

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

In the Matter of the Statement of Issues
Against:

ARTURO PEREZ ENRIQUEZ,

Respondent

Case No. 79/16-4211s

OAH No. 2017021127

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby accepted and adopted by the Director of Consumer Affairs as the Decision in the above-entitled matter.

This Decision shall become effective August 18, 2017

DATED: June 24, 2017

Signature on File
RYAN MARCROFT
Assistant Chief Counsel
Division of Legal Affairs
Department of Consumer Affairs

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

In the Matter of the Statement of Issues
Against:

ARTURO PEREZ ENRIQUEZ,

Respondent.

Case No. 79/16-4211s

OAH No. 2017021127

PROPOSED DECISION

This matter came on regularly for hearing on March 30, 2017, before Susan J. Boyle, Administrative Law Judge, Office of Administrative Hearings, in San Diego, California.

Ron Espinoza, Deputy Attorney General, represented complainant Patrick Dorais, Chief, Bureau of Automotive Repair, Department of Consumer Affairs ("bureau").

Arturo Perez Enriquez, respondent, represented himself.

The matter was submitted on March 30, 2017.

FACTUAL FINDINGS

1. In 2005, the bureau issued Advanced Emission Specialist Technician License Number EA 148766 to respondent. This license was revoked on April 16, 2012.
2. On October 9, 2007, the bureau issued Automotive Repair Dealer Registration Number ARD 251694 to respondent doing business as El Compita Smog. This registration was revoked on November 2, 2009.
3. On October 12, 2007, the bureau issued Smog Check Test Only Station License Number TC 251694 to respondent doing business as El Compita Smog. This license was revoked on November 2, 2009.
4. On December 1, 2015, respondent signed an application in which he sought to obtain a smog check inspector license and a repair technician license. In the application, respondent admitted he was previously licensed by the bureau. He disclosed that his prior

technician license was revoked while he was on probation because he failed to identify that the positive crankcase ventilation (PCV) system had been removed from a bureau undercover vehicle. He stated his certifications in electrical/electronic systems, engine performance and advanced engine performance had expired.

Prior Discipline

5. On August 3, 2008, an Accusation in Case No. 70/09-32 was initiated against El Compita Smog, respondent as owner of El Compita Smog, and an employee technician of El Compita Smog. The accusation contained twenty-four causes for discipline and concerned four surveillance operations where El Compita Smog's technician employee was observed illegally using the clean piping method¹ to issue certificates of compliance to three vehicles that were not in the test bay at the time of the smog inspection.

On September 14, 2009, the Director of the Department of Consumer Affairs adopted the decision of an Administrative Law Judge and revoked the station's and respondent's individual licenses; however, the revocation of respondent's individual license was stayed, and respondent was placed on probation for five years under certain terms and conditions. The conditions of probation required that respondent "comply with all statutes, regulations and rules governing automotive inspections, estimates and repairs."

6. After the station's license was revoked, respondent sold the business, but he continued to work there as a technician.

7. On February 15, 2011, an Accusation in Case No. 79/11-69 was initiated against respondent. The 2011 Accusation alleged that, in June 2010, respondent violated the terms and conditions of his probation by improperly providing a certificate of compliance for a vehicle that had been modified by the bureau so that it could not pass a properly performed smog inspection.

On January 19, 2012, a hearing on the Accusation was held before an Administrative Law Judge. By decision dated February 14, 2012, and adopted by the Director of Consumer Affairs, respondent's license was revoked and he was ordered to pay \$4,425 to the bureau for the costs of its investigation and prosecution of the Accusation.

March 2014 Statement of Issues

8. On April 16, 2013, respondent signed an application for licensure as a SmogCheck Inspector and as a Smog Check Repair Technician. Respondent disclosed on his application that his license had been disciplined.

¹ Clean-piping is using a sample of the exhaust emissions of one vehicle in order to cause the Emission Inspection System (EIS) to issue a certificate of compliance for another vehicle.

9. The bureau denied respondent's application and his request to reconsider its decision. On March 12, 2014, Patrick Dorais, in his official capacity, signed the Statement of Issues in Case number 79/14-105s. The Statement of Issues requested that the bureau's decision to deny respondent's application be upheld. It asserted three grounds for denying respondent's license: previous licenses had been revoked; he had engaged in acts constituting dishonesty, fraud or deceit; and the acts respondent engaged in would be grounds for suspension or revocation of a license.

10. By Decision effective October 30, 2014, the Director of Consumer Affairs upheld the bureau's denial of respondent's application for licensure. The Decision included the following findings and suggestions to respondent.

Respondent has taken bureau certified classes that are required to renew his license He has not sought out any other educational opportunities or training to advance his knowledge of, or expertise in, conducting smog inspections. Respondent acknowledged that he was encouraged to obtain additional training in the 2012 decision that revoked his license He asserted that he could not afford any other training. Nonetheless, respondent testified that he would do whatever the bureau wanted him to do in order to get his license back.

