

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

In the Matter of the Accusation Against:

MARIO ALONSO ALMEIDA dba 6TH STREET SMOG

38702 6th Street, East

Palmdale, CA 93550

Automotive Repair Dealer Registration No. ARD 251667

Smog Check Test Only Station License No. TC 251667

MARIO ALONSO ALMEIDA

36716 Little Sycamore Street

Palmdale, CA 93552

Smog Check Inspector License No. EO 630615

Smog Check Repair Technician License No. EI 630615

Respondents.

Case No. 79/20-15092

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DECISION

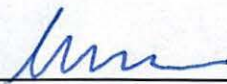
The attached Proposed Decision of the Administrative Law Judge is hereby accepted and adopted by the Director of the Department of Consumer Affairs as the Decision in the above-entitled matter with the following clarifying edit pursuant to Government Code section 11517(c)(2)(C):

- The Proposed Decision does not include a disposition for Smog Check Inspector License No. EO 630615 and Smog Check Repair Technician License No. EI 630615 in the Order section. Paragraph 33 of the Legal Analysis section provides that these licenses shall not be disciplined in this matter. For clarity, the Director adds to the Order paragraph:

“Smog Check Inspector License No. EO 630615 and Smog Check Repair Technician License No. EI 630615 issued to Respondent Mario Alonso Almeida shall not be disciplined.”

This Decision shall be effective on October 20, 2022.

IT IS SO ORDERED this 12 day of Sept., 2022.



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

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

In the Matter of the Accusation Against:

**MARIO ALONSO ALMEIDA dba 6TH STREET SMOG,
Automotive Repair Dealer Registration No. ARD 251667,
Smog Check, Test Only Station License No. TC 251667,

and**

**MARIO ALONSO ALMEIDA,
Smog Check Inspector License No. EO 630615,
Smog Check Repair Technician License No. EI 630615,

Respondent.**

Agency Case No. 79/20-15092

OAH No. 2021120680

PROPOSED DECISION

Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on May 23 and 24, 2022.

Nancy Calero, Deputy Attorney General, represented complainant.

William D. Ferreira, Attorney at Law, Automotive Defense Specialists, represented Mario Alonso Almeida (respondent), individually and doing business as 6th Street Smog.

Oral and documentary evidence was received. The record was held open for the parties to simultaneously file written closing briefs by June 7, 2022, and an optional response brief by June 21, 2022. The parties timely filed their closing briefs, which were marked as follows: complainant's closing brief was marked as Exhibit 22; respondent's closing brief was marked as Exhibit F; and complainant's response brief was marked as Exhibit 23.

The record closed and the matter was submitted for decision on June 21, 2022.

FACTUAL FINDINGS

Jurisdictional Matters

1. In August 2021, complainant Patrick Dorais brought the Accusation solely in his official capacity as the Chief of the Bureau of Automotive Repair (Bureau or BAR), Department of Consumer Affairs, State of California. Respondent filed a Notice of Defense, which contained his request for the hearing that ensued.

2. In 2007, the Bureau issued Automotive Repair Dealer (ARD) Registration number ARD 251667 to respondent doing business as 6th Street Smog. The ARD Registration was in full force and effect at all relevant times and will expire on August 31, 2022, unless renewed.

3. On September 27, 2007, the Bureau issued Smog Check, Test Only, Station License number TC 251667 to respondent doing business as 6th Street Smog. The Smog Check, Test Only, Station License was in full force and effect at all relevant times and will expire on August 31, 2022, unless renewed.

4. 6th Street Smog is certified as a STAR Station. The Bureau's STAR program establishes performance standards that smog check stations must meet or exceed to become STAR certified. (See Cal. Code Regs., tit. 16, § 3340.1.) The Bureau certified 6th Street Smog as a STAR Station on February 19, 2013. The certification will remain active unless respondent's ARD Registration and/or Smog Check Station License are revoked or canceled, the licenses become delinquent, or the certification is invalidated.

5. On August 15, 2012, the Bureau issued Smog Check Inspector (EO) License number 630615 to respondent in his individual capacity. The Smog Check Inspector License was in full force and effect at all relevant times and will expire on September 30, 2022, unless renewed.

6. On August 15, 2012, the Bureau issued Smog Check Repair Technician (EI) License number 630615 to respondent in his individual capacity. The Smog Check Repair Technician License was in full force and effect at all relevant times and will expire on September 30, 2022, unless renewed.

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Smog Check Program

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

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

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

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

11. If the vehicle passes the visual, functional, and tailpipe emissions tests, it passes the overall smog check inspection, and a certificate of compliance is issued by

the station and transmitted electronically to the Bureau's Vehicle Information Database (VID). The VID also contains second-by-second emissions data that the EIS records during the tailpipe test. By issuing a certificate of compliance for a vehicle, the issuing smog station certifies that the vehicle has been properly inspected and has all the required emission control equipment devices installed and functioning correctly. (See Legal Conclusion 9.)

