

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

In the Matter of the Accusation Against:

ROGELIO GUTIERREZ- OWNER dba E Z SMOG AND AUTO REPAIR

1500 N. Gaffey Street

San Pedro, CA 90731

Automotive Repair Dealer Registration No. ARD 231477

Smog Check Station License No. RC 231477

Lamp Station License No. LS 231477, Class A

Brake Station License No. BS 231477, Class C

and

JOHN PAUL GUTIERREZ

2354 Lewis Ave.

Signal Hill, CA 90755

Smog Check Inspector License No. EO 631599

Smog Check Repair Technician License No. EI 631599,

(formerly Advanced Emission Specialist Technician License No. EA 631599)

Respondents.

Case No. 79/17-8954

OAH No. 2018120561

DECISION AFTER REJECTION AND REMAND

The attached Proposed Decision After Rejection and Remand of the Administrative Law Judge is hereby accepted and adopted by the Director of the Department of Consumer Affairs as the Decision in the above-entitled matter with the following edit pursuant to Government Code section 11517:

- Page 28, Term 4 of the Order, "250291" is struck and replaced with "231477."

APR 22 2021

This Decision shall be effective on _____.

IT IS SO ORDERED this 17 day of March, 2021.



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

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No. EA 631599)**

Respondents.

Agency Case No. 79/17-8954

OAH Case No. 2018120561.1

PROPOSED DECISION AFTER REJECTION AND REMAND

Erlinda G. Shrenger, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference and telephone on December 17, 2020.

Morgan Malek, Deputy Attorney General, represented complainant Patrick Dorais.

Michael B. Levin, Attorney at Law, represented respondent Rogelio Gutierrez, owner, doing business as EZ Smog and Auto Repair.

Marvin Vallejo, Attorney at Law, represented respondent John Paul Gutierrez.

Oral and documentary evidence was received, and argument was made. The record was closed and the matter was submitted for decision on December 17, 2020.

PROCEDURAL HISTORY

This matter was initially assigned OAH case number 2018120561. The hearing convened before ALJ Jeremy Cody on August 9, 2019, and October 23 and 25, 2019. Evidence was received, the record was closed, and that matter was submitted for decision on October 25, 2019.

ALJ Cody signed and issued a Proposed Decision dated November 25, 2019. The Proposed Decision included an order (1) revoking the Smog Check Inspector License and Smog Check Repair Technician License issued to respondent John Paul Gutierrez; and (2) revoking the Automotive Repair Dealer Registration and Smog Check Station License issued to respondent Rogelio Gutierrez, dba EZ Smog and Auto Repair, staying the revocation, and placing respondent Rogelio Gutierrez, dba EZ Smog and Auto Repair, on probation for five years under specified terms and conditions.

In the Proposed Decision, ALJ Cody determined there was cause to direct the respondents to pay the Bureau of Automotive Repair for the reasonable costs of investigation and enforcement incurred in the matter, pursuant to Business and Professions Code section 125.3. ALJ Cody ordered that the total cost recovery amount (\$9,854.85) would be allocated equally between the two respondents, so that each would be liable to pay the Bureau \$4,927. Respondent Rogelio Gutierrez was ordered to pay his share of the cost recovery as a condition of his five-year probation. Respondent John Paul Gutierrez was ordered to pay his share of the cost recovery "as directed by the Bureau, in its discretion."

On January 8, 2020, Grace Arupo Rodriguez, Assistant Deputy Director, Legal Affairs Division, Department of Consumer Affairs, issued an Order of Rejection and Remand to Administrative Law Judge (Remand Order), under the authority of Government Code section 11517, subdivision (c)(2)(D). The Remand Order provides that, due to ALJ Cody's order for respondents to pay costs, additional evidence should be taken regarding the factors set out in *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, so that such evidence and discussion may be included in the Proposed Decision.

This new matter was assigned OAH case number 2018120561.1, and the hearing was set for December 17, 2020. ALJ Cody is no longer with the OAH, and the new matter was assigned to ALJ Shrenger. A transcript was provided of the prior hearing in August and October 2019, along with complainant's exhibits 1 through 29, and respondents' exhibits A through O. In this new matter, the Remand Order was marked and admitted as exhibit 30, a financial summary for Rogelio Gutierrez was marked and admitted as exhibit P, and an Income and Expense Declaration for John Paul Gutierrez was marked and admitted as exhibit Q.

The Summary, Factual Findings, Legal Conclusions, and Order that follow are taken verbatim from ALJ Cody's Proposed Decision, with additional and/or modified factual findings and legal conclusions related to *Zuckerman* as directed by the Remand Order. (See Factual Findings 41 through 45; Legal Conclusions 25 through 28; Order, paragraph 3.)

SUMMARY

Complainant alleges that respondents John Paul Gutierrez (John Paul) and Rogelio Gutierrez (Rogelio) engaged in "clean plugging" of 10 vehicles which were smog inspected by John Paul while working at EZ Smog and Auto Repair.¹ Complainant discovered the clean plugging in the course of conducting an analysis of allegedly fraudulent data that was transmitted to the Bureau's Vehicle Information Database during respondents' smog inspection of vehicles. Complainant proved by a

¹ Respondents Rogelio and John Paul are collectively referred to herein as "respondents."

preponderance of the evidence, by means of expert analysis of OIS data, that John Paul engaged in clean plugging in the smog inspection of all 10 subject vehicles.

