

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

In the Matter of the Accusation Against:

T.N.B. TEST ONLY dba SERGIO CALLES

4577 W. Adams Blvd., Suite A

Los Angeles, CA 90016

Automotive Repair Dealer Registration No. ARD 277511

Smog Check Test Only Station License No. TC 277511

SERGIO CALLES

927 E. 52nd Place

Los Angeles, CA 90011

Smog Check Inspector License No. EO 635855

JOSE EDUARDO CALLES

927 E. 52nd Place

Los Angeles, CA 90011

Smog Check Inspector License No. EO 637171

and

ALVARO J. HERRADOR

927 E. 52nd Place

Los Angeles, CA 90011

Smog Check Inspector License No. EO 153673

Smog Check Repair Technician License No. EI 153673

Case No. 79/17-9192

OAH No. 20120010913

Respondents.

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby accepted and adopted by the Director of the Department of Consumer Affairs as the Decision in the above-entitled matter, with the following non-substantive edits pursuant to Government Code Section 11517, subdivision (c), paragraph (2):

- Page 38, paragraph 5, the Smog Check Inspector license issued to respondent Jose Eduardo Calles shall be license number EO 637171.

This Decision shall be effective on October 2, 2020.

IT IS SO ORDERED this 27th day of August, 2020.

Signed Copy on File
GRACE ARUPO RODRIGUEZ
Assistant Deputy Director
Legal Affairs Division
Department of Consumer Affairs

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

In the Matter of the Accusation Against:

T.N.B. TEST ONLY, dba SERGIO CALLES¹

Automotive Repair Dealer Registration No. ARD 277511

Smog Check, Test Only, Station License No. TC 277511;

SERGIO CALLES

Smog Check Inspector License No. EO 635855;

JOSE EDUARDO CALLES

Smog Check Inspector License No. EO 637171; and

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¹ Although listed this way in the caption of the Accusation, the evidence established that the registration and test only station license were issued to Sergio Calles, doing business as T.N.B. Test Only. (See Factual Findings 2 and 3.)

ALVARO J. HERRADOR

Smog Check Inspector License No. EO 153673

Smog Check Repair Technician License No. EI 153673,

Respondents Case No.

79/17-9192 OAH No.

20120010913

PROPOSED DECISION

David B. Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on July 22, 2020, by video and telephonic conference, in California.

Complainant Patrick Dorais was represented by Michael A. Cacciotti, Deputy Attorney General (DAG). Respondent Alvaro J. Herrador was present and was represented by William D. Ferreira, Attorney at Law. No appearance was made by T.N.B. Test Only, Sergio Calles, or Jose Eduardo Calles.

Documentary evidence and testimony were received and argument was made. The record was closed and the matter was submitted for decision on July 22, 2020.

Motion to Amend Accusation

At the outset of the hearing, Complainant moved to amend the Accusation against Respondent Alvaro J. Herrador (Respondent) to add that Respondent owns

and is licensed to operate Arlington Test Only, license no. 286618, and that any discipline against Respondent should also apply to that license. Respondent opposed the motion, arguing that there was no prior notice and that the amendment would necessitate further investigation to gather and be prepared to present evidence related to that license and the effect of any discipline that might be imposed against that license. Respondent requested a continuance to prepare to meet the new material.

Under Government Code section 11507, an agency may file an amended accusation at any time before the matter is submitted for decision. If the amended accusation presents new charges, the agency shall afford the respondent a reasonable opportunity to prepare a defense to the new charges.

The proposed amendment did not include new charges. However, the ALJ determined that the spirit of the statute would be violated by the potential denial of due process to Respondent if the new material was added to the Accusation. Different options were After discussed, including continuing the hearing to allow for amendment, starting the hearing and adding new hearing dates related to the amendment, or going forward with the original Accusation and allowing Complainant to review the Proposed Decision to decide later whether to file and pursue an amended Accusation. Complainant opted for the latter, and this matter proceeded without consideration of the proposed amendment.

SUMMARY

Due to their failure to appear for the hearing, defaults were taken against T.N.B. Test Only, Sergio Calles, and Jose Eduardo Calles, and the matter proceeded as a prove

up against them. DAG Cacciotti noted, for informational purposes, that the technician license of Sergio Calles had been revoked as of March 20, 2020, in a prior proceeding (*William Antonio Belloso, dba Arlington Test Only, and Sergio Calles*, OAH no. 2019060017). The present matter concerns 15 vehicles that were clean plugged from June 2016 to June 2017; five each by Sergio Calles, Jose Calles, and Respondent. The registration and license of T.N.B. Test Only is revoked, and the licenses of Sergio Calles and Jose Eduardo Calles are revoked. The licenses of Respondent are placed on probation for five years.

FACTUAL FINDINGS

Jurisdictional Matters

1. Complainant filed the Accusation in his official capacity as Chief of the Bureau of Automotive Repair (Bureau), Department of Consumer Affairs (Department).
2. On August 11, 2014, the Bureau issued Automotive Repair Dealer (ARD) registration number ARD 277511 to Sergio Calles, doing business as T.N.B. Test Only (T.N.B.). The ARD registration expired on August 31, 2018, and has not been renewed.
3. On October 3, 2014, the Bureau issued Smog Check, Test Only, Station license number TC 277511 to Sergio Calles, dba T.N.B. The Smog Check, Test Only, Station license expired on August 31, 2018, and has not been renewed.
4. On August 9, 2013, the Bureau issued Smog Check Inspector license number EO 635855 to Sergio Calles. The license was scheduled to expire on May 31, 2021. According to licensing details in exhibit 2, the license was revoked starting March 20, 2020.

5. On July 31, 2014, the Bureau issued Smog Check Inspector license number EO 637171 to Jose Eduardo Calles. In the Accusation it is alleged that the license expired January 31, 2020. However, the license certification (exhibit 2) and the investigative report (exhibit 5) establish that the license expired on January 31, 2018.

6. In 2006, Advanced Emission Specialist (EA) Technician license number 153673 was issued to Respondent. That license was cancelled by the Bureau on December 5, 2012, and renewed as Smog Check Inspector license number EO 153673 and Smog Check Repair Technician license number EI 153673. The Repair Technician license expired February 28, 2015. The Smog Check Inspector license will expire February 28, 2021, unless renewed.

7. Respondent was the smog check inspector who performed five of the 15 smog tests at T.N.B. that are alleged in the Accusation.

8. After the Accusation was served, Respondent filed a Notice of Defense, requesting an administrative hearing. All jurisdictional requirements have been met.

9. After the Accusation was served, T.N.B., Sergio Calles, and Jose Eduardo Calles filed a Notice of Defense. Although initially represented by Mr. Ferreira, he withdrew as their attorney on May 31, 2020. T.N.B., Sergio Calles, and Jose Eduardo Calles were each served with notice that the hearing in this matter would take place on July 22, 2020, and served with instructions on how to join the hearing by video or telephone, sent to their addresses of record. Neither T.N.B., Sergio Calles, nor Jose Eduardo Calles joined the hearing. Their defaults are taken under the authority of Government Code section 11520.

Smog Test Procedures

10. As a general rule, part of the smog test for most vehicles built after 1999 requires the smog test inspector to retrieve information from the tested vehicle's on-board computer. When that information is retrieved, it is relayed to a data base maintained by the Bureau. This process is described in more detail below.

