

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

In the Matter of the Statement of Issues Against:

BLANCA CELIA GARCIA,

Respondent.

Citation No. 79/16-11s

OAH No. 2015110648

DECISION


The attached Proposed Decision of the Administrative Law Judge is hereby accepted and adopted by the Director of Consumer Affairs as the Decision in the above-entitled matter.

This Decision shall become effective

March 9, 2017.

DATED:

2/4/2017



RYAN MARCROFT
Assistant Chief Counsel
Division of Legal Affairs
Department of Consumer Affairs

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PROPOSED DECISION

Administrative Law Judge Perry O. Johnson, State of California, Office of Administrative Hearings (OAH) heard this matter on April 12, July 25, and August 24, 2016, in Oakland, California,

Deputy Attorney General Maretta D. Ward represented complainant Wood Robinson, Enforcement Supervisor I, the Bureau of Automotive Repair (the Bureau), Department of Consumer Affairs (the department), State of California.

Attorney at Law William Ferreira represented respondent East Bay Smog, LLC, and the limited liability company's sole member, Blanca Celia Garcia.

The record was held open to afford the parties respective opportunities to file and serve written closing arguments. The parties agreed to an exact schedule for filing, and serving on the opposing party, written closing arguments, and if necessary, reply written statements. On October 18, 2016, which was the prescribed deadline for filing the primary written closing arguments, OAH received "Respondent's Closing Arguments" document, which was marked as exhibit "1". On approximately October 19, 2016, complainant filed a letter requesting additional time for the filing of Complainant's Closing Argument. In light of respondent's strenuous objections, as expressed in a letter, dated October 24, 2016, complainant's request for delay in the filing of written closing argument was denied by an Order, dated October 28, 2016. By the specified date of October 28, 2016, for filing of reply arguments neither party filed further written documents with OAH.

On October 28, 2016, the parties were deemed to have submitted the matter for decision and the record closed.

FACTUAL FINDINGS

1. On May 30, 2014, the Bureau received an application for an Automotive Repair Dealer Registration (ARD registration) from East Bay Smog, LLC, with Blanca Celia Garcia (respondent) as the sole member of the limited liability company. Also, on May 30, 2014, the Bureau received from respondent, as sole member of the limited liability company, an application for licensure of the business to operate a Smog Check Station. The business operations of the limited liability company were to be conducted under the fictitious business name of East Bay Smog, and operated from premises at 5660 Main Street, Suite 102, in Oakley (Contra Costa County), California.

Respondent Garcia had certified under penalty of perjury, on May 12, 2014, to the truthfulness of all statements, answers, and representations set out in the respective applications.

On August 12, 2014, the Bureau denied respondent's applications.

2. On August 10, 2015, complainant Patrick Dorais (complainant), in his official capacity as Chief of the Bureau, issued the Statement of Issues in Case No. 79/16-11s against respondent Garcia. The accusatory pleading was not directed to the limited liability corporation.

On August 13, 2014, the Bureau received the request for a hearing by respondent so that she could present evidence in an appeal of the Bureau's denial. The hearing in this matter ensued.

Background of Past Licensure for Business Operation known as "East Bay Smog"

3. On November 21, 2007, the Bureau issued to Daniel Garcia, his son Daniel Garcia Torres, and another son Eric Moises Garcia, Automotive Repair Dealer Registration No. ARD 252615. The fictitious business name was East Bay Smog, which operated from premises at 5660 Main Street, Suite 102, Oakley, California.

And, on December 19, 2007, the Bureau issued to Daniel Garcia, Daniel Torres Garcia, and Eric Moises Garcia, Smog Test Only Station License No. TC 252615.

4. During the year 2006, the department's Director issued to Eric Moises Garcia Advanced Emission Specialist Technician License No. EA153742. On April 30, 2014, that technician license was cancelled, but renewed in accordance with existing regulations and in accordance with the individual's election, as Smog Check Inspector License No. EO 153742 and Smog Check Repair Technician License No. EI153742. Eric Moises Garcia performed smog technician work from the smog check station known as East Bay Smog, which was located at 5660 Main Street, Suite 102, Oakley, California.

