

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

In the Matter of the Accusation Against:

MANTECA TEST ONLY CENTER
ZAKARIA SULIEMAN SHABBAR, Owner
Manteca, California 95336
Automotive Repair Dealer Registration
No. ARD 250011
Smog Check, Test Only, Station License
No. TC 250011

Case No. 79/10-73

OAH No. 2010080022

and

ZAKARIA SULIEMAN SHABBAR
Manteca, California 95336
Advanced Emission Specialist Technician
License No. EA 150186

Respondent.

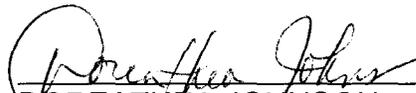
DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby accepted and adopted by the Director of Consumer Affairs as the Decision in the above-entitled matter, except that, pursuant to Government Code section 11517(c)(2)(C), the typographical errors on the following pages of the Proposed Decision are corrected as follows:

1. Page 1, caption, the "Smog Check, Test Only Station License Number TC 25001" is corrected to read "Smog Check, Test Only, Station License Number TC 250011."
2. Page 10, paragraph 27, first line, the word "is" after the phrase "Exhibit A" is deleted.
3. Page 20, paragraph 18, last line, the code section number "9887.4" is corrected to read "9884.7."
4. Page 28, paragraph 29, first line, the code section number "9984.7" is corrected to read "9884.7."
5. Page 28, paragraph 30, third line, the code section number "9984.7" is corrected to read "9884.7."

This Decision shall become effective 11/25/11.

DATED: October 21, 2011


DOREATHEA JOHNSON
Deputy Director, Legal Affairs
Department of Consumer Affairs

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In the Matter of the Accusation Against:

MANTECA TEST ONLY CENTER
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Smog Check, Test Only Station License
Number TC 25001;
ARD License Number ARD 250011;

and

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Advanced Emission Specialist Technician
License No. EA 150186

Appellant.

Case No. 79/10-73

OAH No. 2010080022

PROPOSED DECISION

Administrative Law Judge Stephen J. Smith, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California on January 31, 2011.

Patrick M. Kenady, Deputy Attorney General, represented the Bureau of Automotive Repair.

Zakaria Shabbar, Owner, Manteca Test Only Center, and was represented by Michael B. Levin, Attorney at Law.

The matter was submitted on January 31, 2011.

FACTUAL FINDINGS

1. Sherry Mehl, acting in her official capacity only as the Chief of the Bureau of Automotive Repair (the Bureau), Department of Consumer Affairs, State of California, made the charges and allegations in the Accusation. The Accusation was filed and served on respondent on May 17, 2010.

2. Respondent timely filed a Notice of Defense to the Accusation and requested an evidentiary hearing.

3. The Bureau's official records as of December 15, 2010, show that the Bureau issued respondent Advanced Emission Specialist License (Technician license) number EA 150186 in 2005. Respondent's Technician license expires on March 31, 2011, unless renewed.

4. The Bureau also issued respondent, as Owner of Manteca Test Only Center, Automotive Repair Dealer (ARD) license number ARD 250011 in 2007, and Smog Check Test Only Station license number TC 250011 on June 7, 2007. The ARD and Test Only Station licenses both expire on March 31, 2011, unless renewed.

Previous Citations

5. The Bureau has issued several Citations to respondent previously. These Citations are as follows:

A. The Bureau issued a Citation to respondent on October 18, 2005. The Citation was issued against respondent's Advanced Emission Specialist Technician License alleging violations of Health and Safety Code section 44032, and California Code of Regulations (CCR), title 16 (Regulations), sections 3340.30, subdivision (a), and 3340.42. The Citation was issued because respondent issued a Certificate of Compliance on October 18, 2005, to a Bureau vehicle with a missing air injection system. Respondent admitted the allegations of the Citation. As a result of the Citation, respondent was required to attend an eight-hour training course. Respondent complied with the Citation and completed the training course on or before December 13, 2005.

B.1. The Bureau issued two Citations to respondent on September 9, 2008. The first Citation was issued against respondent's Advanced Emission Specialist Technician License alleging violations of Health and Safety Code section 44032, and Regulations sections 3340.30, subdivision (a) and 3340.42. The Citation was issued because respondent issued a Certificate of Compliance on September 9, 2008, to a Bureau vehicle with a missing PCV system.

B.2. The Bureau issued a second Citation to respondent for the same violation on the same date, September 9, 2008, for the same violations set forth immediately above, and for the same reason. The second Citation differed from the first only in that it was issued against respondent's Test Station license.

B.3. Respondent admitted the allegations of the two September 9, 2008 Citations. The Bureau assessed respondent a civil penalty of \$500. Respondent complied with the Citations and paid the civil penalty on October 14, 2008.

C. The Bureau issued two Citations to respondent on December 17, 2008. The first Citation was issued against respondent's Advanced Emission Specialist Technician License alleging violations of Health and Safety Code section 44032, and Regulations sections 3340.30, subdivision (a) and 3340.42. The Citation was issued because respondent issued a Certificate of Compliance on December 17, 2008, to a Bureau vehicle with a missing thermostatic air cleaner hot air tube.

C.1. The Bureau issued a second Citation to respondent for the same violation on the same date, December 17, 2008, for the same violations as set forth immediately above, and for the same reason. The second Citation differed from the first only in that it was issued against respondent's Test Station license.

C.2. Respondent admitted the allegations of the two December 17, 2008 Citations. The Bureau required respondent to attend a 16 hour training course. Respondent complied with the Citations and completed the training course on February 12, 2009.

D. The Bureau issued two Citations to respondent on April 29, 2009. The first Citation was issued against respondent's Advanced Emission Specialist Technician License alleging violations of Health and Safety Code section 44032, and Regulation sections 3340.30, subdivision (a) and section 3340.42. The Citation was issued because respondent issued a Certificate of Compliance on April 29, 2009, to a Bureau vehicle with a missing fuel evaporative storage canister.

D.1. The Bureau issued a second Citation to respondent for the same violation on the same date, April 29, 2009, for the violations as set forth immediately above, and for the same reason. The second Citation differed from the first only in that it was issued against respondent's Test Station license.

D.2. Respondent admitted the allegations of the two April 29, 2009 Citations. The Bureau required respondent to pay a civil penalty of \$2000 and to attend a clean air course. The content and curriculum of this course and its requirements were not disclosed in the evidence. Respondent complied with the Citations, paid the civil penalty and completed the training course on June 28, 2009.

The September 3, 2009 Undercover Run

6. Most of the basic underlying facts as alleged in the Accusation are not in dispute. Inspectors in the employ of the Bureau conducted an undercover operation at respondent's smog test station located in Manteca, California, using a 2004 Dodge Neon passenger car on September 3, 2009. The Bureau's inspector retrieved the Dodge Neon vehicle from the Bureau's automotive laboratory, confirmed that it was equipped as set forth in detail below, and drove it to Manteca to the vicinity of respondent's Smog Test Only station. The Dodge Neon vehicle was then released to an undercover operator to obtain a smog check inspection at respondent's station. The undercover operator presented the Dodge Neon to respondent and requested a smog inspection. The undercover operator testified respondent was cordial and professional.

Visual Inspection

7. Respondent performed a comprehensive visual inspection of the vehicle as part of the smog inspection. The comprehensive visual inspection requires the inspector to visually inspect the engine for the presence of 16 enumerated categories of emissions controls components and systems, and one general, catch-all category, and confirm that the various components are present, functioning properly and have not been tampered with or modified in a fashion that might affect the functioning of the emissions control system. All of the essential and legally required components of the emissions control systems a smog technician might encounter during a smog check are identified individually on the visual portion BAR 97 check sheet/prompt list the smog check technician must use, in coordination with the under hood schematic diagram of the emissions control system of the vehicle required to be installed in every California vehicle, in order to perform the visual portion of the smog inspection. The final category of prompt on the check sheet is that of "other emission related components." The sixteen enumerated essential components the inspector must look for and visually confirm are present during the visual portion of the smog inspection include such items as the PCV system, the air cleaner, the fuel injection system, and vacuum line and wiring connections to sensors and switches.

8. It was assumed by both parties that the seventeenth and rather vaguely defined category, "Other equipment" requires the inspector to identify and confirm, among other things, that if the vehicle being inspected has "aftermarket" (not original manufacturer equipment (OEM)) parts installed that modify the vehicle's emissions control system; that the inspector is required to identify the aftermarket part and confirm whether that part can be lawfully installed on the vehicle. Whether any given aftermarket part installed on a vehicle's emissions control system is lawful is a function of whether the part has been approved by the Air Resources Board by "EO," meaning, according to the testimony of one of the Bureau's representatives, "an Executive Order." If the aftermarket part is approved by the ARB as a modification to an emissions control system, the aftermarket part is given an EO number.

9. Bureau witnesses confirmed in their testimony that if an aftermarket part is seen on a vehicle's emissions control system during a smog inspection, and the inspector sees an EO number somewhere underneath the hood and in the vehicle's engine compartment, that it is reasonable for the technician inspector to assume that the aftermarket part is lawful as having been approved by the ARB. If the inspector sees an aftermarket part on the emissions control system of the vehicle being inspected, and no EO number can be found under hood that would presumptively validate the presence of the aftermarket part on the emissions control system of the vehicle, the Bureau witnesses testified that the inspector is required to input "M," meaning "Modified" in the "other emissions control equipment" category on the visual inspection portion of the BAR 97 inspection check sheet. If no EO number can be found, and "M" is entered in the visual portion of the inspection, the technician inspector is required to fail the vehicle on the visual portion of the smog inspection as the vehicle's emissions control system is considered "tampered" due to the presence of the unapproved aftermarket modification of the emissions control system.

10. During his inspection of the Bureau's undercover vehicle, respondent correctly identified the existence of the aftermarket exhaust headers (below) on the vehicle and correctly concluded the exhaust headers were aftermarket parts that potentially modified the vehicle's emissions control system. He noted that the aftermarket exhaust headers did not have an EO number stamped on them. Respondent then looked for and found an EO number under the vehicle's hood near but not on the aftermarket headers. He found a sticker with an EO number on the sticker, D-269-31. The sticker bearing the EO number was not attached to an aftermarket part. There was no dispute that this number is a bona fide ARB EO number.

11. Respondent concluded that the EO number on the sticker that he located in the vehicle's engine compartment correlated to the aftermarket exhaust headers that he found when inspecting the vehicle's emissions control system. Since he did not see any other aftermarket parts under the hood to which the EO number might correlate, he concluded that the EO number on the sticker correlated to the only aftermarket parts he found on the vehicle's emissions control system, the aftermarket exhaust headers. Satisfied that the EO number on the sticker validated the lawful presence of the aftermarket exhaust headers, respondent affirmatively entered "Pass" into the BAR 97 test analyzer computer for the "Other emission related components" prompt during his visual inspection of the undercover vehicle. Such an entry by the smog technician confirms that the technician has seen the aftermarket part and confirmed in some fashion that it is approved.

