

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

In the Matter of the Accusation Against:

**ERICK ANTONIO NAVARRO dba ENAV SMOG SHOP,
Automotive Repair Dealer Registration No. ARD 297403,
Smog Check Station License No. RC 297403,**

and

**ERICK A. NAVARRO,
Smog Check Inspector License No. EO 642472,
Smog Check Repair Technician License No. EI 642472,
Respondent.**

Agency Case No. 79/21-9418

OAH No. 2022070231

PROPOSED DECISION

Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on February 9, 2023.

Christine J. Lee, Deputy Attorney General, represented complainant.

William D. Ferreira, Attorney at Law, Automotive Defense Specialists, represented Erick Antonio Navarro (respondent), individually and doing business as Enav Smog Shop.

Oral and documentary evidence was received. The record closed and the matter was submitted for decision on February 9, 2023.

FACTUAL FINDINGS

Jurisdictional Matters

1. In March 2022, complainant Patrick Dorais brought the Accusation in his official capacity as Chief of the Bureau of Automotive Repair (Bureau or BAR), Department of Consumer Affairs, State of California. Respondent filed a Notice of Defense which contained his request for the hearing that ensued.

2. On January 31, 2020, the Bureau issued Smog Check Repair Technician (EI) License number 642472 to respondent in his individual capacity. The Smog Check Repair Technician License was in full force and effect at all relevant times and will expire on April 30, 2024, unless renewed.

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3. On February 10, 2020, the Bureau issued Smog Check Inspector (EO) License number 642472 to respondent in his individual capacity. The Smog Check Inspector License was in full force and effect at all relevant times and will expire on April 30, 2024, unless renewed.

4. On June 11, 2020, the Bureau issued Automotive Repair Dealer (ARD) Registration number ARD 297403 to respondent doing business as Enav Smog Shop. The ARD Registration was in full force and effect at all relevant times and will expire on June 30, 2023, unless renewed.

5. On June 19, 2020, the Bureau issued Smog Check Station License number RC 297403 to respondent doing business as Enav Smog Shop. The Smog Check Station License was in full force and effect at all relevant times and will expire on June 30, 2023, unless renewed.

6. Enav Smog Shop is certified as a STAR Station. The Bureau's STAR program establishes performance standards that smog check stations must meet or exceed to become STAR certified. (See Cal. Code Regs., tit. 16, § 3340.1.) The Bureau certified Enav Smog Shop as a STAR Station on March 10, 2022. The certification will remain active unless respondent's ARD Registration and/or Smog Check Station License are revoked or canceled, the licenses become delinquent, or the certification is invalidated.

Smog Check Program

7. California's smog check program is designed to reduce air pollution by identifying and requiring the repair of polluting motor vehicles. The smog check program requires most vehicles in the state to undergo a smog check inspection every two years and when title is transferred.

8. A smog inspection consists of three tests. The emissions test analyzes tailpipe emissions obtained while the vehicle's engine is running. The visual test requires the smog inspector to verify the presence of required emission control systems and components. The functional test requires the smog inspector to physically test certain emission system components.

9. Smog check inspections of pre-2000 model year vehicles include the visual, functional, and emissions tests. In certain "Enhanced" areas of the State, the emissions test is an Acceleration Simulation Mode (ASM) test, which is performed using an Emission Inspection System (EIS), also known as a BAR-97. The EIS is a computer-based, five-gas analyzer that measures hydrocarbons, carbon monoxide, nitrogen oxides, carbon dioxide, and oxygen.

10. The ASM test entails two loaded mode sequences (i.e., "Mode 1" and "Mode 2") that measure the vehicle's tailpipe emissions on a dynamometer. The vehicle's drive wheels are placed onto rollers, and the vehicle is driven at speeds of 15 miles per hour during Mode 1 and 25 miles per hour during Mode 2. The purpose of the ASM test is to simulate driving conditions while the emissions are sampled and measured by the EIS.

11. An On-Board Diagnostics (OBDII) functional test is performed on most 1996 to 1999 model year vehicles. The inspector is required to connect a test cable from the EIS to a Diagnostic Link Connector (DLC) located in the vehicle's passenger compartment. Through the DLC, the EIS retrieves information from the vehicle's on-board computer including, but not limited to, diagnostic trouble codes.

