

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

In the Matter of the Accusation Against:

THE SMOG SHOP
EDIK SIMONYANS, Owner
Automotive Repair Dealer Registration
No. ARD 238624
Smog Check, Test Only, Station License
No. TC 238624

and

EDIK SIMONYANS
Advanced Emission Specialist Technician
License No. EA 150368

Respondents.

Case No. 79/10-62

OAH No. 2010050163

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.

This Decision shall become effective 4/5/11.

IT IS SO ORDERED this 23rd day of March, 2011.



DOREATHEA JOHNSON
Deputy Director, Legal Affairs
Department of Consumer Affairs

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PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, State of California, Office of Administrative Hearings, on February 23, 2011, in Modesto, California.

Leslie A. Burgermyer, Deputy Attorney General, represented Sherry Mehl (complainant), Chief of the Bureau of Automotive Repair (bureau).

Edgardo Gonzalez, Attorney at Law, appeared on behalf of Edik Simonyans, owner of The Smog Shop, who was also present.

The matter was submitted for decision on February 23, 2011.

FACTUAL FINDINGS

1. Complainant filed the Accusation in her official capacity.

License History

2. On May 12, 2005, the bureau issued Automotive Repair Dealer (ARD) Registration No. ARD 238624 (registration) to Edik Simonyans (respondent), doing business as The Smog Shop. The ARD registration was current and in effect at all times pertinent herein, and expired on March 31, 2010. The Smog Shop is now owned and operated under the name of respondent's sister, Rita Simonyans.

3. On May 13, 2005, the bureau issued Smog Check Test Only Station License No. TC 238624 (station license) to respondent, doing business as The Smog Shop. The station license was current and in effect at all times pertinent herein, and expired on March 31, 2010.

4. On a date uncertain in 2004, the bureau issued Advanced Emission Specialist Technician License No. 150368 (technician license) to respondent.

Background

5. There are three components to a smog inspection: (1) visual inspection of a vehicle's emission components to ensure that they are present, properly connected, and in good working condition; (2) functional testing of each component that is required to be functionally tested, depending on the make of the vehicle; and (3) a tail pipe emissions test to ensure that the vehicle's emissions are reading at or below acceptable levels. A vehicle must pass all three components before an Emission Inspection Certificate of Compliance may be issued.

6. As part of its efforts to enforce provisions of the Smog Check Program, the bureau conducts "undercover runs," in which an undercover operator brings a state-owned vehicle to a licensed smog check station for testing. The vehicle has a documented induced defect that will cause the vehicle to fail a properly performed smog test.

7. Irving J. Develbiss and Mirl A. Morse are employed as Program Representatives in the bureau's Fresno Field Office. They are responsible for enforcing the laws and regulations pertaining to smog inspections and repairs, including undercover vehicle operations. They organized the undercover operation at respondent's facility on March 9, 2009.

8. As the ARD and smog check station licensee, respondent is responsible for the actions of his employees, and has an independent obligation to ensure that laws and regulations pertaining to the Smog Check Program were complied with at his facility.

Undercover Operation – March 9, 2009

9. Mr. Develbiss prepares undercover vehicles for smog inspections and inspects those cars after they are returned. On January 27, 2009, Mr. Develbiss prepared a 1992 Ford

F-150 truck, California license number 4K19770, for an undercover run. The required emissions control systems for this vehicle included, among other things, a fuel evaporation canister (FEC), which a technician is required to visually inspect during the course of a California Emissions Inspection Test. Mr. Develbiss removed the FEC. He installed plugs in both of the fuel evaporation lines going into the FEC. The vehicle would not pass a California Smog Check visual inspection with a missing FEC. Mr. Develbiss photographed the FEC before and after removal for reference. The underhood emission control information label for the 1992 Ford F-150 illustrated the vacuum routing and engine components. The diagram indicated that a FEC is required on this vehicle. This information was in plain sight once the vehicle's hood was raised.

After making the above change, Mr. Develbiss performed a California Emissions Inspection Test. The vehicle failed the visual portion of the test due to the missing FEC.

