BEFORE THE DIRECTOR OF THE

DEPARTMENT OF CONSUMER AFFAIRS

BUREAU OF AUTOMOTIVE REPAIR

STATE OF CALIFORNIA

In the Matter of the Accusation Against:

ADAM GHASSAN ABULASHIN dba THE ORIGINAL RELIABLE SMOG TEST

2416 Huntington Dr.

Duarte, CA 91010

Automotive Repair Dealer Registration No. ARD 282505

Smog Check Test Only Station License No. TC 282505

and

ADAM GHASSAN ABULASHIN

4538 Hastings Ct.

Chino, CA 91710

Smog Check Inspector License No. EO 638091

Respondents.

Case No. 79/22-383

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OAH No. 2022050765

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 non-substantive technical correction pursuant to Government Code section 11517(c)(2)(C):

- Page 12, paragraph 43, "calttanking" shall be replaced with "caltanking."

This Decision shall be effective on March 15, 2023.

IT IS SO ORDERED on Feb. 1, 2023.

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

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

In the Matter of the Accusation Against:

ADAM GHASSAN ABULASHIN doing business as

THE ORIGINAL RELIABLE SMOG TEST

Automotive Repair Dealer Registration No. ARD 282505

Smog Check Test Only Station License No. TC 282505

and

ADAM GHASSAN ABULASHIN

Smog Check Inspector License No. EO 638091,

Respondents.

Agency Case No. 79/22-383

OAH No. 2022050765

PROPOSED DECISION

Administrative Law Judge Chris Ruiz, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on October 19 and 20, 2022.

Deputy Attorney General Brian Lee represented complainant Patrick Dorais, Chief of the Bureau of Automotive Repair (Bureau), Department of Consumer Affairs (Department).

Attorney William D. Ferreira represented respondents Adam Ghassan Abulashin (AGA), doing business as The Original Reliable Smog Test (ORST), and Adam Ghassan Abulashin as an individual (collectively, respondents).

Testimony and documentary evidence was received. The record was held open until November 18, 2022, for the parties to submit written briefs, which were limited to 10 pages.

On October 28, 2022, respondents filed a "Closing Argument," which was marked for identification as Exhibit C and lodged with the record.

On November 18, 2022, complainant filed "Complainant's Closing Reply Brief," which was marked for identification as Exhibit 15 and lodged with the record.

The record was closed, and the matter submitted for decision on November 18, 2022.

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FACTUAL FINDINGS

Jurisdictional Matters

1. Complainant brought the Accusation solely in his official capacity.

2. On January 19, 2016, the Bureau issued Automotive Repair Dealer Registration Number ARD 282505 to AGA, doing business as ORST. The registration was in full force and effect at the times relevant to the charges in the Accusation and will expire on January 31, 2023, unless renewed.

3. On February 16, 2016, the Bureau issued Smog Check, Test Only, Station License Number TC 282505 to AGA, doing business as ORST. The Smog Check Test Only Station License was in full force and effect at the times relevant to the charges in the Accusation and will expire on January 31, 2023, unless renewed.

4. On April 19, 2016, the Bureau certified ORST as a STAR Station. This certification will remain active unless respondents' automotive repair dealer registration and/or smog check station license is revoked, canceled, the licenses become delinquent, or the STAR certification is invalidated.

5. On April 29, 2015, the Bureau issued Smog Check Inspector License Number EO 638091 to AGA. The smog check inspector license was active as relevant to the charges brought in the Accusation and will expire on September 30, 2023, unless renewed.

6. On March 14, 2022, the Bureau issued an Accusation against respondents alleging multiple violations of the laws and regulations arising from clean tanking, an illegal technique used to circumvent smog tests.

7. On April 14, 2022, respondents filed a Notice of Defense challenging the Accusation.

8. All jurisdictional requirements have been met.

Clean Tanking

9. The California Legislature enacted clean air legislation designed to reduce air pollution caused by motor vehicles. The legislation requires motor vehicles to pass periodic smog check inspections. A licensed smog check station causes an electronic certificate of compliance to issue when a vehicle passes an inspection. Only a licensed smog check technician working at a licensed smog check station may conduct a smog check inspection.

10. A vehicle which fails the smog test must be repaired and retested, resulting in additional expenses for the owner. To avoid such an outcome, vehicle owners and smog technicians sometimes engage in illegal activity to circumvent the inspection process.