12. The EIS is connected to the Bureau's Vehicle Information Database (VID). If a vehicle passes the visual, functional, and tailpipe emissions tests, it passes the

overall smog check inspection, and a certificate of compliance is issued by the station and transmitted electronically to the VID. By issuing a certificate of compliance for a vehicle, the issuing smog station certifies that the vehicle has been properly inspected and has all the required emission control equipment devices installed and functioning correctly.

13. The Bureau has become aware of methods some smog check stations and smog check inspectors use to fraudulently issue smog certificates to vehicles that will not pass a properly performed smog check inspection. One such method is known as clean plugging. Clean plugging refers to the use of another vehicle's properly functioning OBD system, or another source, to generate passing diagnostic readings for the purpose of issuing fraudulent certificates of compliance to vehicles that are not in smog compliance and/or not present for testing.

Analysis of Test Data

14. Steve Koch testified at the hearing. Mr. Koch has been a Bureau Program Representative I for 23 years. He has been a licensed smog check inspector since 1996. Mr. Koch is certified by the National Institute for Automotive Service Excellence (ASE) as a master technician, A1 through A9 plus the L1 master level.

15. In July 2022, Mr. Koch initiated an investigation of respondent's smog check activities by reviewing smog test data transmitted to the VID from Enav Smog Shop. Mr. Koch prepared a written report that summarized the findings of his investigation. At hearing, Mr. Koch credibly testified regarding the investigation.

16. Mr. Koch conducted a review of the BAR-97 OBDII VID data for smog check inspections performed at Enav Smog Shop that required the OBDII functional test. Mr. Koch identified 20 pre-2000 model year vehicles that were tested and passed

a smog inspection at Enav Smog Shop between March 2021 and August 2021, for which OBDII code P1800 was transmitted to the VID. Mr. Koch explained the P1800 code is an obscure code that is not often used by vehicle manufacturers. When Mr. Koch saw the P1800 code transmitted from vehicles inspected at Enav Smog Shop on a weekly basis over several months, he thought it was "odd" and indicative of clean plugging. He believed the OBDII interface cable was plugged into a common vehicle that had the P1800 code stored in its on-board computer, and the P1800 code was retrieved by the BAR-97 analyzer during smog inspections of other vehicles.

17. For purposes of his investigation report, Mr. Koch investigated 10 vehicles (subject vehicles) from the original 20 vehicles he identified as transmitting the P1800 code. The smog inspections for the subject vehicles were performed under respondent's smog check inspector license number and occurred at Enav Smog Shop on the following dates:

(1) Subject Vehicle 1, 1999 Toyota Corolla, March 10, 2021.

(Exh. 5.)

(2) Subject Vehicle 2, 1997 Jeep Wrangler, April 8, 2021.

(Exh. 6.)

(3) Subject Vehicle 3, 1999 Acura Integra, April 10, 2021.

(Exh. 7.)

(4) Subject Vehicle 4, 1999 Toyota Sienna, April 17, 2021.

(Exh. 8.)

(5) Subject Vehicle 5, 1997 Honda Civic, May 4, 2021.

(Exh. 9.)

(6) Subject Vehicle 6, 1997 Dodge RAM 1500, May 21, 2021.

(Exh. 10.)

(7) Subject Vehicle 7, 1999 Ford Ranger, June 12, 2021.

(Exh. 11.)

(8) Subject Vehicle 8, 1999 Toyota 4Runner, July 22, 2021.

(Exh. 12.)

(9) Subject Vehicle 9, 1999 Chevrolet S10 2WD, August 20, 2021. (Exh. 13.)

(10) Subject Vehicle 10, 1999 Subaru Impreza, August 31, 2021. (Exh. 14.)

18. Mr. Koch researched whether any of the subject vehicles could produce the P1800 diagnostic trouble code. Mr. Koch reviewed the original equipment manufacturer (OEM) service information for each of the subject vehicles, as well as reference guides for diagnostic trouble codes published by Alldata and Mitchell Pro Demand, which are nationally recognized as industry-standard repair information publishers. Based his review of the OEM service information and reference guides, Mr. Koch determined that none of the subject vehicles produced P1800 as a diagnostic trouble code. Mr. Koch concluded that during the functional part of the smog inspection for each of the subject vehicles, the BAR-97 cable was not plugged into the specific vehicle purportedly tested but, instead, was plugged into another vehicle that produced the P1800 code.

19. Mr. Koch concluded the smog certificates of compliance issued for each of the subject vehicles were the result of clean plugging. As such, the certificates of

compliance for the subject vehicles issued by Enav Smog Shop were false and fraudulent because they contained false and misleading information that the subject vehicles had been properly inspected when, in fact, they had not.

