

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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

ORDER

-by-

**SHERIDAN GARAGE CORP., SAMUEL D. NUNEZ,
ROULY B. MARTINEZ, MOISES MARTINEZ, AND
GUILLERMINA MARTINEZ,**

DEC Case No.
C02-20100615-14

Respondents.

This administrative enforcement proceeding concerns allegations that respondents Sheridan Garage Corp. ("Sheridan"), Samuel D. Nunez, Rouly B. Martinez, Moises Martinez, and Guillermina Martinez completed 680 motor vehicle inspections using noncompliant equipment and procedures, and issued 680 certificates of inspection for these inspections without testing the vehicles' onboard diagnostic ("OBD") systems. OBD systems 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 by service of a notice of hearing and complaint dated August 18, 2010 on respondents Sheridan, Nunez, Rouly B. Martinez, Moises Martinez, and Guillermina Martinez.

Staff alleges that these violations arose out of respondents' operation of an official emissions inspection station located at 1040 Freeman Street in the Bronx, New York, during the period between May 25, 2009 and January 25, 2010. During this period, DEC staff alleges that Sheridan was a domestic business corporation duly authorized to do business in New York State, Guillermina Martinez owned and operated the inspection station, and Samuel D. Nunez, Rouly B. Martinez, and

Moises Martinez worked at Sheridan and performed mandatory annual motor vehicle emission inspections.

In its complaint, DEC staff alleged that respondents violated:

(1) 6 NYCRR 217-4.2, which states that no person shall operate an official emissions inspection station using equipment and/or procedures that are not in compliance with the Department's procedures and/or standards; and

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

For these violations, DEC staff requested a civil penalty of three hundred forty thousand dollars (\$340,000). With respect to the requested penalty, DEC staff requested that all respondents be held jointly and severally liable (see Hearing Report, at 3 and Hearing Transcript, at 14).

Respondents submitted an answer on October 18, 2010, in which they denied DEC staff's charges, while asserting no affirmative defenses (see Hearing Exhibit ["Exh"] 2).

The matter was originally assigned to Administrative Law Judge ("ALJ") Edward Buhrmaster, but due to scheduling conflicts, it was reassigned to ALJ Helene G. Goldberger. A hearing was held on December 16, 2011.

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

Liability

I concur with the ALJ's determinations that Department staff is entitled to a finding of liability with respect to the first charge against respondents Sheridan, Samuel D. Nunez, Rouly B. Martinez, and Moises Martinez for operating an official emissions inspection station using equipment or procedures that are not in compliance with the Department's procedures or standards, in violation of 6 NYCRR 217-4.2. I agree with the ALJ that Sheridan is liable for all 680 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 respondents Samuel D. Nunez, Rouly B. Martinez, and Moises Martinez are each liable for the

violations attributable to their own non-compliant inspections (see id.).

I also concur with the ALJ's determination that the first cause of action must be dismissed as against respondent Guillermina Martinez because no evidence was offered to show that she was a certified motor vehicle emissions inspector at the relevant time, or that, as a corporate officer, she was responsible for, or influenced, the violations by the corporation (see Hearing Report, at 8).

With respect to the second cause of action, I concur with the ALJ's determination that violations of 6 NYCRR 217-1.4 cannot be found 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 shall be dismissed as to all respondents.

Civil Penalty

Staff requested a penalty of three hundred forty thousand dollars (\$340,000) representing a penalty of \$500 per violation, which staff sought jointly and severally against each respondent. The ALJ noted that, consistent with the penalty range established by ECL 71-2103 for such violations, the maximum penalties "would come to over \$15 million" (Hearing Report, at 10), an amount significantly higher than the amount that Department staff requested.¹

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 10-12). The ALJ concluded that although the violations are serious, a smaller penalty was warranted in this case. The ALJ justified the lower penalty, in part, because staff presented no evidence of economic benefit; Sheridan's license to perform emission inspections was revoked by the New York State Department of Motor Vehicles ("DMV"); Sheridan was fined in a related DMV

¹ Although the civil penalty amounts provided by ECL 71-2103 were increased, effective May 28, 2010, the time period of the violations in this case preceded that date.

