

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

In the Matter of the Accusation Against:

**HARRY'S AUTOMOTIVE INC., d.b.a. HARRY'S AUTO REPAIR
INC., SCOTT BOLLENGIER, President,**

Automotive Repair Dealer Registration No. ARD 213389

Smog Check Station License No. RC 213389

Brake Station License No. BA 213389, class C

Lamp Station License No. LA 213389, class A;

KEVIN TODD McGILBRA

Smog Check Inspector License No. EO 639121

Smog Check Repair Technician License No. EI 639121

Brake Adjuster License No. BA 639121, class C

Lamp Adjuster License No. LA 639121, class A;

JUSTIN MICHAEL NOFCHISSEY

Smog Check Inspector License No. EO 151217

Smog Check Repair Technician License No. EI 151217

Brake Adjuster License No. BA 151217, class A
Lamp Adjuster License No. 151217, class A

Respondents.

Agency Case No. 77/19-5307

OAH No. 2020080153

PROPOSED DECISION

Administrative Law Judge Traci C. Belmore, State of California, Office of Administrative Hearings, heard this matter on January 13, 2021, by videoconference.

Deputy Attorney General Julianne Mossler represented complainant Patrick Dorais, Chief of the Bureau of Automotive Repair, Department of Consumer Affairs.

Respondent Kevin Todd McGilbra was present at the hearing, representing himself.

Respondents Harry's Automotive Inc. and Justin Michael Nofchissey did not appear at hearing, having reached settlement agreements with the Bureau of Automotive Repair prior to the hearing.

The record closed and the matter was submitted for decision on January 13, 2021.

FACTUAL FINDINGS

1. On April 17, 2020, complainant Patrick Dorais issued the accusation in his official capacity as Chief of the Bureau of Automotive Repair (Bureau or BAR), Department of Consumer Affairs, containing 15 causes for discipline against Harry's Automotive Inc., doing business as Harry's Auto Repair, Scott Bollengier, President (Harry's Auto Repair); Kevin Todd McGilbra (McGilbra), and Justin Michael Nofchissey (Nofchissey).

2. Respondents Harry's Auto Repair and Nofchissey reached stipulated agreements with the Bureau. As a result, the hearing proceeded only against the remaining respondent, McGilbra (tenth through twelfth causes for discipline).

3. On March 25, 2016, the Bureau issued Smog Check Inspector License No. EO 639121 to respondent. On December 29, 2017, the Bureau issued Smog Check Repair Technician License No. EI 639121 to respondent. Both of those licenses are active and will expire on October 31, 2021, unless renewed. On July 8, 2016, the Bureau issued Brake Adjuster License No. BA 639121, class C, to respondent. The brake adjuster license expired on October 31, 2019. On September 19, 2016, the Bureau issued Lamp Adjuster License No. LA 639121, class A, to respondent. The lamp adjuster license expired on October 31, 2019 and was cancelled on December 1, 2019.

4. A lamp inspection requires a vehicle's lighting equipment to be inspected for defects and/or proper aim. The aim is verified by using an aiming screen or an optical type headlamp-aiming machine. The certificate of compliance form contains a series of boxes which when checked indicate that the inspector performed an inspection and/or adjustment of the lamps and which type of headlight aimer was used.

Undercover Operations

5. On May 1, 2019, the Bureau sent an undercover operator to Harry's Auto Repair to request a lamp inspection on a 2003 Honda Pilot (Pilot).

6. Prior to the undercover operation, Noel Monterrey, a BAR Program Representative I, modified the Pilot by adjusting the left front headlight up and the right front headline down. Both headlights were adjusted so that they would not pass a properly performed lamp inspection. Monterrey took photographs of the Pilot before and after making the modifications.

7. On May 1, 2019, Gregory Bernes, a BAR Program Representative I, obtained the Pilot from the Bureau's storage facility in San Jose. He then released custody of the Pilot to Jesus Mora, a Bar Representative II, and instructed him to take the vehicle to Harry's Auto Repair and request a lamp inspection. Mora took the Pilot to Harry's Auto Repair and requested a lamp inspection, using an assumed name.

8. Respondent performed the lamp inspection and provided Mora with a certificate of compliance-lamp adjustment that indicated the Pilot had passed inspection. More specifically, the certificate of compliance indicated the Pilot passed the headlamp portion of the inspection despite the headlights being misaligned. The certificate did not indicate which type of headlight aimer had been used and was signed by respondent under penalty of perjury.