Station Inspection

20. On September 2, 2021, Mr. Koch conducted a station inspection at Enav Smog Shop to check for required equipment and to review the station's records. Respondent was present at the station during the inspection.

21. Upon arriving at Enav Smog Shop, Mr. Koch saw there were several cars parked in the front and back of the station. Mr. Koch had his computer and ran smog check histories for some of the cars parked in front of the station. One of the cars was a 2002 Nissan Maxima (2002 Maxima), which had been recently tested and produced the P1800 diagnostic trouble code. Mr. Koch suspected the Maxima was the surrogate vehicle used for the clean plugging of the subject vehicles.

22. During the station inspection, Mr. Koch asked respondent to perform a smog inspection and asked if he had a vehicle to do an inspection. Respondent chose the 2002 Maxima that was parked in front of the station. Respondent performed a smog inspection on the 2002 Maxima. The vehicle passed the inspection, but respondent did not issue a smog certificate. (See Exh. 16.) Mr. Koch testified that when he asked respondent about his BAR-97, respondent did not say there was anything wrong with it.

23. During the station inspection, Mr. Koch asked to review the station's records for smog inspections. Respondent did not have records for every smog test performed. Mr. Koch asked for records for specific inspections, including the inspections for subject vehicles 6, 9, and 10. Respondent did not have the records;

however, he had documentation in his computer database showing he performed inspections on the specific vehicles. Respondent told Mr. Koch he did not have paper records for the inspections because the inspections were "not cashed out" or he did not charge for the inspections because they were done for friends.

24. Towards the end of the station inspection, Mr. Koch reviewed the station's testing data with respondent and informed him the data indicated his station was fraudulently certifying vehicles by clean plugging. Respondent indicated he did not know the meaning of the term "clean plugging." Mr. Koch told respondent the data indicated he was periodically plugging the analyzer OBDII cable into a different vehicle than the one being tested. Respondent told Mr. Koch he never did that.

25. On cross-examination, Mr. Koch testified he reviewed respondent's station data for indications of clean plugging after the September 2, 2021 inspection and found the transmission of the P1800 code from respondent's station had stopped. On cross-examination, Mr. Koch testified regarding respondent's certification as a STAR station. Mr. Koch explained the STAR certification is intended for higher performing stations. At hearing, Mr. Koch was shown respondent's Inspector Report Card (Exhibit D), showing the Follow-up Pass Rate (FPR) for vehicles inspected by respondent. Respondent did not have an FPR score prior to July 2021. Respondent's FPR scores were 0.41 in July 2021, 0.59 in January 2022, and 0.72 in July 2022. (*Ibid.*) Mr. Koch testified a score of 0.40 and above is required for STAR certification.

26. Complainant's evidence that each of the subject vehicles was clean plugged was persuasive and unrebutted. Mr. Koch's testimony was convincing and supported by documentary evidence that the P1800 code, which was not produced by the subject vehicles, was retrieved from another vehicle connected to the BAR-97.

Respondent's Testimony and Contentions

27. Respondent testified at the hearing. He has been a mechanic for 16 years. He worked at Sears for one year, Firestone for 15 years, and then one year at Midas before opening his own shop in 2020. Respondent testified he has been an ASC certified master automotive technician, A1 to A9 and level L1, for eight years.

28. Respondent testified he did not work as a smog technician or perform smog inspections until he opened his own business, Enav Smog Shop, in 2020. He denied knowing what clean plugging was until Mr. Koch told him. Respondent noted he had been a smog inspector for less than one year at the time he inspected the subject vehicles in 2021.

29. At hearing, respondent asserted the P1800 code may have been transmitted during the inspections of the subject vehicles because he inadvertently left the OBDII connector plugged into the 2002 Maxima during the inspections of the subject vehicles. Respondent explained the 2002 Maxima was owned by Thomas Dunger, the father of the previous owner of the business. In August or September 2021, Mr. Dunger left the 2002 Maxima with respondent to diagnose and repair an intermittent rattling sound that occurred when the vehicle was driven. Respondent agreed to work on the 2002 Maxima, with the cost of any repairs applied towards the amount respondent still owed for the purchase of the business. Respondent worked on the 2002 Maxima during breaks and down time at the station.

