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

In the Matter of the Accusation Against: SAN RAFAEL SMOG 36 Lisbon Street San Rafael, California 94901 RAMIN ALIYEV, OWNER Automotive Repair Dealer Registration No. ARD 243548 Smog Check, Test Only Station License No. TC 243548, and RAMIN ALIYEV San Rafael, California Advanced Emission Specialist Technician License No. EA 147215, Respondents.	Case No. 79/09-94 OAH No. 2009050513

DECISION

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

This Decision shall become effective on 12/7/09.

IT IS SO ORDERED November 2, 2009.

DOREATHEA JOHNSON
Deputy Director, Legal Affairs
Department of Consumer Affairs

BEFORE THE
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BUREAU OF AUTOMOTIVE REPAIR
STATE OF CALIFORNIA

In the Matter of the Accusation Against: SAN RAFAEL SMOG 36 Lisbon Street San Rafael, California 94901 RAMIN ALIYEV, OWNER Automotive Repair Dealer Registration No. ARD 243548 Smog Check, Test Only Station License No. TC 243548, and RAMIN ALIYEV San Rafael, California Advanced Emission Specialist Technician License No. EA 147215, Respondents.	Case No. 79/09-94 OAH No. 2009050513

PROPOSED DECISION

On August 27, 2009, and September 3, 2009, in Oakland, California, Perry O. Johnson, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Kim M. Settles, Deputy Attorney General, represented Complainant Sherry Mehl.

Adam G. Slote, Attorney at Law of Slote and Links, 100 Pine Street, Suite 750, San Francisco, California 94111, represented Respondents San Rafael Smog and Ramin Aliyev.

On September 3, 2009, the parties submitted the matter and the record closed.

FACTUAL FINDINGS

1. On April 13, 2009, Complainant Sherry Mehl, in her official capacity as Chief, Bureau of Automotive Repair, Department of Consumer Affairs, State of California (Complainant), made the Accusation against both Respondent San Rafael Smog, with Ramin Aliyev as owner, and Respondent Ramin Aliyev.

Registration, Certificate and License Information

ARD Registration No. ARD 243548

2. On February 3, 2006, the Director of the Department of Consumer Affairs (the Director) issued Automotive Repair Dealer Registration No. ARD 243548 (ARD) to Respondent San Rafael Smog with its sole owner being Ramin Aliyev. Respondent San Rafael Smog's ARD was cancelled[1] on July 15, 2008. (The expiration date for the ARD had been set on January 31, 2009.)

Smog Check Station License No. TC 243548

3. On February 21, 2006, the Director issued Smog Check, Test Only Station License No. TC 243548 to Respondent San Rafael Smog. Respondent's smog check station license was cancelled on July 15, 2008. (The expiration date for the smog check station license had been set on January 31, 2009.)

Advanced Emission Specialist Technician No. EA 147215

4. In 2003, the Director issued Advanced Emission Specialist (EA) Technician license EA 147215 to Respondent Aliyev. The EA license will expire on April 30, 2011.

Investigator's Surveillance, Observations and Conclusions

5. On two dates in April 2008, Bureau Program Representative I Harold Jennings (BAR PR I Jennings) organized a surveillance of, and investigation into, the smog check station practices of individual employees or agents of Respondent San Rafael Smog.

Before activating the surveillance operation of activities at the premises of Respondent San Rafael Smog, BAR PR I Jennings analyzed computer database information gathered by the Bureau of all smog check stations. As measured against data from other smog check stations, BAR PR I Jennings discerned statistical anomalies in records of smog inspections performed by technicians at the facilities of Respondent San Rafael Smog. Results from an analysis of computerized data, which showed indicia of abnormal or irregular activities at the subject smog

[1] During the hearing of this matter, Respondent Aliyev established that in the summer of 2008 he sold his business interests in San Rafael Smog.

check facility, prompted BAR PR I Jennings to scrutinize the licensed status of the owners and licensed employees of Respondent San Rafael Smog.

Overview of Bureau Investigation

6. Through the collective investigative experience of its employees, the Bureau has become aware of several methods by which unethical practitioners in the smog inspection industry set out to issue fraudulent and illegal smog certification certificates. One method of such unethical, fraudulent and illegal practices is known as clean piping. To clean pipe, a smog check technician enters vehicle information into the EIS (that is, the BAR97 Emission Inspection System) for the vehicle that the technician wishes to certify and then the technician samples the exhaust of another vehicle that is known by the technician to be "clean running." By use of this method, the unethical technician is able to issue a smog certificate for a vehicle that either is not physically present for testing at the premises of the smog check facility or when the vehicle is known to be unable to pass the smog check test.

