

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

In the Matter of the Accusation Against:

Case No.: 79/17-316

BISHAY SMOG TWO, LLC
SHEREEF BISHAY & JOLANA HERTZ,
Members
dba, ABE'S TEST ONLY SMOG
STATION
997 23rd Street
Richmond, CA 94804

OAH No.: 2018041064

Automotive Repair Dealer Registration No.:
ARD 264695
Smog Check Station License No.: TC 264695

and

MIKEY QUANG TRAN
997 23rd Street
Richmond, CA 94804

Smog Check Inspector License No.: EO
632091

and

FATAFEHI ATALUA MESUI
997 23rd Street
Richmond, CA 94804

Smog Check Inspector License No.: EO
632412
Smog Check Repair Technician License No.:
EI 632412

Respondents.

DECISION AFTER REJECTION OF PROPOSED DECISION

Administrative Law Judge (ALJ) Ruth S. Astle, State of California, Office of Administrative Hearings, heard this matter on September 13, 2018, in Oakland, California.

Deputy Attorney General Sheila Vasantharam represented complainant Patrick Dorais in his official capacity as the Chief of the Bureau of Automotive Repair (Bureau or BAR),

Department of Consumer Affairs (Department).

Mikey Quan Tran and Fatafehi Atalua Mesui were present and were represented by William Ferreira, Attorney at Law.

Shereef Bishay and Jolana Hertz, members, Bishay Smog Two, LLC, dba Abe's Test Only Smog Station did not return a request for hearing; therefore, they were not a party to this matter.

The matter was submitted for decision on September 13, 2018.

On October 8, 2018, ALJ Astle issued a Proposed Decision in this matter. On December 21, 2018, the Director of the Department issued an Order of Rejection of Proposed Decision. On February 28, 2019, the Director issued an Order Fixing Date for Submission of Written Argument ordering the parties to submit written argument on or before April 9, 2019 at 5:00 p.m. Complainant timely submitted written argument. After review of the entire administrative record, including the transcript and Complainant's written argument, the Director, pursuant to Government Code section 11517, hereby renders the final decision in this matter.

FACTUAL FINDINGS

1. Patrick Dorais brought the accusation solely in his official capacity as the Chief of the Bureau of Automotive Repair.
2. On May 19, 2010, the Bureau issued Advanced Emissions Specialist Technician License Number EA 632091 to Mikey Quang Tran (Tran). The license expired and was renewed effective January 8, 2013 as Smog Check Inspector License Number EO 632091. The Inspector licenses was in full force and effect at all times relevant to this matter and will expire October 31, 2018, unless renewed or revoked.
3. On August 23, 2010, the Bureau issued Advanced Emission Specialist Technician License Number EA 632412 to Fatafehi Atalua Mesui (Mesui). The licensed expired and was renewed effective September 10, 2012, as Smog Check Inspector License Number EO 632412, and Smog Check Repair Technician License Number EI 632412. Both licenses have expired and have not been renewed.
4. It was stipulated by the parties that respondents Tran and Mesui (collectively respondents) admit that the factual allegations relating to the factual description of 10 instances of clean plugging¹ contained in paragraphs 27 through 50 of Accusation No. 79/17-316 (Accusation) are true. Respondents did not contest the factual allegations in the paragraphs referenced herein at the administrative hearing.
5. This decision is applicable to only respondents Tran and Mesui as Abe's Test Only Smog Station did not request a hearing. Therefore, this matter as to them was returned to

¹ "Clean plugging" is a method used by some smog check stations and smog check technicians to issue fraudulent smog certificates of compliance to vehicles that are either not in compliance with the smog check program or not present for the smog inspection itself.

the Bureau for further action.

6. A brief summary of the clean plugging is set forth herein. The full factual findings are set forth in the paragraphs referred in Factual Finding 4, above, and incorporated by this reference as if fully set forth herein. On January 9, 2017, Bureau representative Gregory Bernes reviewed the On-Board Diagnostic Inspection System (OIS) smog data for vehicles inspected by respondents Tran and Mesui and certified by Abe's Test Only Smog Station, for the period between May 12, 2016, and January 4, 2017. Mr. Bernes identified 10 vehicles certified by Abe's Test Only Smog Station and inspected by either Tran or Mesui that either differed from the OIS data the vehicles transmitted during other inspections, or the data was inconsistent with the OIS data transmitted by "like vehicles" inspected or both. There were two instances in which Mesui certified vehicles that were not connected to the Data Acquisition Device (DAD) when they were certified. Mesui therefore clean plugged two vehicles, resulting in the issuance of two Certificates of Compliance that should not have been issued. There were also eight instances in which Tran certified vehicles that were not connected to the DAD when they were certified. This resulted in the issuance of an additional eight Certificates of Compliance that should not have been issued for a total of 10 Certificates of Compliance that should not have been issued between May 12, 2016, and January 4, 2017. It was not established that Tran or Mesui intentionally certified vehicles. However, the smog checks performed were incorrectly done.

