

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

**In the Matter of the Accusation and Petition to Revoke
Probation Against:**

**FIRE HOUSE SMOG, REID VENTURES, MITCHEL SCOTT
BORNSTEIN, PRESIDENT, Automotive Repair Dealer
Registration No. ARD 279070, Smog Check, Test Only,
Station No. TC 279070, and**

**DOMINIC BONIFACIO DUCUT, Smog Check Inspector No. EO
631156, Respondents.**

Agency Case No. 79/21-16089

OAH No. 2023050151

PROPOSED DECISION

Administrative Law Judge Karen Reichmann, State of California, Office of
Administrative Hearings heard this matter on October 15 and 16, 2024, by
videoconference.

Deputy Attorney General Aspasia Papavassiliou represented complainant Patrick Dorais, Chief of the Bureau of Automotive Repair.

Attorney William Ferreira represented respondents Reid Ventures doing business as Fire House Smog, Mitchel Bornstein, President, and Dominic Bonifacio Ducut. Bornstein and Ducut were present throughout the hearing.

The record closed and the matter was submitted for decision on October 16, 2024.

FACTUAL FINDINGS

Jurisdictional Matters

1. Complaint Patrick Dorais filed this Accusation and Petition to Revoke Probation on November 29, 2022, solely in his official capacity as Chief of the Bureau of Automotive Repair (Bureau or BAR), Department of Consumer Affairs, State of California.

2. On January 26, 2015, the Bureau issued Automotive Dealer Registration No. ARD 279070 to respondent Reid Ventures, doing business as Fire House Smog, Mitchel Bornstein, President (Fire House Smog or the facility). On February 6, 2015, the Bureau issued Smog Check, Test Only, Station License No. TC 279070 to respondent Reid Ventures. The ARD registration and smog check station license were in effect at all times relevant to this matter. They are scheduled to expire January 31, 2025, unless renewed.

3. Respondent Dominic Bonifacio Ducut has been licensed by the Bureau since July 9, 2009. He currently holds Smog Check Inspector License No. EO 631156.

This license was in effect at all times relevant to this matter, and will expire September 30, 2025, unless renewed. Ducut works at Fire House Smog, which is located in Antioch.

4. In 2018, an accusation in Case No. 79/17-2297 was filed against the facility, Ducut, and two other smog technicians, alleging ten instances of "clean plugging," four of which were performed by Ducut. After an administrative hearing, the Bureau adopted a proposed decision revoking the facility's ARD registration and smog check license and Ducut's smog check inspector license, staying the revocations, and placing both respondents on probation for three years, effective April 7, 2020. The decision did not find cause for discipline against either respondent for fraud or dishonesty and instead found that respondents had been careless.

Because this Accusation and Petition to Revoke Probation was filed during the probation period, both respondents remain on probation. The Bureau notifies respondents on probation that undercover vehicles might be sent for inspection to confirm compliance with Bureau regulations.

Other Prior Discipline

5. The facility received Citation C2015-1637 on August 26, 2015, for using the BAR-97 inspection system during a smog inspection when use of the OIS system was required. The citation contained an order of abatement and no other penalty was imposed.

6. Ducut received Citation M2011-0670 on December 3, 2010, for issuing a certificate of compliance to a Bureau undercover vehicle with the ignition timing adjusted beyond specifications. He was ordered to complete an 8-hour training course and did so. Ducut received Citation M2015-1638 on August 26, 2015, because he was

the technician who used the wrong inspection system underlying the citation described in Finding 5. The citation contained an order of abatement and no other penalty was imposed.

Basis for Accusation and Petition to Revoke Probation

7. After September 27, 2021, Bureau employee Jacob Okuma modified a 2009 Chevrolet Silverado 2500 diesel truck by removing exhaust gas recirculation (EGR) components using a non-approved EGR delete kit. He removed the EGR valve, EGR cooler, and EGR coolant hoses, and installed block-off plates where the EGR components had been. In this modified condition, exhaust gases will not be recirculated, resulting in increased pollutants and emissions. Okuma also used an aftermarket tuner to reprogram the vehicle's computer to ignore the missing EGR components, so that the vehicle's malfunction indicator (check engine) light would not illuminate. Okuma believes a consumer might modify this vehicle in this fashion in order to improve performance and/or avoid repairing a failing EGR. The emissions label on this vehicle states that there is an "EGR" component but does not reflect that there is an EGR cooler. More detailed information about the vehicle's emissions systems is available through manufacturer and industry publications.

