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7
8 **BEFORE THE**
DEPARTMENT OF CONSUMER AFFAIRS
9 **FOR THE BUREAU OF AUTOMOTIVE REPAIR**
STATE OF CALIFORNIA

10
11 In the Matter of the Accusation Against:

Case No. *79/14-78*

12 **GUTIERREZ AUTOMOTIVE**
13 **94 Airport Blvd.**
Freedom, CA 95019
14 **GUSTAVO GUTIERREZ, OWNER**
Automotive Repair Dealer Registration
15 **No. ARD 259957**
Smog Check Station License No. RC 259957

ACCUSATION

Smog Check

16 and

17 **GUSTAVO GUTIERREZ**
18 **375 Calabasas Rd.**
Watsonville, CA 95076

19 **Smog Check Inspector License No. EO 151776**
20 **Repair Technician License No. EI 151776**
(formerly Advanced Emission Specialist
21 **Technician License No. EA 151776)**

22 Respondents.
23

24
25 Complainant alleges:

26 **PARTIES**

27 1. Patrick Dorais (Complainant) brings this Accusation solely in his official capacity as
28 Chief of the Bureau of Automotive Repair (Bureau), Department of Consumer Affairs.

1 (2) Causing or allowing a customer to sign any work order that does not state the repairs
2 requested by the customer or the automobile's odometer reading at the time of repair.

3 ...

4 (4) Any other conduct that constitutes fraud.

5 ...

6 (6) Failure in any material respect to comply with the provisions of this chapter or
7 regulations adopted pursuant to it.

8 ...

9 (c) Notwithstanding subdivision (b), the director may suspend, revoke, or place on
10 probation the registration for all places of business operated in this state by an automotive repair
11 dealer upon a finding that the automotive repair dealer has, or is, engaged in a course of repeated
12 and willful violations of this chapter, or regulations adopted pursuant to it.

13 6. Code section **9884.13** provides, in pertinent part, that the expiration of a valid
14 registration shall not deprive the director or chief of jurisdiction to proceed with a disciplinary
15 proceeding against an automotive repair dealer or to render a decision invalidating a registration
16 temporarily or permanently.

17 7. Section **44002** of the Health and Safety Code provides, in pertinent part, that the
18 Director has all the powers and authority granted under the Automotive Repair Act for enforcing
19 the Motor Vehicle Inspection Program.

20 8. Section **44012** of the Health and Safety Code states, in pertinent part:

21 The test at the smog check stations shall be performed in accordance with procedures
22 prescribed by the department and may require loaded mode dynamometer testing in enhanced
23 areas, two-speed idle testing, testing utilizing a vehicle's onboard diagnostic system, or other
24 appropriate test procedures as determined by the department in consultation with the state board.
25 The department shall implement testing using onboard diagnostic systems, in lieu of loaded mode
26 dynamometer or two-speed idle testing, on model year 2000 and newer vehicles only, beginning
27 no earlier than January 1, 2013. However, the department, in consultation with the state board,
28 may prescribe alternative test procedures that include loaded mode dynamometer or two-speed

1 idle testing for vehicles with onboard diagnostic systems that the department and the state board
2 determine exhibit operational problems. The department shall ensure, as appropriate to the test
3 method, the following:

4 (a) Emission control systems required by state and federal law are reducing excess
5 emissions in accordance with the standards adopted pursuant to subdivisions (a) and (c) of
6 Section 44013.

7 (b) Motor vehicles are preconditioned to ensure representative and stabilized operation of
8 the vehicle's emission control system.

9 (c) For other than diesel-powered vehicles, the vehicle's exhaust emissions of hydrocarbons,
10 carbon monoxide, carbon dioxide, and oxides of nitrogen in an idle mode or loaded mode are
11 tested in accordance with procedures prescribed by the department. In determining how loaded
12 mode and evaporative emissions testing shall be conducted, the department shall ensure that the
13 emission reduction targets for the enhanced program are met.