12. The Bureau has become aware of methods some smog check stations and smog check inspectors use to fraudulently issue smog certificates to vehicles that will not pass a properly performed smog check inspection. One such method is known as "clean gassing." Clean gassing is a method by which a smog inspector introduces a surrogate gas, or a mixture of surrogate gas and exhaust emissions, into a vehicle's exhaust gas stream, which alters the exhaust gases in such a way that a vehicle that is unable to pass the tailpipe test of a smog inspection will receive a passing score and will pass the smog inspection, thus generating a false and fraudulent certificate of compliance.

13. The Bureau can identify fraudulent clean gassing activity by analyzing specific second-by-second emissions data that is recorded by the EIS during a smog inspection. Second-by-second data refers to vehicle emissions and speed data that are recorded on a second-by-second basis throughout the ASM test. For example, dramatic simultaneous drops and/or rises in the concentrations of nitrogen oxides, carbon monoxide and/or hydrocarbons during a smog inspection indicates that a surrogate gas was introduced at specific times during the ASM test in order to obtain passable readings for those pollutants.

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Analysis of Test Data

14. In December 2020, Marc Ortega, a Bureau Program Representative, initiated an investigation of the smog check activities at 6th Street Smog by reviewing smog test data transmitted to the VID from 6th Street Smog. Mr. Ortega prepared a written report that summarized the findings of his investigation. At hearing, Mr. Ortega credibly testified regarding the investigation.

15. Based on his investigation, Mr. Ortega identified nine pre-2000 model year vehicles (subject vehicles) that were tested and passed a smog inspection at 6th Street Smog between May 2019 and January 2020, for which the second-by-second emissions data showed an unusual pattern of gas readings consistent with clean gassing. In each test, the data showed at least one sharp, simultaneous drop in the concentrations of nitrogen oxides, carbon monoxide, and hydrocarbons during the ASM test at a period of steady-state speed. The simultaneous drop in pollutants was followed by a simultaneous rise of the same pollutants several seconds later. The subject vehicles also had a second sharp, simultaneous drop in the same pollutant concentrations later in the test.

16. The smog inspections for the subject vehicles were performed under the smog check inspector license number of Rogelio Rosales (Rosales), who was employed at 6th Street Smog at the time. Bureau records show Rosales was issued Smog Check Inspector (EO) License number EO 637163 in 2014. In March 2021, Rosales' license was revoked by the Bureau in another proceeding (BAR case number 79/20-6135), separate from and not involving the smog inspections of the subject vehicles in this proceeding.

17. Rosales, while employed at 6th Street Smog, performed smog inspections on each of the subject vehicles during which a surrogate gas was

introduced. Second-by-second data revealed a pattern that could only be explained as clean gassing. As a result of the clean gassing, each of the subject vehicles passed the ASM test based on false and altered exhaust emission readings rather than the vehicle's true emission levels, and a false and fraudulent certificate of compliance was issued for the vehicle. The smog inspections by Rosales occurred at 6th Street Smog on the following dates:

(1) Vehicle 1, 1999 Toyota 4Runner, May 13, 2019.

(Exh. 8, pp. AG-85 to 86; Exh. 9.)

(2) Vehicle 2, 1997 Toyota Camry, June 3, 2019.

(Exh. 8, pp. AG-88 to 89; Exh. 10.)

(3) Vehicle 3, 1999 Chevrolet Tahoe, June 6, 2019.

(Exh. 8, pp. AG-91 to 92; Exh. 11.)

(4) Vehicle 4, 1990 Jeep Wrangler, June 12, 2019.

(Exh. 8, pp. AG-94 to 95; Exh. 12.)

(5) Vehicle 5, 1998 Acura 3.0CL, July 31, 2019.

(Exh. 8, pp. AG-97 to 98; Exh. 13.)

(6) Vehicle 6, 1989 Jeep Cherokee, September 19, 2019.

(Exh. 8, pp. AG-100 to 101; Exh. 14.)

(7) Vehicle 7, 1994 Honda Civic, October 1, 2019.

(Exh. 8, pp. AG-103 to 104; Exh. 15.)

(8) Vehicle 8, 1995 Toyota 4Runner, November 23, 2019.

(Exh. 8, pp. AG-106 to 107; Exh. 16.)

(9) Vehicle 9, 1998 Chevrolet C1500 Pickup, January 25, 2020. (Exh. 8, pp. AG-109 to 110; Exh. 17.)

18. The certificates of compliance for the subject vehicles, issued by 6th Street Smog as a result of clean gassing by Rosales, were false and fraudulent because they contained false and misleading information that the subject vehicles had been properly inspected when, in fact, they had not.

19. As part of his investigation, Mr. Ortega reviewed data from the VID for each of the subject vehicles to determine the results of prior inspections of the vehicles. The data showed each of the subject vehicles failed a prior inspection due to elevated pollutant concentration levels measured by the EIS during the ASM test. The prior inspections of the subject vehicles occurred on the following dates, with some just a few days before the fraudulent inspections by Rosales:

(1) Vehicle 1 failed a prior inspection on May 8, 2019, five days before passing an inspection with Rosales on May 13, 2019. (Exh. 8, pp. AG-85 and AG-87.)