7. Under the leadership of BAR PR I Jennings, the surveillance of the premises of Respondent San Rafael Smog spanned two days that began on April 9, 2008, and concluded on April 24, 2008, when a videotape was retrieved from a surveillance camera. On the second day (April 22) of the two days of surveillance, BAR PR I Jennings supposedly detected that one act of illegal "clean piping" had been performed by Respondent Aliyev.

Alleged Single Instance of "Clean Piping" by Respondent San Rafael Smog

8. On April 22, 2008, over the period of time from approximately 6:35 a.m. until 6:51 p.m., Bureau Program Representative I (BAR PR I) Jennings caused one video camera and one time lapse video recorder to be secured at a location near the premises of Respondent San Rafael Smog. From a concealed vantage point, the camera was aimed at the garage door of the subject premises so as to track all vehicles that entered or exited the smog service bay of Respondent San Rafael Smog.

On April 24, 2008, BAR PR I Jennings retrieved the videotape and then he studied the videotape as well as the Bureau's Vehicle Information Database (VID) and BAR97 Test Summary and BAR97 Test Details for the vehicles that underwent smog inspections and had issued certification by Respondent San Rafael Smog on April 22, 2008. Because of his study and analysis, BAR PR I Jennings noted that for the period of between 1:53 p.m. and 2:08 p.m., that Smog Certification Compliance No. NA373542C was issued for a 1990 Ford Festiva automobile. The smog certification compliance document suggested that the Ford Festiva automobile had been lawfully tested. But the program representatives' review of the videotape for the surveillance of the facility on April 22, 2008, regarding the time of the supposed smog test of the Ford Festiva automobile, led the Bureau's agent to surmise that the Ford Festiva automobile was not in the smog service bay of the facility at the stated time so as to undergo a lawful smog inspection. The Bureau's program representative concluded that a

Toyota Camry automobile had been used in a clean piping scheme in order to certify that the Ford Festiva met standards for issuance of a certificate of compliance.

9. Notwithstanding the good faith effort of PR I Jennings, the weight of the evidence offered by respondents suggested that the program representative and other Bureau personnel erred in making a determination regarding an unlawful clean-piping of the Ford Festiva through the use of readings for a Toyota Camry.

Respondent Aliyev's Credible Testimonial Evidence

10. By his demeanor while testifying, his attitude towards the proceeding and the consistency in providing an account of substantial matters concerning the conduct and business practices of Respondent San Rafael Smog, Respondent Aliyev demonstrated that he was a credible[2] and forthright witness at the hearing on various aspects of his testimony.

11. Respondent Aliyev studied courses at Skyline College in San Bruno, California, in order to pass the test to gain licensure in 2003 as a smog check technician. He gained practical experience at a shop operated by a friend before he became the sole proprietor of Respondent San Rafael Smog.

12. Before the subject accusation, the Bureau has never imposed any form of disciplinary action against the licenses held by Respondent.

13. On April 22, 2008, Respondent Aliyev performed either 22 or 23 smog inspections, with three of those vehicles failing the smog inspections on that day. Respondent Aliyev had a busy time on the subject day and he used each of the two test bays on the premises of San Rafael Smog. At the time of the testing of the Ford Festiva, Respondent Aliyev also attended to the testing of an Infiniti automobile. He was convincing that he performed different aspects of smog test on the two vehicles at the same approximate time. After he completed the test for the Infiniti automobile, Respondent Aliyev caused the Toyota Camry to be driven into one of the two bays within the smog check facility. Even though he performed the test on the BAR Test 97 analyzer for the Ford Festiva and caused that automobile to be driven out of the test bay, later in the afternoon but within a few minutes of having recorded the results on the Vehicle Inspection Report document, Respondent Aliyev drove the Ford Festiva back into the test bay so that he could recheck the timing for the vehicle.

14. Respondent Aliyev compellingly pointed out that the surveillance filming of San Rafael Smog as effected by Complainant's program representatives showed a very small portion of the premises and the movement of vehicles into and out of the shop check bays. Importantly, the filming failed to show the parked vehicles that were in line for smog check

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[2] California Government Code section 11425.50, subdivision (b), third sentence.

testing. And at times, traffic on the street in front of the smog station's door blocked the camera's view.

Matters in Mitigation

15. On average, Respondent Aliyev performed about 350 smog inspections each month at the premises of Respondent San Rafael. He has had an unblemished report of completing accurate smog inspections.

16. Evidence did not establish that Respondents' acts or their employees involved any pattern or practice of unlawful conduct.

17. Respondent Aliyev was not an "absentee manager" of the subject smog check station. Rather, during the time of the Bureau's investigation, Respondent Aliyev was a full-time operator and manager of the business's smog check operations.

