

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

In the Matter of the Alleged Violations of the Environmental Conservation Law (ECL) 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,

-by-

ORDER

DYRE AVE AUTO REPAIR CORP.¹, MINNELLI L. DE LA HOZ,² HARO L. LANTIGUA, GENELLY CORNELIO, and CRISTIAN A. TEJADA,

DEC Case No.
CO2-20100615-12

Respondents.

This administrative enforcement proceeding concerns allegations that respondents Dyre Ave Auto Repair Corp. (Dyre Auto), Minnelli L. De La Hoz, Haro L. Lantigua, Genelly Cornelio and Cristian A. Tejada 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 by serving on respondents a notice of hearing and complaint dated August 31, 2010.

Staff alleges that these violations occurred at an official emissions inspection station located at 3610 Dyre Avenue, Bronx, New York, during the period from June 9, 2009 through October 29, 2009. Staff alleges that respondent Minnelli L. De La Hoz owned and operated Dyre Auto, and respondents Lantigua, Cornelio and Tejada 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 577 separate occasions. Staff contends that, of these inspections, respondent Lantigua performed 241 inspections, respondent Tejada performed 292

¹ Department staff's caption incorrectly identifies Dyre Ave Auto Repair Corp. as "Dyre Auto Repair Corp." The caption has been revised to reflect the corporate name as it appears on the New York State Department of State records (see Exhibit 16).

² Department staff's caption identifies Ms. De La Hoz's first name as "Minnelly," but she spelled her first name as "Minnelli" in her November 1, 2010 letter to the Department responding to the complaint (see Exhibit 5), and signed her name as "Minnelli" in her capacity as President of respondent Dyre Ave Auto Repair Corp. on the application by Dyre Ave Auto Repair Corp. to be a DMV-authorized inspection station (see Exhibit 6). I have therefore corrected the caption to reflect accurately respondent De La Hoz's first name.

inspections, and respondent Cornelio performed 44 inspections (see hearing report [Hearing Report] of Administrative Law Judge [ALJ] Daniel P. O’Connell, at 10, Finding of Fact no. 28; id. at 14-15) and that, as a result, 574 certificates of inspection were issued based on these simulated inspections.

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 ¶¶ 10-14); 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. ¶¶ 15-19).

For these violations, Department staff requests a civil penalty of two hundred eighty-eight thousand five hundred dollars (\$288,500) (id. at Wherefore Clause).

None of the respondents was represented by counsel. Respondents Tejada, Cornelio, Lantigua, and De La Hoz each sent a letter in response to the complaint (see Exs. 2, 3, 4, 5).³ Although served through the New York Secretary of State (see Ex. 16) and by service on respondent and company owner De La Hoz, respondent Dyre Auto did not serve an answer. A hearing was held on February 2, 2012. Respondents Tejada and Cornelio appeared at the hearing, but respondents Dyre Auto, Lantigua, and De La Hoz did not appear at the hearing.

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 Dyre Auto, Lantigua and Tejada 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 Dyre Auto is liable for all 577 violations because, “[a]t the time the inspections were conducted, Dyre Auto held the license to ‘operate’ the official inspection station” (Hearing Report, at 26). I also agree with the ALJ that respondents Lantigua and Tejada should be held liable for the noncompliant inspections they each performed (id.).

According to the records of the New York State Department of State, of which I take official notice pursuant to 6 NYCRR 622.11(a)(5), Dyre Ave Auto Repair Corp. was dissolved as of October 26, 2011. The noncompliant inspections that are the subject of this enforcement proceeding occurred between June 9, 2009 and October 29, 2009, a period that predates the corporation’s dissolution. Where, as here, violations relate to events that occurred prior to the

³ The ALJ held that these letter-responses, which acknowledged receipt of the notice of hearing and complaint, served as respondents’ answers to the complaint (Hearing Report, at 15).

dissolution of a business, subsequent dissolution of that business has no bearing on the proceeding (see Business Corporation Law [BCL] §§ 1006[a][4] & [b] and 1009; Matter of Quadrozzi Concrete Corp., Order of the Commissioner, July 8, 2013, at 2; Matter of AMI Auto Sales Corp., Decision of the Commissioner, February 16, 2012, at 5.

With respect to respondent De La Hoz, I agree with the ALJ's conclusion that 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 2-3, 5 [Finding of Fact no. 4], 16-17). In addition, I agree that the record contains sufficient evidence to rebut the claim against respondent Cornelio (see Hearing Report, at 9-10, Findings of Fact nos. 25-27; id. at 33, Conclusion no. 6; see also Exs. 22 and 23 [reflecting that Ms. Cornelio was working at a hospital on the dates that her inspector's certificate was used for noncompliant inspections]). I therefore dismiss the claims against respondents De La Hoz and Cornelio.

With respect to the apparent use of Ms. Cornelio's inspector's certificate by someone other than Ms. Cornelio, I note that certified inspectors are responsible for the security of their own inspection certificate. If evidence in a proceeding reveals that an inspector failed to take any steps to prevent – or was aware of or affirmatively allowed – the use of his or her certificate by someone else, such failure may result in liability for noncompliant inspections relating to that certificate. Because there is no evidence in this case that Ms. Cornelio failed to prevent, was aware of, or affirmatively allowed the improper use of her inspection certificate, I do not find her liable for the noncompliant inspections performed by someone else using her inspection certificate. However, I am directing Department staff to contact the New York State Department of Motor Vehicles to advise that agency of the improper use of Ms. Cornelio's inspection certificate at the facility.

With respect to the second cause of action, violations of 6 NYCRR 217-1.4 cannot be found (Hearing Report, at 27-28) 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 two hundred eighty-eight thousand five hundred dollars (\$288,500), representing a penalty of \$500 for each violation. The ALJ noted that, consistent with the penalty range established by ECL 71-2103 for such violations, the maximum penalties “would exceed twelve million dollars” (Hearing Report, at 29), 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 29-31). I adopt the ALJ's

holding that respondent Tejada's claim of cooperation was not supported by the evidence (id. at 30-31) and that respondents offered no evidence supporting a claim of inability to pay (id. at 31).

The ALJ recommended a total civil penalty of ninety-seven thousand six hundred seventy dollars (\$97,670), assessed as follows: (i) respondent Dyre Auto to be assessed a civil penalty of fifty thousand seven hundred seventy dollars (\$50,770); (ii) respondent Lantigua to be assessed a civil penalty of twenty-one thousand two hundred dollars (\$21,200); and (iii) respondent Tejada to be assessed a civil penalty of twenty-five thousand seven hundred dollars (\$25,700) (Hearing Report, at 33, Recommendation nos. 1-3).⁴

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 New Power Muffler Inc., Order of the Commissioner, July 15, 2013 [New Power]; Matter of Autoramo, Inc., Order of the Commissioner, August 13, 2013 [Autoramo]). 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; New Power, at 5; Autoramo, at 4-5). With respect to individual inspectors, I allocated the remaining penalty amount based on the number of noncompliant inspections that each inspector conducted. 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 e.g. Jerome Muffler, at 4-5 [discussing examples of mitigating or aggravating factors]).

In this matter, at the time the violations occurred, Dyre Auto 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 5, Finding of Fact no. 3; see also id. at 26). Dyre Auto 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. Moreover, the evidence in this case reflects that someone other than Ms. Cornelio used her inspection certificate to conduct inspections. The official inspection station licensee – in this case Dyre Auto – has the

⁴ The ALJ noted that Department staff did not offer any argument concerning whether joint and several liability should be imposed (see Hearing Report, at 28). Even though joint and several liability may be imposed in administrative enforcement proceedings, no basis exists for holding the individual respondents responsible for each other's noncompliant inspections, and I decline to impose joint and several liability on respondents here (see e.g. New Power, at 4-5).

responsibility to have in place procedures and controls to ensure that no inspector or other person uses the inspector certification number of someone else.

In consideration of the penalty range established by ECL 71-2103(1), the impacts of this illegal activity (see Hearing Report at 29-30), and my decisions in Jerome Muffler, New Power and Autoramo, I am imposing on Dyre Auto a civil penalty of eighty-two thousand two hundred dollars (\$82,200).

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 such respondent's unique inspector's certificate number on inspection records of the New York Department of Motor Vehicles (DMV), the inspector-respondents in this case performed a number of improper inspections, as follows: Mr. Lantigua (241) and Mr. Tejada (292).⁵

Mr. Lantigua performed 241 noncompliant inspections, approximately forty-two percent (42%) of the 577 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. Lantigua in the amount of eight thousand six hundred dollars (\$8,600).

Mr. Tejada performed 292 noncompliant inspections, approximately fifty-one percent (51%) of the 577 noncompliant inspections at this facility. In addition, Mr. Tejada has been found liable after a hearing for committing violations of the same regulation at another facility (see Matter of East Tremont Repair Corp., Order of Commissioner, July 23, 2012). Applying the penalty guidelines set forth above, considering the number of inspections using noncompliant equipment and procedures that he performed, and applying as an aggravating factor Mr. Tejada's additional 265 violations at another facility, I assess a civil penalty against Mr. Tejada in the amount of twenty-one thousand dollars (\$21,000).⁶

In sum, the overall amount of the civil penalty assessed by this order is one hundred eleven thousand eight hundred dollars (\$111,800), 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.

