

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

In the Matter of the Accusation Against:

**DAVIS TEST ONLY SMOG TESTING, dba CITRUS HEIGHTS STAR SMOG; DANIEL**

**MCGARRY, aka DANIEL LAWRENCE MCGARRY,**

**PRESIDENT/SECRETARY/TREASURER**

8420 Auburn Blvd. B

Citrus Heights, CA 95610

Automotive Repair Dealer Registration No. ARD 263636

Smog Check Station License No. RC 263636

**DAVIS TEST ONLY SMOG TESTING, dba LINCOLN STAR SMOG; DANIEL MCGARRY,**

**aka DANIEL LAWRENCE MCGARRY, PRESIDENT/SECRETARY/TREASURER**

199 Lincoln Blvd.

Lincoln, CA 95648

Automotive Repair Dealer Registration No. ARD 275297

Smog Check Station License No. RC 275297

and

**DAVIS TEST ONLY SMOG TESTING, dba NORTH BEALE STAR SMOG DANIEL**

**MCGARRY; aka DANIEL LAWRENCE MCGARRY,**

**PRESIDENT/SECRETARY/TREASURER**

1152 North Beale Road, #2

Marysville, CA 95901

Mailing Address:

271 Unity Circle

Sacramento, CA 95833

Automotive Repair Dealer Registration No. ARD 278039

Smog Check Station License No. RC 278039

**DANIEL LAWRENCE MCGARRY**

8420 Auburn Blvd.

Citrus Heights, CA 95610

Smog Check Inspector License No. EO 142931

Smog Check Repair Technician License No. EI 142931

Respondents.

Case No. 77/17-18174

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**DECISION**

The attached Proposed Decision of the Administrative Law Judge is hereby accepted and adopted by the Director of the Department of Consumer Affairs as the Decision in the above-entitled matter.

This Decision shall be effective on April 12, 2022.

IT IS SO ORDERED this 7 day of March, 2022.



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GRACE ARUPO RODRIGUEZ  
Assistant Deputy Director  
Legal Affairs Division  
Department of Consumer Affairs

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

**In the Matter of the Accusation Against:**

**DAVIS TEST ONLY SMOG TESTING, dba CITRUS HEIGHTS  
STAR SMOG, LINCOLN STAR SMOG, and NORTH BEALE STAR  
SMOG, DANIEL MCGARRY, aka DANIEL LAWRENCE  
MCGARRY, PRESIDENT/SECRETARY/TREASURER; and  
DANIEL LAWRENCE MCGARRY, INDIVIDUALLY,**

**Respondents**

**Agency Case No. 77/17-18174**

**OAH No. 2018070406**

**PROPOSED DECISION**

Tiffany L. King, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference and telephone on January 6, 2022, from Sacramento, California.

Kevin Bell, Deputy Attorney General, represented Patrick Dorais (complainant), Chief of the Bureau of Automotive Repair (Bureau), Department of Consumer Affairs, State of California.

Daniel McGarry (respondent) represented himself.<sup>1</sup>

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on January 6, 2022.

## **FACTUAL FINDINGS**

1. In 2001, the BAR issued Advanced Emission Specialist Technician License Number EA 142931 (EA license) to respondent. On June 20, 2013, the EA license was renewed as Smog Check Inspector License Number EO 142931 and Smog Check Repair Technician License Number EI 142931. The smog check inspector and smog check repair technician licenses were in full force and effect at all times relevant to the matters herein, and will expire on June 30, 2023, unless renewed or revoked.

2. On May 18, 2018, complainant filed and served the Accusation against respondent alleging cause to discipline his licenses based upon his 2017 criminal conviction for assault. Respondent timely filed a notice of defense. The matter was

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<sup>1</sup> Prior to hearing, respondent Davis Test Only Smog Testing, doing business as Citrus Heights Star Smog, Lincoln Star Smog, and North Beale Star Smog, entered into a Stipulation and Agreement to resolve this matter as to that respondent only. This Decision, therefore, addresses only those allegations and charges against respondent McGarry individually.

continued several times while respondent's criminal appeal was pending. This hearing followed.