Respondents' Expert Witness

18. Respondents called Mr. Edward "Ed" Jaramillo[3] to offer persuasive and compelling testimonial evidence and opinions as an expert witness. By his experience, training and education, Mr. Jaramillo demonstrated his ability to establish himself as a reliable expert witness.

19. Mr. Jaramillo expressed a reasonable opinion that the respective Smog Check Vehicle Inspection Report (VIR) documents that pertained to the 1990 Ford Festiva and the 1996 Toyota Camry were not consistent with demonstrating unlawful clean-piping activity. His opinion focused upon knocks (NO PPM) readings under the ASM Emission Test Results on the VIR documents. For the Toyota Camry the NO PPM was tested by respondents at 59 NO PPM at 15 miles per hour and 6 NO PPM at 25 miles per hour. The average reading for the Toyota Camry are 57 NO PPM at 15 miles per hour and 50 No PPM at 25 miles per hour. The test results on the VIR document produced by respondents were low for a Toyota Camry. In the instance of the Ford Festiva the NO PPM was tested by respondents according to the VIR document at 797 NO PPM at 15 miles per hour and 453 NO PPM at 25 miles per hour.

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[3] Mr. Jaramillo has for the past twenty years worked as an automotive instructor within the Automotive Repair Department at the College of Alameda. As part of the full-time college faculty, Mr. Jaramillo has taught the BAR Clean-Air courses, the Electronic Engine Controls course, Engine Performance and Emission Control courses as well as other courses pertaining to automotive repair. In the process of teaching smog check training courses, Mr. Jaramillo has used the BAR 97 certification system on hundreds of vehicles. Before he became a college instructor in the automotive repair course of study, Mr. Jaramillo has had practical experience in smog testing and engine emission control systems. In addition he has Automotive Service Excellence (ASE) designations in eight areas including engine performance, advanced engine performance, and engine repairs. And currently Mr. Jaramillo is a licensed smog check technician.

Average readings for a Ford Festiva are 237 NO PPM at 15 miles per hour and 50 NO PPM at 25 miles per hour. Such test results for the Ford Festiva on the VIR produced by respondents were above average but not untypical for a Ford Festiva, which has a maximum of 889 NO PPM at 15 miles per hour and 828 NO PPM at 25 miles per hour.

Mr. Jaramillo opined that the Ford Festiva was 18 years old at the testing on April 22, 2008, so that the smog test's knocks results were not peculiar. With aging, carbon deposits build up at the top of the pistons, which raises the compression level so that knocks are created within the engine when it reaches 2,500 degrees of internal temperature. On the other hand, the Toyota was a much newer model car so that there was less build-up of carbon so that fewer knocks were detected in the VIR document. Had the Toyota Camry been used to clean-pipe the Ford Festiva, the VIR document's NO PPM reading for the Ford (797 and 453) should have been closer to the reading of the Camry (59 and 6).

Mr. Jaramillo noted that clean-piping activity would have been implausible with regard to the two vehicles involved in this matter insofar as the on-board diagnostic-two (OBD-2), which is a monitoring system built into newer vehicles. The Toyota Camry is an OBD-2 car. But the Ford Festiva is not an OBD-2 vehicle. Mr. Jaramillo persuasively pointed out the great unlikelihood on the part of a technician to manipulate a Toyota Camry to appear to be a Ford Festiva.

Mr. Jaramillo further showed that clean-piping of the Ford Festiva by use of the Toyota Camry was not probable because of the disparate weights of the two vehicles. Respondents' expert witness pointed out the VIR documents were believable as the test weights for the Toyota Camry (3,625 pounds) versus Ford Festiva (2,125 pounds).

Mr. Jaramillo was credible in expressing his opinion on an ultimate issue, namely, that the Ford Festiva as not clean-piped by use of the Toyota Camry.

Complainant's Request for Recovery of Costs of Investigation and Prosecution and Respondent's Objection to Imposition of Costs

20. Complainant requested that Respondent San Rafael Smog be ordered to pay the Bureau its costs of investigation and prosecution under Business and Professions Code section 125.3. In support of its request for cost recovery, Complainant offered a declaration, dated June 2, 2009, by Curtis Worden, Program Manager I, Bureau of Automotive Repair, as well as the declaration, dated August 27, 2008, by Kim M. Settles, Deputy Attorney General. The declarations state that the Bureau has incurred the following costs in connection with the investigation and prosecution of this accusation:

Investigative services by Bureau staff including travel time, investigative time, report writing and travel time and clerical services $10,778.36

Attorney General's Office costs that includes the work of deputy attorney general in litigation preparation ..... $ 4,176.75

Total Costs $14,176.11

21. Respondent Aliyev made a demand to require testimony from Bureau employees that sought a statement of greater detail of the time expended by Bureau personnel regarding the efforts recorded in the declarations of Bureau employees as set out in the substantive evidence offered in this matter. The declarations by Bureau personnel failed to show in adequate descriptive language the efforts and expenditure of time for the investigative services as reflected in the cost certification by Program Manager Worden. The declaration by Program Manager Worden does fairly present such information by which the reasonableness of the costs may be determined or apportioned for the Bureau's activities before June 2008. The declaration and its attachment fail to provide a requisite general overview, yet clear, description of the tasks performed, the time spent in attending to such tasks, and the methods of tabulating the hours involved in calculating the costs as set out in California Code of Regulations, title 1, section 1042.

