

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

In the Matter of the Petition For Interim
Order of Suspension Against:

OAH No. 2013080956

LORENZO SOLORIO SANCHEZ, OWNER,
dba ABC TEST ONLY,
Automotive Repair Dealer Registration
No. ARD 263213,

Smog Test Only Station License
No. TC 263213,

and

GABINO V. HERNANDEZ,
Smog Check Inspector License
No. EO020707,

Respondents.

DECISION ON PETITION FOR INTERIM ORDER

This petition for interim suspension order was heard on September 20, 2013, before Susan J. Boyle, Administrative Law Judge, Office of Administrative Hearings, in San Diego, California.

Deputy Attorney General G. Michael German, Department of Justice, State of California, represented Patrick Dorais (petitioner), Acting Chief of the Bureau of Automotive Repair (bureau), Department of Consumer Affairs.

Respondent Gabino V. Hernandez (Hernandez) represented himself.

Respondent Lorenzo Solorio Sanchez (Sanchez), Owner, doing business as ABC Test Only, did not appear.

Oral and documentary evidence was presented, and the matter was submitted on September 20, 2013.

DEFAULT

With regard to Sanchez, on proof of compliance with Government Code sections 11505 and 11509, this matter proceeded as a default pursuant to section 11520.

FACTUAL FINDINGS

1. On September 8, 2010, the bureau issued Automotive Repair Dealer Registration Number ARD 263213 to Sanchez, doing business as ABC Test Only. On September 22, 2010, the bureau issued Smog Check Test Only Station License Number TC 263213 to Sanchez, doing business as ABC Test Only. The registration and license will expire on September 30, 2013, unless renewed or revoked.

2. In 2002, the bureau issued Advanced Emission Specialist Technician License Number EA 20707 to Hernandez. The license will expire on February 28, 2015, unless renewed or revoked.

3. On August 28, 2013, petitioner filed an Ex Parte Petition for an Interim Suspension Order (Ex Parte Petition) pursuant to Business and Professions Code section 494, which sought to suspend the licenses issued to ABC Test Only, Sanchez and Hernandez. The Ex Parte Petition alleged that Hernandez fraudulently performed smog check inspections and that he falsely issued certificates of compliance to vehicles that should have failed smog inspections. The ex parte hearing was held on September 4, 2013. Following consideration of the documentary evidence and arguments presented, Administrative Law Judge Susan J. Boyle issued an ex parte interim order suspending the licenses issued to ABC Test Only, Sanchez and Hernandez pending a noticed hearing on the petition. A hearing on the petition for an interim suspension order was set for September 20, 2013.

Garcia's Request to Represent Respondent Sanchez

4. The noticed hearing on the petition for an interim suspension order (Petition) was held on September 20, 2013. Hernandez and Apolonia Garcia, who was an acquaintance of Sanchez, appeared at the hearing. Sanchez was properly served with notice of the hearing on the Petition but did not appear. Petitioner objected to Garcia's request for permission to represent Sanchez at the hearing. Sanchez had not appeared at the hearing on the Ex Parte Petition, and Garcia stated that Sanchez was "still in Mexico." Garcia was unable to present proof that Sanchez had requested him to represent him and/or ABC Test Only. Garcia's request to represent Sanchez was denied. Garcia was permitted to assist Hernandez and to testify as a witness at the hearing.

The Smog Check Process

5. The State of California has instituted a mandatory smog check program designed to improve air quality and to protect the public health by reducing vehicle emissions. To this end, the state has a detailed mechanism for testing a vehicle's emissions to ensure this goal is met.

6. A licensed smog check station is authorized to issue an electronic certificate of compliance when a vehicle that is being tested passes a smog check inspection. A certificate of compliance cannot be issued until a vehicle passes a smog check inspection.

7. A smog check inspection is conducted by using a computer-based device known as an emission inspection system (EIS). Information entered into an EIS concerning a smog check inspection is stored in the EIS and in the statewide Vehicle Information Database (VID).

8. An EIS is activated when a licensed smog check technician enters his or her unique personal identification number. Thereafter, the technician inputs information pertaining to the vehicle being inspected.

9. After the required vehicle identification information is entered, the EIS leads the technician through the three parts of a smog inspection: the tailpipe exhaust emissions test, a visual examination, and functional tests. The technician enters the results of the three tests into the EIS.

10. An on-board diagnostics (OBDII) test is one of the mandated functional tests for most vehicles manufactured after 1996. The OBDII test requires the technician to connect a test cable from the EIS to the vehicle's on-board computer. Once the test cable is connected, the OBDII system runs several self-tests on the vehicle's emission and engine control systems, retrieves information from the vehicle's computer, and transmits the information to the EIS. When the vehicle fails a self-test, a diagnostic trouble code specific to that failure is generated and reported to the EIS. A vehicle can generate a diagnostic trouble code only for something for which its on-board computer has been programmed. Some, but not all, generated diagnostic trouble codes result in a failed smog inspection.