Most of the EGR assembly is hidden under other engine components, but pieces of it are partially visible if a technician knows what to look for. Part of at least one block-off plate where the EGR cooler was located towards the rear of the engine compartment is visible. The block-off plate should alert a diligent technician to research further whether the vehicle's emissions components have been modified. There is no way for a technician to tell during a visual inspection that a vehicle's software has been modified.

8. In this modified condition, the vehicle cannot pass the visual inspection portion of a properly performed smog inspection. The individual inspecting the vehicle should enter "TAMPERED" "MODIFIED" or "MISSING" in the visual inspection section of the inspection under the EGR category. With this entry, the vehicle will fail the inspection and cannot be issued a certificate of compliance.

9. A Bureau employee provided the vehicle to an undercover operator and directed her to drive the vehicle to the facility and request a smog inspection.

10. The operator took the vehicle to the facility on December 9, 2021. Respondent Ducut performed the inspection. During the visual inspection portion of the inspection, Ducut entered "PASS" as the result of his visual inspection of the vehicle's EGR system. This information was transmitted to the BAR. The vehicle passed the inspection, and a certificate of compliance was issued to it, even though the vehicle was missing the EGR components and should not have passed the visual inspection. Ducut gave the operator a Vehicle Inspection Report (VIR) reflecting that the vehicle's EGR system passed the visual inspection.

11. The operator took the vehicle to two other facilities at the direction of the BAR employee. The vehicle also passed the smog inspections at these facilities.

Respondents' Evidence

12. Respondents request dismissal of the Accusation and Petition to Revoke Probation, contending that respondent Ducut made a "bona fide error" in his inspection of the 2009 Chevrolet Silverado and did not engage in fraud.

13. Respondents noted that the vehicle's emissions control label identifies the presence of an EGR but does not indicate that this vehicle has an EGR cooler. Not

all vehicles with an EGR have an EGR cooler. The labels on many other vehicles specifically indicate the presence of an EGR cooler, and some labels have a detailed diagram of the components. Without knowing that the vehicle should have an EGR cooler, respondents contend that a technician could reasonably think the manufacturer uses block-off plates in engine models without an EGR cooler.

14. Bornstein was “blown away” by the Accusation and Petition to Revoke Probation. He tried to find video footage of the inspection of the vehicle but it was not available because his video system only archives footage for two weeks. Bornstein purchased a 2008 Chevrolet Silverado diesel truck, which has the same engine configuration and emissions components as the 2009 model year vehicle modified by Okuma. Bornstein had a mechanic (not Ducut) perform the same modification, including reprogramming the vehicle’s computer to prevent the malfunction indicator light from illuminating. Prior to reprogramming the computer, the malfunction indicator light immediately illuminated and stayed illuminated due to the missing EGR. Bornstein testified that he was unable to see the EGR components when they were still installed and could not subsequently see the block off plates. Bornstein took the vehicle to five different smog check stations in Antioch and Berkeley between July 26 and August 16, 2024. The vehicle passed all five inspections performed by five different technicians. Bornstein did not know any of the technicians and did not offer an inducement for them to pass the vehicle.

15. Respondents do not believe a consumer would perform this modification, noting that the delete kit and tuner cost \$800 and the modification took the mechanic five hours to perform. A new EGR valve and cooler costs \$600.

16. Bornstein is not a licensed smog check technician. He bought his first smog check facility in Berkeley in 2012, because he was looking to purchase a business

after moving to California from the East Coast. He appreciated that operating a smog check business benefits the environment and enables him to employ immigrants and other underprivileged workers. He initially thought he could be an absentee owner but quickly realized that he needed to be a hands-on owner. Bornstein now owns four facilities and goes to each one at least twice a week. Bornstein's number one priority is hiring good technicians and instructing them to follow all rules and regulations. Bornstein instructs his technicians to follow the smog manual and always perform proper visual inspections. He provides flashlights and mirrors at all his facilities to assist in visual inspections. He has fired technicians for poor performance, dishonesty, and stealing.

