

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

In the Matter of the Accusation Against:

DONG Q. PHAM

Respondent.

Case No. 79/12-117

OAH No. 2012070055

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 error on page 1, paragraph 2, third line, under Factual Findings, of the Proposed Decision is corrected as follows:

The expiration date of "November 20, 2013" of the Advanced Emission Specialist Technician license number EA 630098 is corrected to read "November 30, 2013".

This Decision shall become effective DEC 06 2013.

DATED: November 1, 2013



DONALD CHANG
Assistant Chief Counsel
Department of Consumer Affairs

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

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PROPOSED DECISION

Administrative Law Judge Paul Slavit, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on October 30, 2012.

Shana A. Bagley, Deputy Attorney General, represented complainant Bureau of Automotive Repair.

Respondent Dong Q. Pham represented himself.

The case was submitted on October 30, 2012.

FACTUAL FINDINGS

1. John Wallauch, Chief of the Bureau of Automotive Repair, Department of Consumer Affairs (bureau) brought this accusation in his official capacity.

2. Respondent Dong Q. Pham has been licensed as an Advanced Emission Specialist Technician under license number EA 630098 since March 21, 2008. The license will expire on November 20, 2013, unless renewed.

Prior Disciplinary History

3. On November 2, 2009, the bureau issued a citation against respondent following a bureau undercover operation. Respondent was found to have issued a smog certificate to a bureau undercover car despite the fact that the vehicle was missing its thermostatic air cleaner system. Pursuant to a citation conference, respondent was ordered to attend an eight-hour training class, which he has completed.

4. On March 14, 2011, the bureau issued a citation against respondent following a bureau undercover operation. Respondent was found to have issued a smog certificate for a car despite the fact that the vehicle was missing its positive crankcase ventilation valve (PCV valve).

Pursuant to a citation conference, respondent was ordered to attend a 16-hour training class. Respondent appealed the citation; and he has not completed the training class.

5. On July 12, 2011, the bureau issued a citation against respondent following a bureau undercover operation. In that matter, respondent issued a smog certificate to a car despite the fact that the vehicle was missing its fuel evaporative canister. As with the previous matters, a citation conference was held and respondent was ordered to attend the basic clean air car course—a 68-hour course. Respondent appealed the citation; and he has not completed the training class.

The Bureau's Undercover Operation – 1999 Mazda Pickup

6. Michael A. Frerich, Program Representative II; Raymond Blanco; and Arthur Sanchez, Program Representative testified for the bureau concerning the undercover operation that led to this accusation.

7. During the period October 11, 2011 through October 18, 2011, Frerich inspected and documented the condition of a bureau owned 1999 Mazda pickup at the bureau's documentation lab. He first determined that the car had a properly installed and operating emissions control system in place, and otherwise was running properly. After documenting its original condition, Frerich then intentionally removed the PCV valve from the emissions control system. In place of the PCV valve, he inserted a short piece of rubber hose with a bolt inserted in it.

8. Frerich explained that a smog certification test consists of three parts—a visual inspection, functional test of the engine, and the tail pipe emissions test. If a car fails any one component of the test, it must fail the whole test. In this instance, the PCV valve is a required part of the emissions control system on the 1999 Mazda. The valve falls within the visual inspection portion of the smog test. If it is not present, the car fails the visual inspection portion of the smog test, and a smog certificate legally cannot be issued.

9. On October 20, 2011, Frerich trucked the Mazda to the bureau's San Jose garage, where he released it to the custody of Sanchez.

10. Thereafter, on November 9, 2011, Sanchez met with Blanco; he released the Mazda to Blanco, who brought the car to I DO SMOG, a smog test center in Sunnyvale where respondent worked. Using an assumed name, Blanco requested, paid for and received a smog test for the truck, which indicated that the truck was smog compliant. The smog certificate indicates that respondent was the technician who performed the smog test, passed the car and issued the smog certificate. Notably, the certificate that respondent issued specifically passed the truck as to the PCV valve, despite the absence of the valve.

11. After receiving the certificate, Blanco returned the truck to Sanchez who took it to the bureau's San Jose garage. On December 7, 2011, he released the Mazda back to Frerich, who in turn transported it to the Sacramento documentation lab.

12. Frerich, Sanchez and Blanco's collective testimony established that the 1999 Mazda remained in the secure custody of the bureau throughout the operation. Before and after the truck was transferred from Frerich to Sanchez, from Sanchez to Blanco, and then returned to each person, the condition of the car's emissions system was inspected and documented, including photographs of the engine compartment, emissions control system, and missing PCV valve. On return to the Sacramento lab, Frerich confirmed that the truck was in the same condition as when he first prepared it for the undercover run, with its PCV valve still missing, and thus smog non-compliant.

Respondent's Contentions

13. Respondent acknowledged that he received citations for three previous violations: one involving a missing thermostatic cleaner, one a missing PCV valve, and the third a missing evaporative canister. Respondent testified that he currently is taking classes to complete the training ordered in the citation proceedings.