For the protection of the public, John Paul's smog check repair technician license and smog inspector licenses will be revoked. Rogelio was not present when the clean plugging occurred and he testified credibly that he was not aware that clean plugging was occurring at his business. Nonetheless, Rogelio is responsible for John Paul's misconduct as the employer of John Paul. Rogelio's ARD Registration and Smog Check Station license will be revoked; however, the revocation of the registration and license shall be stayed and the registration and license will be placed on probation for a period of five years.

FACTUAL FINDINGS

Jurisdictional Matters

1. Complainant Patrick Dorais instituted and maintained this action in his official capacity as Chief of the Bureau of Automotive Repair (Bureau or BAR), Department of Consumer Affairs (Department).
2. EZ Smog and Auto Repair (EZ Smog), located in Signal Hill, California, is owned and operated by Rogelio, under ARD registration 231477, issued in 2004 and expiring on January 31, 2020, unless renewed. The business of EZ Smog includes a smog check station, lamp and brake stations, and automobile repair shop. Rogelio's ARD registration is required for operation of all four automotive-related activities.
3. Rogelio was issued the following licenses:

A. Smog Check Station license RC 231477, issued on January 26, 2004, and expiring on January 31, 2020, unless renewed.²

B. Lamp Station License number LS 231477, class A, issued on January 31, 2009, and expiring on January 31, 2020, unless renewed.

C. Brake Station License number BS 231477, class C, issued on February 9, 2004, expiring on January 31, 2020, unless renewed.

4. John Paul was issued the following licenses:

A. Advanced Emission Specialist Technician License number EA 631599, issued on December 21, 2009, was due to expire on September 30, 2013, and was cancelled on June 11, 2013.

B. At John Paul's election, the EA license was renewed, effective on June 11, 2013, as Smog Check Inspector License number EO 631599, and Smog Check Repair Technician License number EI 631599. Both licenses will expire on September 30, 2020, unless renewed.

Disciplinary History

5. Rogelio, doing business as EZ Smog, has been issued three prior citations: (1) Citation C2013-0132, issued on August 2, 2012, with an order to pay a fine of \$1,000.00; (2) Citation C2015-2016, issued on August 27, 2015, with a Notice of

² EZ Smog was certified as a STAR station on February 21, 2018. The certification has no expiration and will remain active unless Rogelio's ARD registration and/or Smog Check Station license are revoked, cancelled or otherwise becomes delinquent.

Abatement; and (3) Citation C2016-2028, issued on November 7, 2016, with an order to pay a fine of \$1,000.00. Rogelio, in his individual capacity, has been issued one prior citation: Citation M2015-2019, issued on August 27, 2015, with a Notice of Abatement.

6. John Paul has been issued two prior citations: (1) Citation M2013-0133, issued on August 2, 2012, with an order to complete a training course; and (2) Citation M2016-2029, issued on November 7, 2016 and effective January 9, 2017, with a Notice of Abatement.

7. Respondents were served with the Accusation in this case. Respondents filed Notices of Defense, denying the charges and requesting a hearing. All jurisdictional requirements have been met.

Smog Check Procedures

8. Smog tests for most vehicles built after 1999 require the smog test inspector to retrieve information from the tested vehicle's on-board computer. When that information is retrieved, it is relayed to a data base maintained by the Bureau known as the Vehicle Information Database (VID).

9. Modern automobiles are programmed with an On-Board Diagnostic Inspection System (OIS). If some aspect of the engine performance is not as it should be, the OIS causes the Malfunction Indicator Light (MIL) on the dashboard that displays "check engine" to the driver to illuminate. The OIS plays a role in smog check inspection.

10. Beginning in March 2015, the Bureau prescribed that the testing process on most vehicles manufactured after 1999 be performed, in part, with the On-Board Diagnostics Generation II (OBDII) functional test. In that test, the licensed inspector

connects a cable from the smog check station's test computer to a Diagnostic Link Connector (DLC), which is a receptacle found inside the vehicle's passenger cabin. Through the receptacle and cable, the test computer retrieves information from the vehicle's on-board computer. That information is transmitted to the Bureau's VID, and is analyzed to see that the vehicle is functioning so that it will not emit excess pollutants.

11. An important piece of information usually obtained from the vehicle during this process is the "eVIN," the Vehicle Identification Number (VIN) in electronic form. The eVIN must match the VIN stamped on a metal badge that is typically affixed to the top of the vehicle's dashboard in front of the driver, visible through the windshield. Although some cars built between 2000 and 2005 do not transmit an eVIN, the majority do so, and the capacity to transmit the eVIN was mandated for cars built after 2005.

12. Another piece of the electronically-retrieved information is a test protocol, or communication protocol, which is identified with a combination of letters and/or numbers that indicate a particular system or language whereby the vehicle's computer will communicate with the station's test computer. The communication protocol is programmed into the vehicle when it is manufactured.