matter; Sheridan was a small business; and Ms. Martinez's personal circumstances mitigated the penalties against Sheridan (see Hearing Report, at 10-12).²

The ALJ recommended a total civil penalty of one hundred two thousand eight hundred dollars (\$102,800), assessed as follows: (i) a civil penalty in the amount of sixty thousand dollars (\$60,000) against respondent Sheridan (ii) a civil penalty in the amount of thirty thousand dollars (\$30,000) against respondent Rouly B. Martinez; (iii) a civil penalty in the amount of seven thousand two hundred dollars against respondent Samuel D. Nunez (\$7,200); and (iv) a civil penalty in the amount of five thousand six hundred dollars (\$5,600) against respondent Moises Martinez (see Hearing Report, at 12). Further, although joint and several liability may be imposed in administrative enforcement proceedings, I concur with the ALJ that imposing joint and several liability is inappropriate here. Samuel D. Nunez, Rouly B. Martinez, and Moises Martinez each performed their own inspections for which each is being held individually responsible.

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 e.g. Jerome Muffler; Matter of Autoramo, Inc., Order of the Commissioner, August 13, 2013 ["Autoramo"]; Matter of New Power Muffler Inc., Order of the Commissioner, July 15, 2013 ["New Power"]). I have 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; Autoramo, at 4-5; New Power, at 5). With respect to individual inspectors, I have

² The fact of violation is the primary determinant of penalty. I do not consider the fact that Sheridan may be a "small business" to be a mitigating factor with respect to determining the appropriate penalty for the 680 violations committed at the facility, and therefore decline to adopt that portion of the ALJ's analysis (see Hearing Report, at 11-12). In addition, I do not consider DMV's revocation of Sheridan's license, DMV's imposition of a fine for violations of DMV regulations, or Ms. Martinez's personal circumstances, to be factors warranting a reduction in the penalties to be assessed in this proceeding (see id.).

allocated the remaining penalty amount based on the number of noncompliant inspections that each inspector conducted. As I have previously discussed, the aggregate penalty amount and the allocation of that amount (a) between 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 Jerome Muffler, at 4-5 [noting examples of mitigating or aggravating factors]).

In this matter, at the time the violations occurred, Sheridan Garage Corp. 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 9). Sheridan 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 applicable to vehicular air emissions. Whether or not Sheridan's officers, directors or shareholders lacked an understanding of the corporation's obligations is not relevant to the penalty calculation.

In consideration of the penalty range established by ECL 71-2103(1), the impacts of this illegal activity (see Hearing Report at 11-13), and penalties assessed in my decisions in Jerome Muffler, Autoramo, and New Power, I am imposing on Sheridan Garage Corp. a civil penalty of ninety-six thousand eight hundred dollars (\$96,800).

With respect to individual inspectors, as the number of inspections that an individual performs with noncompliant equipment increases, higher penalties shall be assessed, subject to any aggravating or mitigating circumstances. As evidenced by the appearance of each inspector-respondent's unique certificate number on inspection records of the DMV, the inspector-respondents in this case performed a number of improper inspections, as follows: Nunez (81), Rouly Martinez (535), and Moises Martinez (64) (see Hearing Report, at 6, Findings of Fact No. 16).

Accordingly, in consideration of the above, I hereby assess civil penalties against the individual inspector-respondents as follows: (i) Rouly B. Martinez, who performed 535 (approximately

79 percent) of the noncompliant inspections, is assessed a civil penalty in the amount of nineteen thousand one hundred dollars (\$19,100); (ii) Samuel D. Nunez, who performed 81 (approximately 12 percent) of the noncompliant inspections, is assessed a civil penalty of two thousand nine hundred dollars (\$2,900); and (iii) Moises Martinez, who performed 64 (approximately 9 percent) of the noncompliant inspections, is assessed a civil penalty of two thousand two hundred dollars (\$2,200).

In sum, the overall amount of the civil penalty assessed by this order is one hundred twenty-one thousand dollars (\$121,000), which is substantial in light of the number of noncompliant inspections, and should serve as a deterrent against any future noncompliant activity of this kind.