14. Respondent explained that the PCV valve is no larger than one's thumb, and therefore difficult to see in the engine compartment. He agreed that if the 1999 Mazda was missing its PCV valve, it should not have passed the smog test. However, he stated that a person needs to see the vehicle "in the real world" to understand how difficult it can be to find and identify the valve.

15. Respondent asserted that the regulations or procedures applicable to smog testing state that the presence of the PCV valve only needs to be visually confirmed if it is "inspectable"—that is, it can be seen easily inside the engine compartment. He stated that sometimes other components in the engine compartment conceal the valve, so that its presence cannot be confirmed. In addition, he said that the label under the hood of the vehicle sometimes shows what the PVC valve looks like, but not where it is located in the engine compartment; so, it is not always helpful in visually confirming that the PCV valve is there.

In rebuttal, the bureau's program representative Sanchez testified that there is no exception in the smog test procedures for a PCV valve that might be concealed or difficult to locate. In any event, the valve on this Mazda was easily located on the valve cover of the engine.

Costs

16. In connection with the prosecution of this accusation, the board's counsel submitted a certification of costs showing billable professional time for attorney and staff in the sum of \$2,822.50. These costs relate only to professional time devoted to this accusation, and do not include bureau or attorney time devoted to any of the prior citation matters.

The case of *Zuckerman v. Board of Chiropractic Engineers* (200) 29 Cal.4th 32 sets forth the factors to be considered in determining the reasonableness of costs. Those factors include whether the respondent has been successful at the hearing in getting charges reduced or dismissed; respondent's subjective good faith belief in the merits of his position; whether the respondent has raised a colorable challenge to the proposed discipline; the financial

ability to pay the cost award; and whether the scope of the investigation was appropriate to the alleged conduct of the respondent.

In this case, the only factor that might have a bearing on the award of costs is respondent's ability to pay. No evidence was offered in this regard, although the proposed discipline in this matter likely will lead to loss of respondent's employment. In any event, the amount of costs claimed is not disproportionate to the nature of the violation and prosecution required to prove it at the hearing. The costs claimed are deemed reasonable pursuant to Business and Professions Code section 125.3.

LEGAL CONCLUSIONS

1. Health and Safety Code section 44072.2 provides:

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.

2. Cause exists for discipline against respondent's advanced emissions specialist license pursuant to Health and Safety Code section 44072.2, subdivisions (a), (c) and (d), in that respondent did not comply with regulations pertaining to the testing of the 1999 Mazda pickup, by failing to determine that all emission control devices were present and functioning, failing to perform all emissions control tests and inspections, and making false and misleading entries that the car had been inspected and passed smog certification, all as set forth in Findings 6 through 12.

Factors in Mitigation or Aggravation

3. The bureau's guidelines for disciplinary penalties in Code of Regulations, title 16, section 3395.4 set forth factors in aggravation, which are present here. These include prior notices of violations, prior office conference with the bureau; prior evidence of incompetence, prior history of citations, evidence that the unlawful act was part of a pattern of practice; and other conduct which constitutes fraud or gross negligence. Conversely, none of the bureau's stated factors in mitigation apply.

4. In the last three years, respondent has received three citations—all involving

bureau undercover operations, and all involving missing components to vehicle emissions systems. He has completed an eight-hour training program; and by his testimony, is in the process of completing the 68-hour basic clean air car course. As such, by the time of the fourth undercover operation, he should have been well aware of his responsibilities as a smog technician, the requirements for a properly performed smog test, and the likelihood that the bureau might run another undercover investigation to test his compliance.

Despite the warnings and assistance offered in the citation process, and the supplemental training required by the bureau, respondent continued to perform tests improperly and/or incompletely, and issued a certificate of compliance on the 1999 Mazda which, in reality, was non-compliant.

5. Given respondent's previous history of improper performance of smog certification; his failure to learn from the previous violations and required training, and then correct his performance; and the facts of this fourth violation, it is appropriate that respondent's advanced emission specialist license be revoked.

ORDER

1. Respondent's advanced emission specialist license number EA 630098 is revoked.

2. Respondent shall pay the bureau the sum of \$2,822.50 for reasonable costs of prosecution of this accusation.

DATED: November 26, 2012



PAUL SLAVIT
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**

12 In the Matter of the Accusation Against:

Case No. 79/12-117

13 **DONG Q. PHAM**
14 **3046 Hostetter Road**
15 **San Jose, CA 95132**
16 **Advanced Emission Specialist Technician**
17 **License No. EA 630098**

A C C U S A T I O N
(Smog Check)

Respondent.

18 Complainant alleges:

19 **PARTIES**

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

21 2. On or about March 21, 2008, the Director of Consumer Affairs ("Director") issued
22 Advanced Emission Specialist Technician License Number EA 630098 to Dong Q. Pham
23 ("Respondent"). Respondent's advanced emission specialist technician license was in full force
24 and effect at all times relevant to the charges brought herein and will expire on November 30,
25 2013, unless renewed.

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1 JURISDICTION

2 3. Health and Safety Code ("Health & Saf. Code") section 44002 provides, in pertinent
3 part, that the Director has all the powers and authority granted under the Automotive Repair Act
4 for enforcing the Motor Vehicle Inspection Program.