11. "Clean plugging" occurs when a smog technician connects the test cable from the EIS to an on-board computer of a vehicle other than the one for which a smog test is being performed. Clean plugging allows a vehicle to fraudulently pass an inspection it would fail if actually tested.

12. When a technician completes an inspection, the EIS generates a written report known as a vehicle inspection report (VIR). The VIR contains a description of the vehicle and the results of the inspection. If the vehicle has passed the smog check inspection, an electronic certificate of compliance is issued automatically to the California Department of

Motor Vehicles (DMV). If the vehicle does not pass the smog check inspection, the vehicle must be repaired and retested.

13. Smog certificates issued by licensed smog stations and related information are automatically transmitted to the VID. In addition to containing registration data from the DMV, the VID includes data from each smog inspection conducted at a smog station; the EIS identification number; license number of the technician who conducted the test; date of the test; start and end times of the test; the year, make, and vehicle identification number of the vehicle tested; test results; and the certificate of compliance number, if one was issued. The VID is accessible to the bureau and allows bureau employees to analyze data generated by specific smog check stations and/or technicians to determine whether a smog check station's activities or procedures indicate a need for further investigation.

The Bureau's Review of Records and Inspection

14. Pete Kaliszewski (Kaliszewski), a Program Representative Specialist II with the bureau, testified at the hearing. Kaliszewski has worked for the bureau for eight years and has extensive experience in the automobile industry, including fourteen years as an automobile technician. He is familiar with the practice known as "clean plugging."

Prior to June 5, 2013, Kaliszewski reviewed the VID for smog inspections requiring the OBDII function test performed at ABC Test Only. In his review, Kaliszewski found ten inspections in a four month period where the trouble code P0325, a code that did not apply to the vehicle being tested, was generated by the EIS.

15. On June 5, 2013, after reviewing the VID information, Kaliszewski met with Hernandez at ABC Test Only. Kaliszewski obtained the records maintained by ABC Test Only for the ten vehicles that purportedly generated an inapplicable P0325 diagnostic trouble code. Kaliszewski confirmed that Hernandez was the smog inspector who performed the smog tests on the ten vehicles. Kaliszewski provided Hernandez an opportunity to explain the unsupported diagnostic trouble code that appeared in the records for the ten vehicles. Hernandez offered no explanation.

16. On July 30, 2013, Kaliszewski reviewed the VID for smog inspections requiring the OBDII function test performed at ABC Test Only for the period from July 12 through July 20, 2013. Kaliszewski's review disclosed that, on July 16, 2013, a vehicle was tested, passed inspection, and generated a diagnostic trouble code (P0735) that was not supported by the vehicle being tested.

17. Based upon the records he reviewed and the lack of a viable explanation for the generation of diagnostic trouble codes in eleven vehicles that did not support the codes generated, Kaliszewski determined that a "donor" vehicle was "most likely used" to allow those vehicles to pass the smog inspection. Kaliszewski concluded that by "clean plugging" during the smog inspections, Hernandez, Sanchez and ABC Test Only fraudulently allowed the issuance of smog compliance certificates for eleven vehicles that were improperly tested.

Evidence on Behalf of Respondent Hernandez

18. Garcia testified at the hearing. He stated that he has been in the automotive industry since 1988 and has four Automotive Service Excellence (ASE) certifications. He is certified in engine repairs, but he is not certified or licensed as a smog technician.

Garcia noted that that four of the ten vehicles initially flagged by Kaliszewski were Nissans. Garcia testified that his research showed that Nissan vehicles could have a P0325 code present during smog testing. However, the Nissans on Kaliszewski's list were 2002 and 2004 models. Kaliszewski testified that the P0325 code could be found only in 2001 and older Nissan model vehicles and would not be generated in 2002 or 2004 models. The documents presented by Garcia did not support a finding that a P0325 code could be generated in Nissan vehicles after 2001 models.

Garcia offered no explanation for the generation of the diagnostic trouble code in the six non-Nissan vehicles contained in Kaliszewski's original list or the eleventh vehicle Kaliszewski discovered in July 2013.

Hernandez did not testify at the hearing.

LEGAL CONCLUSIONS

Applicable Statutes and Regulations

1. Business and Professions Code section 494, subdivision (a), provides that an interim suspension order may be issued when the licentiate has engaged in conduct constituting cause for discipline of his or her license and when "[p]ermitting the licentiate to continue to engage in the licensed activity, or permitting the licentiate to continue in the licensed activity without restrictions, would endanger the public health, safety, or welfare."