13. A third type of data collected by the system is a parameter identification (PID) count. This refers to the number of data points transmitted from the tested vehicle. The data points may include, for example, the engine speed and temperature and other data used by the computer system to check for proper engine performance and compliance with smog regulations. Each vehicle reports a specific known PID count, with occasional slight variations, programmed during the manufacture of the vehicle.

14. In some circumstances, smog check inspectors and test center operators engage in the illegal practice of "clean plugging." In those cases, the vehicle ostensibly being tested is not connected into the test system and might not even be in the facility. Instead, the test equipment is either plugged into another vehicle, or into a simulator which produces data roughly of the type that should be communicated from the vehicle ostensibly being tested. Some simulators allow eVINs to be manually entered by the technician.

15. When clean plugging occurs, it leaves an electronic trail in the VID. Typically, as in this case, the PID and protocol data transmitted to the VID will not match the data of cars similar to the vehicle tested. When clean plugging occurs, it is not confirmed that the vehicle is compliant with smog control requirements.

The Subject Tests

16. Between January 25, 2017, and May 10, 2017, while working for Rogelio as a smog technician at EZ Smog, John Paul conducted smog tests (subject tests) on 10 vehicles (subject vehicles). The subject tests produced anomalous results, indicating in each case that the inspections occurred through clean plugging. In each of the subject tests, a Certificate of Compliance was issued for the vehicle by John Paul as the inspector, and Rogelio, when a Certificate of Compliance should not have been issued. The Certificates of Compliance were transmitted electronically to the Department of Motor Vehicles in each case. In each of the subject tests, respondents failed to comply with Bureau specifications, instead clean plugging the subject vehicles.

17. Marc Ortega, Bureau Program Representative II, reviewed data transmitted from Rogelio to the Bureau. He found various anomalies in the subject tests because, in each case, the protocol and the PID count that were transmitted to

the VID were not the type that the tested vehicle was expected to have transmitted. Mr. Ortega reviewed data for cars similar to those in the subject tests, to determine the expected PID count and communication protocol. Mr. Ortega found that each of the 10 subject vehicles communicated the same communication protocol (I914) and the same PID count (9 or 10), when different communication protocols and PID counts were expected. Mr. Ortega generally found that between 95 and 99 percent of vehicles of the same year, make and model of the 10 subject vehicles transmitted the same protocol and PID count. In every test of the 10 subject vehicles, the information transmitted did not conform to the expected data, as confirmed by Mr. Ortega's research. Based on those anomalies, Mr. Ortega concluded that the 10 subject vehicles had been clean plugged.

18. Subject vehicle 1: On January 25, 2017, John Paul tested a 2002 Ford Explorer XLS, which transmitted communication protocol I914 when the expected protocol was JPWM, and had a PID count of 9 when the expected PID count was 22. The expected eVIN was transmitted. Respondents caused a Certificate of Compliance to be issued for this vehicle.

19. Subject vehicle 2: On March 23, 2017, John Paul tested a 2001 Chevrolet Tahoe C1500, which transmitted communication protocol I914 when the expected protocol was JVPW, and had a PID count of 10 when the expected PID count was 22 or 23. The expected eVIN was transmitted. Respondents caused a Certificate of Compliance to be issued for this vehicle.

20. Subject vehicle 3: On March 28, 2017, John Paul tested a 2000 Chevrolet Suburban C1500, which transmitted communication protocol I914 when the expected protocol was JVPW, and had a PID count of 10 when the expected PID count was 22.

The vehicle transmitted an eVIN when none was expected. Respondents caused a Certificate of Compliance to be issued for this vehicle.

21. Subject vehicle 4: On March 30, 2017, John Paul tested a 2005 Chrysler 300, which transmitted communication protocol I914 when the expected protocol was ICAN11bt5, and had a PID count of 9 when the expected PID count was 43/8. The vehicle transmitted an eVIN as expected. Respondents caused a Certificate of Compliance to be issued for this vehicle.

22. Subject vehicle 5: On April 5, 2017, John Paul tested a 2001 Mercedes-Benz S 430, which transmitted communication protocol I914 when the expected protocol was KWPF, and had a PID count of 9, when the expected PID count was 22. The vehicle transmitted no eVIN, as expected. Respondents caused a Certificate of Compliance to be issued for this vehicle.

23. Subject vehicle 6: On April 7, 2017, John Paul tested a 2002 Saturn LW200, which transmitted communication protocol I914 when the expected protocol was JVPW, and had a PID count of 9 when the expected PID count was 18 or 19. The vehicle did not transmit an eVIN, when it should have. Respondents caused a Certificate of Compliance to be issued for this vehicle.

24. Subject vehicle 7: On April 12, 2017, John Paul tested a 2000 Cadillac Deville DTS, which transmitted communication protocol I914 when the expected protocol was JVPW, and had a PID count of 9 when the expected PID count was 20 or 21. The vehicle did not transmit an eVIN, when it should have. Respondents caused a Certificate of Compliance to be issued for this vehicle.

25. Subject vehicle 8: On April 14, 2017, John Paul tested a 2005 Kia Sedona EX, which transmitted communication protocol I914 when the expected protocol was

KWPF, and had a PID count of 9 when the expected PID count was 20. The vehicle transmitted an eVIN with one number different than the expected eVIN. Respondents caused a Certificate of Compliance to be issued for this vehicle.