14 (d) For other than diesel-powered vehicles, the vehicle's fuel evaporative system and
15 crankcase ventilation system are tested to reduce any nonexhaust sources of volatile organic
16 compound emissions, in accordance with procedures prescribed by the department.

17 (e) For diesel-powered vehicles, a visual inspection is made of emission control devices and
18 the vehicle's exhaust emissions are tested in accordance with procedures prescribed by the
19 department, that may include, but are not limited to, onboard diagnostic testing. The test may
20 include testing of emissions of any or all of the pollutants specified in subdivision (c) and, upon
21 the adoption of applicable standards, measurement of emissions of smoke or particulates, or both.

22 (f) A visual or functional check is made of emission control devices specified by the
23 department, including the catalytic converter in those instances in which the department
24 determines it to be necessary to meet the findings of Section 44001. The visual or functional
25 check shall be performed in accordance with procedures prescribed by the department.

26 (g) A determination as to whether the motor vehicle complies with the emission standards
27 for that vehicle's class and model-year as prescribed by the department.

28 ///

1 (h) An analysis of pass and fail rates of vehicles subject to an onboard diagnostic test and a
2 tailpipe test to assess whether any vehicles passing their onboard diagnostic test have, or would
3 have, failed a tailpipe test, and whether any vehicles failing their onboard diagnostic test have or
4 would have passed a tailpipe test.

5 (i) The test procedures may authorize smog check stations to refuse the testing of a vehicle
6 that would be unsafe to test, or that cannot physically be inspected, as specified by the department
7 by regulation. The refusal to test a vehicle for those reasons shall not excuse or exempt the
8 vehicle from compliance with all applicable requirements of this chapter.

9 9. Section **44015** of the Health and Safety Code states, in pertinent part:

10 . . .

11 (b) If a vehicle meets the requirements of Section 44012, a smog check station licensed to
12 issue certificates shall issue a certificate of compliance or a certificate of noncompliance.

13 . . .

14 10. Section **44032** of the Health and Safety Code states:

15 No person shall perform, for compensation, tests or repairs of emission control devices or
16 systems of motor vehicles required by this chapter unless the person performing the test or repair
17 is a qualified smog check technician and the test or repair is performed at a licensed smog check
18 station. Qualified technicians shall perform tests of emission control devices and systems in
19 accordance with Section 44012.

20 11. Section **44059** of the Health and Safety Code states:

21 The willful making of any false statement or entry with regard to a material matter in any
22 oath, affidavit, certificate of compliance or noncompliance, or application form which is required
23 by this chapter or Chapter 20.3 (commencing with Section 9880) of Division 3 of the Business
24 and Professions Code, constitutes perjury and is punishable as provided in the Penal Code.

25 12. Section **44072.2** of the Health and Safety Code states, in pertinent part:

26 The director may suspend, revoke, or take other disciplinary action against a license as
27 provided in this article if the licensee, or any partner, officer, or director thereof, does any of the
28 following:

1 (a) Violates any section of this chapter and the regulations adopted pursuant to it, which
2 related to the licensed activities.

3 ...

4 (c) Violates any of the regulations adopted by the director pursuant to this chapter.

5 (d) Commits any act involving dishonesty, fraud, or deceit whereby another is injured.

6 ...

7 (h) Violates or attempts to violate the provisions of this chapter relating to the particular
8 activity for which he or she is licensed.

9 13. Section **44072.6** of the Health and Safety Code provides, in pertinent part, that the
10 expiration or suspension of a license by operation of law, or by order or decision of the Director
11 of Consumer Affairs, or a court of law, or the voluntary surrender of the license shall not deprive
12 the Director of jurisdiction to proceed with disciplinary action.

13 14. Section **44072.8** of the Health and Safety Code states:

14 When a license has been revoked or suspended following a hearing under this article, any
15 additional license issued under this chapter in the name of the licensee may be likewise revoked
16 or suspended by the director.