⁵ See Exs. 7 (Lantigua's application for certification as a motor vehicle inspector, reflecting inspector certificate number 4WE8) and 9 (Tejada's application, certificate number 4KR8); see also Exs. 10, 11, 12, 13 (DMV records reflecting inspections conducted by respondents); see also Tr., at 63:20-64:4 (identifying number of noncompliant inspections connected with respondents' inspector certificate numbers, as evidenced by DMV records).

⁶ In his letter responding to the complaint, respondent Lantigua alleged that respondent Tejada brought to the facility "his own machines and equipment to make the inspections" (Exhibit 4). Lantigua did not appear or testify at the hearing, however, and no evidence to support this allegation was offered by any party at the hearing. Absent evidence to support this allegation, I have not considered it with respect to an additional aggravating factor concerning Tejada's civil penalty.

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

- I. Respondents Dyre Ave Auto Repair Corp., Haro L. Lantigua, and Cristian A. Tejada 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. Five hundred seventy-seven (577) inspections using noncompliant equipment and procedures were performed at Dyre Ave Auto Repair Corp., of which Haro L. Lantigua performed two hundred forty-one (241) and Cristian A. Tejada performed two hundred ninety-two (292).
- II. Department staff's claims that respondents Minnelli L. De La Hoz and Genelly Cornelio violated 6 NYCRR 217-4.2 are dismissed.
- III. Department staff's claim that respondents Dyre Ave Auto Repair Corp., Minnelli L. De La Hoz, Haro L. Lantigua, Genelly Cornelio and Cristian A. Tejada violated 6 NYCRR 217.1-4 is dismissed.
- IV. The following penalties are assessed:
 - A. Respondent Dyre Ave Auto Repair Corp. is hereby assessed a civil penalty in the amount of eighty-two thousand two hundred dollars (\$82,200);
 - B. Respondent Haro L. Lantigua is hereby assessed a civil penalty in the amount of eight thousand six hundred dollars (\$8,600); and
 - C. Respondent Cristian A. Tejada is hereby assessed a civil penalty in the amount of twenty-one thousand dollars (\$21,000).

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 Department of Environmental Conservation
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. Department staff is hereby directed to advise the New York State Department of Motor Vehicles (DMV) in writing of the improper use of the inspection certificate that DMV issued to Ms. Genelly Cornelio.
- VII. The provisions, terms and conditions of this order shall bind respondents Dyre Ave Auto Repair Corp., Haro L. Lantigua, and Cristian A. Tejada, and their agents, successors, and assigns in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: September 5, 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 New York State Environmental Conservation
Law Article 19, and Title 6 of the Official Compilation of
Codes, Rules and Regulations of the State of New York Part 217

- by -

Dyre Ave Auto Repair Corp.,
Minnelli L. De la Hoz,
Haro L. Lantigua,
Genelly Cornelio, and
Cristian A. Tejada,

Respondents

Case No. CO2-20100615-12

Hearing Report

- by -

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

August 31, 2012

Proceedings

Pursuant to a complaint dated August 31, 2010 (Exhibit 1), staff of the Department of Environmental Conservation (Department staff) alleged that Dyre Ave Auto Repair Corp.¹ (Dyre Auto), Minnelli L. De la Hoz, Haro L. Lantigua, Genelly Cornelio, and Cristian A. Tejada (collectively, Respondents) violated provisions of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Part 217, which concerns motor vehicle emission inspections.

The August 31, 2010 complaint asserted two causes of action. In the first, Department staff alleged that Respondents violated 6 NYCRR 217-4.2, which states that no person shall operate an official emissions inspection station using equipment or procedures that are not in compliance with the Department's procedures or standards. In the second cause of action, Department staff alleged that Respondents violated 6 NYCRR 217-1.4 by issuing emission certificates of inspection to motor vehicles that had not undergone an official emission inspection.

Both violations allegedly occurred from June 9, 2009 to October 29, 2009 at the Dyre Auto facility, located at 3610 Dyre Avenue, Bronx, New York. During this period, Department staff alleged, in the August 31, 2010 complaint, that Dyre Auto was a domestic business corporation duly authorized to do business in New York State, and that Minnelli L. De la Hoz owned and operated the inspection station as the chairman or chief executive officer of Dyre Auto. Department staff alleged further that Haro L. Lantigua, Cristian A. Tejada, and Genelly Cornelio worked at the facility as certified motor vehicle emission inspectors, and performed mandatory annual motor vehicle emission inspections.

According to Department staff, Respondents performed a total of 577 inspections from June 9, 2009 to October 29, 2009 using a device to substitute for, and simulate, the motor vehicle of record, and issued 574 emission certificates based on these simulated inspections.

¹ Exhibit 16 demonstrates that the corporate name on file with the New York State Department of State is: "Dyre Ave Auto Repair Corp."

For these alleged violations, Department staff requested a total civil penalty of \$288,500. Department staff did not apportion the requested civil penalty between the two causes of action. However, it appears that Department staff has requested \$500 for each of the 577 inspections that Respondents illegally performed.

Mr. Tejada answered the August 31, 2010 complaint with a letter dated October 19, 2010 (Exhibit 2). In his October 19, 2010 letter, Mr. Tejada acknowledged that he received notices of hearing and complaints for the following inspection facilities: (1) Sugar Hill Service Station, Inc., (2) East Tremont Repair Corp.,² (3) RV Auto Repairs, Inc., (4) Dyre Ave Auto Repair Corp., and (5) San Miguel Auto Repair Corp.

Ms. Cornelio stated, in a letter faxed on November 30, 2010 (Exhibit 3), that she received three different notices of hearing and complaints for the following inspection facilities: (1) Dyre Auto Repair Corp., (2) Mega Tire Shop Auto Repair, and (3) San Miguel Auto Repair Corp. In addition, Ms. Cornelio said that she "never worked in any of these shops as an inspector" (Exhibit 3).

In response to the August 31, 2010 complaint, Mr. Lantigua filed a letter dated November 1, 2010 (Exhibit 4), and attached a purported copy of portions of his US passport. In his letter, Mr. Lantigua stated, among other things, that his wife Minnelli De la Hoz has never worked at Dyre Auto. (Exhibit 4).

In addition, Mr. Lantigua stated that Mr. Tejada is not an employee of Dyre Auto. Mr. Lantigua stated further that he did not purchase any machines to perform inspections at Dyre Auto because Mr. Tejada had "his own machines and equipment to make the inspections" (Exhibit 4). Mr. Lantigua denied knowing that Mr. Tejada was not performing vehicle inspections properly.

Mr. Lantigua also said that he did not hire Ms. Cornelio to work at Dyre Auto as a certified motor vehicle emission inspector. Mr. Lantigua said that he met Ms. Cornelio for the first time at the prehearing conference held at the Department's Region 2 office on September 15, 2010. In his November 1, 2010 letter, Mr. Lantigua accused Mr. Tejada of using Mr. Lantigua's

² See *Matter of East Tremont Repair Corp. (East Tremont)*, Order dated July 23, 2012.

and Ms. Cornelio's certification cards to perform inspections at Dyre Auto.

Ms. De la Hoz filed a letter dated November 1, 2010 (Exhibit 5). Ms. De la Hoz acknowledged that she holds the title of president of Dyre Auto, but asserted that she never worked there. Rather, Ms. De la Hoz said that Mr. Lantigua, her husband, was responsible for day-to-day operations. Ms. De la Hoz requested that the charges alleged against her in the August 31, 2010 complaint be dismissed.

Blaise W. Constantakes, Esq., Assistant Counsel, filed a statement of readiness dated December 30, 2010, on behalf of Department staff. Department staff requested that the Office of Hearings and Mediation Services schedule this matter for hearing. By letter of March 18, 2011, Chief Administrative Law Judge James T. McClymonds informed the parties that the matter had been assigned to Administrative Law Judge Edward Buhrmaster. Subsequently, the matter was reassigned to me.

I issued a hearing notice dated December 14, 2011 announcing the date, time, and location of the hearing. As announced in that notice, the hearing convened on February 2, 2012 at 1:30 p.m. at the Department's Region 2 office in Long Island City, and concluded on that date.

Two witnesses testified on behalf of Department staff. Michael Devaux is a Vehicle Safety Technical Analyst II employed in the Yonkers office of the New York State Department of Motor Vehicles (NYS DMV), Division of Vehicle Safety, Office of Clean Air (Tr. at 9-10). James Clyne, P.E., is an environmental engineer and Chief for the Bureau of Mobile Sources and Technology Development in the Department's Division of Air Resources (Tr. at 41-42).

Mr. Tejada appeared at the hearing, and cross-examined Department staff's witnesses. Ms. Cornelio appeared at the hearing, and cross-examined Department staff's witnesses. Neither Mr. Tejada nor Ms. Cornelio testified at the February 2, 2012 hearing. The other Respondents did not appear at the hearing.