17. Bornstein has installed video cameras at his facilities so that he can review inspections for compliance. He reviews all VIRs and invoices. Bornstein attends BAR trainings and watches advisory meetings to stay up to date.

18. Since Fire House Smog was placed on probation, Bornstein corrected procedures to prevent clean plugging. He has also reached out to Bureau employees several times with questions about proper procedures.

19. In July 2021, BAR implemented an upgrade to its smog inspection system to detect vehicles with modified software. Such vehicles are supposed to fail inspections. It was not established why the vehicle at issue in this matter, and the vehicle modified by Bornstein, were not failed by the Bureau's inspection system. Bornstein testified that smog check station owners have been begging the Bureau for years for help detecting modified software and that a small number of vehicles at his facilities have been failed by the BAR's inspection system for modified software since 2021.

20. Fire House Smog is a busy facility, performing 1,000 smog inspection each month. Fire House Smog is STAR-certified. During the four calendar quarters between September 2021 and June 2022, the station consistently had a slightly higher fail rate than the state average.

21. Ducut testified that he always looks at the vehicle's label to figure out what components are present. His understanding from courses he has taken is that if he cannot see a component after searching for it, he can enter "PASS" for that component. He has also been told by instructors that he can take into consideration the failure of the check engine light to illuminate when determining whether to pass or fail a vehicle during the visual inspection.

22. Ducut testified that he has been vigilant about scanning the VIN on each vehicle since he was placed on probation for clean plugging, to avoid inadvertently inspecting the wrong vehicle.

23. Ducut was ordered to take a training course as a condition of his probation. He took the course in January 2021. He did not take it sooner due to the COVID-19 pandemic.

24. Several technicians who work or have worked for Reid Ventures at the Fire House Smog facility and other locations testified at the hearing. The technicians confirmed that Bornstein is at the facilities regularly, does not cut corners, provides the technicians with all needed resources, reviews every VIR, and reviews the facilities' STAR scores with them. The technicians also testified that Ducut is honest, helpful, and collaborative. The former owner of the Fire House Smog facility testified that Ducut worked for him for four years and was committed, professional, customer-focused, helpful, and honest.

25. Peter Tubesing, Bornstein's close friend of 30 years, testified at the hearing. Tubesing has invested in Bornstein's businesses in the past but has no current business interest in Reid Ventures. Tubesing has found Bornstein to have ethical business practices and does not question Bornstein's honesty and integrity. He added that Bornstein is an excellent father and husband.

Costs

26. In connection with the prosecution of this case, the Department of Justice has billed the Bureau \$29,744.50 for legal services provided through September 30, 2024. These charges are supported by certifications that comply with the requirements of California Code of Regulations, title 1, section 1042. Respondent argued, and complainant acknowledged, that a reduction in costs is appropriate due to the reassignment after the death of the attorney originally assigned to the case. The reasonable prosecution costs for this matter are \$20,000.

Ultimate Findings

27. The evidence established that Ducut passed a vehicle with modified components that should have failed the visual inspection. The evidence did not establish that Ducut knowingly and intentionally did so. Rather, the evidence established that Ducut should have been more diligent in researching the vehicle's emissions components so that he could have detected the modification.

LEGAL CONCLUSIONS

First Cause for Discipline

1. Business and Professions Code section 9884.7, subdivision (a)(1), provides that the Bureau may suspend or revoke the Automotive Repair Dealer registration of a facility for making or authorizing untrue or misleading statements. Respondent Reid Ventures transmitted false information regarding the vehicle's EGR system and generated a VIR containing this false information. Cause for discipline was established in light of the matters set forth in Finding 10.

Second Cause for Discipline

2. Complainant conceded that the second cause for discipline was not established.

Third Cause for Discipline

3. Business and Professions Code section 9884.7, subdivision (a)(6), provides that the Bureau may suspend or revoke the Automotive Repair Dealer registration of a facility for violating the Bureau's regulations. In connection with the December 2021 inspection of the Bureau's undercover vehicle, respondent Reid Ventures issued a certificate of compliance to a vehicle which should have failed a properly performed smog inspection. Cause for discipline was established in light of the matters set forth in Finding 10.