11. Modern automobiles are increasingly computerized. Computers help to manage the operation of the engine and other systems, such as the transmission and air bag systems, and they play a key role in assisting the vehicle to run as smog-free as possible. The On-Board Diagnostic Inspection System (OIS) is part of the equipment required in California for smog testing of certain vehicles. More specifically, beginning in March 2015, the Bureau required that part of the smog testing process on most vehicles (and as a practical matter all gasoline powered cars) manufactured after 1999 be performed with the On-Board Diagnostics Generation II (OBDII) functional test. In that test, the licensed inspector connects the smog check station's test computer through a cable to a Diagnostic Link Connector, which is a receptacle data port found on or under the dashboard. Through the cable, the station's computer retrieves information from the vehicle's on-board computer, also known as the engine control module. The vehicle's on-board computer, among other things, stores data about engine operations and, if there is a problem, it stores diagnostic trouble codes that may also cause the vehicle's "check engine" light to illuminate. During the OBDII functional test, the data retrieved from the vehicle's on-board computer is sent to the test station's computer and then transmitted over the Internet to the Bureau's data base, known as the Vehicle Information Database (VID).

12. A piece of information often obtained from the vehicle's on-board computer during this process is the "eVIN," the Vehicle Identification Number (VIN) in

electronic form. The eVIN must match the VIN stamped on a metal badge that is typically affixed to the top of the vehicle's dashboard in front of the driver, visible through the windshield. Some vehicles have a bar code on a doorpost or the edge of a door that, when scanned, also transmits the VIN. Although some vehicles built between 2000 and 2005 do not transmit an eVIN, the majority do, and the capacity to transmit the eVIN was mandated for vehicles built after 2005.

13. Another piece of the electronically-retrieved information is the communication protocol, the computer language used by the vehicle's on-board computer/engine control module to transmit data to the test station's computer. The communication protocol is a combination of letters and numbers that indicate one of several available computer languages. A specific protocol for a vehicle make, model and year is programmed by the manufacturer into the vehicle's on-board computer/engine control module.

14. A third type of data collected by the test system is a parameter identification (PID) count. This refers to the number of data points transmitted from the tested vehicle. The data may include, for example, the engine coolant temperature, intake air temperature, fuel mixture, and other data used by the on-board computer system to check for proper engine performance and emissions controls, to be in compliance with smog laws. Each year, make, and model of vehicle reports a specific known PID count, with occasional slight variations, programmed during the manufacture of the vehicle.

15. Sometimes a PID count includes two numbers, such as "20|8." In such instances, the second number indicates the number of data points reporting from other computer modules in the vehicle, such as the airbag control module or the transmission control module.

16. A licensed smog check technician or inspector is the only person authorized by the Bureau to perform smog tests. The technician or inspector is issued a personal access code and license number, which the technician or inspector inputs into the test station's computer to access the smog test program and thereby use the OIS to perform smog tests.

17. If a vehicle passes all parts of a smog test, it will be issued a Certificate of Compliance that is transmitted automatically to the Bureau's VID. The smog test station purchases blocks of Certificates of Compliance, each of which has a unique number. (See ex. 29.) The smog test station also prints a Vehicle Inspection Report (VIR), signed by the inspector, indicating whether the vehicle passed the smog test and, if so, the number assigned to the Certificate of Compliance. The printout is given to the vehicle owner, and the station is required to save a copy. The Certificate of Compliance is also transmitted to the Department of Motor Vehicles (DMV) for use in vehicle registration.

18. In some circumstances, dishonest smog check inspectors and smog test station operators engage in the illegal practice of clean plugging: testing a vehicle that is not connected to the test station's computer system. Instead, the test station's computer cable is plugged into another vehicle, or into a simulator which produces data roughly of the type that should be communicated from the vehicle ostensibly being tested. By this method, a Certificate of Compliance may be issued even though the vehicle listed on the VIR was not the vehicle, or source, from which the computer data was received. In this manner, the vehicle listed on the VIR receives a Certificate of Compliance when that vehicle has not provided data about its operation and emissions controls to the test computer, the Bureau, or the DMV.

19. In some instances, the owner of a vehicle will be concerned that it may not pass a smog check and may tamper with the vehicle by installing a different on-board computer to be connected to the cable at the smog test station, or by installing a different computer circuit in the vehicle's on-board computer, or by installing a simulator.

20. In some instances, the inspector or technician will scan the bar code on a registration renewal notice from the DMV, brought by the vehicle owner. If the inspector or technician does not verify that the renewal notice is for the same vehicle that is present for the smog test, the test results for the vehicle at the station will not be attributed to that vehicle but, rather, to the different vehicle identified in the DMV registration renewal notice.

21. Ian Evans is employed by the Bureau as a Program Representative II. He reviewed data in the Bureau's VID and specifically data of smog tests performed by Respondent, Sergio Calles, and Jose Calles at T.N.B. Mr. Evans's investigation revealed anomalies in information about the smog inspections for the 15 vehicles which are the subject of the Accusation, the specifics of which are detailed below.

Inspections at T.N.B.

22. Between June 20, 2016, and June 6, 2017, while working at T.N.B., Sergio Calles, Jose Calles, or Respondent conducted smog tests (the subject tests) on 15 vehicles (the subject vehicles). The subject tests produced anomalous results, indicating in each case that the inspections occurred through clean plugging. In each of the subject tests, a Certificate of Compliance was issued for the vehicle in question by Sergio Calles, Jose Calles, or Respondent as the inspector, and T.N.B. as the testing station. Certificates of Compliance should not have been issued. The Certificates of

Compliance were transmitted electronically to the DMV in each case. In each of the subject tests, Respondent, Sergio Calles, or Jose Calles, and T.N.B. failed to comply with Bureau specifications, instead clean plugging the 15 subject vehicles.

23. Mr. Evans reviewed data transmitted from the smog test computer at T.N.B. to the Bureau. He found various anomalies in the subject tests because, in 13 instances, the protocol that was transmitted, and in 15 instances, the PID count that was transmitted to the VID were not the type that the tested vehicle should have transmitted. Mr. Evans found 13 subject vehicles communicated the same communication protocol (I914), and 10 communicated PID count 9 or 10, when different communication protocols and PID counts were expected. Mr. Evans reviewed data for cars similar to those in the subject tests, to determine what PID count and communication protocol were expected. Mr. Evans generally found that, for each of the 15 subject vehicles, between 95 and 98 percent of vehicles of similar year, make and model transmitted the same expected protocol and PID count. In every test of the 15 subject vehicles, the information transmitted did not conform to the data transmitted by the numerous similar vehicles, contrary to the expectations generated by Mr. Evans's research. Based on those anomalies, Mr. Evans concluded that the 15 subject vehicles had been clean plugged. This conclusion is supported by a preponderance of the evidence. The details of these tests are provided below. Respondent performed the smog tests on subject vehicles 1, 12, 13, 14, and 15. Mr. Evans testified that a simulator can be programmed with an eVIN to be transmitted during a smog test.

24. Subject vehicle 1: On June 20, 2016, Respondent tested a 2004 Ford F250 Super Duty, which transmitted communication protocol ICAN29bt5 when the expected protocol was JPWM, and had a PID count of 25|13|0 when the expected PID count was

18, 21 or 22. The vehicle transmitted an incorrect eVIN, although an eVIN was not expected. Respondent caused a Certificate of Compliance to be issued by T.N.B. for this vehicle.