26. Subject vehicle 9: On April 14, 2017, John Paul tested a 2001 Ford Windstar LX, which transmitted communication protocol I914 when the expected protocol was KPWM, and had a PID count of 9 when the expected PID count was 20 or 21. The vehicle transmitted an eVIN as expected. Respondent caused a Certificate of Compliance to be issued for this vehicle.

27. Subject vehicle 10: On May 10, 2017, John Paul tested a 2007 Acura TL Type S, which transmitted communication protocol I914 when the expected protocol was ICAN29bt5, and had a PID count of 9 when the expected PID count was 41 or 43. The vehicle transmitted an eVIN as expected. Respondents caused a Certificate of Compliance to be issued for this vehicle.

28. The variability in the data reported when John Paul performed the subject tests supports the inference that either a simulator was used to generate the data, or that the OIS system was connected to different vehicles, but not those being ostensibly tested, during the subject tests.

29. Complainant's evidence of fraudulent clean plugging by respondents is further strengthened by evidence showing that seven of the 10 subject vehicles, when tested earlier at other smog check stations, transmitted the expected communication protocols and expected PID counts. Those same vehicles when tested by respondents in 2017, generated completely different protocols (I914) and unexpected PID counts (PID counts of 9 or 10).

30. Subject vehicle 7, unique among the list, was tested twice by respondents in the same month. On April 4, 2017, when John Paul first smog tested the vehicle and it failed the test, the OIS Test Detail revealed the expected communication protocol (JVPW) and the expected PID count of 21. On April 12, 2017, John Paul tested the vehicle again and it passed the smog test; however, the data transmitted through the OIS system was completely different, showing an unexpected communication protocol of I914 and an unexpected PID count of 9. This evidence supports complainant's contention that the second smog inspection conducted by John Paul on April 12, 2017, was fraudulent.

31. Complainant presented Praneel Chand, an electronics engineer working for the Bureau, as an expert. Mr. Chand was qualified at the hearing as an expert in automotive smog test simulators and clean plugging. Having examined Ortega's investigative report and its supporting documentation, including OIS Test Details for the subject vehicles, Mr. Chand opined that the incorrect communication protocol data and extremely low PID count data strongly indicated that a device, known as a simulator, had been used to generate inspection data for each of the 10 subject vehicles. Mr. Chand opined that the low PID count and sameness of the count, as well as the communication protocol of I914, appearing in the OIS data for the 10 subject vehicles, further indicated that the data had been generated by a simulator.

32. Mr. Chand further opined that the extremely low level of bus voltage, as recorded in the OIS Test Results with respect to each of the 10 subject vehicles, indicated that the voltage was generated by a simulator rather than an automobile. Thus, the bus voltage readings were further evidence supporting Mr. Ortega's and Mr. Chand's conclusion that these inspections were generated by a simulator and not by the vehicle purportedly listed in the eVIN data.

33. The Certificates of Compliance issued by respondents contained false and misleading information, which John Paul knew, or should have known, to be false. The conduct of John Paul, in connection with the tests described in Factual Findings 16 through 27, and the issuance of the associated Certificates of Compliance was fraudulent, and contrary to the health, safety, and welfare of the State of California and its citizens.

34. During the relevant period from January through May 2017, respondents were the only two smog repair technicians working at EZ Smog. Typically, Rogelio operated and managed EZ Smog on a full-time basis, conducting smog inspections, reviewing all of EZ Smog's paperwork and supervising the work of his employee, John Paul. He never suspected John Paul of clean plugging vehicles.

35. During the period from January through May 2017, Rogelio worked a reduced schedule at EZ Smog; he worked only in the mornings and left John Paul in charge of the business in the afternoons. During the afternoons, Rogelio often brought his wife to a medical facility about one hour away, in Duarte, California, where she was undergoing medical treatments for cancer. In addition, Rogelio had several medical appointments regarding his own health. EZ Smog officially closed at 5 p.m., but would stay open for a few minutes to finish a customer's job. Rogelio testified that he managed and supervised the operations of EZ Smog even when he was working a reduced schedule. Rogelio maintained contact with John Paul by telephone in the afternoon. Every morning, Rogelio would review the EZ Smog invoices for work that had been performed the previous day.

36. After Rogelio received the Accusation, he confronted John Paul, who denied he ever engaged in clean plugging. Rogelio terminated his son's employment, but rehired John Paul three months later after deciding to disregard the evidence in

the Accusation and, instead, rely on his son's assurances that he did not engage in clean plugging. Subsequently, John Paul left his employment at EZ Smog and moved to another job. As of the date of hearing, John Paul was no longer working for Rogelio.

Respondents' Evidence and Contentions

37. At hearing, both respondents denied that they had engaged in any clean plugging activity in the course of their business. Both respondents denied having any knowledge of the technical aspects of the OIS II system. They denied having any knowledge of PID counts and protocol languages, and claimed they had never seen an OIS Test Detail (e.g., exhibits 9, 11, and 13) before this case. Both respondents testified that they had never seen a simulator. John Paul testified that before this case, he was not aware that a device such as a simulator existed, or that any device could be used to fake a smog inspection.