Fourth Cause for Discipline

4. Complainant conceded that the fourth cause for discipline was not established.

Fifth Cause for Discipline

5. Health and Safety Code section 44072.2, subdivision (d), provides that the Bureau may discipline a Smog Check Station licensee for acts involving dishonesty, fraud, or deceit whereby another is injured. The false certification that the vehicle's EGR system was present was not an act involving dishonesty, fraud, or deceit which caused injury to the people of the State of California. Although Ducut should have been more diligent when inspecting the vehicle, it was not established that the improper issuance of a certificate of compliance to the Bureau's undercover vehicle was the result of dishonesty, fraud, or deceit.

Sixth Cause for Discipline

6. Health and Safety Code section 44072.2, subdivisions (a) and (c), provides that the Bureau may discipline Smog Check Station licensees for violating laws and regulations. Respondent Reid Ventures violated laws and regulations by: (a) failing to provide an inspection of the Chevrolet vehicle according to prescribed procedures (Health & Saf. Code, § 44012, subd. (f)); (b) issuing a certificate of compliance to a vehicle that had been modified (Health & Saf. Code, § 44015, subd. (b)); (c) making false statements in issuing the certificate of compliance (Health & Saf. Code, § 44059); (d) issuing a certificate of compliance to a vehicle that did not have all required emissions control equipment and devices installed correctly (Cal. Code Regs., tit. 16, § 3340.35, subd. (c)); (e) failing to perform a proper visual inspection of the Chevrolet (Cal. Code Regs., tit. 16, § 3340.42, subd. (b)(1)); and (f) failing to perform an inspection

as prescribed by the Smog Check Manual (Cal. Code Regs., tit. 16, § 3340.45, subd. (a)(2)). Cause for discipline was established in light of the matters set forth in Finding 10.

Seventh Cause for Discipline

7. Health and Safety Code section 44059 provides that the Bureau may discipline smog check inspectors for willfully making a false statement on a certificate of compliance. It was not established that Ducut willfully made a false statement on the certificate of compliance issued to the Bureau's undercover vehicle.

Eighth Cause for Discipline

8. Health and Safety Code section 44012 provides that the Bureau may discipline smog check inspectors for violating smog check program laws and regulations. Respondent Ducut violated laws and regulations by: (a) failing to provide an inspection of the Chevrolet vehicle according to prescribed procedures (Health & Saf. Code, § 44012, subd. (f)); (b) issuing a certificate of compliance to a vehicle that had been modified (Health & Saf. Code, § 44015, subd. (b)); (c) failing to perform tests in accordance with section 44012 (Health & Saf. Code, § 44032); (d) making false statements in issuing the certificate of compliance (Health & Saf. Code, § 44059); (e) issuing a certificate of compliance to a vehicle which was not inspected in accordance with the Health and Safety Code and section 3340.42 (Cal. Code Regs., tit. 16, § 3340.30, subd. (a)); (f) failing to perform a proper visual inspection of the Chevrolet (Cal. Code Regs., tit. 16, § 3340.42, subd. (b)(1)); and (g) failing to perform an inspection as prescribed by the Smog Check Manual (Cal. Code Regs., tit. 16, § 3340.45, subd. (a)(2)).

Cause for Probation Revocation

9. Term A of respondent Reid Ventures's and respondent Ducut's probation provides that they "shall comply with all federal and state statutes, regulations and rules" governing their BAR registrations and licenses.

10. Term F of respondent Reid Ventures's and respondent Ducut's probation provides that if they violate a term of probation, the Director may, after affording them notice and the opportunity to be heard, set aside the stay order.

11. Cause for probation revocation was established for Reid Ventures, doing business as Fire House Smog's Automotive Repair Dealer Registration and Smog Check Station, Test Only, License, for violations of statutes and regulations, in light of the matters set forth in Legal Conclusions 1, 3, and 6.

12. Cause for probation revocation was established for Ducut's violations of statutes and regulations, in light of the matters set forth in Legal Conclusion 8.