10. On March 2, 2009, Mr. Develbiss released the vehicle to Mr. Morse, who visually verified that the FEC had been removed from the vehicle. On March 9, 2009, Mr. Morse released the vehicle to a bureau undercover operator, who drove the vehicle to respondent's facility and requested a smog inspection. Respondent's employee, technician Andrew Lucas, performed the inspection, signed a Smog Check Vehicle Inspection Report (VIR), and issued electronic Certificate of Compliance No. NI390334, certifying that the 1992 Ford F-150 truck was in compliance with applicable laws and regulations. The operator paid for the smog inspection and certificate. He received copies of an invoice and VIR.

11. The VIR included a section entitled "Emission Control Systems Visual Inspection/Functional Check Results." The VIR explained that the "Visual/Functional tests are used to assist in the identification of crankcase and cold start emissions which are not measured during the ASM test." During the inspection, a test analyzer prompts the technician to inspect a list of items. The technician must respond to the prompt by entering on the screen either pass, fail or not applicable. One of the items on the Visual Inspection/Functional Check test is "Fuel Evaporative Controls." The VIR completed by respondent's technician and provided to the operator stated "PASS," indicating that the FEC was observed.

12. After completing the smog inspection, the operator returned the Ford F-150 truck to Mr. Morse, who re-inspected the vehicle and visually confirmed that the FEC was missing. He also took a photograph of the engine compartment area where the FEC was missing.

13. On March 9, 2009, respondent authorized statements which, in the exercise of reasonable care, he should have known to be untrue or misleading, by issuing electronic Certificate of Compliance No. NI390334 for the 1992 Ford F-150 truck, certifying that the vehicle passed the inspection and was in compliance with applicable laws and regulations. In fact, the vehicle could not have passed the smog inspection required by Health and Safety Code section 44012 because the vehicle's FEC was missing.

14. On March 9, 2009, respondent committed acts constituting fraud,¹ and committed a dishonest act whereby another was injured, by issuing electronic Certificate of Compliance No. NI390334 for the 1992 Ford F-150 truck without performing a bona fide inspection of the emission control devices and systems on the vehicle, thereby depriving the people of the State of California of the protection afforded by the Motor Vehicle Inspection program.

15. In connection with the smog test performed on the 1992 Ford F-150 truck on March 9, 2009, respondent failed to comply with the Health and Safety Code in the following respects:

A. Respondent, through his employee, failed to perform emission control tests on the vehicle in accordance with prescribed procedures, as required by Health and Safety Code section 44012, subdivisions (a) and (f).²

B. Respondent issued electronic Certificate of Compliance No. NI390334C for the vehicle without properly testing and inspecting the vehicle

¹ Civil Code section 1573 defines “constructive fraud” and states, in pertinent part:

CONSTRUCTIVE FRAUD. Constructive fraud consists:

1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;...

² Health and Safety Code section 44012, subdivision (f), states:

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.

to determine if it was in compliance with Health and Safety Code section 44012, as required by Health and Safety Code section 44015, subdivision (b).³

16. In connection with the smog test performed on the 1992 Ford F-150 truck on March 9, 2009, respondent failed to comply with provisions of the California Code of Regulations, title 16, in the following respects:

A. Respondent falsely issued electronic Certificate of Compliance No. NI390334 for the vehicle, in that it could not pass the smog inspection because the vehicle's FEC was missing, in violation of California Code of Regulations, title 16, section 3340.24, subdivision (c).⁴

B. Respondent issued electronic Certificate of Compliance No. NI390334 for the vehicle, even though the vehicle had not been inspected in accordance with California Code of Regulations, title 16, section 3340.42, as required by California Code of Regulations, title 16, section 3340.35, subdivision (c).⁵

C. Respondent failed to conduct the required smog tests on the vehicle in accordance with the bureau's specifications, as required by California Code of Regulations, title 16, section 3340.42.⁶

³ 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."

⁴ California Code of Regulations, title 16, section 3340.24, subdivision (c), states: "The bureau may suspend or revoke the license of or pursue other legal action against a licensee, if the licensee falsely or fraudulently issues or obtains a certificate of compliance or a certificate of noncompliance."

⁵ California Code of Regulations, title 16, section 3340.35, subdivision (c), states in pertinent part: "A licensed station shall issue a certificate of compliance or noncompliance to the owner or operator of any vehicle that has been inspected in accordance with the procedures specified in section 3340.42 of this article and has all the required emission control equipment and devices installed and functioning correctly...."