12. Respondent also performed functional tests and idle and 15 mile an hour loaded tailpipe emissions tests on the vehicle, as part of the inspection of the Bureau undercover vehicle. Both at idle and at 15 mph, the vehicle's tailpipe emissions were well within the permissible range, confirming that this vehicle with the aftermarket exhaust headers in place, did not emit any impermissible quantity of exhaust pollutants. Respondent's tailpipe emissions test results were identical to that of the same tests run by the Bureau's technical specialists on the vehicle while it was still in the Bureau's automotive laboratory before it was released to use in this undercover operation. The presence of these individual aftermarket exhaust headers on this vehicle, regardless of their status with the

ARB (which may well be pre-ARB testing of these exhaust headers) demonstrates that these particular headers have no material negative impact upon this vehicle's discharge of pollutants in its tailpipe emissions, and thus no material negative impact upon California air quality or the health, safety and welfare of Californians who must breathe the air.

13. Respondent concluded that the vehicle passed the smog inspection and issued an electronic Certificate of Compliance for the vehicle. A Certificate of Compliance is a statement made by a licensed smog technician under penalty of perjury certifying that the vehicle fully complies with all applicable California emissions controls requirements.

The Undercover Vehicle's Aftermarket Emissions Systems Equipment

14. The Dodge Neon used in the undercover operation at issue (the undercover vehicle) was equipped with "non-approved aftermarket exhaust headers." It was not clear in the evidence when the aftermarket exhaust headers were added to the vehicle, but when the Bureau's in-house shop technician specialist inspected the vehicle before it was used in the undercover operation at issue in this matter, the technician specialist confirmed the presence of the aftermarket exhaust headers on the vehicle.

15. The Bureau technical specialist testified that the particular aftermarket exhaust headers at issue that he saw on the undercover vehicle were manufactured by OBX (the OBX exhaust headers). He testified that he knew this because the manufacturer's initials "OBX" were stamped on a plate that was welded onto each header. He noted that the OBX exhaust headers did not have an EO number stamped on them, nor did they have a sticker with an EO number on it affixed to either one of the headers. He confirmed during questioning that these OBX exhaust headers and identifying information on the headers had become badly darkened and discolored due to the heat from the engine and the exhaust gases that pass through the headers, making identifying information on the headers rather difficult to read.

16. The Bureau technician testified that exhaust headers are a part a vehicle's exhaust manifold system. He offered no further explanation. He did explain that car owners purchase and install aftermarket exhaust headers in order to improve the performance of that part over the original manufacturer's equipment (OEM). The purpose of the installation of the aftermarket exhaust headers to replace the OEM headers on the vehicle at issue in this matter, or on any vehicle, that the aftermarket exhaust headers generally cool engine exhaust more efficiently than the OEM part as the exhaust is released from the engine. This cooling process helps the vehicle run cooler, more efficiently, and with more power. The Bureau technician did not explain, nor did any other witness, how the substitution of aftermarket exhaust headers for the OEM exhaust headers has any impact upon a vehicle's tailpipe emissions, or the amount of gases the vehicle emits into the air in its exhaust. Based on both the Bureau's in-technical laboratory tailpipe emissions testing of the undercover vehicle before the undercover run, and respondent's similar testing, it appears that the presence of the OBX aftermarket exhaust headers on the undercover vehicle has at best a neutral and noncontributory impact upon tailpipe emissions, if not a factor in actually reducing the amount of harmful gases leaving the tailpipe.

17. The Bureau technician further explained that having aftermarket exhaust headers on a passenger vehicle is not necessarily a violation of California emissions controls law, and there are numerous such aftermarket exhaust headers produced by a variety of manufacturers that have been tested and approved. The Bureau technical specialist testified that, in order to be in conformity with California law¹ as a permissible modification to a vehicle's OEM configured emissions control system, all aftermarket parts, including, the aftermarket headers at issue here, must be tested and approved by the Air Resources Board (ARB). If the ARB approves the header, the ARB assigns the header an EO number. The assigned EO number is contained in an ARB database that a smog technician can access and check to determine whether the part is ARB approved.²

18. The Bureau technician explained that the EO number is often, but not always, stamped on the aftermarket part itself. Otherwise, the EO number is found on a sticker that is mounted elsewhere in the engine compartment. The location of such EO identification stickers can vary widely; from on the aftermarket part itself, to a location considerably away from where the part is actually installed on the vehicle. The technician explained that the sticker containing the EO number for the aftermarket part can be found anywhere under the hood, even next to the under hood schematic label identifying the configuration and components of the emissions control system of the vehicle generally.

19. The Bureau technician confirmed that the OEX exhaust headers that he saw on this Bureau undercover vehicle did not have EO numbers stamped on them. He testified that when he saw these OEX exhaust headers on this Dodge Neon being prepared for use in this undercover run on respondent's smog test station, he accessed the ARB database on his Bureau computer and confirmed that the ARB had not approved the OEX headers, nor had the ARB issued these OEX aftermarket exhaust headers an EO number.³

¹ There was no citation to any legal authority in any of the Bureau representatives' testimonies or in the Accusation in support of these claims.

² This, of course, assumes that the technician has immediate access to a computer and the Internet.

³ The Bureau technical specialist testified that ARB engineers customarily issued EO numbers to aftermarket parts if they are tested and determined that they have no material impact on tailpipe emissions. Both his own tests in the Bureau shop before the undercover run, and respondent's tests confirmed that these OEX aftermarket exhaust headers had no material impact on tailpipe emissions of the Bureau undercover vehicle. From these facts, it is fair to infer that either the ARB has not yet tested the OEX exhaust headers that were on this Bureau undercover vehicle at the time respondent inspected it, or, that if such tests have been conducted by the ARB, the results have not been published yet or that the ARB has not gotten around to issuing an EO number to OEX for this particular part.

A Second Aftermarket Part

20. A second aftermarket part also existed on this Dodge Neon used in the undercover run. The air intake on this vehicle was also an aftermarket part. Like the OEX headers, the aftermarket air intake on the Dodge Neon did not have an EO number stamped on the part itself. The EO number was printed on a sticker that was mounted on the radiator, which was undisputedly not part of the vehicle's emissions control system. The radiator is located at the very front of the engine compartment and is part of the vehicle's cooling system. The aftermarket air intake that existed on the Dodge Neon at the time the Bureau used this vehicle for the undercover run and respondent inspected is located under hood mid-engine. The aftermarket air intake was manufactured by K and N Engineering. The ARB has tested and approved this particular aftermarket air intake and issued K and N Engineering an EO number, D-269-31, the same number that respondent wrote on the invoice when he saw the EO number on the sticker mounted on the radiator during the course of his inspection.

A Candid Acknowledgment

21. Respondent testified that during the course of the inspection, he saw the exhaust headers and immediately recognized them as aftermarket parts. He knew that aftermarket parts could possibly constitute an illegal or improper modification of the Dodge Neon's emissions control system, so he began to look for an EO number as a part of his inspection. He found the EO number D-269-31 on a sticker in the engine compartment and believed that the sticker correlated to the aftermarket exhaust headers. Despite the fact that he had already heard the Bureau's technician testify that the sticker was located on the radiator in the engine compartment, respondent did not shape his testimony to what he had already heard, but acknowledged that he simply did not remember where he saw the EO number; only that he did in fact see it, that the EO number was not attached to any aftermarket part, and he wrote the number down as soon as he saw it for fear that he might forget it or lose it, or that he might be faulted for overlooking the presence of the aftermarket exhaust headers as a possibly unlawful modification of the Dodge Neon's emissions control system. He was not in a position to be able to access the ARB database and determine whether the EO number on the sticker correlated to the aftermarket exhaust headers because he did not have a computer in his shop at the time, or immediate access to one. At the time of this inspection, respondent's only access to a computer was at the local public library. He was not in a position to leave the vehicle and the presumably legitimate customer seeking a smog inspection standing by while he went to the library to check the EO number.

22. Respondent candidly acknowledged that he did not notice that the air intake was also an aftermarket part. He did note, and the Bureau representatives confirmed, that the aftermarket exhaust headers' EO number was not stamped on the exhaust headers, nor was the EO sticker attached to the headers.

23. The evidence was in conflict regarding the relative proximity of the EO sticker mounted on the radiator to the exhaust headers and/or the air intake. What was clear was that the perception of the Bureau's technical expert as to what constituted within the "immediate proximity" of the aftermarket part was the product of his exceptionally high level of technical expertise and the fact that he already knew about the existence of both aftermarket parts before he came to the conclusion and made the claim that the sticker was within the immediate proximity of the air intake. Looking at a photograph in evidence of the engine compartment of this particular vehicle at issue, this technical expert's "immediate proximity" is certainly not that of all observers, even those with some reasonable level of automotive familiarity. An EO sticker placed on the radiator is no more in the immediate proximity of the air intake than it is to the exhaust headers, and a good argument can be made that the sticker is actually closer to the headers than it is to the air intake.

24. The Bureau failed to prove that the location of the EO sticker for the air intake mounted on the radiator in this vehicle was in such a position that it was unreasonable for respondent to correlate the EO sticker to the aftermarket exhaust headers. Not noticing that the air intake was an aftermarket part, respondent had no other information at the time of the inspection that would conflict with his perception that the EO number correlated to the aftermarket exhaust headers or put him on notice that his correlation of the EO number in the aftermarket headers might not be reasonable. Respondent testified that he saw one aftermarket part and one EO number that was not on or in the immediate neighborhood of an aftermarket part, other than the aftermarket exhaust headers, and thus assumed that the EO number correlated to the only aftermarket part he noticed, the aftermarket exhaust headers. Under the circumstances, this assumption was reasonable, albeit it was ultimately demonstrated to be incorrect, after considerable additional extrinsic evidence was brought to light.

Credibility

25. The Bureau sought to impeach respondent's claim that he wrote the EO number D-262-31 on the invoice at the time that he performed the inspection September 3, 2009. The effort failed. Respondent's testimony was both credible and persuasive standing on its own, considering what respondent said, and in the manner in which he presented himself, answered questions, and exhibited in his demeanor while testifying and in his conduct during the entire proceeding. Respondent's testimony additionally was validated by extrinsic corroboration in some of the documentary evidence, and with the application of some common sense.