11. The Bureau is responsible for investigating potential violations of the smog check system. Among its tools is the ability to review the results of smog checks. These results are electronically transmitted directly to its Vehicle Information Database (VID) during smog inspections. The Bureau reviews this data, and notes anomalies which may indicate potential fraudulent inspections.

12. Among the fraudulent inspection methods is clean tanking. Clean tanking is utilized for qualifying vehicles manufactured between 1976 and 1995. Such vehicles' emission systems are inspected by administering a Low Pressure Fuel Evaporative Test (LPFET), using an LPFET testing unit. The test's purpose is to detect leaks in the fuel

evaporative system. It requires the technician to connect a hose from the LPFET testing machine to the vehicle and pressurize the fuel tank with Nitrogen gas after pinching off the gas overflow hose. If the system does not hold pressure, the vehicle fails the smog inspection. The failure indicates that the vehicle's fuel evaporative controls are not functioning properly, and the vehicle is releasing polluting vapors into the atmosphere.

13. As part of the LPFET, the testing unit measures the "head space" in the fuel tank of the subject vehicle. The head space is the volume of vapor space in the fuel tank above the fuel level. A vehicle with a full tank of gas will have a smaller head space than a vehicle with a half-full gas tank, if the vehicles are the same make and model.

14. The LPFET testing unit's calibration tank is normally only used to test and verify that the LPFET testing unit is working properly. When the hose emitting the Nitrogen gas is inserted into the calibration tank, the resulting headspace will be in the 1.5-to-2.5-gallon range. If the equipment is not working properly when tested with the calibration tank, the LPFET tester is designed to lock and becomes unusable until it is repaired.

15. If inspecting a vehicle which an unscrupulous smog test technician believes is likely to fail the LPFET, he or she will insert the hose into the LPFET testing unit's calibration tank, rather than into the vehicle, as a way of bypassing the LPFET.

16. Vehicles generally have varying expected headspace range readings based on their make, model, and model year (MMMY). A small percentage of vehicles with properly working fuel evaporative controls will result in a 1.5-to-2.5-gallon headspace reading.

17. When the Bureau reviews the data received into the VID from a smog test station and it shows LPFET results with a much higher percentage of vehicles emitting a 1.5-to-2.5-gallon headspace reading, one possible explanation is that the results are based on clean tanking. In other words, the results may have been obtained by plugging the LPFET tester hose into the calibration tank, instead of the subject vehicles, and then ascribing the results to those vehicles.

The Bureau's Investigation and Analysis

18. Bureau Investigator Oran Medina (Medina), Program Representative I, reviewed the data collected in the Bureau's VID from LPFET's performed at ORST during the period of January 1, 2020, through January 4, 2022.

19. Medina noted a statistical anomaly in the number of vehicles tested at ORST, which emitted a 1.5-to-2.5-gallon headspace reading. 519 total vehicles passed LPFET testing during the two-year time period. 413 of the 519 vehicles, which is 79.58 percent, had a calculated headspace volume within the 1.5-to-2.5-gallon range. Medina concluded that 413 vehicles were issued "possible fraudulent certifications."

20. Medina testified at the hearing and stated, on a statewide basis, for the same two-year period of time, 14.27 percent of all vehicles that underwent an LPFET, 14.27 percent, reported a calculated headspace volume within the 1.5 to 2.5 range. The Bureau assumes that these results include some vehicles which were clean tanked.

21. Medina then adjusted ORST's statistics and deducted 14.27 percent of the 413 vehicles, to account for the state average, which resulted in 354 possible fraudulent certifications issued by respondents. In all these cases, AGA performed the smog inspection.

22. Because the headspace volume within the 1.5 to 2.5 range is the same as that recorded with the calibration tank, it is sometimes referred to as the 'caltank' range. (Further references to the 1.5 to 2.5 headspace volume range will be referred to as caltank range.)

Bureau Expert

23. Francis Di Genova (Di Genova) is employed as an Air Quality Engineer II in the Bureau's Program Evaluation and Referee Unit. Mr. Di Genova holds a Bachelor of Science degree in physics and a Master of Science degree in Environmental Science. His studies included classes in statistics and statistical analysis, and he has continued to study statistics and related subjects through continuing education classes.

24. Di Genova has been working in the air quality and automotive emissions field for more than 45 years. Before working for the Bureau, Di Genova spent 24 years as a partner and the laboratory director of Sierra Research, Inc., an air pollution consulting firm. There, Di Genova designed and conducted emission tests and analyzed their results for clients which included the United States Environmental Protection Agency, the California Air Resource Board, and the Bureau, as well as other states' air quality regulatory agencies. Di Genova's clients also included private sector companies, such as automobile manufacturers.