30. Respondent testified that diagnosing the cause of the problem with the 2002 Maxima took a long time, especially because it was an intermittent problem that only occurred when the vehicle was being driven. Respondent attempted to replicate the problem by placing the 2002 Maxima on the BAR-97 dynamometer to simulate

driving conditions. Respondent testified he used a wireless OBDII connector. Respondent testified he never performed a smog inspection while the 2002 Maxima was on the dynamometer. He would move the 2002 Maxima off the dynamometer before starting a smog inspection of another vehicle. Respondent explained, due to his OBDII connector being wireless, he did not notice it was still plugged into the 2002 Maxima when he moved the Maxima off the dynamometer to do a smog inspection of another vehicle. Respondent completed the repair of the 2002 Maxima in April 2022, and the vehicle is no longer at his station.

31. Respondent presented a letter dated November 8, 2022, by Thomas Dunger regarding the repairs to the Maxima (Exh. E) and an invoice for the parts ordered from Rock Auto for the repairs. (Exh. B.) In his letter, Mr. Dunger wrote, in part, that the problem with the 2002 Maxima “happened between second and third gear so it was hard to duplicate, so the vehicle was placed on the dynamometer [*sic*] many times to try to replicate the noise. I also certify that the vehicle was left at the shop from mid August 2021 through mid September 2021 to slowly or during [respondent’s] free time to work on the issue and try to solve the problem, [and] finally the issue was diagnosed to be a spring broken on the clutch plate and because of lack of funds the issue was not fixed until April 2022 for which there is documentation for the part ordered on the internet at Rock Auto. [Respondent] never charged me for labor since I have known [respondent] for quite a while and he worked on the car in conjunction with my son Tim.” (Exh. E.)

32. Respondent denied he intentionally plugged the OBDII connector into the 2002 Maxima to fraudulently certify the subject vehicles. He characterized his failure to disconnect the 2002 Maxima from the BAR-97 as inadvertent and negligent. He noted the emission readings for the subject vehicles indicate they could not have

been taken from the same 2002 Maxima. If they had been, the emissions numbers should be the same for HC, CO, CO₂, and NO for all the subject vehicles; they are not. (E.g. compare Exhibits 5 and 6.)

33. Respondent denied that he intentionally left the OBDII connector plugged into the 2002 Maxima to fraudulently certify the 10 subject vehicles. He characterized his failure to disconnect the 2002 Maxima from the BAR-97 as inadvertent and negligent. Respondent is aware he is required to perform proper smog inspections. He was unaware of the data showing the subject vehicles were transmitting the P1800 code. The BAR-97 does not notify the inspector of the OBDII data retrieved from a vehicle during a smog inspection.

34. Respondent, in testimony, asserted the data transmitting the P1800 code for the subject vehicles may have resulted from problems he was having with his BAR-97. He presented a report by Opus Inspection that listed all of the service repair calls he made for his BAR-97. (Exh. C.) Respondent assertion was not persuasive. Notably, respondent did not mention to Mr. Koch he was having any problems with his BAR-97 during the September 2, 2021 station inspection. Mr. Koch's testimony at hearing convincingly established the service repair calls listed on the Opus Inspection report had nothing to do with problems involving the OBDII system.

35. During his testimony, respondent testified he would be willing to take any training courses the Bureau recommends. For example, respondent acknowledged he is not good at keeping paperwork and feels he would benefit from BAR's training class on paperwork. Respondent also expressed he is willing to comply with any terms of probation required by the Bureau.

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36. Respondent presented 16 character reference letters from customers, friends, acquaintances, former co-workers, and a former employer. (Exh. H.) In the letters, respondent is generally described as an honest, fair, upfront, conscientious, and trustworthy mechanic and smog inspector, with many of the writers noting they have recommended respondent to their friends and family.

37. In a letter dated February 6, 2023, Ariel Verna, General Manager of World Motors Inc., wrote, in part: "Ever since I met [respondent], he has always being [*sí*] up front and truthful with his job. I have brought hundreds of vehicles to his location to be smog, including personal vehicles. In the event that a vehicle has not passed, [respondent] [h]ad advised me to take care of any issues it may had, before we can retest it. Due to his honesty, I have also recommended [respondent] to my clients for the smog checks. I can honestly say that [respondent] is sincere at his work and I will not hesitate to continue to recommend [respondent] to my clients." (Exh. H, p. B46.)