22. The nature of the Bureau's declarations and supporting documents for Complainant's Certification of Costs do not establish that the Bureau is entitled to the full measure of its costs of investigation and prosecution. The facts developed at the hearing do not indicate that Complainant's personnel expended objective and thorough analytical efforts in the investigation of this matter. (However, the declaration by the deputy attorney general establishes adequate specificity as to warrant recovery, if Complainant prevailed in this matter. The declaration by the deputy attorney general, involving in the prosecution of this matter, showed that she devoted ample documented time, which is found to have been of a reasonable and prudent nature, for the prosecution of this matter.)

23. Respondent San Rafael Smog and Respondent Aliyev did advance a meritorious defense in the exercise of their right to a hearing in this matter. Respondents did show that components or allegations in the investigative reports by various program representatives were not established by either evidence or by stipulations. Also, Respondent Aliyev's employees, under the facts set out above, appear to have committed no or possibly slight or inconsequential error[4] in the context of the Accusation. And, Respondent San Rafael Smog raised a "colorable challenge" to Complainant's Accusation's paramount cause for discipline, namely fraudulent acts in conducting the business of a smog check station.

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[4] That is performing the smog test readings on the analyzer for the Ford Festiva, moving the vehicle from the test bay, moving another vehicle into the test bay and then returning the Ford Festiva into the test bay to only examine the engine timing.

The immediate foregoing factors indicate that the imposition upon respondents of the full costs of investigation and prosecution will penalize respondents.

A substantial basis exists to warrant expungement of the assessment against Respondent San Rafael Smog and Respondent Aliyev for the costs of investigation and prosecution incurred by Complainant.

Complainant's Failure of Proof

24. Complainant's witnesses were not persuasive on various matters.

The lead investigating program representative insisted during direct testimony that he closely scrutinize the surveillance film of respondent's smog check station and that for all relevant time he could visually discern all movements of vehicles in and out of the smog test bays at the station. But on cross-examination, Respondent Aliyev persuasively established that the lone camera's single focus of surveillance was blocked for significant time by street traffic that passed in front of the camera's lens.

In another instance, the program representatives proclaimed that Respondent San Rafael Smog had only one test bay, and hence without two bays within the facility the Ford Festiva and the Camry Toyota could not have been both within the smog check station. But through the testimony of the current operator of San Rafael Smog, the station was shown currently to have one test bay because after the new station operator purchased the business from Respondent Aliyev in the summer of 2008, the new owner changed the shop's interior from two test bays to the current single bay.

The failure of proof renders Complainant unable to establish by clear and convincing evidence the causes for discipline as alleged in the Accusation.

Ultimate Findings

25. On April 22, 2008, Complainant did not establish by clear and convincing evidence that Respondent San Rafael Smog, through Respondent Aliyev, made written statements in the issuance of a bogus certificate of compliance for the Ford Festiva. The Vehicle Inspection Report as issued for the Ford Festiva cannot be found to be untrue or misleading.

26. Complainant did not establish by clear and convincing evidence that the Bureau's investigator correctly inferred that Respondent Aliyev on April 22, 2008, falsely signed, under penalty of perjury, the smog check certificate of compliance that the Ford Festiva automobile had not been inspected in accordance with all Bureau requirements. Nor did Complainant establish that the certificate of compliance or Vehicle Inspection Report for

the Ford Festiva automobile, as a work product of the subject smog check station as signed by Respondent Aliyev was fraudulent.

LEGAL CONCLUSIONS

The Standard of Proof

1. The standard of proof in an administrative disciplinary action that seeks the suspension or revocation of a real estate professional's license is "clear and convincing evidence to a reasonable certainty." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 583.)

The standard of proof known as clear and convincing evidence is required where particularly important individual interests or rights are at stake. (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487.) "Clear and convincing evidence" means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered. "Clear and convincing evidence" is a higher standard of proof than proof by "a preponderance of the evidence." (*CACI*[5] 201.) "Clear and convincing evidence" requires a finding of high probability for the propositions advanced in an Accusation against a targeted licensee. It must be so clear as to leave no substantial doubt and to command the unhesitating assent of every reasonable mind. (*In re Michael G.* (1998) 63 Cal.App.4th 700.)