## **Criminal Conviction**

3. On June 20, 2017, in the Sacramento County Superior Court, Case No. 14F05046, respondent was found guilty by jury trial of violating Penal Code section 245, subdivision (a)(4) (assault by means of force likely to produce great bodily injury), a felony. On September 18, 2017, imposition of sentencing was suspended and respondent was placed on formal probation for five years. In addition, respondent was ordered to attend anger management counseling and a criminal thinking intervention program, pay restitution to the victim, and serve 364 days in the county jail with credit for time served (185 days).

4. Respondent appealed his conviction to the Third District Court of Appeal, which affirmed his conviction on June 18, 2021. He then sought review by the California Supreme Court, which denied his petition on September 15, 2021.

5. The circumstances underlying the conviction took place on July 12, 2014, at respondent's place of employment, Citrus Heights Star Smog. Between 8:00 and 8:30 a.m., customer Stephen Saunders (Saunders) dropped off his vehicle for a smog inspection. He left the vehicle at the facility and planned to return later to pick it up. At approximately 4:00 p.m., respondent performed a smog inspection of Saunders's vehicle, which did not pass. Saunders returned to the facility in a different car. His wife and children waited in the vehicle while Saunders met with respondent. When respondent informed him the vehicle had failed the inspection, Saunders was upset and asked for a discount on the price; respondent refused. A verbal argument ensued.

Respondent held the vehicle keys in his hand and refused to return them to Saunders because the bill was not paid.

At the time, Saunders stood approximately five feet five inches tall and weighed 145 pounds. Respondent stood approximately six feet five inches tall and weighed 245 pounds. When respondent refused to return the keys, Saunders reached for them in an unsuccessful attempt to forcibly take them from respondent. Respondent responded by putting him in a headlock and punching his head several times. Saunders fell to the ground and respondent climbed on top of him, preventing Saunders from escaping. Trying to get respondent to move, Saunders grabbed respondent's genitals and "squeezed" tightly. Respondent yelled and punched Saunders in the head again. Respondent then stood up and Saunders retreated to the vehicle holding his family.

Witnesses observed the altercation and notified the police. The police arrived to the scene and interviewed Saunders, respondent, and several eyewitnesses. The officers determined respondent was the aggressor and arrested him.

## **Respondent's Evidence**

6. At hearing, respondent testified that he punched Saunders in self-defense. He described the circumstances leading to the physical confrontation, which are summarized in pertinent part as follows. After respondent informed Saunders the vehicle failed the inspection, Saunders did not believe him and became very angry. He refused to pay the bill, then demanded a discount. He called respondent a "douche" and "chicken shit," and respondent "called him names back." Saunders demanded his keys, but respondent refused to return them while the bill remained unpaid. Saunders tried to grab the keys out of respondent's hand, and respondent put them in his pants

pocket. Saunders then reached for respondent's pocket, but respondent pushed him away and placed him in a headlock.

Saunders flailed his arms trying to hit respondent as respondent continued to hold him. He then grabbed respondent by his genitals and "squeezed hard." Respondent had "never experienced pain like that in [his] life." He released Saunders from the headlock and yelled at him to let go. When Saunders continued to hang on, respondent punched him in the face "five to ten times" until Saunders released his grip. Respondent feared that Saunders would go for his groin again, so he "pounced forward and threw [Saunders] on his stomach." Respondent then grabbed Saunders' shoulder, "slammed him down to the concrete," and jumped on his back as Saunders continued "trying to get" at him. A coworker heard the commotion and yelled at respondent to "get up." Respondent stood up and let Saunders go.

7. Respondent completed his court-ordered jail term. He was thereafter on felony probation supervised by the Sacramento County Probation Department and later transferred to the Yuba County Probation Department. He had no probation violations with either county. Pursuant to AB 1950,<sup>2</sup> respondent's probation was terminated early on January 21, 2021. Subsequently, the court reduced respondent's felony conviction to a misdemeanor on October 28, 2021.