38. In a letter dated February 4, 2023, Armando Davalos, owner of Energy Alternators and Starters, wrote: "I have known [respondent] for a little over two years now. Since he opened his business I have brought multiple vehicles to his location, for either smogs or repairs and I can gladly say that his knowledge and honesty was reason for me to bring back other vehicles. [Respondent] has always shown me the problem and has given me the option for the best economic [*sí*] was to fix an issue, without taking advantage or gain on his part. I have recommended [respondent] to my customers as well as my family for his outstanding knowledge and ethics." (Exh. H, p. B47.)

39. Respondent presented a letter dated February 1, 2023, by Michael Altman, who wrote, part: "I have known [respondent] for more than a decade. He and I met while working for Firestone and he also worked at my automotive shop (Midas in

Corona, CA) as a shop foreman/lead technician overseeing the day-to-day service operations of the mechanics. [Respondent] helped me grow my business from the ground up and I was very fortunate to have him by my side as he is very reliable.” (Exh, H, p. B52.) Mr. Altman further described respondent as “one of the most dedicated, hardworking, and innovative people I’ve had the pleasure of working with in any capacity. He is also compassionate, kind and never misses the opportunity to help others.” (*Ibid.*)

40. In a letter dated February 1, 2023, Sarah Shelley wrote that she has known respondent for nine years, and she has “absolute confidence that he is honest, trustworthy, and a loyal friend and mechanic. [Respondent] is dependable, hardworking, and always illustrates substantial work ethic. [Respondent] has been my mechanic and services my vehicle allowing me to feel safe and confident in his repairs. He [has] continuously proven his trustworthiness, reliability and genuine care to his customers and friends.” (Exh. H, p. B55.)

Cost Recovery

41. The Bureau incurred costs of enforcement in this matter of \$7,853.75. (Exh. 19.) These costs are found to be reasonable.

42. At hearing, respondent testified he is willing to pay any part of the cost recovery amount the court deems appropriate. Respondent requested a payment plan if he is ordered to pay the Bureau’s costs. Respondent noted he currently has only one employee working one day per week.

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LEGAL CONCLUSIONS

Legal Principles

BURDEN AND STANDARD OF PROOF

1. The burden of proof in a licensing disciplinary action is on the party making the charges in an accusation. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789 fn. 9.) In a case that involves an occupational license, complainant bears the burden of proving cause for discipline by a preponderance of the evidence. (*Imports Performance v. Dept. of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-918.) "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.)

AUTOMOTIVE REPAIR ACT

2. The Automotive Repair Act is set forth at Business and Professions Code section 9880 et seq. and relates to ARD registrations.

3. Pursuant to Business and Professions Code section 9884.7, subdivision (a), the Director of Consumer Affairs may suspend, revoke, or place on probation the registration of an automotive repair dealer for certain acts or omissions related to the conduct of the automotive repair dealer's business which are done by the automotive repair dealer or any automotive technician or employee, including but not limited to:

(1) Making or authorizing in any manner or by any means whatever any statement written or oral 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. [¶ . . . ¶] (4) Any other conduct that constitutes fraud.

MOTOR VEHICLE INSPECTION PROGRAM

4. The Motor Vehicle Inspection Program is set forth at Health and Safety Code section 44000 et seq. and relates to smog check station and inspector licenses. The implementing regulations are set forth at California Code of Regulations, title 16 (CCR), section 3340.1 et seq.

5. Health and Safety Code section 44072.2 provides, in pertinent part:

The director may suspend, revoke, or take other disciplinary action against a license as provided in this article if the licensee, or any partner, officer, or director thereof, does any of the following: [¶] (a) Violates any section of this chapter and the regulations adopted pursuant to it, which related to the licensed activities. [¶ . . . ¶] (c) Violates any of the regulations adopted by the director pursuant to this chapter. [¶ . . . ¶] (d) Commits any act involving dishonesty, fraud, or deceit whereby another is injured.

6. Health and Safety Code section 44012 provides, in pertinent part: "The test at the smog check stations shall be performed in accordance with procedures prescribed by the department and may require loaded mode dynamometer testing in enhanced areas, two-speed idle testing, testing utilizing a vehicle's onboard diagnostic system, or other appropriate test procedures as determined by the department in consultation with the state board."

7. Health and Safety Code section 44015, subdivision (b), states: "If a vehicle meets the requirements of Section 44012, a smog check station licensed to issue certificates shall issue a certificate of compliance or a certificate of noncompliance."

8. CCR section 3340.24, subdivision (c), states: "The bureau may suspend or revoke the license of or pursue other legal action against a licensee, if the licensee falsely or fraudulently issues or obtains a certificate of compliance or a certificate of noncompliance."