17 15. California Code of Regulations, Title 16, section **3340.24**, states:

18 (c) The bureau may suspend or revoke the license of or pursue other legal action against a
19 licensee, if the licensee falsely or fraudulently issues or obtains a certificate of compliance or a
20 certificate of noncompliance.

21 16. California Code of Regulations, Title 16, section **3340.30**, states, in pertinent part:

22 A licensed smog check inspector and/or repair technician shall comply with the following
23 requirements at all times while licensed:

24 (a) Inspect, test and repair vehicles, as applicable, in accordance with section 44012 of the
25 Health and Safety Code, section 44035 of the Health and Safety Code, and section 3340.42 of this
26 article.

27 ...

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1 emissions are less than or equal to the applicable emission standards specified in the applicable
2 table.

3 (2) A two-speed idle mode test shall be the test method used to inspect 1976 - 1999 model-
4 year vehicles, except diesel-powered, registered in all program areas of the state, except in those
5 areas of the state where the enhanced program has been implemented. The two-speed idle mode
6 test shall measure hydrocarbon, carbon monoxide and carbon dioxide emissions at high RPM and
7 again at idle RPM, as contained in the bureau's specifications referenced in subsection (a) of
8 Section 3340.17 of this article. Exhaust emissions from a vehicle subject to this inspection shall
9 be measured and compared to the emission standards set forth in this section and as shown in
10 TABLE III. A vehicle passes the two-speed idle mode test if all of its measured emissions are less
11 than or equal to the applicable emissions standards specified in Table III.

12 (3) An OBD-focused test, shall be the test method used to inspect gasoline-powered
13 vehicles 2000 model-year and newer, and diesel-powered vehicles 1998 model-year and newer.
14 The OBD test failure criteria are specified in section 3340.42.2.

15 (b) In addition to subsection (a), all vehicles subject to the smog check program shall
16 receive the following:

17 (1) A visual inspection of emission control components and systems to verify the vehicle's
18 emission control systems are properly installed.

19 (2) A functional inspection of emission control systems as specified in the Smog Check
20 Manual, referenced by section 3340.45, which may include an OBD test, to verify their proper
21 operation.

22 ...

23 **COST RECOVERY**

24 20. Code section 125.3 provides, in pertinent part, that a Board may request the
25 administrative law judge to direct a licentiate found to have committed a violation or violations of
26 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
27 enforcement of the case.

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1 **FACTUAL SUMMARY**

2 21. On or about April 4, 2013, Bureau staff documented an undercover vehicle, a 1990
3 Pontiac. Bureau staff introduced a non-functioning EGR valve, along with an EGR blockage
4 plate, into the vehicle. Addition of these items into the vehicle caused the vehicle to be unable to
5 pass the functional portion of a smog inspection.

6 22. On or about June 27, 2013, the Bureau's investigative staff conducted an undercover
7 operation at Respondent's shop, Gutierrez Automotive. A Bureau operator brought the 1990
8 Pontiac to the shop and requested a smog inspection. Respondent charged \$50.00 to perform a
9 smog inspection. Respondent provided an invoice to the Bureau operator. Gustavo Gutierrez
10 signed, under penalty of perjury, a Vehicle Inspection Report which falsely stated that the vehicle
11 had passed the inspection. Respondent also submitted an electronic BAR97 form to the Bureau
12 which falsely stated that the vehicle had passed the inspection.

13 23. Bureau staff subsequently reassessed the vehicle and found as follows:

- 14 a. Tamper indicators were still in place on the EGR valve and blockage plate,
15 establishing that Respondent made no attempt to remove or service them.
16 b. The vehicle failed the functional portion of a valid smog check.
17 c. Respondent failed to properly perform the visual and functional portions of the
18 smog check procedure.