(2) Vehicle 2 failed a prior inspection on June 1, 2019, two days before passing an inspection with Rosales on June 3, 2019. (Exh. 8, p. AG-90.)

(3) Vehicle 3 failed prior inspection on June 5, 2019, one day before passing an inspection with Rosales on June 6, 2019. (Exh. 8, pp. AG-91 and AG-93.)

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(4) Vehicle 4 failed a prior inspection June 11, 2019, one day before passing an inspection with Rosales on June 12, 2019.

(Exh. 8, pp. AG-94 and AG-96.)

(5) Vehicle 5 failed a prior inspection on July 30, 2019, one day before passing an inspection with Rosales on July 31,

2019. (Exh. 8, pp. AG-97 and AG-99.)

(6) Vehicle 6 failed a prior inspection on September 12, 2019, seven days before passing an inspection with Rosales on September 19, 2019. (Exh. 8, pp. AG-100 and AG-102.)

(7) Vehicle 7 failed a prior inspection on May 26, 2018, but several months later passed an inspection with Rosales on October 1, 2019. (Exh. 8, pp. AG-103 and AG-105.)

(8) Vehicle 8 failed a prior inspection on August 7, 2019, three months before passing an inspection with Rosales on November 23, 2019. (Exh. 8, pp. AG-106 and AG-108.)

(9) Vehicle 9 failed a prior inspection on January 22, 2020, three days before passing an inspection with Rosales on January 25, 2020. (Exh. 8, pp. AG-109 and AG-111.)

20. Bureau records show that the prior inspections of Vehicles 2, 3, 8, and 9 were performed at 6th Street Smog by respondent himself. Respondent's inspections resulted in these four vehicles failing the smog inspection. Bureau records also show that the prior inspections of Vehicles 4, 5, and 6 were performed at 6th Street Smog by Rosales. The three vehicles failed those prior inspections.

21. Mr. Ortega referred the smog check inspections of the subject vehicles to the Bureau's Engineering and Research Branch for a further in-depth evaluation. Air Quality Engineer Francis J. Di Genova evaluated the smog inspections for the subject vehicles. At hearing, Mr. Di Genova credibly testified regarding his findings and opinions. His testimony was supported by his two affidavits. (Exhs. 19, 20.)

22. Mr. Di Genova has been employed by the Bureau since April 2014. He presently holds the position of Air Quality Engineer II in the Program Evaluation and Referee Unit. Mr. Di Genova has worked in the air quality field over 45 years. He holds a Bachelor of Science degree in physics and a Master of Science degree in environmental science. He has extensive experience in both the private and public sectors, which employment included the California Air Resources Board for 13 years. Most of his employment with that board was as a Supervising Air Pollution Specialist in the Research Division. Mr. Di Genova was involved in the certification testing of the BAR-97 analyzer. He has been a member of the Society of Automotive Engineers since 1990 and has been certified as a Qualified Environmental Professional by the Institute for Professional Environmental Practice since 1994. He has authored or co-authored more than 40 reports and papers related to vehicular emissions, emission controls, and their measurements and analysis.

23. Mr. Di Genova reviewed the second-by-second data regarding the smog inspections for the subject vehicles. Mr. Di Genova, in detailed testimony and his affidavits, opined that each of the subject vehicles tested by 6th Street Smog was clean gassed. He found that the second-by-second data sent to the VID by 6th Street Smog for each of the subject vehicles "is not consistent with a valid steady state California Smog Check [ASM] emission test of a vehicle with a gasoline-powered, spark ignition engine"; that the "multiple sharp, significant, simultaneous changes in all pollutants

that are documented in the second-by-second data from each test cannot be explained by air dilution, catalyst light-off, change in Air-Fuel ratio of the charge to the engine, or any single component failure of the [EIS]"; and that "there is no plausible explanation other than deliberate clean gassing by 6th Street Smog . . . for the falsified second-by-second test data and illegal certification tests identified" (Exh. 20, p. AG-161.)

24. At hearing, Mr. Ortega testified that an adverse effect of clean gassing is that it allows a vehicle that does not meet the requirements of the smog check program to continue polluting the atmosphere, which is detrimental to all Californians. Mr. Di Genova's testimony explained how clean gassing contributes to air pollution and undermines the considerable efforts by the State of California and the Bureau to reduce automobile emissions.

25. Complainant's evidence that each of the subject vehicles was clean gassed at 6th Street Smog was persuasive and un rebutted. The exhibits and testimony from Mr. Ortega and Mr. Di Genova established there is no other plausible explanation for the smog test data for the subject vehicles. The fact that seven of the nine subject vehicles failed their prior smog inspections tends to support complainant's allegations that the smog inspections at issue were fraudulent. Respondent's critiques of the Bureau's investigation and analysis lacked persuasive force as compared to this evidence.

26. Both Mr. Ortega and Mr. Di Genova credibly testified that clean gassing activity at a smog station would be noticeable and visible. Clean gassing requires a source of surrogate gas and a system for drawing the gas into the analyzer. Typically, the source of the surrogate gas, e.g., a compressed gas bottle or another vehicle, is a visible indicator of clean gassing activity. Mr. Di Genova testified there are various

types of surrogate gas and different configurations of systems to draw the gas into the analyzer. He noted there are many ways to do clean gassing and many ways to conceal it. Clean gassing is not something that happens accidentally.