8. In June 2020, respondent earned his juris doctor from the American International School of Law. He plans to sit for the California bar exam in February 2022.

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<sup>2</sup> Effective January 1, 2021, AB 1950 amended the Penal Code to shorten the length of probation in most felony cases to two years.



9. Respondent is married and has two minor children, ages 2 and 3. He continues to work as a smog technician and earns approximately \$60,000 gross annually. He is the sole financial support for his family. Respondent owns his home and has a mortgage. He has no other debt.

## **Analysis**

10. A criminal conviction is substantially related to the qualifications, functions, or duties of a licensee if "it evidences present or potential unfitness of a licensee to perform the functions authorized by the license . . . in a manner consistent with the public health, safety or welfare." (Cal. Code Regs., tit. 16, § 3395.2, subd. (a).) Factors to include in determining substantial relationship include the nature and gravity of the offense, the time elapsed since the offense occurred, and the nature and duties of the licensee. (*Id.* at subd. (b).)

11. Respondent's assault conviction arose out of his physical attack on a customer while respondent was on duty at a smog facility licensed by the Bureau. Such conduct was serious and evidences his unfitness to perform the functions authorized by his licenses. The offense occurred over seven years ago, though respondent was released from probation less than one year ago. Based thereon, respondent's conviction is substantially related to the qualifications, functions, or duties of a smog check inspector and repair technician.

## **FACTORS IN AGGRAVATION, MITIGATION, AND REHABILITATION**

12. The Bureau has adopted disciplinary guidelines entitled, "Guidelines for Disciplinary Orders and Terms of Probation" (Guidelines). (Cal. Code Regs., tit. 16, § 3395.4.) The Guidelines instruct that the determination whether to discipline a licensee

should be made only after consideration of the licensee's conduct and any factors introduced in aggravation, mitigation, and rehabilitation.

13. Respondent has no prior discipline with the Bureau. His conviction is over four years old, and the underlying conduct occurred more than seven years ago. Respondent has had no further arrests or convictions. He successfully completed his criminal probation, which ended two years early pursuant to AB 1950. Since the misconduct, respondent married and started a family. He also obtained his juris doctor and intends to sit for the California bar exam.

14. Notwithstanding the above, respondent offered little evidence of rehabilitation. Respondent has been off criminal probation for less than a year. (*In re Gossage* (2000) 23 Cal.4th 1080, 1099 [when a person is on criminal probation, rehabilitation efforts are accorded less weight since they are "required to behave in exemplary fashion"].) More significantly, respondent continues to refuse responsibility for his own conduct. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940 [fully acknowledging the wrongfulness of one's actions is an essential step towards rehabilitation].) Rather, he maintains his actions were justified. However, the fact that respondent may have been provoked by Saunders does not mitigate his wrongdoing. He punched Saunders in the head multiple times, caused him to fall on the ground, then climbed on top of him to prevent him from escaping. When Saunders grabbed respondent's genitals in self-defense, respondent punched him again. Respondent's conduct was exacerbated by the fact he was a foot taller and 100 pounds heavier than Saunders. Even assuming Saunders initiated the altercation, as purported by respondent, that fact does not justify respondent physically attacking him in an overwhelmingly disproportionate response.

15. Finally, respondent cannot impeach his conviction. (Arneson v. Fox (1980) 28 Ca.3d 440, 449 [a criminal conviction is conclusive evidence of defendant's guilt of the offense charged].) Respondent raised self-defense as an affirmative defense at his criminal trial, which the jury rejected. The conviction was upheld on appeal and the California Supreme Court declined review. Thus, respondent is precluded from relying on a self-defense argument in this matter.

### **APPROPRIATE DISCIPLINE**

16. For respondent's violation, the Guidelines recommend a maximum discipline of revocation and a minimum discipline of revocation stayed with five years' probation. The purpose of disciplinary proceedings is not to punish a licensee, but to ensure that a licensee does not pose a threat to the public health, safety, or welfare. When all the evidence is considered, and given the serious nature of respondent's offense and his steadfast refusal to accept any level of responsibility, revocation is appropriate and necessary to ensure the public's safety.

