

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

In the Matter of the Accusation Against:

ANTHONY MENDOZA ALVAREZ, d.b.a. ANT SMOG CHECK,

Automotive Repair Dealer Registration No. ARD 281731

Smog Check Repair Station License No. RC 281731

and

JOSUE MATEOS MONTOYA

Smog Check Inspector License No. EO 631761

Smog Check Repair Technician License No. EI 631761

Respondents.

Agency Case No. 79/23-4256

OAH No. 2024010473

PROPOSED DECISION

Administrative Law Judge Michael C. Starkey, State of California, Office of Administrative Hearings, heard this matter on August 13, 2024, via videoconference.

Deputy Attorney General Susana A. Gonzales represented complainant Patrick Dorais, Chief of the Bureau of Automotive Repair, Department of Consumer Affairs.

Attorney William D. Ferreira represented respondents Anthony Mendoza Alvarez and Josue Mateos Montoya, who were not present.

The matter was submitted on August 13, 2024.

FACTUAL FINDINGS

Jurisdictional Matters

1. On October 12, 2015, the Bureau of Automotive Repair (Bureau), Department of Consumer Affairs (Department), issued Automotive Repair Dealer (ARD) Registration No. ARD 281731 to Anthony Mendoza Alvarez (Alvarez) doing business as ANT Smog Check.

2. On March 9, 2020, the Bureau issued Smog Check Station License No. RC 281731 to Alvarez. The registration and license were both in full force and effect at all relevant times. As of August 6, 2024, they were scheduled to expire on October 31, 2024, unless renewed.

3. On February 16, 2010, the Bureau issued Advanced Emission Specialist Technician License No. EA 631761 to respondent Josue Mateos Montoya (Montoya).

On August 14, 2012, the license was cancelled and renewed as Smog Check Inspector License No. EO 631761 and Smog Check Repair Technician License No. EI 631761. Both licenses were in full force and effect at all relevant times and are scheduled to expire on July 31, 2025, unless renewed.

4. Complainant Patrick Dorais issued the accusation on October 11, 2023, solely in his official capacity as the Chief of the Bureau. Complainant seeks to discipline respondents' ARD registration and licenses based on allegations that they issued 10 fraudulent smog certificates of compliance and violated other statutes and regulations. Respondents timely filed notices of defense and this proceeding followed.

Smog Check Inspections and the Practice of Clean Plugging

5. Beginning in March 2015, smog check inspections of most vehicles in California are performed pursuant to the BAR-OIS protocol, which requires a functional computer test during the inspection. As part of a BAR-OIS inspection, the on-board diagnostic system of the vehicle being tested is connected to the station's inspection system by means of a cable and data acquisition device (DAD). The inspection system retrieves data from the vehicle's computer, which the system sends to the Bureau's vehicle information database.

6. Clean plugging is the illegal practice of using another vehicle's on-board diagnostic system, or another device, during the on-board diagnostic portion of a smog inspection to generate passing data readings for the purpose of fraudulently issuing smog certificates to vehicles that are not in compliance or not actually tested.

7. One method of detecting clean plugging is identifying whether the electronic vehicle identification number (eVIN), communication protocol, or parameter identification (PID) count electronically transmitted by the vehicle to the Bureau's

vehicle information database matches the data expected for the year, make, and model of the vehicle being inspected. If a different vehicle is tested, it will not transmit the unique eVIN for the vehicle purportedly being tested. If the vehicle actually tested is a different year, make, or model than the vehicle purportedly tested, it may transmit a different communication protocol or PID count than expected.

8. Marc Ortega, an experienced Bureau employee, testified at hearing and wrote an investigative report, dated March 24, 2023. He has worked for the Bureau since 2005. Ortega has been a Program Representative III – Supervisor for approximately two months. Before that he was a Program Representative II for more than 13 years. Ortega has held active smog check repair and inspector licenses since 1986. He is also licensed as brake and lamp adjuster. He is certified as a master level technician and holds numerous certifications in automobile mechanic subspecialties.