2. The California Legislature has declared its intent to meet or exceed air quality standards in the federal Clean Air Act (42 U.S. C. § 7401, et. seq.) and has determined that enhancements to vehicle smog testing will help in meeting that goal. The statutory scheme includes a focus on detection and repair of malfunctioning emission control systems and a vigorous and effective monitoring of licensed smog stations and technicians. (Health & Saf. Code, §§ 44000, 44000.5, & 44001.)

3. Business and Professions Code section 9884.7, subdivision (a), authorizes the bureau to discipline the license of an automobile repair dealer for misconduct, including the making of an untrue or misleading statement, and the failure to comply with the laws and regulations governing smog inspections.

4. Business and Professions Code section 9889.22, and Health and Safety Code section 44059, authorize the bureau to discipline a licensee for making a false statement or entry in a certificate of compliance.

5. California Health and Safety Code section 44012 mandates that smog check inspections be performed in accordance with the bureau's requirements, which may include a test "utilizing a vehicle's onboard diagnostic system" Subdivision (f) provides that smog inspections must include a determination that emission control devices and systems that are required by State and Federal law are installed and functioning correctly in accordance with test procedures.

6. California 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.

[¶ . . . ¶]

(h) Violates or attempts to violate the provisions of this chapter relating to the particular activity for which he or she is licensed

7. California Code of Regulations, title 16, section 3340.35, subdivision (c), permits the issuance of a certificate of compliance only when a vehicle passes all aspects of a smog inspection.

Determination

8. Jurisdiction to proceed in this matter exists under Business and Professions Code section 494.

9. Hernandez used the illegal technique of “clean plugging” by entering identifying information about a vehicle ostensibly being tested into the EIS computer system, and then attaching the EIS test cable to the OBDII of a different vehicle. After engaging in this illegal technique, Hernandez, Sanchez and ABC Test Only issued fraudulent certificates of compliance.

10. Sanchez owned and operated ABC Test Only. As a registrant and licensee, Sanchez was obligated to see that the license is not used in violation of the law. If a licensee elects to operate his business through employees, he must be responsible to the licensing authority for their conduct in the exercise of his license, and he is responsible for the acts of his agents or employees done in the course of his business in the operation of the license. A licensee “may not insulate himself from regulation by electing to function through employees or independent contractors.” (*Rob-Mac, Inc v. Department of Motor Vehicles* (1983) 148 Cal.App.3d 793, 797.)

11. Hernandez, Sanchez and ABC Test Only violated Business and Professions Code sections 9884.7 and 9889.22, and Health and Safety Code section 44072.2, subdivisions (a), (c), (d), and (h), by clean plugging vehicles and by issuing false and fraudulent smog certificates.

12. The false smog certificates issued by Hernandez, Sanchez and ABC Test Only were transmitted to the VID. The DMV accesses that data base to establish that a vehicle has passed a smog check before its registration is renewed. It is reasonably inferred that the owners of the automobiles for which false certificates were issued were able to renew the registration of their vehicles and that the DMV relied on the false information in the data base when renewing those vehicle registrations.

13. Falsely providing certificates of compliance allows vehicles that do not have fully functioning emission control systems to continuously emit dangerous particles into the air and create further pollution. Additionally, unlawfully issuing certificates of compliance for vehicles that should not have passed the inspection is a disservice to the vehicle owner who has paid for an honest evaluation but did not receive it. Such an owner may attempt to sell the vehicle and will be unable to do so when the vehicle cannot pass a smog inspection prior to sale. Further, the issuance of fraudulent documents by a licensee that become part of a public record, and are relied upon by public agencies, also harms the public.

14. Control and elimination of air pollutants is necessary to protect public health and well being, and to protect property and vegetation. (Health & Saf. Code, § 43000, subd. (a) and (b); Declaration of Barbara Weller Ph.D., dated April 3, 2013.)

15. Allowing Hernandez, Sanchez and ABC Smog Test Only to continue in their licensed activities would endanger the public health, safety, and welfare.

16. Based on the foregoing, cause has been established to issue an interim suspension order, suspending ABC Test Only and Hernandez's licenses and Sanchez's registration pending the filing of an accusation and hearing.

ORDER

1. The Automotive Repair Dealer Registration Number ARD 263213 issued to respondent Lorenzo Solorio Sanchez, doing business as ABC Test Only remains suspended pursuant to Business and Professions Code section 494.

2. The Smog Check Test Only Station License Number TC 263213 issued to respondent Lorenzo Solorio Sanchez, doing business as ABC Test Only remains suspended pursuant to Business and Professions Code section 494.

3. The Advanced Emission Specialist Technician License Number EA 20707 issued to respondent Gabino V. Hernandez remains suspended pursuant to Business and Professions Code section 494.

4. Petitioner shall file an accusation and set a hearing thereon in compliance with Business and Professions Code section 494 and other applicable law.

Dated: September 26, 2013



SUSAN J. BOYLE

Administrative Law Judge
Office of Administrative Hearings