7. Mikey Quang Tran has worked for Abe's Test Only since 2009. He testified that he never intended to clean plug any vehicle. Most of the vehicles were from used car dealers who bought vehicles at auction and brought the vehicles in for inspection before they could be sold. There was no Department of Motor Vehicle paperwork other than what was supplied by the auction sale. Many of the vehicles had similar Vehicle Identification Numbers² (VIN) at least at the beginning of the sequence. Tran admits that he was not careful to match the numbers exactly. He has now changed his practice and checks the numbers carefully to make sure the vehicle he is working on is the vehicle in the paperwork.

8. Fatafehi Atalua Mesui let his Smog Check Inspector License expire pending the outcome of this matter. He is working at Tesla as a helper and at Abe's Test Only, but he does not perform smog checks. He will check the paperwork very closely in the future.

9. Mr. Bernes testified that the Bureau now has the ability to block the issuance of a certificate of compliance at certain smog stations suspected of engaging in clean plugging if the data reported does not match what was expected. In such circumstances, the vehicle would need to be tested by a "referee."³ The Bureau has activated this system of "cert blocking" at Abe's Test Only Smog Station.

² A "vehicle identification number" is the motor number, serial number, or other distinguishing number, letter, mark, character, or datum, or any combination thereof, required or employed by the manufacturer or the department for the purpose of uniquely identifying a motor vehicle or motor vehicle part or for the purpose of registration. (Veh. Code, § 671, subd. (a).)

³ A "referee" refers to a facility under contract with BAR to provide independent evaluations of vehicles and services to accommodate vehicles with unusual inspection circumstances. (Cal. Code Regs., tit. 16, § 3340.1.)

10. Respondents presented five letters from companies and individuals who have accounts with Abe's Smog Test Only. Cheap Auto Wholesale stated that they have been doing business with Abe's Smog Test Only for six years and that they are happy with the service they provide. Armando Ramirez from Cheap Auto Wholesale wrote that he had a disgruntled employee who was switching vehicles and paperwork that may account for some of the problems.

11. A letter from The Car Company signed by Ahmad Aghababa states that he has been doing business with Abe's Smog Test Only for the past seven years and that he believes they have always done everything "by the book." He had two vehicles that were in the list of the 10 vehicles that were dean plugged. He believes that is was an unintentional error.

12. A letter was submitted from OC Osceolan Redrickn, the owner of one of the vehicles that was on the list. He states that he brought in the wrong paperwork and that the technician was unaware of the mistake. There is a similar letter from Francis Mongul and Jimmy Dielo, whose respective vehicles were also on the list.

13. While the Bureau argues for revocation, it is not always the most appropriate disciplinary action. Tran and Mesui have learned a difficult lesson and have indicated that they are both willing to only work at stations that agree to have the "cert blocking" system activated on their smog inspection machines.

Costs

14. The Bureau has incurred \$4,901.96 in investigative costs, and \$9,468 in legal costs, for a total of \$14,369.96 in cost of investigation and enforcement. Since three parties were involved in the investigation, each respondent would be responsible for one-third of the costs. That amount is \$4,789.99 each.

LEGAL CONCLUSIONS

Jurisdiction

1. The expiration of the Smog Check Inspector and Smog Check Repair Technician licenses issued to Mesui does not deprive the Director of jurisdiction to proceed with disciplinary action against him or to render a decision suspending or revoking his licenses. (Bus. & Prof. Code, §§ 118, subd. (b), 9884.13; Health & Saf. Code, §§ 44002, 44072.6.)

