

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

**In the Matter of the Accusation Against:**

**CRISTINA PORTILLO, individually and doing business as  
FREEDOM SMOG (multiple locations); and ALEJANDRO  
HERNANDEZ-VILLA, individually, Respondents**

**Agency Case No. 79/20-7459**

**OAH Case No. 2020110457**

**PROPOSED DECISION**

On May 10, 2021, Wim van Rooyen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by telephone and videoconference from Sacramento, California.

Seth A. Curtis, Deputy Attorney General, represented Patrick Dorais (complainant), Chief of the Bureau of Automotive Repair (Bureau), Department of Consumer Affairs, State of California.

William Ferreira, Attorney at Law, Automotive Defense Specialists, represented respondent Cristina Portillo (Portillo), individually and doing business as (dba) Freedom Smog at multiple locations.

Respondent Alejandro Hernandez-Villa (Hernandez-Villa) did not appear at hearing.<sup>1</sup>

Evidence was received, and the record left open until July 9, 2021, to allow for closing briefs. On May 28, 2021, Portillo filed her closing brief, which was marked for identification as Exhibit N. On July 9, 2021, complainant filed his closing brief, which was marked for identification as Exhibit 82. On July 9, 2021, Exhibits 82 and N were admitted as argument, the record was closed, and the matter was submitted for decision.

On August 5, 2021, the record was re-opened until August 16, 2021, to permit complainant to file missing license certifications for certain Freedom Smog locations and Portillo to file any objections. On August 11, 2021, complainant filed the additional license certifications, marked for identification as Exhibit 83. Portillo did not file any objections. Consequently, on August 16, 2021, Exhibit 83 was admitted, the record was closed, and the matter was re-submitted for decision.

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<sup>1</sup> Hernandez-Villa did not file a Notice of Defense. The Bureau will prepare a separate Default Decision addressing any discipline as to Hernandez-Villa.

## **FACTUAL FINDINGS**

### **Jurisdiction**

#### **LICENSES**

##### **Freedom Smog Manteca**

1. On August 28, 2012, the Bureau issued Portillo Automotive Repair Dealer (ARD) Registration No. ARD 270071 (Manteca ARD Registration) for a Freedom Smog location in Manteca, California (Freedom Smog Manteca). The Manteca ARD Registration will expire on August 31, 2021, unless renewed or revoked.

2. On September 10, 2012, the Bureau issued Portillo Smog Check Test Only Station (SCTOS) License No. TC 270071 (Manteca SCTOS License) for Freedom Smog Manteca. The Manteca SCTOS License will expire on August 31, 2021, unless renewed or revoked.

##### **Freedom Smog Modesto Kansas Ave.**

3. On November 7, 2012, the Bureau issued Portillo ARD Registration No. ARD 270786 (Modesto Kansas Ave. ARD Registration) for a Freedom Smog location on Kansas Avenue in Modesto, California (Freedom Smog Modesto Kansas Ave.). The Modesto Kansas Ave. ARD Registration will expire on November 30, 2021, unless renewed or revoked.

4. On February 14, 2018, the Bureau issued Portillo Smog Check Station (SCS) License No. RC 270786 (Modesto Kansas Ave. SCS License) for Freedom Smog

Modesto Kansas Ave. The Modesto Kansas Ave. SCS License will expire on November 30, 2021, unless renewed or revoked.

### **Freedom Smog Riverbank**

5. On April 8, 2015, the Bureau issued Portillo ARD Registration No. ARD 279837 (Riverbank ARD Registration) for a Freedom Smog location in Riverbank, California (Freedom Smog Riverbank). The Riverbank ARD Registration will expire on April 30, 2022, unless renewed or revoked.

6. On July 17, 2018, the Bureau issued Portillo SCS License No. RC 279837 (Riverbank SCS License) for Freedom Smog Riverbank. The Riverbank SCS License will expire on April 30, 2022, unless renewed or revoked.

### **Freedom Smog Modesto 11th Street**

7. On August 9, 2019, the Bureau issued Portillo ARD Registration No. ARD 295097 (Modesto 11th Street ARD Registration) for a Freedom Smog location on 11th Street in Modesto (Freedom Smog Modesto 11th Street). The Modesto 11th Street ARD Registration will expire on August 31, 2021, unless renewed or revoked.

8. On September 5, 2019, the Bureau issued Portillo SCS License No. RC 295097 (Modesto 11th Street SCS License) for Freedom Smog Modesto 11th Street. The Modesto 11th Street SCS License will expire on August 31, 2021, unless renewed or revoked.

## **Portillo's Individual Smog Check Inspector License**

9. On October 15, 2014, the Bureau issued Portillo Smog Check Inspector License No. EO 637408 (SCI License). The SCI License will expire on April 30, 2022, unless renewed or revoked.