25. Before working for Sierra Research, Di Genova worked for the California Air Resources Board for 13 years. There, he served as a supervising air pollution specialist in the agency's research division and later, as chief of its research and economic studies branch. Di Genova's work at the Air Resources Board involved studies of emission control and atmospheric studies among other aspects of air pollution regulation and study.

26. In addition to his work, Di Genova is active in professional associations involved with the study and regulation of emission control and air pollution, the Air and Waste Management Association and the Society of Automotive Engineers. Since 1994, Di Genova has been certified as a "qualified environmental professional" by the Institute for Professional Environmental Practice.

27. Di Genova analyzed the data retrieved by Medina from the VID related to ORST. During his testimony at the hearing, as supplemented and further explained by his affidavit (see Exh. 14), Di Genova explained his analytical process and findings.

28. Di Giovani began by examining the LPFET results captured in the VID statewide, for the same period which Medina reviewed ORST's test data. Di Genova discovered that, of the 4,631 stations reporting LPFET test results, 78 stations, which is 1.7 percent of the total stations, accounted for half the test results in the caltank range. Further, Di Genova found 44.2 percent of the stations had no test results in the caltank range. Di Giovani determined that in some areas of the state, the caltank range results were 10 times, or more times, the rate of other areas. Di Genova concluded that because of the fraudulent tests being performed by only a few stations, the statewide "average" is almost certainly less than the 14.27 percent "average" that is calculated by including the few stations which have many caltank results.

29. Di Genova next calculated whether, by random chance, vehicles tested at ORST could have emitted a test result in the caltank range. According to the binomial probability distribution, the likelihood of ORST having more than 74 caltank range tests by chance is about 47 percent. There is about 1 percent chance of more than 93 caltank range tests, less than one in a million chance of more than 114 tests in the caltank range, less than one in a billion chance of more than 126 caltank range tests, and less than one in 29 trillion chance of more than 135 caltank range tests.

30. Using principles of mathematical probability, Di Genova concluded that it would be virtually impossible to have 413 out of 519 certification tests in the caltank range purely by chance.

31. Di Genova noted that between November 16, 2020, and September 20, 2021, ORST performed 239 consecutive LPFET certification tests of vehicles that varied widely in their makes, models, types, and model years. Di Genova testified these 239 vehicles would be expected to have fuel tanks of varying fill levels, size, composition, shape, volume of safety expansion spaces, expandability when pressured, fill levels, temperatures, and other factors. Di Genova stated the vehicles would have been expected to have different LPFET vapor space equivalent volume measurements.

32. Considering the mathematical probability and odds, Di Genova concluded the probability of recording 239 consecutive headspace measurements in the caltank range, occurring purely by chance, is far more than one in a trillion and is mathematically essentially not possible.

33. Di Genova testified that between May 25, 2021, and August 6, 2021, ORST performed 63 consectutive LPFET tests which resulted in headspace readings of exactly two gallons. Di Genova opined 63 consecutive LPFET tests, of different vehicles, all of which resulted in headspace readings of exactly two gallons, is virtually impossible based on chance.

34. Di Genova also considered whether a malfunction in the testing unit could have caused the anomalous results and he concluded that it could not have because the LPFET testing unit is designed to shut down and lock out the inspector when it is malfunctioning. Di Genova testified he was familiar with the theory of operation and type of hardware associated with headspace volume measurement by

the LPFET. Neither Di Genova or the Bureau is aware of an analyzer failure mode that will cause a BAR-certified LPFET analyzer to "accidentally" report valid gas tank headspace measurements.

Respondent's Challenges to the Bureau's Expert Testimony

35. As noted by respondents through their counsel, the Bureau's entire case against them is based on data mining from the VID and Di Genova's analysis of that data. No one from the Bureau visited the ORST or spoke to AGA. Therefore, there is no direct evidence of respondents committing wrongdoing. Respondents argued that such evidence is too theoretical to support findings of wrongdoing.

36. Di Genova also acknowledged the technician performing the LPFET inspection is unable to see the headspace results. Therefore, if the testing machine was malfunctioning and reporting incorrect results, the smog technician would not know there was any issue until Bureau personnel informed the technician.