Respondent's Testimony

27. Respondent has been a smog check technician since 2008 and has been the owner of 6th Street Smog since 2007. Respondent and one smog technician are the station's only employees. Currently, respondent employs his cousin as the smog technician for the station. Respondent testified the station only performs smog inspections and does not perform any automobile repair work. The station premises has three car bays. Respondent testified only one car bay is used for smog inspections and the other two car bays are "used like storage." The station is open seven days a week from 10 a.m. to 6 p.m.

28. Respondent testified he works five to six days per week, Monday through Saturday. Respondent performs most of the smog inspections when he is present at the station; otherwise, the smog technician performs the inspections.

29. Respondent testified Rosales was his friend who he hired in 2013 as a smog technician for 6th Street Smog. Rosales worked at the station five days per week. Respondent testified he was present at the station "sometimes" when Rosales was working. Respondent admitted he supervised Rosales "not that often," and there were no measures to supervise Rosales when he was working at the station alone. Respondent testified he checked Rosales' work by reviewing his invoices and paperwork for smog inspections. Respondent testified Rosales left his employment at 6th Street Smog "when he found another job somewhere else." At the time respondent

received the Accusation in August 2021, Rosales was no longer working at 6th Street Smog.

30. Respondent testified he was unaware Rosales performed improper smog inspections during his employment at 6th Street Smog. Respondent testified he first learned that Rosales performed improper smog inspections by reading the Accusation paperwork. According to respondent, he saw no indication at the station, such as additional equipment or tubing used for inspections, that Rosales was performing inspections by clean gassing or other improper methods.

31. Respondent testified he did not perform any improper or fraudulent smog inspections by clean gassing or any other improper method. Respondent noted the clean gassing of the subject vehicles was done by Rosales, under Rosales' smog technician license number. Respondent testified he was not present at the station when Rosales performed the fraudulent inspections. Respondent noted that he conducted smog inspections of some of the subject vehicles (Vehicles 2, 3, 8, and 9) and properly failed the vehicles, before they were subsequently inspected and passed by Rosales.

32. Respondent testified he understands his responsibility to supervise the smog technicians he employs, and that he is responsible for the technician's conduct even when he is not present at the station. Respondent reiterated he would not permit improper smog inspections at his station. Respondent asserted that if a smog technician engages in illegal activity, he would not want them employed at his station. Respondent is cognizant of the requirements for maintaining his station's STAR certification, which he considers important to his business.

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33. Respondent testified he has taken steps to ensure proper inspections at his station. He testified he installed cameras to monitor inspections performed by his smog technician. Respondent admitted, however, the cameras are located on the outside of the station and none of the cameras show the inside of the station. The cameras were installed one year ago as a security measure to protect the station premises. Respondent admitted he would have to purchase an additional camera in order to monitor an employee performing a smog inspection at the station.

34. Respondent testified he also instituted an audit policy for paperwork review as a means to ensure proper smog inspections by his smog technician. The policy requires the technician to sign a document titled, "Smog Inspection Audit Policy and Procedures," which summarizes the procedures and expectations for smog inspections performed at the station. (Exh. E.) Respondent admitted the document was created one week before this administrative hearing, and that his cousin, who is currently employed as the station's smog technician, has not yet signed the document.

35. Respondent testified he has no prior discipline against his licenses except for citations issued to him by the Bureau in 2010, discussed below. Respondent wants to keep his ARD registration and smog licenses. He is willing to go on probation and give the Bureau unfettered access to his station for inspections; meet with Bureau representatives to discuss methods of ensuring compliance; and take training courses to ensure he operates his station in compliance with applicable laws and regulations.

Other Findings

36. In 2020, the Bureau filed a disciplinary action against Rosales and the smog station in Palmdale that employed him at the time, based on improper smog inspections and fraudulent certificates of compliance issued for three vehicles in 2020.

(Exh. A.) Rosales' license was revoked by default effective March 25, 2021. (Exh. B.) The Bureau and the Palmdale smog station entered into a stipulated settlement that placed the Palmdale smog station on five years' probation under specified terms and conditions. (Exh. D.) The Bureau's resolution of the matter involving the Palmdale smog station is not binding precedent in this matter.

Discipline Considerations

37. To determine the degree of discipline, if any, the Accusation alleges that the Bureau issued citations to respondent on February 8, 2010, and June 24, 2020. (Accusation, ¶¶ 39-43.)

38. On February 8, 2010, respondent and his station were issued citations for violations resulting from respondent issuing a certificate of compliance to a Bureau undercover vehicle with a missing Positive Crankcase Ventilation System. (Exh. 4, p. AG-57; Exh. 5, p. AG-60.) The citations imposed a \$500 fine and ordered respondent to complete an 8-hour training course. Bureau records indicate respondent paid the fine and completed the training course. (Exhs. 4, 5.)