At the hearing (Tr. at 66-68), Ms. Cornelio requested an opportunity to present information to document the hours she worked as a full-time clerical assistant at the Metropolitan

Hospital. Though not a hospital employee, Ms. Cornelio stated that she worked for Winston Support Services, LLC, which is a placement agency. Subsequently, Ms. Cornelio filed a spread sheet, and a set of pay stubs, which are collectively marked for identification as Exhibit 22. Ms. Cornelio also filed a copy of a letter dated February 8, 2012 from Vanessa James, Payroll Coordinator, Winston Support Services, LLC, which is marked for identification as Exhibit 23. Initially, Department staff objected to the receipt of Exhibits 22 and 23 into evidence, but subsequently withdrew any objections concerning the receipt of Exhibits 22 and 23 into evidence.

With a letter dated February 16, 2012, Mr. Constantakes provided certified copies of the charge sheets/alleged violations notices from NYS DMV (Tr. at 27-29). The NYS DMV notices charge Dyre Auto, Mr. Lantigua and Mr. Tejada with violations of sections of the Vehicle and Traffic Law (VTL) and 15 NYCRR part 79 (Motor Vehicle Inspection). The February 16, 2012 cover letter and charge sheets are identified as Exhibit 24 in the hearing record, and are received into evidence as business records (see 6 NYCRR 622.1[a][6]).

On February 22, 2012, the Office of Hearings and Mediation Services received the transcript for the February 2, 2012 hearing. The hearing record closed on June 21, 2012 when Department staff withdrew any objections concerning the receipt of Exhibits 22 and 23. The hearing record includes 73 pages of transcript and 24 hearing exhibits. A copy of the exhibit list is attached to this hearing report as Appendix A.

FINDINGS OF FACT

I. The Licensee

1. Dyre Ave Auto Repair Corp. (Dyre Auto) applied to the New York State Department of Motor Vehicles (NYS DMV) and, subsequently, received a license to operate a motor vehicle inspection station at 3610 Dyre Avenue in the Bronx. The facility number assigned by NYS DMV to Dyre Auto was 7103628. (Tr. at 15-17, 21-23; Exhibit 6.)
2. To receive a license to operate a motor vehicle inspection station from the NYS DMV, the facility must

- employ at least one full-time certified inspector (see 15 NYCRR 79.8[b][2]; Tr. at 16, 47). After receiving the license, the facility must display signs showing the fees for the various inspections, as well as a list of the certified inspectors that includes their names, their inspection numbers, the inspection groups, and the expiration dates of the inspectors' certificates (see 15 NYCRR 79.13[f]). The bar code on an inspector's certificate is not displayed on the signs posted in the facility. (Tr. at 16-17, 34, 46-47.)
3. The licensee who operates a motor vehicle inspection station is responsible for all activities of the certified inspectors and must supervise them accordingly (see 15 NYCRR 79.8[b]; Tr. at 17).
 4. At the time of Dyre Auto's application to NYS DMV, Minnelli L. De la Hoz was its president, and held 100% of the ownership interest in Dyre Auto. (Exhibit 6.) No evidence was offered to show that Ms. De la Hoz was a certified motor vehicle emission inspector at the time of the alleged violations.

II. New York Vehicle Inspection Program

5. NYS DMV and the Department jointly administer the New York Vehicle Inspection Program (NYVIP), a Statewide annual emissions inspection program for gasoline-powered vehicles. NYVIP is required by the federal Clean Air Act Amendments of 1990 and U.S. Environmental Protection Agency regulations outlined at 40 CFR Part 51. (Tr. at 42-46, 54.)
6. For model year 1996 and newer light-duty vehicles, NYVIP requires the completion of an on-board diagnostic (OBD) emissions inspection commonly referred to as OBD II, because it succeeds a version that was previously employed. (Tr. at 42-43.)
7. The OBD II inspection monitors the operation of the engine and emissions control system in vehicles that are manufactured with the technology installed. (Tr. at 48-51.)

8. To perform an OBD II inspection, the NYVIP work station must be set up correctly. To do so, the NYVIP work station must receive an approved configuration from SGS Testcom. SGS Testcom is under contract with NYS DMV to manage the NYVIP program. SGS Testcom is responsible for the development, maintenance, and repair of inspection equipment, as well as the transmission of electronic data from the inspection station to NYS DMV. (Tr. at 15, 17, 46-47.)
9. Before an inspection can be completed with the NYVIP work station, the bar code on the facility's license must be scanned into the work station. This bar code is scanned once to assign the facility's number to the work station. (Tr. at 17, 46-47.)

III. Inspector Training and Certification

10. On August 23, 2006, Haro Lantigua applied to NYS DMV for certification as a motor vehicle inspector. Upon approval of Mr. Lantigua's application, NYS DMV assigned him certificate number 4WE8. (Tr. at 23-24; Exhibit 7.)
11. On March 1, 2008, Genelly Cornelio applied to NYS DMV for certification as a motor vehicle inspector. Upon approval of Ms. Cornelio's application, NYS DMV assigned her certificate number 7FZ7. (Tr. at 24-25; Exhibit 8.)
12. On October 19, 2004, Cristian A. Tejada applied to NYS DMV for certification as a motor vehicle inspector. Upon approval of his application, NYS DMV assigned Mr. Tejada certificate number 4KR8. (Tr. at 26; Exhibit 9.)
13. Each candidate who applies for certification as a motor vehicle emissions inspector must attend a three-hour training class provided by NYS DMV and, subsequently, pass a written test. During the training, the candidates are instructed, among other things, to safeguard their certification cards by securing them when not being used during the inspection process (see 15 NYCRR 79.17[c][2]), and to report lost or stolen certification cards to NYS DMV immediately (see 15 NYCRR 79.17[c][3]). The candidates are advised where to obtain a copy of the regulations, and to become familiar with them. After a

candidate passes the written test, he or she receives a temporary certificate. (Tr. at 18-20, 31-32.)

14. When the candidate returns to the facility, he or she must inform the licensee about obtaining a temporary certificate. To complete the certification process, the licensee enters the candidate's name and other information into the facility's NYVIP work station. Using the work station, the candidate can then take an on-line test. After passing the on-line test, the candidate is authorized to conduct OBD II inspections. (Tr. at 20-21, 31-32, 47.)

IV. OBD II Inspections

15. To begin an OBD II inspection, the inspector scans the bar code on his or her certification card into the NYVIP work station. (Tr. at 11, 47.)
16. The OBD II inspection involves collecting information from the vehicle being presented, such as make, model, and model year. This may be done by scanning the NYS DMV registration bar code on the vehicle or manually entering information using a keyboard, or some combination of the two. At the same time, the inspector also records the NYS DMV registration-based vehicle identification number (VIN), which is a unique 17-character alphanumeric identifier. (Tr. at 11-12, 47.)
17. Based on the vehicle information, the NYVIP work station makes a determination as to what type of inspection the vehicle should receive based on its age and weight, and a connection, via the internet, is made to NYS DMV to try to match this information to that contained in the NYS DMV registration file. When the information is matched on the NYS DMV side, the inspection continues with a series of menus that allow for the completion of the safety inspection. After that, another series of screens comes up for what is known as the emission control device (ECD) checks. (Tr. at 11-12, 47-50.)
18. The OBD II inspection is the final inspection component. The first two parts of this inspection ask the inspector to put the key in the ignition and turn it to what is

- known as the "key on, engine off" position, such that the key is turned but the vehicle is not running. At this point the malfunction indicator light (MIL) should come on, demonstrating that the bulb has not burned out. The next step involves moving to the "key on, engine running" position, which involves turning the ignition on, so that the engine is running, though the car remains idling while parked at the station. At this point, the light should go off, indicating that the OBD system has not found a fault. If the light remains on, it indicates an emissions failure. (Tr. at 13-14, 48, 50.)
19. A complete vehicle inspection includes a safety inspection, a visual inspection of the emission control devices (including the gas cap), and the OBD II inspection itself. (Tr. at 12-13.)
 20. Following these initial steps, the inspector is directed to plug the NYVIP work station connector into the vehicle's diagnostic link connector (DLC), which is found in every vehicle that is OBD II compliant. With the connection established, the NYVIP work station communicates with the vehicle's onboard computer with standardized requests for which standardized responses are sent back from the vehicle. Based on the information provided during this exchange, which includes identifying information for the vehicle, it is determined whether the vehicle will pass or fail the inspection. (Tr. at 12-14, 48-49.)
 21. Once the electronic exchange between the vehicle's onboard computer and the NYVIP work station is completed, the NYVIP work station determines whether the vehicle passes or fails the inspection. If the vehicle passes the inspection, the work station prompts the inspector to scan the inspection sticker, which the inspector then places on the windshield, so that NYS DMV can track the sticker (or certificate) to the inspection. The inspector must indicate that he or she scanned the sticker and affixed it to the vehicle. The record of the full inspection is then sent electronically to NYS DMV. (Tr. at 14-15, 51-52.)