Complainant did not establish by clear and convincing evidence the legal conclusions below upon which disciplinary action is imposed upon Respondents herein.

No Cause for Discipline

2. Business and Professions Code section 9884.7, subdivision (a)(1), sets forth that the Director may invalidate temporarily or permanently an automobile repair dealer registration when the licensee has committed acts or through omissions allowed the "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 the exercise of reasonable care should be known, to be untrue or misleading."

No cause exists for discipline of Respondent San Rafael Smog's automotive repair dealer registration under Business and Professions Code section 9884.7, subdivision (a)(1), by reason of the matters set forth in Factual Findings 10 through 19, 25 and 26.

3. Business and Professions Code section 9884.7, subdivision (a)(4), provides, in part, that "where the automotive repair dealer cannot show a bona fide error" the Director of the

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[5] Judicial Council of California, Civil Jury Instructions.

Department of Consumer Affairs may invalidate temporarily or permanently an automobile repair dealer registration for "any . . . conduct [that] constitutes fraud."

> Fraud assumes so many shapes that courts and authors have ever been cautious in attempting to define it. Each case must be considered on its own facts. [Citation omitted.] In its generic sense, constructive fraud comprises all acts, omissions and concealment involving a breach of legal or equitable duty, trust, or confidence, and resulting in damage to others. . . . Constructive fraud exists in cases in which conduct, although not actually fraudulent, ought to be so treated. . . . Constructive fraud, as contrasted to actual fraud, may be defined as a breach of legal or equitable duty which, irrespective of the moral guilt or intent of the fraud feasor, the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. (*County of Santa Cruz v. McLeod* (1961) 189 Cal.App.2d. 222, 234.)

Fraud under the subject Code section entails fraud[6] in the context of contract law. Under Civil Code section 1572, actual fraud: ". . . consists in any of the following acts, committed by a party to the contract, or with his connivance, with the intent to deceive another party thereto, or to induce him to enter into that contract:

> a. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
>
> b. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
>
> c. The suppression of that which is true, by one having knowledge or belief of the fact;
>
> d. A promise made without any intention of performing it; or,
>
> e. Any other act to deceive.

Under California law, in order to find a person culpable of actual fraud, the party must be shown to have concealed material facts from the victim with an intent thereby to deceive the victim or to induce the victim to enter into a contract. (*Earl v. Saks & Co.*

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[6] Civil Code section 1571, et seq.

(1951) 36 Cal.2d 602. See also, *Finch v. Hughes Aircraft Co.* (1994) 465 A.2d 867, 57 MD. App. 190.)

No cause exists for discipline of Respondent San Rafael Smog's automotive repair dealer registration under Business and Professions Code section 9884.7, subdivision (a)(4), by reason of the matters set forth in Factual Findings 10 through 19, 25 and 26.

3. Health and Safety Code section 44072.2, subdivision (a), prescribes that the Director may suspend or revoke the license of a smog check station due to the licensee, or its employees, failure to meet or maintain the standards required by the Motor Vehicle Inspection program as executed by the Bureau.

No cause exists for discipline of Respondent San Rafael Smog's smog check station license under Health and Safety Code section 44072.2, subdivision (a), by reason of the matters set forth in Factual Findings 10 through 19, 25 and 26.

4. No cause exists for discipline of Respondent Aliyev's advanced emission specialist technician license under Health and Safety Code section 44072.2, subdivision (a), by reason of the matters set forth in Factual Findings 10 through 19, 25 and 26.

5. Health and Safety Code section 44072.2, subdivision (c), declares, in part that 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, violates any of the regulations adopted by the director pursuant to this chapter.

No cause exists for discipline of Respondent San Rafael Smog's smog check station license under Health and Safety Code section 44072.2, subdivision (c), by reason of the matters set forth in Factual Findings 10 through 19, 25 and 26.

6. No cause exists for discipline of Respondent Aliyev's advanced emission specialist technician license under Health and Safety Code section 44072.2, subdivision (c), by reason of the matters set forth in Factual Findings 10 through 19, 25 and 26.

7. Health and Safety Code section 44072.2, subdivision (d), provides that 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, commits any act involving dishonesty, fraud, or deceit whereby another is injured.

No cause exists for discipline of the smog check station license under Health and Safety Code section 44072.2, subdivision (d), by reason of the matters set forth in Factual Findings 22 and 23.

8. No cause exists for discipline of Respondent Aliyev's advanced emission specialist technician license under Health and Safety Code section 44072.2, subdivision (d), by reason of the matters set forth in Factual Findings 10 through 19, 25 and 26.