Burden and Standard of Proof

2. As the complainant in this matter, the burden of proof is on the Bureau. The standard of proof applied in this proceeding is preponderance of the evidence as the licenses at issue in this case are nonprofessional because they do not require extensive educational, training, or testing requirements similar to a professional license. (See *Mann v. Dept. of Motor Vehicles* (1999) 76 Cal.App.4th 312, 319; *San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1894; *Imports Performance v. Dept. of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911; Evid. Code, § 115.) "Preponderance of the evidence means evidence that has more convincing force than that opposed to it." [citations omitted]. [...] The sole focus of the

legal definition of ‘preponderance in the phrase ‘preponderance of the evidence’ is on the *quality* of the evidence. The *quantity* of evidence presented by each side is irrelevant.” (*Glage v. Hawes Firearms Co.* (1996) 226 Cal.App.3d 314, 324-325, emphasis in original.)

3. Once the party bearing the burden of proof has made a prima facie case, the burden shifts to the respondent, who has the burden of proving any affirmative defenses. (*Whetstone v. Board of Dental Examiners* (1927) 87 Cal.App. 156.)

Relevant Statutes and Regulations

4. Tests of emission control devices and systems must be verified by qualified smog check technicians at licensed smog check stations in accordance with procedures prescribed by the Department, which are set forth in the Smog Check Manual. (Health & Saf. Code, §§ 44012, 44032; Cal. Code Regs., tit. 16, §§ 3340.30, 3340.35, 3340.42.)

5. California Code of Regulations, title 16, section 3340.45, subdivision (c) permits the issuance of a certificate of compliance only when a vehicle passes all aspects of a smog inspection that has been performed in accordance with procedures specified in section 3340.42 of title 16 of California Code of Regulations and has all the required emission control equipment and devices installed and functioning correctly.

6. California Code of Regulations, title 16, section 3340.41, subdivision (c), provides in relevant part that:

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.

7. Health and Safety Code section 44072.2 provides in relevant part that:

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 [the Motor Vehicle Inspection Program] 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 [the Motor Vehicle Inspection Program].

8. Health and Safety Code section 44072.8 provides that, “[w]hen a license has been revoked or suspended following a hearing [...], any additional license issued under [the Motor Vehicle Inspection Program] in the name of the licensee may be likewise revoked or suspended by the director.

9. Protection of the public is the highest priority for the Bureau in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount. (Bus. & Prof. Code, § 9880.3.)

10. The purpose of disciplinary action is to protect the public, and not to punish the licensee. (*Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164; *Small v. Smith* (1971) 16 Cal.App.3d 450, 457.) "Discipline is preventative, protective and remedial, not punitive. [...] Keeping this in mind, it is our responsibility to impose a discipline that will protect the public from this potential harm." (*In re Kelley* (1990) 52 Cal.3d 487.)

Causes for Discipline

11. Cause exists to suspend or revoke respondent Tran's smog check inspector license for failing to follow test procedures prescribed by the Department when performing smog check inspections of eight vehicles as described herein, which resulted in the issuance of eight certificates of compliance that should not have been issued.

12. Cause exists to suspend or revoke respondent Mesui's smog check inspector and smog check repair technician licenses for failing to follow test procedures prescribed by the Department when performing smog check inspections of two vehicles as described herein, which resulted in the issuance of two certificates of compliance that should not have been issued.

13. A. Pursuant to Business and Professions Code section 125.3, the Bureau may request the administrative law judge to direct a licensee found to have violated the licensing act to pay a sum not to exceed the reasonable costs of investigation and prosecution. The bureau incurred costs in the amount of \$14,369.96, in regard to the accusation. (Factual Finding 12.) Each respondent would be responsible for one-third of the cost. However, respondents argue that the Bureau's investigative cost declaration does not comply with applicable rules and regulations in that it is conclusory. The testimony established that the time could not be allocated to specific activities. This is particularly important since there are three respondents. The investigative costs in the amount of \$4,901.96 is disallowed because the declaration does not comply with California Code of Regulations, title 1, section 1042.

B. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45, the Supreme Court enumerated several factors that a licensing agency must consider in assessing costs. It must not assess the full costs of investigation and enforcement when to do so would unfairly penalize a 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 agency must also 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 to the discipline or is unable to pay. In this matter, respondents Tran and Mesui cannot and should not pay the full amount. Respondents each owe \$3,156 (one-third of the legal costs). Under the circumstances, they can make reasonable monthly payments.