19 **FIRST CAUSE FOR DISCIPLINE**

20 **(Untrue/Misleading Statements - Registration)**

21 24. Respondent has subjected his registration to discipline under Code section 9884.7,
22 subdivision (a)(1), in that he made statements which he knew or which by exercise of reasonable
23 care he should have known were untrue or misleading, as set forth above in paragraphs 21-23.
24 Respondent fraudulently purported to test the 1990 Pontiac, and certified that the vehicle passed
25 inspection and was in compliance with applicable laws and regulations. In fact, Respondent
26 failed to adequately perform the visual and functional portions of the smog inspection.

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1 **SECOND CAUSE FOR DISCIPLINE**

2 **(Fraud - Registration)**

3 25. Respondent has subjected his registration to discipline under Code section 9884.7,
4 subdivision (a)(4), in that he committed acts which constitute fraud, as set forth above in
5 paragraphs 21-23.

6 **THIRD CAUSE FOR DISCIPLINE**

7 **(Failure to Comply With Chapter - Registration)**

8 26. Respondent has subjected his registration to discipline under Code section 9884.7,
9 subdivision (a)(6), in that he failed to comply with laws and regulations pertaining to the
10 performance of smog checks, as set forth above in paragraphs 21-23.

11 **FOURTH CAUSE FOR DISCIPLINE**

12 **(Violation of the Motor Vehicle Inspection Program – Station License)**

13 27. Respondent has subjected his station license to discipline under Health and Safety
14 Code section 44072.2, subdivisions (a) and (c), in that he violated sections of that Code and
15 applicable regulations, as set forth above in paragraphs 21-23, as follows:

16 a. **Section 44012:** Respondent failed to ensure that the emission control testing was
17 performed on the vehicle in accordance with procedures prescribed by the department.

18 b. **Section 44015:** Respondent issued a certificate of compliance for the vehicle without
19 ensuring that the vehicle was properly tested and inspected to determine if it was in compliance
20 with Health and Safety Code section 44012.

21 c. **Section 44059:** Respondent willfully made false entries in the certificate of
22 compliance by certifying that the vehicle had been inspected as required when, in fact, it had not.

23 d. **Section 3340.24, subdivision (c):** Respondent falsely or fraudulently issued a
24 certificate of compliance for the vehicle without performing bona fide inspections of the emission
25 control devices and systems on the vehicle as required by Health and Safety Code section 44012.

26 e. **Section 3340.35, subdivision (c):** Respondent issued a certificate of compliance
27 even though the vehicle had not been inspected in accordance with section 3340.42.

28

1 f. **Section 3340.42:** Respondent failed to conduct the required smog tests and
2 inspections on the vehicle in accordance with the Bureau's specifications.

3 **FIFTH CAUSE FOR DISCIPLINE**

4 **(Dishonesty, Fraud or Deceit – Station License)**

5 28. Respondent subjected his station license to discipline under Health and Safety Code
6 section 44072.2, subdivision (d), in that he committed acts involving dishonesty, fraud or deceit,
7 whereby another was injured, by issuing a certificate of compliance for the vehicle without
8 performing bona fide inspections of the emission control devices and system on the vehicle,
9 thereby depriving the People of the State of California of the protection afforded by the Motor
10 Vehicle Inspection Program, as set forth above in paragraphs 21-23.

11 **SIXTH CAUSE FOR DISCIPLINE**

12 **(Violations of the Motor Vehicle Inspection Program – Technician License)**

13 29. Respondent has subjected his technician licenses to discipline under Health and
14 Safety Code section 44072.2, subdivisions (a) and (c), in that he violated sections of that Code
15 and applicable regulations, as set forth above in paragraphs 21-23, as follows:

16 a. **Section 44012:** Respondent failed to ensure that the emission control tests were
17 performed on the vehicle in accordance with procedures prescribed by the department.

18 b. **Section 44015:** Respondent issued a certificate of compliance for the vehicle without
19 ensuring that the vehicle was properly tested and inspected to determine if it was in compliance
20 with Health and Safety Code section 44012.

21 c. **Section 44059:** Respondent willfully made false entries for the certificate of
22 compliance by certifying that the vehicle had been inspected as required when, in fact, it had not.