V. Simulator Usage

22. Department staff reviewed all of the NYVIP inspection data for 10,000 to 11,000 facilities located throughout the State from September 2004 to August 2010. Based on this analysis, Department staff discovered 15 data fields, exclusive of the RPM value, that constitute an electronic signature for a simulated OBD II inspection. A review of the inspection records collected from March 2008 to July 2010 showed a simulator profile at 44 inspection facilities, including Dyre Auto. By comparison, Department staff found no vehicles matching the 15-data field signature for data collected from September 2004 to February 28, 2008. Similarly, after July 2010, the electronic signature for the simulator did not appear in any inspection data. (Tr. at 56-57.)
23. Inspectors at Dyre Auto performed OBD II inspections during the period between June 9, 2009 and October 29, 2009 (Tr. at 58-60; Exhibits 10, 11, 12, and 13).
24. Data collected from the OBD II inspections performed at Dyre Auto from June 2009 through October 2009 shows that inspectors used the "Ozen" simulator (Tr. at 56, 60-62).
25. From July 6, 2009 to August 7, 2009, Genelly Cornelio worked Monday through Friday from 9:00 a.m. to 5:00 p.m. at the Metropolitan Hospital in Manhattan (Exhibits 22 and 23).
26. Ms. Cornelio's certification number (7FZ7 [Exhibit 8]) is associated with more than 70 inspections at Dyre Auto from June 30, 2009 to August 3, 2009. Of the total number of inspections associated with Ms. Cornelio's certification number during this period, a simulator was used for 44 of them. After August 3, 2009, Ms. Cornelio's certification number is not associated with any other inspections at Dyre Auto. (Exhibits 10 and 12).
27. A comparison of the dates of the vehicle inspections (Exhibits 10 and 12) associated with Ms. Cornelio's certification number (7EZ7 [Exhibit 8]) with the dates from her pay stubs (Exhibit 22) shows that vehicle inspections were performed at Dyre Auto in the Bronx from

July 6, 2009 to August 3, 2009 with Ms. Cornelio's certification card when she was working at the Metropolitan Hospital in Manhattan. Ms. Cornelio was not at Dyre Auto when these 44 illegal inspections were performed.

28. From June 9, 2009 through October 29, 2009, inspectors at Dyre Auto performed a total of 577 inspections using a device to substitute for, and simulate, the motor vehicles of record. Of the total number, Mr. Lantigua performed 241 of these inspections, and Mr. Tejada performed 292 inspections. Someone with access to the NYVIP work station at Dyre Auto and Ms. Cornelio's certification card performed 44 inspections with a simulator. (Tr. at 57, 63-64; Exhibit 11 and 13.)

Discussion

According to the August 31, 2010 complaint (Exhibit 1), Dyre Auto and its certified inspectors, Mr. Lantigua, Ms. Cornelio, and Mr. Tejada, did not check the OBD II systems as part of their inspections for 577 motor vehicles from June 9, 2009 through October 29, 2009. Rather, Department staff alleges that the inspectors simulated the OBD II inspections for these vehicles by using non-compliant equipment and procedures, and then improperly issued emission certificates.

On behalf of Department staff, Mr. Clyne explained that OBD II testing is part of the New York vehicle inspection program (NYVIP), which is required under the federal Clean Air Act, to reduce low-level ozone pollution. Pursuant to federal law and regulation, New York is required to submit a detailed State Implementation Plan (SIP) describing how to implement and enforce the NYVIP. For the vehicle inspection program, New York submitted SIP revisions to the U.S. Environmental Protection Agency in 2006, which outlined the Statewide program. In 2009, the Department committed to a vigorous enforcement program based on the review of enhanced inspection data. (Tr. at 42-44, 54.)

I. Determining the Simulator Signature

According to Mr. Clyne, in September 2008, NYS DMV alerted Department staff to what DMV staff believed was the illegal use

of simulators within the greater New York metropolitan area. DMV staff's concern was based on what it considered to be very repetitive, and extremely unrealistic readings for engine revolutions per minute (RPM) that had been recorded from vehicles during OBD II inspections. Engine RPM is recorded to ensure that the vehicle is running while the vehicle is connected to the NYVIP work station. Mr. Clyne testified that during a normal inspection, with the car idling in park, the RPM reading should be between 300 and 1,100. However, some recorded RPM readings were frequently in excess of 5,000. Mr. Clyne explained that such readings were unusual because each vehicle should produce a different RPM reading. (Tr. at 54-55.)

Mr. Clyne testified further that after reviewing the inspection data from the greater New York metropolitan area, Department staff identified five or six inspection stations that were reporting very high RPM readings (Tr. at 55). Then, with the assistance of DMV staff, and the New York State Attorney General's Office, Department staff initiated an undercover investigation of these facilities in July 2009 to monitor vehicles during inspections (Tr. at 55).

Department staff concluded, however, that a high RPM value alone was not a sufficient indicator of simulator usage. Staff undertook an extensive analysis of data collected at all facilities in New York State from September 2004 to August 2010 in an attempt to identify a better profile. Based on this analysis, Department staff discovered 15 data fields, exclusive of the RPM value, that constitute an electronic signature for a simulated OBD II inspection. A review of the inspection records collected from March 2008 to July 2010 showed a simulator profile at 44 inspection facilities, including Dyre Auto. By comparison, Department staff found no vehicles matching the 15-data field signature for data collected from September 2004 to February 28, 2008. Similarly, after July 2010, which is when the enforcement initiative commenced, the electronic signature for the simulator did not appear in any inspection data. (Tr. at 55-57.)

Exhibits 10, 11, 12 and 13 are abstracts of data collected from the OBD II inspections performed at Dyre Auto from June 2009 through December 2009. Mr. Clyne explained that he requested this information from NYS DMV, and NYS DMV provided certified paper records as well as the data in electronic

format. According to Mr. Clyne, the data show that a simulator was used at Dyre Auto. (Tr. at 58-59.)

Referring to Exhibits 10, 11, 12 and 13, Mr. Clyne identified the column labeled "DMV_FACILITY_NUM," which is the identification number for the inspection facility. Only the facility identification number for Dyre Auto (7103628 [Exhibit 6]) appears in this column. (Tr. at 60.) Mr. Clyne also identified the column labeled "CI_NUM," which provides the identification numbers for the inspectors (Tr. at 60).

From more than 100 fields generated during the course of an inspection, Mr. Clyne selected the data fields shown in Exhibits 10, 11, 12, and 13 (Tr. at 58-60). From left to right across the top of each page on Exhibits 10, 11, 12, and 13, there are headings for each column of data that is displayed:

DMV_VIN_NUM is the vehicle identification number, which is scanned or manually entered into the NYVIP work station.

INSP_DTE shows the date and time of the inspection.

DMV_FACILITY_NUM is the number that was assigned to the station by NYS DMV, and is programmed into the NYVIP work station when the facility bar code is scanned. In each case, the number is 71043628, which is the number that appears in the upper left hand corner of the first page of Dyre Auto's original facility application (Exhibit 6).

ODOMETER_READING is recorded manually by the inspector.

REC_NUM is the record number, which is a serial tally of inspections.

CI_NUM (certified inspector number) is the unique alphanumeric identifier the NYS DMV assigns to each inspector. Mr. Lantigua's certificate number is 4WE8 (Exhibit 7). Ms. Cornelio's certificate number 7FZ7 (Exhibit 8), and Mr. Tejada's certificate number is 4KR8 (Exhibit 9). Prior to starting the inspection, the inspector scans the bar code on his or her

certification card, and the inspector's certificate number is recorded for each inspection.

DATA_ENTRY_METHOD indicates how the vehicle information was entered into the inspection record.

GAS_CAP_RESULT is a pass/fail indicator for the gas cap check.

ASSIGNED_CERT_NUM is taken from the scanned bar code on the sticker that the inspector issued for the vehicle passing the inspection.

VEH_YEAR is the model year of the vehicle.

DMV_VEH_MAKE_CDE is the make of the vehicle.

PUBLIC_MODEL_NAME is the model name of the vehicle.

NYVIP_UNIT_NUM is the identifier for the work station that was assigned to the inspection station by SGS Testcom, the program manager. Two numbers are shown on Exhibits 10, 11, 12, and 13; the first is B000006778, and the second is A000010121.

Mr. Clyne testified that to the right of these headings on Exhibits 10, 11, 12 and 13, are the headings for entries which, when read together, form the 15-field electronic signature that constitutes the profile of the simulators used in the greater New York metropolitan area (Tr. at 60-62).

The simulator used at the Dyre Auto facility is referred to as the "Ozen." The headings, and the respective entries (shown here in quotation marks) that are consistent with the profile for the Ozen simulator are as follows:

PCM_ID1	"10"
PCM_ID2	"0"
PID_CNT1	"11"

PIC_CNT2	"0" ³
RR_COMP_COMPONENTS	"R"
RR_MISFIRE	"R"
RR_FUEL_CONTROL	"R"
RR_CATALYST	"R"
RR_O2_SENSOR	"R"
RR_EGR	"R"
RR_EVAP_EMISS	"R"
RR_HEATED_CATA	"U"
RR_O2_SENSOR_HEAT	"R"
RR_SEC_AIR_INJ	"U"
RR_AC	"U"

(Tr. at 56, 60-62.)

Mr. Clyne provided an example of an inspection where the Ozen simulator was used. Referring to Exhibit 12 (page 4 of 9), Mr. Clyne said that Mr. Tejada (Certification No. 4KR8) inspected a 2005 Nissan Altima on July 11, 2009 at 1347 (*i.e.*, 1:47 p.m.) that failed the OBD II inspection due to the fifth criteria, which is the readiness evaluation. Mr. Tejada subsequently re-inspected the same vehicle on July 15, 2009 at 1211 (*i.e.*, 12:11 p.m.); however, the 15-field electronic signature characteristic of the Ozen profile is reported. (Tr. at 62-63.)