38. John Paul admitted that he had conducted the smog inspections and issued Certificates of Compliance for each of the 10 subject vehicles. He denied that he had engaged in any fraudulent conduct in connection with these smog tests. The ALJ did not find John Paul's testimony to be credible, given the persuasive expert testimony of Mr. Chand and the inspection report (exhibit 4) presented by complainant.

39. Rogelio established by a preponderance of the evidence that he was not present at EZ Smog when the 10 subject vehicles were smog inspected. Although Rogelio reviewed work invoices the morning following each work day, the invoices themselves contained no data that would indicate fraudulent conduct. With respect to smog inspections, neither the smog check inspector nor the facility have access to the information transmitted to the Bureau's VID in the nature of the communication

protocol, PID count or eVin. Even if Rogelio did review work invoices every morning from the previous day, those invoices did not contain any information that would indicate that fraudulent smog inspections were occurring.

Costs

40. The Bureau has incurred costs of investigation (\$757.35) and enforcement (\$9,097.50) of this matter, in the total amount of \$9,854.85. These costs are reasonable.

41. At the remand hearing, Rogelio and John Paul testified and presented documentation regarding their respective financial status and ability to pay costs. (See exhibits P, Q.)

42. Rogelio is currently operating his business, EZ Smog and Auto Repair. His accountant prepared a summary of Rogelio's monthly income and expenses dated October 20, 2020. (Exh. P.) Rogelio's business generated gross income of \$43,182 for the second quarter of 2020, which equates to gross monthly income of \$14,394. Rogelio's monthly business expenses are \$6,700.90, and his monthly personal expenses are \$6,904.82, for total monthly expenses of \$13,605.72. (Exh. P, pp. 1-2.) The difference between Rogelio's monthly income (\$14,394) and his monthly expenses (\$13,605.72) is \$788.28. Rogelio contends it would be hard for him to pay \$4,927 for BAR's costs, whether in a lump sum or in installments. Rogelio testified, if he is ordered to pay BAR's costs, he might be able to borrow money to pay the costs.

43. John Paul presented an Income and Expense Declaration that he signed and dated December 14, 2020 (Declaration). (Exh. Q.) John Paul currently works as a "freelancer mechanic" and earns \$300 to \$500 per month. His fiancé earns \$1,500 per month. John Paul and his fiancé have a one-year-old son. The family's total monthly

expenses are \$1,825. (Exh. Q, p. 3.) Although he is not currently working as a smog technician, John Paul would like to resume working as a smog technician in the future. John Paul testified his father, Rogelio, has not offered him a job at his business.

44. In his testimony, John Paul explained that he chose to testify at the prior hearing in order to protect his smog check license and to present his defense that no clean plugging was involved in the subject tests on the subject vehicles. John Paul believed, and continues to believe, in the merits of his defense.

45. In the Declaration, John Paul indicated that the persons living in his household are: Rogelio, his mother Lydia Gutierrez, his fiancé Vianca Jaimes, and their infant son. In his testimony, John Paul explained he and his fiancé rent the back part of a duplex owned by Rogelio. The duplex has two separate residences. Rogelio and his wife live in the front residence, and John Paul and his family live in the back residence. John Paul pays Rogelio rent of \$500 per month for the back residence. John Paul testified that Rogelio does not pay for any of his family's household expenses.

LEGAL CONCLUSIONS

1. (A) Jurisdiction to proceed in this matter exists under Business and Professions Code section 9884.7, which relates to ARD registrations, as well as Health and Safety Code sections 44002 and 44072.2, which relate to smog check station and inspector licenses, based on Factual Findings 1 through 4 and 7.

(B) Under Business and Professions Code section 9884.7, subdivision (a), the registration of an automotive repair dealer can be disciplined "for any of the following acts or omissions related to the conduct of the business of the automotive repair dealer, which are done by the automotive repair dealer or any automotive

technician, employee, partner, officer, or member of the automotive repair dealer,” including making or authorizing a written statement which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading (subdivision (a)(1)), or any other conduct that constitutes fraud (subdivision (a)(4)).

2. Under Health and Safety Code section 44012, smog tests shall be performed in accordance with procedures prescribed by the Department.

3. Under Health and Safety Code section 44072.2, subdivisions (a), (c) and (d), the licenses of a smog check station and a smog check inspector can be disciplined for violating any statutes or regulations related to the license, or for committing any act involving dishonesty, fraud, or deceit whereby another is injured.

4. Under Business and Professions Code section 9889.9, if any license issued by the Bureau under that part of the Code is disciplined, any other licenses issued by the Bureau may be disciplined.

5. The Accusation alleges a total of nine causes for discipline. To impose discipline, the Bureau must prove the allegations by the standard of proof of a preponderance of the evidence. (*Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-917.) A preponderance of the evidence means evidence that has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Causes for Discipline

6. Rogelio is responsible for the acts of his employee. The owner of a license is obligated to see that the license is not used to violate the law. (*Ford Dealers Ass'n v. Department of Motor Vehicles* (1982) 32 Cal. 3d 347, 360.) Consequently, Rogelio is also subject to disciplinary action as the employer and owner of EZ Smog under the doctrine of respondeat superior. (*Randle v. California State Board of Pharmacy* (1966) 240 Cal.App.2d 254.)