Costs of Investigation and Prosecution

9. Business and Professions Code section 125.3 prescribes that a "licentiate found to have committed a violation or violations of the licensing act" may be directed "to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

California Code of Regulations, title 1, section 1042, subdivision (2) sets forth "a certificate or affidavit in support of costs incurred by the agency for services provided by regular agency employees should include sufficient information by which the ALJ can determine the costs incurred in connection with the matter and the reasonableness of such costs, for example, a general description of tasks performed, the time spent on such tasks, and the method of calculation the cost for such services."

Respondent Aliyev's motion to strike Complainant's petition for an award of costs is granted.

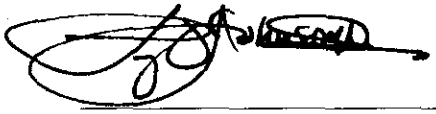
A licensing agency's action to fairly and conscientiously impose costs in administrative adjudication is articulated in *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45-46. The decision is persuasive and should be considered in this matter. Scrutiny of certain factors, which pertain to the Bureau's exercise of discretion to analyze or examine factors that might mitigate or reduce costs of investigation and prosecution upon a licensee found to have engaged in unprofessional conduct, are set forth in Factual Finding 23.

By reason of Factual Findings 21 through 23, as well as the Legal Conclusion above that determine no cause to sustain the allegations in the Accusation, Complainant is not entitled, on behalf of the Bureau, to recover costs or expenses of investigation and prosecution in this matter.

ORDER

The Accusation is dismissed as against the licenses respectively issued to Respondent San Rafael Smog, with Ramin Aliyev as owner, as an Automotive Repair Dealer Registration holder and as a Smog Check, Test Only Station, and Respondent Ramin Aliyev in his individual capacity as an Advanced Emission Specialist Technician.

DATED: October 5, 2009



PERRY O. JOHNSON
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BEFORE THE
DEPARTMENT OF CONSUMER AFFAIRS
FOR THE BUREAU OF AUTOMOTIVE REPAIR
STATE OF CALIFORNIA

In the Matter of the Accusation Against: **SAN RAFAEL SMOG** 36 Lisbon Street San Rafael, California 94901 **RAMIN ALIYEV, OWNER** Automotive Repair Dealer Registration No. ARD 243548 Smog Check, Test Only Station License No. TC 243548, and **RAMIN ALIYEV** 36 Lisbon Street San Rafael, California 94901 Advanced Emission Specialist Technician No. EA 147215, Respondents.	79/09-94 Case No. **ACCUSATION** **[SMOG CHECK]**

Sherry Mehl ("Complainant") alleges:

PARTIES

1. Complainant brings this Accusation solely in her official capacity as the Chief of the Bureau of Automotive Repair ("Bureau"), Department of Consumer Affairs.

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Automotive Repair Dealer Registration

2. On or about February 3, 2006, the Bureau issued Automotive Repair Dealer Registration Number ARD 243548 ("registration") to Ramin Aliyev doing business as San Rafael Smog ("Respondent"). The registration was canceled on July 8, 2008, and expired on January 31, 2009.

Smog Check Test Only Station License

3. On or about February 21, 2006, the Bureau issued Smog Check Test Only Station License Number TC 243548 ("station license") to Respondent. The station license was canceled on July 8, 2008, and expired on January 31, 2009.

Advanced Emission Specialist Technician License

4. On a date uncertain in 2003, the Bureau issued Advanced Emission Specialist Technician Number EA 147215 ("technician license") to Respondent. The technician license will expire on April 30, 2009, unless renewed.

STATUTORY PROVISIONS

5. Section 9884.7 of the Business and Professions Code ("Code") states, in pertinent part:

> (a) The director, where the automotive repair dealer cannot show there was a bona fide error, may refuse to validate, or may invalidate temporarily or permanently, 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 the exercise of reasonable care should be known, to be untrue or misleading.
>
> (4) Any other conduct which constitutes fraud.
>
> (b) Except as provided for in subdivision (c), if an automotive repair dealer operates more than one place of business in this state, the director pursuant to subdivision (a) shall only invalidate temporarily or permanently the registration of the specific place of business which has violated any of the provisions of this chapter. This violation, or action by the director, shall not affect in any manner the right of the automotive repair dealer to operate his or her other places of business.

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(c) Notwithstanding subdivision (b), the director may invalidate temporarily or permanently, the registration for all places of business operated in this state by an automotive repair dealer upon a finding that the automotive repair dealer has, or is, engaged in a course of repeated and willful violations of this chapter, or regulations adopted pursuant to it.

6. Code section 9884.13 provides, in pertinent part, that the expiration of a valid registration shall not deprive the director or chief of jurisdiction to proceed with a disciplinary proceeding against an automotive repair dealer or to render a decision invalidating a registration temporarily or permanently.