9. Ortega reports that “defeat devices” exist, and one can be plugged into a station’s inspection system by means of a DAD. A defeat device is used to simulate the engine operation of a vehicle purportedly being tested and transmit data to the Bureau during a smog inspection, in order to falsely generate a “pass” result and issue a fraudulent certificate of compliance.

10. Ortega reports that to use a defeat device, a technician would typically have to enter the eVIN, odometer reading, make, model, and year of the vehicle purportedly tested. The defeat device would contain all of the other expected data for the specified vehicle, such as the appropriate communication protocol and PID count. The defeat device would transmit the data expected by the Bureau during the functional portion of the BAR-OIS inspection. If so, a fraudulent smog inspection might not be detectable via review of the eVIN, communication protocol, and PID count data transmitted.

11. However, the Bureau has devised another method to detect fraudulent smog inspections via the data transmitted. In his report, Ortega explained:

During an OIS Smog Check inspection, along with other visual and functional inspections, there is an OBD II query portion of the inspection. The OBD II query is performed with the engine idling and, when requested by the OIS analyzer, . . . an elevated or increased engine speed. The increase in engine speed is performed by the inspector by stepping on the throttle pedal or manually opening the throttle resulting in a corresponding increase in engine RPMs [revolutions per minute] by allowing an increase in airflow into the engine.

12. At hearing, Ortega explained that this instruction to the technician to increase the engine speed is not a standard part of a smog inspection, and has no bearing on whether a vehicle passes the inspection. This procedure exists solely to confirm the integrity of the inspection.

13. Ortega further explained that, during this portion of a BAR-OIS test, inspection data is transmitted to the Bureau's vehicle information database, including:

- engine speed measured in RPM;
- throttle position measured in a percentage of opening, ranging from near zero percent at idle to near or at 100 percent at full throttle;

- manifold air pressure (MAP) measured in kilo pascals (kpa), with typical readings for a normally aspirated vehicle of 25 to 45 kpa at idle and 101 kpa at full throttle; and
- mass air flow (MAF) measured in grams per second (gps).

14. Ortega opined that, during normal engine operation at idle, the engine speed is relatively steady; throttle position is steady at or near zero percent; and the MAP and MAF readings are also steady. Opening the throttle increases the engine speed, with a corresponding increase in MAF and a change in MAP. Ortega opined that, if the data transmitted show that the engine speed is increased, but there is no change in throttle position, MAP, or MAF, then the data could not have come from a gasoline-powered engine.

15. Ortega was asked how—if no vehicle was connected to a station's inspection system—the technician could simulate increasing the engine speed when directed to do so? Ortega responded that he has seen a defeat device that had a dial at the bottom to simulate engine speed. He is also aware that standalone devices can be used to simulate engine speed.

Ten Instances of Clean Plugging by Respondents

16. Ortega reviewed the OIS data transmitted from ANT Smog Check over the first three months of 2023. He also reviewed the Vehicle Inspection Report (VIR) and OIS Test Detail Report associated with each inspection.

17. Ortega identified 10 smog inspections with anomalous data. In each of these 10 inspections, a certificate of compliance was issued by respondents after an inspection by Montoya. In each of these 10 inspections, when Montoya was asked to

increase the engine speed during the inspection, the data transmitted showed a significant increase in the engine speed (the RPM more than doubled), but no change in throttle position, MAP, or MAF. Ortega verified that pursuant to the data transmitted, there were no diagnostic test codes reported and the malfunction indicator lamp (MIL or "check Engine" lamp) was not illuminated in any of the vehicles.

18. Ortega concluded that in each of these 10 inspections, the data received by the Bureau could not have come from the vehicle purportedly tested, or any gasoline-powered engine, and came instead from a defeat device.

19. Ortega did not compare this data to that of prior inspections of the 10 vehicles at issue. He explained that this procedure of instructing the technician to increase the engine speed is new, so there was no similar prior data with which to compare.