14. Although respondents Tran and Mesui subjected their respective licenses to

suspension or revocation, they presented sufficient mitigation, rehabilitation and extenuation evidence. It was also established that both respondents will be careful in the future to check all paperwork. There is no evidence that the public is endangered by respondents' continued licensure. Accordingly, a period of probation on the terms and conditions set forth below is sufficient to protect the public and ensure compliance with the smog check program.

ORDER

1. Smog Check Inspector (EO) License No. 632412 and Smog Check Repair Technician (EI) License No. 632412 issued to Fatafehi Atalua Mesui are hereby revoked. However, the revocations are stayed, and respondent is placed on two years' probation on the terms and conditions set forth below.

1. Obey All Laws

During the period of probation, Respondent shall comply with all federal and state statutes, regulations and rules governing all BAR registrations and licenses held by Respondent.

2. Quarterly Reporting

During the period of probation, Respondent shall report either by personal appearance or in writing as determined by BAR on a schedule set by BAR, but no more frequently than once each calendar quarter, on the methods used and success achieved in maintaining compliance with the terms and conditions of probation.

3. Report Financial Interests

Respondent shall, within 30 days of the effective date of the decision and within 30 days from the date of any request by BAR during the period of probation, report any financial interest which any Respondent or any partners, officers, or owners of any Respondent facility may have in any other business required to be registered pursuant to Section 9884.6 of the Business and Professions Code.

4. Access to Examine Vehicles and Records

Respondent shall provide BAR representatives unrestricted access to examine all vehicles (including parts) undergoing service, inspection, or repairs, up to and including the point of completion. Respondent shall also provide BAR representatives unrestricted access to all records pursuant to BAR laws and regulations.

5. Tolling of Probation

If, during probation, Respondent leaves the jurisdiction of California to reside or do business elsewhere or otherwise ceases to do business in the jurisdiction of California, Respondent shall notify BAR in writing within 10 days of the dates of departure and return, and of the dates of cessation and resumption of business in

California.

All provisions of probation other than cost reimbursement requirements, restitution requirements, training requirements, and that Respondent obey all laws, shall be held in abeyance during any period of time of 30 days or more in which Respondent is not residing or engaging in business within the jurisdiction of California. All provisions of probation shall recommence on the effective date of resumption of business in California. Any period of time of 30 days or more in which Respondent is not residing or engaging in business within the jurisdiction of California shall not apply to the reduction of this probationary period or to any period of actual suspension not previously completed. Tolling is not available if business or work relevant to the probationary license or registration is conducted or performed during the tolling period.

6. Violation of Probation

If Respondent violates or fails to comply with the terms and conditions of probation in any respect, the Director, after giving notice and opportunity to be heard may set aside the stay order and carry out the disciplinary order provided in the decision. Once Respondent is served notice of BAR's intent to set aside the stay, the Director shall maintain jurisdiction, and the period of probation shall be extended until final resolution of the matter.

7. Maintain Valid License

Respondent shall, at all times while on probation, maintain a current and active registration and/or license(s) with BAR, including any period during which suspension or probation is tolled. If Respondent's registration or license is expired at the time the decision becomes effective, the registration or license must be renewed by Respondent within 30 days of that date. If Respondent's registration or license expires during a term of probation, by operation of law or otherwise, then upon renewal Respondent's registration or license shall be subject to any and all terms and conditions of probation not previously satisfied. Failure to maintain a current and active registration and/or license during the period of probation shall also constitute a violation of probation.

8. Cost Recovery

Respondent shall pay the Bureau of Automotive Repair \$3,156 for the reasonable costs of enforcement of case No. 79/17-316. Respondent shall make such payment as follows: monthly. Any agreement for a scheduled payment plan shall require full payment to be completed no later than six (6) months before probation terminates. Respondent shall make payment by check or money order payable to the Bureau of Automotive Repair and shall indicate on the check or money order that it is for cost recovery payment for Case No. 79/17-316. Any order for payment of cost recovery shall remain in effect whether or not probation is tolled. Probation shall not terminate until full cost recovery payment has been made.

BAR reserves the right to pursue any other lawful measures in collecting on the costs ordered and past due, in addition to taking action based upon the violation of probation.

9. Prescribed Equipment

During the period of probation, Respondent shall not perform any form of smog inspection, or emission system diagnosis or repair, until Respondent has purchased, installed, and maintained the diagnostic, inspection, and repair equipment prescribed by BAR and necessary to properly perform such work. Respondent shall give BAR at least 10 days' notice of the availability of the equipment for inspection by a BAR representative.

