragraphs 51-58, above.

25 **SEVENTEENTH CAUSE FOR DISCIPLINE**

26 **Smog Check Inspector License**
27 **(Failure to Comply with Regulations)**

28 67. Respondent Perez has subjected his Smog Check Inspector License to discipline
under H & S Code section 44072.2, subdivision (c), in that on June 11, 2014, Respondent Perez
failed to comply with California Code of Regulations, Title 16, section 3340.41, subdivision (c),

1 by entering false vehicle identification information or emissions control system identification
2 into the EIS on the 1989 Toyota Corolla, CA License 2NZZ091, referenced in paragraphs 51-54.

3 a. **Section 44012:** Respondent Perez failed to perform complete smog tests
4 on the 1989 Toyota Corolla in accordance with test procedures prescribed by the department.

5 b. **Section 44012, subdivision (f):** Respondent Perez failed to perform a
6 visual or functional check on the emission control devices of the 1989 Toyota Corolla in
7 accordance with procedures prescribed by the department.

8 c. **Section 44032:** Respondent Perez failed to perform tests of the emission
9 control devices and systems on the 1989 Toyota Corolla in accordance with section 44012 of that
10 Code, in that the vehicle had been clean piped.

11 d. **Section 44059:** Respondent Perez made false entries for electronic
12 Certificate of Compliance No. YH042312C, certifying that the 1989 Toyota Corolla had been
13 inspected as required when, in fact, it had not.

14 **EIGHTEENTH CAUSE FOR DISCIPLINE**

15 **Smog Check Inspector License
16 (Violations of Regulations)**

17 68. Respondent Perez has subjected his Smog Check Inspector License to discipline
18 under Health and Safety Code section 44072.2, subdivision (c), in that on June 11, 2014,
19 referenced in paragraphs 51-54, above, he violated sections of the California Code of
20 Regulations, Title 16, as follows:

21 a. **Section 3340.30, subdivision (a):** Respondent Perez failed to inspect and
22 test the 1989 Toyota, in compliance with the requirements of Health and Safety Code section
23 44012 and 44035, and section 3340.42, as detailed in subparagraph (d), below.

24 b. **Section 3340.41, subdivision (c):** Respondent Perez entered false
25 information into the EIS for electronic Certificate of Compliance No. YH042312C, by entering
26 vehicle identification information and emission control system identification for the 1989 Toyota
27 when he was testing a 1991 Honda.

28 c. **Section 3340.42:** Respondent Perez failed to conduct the required smog
tests and inspections on the 1989 Toyota in accordance with the Bureau's specifications.

MATTERS IN AGGRAVATION

69. To determine the degree of discipline, if any, to be imposed on Respondents,
Complainant alleges as follows:

a. On January 21, 2011, the Bureau issued Citation No. C2011-0833 to Respondent Owner, for violations of H & S Code section 44012, subdivision (f) (failure to determine that emission control devices and systems required by State and Federal law are installed and functioning correctly in accordance with test procedures); and California Code of Regulations, title 16, section 3340.35, subdivision (c) (issuing a certificate of compliance to a vehicle that was improperly tested). On December 8, 2010, Respondent Owner's employee issued Certificate of Compliance No. WP722142 to a Bureau undercover vehicle with the ignition timing adjusted beyond specifications and failed to perform the required low-pressure fuel evaporative test (LPFET)³. The Bureau assessed civil penalties totaling \$1,500.00 against Respondent Owner for the violations. Respondent Owner paid the fine on March 29, 2012.

b. On January 21, 2011, the Bureau issued Citation No. M2011-0834 to Respondent Manager, for violations of H & S Code section 44032 (qualified technicians shall perform tests of emission control systems and devices in accordance with section 44012 H & S); and California Code of Regulations, title 16, section 3340.30, subdivision (a) (qualified technicians shall inspect, test, and repair vehicles in accordance with sections 44012 H & S, 44035 H & S, and 3340.42 CCR). On December 8, 2010, Respondent Manager issued Certificate of Compliance [REDACTED] to a Bureau undercover vehicle with the ignition timing adjusted beyond specifications and failed to perform the required LPFET. The Bureau required Respondent Manager to enroll in a 16-hour training course for the violations. Respondent Manager completed the training on August 9, 2011.

c. On April 28, 2011, the Bureau issued Citation No. M2011-1282 to Respondent Manager, for violation of H & S Code section 44032 (qualified technicians shall

³ The LPFET functional test is performed on most 1995 and older vehicles. The technician is required to follow the procedures set forth in the Bureau's Smog Check Inspection Procedures Manual to determine if the vehicle requires an LPFET test.