### **ACCUSATION**

10. On October 9, 2020, complainant, in his official capacity, signed and thereafter filed an Accusation in Case No. 79/20-7459 (Accusation). The Accusation alleges that Hernandez-Villa, while employed as a Smog Check inspector by Freedom Smog Manteca, issued fraudulent certificates of compliance related to the inspections of 10 different vehicles. The Accusation asserts five causes for discipline against Portillo: as to the Manteca ARD Registration, (1) untrue or misleading statements, and (2) fraud; and as to the Manteca SCTOS License, (3) violations of the Motor Vehicle Inspection Program, (4) failure to comply with regulations pursuant to the Motor Vehicle Inspection Program, and (5) dishonesty, fraud, or deceit.<sup>2</sup> No cause for discipline was pled concerning Portillo's SCI License.

Complainant requests that Portillo's Manteca ARD Registration, Manteca SCTOS License, and SCI License, as well as any additional Bureau-issued registrations or licenses in Portillo's name be revoked or suspended. Also, complainant requests that

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<sup>2</sup> The Accusation's sixth cause for discipline is duplicative of the second cause for discipline. (*Compare* Accusation, ¶¶ 63 & 67.) The remaining seventh, eighth, and ninth causes for discipline relate to Hernandez-Villa only.

Portillo be ordered to pay the Bureau's reasonable investigation and enforcement costs related to this matter.

11. Portillo timely filed a Notice of Defense. The matter was then set for an evidentiary hearing before an ALJ of the OAH, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

### **The Motor Vehicle Inspection (Smog Check) Program**

12. The Bureau regulates the automotive repair and Smog Check industry. The Smog Check Program seeks to reduce air pollution by identifying vehicles with excess emissions so they can be repaired or retired. Smog Check inspections of vehicles are performed approximately every two years or upon change of ownership. As part of its enforcement operations, the Bureau conducts investigations with undercover cars and performs analysis of data transmitted to the Bureau during Smog Check inspections.

13. Ian Evans, a Bureau Program Representative II, testified at hearing concerning the Smog Check program, the inspection process and equipment used, the data generated during the inspection, how the Bureau analyzes the data, and why the Bureau ultimately launched an investigation into Portillo. Mr. Evans started working in the automotive repair industry around 1970, is a licensed Smog Check inspector and repair technician, and has worked for the Bureau for approximately 15 years.

### **SMOG CHECK SYSTEM AND EQUIPMENT**

14. California's Smog Check Program previously used the BAR-97 emission inspection system (EIS). However, since March 9, 2015, the program requires Smog Check Stations to use an On-Board Diagnostic Inspection System (BAR-OIS) when

inspecting most model-year 2000 and newer gasoline and hybrid vehicles, and most model-year 1998 and newer diesel vehicles. The BAR-OIS consists of a certified Data Acquisition Device (DAD), computer with specialized software, bar code scanner, and printer. All vehicles at issue in this matter were tested with the BAR-OIS.

### **SMOG CHECK INSPECTION PROCESS**

15. A Smog Check inspector follows a step-by-step process for the inspection as prompted and guided by the BAR-OIS computer software. The software requires the inspector to verify the information and actions at each step before proceeding to the next step. Generally, the steps are as follows:

First, the inspector uses the bar code scanner to scan their badge with a unique bar code and then enters their unique password. This step identifies the inspector performing the inspection. When an inspector is hired, the station owner(s) must grant the inspector access to the BAR-OIS by setting up a profile and account for the inspector. However, an inspector is not permitted to share their unique password with any other person, including the station owner(s), or to allow another person to perform any part of an inspection under their bar code and password.

Second, the inspector uses the bar code scanner to scan the bar code: (a) on the Department of Motor Vehicles (DMV) renewal notice or registration documentation, (b) on the driver's side door, or (c) under the front windshield of the vehicle to be inspected. Scanning one of those barcodes causes the vehicle's Vehicle Identification Number (VIN), license plate number, and year/make/model to populate in the computer software. Alternatively, the inspector can manually enter the VIN into the computer software.

Third, the inspector verifies that the information populated in the computer software physically matches the vehicle being inspected. The software prompts the inspector to verify that the information matches at least twice before the inspector can move to the next step.

Fourth, the inspector connects the DAD to the vehicle's diagnostic link connector, starts the vehicle's engine, and lets the engine run. While the engine runs, the DAD retrieves and records live data from the vehicle's computer, which is transmitted to the BAR-OIS computer. This process usually takes only a few minutes and includes the following data:

(a) The vehicle's eVIN: Each vehicle's physical VIN is also electronically programmed into the vehicle's computer during the manufacturing process and is known as the eVIN. The eVIN cannot be manually entered into the BAR-OIS computer software. A vehicle's physical VIN and eVIN should always match.

(b) The vehicle's communication protocol: This is the specific manufacturer and model's unique communication "language" used by the vehicle's computer to communicate to the BAR-OIS. The unique communication protocol is programmed into the vehicle's computer during manufacture.

(c) The number of Parameter Identifications (PIDs): PIDs are data points reported by the vehicle's computer to BAR-OIS, such as engine speed [rpm], vehicle speed, engine temperature, etc. The PID count is the number of data points reported by the vehicle's computer and is programmed during manufacture. Each make and model vehicle reports a specified number of PID counts.

Fifth, the inspector turns off the vehicle and disconnects the DAD from the vehicle. When the DAD is disconnected, all the vehicle's data is automatically deleted from the DAD.