⁶ California Code of Regulations, title 16, section 3440.42 states, in pertinent part: "Smog check stations and smog check technicians shall conduct tests and inspections in accordance with the bureau's BAR-97 Emissions Inspection System Specifications referenced in subsection (b) of Section 3340.17 of this article..."

Matters in Aggravation – Prior Citations

17. On February 26, 2008, the bureau issued Citation No. C08-0714 against respondent's registration and station licenses for violations of Health and Safety Code section 44012, subdivision (f) (failure to perform a visual/functional check of emission control devices according to procedures prescribed by the department) and California Code of Regulations, title 16, section 3340.35, subdivision (c) (issuing a certificate of compliance to a vehicle that was improperly tested). The Smog Shop issued a certificate of compliance for a bureau undercover vehicle with a missing PCV valve. The bureau assessed civil penalties totaling \$500 against respondent for the violations. Respondent complied with the citation and paid the fine on April 3, 2008.

The bureau also issued Citation No. M08-0715 against respondent's technician license for issuing the certificate of compliance to the bureau undercover vehicle with the missing PCV valve. Respondent was required to attend an eight-hour training course. He complied with this citation on April 12, 2008.

18. On June 12, 2008, the bureau issued Citation No. C08-1090 against respondent's registration and station licenses for violations of Health and Safety Code section 44014 (testing and repair of vehicles pursuant to the program shall be conducted at smog check stations by licensed technicians who have qualified pursuant to this chapter). Respondent made repairs to bureau undercover vehicle with the ignition timing out of specification. The bureau assessed civil penalties totaling \$1,500 against respondent for the violations. Respondent complied with the citation and paid the fine on July 8, 2008.

19. On September 4, 2008, the bureau issued Citation No. C09-0207 against respondent's registration and station licenses for violations of Health and Safety Code section 44012, subdivision (f) (failure to perform a visual/functional check of emission control devices according to procedures prescribed by the department) and California Code of Regulations, title 16, section 3340.35, subdivision (c) (issuing a certificate of compliance to a vehicle that was improperly tested). The Smog Shop issued a certificate of compliance for a bureau undercover vehicle with a missing Air Suction Valve. The bureau assessed civil penalties totaling \$2,000 against respondent for the violations. Respondent complied with the citation and paid the fine on October 15, 2008.

The bureau also issued Citation No. M09-0208 against respondent's technician license for issuing a certificate of compliance to the bureau undercover vehicle with the missing Air Suction Valve. He was required to attend a 16-hour training course. Respondent complied with this citation on October 18, 2008.

Citation Conferences

20. As the owner of The Smog Shop and as the technician, respondent attended a Citation Office Conference on March 19, 2008, in connection with the February 26, 2008 citation (Finding 17). Bureau Program Representatives Jerry Esmay and Mirl Morse were

present. Respondent was provided with current copies of the laws and regulations pertaining to the Automotive Repair Act and the Smog Check Program; a reprint of the *Bennett v. Hayes* court decision; a copy of the *Smog Check Inspection Manual*; and "Write it Right," an instructional pamphlet for invoice writing. Respondent was informed that another documented vehicle and/or station inspection may be employed to confirm compliance with applicable laws and regulations.

21. Respondent attended a second Citation Office Conference on June 30, 2008, in connection with the June 12, 2008 citation (Finding 18). Bureau Program Representatives Jerry Esmay and Brian Young were present. Respondent was advised that following this conference, another documented vehicle and/or station inspection may be employed to confirm compliance. Bureau representatives offered to conduct a Citation Seminar for service representatives. Respondent was also advised that future violations of the Health and Safety Code would lead to additional civil penalties and further legal action.

22. A third Citation Office Conference was held on September 19, 2008, in connection with the September 4, 2008 citation (Finding 19). Bureau Program Representatives Jerry Esmay and Mirl Morse were present. Similar written materials and information were provided as in the previous two conferences. Respondent was warned that another documented vehicle and/or station inspection would be employed to confirm compliance.