37. Most vehicles will have a headspace result of over three gallons after an LPFET test. Di Genova acknowledged that the LPFET testing machines are not set to automatically fail a vehicle if the headspace result is less than three gallons. It was not established why the Bureau does not automatically fail vehicles with a headspace result of less than three (or between 1.5 gallon and 2.5 gallons), which the Bureau contends almost always indicates the technician is misusing the calibration tank. It was also established that a smog technician could use a tank which is larger than the calibration tank, thus eliciting headspace results above 2.5 gallons.

38. It was not established why the Bureau did not contact AGA about ORST's headspace results prior to filing an Accusation. The violations at issue occurred between January 2020 and January 2022. According to the evidence, only a few

stations perform the vast majority of the alleged caltank smog inspections. The evidence did not establish why the Bureau does not discover these headspace reporting issues earlier in time, or why the Bureau does not contact the station owner. It was also not established why the Bureau does not send an undercover car to the station for LPFET testing.

Number of Potential Violations

39. As discussed previously, 413 vehicles tested by ORST had results within the caltank range. Although each one could be a potential violation, based on the 14.27 percent state-wide rate of caltank range results, the Bureau has chosen to reduce the number of caltank violations to 354. AGA performed all the 354 inspections at issue.

Costs

40. Complainant seeks $9,283.75 in enforcement costs and $754.56 in investigation costs, pursuant to Business and Professions Code section 125.3.

Respondents' Evidence

41. Respondent AGA testified at the hearing and provided the following information.

42. AGA is 34 years of age. He is married with two children, ages 3 years and 3 months. He is the sole support for his family. AGA's average earnings are $4,500 per month, before taxes. His family's average monthly expenses for rent, food, and insurance is $3,400.

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43. AGA has been a licensed smog check inspector for approximately seven and a half years. He has owned ORST for approximately six years. AGA believes in the benefits of LPFET testing to protect the environment. He testified that before the Accusation was filed, he was unaware that unscrupulous technicians use "calttanking" as a method to pass vehicles which otherwise would fail, or in order to save the time it takes to conduct a proper LPFET test, which AGA described as taking between five and 15 minutes to complete.

44. AGA leased a used Environmental Systems Products (ESP) brand LPFET testing machine in 2016. He has had multiple problems with the LPFET machine, and it has failed on multiple occasions. ESP utilizes Opus Company (Opus) to perform repairs for its LPFET machines. AGA identified Opus employees Marcelo and Jose, as persons sent by Opus to service AGA's LPFET machine.

45. AGA has contacted Opus on 20 to 30 previous occasions to request repair of his LPFET machine. He has reported that the LPFET machine "freezes" during inspections. Over the phone, Opus has told AGA to recalibrate the machine, which AGA has tried on many occasions. Sometimes, recalibration rectifies the issue, but other times AGA must recalibrate the machine on multiple occasions. AGA has also contacted the Bureau for assistance with his LPFET machine. Bureau personnel told him to turn of the machine and recalibrate, which AGA has done on many occasions.

46. AGA contact the Bureau for assistance with his LPFET machine in April of 2020 and again in 2022 near the beginning of the year. Specifically, he phoned the Bureau's El Monte office.

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47. When AGA performs an LPFET test, he charges $10, in addition to the usual price for a smog inspection. AGA charges the customer this $10 dollar fee, whether the vehicle passes or fails.

48. AGA performs 10 to 15 smog inspections per day. He works 8 to 10 hours per day, six days a week. Respondent has no employees.

49. AGA's Bureau issued licenses have not previously been disciplined.

50. AGA denied ever using the calibration tank for any other purpose than to calibrate the LPFET machine.

51. AGA finds it difficult to understand why the Bureau did not contact him to discuss the issue. He would have informed Bureau personnel regarding the issues he was having with his LPFET machine and he would have requested their assistance in determining the cause of his LPFET machine's repeated malfunctions.

Analysis

52. Complainant's complete reliance on circumstantial evidence does not necessarily weaken his case. Evidence does not have to be direct to effectively carry the burden of establishing a charge; circumstantial evidence may be as persuasive and convincing as direct evidence. (*People v. Overstock.com, Inc.* (2017) 12 Cal.App.5th 1064,1986). Inferences drawn from circumstantial evidence "may constitute substantial evidence, but they must be the product of logic and reason." (*Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1360.)