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

- I. Respondents Sheridan Garage Corp., Rouly B. Martinez, Samuel D. Nunez, and Moises Martinez are adjudged to have violated 6 NYCRR 217-4.2 by operating an official emissions inspection station using equipment or procedures that are not in compliance with the Department's procedures or standards. Six hundred eighty (680) inspections using noncompliant equipment and procedures were performed at Sheridan Garage Corp., of which Rouly B. Martinez performed 535, Samuel D. Nunez performed 81, and Moises Martinez performed 64.
- II. DEC staff's charges that respondent Guillermina Martinez violated 6 NYCRR 217-4.2 are dismissed.
- III. DEC staff's charges that respondents Sheridan Garage Corp., Guillermina Martinez, Rouly B. Martinez, Samuel D. Nunez, and Moises Martinez violated 6 NYCRR 217-1.4 are dismissed.

IV. The following penalties are hereby assessed:

A. Respondent Sheridan Garage Corp. is hereby assessed a civil penalty in the amount of ninety-six thousand eight hundred dollars (\$96,800);

B. Respondent Rouly B. Martinez is hereby assessed a civil penalty in the amount of nineteen thousand one hundred dollars (\$19,100);

C. Respondent Samuel D. Nunez is hereby assessed a civil penalty in the amount of two thousand nine hundred dollars (\$2,900); and

D. Respondent Moises Martinez is hereby assessed a civil penalty in the amount of two thousand two hundred dollars (\$2,200).

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 DEC at the following address:

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

V. All communications from any respondent to the Department 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 Sheridan Garage Corp., Samuel D. Nunez, Rouly B. Martinez, and Moises Martinez, and their agents, heirs, successors, and assigns in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Joseph J. Martens
Commissioner

Dated: October 3, 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:

**SHERIDAN GARAGE CORP., SAMUEL D. NUNEZ,
ROULY B. MARTINEZ, MOISES MARTINEZ and
GUILLERMINA MARTINEZ,**

Respondents.

NYSDEC CASE NO. CO2-20100615-14

HEARING REPORT

- by -

_____/s/_____
Helene G. Goldberger
Administrative Law Judge

February 17, 2012

Proceedings

Pursuant to a notice of hearing and complaint, dated August 18, 2010 (Hearing Exhibit [Ex.] 1), staff of the New York State Department of Environmental Conservation (DEC or Department) charged Sheridan Garage Corp., Samuel D. Nunez, Rouly B. Martinez, Moises Martinez, and Guillermina Martinez (the respondents) with violations of Part 217 of Title 6 of the Official Compilation of Codes, Rules and Regulations (6 NYCRR), which concerns inspection 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 emission inspection station using equipment and/or procedures that were not in compliance with Department procedures and/or standards, from May 25, 2009 to January 25, 2010, in 680 mandatory annual motor vehicle emission 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 680 emissions certificates of inspection, as defined by 15 NYCRR 79.1(a), for motor vehicles, from May 25, 2009 to January 25, 2010, based on simulated motor vehicle emission inspections.

Staff alleged that all of the violations occurred at the respondents' official emissions inspection station known as Sheridan Garage Corp. (Sheridan), located at 1040 Freeman Street, in the Bronx, New York. Staff represents that during this period, respondent Sheridan Garage Corp. was a domestic business corporation duly authorized to do business in New York. Staff alleged that respondents Samuel D. Nunez, Rouly B. Martinez, and Moises Martinez were certified motor vehicle inspectors, and Guillermina Martinez was the owner and operator of the facility.

The respondents submitted an answer (Ex. 2) by their counsel dated October 18, 2010 in which they denied the staff's charges but did admit that Sheridan was a domestic business corporation duly authorized to do business in the State of New York; that Ms. Martinez was the owner/operator of Sheridan Garage, an official emissions inspection station; and that respondents Nunez, Rouly Martinez, and Moises Martinez were certified motor vehicle emission inspectors working at the facility for the purposes of aiding in its operation and performing mandatory annual motor vehicle emission inspections. The answer does not set forth any affirmative defenses.