7. Code section 477 provides, in pertinent part, that "Board" includes "bureau," "commission," "committee," "department," "division," "examining committee," "program," and "agency." "License" includes certificate, registration or other means to engage in a business or profession regulated by the Code.

8. Section 44002 of the Health and Safety Code provides, in pertinent part, that the Director has all the powers and authority granted under the Automotive Repair Act for enforcing the Motor Vehicle Inspection Program.

9. Section 44072.2 of the Health and Safety Code states, in pertinent 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.

(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.

10. Section 44072.6 of the Health and Safety Code provides, in pertinent part, that the expiration or suspension of a license by operation of law, or by order or decision of the Director of Consumer Affairs, or a court of law, or the voluntary surrender of the license shall not deprive the Director of jurisdiction to proceed with disciplinary action.

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11. Section 44072.8 of the Health and Safety Code 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."

COST RECOVERY

12. Code section 125.3 provides, in pertinent part, that a 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 the investigation and enforcement of the case.

SURVEILLANCE OPERATION - APRIL 22, 2008

13. On or about April 22, 2008, the Bureau performed a videotaped surveillance at Respondent's facility. The surveillance operation and information obtained from the Bureau's Vehicle Information Database ("VID") revealed that from approximately 1353 hours to 1408 hours, Respondent performed one (1) smog inspection that resulted in the issuance of electronic Certificate of Compliance No. NA373542C, certifying that he had tested and inspected a 1990 Ford Festiva and that vehicle was in compliance with applicable laws and regulations. In fact, Respondent performed the smog inspection using the clean piping[1] method by using the tail pipe emissions of a blue colored Toyota station wagon in order to issue the certificate of compliance. The vehicle certified was not in the test bay at the time of the smog inspection.

FIRST CAUSE FOR DISCIPLINE

(Misleading Statements)

14. Respondent has subjected his registration to discipline under Code section 9884.7, subdivision (a)(1), in that on or about April 22, 2008, he made statements which he knew or which by exercise of reasonable care he should have known were untrue or misleading when

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1. "Clean piping" is sampling the (clean) tailpipe emissions and/or the RPM readings of another vehicle for the purpose of illegally issuing smog certifications to vehicles that are not in compliance or are not present in the smog check area during the time of the certification.

he issued electronic Certificate of Compliance No. NA373542C for the 1990 Ford Festiva, certifying that he had tested and inspected the vehicle and that the vehicle was in compliance with applicable laws and regulations when, in fact, the vehicle had been clean piped.

SECOND CAUSE FOR DISCIPLINE

(Fraud)

15. Respondent has subjected his registration to discipline under Code section 9884.7, subdivision (a)(4), in that on or about April 22, 2008, he committed acts which constitute fraud by issuing electronic Certificate of Compliance No. NA373542C for the 1990 Ford Festiva without performing a bona fide inspection of the emission control devices and systems on that vehicle, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

THIRD CAUSE FOR DISCIPLINE

(Violation of the Motor Vehicle Inspection Program)

16. Respondent has subjected his station license to discipline under Health and Safety Code section 44072.2, subdivision (a), in that on or about April 22, 2008, regarding the 1990 Ford Festiva, he violated sections of that Code, as follows:

a. **Section 44012, subdivision (a):** Respondent failed to determine that all emission control devices and systems required by law were installed and functioning correctly in accordance with test procedures.

b. **Section 44012, subdivision (f):** Respondent failed to perform emission control tests on that vehicle in accordance with procedures prescribed by the department.

c. **Section 44015, subdivision (b):** Respondent issued electronic Certificate of Compliance No. NA373542C without properly testing and inspecting the vehicle to determine if it was in compliance with section 44012 of that Code.

d. **Section 44059:** Respondent willfully made false entries for electronic Certificate of Compliance No. NA373542C, certifying that the vehicle had been inspected as required when, in fact, it had not.

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FOURTH CAUSE FOR DISCIPLINE

(Violations of Regulations Pursuant to the Motor Vehicle Inspection Program)

17. Respondent has subjected his station license to discipline under Health and Safety Code section 44072.2, subdivision (c), in that on or about April 22, 2008, regarding the 1990 Ford Festiva, he violated sections of the California Code of Regulations, title 16, as follows:

a. **Section 3340.24, subdivision (c):** Respondent falsely or fraudulently issued electronic Certificate of Compliance No. NA373542C without performing a bona fide inspection of the emission control devices and systems on that vehicle as required by Health and Safety Code section 44012.

b. **Section 3340.35, subdivision (c):** Respondent issued electronic Certificate of Compliance No. NA373542C for that vehicle even though the vehicle had not been inspected in accordance with section 3340.42 of that Code.