39. On June 24, 2010, respondent and his station were issued citations for violations resulting from respondent issuing a certificate of compliance to a Bureau undercover vehicle with a missing Evaporative Emission (EVAP) System. (Exh. 4, p. AG-58; Exh. 5, p. AG-61.) The citations imposed a \$1,500 fine and ordered respondent to complete a 16-hour training course. Bureau records indicate the fine was paid but does not indicate the status of the training course. (Exhs. 4, 5.)

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Cost Recovery

40. The Bureau incurred costs of investigation (\$2,541.36) and enforcement (\$15,935) of this matter totaling \$18,476.36. (Exhs. 6, 7.) These costs are found to be reasonable.

41. Respondent testified he has no source of income other than his smog check business. Respondent is not married and lives with his two minor children, ages 13 and 6, and the children's mother. Respondent is the sole financial provider for his children and their mother, who does not work because she is disabled. Respondent presented no documentary evidence of his monthly income and household expenses.

LEGAL CONCLUSIONS

Legal Principles

BURDEN AND STANDARD OF PROOF

1. The burden of proof in a licensing disciplinary action is on the party making the charges in an accusation. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789 fn. 9.) In a case that involves a nonprofessional license, complainant bears the burden of proving cause for discipline by a preponderance of the evidence. (*Imports Performance v. Dept. of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-918.) "Preponderance of the evidence" means evidence that has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

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AUTOMOTIVE REPAIR ACT

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

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

(1) Making or authorizing in any manner or by any means whatever any statement written or oral which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading. [¶ . . . ¶] (4) Any other conduct that constitutes fraud. [¶ . . . ¶] (6) Failure in any material respect to comply with the provisions of this chapter [i.e., the Automotive Repair Act] or regulations adopted pursuant to it.

MOTOR VEHICLE INSPECTION PROGRAM

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

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

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

6. Health and Safety Code section 44012 provides, in pertinent part: "The test at the smog check stations shall be performed in accordance with procedures prescribed by the department and may require loaded mode dynamometer testing in enhanced areas, . . . or other appropriate test procedures as determined by the department in consultation with the state board."

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

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

9. CCR section 3340.35, subdivision (c), states in pertinent part: "A licensed station shall issue a certificate of compliance or noncompliance to the owner or

operator of any vehicle that has been inspected in accordance with the procedures specified in section 3340.42 of this article and has all the required emission control equipment and devices installed and functioning correctly."

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

Responsibility for Employee's Conduct

11. Respondent is responsible for the improper smog inspections of the subject vehicles performed by Rosales while an employee of 6th Street Smog. As the owner of 6th Street Smog, respondent has a nondelegable duty and is strictly liable for the conduct of his employees and agents under the doctrine of respondeat superior. "The owner of a license is obligated to see that the license is not used in violation of the law." (*Ford Dealers Assn. v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 359-360 [finding that an administrative regulation promulgated by the DMV can impose strict liability on auto dealers for the fraudulent statements of its salesperson-employees to the public].)

12. This nondelegable duty applies to an employee or agent's fraudulent conduct, even where the licensee did not know of the conduct. (*Rob-Mac, Inc. v. Department of Motor Vehicles* (1983) 148 Cal.App.3d, 793, 796-797, 799.) A licensee who operates his business through employees must be responsible to the licensing authority for the acts of agents or employees performed "in the course of his business in the operation of the license" even if the licensee does not have knowledge of the unlawful acts or authorize the activity. (*Arenstein v. California State Bd. of Pharmacy* (1968) 265 Cal.App.2d 179, 192-193.)

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13. Although respondent's employee, and not respondent himself, performed the clean gassing on the subject vehicles, respondent's ARD Registration and Smog Station License may, nonetheless, be subject to discipline for the employee's fraudulent conduct.

Cause for Discipline Against ARD Registration

14. Cause exists to discipline respondent's ARD Registration pursuant to Business and Professions Code section 9884.7, subdivision (a)(1), in that respondent, through his employee Rosales, made untrue and misleading statements that were known to be untrue and misleading, by issuing electronic certificates of compliance for each of the subject vehicles, which certified the vehicles had passed inspection and were in compliance with applicable laws and regulations when, in fact, the vehicles had not been properly inspected, based on Factual Findings 7 through 26 and Legal Conclusions 11 through 13 and 18.

15. Cause exists to discipline respondent's ARD registration pursuant to Business and Professions Code section 9884.7, subdivision (a)(4), in that respondent, through his employee Rosales, committed acts which constitute fraud, by issuing electronic certificates of compliance for each of the subject vehicles without first performing bona fide inspections of the emission control devices and systems on those vehicles, and thereby deprived the people of the State of California of the protection afforded by the Motor Vehicle Inspection Program based on Factual Findings 7 through 26 and Legal Conclusions 11 through 13, 16, and 18.

16. The preponderance of the evidence established that the smog inspections of the subject vehicles were the product of clean gassing, which is

fraudulent conduct. Complainant's evidence of clean gassing was persuasive and un rebutted. (Factual Findings 14 through 26.)