10. Completion of Probation

Upon successful completion of probation, Respondent's affected registration and/or license will be fully restored or issued without restriction, if Respondent meets all current requirements for registration or licensure and has paid all outstanding fees, monetary penalties, or cost recovery owed to BAR.

11. License Surrender

Following the effective date of a decision that orders a stay of invalidation or revocation, if Respondent ceases business operations or is otherwise unable to satisfy the terms and conditions of probation, Respondent may request that the stay be vacated. Such request shall be made in writing to BAR. The Director and the BAR Chief reserve the right to evaluate the Respondent's request and to exercise discretion whether to grant the request or take any other action deemed appropriate or reasonable under the circumstances. Upon formal granting of the request, the Director will vacate the stay order and carry out the disciplinary order provided in the decision.

Respondent may not petition the Director for reinstatement of the surrendered registration and/or license or apply for a new registration or license under the jurisdiction of BAR at any time before the date of the originally scheduled completion of probation. If Respondent applies to BAR for a registration or license at any time after that date, Respondent must meet all client requirements for registration or licensure and pay all outstanding fees or cost recovery owed to BAR and left outstanding at the time of surrender.

2. Smog Check Inspector (EO) Licensed No. 632091, issued to Mickey Quang Tran, is hereby revoked. However, the revocation is stayed and the respondent is placed on two years' probation on the terms and conditions set forth below.

1. During the period of probation, Respondent shall comply with all federal and state statutes, regulations and rules governing all BAR registrations and licenses held by Respondent.

2. Quarterly Reporting

During the period of probation, Respondent shall report either by personal appearance or in writing as determined by BAR on a schedule set by BAR, but no more frequently than once each calendar quarter, on the methods used and success achieved in maintaining compliance with the terms and conditions of probation.

3. Report Financial Interests

Respondent shall, within 30 days of the effective date of the decision and within 30 days from the date of any request by BAR during the period of probation, report any financial interest which any Respondent or any partners, officers, or owners of any Respondent facility may have in any other business required to be registered pursuant to Section 9884.6 of the Business and Professions Code.

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Respondent shall provide BAR representatives w/ restricted access to examine all vehicles (including parts) undergoing service, inspection, or repairs, up to and including the point of completion. Respondent shall also provide BAR representatives unrestricted access to all records pursuant to BAR laws and regulations.

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If, during probation, Respondent leaves the jurisdiction of California to reside or do business elsewhere or otherwise ceases to do business in the jurisdiction of California, Respondent shall notify BAR in writing within 10 days of the dates of departure and return, and of the dates of cessation and resumption of business in California.

6. All provisions of probation other than cost reimbursement requirements, restitution requirements, training requirements, and that Respondent obey all laws, shall be held in abeyance during any period of time of 30 days or more in which Respondent is not residing or engaging in business within the jurisdiction of California. All provisions of probation shall recommence on the effective date of resumption of business in California. Any period of time of 30 days or more in which Respondent is not residing or engaging in business within the jurisdiction of California shall not apply to the reduction of this probationary period or to any period of actual suspension not previously completed. Tolling is not available if business or work relevant to the probationary license or registration is conducted or performed during the tolling period.

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Respondent shall pay the Bureau of Automotive Repair \$3,156 for the reasonable costs of enforcement of case No. 79/17-316. Respondent shall make such payment as follows: monthly. Any agreement for a scheduled payment plan shall require full payment to be completed no later than six (6) months before probation terminates. Respondent shall make payment by check or money order payable to the Bureau of Automotive Repair and shall indicate on the check or money order that it is for cost recovery payment for Case No. 79/17-316. Any order for payment of cost recovery shall remain in effect whether or not probation is tolled. Probation shall not terminate until full cost recovery payment has been made. BAR reserves the right to pursue any other lawful measures in collecting on the costs ordered and past due, in addition to taking action based upon the violation of probation.

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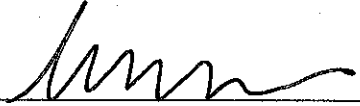
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This Decision shall be effective at 5:00 p.m. on June 13, 2019.

IT IS SO ORDERED this 7 day of May, 2019.



GRACE ARUPO RODRIGUEZ
Assistant Deputy Director
Legal Affairs Division
Department of Consumer Affairs