By a statement of readiness dated December 30, 2010 (Ex. 3), 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 February 4, 2011 (Ex. 4) that the matter was assigned to Administrative Law Judge (ALJ) Edward Buhmaster. Due to several adjournments requested by the respondent and staff and scheduling issues, the matter was reassigned to me on November 23, 2011. Following a

conference call with the parties held on November 28, 2011, I issued a hearing notice dated November 29, 2011 that set the hearing for December 16, 2011 at DEC's Region 2 offices in Long Island City, New York. Ex. 5. Because the respondents' counsel represented that Ms. Martinez did not understand English well, the OHMS arranged for a translator to be present at the adjudicatory hearing. The hearing went forward on December 16, 2011.

At the adjudicatory hearing held on December 16, 2011 in the Department's Region 2 offices, mainly through her counsel and the introduction of her testimony at a NYS Department of Motor Vehicles (DMV) hearing on similar charges, Ms. Martinez claimed that due to the murder of her husband and her attention on raising her young children, she was unaware of the improper activities of her three employees, including two nephews, who are the other respondents in this matter. Ex. 14; Hearing Transcript pages (TR) 68-70.

On December 20, 2011, I wrote to the parties requesting additional documentary evidence from the respondents relating to their mitigation defense relating to the murder of Ms. Martinez's husband. By electronic mail, on December 26, 2011, the respondents' counsel, Mr. Nesci, sent me a copy of the ALJ's Finding Sheet dated December 20, 2010, in the New York State Department of Motor Vehicles (DMV) matter charging the respondents with violations of New York State Vehicle and Traffic Law Section 303(e)(3) by substituting vehicles or using an electronic device for exhaust emissions testing on forty occasions. On December 28, 2011, DEC Assistant Counsel Blaise Constantakes sent via electronic mail a copy of the Decision of Appeal in the DMV Sheridan Garage Corp. matter. By e-mail, I advised the parties that I took the ALJ's Finding Sheet and the appellate decision into the record as Exs. 15 and 16, Mr. Nesci responded that he did not agree with these decisions; Mr. Constantakes responded by noting that Mr. Nesci has filed an Article 78 proceeding in that matter.

On December 28, 2011, I received via e-mail from Mr. Nesci copies of a certificate of death for her husband Jose Martinez dated July 6, 1998, certificates of birth for the children of Guillermina Martinez – Jose (9/17/98), Maria (8/30/97), Chris (6/16/92), and a page from the U.S. passport of the deceased husband. I have marked these exhibits as Exhibit 17a-e and made them part of this record. Mr. Constantakes objected to the admission of these exhibits based upon relevancy given the amount of time that has passed between the dates of these events and the charges in the complaint. I took them in as they constitute the respondent Guillermina Martinez's only defense. On January 9, 2012, I sent the parties my corrections to the hearing transcript and requested their corrections by no later than January 27, 2012. The record closed on January 26, 2012 upon receipt of the staff's corrections to the transcript.¹

Staff's Charges

As noted above, the staff has alleged that the respondents, as the owner/operator of the facility and emissions inspectors: 1) violated 6 NYCRR § 217-4.2 by conducting 680 mandatory annual motor vehicle emission inspections from May 25, 2009 to January 25, 2010 using a device to substitute for and simulate the motor vehicle of record; and 2) violated 6 NYCRR

¹ The respondent did not provide any corrections to the transcript.

§ 217-1.4 by issuing 680 emission certificates of inspections based on simulated motor vehicle emission inspections from May 25, 2009 to January 25, 2010.²

Respondents' Position

The respondents denied the violations in their answer but they did not submit any evidence in opposition to the staff's proof at the hearing. Apart from the general denials in their answer, they offered Ms. Martinez's testimony from the DMV hearing on March 2, 2011 in which she explained that her husband had been murdered one year after the company had started. Ex. 14, p. 42. At that hearing, she testified that she took over the business but because of her young children and lack of experience with automobile mechanics, she relied on her employees, including her two nephews, to repair and inspect the vehicles that came into the business. *Id.*, pp. 42-44.

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 respondents were represented by Vincent P. Nesci, Esq. of Mount Kisco, New York. The respondents appeared, but apart from Ms. Martinez's response to a few of my questions, they presented no testimony other than the introduction of Ms. Martinez's testimony at the DMV hearing. Mr. Nesci offered the transcript of the DMV testimony of Ms. Martinez into evidence and I accepted it as Ex. 14.