20. Ortega did not utilize technical references in reaching his conclusions. He did not have anyone review his report, other than his supervisor.

21. On cross examination, Ortega appeared surprised that 7 of the 10 vehicles in question were Honda Accords, model years from 2003 to 2007. Ortega did not have an explanation for this phenomenon. He reported that he does not know if these cars have a higher fail rate in smog inspections than other makes or models. He does not believe that this number of Honda Accords indicates that these vehicles have a problem transmitting data correctly.

22. Ortega was also asked about two other data points collected during the inspections and stated in the OIS Test Detail reports for each inspection, the "CAL ID" and "CAL CVN." Ortega reported that the CAL ID is a calibration identification number of the operating software of the vehicle's powertrain control module (PCM, the

computer that controls the vehicles engine and transmission). He reported that the CAL CVN number is also related to the PCM software. Ortega initially testified that these numbers are the same for the vehicles of the same year, make, and model, then later testified that these number might be different if the engine family were different. Later, when shown that two of the vehicles in question were both 2004, Honda Accords, with the same engines, but had different CAL ID and CAL CVN numbers, Ortega testified that perhaps that these numbers might vary even between vehicles of the same year, make, model and engine family. Ortega also testified that because this information regarding the two 2004 Honda Accords came from a defeat device, whoever programmed that device could have chosen any number.

Prior Disciplinary History of Montoya

23. On April 16, 2018, the Bureau issued a final decision in Case Number 79/15-2746 (OAH No. 2017060403), finding that during an undercover operation, Montoya's station (at that time he held an ARD registration and Smog Check Station license, as well as inspection licenses), had issued a certificate of compliance to a vehicle not capable of passing a proper smog inspection due to illegal modifications. Montoya's brother, whose inspection license was revoked years earlier, had performed the inspection using another technician's access code. The Bureau concluded that, as the station owner, Montoya was responsible for his brother's misconduct, and for wrongful issuance of the certificate, but was not actually aware of the misconduct. Therefore, the Bureau revoked Montoya's ARD registration and Smog Test Station license, but did not discipline his Smog Check Inspection or Smog Check Repair technician licenses.

Prior Station Inspections at ANT Smog

24. On August 5, 2021, Bureau representatives conducted a station inspection of ANT Smog. They observed that the BAR/OIS access codes of multiple inspectors, including Montoya, were posted on a piece of wood attached to the wall of the station, near the testing equipment. Technicians are not allowed to share their access codes. One of the technicians did not have a valid license. The access codes were reset. No defeat devices were observed. However, Bureau employees are allowed to observe only what is in plain sight. They are not allowed to open cabinets, or the like.

25. On July 27, 2022, Bureau representatives conducted another station inspection of ANT Smog. An OIS/DAD testing unit was "locked out" and therefore inoperable. The purpose of this inspection was to verify that all required smog test equipment was present and in operating condition before the Bureau reactivated the testing equipment. The Bureau representatives did not test the device.

Respondent's Evidence

26. Neither respondent testified. The only documents respondents submitted were related to identifying the engines of the two 2004 Honda Accords at issue. (See Factual Finding 22.)

Ultimate Findings

27. Ortega is a very qualified and experienced smog check technician and mechanic. His testimony was generally credible and persuasive, despite some contradiction regarding whether CAL ID and CAL CVN numbers may vary for vehicles of the same, year, make, model, and engine family. Ortega's opinion is persuasive that

when a gasoline-powered engine's speed is increased in response to a request, a corresponding change in throttle position, MAP, or MAF always occurs. However, Ortega's opinion that data received by the Bureau during smog inspections showing increased engine speed without change in throttle position, MAP, or MAF could not have come from a gasoline-powered vehicle rests on an implicit assumption that such a vehicle is accurately transmitting the relevant data. And Ortega proffered no explanation for the fact that 7 of the 10 vehicles at issue were 2003 to 2007 model year Honda Accords.