In addition, Mr. Clyne pointed out that for a typical OBD II vehicle inspection for model years 2005 to present, the information presented in the "DMV_VIN_NUM" and "PCM_VIN" columns should be the same. The information reported in the DMV_VIN_NUM column is the vehicle identification number, which the inspector enters into the NYVIP work station by scanning the vehicle's bar code. The information presented in the PCM_VIN column is the

³ With reference to Exhibits 10, 11, 12 and 13, Mr. Clyne testified that the third data field of the electronic signature is "PID_CNT1 which stands for PID count one, followed by PIC_CNT2, which stands for PID [sic] count two" (Tr. at 61).

vehicle identification number reported electronically during the OBD II inspection. (Tr. at 62; Exhibits 10, 11, 12, and 13).

Referring to Exhibits 10, 11, 12 and 13, Mr. Clyne testified that, from June 9, 2009 to October 29, 2009, the 15-field data signature for the simulator appeared at Dyre Auto during 577 OBD II inspections. Mr. Clyne said that he was able to sort the data to determine who performed these inspections. For certification No. 4WE8 (Exhibit 7), Mr. Lantigua performed 241 inspections. For certification No. 7FZ7 (Exhibit 8), either Ms. Cornelio, or someone with access to her certification card, performed 44 inspections, and for certification No. 4KR8 (Exhibit 9), Mr. Tejada performed 292 inspections. (Tr. at 63-64.)

II. Proof of Service

When, as here, some of Respondents do not appear at the administrative hearing, there is a threshold question whether the non-appearing Respondents received a copy of the notice of hearing and complaint in a manner consistent with the regulations. Pursuant to 6 NYCRR 622.3(a)(3), service of the notice of hearing and complaint must be either by personal service consistent with the Civil Practice Law and Rules (CPLR), or by certified mail.

As noted above, each Respondent, except for Dyre Auto, filed a letter after receiving the Department's August 31, 2010 notice of hearing and complaint (Exhibits 2, 3, 4, and 5), which serve as their respective answers to the August 31, 2010 complaint (see 6 NYCRR 622.4). In addition, Department staff provided affidavits of service for those Respondents who did not appear at the February 2, 2012 hearing.

With respect to Dyre Auto, Department staff offered Exhibit 16. This exhibit is a copy of a receipt of service, dated September 9, 2010, from the New York State Department of State, Division of Corporations, State Records and Uniform Commercial Codes. The New York Secretary of State acts as the statutory agent for personal service of process for domestic corporations, such as Dyre Auto (see Business Corporation Law § 306[b][1]). Service upon Dyre Auto in this manner is consistent with the requirements outlined at 6 NYCRR 622.3(a)(3) (see CPLR § 308).

Exhibit 14 is an affidavit of service prepared by Environmental Conservation Officer (ECO) Shea Mathis. According to this affidavit, ECO Mathis served Haro L. Lantigua with a copy of the August 31, 2010 notice of hearing and complaint at Dyre Auto on October 8, 2010. I conclude, therefore, that Exhibit 14 demonstrates that Mr. Lantigua was served in a manner consistent with the requirements outlined at 6 NYCRR 622.3(a)(3).

Exhibit 15 is an affidavit of service also prepared by ECO Mathis. According to this affidavit, ECO Mathis served Minnelli L. De la Hoz with a copy of the August 31, 2010 notice of hearing and complaint at Dyre Auto on October 8, 2010. I conclude, therefore, that Exhibit 15 demonstrates that Ms. De la Hoz was served in a manner consistent with the requirements outlined at 6 NYCRR 622.3(a)(3).

As noted above, Ms. Cornelio and Mr. Tejada appeared at the February 2, 2012 hearing. Consequently, I conclude that Department staff duly served Ms. Cornelio and Mr. Tejada with a copy of the August 31, 2010 notice of hearing and complaint in a manner consistent with the requirements outlined at 6 NYCRR 622.3(a)(3).

III. Individual Corporate Officer Liability

According to the August 31, 2010 complaint, Ms. De la Hoz was the Chairman/Chief Executive Officer of Dyre Auto, and owned and operated Dyre Auto at the time of the alleged violations (¶¶ 3 and 4, Exhibit 1). At the hearing, Department staff offered Exhibit 6, which is a certified copy of the original facility application (DMV form VS-1 [10/05]) filed by Dyre Auto. With this application, Dyre Auto sought, and subsequently received, a license to inspect motor vehicles from NYS DMV. Ms. De la Hoz is identified on page 2 of 4 of the application (see Exhibit 6) as the president of Dyre Auto, and holds 100% of the stock or ownership of the corporation. Therefore, Exhibit 6 connects Ms. De la Hoz to Dyre Auto, as a corporate officer. However, Dyre Auto, as a corporation, exists as a separate legal entity independent of its ownership.

To find that Ms. De la Hoz, as a corporate officer, is individually liable for the violations alleged in the August 31, 2010 complaint, Department staff must present a legal theory

and, as appropriate, evidence that the individual corporate officer was responsible for, or influenced, the corporate actions that constituted the violations. In this case, Department staff offered nothing to show that Ms. De la Hoz, as the president of the corporation, was personally liable for the illegal inspections allegedly performed by Mr. Lantigua, Mr. Tejada, and Ms. Cornelio.

In the absence of such a showing, I cannot conclude that Ms. De la Hoz is personally liable for any of the violations alleged in the complaint. Accordingly, the Commissioner should dismiss the charges alleged in the complaint against her.

IV. Respondents' Defenses

The contentions raised by the certified inspectors charged in the August 31, 2010 complaint are addressed below.

A. Haro L. Lantigua

In response to the charges alleged in the August 31, 2010 complaint, Mr. Lantigua filed a letter dated November 1, 2010, which is identified in the hearing record as Exhibit 4. Department staff offered Exhibit 4 for the sole purpose of establishing that a copy of the August 31, 2010 notice of hearing and complaint was properly served upon Mr. Lantigua. With respect to the captioned matter, I will consider Mr. Lantigua's November 1, 2010 letter to be his answer to the August 31, 2010 complaint (see 6 NYCRR 622.4).

In his November 1, 2010 letter, Mr. Lantigua said, among other things, that he is frequently out of the country visiting the Dominican Republic, and was not at Dyre Auto to perform any of the inspections associated with his certification number during the period alleged in the August 31, 2010 complaint. To support this statement, Mr. Lantigua attached a photocopy of portions of his purported US passport to demonstrate the dates and duration of his trips to the Dominican Republic.

Mr. Lantigua did not appear at the hearing⁴ to testify about his travel, and no evidence in this hearing record links the documentation attached to Mr. Lantigua's November 1, 2010 letter (Exhibit 4) to him. Moreover, the photocopy of Mr. Lantigua's purported passport is of very poor quality. Upon examination, I cannot distinguish the entry and departure stamps to and from the United States from those to and from the Dominican Republic. Therefore, assuming that the passport is Mr. Lantigua's, which has not been established, I cannot determine when Mr. Lantigua left the United States and for how long.

Given these circumstances, the unauthenticated passport photocopy attached to Mr. Lantigua's November 1, 2010 letter is not sufficient to serve as the basis for any findings of fact concerning Mr. Lantigua's whereabouts at the time of the alleged violations. I conclude further that the other unsubstantiated statements in Mr. Lantigua's November 1, 2010 letter are not sufficient to serve as the basis for any findings of fact concerning operations at Dyre Auto.

B. Genelly Cornelio

In response to the August 31, 2010 complaint, Genelly Cornelio faxed a letter on November 30, 2010 in which she stated that she never worked at Dyre Auto or at any other inspection facility.⁵ Ms. Cornelio appeared at the February 2, 2012 hearing, but did not testify. In her closing statement, however, Ms. Cornelio said that in 2009, she worked full-time, during the day, through a temporary placement agency, at Metropolitan Hospital, and was a full-time student at Bronx Community College. Ms. Cornelio requested an opportunity, during the February 2, 2012 hearing, to present information about when and where she was working and going to school at the time of the alleged violations. (Tr. at 69-70, 72-73.)

⁴ If Mr. Lantigua had appeared at the February 2, 2012 hearing, he would have had the opportunity to examine all the evidence presented by the other parties to the proceeding, and to offer any evidence to support the unsworn statements outlined in his November 1, 2010 letter, subject to examination by the other parties (see 6 NYCRR 622.10 and 622.11).

⁵ Department staff also served two separate complaints upon Ms. Cornelio concerning alleged violations at Mega Tire Shop Auto Repair, and at San Miguel Auto Repair Corp.

With an email dated February 6, 2012, Ms. Cornelio provided a document entitled "Dyre Auto Ave.xlsx," which is a list of dates and times, and copies of pay stubs from Winston Resources, LLC. Collectively, these documents are identified in the hearing record as Exhibit 22. Subsequently, attached to a separate email, Ms. Cornelio provided a copy of a letter dated February 8, 2012 from Vanessa James, a payroll coordinator from Winston Support Services, LLC, which is a subsidiary of Winston Resources, LLC. The February 8, 2012 letter is identified as Exhibit 23.