In its complaint, the staff requests a penalty of \$340,000; which Mr. Constantakes explained that he seeks jointly and severally from all the respondents. TR 14.

In addition to the exhibits that I marked at the start of the hearing and the parties agreed could be entered into evidence (Exs. 1-5), the staff offered Exs. 6-13. See, exhibit list annexed hereto. Upon staff's offering of Exs. 10-13, Mr. Nesci limited his agreement to their entry by stating that he did not agree to their admission as to the truth of what these documents contained. TR 10. I overruled his objection and took in these documents that are records (certified copies) of DMV data. *Id.* As to his objection, all evidence that is submitted is subject to examination by opposing counsel and the trier of fact who will weigh it to make a determination on the outcome. However, counsel did not contest that the data originated from DMV records and he failed to produce any evidence to contest the probative value of the records. *See*, 6 NYCRR § 622.11(a)(11).

² In paragraph 18 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. While the respondent's counsel objected to the correction, I overruled this objection as it is clearly a typographical error as the preceding paragraph of the complaint cites the correct regulation.

In addition to the records that I took in at the hearing, I held the hearing record open for the admission of documentary evidence that I requested in a letter dated December 20, 2011 to Mr. Nesci. I requested that he produce the decision of ALJ Walter Zulkoski in the DMV matter and evidence of the death of Ms. Martinez's husband. Upon receipt, I marked those records as Exs. 15 and 17a, respectively, and made them part of the record. As noted above, staff also produced the DMV appellate decision which is Ex. 16 in this record.

FINDINGS OF FACT

1. On May 28, 2008, Guillermina Martinez, as owner of Sheridan Garage Corp., submitted an original facility application to DMV to license Sheridan as a motor vehicle inspection station. Ex. 6. The application was approved by DMV, which assigned Sheridan a facility number of 7106266. *Id.*

2. On December 9, 2008, Rouly B. Martinez, Ms. Martinez's nephew, applied to DMV for certification as a motor vehicle inspector. Ex. 7. DMV approved this application and assigned Mr. Martinez a certificate number of 7UH3. *Id.*

3. On June 8, 2009, Moises Martinez, Ms. Martinez's nephew, applied to DMV for certification as a motor vehicle inspector. Ex. 8. DMV approved this application and assigned Moises Martinez a certificate number of 8DT3. *Id.*

4. On May 23, 2001, Samuel D. Nunez applied to DMV for certification as a motor vehicle inspector. Ex. 9. DMV approved Mr. Nunez's application and assigned a certificate number of 1BH5. *Id.*

5. 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 27-28. The course is given in English. TR 30. DMV issues each inspector a unique card that must be used to access the work station at the inspection facility. TR 28. DMV requires inspectors to safeguard these cards at all times and not allow any other individual to use the card. *Id.*

6. 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 41-44.

7. NYVIP features on-board diagnostic (also known as OBD II) testing for model years 1996 and newer light-duty vehicles. TR 44-45. SGS Testcom is the entity that has the contract with New York State to operate the work station analyzer system. TR 19.

8. To commence the OBD II inspection, a motorist presents his/her vehicle for inspection. TR 18. The car is brought into the shop and put on the lift. *Id.* The inspector does the safety check and then examines the low enhanced emission inspection items. *Id.* Then the inspector must access the work station analyzer by scanning the bar code from his card with its unique

identifying information. TR 18-19. The work station will then instruct the inspector to scan in the identifying information from the vehicle or manually enter this information. TR 19.

9. The OBD II 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 20-21, 48. The purpose of the MIL is to alert the driver when there is an emissions system problem and a repair is needed. TR 21, 45.

10. The analyzer proceeds with an initial phone call to SGS Testcom and to DMV's database and the inspector has the opportunity to enter the results of the safety inspection. TR 19. Next, the inspector will be prompted by the analyzer to connect the diagnostic link connector (DLC) to the vehicle for the OBD II portion of the inspection. TR 20, 48. The inspector will also input the responses to the two questions regarding the MIL visual check. TR 20-21. With the connection to the vehicle established, the system proceeds to extract information from the vehicle's electronic control module (ECM) without any intervention by the inspector. TR 48-49. The system will identify the vehicle being inspected and determine if that vehicle meets the inspection standards. TR 49-51. If the vehicle passes the inspection, the inspector is alerted by the NYVIP unit to scan the inspection sticker serial number bar code and the machine asks if the sticker was affixed to the windshield. TR 21. Once that is completed, the inspection is done and the vehicle inspection report/receipt is printed out and given to the customer. TR 22.