26. At the conclusion of the smog inspection/undercover run, respondent provided the Bureau's undercover operator with an invoice. There are different copies of the invoice in evidence; Exhibit 5, Exhibit A and Exhibit B. Exhibit 5 does not have the undercover operator's signature nor does it have an ARB EO number hand written on it. The Bureau rested its claim that respondent's testimony was not credible entirely upon this document, as it attempted to lay a foundation that this was the only document that respondent provided to the undercover operator at the conclusion of the inspection, and it does not have the ARB EO

number written on it. This document failed to support the Bureau's position, as the undercover operator testified that, although she did not remember a lot about the inspection, she did recall signing the invoice, and the Exhibit 5 invoice does not contain her signature

27. Exhibit A contains all the data found on Exhibit 5, but differs from Exhibit 5 in that Exhibit A does have the undercover operator's signature on it. Exhibit A also has the ARB EO number D-269-31 that respondent testified he wrote on the invoice when he saw the EO number in the engine compartment of the Bureau Dodge Neon under the hood when he was performing the inspection. Exhibit B is identical to Exhibit A, bearing the undercover operator's signature attesting to the fact that she has received and paid for the inspection, but does not contain the ARB EO number.

28. Respondent credibly explained the conflict between Exhibit 5, Exhibit A and Exhibit B by reporting that his custom and practice is to prepare multiple copies of the invoice following all inspections, return a signed copy to the customer, and retain one with his notes for his permanent file records. In this instance, Exhibit A, respondent's file copy, has the ARB EO number on it. He gave a copy of Exhibit B to the undercover operator.

29. Stepping back from the dispute just slightly, it is apparent that what respondent said about how he obtained the EO number and when he wrote it on his invoice record of the inspection is the only version of the facts that makes any sense. Once the Bureau vehicle was returned to the undercover operator following the inspection, it was quite apparent that respondent would never see that EO number again. Absent writing down the EO number at the time respondent testified he saw it, there was no other way that respondent could obtain this EO number. Respondent readily acknowledged that he did not notice that the air intake was an aftermarket part, and thus had no idea who the manufacturer was, and had no possible means available to him of obtaining this EO number by any other source other than the way that he explained in his testimony.

Respondent's Testimony Generally, Mitigation and Rehabilitation

30. As mentioned above, respondent was candid, credible, persuasive and genuine in his presentation. He is quite mindful of what is at stake in this matter, nevertheless, he declined a couple of fruitful opportunities to shape his testimony and downplay his culpability or diminish the gravity of the error he made, or to minimize what he did and failed to do in this inspection. Respondent expressed genuine concern and sincere motivation to continue to learn more technical skills as well as he can and do the best job he can to consistently comply and produce full and complete accuracy in all his inspections as a test station operator. He convincingly demonstrated that he is not the serial violator of the law that the Accusation appears to suggest he is, and that he genuinely intends to continue to make every effort he can to comply with the letter and the spirit of the Motor Vehicle Inspection Program. There was no suggestion in any of the evidence that respondent is unconcerned or careless about his compliance, or that he rushes vehicles through inspections or ignores inspection requirements in order to try to make more money. He is obviously embarrassed about the errors that resulted in the earlier Citations and the lack of technical

expertise and experience that produces the violations. There was no suggestion that respondent's shop present a promising place for a person who seeks to evade the smog check law to obtain an inspection of the vehicle known not to comply. There was no credible or persuasive evidence of fraud, deceptiveness, dishonesty or any intent to deceive the Bureau or the undercover operator in the smog inspection at issue in this matter. Respondent simply made an honest and reasonable mistake. This mistake related to a trap the Bureau set to try to catch respondent certifying a vehicle with a deficit in its emissions system that required a considerable level of technical skill and expertise to fully and correctly follow the trail of the EEO number on the sticker all the way to the end to confirm that it did not belong to the aftermarket exhaust headers. Respondent made it most of the way there, but not quite. In addition, respondent honest mistake had no material impact upon the vehicle's tailpipe emissions.

31. Respondent introduced a letter of support written by the teacher of the Level III Citation remedial classes respondent has taken in order to comply with the requirements of the previous Citations. The instructor's experience with respondent is recent, in that respondent completed his most recent educational requirement in early 2009. Although brief, the contents of the letter are impressive and persuasive. The author is an instructor at TechHelp, a vocational educational and training institution located in Concord, California. The instructor commented that he was very impressed with respondent for several reasons. He observed that respondent was always on time for class, even though he lives a good distance away from Concord. He observed that respondent was attentive in class and asked many relevant questions, and showed great and evident concern about performing his duties competently and lawfully. The instructor noted that respondent was an eager learner and very actively participated in class, asking many relevant questions from which the instructor concluded that respondent was eager to learn, improve and successfully comply with the law. He also noted that respondent continues to call him after the class ended to ask questions and to taint advice in order to help improve his performance. The instructor advocated in his letter that respondent be "given another chance," in that it is the instructor's opinion that respondent is a an honest technician who tries hard to do a good and lawful job, and should be given an additional opportunity to continue to try and improve his performance and compliance.

Costs

32. Certification of the costs of investigation incurred by the Bureau, and costs of enforcement for the services of the Attorney General incurred by the Bureau were made by the Bureau's Program Enforcement Manager and the Deputy Attorney General, respectively, under penalty of perjury and were offered in evidence.⁴ The certifications sets forth total and itemized costs incurred directly by the Bureau in the course of its investigation, and additional costs billed to the Bureau for the services of the Deputy Attorney General and the services of the Attorney General's paralegal.

⁴ Business and Professions Code section 125.3.

33. Costs sought to be recovered by the Bureau for its investigation total \$1716.06, including 21 hours of investigative work, and \$243.50 for "evidence". There is no identification in the declaration of the Bureau's Program Enforcement Manager regarding what this "evidence" is. Since this vehicle was, according to the undercover operator used in at least "two or three" other operations, without more detail, it cannot be ascertained whether these costs are specifically and exclusively assignable to this individual investigation at issue in this matter. Without more specificity as to what this "evidence" is, and whether it was used in other operations, which would require apportionment of the cost recovery to those other actions, it is not reasonable to saddle respondent alone with this cost and pass that cost on to respondent in a cost recovery order. In all other respects, the costs claimed in the Program Manager's declaration are reasonable.

34. The costs sought to be recovered for the services of the Deputy Attorney General total \$2385.00, which consists of \$1785.00 for 10.50 hours of Deputy Attorney General time and work, and five hours for the services of the Deputy Attorney General's paralegal. These costs are reasonable and were not contested.

35. Total costs sought to be recovered are \$4101.06, of which \$3858.06 are reasonable and may be recovered in this action.

LEGAL CONCLUSIONS

1. The burden of proof for all of the allegations made in this matter rests upon the Bureau. "As in ordinary civil actions, the party asserting the affirmative in an administrative hearing has the burden of proof going forward and the burden of persuasion by a preponderance of the evidence."⁵ The Bureau must prove all the allegations made in the Accusation by a preponderance of the evidence. A preponderance of the evidence is that state of the evidence where proof of a fact at issue is more likely than not.⁶ This standard of proof was applied to each and every allegation in the Citation in making the conclusions below.

Legislative Purposes of the Motor Vehicle Inspection Program

2. Health and Safety Code section 44001 provides, in pertinent part, as follows:

(a) The Legislature hereby finds and declares that California has been required, by the amendments enacted to the Clean Air Act in 1990, and by regulations adopted by the Environmental Protection Agency, to enhance California's existing motor vehicle inspection and maintenance program to meet new, more stringent *emission reduction* targets. Therefore, the Legislature declares that

⁵ *McCoy v. Board of Retirement* (1986) 183 Cal.App. 3d 1044, 1051.

⁶ Evidence Code section 115.

the 1994 amendments to this chapter are adopted to implement further improvements in the existing inspection and maintenance program so that California will meet or exceed the new *emission reduction* targets.

(b) The Legislature further finds and declares all of the following:

[¶]...[¶]

(2) Studies show that a minority of motor vehicles produce a disproportionate amount of the *pollution caused by vehicle emissions*. Those vehicles are referred to as gross polluters.

[¶]...[¶]

(A) Acceptance of the shared obligation and personal responsibility required to successfully inspect and maintain millions of motor vehicles. Specifically, that obligation begins with this chapter, and extends through those regulators charged with its implementation and enforcement. Through the enactment of the 1994 amendments to this chapter, the Legislature hereby recognizes and seeks to encourage, through a number of innovative and significant steps, the critical role that each California motorist must play in maintaining his or her vehicle's emission control systems in proper working order, *in such a way as to continuously meet mandated emission control standards and ensure for California the clean air essential to the health of its citizens, its communities, and its economy*.

(B) A focus on the detection, diagnosis, and repair of broken, *tampered*, or malfunctioning vehicle emission control systems.

[¶]...[¶]

(D) Consideration of convenience and costs to those who are required to participate, including motorists, smog check stations, and technicians.

(E) An enforcement program which is vigorous and effective and includes monitoring of the performance of the smog check test or repair stations and technicians, as well as *the monitoring of vehicle emissions* as vehicles are being driven.

(c) The Legislature further finds and declares that California is, as of the effective date of this section, implementing a number of *motor vehicle emission reduction strategies ...*

[¶]...[¶] (Italics added)

3. Health and Safety Code section 44001.1, provides, in pertinent part, as follows:

(a) The Legislature finds and declares that additional *reductions of motor vehicle emissions* could be achieved by effective repairs to motor vehicle emission control components.

[¶]...[¶]

4. Health and Safety Code section 44001.5 provides, in pertinent part, as follows:

(a) A duty of enforcing and administering this chapter [the Motor Vehicle Inspection Program] is vested in the chief of the bureau who is responsible to the director.

(b) The department shall take those actions consistent with its statutory authority *to ensure that the reduction in vehicle emissions of hydrocarbons, carbon monoxide, and oxides of nitrogen meet or exceed the reductions required by the amendments enacted to the Clean Air Act in 1990.* The department shall endeavor to achieve these vehicle emission reductions as expeditiously as practicable, but not later than the deadlines established by the amendments enacted to the Clean Air Act in 1990.

[¶]...[¶]

5. The initial provisions of the Motor Vehicle Inspection Program quoted above, beginning at Business and Professions Code section 44000, et. Seq., describes the legislative purpose for the implementation of the Motor Vehicle Inspection Program and the creation and authorization of the Bureau to oversee and enforce its provisions. The italicized portions of the legislative purpose provisions quoted above point out that the objective in the legislative adoption of emissions control standards, and the Bureau to oversee and enforce them, is the reduction of air polluting emissions from the engines and tailpipes of vehicles operating in California.

6. The provisions in the legislative purpose sections quoted above that relate to tampering of a vehicle's emissions control system clearly point out that the concern with tampering is any modification of the vehicle that permits it to continue to emit pollutants

from its tailpipe in excess of the standards which the entire program was created to observe and enforce.

Enforcement Provisions

7. Business and Professions Code section 9884.7 states, in pertinent part,

(a) The director, *where the automotive repair dealer cannot show there was a bona fide error*, may refuse to validate, or may invalidate temporarily or permanently, the registration of an automotive repair dealer 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.

