

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

In the Matter of the Accusation Against:

XPRESS SMOG AND TEST ONLY- MAHMOUD A. KWARA, SOLE OWNER

4624 Telephone Road

Ventura, CA 93003

Mailing Address:

4234 Avenida Simi

Simi Valley, CA 93063

Automotive Repair Dealer Registration No. ARD 259932

Smog Check Test Only Station License No. TC 259932

Case No. 79/17-9157

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OAH No. 2019110208

Respondent.

DECISION ADOPTING PROPOSED DECISION WITH REDUCTION IN PENALTY

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 reduction of penalty pursuant to Government Code section 11517:

- The provision, “The terms of probation are extended to any agents, employees, or partners now or anytime in the future affiliated with Xpress Smog and Test Only as long as the probation is in effect,” is omitted.

This Decision shall be effective on November 17, 2020.

IT IS SO ORDERED this 12th day of October, 2020.

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

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Respondent.

Case No. 79/17-9157

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PROPOSED DECISION

Deena R. Ghaly, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on August 3, 2020, via videoconference.

Kevin J. Rigley, Deputy Attorney General, represented Complainant Patrick Dorais, Chief of the Bureau of Automotive Repairs (Bureau or BAR), Department of

Consumer Affairs. Mahmoud A. Kwara represented himself and his company, XPress Smog And Test Only (collectively, Respondents).

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on the hearing day.

FACTUAL FINDINGS

JURISDICTION

1. Complainant brought the Accusation in his official capacity. Respondent filed a timely notice of defense and this hearing ensued.

LICENSE HISTORY

2. On November 12, 2009, BAR issued Automotive Repair Dealer Registration Number ARD 259932 (ARD Registration) to Mahmoud A. Kwara, doing business as Xpress Smog and Test Only (Xpress Smog). The ARD Registration expired on August 31, 2018 and has not been renewed.

3. On February 22, 2010, BAR issued Smog Check, Test Only, Station License Number TC 259932 (Station License) to Xpress Smog. The Station License expired on August 31, 2018 and has not been renewed.

BAR INVESTIGATION

4. A. On January 31, 2017, BAR personnel prepared a Bureau vehicle, a 2002 Honda (subject vehicle), to fail the visual portion of a smog check inspection by removing the vehicle's catalytic converter.

B. On February 22, 2017, an undercover operator drove the subject vehicle to Xpress Smog and requested a smog inspection. When the undercover operator arrived at Xpress Smog, he requested a smog check and signed a work order prepared by Xpress Smog but did not receive a copy of the work order. Thereafter, smog technician Abdallah Kwara performed a smog check inspection on the subject vehicle and passed it, issuing Certificate of Compliance number ZP627941C.

Prior Discipline

5. On August 20, 2013, BAR issued a citation against Xpress Smog's ARD registration and station license for issuing a certificate of compliance for a BAR vehicle missing Air Suction Valve assembly. Xpress Smog paid a \$1,000 fine for the citation. On December 3, 2015, BAR issued a citation against Xpress Smog's ARD registration and station license for issuing a certificate of compliance to a BAR vehicle with the ignition timing adjusted beyond specifications. On August 29, 2016, BAR issued a citation against Xpress Smog's ARD registration and station license for issuing a certificate of compliance to a BAR vehicle with a missing secondary air injection pump. Xpress Smog appealed the 2015 and 2016 citations and both matters are still pending.

Respondents' Evidence

6. Mahmoud Kwara and his son, Abdallah Kwara, who is a licensed smog technician and works with the senior Kwara, both testified. They do not dispute the allegations and expressed remorse for falling short of the applicable standards. Mahmoud Kwara stressed that, although he acknowledged mistakes were made at his shop, he never intended to do anything illegal. The Kwaras have another automobile repair station and have taken steps there to help ensure they are operating within BAR requirements. These include preparing checklists for technicians to follow and setting

higher requirements for the technicians they hire. Mahmoud Kwara stated that he would be willing to operate under a probationary license and abide by its terms and conditions.

Costs

7. A. Complainant submitted evidence of the costs of investigation and enforcement of this matter, summarized as follows: \$1,296.24 in investigation activities and \$11,257.50 for legal services provided by the California Department of Justice, Office of the Attorney General. Complainant also introduced a printout entitled Investigation and Other Costs. With respect to these costs, the Board provided no information about the general tasks performed or the amount of time spent on each particular task. As this request for costs is not properly supported, it is disallowed. (Cal. Code Regs., tit. 1, § 1042, subd. (b)(1).) The enforcement costs, a calculation including over 58 hours of professional and paraprofessional time, are excessive. The allegations at issue arise from a single undercover operation and there were no exceptional legal issues or other reasons explain the large number of hours spent on the matter. Any revision of the cost requested must resort to a certain amount of educated guessing and extrapolation from enforcement costs for similar cases. On these bases, reasonable enforcement costs are deemed to be half the amount requested or \$5,628.25. Thus, the total supported and reasonable costs are \$5,628.25.

