

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

In the Matter of the Accusation Against:

RONALD DALE NEELY,

Advanced Emission Specialist Technician
License No. EA 151255 (to be
re-designated upon renewal as EO
151255 and/or EI 151255)

Respondent.

Case No. 79/14-62

OAH No. 2014040647

DECISION

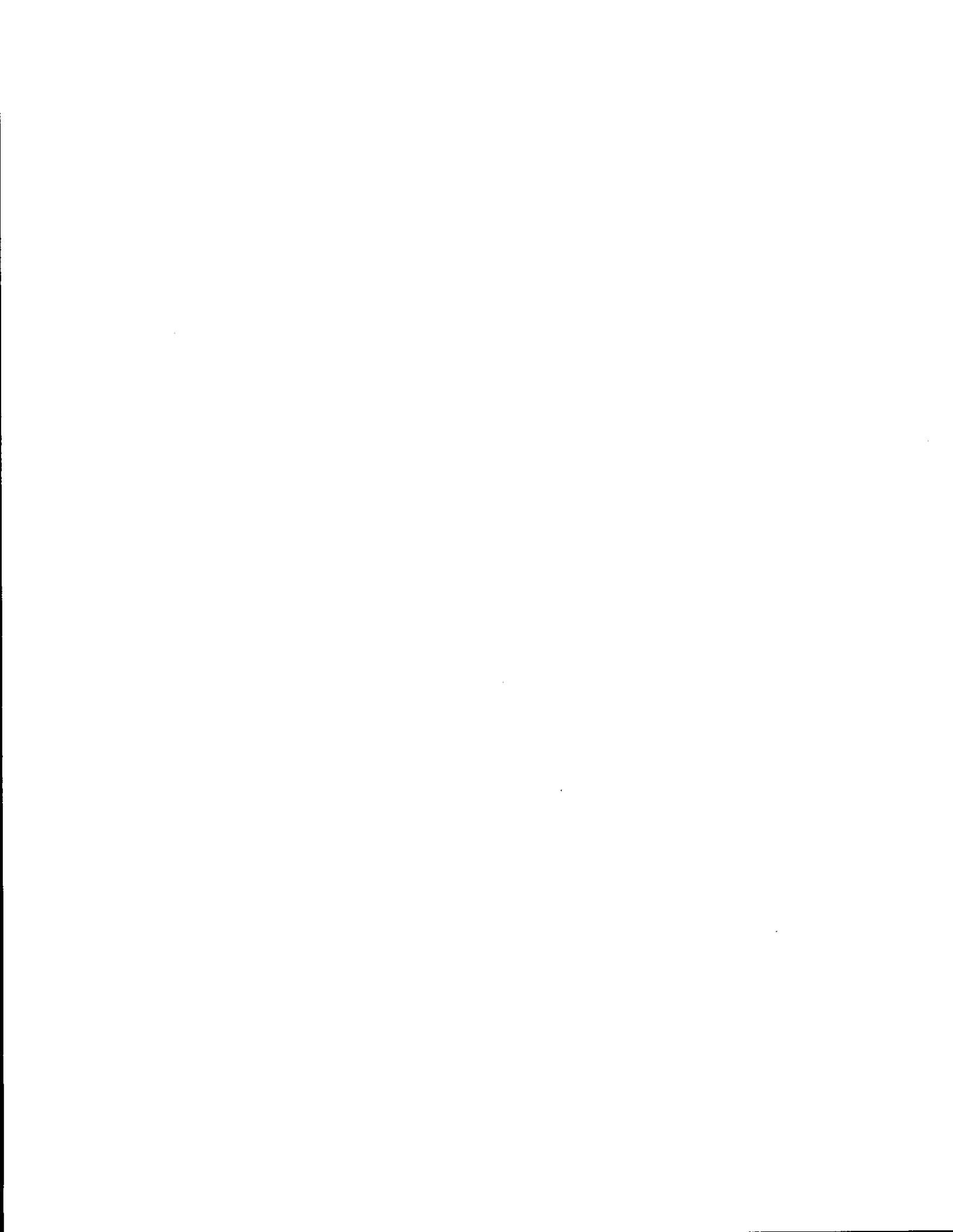
The attached Proposed Decision of the Administrative Law Judge is hereby accepted and adopted by the Director of Consumer Affairs as the Decision in the above-entitled matter.