(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 which constitutes fraud.

[§]... [§] (*italics added*)

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

The director may suspend, revoke, or take other disciplinary action against the licensee 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 [Health and Safety Code sections 44000, et. Seq., the Motor Vehicle Smog Inspection Program] 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.

[§]...[§]

9. Health and Safety Code section 44012 provides, in pertinent part, as follows:

The test at the smog check stations shall be performed in accordance with procedures prescribed by the department, pursuant to Section 44013, and shall require, at a minimum, for all vehicles that are not diesel-powered, loaded mode dynamometer testing in enhanced areas, and two-speed testing in all other program areas. The department shall ensure all of the following:

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

[§]...[§]

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

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

[§]...[§]

10. CCR, title 16, section 3340.35 provides, in pertinent part:

[§]...[§]

(c) 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.

[§]...[§]

11. California Code of Regulations (CCR), title 16, section 3340.42, provides, in pertinent part,

With the exception of diesel-powered vehicles addressed in subsection (f) of this section, the following emissions test methods and standards apply to all vehicles:

(a) A loaded-mode test ... The loaded-mode test shall measure hydrocarbon, carbon monoxide, carbon dioxide and oxides of nitrogen emissions, as contained in the bureau's specifications referenced in subsection (b) of Section 3340.17 of this article. ...

[¶]...[¶]

A vehicle passes the loaded-mode test if all of its measured emissions are less than or equal to the applicable emission standards specified in the applicable table.

(b) A two-speed idle mode test ... The two-speed idle mode test shall measure hydrocarbon, carbon monoxide and carbon dioxide emissions at high RPM and again at idle RPM, as contained in the bureau's specifications referenced in subsection (b) of Section 3340.17 of this article. Exhaust emissions from a vehicle subject to this inspection shall be measured and compared to the emission standards set forth in this section and as shown in TABLE III. A vehicle passes the two-speed idle mode test if all of its measured emissions are less than or equal to the applicable emissions standards specified in Table III.

[¶]...[¶]

(2) Vehicles with emission levels exceeding the emission standards for gross polluters during an initial inspection will be considered gross polluters...

(3) A gross polluting vehicle shall not be passed or issued a certificate of compliance until the vehicle's emissions are reduced to or below the applicable emissions standards for the vehicle included in the tables described in subsections (a) and (b), as applicable.

[¶]...[¶]

(e) In addition to the test methods prescribed in this section, the following tests shall apply to all vehicles, except diesel-powered vehicles, during the Smog Check inspection:

(1) A visual inspection of the vehicle's emissions control systems. During the visual inspection, the technician shall verify that the following emission control devices, as applicable, are properly installed on the vehicle:

(A) air injection systems,

(B) computer(s) and related sensors and switches,

(C) crankcase emissions controls, including positive crankcase ventilation,

(D) exhaust gas after treatment systems, including catalytic converters,

(E) exhaust gas recirculation (EGR) systems,

(F) fuel evaporative emission controls,

(G) fuel metering systems, including carburetors and fuel injection,

(H) ignition spark controls, and

(I) any emissions control systems that are not otherwise prompted by the Emissions Inspection System, but listed as a requirement by the vehicle manufacturer.

[¶]...[¶]

12. CCR, title 16, section 3340.41.5 provides as follows:

A tampered emissions control system is an emissions control system which is missing, modified or disconnected. An emissions control system which has a missing, modified, or disconnected emissions related component is also deemed a tampered emissions control system. For purposes of the visual emission control system inspection pursuant to Health and Safety Code Section 44012(a), the terms missing, modified and disconnected are defined as follows:

(a) Missing. A missing emissions control system or component is one which has been removed from the vehicle or engine.

(b) Modified. An emissions control system is deemed to have been modified if:

(1) The system has been disabled, even though it is present and properly connected to the engine and/or vehicle;

(2) An emissions related component of the system has been replaced by a component not marketed by its manufacturer for street use on the vehicle;
or

(3) An emissions related component of the system has been changed such that there is no capacity for connection with or operation of other emissions control components or systems;

(c) Disconnected. A disconnected hose, wire, belt or component is one which is required for the operation of an emissions control system and which has been disconnected.

I. *Allegations Against Respondent's Ard Registration*

First Cause for Discipline (Misleading Statements)

13. The First Cause for Discipline in the Accusation alleges that respondent's ARD registration is subject to discipline pursuant to Business and Professions Code section 9884.7, subdivision (a) (1), in that respondent made statements which he knew, or by the exercise of reasonable care should have known were untrue or misleading when he issued a Certificate of Compliance for the Bureau 2004 Dodge Neon following his smog inspection of the vehicle on September 3, 2009, certifying that the vehicle was in compliance with applicable laws and regulations, when, in fact the vehicle was equipped with nonapproved aftermarket exhaust headers.

14. The First Cause for Discipline, which rests for its authority upon Business and Professions Code section 9884.7, was not proved. As set forth in the Factual Findings, respondent made a bona fide and reasonable mistake when he certified the vehicle as in compliance with the rules and regulations governing the smog check program. He did not fail to find and identify the aftermarket exhaust headers on the vehicle, which was the trap the Bureau laid for him in this undercover operation. However, he reasonably believed that the EO number on the sticker attached to the radiator related to and validated the presence of the aftermarket exhaust headers. Respondent did not have the means to cross check the EO number that he found on the sticker with the ARB database until well after the inspection had been concluded. Section 9884.7 provides legal authority to impose discipline against the holder of an ARD registration only where the holder of the ARD registration, "[C]annot show there was a bona fide error." Respondent did indeed credibly and persuasively prove that his certification of this vehicle was a bona fide error. Therefore, there is no basis for discipline against respondent pursuant to section 9884.7. The First Cause for Discipline must be dismissed.

Second Cause for Discipline (Fraud)

15. The Second Cause for Discipline in the Accusation alleges that respondent is subject to discipline pursuant to Business and Professions Code 9884.7, subdivision (a) (4), in that respondent committed acts which constituted fraud by issuing a Certificate of Compliance for the 2004 Dodge Neon "without performing a bona fide inspection of the emissions controls devices and systems on that vehicle, thereby depriving the people of the State of California the protection afforded by the Motor Vehicle Inspection Program."

16. Under the circumstances proved in this case, as set forth in detail in the Factual Findings, the Second Cause for Discipline lacks any credible and persuasive factual support. It was not proved that respondent committed fraud in the issuance of the Certificate of Compliance for the Bureau vehicle.

17. Proof of fraud requires evidence that the maker of an allegedly fraudulent statement intended to deceive another person by the making of a false statement, known to be false by the maker of the statement at the time the statement was made, and intended by the maker of the false statement to cause the hearer to rely upon that statement to the hearer's detriment.⁷ There was no such proof adduced during this evidentiary hearing that respondent made any such intentionally deceptive or false statement.

18. As set forth above in the Factual Findings and in the earlier Legal Conclusions regarding the First Cause for Discipline, respondent made an honest mistake, reasonable under the circumstances, when he did not notice that the air intake was an aftermarket part. If he had seen a second aftermarket part on this engine during his inspection, a question would have and should have arisen in the mind of a reasonably competent and skillful smog technician as to which of the two aftermarket parts on the vehicle the EO sticker on the radiator applied. Since respondent did not see the second aftermarket part, even though this was a mistake, it was reasonable for him to conclude under the circumstances at the time that the EO sticker on the radiator validated the presence of the aftermarket exhaust headers. There were no other facts proved that would have and should have triggered in the mind of the reasonably competent and skillful smog inspector a reason to believe that there was no correlation between the EO sticker on the radiator in the presence of the aftermarket exhaust headers. The Bureau's evidence did not prove otherwise. Respondent made a bona fide mistake made during the course of a bona fide effort to inspect the vehicle in compliance with all the applicable rules and regulations governing the smog check program. As a result, the provisions of section 9887.4 do not provide a legal cause for the imposition of discipline.

19. The last part of the allegation of the Second Cause for Discipline, suggesting that as a result of this particular inspection by respondent, the people of the State of California have been harmed by failure to receive the protection afforded by the Motor Vehicle Inspection Program, under the circumstances proved in this case, was actually disproved by the Bureau itself. During the Bureau's pre-undercover operation in-house testing and evaluation of the undercover vehicle before it was sent out on this undercover run, the bureaus technical specialists were presented with test results that demonstrated that the presence of the aftermarket exhaust headers on the undercover vehicle had no material impact on the vehicles tailpipe emissions, and that those emissions, with the aftermarket exhaust headers in place, were fully in compliance with all California emissions standards. Respondent's testing of the vehicle during his inspection of the vehicle on September 3, 2009

⁷ Civil Code section 1752, *Intrieri v. Superior Court (Ocadian Care Centers)* (2004) 117 Cal.App.4th 72, 85; *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407-408, quoting 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 720, p. 819.

produced the same result. Both sets of tests demonstrated that tailpipe emissions on this vehicle were fully and completely in compliance with all California emissions requirements.

20. The Motor Vehicle Inspection Program was implemented in order to protect California's air quality by limiting motor vehicle tailpipe emissions of pollutant gases and particulates to a certain acceptable range, and in attempting to inspect, find and repair or eliminate vehicles that emit more pollutants than the acceptable standards via the smog inspection program. Absent proof that this vehicle had tailpipe emissions of pollutants that exceeded the legally permissible range, thereby contributing to a deterioration of air quality for Californians, the allegation that anything respondent did or didn't do during this ill-fated smog inspection of the Bureau undercover vehicle contributed to harm to Californians completely fails for lack of credible evidentiary support. There was no credible and persuasive evidence that the aftermarket exhaust headers present on the Bureau undercover vehicle had anything to do with increasing the vehicle's tailpipe emissions of pollutants beyond the legally acceptable range, in fact, quite the contrary was proved. Respondent's failure to ultimately determine that the aftermarket exhaust headers were not approved aftermarket parts, and that the EO number on the vehicles radiator did not validate the presence of the aftermarket exhaust headers on this vehicle, harmed no one but himself.

II. Allegations Constituting Cause for Discipline against Respondent's Test Station License

Third Cause for Discipline (Violation of the Motor Vehicle Inspection Program)

21. The Third Cause for Disciplinary Action has four separate suballegations, alleging that respondent has subjected his Test Station License to disciplinary action for violation of Health and Safety Code section 44072.2, subdivision (a), for violations of the Motor Vehicle Inspection Program, as separately set forth in the four sub allegations.

A. The first sub allegation charges that respondent violated Health and Safety Code section 44012, subdivision (a), in that respondent failed to determine that all emissions control devices and systems required by law are installed and functioning correctly in accordance with test procedures.