B. Mahmoud A. Kwara stated that he and his companies have the resources to pay the costs as long as the Bureau-issued registrations and licenses are not revoked, and the costs can be paid pursuant to a payment plan.

LEGAL CONCLUSIONS

Jurisdiction and Burden and Standard of Proof

1. The Bureau may revoke, suspend, or place on probation an automotive repair dealer registration. (Bus. & Prof. Code, § 9884.7.) The Bureau retains jurisdiction to discipline expired registrations. (Bus. & Prof. Code, § 9884.13.)

2. In an action seeking to impose discipline against the holder of Bureau-issued registration and license, the burden of proof is on Complainant to establish the charging allegations by a preponderance of the evidence. (*Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-917.) A preponderance of the evidence means evidence that has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Applicable Law

AUTOMOTIVE REPAIR ACT

3. The Bureau may discipline a registration for any of the following acts or omissions related to the conduct of the automotive repair dealer's business, whether done by the dealer or any employee, partner, or officer:

(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.;

[¶] . . . [¶]

(3) Failing or refusing to give to a customer a copy of any document requiring his or her signature, as soon as the customer signs the document.;

[¶] . . . [¶]

(6) Failure in any material respect to comply with the provisions of this chapter or regulations adopted pursuant to it.;

(Bus. & Prof. Code, § 9884.7, subd. (a).)

4. The Bureau “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).) If the Bureau disciplines any license it has issued under Business and Professions Code sections 9889.1 through 9889.10, it may also discipline any other licenses it has issued. (Bus. & Prof. Code, § 9889.9.)

MOTOR VEHICLE INSPECTION PROGRAM

5. A. The Bureau may discipline a smog check station license pursuant to Health and Safety Code section 44072.2, for violating any section of the Motor Vehicle Inspection Program (Health and Saf. Code, § 44000, et seq) (§ 44072.2, subd. (a)); for violating any of the regulations adopted pursuant to the Motor Vehicle Inspection Program (§ 44072.2, subd. (a)), and for committing any act of dishonesty, fraud, or deceit. (§ 44072.2, subd. (d))

B. Health and Safety Code section 44012, subdivision (a) requires a smog check station to determine that all required emission control devices and systems are installed and properly functioning. Health and Safety Code section 44012, subdivision (f) requires a smog check station to perform a visual inspection of the emission control devices. Health and Safety Code section 44015, subdivision (b) requires a smog check station to issue certificates of compliance only after conducting a proper inspection.

C. California Code of Regulations, title 16 (Regulation), section 3340.30, subdivision (a) provides that a licensed technician shall inspect vehicles in accordance with Health and Safety Code section 44012. Regulation section 3340.35 provides that a licensed station shall issue a certificate of compliance only when the vehicle has been inspected in accordance with proper procedures and the required emission control equipment is installed and functioning. Regulation section 3356, subdivision (d) provides that a smog check station must provide each client a legible copy of the signed invoice.

Causes for Discipline

6. Cause exists to discipline Respondents' registration under Business and Professions Code section 9884.7, subdivisions (a)(3) and (a)(6), for failing to give the operator of the subject car a copy of the invoice he signed as set out in Factual Finding 4.

7. Cause does not exist to discipline Respondents' registration under Business and Professions Code section 9884.7, subdivision (a)(4), for committing fraud by issuing an electronic certificate of compliance for the subject vehicle without performing a bona fide inspection. Fraud generally involves an affirmative act of

deceit. The record did not establish that the issuance of the certificate of compliance was anything other than a mistake or the result of negligence.

8. Cause exists to discipline Respondents' smog check station license under Health and Safety Code section 44072.2, subdivision (a), for failing to determine all emission control devices and systems were installed as required by Health and Safety Code section 44012, subdivision (a), failing to perform a visual check of the emission control devices as required by Health and Safety Code section 44012, subdivision (f), and issuing a certificate of compliance without performing a proper inspection as required by Health and Safety Code section 44015, subdivision (b).

9. Cause exists to discipline Respondents' smog check station license under Health and Safety Code section 44072.2, subdivision (c) for issuing an electronic smog certificate of compliance for the subject vehicle without inspecting it in accordance with proper procedure as required by Regulation section 3340.35, subdivision (c) and failing to give the operator of the subject vehicle a copy of the signed invoice as required by Regulation section 3356, subdivision (d).

10. Cause does not exist to discipline Respondents' smog check station license pursuant to Health and Safety Code section 44072.2, subdivision (d) for committing fraud by issuing an electronic certificate of compliance for the subject vehicle without performing a bona fide inspection. As noted in Legal Conclusion 7 above, fraud involves an affirmative act of deceit. The record did not establish that the issuance of the certificate of compliance was anything other than a mistake or the result of negligence.