1 perform tests of emission control systems and devices in accordance with section 44012 of the H
2 & S Code). On April 7, 2011, Respondent Manager issued Certificate of Compliance [REDACTED]
3 [REDACTED] to a Bureau undercover vehicle with a missing evaporator canister. The Bureau
4 required Respondent Manager to enroll in a 16-hour training course for the violations.
5 Respondent Manager completed the training on August 9, 2011.

6 d. On April 28, 2011, the Bureau issued Citation No. C2011-1281 to
7 Respondent Owner, for violation of H & S Code section 44012, subdivision (f) (failure to
8 determine that emission control devices and systems required by State and Federal law are
9 installed and functioning correctly in accordance with test procedures). On April 7, 2011,
10 Respondent Owner's employee issued Certificate of Compliance [REDACTED] to a Bureau
11 undercover vehicle with a missing evaporator canister. The Bureau assessed civil penalties
12 totaling \$1,500.00 against Respondent Owner for the violation. Respondent Owner paid the fine
13 on March 29, 2012.

14 OTHER MATTERS

15 70. Under Health and Safety Code section 44072.8, if Smog Check-Test Only Station
16 License Number TC 261929, issued to Michelle T. Huynh, owner of National City Smog Check,
17 is revoked or suspended, Automotive Repair Dealer Registration Number ARD 261929, and any
18 additional license issued under this chapter in the name of said licensee may be likewise revoked
19 or suspended by the director.

20 71. Under Health and Safety Code section 44072.8, if Smog Check Inspector License
21 Number EO 151008 issued to Kenny N. Huynh, is revoked or suspended, Smog Check Repair
22 Technician License Number EI 151008, and any additional license issued under this chapter in
23 the name of said licensee may be likewise revoked or suspended by the director.

24 72. Under Health and Safety Code section 44072.8, if Smog Check Inspector License
25 Number EO 632204 issued to Juan Carlos Perez, is revoked or suspended, Smog Check Repair
26 Technician License Number EI 632204, and any additional license issued under this chapter in
27 the name of said licensee may be likewise revoked or suspended by the director.

28

1 PRAYER

2 WHEREFORE, Complainant requests that a hearing be held on the matters herein
3 alleged, and that following the hearing, the Director of Consumer Affairs issue a decision:

4 1. Revoking or suspending Automotive Repair Dealer Registration Number ARD
5 261929, issued to Michelle T. Huynh, owner of National City Smog Check;

6 2. Revoking or suspending Smog Check-Test Only Station License Number TC
7 261929, issued to Michelle T. Huynh, owner of National City Smog Check;

8 3. Revoking or suspending Smog Check Inspector License Number EO 151008,
9 issued to Kenny N. Huynh;

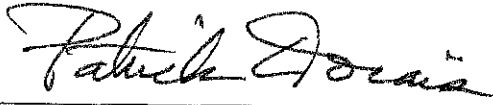
10 4. Revoking or suspending Smog Check Repair Technician License Number EI
11 151008, issued to Kenny N. Huynh;

12 5. Revoking or suspending Smog Check Inspector License Number EO 632204,
13 issued to Juan Carlos Perez;

14 6. Revoking or suspending Smog Check Repair Technician License Number EI
15 632204, issued to Juan Carlos Perez;

16 7. Ordering Michelle T. Huynh, Kenny N. Huynh, and Juan Carlos Perez to pay the
17 Bureau of Automotive Repair the reasonable costs of the investigation and enforcement of this
18 case, pursuant to Business and Professions Code section 125.3; and

19 8. Taking such other and further action as deemed necessary and proper.
20

21
22 DATED: December 22, 2015 

23 PATRICK DORAIS
24 Chief
25 Bureau of Automotive Repair
26 Department of Consumer Affairs
27 State of California
28 Complainant

24
25
26
27
28
SD2014708386