17. Cause exists to discipline respondent's ARD registration pursuant to Business and Professions Code section 9884.7, subdivision (a)(6), in that respondent, through his employee Rosales, failed in a material respect to comply with the statutes and regulations pertaining to the smog inspections of the subject vehicles, based on Factual Findings 7 through 26 and Legal Conclusions 11 through 13 and 18.

18. Business and Professions Code section 9884.7 provides that an ARD registration may be disciplined for "acts or omissions related to the conduct of the business of the automotive repair dealer." A smog check inspection is an activity related to the conduct of an automotive repair dealer's business. Only a registered automotive repair dealer may be licensed as a smog check station. (CCR § 3340.10.) Smog check inspections may only be performed at licensed smog stations, by licensed smog technicians. (CCR §§ 3340.28, 3340.15.) Under Health and Safety Code section 44002, inspections and repairs performed pursuant to the Motor Vehicle Inspection Program must comply with all requirements imposed by, among others, "Chapter 20.3 (commencing with Section 9880) of Division 3 of the Business and Professions Code [i.e., the Automotive Repair Act] and Chapter 33 (commencing with Section 3300) of Title 16 of the California Code of Regulations." When a vehicle passes the smog check inspection, the certificate of compliance is issued by the station, not the inspector, although the inspector's action of passing the car is a predicate act to the issuance of the certificate of compliance. (Health & Saf. Code, 44015, subd. (b); CCR § 3340.35, subd. (c).) Therefore, discipline against an automotive repair dealer's registration may be taken pursuant to Business and Professions Code section 9884.7 based on illegal smog check activities.

Cause for Discipline Against Smog Check Station License

19. Cause exists to discipline respondent's Smog Check, Test Only, Station License, pursuant to Health and Safety Code section 44072.2, subdivision (a), in that respondent, through his employee Rosales, with respect to the subject vehicles, violated Health and Safety Code section 44012 by failing to ensure that the emission control tests were performed on the subject vehicles in accordance with procedures prescribed by the department, and violated Health and Safety Code section 44015, subdivision (b), by issuing electronic smog certificates of compliance for the subject vehicles without properly testing and inspecting the vehicles to determine if they were in compliance with Health and Safety Code section 44012, based on Factual Findings 7 through 26 and Legal Conclusions 11 through 13.

20. Cause exists to discipline respondent's Smog Check, Test Only, Station License, pursuant to Health and Safety Code section 44072.2, subdivision (c), in that respondent, through his employee Rosales, with respect to the subject vehicles, violated CCR section 3340.24, subdivision (c), by falsely or fraudulently issuing electronic smog certificates of compliance without performing bona fide inspections of the emission control devices and systems on those vehicles, violated CCR section 3340.35, subdivision (c), by issuing certificates of compliance even though the vehicles had not been properly inspected, and violated CCR section 3340.42 by failing to conduct the smog tests and inspections in accordance with the Bureau's specifications, based on Factual Findings 7 through 26 and Legal Conclusions 11 through 13.

21. Cause exists to discipline respondent's Smog Check, Test Only, Station License, pursuant to Health and Safety Code section 44072.2, subdivision (d), in that respondent, through his employee Rosales, committed acts involving dishonesty, fraud or deceit whereby another was injured, by issuing electronic smog certificates of

compliance for the subject vehicles without performing bona fide inspections of the emission control devices and systems on the vehicles, thereby depriving the people of the State of California of the protection afforded by the Motor Vehicle Inspection Program, based on Factual Findings 7 through 26 and Legal Conclusions 11 through 13.

Level of Discipline

22. Administrative proceedings to revoke, suspend or impose discipline on a professional or occupational license are noncriminal and nonpenal; they are not intended to punish the licensee, but rather to protect the public. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 785-786.) The statutes relating to the licensing of professions and occupations are designed to protect the public from dishonest, untruthful and disreputable licensees. (*Arneson v. Fox* (1980) 28 Cal.3d 440, 451.) Protection of the public is the Bureau's highest priority in exercising its licensing, regulatory, and disciplinary functions. (Bus. & Prof. Code, § 9880.3.)

23. The Bureau's "Guidelines for Disciplinary Orders and Terms and Conditions of Probation (Rev. June 2021)" (Guidelines), which are incorporated by reference in the Bureau's regulations at CCR section 3395.4, were considered.

24. The Guidelines include recommended levels of discipline for various violations. For the specific violations alleged against respondent in this matter, the recommended probation periods range from two to five years.

25. The Guidelines also contain factors in aggravation and factor in mitigation that are to be considered in determining the level of discipline to be imposed in a given case. (Guidelines, pp. 1-2.) The factors in aggravation include prior warnings from BAR; prior office conferences with BAR; prior history of citations; prior

history of formal disciplinary action; evidence that the unlawful act was of a pattern of practice; and evidence of any other conduct which constitutes fraud or gross negligence. The factors in mitigation include the absence of prior disciplinary action, evidence that the violation was not part of a pattern or practice, evidence of substantial measures to correct its business practices and/or business operations so as to minimize the likelihood of recurrence of the violation; and evidence of any other conduct which could constitute a factor in mitigation. The Guidelines have been considered.