25. Subject vehicle 2: On June 25, 2016, Sergio Calles tested a 2003 Chevrolet Impala, which transmitted communication protocol I914 when the expected protocol was JVPW, and had a PID count of 9 when the expected PID count was 19. The vehicle transmitted the correct eVIN, as expected. Sergio Calles caused a Certificate of Compliance to be issued by T.N.B. for this vehicle.

26. Subject vehicle 3: On June 28, 2016, Sergio Calles tested a 2007 Chrysler PT Cruiser, which transmitted communication protocol I914 when the expected protocol was ICAN29bt5, and had a PID count of 9 when the expected PID count was 32 or 32|8. The vehicle transmitted the correct eVIN, as expected. Sergio Calles caused a Certificate of Compliance to be issued by T.N.B. for this vehicle.

27. Subject vehicle 4: On July 8, 2016, Jose Calles tested a 2001 Chevrolet Silverado C1500, which transmitted communication protocol I914 when the expected protocol was JVPW, and had a PID count of 10 when the expected PID count was 22 or 23. The vehicle transmitted the correct eVIN, as expected. Jose Calles caused a Certificate of Compliance to be issued by T.N.B. for this vehicle.

28. Subject vehicle 5: On July 23, 2016, Jose Calles tested a 2008 Toyota Scion TC, which transmitted communication protocol I914 when the expected protocol was ICAN29bt5, and had a PID count of 10 when the expected PID count was 39. The vehicle transmitted the correct eVIN, as expected. Jose Calles caused a Certificate of Compliance to be issued by T.N.B. for this vehicle. On October 23, 2015, at a different smog shop, this vehicle was tested and reported the expected eVIN, communication

protocol and PID count. (See ex. 11, p. 284.) On May 5, 2017, the same 2008 Toyota Scion TC was tested at a different station. The vehicle provided an eVIN, as expected, and transmitted the correct communication protocol of ICAN29bt5 and correct PID count of 39.

29. Subject vehicle 6: On August 1, 2016, Sergio Calles tested a 2004 BMW 530i, which transmitted communication protocol I914 when the expected protocol was KWPF, and had a PID count of 10 when the expected PID count was 22, 22|1, or 22|7. The vehicle transmitted the correct eVIN, as expected. Sergio Calles caused a Certificate of Compliance to be issued by T.N.B. for this vehicle.

30. Subject vehicle 7: On August 4, 2016, Jose Calles tested a 2004 Chevrolet Avalanche C1500, which transmitted communication protocol I914 when the expected protocol was JVPW, and had a PID count of 10 when the expected PID count was 22. The vehicle transmitted the correct eVIN, when one was expected. Jose Calles caused a Certificate of Compliance to be issued by T.N.B. for this vehicle.

31. Subject vehicle 8: On August 12, 2016, Jose Calles tested a 2008 Nissan Versa S/SL, which transmitted communication protocol I914 when the expected protocol was ICAN29bt5, and had a PID count of 9 when the expected PID count was 38. The vehicle transmitted the correct eVIN, as expected. Jose Calles caused a Certificate of Compliance to be issued by T.N.B. for this vehicle.

32. Subject vehicle 9: On August 18, 2016, Jose Calles tested a 2006 Ford Focus ZX4, which transmitted communication protocol I914 when the expected protocol was ICAN29bt5, and had a PID count of 9 when the expected PID count was 36, 37, or 38. The vehicle transmitted the correct eVIN, as expected. Jose Calles caused a Certificate of Compliance to be issued by T.N.B. for this vehicle.

33. Subject vehicle 10: On September 3, 2016, Sergio Calles tested a 2003 Hummer H2, which transmitted communication protocol I914 when the expected protocol was JVPW, and had a PID count of 10 when the expected PID count was 22. The vehicle transmitted the correct eVIN, as expected. Sergio Calles caused a Certificate of Compliance to be issued by T.N.B. for this vehicle. Eight days earlier, on August 27 at T.N.B., the same 2003 Hummer H2 was smog tested by Jose Calles and provided the correct eVIN and the expected communication protocol and PID count. However, the 2003 Hummer H2 failed this smog test. (Ex. 19.)

34. Subject vehicle 11: On September 3, 2016, Sergio Calles tested a 2003 Chevrolet Trailblazer, which transmitted communication protocol I914 when the expected protocol was JVPW, and had a PID count of 10 when the expected PID count was 17 or 18. The vehicle transmitted the correct eVIN, as expected. Sergio Calles caused a Certificate of Compliance to be issued by T.N.B. for this vehicle. On March 30, 2015, this same 2003 Chevrolet Trailblazer was tested at another station and provided the correct eVIN and the expected communication protocol and PID count.

35. Subject vehicle 12: On October 4, 2016, Respondent tested a 2001 Chevrolet Lumina, which transmitted communication protocol JPWM when the expected protocol was JVPW, and had a PID count of 16 when the expected PID count was 18. The vehicle did not transmit an eVIN, and an eVIN was not expected. Respondents caused a Certificate of Compliance to be issued by T.N.B. for this vehicle. On September 19, 2016, this same 2001 Chevrolet Lumina was tested by Respondent at T.N.B. and provided the correct eVIN and the expected communication protocol and PID count. It failed this smog test because the monitors were not completed. (Ex. 23.)

36. Subject vehicle 13: On October 10, 2016, Respondent tested a 2002 Mercedes-Benz S430, which transmitted communication protocol I914 when the

expected protocol was KWPF, and had a PID count of 20 when the expected PID count was 22. The vehicle did not transmit an eVIN, and no eVIN was expected. Respondent caused a Certificate of Compliance to be issued by T.N.B. for this vehicle.

37. Subject vehicle 14: On February 13, 2017, Respondent tested a 2001 Toyota Tacoma Double Cab Prerunner, which transmitted the correct communication protocol I914, and had a PID count of 19 when the expected PID count was 17. The vehicle did not transmit an eVIN, and no eVIN was expected. Respondent caused a Certificate of Compliance to be issued by T.N.B. for this vehicle. On April 29, 2015, this same 2001 Toyota Tacoma Double Cab Prerunner was tested at another station and provided the expected communication protocol and PID count. It did not report an eVIN, as expected. (Ex. 26.)

38. Subject vehicle 15: On June 6, 2017, Respondent tested a 2001 Honda Accord EX, which transmitted the correct communication protocol I914, and had a PID count of 19 when the expected PID count was 16. The vehicle did not transmit an eVIN, and no eVIN was expected. Respondent caused a Certificate of Compliance to be issued by T.N.B. for this vehicle. On May 31, 2017, this same 2001 Honda Accord EX was tested by Respondent at T.N.B. and provided the expected communication protocol and PID count. No eVIN was reported, as expected. It failed this smog test because the monitors were not completed. (Ex. 28.)

39. The variability in the data from that expected and that which was reported when Sergio Calles, Jose Eduardo Calles, and Respondent performed the subject tests amply supports the inference that either a simulator was used to generate the data, or that the OIS system was plugged into different vehicles, and not those vehicles being ostensibly tested during the subject tests.