A.1. The second sub allegation of the Third Cause for Discipline was not proved. Respondent did not violate section 44012, subdivision (a), in that it was not proved that he failed to perform emissions controls tests on the Bureau undercover vehicle in accordance with procedures prescribed by the Department. As set forth in the Factual Findings, respondent performed the emissions controls tests as required, and confirmed that all emissions control devices and systems required by law were installed and were functioning correctly. Respondent made a bona fide error by failing to notice the aftermarket air intake, which caused him to assume the EO number on the radiator corresponded to the aftermarket exhaust headers, which led to his failure to identify the aftermarket exhaust headers as

unapproved for modification of the vehicle, but that is a violation of subdivision (f) of section 44012 (below), not subdivision (a).

B. In the second sub allegation, it is alleged that respondent violated Health and Safety Code section 44012, subdivision (f), in that respondent failed to perform emissions control tests on the Bureau undercover vehicle in accordance with procedures prescribed by the department.

B.1. Respondent admitted that he violated Health and Safety Code section 44012, subdivision (f), as alleged in the second sub allegation of the Third Cause for Disciplinary Action. Respondent quite candidly acknowledged that he failed during the visual portion of the inspection to see the aftermarket air intake present in the vehicle during his inspection, which then caused him to mistakenly correlate the EO number on the sticker located on the vehicle's radiator to the aftermarket exhaust headers that he did see. Respondent failed to identify the aftermarket exhaust headers as "modified" as required by the visual inspection procedure portion of the smog inspection, which should have resulted in a failure of the inspection and a refusal to issue the Certificate of Compliance. Respondent candidly acknowledged all of the above was accurate. Legal cause therefore exists, pursuant to Health and Safety Code section 44072.2, subdivision (a), to impose disciplinary action upon respondent's test station license.

C. The third sub allegation of the Third Cause for Discipline alleges that respondent violated Health and Safety Code section 44015, subdivision (b), when respondent issued an electronic Certificate of Compliance without properly testing and inspecting the vehicle determine if it was in compliance with section 44012 of the Health and Safety Code.

C.1. Respondent candidly acknowledged that he violated Health and Safety Code section 44015, subdivision (b), by issuing an electronic Certificate of Compliance for the Bureau undercover vehicle when a Certificate of Compliance should not have been issued because the vehicle was not in compliance with section 44012 of the Health and Safety Code. Respondent readily acknowledged that he made a mistake when he failed to correctly conclude during his visual inspection of the vehicle that the aftermarket exhaust headers had not been approved by the ARB and issued an EO number that would permit them as a legal modification for installation on this vehicle. Legal cause therefore exists, pursuant to Health and Safety Code section 44072.2, subdivision (a), to impose disciplinary action upon respondent's test station license.

D. The fourth and final sub allegation of the Third Cause for Discipline alleges that respondent violated section 44059 of the Health and Safety Code when he willfully made false entries for the electronic Certificate of Compliance, certifying that the vehicle had been inspected as required, when, in fact it had not.

D.1. Similar to other such findings and conclusions above, this allegation was not proved. There was no credible and persuasive evidence that respondent willfully made any sort of false entry or statement during his inspection of the Bureau undercover vehicle at issue. Respondent caused the electronic Certificate of Compliance to be issued based on a bona fide effort to inspect the vehicle, during which respondent made an honest error.

*Fourth Cause for Discipline
(Violation of Regulations of the Motor Vehicle Inspection Program)*

22. The Fourth Cause for Discipline has three sub allegations, each alleged to constitute legal cause to subject respondent's Test Station license to discipline for violation of Health and Safety Code section 44072.2, subdivision (c), caused by alleged violations of sections of title 16 of the California Code of Regulations (CCR).

A. In the first sub allegation of the Fourth Cause for Discipline, it was alleged that respondent violated CCR, title 16, section 3340.24, subdivision (c), in that respondent falsely or fraudulently issued an electronic Certificate of Compliance without performing a bona fide inspection of the emissions control devices and systems on that vehicle, as required by Health and Safety Code section 44012.

A.1. As set forth in the earlier Legal Conclusion making the identical allegation against respondent's ARD registration, it was not proved that respondent falsely or fraudulently issued the electronic Certificate of Compliance, or that he failed to perform a bona fide inspection of the emissions control devices and systems on the Bureau undercover vehicle. As did the identical allegation against the ARD registration, this allegation against respondent's Test Station license fails for lack of credible and persuasive proof.

B. The second subpart of the Fourth Cause for Discipline alleges that respondent violated CCR, title 16, section 3340.35, subdivision (c), in that respondent issued an electronic Certificate of Compliance for the Bureau undercover vehicle, even though that vehicle had not been inspected in accordance with section 3340.42 of the same regulations.

B.1. Similar to the Legal Conclusions in the Third Cause for Discipline, respondent candidly acknowledged that he issued an electronic Certificate of Compliance for a Bureau undercover vehicle that should have failed the visual portion of the smog inspection, and thus not have passed the smog inspection, because the undercover vehicle was equipped with unapproved aftermarket exhaust headers installed on its engine. Legal cause therefore exists, pursuant to Health and Safety Code section 44072.2, subdivision (c), to impose disciplinary action upon respondent's Test Station license.

C. The third sub allegation of the Fourth Cause for Discipline alleges that respondent violated CCR, title 16, section 3340.42, in that respondent failed to conduct the required smog tests and inspections on the Bureau undercover vehicle "in accordance with the Bureau specifications."

C.1. Respondent admitted that he made a mistake during the visual portion of the smog inspection of the Bureau undercover vehicle. The protocol for the visual inspection is set forth in section 3340.42. Respondent made a mistake with respect to subdivision (D) by failing to confirm that the aftermarket exhaust headers had actually been approved by ARB as a lawful modification on this vehicle. Although he identified correctly that the exhaust headers were aftermarket modifications, and needed to be ruled in or out as lawful, and was aware that the aftermarket parts required an EO number issued by the ARB in order to pass the visual portion of the inspection, he mistakenly thought that the EO number on the label attached to the radiator applied to these particular parts, when in fact it applied to the aftermarket air intake, which respondent failed to notice. Respondent's efforts almost got him to the correct conclusion, but not quite. Respondent was quite candid in acknowledging his awareness that, based on the additional information about the existence of the aftermarket air intake, this vehicle should not have passed the smog inspection visual portion nor should he have issued Certificate of Compliance for this vehicle. Legal cause therefore exists, pursuant to Health and Safety Code section 44072.2, subdivision (c), to impose disciplinary action upon respondent's Test Station license.

Fifth Cause for Discipline (Dishonesty, Fraud or Deceit)

23. The Fifth Cause for Discipline alleges that respondent has subjected his Test Station license to discipline for violation of Health and Safety Code section 44072.2, subdivision (d), in that respondent is alleged to have committed acts involving dishonesty, fraud or deceit whereby another was injured by respondent issuing an electronic Certificate of Compliance without performing a bona fide inspection of the emission control devices and systems on that vehicle, thereby depriving the people of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

24. This Fifth Cause for Discipline is all but identical to the Cause for Discipline making the same allegations as cause for discipline against respondent's ARD registration. The Fifth Cause for Discipline fails for the same reasons the earlier cause for discipline did; to wit, want of credible and persuasive evidentiary support. There was no evidence that respondent engaged in any sort of fraudulent, dishonest, or deceitful conduct in the smog inspection at issue in this matter. The Fifth Cause for Discipline was not proved.

Iii. Allegations Constituting Cause for Discipline of Respondent's Technician License

*Sixth Cause for Discipline
(Violations of the Motor Vehicle Inspection Program)*

25. The Sixth Cause for Discipline makes similar charges contained in four separate sub allegations as does the Third Cause for Discipline, only against respondent's Technician license as opposed to his Test Station license. Each subpart charges that, due to the violations alleged, respondent's Technician license is subject to discipline pursuant to Health and Safety Code section 44072.2, subdivision (a).

A. The first sub allegation of the Sixth Cause for Discipline alleges that respondent violated Health and Safety Code section 44012, subdivision (a), in that respondent failed to determine that all emission control devices and systems required by law were installed and functioning correctly in accordance with test procedures.

A.1. The first sub allegation of the Sixth Cause for Discipline was not proved. Respondent did not violate section 44012, subdivision (a), in that it was not proved that he failed to perform emissions controls tests on the Bureau undercover vehicle in accordance with procedures prescribed by the Department. As set forth in the Factual Findings, respondent performed the emissions controls tests as required, and confirmed that all emissions control devices and systems required by law were installed and were functioning correctly. Respondent made a bona fide error by failing to notice the aftermarket air intake, which caused him to assume the EO number on the radiator corresponded to the aftermarket exhaust headers, which led to his failure to identify the aftermarket exhaust headers as unapproved for modification of the vehicle, but that is a violation of subdivision (f) of section 44012 (below), not subdivision (a).

B. The second sub allegation of the Sixth Cause for Discipline alleges that respondent violated Health and Safety Code section 44012, subdivision (f), in that respondent failed to perform emission control tests on the Bureau undercover vehicle in accordance with procedures described by the Department.

B.1. Respondent violated section 44012, subdivision (f). Respondent candidly admitted that he failed to properly identify during the visual inspection he performed on the Bureau undercover vehicle that the aftermarket exhaust headers that had been installed on the vehicle that constituted a modification of the vehicle's exhaust system, and there did not exist an ARB EO number that would exempt that modification from causing the vehicle to fail the visual portion of the smog inspection. Therefore, legal cause exists pursuant to Health and Safety Code section 44072.2, subdivision (a) to impose disciplinary action upon respondent's Technician license.

C. The third sub allegation of the Sixth Cause for Discipline alleges that respondent violated Health and Safety Code section 44032, in that respondent failed to perform tests of emissions control devices and systems on that vehicle in accordance with section 44012 of that Code.

C.1. The third sub allegation of the Sixth Cause for Discipline was proved. Respondent performed emissions control devices and systems tests on the Bureau undercover vehicle in accordance with section 44012 of the Health and Safety Code. He made a mistake that should have resulted in causing the vehicle to fail the visual portion of the examination. As set forth immediately above, that failure violated section 44012, subdivision (f). Therefore, legal cause exists pursuant to Health and Safety Code section 44072.2, subdivision (a) to impose disciplinary action upon respondent's Technician license.

D. The fourth and final sub allegation of the Sixth Cause for Discipline alleges that respondent violated Health and Safety Code section 44059, in that respondent willfully made false entries for electronic Certificate of Compliance, certifying that the Bureau undercover vehicle had been inspected as required, when, in fact, it had not.