28. Complainant's evidence is circumstantial and does not answer all questions. Nevertheless, the documentary evidence and Ortega's opinion are persuasive enough to prove that it is more likely than not that the data respondents transmitted to the Bureau during these 10 smog inspections did not come from the vehicles purportedly tested, and instead came from one or more defeat devices. Ortega's opinion was unrebutted. Respondents, who have the most direct knowledge of what happened during the inspections, did not testify or present the testimony of a competing expert. They offered no plausible competing explanation for the data transmitted. There were no diagnostic test codes reported for any of the vehicles, and the data indicated that the MIL was not illuminated in any of the vehicles, suggesting that the anomalous data was not the result of a malfunction in the vehicles purportedly tested. Further, Montoya, the technician who performed each of the 10 inspections at issue, was previously disciplined for facilitating an unlicensed technician's issuance of a smog certificate to a vehicle that could not pass a proper inspection.

29. Accordingly, it is found that respondents committed 10 acts of clean plugging, using a defeat device. The data transmitted to the Bureau was not from the

vehicles purportedly tested. Respondents made untrue and misleading statements. There was no bona fide error. These acts were intentional fraud.

Costs

30. In connection with the investigation and enforcement of this accusation, complainant requests an award of costs in the total amount of \$9,522.92, comprised of \$3,810.42 in investigative costs, and \$5,712.50 for attorney and paralegal services provided by the Department of Justice and billed to the Bureau. That request is supported by declarations that comply with the requirements of California Code of Regulations, title 1, section 1042. Those costs are found to be reasonable.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Complainant bears the burden of proof in this proceeding, and the standard of proof is a preponderance of the evidence. (*Imports Performance v. Dept. of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911.) If respondents contend mitigation or rehabilitation, it is their burden to prove those contentions by a preponderance of the evidence. (*Whetstone v. Board of Dental Examiners of Cal.* (1927) 87 Cal.App. 156, 164; Evid. Code, § 115.)

Causes for Discipline of Alvarez's Registration and License

FIRST CAUSE FOR DISCIPLINE (UNTRUE OR MISLEADING STATEMENTS)

2. The Director of the Department (Director) is authorized to discipline the registration of an automotive repair dealer that makes an untrue or misleading

statement “which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading,” where the automotive repair dealer cannot show there was a bona fide error. (Bus. & Prof. Code, § 9884.7, subd. (a)(1) [All further statutory references are to the Business and Professions Code unless otherwise stated.]) By untruthfully reporting to the Bureau that the 10 vehicles had been properly inspected and by certifying that these vehicles were in compliance, Alvarez made untrue and misleading statements, which with the exercise of reasonable care he should have known were untrue, and those untrue statements were not the result of bona fide error. (Factual Findings 27–29.) Cause exists to discipline Alvarez’s automotive repair dealer registration under section 9884.7, subdivision (a)(1).

SECOND CAUSE FOR DISCIPLINE (FRAUD)

3. The Director may discipline the registration of an automotive repair dealer that commits an act that constitutes fraud. (§ 9884.7, subd. (a)(4).) The evidence established that Alvarez’s issuance of 10 false certificates of compliance was fraudulent. (Factual Findings 27–29.) Cause exists to discipline Alvarez’s ARD registration under section 9884.7, subdivision (a)(4).

THIRD CAUSE FOR DISCIPLINE (FAILURE TO COMPLY WITH AUTOMOTIVE REPAIR ACT)

4. The Director may discipline the registration of an automotive repair dealer that fails to comply with the Automotive Repair Act (Act) (§ 9880 et seq.) or the regulations adopted to implement it. (§ 9884.7, subd. (a)(6).) Alvarez failed to comply with the Act in multiple respects, including failing to perform smog tests in accordance with Department procedures (Health & Saf. Code, § 44012); failing to perform a visual and/or functional check of required emission control devices (Health & Saf. Code,