9. CCR section 3340.35, subdivision (c), states in pertinent part: "A licensed station shall issue a certificate of compliance or noncompliance to the owner or operator of any vehicle that has been inspected in accordance with the procedures specified in section 3340.42 of this article and has all the required emission control equipment and devices installed and functioning correctly."

10. CCR section 3340.42 states, in part: "Smog check inspection methods are prescribed in the Smog Check Manual, referenced by section 3340.45."

ARD Registration

11. First Cause for Discipline: Cause exists to discipline respondent's ARD Registration pursuant to Business and Professions Code section 9884.7, subdivision (a)(1), in that between March 10, 2021 and August 31, 2021, respondent, doing business as Enav Smog Shop, made untrue and misleading statements which he knew, or in the exercise of reasonable care should have known, to be untrue and misleading, by issuing electronic certificates of compliance for each of the subject vehicles, which certified the vehicles had passed inspection and were in compliance with applicable laws and regulations when, in fact, the vehicles had been inspected using the clean

plugging method and, thus, were not tested or inspected as required by Health and Safety Code section 44012. (Factual Findings 7 through 26.)

12. Second Cause for Discipline: Cause exists to discipline respondent's ARD registration pursuant to Business and Professions Code section 9884.7, subdivision (a)(4), in that between March 10, 2021 and August 31, 2021, respondent, doing business as Enav Smog Shop, committed acts which constitute fraud, by issuing electronic certificates of compliance for each of the subject vehicles without first performing bona fide inspections of the emission control devices and systems on those vehicles, and thereby deprived the people of the State of California of the protection afforded by the Motor Vehicle Inspection Program. (Factual Findings 7 through 26.)

13. The preponderance of the evidence established the smog inspections of the subject vehicles were the result of clean plugging, which is fraudulent conduct. Each of the subject vehicles transmitted code P1800, which is not a code associated with any of the subject vehicles and indicated the data retrieved during the smog inspection was retrieved from a different vehicle than the one being tested and certified. Complainant's evidence of clean plugging was persuasive and unrebutted. (Factual Findings 7 through 26.)

Smog Check Station License

14. Third Cause for Discipline: Cause exists to discipline respondent's Smog Check Station License, pursuant to Health and Safety Code section 44072.2, subdivision (a), in that between March 10, 2021, and August 31, 2021, respondent, doing business as Enav Smog Shop, with respect to the subject vehicles, violated the Health and Safety Code, based on Factual Findings 7 through 26, as follows:

- Violated Health and Safety Code section 44012 by failing to ensure that the emission control tests were performed on the subject vehicles in accordance with procedures prescribed by the department.
- Violated Health and Safety Code section 44015, subdivision (b), by issuing electronic smog certificates of compliance for the subject vehicles without properly testing and inspecting the vehicles to determine if they were in compliance with Health and Safety Code section 44012.
- Violated Health and Safety Code section 44059 by willfully making false statements or entries for the electronic smog certificates of compliance by certifying that the subject vehicles had been inspected as required when, in fact, they had not.

15. Fourth Cause for Discipline: Cause exists to discipline respondent's Smog Check Station License, pursuant to Health and Safety Code section 44072.2, subdivision (c), in that between March 10, 2021, and August 31, 2021, respondent, doing business as Enav Smoke Shop, with respect to the subject vehicles, violated the CCR, based on Factual Findings 7 through 26, as follows:

- Violated CCR section 3340.24, subdivision (c), by falsely or fraudulently issuing electronic smog certificates of compliance without performing bona fide inspections of the emission control devices and systems on those vehicles as required by Health and Safety Code section 44012.
- Violated CCR section 3340.35, subdivision (c), by issuing certificates of compliance even though the vehicles had not been properly inspected.

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- Violated CCR section 3340.42 by failing to conduct the required smog tests and inspections in accordance with the Bureau's specifications.

16. Fifth Cause for Discipline: Cause exists to discipline respondent's Smog Check Station License, pursuant to Health and Safety Code sections 44072.2, subdivision (d), and 44072.10, subdivision (c), in that between March 10, 2021, and August 31, 2021, respondent, doing business as Enav Smog Shop, committed acts involving dishonesty, fraud or deceit whereby another was injured, by issuing electronic smog certificates of compliance for the 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, based on Factual Findings 7 through 26.