Respondent's Evidence

23. Respondent has worked as a smog technician since 2004, and as a smog check test only station and automotive repair dealer since 2005. He purchased The Smog Shop from his uncle and operated the business under his name up until last year. The Smog Shop is currently under his sister's name. Respondent works as a smog technician at The Smog Shop, and also at a second smog check station (April Smog) owned by his uncle. Respondent would like to operate The Smog Shop under his name again. He would also like to obtain a degree in business administration.

Respondent terminated the employment of the smog technician involved in the March 9, 2009 bureau undercover run. He hired two smog technicians since then, the current one being Tommy Alexi. Mr. Alexi and respondent both perform smog inspections at The Smog Shop. Respondent pays Mr. Alexi a salary independent of the number of cars that are tested. He has instructed Mr. Alexi to take his time during visual inspections, and to assume that every car is a bureau undercover vehicle. He has also purchased powerful \$200 flashlights and mirrors to improve their ability to visualize engine smog components. He noted that lighting is very important, and that certain components, such as PCV valves, vary in difficulty to spot.

24. Respondent has not been cited since March 9, 2009. He took a 2011 Update Course on January 26, 2011 through San Joaquin Delta College, certified by the bureau. He was not required to complete this program until 2013. Respondent did not dispute the March 9, 2009 violation, or his prior citation history. He did explain circumstances that may have distracted him from properly complying with vehicle test protocols resulting in the citations. For example, he explained that when he was cited on September 4, 2008, his timing light had stopped working. This distracted him and he missed the air suction valve during his visual inspection of the vehicle's smog components. He avers that he has paid all fines, completed all required course work and otherwise done everything required of him by the bureau.

Costs

25. The Accusation contains a request for costs of investigation and enforcement of this matter pursuant to Business and Professions Code section 125.3, in the total amount of \$11,596.08. The costs were certified in the manner provided by Business and Professions Code section 125.3, subdivision (c). The bureau submitted a cost certification for investigative services from bureau staff, including investigator costs of \$3,603.08; undercover vehicle operator fees of \$100; and "evidence purchase costs" of \$58.

The bureau's cost certification listed 40 hours of Program Representative I costs, in the amount of \$2,907.20, and nine hours of Program Representative II costs, in the amount of \$695.88. No written breakdown of the activities of specific individuals was provided to support the cost certification. However, Mr. DeVelbiss and Mr. Morse testified at hearing concerning their activities in support of the undercover operation that formed the basis of the disciplinary action. Considering the time involved in vehicle preparation and undercover operations, and the time drafting the bureau's investigative report, the 49 hours requested by the bureau is not unreasonable.

26. The declaration of Leslie A. Burgermyer, Deputy Attorney General (declaration), was submitted in support of the cost certification for services from the Office of the Attorney General, in the total amount of \$7,835.00. Attached to the declaration was a computer-generated billing printout from the Office of the Attorney General. According to the declaration and accompanying computer printout, a legal analyst spent 6.5 hours for "pleading preparation," at a cost of \$780.00. A total of 41.50 hours of attorney time was charged, for tasks including pleading preparation, trial preparation, client communication, case management, and research, for a total of \$7,055.00.

27. As set forth in Factual Findings 25 and 26, the costs sought for investigation and enforcement of this matter are \$11,596.08. This total amount is unreasonable, given that this case involved a single undercover run and respondent did not contest the facts underlying the March 9, 2009 citation. There is no indication that he ever did so, or that this case involved anything unusual that may have required additional time over that reasonably expected in similar cases. The Office of the Attorney General billed the equivalent of five days work to develop and prepare this case for hearing. That this is an accurate accounting of time charged by the Office of the Attorney General is not questioned here. But viewed in context of a single

undisputed undercover run, the total amount sought by way of reasonable costs should be reduced. Total reasonable costs recoverable by the bureau are therefore set at \$9,000.00.

28. Respondent presented no evidence that he is financially unable to pay costs.

LEGAL CONCLUSIONS

Applicable Statutes and Regulations

1. Business and Professions Code section 9884.7, subdivisions (a)(1) and (4) state:

(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.

2. Health and Safety Code section 44072.2, subdivisions (a), (c), and (d) state:

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.

Cause for Discipline – ARD Registration

3. Cause for discipline of respondent's ARD Registration was established pursuant to Business and Professions Code section 9884.7, subdivision (a)(1) (untrue or misleading statements), by reason of Factual Findings 13 through 16.

4. Cause for discipline of respondent's ARD Registration was established pursuant to Business and Professions Code section 9884.7, subdivision (a)(4) (fraud), by reason of Factual Findings 13 through 16.

Cause for Discipline – Smog Check Station License

5. Cause for discipline of respondent's Smog Check Test Only Station License was established pursuant to Health and Safety Code section 44072.2, subdivision (a) (violations of the Motor Vehicle Inspection Program), by reason of Factual Findings 13 through 16.

6. Cause for discipline of respondent's Smog Check Test Only Station License was established pursuant to Health and Safety Code section 44072.2, subdivision (c) (failure to comply with regulations pursuant to the Motor Vehicle Inspection Program), by reason of Factual Findings 13 through 16.

7. Cause for discipline of respondent's Smog Check Station License was established pursuant to Health and Safety Code section 44072.2, subdivision (d) (dishonesty, fraud or deceit), by reason of Factual Findings 13 through 16.

Cause for Discipline – Technician License

8. No cause for discipline of respondent's technician license was established pursuant to Health and Safety Code section 44072.2, subdivision (d). Respondent was not the smog technician who worked on the bureau's undercover vehicle on March 9, 2009.

Penalty

9. California Code of Regulations, title 16, section 3395.4, states:

In reaching a decision on a disciplinary action under the Administrative Procedure Act (Government Code Section 11400 et seq.), including formal hearings conducted by the Office of Administrative Hearing, the Bureau of Automotive Repair shall consider the disciplinary guidelines entitled "Guidelines for Disciplinary Penalties and Terms of Probation"

[May, 1997] which are hereby incorporated by reference. The "Guidelines for Disciplinary Penalties and Terms of Probation" are advisory. Deviation from these guidelines and orders, including the standard terms of probation, is appropriate where the Bureau of Automotive Repair in its sole discretion determines that the facts of the particular case warrant such deviation -for example: the presence of mitigating factors; the age of the case; evidentiary problems.

10. The BAR's Guidelines for Disciplinary Penalties and Terms of Probation (Guidelines) include factors in aggravation and in mitigation to be considered in determining an appropriate penalty. The Guidelines state, in pertinent part:

II. FACTORS IN AGGRAVATION AND IN MITIGATION

The Bureau normally submits cases for the filing of an Accusation based on investigations and the use of undercover vehicle operations in order to detect and document multiple violations of the Smog Check Program or the Automotive Repair Act.

In determining the proper penalty within the suggested ranges the following factors should be considered:

1. Factors in Aggravation

- a. Prior warnings from BAR
- b. Prior Notices of Violations
- c. Prior Office Conference with BAR
- d. Prior adverse Inspection Reports
- e. Prior demonstrations of incompetence
- f. Prior history of citations
- g. Prior history of formal disciplinary action
- h. Failure to permit BAR inspection of records
- i. Abuse of mechanic's lien
- j. Attempts to intimidate consumer
- k. Negligent or willful improper repair work that endangers consumer
- l. Evidence that the unlawful act was part of a pattern of practice
- m. Failure to comply with BAR request for corrective action/retraining
- n. Currently on probation for improper acts
- o. Failure to successfully complete prior period of probation
- p. Failure to pay court judgment to victim

- q. Violation of previous court order
- r. Any other conduct which constitutes fraud or gross negligence

2. Factors in Mitigation

- a. Evidence that respondent accepted BAR's suggested resolution to consumer complaint
- b. Evidence of voluntary participation in retraining for self or employees
- c. Evidence of voluntary purchase of proper diagnostic equipment and manuals
- d. Evidence of temporary medical condition that prevented respondent from exercising supervision and control over employees or others, which led to wrongdoing
- e. No loss to consumer and no damage to consumer's property (Undercover cars are treated as if they were consumers' cars)
- f. Evidence that shop has taken specific steps for retraining and has initiated steps to minimize recurrence
- g. Evidence of resolution of all consumer complaints with a subsequent change in business practice
- h. Evidence of internal control or audit designed to eliminate errors

The absence of any new allegations or amendments to the accusation as originally filed, during the period between the filing of the accusation and the date the matter comes to hearing, in itself, shall not be regarded as evidence of mitigation.