§ 44012, subd. (f)); issuing certificates of compliance to vehicles that did not meet the requirements of section 44012 (Health & Saf. Code, § 44015, subd. (b)); making false statements or entries on certificates of compliance (Health & Saf. Code § 44059); issuing smog certificates of compliance for vehicles that were not tested in accordance with Department procedures (Cal. Code Regs., tit. 16, § 3340.35, subd. (c)); having in the approved testing area an electronic device or software capable of simulating the OBD data stream from a vehicle or manipulating OBD VIN, calibration identification, calibration verification number, MIL status, readiness, or diagnostic trouble codes collected from a vehicle during the smog check inspections (Cal. Code Regs., tit. 16, § 3340.35, subd. (h)); and making false statements or misleading statements on a record (Cal. Code Regs., tit. 16, § 3373). (Factual Findings 27–29.) Cause exists to discipline Alvarez’s ARD registration under section 9884.7, subdivision (a)(6).

FOURTH CAUSE FOR DISCIPLINE (MISLEADING STATEMENTS)

5. Complainant alleges that Alvarez’s ARD registration is subject to discipline under section 9889.22, which provides:

The willful making of any false statement or entry with regard to a material matter in any oath, affidavit, certificate of compliance or noncompliance, or application form which is required by this chapter or Chapter 5 (commencing with Section 44000) of Part 5 of Division 26 of the Health and Safety Code constitutes perjury and is punishable as provided in the Penal Code.

6. This section authorizes criminal punishment but does not, on its own, authorize license discipline. Cause for discipline was not established under section 9889.22.

FIFTH CAUSE FOR DISCIPLINE (FRAUD)

7. The Director may discipline the smog check station license of a licensee that commits an act that constitutes dishonesty, fraud, or deceit, expressly including clean plugging. (Health & Saf. Code, §§ 44072.2, subd. (d), 44072.10, subd. (c).) Alvarez's issuance of 10 false certificates of compliance was fraud and clean plugging. (Factual Findings 27–29.) Cause exists to discipline his smog check station license under Health and Safety Code sections 44072.2, subdivision (d), and 44072.10, subd. (c).

Causes for Discipline of Montoya's Licenses

FIRST CAUSE FOR DISCIPLINE (FRAUD)

8. Cause to discipline Montoya's smog check inspector and smog check repair technician licenses exists under Health and Safety Code section 44072.2, subdivision (d), for fraud, based on Factual Findings 27 through 29.

SECOND CAUSE FOR DISCIPLINE (VIOLATION OF STATUTES AND REGULATIONS)

9. The Director may discipline the smog check inspector and smog check repair technician licenses of a licensee that violates statutes and regulations. (Health & Saf. Code, § 44072.2, subds. (a), (c), (d) & (h).) Montoya violated applicable statutes and regulations when he: made false statements or entries on certificates of

compliance (Health & Saf. Code, § 44012); failed to perform tests of emission control devices and systems in accordance with Department procedures (Health & Saf. Code, § 44032); made a false statement or entry on a certificate of compliance (Health & Saf. Code, § 44059); failed to perform smog tests in accordance with statutes and Department procedures (Cal. Code Regs., tit. 16, § 3340.30, subd. (a)); and entered information and data into the emission inspection system for a vehicle other than the one being tested (Cal. Code Regs., tit. 16, § 3340.41, subd. (c)). (Factual Findings 27-29.) Cause for discipline of Montoya's smog check inspector and smog check repair technician licenses exists under Health and Safety Code sections 44072.10 and 44072.2, subdivisions (a), (c), (d), and (h), for violations of statutes and regulations.

THIRD CAUSE FOR DISCIPLINE (FALSE STATEMENT ON CERTIFICATE OF COMPLIANCE)

10. Complainant alleges that Montoya's licenses are subject to discipline under section 9889.22, which provides:

The willful making of any false statement or entry with regard to a material matter in any oath, affidavit, certificate of compliance or noncompliance, or application form which is required by this chapter or Chapter 5 (commencing with Section 44000) of Part 5 of Division 26 of the Health and Safety Code constitutes perjury and is punishable as provided in the Penal Code.