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

FIFTH CAUSE FOR DISCIPLINE

(Dishonesty, Fraud or Deceit)

18. Respondent subjected his station license to discipline under Health and Safety Code section 44072.2, subdivision (d), in that on or about April 22, 2008, regarding the 1990 Ford Festiva, he committed acts involving dishonesty, fraud or deceit whereby another was injured by issuing electronic Certificate of Compliance No. NA373542C without performing a bona fide inspection of the emission control devices and systems on that vehicle, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

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SIXTH CAUSE FOR DISCIPLINE

(Violations of the Motor Vehicle Inspection Program)

19. Respondent has subjected his technician license to discipline under Health and Safety Code section 44072.2, subdivision (a), in that on or about April 22, 2008, regarding the 1990 Ford Festiva, he violated sections of that Code, as follows:

a. **Section 44012, subdivision (a):** Respondent failed to determine that all emission control devices and systems required by law were installed and functioning correctly in accordance with test procedures.

b. **Section 44012, subdivision (f):** Respondent failed to perform emission control tests on that vehicle in accordance with procedures prescribed by the department.

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

d. **Section 44059:** Respondent willfully made false entries for electronic Certificate of Compliance No, NA373542C, certifying that the vehicle had been inspected as required when, in fact, it had not.

SEVENTH CAUSE FOR DISCIPLINE

(Violations of Regulations Pursuant to the Motor Vehicle Inspection Program)

20. Respondent has subjected his technician license to discipline under Health and Safety Code section 44072.2, subdivision (c), in that on or about April 22, 2008, regarding the 1990 Ford Festiva, he violated sections of the California Code of Regulations, title 16, as follows:

a. **Section 3340.24, subdivision (c):** Respondent falsely or fraudulently issued electronic Certificate of Compliance No. NA373542C without performing a bona fide inspection of the emission control devices and systems on that vehicle as required by Health and Safety Code section 44012.

b. **Section 3340.30, subdivision (a):** Respondent failed to inspect and test that vehicle in accordance with Health and Safety Code section 44012.

c. **Section 3340.41, subdivision (c):** Respondent entered false information into the Emission Inspection System for electronic Certificate of Compliance No. NA373542C by entering vehicle identification information or emission control information for a vehicle other than the vehicle being certified.

d. **Section 3340.42:** Respondent failed to conduct the required smog tests and inspections on that vehicle in accordance with the Bureau's specifications.

EIGHTH CAUSE FOR DISCIPLINE

(Dishonesty, Fraud or Deceit)

21. Respondent has subjected his technician license to discipline under Health and Safety Code section 44072.2, subdivision (d), in that on or about April 22, 2008, he committed acts involving dishonesty, fraud or deceit whereby another was injured by issuing electronic Certificate of Compliance No. NA373542C for the 1990 Ford Festiva without performing a bona fide inspection of the emission control devices and systems on that vehicle, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

OTHER MATTERS

22. Under Code section 9884.7, subdivision (c), the director may invalidate temporarily or permanently or refuse to validate, the registrations for all places of business operated in this state by Ramin Aliyev doing business as San Rafael Smog, upon a finding that he has, or is, engaged in a course of repeated and willful violations of the laws and regulations pertaining to an automotive repair dealer.

23. Under Health and Safety Code section 44072.8, if Smog Check Test Only Station License Number TC 243548, issued to Ramin Aliyev doing business as San Rafael Smog, is revoked or suspended, any additional license issued under this chapter in the name of said licensee may be likewise revoked or suspended by the director.

24. Under Health and Safety Code section 44072.8, if Advanced Emission Specialist Technician License Number EA 147215, issued to Ramin Aliyev, is revoked or

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suspended, any additional license issued under this chapter in the name of said licensee may be likewise revoked or suspended by the director.

PRAYER

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

1. Temporarily or permanently invalidating Automotive Repair Dealer Registration Number ARD 243548, issued to Ramin Aliyev doing business as San Rafael Smog;

2. Temporarily or permanently invaliding any other automotive repair dealer registration issued to Ramin Aliyev doing business as San Rafael Smog;

3. Revoking or suspending Smog Check, Test Only Station License Number TC 243548, issued to Ramin Aliyev doing business as San Rafael Smog;

4. Revoking or suspending any additional license issued under this chapter in the name of Ramin Aliyev doing business as San Rafael Smog;

5. Revoking or suspending Advanced Emission Specialist Technician Number EA 147215, issued to Ramin Aliyev;

6. Revoking or suspending any additional license issued under this chapter in the name of Ramin Aliyev;

7. Ordering Ramin Aliyev to pay the Bureau of Automotive Repair the reasonable costs of the investigation and enforcement of this case, pursuant to Code section 125.3; and,

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

DATED: 4-13-09

SHERRY MEHL
Chief
Bureau of Automotive Repair
Department of Consumer Affairs
State of California
Complainant

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