[i] [1]]

As was the case in the revocation of his technician license in 2012, respondent failed to get the additional training that he was strongly advised would have helped to demonstrate that he had an understanding of the smog test procedures and would have shown a "good faith effort to gain further knowledge in order to avoid future violations." The bureau's Guidelines for Disciplinary Penalties and terms of Probation (May 1997) suggest that voluntary participation in retraining is a factor in mitigation that may be considered in determining level of discipline. Conversely, respondent's failure to engage in additional training, after having previously told the bureau he would do so and then being advised to do so in a decision that revoked his license, operates as a factor in aggravation. This same principle applies in determining whether to grant an application for a license.

[11] [il]

. . . Respondent is once again encouraged to seek out additional training and to re-apply when he can demonstrate sufficient

efforts to gain the knowledge necessary to succeed as a smog technician.

Evidence on Behalf of Respondent

11. Respondent primarily relied on a two-page typewritten document entitled "My biography" as his testimony at the hearing. In the document respondent stated he came to the United States from Mexico in 1987 and dreamed of having his own business. Within two weeks of arriving in the United States, respondent found work as a welder's assistant in the maintenance shop of a plant nursery. He took English, welding, mechanic and electricity classes to improve his position. He achieved some Automotive Service Excellence (ASE) certifications and decided to get a smog technician license.

12. In 2005, respondent received his smog technician license but continued to work for the nursery. In September 2005, the nursery offered respondent a job in Texas. Respondent accepted the job and moved his family to Texas. In 2007, respondent was on vacation in California when he saw a smog station that was for sale. He purchased the station some months later when it appeared the nursery was having financial difficulties.

13. In October 2007, respondent was in California, and the smog station was transferred to his name. Respondent still lived in Texas. His 19-year-old daughter stayed in California and would visit the station once a week to collect money and pay the smog technician. The technician working in the station when respondent purchased it left after a few months, and respondent hired another technician, Sergio Ivan Hinojosa, whom he trusted.

14. Respondent returned to Texas and continued to work for the nursery until July 2008 when it was sold and he was laid off. Respondent wanted to return to California, but he was unable to sell his home in Texas. Respondent was in California in September 2008 for a short time but went back to Texas. A short time later he received a telephone call from a nearby business telling him Mr. Hinojosa had been arrested. He also received a letter from the bureau advising him that they had video surveillance of Mr. Hinojosa clean piping vehicles.

15. Respondent came back from Texas and closed the smog station until he moved permanently back to California on November 5, 2008, and re-opened the station. His family was not able to relocate to California until the following year.

16. In 2009, respondent's technician license was placed on probation for five years based on the clean piping violations Mr. Hinojosa engaged in. Respondent sold the station but continued to work as a smog technician.

17. On June 2, 2010, a bureau undercover operator drove an intentionally modified vehicle to the station respondent was working in. Respondent wrongfully issued a smog certificate for the vehicle because he failed to observe it did not have a PVC system, a

required system, installed. In April 2012, as a result of this violation, respondent's technician license was revoked.

Respondent stated June 2 was his daughter's birthday, it was very busy in the station, and he had promised to take his daughter out for her birthday. He said these factors combined caused his failure to notice the missing PVC system from the undercover vehicle.

18. Respondent stated in his document that he subsequently lost his house in foreclosure and his "dreams and all the effort I had done was gone." He obtained work as a mechanic and currently works in a smog shop as a service writer for which he does not need a license. He stated he has no criminal record, pays all his taxes, and he vowed he will not make another error if he is permitted to regain his technician license.

19. Respondent provided proof of completion of Level One and Level Two emissions training dated January 2016. The classes cost \$1,250. Respondent took the classes in anticipation of having his license returned; however, he testified that the hearing process took so long that he believed the certificates from the classes have expired. Respondent also provided data showing that six "Follow-up Pass Rate" scores from 2013 through 2014 were within the acceptable range, and that one score from 2012 was one point away from acceptable. The scores showed respondent improved as he became more experienced. He received a 75 percent on his Level Two final exam.

20. Respondent submitted certificates of completion of courses he took in 2003 and 2010. He also submitted two character letters that were obtained in or around 2011. The letters were complimentary of respondent's character and willingness to engage in hard work.

21. In past attempts to regain his license, respondent was criticized for blaming the bureau for his misconduct and failing to accept responsibility. In this proceeding, respondent accepted responsibility although, on cross-examination, he expressed discontent with being "punished" for so long for something he personally did not do.

22. Respondent fully paid the costs assessed in the 2012 decision.

LEGAL CONCLUSIONS

Applicable Statutory and Regulatory Provisions

1. Health and Safety Code section 44072.2 provides, in part, that "[t]he director may refuse to issue a license to any applicant for the reasons set forth in Section 44072.1."

//

2. Health and Safety Code section 44072.1 provides:

The director may deny a license if the applicant, or any partner, officer, or director thereof, does any of the following:

[ill .. · [ill

(b) Was previously the holder of a license issued under this chapter, which license has been revoked and never reissued or which license was suspended and the terms of the suspension have not been fulfilled.

(c) Has committed any act that, if committed by any licensee, would be grounds for the suspension or revocation of a license issued pursuant to this chapter.

(d) Has committed any act involving dishonesty, fraud, or deceit whereby another is injured or whereby the applicant has benefited.

[ill .. · [ill

3. Business and Professions Code section 480, subdivision (a)(3)(A), provides authority for the bureau to deny a license if the applicant has "[d]one any act that if done by a licensee of the business or profession in question, would be grounds for suspension or revocation of license."

4. California Code of Regulations, title 16, section 3395, subdivision (a), provides:

(a) When considering the denial of a license or a registration under Section 480 of the Business and Professions Code, the bureau, in evaluating the rehabilitation of the applicant, will consider the following criteria:

(1) The nature and severity of the act(s) or crime(s) under consideration as grounds for denial.

(2) Evidence of any act(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for denial which also could be considered as grounds for denial under Section 480 of the Business and Professions Code.

(3) The time that has elapsed since commission of the act(s) or crime(s) referred to in subdivision (1) or (2).

(4) The extent to which the applicant has complied with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against the applicant.

(5) Evidence, if any, of rehabilitation submitted by the applicant.

First Cause for Denial of Application

5. Cause for denying respondent's application for a smog check inspector license and a repair technician license exists pursuant to Health and Safety Code section 44072.1, subdivision (b), because respondent previously held licenses and registrations that were revoked by the bureau.

Second Cause for Denial of Application

6. Cause for denying respondent's application for a smog check inspector license and a repair technician license exists pursuant to Health and Safety Code section 44072.1, subdivision (d), because respondent committed acts involving dishonesty, fraud or deceit. In 2008, respondent's company made untrue statements, committed fraud and engaged in dishonesty when its employee failed to perform emissions tests on vehicles as required and certificates of compliance were wrongfully issued for those vehicles. As the owner of El Compita, respondent was responsible for the acts of his employees. (California Assn. of Health Facilities v. Department of Health Services (1997) 16 Cal 4th 284, 295-96.) Respondent failed to properly supervise his employees, and, thus, provided an environment that allowed the employees to engage in uninterrupted unlawful conduct.

Cause for denying respondent's application for a smog check inspector license and a repair technician license also exists pursuant to Health and Safety Code section 44072.1, subdivision (d), because respondent failed to properly conduct a smog inspection and unlawfully issued a certificate of compliance for a vehicle that could not pass a correctly performed smog inspection.

Evaluation

7. This is respondent's second application for licensure since his technician license was revoked. It has been nine years since clean piping was performed at respondent's station while he was absent. Respondent did not fully comply with the recommendation that he seek out other educational opportunities and training to advance his knowledge of, or expertise in, conducting smog inspections, but he **did** take the required courses at a not insignificant cost in an attempt to keep up with the classes he needed to obtain his license. He is currently working in a smog station which exposes him to the operations of a smog station even though he is not permitted to perform any activities for which a license is required.

8. Although respondent continues to feel he was punished for another's bad conduct, he acknowledged his part in the incidents and his demeanor was more contrite. He has persevered in attempting to obtain a license and was sincere in his belief that he would not have any further violations. The purpose of this proceeding is not to punish the applicant but to protect the public. (Ettinger v. Bd. Of Medical Quality Assurance (1982) 135 Cal.App.3d 853, 856.) Continuing to deny his applications based on his inattention to his business in 2008 and one improper smog check begins to appear to be punitive rather than designed to protect the public.

CONDITION PRECEDENT

Respondent must take all classes/courses and obtain all certifications required for the licenses issued. Respondent shall provide proof of completion and/or certification to the bureau or its designee before being issued any licenses. Upon providing proof of completion to the bureau or its designee the following order shall issue:

ORDER

IT IS HEREBY ORDERED that a smog inspector and a smog repair technician license shall be issued to respondent Arturo Perez Enriquez; however the licenses are immediately revoked, the revocation stayed, and respondent is placed on five years' probation 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 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. 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.

9 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 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.

10. 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.

11. Notification to Employer

When performing services that fall within the scope of his or her license, Respondent shall provide each of his current or future employers a copy of the decision and the underlying Accusation or Statement of Issues 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.

DATED: April 17, 2017

Signature on File
SUSAN J. BOYLE
Administrative Law Judge
Office of Administrative Hearings

