STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 19 of the Environmental Conservation Law (ECL) of the State of New York, and Part 217 of Title 6 the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

-by-

AUTORAMO, INC., LUIS A. RAMOS, and RAFAEL TAVERA,

Respondents.

ORDER

DEC Case No. CO2-20100615-06

This administrative enforcement proceeding concerns allegations that respondents Autoramo, Inc. (Autoramo), Luis A. Ramos, and Rafael Tavera completed onboard diagnostic (OBD) II inspections of motor vehicles using noncompliant equipment and procedures in violation of 6 NYCRR 217-4.2. OBD inspections, when properly conducted, are designed to monitor the performance of major engine components, including those responsible for controlling emissions.

In accordance with 6 NYCRR 622.3(a)(3), staff of the New York State Department of Environmental Conservation (DEC or Department) commenced this proceeding against respondents Autoramo and Tavera by service of a notice of hearing and complaint dated September 30, 2010.[1] Staff alleges that these violations occurred at an official emissions inspection station located at 269 East Burnside Avenue in the Bronx, New York, during the period from May 24, 2008 through February 8, 2010. Staff alleges that, during this time, Autoramo was a domestic business corporation duly authorized to do business in New York State, respondent Ramos owned and operated Autoramo, and respondents Ramos and Tavera performed mandatory annual motor vehicle emission inspections at that facility.

Specifically, Department staff alleges that a device was used to substitute for and simulate the motor vehicle of record on 315 separate occasions. Staff contends that, of these inspections, respondent Ramos performed 113 inspections, and respondent Tavera performed 202 inspections (see hearing report [Hearing Report] of Administrative Law Judge [ALJ] Helene G. Goldberger, at Findings of Fact nos. 15 and 16, respectively) and that, as a result, 315 certificates of inspection were issued based on these simulated inspections.

[1] Staff was unable to serve respondent Ramos, and he has neither answered nor otherwise appeared in this proceeding (see Hearing Transcript dated Dec. 16, 2011, at 5:2-21; Hearing Transcript dated January 13, 2012, at 30:24-31:12).

In its complaint, Department staff alleged that respondents violated:

(1) 6 NYCRR 217-4.2, by operating an official emissions inspection station using equipment and procedures that are not in compliance with the Department's procedures and standards (Exhibit [Ex.] 1, Complaint ¶¶ 7-11); and

(2) 6 NYCRR 217-1.4, by issuing emission certificates of inspection to motor vehicles that had not undergone an official emission inspection (id. ¶¶ 12-16).

For these violations, DEC staff requests a civil penalty of one hundred fifty-seven thousand five hundred dollars ($157,500) (id. at Wherefore Clause). Staff requests that the penalty be assessed "against or requested from all of the respondents" (Hearing Transcript [Tr.] dated Jan. 13, 2012 [Day 2 Tr.], at 65:1-5).[2]

Respondents Autoramo and Tavera, through the same counsel,[3] submitted an answer dated December 1, 2010, including three affirmative defenses: (i) the complaint fails to state a cause of action upon which relief may be granted; (ii) the alleged incidents complained of were the result of actions and/or inactions of third parties over whom respondents had no direction or control; and (iii) the action is barred by the doctrines of collateral estoppel and res judicata (see Ex. 2).[4]

The matter was initially assigned to ALJ Edward Buhrmaster and subsequently reassigned to ALJ Goldberger (see Exs. 5 and 7). A hearing was held on January 13, 2012. Respondents Autoramo and Ramos did not appear. Respondent Tavera appeared *pro se*, was assisted by a certified court interpreter (see Day 2 Tr. at 3:12-4:13), provided testimony and questioned witnesses.

Based on the record, I adopt the ALJ's hearing report as my decision in this matter, subject to the following comments.

Liability

I concur with the ALJ's determination that Department staff is entitled to a finding of liability as against respondents Autoramo and Tavera with respect to the first charge; that is, those respondents operated an official emissions inspection station using equipment or procedures that are not in compliance with DEC procedures or standards, in violation of 6 NYCRR 217-4.2. I agree with the ALJ that Autoramo is liable for all 315 violations "because, at the time the violations occurred, it held the license to 'operate' the official inspection station" (Hearing Report, at 9). I also agree with the ALJ that inspector Tavera should be held "liable for

[2] Although staff did not use the phrase, I interpret the quoted language to mean that staff seeks recovery of the penalty "jointly and severally;" that is, from any or all of the respondents.

[3] Counsel later withdrew from representing Autoramo and Tavera, and notified the ALJ by letter dated January 31, 2011 (see Ex. 3).

[4] At the January 13, 2012 hearing, ALJ Goldberger granted staff's motion to dismiss the affirmative defenses (see Day 2 Tr., at 65:15-66:2).

each of the 202 noncompliant inspections he performed," but not for the noncompliant inspections that he did not perform (id.).[5]

With respect to the second cause of action, violations of 6 NYCRR 217-1.4 cannot be found (Hearing Report, at 8, 9-10) for the reasons stated in my prior decisions (see Matter of Jerome Muffler Corp., Order of the Commissioner, May 24, 2013 [Jerome Muffler], at 3 [citing Matter of Geo Auto Repairs, Inc., Order of the Commissioner, March 14, 2012, at 3-4 and other cases]). Accordingly, the alleged violations of 6 NYCRR 217-1.4 are hereby dismissed.

Civil Penalty

Staff requested a penalty of one hundred fifty seven thousand five hundred dollars ($157,500), representing a penalty of $500 for each violation, described by staff as "how we calculated penalties in all of these cases" (Day 2 Tr., at 65:1-13). Staff also requested that the penalty be assessed against "all of the respondents" (id.). The ALJ noted that, consistent with the penalty range established by ECL 71-2103 for such violations, the maximum penalties would exceed seven million dollars (Hearing Report, at 10-11), an amount significantly higher than the amount that Department staff has requested.

The ALJ reviewed the factors set forth in the Department's civil penalty policy, including the economic benefit of noncompliance, the gravity of the violations, and factors that could adjust the gravity component such as respondents' culpability, cooperation, history of noncompliance, ability to pay, and unique factors (Hearing Report, at 10-11). The ALJ recommended a total civil penalty of one hundred five thousand dollars ($105,000), assessed as follows: (i) respondent Autoramo to be assessed a civil penalty of seventy-five thousand dollars ($75,000); and (ii) respondent Tavera to be assessed a civil penalty of thirty thousand dollars ($30,000) (Hearing Report, at 11, 12).[6]

Prior decisions have noted the adverse impact of automotive emissions on air quality, and how the use of simulators subverts the regulatory regime designed to address and control these emissions (see e.g. Matter of Gurabo, Decision and Order of the Commissioner, February 16, 2012, at 6-7). Accordingly, substantial penalties are warranted where violations are found.

I have previously discussed the structure of penalties in administrative enforcement proceedings involving OBD II inspections of motor vehicles using noncompliant equipment and procedures (see generally Jerome Muffler; Matter of Jerome Transmissions Corp., Order of the Commissioner, May 28, 2013 [Jerome Transmissions Corp.]; see also ECL 71-2103[1][establishing the penalty range for such violations]). In Jerome Muffler, Jerome

[5] Because staff has not served respondent Ramos (see note 1 above), I make no findings and reach no conclusions as to his liability. This includes addressing the issue of corporate officer liability, a theory as to which staff in any event made no allegations or argument.

[6] By recommending penalty amounts for each of the respondents, the ALJ rejected Department staff's request for joint and several liability (see Hearing Report, at 9). Even though joint and several liability may be imposed in administrative enforcement proceedings, I hold that Department staff's request for the imposition of joint and several liability in this matter is unsupported. No adequate rationale was provided by Department staff to justify imposing joint and several liability in this proceeding.

Transmissions, and Matter of New Power Muffler Inc., Order of the Commissioner, July 15, 2013 (New Power), ALJ Edward Buhrmaster recommended a penalty structure whereby fifty percent of the penalty would be assessed against the facility and the remaining fifty percent of the penalty would be allocated among the respondent individual inspectors based on the number of noncompliant inspections that each inspector performed.

The aggregate penalty assessed in those matters ranged upwards of one hundred eighty dollars ($180) per noncompliant inspection. For example, in Jerome Muffler, ALJ Buhrmaster recommended a total civil penalty of five hundred seventy thousand dollars ($570,000). As there were 3,532 noncompliant inspections, the proposed penalty per violation was over one hundred sixty dollars. In Jerome Transmissions Corp., the ALJ recommendation was for a total civil penalty of one hundred sixty thousand dollars ($160,000). With 900 noncompliant inspections, the proposed penalty per violation was approximately one hundred seventy-eight dollars. Similarly, in New Power, the ALJ recommendation was for a total civil penalty of four hundred forty-eight thousand six hundred dollars ($448,600). With 2,523 noncompliant inspections, the proposed penalty per violation was approximately one hundred seventy-eight dollars.

In considering penalty assessments in each of the aforementioned cases, I adopted the total civil penalty that ALJ Buhrmaster proposed. However, in allocating the penalty between the facility and the individual inspector respondents, I modified the allocation. Rather than allocating fifty percent of the penalty to the facility, I concluded that the facility where the noncompliant inspections occurred should be subject to a substantially higher percentage allocation of the aggregate penalty (see Jerome Muffler, at 4-5, Jerome Transmissions Corp., at 4; New Power, at 5 [assessing more than half of the civil penalty against the facility in each case, and a lesser amount among the individual inspectors]). With respect to individual inspectors, I allocated the remaining penalty amount based on the number of noncompliant inspections that each inspector has conducted. Following the recommendation of ALJ Buhrmaster, as the number of noncompliant inspections that an individual inspector performs increases, a higher penalty is assessed against that individual. However, the aggregate penalty amount and the allocation of that amount between (a) the facility and the individual inspectors, and (b) among the inspectors themselves, may be modified based on aggravating or mitigating circumstances as appropriate in each case (see e.g. Jerome Muffler, at 4-5 [discussing examples of mitigating or aggravating factors]).

Based on these precedents and applying a penalty of approximately one hundred seventy-eight dollars per noncompliant inspection (as was done in the Jerome Transmissions Corp. and the New Power cases), the penalty that would be assessed on respondents Autoramo, Ramos and Tavera would, in the aggregate, total fifty-six thousand dollars ($56,000). However, respondent Ramos, who Department staff alleged performed one-third of the noncompliant inspections, was not served. Accordingly, no penalty can be assessed against him and, as discussed below, the aggregate penalty is reduced for that reason.

Most of the penalty shall be imposed on the facility. At the time the violations occurred, Autoramo held the license to "operate" the official inspection station. Pursuant to 15 NYCRR 79.8(b), the official inspection station licensee "is responsible for all inspection activities conducted at the inspection station," and is not relieved of that responsibility by the inspectors'

own duties (see Hearing Report, at 8). Autoramo had the responsibility to ensure that inspections conducted at its facility comported with all legal requirements. However, it allowed simulators to be used in inspections at the facility and thereby failed to comply with applicable law. This subverted the intended environmental and public health benefits of the legal requirements to address and control vehicular air emissions.

In consideration of the impacts of this illegal activity (see Hearing Report at 18-20), and administrative precedent, I hereby assess a penalty of forty-four thousand eight hundred dollars ($44,800) against Autoramo. Generally, the remaining amount (that is, eleven thousand two hundred dollars [$11,200]), would be allocated between the two respondent inspectors, Ramos and Tavera. As noted, respondent Ramos was not served and no penalty can be assessed against him. Therefore, the question before me is how much of the remaining amount, if any, should be assessed against Mr. Tavera.

Mr. Tavera is alleged to have performed 202 improper inspections, as evidenced by the appearance of his unique inspector's certificate number (2VX4) on inspection records of the New York Department of Motor Vehicles (DMV) (see Exs. 13 [Tavera's application for certification as a motor vehicle inspector], 15-18 [DMV records]; see also Day 2 Tr., at 44:23-45:22; 52:2-13).[7] Mr. Tavera essentially testified that he did what the "boss" told him to do, but denied using a simulator (see Day 2 Tr., at 28:18-24; 59:17-60:2). Although there is no proof in the record to contradict Mr. Tavera's statement regarding the "boss," the DMV data submitted by Department staff, as well as the testimony provided by Mr. Devaux of DMV and Mr. Clyne from the Department's Division of Air Resources, contradict Mr. Tavera's testimony regarding whether he used a simulator. In the face of this evidence, I conclude that Mr. Tavera's denials are not credible.[8] He also testified that he is not employed (see Day 2 Tr., at 58:3-5; see also id. at 5:17-21) and could not afford counsel, but presented no other evidence as to his current financial condition. This testimony, unsupported by any documentation or other additional evidence, is insufficient to support a claim of inability to pay, and no reduction is being made on that basis.

Mr. Tavera conducted approximately two-thirds of the 315 noncompliant inspections at this facility. Applying the penalty guidelines set forth above, and considering the number of inspections using noncompliant equipment and procedures that he performed, I assess a civil penalty against Mr. Tavera in the amount of seven thousand five hundred dollars ($7,500).

In sum, the overall amount of the civil penalty assessed by this order is fifty-two thousand three hundred dollars ($52,300), which, although a reduction from staff's request and the ALJ's recommendation, is substantial, and should serve as a deterrent against any future noncompliant activity of this kind.

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[7] The evidence also indicates that Mr. Ramos, the owner of Autoramo and a certified inspector, performed 113 improper inspections (see Exs. 14 [Ramos' application for certification as a motor vehicle inspector, reflecting inspector's certificate number TN64], 15-18 [DMV records]; see also Day 2 Tr., at 52:2-13).

[8] As the ALJ noted, this conclusion is further bolstered by the evidence that during a period when Mr. Tavera was out of the country, no simulated inspections were performed at the facility (Hearing Report, at 8).

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

I. Respondents Autoramo, Inc. and Rafael Tavera are adjudged to have violated 6 NYCRR 217-4.2 by operating an official emissions inspection station using equipment and procedures that are not in compliance with Department procedures and standards. Three hundred fifteen (315) inspections using noncompliant equipment and procedures were performed at Autoramo, Inc., of which Rafael Tavera performed two hundred two (202).

II. Department staff's claims against respondent Luis A. Ramos are dismissed without prejudice for failure to serve Mr. Ramos with the notice of hearing and the complaint.

III. Department staff's claim that respondents Autoramo, Inc. and Rafael Tavera violated 6 NYCRR 217.1-4 is dismissed.

IV. The following penalties are assessed:

A. Respondent Autoramo, Inc. is hereby assessed a civil penalty in the amount of forty-four thousand eight hundred dollars ($44,800); and

B. Respondent Rafael Tavera is hereby assessed a civil penalty in the amount of seven thousand five hundred dollars ($7,500).

The penalty for each respondent shall be due and payable within thirty (30) days of the service of this order upon that respondent. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

Blaise Constantakes, Esq.
Assistant Counsel
NYS DEC
Office of General Counsel
625 Broadway, 14th Floor
Albany, New York 12233-1500

V. All communications from any respondent to the DEC concerning this order shall be directed to Assistant Counsel Blaise Constantakes, at the address set forth in paragraph IV of this order.

VI. The provisions, terms and conditions of this order shall bind respondents Autoramo, Inc. and Rafael Tavera, and their agents, successors, and assigns in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By:_____
Joseph J. Martens
Commissioner

Dated: August 13, 2013
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1550

In the Matter

- of -

Alleged Violations of Article 19 of the New York State Environmental Conservation Law and Title 6, Part 217, of the Official Compilation of Codes, Rules and Regulations of the State of New York, by:

AUTORAMO, INC., LUIS A. RAMOS and RAFAEL TAVERA,

Respondents.

NYSDEC CASE NO. CO2-20100615-06

HEARING REPORT

- by -

/s/

_____

Helene G. Goldberger
Administrative Law Judge

February 28, 2012

Proceedings

Pursuant to a notice of hearing and complaint, dated September 30, 2010 (Hearing Exhibit [Ex.] 1), staff of the New York State Department of Environmental Conservation (DEC or Department) charged Autoramo, Inc., Luis A. Ramos and Rafael Tavera (the respondents) with violations of Part 217 of Title 6 of the Official Compilation of Codes, Rules and Regulations (6 NYCRR), which concerns inspections and maintenance of motor vehicle emissions systems.

The staff alleged in its first cause of action that the respondents violated 6 NYCRR § 217-4.2 by operating an official emissions inspection station that was not in compliance with Department procedures and/or standards, from May 24, 2008 to February 8, 2010, in relation to 315 mandatory annual motor vehicle emissions inspections. The Department staff alleged that the respondents used a device to substitute for and simulate the motor vehicles of record.

In the second cause of action in the complaint, staff charges the respondents with violating 6 NYCRR § 217-1.4 by issuing 315 emission certificates of inspection, as defined by 15 NYCRR 79.1(a), for motor vehicles, from May 24, 2008 to February 8, 2010, based on these same simulated motor vehicle emission inspections.

Staff alleged that all of the violations occurred at the respondents' official emissions inspection station known as Autoramo, Inc. (Autoramo), located at 269 East Burnside Avenue, in the Bronx, New York. Staff represents that during this period, respondent Autoramo was a domestic business corporation duly authorized to do business in New York. Staff alleged that respondent Luis A. Ramos was the owner and operator of Autoramo, Inc., as well as a certified motor vehicle emission inspector working at the facility. Staff also alleged that during this period, Rafael Tavera was a certified motor vehicle emission inspector working at Autoramo.

The respondents Autoramo Inc. and Rafael Tavera submitted an answer (Ex. 2) by their counsel, Mary Beth Macina, Esq., dated December 1, 2010, in which they denied the staff's charges but did admit that Autoramo was a domestic business corporation duly authorized to do business in the State of New York. The answer sets forth three affirmative defenses: 1) the complaint fails to state a cause of action upon which relief may be granted; 2) the alleged incidents complained of in DEC's complaint were the results of actions/inactions by third parties over whom the respondents had no control; 3) the action is barred by the doctrines of collateral estoppel and res judicata.

Ms. Macina submitted a letter to Department staff counsel dated January 31, 2011 in which she withdrew her representation of these respondents. Ex. 3.

By a statement of readiness dated October 3, 2011 (Ex. 4), DEC staff requested that the Department's Office of Hearings and Mediation Services (OHMS) schedule this matter for hearing. Chief Administrative Law Judge James T. McClymonds informed the parties via a letter dated October 5, 2011 (Ex. 5) that the matter was assigned to Administrative Law Judge (ALJ) Edward Buhrmaster. Judge Buhrmaster scheduled the hearing for November 29, 2011. Ex. 6. Respondent Tavera's daughter attended the November 29th session and explained to ALJ

Buhrmaster that her father did not have counsel yet and would also have need of an interpreter. Accordingly, the matter was reassigned to me and rescheduled for December 16, 2011. Ex. 7. The respondents did not appear on this date and the staff requested it be rescheduled again for January 13, 2012. Hearing Transcript I pages (TR I) 3-10; Ex. 8.

At the adjudicatory hearing held on January 13, 2012, Mr. Tavera appeared with his son Eddie Taveras.[1] Hearing Transcript II page (TR II) 2. Although he still did not have legal representation, Mr. Tavera elected to go forward as he stated he could not afford counsel. TR II, 5. An interpreter translated the proceedings for Mr. Tavera and also translated his testimony. TR II, 3-4. Neither Mr. Ramos nor Autoramo appeared. TR II, 29-31. Staff presented the receipt that it obtained from the New York State Department of State indicating service of process of the notice of hearing and complaint on Autoramo. Ex. 19; TR II, 29-30.

Mr. Tavera did not produce any evidence in support of the affirmative defenses noted in the answer. I granted staff's motion to dismiss the affirmative defenses based upon the lack of proof. TR II, 65-66. Mr. Tavera claimed that he carried out the instructions of his employer and never performed any illegal inspections using a simulator. TR II, 59-60. He also produced his passport from the Dominican Republic that indicates he was visiting the Dominican Republic between August 4, 2009 and September 6, 2009. Ex. 20; TR II, 60-64.

By electronic mail, on January 23, 2012, I asked DEC to submit to me copies of the administrative decisions in a New York State Department of Motor Vehicles (DMV) matter concerning the respondents Autoramo and Tavera with respect to the substitution of a vehicle or an electronic device for a vehicle subject to exhaust emissions testing. On January 24, 2012, I received the Finding Sheet of DMV ALJ Zulkoski dated October 19, 2010 from Mr. Constantakes and entered it into the record as Ex. 21. In addition, I requested staff provide me with a copy of any DMV appellate decision. On January 27, 2012, Mr. Constantakes forwarded to me the DMV appellate determination indicating that the agency affirmed ALJ Zulkoski's findings in its decision dated August 21, 2010. I made this document Ex. 22.

Staff's Charges

As noted above, the staff has alleged that the respondents, as the owners/operators of the facility and emissions inspectors: 1) violated 6 NYCRR § 217-4.2 by conducting 315 mandatory annual motor vehicle emissions inspections from May 24, 2008 to February 8, 2010 using a device to substitute for and simulate the motor vehicle of record; and 2) violated 6 NYCRR § 217-1.4 by issuing 315 emission certificates of inspections based on simulated motor vehicle emission inspections from May 24, 2008 to February 8, 2010.[2]

[1] At the hearing, the respondent explained that he does not have an "s" at the end of his name and his son stated that the children do. TR 9.

[2] In paragraph 11 of the complaint, there was a typographical error indicating a violation of 6 NYCRR 217-4.2 instead of 217-1.4. At the hearing, staff counsel confirmed it was an error. Because the preceding paragraph of the complaint cites the correct regulation, it is clearly a typographical error and I corrected the complaint.

Respondents' Position

The respondents Autoramo and Luis A. Ramos did not appear at the hearing. However, counsel did submit an answer for Autoramo and Rafael Tavera in which the respondents denied the allegations and asserted three affirmative defenses – failure to state a cause of action; the allegations were caused by third parties; and res judicata/collateral estoppel. Ex. 2. No support for any of these defenses was submitted.

Mr. Tavera testified at the hearing that as an employee of Autoramo, he carried out the instructions of his employer, Mr. Ramos; however, he did not use a simulator. TR II, 59-60. In addition, he stated he was out of the country from August 4, 2009 to September 6, 2009. TR II, 60-61; Ex. 20.

Adjudicatory Hearing

The Department staff was represented by Blaise Constantakes, Assistant Counsel. The staff presented two witnesses, Michael Devaux, a vehicle safety technical analyst employed in the Yonkers office of the DMV, and James Clyne, an environmental engineer and section chief within DEC's Division of Air Resources, Bureau of Mobile Sources and Technology Development.

The respondent Tavera was *pro* se and the other respondents did not appear at the hearing.

In its complaint, the staff requests a penalty of $157,500. Ex. 1; TR II, 65.

At the start of the hearing, I marked Exhibits 1-18 and they were received into evidence. TR II, 6-11. See, exhibit list annexed hereto. In response to my questions regarding service of the notice of hearing and complaint on respondents Autoramo and Ramos, the staff offered the receipt for service from the New York State Department of State regarding service on Autoramo. Ex. 19. Mr. Tavera offered his passport as an exhibit and I copied it, marked it as Ex. 20, and took it into evidence. In addition, as noted above, I marked and took into evidence the DMV Findings Sheet dated October 19, 2010 and the Decision of Appeal dated April 26, 2011. Exs. 21, 22.

I received the transcripts on January 5 (this transcript recorded the rescheduling of the hearing due to the absence of the respondents), and February 2, 2012, respectively. On February 8, 2012, I provided the parties with my corrections and invited them to submit any additional corrections by February 24, 2012. On February 9, 2012, Mr. Constantakes responded with staff's corrections which I noted in the transcript. By letter dated February 10, 2012, I sent Messrs. Tavera and Constantakes a copy of the list of corrections made to the transcript and invited the respondent to send additional corrections by no later than February 24, 2012.[3] On February 24, 2012, having received no further submissions from the parties, I closed the record.

[3] On February 6, 2012, by electronic mail, I sent Mr. Tavera's daughter copies of the hearing transcript and the proposed corrections.

FINDINGS OF FACT

1. In 2005, Luis Ramos, on behalf of Autoramo Inc., submitted an original facility application to DMV to license Autoramo as a motor vehicle inspection station. Ex.12. The application was approved by DMV, which assigned Autoramo a facility number of 7098555. *Id.* The DEC complaint identifies Autoramo as a corporation and in the answer, the respondents admitted to this allegation. Exs. 1, ¶ 2; 2, ¶ 2. The inspection station public (ISP) application notes Mr. Ramos' titles as President, Vice President, Secretary and Treasurer. Ex. 12.