This Decision shall become effective August 31, 2015.

DATED: July 23, 2015



TAMARA COLSON
Assistant General Counsel
Department of Consumer Affairs



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

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PROPOSED DECISION

Administrative Law Judge Floyd D. Shimomura, State of California, Office of Administrative Hearings, heard this matter on January 5, 2015, in Sacramento, California.

Geoffrey S. Allen, Deputy Attorney General, represented complainant Patrick Dorais, Chief, the Bureau of Automotive Repair (bureau), Department of Consumer Affairs.

Ronald Dale Neely (respondent) represented himself and was present throughout the administrative hearing.

The matter was initially submitted for decision on January 5, 2015. It was reopened on January 27, 2015, to permit the possible submission of additional evidence. It was closed on February 13, 2015, after no request to submit additional evidence was filed.¹

¹ The "Order Closing Record" issued on February 13, 2015, states the following:

"The matter was submitted for decision on January 5, 2015. On January 27, 2015, ALJ Shimomura issued an Order Reopening Record, on his own motion, to allow respondent to file a Motion to Reopen the Evidentiary Record to Submit Additional Evidence (Motion to Reopen) relating to a document titled "Certificate of Course Completion" for eight-hours of class, dated February 23, 2014, issued by the Bureau of

FACTUAL FINDINGS

Jurisdictional Facts

1. In 2005 respondent was issued an Advanced Emission Specialist (EA) Technician license number EA 151255.

2. On January 21, 2011, the bureau adopted a Proposed Decision in a case titled, *In the Matter of the Citation Against RONALD D. NEELY Smog Technician License No. EA 151255* (2011 Decision). The 2011 Decision involved a citation (#M2010-0800) against respondent for issuing a certificate of compliance on January 25, 2010 to a bureau undercover vehicle with a missing positive crank case ventilation (PCV) valve. The citation required respondent to take an eight-hour training course. The 2011 Decision, issued after an administrative hearing, affirmed the citation. It ordered respondent to complete an eight-hour training course and submit proof of completion to the bureau within 30 days. It stated that failure to comply “will result in suspension” of respondent’s Smog Check Technician Qualification.

3. On March 2, 2011, the bureau’s 2011 Decision became effective and proof of completion of the eight-hour training was required within 30 days (i.e. by April 1, 2011).

4. On March 31, 2011, respondent’s technician license number EA 151255 became delinquent and expired for failure to comply with renewal requirements.² Upon renewal of the license, the license will be redesignated as EO 151255 and/or EI 151255.

5. On November 25, 2013, complainant filed an Accusation alleging that respondent failed to submit proof of completing the eight-hour training as required by the citation affirmed in the bureau’s 2011 Decision. Complainant requests that respondent’s technician’s license and certain other licenses be suspended or revoked under Health and

Automotive Repair to Ronald Neely, Student Enrollment # 332647, which was attached to respondent’s Notice of Defense dated April 2, 2014. Under the terms of the Order Reopening Record, respondent had until 5:00 p.m. on February 6, 2015, to file the Motion to Reopen. Respondent failed to file a Motion to Reopen by the deadline. Therefore, the record is closed, and the Certificate of Course Completion shall not be considered for any purpose in this proceeding.”

² Although the Accusation, in paragraph 9 (Exh. #1), alleges that respondent’s license was suspended on May 11, 2011, and although this is also asserted in the bureau’s investigative report on page 1 (Exh. # 4), the bureau’s certified record of respondent’s license dated December 4, 2014 (Exh. #2) merely lists respondent’s license as “expired on March 31, 2011” and makes no mention that the license was suspended.

Safety Code sections 44072.8, 44050, and 44055. Complainant also requests recovery of reasonable investigation and enforcement costs under Business and Professions Code section 125.3.