Determination of Discipline

13. After the facility and technician Ducut were placed on probation, the Bureau sent a modified undercover vehicle for inspection. The modification was difficult to detect. Ducut should have been more vigilant in researching the vehicle's emissions components before deciding that the EGR components were simply not visible to the naked eye and entering "PASS." It was not established that he intentionally passed a vehicle that he knew should have failed. Nor was it established that Ducut has a lax attitude towards smog inspections.

Bornstein credibly testified to the efforts he has undertaken to ensure compliance with Bureau rules and regulations at his facilities. It was not established

that he encourages his technicians to perform improper inspections or tolerates unlawful activity.

Under these circumstances, revocation, as sought by complainant, is not warranted. The public will be adequately protected by extending respondents' probation by one year.

Other Matters

14. Business and Professions Code section 9884.7, subdivision (c), provides that the Bureau may suspend, revoke, or place on probation the registration for all places of business operated in this state by respondent Reid Ventures, upon a finding that respondent has engaged in a course of repeated and willful violations of the laws and regulations pertaining to an automotive repair dealer.

Discipline of all automotive repair dealer registrations issued to Reid Ventures under this provision is appropriate, in light of the matters set forth in Factual Findings 4, 10, and 16 and Legal Conclusions 1, 3, and 6.

15. Health and Safety Code section 44072.8 provides that if the Bureau suspends or revokes a license, any additional license issued in the name of that licensee may also be suspended or revoked. Discipline of any additional licenses issued in the name of either respondent is warranted.

Costs

16. Business and Professions Code section 125.3 authorizes the Board to recover its reasonable costs of investigation and enforcement. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth standards by which a licensing board must exercise its discretion to reduce or

eliminate cost awards to ensure that licensees with potentially meritorious claims are not deterred from exercising their right to an administrative hearing. Those standards include whether the licensee has been successful at hearing in getting the charges dismissed or reduced, the licensee's good faith belief in the merits of his or her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate to the alleged misconduct.

A reduction in costs is warranted because not all causes for discipline were established, respondents had a good faith belief in the merits of their defense, and an extension of probation rather than revocation is being imposed. Costs are reduced to \$10,000.

ORDER

1. The probation granted to Automotive Repair Dealer Registration No. ARD 279070, issued to Reid Ventures doing business as Fire House Smog, Mitchel Bornstein, President, is extended by one year from the effective date of this order.

2. The probation granted to Smog Check, Test Only, Station License No. TC 279070, issued to Reid Ventures doing business as Fire House Smog, Mitchel Bornstein, President, is extended by one year from the effective date of this order.

3. The probation granted to Dominic Bonifacio Ducut, Smog Check Inspector License No. EO 631156, is extended by one year from the effective date of this order.

4. Pursuant to Business and Professions Code section 9884.7, subdivision (c), any other automotive repair dealer registration issue to respondent Reid Ventures is revoked, the revocation stayed, and the registration is placed on probation for one year from the effective date of this order on the same terms and conditions of probation imposed on ARD 279070 in Case No. 79/17-2297.

5. Pursuant to Health and Safety Code section 44072.8, any other licenses issued by the Bureau to Reid Ventures are revoked, the revocation stayed, and the licenses are placed on probation for one year from the effective date of this order on the same terms and conditions of probation imposed on Smog Check, Test Only, Station License TC 279070 in Case No. 79/17-2297.

6. Pursuant to Health and Safety Code section 44072.8, any other licenses issued by the Bureau to respondent Dominic Bonifacio Ducut are revoked, the revocation stayed, and the licenses are placed on probation for one year from the effective date of this order on the same terms and conditions of probation imposed on Smog Check Inspector License EO 631156 in Case No. 79/17-2297.

7. Respondents Reid Ventures and Dominic Bonifacio Ducut, jointly and severally, shall pay the Director of the Department of Consumer Affairs the reasonable costs of prosecution of this matter, pursuant to Business and Professions Code section 125.3, for a total of \$10,000.

DATE: **11/15/2024**

Copy of Signature on File

KAREN REICHMANN

Administrative Law Judge

Office of Administrative Hearings