11. As set forth in the Factual Findings, respondent was issued multiple citations by the bureau in 2008. He attended three citation conferences, two for failure to properly perform visual inspections on undercover vehicles. Respondent met with bureau program representatives on three occasions to discuss improper inspections resulting in citations. The bureau provided respondent with copies of laws and regulations, as well as other written materials to assist licensees/registrants to comply with the Smog Check Program. Respondent was put on notice that the bureau would be conducting further inspections to ensure compliance. However, respondent, through his employee, continued to violate applicable statutes and regulations by conducting an improper visual inspection on March 9, 2009.

Respondent's facility performed four improper inspections of bureau undercover vehicles between February 26, 2008, and March 9, 2009, a period of just over one year. Respondent's efforts to rectify the situation were inadequate and he demonstrated over this period that he was incapable of changing his business practices or instituting sufficient internal controls to eliminate errors and improper inspections. Respondent has been

successful over the past two years, having employed a very capable smog technician. However, under all of the facts and circumstances, it would be contrary to the public interest to permit respondent to retain his smog check test only station license and his ARD registration.

12. The evidence did not establish that respondent engaged in improper conduct as an advanced emission specialist technician on March 9, 2009. He has been current in his training. He has personally performed smog inspections since his September 2008 citation, and over the past two years at his station, without citation or complaint. He should be permitted to retain his technician license.

Costs

13. Business and Professions Code section 125.3 provides, in pertinent part, that the bureau may request the administrative law judge to direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case. Business and Professions Code section 125.3, subdivision (c), states:

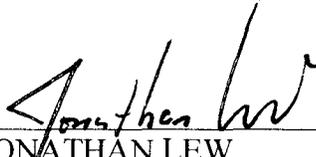
(c) A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the entity bringing the proceeding or its designated representative shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.

14. As set forth in Findings 25 through 28, the reasonable costs of investigation and enforcement to be awarded to the bureau are determined to be \$9,000.00. *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, identifies the factors to be considered in determining the reasonableness of costs pursuant to statutory provisions like Business and Professions Code section 125.3. The factors include whether the licensee has been successful at hearing in getting charges dismissed or reduced; the licensee's subjective good faith belief in the merits of his or her position; whether the licensee has raised a colorable challenge to the proposed discipline; the financial ability of the licensee to pay; and whether the scope of the investigation was appropriate to the alleged misconduct. In this case, all but one of the allegations were sustained. As set forth in Finding 27, total costs of investigation were adjusted to account for the scope of investigation's appropriateness for the misconduct alleged. This is also a case where respondent was successful in getting charges related to his technician license dismissed.

ORDER

1. Smog Check Test Only Station License No. TC 238624, issued to The Smog Shop, is revoked by reason of Legal Conclusions 5, 6 and 7.
2. Automotive Repair Dealer Registration No. ARD 238624, issued to The Smog Shop, is invalidated by reason of Legal Conclusions 3 and 4.
3. The accusation relating to Advanced Emission Specialist Technician License No. EA 150368, issued to respondent, is dismissed by reason of Legal Conclusions 8 and 12.
4. Respondent is ordered to pay to the bureau the costs of investigation and prosecution of this matter, in the amount of \$9,000.00 pursuant to Legal Conclusion 14.

DATED: March 11, 2011



JONATHAN LEW
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. 79/10-62

12 **THE SMOG SHOP**
13 **125 Burney Street**
14 **Modesto, California 95354**
15 **EDIK SIMONYANS, OWNER**
16 **Automotive Repair Dealer Registration**
17 **No. ARD 238624**
18 **Smog Check Test Only Station License**
19 **No. TC 238624,**

A C C U S A T I O N
S M O G C H E C K

17 and

18 **EDIK SIMONYANS**
19 **4176 N. Kilroy Road**
20 **Turlock, California 95382**
21 **Advanced Emission Specialist Technician**
22 **License No. EA 150368**

21 Respondents.

23 Complainant alleges:

24 **PARTIES**

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

27 ///

28 ///

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

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

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

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

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

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

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

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

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

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

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1 SECOND CAUSE FOR DISCIPLINE

2 (Fraud)

3 15. Respondent's registration is subject to discipline pursuant to Code section 9884.7,
4 subdivision (a)(4), in that on or about March 9, 2009, he committed acts which constitute fraud by
5 issuing electronic Certificate of Compliance No. NI390334C for the 1992 Ford pickup without
6 performing a bona fide inspection of the emission control devices and systems on that vehicle,
7 thereby depriving the People of the State of California of the protection afforded by the Motor
8 Vehicle Inspection Program.

9 THIRD CAUSE FOR DISCIPLINE

10 (Violations of the Motor Vehicle Inspection Program)

11 16. Respondent's station license is subject to discipline pursuant to Health & Safety Code
12 section 44072.2, subdivision (a), in that on or about March 9, 2009, regarding the 1992 Ford
13 pickup, Respondent failed to comply with the following sections of that Code:

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

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

19 c. **Section 44015, subdivision (b):** Respondent issued electronic Certificate of
20 Compliance No. NI390334C without properly testing and inspecting that vehicle to determine if it
21 was in compliance with Health & Safety Code section 44012.

22 d. **Section 44059:** Respondent willfully made false entries for electronic Certificate of
23 Compliance No. NI390334C, by certifying that the vehicle had been inspected as required when,
24 in fact, it had not.

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1 **FOURTH CAUSE FOR DISCIPLINE**

2 (Failure to Comply with Regulations Pursuant to the
3 Motor Vehicle Inspection Program)

4 17. Respondent's station license is subject to discipline pursuant to Health & Safety Code
5 section 44072.2, subdivision (c), in that on or about March 9, 2009, regarding the 1992 Ford
6 pickup, Respondent failed to comply with provisions of California Code of Regulations, title 16,
7 as follows:

8 a. **Section 3340.24, subdivision (c):** Respondent falsely or fraudulently issued
9 electronic Certificate of Compliance No. NI390334C, in that the vehicle could not pass the visual
10 portion of the smog inspection because the vehicle's fuel evaporation canister was missing.

11 b. **Section 3340.35, subdivision (c):** Respondent issued electronic Certificate of
12 Compliance No. NI390334C even though that vehicle had not been inspected in accordance with
13 section 3340.42.

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

16 **FIFTH CAUSE FOR DISCIPLINE**

17 (Dishonesty, Fraud or Deceit)

18 18. Respondent's station license is subject to discipline pursuant to Health & Safety Code
19 section 44072.2, subdivision (d), in that on or about March 9, 2009, Respondent committed
20 dishonest, fraudulent or deceitful acts whereby another is injured by issuing electronic Certificate
21 of Compliance No. NI390334C for the 1992 Ford pickup without performing a bona fide
22 inspection of the emission control devices and systems on that vehicle, thereby depriving the
23 People of the State of California of the protection afforded by the Motor Vehicle Inspection
24 Program.

25 **SIXTH CAUSE FOR DISCIPLINE**

26 (Dishonesty, Fraud or Deceit)

27 19. Respondent's technician license is subject to discipline pursuant to Health & Safety
28 Code section 44072.2, subdivision (d), in that on or about March 9, 2009, Respondent committed

1 dishonest, fraudulent or deceitful acts whereby another is injured, as more particularly set forth in
2 paragraphs 15 and 18, above.

3 **PRIOR CITATIONS**

4 20. To determine the degree of discipline, if any, to be imposed on Respondent,
5 Complainant alleges as follows:

6 a. On or about February 26, 2008, the Bureau issued Citation No. C08-0714 against
7 Respondent's registration and station licenses for violations of Health & Safety Code section
8 44012, subdivision (f) (failure to perform a visual/functional check of emission control devices
9 according to procedures prescribed by the department); and, California Code of Regulations, title
10 16, section ("Regulation") 3340.35, subdivision (c) (issuing a certificate of compliance to a
11 vehicle that was improperly tested), for issuing a certificate of compliance to a Bureau undercover
12 vehicle with a missing PCV Valve. The Bureau assessed civil penalties totaling \$500 against
13 Respondent for the violations. Respondent complied with this citation on April 3, 2008.