7. First Cause for Discipline (Untrue or Misleading Statements): Rogelio's ARD registration is subject to discipline pursuant to Business and Professions Code section 9884.7, subdivision (a)(1). It was established by a preponderance of the evidence that certain smog inspections at EZ Smog were fraudulent and based on deliberately falsified data, using the clean plugging method to issue smog certificates of compliance to 10 subject vehicles. Such inspections constitute violations of the Business and Professions Code, as well as the Motor Vehicle Inspection Program set forth in Health and Safety Code section 44000 et seq. Rogelio's employee, John Paul, made untrue statements and falsely certified the 10 subject vehicles as having passed an inspection and in compliance with applicable laws and regulations when, in fact, proper inspections had not been made.

8. Second Cause for Discipline (Fraud): Rogelio's ARD registration is subject to discipline pursuant to Business and Professions Code section 9884.7, subdivision (a)(4), because the preponderance of the evidence established that Rogelio's employee knowingly issued electronic smog certificates of compliance for the 10 subject vehicles without performing bona fide inspections of the emission control devices and systems on those vehicles, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

9. Third Cause for Discipline (Material Violation of Automotive Repair Act): Rogelio's ARD registration is subject to discipline pursuant to Business and Professions Code section 9884.7, subdivision (a)(6), and Health and Safety Code section 44072.2, subdivision (a), in that between January 25, 2017, through May 10, 2017, regarding the 10 subject vehicles, Rogelio and his employee failed to comply with the following sections of the Health and Safety Code:

a. Section 44012: Rogelio failed to ensure that the emission control tests were properly performed on the 10 subject vehicles in accordance with prescribed procedures.

b. Section 44015: Rogelio's employee, John Paul, issued electronic smog certificates of compliance for the 10 subject vehicles without ensuring that the vehicles were properly tested and inspected to determine compliance with Health and Safety Code section 44012.

c. Section 44059: Rogelio's employee, John Paul, willfully made false entries for the electronic smog certificate of compliance by certifying that those vehicles had been inspected as required when, in fact, they had not.

10. Fourth Cause for Discipline (Failure to Comply with Regulations pursuant to the Motor Vehicle Inspection Program): Rogelio's Smog Check Station license for EZ Smog is subject to discipline pursuant to Health and Safety Code section 44072.2, subdivision (c), in that it was established by a preponderance of the evidence that Rogelio, acting through his employee John Paul, failed to comply with provisions of California Code of Regulations, title 16, as follows:

a. Section 3340.24, subdivision (c): Rogelio's Smog Check Station falsely issued 10 electronic smog certificates of compliance for the 10 subject vehicles.

b. Section 3340.35, subdivision (c): Rogelio's Smog Check Station issued electronic smog certificates of compliance for the 10 subject vehicles even though the vehicle had not been inspected in accordance with section 3340.42 of the Title 16 regulations.

c. Section 3340.42: Rogelio's Smog Check Station failed to conduct the required smog tests on the 10 subject vehicles in accordance with the Bureau's specifications.

11. Fifth Cause for Discipline (Dishonesty, Fraud or Deceit): Rogelio's Smog Check Station license is subject to discipline pursuant to Health and Safety Code section 44072.2, subdivision (d), in that it was established by a preponderance of the evidence that Rogelio, through his employee John Paul, committed dishonest, fraudulent, and deceitful acts whereby another was injured.

12. Sixth Cause for Discipline (Dishonesty, Fraud or Deceit): Rogelio's Smog Check Station license is subject to discipline pursuant to Business and Professions Code sections 9889.3, subdivision (d), and 9889.9, in that it was established by a preponderance of the evidence that Rogelio, through his employee John Paul, committed acts with respect to the Smog Check Station License involving dishonesty, fraud, and deceit whereby another was injured. However, cause for discipline against Rogelio's Brake and Lamp Station licenses was not established based on the reasons set forth in Legal Conclusion 19, below.

13. Seventh Cause for Discipline (Violations of the Motor Vehicle Inspection Program - Smog Check Inspector License and Repair Technician License): John Paul's Smog Check Inspector License is subject to discipline pursuant to Health and Safety Code section 44072.2, subdivision (a), in that John Paul failed to comply with section

44012 of the Health and Safety Code in a material respect by failing to perform the emission control tests on the 10 subject vehicles in accordance with procedures prescribed by the Department.

14. Eighth Cause of Discipline (Failure to Comply with Regulations Pursuant to the Motor Vehicle Inspection Program - Smog Inspector License and Repair Technician License): John Paul's Smog Check Inspector License is subject to discipline pursuant to Health and Safety Code section 44072.10, subdivision (c), and Health and Safety Code section 44072.2, subdivision (c), in that John Paul failed to comply with provisions of California Code of Regulations, title 16, as follows:

a. Section 3340.24, subdivision (c): John Paul falsely and fraudulently issued an electronic smog certificates of compliance for the 10 subject vehicles.

b. Section 3340.30, subdivision (a): John Paul failed to inspect and test the 10 subject vehicles in accordance with Health and Safety Code sections 44012 and 440235 and California Code of Regulations, title 16, section 3340.42.

c. Section 3340.42: John Paul failed to conduct the required smog tests on the 10 subject vehicles in accordance with the Bureau's specifications.