53. In this matter, the Bureau's expert, Di Genova, was well-qualified and credible. He presented his results and his methodology. Di Genova's opinion that ORST's LPFTE headspace results could not be possible if proper testing was being

done, are reasonable. However, Di Genova attributes the results to caltanking, based on probability and his and the Bureau's knowledge re LPFET machines. The possibility of a malfunctioning LPFET machine was not considered as a possibility. If Di Genova's testimony stood alone, then it would be persuasive.

54. However, in this case, AGA testified he has never used the calibration tank to bypass performing an LPFET on a vehicle.

55. AGA also credibly testified his LPFET machine malfunctioned on a regular basis. AGA reported those problems to the LPFET manufacturer's service provider and to the Bureau. Nevertheless, AGA has been unable to determine what causes the LPFET machine to consistently malfunction and require re-calibration.

56. AGA provided dates and names regarding his reporting of the LPFET's malfunctioning and the persons that came to service the machine. This testimony corroborated AGA's testimony regarding his efforts to have the LPFET machine repaired.

57. It was not established there was an incentive for AGA to use the caltanking method. First, AGA charges customers for the LPFET test, whether their vehicle fails the LPFET test. Therefore, there is no financial incentive to use the caltanking method to pass a vehicle. The only other possible reason AGA might use the caltanking method is if AGA was trying to save time, to perform as many smog inspections as possible, thereby increasing his earnings. However, the evidence established AGA inspects as many as 15 vehicles per day. AGA works nine hours per day on average. Allowing an hour for lunch, respondent has approximately 32 minutes to perform each smog inspection, which is more than enough time, especially considering that many vehicles do not require an LPFET.

58. The conflicting evidence in this case can be summarized as follows. Either AGA was lying during almost all his testimony, or something is causing the LPFET machine to incorrectly report the same results over and over. AGA was calm during his testimony and did not hesitate when answering questions. He provided information regarding his phone calls to the Bureau, which the Bureau could presumably check against its phone logs. AGA appeared forthright and direct during his testimony, and he did not hesitate before answering, which is sometimes required by a person who is testifying and attempting to hide the truth by lying, while at the same time attempting to ensure that the lies are not inconsistent.

59. For the reasons stated in Factual Findings 54-58, AGA's testimony is found to be credible.

60. Therefore, the evidence provides two plausible explanations regarding what occurred at ORST. Since the Bureau never inspected AGA's LPFET, and because AGA testified that he had on-going problems with his LPFET machine, it was not established that AGA's LPFET machine was working properly when he tested the vehicles at issue in this matter. While it was not established how AGA's LPFET machine may have malfunctioned, the evidence also established that AGA did not know the headspace results being provide to the VID and the Bureau. Therefore, AGA could not have known, or had reason to believe, that his LPFET machine was providing inaccurate results. AGA made multiple and reasonable attempts to determine and repair the issues affecting his LPFTE machine, with little assistance from the manufacturer, its service contractor, or the Bureau.

61. The conflicting evidence provided by the parties is given equal weight.

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62. Any factual allegations stated in the Accusation which are not specifically addressed in this Proposed Decision, are deemed not established.

LEGAL CONCLUSIONS

Burden of Proof

1. Complainant bears the burden of proof in establishing the charges of the Accusation. (Evid. Code, § 115). Complainant did not carry his burden of proof, as set forth in Factual Finding 61. Since complainant has the burden of proof, the Accusation cannot be upheld. A factual basis was not established to uphold any of the eight causes for discipline stated in the Accusation.

2. Cause does not exist to revoke or suspend respondents' Automotive Repair Dealer Registration number ARD 282505.

3. Cause does not exist to revoke or suspend Smog Check Test Only Station License Number TC 282505.

4. Cause does not exist to revoke or suspend Smog Check Inspector License Number EO EO 638091.

5. Complainant's request to be reimbursed for investigation and enforcement costs, pursuant to Business and Professions Code section 125.3, is denied because no cause for discipline was established.

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ORDER

1. The Accusation filed against Adam Ghassan Abulashin, doing business as The Original Reliable Smog Test, which holds Automotive Repair Dealer Registration No. ARD 282505 and Smog Check, Test Only, Station License No. TC 282505, is hereby dismissed and no discipline is imposed.

2. The Accusation filed against Adam Ghassan Abulashin, an individual who holds Smog Check Inspector License No. EO 638091, is hereby dismissed and no discipline is imposed.

DATE: 12/16/2022

Christopher Ruiz (Dec 16, 2022 12:35 PST)

CHRIS RUIZ
Administrative Law Judge
Office of Administrative Hearings