

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

In the Matter of the Accusation Against:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

and

[REDACTED]

[REDACTED]

Advanced Emission Specialist Technician
License No. [REDACTED]

and

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondents.

Case No. [REDACTED]

OAH No. [REDACTED]

PROPOSED DECISION

Administrative Law Judge Danette C. Brown, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California, on [REDACTED] [REDACTED], and [REDACTED].

Sterling A. Smith, Deputy Attorney General, represented complainant Sherry Mehl, in her official capacity as Chief of the Bureau of Automotive Repair (Bureau), Department of Consumer Affairs.

Attorney William D. Ferreira represented respondent [REDACTED], who was present throughout the hearing.

Evidence was received, the record was closed, and the matter was submitted for decision on December 10, 2013.

SUMMARY

Complainant seeks to discipline respondent's license on the grounds that he did not perform a proper smog inspection of the Bureau's undercover vehicle. The Bureau's procedures require the smog technician to conduct a visual inspection of the vehicle's emissions control systems and visually verify that all required emission control devices are properly installed. It is undisputed that respondent performed a visual inspection of the Bureau's undercover vehicle's emissions control systems. Complainant contends, however, that respondent did not perform a proper visual inspection because he incorrectly concluded that the positive crankcase ventilation hose was damaged and the evaporative service port was not properly connected. But the accuracy of his conclusions is irrelevant. Therefore, no cause exists to discipline respondent's license.

FACTUAL FINDINGS

1. Complainant issued the First Amended Accusation against respondent on March 8, 2013.
2. On April 28, 2010, the Bureau issued Advanced Emission Specialist (EA) Technician license [REDACTED] to respondent.² Respondent's license will expire on December 31, 2015, unless renewed.

¹ [REDACTED]
[REDACTED]
[REDACTED] Therefore, this Proposed Decision pertains only to respondent [REDACTED]

² Effective August 1, 2012, California Code of Regulations, title 16, sections 3340.28, 3340.29, and 3340.30 were amended to implement a license restructure from the Advanced Emission Specialist Technician (EA) license and Basic Area (EB) Technician license to Smog Check Inspector (EO) license and/or Smog Check Repair

3. The Bureau has the responsibility of monitoring the performance of smog check stations and smog check technicians and ensuring that they are properly performing their duties under the smog control laws of the State of California. To monitor compliance with the State's Emissions Inspection Program, commonly referred to as the Smog Check Program, the Bureau conducts undercover operations at various licensed smog check stations.

4. The California Emissions Inspection Test requires the licensed technician to: (1) visually inspect the vehicle's emission components to ensure that they are present, properly connected, and in good working condition; (2) functionally test or inspect the vehicle's gas cap, the malfunction indicator light (MIL), if equipped, the ignition timing, if adjustable, and, depending on the test required, the exhaust gas recirculation (EGR) system; and (3) conduct a tailpipe emissions test.

5. The vehicle must pass all visual and functional tests, as well as the tailpipe emissions test, before an Emission Inspection Certificate of Compliance (Certificate of Compliance) can be issued by the technician, verifying that the vehicle passed the smog inspection.

Undercover Operation

6. The Bureau's undercover operation occurred on July 13, 2011, at [REDACTED]. Respondent performed a smog check on the Bureau's 1998 Ford Explorer (Explorer).

7. The Explorer was first taken to the Bureau's Documentation Lab, where Bureau employee Joseph Gibson conducted a Two Speed Idle (TSI) California Emissions Test to ensure that the vehicle passed the test. He did not perform any alterations to the vehicle.

8. On July 13, 2011, Jeff Hammer, a Bureau undercover agent, took the vehicle to [REDACTED] requested a smog inspection, and obtained an estimate for the inspection. He remained on site during the inspection. At the end of the inspection, respondent gave Mr. Hammer a work order receipt documenting payment for the smog inspection in the amount of \$61.75 and a Vehicle Inspection Report (VIR) certifying under penalty of perjury that the vehicle failed visual inspection due to a faulty positive crankcase ventilation (PCV) hose and the fuel evaporative port appeared to be "hooked up wrong."

9. Mr. Hammer returned the vehicle to the Documentation Lab, where it was secured. On July 22, 2011, Mr. Gibson performed a TSI California Emissions Test, which the vehicle passed. Mr. Gibson obtained a printout of the test results

Technician (EI) license. Complainant amended the accusation on the record to reflect that respondent's EA license is now referred to as an EO license.

showing "Overall Test Results – PASS." The "PASS" result indicated that the vehicle met all requirements for issuance of a certificate of compliance.