6. On March 19, 2014, the Accusation and other related papers were served on respondent by certified mail.

7. On April 2, 2014, respondent acknowledged service and requested a hearing.

8. On December 12, 2014, a notice of hearing was served on respondent by registered mail informing him that a hearing would be held on January 5, 2015, at 9:00 a.m. at the Office of Administrative Hearings in Sacramento.

Failure to Take Training

9. Respondent failed to take and complete the required eight-hour training within 30 days of March 2, 2011, which was the effective date of the bureau's 2011 Decision affirming the citation after hearing (i.e., by April 1, 2011). This fact was not disputed by respondent.

Mitigating Circumstances

10. Respondent broke his knee on June 23, 2010. He had surgery four months later in October. Respondent took medication for his injury. It took him one and a half years to fully heal after his injury. Therefore, during later half of 2010 and 2011, respondent was recovering from the knee injury.

11. There was no evidence to support respondent's testimony that the medication for his knee injury made him incoherent much of the time and therefore he was unable to do the eight-hour training during the 30-day period following the March 2, 2011 effective date of the bureau's 2011 Decision. Respondent did not call any family, friend, acquaintance, or medical witness to corroborate his assertion. Also, the 2011 Decision indicates that respondent appeared and represented himself at his hearing on December 22, 2010, which is also during the period respondent claims to have been under medication.

Investigation and Enforcement Costs

12. The Board incurred costs of investigation and enforcement in the total amount of \$1,652.50 pursuant to Business and Professions Code section 125.3. A Certification of Prosecution Costs: Declaration of Geoffrey S. Allen was submitted in support of the request. Attached to the Declaration is a printout entitled Matter Time Activity by Professional Type, which describes the dates, hours, and tasks performed by the Office of the Attorney General in the total amount of \$1,652.50. Respondent did not object to the evidence of complainant's costs.

13. Respondent is a person of limited means. He relied on workers compensation disability payments to live on during his knee injury. He moves from job to job and is often unemployed. If awarded, respondent stated that he had the ability to pay the \$1,652.50 in costs. Respondent indicated that he had \$800 and could pay the rest by credit card.

LEGAL CONCLUSIONS

Failure to Comply with Citation

1. The complainant requests that respondent's license be revoked or suspended for failing to comply with the citation requiring training within 30 days.

2. The bureau may issue a citation against a smog technician for a violation of the Motor Vehicle Inspection Program, and the citation may contain an order of abatement or an administrative fine, or both. (Health & Saf. Code, § 44050, subd. (a).) An order of abatement may require a smog technician to successfully complete retraining or advanced training courses. (Health & Saf. Code, § 44050, subd. (c)(2).) If a smog technician requests a hearing, compliance is due 30 days after a final order is entered if the citation is sustained. (Health & Saf. Code, § 44050, subd. (d).) Failure to comply with an order of abatement requiring training is grounds for suspension or revocation of a smog technician's license or placing the licensee on probation. (Health & Saf. Code, § 44050, subd. (e).) In this case, the bureau's 2011 Decision provides that failure to complete the required training within 30 days "will result in suspension" of respondent's license.

3. Respondent failed to take and complete the required eight-hour training within 30 days of March 2, 2011, which was the effective date of the bureau's 2011 Decision affirming the citation. [Finding 9.] There was no evidence to corroborate respondent's assertion that he was unable to complete the training because medication for a knee injury rendered him incoherent during this period. [Finding 11.] Accordingly, there was no excuse for respondent's failure to comply with the citation. Respondent's license is suspended pursuant to bureau's 2011 decision.

4. Respondent's technician license number EA 151255 became delinquent and expired on March 31, 2011 for failure to comply with renewal requirements. Nevertheless, the expiration of a license does not deprive the bureau to proceed with disciplinary action. (Health and Saf. Code, § 44072.6.)

5. For the above reasons, respondent's continued failure to comply with an order of abatement requiring training is grounds for suspension of his smog technician's license EA 151255 under Health and Safety Code section 44050, subdivision (e) or any other redesignated number (such as EO 151255 and/or EI 151255) should his license be renewed.