2. In March 2002, Mr. Tavera applied for certification from DMV as a motor vehicle inspector and his application was approved. DMV assigned a certificate number of 2VX4. Ex. 13.

3. In January 2006, Mr. Ramos applied for certification from DMV as a motor vehicle inspector and his application was approved. DMV assigned a certificate number of TN64. Ex. 14.

4. To become a certified motor vehicle inspector, an individual must take a 3 hour course and pass a multiple choice examination with a score of 70% or more. TR II, 21-23. While the course is given in English, students are permitted to bring interpreters to the course and to the exam; however they must be different individuals if used for both. TR II, 27-28. DMV issues each inspector a card that must be used to access the work station at the inspection facility. TR II, 14, 23, 36. DMV requires inspectors to safeguard these cards at all times and not allow any other individual to use the card. TR II, 23-24; 15 NYCRR § 79.18(c)(2).

5. DMV and DEC jointly administer the New York Vehicle Inspection Program (NYVIP), a statewide annual motor vehicle emissions inspection program for gasoline-powered vehicles, which is required by the federal Clean Air Act Amendments of 1990 and U.S. Environmental Protection Agency regulations found at 40 CFR Part 51. TR II, 32.

6. NYVIP features on-board diagnostic (also known as OBD II) testing for model year 1996 and newer light-duty vehicles. TR II, 32-33. SGS Testcom is the entity that has the contract with New York State to operate the work station analyzer system. TR II, 18.

7. During an OBD II inspection, a motorist presents his/her vehicle for inspection. TR II, 13. The inspector checks for safety and low enhanced emission inspection items – emission control devices (ECDs). TR II, 13-17. The inspector must access the work station analyzer by scanning the bar code from his card with its unique identifying information. TR II, 14. The work station will then instruct the inspector to scan in the identifying information from the vehicle. TR II, 14.

8. The OBD II emissions inspection begins with two visual checks of the malfunction indicator light (MIL), to see if it comes on when it should, and then to see if it goes off when the vehicle is running. TR II, 16.

9. The inspector then plugs the work station into the diagnostic link connector (DLC) in the vehicle itself. TR II, 16. This allows the inspection machine to communicate with the electronic control module (ECM), a computer that is inside the vehicle. TR II, 37.

10. Once the connection is established, the system proceeds to extract information from the vehicle's ECM without any intervention by the inspector. TR II, 37. The system will determine if that vehicle meets the inspection standards. TR II, 16, 38.

11. After the inspection is completed, the information obtained by the system will be stored in the NYVIP work station and is also transmitted to DMV via SGS Testcom within 5 to 10 seconds. TR II, 18. Both DMV and SGS Testcom maintain the data that is captured during the inspections. TR II, 18, 39-40.

12. In 2008, DMV notified DEC about what it found to be irregularities at various emissions testing stations in the New York metropolitan area. TR II, 41. A one year investigation by the Attorney General's office, DEC, and DMV ensued in which extensive data analysis was done by the agencies. TR II, 42. Based upon the data it was reviewing, DMV concluded that a simulator was being used in tests at these stations rather than the car that was to be tested. TR II, 43-44. Ultimately, they found an electronic signature – 15 data fields that constituted a profile of a simulated inspection. TR II, 43.

13. The agencies identified 44 inspection stations involved in this illegal activity out of over 10,000 inspection facilities statewide. TR II, 43-44. The agencies found that between 2004 and 2008, out of 18.5 million inspections that were performed in New York State, none had this signature. TR II, 43. But between March 2008 and July 2010, in 44 downstate stations, the electronic signature was found. TR II, 44. In July 2010, after DEC notified these stations of the suspected illegal activity, the agencies no longer found evidence of this electronic signature. TR II, 46-47.

14. In the official DMV records of inspections that took place at Autoramo beginning on May 24, 2008 and continuing through February 8, 2010, there is evidence of 315 simulated inspections based upon the 15-data field electronic signature. Exs. 15-18, TR II, 47.

15. The data provides both the unique facility number of the inspection station but also the identifying number of the inspector. TR II, 51-52. Luis A. Ramos (TN64) performed 113 simulated inspections. TR II, 52; Ex. 17.

16. Rafael Tavera (2VX4) performed 202 simulated inspections. TR 52; Exs. 17-18. Mr. Tavera left the United States for the Dominican Republic on or about August 4, 2009 and returned to the U.S. on or about September 6, 2009. Ex. 20; TR II,61. During this period, there were no improper inspections. Exs. 17-18.

17. DMV issued a decision on October 19, 2010 in which ALJ Water Zulkoski found respondents Autoramo, Inc. and Rafael Tavera to have violated NYS Vehicle and Traffic Law Section 303(e)3 by substituting vehicles or using an electronic device for the exhaust emissions testing on fifteen separate occasions. Ex. 21. DMV fined each of the respondents $350 per

violation resulting in: Autoramo, Inc. and Rafael Tavera being fined $5,250.00 each and revocation of the station's license to do inspections and Mr. Tavera's inspector's certification. These findings were upheld on administrative appeal in a decision dated August 21, 2010. Ex. 22.

DISCUSSION

Background – I/M Program

In this enforcement proceeding, DEC staff charges that Autoramo Inc., Luis A. Ramos, and Rafael Tavera, did not check the OBD II systems as part of their inspections of 315 vehicles between May 24, 2008 and February 8, 2010. Ex. 1. Staff claims that instead, the respondents used a simulator to substitute for the vehicles which resulted in a passing inspection for all of these cars. *Id.*

As explained above and also in greater detail in the Hearing Report of ALJ Edward Buhrmaster dated September 1, 2011 and adopted by the Commissioner in his decision of February 16, 2012, *In the Matter of Gurabo Auto Sales Corp.*, the OBD II testing is part of NYVIP, the state's vehicle inspection program that is required under the federal Clean Air Act Amendments of 1990 and 40 CFR Part 51. The 1990 Clean Air Act Amendments required an inspection and maintenance (I/M) program in areas of the country, like New York, that have failed to meet the national ambient air quality standards (NAAQS) for ozone and are thus identified as non-attainment areas.[4] While automobile manufacturers are required to produce cleaner emitting cars under both federal and California laws (the latter more stringent standards having been adopted by New York State pursuant to Clean Air Act § 177 [42 USC § 7507]), these cars will not remain clean without an inspection program that ensures that the relevant equipment is maintained and repaired as necessary over the life of the vehicle. Thus, any strategy by inspection stations that results in the issuance of inspection stickers based upon non-compliant inspections will undermine efforts to reduce air pollution in the State.