Smog Check Inspector and Repair Technician Licenses

17. Sixth Cause for Discipline: Cause exists to discipline respondent's Smog Check Inspector License and Smog Check Repair Technician License, pursuant to Health and Safety Code section 44072.2, subdivision (a), in that between March 10, 2021, and August 31, 2021, respondent failed to perform the emission control tests on the subject vehicles in accordance with procedures prescribed by the department, based on Factual Findings 7 through 26.

18. Seventh Cause for Discipline: Cause exists to discipline respondent's Smog Check Inspector License and Smog Check Repair Technician License, pursuant to Health and Safety Code section 44072.2, subdivision (c), in that respondent, with respect to the subject vehicles, violated the CCR, based on Factual Findings 7 through 26, as follows:

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- Violated CCR section 3340.24, subdivision (c), by falsely or fraudulently issuing electronic smog certificates of compliance without performing bona fide inspections of the emission control devices and systems on those vehicles as required by Health and Safety Code section 44012.
- Violated CCR section 3340.30, subdivision (c), by failing to inspect and test the subject vehicles in accordance with Health and Safety Code section 44012.
- Violated CCR section 3340.41, subdivision (c), by knowingly entering false information into the BAR-97 Emissions Inspection System.
- Violated CCR section 3340.42 by failing to conduct the smog tests and inspections in accordance with the Bureau's specifications.

19. Eighth Cause for Discipline: Cause exists to discipline respondent's Smog Check Inspector License and Smog Check Repair Technician License, pursuant to Health and Safety Code sections 44072.2, subdivision (d), and 44072.10, subdivision (c), in that between March 10, 2021, and August 31, 2021, respondent committed acts involving dishonesty, fraud or deceit whereby another was injured, by issuing electronic smog certificates of compliance for the 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, based on Factual Findings 7 through 26.

Level of Discipline

20. Administrative proceedings to revoke, suspend or impose discipline on a professional or occupational license are noncriminal and nonpenal; they are not

intended to punish the licensee, but rather to protect the public. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 785-786.) 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.) Protection of the public is the Bureau's highest priority in exercising its licensing, regulatory, and disciplinary functions. (Bus. & Prof. Code, § 9880.3.)

21. The Bureau's "Guidelines for Disciplinary Orders and Terms and Conditions of Probation (Rev. June 2021)" (Guidelines), which are incorporated by reference in the Bureau's regulations at CCR section 3395.4. The Guidelines have been considered. The Guidelines include recommended levels of discipline for various violations. For the specific violations alleged against respondent in this matter, the recommended probation periods range from two to five years.

22. The Guidelines also contain factors in aggravation and factors in mitigation that are to be considered in determining the level of discipline to be imposed in a given case. (Guidelines, pp. 1-2.) The factors in aggravation include prior warnings from BAR; prior office conferences with BAR; prior history of citations; prior history of formal disciplinary action; evidence that the unlawful act was of a pattern of practice; and evidence of any other conduct which constitutes fraud or gross negligence. The factors in mitigation include the absence of prior disciplinary action, evidence that the violation was not part of a pattern or practice, evidence of substantial measures to correct its business practices and/or business operations so as to minimize the likelihood of recurrence of the violation; and evidence of any other conduct which could constitute a factor in mitigation.

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23. In this case, the appropriate level of discipline is a stayed revocation with five years' probation against respondent's registration and licenses under the terms and conditions set forth in the Order below.

24. The Bureau's review of data revealed the smog inspections of the subject vehicles were the result of clean plugging, which is fraudulent conduct. However, respondent presented sufficient evidence the P1800 code was transmitted due to his negligence and inadvertence in leaving the OBDII connector plugged into the 2022 Maxima when he performed inspections of the subject vehicles. Respondent had been using the BAR-97 to diagnose the problem with the 2022 Maxima. Once he was informed by Mr. Koch of the transmission of the P1800 code, respondent stopped using his BAR-97 for diagnostic purposes. Mr. Koch confirmed that, after the station inspection in September 2021, transmission of the P1800 code from respondent's station stopped.

25. The smog inspections of the subject vehicles were performed by respondent between March 10, 2021, and August 31, 2021. At that time, respondent had only been operating his smog station for eight months since July 2020. Respondent had not worked as a smog inspector or performed smog inspections prior to opening his own business. Thus, he was not aware of clean plugging despite his many years of employment as a mechanic. Respondent's character reference letters attested to his honesty and trustworthiness in conducting business as a mechanic and smog inspector. No evidence was presented of respondent having any history of prior discipline with the Bureau.