Respondent's Related Licenses

6. Complainant requests that certain related licenses be revoked or suspended under Health and Safety Code section 44072.8. When a license is revoked or suspended following a hearing under the Motor Vehicle Inspection Program, any additional license issued under this program in the name of the licensee may be likewise revoked or suspended by the bureau. (Health & Saf. Code, § 44072.8.) Good cause having been established based on the suspension of respondent's smog technician's license, there is adequate grounds to grant this request.

Investigation and Enforcement Costs

7. The complainant requests reimbursement of the reasonable costs of investigation and enforcement in the total amount of \$1,652.50 pursuant to Business and Professions Code section 125.3.

8. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and Professions Code section 125.3. These factors include: 1) the licentiate's success in getting the charges dismissed or reduced; 2) the licentiate's subjective good faith belief in the merits of his or her position; 3) whether the licentiate raised a colorable challenge to the proposed discipline; 4) the licentiate's financial ability to pay; and 5) whether the scope of the investigation was appropriate in light of the alleged misconduct. (*Id.*, at p. 45.)

9. Respondent's defense was weak, but not frivolous or made in bad faith. Although respondent had a colorable excuse that medication for his knee injury rendered him incoherent and unable to do the training and although respondent appeared to have a good faith belief in the merits of his position, respondent's evidentiary case was insufficient because he presented no witness or other evidence to corroborate his story in a situation where corroboration by a doctor, caregiver, family member, or friend would have been helpful. Therefore, respondent had no success in getting the charges dismissed or reduced.

10. The prosecution and enforcement costs were reasonable. A detailed declaration certifying the costs of prosecution by the Attorney General was submitted in the amount of \$1,652.50. Respondent did not object to the evidence of complainant's costs. [Finding 12.] The scope of the prosecution and enforcement costs in the amount requested appear reasonable in light of the misconduct alleged.

11. Respondent is a person of limited means. He indicated at hearing that, if awarded, he had the ability to pay \$800 and the rest of the \$1,652.50 by credit card. [Finding 13.] Given the fact that respondent's defense was not frivolous and made in good faith and given that paying more than \$800 would require him to go into debt and would be a serious barrier to his regaining his license, it is concluded that \$800 is the fair and reasonable amount that respondent should pay in enforcement and prosecution costs.

Good Cause for Suspension and Other Relief

12. Based on the above, respondent's failure to comply with an order of abatement requiring training is ground for suspension of his smog technician's license pursuant to Health and Safety Code section 44050, subdivision (e) and in accordance with the bureau's 2011 Decision, which provides that failure to complete the required training "will result in suspension." Since respondent's license has been suspended after hearing under the Motor Vehicle Inspection Program, any additional license issued under this program in respondent's name may be likewise suspended by the bureau under Health and Safety Code section 44072.8. Lastly, respondent must pay \$800 in enforcement and prosecution costs.

ORDER

1. The Advanced Emission Specialist (EA) Technician License, currently designated as EA 151255 (and which may be re-designated upon renewal as EO 151255 and/or EI 151255) issued to Ronald Dale Neely is **SUSPENDED** until respondent has completed the eight-hour training specified in the bureau's 2011 Decision, complied with all normal requirements of renewal, and any other additional training the bureau deems necessary.

2. Any additional license issued to Ronald Dale Neely under the Motor Vehicle Inspection Program is likewise suspended under Health and Safety Code section 44072.8.

3. Respondent shall reimburse the Board \$800 for its costs of investigation and enforcement of this case. The Board shall not renew or reinstate the license if respondent has not paid all the costs ordered.