11. The information obtained by the system will be stored in the NYVIP work station and also transmitted to DMV via SGS Testcom within 5 to 10 seconds. TR 24. Both DMV and SGS Testcom maintain the data that is captured during the inspections. *Id.*

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 51. Based upon the data it was reviewing, DMV concluded that a simulator was being used in these tests rather than the car that was to be tested. TR 52. A one year investigation by DEC, DMV and the Attorney General ensued in which extensive data analysis was done. TR 53. Ultimately, they were able to find an electronic signature – 15 data fields that constituted a profile of a noncompliant inspection. *Id.*

13. The agencies identified 44 inspection stations involved in this suspected illegal activity out of close to 11,000 inspection facilities statewide. TR 54. 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. *Id.* But between March 2008 and July 2010, in 44 downstate stations, the electronic signature was found. *Id.* After the stations were notified by notices of violation of the suspected illegal activity in July 2010, the agencies no longer found evidence of this electronic signature. TR 54-55.

14. In the official DMV records of inspections that took place at Sheridan beginning on May 25, 2009 and continuing on dates through January 25, 2010, there is evidence of 680 noncompliant inspections on approximately 170 separate dates. Exs. 10-13. Because the 15 data fields show the identical information for widely varying vehicles, it is impossible that the emissions tests performed were of real vehicles. TR 60.

15. As an example, on August 31, 2009, Sheridan inspected a 2006 Mercury Marquis and it passed inspection. TR 60; Ex. 12, p. 15. On January 4, 2010, the same vehicle was presented for inspection but in this case, the simulator signature is found instead and no electronic VIN is reported for this vehicle even though there should be one for a 2006 vehicle. TR 60-61; Ex. 13, p.5.

16. The data provides both the unique facility number of the inspection station but also the identifying number of the inspector. Exs. 12-13. From this information, it is shown that Sam Nunez performed 81 noncompliant inspections, Rouilly Martinez performed 535 noncompliant inspections, and Moises Martinez performed 64 noncompliant inspections. TR 62; Exs. 12-13.

17. DMV issued a decision on December 20, 2010 in which ALJ Water Zulkoski found respondents Sheridan Garage Corp., Rouly B. Martinez, and Moises Martinez 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 forty separate occasions. Ex. 15. DMV fined the respondents \$350 per violation resulting in: Sheridan being fined \$14,000.00 and having its inspection license revoked; Rouly B. Martinez being fined \$7,7000.00 and having his certification to do inspections revoked; and Moises Martinez being fined \$6,300.00 and having his certification to do inspections revoked. Ex. 15. These findings were upheld on administrative appeal in a decision dated July 26, 2011. Ex. 16.

DISCUSSION

Background – I/M Program

This enforcement proceeding charges that Sheridan, its owner, and three inspectors did not check the OBD II systems as part of their inspections of 680 vehicles between May 25, 2009 and January 25, 2010. Staff claims that instead, the respondents used a simulator to substitute for the vehicles.

As explained above and also in greater detail in the Hearing Report of ALJ Edward Buhrmaster dated September 1, 2011, *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) and are thus identified as non-attainment areas.³ While automobile manufacturers are required to produce cleaner emitting cars under both federal and California laws (the latter more stringent standards

³ 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. There is more information about the State's I/M program at: <http://www.dec.ny.gov/chemical/48153.html>.

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 simulated 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.

In this matter, 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 ongoing at certain inspection stations in the State. TR 57-60. He was able to show how the specific 15-field electronic signature appearing on Sheridan's inspection data (as highlighted by Mr. Clyne in Exs. 12 and 13) represents the data that would be obtained from a simulator rather than a vehicle. *Id.*

Specifically, Exs. 12 and 13 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. For example, on page 9 of Ex. 12, Mr. Clyne concluded that the inspection of the Mitsubishi Eclipse on May 25, 2009 at 10:20 a.m. 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 63.