5. On May 10, 2011, the Bureau Chief filed an Accusation in Case No. 79/11-89 against "East Bay Smog," Eric Moises Garcia, Daniel Garcia and Daniel Torres Garcia, as licensees or holders of ARD No. 252615 and Smog Check, Test Only, Station License No. TC 252615. Also, the Accusation was filed against Eric Moises Garcia in his licensed capacity as holder of Advanced Emission Specialist Technician License No. EA 153742.

The Accusation was grounded upon allegations of the above named individuals violation of Business and Professions Code sections 9884.7, subdivision (a)(1) (Making False and Misleading Statements), and 9884.7, subdivision (a)(4) (Conduct Constituting Fraud). The pleading alleged also that respondents allowed, or engaged in, failure to provide a consumer with a written estimate for a smog inspection of a vehicle presented for a smog test in violation of Business and Professions Code sections 9884.9, subdivision (a). Further, respondents were alleged to have engaged in, or allowed, acts constituting violations of the Motor Vehicle Inspection Program contrary to Health and Safety Code section 44072.2 as it interacts with that Code's sections 44012 and 44015. Also, the Accusation alleged that respondents had failed to comply with the Bureau's regulations under the Motor Vehicle Inspection Program regarding false or fraudulent issuance of an electronic smog certificate of compliance contrary to California Code of Regulations, title 16, sections 3340.24, subdivision (c), 3340.35, subdivision (c), and 3340.42. And, in the pleading it was alleged that respondents' acts and omissions reflected dishonesty, fraud or deceit in violation of Health and Safety Code section 44072.2, subdivision (d). In aggravation, the Accusation set out that the individual holders of the ARD and Smog Check Station known as "East Bay Smog" had a history of violations of law as set out in not less than three citations dated January 12, 2009, July 20, 2009, and January 13, 2010. And under the Accusation, Eric Moises Garcia, as a smog technician, was alleged to have violated corresponding violations of law, including acts of dishonesty, fraud or deceit along with acts establishing failure to comply with the Bureau's regulations under the Motor Vehicle Inspection Program.

Records of Prior Discipline against Respondent's Close Family Members formerly operating East Bay Smog.

6. Effective July 23, 2014, the Decision of the department's Director was rendered final for the Accusation in Case No. 79/11-89. Respondents stipulated and agreed to the truth of the allegations set out in the Accusation filed against each of them. The ARD issued to each respondent was revoked (invalidated); but, the disciplinary actions were stayed for three years under terms and conditions including suspension of the ARD issued to the three individuals for 15 consecutive days. And, the Smog Inspector License and Smog Check Technician License as issued to Eric Moises Garcia were revoked; but, the revocation actions were stayed for three years under terms and conditions including suspension of the respective licenses for a period of 15 consecutive days. Respondents were held jointly and severally liable for the Bureau's costs in an amount of \$7,000.

7. Because of the disciplinary action, which resulted in the ARD and Smog Check, Test Only, Station License to be placed on probation, with the prospect of permanent invalidation of the ARD and unqualified revocation of the Smog Check Station license, the

STAR¹ Station designation, which had been granted East Bay Smog as owned and operated by Daniel Garcia, Daniel Torres Garcia, and Eric Moises Garcia, was in jeopardy for cancellation or rescission.