9. On June 18, 2019, the Bureau sent an undercover operator to Harry's Auto Repair to request a lamp inspection on a 2007 Pontiac Grand Prix (Grand Prix).

10. Prior to the undercover operation, Christopher Norris, a BAR Program Representative I, modified the Grand Prix using a headlight aiming screen by adjusting

the left headlight approximately 10 inches below the headlight center horizontal line and the right headlight approximately 7 inches above the headlight center horizontal line. These adjustments rendered the vehicle unable to pass a properly performed lamp inspection and therefore unable to receive a certificate of compliance.

11. On June 18, 2019, Bernes obtained the Grand Prix from the Bureau's storage facility in Hercules. He then released custody of the Grand Prix to Mora and instructed him to take the vehicle to Harry's Auto Repair and request a lamp inspection. Mora took the Grand Prix to Harry's Auto Repair and requested a lamp inspection, using an assumed name.

12. Respondent performed the lamp inspection and provided Mora with a certificate of compliance-lamp adjustment that indicated the Grand Prix had passed inspection. More specifically, the certificate of compliance indicated the Grand Prix passed the headlamp portion of the inspection despite the headlights being misaligned. The certificate did not indicate which type of headlight aimer had been used and was signed by respondent under penalty of perjury.

Respondent's Evidence

13. Respondent was very remorseful and took full responsibility for his wrongdoing. Respondent acknowledged that he did not conduct the lamp inspections correctly but maintained that it was a matter of incompetence rather than fraud. Respondent credibly testified that at the time he signed the certificates of compliance he believed he had completed the inspections correctly and that he did not intend to defraud anyone.

14. Respondent has 25 years of experience in automotive repair but only recently obtained his lamp adjuster license. In order to obtain the license, respondent

was required to pass a written test. Respondent taught himself how to conduct the inspections as there were no formal training requirements for licensure. Respondent is currently shadowing a more experienced lamp adjuster to learn how to conduct a lamp inspection correctly. Respondent is not currently performing any lamp inspections. Respondent believes it is unfair to discipline his smog and brake licenses based on these two mistakes regarding lamp inspections. Respondent has no other history of discipline on any of his licenses.

15. Respondent is no longer employed at Harry's Auto Repair. He is currently employed at a shop owned by Mitchell Bornstein, who testified on respondent's behalf. Bornstein has known respondent since 2016 and described respondent as honest and hardworking. Bornstein affirmed that there is no formal training for lamp inspection.

16. Respondent testified in an open and forthright manner at hearing, consistent with one who is telling the truth.

Costs

17. In connection with the investigation and enforcement of this accusation, complainant requests an award of costs in the total amount of \$19,527.40. These costs reflect \$14,090 in enforcement costs and \$4,437.40 in investigative costs. The request is supported by declarations that comply with the requirements of California Code of Regulations, title 1, section 1042. These costs are reasonable.

LEGAL CONCLUSIONS

1. Business and Professions Code section 9889.3 authorizes the director to suspend, revoke, or take other disciplinary action against a license if the licensee violates any section of the Business and Professions Code that relates to his or her licensed activities; violates any of the regulations promulgated by the director pursuant to the Automotive Repair Act, or violates the provisions of the Automotive Repair Act relating to the particular activity for which he or she is licensed.

2. Licensed lamp adjusters may only issue a certificate of compliance after an inspection or adjustment made in accordance with the requirements of the Vehicle Code, the vehicle manufacturer's standards, specifications and procedures, and the Bureau's Handbook for Lamp Adjusters and Stations. (Bus. & Prof. Code, § 9889.16; Cal. Code Reg., tit. 16, § 3305, subds. (a)(1), (2), (3), (5).) Respondent issued lamp certificates of compliance for two vehicles whose headlamps were improperly aligned. Based on the matters set forth in Factual Findings 5 through 12, cause exists to discipline respondent's lamp adjuster license pursuant to Business and Professions Code section 9889.3, subdivisions (a) and (c).

3. Vehicle Code section 20 prohibits an individual from knowingly making any false statement or knowingly concealing any material fact in any document filed with the Department of Motor Vehicles or the Department of the California Highway Patrol. Vehicle Code section 4463, prohibits the falsification of a certificate and the uttering, publishing, passing, or attempting to pass as true and genuine, a false, altered, forged, or counterfeited certificate knowing it to be false, altered, forged, or counterfeited with the intent to prejudice, damage, or defraud. Respondent issued two lamp certificates of compliance although both vehicles' headlights were misaligned.

(Factual Findings 8, 12 & 13.) However, he did not issue the certificates of compliance with the intent to defraud or with the knowledge that the statements contained therein were false. (Factual Finding 13.) Accordingly, cause does not exist to discipline respondent's lamp adjuster license pursuant to these sections.

4. Business and Professions Code section 9889.22 prohibits the willful making of any false statement or entry regarding a material matter in any oath, affidavit, certificate of compliance or noncompliance, or application form. Respondent signed the certificates of compliance even though the headlamps on the two vehicles were misaligned. (Factual Findings 8 & 12.) As a result, cause exists to discipline respondent's lamp adjuster license pursuant to Business and Professions Code Section 9889.3, subdivision (a).

Determination of Discipline

5. Having established cause for discipline against respondent's license, the issue is what level of discipline to impose. The Bureau set forth factors to be considered when determining the appropriate discipline in its Guidelines for Disciplinary Orders and Terms of Probation (rev. March 2016) (Guidelines). The Guidelines also set forth the recommended discipline for violations. For a violation of Business and Professions Code section 9889.3, subdivisions (a) and (c), the Guidelines recommend stayed revocation with a two-year term of probation. For a violation of California Code of Regulations, title 16, section 3305, the Guidelines recommend stayed revocation with a three-year term of probation.

Pursuant to the Guidelines, an aggravating factor to be considered is whether the licensee engaged in conduct which constitutes fraud or gross negligence. Mitigating factors to be considered are the absence of prior discipline, evidence of

voluntary participation in retraining, and evidence of retraining and initiating steps to minimize recurrence.

Respondent admits that he was negligent in conducting the lamp inspections. He has taken steps to retrain himself to ensure that the conduct does not recur. Respondent has no record of discipline on any of his licenses. Given these circumstances, the public can be adequately protected by placing respondent's lamp adjuster license on probation for three years.

Complainant requests that respondent's smog check inspector, smog check repair, and brake adjuster licenses also be disciplined in addition to his lamp adjuster license. However, complainant cited no statutory or regulatory authority to do so. Therefore, no discipline is imposed on those licenses.

Costs

6. Business and Professions Code section 125.3 authorizes the Bureau to recover its reasonable costs of investigation and enforcement in disciplinary proceedings. As set forth in Finding 17, complainant has reasonably incurred \$19,527.40 in investigation and prosecution costs in connection with this matter.

7. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45, the California Supreme Court established standards for determining whether costs should be assessed in the particular circumstances of each case, to ensure that licensees are not deterred from exercising their right to an administrative hearing. Among those standards are whether or not the licensee was successful at hearing in getting the charges reduced or outright dismissed; the licensee's good faith belief in the merits of his 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.

In this case, respondent provided evidence that formed a basis for determining that outright revocation of all his licenses was unnecessary, that only his lamp adjuster license should be disciplined, and that a stayed revocation with probation should be imposed. Additionally, the costs for enforcement of this matter were incurred originally against three respondents and therefore respondent is responsible for only a portion of the total. In consideration of these factors, it is determined that it is appropriate to reduce the Board's cost recovery to \$1,500.

ORDER

Lamp Inspector License No. LA 639121, class A, issued to Kevin Todd McGilbra is revoked. However, the revocation is stayed, and respondent is placed on probation for three years on the following terms and conditions.

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 Business and Professions Code section 9884.6.

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 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 \$1,500 for the reasonable costs of the investigation and enforcement of this case. 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. 77/19-5307. 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. 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.

10. 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 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 current requirements for registration or licensure and pay all outstanding fees or cost recovery owed to BAR and left outstanding at the time of surrender.

11. Training Course

During the period of probation, respondent shall attend and successfully complete a BAR-specified and -approved training course in inspection, diagnosis and/or repair of emission systems failures and engine performance, applicable to the class of license held by the respondent. Respondent shall provide to the Bureau proof of enrollment in the course within 30 days of the effective date of the decision, and proof of successful course completion within 180 days of the effective date of the decision. Failure to provide proof of enrollment and/or successful course completion to the Bureau within the timeframes specified shall constitute a violation of probation, and respondent shall be prohibited from issuing any certificate of compliance or noncompliance until such proof is received.

12. Notification to Employer

When performing services that fall within the scope of his license, respondent shall provide each of his current or future employers a copy of the decision and the underlying Accusation before commencing employment. Notification to respondent's

current employer shall occur no later than the effective date of the decision.

Respondent shall submit to BAR, upon request, satisfactory evidence of compliance with this term of probation.

DATE: 02/02/2021

Signature on File

TRACI C. BELMORE

Administrative Law Judge

Office of Administrative Hearings