D.1. The fourth and final sub allegation of the Sixth Cause for Discipline also fails for lack of credible and persuasive proof. There was no evidence adduced in this matter that respondent willfully made any false entry, either during his test, or in the production of the Certificate of Compliance. It was undisputed that the Certificate of Compliance should not have been issued. By the same token, it was not proved that it was fraudulently or deceitfully issued. Respondent issued the Certificate of Compliance as a result of inadvertence and mistake, not as the result of any willful, dishonest, intentional or deceitful action to perpetrate a fraud or to make a false statement.

Seventh Cause of Action for Discipline (Violations of Regulations Pursuant To the Motor Vehicle Inspection Program)

26. In the seventh Cause for Disciplinary Action, it is alleged within four sub allegations that respondent's Technician license is subject to discipline for violations of Health and Safety Code section 44072.2, subdivision (c), for violation of sections of the Bureau's Regulations, contained in the CCR, title 16.

A. In the first sub allegation, it is alleged that respondent violated CCR, title 16, section 3340.24, subdivision (c), in that respondent falsely or fraudulently issued an electronic Certificate of Compliance for the Bureau undercover vehicle without performing a bona fide inspection of the emission control devices and systems on that vehicle as required by Health and Safety Code section 44012.

A.1 As set forth several places above, where identical charges are made under different legal rubrics, this allegation was not proved. The first sub allegation fails for lack of credible and persuasive proof.

B. The second sub allegation of the Seventh Cause for Discipline alleges that respondent violated CCR, title 16, section 3340.30, subdivision (a) in that respondent failed to inspect and test the Bureau undercover vehicle in accordance with the requirements of Health and Safety Code section 44012.

B.1. Respondent violated section 3340.30, subdivision (a). Respondent performed emissions control devices and systems tests on the Bureau undercover vehicle in accordance with section 44012 of the Health and Safety Code. He made a mistake that should have resulted in causing the vehicle to fail the visual portion of the examination. That failure violated section 44012, subdivision (f). Therefore, legal cause exists pursuant to Health and Safety Code section 44072.2, subdivision (c) to impose disciplinary action upon respondent's Technician license.

C. In the third sub allegation of the Seventh Cause for Discipline, it is alleged that respondent violated CCR, title 16, 3340.41, subdivision (c), in that respondent entered false information into the emissions inspection system by entering "pass" for the visual inspection portion of the smog inspection when, in fact, the vehicle should not have passed the visual portion of the smog inspection because it was equipped with a nonapproved aftermarket exhaust headers.

C.1. Despite the fact that respondent candidly acknowledged that he made an error by entering "pass" for the visual inspection portion of the smog inspection of the Bureau undercover vehicle, and also candidly acknowledged that the vehicle should not have passed the visual portion of the smog inspection because it was equipped with a nonapproved aftermarket exhaust header, the allegation was still not proved. The allegation alleges that respondent entered false information into the emissions inspection system. He did not. The information was not false, it was mistaken. The allegation was not proved.

D. In the fourth sub allegation of the Seventh Cause for Discipline, it was alleged that respondent violated CCR, title 16, section 3340.42, in that respondent failed to conduct the required smog tests and inspections on the Bureau undercover vehicle in accordance with the Bureau specifications.

D.1. Although this particular sub allegation is incredibly vague, respondent acknowledged that he violated section 3340.42, in that he failed to satisfactorily and completely perform the visual portion of the smog inspection, resulting in the inappropriate issuance of a Certificate of Compliance for a vehicle that should not have been certified. Therefore, legal cause exists pursuant to Health and Safety Code section 44072.2, subdivision (c) to impose disciplinary action upon respondent's Technician license.

Eighth Cause for Discipline (Dishonesty Fraud or Deceit)

27. In the Eight Cause for Discipline, it was alleged that respondent violated Health and Safety Code section 44072.2, subdivision (d), in that he committed acts involving dishonesty, fraud or deceit whereby another was issued injured by issuing an electronic certificate of compliance for the Bureau undercover vehicle without performing a bona fide inspection of the emission control devices and systems on that vehicle, thereby depriving the people of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

28. Similar to the identical allegations made against respondent's ARD Registration and Test Station license, this allegation fails for want of credible and persuasive proof. As set forth above in the Factual Findings in detail, and in the earlier Legal Conclusions, there was no evidence that respondent engaged in any act involving dishonesty, fraud or deceit in the conduct of the smog inspection of the Bureau undercover vehicle and in the issuance of the Certificate of Compliance. The only person harmed by the mistake respondent made during the visual portion of the inspection and the issuance of the

Certificate of Compliance was himself, as he now finds himself and his licensure in serious jeopardy.

Other Matters

29. It was alleged that under Business and Professions Code section 9984.7, subdivision (c) that the director may invalidate, temporarily or permanently, or refuse to validate the registrations for all places of business operated in this state by respondent, doing business as Manteca Test Only Center, upon a finding that he has, or is, engaged in a course of repeated and willful violations of the laws and regulations pertaining to an automotive repair dealer.

30. Regardless of the previous Citations issued against respondent's Technician and Test Station licenses, the requisite predicate findings to invoking the authority of Business and Professions Code section 9984.7, subdivision (c) do not exist in this record. There is no evidence that respondent has engaged in a course of willful violations of the laws and regulations pertaining to an automotive repair dealer. The previous Citations issued to respondent reveal plenty of errors and omissions, but no willful misconduct or any willful pattern to violate the law. The entire history of respondent's violations up to and including the present one are matters of competence and lack of appropriate technical skills and expertise, rather than matters of dishonesty, deceitfulness, or a conscious attempt to violate or circumvent the law. Respondent has no adverse disciplinary record as an ARD registrant, and none of the previous actions against him, including this one, have anything to do with errors and omissions regarding the repair of vehicles. Finally, there is no evidence that respondent does business in any other location than his single shop in Manteca that he operates under the fictitious business name of Manteca Test Only Center as a sole proprietor.

Prior Citations, Mitigation, Rehabilitation, and Penalty

31. As set forth above, respondent has suffered several previous Citations for violations resulting from Bureau undercover runs where he failed to accurately and adequately perform smog inspections on Bureau undercover vehicles. In each of those sets of Citations, the traps that the Bureau set to try to catch respondent failing to make an adequate inspection increased in difficulty, requiring increasingly greater levels of technical skill in order to identify the deficit.

32. The current undercover operation resulting in this action was the most difficult and technically sophisticated of all, and a very persuasive argument could be made that this particular trap the Bureau laid for respondent extended beyond the range of a fair test of a reasonably well trained and skillful Technician and Test Station operator. But again, rather than complaining that he had been potentially entrapped, respondent readily and honestly admitted that he made an error that he should not have made. Considering the technical sophistication and expertise required to ferret out the trap the Bureau had set with this particular vehicle and its aftermarket parts, particularly with the EO number label on the radiator, which in this instance constituted a red herring, the error is understandable.

Respondent again eagerly embraces and seeks the opportunity to continue to learn, receive more training and education, and enhance his inspection skills to in order to meet Bureau technical skills requirements and to consistently produce compliant inspections with a zero error rate.

33. Each one of the Bureau's representatives and technical specialists who testified in this matter confirmed that the Bureau's mission is to "gain compliance." The evidence is essentially undisputed that respondent desperately wants to be able to "gain compliance" and perform competent and adequate smog inspections and conform to the requirements of the statutes and regulations that govern such inspections in the State of California. The letter of support respondent's technical instructor wrote in his support verifies respondent's high level of motivation to learn and improve, and to "gain compliance." It was not credibly disputed that respondent's motivation and enthusiasm to learn, improve and become able to routinely performed fully compliant inspections was anything other than completely genuine.

34. Respondent's efforts to improve his skills and become fully and completely compliant in every smog inspection are on all fours with the Bureau's mission to "gain compliance." The fact that respondent has had several previous Citations is not, as the Bureau suggested in closing, evidence that respondent has some sort of terminal and irremediable defect in his competence and capabilities, or that he does not care to be compliant. Respondent readily acknowledged in his testimony that the violations leading to the earlier citations were the product of his "lack of experience" and need for additional training. He has received some of that training, probably more than most, but he obviously needs more. The fact that a significant amount of remedial training has not fully resolved the problem is more a reflection of how bad the problem was at the outset than of any defect or deficiency that cannot be removed or remedied with additional training. The Bureau implicitly acknowledged that respondent has learned and obtained at least a baseline level of competence in performing smog inspections, as evidenced by the fact that the most recent undercover operation at respondent's test station did not use an undercover vehicle with a defect in the emissions system that was obvious to a reasonably well trained skilled and competent technician, such as an obviously missing component leaving an easily visible cavity clearly evident with a cursory look with a pair of skilled and trained eyes at the engine compartment, or even one that was likely to be encountered in a typical commercial smog inspection transaction.

35. The purpose of proceedings of this type are to protect the public, and not to punish an errant licensee.⁸ The Bureau has developed guidelines for use in determining what sort of discipline should flow from violations of the statutes and regulations that it is charged with enforcing. The guidelines are incorporated into regulations that appear at CCR, title 16, section 3395.4 (Guidelines). These Guidelines list a number of factors in aggravation, and the ones most applicable to respondent pertain to the history of prior citations. As Set Forth in the Factual Findings, balanced against the factors in aggravation is considerable evidence

⁸ *Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164, as well as many cases following it for this particular principle.

in mitigation as well as respondent's genuine desire to continue with a rehabilitation process that is yet incomplete. The evidence in this matter was balanced and weighed against The Guidelines, and on balance, and outright revocation of respondent's licenses is unwarranted and excessively severe. Respondent is acutely and painfully conscious of the fact that he is running out of opportunities to prove that additional education will solve the problems that have resulted in the actions against him. Time and the additional education and training will demonstrate whether the problem can be solved, but now is not the time to call this the final act and roll down the curtain on respondent's business.

36. At issue in this matter is a respondent who is desperately eager to continue to learn and add to his skills and technical abilities, and genuinely highly motivated to "gain compliance;" to be able to routinely and consistently perform fully compliant smog inspections. Respondent shall be permitted an opportunity to undertake another significant course of technical and remedial training, presumably through the same institution in Concord he used for his past training, with a focus on acquiring additional skills and technical abilities. Respondent is well aware that the Bureau will be back to test him again, and that he is rapidly running out of chances, as this action has made him acutely aware. Time will tell whether additional training results the problem. Considering all the facts and circumstances in this matter, respondent should be given the opportunity to see if he can close the gap.

Costs

37. Costs of investigation and prosecution of the action are recoverable if the Board prevails in the action.⁹ The Board partially prevailed in the action and respondent partially prevailed. *Zuckerman v. Board of Chiropractic Examiners*¹⁰ requires consideration of the following factors in determining the amount of costs to be assessed:

- The board must not assess the full costs of investigation and prosecution when to do so will unfairly penalize a licensee who has committed some misconduct, but who has used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed.
- The board must consider the licensee's subjective good faith belief in the merits of his or her position.
- The board must consider whether the licensee has raised a colorable challenge to the proposed discipline.