Sixth, the inspector performs a visual inspection of the emission control components to verify that the required emission control devices are present and properly connected. Additionally, the inspector performs a functional test of the malfunction indicator light. The inspector then enters the results of the visual inspection and functional test into the computer software.

Seventh, the BAR-OIS computer software determines whether the vehicle passed the Smog Check inspection by analyzing the data obtained from the DAD, the visual inspection, and the functional test.

Eighth, the inspector uses the BAR-OIS printer to print a Vehicle Inspection Report (VIR), which shows the overall inspection result (but not the underlying test data) and the Smog Check Certificate of Compliance Number for passing vehicles. Stations electronically purchase Smog Check Certificates of Compliance from the Bureau in numbered batches to be issued by the Smog Check Station for individual inspections. The inspector signs and dates the VIR, certifying under penalty of perjury that they "performed the inspection in accordance with all [B]ureau requirements and that the information listed on this [VIR] is true and accurate." The inspector then provides the customer with a signed copy of the VIR, and the Smog Check Station also retains a signed copy. Additionally, an electronic copy of the VIR is transmitted to the DMV with a unique DMV ID number, which serves as the inspector's electronic signature.

16. The VIR and OIS Test Details for each inspection are also transmitted to the Bureau and stored in the Bureau's Vehicle Information Database (VID). The OIS Test Details contain the underlying data retrieved from the inspected vehicle, including the e-VIN, communication protocol, and PID count. Smog Check Station owners do not have access to the VID or the OIS Test Details for inspections performed by their inspectors; they can only access the station's copies of the signed VIRs.

### **The Bureau's Investigation**

17. Mr. Evans reviewed BAR-OIS data from Freedom Smog Manteca and identified certain data anomalies suggestive of "clean plugging." Clean plugging is the use of a surrogate vehicle's passing diagnostic readings for the purpose of issuing a fraudulent Smog Check Certificate of Compliance for another vehicle. Practically, this is accomplished by manually entering the VIN or scanning a bar code for the vehicle to be inspected, but then connecting the DAD to a surrogate vehicle. In that scenario, the data reflected in the OIS Test Details (such as the e-VIN, communication protocol, and PID count) will be generated from the surrogate vehicle and will not match the VIN and other data expected from the vehicle supposed to be tested, leading to identifiable anomalies.

18. The Bureau and Portillo agree that data anomalies in this case demonstrate that Hernandez-Villa, while employed by Freedom Smog Manteca, clean

plugged and knowingly issued fraudulent Certificates of Compliance for 10 specific vehicles on the following dates:<sup>3</sup>

Vehicle One: 2009 Ford Mustang Shelby GT500 – August 23, 2019

Vehicle Two: 2005 Honda Accord Hybrid – March 11, 2020

Vehicle Three: 2008 Cadillac STS – April 21, 2020

Vehicle Four: 2005 Acura TL – May 6, 2020

Vehicle Five: 2000 Mitsubishi Montero Sport LS – May 8, 2020

Vehicle Six: 2003 Ford Mustang Mach 1 – May 21, 2020

Vehicle Seven: 2006 Nissan Pathfinder LE – June 2, 2020

Vehicle Eight: 2007 Jeep Grand Cherokee – June 2, 2020

Vehicle Nine: 2006 Jeep Wrangler/TJ Sport – June 5, 2020

Vehicle Ten: 2002 Volkswagen Jetta GLS – June 11, 2020

19. Mr. Evans explained that Smog Check inspectors are the Bureau's "first line of defense," because they perform the Smog Check inspections and sign the VIRs. Thus, the Bureau must be able to rely on their honesty and integrity. Unlike the Bureau, Smog Check Station owners are unable to use data anomalies to detect clean

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<sup>3</sup> Because the parties at hearing stipulated to the 10 incidents of clean plugging and the underlying supportive data, the details of the underlying data are not set forth here.

plugging by an inspector, because they do not have access to the OIS Test Details for inspections or the Bureau's VID. Accordingly, owners must be especially vigilant when hiring and supervising inspectors to avoid clean plugging at their stations.

20. As part of his investigation, Mr. Evans reviewed licensing history records, which showed that neither Freedom Smog Manteca nor Portillo has any history of Bureau discipline or citations. Freedom Smog Manteca has also held a STAR Certification<sup>4</sup> for eight years. Additionally, Hernandez-Villa has no history of Bureau discipline or citations prior to this matter.

21. Mr. Evans never visited Freedom Smog Manteca or any of the other Freedom Smog locations as part of his investigation. Additionally, he never contacted Portillo or any other Freedom Smog representative regarding his investigative findings.

### **Portillo's Evidence**

22. Portillo testified at hearing. When Portillo initially purchased Freedom Smog Manteca in 2012, there were significant compliance issues. Because compliance was important to her, Portillo immediately familiarized herself with the Bureau's laws and regulations, and took several industry-related courses. She also visited numerous successful Smog Check shops with no disciplinary issues and high Yelp reviews to learn about their business operations and compliance efforts, with the goal to learn from "the best of California." She hired new staff and installed security cameras in the

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<sup>4</sup> A STAR Certification is only issued to trusted and high-performing Smog Check stations, which allows them to inspect and certify directed and gross-polluting vehicles.

inspection bays, with both video and audio recording. In 2014, she obtained her own SCI License to allow her to better understand Smog Check inspectors' work requirements and more effectively audit their work.

23. Over the years, Freedom Smog expanded to four different locations – Manteca, Modesto Kansas Ave., Riverbank, and Modesto 11th Street. Portillo has a total of 10 employees that work at the four locations, and she has experienced very little staff turnover. Employees are provided with the latest printed manuals and online educational resources in each inspection bay.

24. Portillo actively supervises, and divides her on-site time equally between, the four locations over a typical workweek. Her goal has always been to run an honest business with excellent customer service and full compliance with applicable law. To promote that goal, Portillo attempts to hire the best employees.

25. Portillo hired Hernandez-Villa around February 2019 through an advertisement posted on the Indeed website. After reviewing Hernandez-Villa's resume, Portillo and Freedom Smog's lead Smog Check inspector conducted two rounds of interviews, which included candidates performing Smog Check inspections under their supervision. Additionally, Portillo verified Hernandez-Villa's disciplinary history with the Bureau and OAH, and discovered no red flags. Upon hiring, Hernandez-Villa worked under direct supervision for the first 60 days. Then, after another satisfactory assessment by Portillo and the lead Smog Check inspector, Hernandez-Villa was permitted to perform Smog Check inspections without direct supervision.

26. Portillo first learned of the allegations involving Hernandez-Villa when she was served with the Accusation on October 23, 2020. She was "shocked," because

there had been no prior indication that Hernandez-Villa was clean plugging vehicles. That same day, Portillo suspended Hernandez-Villa pending an investigation.

27. Portillo immediately started her investigation. Freedom Smog's records confirmed that Hernandez-Villa was the inspector for Vehicles One through Ten, and that those inspections took place on days he worked by himself at Freedom Smog Manteca. Upon reviewing Freedom Smog's invoice system, Portillo further discovered that there were no invoices associated with Vehicles One through Ten, i.e., there was no documented payment to Freedom Smog or Portillo associated with their inspections. Based on the foregoing, Portillo "immediately knew something was wrong" and suspected that Hernandez-Villa had directly received payment for those inspections "off the books."

28. When Portillo confronted Hernandez-Villa with her findings, Hernandez-Villa admitted to clean plugging Vehicles One through Ten. On October 26, 2020, Portillo removed Hernandez-Villa's access to Freedom Smog's systems and machines. On October 28, 2020, Portillo formally terminated Hernandez-Villa's employment. She also requested the Bureau to remove Hernandez-Villa as a Smog Check inspector affiliated with Freedom Smog in the Bureau's records. Finally, Portillo attempted to file a report with the City of Manteca Police Department, but was informed she would have to take the matter up with the Bureau and/or file a civil fraud claim against Hernandez-Villa. Portillo understood that clean plugging could be prosecuted criminally, but at the time deferred to the police's representations.

29. Portillo never authorized, and had no prior knowledge of, Hernandez-Villa's clean plugging of Vehicles One through Ten. Such misconduct directly contravened Freedom Smog's employee handbook, which prohibits dishonest or

illegal conduct. Neither Portillo nor Freedom Smog Manteca profited or benefited from Hernandez-Villa's clean plugging.

30. Following Hernandez-Villa's termination, Portillo took the following additional steps to deter and prevent future clean plugging by employees:

(a) She reassigned remaining employees to different Freedom Smog locations, bringing a new set of employees to Freedom Smog Manteca. Her desire was to prevent any effort by Hernandez-Villa's former co-worker(s) to "fix" or "cover up" issues. However, she ultimately found no evidence that any other employee was complicit in Hernandez-Villa's clean plugging.

(b) She changed employee schedules to ensure that there would always be at least two Smog Check inspectors present at each Freedom Smog location at any time. Employees were no longer permitted to work alone.

(c) She restricted the BAR-OIS units at all locations to business hours only, thereby preventing any after-hours Smog Check inspections.

(d) She installed additional cameras with both video and audio recording in the reception areas of each Freedom Smog location, which would allow her to detect attempted bribes or improprieties in those locations as well as the inspection bays.

(e) She added remote access to her computer systems, allowing her to monitor all Freedom Smog systems in real time. That permits her to conduct audits more easily and promptly, and compare the vehicles in the online inspection queue with the live camera footage.

(f) She changed the electronic invoice system to require employees to enter the certificate number for each passing vehicle, the inspector's ID number, the

lane/bay number, and who accepted payment from the customer on each invoice, allowing for easier audits. Additionally, at the end of each work day, every employee is required to match each certificate issued to an invoice and post the results on Freedom Smog's internal communications system, ensuring accountability.

(g) She increased the number of audits she conducts.

(h) She provided employees with additional training on clean plugging and conducts daily conference calls to review the prior day's inspections for compliance.

(i) She is currently in the process of hiring a manager for each Freedom Smog location. The manager would be onsite at all times during business hours to supervise Smog Check inspectors when Portillo is not personally present.

31. Portillo is passionate about the Smog Check industry and California's clean air mission. She has "nothing to hide" and welcomes strict compliance laws, because it "makes it harder for the bad guys." She acknowledges that she has a duty to supervise her employees and take reasonable steps to prevent or minimize clean plugging. She takes that obligation very seriously. However, she also believes that she cannot 100% prevent clean plugging, although she is doing "everything [she] possibly can." She would like to partner with the Bureau, and is willing to comply with any additional recommendations or restrictions by the Bureau.

32. Freedom Smog is actively involved in the local communities in which it operates. It offers free Smog Check inspections for active duty military members and their dependents, as well as discounts to veterans, first responders, and low-income individuals. It often participates in community charitable fundraising drives. Portillo also submitted several online reviews praising Freedom Smog for its excellent customer service and community involvement.

## **Analysis**

### **CAUSE FOR DISCIPLINE**

33. It is undisputed that Hernandez-Villa clean plugged and knowingly issued fraudulent Certificates of Compliance for 10 different vehicles. Based on those facts, the parties further agree that Hernandez-Villa made untrue or misleading statements, engaged in fraud, and violated the Motor Vehicle Inspection Program and its associated regulations. Hernandez-Villa's conduct also plainly harmed the people of the State of California by depriving them of the protection afforded by the Motor Vehicle Inspection Program, which mission is to reduce air pollution. Thus, the only question is whether Portillo's registrations and licenses may be disciplined for Hernandez-Villa's misconduct under the applicable statutes.

### **Manteca ARD Registration (First and Second Causes for Discipline)**

34. "The director, where the automotive repair dealer cannot show there was a bona fide error, may deny, suspend, revoke, or place on probation 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 that constitutes fraud. ...." (Bus. & Prof. Code, § 9884.7, subs. (a)(1) & (a)(4).)

35. Freedom Smog Manteca is an ARD that performs Smog Check inspections as part of its business operations. The Health and Safety Code provisions concerning the Motor Vehicle Inspection program specifically provide that “[i]nspections and repairs performed pursuant to this chapter, in addition to meeting the specific requirements imposed by this chapter, shall also comply with all requirements imposed pursuant to . . . Chapter 20.3 (commencing with Section 9880) of Division 3 of the Business and Professions Code .....” (Health & Saf. Code, § 44002.) Here, Hernandez-Villa, while employed at Freedom Smog Manteca, knowingly made untrue and misleading statements, and committed fraud, by virtue of the above-mentioned 10 instances of clean plugging. Because the statute expressly permits discipline to be imposed for the misconduct of an employee, cause exists to discipline the Manteca ARD Registration pursuant to Business and Professions Code section 9884.7, subdivisions (a)(1) and (a)(4).

### **Manteca SCTOS License (Third, Fourth, and Fifth Causes for Discipline)**

36. “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) [v]iolates any section of this chapter and the regulations adopted pursuant to it, which related to the licensed activities[;] .....(c) [v]iolates any of the regulations adopted by the director pursuant to this chapter[;] (d) [c]ommits any act involving dishonesty, fraud, or deceit whereby another is injured[;] . . . .” (Health & Saf. Code, § 44072.2, subs. (a), (c), & (d).)

37. Health and Safety Code section 44072.2 encompasses misconduct by the “licensee, or any partner, officer, or director thereof,” and does not expressly reference imposition of discipline based on an employee’s misconduct. Nevertheless, case law

firmly establishes that Portillo is vicariously liable for Hernandez-Villa's misconduct, including any dishonesty, fraud, and deceit, under the well-established rule of nondelegable duties of licensees. (*Cal. Assn. of Health Facilities v. Dept. of Health Services* (1997) 16 Cal.4th 284, 295 [if a licensee elects to operate her business through employees, the licensee is responsible for the employees' conduct in exercise of the license, akin to the rule of respondeat superior in tort law].)

38. Portillo argues that she should not be held responsible for Hernandez-Villa's misconduct based on a suggestion in *Ford Dealers Assn. v. Dept. of Motor Vehicles* (1982) 32 Cal.3d 347, 361 fn. 8, that a licensee should not be subject to discipline if she demonstrates "unusual circumstances that negate the presumption of control" over the employee. That argument lacks merit for two reasons.

First, the cited footnote is dicta and not binding precedent. (*Ibid.* ["[i]n the absence of a specific factual setting raising the question, the court need not decide the exact dimensions of a possible exception to that general rule" of employer liability].)

Second, even if it were binding precedent, Portillo has not offered evidence of the requisite "unusual circumstances." Hernandez-Villa was not acting outside the scope of his employment when he clean plugged the 10 vehicles. He was working onsite at Freedom Smog Manteca, performing the duties of a Smog Check inspector, albeit fraudulently. That clean plugging can be performed in a matter of minutes and that Portillo did not have access to OIS Test Details to detect data anomalies do not mean Portillo was unable to control Hernandez-Villa. Here, Portillo scheduled Hernandez-Villa to work on his own at Freedom Smog Manteca, without any on-site supervision. That choice does not constitute "unusual circumstances."

39. Portillo also suggests that vicarious liability is inappropriate in this context, because the Bureau can adequately protect the public by revoking Hernandez-Villa's license. However, that argument overlooks the Bureau's legitimate interest in encouraging licensees to closely supervise employees to ensure compliance with applicable laws and regulations. (*See Rob-Mac, Inc. v. Dept. of Motor Vehicles* (1983) 148 Cal.App.3d 793, 799 ["The public interest is better served by holding dealers responsible for the acts of their salespersons in all but unusual cases, thereby providing strong incentive for dealers to prevent wrongdoing by their agents in the first place."].)

40. Consequently, Portillo is responsible for Hernandez-Villa's violations of the Motor Vehicle Inspection Program, failure to comply with regulations pursuant to the Motor Vehicle Inspection Program, and dishonesty, fraud, or deceit injurious to the public. Thus, cause exists to discipline the Manteca SCTOS License pursuant to Health and Safety Code, section 44072.2, subdivisions (a), (c), and (d).

### **Other Freedom Smog Locations' Registrations**

41. "Except as provided for in subdivision (c), if an automotive repair dealer operates more than one place of business in this state, the director pursuant to subdivision (a) shall only suspend, revoke, or place on probation the registration of the specific place of business which has violated any of the provisions of this chapter. This violation, or action by the director, shall not affect in any manner the right of the automotive repair dealer to operate his or her other places of business." (Bus. & Prof. Code, § 9884.7, subd. (b).)

"Notwithstanding subdivision (b), the director may suspend, revoke, or place on probation the registration for all places of business operated in this state by an

automotive repair dealer upon a finding that the automotive repair dealer has, or is, engaged in a course of repeated and willful violations of this chapter, or regulations adopted pursuant to it.” (Bus. & Prof. Code, § 9884.7, subd. (c).)

42. Here, the preponderance of the evidence does not establish that Portillo engaged in a course of repeated and willful violations. The multiple instances of clean plugging here resulted from the actions of a single “bad apple” employee and were limited to Freedom Smog Manteca. Although Portillo is ultimately responsible for Hernandez-Villa’s misconduct for the reasons discussed above, she never encouraged, authorized, or ratified it. Indeed, she promptly terminated Hernandez-Villa after being notified of his misconduct. There is no evidence that other Freedom Smog employees were involved or that there is a pervasive problem of non-compliance across Freedom Smog locations. Thus, cause does not exist to discipline the Modesto Kansas Ave. ARD Registration, the Riverbank ARD Registration, or the Modesto 11th Street ARD Registration.

### **Other Freedom Smog Locations’ Licenses**

43. “When a license has been revoked or suspended following a hearing under this article, any additional license issued under this chapter in the name of the licensee may be likewise revoked or suspended by the director.” (Health & Saf. Code, § 44072.8.) For the same reasons discussed above with respect to the other Freedom Smog locations’ registrations, cause does not exist to discipline the Modesto Kansas Ave. SCS License, the Riverbank SCS License, or the Modesto 11th Street SCS License. Even if cause for discipline existed, no discipline of those licenses would be warranted under the circumstances here.

## **Portillo's SCI License**

44. No cause for discipline was pled concerning Portillo's SCI License. Nevertheless, given that cause exists to discipline the Manteca SCTOS License, the SCI License may be disciplined under appropriate circumstances pursuant to Health and Safety Code section 44072.8.

45. Based on the record as a whole, cause does not exist to discipline Portillo's SCI License. Although Portillo is ultimately responsible for Hernandez-Villa's misconduct for the reasons discussed above, there is no indication that Portillo herself clean plugged vehicles or engaged in any other misconduct or negligence in her capacity as a Smog Check inspector. Even if cause for discipline existed, no public protection purpose would be served by disciplining Portillo's SCI License.

## **Conclusion**

46. Given the foregoing, cause exists to discipline the Manteca ARD Registration and Manteca SCTOS License only. The remaining question is the appropriate degree of discipline.

## **APPROPRIATE DISCIPLINE**

47. The Bureau has promulgated Guidelines for Disciplinary Orders and Terms of Probation, Rev. March 2016 (Guidelines). Under the Guidelines, factors in mitigation and aggravation should be considered to determine the appropriate level of discipline.

Factors in mitigation include: (1) evidence that the respondent implemented the Bureau's suggested resolution to a consumer complaint; (2) evidence of restitution to the consumer and/or correct repair of the consumer's vehicle; (3) evidence of

voluntary participation in retraining for self or employees; (4) evidence of voluntary purchase of proper diagnostic equipment and manuals; (5) evidence of a medical condition that temporarily prevented respondent from exercising supervision and control over employees or others at the time of the violation; (6) absence of prior disciplinary action; (7) evidence that the violation was not part of a pattern or practice; (8) evidence of no loss to consumer and no damage to consumer's property; (9) evidence of retraining and initiated steps to minimize recurrence; (10) evidence of resolution of all consumer complaints with a subsequent change in business practice; (11) 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 (12) evidence of any other conduct which would constitute a factor in mitigation.

Factors in aggravation include: (1) prior warnings from the Bureau; (2) prior office conference(s) with the Bureau; (3) prior history of citations; (4) prior history of formal disciplinary action; (5) failure to permit Bureau inspection of records; (6) evidence of abuse of mechanic's lien; (7) evidence of attempts to intimidate consumer; (8) evidence of negligent or willful improper repair work that endangers consumers; (9) evidence that the unlawful act was part of a pattern of practice; (10) failure to comply with Bureau request for corrective action or retraining; (11) currently on probation for improper acts; (12) failure to successfully complete prior probation; (13) failure to pay court judgment to victim; (14) violation of previous court order; and (15) evidence of any other conduct which constitutes fraud or gross negligence.

48. Portillo credibly testified that she had no knowledge of Hernandez-Villa's clean plugging, and never profited or benefited from his misconduct. Once Portillo learned of the misconduct, she promptly terminated Hernandez-Villa, notified the Bureau to remove him as a Smog Check inspector associated with Freedom Smog, and

attempted to file a police report. Additionally, Portillo took numerous meaningful steps to improve her existing operations and security measures so as to minimize the likelihood of such misconduct's recurrence. Portillo has no history of Bureau discipline in her almost nine years of licensure by the Bureau. Her testimony was credible and showed remorse and acceptance of responsibility. She also demonstrated a genuine commitment to the Smog Check Program and the mission of California's clean air laws. Additionally, numerous customers attest to Freedom Smog's excellent customer service and community involvement.

49. That said, Portillo's failure to adequately supervise and monitor Hernandez-Villa was serious. A licensee has a duty to effectively supervise all employees working under the license. Here, inadequate supervision resulted in 10 separate instances of clean plugging over a course of approximately 11 months. Because the customers of clean plugged vehicles are unlikely to complain about the practice, the Bureau must be able to rely on its licensees to effectively implement the Smog Check Program and reduce air pollution. For those reasons, Portillo's proposed discipline of a public reproof is insufficient.

50. Complainant requests outright license revocation. However, that discipline would be disproportionately severe, be unnecessary to protect the public interest, and amount to an improper punitive measure. (*Fahmy v. Medical Bd. of Cal.* (1995) 38 Cal.App.4th 810, 817; *see also Rob-Mac, Inc., supra*, 148 Cal.App.3d at 799 [in the context of licensee responsibility for an employee's misconduct, "the relative culpability of the [licensee] in a given situation will undoubtedly affect the nature of the discipline imposed"].) Even though Portillo failed to adequately supervise Hernandez-Villa, and thus is ultimately responsible for his misconduct, imposition of

probation will more accurately address Portillo's personal culpability while adequately protecting the public interest through a period of monitoring.

51. The Guidelines also recommend imposition of probation as the appropriate discipline for the specific violations pled in the Accusation. Specifically, the Guidelines recommend a stayed revocation, suspension, and between two and five years of probation for violations of Business and Professions Code section 9884.7, subdivisions (a)(1) and (a)(4), and Health and Safety Code section 44072.2, subdivisions (a), (c), and (d). For those violations, the Guidelines suggest imposition of standard probationary terms as well as consideration of various optional probationary terms, if appropriate.

52. On this record, and especially given the significant rehabilitation evidence presented by Portillo, it is appropriate to impose a two-year probation term, with standard probationary terms and optional probationary terms 3b and 3c (training courses relevant to the issues in this case) and 7 (supervision requirements). Such probation terms are sufficient to protect the public interest. No public protection interest would be served by an actual suspension under the facts of this case.

## **COSTS**

53. The Bureau may recover its reasonable investigation and enforcement costs of a case. (Bus. & Prof. Code, § 125.3, subd. (a).) Complainant here incurred a total of \$1,850.49 in investigation costs. The investigation costs are supported by a Declaration of Ian Evans, dated June 25, 2020, and a Declaration of Mark Casillas, dated June 23, 2020, both of which are accompanied by documents describing the general tasks performed, the time spent on each task, and the method of calculating the costs. The investigation costs are reasonable given the issues in this case.

Complainant also incurred a total of \$7,836.25 in enforcement costs. The enforcement costs are supported by a Certification of Prosecution Costs: Declaration of Seth A. Curtis, dated February 11, 2021, which is accompanied by documents describing the general tasks performed, the time spent on each task, and the method of calculating the costs.<sup>5</sup> The enforcement costs are reasonable given the issues in this case.

54. In sum, the total costs of \$9,686.74 are reasonable. However, complainant does not distinguish between the costs incurred with respect to Portillo and Hernandez-Villa. Portillo is only implicated in five of the eight causes for discipline.<sup>6</sup> Thus, Portillo should only be responsible for five-eighths of the total reasonable costs, or \$6,054.21.

55. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth guidelines for determining whether costs should be assessed in the particular circumstances of each case. These factors include whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of her position, whether the licensee has raised a colorable challenge to the proposed discipline, the

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<sup>5</sup> Mr. Curtis's declaration suggests that complainant expected to incur an additional \$440 in enforcement costs to prepare for hearing. Unrealized enforcement costs are not reasonable or awarded.

<sup>6</sup> Although nine causes for discipline were pled in the Accusation, the sixth cause for discipline is duplicative of the second cause for discipline, as noted above.

licensee's financial ability to pay, and whether the scope of the investigation was appropriate to the alleged misconduct.