10. Mr. Gibson then inspected the VIR report respondent had previously provided Mr. Hammer. He noticed that the visual inspection results of the VIR stated "Fail" for the PCV system and "Modified" for the fuel evaporative controls. The PCV system on the Explorer consists of a PCV valve mounted in the left engine valve cover, a hose connecting the PCV valve to a vacuum source at the engine intake manifold, and a tube connecting the engine crankcase to filtered fresh air. The PCV system controls engine crankcase vapor emissions by using engine vacuum to pull fresh air through the engine crankcase, picking up engine vapors through the PCV valve into the intake manifold to be burned in the engine with the air/fuel mixture.

11. Mr. Gibson examined the PCV hose and valve. The hose is a pre-formed rubber hose marked with the Ford oval logo and a part number. The hose was not collapsed, split, cut, or damaged. Mr. Gibson found that the PCV hose was identical in all respects to a new hose obtained from a Ford dealer parts department. The PCV hose was not modified or damaged, and, in Mr. Gibson's opinion, should not have caused the Explorer to fail a properly performed smog check visual inspection.

12. Mr. Gibson also noticed the handwritten note on the VIR stating, "Evap service port looks like its hook up [*sic*] wrong." The evaporative emissions service port is a component of the vehicle's fuel evaporative control system. It is a service access valve, similar in appearance and operation to a tire valve stem. The service port is used by a technician to monitor pressure in the vehicle's fuel evaporative system during diagnosis and repair of the fuel evaporative system. The Explorer's port is connected to the end of a hose routed to the evaporative canister purge valve. The purge valve is located under the vehicle's battery. The service port hose and valve is routed from the purge valve, under the battery, to the battery ground cable wire harness, adjacent to the radiator filler cap. The hose and service port are secured to the wire harness with a metal clip. The service port and hose, and their location, are illustrated in the ALLDATA computerized vehicle repair information database. Mr. Gibson determined that the service port and hose were correct for the Explorer, properly installed, not modified or damaged, and should not have caused the Explorer to fail a properly performed smog check visual inspection.

Respondent's Evidence

13. Respondent began his employment at [REDACTED] in June 2010.

14. Respondent signed a sworn declaration dated March 11, 2013, wherein he stated that he performed the smog inspection on the Explorer on July 13, 2011, at [REDACTED]. Respondent's declaration stated, "The hose was unusually soft to the touch and would collapse when the vehicle's engine was revved." In his

professional opinion, respondent felt the hose was sufficiently faulty to cause the vehicle "not to pass the smog inspection." At the time of the smog inspection, respondent consulted [REDACTED], another licensed Advanced Emission Specialist Technician employed by [REDACTED], for a second opinion. [REDACTED] agreed with respondent's assessment.

15. Respondent testified that when he sees a collapsing hose, he is supposed to "fail" it. He asserted that a hose can collapse after being driven for 50 miles to an elevation of 2,500 feet on a hot day. His boss agreed that the hose was collapsing, and that respondent should "fail" the vehicle. It was respondent's "call" to fail the PCV hose due to the visual inspection. He did so, and did not issue a certificate of compliance.

16. Respondent also observed during his visual inspection that the evaporative service port was not properly connected. Respondent testified that he thought it was unusual that the evaporative service port was clipped to the negative battery cable. To determine the proper wiring location, respondent checked the underhood emissions label and the schematic diagram with ALLDATA. Respondent testified that the underhood label and ALLDATA were "not much help with the proper location of the [evaporative service port] hose." Respondent consulted with his supervisor [REDACTED] for a second opinion. [REDACTED] agreed with respondent's visual observation, in that the connection of the evaporative service port "raised a red flag." Respondent failed the fuel evaporative controls based upon his visual inspection.

17. Respondent is no longer employed at [REDACTED]. His employment terminated in May 2012. Respondent is currently employed as a smog technician at a star-certified station in [REDACTED]. The station is certified by the Bureau to conduct smog check and gross polluter inspections.

18. Respondent does not have a history of prior citations or discipline by the Bureau.

Evidentiary Discussion

19. Complainant asserts that the PCV hose was not damaged, and the fuel evaporative port was connected properly. Complainant further asserts that had respondent conducted a visual inspection in accordance with the Bureau's procedures and verified that the emission control devices were properly installed, the Explorer would have passed the smog check inspection. However, the evidence established that respondent conducted a visual inspection of the Explorer's PCV valve and hose and determined that the PCV hose was collapsed and therefore damaged. While respondent's conclusions differed from Mr. Gibson's testimony that the PCV hose was not damaged or collapsed, those differences do not negate the fact that respondent performed the visual inspection. The evidence did not establish that

respondent failed to perform his visual inspection of the PCV valve and hose in accordance with the procedures prescribed by the Bureau. (Health & Saf. Code, § 44012, subd. (f), Cal. Code Regs., tit. 16, § 3340.30, subd. (a).)