Complainant's Contentions in the Statement of Issues against Respondent

8. Complainant contends that when respondent, through a limited liability company, filed the applications for licensure, she failed to disclose material information regarding the circumstances and particulars of her contemplated ownership and resultant operations of the automobile dealer repair facility and smog check station business known as East Bay Smog located on Main Street in Oakley, California. In particular, respondent did not disclose that she is respectively the wife or mother of the individuals owning, operating, or working at East Bay Smog, who had been subject to license disciplinary action by the Bureau. And, complainant avers that respondent did not personally furnish information sought by the Bureau regarding the management, actual control, and precise operation of the business conducted under the contemplated ARD and the Smog Check Station license. Further, it is alleged that respondent did not appear in person at conferences requested by the Bureau, but rather she dispatched the attorney for the limited liability company to attend conferences with personnel of the Bureau. Ultimately, complainant contends respondent's applications serve as an attempt to circumvent the disciplinary disposition under the Accusation issued against Daniel Garcia, Daniel Torres Garcia, and Eric Moises Garcia, jointly and individually. Such attempt by respondent is alleged to be a deceptive means to acquire a new ARD and smog check station license having no disciplinary record so that the STAR station recognition may be granted to the smog check station as a means for increased revenue.

9. The weight of the evidence indicates that complainant's contentions are speculative, without merit, or based upon underground regulations.

¹ STAR stations are Smog Check stations that meet higher performance standards established by the Bureau of Automotive Repair. Some STAR stations are licensed to perform only tests, while others are licensed to perform both tests and repairs. The station is required to post a sign on the services it performs. State law requires that a percentage of vehicles have their Smog Check Inspections performed at a STAR station. A licensed Smog Check station seeking STAR certification must meet all of eligibility requirements, including "[t]he current or any previous registration or license of the station owner, manager or licensed Smog Check Inspector employed by the station must not have been issued an order of suspension, a probationary order, or any other disciplinary order within the preceding three-year period." (www.bar.ca.gov/STAR)

Respondent's Evidence

10. On approximately July 16, 2014, the Bureau requested respondent to file additional information. On July 24, 2014, respondent along with her legal counsel attended a conference with the Bureau's personnel.

11. Nothing refutes respondent's persuasive testimony that at the July 24, 2014, conference, she provided adequate responses to concerns and questions voiced by the Bureau's personnel.

12. The weight of the evidence supports respondent that the Bureau was unreasonable in the determination of denying the applications for licensure or registration due to grounds alleging respondent having made false or misleading statements or omitting material facts the applications filed with the Bureau.

13. The evidence establishes that the Bureau's application form, as used to seek licensure or registration, does not ask an applicant to disclose any familial relationship between an applicant and previous owners or operators of an ARD or Smog Check Station. Accordingly, nothing on the application demonstrates that respondent made a false statement by omission.

14. Respondent demonstrated that the applications for licensure and registration are, in fact and law, made on behalf of the limited liability company known "East Bay Smog LLC." Regarding meetings about East Bay Smog as sought by the Bureau, the applicant limited liability company, through respondent, elected to dispatch the company's attorney at law to attend the conferences unilaterally scheduled by the Bureau's personnel. At the conferences, the company's attorney conveyed adequate and truthful responses to the inquiries about the applicant company as made by the Bureau's personnel. And, the Bureau was given respondent's written responses on a printed document, which was signed by respondent. Respondent's written responses set forth full and complete disclosure of all familial relationships between respondent and the previous owners and operators of the business conducted under the name of "East Bay Smog."

15. No evidence established that respondent has refused or failed to designate an authorized representative to fully communicate with Bureau personnel on questions pertaining to the ownership, management, or operations of the ARD or Smog Check Station.

16. Respondent and her husband, Daniel Garcia, executed a document titled "Garcia Post-Nuptial Property Transmutation Agreement." Under the agreement, Eric Garcia relinquished, disowned, and disavowed ownership in all community property rights and claims in the business interests constituting "East Bay Smog." Complainant offered no evidence establishing that the agreement was a subterfuge or sham.

17. Respondent is an experienced businessperson, who has owned and operated a restaurant in Contra Costa County for several years. Complainant presented no evidence

establishing that she lacks the business acumen and professional skills to own and operate the businesses for which licensure and license rights are sought for the limited liability company.