40. The Certificates of Compliance issued by T.N.B. at the direction of Sergio Calles, Jose Eduardo Calles, and Respondent contained false and misleading information, which T.N.B., Sergio Calles, Jose Eduardo Calles, and Respondent knew, or should have known to be false. The conduct of T.N.B., Sergio Calles, Jose Eduardo Calles, and Respondent, in connection with the tests described in Factual Findings 24 through 38, and the issuance of the associated Certificates of Compliance was fraudulent, and contrary to the health, safety, and welfare of the State of California and its citizens.

41. While a smog test is being performed, neither the inspector nor the facility have access to the information transmitted to the Bureau's VID in the nature of the protocol, PID count or eVIN.

Matters in Aggravation

42. On November 9, 2011, the Bureau issued Citation number M2012-0433 against Respondent for violating Health and Safety Code section 44012, failing to follow proper smog test procedures. Respondent issued a Certificate of Compliance on October 10, 2011, for an undercover vehicle with a missing EVAP canister. Respondent complied with the direction to complete an eight-hour training course.

43. On May 31, 2012, the Bureau issued Citation number M2012-1677 against Respondent for violating Health and Safety Code section 44032, failing to assure that the technician followed proper smog test procedures. Respondent issued a Certificate of Compliance on April 24, 2012, for an undercover vehicle with a missing positive crankcase ventilation valve and hose. Respondent appealed the Citation, withdrew the appeal, and complied with the direction to complete a 16-hour training course.

Respondent's Testimony and Contentions; Other Matters

44. Respondent has been licensed to perform smog tests for 13 years. He recalls the two citations, and has had no other discipline imposed by the Bureau.

45. T.N.B. operated with one bay for testing, and one smog test machine. Although the business was owned by Sergio Calles, he did not supervise Respondent. Respondent, Sergio Calles, and Jose Calles are cousins. All three took turns doing smog tests at T.N.B. Respondent had the most experience among them. Respondent worked at T.N.B. part-time, two or three days each week. Sergio Calles was there a few hours each day. There were five or fewer smog tests per day at T.N.B.

46. Respondent recalls that the smog testing procedure changed, perhaps in 2015. Prior, the vehicle was placed on rollers with the engine running during the test. The old procedure did not require the inspector to double check the type of vehicle being tested. The new test was easier because you could use a scanner to input information about the type of car being tested. Respondent received little training for using the new test machine. Some subjects were covered in the courses a licensee was required to take every two years to renew the license. Other training was given by the person who sold the test machine, and there were instructions. Respondent stated there was very little hands-on training.

47. Respondent does not recall the five subject vehicles he tested as described in the Accusation. Respondent testified credibly that, by using the new test procedure, including scanning documents to get identifying information, he did the tests faster. He would rush, and sometimes did not confirm that the vehicle present for the test was the same vehicle identified in the document he scanned. Respondent admitted that he got lazy, was in a "comfort zone," and might chat with the customer.

He became distracted. Respondent learned of the problems when the Accusation identified him as the inspector for these five vehicles.

48. Respondent was sincere in testifying that he has learned from his "big mistake." He takes more time and does several things to confirm the type of vehicle being tested, including watching more closely and inspecting the VIN, and referring to the DMV database for vehicle information and history. Now that he is more careful, Respondent recalled a few times when the customer brought DMV registration papers for a different vehicle than the one brought in for the test. When it happened, he told the customer to bring back either the right papers or the right car. Respondent also stated that the test machine will now inform the inspector if the wrong vehicle is being tested.

49. In 2017, the Bureau initiated the Certification ID Blocking Program (Cert Block), which electronically terminates the smog test when the car tested has data inconsistent with the Bureau's database of information on that car's make, model and year. The car is then directed to be retested by a neutral State of California referee.

50. Respondent now works at his own test station, Arlington. He has no employees. His usual workday was eight hours, but he now stays open longer because, due to the COVID-19 pandemic, fewer vehicles are brought to him for testing. He is the sole support for his wife and three children. Respondent testified that, after paying expenses, there might be a few hundred dollars left each month. He has very little in savings, and has no other notable assets. Respondent described losing his license as putting his family in "deep trouble." If he loses his license, he has no ability to pay any costs imposed against him. Respondent is willing to take a loan if he is required to make payments, and will take classes and comply with terms of a probationary license.

51. Respondent has heard that there are devices that can be connected to the test cable instead of connecting the cable to a vehicle. He has never used that type of device. He did not intend to bypass proper test procedures, stating that these were accidental. Respondent is aware that smog tests help keep pollution in check, by taking polluting vehicles off the streets.

52. Respondent's counsel raised several contentions, including, but not limited to:

a. A vehicle may have had a door replaced, and if the inspector scanned the bar code on the door, incorrect vehicle information would be entered in the test computer.

b. Some of the subject vehicles tested by Respondent did not show prior failure of a smog test, eliminating a basis or motivation to clean plug.

c. Some of the subject vehicles tested by Respondent failed prior tests because monitors were not completed. Driving those vehicles a few more miles, before retesting, could clear the monitors, so there was no incentive to clean plug.

d. While the evidence against Sergio or Jose Calles may support the conclusion that a simulator was used that could be programmed with the correct eVin, there was no such evidence regarding Respondent. Therefore, such evidence of fraud and intent, present for Sergio and Jose Calles, was not present for Respondent.

e. Evidence of other tests on the subject vehicles tested by Respondent are more indicative of negligent, accidental acts by Respondent, and not intentional acts.

f. Respondent should not be held responsible for the total amount of costs requested. Sergio and Jose Calles also violated the law and should shoulder some costs. And Respondent's responsibility for costs should be reduced due to his good faith belief in his defense and due to his poor financial condition.

53. Mr. Evans rebutted several of Respondent's assertions. In particular, Mr. Evans testified that, for the subject vehicles tested by Respondent that were previously or subsequently tested (either at T.N.B. or elsewhere), those vehicles had the expected eVINs, communication protocols and PID counts. Respondent did not submit evidence to support some of the contentions. For example, he was not asked whether he scanned the door label to identify any of the subject vehicles.

Costs

54. The Bureau has incurred costs of investigation (\$836.06) and prosecution (\$8,518.75) of this matter, in the total amount of \$9,354.81. These costs are reasonable. In addition, DAG Cacciotti estimated that additional prosecution costs of \$1,540 would be incurred to prepare the case, beyond the activities and related costs listed in the time and activity documents attached to his declaration (exhibit 3). The evidence of estimated costs is insufficient to support a finding, as discussed in more detail in the Legal Conclusions below.

Miscellaneous

55. Except as set forth in this Proposed Decision, all other arguments and evidence submitted by the parties are found to lack merit or deemed surplusage.

LEGAL CONCLUSIONS

1. Jurisdiction to proceed in this matter exists under Health and Safety Code sections 44002 and 44072.2, which relate to smog check station and inspector licenses, based upon Factual Findings 1 through 9. Although some licenses have expired, the Bureau retains jurisdiction to proceed with a disciplinary action. (Health & Saf. Code, § 44072.6; Bus. & Prof. Code, §§ 9884.13 and 9889.7.)

2. Under Health and Safety Code section 44012, smog tests shall be performed in accordance with procedures prescribed by the Department of Consumer Affairs.

