

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

In the Matter of the Accusation Against:

**OSCAR URENA;
dba KING AUTO REPAIR,**

Automotive Repair Dealer Registration
No. ARD 254888,

Smog Check-Test Only Station License
No. TC 254888,

Smog Check Inspector License
No. EO 633497 (formerly Advanced
Emission Specialist Technician
License No. EA 633497),

and

OMAR URENA,

Advanced Emission Specialist Technician
License No. EA 148289,

Respondents.

Case No. 79/13-57

OAH No. 2013040316

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 errors in the Proposed Decision are corrected as follows:

1. Page 2, paragraph 1, under Factual Findings, lines 2 and 3: The statement "Oscar's ARD expired on February 28, 2014" is corrected to read "Oscar's ARD expires on February 28, 2015, unless renewed."
2. Page 2, paragraph 2, under Factual Findings, line 2: The statement "Oscar's station license expired on February 28, 2014" is corrected to read "Oscar's station license expires on February 28, 2015, unless renewed."

This Decision shall become effective May 28, 2014.

DATED: APR 18 2014



DONALD CHANG
Assistant Chief Counsel
Department of Consumer Affairs

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DIRECTOR OF CONSUMER AFFAIRS
BUREAU OF AUTOMOTIVE REPAIR
STATE OF CALIFORNIA

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OSCAR URENA; dba KING AUTO
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Automotive Repair Dealer Registration No.
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Smog Check Inspector License
No. EO 633497 (formerly Advanced
Emission Specialist Technician License
No. EA 633497),

and

OMAR URENA,

Advanced Emission Specialist Technician
License No. EA 148289,

Respondent(s).

BAR Case No. 79/13-57

OAH No. 2013040316

PROPOSED DECISION

On February 11, 2014, Agustin F. Lopez II, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California.

G. Michael German, Deputy Attorney General, Department of Justice (DOJ), State of California, represented complainant Patrick Dorais in his official capacity as the Chief of the Bureau of Automotive Repair (BAR), Department of Consumer Affairs, State of California.

Respondent Oscar Urena (Oscar) appeared and represented himself as well as co-respondent Omar Urena (Omar). Omar was present throughout the proceeding. Oscar and

Omar are brothers. For simplicity sake, the respondents will be referred to by their first names.

The matter was submitted on February 11, 2014.

FACTUAL FINDINGS

Jurisdictional Background

1. On May 19, 2008, the BAR issued automotive repair dealer registration number (ARD) 254888 to Oscar Urena. Oscar is the owner of King Auto Repair. Oscar's ARD expired on February 28, 2014.
2. On June 2, 2008, the BAR issued Smog Check Station License (station license) number TC 254888 to Oscar. Oscar's station license expired on February 28, 2014.
3. On August 11, 2011, the BAR issued advanced emission specialist technician license (smog technician license) number EA 633497 to Oscar. Oscar's smog technician license expired on May 31, 2013.¹

On June 6, 2013, Oscar's smog technician license was renewed and converted to smog check inspector license number EO 633497 (inspector license). Oscar's inspector license expires May 31, 2015.

4. In 2004, the BAR issued to Omar advanced emission specialist technician license number EA 148289. If renewed, Omar's license will be re-designated as EO 148289 or EI 148289. Omar's license will expire on May 31, 2014.

Omar is an employee of King Auto Repair, where the brothers work together.

Prior Discipline

5. On March 8, 2011, the BAR issued citation number C2011-1035 to Oscar for issuing smog certificates to undercover vehicles that were purposefully designed to fail a smog test. Oscar paid the \$1,000.00 citation on May 3, 2011.
6. On March 8, 2011, the BAR issued citation number M2011-1036 to Omar for issuing smog certificates to undercover vehicles that were designed to fail a smog test. The BAR ordered Omar to attend an eight-hour training class. Omar completed the training on May 3, 2011.

¹ On August 1, 2012, California Code of Regulations, title 16, sections 3340.28, 3340.29, and 3340.30, were amended to implement a license restructure in which the titles of licenses issued to emission control technicians changed from the advanced emission specialist technician (EA) license and basic area technician (EB) license to smog check inspector (EO) license or smog check repair technician (EI) license.

7. Oscar testified that he did not appeal the citation because he wanted to “move on.”

Procedural History

8. On February 26, 2013, complainant signed the accusation in this case. The accusation sought to revoke respondents licenses based on nine causes for discipline.

9. On March 14, 2013, respondents were served with the accusation and other jurisdictional documents in this matter.

10. On March 26, 2013, Oscar submitted his notice of defense.

11. On April 3, 2013, the BAR received Omar’s notice of defense.

12. On January 27, 2014, respondents were served with a first amended accusation. The first amended accusation sought to revoke respondents’ licenses and were based on eight causes for discipline. The first five causes for discipline were alleged against Oscar and the last three were alleged against Omar.

The first and second causes for discipline alleged Oscar violated Business and Professions Code section 9884.7, subdivision (a)(1) and (4), by making untrue or misleading statements, as well as committing fraud. The third cause for discipline alleged Oscar violated Health and Safety Code section 44072.2, subdivision (a), by violating the motor vehicle inspection program. The fourth cause for discipline alleged Oscar violated Business and Professions Code 9884.7, subdivision (a)(6), and Health and Safety Code section 44072.2, subdivision (c), by failing to comply with regulations pursuant to the motor vehicle inspection program. The fifth cause for discipline alleged Oscar violated Health and Safety Code section 44072.2, subdivision (d), by committing dishonest, fraudulent, or deceitful acts.

The sixth cause for discipline alleged Omar violated Health and Safety Code section 44072.2, subdivision (a), by violating the motor vehicle inspection program. The seventh cause for discipline alleged Omar violated Business and Professions Code 9884.7, subdivision (a)(6), and Health and Safety Code section 44072.2, subdivision (c), by failing to comply with regulations pursuant to the motor vehicle inspection program. The eighth cause for discipline alleged Omar violated Health and Safety Code section 44072.2, subdivision (d), by committing dishonest, fraudulent, or deceitful acts.

Underlying Allegations

13 Between November 14, 2011, and January 5, 2012, Steve P. Koch, BAR Program Representative I, conducted an investigation into the smog check certificates respondents submitted to the BAR.

Mr. Koch is a licensed smog technician and has been a BAR Program Representative I for fourteen years. Mr. Koch handles consumer complaints and investigations for the BAR.

14. Mr. Koch explained that his investigation revealed a suspicious pattern relating to a smog check diagnostic code (P1518) that kept appearing for 32 different vehicles over a 53 day period. He explained that the digit “1” was a manufacturer specific code and that it was very unusual for code P1518 to appear on the BAR 97 Test Detail reports for so many different vehicles.

Mr. Koch focused on 10 of the 32 vehicles (vehicle nos. 1 through 10 below). He determined that these 10 vehicles could not produce code P1518 when smog tested because the manufacturers of the vehicles did not use that code.

#	Test Date Start-End	Year	Make	Model	License #	Unsupported Code	Certificate #
1	11/14/2011 1245-1256	1999	Cadillac	Escalade	6MPC983	P1518	XB111231C
2	11/15/2011 1437-1449	1996	Geo	PRIZM	3SEN788	P1518	XB111241C
3	11/18/2011 1319-1335	2001	Kia	Rio	4PJR834	P1518	XB293763C
4	12/1/2011 1252-1258	2001	Mitsubishi	Montero Sport	4UOT718	P1518	XB458488C
5	12/6/2011 1632-1641	1996	Toyota	Tacoma	8J79875	P1518	XB458488C
6	12/7/2011 1301-1325	1996	Chevrolet	Corsica	3NKA572	P1518	XB458495C
7	12/8/2011 1639-1654	1991	Chevrolet	S10	8W21417	P1518	XB603701C
8	12/20/2011 1012-1032	2003	Hyundai	Elantra	4YVF533	P1518	XB767854C
9	12/20/2011 1618-1631	2002	Saturn	SL	6LDX607	P1518	XB767854C
10	12/30/2011 1206-1238	2000	Plymouth	Neon	4MLJ504	P1518	XB767869C

15. Mr. Koch further determined that respondents’ were issuing smog check certificates for vehicles that would otherwise fail a smog test by employing an illegal testing method known as “clean plugging.”

Clean plugging involves a component of the smog check test called the on board diagnostic generation II functional test (OBD II). During the OBD II test, a technician is required to connect an interface cable from a BAR-97 emissions inspection system analyzer (EIS) to a diagnostic link connector (DLC) that is located inside the vehicle. The EIS automatically retrieves information from the vehicle’s on-board computer, via the DLC, about the how the vehicle’s emission control system is working. If the vehicle fails the OBD II test it will fail the smog check test.

In a clean plugging situation, a technician would use the OBD II readiness monitor status and stored code status of a passing vehicle for the purpose of illegally issuing a smog certificate to another vehicle that would not pass. A technician attempting to clean plug would enter the information into the EIS for a non-passing vehicle and then plug the OBD II system connector from the EIS into another vehicle that has a properly functioning exhaust system.

16. On July 31, 2012, Mr. Koch executed his investigative report into the foregoing. Mr. Koch stated that the pattern of vehicles showing code P1518 after being smog tested “confirms the vehicles receiving smog certificates were not tested during the OBD II functional test and another vehicle was used, which constitutes Clean Plugging.”

17. Mr. Koch testified that BAR records show Omar was the technician who clean plugged the ten vehicles. The BAR Test Detail Reports for all ten vehicles identify Omar as the technician who conducted the smog check by his license number (EA 148289). Mr. Koch further testified that the information transmitted to the BAR regarding the 10 vehicles was done at Oscar’s facility using his equipment. The BAR Test Detail Reports for the vehicles identified the station by Oscar’s Smog Check Station License number (TC 254888).

18. Mr. Koch stated that, “this isn’t the type of thing [referring to the occurrence of the P1518 code] that happens as a result of negligence.” Instead, his conclusion was that the respondents intentionally sought to certify vehicles that would not otherwise pass a smog check.

19. Oscar testified that he works with Omar at King Auto Repair. He asserted that the P1518 code could have resulted from a failure of the transmission of the data between the facility and the BAR. In support of Oscar’s assertion, Omar claimed that often when they attempted to transmit smog check information about vehicles to the BAR, he would receive an “error” message because the “state computer didn’t answer.”

20. Oscar blamed the P1518 code results on software updates for the facilities’ equipment. He stated that the “updates on the software changes the machine’s calibration.” Mr. Koch, however, testified that neither the error message nor the updating process would result in a P1518 code resulting from a smog test.

21. On cross-examination Oscar testified that the error message and update problems happened in July or August of 2012. But the instances with vehicle nos. 1-10 occurred between November and December of 2011.

Cost Recovery

22. Complainant seeks \$11,338.18 in cost recovery associated with the investigation and prosecution of this matter.

The Attorney General’s Office submitted a declaration with exhibits supporting the costs. The declaration divided the costs into two categories; one for cost of services provided

by the DOJ (\$6,895.00) and one for costs attributed to the BAR's investigation (\$4,443.18). The materials supporting the costs related to the DOJ include a matter time activity by professional type (MTAP) report. The MTAP report describes the work done by DOJ personnel in terms of individual personnel, date, task description, hours worked, rate, and amount billed. Ultimately, the MTAP report provided sufficient detail to support findings regarding the actual costs incurred and the reasonableness of the costs.

In contrast, the materials in support of the BAR costs provide insufficient detail to support a finding regarding the actual costs incurred and the reasonableness of those costs. Specifically, the BAR materials did not contain the general tasks performed nor the time spent on each task.

Respondents argued that they believed the costs sought by the BAR were too high, but could not say why.

Evaluation

23. Complainant established that Oscar is the owner of King Auto Repair and that Omar is an automotive technician working for King Auto Repair.

Complainant established that respondents intended to clean plug vehicle nos. 1 through 10. In so doing respondents certified ten vehicles that would otherwise not have passed a smog check.

24. Complainant established that Omar failed to perform the functional test (OBD II) in accordance with procedures prescribed by the department. Specifically, Omar entered information into the EIS for vehicle nos. 1 through 10 and then plugged the OBD II system connector from the EIS into another vehicle that was capable of passing a smog check.

25. Complainant established that Omar clean plugged ten vehicles and then transmitted false information about those vehicles to the BAR. The false information was that the ten vehicles were tested properly and were entitled to pass a smog check.

Complainant also established that Omar clean plugged the vehicles using King Auto Repair's equipment and facilities. Additionally, complainant established that Oscar failed to supervise Omar properly and as a result allowed the false information to be transmitted.

LEGAL CONCLUSIONS

1. Administrative proceedings are not intended to punish the licensee, but rather to protect the public. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 785.) The main purpose of license discipline is protection of the public through the prevention of future harm and the improvement and rehabilitation of the licensee. (*Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 772.)

2. California Business and Professions Code section 9884.7 states as follows:

(a) 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 the exercise of reasonable care should be known, to be untrue or misleading.

[¶ . . . ¶]

(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.

Additionally, a licensee can be subject to discipline when an employee negligently performs a licensed activity. *Camacho v. Youde* (1979) 95 Cal. App. 3d 161.

3. Health and Safety Code section 44012 states as follows:

The test at the smog check stations shall be performed in accordance with procedures prescribed by the department, pursuant to Section 44013, and shall require, at a minimum, for all vehicles that are not diesel-powered, loaded mode dynamometer testing in enhanced areas, and two-speed testing in all other program areas. The department shall ensure all of the following:

[¶ . . . ¶]

(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.

4. Health and Safety Code section 44015, subdivision (b), states, "If a 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."

5. Health and Safety Code section 44072.2 states as follows:

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 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.

6. Health and Safety Code section 44059 states as follows:

The willful making of any false statement or entry with regard to a material matter in any oath, affidavit, certificate of compliance or noncompliance, or application form which is required by this chapter or Chapter 20.3 (commencing with Section 9880) of Division 3 of the Business and Professions Code, constitutes perjury and is punishable as provided in the Penal Code.

7. Code of Regulations, title 16, section 3340.30, subdivision (a), states as follows:

A smog check technician shall comply with the following requirements at all times while licensed.

(a) A licensed technician shall inspect, test and repair vehicles 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.

8. Code of Regulations, title 16, section 3340.41(c) states as follows:

(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.

9. Code of Regulations, title 16, section 3340.42 states as follows:

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

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

[¶ . . . ¶]

(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:

[¶ . . . ¶]

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

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

[¶ . . . ¶]

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

10. Business and Professions Code section 125.3 provides the authority for the recovery of costs associated with investigation and enforcement of a matter.

11. The Office of Administrative Hearings has enacted regulations for use when evaluating an agency's cost request. California Code of Regulations, title 1, section 1042, provides in part as follows.

(b) Except as otherwise provided by law, proof of costs at the Hearing may be made by Declarations that contain specific and sufficient facts to support findings regarding actual costs incurred and the reasonableness of the costs, which shall be presented as follows:

(1) For services provided by a regular agency employee, the Declaration may be executed by the agency or its designee and shall describe the general tasks performed, the time spent on each task and the method of calculating the cost. For other costs, the bill, invoice or similar supporting document shall be attached to the Declaration.

12. *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 held that imposing costs under California Code of Regulations, title 16, section 317.5 (a regulation that is very similar to Business and Professions Code section 125.3) did not violate due process so long the Board of Chiropractic Examiners exercised its discretion so that the cost regulation did not deter chiropractors with potentially meritorious claims or defenses from exercising their right to a hearing.

The Supreme Court set forth four factors that must be considered in deciding whether to reduce or eliminate costs: (1) Whether the chiropractor used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed; (2) whether the chiropractor had a "subjective" good faith belief in the merits of his position; (3) whether the chiropractor raised a "colorable challenge" to the proposed discipline; and (4) whether the chiropractor had the financial ability to make payments.

Since the regulation at issue in *Zuckerman* and Business and Professions Code section 125.3 contain substantially the same language and concern the same sort of cost recovery, the reasoning in *Zuckerman* must be applied to Business and Professions Code section 125.3 to avoid constitutional pitfalls.

Evaluation

13. Complainant established that the P1518 code found in Vehicle Nos. 1 through 10 was not due to a bona fide error. Respondents' claim that the suspicious pattern was a result of an error message or update problem was unconvincing. Oscar testified that the error messages received by the smog station occurred at a different time than when the P1518 code appeared for vehicle nos. 1 through 10. Mr. Koch's testimony that an update would not cause a P1518 code was convincing.

Likewise, complainant established that respondents intended to certify vehicle nos. 1 through 10 after performing faulty functional smog tests. The wrongful certification of the ten vehicles was not due to a bona fide error.

Therefore, complainant was justified in seeking to revoke respondents' licenses.

14. Complainant established that Omar made untrue statements to the BAR regarding the OBD II functional test. Mr. Koch's testimony demonstrated that vehicle nos. 1 through 10 could not have returned a P1518 code because that code was not associated with the vehicle brands corresponding to the ten vehicles investigated. The untrue statements were then transmitted to the BAR via the King Auto Repair equipment.

15. Complainant established that at the very least, Oscar was negligent in supervising Omar. Oscar allowed Omar to clean plug the ten vehicles. Oscar then allowed Omar to transmit untrue statements to the BAR using King Auto Repair facilities and equipment. Oscar was the owner of King Auto Repair where Omar worked and was responsible for supervising Omar. As a result, discipline is justified against Oscar.

16. Complainant established that Omar did not perform the OBD II functional test in accordance with procedures prescribed by the department. Omar clean plugged vehicle nos. 1 through 10. Omar entered the information into the EIS for vehicle nos. 1 through 10 and then plugged the OBD II system connector from the EIS into another vehicle that would pass a smog check. Clean plugging is not consistent with the procedures prescribed by the department.

17. Complainant established that respondents issued certificates of compliance for vehicle nos. 1 through 10 without properly testing them. As discussed above, Omar failed to perform a proper functional test and Oscar did not ensure that Omar performed the tests properly. The result of the improper tests was that certificates were wrongfully issued for each of the ten vehicles.

18. Complainant established that respondents committed acts of dishonesty with regard to the clean plugging of vehicle nos. 1 through 10.

19. Complainant established that respondents willfully made false statements in conjunction with certifying vehicle nos. 1 through 10. Respondents' explanation for why the P1518 code resulted was unpersuasive. Even assuming Oscar was negligent, the prior discipline imposed upon both respondents suggests that Oscar should have been more vigilant in supervising Omar—but was not. Given respondents' implausible explanation for the appearance of the P1518 code on all ten vehicles, and the unlikelihood that its appearance was an accident or due to some innocent anomaly, it is more likely than not that respondents' willfully made the untrue statements relating to the certification of the vehicles in question. Respondents had no other viable explanation for the appearance of a P1518 code on vehicle nos. 1 through 10.

20. Complainant established that Omar entered information into the EIS for vehicles other than the ten that were supposed to be tested.

21. Complainant established that respondents violated Health and Safety Code sections 44012 and 44035, as well as Code of Regulations, title 16, section 3340.42, by clean plugging ten vehicles.

22. Respondents' prior discipline involved acts of dishonesty that serve as aggravating factors in this matter. Mr. Koch's testimony established that the occurrence of the P1518 code could not have occurred by accident. This further supports the fact that the representations made to the BAR about the 10 vehicles were dishonest. As such, respondents have not had a change in attitude from their previous discipline.

23. Given respondents' prior disciplinary history and the violations established in this proceeding, the protection of the public can be achieved only by revocation of the respondents' licenses.

Cost Recovery

24. The DOJ request for costs in the amount of \$6,895.00 provided sufficient information to determine whether the costs incurred by the DOJ were reasonable. Respondents failed to explain why the costs were too high and failed to provide any evidence to support such a finding. As a result, these costs are allowable.

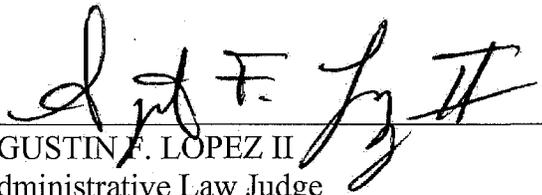
On the other hand, the materials supporting the request for the BAR's investigation costs were insufficiently specific. Given the absence of this information, it is impossible to determine if the time spent is reasonable or inordinate. Accordingly, costs attributed to the BAR in the amount of \$4,443.18 are disallowed.

ORDER

1. Automotive Repair Dealer Registration No. ARD 254888, issued to Oscar Urena is revoked.
2. Smog Check-Test Only Station License No. TC 254888, issued to Oscar Urena is revoked.
3. Smog Check Inspector License No. EO 633497 (formerly Advanced Emission Specialist Technician License No. EA 633497), issued to Oscar Urena is revoked.
4. Advanced Emission Specialist Technician License No. EA 148289, issued to Omar Urena is revoked.

5. Respondents, Oscar and Omar Urena, are jointly and severally ordered to pay the BAR's costs in the amount of \$6,895.00 within 90 days of the issuance of this order.

DATED: March 27, 2014


AGUSTIN F. LOPEZ II
Administrative Law Judge
Office of Administrative Hearings

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

11 In the Matter of the Accusation Against:

Case No. 79/13-57

12 **KING AUTO REPAIR**
13 **OSCAR URENA, OWNER**
12576 Heacock Street
14 Moreno Valley, CA 92553

OAH Case No. 2013040316

FIRST AMENDED
ACCUSATION
(SMOG CHECK)

15 Automotive Repair Dealer Registration No.
ARD 254888

Hearing Date: February 11, 2014

16 Smog Check-Test Only Station License No.
TC 254888

17 **OSCAR URENA**
18 12576 Heacock Street
19 Moreno Valley, CA 92553

20 Smog Check Inspector License No. EO 633497
(formerly Advanced Emission Specialist
21 Technician License No. EA633497)

22 and

23 **OMAR URENA**
3092 Clapper Street
24 Perris, CA 92571

25 Advanced Emission Specialist Technician
License No. EA 148289 (to be designated upon
26 renewal as EO 148289 and/or EI 148289)

27 Respondents.

28 Complainant alleges:

1 **PARTIES**

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

5 **Automotive Repair Dealer Registration**

6 2. On May 19, 2008, the Bureau issued Automotive Repair Dealer (ARD)
7 Registration Number ARD 254888 to Oscar Urena, owner of King Auto Repair (Respondent).
8 The ARD registration was in full force and effect at all times relevant to the charges brought
9 herein and will expire on February 28, 2014, unless renewed.

10 **Smog Check Test Only Station License**

11 3. On June 2, 2008, the Bureau issued Smog Check Station License (station license)
12 Number TC 254888 to Respondent. The Smog Check Station License was in full force and
13 effect at all times relevant to the charges brought herein and will expire on February 28, 2014,
14 unless renewed.

15 **Advanced Emission Specialist Technician Licenses**

16 4. On August 11, 2011, the Bureau issued Advanced Emission Specialist Technician
17 License Number EA 633497 (smog technician license) to Respondent. The Advanced Emission
18 Specialist Technician License was in full force and effect at all times relevant to the charges
19 brought herein and expired on May 31, 2013. Pursuant to California Code of Regulations, title
20 16, section 3340.28, subdivision (e), Respondent's smog technician license was renewed
21 pursuant to Respondent's election as Smog Check Inspector License No. EO 633497 (inspector
22 license), effective June 6, 2013.¹ The inspector license was in full force and effect at all times
23 relevant to the charges brought herein and will expire on May 31, 2015, unless renewed.

24 5. In 2004, the Bureau issued Advanced Emission Specialist Technician License
25 Number EA 148289 to Omar Urena (Respondent Omar). The Advanced Emission Specialist

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 Technician License was in full force and effect at all times relevant to the charges brought herein
2 and will expire on May 31, 2014, unless renewed. Upon renewal of the license, the license will
3 be redesignated as EO 148289 and/or EI 148289.

4 JURISDICTION

5 6. Business and Professions Code (Code) section 9884.7 provides that the Director
6 may revoke an automotive repair dealer registration.

7 7. Code section 9884.13 provides, in pertinent part, that the expiration of a valid
8 registration shall not deprive the Director of jurisdiction to proceed with a disciplinary proceeding
9 against an automotive repair dealer or to render a decision temporarily or permanently
10 invalidating (suspending or revoking) a registration.

11 8. Health and Safety Code (H&S Code) section 44002 provides, in pertinent part,
12 that the Director has all the powers and authority granted under the Automotive Repair Act for
13 enforcing the Motor Vehicle Inspection Program.

14 9. H&S Code section 44072.2 of the states, in pertinent part:

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

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

19

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

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

24 10. H&S Code section 44072.4 states, in pertinent part:

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

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

(b) Suspending the license.

(c) Revoking the license.

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

5 12. Section 9884.7 of the Code states, in pertinent part:

6 (a) The director, where the automotive repair dealer cannot show there
7 was a bona fide error, may refuse to validate, or may invalidate temporarily or
8 permanently, the registration of an automotive repair dealer for any of the
9 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.

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

13

14 (4) Any other conduct which constitutes fraud.

15

16 (6) Failure in any material respect to comply with the provisions of
17 this chapter [the Automotive Repair Act (Bus. & Prof. Code, § 9880, et seq.)] or
regulations adopted pursuant to it.

18 STATUTORY PROVISIONS

19 13. H&S Code section 44012 states, in pertinent part:

20 The test at the smog check stations shall be performed in accordance with
21 procedures prescribed by the department and may require loaded mode
22 dynamometer testing in enhanced areas, two-speed idle testing, testing utilizing a
23 vehicle's onboard diagnostic system, or other appropriate test procedures as
24 determined by the department in consultation with the state board. The
25 department shall implement testing using onboard diagnostic systems, in lieu of
26 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:

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

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

5 14. H&S Code section 44015, subdivision (b) provides that if a vehicle meets the
6 requirements of Section 44012, a smog check station licensed to issue certificates shall issue a
7 certificate of compliance or a certificate of noncompliance.

8 15. H&S Code section 44059 states:

9 The willful making of any false statement or entry with regard
10 to a material matter in any oath, affidavit, certificate of compliance or
11 noncompliance, or application form which is required by this chapter or
12 Chapter 20.3 (commencing with Section 9880) of Division 3 of the
Business and Professions Code, constitutes perjury and is punishable
as provided in the Penal Code.

13 16. H&S Code section 44072.8 states that when a license has been revoked or
14 suspended following a hearing under this article, any additional license issued under this chapter
15 in the name of the licensee may be likewise revoked or suspended by the director.

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

17
18 (c) The department shall revoke the license of any smog check
19 technician or station licensee who fraudulently certifies vehicles or participates in
the fraudulent inspection of vehicles. A fraudulent inspection includes, but is not
20 limited to, all of the following:

21 (1) Clean piping, as defined by the department.

22 (4) Intentional or willful violation of this chapter or any regulation,
23 standard, or procedure of the department implementing this chapter .
24

24 REGULATORY PROVISIONS

25 18. California Code of Regulations, Title 16 (Regulations), section 3340.24,
26 subdivision (c) provides that the bureau may suspend or revoke the license of or pursue other
27 legal action against a licensee, if the licensee falsely or fraudulently issues or obtains a
28 certificate of compliance or a certificate of noncompliance.

1 19. Regulations, section 3340.28, subdivision (e), states that “[u]pon renewal of an
2 unexpired Basic Area Technician license or an Advanced Emission Specialist Technician
3 license issued prior to the effective date of this regulation, the licensee may apply to renew as a
4 Smog Check Inspector, Smog Check Repair Technician, or both.”

5 20. Regulations, section 3340.30, states:

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

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

11

12 21. Regulations, section 3340.35, subdivision (c) states:

13 A licensed station shall issue a certificate of compliance or noncompliance
14 to the owner or operator of any vehicle that has been inspected in accordance with
15 the procedures specified in section 3340.42 of this article and has all the required
16 emission control equipment and devices installed and functioning correctly. The
17 following conditions shall apply:

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

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

21 22. Regulations, section 3340.41, subdivision (c), states:

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

27 23. Regulations, section 3340.42, states:

28 With the exception of diesel-powered vehicles addressed in subsection (f)
of this section, the following emissions test methods and standards apply to all
vehicles:

 (a) A loaded-mode test, except as otherwise specified, shall be the test
method used to inspect vehicles registered in the enhanced program areas of the
state. The loaded-mode test shall measure hydrocarbon, carbon monoxide, carbon
dioxide and oxides of nitrogen emissions, as contained in the bureau’s
specifications referenced in subsection (b) of Section 3340.17 of this article. The

1 loaded-mode test shall use Acceleration Simulation Mode (ASM) test equipment,
2 including a chassis dynamometer, certified by the bureau.

3 On and after March 31, 2010, exhaust emissions from a vehicle subject to
4 this inspection shall be measured and compared to the emissions standards shown
5 in the VLT Row Specific Emissions Standards (Cutpoints) Table, dated March
6 2010, which is hereby incorporated by reference. If the emissions standards for a
7 specific vehicle is not included in this table then the exhaust emissions shall be
8 compared to the emissions standards set forth in TABLE I or TABLE II, as
9 applicable. A vehicle passes the loaded-mode test if all of its measured emissions
10 are less than or equal to the applicable emission standards specified in the
11 applicable table.

12

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

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

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

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

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

(e) In addition to the test methods prescribed in this section, the following
tests shall apply to all vehicles, except diesel-powered vehicles, during the Smog
Check inspection:

(1) A visual inspection of the vehicle's emissions control systems. During
the visual inspection, the technician shall verify that the following emission
control devices, as applicable, are properly installed on the vehicle:

- (A) air injection systems,
- (B) computer(s) and related sensors and switches,
- (C) crankcase emissions controls, including positive crankcase ventilation,
- (D) exhaust gas after treatment systems, including catalytic converters,
- (E) exhaust gas recirculation (EGR) systems,

1 (F) fuel evaporative emission controls,
2 (G) fuel metering systems, including carburetors and fuel injection,
3 (H) ignition spark controls, and
4 (I) any emissions control systems that are not otherwise prompted by the
5 Emissions Inspection System, but listed as a requirement by the vehicle
6 manufacturer.

7 (2) A functional inspection of the vehicle's emission control systems.
8 During the functional inspection, the technician shall conduct, as applicable, the
9 following tests and verifications of the vehicle:

- 10 (A) proper operation of the exhaust gas recirculation (EGR) system,
- 11 (B) a check of the gasoline filler cap's integrity,
- 12 (C) proper setting of ignition timing,
- 13 (D) a low pressure check of the fuel evaporative control system,
- 14 (E) proper operation of the malfunction indicator light (MIL) or "Check
15 Engine Light," and
- 16 (F) an on-board diagnostics (OBD) system test.

17 (3) A liquid leak inspection of the vehicle's fuel storage and delivery
18 systems.

19 (4) An inspection of the vehicle's tailpipe and crankcase for the emissions
20 of smoke.

21

22 COST RECOVERY

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

BACKGROUND

25 25. In February 2012, the Bureau initiated an investigation of Respondents based on a
26 review of information from the Bureau's vehicle information database (VID), which indicated
27 that Respondents may be engaging in fraudulent smog check inspections.

1 26. Beginning in February of 2012, a representative of the Bureau conducted a
2 detailed review of VID data for all smog inspections performed at Respondent's automotive
3 repair dealership for the period of November 14, 2011, through January 5, 2012. The review of
4 the OBD II functional tests² showed a pattern of the same OBD II diagnostic trouble code
5 (P1518) stored in the memory of the power train control module (PCM) on thirty two different
6 vehicles that received smog certificates in the two month period. The Bureau specifically
7 examined the VID data for ten of the vehicles that were certified from November 14, 2011, to
8 December 30, 2011, and it was determined that none of them support the P1518 OBD II code.
9 Vehicles 1 through 10, set forth in Table 1 in paragraph 26, below, were all certified with a
10 pending P1518 code stored in the PCM memory while the original equipment manufacturer
11 (OEM) service information shows these vehicles do not support a P1518 diagnostic trouble code.

12 27. The Bureau's representative obtained information indicating that the P1518 code
13 was not applicable to the ten vehicles. The VID data also showed that the inspections on all of
14 the vehicles were performed under Respondent Omar's technician license. The Bureau
15 concluded that Respondents performed the smog inspections on the vehicles using a different
16 vehicle(s) during the OBD II tests, a method known as "clean plugging,"³ resulting in the
17 issuance of fraudulent certificates of compliance for the vehicles that were tested as outlined in
18 the following table.

19 ² The On Board Diagnostic, generation II ("OBD II"), functional test is an automated
20 function of the BAR-97 Emissions Inspection System analyzer ("EIS"). The EIS includes a
21 computer based, five-gas analyzer that tests vehicles under simulated driving conditions to detect
22 oxides of nitrogen, hydrocarbons, and carbon monoxide emissions. During the OBD II functional
23 test, the technician is required to connect an interface cable from the EIS to a Diagnostic Link
24 Connector (DLC) which is located inside the vehicle. Through the DLC, the EIS automatically
25 retrieves information from the vehicle's on-board computer about the status of the readiness
26 indicators, trouble codes, and the MIL (malfunction indicator light). If the vehicle fails the OBD
27 II functional test, it will fail the overall inspection.

28 ³ Clean-plugging is the use of the OBD II readiness monitor status and stored code status
of a passing vehicle for the purpose of illegally issuing a smog certificate to another vehicle that
is not in compliance due to the noncompliant vehicle's failure to complete the minimum number
of self tests, known as monitors, or due to the presence of a stored fault code that indicates an
emission control system or component failure. Clean plugging occurs during the inspection of a
vehicle that has an OBD II system. To clean plug a vehicle, the smog technician enters
information into the EIS for the vehicle the technician wishes to certify and then plugs the OBD
II system connector from the EIS into another vehicle that has a properly functioning OBD II
system for the purpose of obtaining a "Passing" OBD II functional test result.