18. On May 14, 2014, Eric Garcia, as seller, and East Bay Smog, LLC, as buyer, entered into a Business Sales Agreement. Under the agreement, Eric Garcia conveyed “good, clear, and marketable title to all property” to the limited liability company as buyer. Hence, Eric Garcia will no longer hold any property interest in the business of the ARD or Smog Check Station for which respondent, acting on behalf of the limited liability company, has submitted applications to operate.

19. Complainant presented no evidence establishing that respondent lacks the integrity and good character to assure that persons who are undesirable or disqualified to participate in business operations will circumvent past disciplinary determinations made by the Bureau or the Department of Consumer Affairs.

Ultimate Finding

20. The Bureau’s rationale for denial of respondent’s application for registration as an Automobile Repair Dealer and licensure as a Smog Check Station cannot be determined to be reasonable and devoid of arbitrariness. The application filed on behalf of a limited liability company, through its sole member, should be granted.

LEGAL CONCLUSIONS

Standard of Proof

1. The party asserting the affirmative in an administrative hearing has both the burden of proof of going forward as well as the burden of persuasion by a preponderance of the evidence. (Gov. Code, § 11504; *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.)

The burden of proof is on respondent by a preponderance of the evidence, to establish that the applications for issuance of an Automotive Repair Dealer Registration and a Smog Check Station License should be granted because the member of a limited liability company is qualified for the status for which the limited liability company applied and that complainant has no cause to deny the application.

Statutory Authority

2. Business and Professions Code section 9884 provides

(a) To the extent prescribed by the director, an automotive repair dealer shall identify the owners, directors, officers,

partners, members, trustees, managers, and any other persons who directly or indirectly control or conduct the business. The forms shall include a statement signed by the dealer under penalty of perjury that the information provided is true.

3. Business and Professions Code section 475 states

(a) Notwithstanding any other provisions of this code, the provisions of this division shall govern the denial of licenses on the grounds of:

(1) Knowingly making a false statement of material fact, or knowingly omitting to state a material fact, in an application for a license.

4. Business and Professions Code section 480 sets forth

(a) A board may deny a license regulated by [Business and Professions Code] on the grounds that the applicant has one of the following:

[¶] . . . [¶]

(2) Done any act involving dishonesty, fraud, or deceit with the intent to substantially benefit himself or herself or another, or substantially injure another.

[¶] . . . [¶]

(d) A board may deny a license regulated by this code on the ground that the applicant knowingly made a false statement of fact that is required to be revealed in the application for the license.

5. Complainant presented no statutory provision or Bureau regulation to support the contentions and arguments advanced by the Statement of Issues. The evidence did not establish that respondent, as the sole member of the limited liability company applicant, failed to provide requested information needed by statute or regulation as additional information outside the responses given in the applications for licensure. And, the evidence did not establish that respondent, as the sole member of the limited liability company applicant, failed to disclose her familial relationship with persons who previously owned, operated or managed aspects of the ARD or Smog Check Station.

Complainant may not deny licensure based upon underground regulations. The law is clear that, "[n]o state agency shall issue, utilize, enforce, or attempt to enforce any guideline.

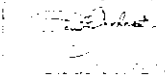
criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation . . . , unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State” (Gov. Code § 11340.5, subd. (a).) For a state agency, such as the Bureau, to take action on unwritten notions or suspicions constitutes taking actions grounded upon an illegal underground regulation. “One purpose of the [Administrative Procedure Act] is to ensure that those persons or entities whom a regulation will affect have a voice in its creation . . . as well as notice of the law's requirements so that they can conform their conduct accordingly The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny” (*Morning Star Company v. State Board of Equalization* (2006) 38 Cal.4th 324, 333.)

ORDER

The applications for an Automotive Repair Dealer Registration and a Smog Check Station License, as filed by respondent Blanca Celia Garcia as sole member, on behalf of East Bay Smog LLC doing business as East Bay Smog, are granted.

DATED: November 28, 2016

DocuSigned by:



PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings