

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

In the Matter of the Citation Issued Against:

MOHAMMAD FARAJI

Smog Check Inspector (EO) License
No. 312386
Smog Check Repair Technician (EI) License
No.312386

Respondent.

Case No. M2015-1666

OAH No. 2017010575

BAR PRECEDENTIAL DECISION
NO. 2018-02

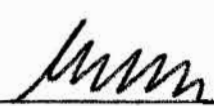
CORRECTED ORDER DESIGNATING DECISION AS PRECEDENT

PRECEDENTIAL DECISION
(Government Code section 11425.60)

The Bureau of Automotive Repair, Department of Consumer Affairs hereby designates as Precedential Factual Findings 3 through 11 of *In the Matter of the Citation Issued Against Mohammad Faraji*, OAH No. 2017010575 (Bureau of Automotive Repair Case No. M2015-1666).

This precedential decision became effective on November 26, 2018.

IT IS SO ORDERED this 4th day of December, 2018.



Grace Arupo Rodriguez
Assistant Deputy Director
Legal Affairs Division
Department of Consumer Affairs

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312386
Smog Check Repair Technician (EI)
License No. 312386

Case No. M2015-1666

OAH No. 2017010575

Respondent.

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

October 24, 2017.

DATED: _____

9/20/17



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

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Respondent.

Case No. M2015-1666

OAH No. 2017010575

PROPOSED DECISION

This matter was heard by Humberto Flores, Administrative Law Judge with the Office of Administrative Hearings, on July 11, 2017, in Los Angeles, California.

Complainant was represented by Steven D. Svetich, Deputy Attorney General.

Mohammad Faraji (respondent), appeared and was represented by William D. Ferreira, Attorney at Law.

Oral and documentary evidence was received and the matter was submitted for decision. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions and Order:

FACTUAL FINDINGS

1. In 1996, the Bureau of Automotive Repair (Bureau or BAR) issued Advanced Emission Specialist (EA) Technician License No. 312386 to respondent. This license was cancelled on March 13, 2014. Effective March 13, 2014, Smog Check Inspector (EO) License No. 312386 and Smog Check Repair Technician (EI) License No. 312386 were issued to respondent. These licenses are in full force and effect and will expire on May 31, 2018, unless renewed,

2. Citation No. M2015-1666 (Citation) was served on respondent with regard to his Smog Check Inspector (EO) License No. 312386,¹ after he conducted a smog test and issued a certificate of compliance to a 1999 Ford F-250 Diesel using the BAR-97 Emissions Inspection System (BAR-97), instead of the OBD (On-Board Diagnostic) Inspection System (OIS). Pursuant to the Citation, respondent was ordered to cease and desist from violating Health and Safety Code section 44032. Respondent timely appealed from the Citation.

3. Respondent does not dispute the allegation that he used the BAR-97 to conduct the above referenced smog test on the 1999 Ford F-250 Diesel. However, respondent contends that the legislature did not expressly authorize the BAR to establish a roll-out date, or give the BAR authority to impose discipline for failure to use the OIS system. Respondent further contends that the BAR did not follow proper procedures for establishing and implementing the new smog check regulation relating to the use of OIS system. In support of this contention, respondent asserts that the BAR failed to file the new rule or regulation with the Secretary of State as required by Government Code section 11340.5. Because of this alleged failure, respondent claims that the rule relating to the use of the OIS system is tantamount to an underground regulation. Therefore, the BAR does not have the authority to impose discipline or issue a citation in this case (Exhibit A).

Factual Findings Regarding Implementation of OIS

4. On April 12, 2012, the Bureau published a Notice of Proposed Regulatory Action and Public Hearing Concerning Smog Check Inspection Procedures (Notice). The Notice informed the public that the New Smog Check Regulations required the Bureau "to implement a new protocol for testing 2000 and newer model-year vehicles This proposed regulatory action requires most gasoline powered vehicles model-year 2000 and newer and diesel-powered vehicles model--year 1998 and newer to have an OBD focused inspection on the OIS. In the Notice, the Bureau advised that any "person interested may present statements or arguments-orally or in writing relevant to the proposed action." The Bureau held hearings to seek public comment on February 19, 2013, the same due-date for the written comments. (Exhibit 5, Tab 2.)

5. On January 4, 2013, the Bureau filed a Notice Publication/Regulation Submission with the Office of Administrative Law (OAL). On March 22, 2013, the Bureau submitted the proposed regulations to OAL for publication. The New Smog Check Regulations provide for the adoption of California Code of Regulations, title 16, sections 3340.17.1 and 3340.17.2, and the amendment California Code of Regulations, title 16, sections 3340.1, 3340.16, 3340.16.4, 3340.16.5, 3340.17, 3340.18, 3340.42, 3340.42.2, 3340.45, and 3394.5. Pursuant to Government Code section 11343.4, subdivision (a), the New Smog Check Regulations became effective on July 1, 2013. (Exhibit 5, Tab 3.)

¹ The Citation refers to respondent's Smog Technician License but references the license number associated with respondent's Smog Check Inspector (EO) License. The Citation Report (Exhibit 3) refers to respondent's Smog Check Inspector (EO) License.

6. On May 2, 2013, the Bureau filed the New Smog Check Regulations with the Secretary of State. Pursuant to Government Code section 11343.4, subdivision (a), the New Smog Check Regulations became effective on July 1, 2013. (Exhibit 5, Tab 3.)