23 d. **Section 3340.24, subdivision (c):** Respondent falsely or fraudulently issued a
24 certificate of compliance for the vehicle without performing a bona fide inspection of the
25 emission control devices and systems on the vehicle as required by Health and Safety Code
26 section 44012.

27 e. **Section 3340.30, subdivision (a):** Respondent failed to inspect and test the vehicle in
28 accordance with Health and Safety Code section 44012.

1 f. **Section 3340.35, subdivision (c):** Respondent issued a certificate of compliance
2 even though the vehicle had not been inspected in accordance with section 3340.42.

3 g. **Section 3340.42:** Respondent failed to conduct the required smog tests and
4 inspections on the vehicle in accordance with the Bureau's specifications.

5 **SEVENTH CAUSE FOR DISCIPLINE**

6 **(Dishonesty, Fraud or Deceit – Technician License)**

7 30. Respondent subjected his technician licenses to discipline under Health and Safety
8 Code section 44072.2, subdivision (d), in that he committed acts involving dishonesty, fraud or
9 deceit, whereby another was injured by issuing a certificate of compliance for a vehicle without
10 performing bona fide inspections of the emission control devices and systems on the vehicle,
11 thereby depriving the People of the State of California of the protection afforded by the Motor
12 Vehicle Inspection Program, as set forth above in paragraphs 21-23.

13 **DISCIPLINARY CONSIDERATIONS**

14 31. To determine the degree of discipline, if any, to be imposed on Respondent,
15 Complainant alleges aggravating circumstances as follows:

16 First Citations:

17 32. On or about June 28, 2011, Respondent was issued Citation No. C2011-1509 based
18 on his failure to perform a visual/functional check of emission control devices during a vehicle
19 inspection, in violation of California Health and Safety Code section 44012(f).

20 33. On or about June 28, 2011, Respondent was issued Citation No. M2011-1510 based
21 on his failure to perform a visual/functional check of emission control devices during a vehicle
22 inspection, in violation of California Health and Safety Code section 44012(f).

23 34. On or about July 22, 2011, Bureau staff met with Respondent to discuss Respondent's
24 misconduct in Citation Numbers C2011-1509 and M2011-1510.

25 Second Citations:

26 35. On or about November 18, 2011, Respondent was issued Citation No. C2012-0484
27 based on his failure to perform a visual/functional check of emission control devices during a
28 vehicle inspection, in violation of California Health and Safety Code section 44012(f).

1 PRAYER

2 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
3 and that following the hearing, the Director of Consumer Affairs issue a decision:

4 1. Revoking, suspending, or placing on probation Automotive Repair Dealer
5 Registration Number ARD 259957, issued to Gustavo Gutierrez, doing business as Gutierrez
6 Automotive;

7 2. Revoking, suspending, or placing on probation any other automotive repair dealer
8 registration issued to Gustavo Gutierrez;

9 3. Revoking or suspending Smog Check Station License Number RC 259957, issued to
10 Gustavo Gutierrez, doing business as Gutierrez Automotive;

11 4. Revoking or suspending any additional license issued under Chapter 5 of the Health
12 and Safety Code in the name of Gustavo Gutierrez;

13 5. Revoking or suspending Smog Check Inspector License Number EO 151776 and
14 Repair Technician License EI 151776 (formerly Advanced Emission Specialist Technician
15 License Number EA 151776), issued to Gustavo Gutierrez;

16 6. Revoking or suspending any additional license issued under Chapter 5 of the Health
17 and Safety Code in the name of Gustavo Gutierrez;

18 7. Ordering Gustavo Gutierrez to pay the Bureau of Automotive Repair the reasonable
19 costs of the investigation and enforcement of this case, pursuant to Business and Professions
20 Code section 125.3; and,

21 8. Taking such other and further action as deemed necessary and proper.

22
23
24 DATED: January 6, 2014


25 PATRICK DORAIS
26 Chief
27 Bureau of Automotive Repair
28 Department of Consumer Affairs
State of California
Complainant