56. Here, the scope of the investigation and prosecution was appropriate. However, Portillo successfully challenged cause for discipline as to some of the registrations and licenses, as well as the overall degree of discipline sought by complainant. As to those matters, she also demonstrated subjective good faith in the merits of her position. She did not present evidence of financial inability to pay. Given the foregoing, a reduced cost recovery award of \$4,000 is appropriate. Payment may be made pursuant to a payment plan approved by the Bureau.

## **LEGAL CONCLUSIONS**

### **Burden and Standard of Proof**

1. The Bureau bears the burden of proving by a preponderance of the evidence that Portillo's Bureau-issued registrations and licenses should be disciplined. (*Imports Performance v. Dept. of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-17.)

### **Cause for Discipline**

2. Based on the Factual Findings as a whole, and specifically, Factual Findings 33 through 35 and 46, cause exists to discipline the Manteca ARD Registration pursuant to Business and Professions Code section 9884.7, subdivisions (a)(1) and (a)(4).

3. Based on the Factual Findings as a whole, and specifically, Factual Findings 33, 36 through 40, and 46, cause exists to discipline the Manteca SCTOS

License pursuant to Health and Safety Code, section 44072.2, subdivisions (a), (c), and (d).

4. Based on the Factual Findings as a whole, and specifically, Factual Findings 33 and 41 through 45, cause does not exist to discipline the Modesto Kansas Ave. ARD Registration, the Modesto Kansas Ave. SCS License, the Riverbank ARD Registration, the Riverbank SCS License, the Modesto 11th Street ARD Registration, the Modesto 11th Street SCS License, or Portillo's SCI License. Even if cause for discipline existed, no discipline of those registrations and licenses would be warranted under the circumstances of this case.

### **Appropriate Discipline**

5. Based on the Factual Findings as a whole, and specifically, Factual Findings 47 through 52, it is appropriate to place the Manteca ARD Registration and Manteca SCTOS License on probation for a period of two years, on specific terms and conditions outlined below. Such probationary terms are sufficient to protect the public interest.

### **Costs**

6. The Bureau may recover its reasonable investigation and enforcement costs of a case. (Bus. & Prof. Code, § 125.3, subd. (a).) Based on Factual Findings 53 through 56, reasonable costs in the amount of \$4,000 are awarded.

## **ORDER**

IT IS HEREBY ORDERED that Automobile Repair Dealer Registration No. ARD 270071 and Smog Check Test Only Station License No. TC 270071, issued to

respondent Cristina Portillo, doing business as Freedom Smog in Manteca, California, are REVOKED. However, the revocation is STAYED, and respondent placed ON PROBATION for TWO YEARS on the following terms and conditions:

1. OBEY ALL LAWS

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

2. QUARTERLY REPORTING

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

3. REPORT FINANCIAL INTERESTS

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

4. ACCESS TO EXAMINE VEHICLES AND RECORDS

Respondent shall provide BAR representatives unrestricted access to examine all vehicles (including parts) undergoing service, inspection, or repairs, up to and

including the point of completion. Respondent shall also provide BAR representatives unrestricted access to all records pursuant to BAR laws and regulations.

#### 5. TOLLING OF PROBATION

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

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

#### 6. VIOLATION OF PROBATION

If respondent violates or fails to comply with the terms and conditions of probation in any respect, the Director, after giving notice and opportunity to be heard, may set aside the stay order and carry out the disciplinary order provided in the decision. Once respondent is served notice of BAR's intent to set aside the stay, the

Director shall maintain jurisdiction, and the period of probation shall be extended until final resolution of the matter.

7. MAINTAIN VALID LICENSE

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

8. COST RECOVERY

Respondent shall pay the Bureau of Automotive Repair \$4,000 for the reasonable costs of the investigation and enforcement of Case No. 79/20-7459. Respondent shall make such payment pursuant to a BAR-approved payment plan. 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. 79/20-7459. Any order for payment of cost recovery shall remain in effect whether or not probation is tolled. Probation shall not terminate until full cost recovery payment has been made. BAR reserves the right to pursue any other lawful

measures in collecting on the costs ordered and past due, in addition to taking action based upon the violation of probation.

#### 9. COMPLETION OF PROBATION

Upon successful completion of probation, respondent's affected registration and/or 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.

#### 10. LICENSE SURRENDER

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

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

## 11. TRAINING COURSES

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

Within 180 days of the effective date of a decision, respondent shall complete ordered coursework or training that is acceptable to BAR and relevant to the adjudicated violation. Respondent shall submit to BAR satisfactory evidence of completion of coursework or training within the timeline specified for completion of the ordered coursework or training.

## 12. SUPERVISION REQUIREMENTS

Respondent shall not delegate her supervisory duties, as they relate to the business activities relevant to the probationary registration and/or license, to another person during the period of probation. Any persons employed by respondent to carry out such business activities shall be directly supervised by respondent. In the event that a bona fide medical condition arises during the period of probation, which temporarily prevents respondent from exercising direct supervision over employees, notice and medical substantiation of the condition shall be submitted to BAR within ten (10) days of the medical affirmation of the condition.

DATE: August 17, 2021

*Signed Copy on File*

WIM VAN ROOYEN

Administrative Law Judge

Office of Administrative Hearings