20. The evidence further established that respondent performed a visual inspection of the fuel evaporative service port and determined that it was not connected properly after verifying that the fuel evaporative emission controls were properly installed. (Cal. Code Regs., tit. 16, § 3340.42, subd. (e)(1).) The evidence did not establish that respondent failed to perform a visual inspection of the fuel evaporative emission controls in accordance with the procedures prescribed by the Bureau. (Health & Saf. Code, § 44012, subd. (f).)

Costs

21. The Bureau submitted a certified copy of the actual costs of investigation of this matter. The Bureau incurred a total of \$6,556.35 in investigative costs. Specific components of costs were \$6,362.85 for Bureau staff investigative services and \$193.50 for undercover runs. Similarly, the attorney general certified his prosecution costs of \$7,027.50 for legal services, including case evaluation and preparation, and paralegal work. The total amount of costs of investigation and prosecution of this matter is \$13,583.85.

LEGAL CONCLUSIONS

Burden of Proof

1. The Bureau bears the burden of proving, by a preponderance of the evidence, that the facts alleged in its Accusation are true and that the requested discipline against respondent's license should be imposed.

Statutes and Regulations

2. Qualified smog check technicians shall perform tests of emission control devices and systems in accordance with section Health and Safety Code section 44012. (Health & Saf. Code, § 44032.) Pursuant to Health and Safety Code section 44012, the test at the smog check stations "shall be performed in accordance with procedures prescribed by the department," which shall ensure, *inter alia*, "a visual or functional check ... made of emission control devices specified by the department, including the catalytic converter in those instances in which the department determines it to be necessary to meet the findings of Health and Safety Code section 44001. The visual or functional check shall be performed in accordance with procedures prescribed by the department." (Health & Saf. Code, § 44012, subd. (f).)

3. A smog check station's license or a qualified smog check technician's qualification may be suspended or revoked by the department, after a hearing, for failure to meet or maintain the standards prescribed for qualification, equipment, performance, or conduct. (Health & Saf. Code, § 44035, subd. (a).)

4. The director may suspend, revoke, or take other disciplinary action against a license if the licensee violates any statute or regulation relating to the Program. (Health & Saf. Code, § 44072.2, subds. (a), (c).)

5. A smog check technician shall inspect, test and repair vehicles, as applicable, in accordance with Health and Safety Code sections 44012 and 44035, and California Code of Regulations, title 16, section 3340.42. (Cal. Code Regs., tit. 16, § 3340.30, subd. (a).)

6. Smog check technicians are required conduct to a visual inspection of the vehicle's emissions control systems. During the visual inspection, the technician shall verify that emission control devices, including but not limited to: crankcase emissions controls, including positive crankcase ventilation; and fuel evaporative emission controls, are properly installed on the vehicle. (Cal. Code Regs., tit. 16, § 3340.42, subd. (e).)

Cause for Discipline

7. By reason of Findings 6, 14 through 16, 19, and 20, cause does not exist to discipline respondent's Smog Check Inspector License No. EO [REDACTED], for violating Health and Safety Code section 44012, subdivision (f), in that the evidence did not establish that respondent failed to perform a visual inspection of the emission control systems and devices on the Explorer in accordance with the procedures prescribed by the Bureau.

8. By reason of Findings 6, 14 through 16, 19, and 20, cause does not exist to discipline respondent's Smog Check Inspector License No. EO [REDACTED], for violating Health and Safety Code section 44072.2, subdivision (c), in conjunction with California Code of Regulations, title 16, section 3340.30, subdivision (a), in that the evidence did not establish that respondent failed to inspect and test the Explorer in accordance with Health and Safety Code sections 44012 and 44035, and California Code of Regulations, title 16, section 3340.42.

9. By reason of Findings 6, 14 through 16, 19, and 20, cause does not exist to discipline respondent's Smog Check Inspector License No. EG [REDACTED] for violating Health and Safety Code section 44072.2, subdivision (c), in conjunction with California Code of Regulations, title 16, section 3340.42, in that the evidence did not establish that respondent failed to perform visual inspections of the PCV valve and hose and the fuel evaporative emission controls for proper installation on the vehicle.


Costs

10. As set forth in Legal Conclusions 7 through 9, cause does not exist to discipline respondent's license. Therefore, costs shall not be awarded to the Bureau.

ORDER

The Accusation against respondent [REDACTED] is hereby DISMISSED, by reason of Legal Conclusions 7 through 9.

DATED: January 23, 2014.



DANETTE C. BROWN
Administrative Law Judge
Office of Administrative Hearings