Exhibit 23 states, in part, that Ms. Cornelio registered as a per diem clerical assistant in February 2009, and that "Ms. Cornelio's assignment lasted from 05/09-09/09, her scheduled (sic) was Mondays-Fridays, 9:00am - 5:00pm" (Exhibit 23). Exhibit 22 includes five weekly pay stubs dated July 12, 19 and 26, 2009, and August 2 and 9, 2009. In 2009, these dates were Sundays. It can reasonably be inferred that the pay period that ended on Sunday, July 12 began on the previous Monday, which was July 6, 2009. According to the pay stubs, Ms. Cornelio worked from 30 to 35 hours during each of these weekly pay periods. Therefore, from July 6, 2009 to August 7, 2009, Ms. Cornelio worked Monday through Friday, from 9:00 a.m. to 5:00 p.m., at the Metropolitan Hospital in Manhattan (Exhibits 22 and 23).

Exhibits 10 and 12 are abstracts of data collected from the OBD II inspections performed at Dyre Auto from June 2009 through September 2009. Mr. Clyne explained that he requested this information from NYS DMV, and NYS DMV provided certified paper records (Exhibits 10 and 12), as well as the data in electronic format. According to Mr. Clyne, the data show that a simulator was used at Dyre Auto. (Tr. at 58-62.)

With reference to Exhibits 10 and 12, Ms. Cornelio's certification number (7FZ7 [Exhibit 8]) is associated with more than 70 inspections at Dyre Auto from June 30, 2009 to August 3, 2009. These inspections occurred on every day of the week except Sunday. These inspections took place as early as 8:36 a.m. on Wednesday, July 1, 2009, for example (see Exhibit 12, page 3 of 9). Inspections occurred after 5:00 p.m. (see Exhibit 12, page 3 of 9 to page 6 of 9) on Wednesday, July 1, 2009 at 17:38 (5:38 p.m.), Thursday, July 2 at 17:12 (5:12 p.m.), Wednesday, July 15, 2009 at 17:28 (5:28 p.m.), Monday, July 20, 2009 at 17:12 (5:12 p.m.), Thursday, July 23 at 17:23 (5:23 p.m.), and Monday, August 3, 2009 at 17:02 (5:02 p.m.). Of the

total number of inspections associated with Ms. Cornelio's certification number from June 30, 2009 to August 3, 2009, a simulator was used for 44 of them. After August 3, 2009, Ms. Cornelio's certification number is not associated with any other inspections at Dyre Auto. (See Exhibits 11 and 13).

The dates of the vehicle inspections (Exhibits 10 and 12) associated with Ms. Cornelio's certification number (7FZ7 [Exhibit 8]) were compared with the dates from her pay stubs (Exhibit 22). This comparison shows that vehicle inspections were performed at Dyre Auto in the Bronx from July 6, 2009 to August 3, 2009 with Ms. Cornelio's certification card when she was working at the Metropolitan Hospital in Manhattan. It can reasonably be inferred that Ms. Cornelio would not have been paid for the hours that she worked at the Metropolitan Hospital, which coincide with the times that vehicle inspections were performed at Dyre Auto, if she had not been present at the hospital.

An element of the violation asserted in the August 31, 2010 complaint is that the inspector alleged to have performed the illegal inspection was present at the facility and improperly operated the NYVIP work station. If unrebutted, the NYS DMV data sheets of the inspections (Exhibits 10, 11, 12 and 13), offered by Department staff are presumptive proof linking the certified inspector to the inspections performed at the facility. Ms. Cornelio has offered evidence to rebut that presumption, however. Because Ms. Cornelio was not at Dyre Auto when illegal inspections were performed, someone other than she operated the NYVIP equipment improperly and failed to comply with the Department's procedures outlined in the regulations. Consequently, Ms. Cornelio did not violate 6 NYCRR 217-4.2 from June 9, 2009 to October 29, 2009 at Dyre Auto as alleged in the August 31, 2010 complaint, and the Commissioner should dismiss the charge.

Based on the forgoing, however, Ms. Cornelio has not complied with all applicable regulations. As noted above, inspectors are instructed to safeguard their certification cards by securing them when not being used during the inspection process (see 15 NYCRR 79.17[c][2]), and to report lost or stolen certification cards to NYS DMV immediately (see 15 NYCRR 79.17[c][3]) (Tr. at 19-20). Given the circumstances of this matter, I find that Ms. Cornelio did not properly secure her certification card, and failed to report her lost or stolen

certification card to NYS DMV. Although violations of 15 NYCRR part 79 are beyond the scope of this administrative enforcement hearing, Ms. Cornelio's failure to comply with these regulations allowed someone else to conduct illegal inspections while concealing his or her identity.

C. Cristian A. Tejada

In Mr. Tejada's letter dated October 19, 2010 (Exhibit 2), he stated that he received five notices from the Department alleging violations at five different inspection facilities. The facilities identified in Mr. Tejada's correspondence are: (1) Sugar Hill Service Station, Inc., (2) East Tremont Repair Corp., (3) RV Auto Repairs, Inc., (4) Dyre Ave. Auto Repair Corp., and (5) San Miguel Auto Repair Corp.

Mr. Tejada did not testify at the hearing (Tr. at 65). He cross-examined Mr. Devaux (Tr. at 31-39), and offered a closing statement (Tr. at 69). In his closing statement, Mr. Tejada reiterated that he received five notices of hearing and complaints from Department staff concerning five different facilities. After receiving the complaints, Mr. Tejada stated that he reported to DMV that his certification card was either missing or stolen, and that DMV issued a new certification card to him. Mr. Tejada argued further that anybody could easily re-create the bar code on an inspector's certification card based on the information presented on the sign posted in the facility. According to Mr. Tejada, Mr. Lantigua interviewed Ms. Cornelio for a position at Dyre Auto, but did not hire her. (Tr. at 69.) Mr. Tejada's various arguments are discussed below.

1. Working at Multiple Inspection Facilities

Department staff has identified Mr. Tejada as a respondent in five matters related to motor vehicle inspection facilities. Each complaint identifies a specific period when violations allegedly occurred. The following chart identifies each facility and the period when the alleged violations took place.

Facility	Period of Alleged Violations
East Tremont Repair Corp.	June 10, 2008 - August 9, 2009

Sugar Hill Service Station, Inc.	October 14 - 27, 2008
Dyre Auto Repair Corp.	June 9, 2009 - October 29, 2009
San Miguel Auto Repair Corp.	February 14, 2009 - July 20, 2010
RV Auto Repairs, Inc.	No Information Available

Neither Mr. Tejada nor Department staff offered any information about the *RV Auto Repairs, Inc.* matter.

Given his assertion, Mr. Tejada has the burden to prove there was a conflict concerning when the dates of the alleged violations took place at Dyre Auto and the other facilities (see 6 NYCRR 622.11[b][2]). Based on the individual notices of hearings and complaints for the administrative enforcement actions listed above, the periods of alleged violations overlap. However, Mr. Tejada offered no evidence to identify actual conflicts about working, or being present, at more than one facility at any particular time.

For example, contrary to Mr. Tejada's assertion, no conflict exists based on a comparison of the dates for the violations asserted in the captioned matter with those concerning the Sugar Hill Service Station, Inc. (Sugar Hill) matter. All alleged violations concerning the Sugar Hill matter occurred in 2008, which predates the June 9, 2009 to October 29, 2009 period alleged in this matter. In addition, the hearing record concerning the *East Tremont* matter demonstrates that Mr. Tejada did not perform any of the vehicle inspections at East Tremont from June 9, 2009 through October 29, 2009, which is the period at issue here (see *East Tremont*, supra, Hearing Report at 19).

As noted above, Mr. Tejada's arguments presented during his closing statement are not evidence that can be relied upon as the basis for any findings of fact. In the absence of any proof, I conclude that Mr. Tejada did not meet his burden, and conclude further that his unsupported assertion is not credible.

2. Fake Certifications

The sign posted at every inspection facility, as required by the regulations (see 15 NYCRR 79.13[f]), must include the first and last names of the inspectors, their respective certification numbers, the expiration date of the certifications, the type or types of inspections that each inspector may perform, and the fees for the inspections. The information on the posted sign is generally the same as that printed on the inspector's certification card. However, the bar code on the certification card, which the inspector scans into the work station for each OBD II inspection, does not appear on the posted sign. (Tr. at 34.)

The availability of the information on the required sign to members of the public is the basis for Mr. Tejada's claim that the bar code on a certification card could be reproduced and used to perform an OBD II inspection. Based on the record of this proceeding, however, I find that Mr. Tejada did not demonstrate that someone reproduced his certification card, or at least the bar code on it, and subsequently used it to perform motor vehicle emission inspections. Conspicuously absent from Mr. Tejada's presentation is an explanation of who may have used the fake certification card and, more importantly, how someone could access the NYVIP work station at Dyre Auto.

At the hearing, Mr. Devaux explained how passing the inspector certification training would result in a temporary certification that the newly-certified inspector would present to the licensee who, in turn, would enter information about the inspector into the NYVIP work station at the facility. Subsequently, the inspector is required to take an on-line exam to complete the process of becoming a certified inspector. Thereafter, the inspector must scan the bar code on his or her certification card into the work station each time any OBD II inspection is performed. When vehicles pass the OBD II inspection, the inspector must also scan the bar code on the new inspection sticker to complete the inspection before placing the sticker on the windshield of the vehicle. (Tr. at 14-15, 18-21, 31-32.)