15. Ninth Cause of Discipline (Dishonesty, Fraud or Deceit - Smog Check Inspector License and Repair Technician License): John Paul's Smog Check Inspector License is subject to discipline pursuant to Health and Safety Code section 44072.2, subdivision (d), in that John Paul committed dishonest, fraudulent, or deceitful acts by issuing electronic smog certificates of compliance for the 10 subject vehicles without performing bona fide inspections of the emission control devices and systems on the vehicles, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

Disciplinary Considerations

16. To determine the proper disposition of this matter, several factors are relevant. The Bureau has issued Guidelines for Disciplinary Penalties and Terms of Probation (Guidelines) under the authority of California Code of Regulations, title 16, section 3395.4, which include factors in aggravation and mitigation. Relevant aggravating factors include (a) whether the Bureau issued prior warnings, citations, notices of violation, or adverse inspection reports; (b) any failure to permit BAR inspection of records; (c) prior abuse of mechanic's liens or attempts to intimidate a consumer; (d) any negligent or willful improper repair work that endangers a consumer; (e) any evidence that the unlawful act was part of a pattern of practice; (f) any failure to comply with a Bureau request for corrective action/retraining; (g) any current probation for improper acts or failure to successfully complete a prior probation; or (h) any other conduct which constitutes fraud or gross negligence. As to Rogelio, there is an aggravating factor of prior citations in 2012, 2015 and 2016. As to John Paul, there is an aggravating factor of a prior citation in 2015. As to both respondents, there is evidence of a pattern of practice.

17. The Guidelines include as relevant factors in mitigation, evidence that a shop has taken specific steps for retraining and has initiated steps to minimize recurrence, or evidence of internal control or audit designed to eliminate errors. Here, the mitigation evidence is minimal. Rogelio changed his business practice when he terminated John Paul's employment upon receiving the Accusation, but then rehired John Paul three months later. In any event, as of the date of hearing, John Paul had left his employment at EZ Smog.

18. The Guidelines set forth ranges of discipline for violation of specific statutes and regulations. The Guidelines also include recommended terms and conditions of probation for a license placed on probation.

19. Pursuant to Business and Professions Code section 9889.9, if Rogelio's Smog Check Station License is revoked, any additional license issued under Articles 5 and 6 of Chapter 20.3 (Automotive Repair) in the name of this licensee may likewise be revoked. Complainant contends in the Sixth Cause for Discipline that Rogelio's Lamp Station License No. LS 231477, Class A, and his Brake Station License No. BS 231477, Class C, should both be revoked along with his Smog Check Station License No. RC 231477. In this case, no evidence or allegation has been put forth with regard to Rogelio's brake and lamp inspection practices. Further, there is no record of any prior Bureau discipline regarding Rogelio's brake and lamp inspection practices. Based on the lack of wrongdoing related to these other licenses held by Rogelio, discipline against these licenses is not necessary to protect the public and would be unduly punitive under the circumstances. Accordingly, the Accusation will be dismissed as against Rogelio's brake station and lamp station licenses.

20. The statutes relating to the licensing of professions and occupations are designed to protect the public from dishonest, untruthful and disreputable licensees. (*Arneson v. Fox* (1980) 28 Cal.3d 440, 451.) Such proceedings are not for the primary purpose of punishing an individual. (*Camacho v. Youde* (1979) 95 Cal.App.3d 161, 165.) Rather, in issuing and disciplining licenses, a state agency is primarily concerned with protection of the public, maintaining the integrity and high standards of the profession, and preserving public confidence in licensure. (*Ibid*; *Fahmy v. Medical Bd. of California* (1995) 38 Cal.App.4th 810, 817.)

21. The preponderance of the evidence established that John Paul, while working for Rogelio, engaged in clean plugging. There were anomalies and irregularities in the data generated by the BAR-OIS at Rogelio's smog station on at least 10 occasions. The anomalies proved that the DAD was not connected to the vehicles that were being inspected, which is a fact that John Paul knew or should have known at the time he conducted the 10 inspections. The preponderance of the evidence established that the anomalies were more likely than not, created by the use of a simulator.³ The use of a simulator is a fact that John Paul knew or should have known at the time he conducted the inspections. In each of the 10 inspections, John Paul engaged in clean plugging, the vehicles were not properly inspected, and Certificates of Compliance were issued to the 10 subject vehicles based on fraudulent data supplied by respondents. Discipline is appropriate. (Factual Findings 1-39; Legal Conclusions 1-20.)

³ In his cross-examination of Mr. Ortega and Mr. Chand, Rogelio's counsel attempted to establish several scenarios that could have led to incorrect eVIN information being transmitted into the OIS system by mistake. The scenarios appeared far-fetched and highly unlikely to occur. Moreover, none of the scenarios, even if they occurred, would explain how the communication protocol and PID counts for all 10 subject vehicles were (a) nearly identical to each other, and (b) constituted data (protocol of I914 and PID count of 9 or 10) that would not be generated by the particular vehicle being inspected. Given these facts, the BAR expert, Mr. Chand, opined that the unexpected protocol and PID counts that were recorded in the OIS Test Reports could only have been generated by a simulator.