DATED: June 1, 2015


FLOYD D. SHIMOMURA
Administrative Law Judge
Office of Administrative Hearings

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

12 In the Matter of the Accusation Against:

Case No. *179/14-62*

13 **RONALD DALE NEELY**
14 **3412 Sunny Rd.**
15 **Stockton, CA 95215**

A C C U S A T I O N

16 **Advanced Emission Specialist Technician**
17 **License No. EA 151255 (to be re-designated**
upon renewal as EO 151255 and/or EI
18 **151255)**

19 Respondent.

20
21 Patrick Dorais ("Complainant") alleges:

22 **PARTIES**

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

25 2. On a date uncertain in 2005, the Bureau issued Advanced Emission Specialist
26 Technician License Number EA 151255 ("technician license") to Ronald Dale Neely
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28

1 ("Respondent"). The technician license expired on March 31, 2011, and has not been renewed.
2 Upon renewal of the license, the license will be re-designated as EO 151255 and/or EI 151255.¹

3 **STATUTORY PROVISIONS**

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

7 4. Section 44050 of the Health and Safety Code states, in pertinent part:

8 (a) In addition to or in lieu of any other remedy or penalty, including, but
9 not limited to, education, training, or an office conference, the department may issue
10 a citation to a licensee, contractor, or fleet owner for a violation of the requirements
11 of this chapter or a regulation adopted pursuant to this chapter. The citation may
12 contain an order of abatement or the assessment of an administrative fine, or both.

13 (e) Failure to comply with an order of abatement or payment of an
14 administrative fine issued by the department pursuant to this section is grounds for
15 suspension or revocation of the license, or placing the license on probation.

16 5. Section 44055 of the Health and Safety Code, subdivision (b) states:

17 (b) The department may deny an application for the renewal of a test
18 station or repair station license if the applicant, or any partner, officer, or director
19 thereof, has failed to pay any civil penalty or administrative fine in accordance with
20 this article.

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

25 7. Section 44072.8 of the Health and Safety Code states:

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

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¹ Effective August 1, 2012, California Code of Regulations, title 16, sections 3340.28, 3340.29, and 3340.30 were amended to implement a license restructure from the Advanced 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 **COST RECOVERY**

2 8. Section 125.3 of the Code provides, in pertinent part, that a Board may request the
3 administrative law judge to direct a licensee found to have committed a violation or violations of
4 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
5 enforcement of the case.

6 **CAUSE FOR DISCIPLINE**

7 **(Failure to Comply with Citation)**

8 9. Respondent has subjected his technician license to discipline pursuant to Health and
9 Safety Code section 44050, subdivision (c), in that on or about February 3, 2010, the Bureau
10 issued Citation No. M2010-0800 to Respondent against his technician license for violations of
11 Health and Safety Code section 44032, (qualified technicians shall perform tests of emission
12 control systems and devices in accordance with section 44012 of that Code) and California Code
13 of Regulations, title 16, ("Regulation") section 3340.30, subdivision (a) (qualified technicians
14 shall inspect, test, and repair vehicles in accordance with sections 44012 and 44035 of the Health
15 and Safety Code, and Regulation section 3340.42). On March 10, 2010, the Bureau served
16 Respondent with the citation requiring Respondent to complete an 8-hour training course.
17 Respondent appealed the citation and a hearing was held on December 22, 2010. The citation
18 was affirmed and became effective on March 2, 2011. Respondent failed to provide proof of
19 training. The license became delinquent on March 31, 2011, and was suspended on May 11,
20 2011.

21 **OTHER MATTERS**

22 10. Under Health and Safety Code section 44072.8, if Respondent's technician license,
23 currently designated as EA 151255, and as re-designated upon timely renewal as EO 151255
24 and/or EI 151255, is/are revoked or suspended, any additional license issued under this chapter in
25 the name of said licensee may be likewise revoked or suspended by the director.

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1 PRAYER

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

4 1. Revoking or suspending Ronald Dale Neely's technician license, currently designated
5 as EA 151255, and as re-designated upon renewal as EO 151255 and/or EI 151255;

6 2. Revoking or suspending any additional license issued under Chapter 5 of the Health
7 and Safety Code in the name of Ronald Dale Neely;

8 3. Ordering Ronald Dale Neely to pay the Bureau of Automotive Repair the reasonable
9 costs of the investigation and enforcement of this case, pursuant to Business and Professions
10 Code section 125.3;

11 4. Taking such other and further action as deemed necessary and proper.

12 DATED: November 25, 2013



PATRICK DORAIS
Chief
Bureau of Automotive Repair
Department of Consumer Affairs
State of California
Complainant

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