Mr. Devaux's testimony demonstrates that access to any NYVIP work station would be limited to the inspectors employed

by the facility. Accordingly, Mr. Tejada did not explain how someone could walk into Dyre Auto from the street with a fake certification card, and conduct over 200 inspections without being confronted by Mr. Tejada, the other inspectors, the manager, or the owner of the facility.

Finally, Mr. Tejada offered no proof to show that the work stations at Dyre Auto (see Exhibits 12 and 13, column heading entitled, "NYVIP_UNIT_NUM" [B000006778 and A000010121]) had been lost or stolen, and were subsequently used to conduct OBD II inspections. Under such circumstances, a supply of inspection stickers would also be needed because the bar code on the inspection sticker must be scanned in order to complete the OBD II inspection (Tr. at 14-15).

With respect to the illegal reproduction of bar codes to perform OBD II inspections, I do not find Mr. Tejada's assertion credible in the absence of any supporting evidence that addresses the circumstances outlined above.

V. Department staff's Proof

Department staff's case relies on the OBD II data (Exhibits 10, 11, 12 and 13), as well as the application documents maintained by NYS DMV (Exhibits 6, 7, 8 and 9), which connect the inspections to the facility and the inspectors. Department staff used the facility number that the NYS DMV assigned to the inspection station, and the certificate numbers assigned to the inspectors, to identify the parties responsible for the inspections documented in Exhibits 10, 11, 12 and 13 because those exhibits do not identify them by name.

Department staff demonstrated that, at the Dyre Auto facility, Mr. Lantigua, and Mr. Tejada used a simulator for over 500 OBD II inspections between June 9, 2009 and October 29, 2009. This was done through a combination of the documentary evidence, all of which Mr. Clyne retrieved from NYS DMV as certified copies, and the testimony of Mr. Clyne associating simulator use with the 15-field electronic signature that appears in the inspection data (Exhibits 10, 11, 12 and 13). Ms. Cornelio, however, presented evidence to rebut the presumptive proof offered by Department staff, and demonstrated that she was not present at Dyre Auto when the illegal

inspections associated with her certification number (7FZ7 [Exhibit 8]) were performed.

Respondents did not impeach Mr. Clyne's testimony about the identification and significance of the electronic signature. In particular, Mr. Lantigua and Mr. Tejada did not offer any evidence to demonstrate their respective claims.

There is no question that the inspections documented in Exhibits 10, 11, 12 and 13 are attributable to Dyre Auto because its NYS DMV-assigned facility number (7103628 [Exhibit 6]), which had been scanned into the NYVIP work station, appears for each inspection. Also, there is no question that Mr. Lantigua (4WE8 [Exhibit 7]), and Mr. Tejada (4KR8 [Exhibit 9]) performed the inspections because their certificate numbers appear in the inspection data.

VI. Liability for Violations

Department staff alleges that Respondents violated both 6 NYCRR 217-4.2 (first cause of action) and 217-1.4 (second cause of action). Each cause of action is addressed below.

A. 6 NYCRR 217-4.2

Section 217-4.2 states, in pertinent part, that:

"No 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."

For purposes of this regulation, "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) provides that a license to operate an official inspection station would be issued only upon written application

to NYS DMV, after NYS DMV is satisfied that the station is properly equipped and has competent personnel to make inspections, and that such inspections would be properly conducted.

I conclude that Dyre Auto violated 6 NYCRR 217-4.2 on 577 separate occasions by using a simulator to perform OBD II emissions inspections. Of that number, Mr. Lantigua performed 241 illegal inspections with a simulator. Mr. Tejada performed 292 illegal inspections, and an unidentified person, who used Ms. Cornelio's certification card to gain access to the NYVIP work station, performed 44 illegal inspections with a simulator. A simulator is an electronic device not associated with a motor vehicle's onboard diagnostic computer. Its use has no place in the administration of an actual emissions test.

Consequently, the use of a simulator is not consistent with the emissions inspection procedures outlined at 6 NYCRR 217-1.3, which requires testing of the vehicle's OBD II system to ensure that it functions as designed, and completes diagnostic routines for necessary supported emission control systems. If an inspector connects the NYVIP work station to a simulator in lieu of the vehicle that has been presented, whether the vehicle would pass the OBD II inspection cannot be determined.

Dyre Auto is liable for all 577 violations, even those performed with Ms. Cornelio's certification card. At the time the inspections were conducted, Dyre Auto 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, which include performing inspections in a thorough manner. [See 15 NYCRR 79.17(b)(1) and (c).]

Each inspector is liable for the violations attributable to the non-compliant inspections that he performed. This liability is due to the connection between the official inspection station, which is licensed under VTL § 303, and the inspectors who work at the station, who are certified under VTL § 304-a. Pursuant to 15 NYCRR 79.8(b)(2), 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 perform the services required under NYS DMV's regulations. In

this sense, the inspection station operates through the services that its inspectors provide.

In summary, each inspector should share liability with the inspection station for the OBD II inspections he performed using a device to simulate the vehicles that had been presented. However, there is no basis for holding the inspectors liable for each other's non-compliant inspections. Based on Exhibits 10, 11, 12 and 13, and Mr. Clyne's testimony (Tr. at 63-64), Mr. Lantigua performed 241 non-compliant inspections. Mr. Tejada performed 292 non-compliant inspections, and someone using Ms. Cornelio's certification card performed 44 non-compliant inspections.

B. 6 NYCRR 217-1.4

In the second cause of action, Respondents are charged with violating 6 NYCRR 217-1.4. According to this provision:

"[n]o 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."

Pursuant to 15 NYCRR 79.1(g), an official inspection station, however, is one that has been issued a license by the Commissioner of DMV "to conduct *safety* inspections of motor vehicles *exempt* from the emissions inspection requirement" [emphasis added].

In cases similar to the captioned matter, the Commissioner has determined that violations of 6 NYCRR 217-1.4 cannot be found. (See *East Tremont*, supra, at 4; *Matter of Geo Auto Repairs, Inc. (Geo)*, Order, March 14, 2012, at 3-4; *Matter of AMI Auto Sales Corp. (AMI)*, Decision and Order of the Commissioner, February 16, 2012, at 3; and *Matter of Gurabo Auto Sales Corp. (Gurabo)*, Decision and Order of the Commissioner, February 16, 2012, at 3.) In these cases, the Commissioner determined there was no evidence that the respondent facilities were official safety inspection stations as defined by 15 NYCRR 79.1(g). Like the facilities in *East Tremont*, *Geo*, *AMI* and *Gurabo*, Dyre Auto is an emission inspection station, rather than an official safety inspection station pursuant to 15 NYCRR

79.1(g). Consequently, the Commissioner should dismiss the charge alleged in the second cause of action that Respondents in the captioned matter violated 6 NYCRR 217-1.4.

VII. Civil Penalty

In the August 31, 2010 complaint, Department staff requested that the Commissioner assess a total civil penalty of \$288,500. Staff did not apportion the requested civil penalty between the two causes of action, or among Respondents. The Commissioner has determined that in cases like this, however, that it would be inappropriate to impose joint and several liability against the facility and the certified inspectors (see *Geo*, supra, at 5, n 4; *AMI*, supra, at 9; and *Gurabo*, supra, at 8). Here, Department staff did not offer any argument about whether joint and several liability should be imposed against the facility and its corporate officers.

ECL 71-2103(1) authorizes civil penalties for violations of any provision of ECL Article 19 (Air Pollution Control Act) or any regulation promulgated pursuant thereto, such as 6 NYCRR 217-4.2. For the period alleged in the complaint (*i.e.*, June 9, 2009 to October 29, 2009), ECL 71-2103(1) provided for a civil penalty of not less than \$375 nor more than \$15,000 for the first violation, and an additional civil penalty not to exceed \$15,000 for each day that a violation continues. In the case of a second or any further violation, ECL 71-2103(1) provided for a civil penalty not to exceed \$22,500, and an additional civil penalty not to exceed \$22,500 for each day that a violation continues.

Department staff argued that each illegal inspection constitutes a separate violation of the Department's regulations, and I agree. Each simulated inspection was a discrete event occurring on a specific date and time and, by itself, constituted operation of the NYVIP work station in a manner that did not comply with the Department's procedures. Simulated inspections occurred with ones that were conducted properly. Based on the total civil penalty requested and the number of demonstrated violations, Department staff essentially requested a civil penalty of \$500 per simulated inspection ($\$288,500 \div 577 \text{ violations} = \$500 \text{ per violation}$).

If each simulated inspection is deemed to be a separate violation of 6 NYCRR 217-4.2, the potential maximum civil penalty, pursuant to ECL 71-2103(1), would exceed twelve million dollars. However, according to the Commissioner's Civil Penalty Policy ([DEE-1] dated June 20, 1990), the computation of the maximum potential penalty for all provable violations is only the starting point of any penalty calculation (§ IV.B); it merely sets the ceiling for any civil penalty that is ultimately assessed.

Pursuant to DEE-1, an appropriate civil penalty is derived from a number of considerations, including the economic benefit of noncompliance, the gravity of the violations, and the culpability of Respondents' conduct. Each is discussed below.

A. Economic Benefit

DEE-1 states that every effort should be made to calculate and recover the economic benefit of non-compliance (§ IV.C.1). In this case, however, the economic benefit, if it does exist, is unknown.