11. This section authorizes criminal punishment but does not on its own authorize license discipline. Cause for discipline was not established under section 9889.22.

Other Matters

12. 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 Alvarez, upon a finding that he has engaged in a course of repeated and willful violations of the laws and regulations pertaining to an automotive repair dealer. Such a course of repeated and willful violations has been established, based on Factual Findings 27 through 29, and Legal Conclusions 2 through 4 and 7.

13. Health and Safety Code section 44072.8 provides that if the Bureau revokes a license, any additional license issued under chapter 5 of part 5 of division 26 of the Health and Safety Code in the name of that licensee may also be revoked.

Discussion

14. In exercising its licensing and disciplinary functions, the Bureau's highest priority is the protection of the public. (§ 9880.3.) The purpose of license discipline is protection of the public through the prevention of future harm, and the improvement and rehabilitation of the licensee. (*Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 772.) The Bureau's guidelines for disciplinary penalties (Cal. Code Regs., tit. 16, § 3395.4) have been considered in reaching the determination of the appropriate discipline. For the violations involved here, the guidelines recommend a minimum of license revocation, stayed during a five-year period of probation, and a maximum of outright revocation. Evidence that an unlawful act was part of a pattern or practice is a factor in aggravation.

15. Respondents' 10 instances of clean plugging constitute a pattern or practice of fraud in the performance of their duties as licensees. Montoya has a previous history of discipline. Respondents submitted no evidence of mitigation or

rehabilitation. The evidence shows that respondents cannot be trusted to perform smog inspections in accordance with the Bureau's specifications and are not good candidates for probation. Public protection requires the outright revocation of Alvarez's ARD registration and smog check station license, and Montoya's smog check inspector and smog check repair technician licenses.

Costs

16. Pursuant to section 125.3, a complainant may request an administrative law judge to order a licensee found to have violated the licensing act to pay an amount that does not exceed the reasonable costs of investigation and enforcement. Cause exists to order respondents to pay the Board's costs in the amount of \$9,522.92. (Factual Finding 30, Legal Conclusions 2–4 and 7–9.)

17. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth guidelines for determining whether costs should be assessed in the particular circumstances of each case. The Bureau must consider whether to do so will unfairly penalize the licensee who has committed misconduct, but who has used the hearing process to obtain a dismissal or a reduction in the severity of the discipline imposed, as well as whether the licensee will be financially able to pay the full costs of investigation and prosecution when the Bureau has conducted a disproportionately large investigation to prove that a licensee engaged in relatively innocuous misconduct. (*Id.* at pp. 44–45.) No cause for reduction of the cost award was established.

ORDER

1. Automotive Repair Dealer Registration No. ARD 281731, issued to Anthony Mendoza Alvarez doing business as ANT Smog Check, is revoked.
2. Any other automotive repair dealer registrations issued to respondent Anthony Mendoza Alvarez are revoked.
3. Smog Check Station License No. RC 281731, issued to respondent Anthony Mendoza Alvarez doing business as ANT Smog Check, is revoked.
4. Any other licensed issued under chapter 5 of part 5 of division 26 of the Health and Safety Code in the name of Anthony Mendoza Alvarez is revoked.
5. Smog Check Inspector License No. EO 631761, issued to respondent Josue Mateos Montoya, is revoked.
6. Smog Check Repair Technician License No. EI 631761, issued to respondent Josue Mateos Montoya, is revoked.
7. Any other licenses issued to respondent Josue Mateos Montoya under chapter 5 of part 5 of division 26 of the Health and Safety Code are revoked.

8. Respondents Anthony Mendoza Alvarez and Josue Mateos Montoya are jointly and severally ordered to pay the Bureau of Automotive Repair its costs of investigation and enforcement in the amount of \$9,522.92.

DATE: 09/09/2024

Copy of Signature on File
MICHAEL C. STARKEY

Administrative Law Judge

Office of Administrative Hearings