⁹ Business and Professions Code section 125.3.

¹⁰ *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45.

- Furthermore, as in cost recoupment schemes in which the government seeks to recover from criminal defendants the cost of their state-provided legal representation, the board must determine that the licensee will be financially able to make later payments.
- Finally, the board may not assess the full costs of investigation and prosecution when it has conducted a disproportionately large investigation to prove that a licensee engaged in relatively innocuous misconduct.

38. The costs declarations and supporting itemizations were carefully considered and reviewed against the standards set forth above, as set forth in detail in the last Factual Finding above. The costs of investigation and enforcement are recoverable by the Bureau as part of the disciplinary Order. Total costs sought to be recovered are \$4101.06, of which \$3858.06 are reasonable and may be recovered in this action. Of this recoverable sum, an apportionment is required because respondent prevailed on some allegations, while the Bureau prevailed on many others. Respondent prevailed on the most serious allegations. The Bureau prevailed on the heart of the technical allegations. Under the circumstances then, it is appropriate to apportion the costs. The Bureau shall recover \$2,000 in costs reimbursement as part of the disciplinary Order below.

ORDER

The Accusation with respect to the Automotive Repair Dealer Registration number ARD 250011, issued by the Department of Consumer Affairs, Bureau of Automotive Repair, to Manteca Test Only Center, Zakaria Suleiman Shabbbar, Owner, is **DISMISSED**.

Smog Check Test Only Station license number TC 250011; and Advanced Emission Specialist Technician license number EA 150186, each issued by the Department of Consumer Affairs, Bureau of Automotive Repair, to Manteca Test Only Center, Zacharia Sulieman Shabbbar, Owner, are each **REVOKED**; however, the revocations are **STAYED** for a period of two (2) years, during which time respondent shall be on probation to the Bureau, subject to the following terms, conditions and limitations:

During the period of probation, respondent shall:

1. Comply with all statutes, regulations and rules governing automotive inspections, estimates and repairs.
2. Respondent or respondent's authorized representative must report in person or in writing as prescribed by the Bureau of Automotive Repair, on a schedule set by the Bureau, but no more frequently than each quarter, on the methods used and success achieved in maintaining compliance with the terms and conditions of probation.

3. Respondent shall enroll in and complete within the first year of probation following the effective date of this Decision eighty (80) hours of Bureau-approved continuing technical education and training, ideally provided by TecHelp, with a concentration on the automotive emissions systems, the requirements of the motor vehicle inspection program, and technical refreshers and updates regarding developments in the emissions systems and controls industry. Respondent shall furnish written certificates of completion to verify successful completion of all training. If respondent fails to complete all 80 hours within the first one year of probation following the effective date of the decision, upon written notice to the Bureau and the Bureau's written approval, probation may be extended for an additional year to permit respondent an opportunity to complete the required hours of additional education and training.

4. Within 30 days of the effective date of this action, respondent shall report any financial interest which any partners, officers, or owners of the respondent facility may have in any other business required to be registered pursuant to Section 9884.6 of the Business and Professions Code. If none, respondent file a written statement with the Bureau that this is the case.

5. Provide Bureau representatives unrestricted access to inspect all vehicles (including parts) undergoing smog inspections, up to and including the point of completion.

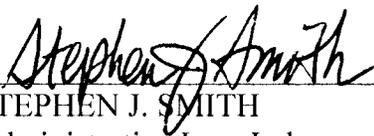
6. If an Accusation or a Petition to Violate Probation is filed against respondent during the term of probation, the Director of Consumer Affairs shall have continuing jurisdiction over this matter until the final decision on the Accusation or a Petition to Violate Probation, probation shall be tolled and the period of probation shall be extended until the Bureau issues a final decision in that matter.

7. Should the Director of Consumer Affairs determine that respondent has failed to comply with the terms and conditions of probation, the Department may, after giving respondent reasonable notice and opportunity to be heard, impose additional disciplinary action, up to and including lifting the stay of the revocation and imposing an outright revocation of the licenses held by respondent.

8. Respondent shall reimburse the Bureau its costs of investigation and enforcement in the amount of \$2000, on terms and conditions to be arranged between the Bureau and respondent, considering respondent's ability to pay, such terms and conditions to particularly take into account the need for respondent to pay for the additional technical training required by this Order. The obligation to repay the Bureau shall be a continuing obligation until the entire amount is paid, beginning 30 days after the effective date of this order. If respondent has not been able to repay all of the costs by the expiration of the probationary period, probation may be extended for an additional year to allow respondent to liquidate the costs obligation. Failure to pay the costs may be deemed a violation of probation.

9. If respondent fully complies with all probation terms and conditions, at the end of the two-year period, respondent's licenses shall be fully restored.

DATED: September 21, 2011



STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings

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

11 In the Matter of the Accusation Against:
12
13 **MANTECA TEST ONLY CENTER**
178 Button Avenue
Manteca, CA 95336
14 **ZAKARIA SULEIMAN SHABBAR, OWNER**
Automotive Repair Dealer Registration
15 No. ARD 250011
Smog Check Test Only Station License
16 No. TC 250011
17 and
18 **ZAKARIA SULEIMAN SHABBAR**
1186 Jasper Court
19 Manteca, CA 95336
Advanced Emission Specialist Technician License
20 No. EA 150186
21 Respondents.

Case No. 79/10-73

A C C U S A T I O N
S M O G C H E C K

22
23 Complainant alleges:

24 **PARTIES**

25 1. Sherry Mehl ("Complainant") brings this Accusation solely in her official capacity as
26 the Chief of the Bureau of Automotive Repair ("Bureau"), Department of Consumer Affairs.

27 ///

28 ///

1 (c) Notwithstanding subdivision (b), the director may invalidate
2 temporarily or permanently, the registration for all places of business operated in this
3 state by an automotive repair dealer upon a finding that the automotive repair dealer
4 has, or is, engaged in a course of repeated and willful violations of this chapter, or
5 regulations adopted pursuant to it."

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

10 7. Code section 477 provides, in pertinent part, that "Board" includes "bureau,"
11 "commission," "committee," "department," "division," "examining committee," "program," and
12 "agency." "License" includes certificate, registration or other means to engage in a business or
13 profession regulated by the Code.

14 8. Section 44002 of the Health and Safety Code provides, in pertinent part, that the
15 Director has all the powers and authority granted under the Automotive Repair Act for enforcing
16 the Motor Vehicle Inspection Program.

17 9. Section 44072.2 of the Health and Safety Code states, in pertinent part:

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

21 (a) Violates any section of this chapter [the Motor Vehicle Inspection
22 Program (Health and Saf. Code, § 44000, et seq.)] and the regulations adopted
23 pursuant to it, which related to the licensed activities.

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

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

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

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1 11. Section 44072.8 of the Health and Safety Code states:

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

5 **COST RECOVERY**

6 12. Section 125.3 of the Code provides, in pertinent part, that a Board may request the
7 administrative law judge to direct a licensee found to have committed a violation or violations of
8 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
9 enforcement of the case.

10 **UNDERCOVER OPERATION – SEPTEMBER 3, 2009**

11 12. On or about September 3, 2009, a Bureau undercover operator drove a Bureau-
12 documented 2004 Dodge Neon to Respondent's facility and requested a smog inspection. The
13 vehicle could not pass the visual portion of a smog inspection because the vehicle was equipped
14 with non-approved aftermarket exhaust headers. The operator signed a work order and was
15 provided with a copy of the document. Respondent performed the smog inspection and issued
16 electronic Certificate of Compliance No. NM691698 for that vehicle; however, Respondent failed
17 to perform a proper visual inspection of the vehicle. The operator paid \$59.50 for the smog
18 inspection and received a copy of Invoice No. 2565 and the Vehicle Inspection Report ("VIR").

19 **FIRST CAUSE FOR DISCIPLINE**

20 **(Misleading Statements)**

21 13. Respondent has subjected his registration to discipline under Code section 9884.7,
22 subdivision (a)(1), in that on or about September 3, 2009, he made statements which he knew or
23 which by exercise of reasonable care he should have known were untrue or misleading when he
24 issued electronic Certificate of Compliance No. NM691698 for the 2004 Dodge Neon, certifying
25 that the vehicle was in compliance with applicable laws and regulations when, in fact, the vehicle
26 was equipped with non-approved aftermarket exhaust headers.

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1 SECOND CAUSE FOR DISCIPLINE

2 (Fraud)

3 14. Respondent has subjected his registration to discipline under Code section 9884.7,
4 subdivision (a)(4), in that on or about September 3, 2009, he committed acts which constitute
5 fraud by issuing electronic Certificate of Compliance No. NM691698 for the 2004 Dodge Neon,
6 without performing a bona fide inspection of the emission control devices and systems on that
7 vehicle, thereby depriving the People of the State of California of the protection afforded by the
8 Motor Vehicle Inspection Program.

9 THIRD CAUSE FOR DISCIPLINE

10 (Violation of the Motor Vehicle Inspection Program)

11 15. Respondent has subjected his station license to discipline under Health and Safety
12 Code section 44072.2, subdivision (a), in that on or about September 3, 2009, regarding the 2004
13 Dodge Neon, he violated sections of that Code, as follows:

14 a. **Section 44012, subdivision (a):** Respondent failed to determine that all emission
15 control devices and systems required by law were installed and functioning correctly in
16 accordance with test procedures.

17 b. **Section 44012, subdivision (f):** Respondent failed to perform emission control tests
18 on that vehicle in accordance with procedures prescribed by the department.

19 c. **Section 44015, subdivision (b):** Respondent issued electronic Certificate of
20 Compliance No. NM691698 without properly testing and inspecting the vehicle to determine if it
21 was in compliance with section 44012 of that Code.

22 d. **Section 44059:** Respondent willfully made false entries for the electronic Certificate
23 of Compliance No. NM691698, certifying that the vehicle had been inspected as required when,
24 in fact, it had not.

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1 **FOURTH CAUSE FOR DISCIPLINE**

2 **(Violations of Regulations Pursuant to the Motor Vehicle Inspection Program)**

3 16. Respondent has subjected his station license to discipline under Health and Safety
4 Code section 44072.2, subdivision (c), in that on or about September 3, 2009, regarding the 2004
5 Dodge Neon, he violated sections of the California Code of Regulations, title 16, as follows:

6 a. **Section 3340.24, subdivision (c):** Respondent falsely or fraudulently issued
7 electronic Certificate of Compliance No. NM691698 without performing a bona fide inspection
8 of the emission control devices and systems on that vehicle as required by Health and Safety
9 Code section 44012.

10 b. **Section 3340.35, subdivision (c):** Respondent issued electronic Certificate of
11 Compliance No. NM691698 even though that vehicle had not been inspected in accordance with
12 section 3340.42 of that Code.