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 on Exs. 12 and 13 (Exs. 12 and 13 are the same as 10 and 11 except that the 15-field simulator profile inspections are highlighted in orange), this data is exactly the same for each of these inspections.⁴ Mr. Clyne testified that with legitimate inspections, these results would vary. TR 59-60.

These data sheets identify Sheridan as the inspection station because they contain the DMV facility number on each inspection – 7106266. This number corresponds to the approved facility application. Ex. 6. Similarly, each inspection on the data sheets provides an inspector number that corresponds with one of the three respondent inspectors' certificate numbers: Rouly Martinez (7UH3); Moises Martinez (8DT3); or Samuel Nunez (1BH5). Exs. 7, 8, 9.

The respondents presented no evidence to contradict the Department's presentation that these individuals were inspectors at Sheridan and that they conducted improper 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 attributed to Sheridan as the licensed inspection station, and that the three respondent inspectors, as the station's certified inspectors, may be held liable for the noncompliant inspections that they performed.

I do not find that Ms. Martinez is personally liable for any of the violations. While Ms. Martinez is the sole shareholder of the company and thus is connected to the respondent Sheridan, as noted in *Gurabo*, the corporation exists independently from the ownership. And, as the staff did not provide any proof that she performed any inspections or oversaw the noncompliant inspections of the other respondents, the staff did not establish liability under the corporate officer doctrine. 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 making this determination, I am not relying upon the evidence presented on her behalf with respect to the murder of her husband in 1998 and the age of her children (Exs. 17a-e). As noted by DEC counsel, the murder of her husband, however unfortunate, occurred in 1998, over 10 years prior to the illegal activities at Sheridan. And, ten years before Ms. Martinez applied to DMV for a license to operate a motor vehicle inspection station. Ex. 6. While it is reasonable given her lack of experience with the business that she gave over the running of the shop to the other respondents, the bottom line is that staff presented no evidence to show any direct involvement by her. Ex. 14, pp. 42-44.

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

⁴ Not only are these numbers identical for the highlighted inspections in Exs. 12 and 13 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).

[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 on 680 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. TR 51.

Sheridan is liable for all 680 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 the inspectors’ own duties, which include performing inspections in a thorough manner. 15 NYCRR §§ 79.17(b)(1) and (c). As a private corporation, Sheridan falls within the definition of “person” at 6 NYCRR § 200.1(bi).

Each of the respondent-inspectors is liable for each of the non-compliant inspections he performed. This liability is based upon the connection between the respondent-inspectors who are certified under VTL 304-1 and the official inspection station which is licensed under VTL 303. 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.

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

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 Sheridan 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 simulated 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 (\$15,000) Dollars, 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 \$340,000 from the respondents – amounting to \$500 per violation. While this amount is less than the maximum that could be derived based upon the 680 separate violations, I find for the reasons set forth below that penalties of \$60,000 for Sheridan, \$30,000 for Rouilly Martinez, \$7,200 for Sam Nunez, and \$5,600 for Moises Martinez are more 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 \$15 million, 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 their inspection certifications from DMV, the respondent-inspectors received training that demonstrated the correct use of the NYVIP system. With respect to violator cooperation, the respondents were discovered to be violating the law by an investigation by DEC and DMV and therefore, there is no evidence of cooperation. Moreover, they have 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. Other than statements made by their attorney that the amount the staff has requested is outside of the realm of possibility for his clients (TR 70), the subject was not addressed in the pleadings or at the hearing.

The Civil Penalty Policy does provide for the consideration of "unique factors" in calculation of the penalty. Ms. Martinez's testimony at the DMV hearing revealed that her husband who had previously operated Sheridan was killed. Ex. 14, p. 42; Ex.17a. Given his sudden death, she was thrust into taking over the business while continuing to raise a family. Ex. 15, pp. 42-44. While the respondent's attorney implied that Ms. Martinez's husband was murdered not long before the events involved in this proceeding, the fact is that Mr. Martinez was murdered in 1998. Ex. 17a. However, apart from her lack of experience with the business, Ms. Martinez did have school age children at home around the time that the violations occurred. Exs. 17b-c. Given these facts, it is understandable that she would continue to rely on others to run the business. Ex. 15, pp. 42-44. While I have not found Ms. Martinez personally liable for any violations in this matter, given the closely held nature of the business, I believe these circumstances should also go to mitigate the penalties against Sheridan.

Sheridan has already been fined for similar violations by DMV and its inspection license has been revoked. Exs. 15, 16. Therefore, it can no longer perform inspections and it is likely that it will lose business due to this circumstance. These actions, as noted by Judge Buhrmaster in *Gurabo*, will serve to discourage others from similar conduct.

With respect to each of the respondent- inspectors, they should be fined based upon the number of illegal inspections they each performed – there is no basis to fine them for the actions of their co-respondents. Rouilly Martinez performed the bulk of the illegal inspections with approximately 80% of them as documented in Exs. 12-13. Sam Nunez and Moises Martinez performed approximately 12% and 9% of the illegal inspections, respectively. *Id.* Thus, the penalties assessed should be assessed based upon their individual illegal activities.

Penalty Recommendation

For the 680 separate violations of 6 NYCRR § 217-4.2, Sheridan should be assessed a penalty of \$60,000. Because Mr. Rouilly Martinez performed the majority of the illegal inspections, he should be fined \$30,000; Mr. Nunez fined \$7,200; and Mr. Moises Martinez, \$5,600, respectively. 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 respondent-inspectors were clearly aware that they were performing illegal actions given the training they received, their failure to connect the NYVIP system to the automobiles that were to be inspected, and their affirmative deceptive activity in using a simulator during the inspections. Given the circumstances described by Ms. Martinez, the fact that Sheridan is a small business, and the dismissal of the second cause of action, I am recommending a substantially lower penalty than what was proposed by staff. I believe that despite the lower penalty, these sums are substantial ones for a small company and will send a message to the inspection station community that non-compliant inspections will not be tolerated.

CONCLUSIONS

1. Between May 25, 2009 and January 25, 2010, the respondents, Sheridan Garage Corp., Samuel D. Nunez, Rouly B. Martinez, and Moises Martinez, used a simulator to perform OBD II emission inspections on 680 separate occasions.
2. 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 Sheridan Garage Corp. should be assessed a civil penalty of \$60,000, respondent Rouly B. Martinez should be assessed a civil penalty of \$30,000, respondent Samuel D. Nunez should be assessed a penalty of \$7,200, and respondent Moises Martinez should be assessed a penalty of \$5,600. All penalties should be paid within 30 days of service of the Commissioner's order.
2. The second cause of action, which alleges violations of 6 NYCRR § 217-1.4, should be dismissed.
3. All charges against respondent Guillermina Martinez should be dismissed.

Exhibit List

Matter of Sheridan Garage Corp., Samuel D. Nunez, Rouly B. Martinez, Moises Martinez and Guillermina Martinez

1. Notice of hearing and complaint dated August 18, 2010
2. Answer dated October 18, 2010
3. Statement of Readiness dated December 30, 2010
4. Assignment letter dated February 4, 2011
5. Notice of Enforcement Hearing dated November 29, 2011
6. Original Facility Application for Sheridan Garage Corp – ISP
7. Rouly Martinez Application for Certification as a Motor Vehicle Inspector
8. Moises Martinez Application for Certification as a Motor Vehicle Inspector
9. Samuel Nunez Application for Certification as a Motor Vehicle Inspector
10. NYS DMV certification of attached records w/records dated January 20, 2010
11. NYS DMV certification of attached records w/records dated September 1, 2010
12. Highlighted data
13. Highlighted data
Transcript of hearing re: Sheridan Garage, et al before NYS DMV on March 2, 2011, pp. 41-44 and court reporter's certification
DMV Finding Sheet – ALJ Water Zulkoski – Sheridan Garage Corp., et al, December 20, 2010
Decision of Appeal – DMV Administrative Appeals Board – Re: Sheridan Garage Corp., July 26, 2011
- 17a. Death certificate of Jose Martinez – July 2, 1998
- 17b. Birth certificate – Jose Abel Martinez Guerrero – September 17, 1998
- 17c. Birth certificate – Maria Isabel Martinez Guerrero – August 30, 1997
- 17d. Birth certificate – Chris Mary Martinez Guerrero – June 16, 1992