26. Based on consideration of the Guidelines, and as explained below, the appropriate level of discipline in this case is a stayed revocation with five years' probation against respondent's ARD Registration and Smog Check, Test Only, Station License, under the terms and conditions set forth in the Order below. The Order below includes the Bureau's standard terms and conditions of probation, as well as the optional condition of an actual suspension. An actual suspension of five days is appropriate and will provide respondent time to correct his business practices and reinforce his understanding of his responsibility to supervise and monitor his employee(s) who perform smog inspections at his station.

27. The improper inspections of the subject vehicles, revealed by the Bureau's analysis of the testing data from 6th Street Smog, were not part of a pattern or practice of clean gassing at respondent's station. No evidence was presented of respondent himself engaging in improper and fraudulent inspections. All of the improper inspections of the subject vehicles were done by Rosales. When respondent conducted prior inspections on four of the subject vehicles, the vehicles properly failed respondent's inspections. Rosales' practice of clean gassing at another smog station in

Palmdale shows that he did not require respondent's assistance to conduct fraudulent smog inspections.

28. The clean gassing of the subject vehicles was the result of the activities of one employee, Rosales, who was able to engage in illegal activity at the station due, in part, to respondent's failure to provide adequate supervision and monitoring. Respondent has acknowledged and understands his responsibility, as station owner, to provide adequate supervision and monitoring of his smog technician to ensure proper smog inspections at his station.

29. The clean gassing of six of the subject vehicles occurred at the rate of one vehicle per month during the months of May, July, September, October, and November of 2019, and January 2020, with three of the subject vehicles being clean gassed in June 2019. Rosales was able to engage in clean gassing of the subject vehicles because of inadequate monitoring and supervision by respondent. Although respondent claimed to work five days per week, he apparently was not present at the station for the entirety of the station's operating hours of 10 a.m. to 6 p.m. Respondent admitted he was not present at the station when the subject vehicles were clean gassed by Rosales. He further admitted that his supervision of Rosales was "not that often," even though, according to respondent, he and Rosales worked at the station five days per week. There were no measures to monitor Rosales when Rosales was working alone at the station. Respondent had no reason to suspect Rosales of improper activity. After being hired by respondent in 2013, Rosales worked for respondent during the ensuing five to six years with no incidents of improper smog inspections during that period.

30. Respondent has a prior history of citations with the Bureau from 2010. The 2010 citations did not involve clean gassing. The citations involved respondent

issuing certificates of compliance to Bureau undercover vehicles with missing emissions system components. After completing an 8-hour training course ordered by the Bureau, there has been no recurrence of respondent issuing certificates of compliance to vehicles with missing components. During the approximately 11 years since the citations were issued in 2010, respondent has had no other disciplinary action filed against him by the Bureau, until the Accusation in this matter was filed in 2021, based on improper smog inspections by respondent's employee.

31. Respondent's testimony, regarding cameras on the outside of the station and an audit procedure developed one week before this hearing, was entitled to little weight as evidence of mitigation. Those measures cannot reasonably be construed as substantial corrective measures that will minimize the likelihood of recurrence of illegal smog inspections at the station. Respondent admitted the cameras do not allow him to view the inside of the station while an inspection is being performed, and his current smog technician has not yet signed an agreement to abide by the audit procedure. Respondent can use the five-day suspension as an opportunity to fine tune the corrective measures to his business practices.

Other Matters

32. Any other ARD registration held by respondent may be disciplined pursuant to Business and Professions Code section 9884.7, subdivision (c), for the violations established herein.

33. However, respondent's smog inspector and smog technician licenses shall not be disciplined in this matter. Pursuant to Health and Safety Code section 44072.8, any other licenses issued to respondent pursuant to Chapter 5 of Part 5 of Division 26 of the Health and Safety Code may be disciplined as a result of the

discipline of his licenses that are the subject of this proceeding. In this case, none of the clean gassing violations involved respondent's individual smog inspector and smog technician licenses. Respondent's involvement was his failure, as station owner, to adequately monitor and supervise the employee who committed the violations. There is no evidence of respondent, individually, engaging in a pattern or practice of improper and fraudulent smog inspections. Public protection does not require disciplinary action against respondent's individual smog licenses.

Cost Recovery

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

35. The Bureau must exercise its discretion to reduce or eliminate cost awards in a manner that will ensure registrants and licentiates with potentially meritorious claims or defenses are not deterred from exercising their right to a hearing, and must not assess the full costs of investigation and prosecution when to do so would unfairly penalize the 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. (See *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45.) Factors to be considered in determining costs

sought pursuant to Business Code, section 125.3, include: the licentiate's success in getting the charges dismissed or reduced; the licentiate's subjective good faith belief in the merits of his or her position; whether the licentiate raised a colorable challenge to the proposed discipline; the licentiate's financial ability to pay; and whether the scope of the investigation was appropriate in light of the alleged misconduct. (*Id.*)

36. The declarations signed with the attached statements constitute prima facie evidence of the reasonableness of the costs incurred for prosecution. (Bus. & Prof. Code, § 125.3, subd. (c).) Respondent failed to rebut the reasonableness of the costs, or to establish sufficient cause to not award these costs to complainant. For example, respondent presented no testimony or documentary evidence of his monthly income and expenses to demonstrate a financial inability to pay costs. Therefore, cause exists, pursuant to Business and Professions Code section 125.3, to order respondent to pay the Bureau \$18,476.36 for the reasonable costs of the investigation and enforcement of this matter. (Factual Findings 40 and 41.)