13 c. **Section 3340.42:** Respondent failed to conduct the required smog tests and
14 inspections on that vehicle in accordance with the Bureau's specifications.

15 **FIFTH CAUSE FOR DISCIPLINE**

16 **(Dishonesty, Fraud or Deceit)**

17 17. Respondent subjected his station license to discipline under Health and Safety Code
18 section 44072.2, subdivision (d), in that on or about September 3, 2009, regarding the 2004
19 Dodge Neon, he committed acts involving dishonesty, fraud or deceit whereby another was
20 injured by issuing electronic Certificate of Compliance No. NM691698 without performing a
21 bona fide inspection of the emission control devices and system on that vehicle, thereby depriving
22 the People of the State of California of the protection afforded by the Motor Vehicle Inspection
23 Program.

24 **SIXTH CAUSE FOR DISCIPLINE**

25 **(Violations of the Motor Vehicle Inspection Program)**

26 18. Respondent has subjected his technician license to discipline under Health and Safety
27 Code section 44072.2, subdivision (a), in that on or about September 3, 2009, regarding the 2004
28 Dodge Neon, he violated sections of that Code, as follows:

1 a. **Section 44012, subdivision (a):** Respondent failed to determine that all emission
2 control devices and systems required by law were installed and functioning correctly in
3 accordance with test procedures.

4 b. **Section 44012, subdivision (f):** Respondent failed to perform emission control tests
5 on that vehicle in accordance with procedures prescribed by the department.

6 c. **Section 44032:** Respondent failed to perform tests of the emission control devices
7 and systems on that vehicle in accordance with section 44012 of that Code.

8 d. **Section 44059:** Respondent willfully made false entries for electronic Certificate of
9 Compliance No. NM691698, certifying that the vehicle had been inspected as required when, in
10 fact, it had not.

11 **SEVENTH CAUSE FOR DISCIPLINE**

12 **(Violations of Regulations Pursuant to the Motor Vehicle Inspection Program)**

13 19. Respondent has subjected his technician license to discipline under Health and Safety
14 Code section 44072.2, subdivision (c), in that on or about September 3, 2009, regarding the 2004
15 Dodge Neon, he violated sections of the California Code of Regulations, title 16, as follows:

16 a. **Section 3340.24, subdivision (c):** Respondent falsely or fraudulently issued
17 electronic Certificate of Compliance No. NM691698 without performing a bona fide inspection
18 of the emission control devices and systems on that vehicle as required by Health and Safety
19 Code section 44012.

20 b. **Section 3340.30, subdivision (a):** Respondent failed to inspect and test that vehicle
21 in accordance with Health and Safety Code section 44012.

22 c. **Section 3340.41, subdivision (c):** Respondent entered false information into the
23 Emission Inspection System for electronic Certificate of Compliance No. NM691698 by entering
24 "Pass" for the visual inspection portion of the smog inspection when, in fact, the vehicle should
25 not have passed the visual portion of the smog inspection because it was equipped with non-
26 approved aftermarket exhaust headers.

27 d. **Section 3340.42:** Respondent failed to conduct the required smog tests and
28 inspections on that vehicle in accordance with the Bureau's specifications.

1 **EIGHTH CAUSE FOR DISCIPLINE**

2 **(Dishonesty, Fraud or Deceit)**

3 20. Respondent has subjected his technician license to discipline under Health and Safety
4 Code section 44072.2, subdivision (d), in that on or about September 3, 2009, regarding the 2004
5 Dodge Neon, he committed acts involving dishonesty, fraud or deceit whereby another was
6 injured by issuing electronic Certificate of Compliance No. NM691698 without performing a
7 bona fide inspection of the emission control devices and systems on that vehicle, thereby
8 depriving the People of the State of California of the protection afforded by the Motor Vehicle
9 Inspection Program.

10 **PRIOR CITATIONS**

11 21. To determine the degree of penalty, if any, to be imposed upon Respondent,
12 Complainant alleges as follows:

13 a. On September 9, 2008, the Bureau issued Citation No. C09-0213 to Respondent
14 against his registration and station licenses for violations of Health and Safety Code section
15 44012, subdivision (f) (failure to perform a visual/functional check of emission control devices)
16 and California Code of Regulations, title 16, ("Regulation"), section 3340.35, subdivision (c)
17 (issuing a certificate of compliance to a vehicle improperly tested). Respondent issued a
18 certificate of compliance to a Bureau vehicle with a missing PCV system. The Bureau assessed a
19 civil penalty of \$500. Respondent complied with this citation on October 14, 2008.

20 b. On December 17, 2008, the Bureau issued Citation No. C09-0733 to Respondent
21 against his registration and station licenses for violations of Health and Safety Code section
22 44012, subdivision (f) (failure to perform a visual/functional check of emission control devices)
23 and Regulation, section 3340.35, subdivision (c) (issuing a certificate of compliance to a vehicle
24 improperly tested). Respondent issued a certificate of compliance to a Bureau vehicle with a
25 missing thermostatic air cleaner hot air tube. The Bureau assessed a civil penalty of \$1,000.
26 Respondent complied with this citation on February 9, 2009.

27 c. On April 29, 2009, the Bureau issued Citation No. C09-1243 to Respondent against
28 his registration and station licenses for violations of Health and Safety Code section 44012,

1 subdivision (f) (failure to perform a visual/functional check of emission control devices) and
2 Regulation, section 3340.35, subdivision (c) (issuing a certificate of compliance to a vehicle
3 improperly tested). Respondent issued a certificate of compliance to a Bureau vehicle with a
4 missing fuel evaporative storage canister. The Bureau assessed a civil penalty of \$2,000.
5 Respondent complied with this citation on June 1, 2009.

6 d. On October 18, 2005, the Bureau issued Citation No. M06-0213 to Respondent
7 against his technician license for violations of Health and Safety Code section 44032, (qualified
8 technicians shall perform tests of emission control systems and devices in accordance with
9 section 44012 of that Code) and Regulation, section 3340.30, subdivision (a) (qualified
10 technicians shall inspect, test, and repair vehicles in accordance with sections 44012 and 44035 of
11 the Health and Safety Code, and Regulation section 3340.42). Respondent issued a certificate of
12 compliance to a Bureau vehicle with a missing air injection system. Respondent was required to
13 attend an 8-hour training course. Respondent complied with this citation on December 13, 2005.

14 e. On September 9, 2008, the Bureau issued Citation No. M09-0214 to Respondent
15 against his technician license for violations of Health and Safety Code section 44032, (qualified
16 technicians shall perform tests of emission control systems and devices in accordance with
17 section 44012 of that Code) and Regulation, section 3340.30, subdivision (a) (qualified
18 technicians shall inspect, test, and repair vehicles in accordance with sections 44012 and 44035 of
19 the Health and Safety Code, and Regulation, section 3340.42). Respondent issued a certificate of
20 compliance to a Bureau vehicle with a missing PCV system. Respondent was required to attend
21 an 8-hour training course. Respondent complied with this citation on October 2, 2008.

22 f. On December 17, 2008, the Bureau issued Citation No. M09-0734 to Respondent
23 against his technician license for violations of Health and Safety Code section 44032, (qualified
24 technicians shall perform tests of emission control systems and devices in accordance with
25 section 44012 of that Code) and Regulation, section 3340.30, subdivision (a) (qualified
26 technicians shall inspect, test, and repair vehicles in accordance with sections 44012 and 44035 of
27 the Health and Safety Code, and Regulation, section 3340.42). Respondent issued a certificate of
28 compliance to a Bureau vehicle with a missing thermostatic air cleaner hot air tube. Respondent

1 was required to attend a 16-hour training course. Respondent complied with this citation on
2 February 12, 2009.

3 g. On April 29, 2009, the Bureau issued Citation No. M09-1244 to Respondent against
4 his technician license for violations of Health and Safety Code section 44032, (qualified
5 technicians shall perform tests of emission control systems and devices in accordance with
6 section 44012 of that Code) and Regulation, section 3340.30, subdivision (a) (qualified
7 technicians shall inspect, test, and repair vehicles in accordance with sections 44012 and 44035 of
8 the Health and Safety Code, and Regulation, section 3340.42). Respondent issued a certificate of
9 compliance to a Bureau vehicle with a missing fuel evaporative storage canister. Respondent was
10 required to attend a clean air car course. Respondent complied with this citation on June 28,
11 2009.

12 **OTHER MATTERS**

13 22. Under Code section 9884.7, subdivision (c), the director may invalidate temporarily
14 or permanently or refuse to validate, the registrations for all places of business operated in this
15 state by to Zakaria Suleiman Shabbar doing business as Manteca Test Only Center, upon a
16 finding that he has, or is, engaged in a course of repeated and willful violations of the laws and
17 regulations pertaining to an automotive repair dealer.

18 23. Under Health and Safety Code section 44072.8, if Smog Check Test Only Station
19 License Number TC 250011, issued to Zakaria Suleiman Shabbar doing business as Manteca Test
20 Only Center, is revoked or suspended, any additional license issued under this chapter in the
21 name of said licensee including, but not limited to Advanced Emission Specialist Technician
22 License Number EA 150186, may be likewise revoked or suspended by the director.

23 **PRAYER**

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

26 1. Temporarily or permanently invalidating Automotive Repair Dealer Registration
27 Number ARD 250011, issued to Zakaria Sulciman Shabbar doing business as Manteca Test Only
28 Center;

1 2. Temporarily or permanently invalidating any other automotive repair dealer registration
2 issued in the name of Zakaria Suleiman Shabbar;

3 3. Revoking or suspending Smog Check Test Only Station License Number TC 250011,
4 issued to Zakaria Suleiman Shabbar doing business as Manteca Test Only Center;

5 4. Revoking or suspending any additional license issued under Chapter 5 of the Health
6 & Safety Code in the name of Zakaria Suleiman Shabbar;

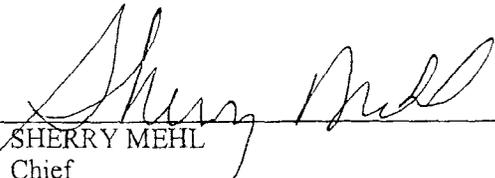
7 5. Revoking or suspending Advanced Emission Specialist Technician License Number
8 EA 150186, issued to Zakaria Suleiman Shabbar

9 6. Ordering Zakaria Suleiman Shabbar to pay the Bureau of Automotive Repair the
10 reasonable costs of the investigation and enforcement of this case, pursuant to Business and
11 Professions Code section 125.3; and,

12 7. Taking such other and further action as deemed necessary and proper.

13
14
15
16 DATED: _____

4/24/10



SHERRY MEHL

Chief
Bureau of Automotive Repair
Department of Consumer Affairs
State of California
Complainant

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