Liability

Pursuant to 6 NYCRR § 622.11(b), the Department staff bears the burden of proof on the charges it asserts in the complaint. Pursuant to 6 NYCRR § 622.11(c), the staff also has to sustain that burden by a preponderance of the evidence.

The Department's witness, James Clyne, credibly testified as to the investigation that gave rise to establishing an "electronic signature" that demonstrated that non-compliant inspections were occurring at certain inspection stations in the State. TR II, 43-51. He was able

[4] NAAQS place a cap on the allowable concentrations of the particular pollutant in question – these are primary and secondary caps – protecting health and the environment/property, respectively. 42 U.S.C. § 7409(a)(2). The six criteria pollutants that are covered by NAAQS are particulates, sulfur dioxide, nitrogen dioxide, carbon monoxide, ozone and lead. In areas that do not meet the NAAQS and are thus in non-attainment, the state submits a state implementation plan (SIP) to EPA that spells out the actions the state will take to achieve attainment. 42 USC §§ 7413, 7604. The I/M program is part of the New York SIP that is directed at ozone non-attainment. 42 USC §§ 7511a, 7512a. For more information on the State's Inspection/Maintenance program: http://www.dec.ny.gov/chemical/48153.html.

to show how the specific 15-field electronic signature appearing on Autoramo's inspection data (as highlighted by Mr. Clyne in Exs. 17 and 18) represents the data that would be obtained from a simulator rather than a vehicle. TR II, 50-51.

Specifically, Exs.17 and 18 have a series of headings across the page that identify the data obtained for each column. The first heading is DMV VIN NUM – the vehicle identification number which is obtained from the DMV registration bar code or by manual entry by the inspector. The next column is INSP DTE which is the date of the inspection. As an example of what comprised an illegal inspection, on page 1 of 4 of Ex. 18, the first inspection on December 9, 2009 at 18:01 p.m., Mr. Clyne concluded that the inspection of the 2001 Acura was not a valid inspection but rather the product of a simulator because the data for that vehicle entry mimics the results that appear in the 15 data fields identified as that of a simulator. TR II, 48-51.

These fields, and the entries that are consistent with the simulator profile (shown here in quotation marks), are as follows:

PCM	ID1	"10"
PCM	ID2	"0"
PID	CNT 1	"11"
PIC	CNT 2	"0" (should read as PID CNT 2) TR 49.
RR	COMP COMPONENTS	"R"
RR	MISFIRE	"R"
RR	FUEL CONTROL	"R"
RR	CATALYST	"R
RR	02 SENSOR	"R"
RR	EGR	"R"
RR	EVAP EMISS	"R"
RR	HEATED CATA	"U"
RR	02 SENSOR HEAT	"R"
RR	SEC AIR INJ	"U"
RR	AC	"U"

As can be seen from all the highlighted data that appears in Exs.17 and 18 (Exs.17 and 18 are the same as 15 and 16 except that the 15-field simulator profile inspections are highlighted in orange), this data is exactly the same for each of these inspections.[5] Mr. Clyne testified that with legitimate inspections, these results would vary. TR II, 51.

These data sheets identify Autoramo as the inspection station because they contain its DMV facility number - 7098555 - on each inspection. TR II, 51. This number corresponds to that on the approved facility application. Ex. 12. Similarly, each inspection on the data sheets provides an inspector number that corresponds with either Mr. Ramos' certificate number (TN64) or Mr. Tavera's certificate number (2VX4). Exs. 14,13.

[5] Not only are these numbers identical for the highlighted inspections in Exs. 17 and 18 at the respondents' facility, they are also identical to the numbers that were reported in *Gurabo* (ALJ Hearing Report, 9/1/11) and *Matter of AMI Auto Sales Corp., et al* (ALJ Hearing Report, 9/1/11).

Mr. Tavera testified that he was out of the country from approximately August 4, 2009 until September 6, 2009. TR II, 61; Ex. 20. However, there is no evidence of simulated inspections during this period. Exs. 17-18.

Mr. Ramos did not appear at the hearing to provide any defense. Mr. Tavera testified that if the "boss" told him to do something, he did it. TR II, 28, 59. But he also testified that he did not do any simulated inspections and did not observe Mr. Ramos perform any. TR II, 59-60. However, the DMV data presented by DEC staff undermines Mr. Tavera's testimony. Because Mr. Tavera's inspection card number appears on the data sheets for 202 simulated inspections and there is no dispute that the respondent worked at the facility as an inspector, I must make the conclusion that he performed these inspections. This conclusion is further bolstered by the evidence that during the period Mr. Tavera was away, there is no evidence of simulated inspections.

DEC has charged the respondents with violations of both 6 NYCRR §§ 217-4.2 (first cause of action) and 217-1.4 (second cause of action). I find that the violations of 6 NYCRR § 217-4.2 have been established; but for the reasons set forth in ALJ Buhrmaster's report in *Gurabo*, I do not find violations of § 217-1.4. I also find that all the violations of § 217-4.2 are attributable to Autoramo as the licensed inspection station, and that the two respondent inspectors, as the station's certified inspectors, should be held liable for the non-compliant inspections that they performed.

The violations of § 217-4.2 could be attributed personally to Mr. Ramos based on the hearing record that indicates his involvement in the day to day operations of the facility. TR II 59-60, 63-64. He not only was the only corporate officer of Autoramo, he was the on-site manager of the facility, performed inspections himself, and directed the inspections of his employee Tavera. Thus, his position and actions should make him personally liable for all the simulated inspections at Autoramo. *See, United States v. Park*, 421 U.S. 658, 673-74 (1975); *Matter of 125 Broadway, LLC and Michael O'Brien,* Decision and Order of the Commissioner, December 15, 2006. In addition, section 79.8(b) of 15 NYCRR provides the official inspection station licensee "is responsible for all inspection activities conducted at the inspection station," and is not relieved of that responsibility by the inspectors' own duties, which include performing inspections in a thorough manner. 15 NYCRR § 79.17(b)(1). However, because staff was unable to demonstrate proof of service on Mr. Ramos, he cannot be found liable for the violations. TR II, 29-31.