26. The Order below includes the Bureau's standard terms and conditions of probation, as well as the optional condition for training courses applicable to smog technicians and to registrants, and the optional condition prohibiting respondent,

during the period of probation, from inspecting vehicles requiring certification at a STAR station. The training courses will address respondent's deficiencies in performing smog inspections and maintaining required paperwork.

Cost Recovery

27. In any order issued in resolution of a disciplinary proceeding, at the request of the Bureau, the ALJ may direct the licentiate found to have committed a violation to pay a sum not to exceed the reasonable costs of investigation and enforcement. A certified copy of the actual costs, signed by the Bureau or its designated representative, is prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General. (Bus. & Prof. Code § 125.3, subds. (a), (c); see Cal. Code Regs., tit. 1, § 1042, subd. (b).)

28. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and Professions Code section 125.3. Those factors include: (1) the licentiate's success in getting the charges dismissed or reduced; (2) the licentiate's subjective good faith belief in the merits of his or her position; (3) whether the licentiate raised a colorable challenge to the proposed discipline; (4) the licentiate's financial ability to pay; and (5) whether the scope of the investigation was appropriate in light of the alleged misconduct. (*Zuckerman v. Board of Chiropractic Examiners, supra*, 29 Cal.4th at p. 45.)

29. The declarations signed with the attached statements constitute prima facie evidence of the reasonableness of the costs incurred for prosecution. (Bus. &

Prof. Code, § 125.3, subd. (c).) Respondent failed to rebut the reasonableness of the costs, or to establish sufficient cause to not award these costs to complainant. Therefore, cause exists, pursuant to Business and Professions Code section 125.3, to order respondent to pay the Bureau \$7,853.75 for the reasonable costs of the investigation and enforcement of this matter. (Factual Findings 40 and 41.)

ORDER

IT IS HEREBY ORDERED that ARD Registration No. ARD 297403 and Smog Check Station License No. RC 297403 issued to Erick Antonio Navarro (Respondent) doing business as Enav Smog Shop, and any other ARD Registrations issued to Respondent, and Smog Check Inspector License No. EO 642472 and Smog Check Repair Technician License No. EI 642472 issued to Respondent individually, and any additional license issued under Chapter 5 of Part 6 of Division 26 of the Health and Safety Code in Respondent's name, are all revoked; however, the revocations are stayed, and Respondent is placed on probation for five years on the terms and conditions set forth below.

1. Obey All Laws

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

2. Quarterly Reporting

During the period of probation, Respondent shall report either by personal appearance or in writing as determined by BAR on a schedule set by BAR, but no more

frequently than once each calendar quarter, on the methods used and success achieved in maintaining compliance with the terms and conditions of probation.

3. Reporting 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 a Valid License

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

active registration and/or license during the period of probation shall also constitute a violation of probation.

8. Cost Recovery

Respondent shall pay the Bureau of Automotive Repair \$7,853.75 for the reasonable costs of the investigation and enforcement of Case No. 79/21-9418. Respondent shall make such payment as directed by BAR. 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. 79/21-9418. Any order for payment of cost recovery shall remain in effect whether or not probation is tolled. Probation shall not terminate until full cost recovery payment has been made. BAR reserves the right to pursue any other lawful measures in collecting on the costs ordered and past due, in addition to taking action based upon the violation of probation.

9. Completion of Probation

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

10. License Surrender

Following the effective date of a decision that orders a stay of invalidation or revocation, if Respondent ceases business operations or is otherwise unable to satisfy

the terms and conditions of probation, Respondent may request that the stay be vacated. Such request shall be made in writing to BAR. The Director and the BAR Chief reserve the right to evaluate 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.

11. Training Courses

a) 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.

b) Within 60 days of the effective date of a decision, Respondent shall attend a Write It Right presentation provided by a Bureau representative at a location, date, and time determined by the Bureau.

12. Restriction on Inspection of Vehicles Requiring Smog Check Certification at a STAR Station.

Respondent shall not be permitted to issue certificates of compliance for any vehicles requiring Smog Check certification at a STAR station for their biennial Smog Check pursuant to Section 44010.5 or 44014.7 under the Health and Safety Code.

DATE: 03/13/2023

Erlinda G. Shrenger
Erlinda G. Shrenger (Mar 13, 2023 10:38 PDT)

ERLINDA G. SHRENGER

Administrative Law Judge

Office of Administrative Hearings