3. Under Health and Safety Code section 44072.2, subdivisions (a), (c), and (d), the licenses of a smog check station and a smog check inspector can be disciplined for violating any statutes or regulations related to the license, or for committing any act involving dishonesty, fraud, or deceit whereby another is injured.

4. Under Business and Professions Code section 9889.9, if any license issued by the Bureau under that part of the Code is disciplined, any other licenses issued by the Bureau may be disciplined.

5. When an automotive repair dealer cannot show there was a bona fide error, the Director of Consumer Affairs (Director) may revoke the automotive repair dealer's ARD registration if any of the following occur: the dealer or any employee makes or authorizes any statement 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; conducts an act that constitutes fraud; or fails to materially comply with the Program or its regulations. (Bus. & Prof. Code, § 9884.7, subd. (a)(1), (4), & (6).)

6. A smog check station will issue a Certificate of Compliance if a vehicle meets the requirements of Health and Safety Code section 44012 concerning proper performance of a smog test. (Health & Saf. Code, § 44015, subd. (b).)

7. The Bureau may revoke a license if the licensee falsely or fraudulently issues a Certificate of Compliance. (Cal. Code Regs., tit. 16, § 3340.24, subd. (c).)

8. A licensed station must issue a Certificate of Compliance to the owner or operator of any vehicle that has been inspected in accordance with the procedures specified in California Code of Regulations, title 16, section 3340.42, and has all the required emission control equipment and devices installed and functioning correctly. (Cal. Code Regs., tit. 16, § 3340.35, subd. (c).)

9. A licensed smog check inspector must inspect, test and repair vehicles in accordance with Health and Safety Code sections 44012 and 44035, and California Code of Regulations, title 16, section 3340.42, which details smog check test methods and standards. (Cal. Code Regs., tit. 16, § 3340.30, subd. (a).)

10. The willful making of any false statement or entry with regard to a material matter in any Certificate of Compliance issued under the Health and Safety Code constitutes perjury and is punishable as provided in the Penal Code (Bus. & Prof. Code, § 9889.22.)

11. The willful making of any false statement or entry with regard to a material matter in any Certificate of Compliance which is required by the Business and Professions Code, constitutes perjury and is punishable as provided in the Penal Code. (Health & Saf. Code, § 44059.)

12. As stated in California Code of Regulations, title 16, section 3340.45, subdivision (a):

All Smog Check inspections shall be performed in accordance with requirements and procedures prescribed in the following:

(1) Smog Check Manual, dated 2013, which is hereby incorporated by reference. This manual became effective on or after January 1, 2013. This manual shall remain in effect until subparagraph (2) is implemented.

(2) Smog Check Manual dated November 2, 2017, which is hereby incorporated by reference. This manual shall become effective on August 2, 2018.

13. No automotive repair dealer or individual in charge shall, in filling out an estimate, invoice, or work order, or record required to be maintained by California Code of Regulations, title 16, section 3340.15, subdivision (e), withhold therefrom or insert therein any statement or information which will cause any such document to be false or misleading, or where the tendency or effect thereby would be to mislead or deceive customers, prospective customers, or the public. (Cal. Code Regs., tit. 16, § 3373.)

14. The requirement to verify the proper vehicle has been identified for testing is stated in California Code of Regulations, title 16, section 3340.41, subdivision (c):

No person shall enter into the BAR-97 Emissions Inspection System or the OBD 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 BAR-97 Emissions Inspection System or the OBD Inspection System any false information about the vehicle being tested.

15. Smog tests must be performed by a qualified licensee, and must be done according to required procedures, under Health and Safety Code section 44032, which states:

No person shall perform, for compensation, tests or repairs of emission control devices or systems of motor vehicles required by this chapter unless the person performing the test or repair is a qualified smog check technician and the test or repair is performed at a licensed smog check station. Qualified technicians shall perform tests of emission control devices and systems in accordance with Section 44012.

16. The Accusation lists 14 causes for discipline, with five causes for discipline against T.N.B.'s registration and smog check, test only station license, three causes for discipline against the inspector license of Sergio Calles, three causes for discipline against the inspector license of Jose Calles, and three causes for discipline against Respondent's inspector and repair technician licenses. These causes for discipline are based upon the connection between certain requirements under regulations and statutes relating to proper smog test procedures, some of which are

discussed above. To impose discipline, the Bureau must prove the allegations by the standard of proof of a preponderance of the evidence. (*Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-917.) A preponderance of the evidence means evidence that has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

17. T.N.B. is responsible for the acts of its employees. The employer licensee's liability for the conduct of an employee acting under the employer's license is based on the theory that the employer licensee has a non-delegable duty of compliance. (*Rob-Mac, Inc. v. Department of Motor Vehicles* (1983) 148 Cal.App.3d 793, 799.) By virtue of ownership of a license, the owner has a responsibility to see to it that the license is not used in violation of the law. (*Ford Dealers Assn. v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 360.)

Causes for Discipline

18. **First Cause for Discipline** (Untrue or Misleading Statements): The ARD registration of T.N.B. is subject to discipline under Health and Safety Code section 9884.7, subdivision (a)(1), as set forth in Factual Findings 24 through 40, in that T.N.B. made or authorized statements which were known or in the exercise of reasonable care T.N.B. should have known to be untrue or misleading, in that T.N.B.'s employees, Sergio and Jose Calles and Respondent, certified the 15 subject vehicles as having passed inspection and in compliance with applicable laws and regulations when proper inspections had not been made. Complainant established by a preponderance of the evidence that Sergio and Jose Calles and Respondent conducted inspections using the clean plugging method by substituting or using different vehicles or another source during the OBD II functional test in order for T.N.B. to issue smog Certificates of

Compliance for the 15 subject vehicles, and that the inspections were not conducted in the manner required by Health and Safety Code section 44012.

19. **Second Cause for Discipline** (Fraud): The ARD registration of T.N.B. is subject to discipline under Business and Professions Code section 9884.7, subdivision (a)(4), as set forth in Factual Findings 24 through 40, because Complainant established by a preponderance of the evidence that T.N.B.'s employees knowingly issued electronic smog Certificates of Compliance for the 15 subject vehicles without performing bona fide inspections of the emission control devices and systems on those vehicles, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

20. **Third Cause for Discipline** (Failure to Comply with the Motor Vehicle Inspection Program): The Smog Check, Test Only, station license of T.N.B. is subject to discipline under Health and Safety Code section 44072.2, subdivision (a), as set forth in Factual Findings 24 through 40, in that it was established by a preponderance of the evidence that it failed to comply with that Code as follows:

a. Section 44012: T.N.B. failed to ensure that the emission control tests were properly performed on the 15 subject vehicles in accordance with prescribed procedures.

b. Section 44015, subdivision (b): T.N.B., through Sergio and Jose Calles and Respondent, issued electronic smog Certificates of Compliance for the 15 subject vehicles without ensuring that the vehicles were properly tested and inspected to determine compliance with Health and Safety Code section 44012.

c. Section 44059: T.N.B willfully made false entries to issue Certificates of Compliance for the 15 subject vehicles, by certifying that those vehicles had been inspected as required when they had not.

21. **Fourth Cause for Discipline** (Failure to Comply with Regulations pursuant to the Motor Vehicle Inspection Program): The Smog Check, Test Only, station license of T.N.B is subject to discipline under Health and Safety Code section 44072.2, subdivision (c), as set forth in Factual Findings 24 through 40, in that it was established by a preponderance of the evidence that T.N.B. failed to comply with provisions of California Code of Regulations, title 16, as follows:

a. Section 3340.35, subdivision (c): Issuing electronic smog Certificates of Compliance for the 15 subject vehicles even though the vehicles had not been inspected in accordance with section 3340.42.

b. Section 3340.42: Failing to conduct the required smog tests on the 15 subject vehicles in accordance with the Bureau's specifications.

22. **Fifth Cause for Discipline** (Dishonesty, Fraud or Deceit): The Smog Check, Test Only, station license of T.N.B is subject to discipline under Health and Safety Code section 44072.2, subdivision (d), as set forth in Factual Findings 24 through 40, in that it was established by a preponderance of the evidence that T.N.B. committed dishonest, fraudulent, or deceitful acts whereby another was injured by issuing electronic Certificates of Compliance for the 15 subject vehicles without ensuring that bona fide inspections were performed of the emission control devices and systems of the vehicles, thereby depriving the People of the State of California of the protection provided by the Motor Vehicle Inspection Program.

23. **Sixth Cause for Discipline** (Violations of the Motor Vehicle Inspection Program): The smog check inspector license of Sergio Calles is subject to discipline under Health and Safety Code section 44072.2, subdivision (a), as set forth in Factual Findings 25, 26, 29, 33, 34, 39, and 40, in that Sergio Calles failed to materially comply with Health and Safety Code section 44012 by failing to perform the emission control tests on five subject vehicles (vehicles 2, 3, 6, 10, and 11) in accordance with procedures prescribed by the Department.

24. **Seventh Cause for Discipline** (Failure to Comply with Regulations): The smog check inspector license of Sergio Calles is subject to discipline under Health and Safety Code section 44072.2, subdivision (c), as set forth in Factual Findings 25, 26, 29, 33, 34, 39, and 40, in that he failed to comply with provisions of California Code of Regulations, title 16, as follows:

a. Section 3340.30, subdivision (a): Sergio Calles failed to inspect and test the five subject vehicles (vehicles 2, 3, 6, 10, and 11) in accordance with Health and Safety Code sections 44012 and 44035, and California Code of Regulations, title 16, section 3340.42.

b. Section 3340.42: Sergio Calles failed to conduct the required smog tests on the five subject vehicles (vehicles 2, 3, 6, 10, and 11) in accordance with the Bureau's specifications.

25. **Eighth Cause of Discipline** (Dishonesty, Fraud or Deceit): The smog check inspector license of Sergio Calles is subject to discipline pursuant to Health and Safety Code section 44072.2, subdivision (d), as set forth in Factual Findings 25, 26, 29, 33, 34, 39, and 40, in that he committed dishonest, fraudulent, or deceitful acts by issuing electronic smog Certificates of Compliance for five subject vehicles (vehicles 2,

3, 6, 10, and 11) without performing bona fide inspections of the emission control devices and systems on the vehicles, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

26. **Ninth Cause of Discipline** (Violations of the Motor Vehicle Inspection Program): The smog check inspector license of Jose Eduardo Calles is subject to discipline under Health and Safety Code section 44072.2, subdivision (a), as set forth in Factual Findings 27, 28, 30, 31, 32, 39, and 40, in that he failed to materially comply with Health and Safety Code section 44012 by failing to perform the emission control tests on five subject vehicles (vehicles 4, 5, 7, 8, and 9) in accordance with procedures prescribed by the Department.

27. **Tenth Cause for Discipline** (Failure to Comply with Regulations): The smog check inspector license of Jose Eduardo Calles is subject to discipline under Health and Safety Code section 44072.2, subdivision (c), as set forth in Factual Findings 27, 28, 30, 31, 32, 39, and 40, in that he failed to comply with provisions of California Code of Regulations, title 16, as follows:

a. Section 3340.30, subdivision (a): Jose Calles failed to inspect and test five subject vehicles (vehicles 4, 5, 7, 8, and 9) in accordance with Health and Safety Code sections 44012 and 440235, and California Code of Regulations, title 16, section 3340.42.

b. Section 3340.42: Jose Calles failed to conduct the required smog tests on five subject vehicles (vehicles 4, 5, 7, 8, and 9) in accordance with the Bureau's specifications.

28. **Eleventh Cause of Discipline** (Dishonesty, Fraud or Deceit): The smog check inspector license of Jose Eduardo Calles is subject to discipline pursuant to

Health and Safety Code section 44072.2, subdivision (d), as set forth in Factual Findings 27, 28, 30, 31, 32, 39, and 40, in that he committed dishonest, fraudulent, or deceitful acts by issuing electronic smog Certificates of Compliance for five subject vehicles (vehicles 4, 5, 7, 8, and 9) without performing bona fide inspections of the emission control devices and systems on the vehicles, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

29. **Twelfth Cause for Discipline** (Violations of the Motor Vehicle Inspection Program): Respondent's smog check inspector license is subject to discipline under Health and Safety Code section 44072.2, subdivision (a), as set forth in Factual Findings 24, 35, 36, 37, 38, 39, and 40, in that he failed to materially comply with Health and Safety Code section 44012 by failing to perform the emission control tests on five subject vehicles (vehicles 1, 12, 13, 14, and 15) in accordance with procedures prescribed by the Department.

30. **Thirteenth Cause of Discipline** (Failure to Comply with Regulations): Respondent's smog check inspector license is subject to discipline under Health and Safety Code section 44072.2, subdivision (c), as set forth in Factual Findings 24, 35, 36, 37, 38, 39, and 40, in that Respondent failed to comply with provisions of California Code of Regulations, title 16, as follows:

a. Section 3340.30, subdivision (a): Respondent failed to inspect and test five subject vehicles (vehicles 1, 12, 13, 14, and 15) in accordance with Health and Safety Code sections 44012 and 440235, and California Code of Regulations, title 16, section 3340.42.

b. Section 3340.42: Respondent failed to conduct the required smog tests on five subject vehicles (vehicles 1, 12, 13, 14, and 15) in accordance with the Bureau's specifications.

31. **Fourteenth Cause of Discipline** (Dishonesty, Fraud or Deceit): The smog check inspector license and smog check repair technician license of Respondent are subject to discipline pursuant to Health and Safety Code section 44072.2, subdivision (d), as set forth in Factual Findings 24, 35, 36, 37, 38, 39, and 40, in that Respondent committed dishonest, fraudulent, or deceitful acts by using false information for issuing electronic smog Certificates of Compliance for five subject vehicles (vehicles 1, 12, 13, 14, and 15) without performing bona fide inspections of the emission control devices and systems on the vehicles, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

32. Respondent contends that his acts were not intentional or fraudulent; rather, he made mistakes and was distracted, amounting to accidental or negligent acts. This contention is not supported by the law and the facts.