BUREAU GUIDELINES

11. A. The Bureau's Guidelines for Disciplinary Orders and Terms of Probation (Rev. March 2016) (Guidelines) were considered. The Guidelines are incorporated by reference in the Bureau's regulations at Regulation section 3395.4. The Guidelines provide that the maximum discipline for each individual violation is revocation. The "Recommended Order[s]" of discipline for specific violations are contained in three tables – Table A contains the recommended orders of discipline for violations of the Business and Professions Code, Table B contains the recommended orders of discipline for violations of the Health and Safety Code, and Table C contains the recommended orders of discipline for violations of the California Code of Regulations. Each table recommends that the disciplinary order include revocation of the applicable license, a stay of the revocation, and a suspension of the license for an undefined period of time, and the tables specify a period of probation for each described violation. The recommended order for statutory and regulatory violations alleged as cause for discipline range from two years to five years' probation with applicable optional terms.

B. In mitigation, the Kwaras have initiated steps to minimize the likelihood of recurrence of the violations, including developing checklists and hiring better qualified technicians. Mahmoud Kwaras readily admitted to the allegations and expressed a willingness to operate under the terms of a probationary period. However, Respondents have previous citations for similar violations, a seriously aggravating factor.

DISPOSITION

12. Balancing the applicable factors and circumstances, a penalty of costs and stayed revocation pending successful completion of a three-year probationary term is warranted. Suspending the registration and license of Xpress Smog or any other Bureau-issued registrations or licenses is not warranted.

Costs

13. Under Business and Professions Code section 125.3, a licensee may be ordered to pay the reasonable costs of the investigation and enforcement of the case. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal. 4th 32, the California Supreme Court considered whether a similar cost recovery provision impermissibly discouraged licensees from exercising their due process rights to a hearing before their licenses could be revoked or suspended. The Court determined that cost recovery for investigation and prosecution is permissible as long as certain conditions are met: assessment of the costs will not unfairly penalize a licensee who is found to have committed some wrongdoing but has used the hearing process to reduce the charges or the severity of the discipline; the licensee has a subjective belief in the merits of her position; the licensee has the means to pay the costs; and the costs are not disproportionately large when considered in the context of the innocuousness of the charge at issue. (*Id.* at p. 45.)

14. Here, Respondents' proffered arguments did not result in reducing the charges against them. Their subjective belief in the merits of their position can be presumed. They were able to present important evidence of mitigation and rehabilitation which were relevant to determining level of discipline. Enforcement costs

of \$5,628.25 are supported and reasonable. (Factual Finding 7B.) Accordingly, these costs are awarded as set out in the order below.

ORDER

Automotive Repair Dealer Registration Number 259932 and Smog Check, Test Only, Station License Number 259932 issued to Xpress Smog and Test Only, Mahmoud Kwara, sole owner is revoked. However, the revocation is stayed and Respondent Mohammed A. Kwara in his capacity as owner of Xpress Smog and Test Only, is placed on probation for three years on the following terms and conditions. The terms of probation are extended to any agents, employees, or partners now or anytime in the future affiliated with Xpress Smog and Test Only as long as the probation is in effect.

Terms and Conditions of Probation

1. Obey All Laws – 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. Training Course - 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.

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

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

6. Tolling of Probation - If, during probation, Respondent leaves the jurisdiction of California to reside or do business elsewhere or otherwise ceases to do business in the jurisdiction of California, he 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 30 days or more in which Respondent is not residing or engaging in business within the jurisdiction of California shall not apply to the reduction of this probationary period or to any period of actual suspension not previously completed. Tolling is not available if business or work relevant to the probationary license or registration is conducted or performed during the tolling period.

7. Supervision Requirements - Respondent shall not delegate his 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 10 days of the medical affirmation of the condition.

8. Violation of Probation - 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 and license shall be subject to any and all terms and conditions of probation not previously satisfied. Failure to

maintain a current and active registration and/or license during the period of probation shall also constitute a violation of probation.

9. 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.

10. Cost Recovery - Respondent shall pay BAR's costs of investigation and enforcement in the amount of \$5,628.25 pursuant to a payment plan approved by BAR. Any agreement for a scheduled payment plan shall require full payment to be completed no later than six 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. 79/17-915. 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.

11. Completion of Probation - Upon successful completion of probation, Respondent's affected registration and 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.

12. 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 license or apply for a new registration or license under the jurisdiction of BAR at any time before the date of the originally scheduled completion of probation. If Respondent applies to BAR for a registration or license at any time after that date, Respondent must meet all current requirements for registration or licensure and pay all outstanding fees or cost recovery owed to BAR and left outstanding at the time of surrender.

DATE: September 2, 2020

signed copy on file
Deena R. Ghaly
Administrative Law Judge
Office of Administrative Hearings