7. On January 7, 2015, the Bureau mailed a letter to all smog check station owners advising that the Bureau would start enforcing the New Smog Check Regulations on March 9, 2015. The letter was also posted on the Bureau's website a "Notice of Statewide OBD Inspection System (OIS) Implementation," which, in relevant part, stated:

This letter provides you with important information regarding upcoming changes to the Smog Check Program.

Beginning **March 9, 2015**:

1) Smog Check stations must use an OBD Inspection System to test the following vehicles:

- 2000 and newer model-year gasoline powered vehicles (unless over 14,000 lbs. GVWR² or those without OBDII),
- 1998 and newer diesel-powered vehicles, and
- All hybrid vehicles.

2) The BAR-97 EIS must not be used to inspect the above vehicles....³

(Bolding and underlining in original.)

8. "ET Blasts" are electronic communications sent by the Bureau through smog check test machines to licensed smog check stations. On January 7, 2015, the Bureau sent ET Blast# 38024 to OIS machines and ET Blast #38025 to BAR 97 machines, regarding the "Statewide OBD Inspection System (OIS) Implementation," which in relevant part stated:

Effective March 9, 2015, an OBD Inspection System (OIS) is required when inspecting 2000 and newer model-year gasoline powered vehicles (unless over 14,000 lbs. GVWR or those without OBDII), 1998 and newer diesel-powered vehicles, and all hybrid vehicles. Refer to the Notice of Statewide OIS Implementation letter dated January 7, 2015, which is posted on BAR's website at www.smogcheck.ca.gov.

² "GVWR" stands for Gross Vehicle Weight Rating.

³ "EIS" stands for Emissions Inspection System.

9. On February 6, 2015, the Bureau sent the above notice to BAR 97 and OIS machines in ET Blast # 38464.

10. On March 4, 2015, the Bureau sent ET Blast# 38684 to all BAR 97 and OIS machines, which stated:

This is the final reminder that on Monday, March 9, 2015, an OBD Inspection System (OIS) will be required when inspecting 2000 and newer model-year gasoline powered vehicles, 1998 and newer diesel-powered vehicles, and all hybrid vehicles.

Also, beginning March 9, stations and technicians shall only use the 2013 Smog Check Manual when performing a Smog Check inspection. The new manual contains procedures for performing both OIS and BAR-97 inspections.

Discussion

11. Factual Findings 4 through 10 establish that the Bureau followed proper procedures in promulgating and implementing the smog check procedures relating to the OIS. The fact that Bureau filed the New Smog Check Regulations with the Secretary of State created a rebuttable presumption that the regulation was duly adopted, and that the Bureau complied with all requirements of Chapter 3.5 of the Government Code, titled Administrative Regulations and Rulemaking (Government Code section 11343.6). Respondent has not rebutted this presumption. Therefore, respondent's contention that the implementation of the new smog check rules violated the Administrative Procedure Act (Government Code section 11340.5) is rejected.

12. The Bureau plays a vital role in safeguarding our environment by mandating that vehicles are inspected in accordance with the Bureau's smog test procedures to ensure that their emissions do not exceed safety standards. Respondent did not comply with the Bureau's procedures when he smog tested the 1999 Ford F-250 diesel on June 5, 2015, using the BAR-97, instead of the OIS. Complainant therefore established that the Bureau properly served the Citation on respondent. Pursuant to the Citation, respondent was not assessed an administrative fine for using the BAR-97 instead of the OIS. Instead, he was ordered only to cease and desist from violating the law.

LEGAL CONCLUSIONS

1. Health and Safety Code section 44032 provides:

No person shall perform, for compensation, tests or repairs of emission control devices or systems of motor vehicles required

by this chapter unless the person performing the test or repair is a qualified smog check technician and the test or repair is performed at a licensed smog check station. Qualified technicians shall perform tests of emission control devices and systems in accordance with Section 44012.

2. Health and Safety Code section 44012, in relevant part, provides:

The test at the smog check stations shall be performed in accordance with procedures prescribed by the department. ...

3. California Code of Regulations, title 16, section 3340.30, in relevant part, provides:

A licensed smog check inspector and/or repair technician shall comply with the following requirements at all times while licensed:

(a) Inspect, test and repair vehicles, as applicable, in accordance with section 44012 of the Health and Safety Code, section 44035 of the Health and Safety Code, and section 3340.42 of this article,

4. California Code of Regulations, title 16, section 3340.42, subdivision (a)(3), mandates that "[a]n OBD-focused test shall be the test method used to inspect gasoline-powered vehicles 2000 model-year and newer and diesel-powered vehicles 1998 model-year and newer. The OBD test-failure criteria are specified in section 3340.42.2."

5. California Code of Regulations, title 16, section 3340.45, in relevant part, provides:

(a) All Smog Check inspections shall be performed in accordance with requirements and procedures prescribed in the following:

[¶] ... [¶]

(2) Smog Check Manual, dated 2013, which is hereby incorporated by reference. This manual shall become effective on or after January 1, 2013.

6. Respondent issued a certificate of compliance to a Ford F-250 diesel using the BAR-97, when an OIS test was required, Complainant therefore established cause to issue the Citation to respondent for violating Health and Safety Code sections 44032. When all the evidence is considered, the Citation against respondent should be affirmed.

ORDER

1 The appeal of respondent Mohammad Faraji (Smog Check Inspector (EO) License No. 312386) of Citation No. M2015-1666 is DENIED. Citation No. M2015-1666 is AFFIRMED.

2. Respondent Mohammad Faraji is hereby ordered to cease and desist from violating Health and Safety Code section 44032.

DATED: August 10, 2017

DocuSigned by:
Humberto Flores
HUMBERTO FLORES
Administrative Law Judge
Office of Administrative Hearings