33. Fraud as a basis for license discipline is included in several of the statutes and regulations cited above. (See, e.g., Bus. & Prof. Code, § 9884.7, subd. (a)(4) [an ARD registration may be invalidated when fraudulent conduct is done by the automotive repair dealer or any employee]; Health & Saf. Code, § 44072.2, subd. (d) [station and inspector licenses can be suspended for committing any act involving dishonesty, fraud, or deceit whereby another is injured]; and Health & Saf. Code, § 44072.10, subd. (c) [station and inspector licenses shall be revoked for fraudulent certification of a vehicle or a fraudulent inspection].) "Fraudulent inspection" is defined as including "[c]lean piping, as defined by the department," or "[i]ntentional or willful violation of this chapter or any regulation, standard, or procedure of the

department implementing this chapter.” (Health & Saf. Code, § 44072.10, subd. (c)(1) & (4).)²

34. Although Health and Safety Code section 44072.10, subdivision (c)(1), includes the Legislature’s determination, as a matter of law, that a fraudulent inspection has occurred when a vehicle has been clean piped, no such legislative conclusion is included for clean plugging. The statute also states that, when a licensee engages in an intentional or willful violation of the law, there has been a “fraudulent inspection,” defined as noted above (Subd. (c)(8)).

35. The term “willful” is not defined in either the Business and Professions Code or the Health and Safety Code. When a term used within one code is not defined in that code, the term may be defined by reference to a different code. (*Brown v. State Department of Health* (1978) 86 Cal.App.3d 548, 554.) Penal Code section 7 states, in relevant part: “1. The word ‘willfully,’ when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.” “The evil therefore is not in the intent to do harm, but in falsely certifying facts which are not true.” (*Brown v. State Department of Health, supra*, at p. 555 [referring to false statements in Medi-Cal bills].) The terms “willful” or “willfully” imply “simply a purpose or willingness to commit the act, . . .

² Clean piping occurs when a tailpipe probe, used in an older method of smog testing, is inserted into a vehicle other than the vehicle being certified, to provide clean exhaust gas, with the goal of passing the test. Clean piping has obvious similarities to clean plugging, in that emissions information is gathered from a separate vehicle.

without regard to motive, intent to injure, or knowledge of the act's prohibited character.....The terms imply that the person knows what he is doing, intends to do what he is doing, and is a free agent. Stated another way, the term 'willful' requires only that the prohibited act occur intentionally. . . ." (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438; citations omitted.)

36. In the recent decision of *Acco Engineered Systems, Inc. v. Contractors' State License Bd.* (2018) 30 Cal.App.5th 80, the court recognized that the definition of "willfully" from Penal Code section 7 has been adopted in other cases involving discipline of licensees in other professions, and would be applied to statutes describing violations by contractors. The court rejected the argument that liability would be precluded where a licensee acted in good faith.

37. The only intent required is the general intent to act; in this case, the intent to indicate that the smog test was passed and to issue a Certificate of Compliance. There was no evidence to the contrary; rather, the evidence supports the finding that T.N.B., Sergio and Jose Calles, and Respondent willfully engaged in fraudulent inspections to pass the 15 subject vehicles and issue Certificates of Compliance.

Costs

38. Business and Professions Code section 125.3 provides, in pertinent part, that the Bureau may request the administrative law judge to direct a licensee found to have committed a violation of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case. Reasonable costs in this case are \$9,354.81, as set forth in Factual Finding 54.

39. DAG Cacciotti estimated that additional prosecution costs of \$1,540 would be incurred to prepare the matter for hearing. Business and Professions Code section 125.3, subdivision (c), provides that a request to award costs may be based upon "a good faith estimate of costs where actual costs are not available." Although DAG Cacciotti estimated the additional time needed for preparation for hearing at the time he prepared his declaration, he was present at the hearing and could have provided the actual costs incurred to that time. Because the actual costs were available, the language of the statute compels the conclusion that a good faith estimate is insufficient.

40. Respondent contends that the amount of costs should be divided *pro rata* among the parties, and that Respondent should not found jointly liable for the full amount. There is logic behind this request. Discipline has been sought, and will be imposed, on T.N.B., Sergio Calles, Jose Calles, and Respondent. Apportionment of costs is appropriate.

41. On the issue of apportionment, the cost recovery statute (Bus. & Prof. Code, §125.3) is silent. When an agency seeks to impose discipline against four licenses and only prevails against two licenses, it is not required to apportion the costs. As noted in *Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-917, even though some of the allegations were unproven, nevertheless they were part of the overall investigation and prosecution of the case, and it was not necessary to make a pro rata division of costs.

42. The circumstances herein do not match those in *Imports Performance*, as all named parties are found in violation, but for different acts at different times. The theory of apportionment has been upheld in civil cases involving the recovery of attorney fees by the prevailing party, where apportionment is not covered by the

applicable statute or contract clause. For example, allocation can take place where a party prevails on some, but not all, of its claims. (*Slavin v. Fink* (1994) 25 Cal.App.4th 722.) In *Myers Bldg. Indus., Ltd. v. Interface Technology Inc.* (1993) 13 Cal.App.4th 949, attorney fees were awarded only for the fees incurred to enforce the subcontract (which had an attorney fees recovery clause) and not for a construction contract (which did not have such a clause). And where a party prevails on a cause based on a contract including a fee recovery clause, as well as on a tort theory where the fees are not recoverable, the fees should be allocated between the two causes of action. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124.)

43. Again, none of these scenarios matches this case. However, consideration of additional factors before determining the award of costs was the subject of the opinion in *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, where the Supreme Court rejected a constitutional challenge to a cost recovery provision similar to Business and Professions Code section 125.3. In so doing, the Court directed the administrative law judge and the agency to evaluate several factors to ensure that the cost recovery provision did not deter individuals from exercising their right to a hearing. Thus, the Bureau must not assess the full costs where it would unfairly penalize the respondent who has committed some misconduct, but who has used the hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty; the Bureau must consider a respondent's subjective good faith belief in the merits of his or her position and whether the respondent has raised a colorable challenge; the Bureau must consider a respondent's ability to pay; and the Bureau may not assess disproportionately large investigation and prosecution costs when it has conducted a disproportionately large investigation to prove that a respondent engaged in relatively innocuous misconduct. (*Zuckerman, supra* at p. 45.)

44. To apply all of this to the case at hand, it would not be fair or equitable to make Respondent pay the costs of that portion of the investigation that did not lead to license discipline against him. Apportionment among the four liable parties will be applied such that Respondent is responsible for one-fourth of the total reasonable costs; that is, \$2,338.70. He will be permitted to have a payment plan. Because no evidence was submitted by T.N.B., Sergio Calles, or Jose Calles about many of the relevant factors for consideration, their responsibility for the remaining three-fourths of the costs, the sum of \$7,016.11, will be joint and several.

Default

45. Under Government Code section 11520, subdivision (a), when a party fails to appear at the hearing, "the agency may take action based on the respondent's express admissions or upon other evidence....." T.N.B., Sergio Calles, and Jose Eduardo Calles were served with notice of the hearing but did not appear at the hearing. (See Factual Finding 9.) Their defaults were taken under Government Code section 11520.

Discussion and Disposition

46. Having found cause for discipline on all 14 causes of discipline, it is necessary to determine the appropriate level of discipline. To that end, the Bureau has issued Guidelines for Disciplinary Penalties and Terms of Probation (Guidelines) under the authority of California Code of Regulations, title 16, section 3395.4, which include factors in aggravation and mitigation. The relevant aggravating factors here include evidence the unlawful acts were part of a pattern of practice, all parties' conduct constitutes fraud, and Respondent had a history of prior citations. (Guidelines, pp. 1-2.) One factor of mitigation outlined in the Guidelines applies to Respondent, in that he

has changed his practices to confirm that he is testing the proper vehicle, to minimize recurrence. (Guidelines, p. 3.)