OBDII Clean Plug Table No. 1

Vehicle Certified							
#	Test Date Start-End	Year	Make	Model	License #	Unsupported Code	Certificate #
1	11/14/2011 1245-1256	1999	Cadillac	Escalade	6MPC983	P1518	XB111231C
2	11/15/2011 1437-1449	1996	Geo	Prizm	3SEN788	P1518	XB111241C
3	11/18/2011 1319-1335	2001	Kia	Rio	4PJR834	P1518	XB293763C
4	12/1/2011 1252-1258	2001	Mitsubishi	Montero Sport	4UOT718	P1518	XB458460C
5	12/6/2011 1632-1641	1996	Toyota	Tacoma	8J79875	P1518	XB458488C
6	12/7/2011 1301-1325	1996	Chevrolet	Corsica	3NKA572	P1518	XB458495C
7	12/8/2011 1639-1654	1999	Chevrolet	S10	8W21417	P1518	XB603701C
8	12/20/2011 1012-1032	2003	Hyundai	Elantra	4YVF533	P1518	XB767851C
9	12/20/2011 1618-1631	2002	Saturn	SL	6LDX607	P1518	XB767854C
10	12/30/2011 1206-1238	2000	Plymouth	Neon	4MLJ504	P1518	XB767869C

FIRST CAUSE FOR DISCIPLINE

(Untrue or Misleading Statements)

28. Respondent's registration is subject to disciplinary action pursuant to Code section 9884.7, subdivision (a)(1), in that he made or authorized statements which he knew or in the exercise of reasonable care should have known to be untrue or misleading as follows: Respondent certified that vehicles 1 through 10, identified in Table 1 above, had passed inspection and were in compliance with applicable laws and regulations. In fact, Respondent conducted the inspections on the vehicles using clean-plugging methods substituting a different vehicle(s) during the OBD II functional tests in order to issue smog certificates of compliance for the vehicles, and the vehicles were not tested or inspected, as required by Health and Safety Code section 44012.

1 **DISCIPLINARY CONSIDERATIONS**

2 36. To determine the degree of penalty, if any, to be imposed upon Respondents,
3 Complainant alleges as follows:

4 a. On March 8, 2011, the Bureau issued Citation No. C2011-1035 to Respondent
5 Oscar Urena for certifying Bureau undercover vehicles documented to fail a smog test. The
6 Bureau assessed a civil penalty of \$1,000. Respondent paid the citation on May 3, 2011.

7 b. On March 8, 2011, the Bureau issued Citation No. M2011-1036 to Respondent
8 Omar Urena for certifying Bureau undercover vehicles documented to fail a smog test. The
9 Bureau ordered Respondent Omar Urena to attend an eight-hour training class. Respondent Omar
10 Urena completed the training class on May 3, 2011.

11 **OTHER MATTERS**

12 37. Pursuant to Code section 9884.7, subdivision (c), the Director may suspend,
13 revoke or place on probation the registration for all places of business operated in this state by
14 Respondent, Oscar Urena, owner of King Auto Repair, upon a finding that Respondent has, or is,
15 engaged in a course of repeated and willful violations of the laws and regulations pertaining to an
16 automotive repair dealer.

17 38. Pursuant to H&S Code section 44072.8, if Smog Check, Test Only, Station
18 License Number TC 254888, issued to Respondent, Oscar Urena, owner of King Auto Repair, is
19 revoked or suspended, any additional license issued under the same chapter in the name of said
20 licensee, including but not limited to Smog Check Inspector License No. EO 633497, formerly
21 Advanced Emission Specialist Technician License No. EA633497, may be likewise revoked or
22 suspended by the Director.

23 39. Pursuant to H&S Code section 44072.8, if Advanced Emission Specialist
24 Technician License Number EA 148289, issued to Respondent Omar Urena, to be redesignated
25 upon timely renewal as EO 148289 and/or EI 148289, is revoked or suspended, any additional
26 license issued under the same chapter in the name of said licensee may be likewise revoked or
27 suspended by the Director.

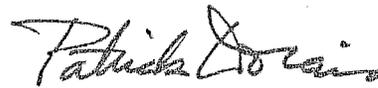
28

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 254888, issued to Respondent Oscar Urena, Owner of King Auto Repair;
- 6 2. Revoking or suspending any other automotive repair dealer registration issued to
7 Respondent Oscar Urena;
- 8 3. Revoking or suspending Smog Check Station License Number TC 254888, issued
9 to Respondent Oscar Urena, Owner of King Auto Repair;
- 10 4. Revoking or suspending any additional license issued under Chapter 5 of the
11 Health and Safety Code in the name of Oscar Urena;
- 12 5. Revoking or suspending Smog Check Inspector License No. EO 633497, formerly
13 Advanced Emission Specialist Technician License No. EA633497, issued to Respondent Oscar
14 Urena;
- 15 6. Revoking or suspending Advanced Emission Specialist Technician Number EA
16 148289, to be redesignated upon timely renewal as EO 148289 and/or EI 148289, issued to Omar
17 Urena;
- 18 7. Revoking or suspending any additional license issued under Chapter 5 of the
19 Health and Safety Code in the name of Omar Urena;
- 20 8. Ordering Oscar Urena and Omar Urena to pay the Bureau of Automotive Repair
21 the reasonable costs of the investigation and enforcement of this case, pursuant to Business and
22 Professions Code section 125.3;
- 23 9. Taking such other and further action as deemed necessary and proper.

24 DATED: January 24, 2014



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

SD2012704077