Violation of 6 NYCRR § 217-4.2

Section 217-4.2 of 6 NYCRR provides, "[n]o person shall operate an official emissions inspection station using equipment and/or procedures that are not in compliance with department [DEC] procedures and/or standards." "Official emissions inspection station" means "[a] facility that has obtained a license from the Commissioner of Motor Vehicles, under section 303 of the VTL [Vehicle and Traffic Law], to perform motor vehicle emissions inspections in New York State." 6 NYCRR § 217-1.1(k). VTL § 303(a)(1) sets forth that a license to operate an official inspection station shall be issued only upon written application to DMV, after DMV determines that the station is properly equipped and has competent personnel to perform inspections, and

that such inspections will be properly conducted. Section 217-1.3 of 6 NYCRR, along with 15 NYCRR § 79.24(b)(1)(ii), as well as the instructions found in the NYVIP vehicle inspections systems operators manual, establish the appropriate procedures and standards that the respondents were to follow to conduct accurate emissions inspections but failed to.

I find that § 217-4.2 was violated 315 separate occasions by the use of a simulator to perform OBD II emissions inspections. The use of a simulator is not consistent with the emissions inspection procedures set forth at 6 NYCRR § 217-1.3, which requires testing of the vehicle's OBD system to ensure that it functions as designed and completes the diagnostic routines for necessary supported emission control systems. As Mr. Clyne explained in his testimony, if the inspector plugs the NYVIP work station into a simulator, rather than the automobile to be inspected, there can be no determination as to whether the vehicle would pass the OBD II inspection.

Autoramo, Inc. is liable for all 315 violations because, at the time they occurred, it held the license to "operate" the official inspection station. Pursuant to 15 NYCRR § 79.8(b), the official inspection station licensee "is responsible for all inspection activities conducted at the inspection station," and is not relieved of the responsibility by any inspector's duties, which include performing inspections in a thorough manner. 15 NYCRR §§ 79.17(b)(1) and (c). Section 79.8(b)(2) of 15 NYCRR requires that the inspection station must employ at least one full-time employee who is a certified motor vehicle inspector to perform the services required under DMV's regulations. The inspection station operates through the services that the inspectors provide.[6]

Mr. Tavera is liable for each of the 202 non-compliant inspections he performed. Each inspector is liable for the violations attributable to his own non-compliant inspections. This liability is based on the connection between the official inspection station that is licensed pursuant to VTL § 303, and the inspectors who are employed by the station, who are certified pursuant to VTL § 304-a. Section 79.8(b)(2) of Title 15 of NYCRR provides that the specific duties of the inspection station include employing at all times, at least one full-time employee, who is a certified motor vehicle inspector to carry out the inspections pursuant to DMV regulations. Accordingly, the inspection station operates through the services that its inspectors provide. *See*, *Gurabo* Hearing Report, *supra.*

While the Department staff seeks to penalize each of the respondent-inspectors for all the illegal inspections performed, I find (as ALJ Buhrmaster did in *Gurabo*) that Mr. Tavera should be held liable only for the specific illegal inspections he performed.

Mr. Ramos should also be held liable for the non-compliant inspections he performed as it was through those simulated inspections that he operated Autoramo, a licensed emissions inspection station, improperly and in violation of 6 NYCRR § 217-4.2. However, since the Department staff could show no proof of service of the notice of hearing and complaint on him personally, these charges cannot be sustained. TR II, 29-31.

[6] While neither Autoramo nor Mr. Ramos appeared at the hearing, the Department staff provided proof of service of the notice of hearing and complaint on Autoramo through the Secretary of State. Ex. 19.

Violation of 6 NYCRR § 217-1.4

In the Department staff's second cause of action, it charged violations of 6 NYCRR § 217-1.4. This regulation provides: "No official inspection station as defined by 15 NYCRR 79.1(g) may issue an emission certificate of inspection, as defined by 15 NYCRR 79.1(a), for a motor vehicle, unless that motor vehicle meets the requirements of section 217-1.3 of this Subpart."

As found by Judge Buhrmaster in the *Gurabo* matter, violations of 6 NYCRR § 217-1.4 cannot be found because there is no evidence that Autoramo was an official inspection station as defined by 15 NYCRR 79.1(g). Section 79.1(g) defines an "official safety inspection station" as one "which has been issued a license by the Commissioner of Motor Vehicles pursuant to Section 303 of the Vehicle and Traffic Law, to conduct safety inspections of motor vehicles exempt from the emissions inspection requirement" (emphasis added). Since the entire focus of the staff's case was the allegations concerning non-compliant emissions inspections, the established facts do not support a violation of this regulation.

As also noted by ALJ Buhrmaster in *Gurabo*, there is a newly promulgated Subpart 217-6 governing motor vehicle enhanced inspection and maintenance program requirements for the period beginning January 1, 2011. Section 217-6.4 of 6 NYCRR provides: "No official emissions inspection station or certified inspector may issue an emission certificate of inspection, as defined by 15 NYCRR section 79.1, for a motor vehicle unless the motor vehicle has been inspected pursuant to, and meets the requirements of section 217-6.3 of this Subpart." Section 217-6.3 provides the inspection procedure that an inspection station must use to determine whether the OBD II system performs or fails consistent with the relevant motor vehicle exhaust and emissions standards. These new regulations contain the provisions relevant to the allegations set forth in the second cause of action. However, these regulations do not apply to violations that occurred prior to their promulgation and effective date. Accordingly, the second cause of action must be dismissed.

Penalties

As noted by staff in its complaint, ECL § 71-2103 provides that any person who violates a provision of Article 19 of the ECL, or any code, rule or regulation which was promulgated pursuant thereto, shall be liable for a penalty, in the case of a first violation, of at least Three Hundred Seventy–Five Dollars ($375.00), but no more than Fifteen Thousand Dollars ($15,000), and, in the case of a second and any further violation, a penalty of not more than Twenty-Two Thousand Five-Hundred Dollars ($22,500.00) per violation. The staff requested a penalty of $157,500 from the respondents – amounting to $500 per simulated inspection. While this amount is less than the maximum that could be derived based upon the 315 separate violations, I find for the reasons set forth below that a penalty of $75,000 against Autoramo for all the non-compliant inspections performed at the facility and $30,000 against Tavera for the inspections that he performed is appropriate.