5 4. Health & Saf. Code section 44072.6 provides, in pertinent part, that the expiration or
6 suspension of a license by operation of law, or by order or decision of the Director of Consumer
7 Affairs, or a court of law, or the voluntary surrender of the license shall not deprive the Director
8 of jurisdiction to proceed with disciplinary action.

9 STATUTORY PROVISIONS

10 5. Health & Saf. Code section 44072.2 states, in pertinent part:

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

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

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

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

19 6. Health & Saf. Code section 44072.8 states that when a license has been revoked or
20 suspended following a hearing under this article, any additional license issued under this chapter
21 in the name of the licensee may be likewise revoked or suspended by the director.

22 7. Business and Professions Code ("Bus. & Prof. Code") section 22, subdivision (a),
23 states:

24 "Board" as used in any provision of this Code, refers to the board in
25 which the administration of the provision is vested, and unless otherwise expressly
26 provided, shall include "bureau," "commission," "committee," "department,"
"division," "examining committee," "program," and "agency."

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1 COST RECOVERY

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

6 UNDERCOVER OPERATION: 1999 MAZDA PICKUP

7 9. On November 9, 2011, an undercover operator with the Bureau ("operator") took the
8 Bureau's 1999 Mazda pickup to I Do Smog located in Sunnyvale, California, and requested a
9 smog inspection. The positive crankcase ventilation (PCV) valve had been removed from the
10 Bureau-documented vehicle. After the inspection was completed, the operator paid the facility
11 \$58 and received copies of an invoice and a vehicle inspection report. The vehicle inspection
12 report indicated that the smog inspection was performed by Respondent. That same day,
13 electronic smog Certificate of Compliance No. [REDACTED] was issued for the vehicle.

14 10. On December 8, 2011, the Bureau inspected the vehicle and found that the PCV valve
15 was still missing.

16 FIRST CAUSE FOR DISCIPLINE

17 **(Violations of the Motor Vehicle Inspection Program)**

18 11. Respondent is subject to disciplinary action pursuant to Health & Saf. Code section
19 44072.2, subdivision (a), in that Respondent failed to comply with section 44012, subdivision (f),
20 of that Code, as follows: Respondent failed to perform the visual inspection of the emission
21 control systems and devices on the Bureau's 1999 Mazda pickup in accordance with procedures
22 prescribed by the department in that Respondent failed to determine that the PCV valve was
23 missing.

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1 2009, Respondent had issued a certificate of compliance to a Bureau undercover vehicle with a
2 missing thermostatic air cleaner. Respondent was directed to complete an 8 hour training course
3 and to submit proof of completion to the Bureau within 30 days from receipt of the citation.
4 Respondent completed the training on November 20, 2009.

5 b. On or about March 14, 2011, the Bureau issued Citation No. M2011-1062 against
6 Respondent for violations of Health & Saf. Code sections 44032 (qualified technicians shall
7 perform tests of emission control systems and devices in accordance with Health & Saf. Code
8 section 44012); and Regulation 3340.30, subdivision (a) (qualified technicians shall inspect, test
9 and repair vehicles in accordance with Health & Saf. Code sections 44012 and 44035 and
10 Regulation 3340.42). On or about February 17, 2011, Respondent had issued a certificate of
11 compliance to a Bureau undercover vehicle with a missing PCV valve. Respondent was directed
12 to complete a 16 hour training course and to submit proof of completion to the Bureau within 30
13 days from receipt of the citation. Respondent appealed the citation on April 12, 2011; the citation
14 is currently pending.

15 c. On or about July 12, 2011, the Bureau issued Citation No. M2012-0027 against
16 Respondent for violating Health & Saf. Code section 44032 (qualified technicians shall perform
17 tests of emission control systems and devices in accordance with Health & Saf. Code section
18 44012). On or about June 21, 2011, Respondent had issued a certificate of compliance to a
19 Bureau undercover vehicle with a missing fuel evaporative canister. Respondent was directed to
20 complete the Basic Clean Air Care Course and to submit proof of completion to the Bureau.
21 Respondent appealed the citation on August 12, 2011; the citation is currently pending.

22 OTHER MATTERS

23 15. Pursuant to Health & Saf. Code section 44072.8, if Advanced Emission Specialist
24 Technician License Number EA 630098, issued to Respondent Dong Q. Pham, is revoked or
25 suspended, any additional license issued under this chapter in the name of said licensee may be
26 likewise revoked or suspended by the Director.

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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. Revoking or suspending Advanced Emission Specialist Technician License Number EA 630098, issued to Dong Q. Pham;

2. Revoking or suspending any additional license issued under Chapter 5 of the Health and Safety Code in the name of Dong Q. Pham;

3. Ordering Dong Q. Pham to pay the Director of Consumer Affairs the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;

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

DATED: 4/5/12

John Wallauch by Dong Q. Pham
JOHN WALLAUCH
Chief
Bureau of Automotive Repair
Department of Consumer Affairs
State of California
Complainant