22. As to John Paul, public protection requires revocation of John Paul's Smog Check Inspector License No. EO 631599 and Smog Check Repair Technician License No. EI 631599.

23. As to Rogelio, the public will be adequately protected by revocation of his ARD Registration No. 231477 and Smog Check Station License No. RC 231477, with the revocation stayed during a probationary period of five years, under the Bureau's standard terms and conditions of probation. Rogelio shall retain his brake station and lamp station licenses, pursuant to Legal Conclusion 19.

Cost Recovery

24. Pursuant to Business and Professions Code section 125.3, the Bureau may request the administrative law judge to direct a licensee found to have committed violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

25. Cause exists to direct respondents to pay the costs of investigation and enforcement pursuant to Business and Professions Code section 125.3 in that respondents violated provisions of the Automotive Repair Act, based on Legal Conclusions 6 through 15. The reasonable costs of investigation and enforcement of this matter are \$9,854.85, as set forth in Factual Finding 40. ALJ Cody ordered the total cost recovery amount should be allocated equally among the respondents, so that each is liable to pay the Bureau \$4,927.

26. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45, the California Supreme Court enumerated several factors that a licensing agency must consider when assessing costs. An agency must not assess the full costs where it 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 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; the agency must consider a respondent's ability to pay; and the agency may not assess disproportionately large investigation and prosecution costs when it has conducted a disproportionately large investigation to prove that a respondent engaged in relatively innocuous misconduct.

27. The evidence and argument presented by respondents at the remand hearing were considered. Rogelio shall be ordered to pay the full cost recovery amount of \$4,927 as a condition of probation. As provided in the Order below, full payment shall be completed no later than six months before the end of the five-year probation period. The payment of \$4,927 in 54 monthly installments equates to a monthly payment of \$91.24. Rogelio is continuing to operate his business and earns monthly income of approximately \$14,394. After payment of his monthly expenses, he has approximately \$788, which can be applied towards a monthly payment for the Bureau's costs. (Factual Finding 42.)

28. Based on John Paul's financial situation, and given that he will be unable to work as a smog check inspector and smog check repair technician due to the revocation of his licenses, the enforcement of cost recovery against John Paul shall be deferred. John Paul shall be required to pay the \$4,927 cost recovery as a condition precedent to his obtaining new licensure by the Bureau or the reinstatement of his revoked licenses. (Factual Findings 43 through 45.)

ORDER

1. IT IS HEREBY ORDERED that Smog Check Inspector License No. EO 631599, issued to John Paul Gutierrez, is revoked.

2. IT IS HEREBY ORDERED that Smog Check Repair Technician License No. EI 631599, issued to John Paul Gutierrez, is revoked.

3. IT IS HEREBY ORDERED that John Paul Gutierrez shall pay to the Bureau its costs of investigation and enforcement in the amount of \$4,927 as a condition precedent to the issuance of any new license by the Bureau or the reinstatement of his revoked licenses. John Paul Gutierrez shall pay the \$4,927 cost recovery, in full, prior to the Bureau's issuance to him of any new license or the reinstatement of his revoked licenses. John Paul Gutierrez shall pay the cost recovery of \$4,927 as directed by the Bureau, in its discretion.

4. IT IS HEREBY ORDERED that Automotive Repair Dealer Registration Number ARD 250291 and Smog Check Station License Number RC 231477, issued to Rogelio Gutierrez, dba EZ Smog and Auto Repair (Respondent), are revoked. However, the revocation is stayed and Respondent is placed on probation for five (5) years on the following terms and conditions.

(A) 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.

(B) Quarterly Reporting: During the period of probation, Respondent shall report either by personal appearance or in writing as determined by the BAR, on a schedule set by the 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.

(C) Report Financial Interests: Respondent shall, within 30 days of the effective date of this decision and within 30 days from the date of any request by the BAR during the period of probation, report any financial interest which 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.

(D) Access to Examine Vehicles and Records: Respondent shall provide BAR representatives unrestricted access to inspect 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.

(E) 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 the 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 with the jurisdiction of 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.

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

(G) Cost Recovery: Respondent shall pay the Bureau of Automotive Repair \$4,927 for the reasonable costs of the investigation and enforcement of Agency Case No. 79/17-8954 (OAH No. 2018120561). Respondent shall make such payment according to a payment schedule approved by the Bureau. 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. 79/17-8954 (OAH No. 2018120561). 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.

(H) 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 the BAR.

5. IT IS HEREBY ORDERED THAT the Accusation is dismissed with respect to Respondent's Lamp Station License No. LS 231477, Class A, and Respondent's Brake Station License No. BS 231477, Class C.

DATE: Jan 15, 2021

Erlinda Shrenger
Erlinda Shrenger (Jan 15, 2021 09:26 PST)

ERLINDA G. SHRENGER

Administrative Law Judge

Office of Administrative Hearings