The 1990 Civil Penalty Policy requires that all monetary penalty calculations begin with the statutory maximum. The maximum penalty in this matter would come to over seven million

dollars, clearly unreasonable given the small business involved. However, the maximum penalty is only the starting point; a number of considerations, including the economic benefit of noncompliance, the gravity of the violations, and the culpability of the respondents' conduct are to be taken into account in determining the appropriate penalty.

With respect to economic benefit, there was no evidence presented of the financial advantage that the respondents gained by violating the law in this matter and so, economic benefit is not a consideration.

With respect to gravity, the violations are extremely serious as they undermine the State's air pollution program by passing vehicles which may have had faulty emissions systems. To the extent these vehicles did not have their emissions systems repaired as required, they would add pollutants to the air that will increase ozone, a component of smog. Thus, a substantial penalty is warranted given the potential impact on the environment.

The Civil Penalty Policy also provides for factors that could adjust the gravity component: (a) culpability; (b) violator cooperation; (c) history of non-compliance; (d) ability to pay; and (e) unique factors. The respondents' culpability in this matter merits an upward penalty adjustment. Prior to receiving his inspection certification from DMV, Mr. Tavera received training that demonstrated the correct use of the NYVIP system. TR II, 58-59. With respect to violator cooperation, the respondents were discovered to be violating the law by the State's investigation and therefore, there is no evidence of cooperation. Moreover, Autoramo did not appear at the hearing and Mr. Tavera elected to proceed to an adjudicatory hearing rather than resolve the matter outside of litigation. As for ability to pay, no evidence was presented by the respondents of their financial status.

The Civil Penalty Policy does provide for the consideration of "unique factors" in calculation of the penalty. The small size of the company should go to mitigate the penalty to some degree. Mr. Tavera testified that he was out of the country for about a month in 2009. However, the staff has not presented any proof of non-compliant inspections during that period.

The last consideration for mitigation is that DMV has already fined Autoramo and Mr. Tavera $5,250.00 each for performing 15 simulated inspections and revoked their inspection licenses and certifications, respectively. Ex. 21. Therefore, these respondents can no longer perform inspections and as testified to by Mr. Tavera, the repair shop is closed. TR II, 60. DMV's actions, as noted by Judge Buhrmaster in *Gurabo*, will serve to discourage others from similar conduct.

Penalty Recommendation

For the 315 separate violations of 6 NYCRR § 217-4.2, Autoramo should be assessed a penalty of $75,000. Mr. Tavera, should be fined $30,000 for the 202 separate violations for which he is responsible. As explained above, the violations are extremely serious as they undermine a key aspect of New York's efforts to reduce ozone pollution which causes health and property damage. The respondents had to be aware that they were performing improper actions given the training Mr. Tavera received and their failure to connect the NYVIP system to the

automobiles that were to be inspected. Despite the lower penalty, the recommended penalties are substantial ones for a small company and its employees and will let the inspection station community know that the State will not tolerate simulated inspections.

CONCLUSIONS

1. Between May 24, 2008 and February 8, 2010, the respondent, Autoramo, Inc. used a simulator to perform OBD II emission inspections on 315 separate occasions.

2. Between May 24, 2008 and February 8, 2010, the respondent, Rafael Tavera, used a simulator to perform OBD II emissions inspections on 202 separate occasions.

3. This use of a simulator was in violation of 6 NYCRR § 217-4.2, which prohibits the operation of an official emissions inspection station using equipment and/or procedures that are not in compliance with DEC procedures and/or standards.

RECOMMENDATIONS

1. For the first cause of action, which alleges violation of 6 NYCRR § 217-4.2, respondent Autoramo, Inc. should be assessed a civil penalty of $75,000. Respondent Rafael Tavera should be assessed a penalty of $30,000. The penalties should be paid within 30 days of service of the Commissioner's order.

2. Because the Department staff could not demonstrate proof of service on Ramos individually, neither cause of action can be sustained against him.

3. The second cause of action, which alleges violations of 6 NYCRR § 217-1.4, should be dismissed as to respondents Autoramo, Inc. and Tavera.

EXHIBIT CHART

Matter of Autoramo, Inc., Luis A. Ramos, and Rafael Tavera

January 13, 2012

Exhibit No.	Description	ID'd?	Rec'd?	Offered By
1	September 30, 2010 Notice of Hearing and Complaint	√	√	N/A
2	December 1, 2010 Answer	√	√	N/A
3	January 31, 2011 letter from Mary Beth Macina, Esq. indicating that she is no longer representing respondents.	√	√	N/A
4	October 3, 2011 statement of readiness	√	√	N/A
5	October 5, 2011 assignment letter	√	√	N/A
6	November 9, 2011 Hearing Notice	√	√	N/A
7	December 1, 2011 Hearing Notice	√	√	N/A
8	December 19, 2011 Hearing Notice	√	√	N/A
9	November 9, 2011 Hearing Notice w/envelope addressed to Autoramo, Inc. and USPS sticker indicating inability to deliver	√	√	N/A
10	December 1, 2011 Hearing Notice w/envelope addressed to Autoramo, Inc. and USPS sticker indicating inability to deliver	√	√	N/A
11	December 19, 2011 Hearing Notice w/envelope addressed to Autoramo, Inc. and USPS sticker indicating inability to deliver	√	√	N/A
12	NYS DMV Original Facility Application – ISP for Autoramo, Inc.	√	√	BC
13	Application for Certification as a Motor Vehicle Inspector for Rafael Tavera	√	√	BC
14	Application for Certification as a Motor Vehicle Inspector for Luis Ramos	√	√	BC
15	Certified DMV records	√	√	BC
16	Certified DMV records	√	√	BC
17	DMV records w/highlighting	√	√	BC
18	DMV records w/highlighting	√	√	BC
19	State of NY – Department of State – Receipt for Service on Autoramo, Inc.	√	√	BC
20	Copy of Passport of Rafael Tavera	√	√	BC
21	Finding Sheet – Autoramo, Inc., Rafael Tavera – October 19, 2010	√	√	BC
22	DMV Administrative Appeals Board - Decision of Appeal April 26, 2011	√	√	BC