47. The Guidelines set forth ranges of discipline for specific statutory and regulatory violations. For the statutes and regulations in the 14 causes for discipline alleged in the Accusation, the recommended discipline ranges from license revocation, to probation of two to five years, to license suspension. More specifically, recommended minimum penalties vary, from a minimum of 90-day license suspension with 80 days stayed for making untrue or misleading statements in violation of Business and Professions code section 9884.7, subdivision (a)(1), to revocation stayed, five years of probation, and a 30-day suspension for conduct constituting fraud in violation of Business and Professions code section 9884.7, subdivision (a)(4). The Guidelines also include recommended language for conditions of a license placed on probation.

48. Health and Safety Code section 44072.10, subdivision (c), mandates license revocation for any smog check technician or station licensee who participates in the fraudulent inspection of vehicles, which was established here. Under the authority of Government Code section 11519, subdivisions (a) and (b), a decision after an administrative hearing may include a stay of execution of the penalty and the condition that a respondent comply with specified terms of probation.

49. The statutes relating to licensing of professions generally are designed to protect the public from dishonest, untruthful and disreputable licensees. (*Arneson v. Fox* (1980) 28 Cal.3d 440, 451.) Such proceedings are not for the primary purpose of punishing an individual. (*Camacho v. Youde* (1979) 95 Cal.App.3d 161, 165.) Rather, in issuing and disciplining licenses, a state agency is primarily concerned with protection of the public, maintaining the integrity and high standards of the profession, and

preserving public confidence in licensure. (*Ibid*; *Fahmy v. Medical Bd. of California* (1995) 38 Cal.App.4th 810, 817.)

50. Here, Respondent perpetrated five clean plugs in one year, which represents a pattern of fraudulent behavior. Considering his evidence of rehabilitation, including acknowledgment of responsibility and new procedures to prevent recurrence, a probationary order will be imposed. As to T.N.B., Sergio Calles and Jose Calles, the public can only be adequately protected by revocation.

51. Any other ARD's held by T.N.B., Sergio Calles, Jose Calles, or Respondent may be disciplined pursuant to Business and Professions Code section 9884.7, subdivision (c), for the violations established herein.

52. Any other licenses held by T.N.B., Sergio Calles, Jose Calles, or Respondent pursuant to Business and Professions Code, Division 3, Chapter 20.3, articles 5 and 6, may be disciplined pursuant to section 9889.9 if discipline is imposed on any other license.

53. Any other licenses issued to T.N.B., Sergio Calles, Jose Calles, or Respondent pursuant to Chapter 5 of Part 5 of Division 26 of the Health and Safety Code may be disciplined as a result of the discipline of their licenses that are the subject to this proceeding, based on Health and Safety Code section 44072.8.

54. Complainant established by a preponderance of the evidence that T.N.B., Sergio Calles, Jose Calles, and Respondent engaged in clean plugging. There were anomalies and irregularities in the data generated by the BAR-OIS at T.N.B. on at least 15 occasions. Under these circumstances, revocation of the licenses and registration of T.N.B., Sergio Calles, and Jose Calles is necessary to preserve the Bureau's mission of protecting public safety.

55. The license of Respondent will be placed on probation. As noted in the section above titled "Motion to Amend," no order is issued related to Respondent's smog test station license. However, the Bureau, in its discretion, may amend the Accusation, or file a new pleading against Respondent, and request a hearing.

ORDER

T.N.B. Test Only, Sergio Calles, and Jose Eduardo Calles

1. Automotive Repair Dealer registration, number ARD 277511, issued to Sergio Calles, doing business as T.N.B. Test Only, is revoked.
2. Smog Check, Test Only, Station license number TC 277511, issued to Sergio Calles, doing business as T.N.B. Test Only, is revoked.
3. Any registration or license issued by the Bureau for any and all places of business operated in California by Sergio Calles, are revoked.
4. Smog Check Inspector license number EO 635855, issued to respondent Sergio Calles, is revoked.
5. Smog Check Inspector license number EO 635855, issued to respondent Jose Eduardo Calles, is revoked.
6. Any additional license issued under Chapter 5 of Part 5 of Division 26 of the Health and Safety Code in the name Sergio Calles, is revoked.
7. Any additional license issued under Chapter 5 of Part 5 of Division 26 of the Health and Safety Code in the name Jose Eduardo Calles, is revoked.

8. T.N.B. Test Only, Sergio Calles, and Jose Eduardo Calles are jointly and severally liable for investigation and prosecution costs in the amount of \$7,016.11.

Respondent Alvaro J. Herrador

9. Smog Check Inspector license number EO 153673 and Smog Check Repair Technician license number EI 153673, issued to Respondent Alvaro J. Herrador, are hereby revoked. The revocations are stayed for a period of five years under the following conditions.

A. All licenses of Respondent are suspended for 30 days.

B. During the period of probation, Respondent shall comply with all statutes, regulations and rules governing automotive inspections, estimates and repairs.

C. During the period of probation, Respondent shall post a prominent sign, provided by the Bureau, indicating the beginning and ending dates of the suspension and indicating the reason for the suspension. The sign shall be conspicuously displayed in a location open to and frequented by customers and shall remain posted during the entire period of actual suspension.

D. During the period of probation, Respondent or Respondent's authorized representative must report in person or in writing as prescribed by the Bureau, on a schedule set by the Bureau, but no more frequently than each quarter, on the methods used and success achieved in maintaining compliance with the terms and conditions of probation.

E. Respondent shall, within 30 days of the effective date of this decision, report any financial interest which Respondent or any partners may have in

any other business required to be registered pursuant to Business and Professions Code section 9884.6.

F. During the period of probation, Respondent shall provide Bureau representatives unrestricted access to inspect all vehicles (including parts) undergoing repairs, up to and including the point of completion.

G. If an accusation is filed against Respondent during the term of probation, the Director of Consumer Affairs shall have continuing jurisdiction over this matter until the final decision on the accusation, and the period of probation shall be extended until such decision is issued.

H. Should the Director of Consumer Affairs determine that Respondent has failed to comply with the terms and conditions of probation, the Department may, after giving notice and opportunity to be heard, suspend or revoke the licenses.

I. Upon successful completion of probation, Respondent's Smog Check Inspector licenses shall be fully restored. His Repair Technician license has expired.

J. During the period of probation, Respondent shall attend and successfully complete a Bureau certified training course in diagnosis and repair of emission systems failures and engine performance, applicable to the class of licenses held by Respondent. Said course shall be completed and proof of completion submitted to the Bureau within 60 days of the effective date of this decision and order. If proof of completion of the course is not furnished to the Bureau within the 60-day period, Respondent's license shall be immediately suspended until such proof is received.

K. Respondent shall pay costs of investigation and prosecution to the Bureau in the amount of \$2,338.70 during the period of probation on a schedule to be approved by the Bureau, but at a rate not greater than \$100 per month.

Signed Copy on File

DATE: August 11, 2020

DAVID B. ROSENMAN

Administrative Law Judge

Office of Administrative Hearings