ORDER

IT IS HEREBY ORDERED that ARD Registration No. ARD 251667 and Smog Check, Test Only, Station License No. TC 251667, issued to Respondent Mario Alonso Almeida dba 6th Street Smog, and any other ARD Registration issued to Respondent, are revoked. However, the revocation is stayed, and Respondent is placed on probation for five years on the following terms and conditions.

1. Actual Suspension

ARD Registration No. ARD 251667, and Smog Check, Test Only, Station License No. TC 251667, issued to Respondent, and any other ARD Registration issued to

Respondent, are suspended for five (5) consecutive days beginning on the effective date of the Decision and Order.

2. Obey All Laws

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

3. Quarterly Reporting

During the period of probation, Respondent shall report either by personal appearance or in writing as determined by BAR on a schedule set by BAR, but no more frequently than once each calendar quarter, on the methods used and success achieved in maintaining compliance with the terms and conditions of probation.

4. Reporting Financial Interests

Respondent shall, within 30 days of the effective date of the decision and within 30 days from the date of any request by BAR during the period of probation, report any financial interest which any Respondent or any partners, officers, or owners of any Respondent facility may have in any other business required to be registered pursuant to Section 9884.6 of the Business and Professions Code.

5. Access to Examine Vehicles and Records

Respondent shall provide BAR representatives unrestricted access to examine all vehicles (including parts) undergoing service, inspection, or repairs, up to and including the point of completion. Respondent shall also provide BAR representatives unrestricted access to all records pursuant to BAR laws and regulations.

6. Tolling of Probation

If, during probation, Respondent leaves the jurisdiction of California to reside or do business elsewhere or otherwise ceases to do business in the jurisdiction of California, Respondent shall notify BAR in writing within 10 days of the dates of departure and return, and of the dates of cessation and resumption of business in California.

All provisions of probation other than cost reimbursement requirements, restitution requirements, training requirements, and that Respondent obey all laws, shall be held in abeyance during any period of time of 30 days or more in which Respondent is not residing or engaging in business within the jurisdiction of California. All provisions of probation shall recommence on the effective date of resumption of business in California. Any period of time of 30 days or more in which Respondent is not residing or engaging in business within the jurisdiction of California shall not apply to the reduction of this probationary period or to any period of actual suspension not previously completed. Tolling is not available if business or work relevant to the probationary license or registration is conducted or performed during the tolling period.

7. Violation of Probation

If Respondent violates or fails to comply with the terms and conditions of probation in any respect, the Director, after giving notice and opportunity to be heard, may set aside the stay order and carry out the disciplinary order provided in the decision. Once Respondent is served notice of BAR's intent to set aside the stay, the Director shall maintain jurisdiction, and the period of probation shall be extended until final resolution of the matter.

8. Maintain a Valid License

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

9. Cost Recovery

Respondent shall pay the Bureau of Automotive Repair \$18,476.36 for the reasonable costs of the investigation and enforcement of Case No. 79/20-15092. Respondent shall make such payment as directed by BAR. Any agreement for a scheduled payment plan shall require full payment to be completed no later than six (6) months before probation terminates. Respondent shall make payment by check or money order payable to the Bureau of Automotive Repair and shall indicate on the check or money order that it is for cost recovery payment for Case No. 79/20-15092. Any order for payment of cost recovery shall remain in effect whether or not probation is tolled. Probation shall not terminate until full cost recovery payment has been made. BAR reserves the right to pursue any other lawful measures in collecting on the costs ordered and past due, in addition to taking action based upon the violation of probation.

10. Completion of Probation

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

11. License Surrender

Following the effective date of a decision that orders a stay of invalidation or revocation, if Respondent ceases business operations or is otherwise unable to satisfy the terms and conditions of probation, Respondent may request that the stay be vacated. Such request shall be made in writing to BAR. The Director and the BAR Chief reserve the right to evaluate the Respondent's request and to exercise discretion whether to grant the request or take any other action deemed appropriate or reasonable under the circumstances. Upon formal granting of the request, the Director will vacate the stay order and carry out the disciplinary order provided in the decision.

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Respondent may not petition the Director for reinstatement of the surrendered registration and/or license, or apply for a new registration or license under the jurisdiction of BAR at any time before the date of the originally scheduled completion of probation. If Respondent applies to BAR for a registration or license at any time after that date, Respondent must meet all current requirements for registration or licensure and pay all outstanding fees or cost recovery owed to BAR and left outstanding at the time of surrender.

DATE: **08/08/2022**

Erlinda G. Shrenger
Erlinda G. Shrenger (Aug 8, 2022 13:44 PDT)

ERLINDA G. SHRENGER

Administrative Law Judge

Office of Administrative Hearings