14 b. On or about June 12, 2008, the Bureau issued Citation No. C08-1090 against
15 Respondent's registration and station licenses for violations of Health & Safety Code section
16 44014 (testing and repair of vehicles pursuant to the program shall be conducted at smog check
17 stations by licensed technicians who have qualified pursuant to this chapter). Respondent made
18 repairs to a Bureau undercover vehicle with the ignition timing out of specification. The Bureau
19 assessed civil penalties totaling \$1,500 against Respondent for the violations. Respondent
20 complied with this citation on July 8, 2008.

21 c. On or about September 4, 2008, the Bureau issued Citation No. C09-0207 against
22 Respondent's registration and station licenses for violations of Health & Safety Code section
23 44012, subdivision (f) (failure to perform a visual/functional check of emission control devices
24 according to procedures prescribed by the department); and, Regulation, section 3340.35,
25 subdivision (c) (issuing a certificate of compliance to a vehicle that was improperly tested), for
26 issuing a certificate of compliance to a Bureau undercover vehicle with a missing Air Suction
27 Valve. The Bureau assessed civil penalties totaling \$2,000 against Respondent for the violations.
28 Respondent complied with this citation on October 15, 2008.

1 d. On or about February 26, 2008, the Bureau issued Citation No. M08-0715 against
2 Respondent's technician license for violations of Health & Safety Code section 44032, (failure to
3 perform tests and inspects in accordance with Health & Safety Code section 44012), and
4 Regulation, section 3340.30, subdivision (a) (inspect, test, and repair vehicles in accordance with
5 Health & Safety Code sections 44012, 44035, and Regulation 3340.42) for issuing a certificate of
6 compliance to a Bureau undercover vehicle with a missing PCV Valve. Respondent was required
7 to attend an 8-hour training course. Respondent complied with this citation on April 12, 2008.

8 e. On or about September 4, 2008, the Bureau issued Citation No. M09-0208 against
9 Respondent's technician license for violations of Health & Safety Code section 44032, (failure to
10 perform tests and inspects in accordance with Health & Safety Code section 44012), and
11 Regulation, section 3340.30, subdivision (a) (inspect, test, and repair vehicles in accordance with
12 Health & Safety Code sections 44012, 44035, and Regulation, section 3340.42) for issuing a
13 certificate of compliance to a Bureau undercover vehicle with a missing Air Suction Valve.
14 Respondent was required to attend a 16-hour training course. Respondent complied with this
15 citation on October 18, 2008.

16 **OTHER MATTERS**

17 21. Under Code section 9884.7, subdivision (c), the director may invalidate temporarily
18 or permanently or refuse to validate, the registrations for all places of business operated in this
19 state by to Edik Simonyans doing business as The Smog Shop, upon a finding that he has, or is,
20 engaged in a course of repeated and willful violations of the laws and regulations pertaining to an
21 automotive repair dealer.

22 22. Under Health and Safety Code section 44072.8, if Smog Check Test Only Station
23 License Number TC 238624, issued to Edik Simonyans doing business as The Smog Shop, is
24 revoked or suspended, any additional license issued under this chapter in the name of said
25 licensee may be likewise revoked or suspended by the director, including, but not limited to
26 Advanced Emission Specialist Technician License Number EA 150368, issued to Edik
27 Simonyans.
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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 238624, issued to Edik Simonyans doing business as The Smog Shop;
2. Temporarily or permanently invalidating any other automotive repair dealer registration issued in the name of Edik Simonyans;
3. Revoking or suspending Smog Check Test Only Station License Number TC 238624, issued to Edik Simonyans doing business as The Smog Shop;
4. Revoking or suspending any additional license issued under Chapter 5 of the Health & Safety Code in the name of Edik Simonyans;
5. Revoking or suspending Advanced Emission Specialist Technician License Number EA 150368, issued to Edik Simonyans;
6. Revoking or suspending any additional license issued under Chapter 5 of the Health & Safety Code in the name of Edik Simonyans;

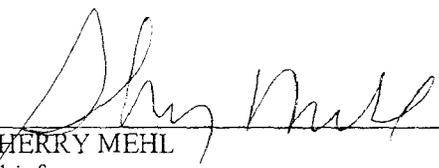
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7. Ordering Edik Simonyans to pay the Bureau of Automotive Repair the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3; and,

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

DATED: 4/1/02


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