### **Costs**

17. Pursuant to Business and Professions Code section 125.3, the Bureau may recover its reasonable investigation and enforcement costs of a case. To do so, complainant must submit cost certifications that either "describe the general tasks performed, the time spent on each task and the hourly rate or other compensation for the service." (Cal. Code Regs., tit. 1, § 1042, subd. (b)(2).)

18. Complainant requested reimbursement of its investigation costs in the total amount of \$1,613.10, and submitted a supporting declaration by Bill Thomas, Program Representative II for the Bureau. Attached to the declaration is a document entitled "Investigative and Other Costs," which lists 21 hours expended in the

2017/2018 fiscal year at an hourly rate of \$76.81. However, neither the declaration nor its attachment describes the general tasks performed or the time spent on each task. For these reasons, the request for investigation costs does not comply with California Code of Regulations, title 1, section 1042, and must be denied.

19. Complainant also requested reimbursement of its enforcement costs in the total amount of \$23,185. These costs are supported by a Certification of Prosecution Costs: Declaration of Kevin W. Bell, and are accompanied by documents describing the general tasks performed, the time spent on each task, and the method of calculating the costs. Given the factual and legal matters raised in this case, and the cost information provided, these enforcement costs are reasonable and the activities conducted appear necessary and appropriate to the development and presentation of the case.

## **LEGAL CONCLUSIONS**

1. In a revocation proceeding, the Bureau must prove that charges in the Accusation are true by a preponderance of the evidence. (*Imports Performance et al. v. Dept. of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-918.) Respondent has the burden of establishing any affirmative defenses. Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Bd. of Retirement* (1984) 152 Cal.App.3d 775, 783.) To be "substantial," evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.)

2. The Bureau may discipline a license if the licensee is convicted of a crime that is substantially related to the qualifications, functions or duties of a licensee.

(Health & Saf. Code, § 44072.2, subd. (b).) As set forth in the Factual Findings as a whole, and particularly Factual Findings 10 and 11, respondent was convicted of assault, a crime substantially related to the qualifications, functions and duties of a smog check inspector and repair technician. Thus, cause exists to discipline his licenses pursuant to Health and Safety Code section 44072.2, subdivision (b).

3. As set forth in the Factual Findings as a whole, and particularly Factual Findings 12 through 16, respondent failed to demonstrate evidence of sufficient rehabilitation. In light of the serious nature of his misconduct, and refusal to accept responsibility therefor, his license should be revoked to protect the public health, safety and welfare.

## **Costs**

4. As set forth in Factual Findings 17 through 19, complainant has requested recovery of its investigation and enforcement costs pursuant to Government Code section 125.3. The request for investigation costs is denied as legally deficient. The requested enforcement costs are reasonable given the matters raised in this case.

5. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and Professions Code section 125.3. These factors include whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of his position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate in light of the alleged misconduct.

6. Here, respondent was unsuccessful in getting the charges dismissed or reduced. His defenses bordered on the frivolous, attempted to impeach the underlying jury conviction, and presented no colorable challenge to the proposed discipline. In light of this, the costs of enforcement are appropriate. Nevertheless, given that respondent is the sole financial support for his family and will likely lose his current source of income upon license revocation, a reduced cost recovery award of \$12,000 is appropriate.

### **ORDER**

Smog Check Inspector License Number EO 142931 and Smog Check Repair Technician License Number EI 142931, issued to respondent Daniel McGarry, are REVOKED.

As a condition precedent of any license reinstatement, respondent shall reimburse the Bureau the sum of \$12,000 for costs incurred in the enforcement of this matter. Said costs may be paid according to a payment plan approved by the Bureau or its designee.

DATE: February 10, 2022



TIFFANY L. KING

Administrative Law Judge

Office of Administrative Hearings