B. Gravity Component

According to DEE-1, removal of the economic benefit of non-compliance merely evens the score between violators and those who comply. Therefore, to be a deterrent, the assessed civil penalty must include a gravity component, which reflects the seriousness of the violation. (§ IV.D.1.) The policy states that a "preliminary gravity penalty component" is developed through an analysis addressing the potential harm and actual damage caused by the violation, and the relative importance of the type of violation in the regulatory scheme (§ IV.D.2).

As Mr. Clyne explained, OBD II testing is how the Department and NYS DMV implement NYVIP, an annual emissions inspection program required by the federal Clean Air Act amendments of 1990 and EPA regulations at 40 CFR Part 51 (Tr. at 42-44). It is intended to assure that motor vehicles are properly maintained, which in turn would limit emissions of ozone precursors (*i.e.*, hydrocarbons and nitrogen oxide). Ground level ozone is a pollutant found during the unhealthy air

condition known as smog, and can cause a variety of respiratory problems. (Tr. at 44-46.)

The actual damage caused by Respondents' violations cannot be determined. However, there is a clear potential for harm when the required OBD II testing is not actually performed because this removes an opportunity to identify vehicles with malfunctioning emission control systems, and fails to ensure that those systems are repaired.

C. Penalty Adjustment Factors

According to DEE-1, the penalty derived from the gravity assessment may be adjusted in relation to factors including the culpability of the violator, the violator's cooperation in remedying the violation, any prior history of non-compliance, and the violator's ability to pay a civil penalty. (§ IV.E.)

In this case, violator culpability (§ IV.E.1) is an aggravating factor warranting a significant upward penalty adjustment. Due to the training that inspectors receive, including the training on the NYVIP work station, they would have known that using a simulator is not compliant with the procedures for a properly conducted OBD II inspection.

DEE-1 states that mitigation may be appropriate where the cooperation of the violator is manifested, for example, by self-reporting, when not otherwise required by law (§ IV.E.2). Here, however, no such mitigation is appropriate because the violations were determined by an investigation, not by disclosure by any of Respondents.

Mr. Tejada argued that he cooperated by complying with the NYS DMV regulation (see 15 NYCRR 79.17[c][3]), which requires certified inspectors to notify NYS DMV when they suspect that their certification cards have been lost or stolen. After he received notification by mail from Department staff of alleged violations at five different inspection facilities, Mr. Tejada said that he advised NYS DMV that his certification card was missing, and that DMV issued a new certification card to him with a different number. Mr. Tejada's argument does not establish mitigation for the following reasons. First, he offered no proof to support his argument. Second, Mr. Tejada said that he did not notify NYS DMV that his certification card

was lost or stolen until *after* the Department commenced administrative enforcement proceedings. (Tr. at 69.)

Department staff offered Exhibits 18 and 24 to show that Messrs. Lantigua and Tejada have a prior history of non-compliance (Tr. at 27-29). Exhibit 24 is a set of NYS DMV charge sheets/alleged violations notices for the Dyre Auto facility (No. 7104777 [Exhibit 6]), and for Haro Lantigua (No. 4WE8 [Exhibit 7]) and Cristian Tejada (No. 4KR8 [Exhibit 9]) as motor vehicle inspectors.

Based on Exhibit 24 (NYS DMV Case Nos. 2-IPO-09671, 2-IN0-09803, and 2-IN0-09804), NYS DMV alleged that Dyre Auto, Mr. Lantigua, and Mr. Tejada violated provisions of VTL § 303(e) and 15 NYCRR 79.24(b)(1) in September and October 2009. After an administrative adjudicatory hearing, the NYS DMV administrative law judge concluded that Dyre Auto, Mr. Lantigua and Mr. Tejada violated provisions of VTL § 303(e) and 15 NYCRR 79.24(b)(1) as alleged in the charge sheets, assessed civil penalties, and revoked the facility's license and the inspectors' certifications to perform inspections (Tr. at 27-29; Exhibit 18).

The Commissioner has determined that the DEC and DMV enforcement activities are not duplicative, in part because, like here, different regulatory standards apply (*see GEO*, supra, at 4, n 3; *AMI*, supra, at 4-5; *Gurabo*, supra, at 4). Accordingly, the Commissioner may rely on these demonstrated DMV violations as an aggravating factor relevant to this matter to justify a substantial civil penalty against Dyre Auto and Messrs. Lantigua and Tejada.

Finally, DEE-1 states that the Commissioner may consider the ability of a violator to pay a civil penalty in arriving at the method or structure for payment of final penalties. (§ IV.E.4.) In this case, Respondents offered no evidence that they could not afford to pay a civil penalty. In the absence of financial information, no conclusions may be drawn about their ability to pay any civil penalty the Commissioner may assess.

D. Civil Penalty Recommendation

As noted above, the Commissioner has considered violations similar to those alleged in the captioned matter, and assessed

civil penalties for the demonstrated violations (see *East Tremont*, supra, at 4-5; *Geo*, supra, at 4-5; *AMI*, supra, at 6-9; and *Gurabo*, supra, at 5-8). Consistent with these administrative precedents, I recommend the following civil penalties.

The civil penalty assessed against Dyre Auto should be equal to the aggregate penalty imposed on Messrs. Lantigua and Tejada, as well as the civil penalty for the 44 illegal inspections associated with Ms. Cornelio's certification card. Dyre Auto is the domestic business corporation at which all 577 motor vehicle inspections using noncompliant equipment and procedures were conducted. Consequently, the Commissioner should assess a total civil penalty of at least \$50,770 against Dyre Auto.

In this matter Mr. Lantigua, and Mr. Tejada each performed their own inspections and should be held individually responsible for them. Of the total number of motor vehicle inspections conducted using noncompliant equipment and procedures, Mr. Lantigua performed 241. For these violations, the Commissioner should assess Mr. Lantigua a total civil penalty of \$21,200. Mr. Tejada performed 292 inspections, and the Commissioner should assess Mr. Tejada a total civil penalty of \$25,700.

The sum of the recommended civil penalties for Mr. Lantigua (\$21,200) and Mr. Tejada (25,700) is \$46,900. The difference between the recommended civil penalty for Dyre Auto (\$50,770) and these Respondents (\$46,900) is \$3,870. This amount reflects the civil penalty for the remaining 44 illegal inspections associated with Ms. Cornelio's certification card.

Conclusions

1. Department staff served a copy of the August 31, 2010 notice of hearing and complaint upon Dyre Ave Auto Repair Corp. and Minnelli L. De la Hoz, as the president of the corporation, in a manner consistent with 6 NYCRR 622.3(a)(3).
2. Department staff served a copy of the August 31, 2010 notice of hearing and complaint upon Haro L. Lantigua in a manner consistent with 6 NYCRR 622.3(a)(3).

3. Department staff served a copy of the August 31, 2010 notice of hearing and complaint upon Genelly Cornelio and Cristian A. Tejada in a manner consistent with 6 NYCRR 622.3(a)(3).
4. Between June 9, 2009 and October 29, 2009, Respondents, Dyre Ave Auto Repair Corp., Haro L. Lantigua, Cristian A. Tejada, and an unknown person with access to the NYVIP work station used a simulator to perform OBD II inspections at Dyre Auto on 577 separate occasions. The use of a simulator is a 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 the Department's procedures and/or standards.
5. Department staff failed to show that Minnelli L. De la Hoz, as president of Dyre Ave Auto Repair Corp., is personally liable for the violations alleged in the August 31, 2010 complaint.
6. Department staff failed to show that Genelly Cornelio was present at Dyre Ave Auto Repair Corp. from June 9, 2009 to October 29, 2009 to perform vehicle inspections.

Recommendations

1. For 577 violations of 6 NYCRR 217-4.2, the Commissioner should assess Dyre Ave Auto Repair Corp. a total civil penalty of at least \$50,775.
2. For 241 violations of 6 NYCRR 217-4.2, the Commissioner should assess Haro L. Lantigua a total civil penalty of \$21,200.
3. For 292 violations of 6 NYCRR 217-4.2, the Commissioner should assess Cristian A. Tejada a total civil penalty of \$25,700.
4. All civil penalties should be paid within 30 days of service of the Commissioner's order.

5. The Commissioner should dismiss the first cause of action, which alleges violations of 6 NYCRR 217-4.2, against Minnelli L. De la Hoz and Genelly Cornelio.
6. The Commissioner should dismiss, with prejudice, against all Respondents, the second cause of action, which alleges violations of 6 NYCRR 217-1.4.

Appendix A Exhibit List

Exhibit List

Dyre Ave Auto Repair Corp., et al.
DEC Case No: CO2-20100615-12

1. Complaint dated August 31, 2010. Identification Only
2. Letter dated October 19, 2010 from Cristian A. Tejada. Identification Only
3. Letter faxed November 30, 2010 from Genelly Cornelio. Identification Only
4. Letter dated November 1, 2010 from Haro L. Lantigua. Identification Only
5. Letter dated November 1, 2010 from Minnelli de la Hoz. Identification Only
6. DMV form VS-1 (10/05). Certified copy of Original Facility Application filed by Dyre Ave Auto Repair Corp. (pages 1 of 4 and 2 of 4); and
DMV form VS-1 (7/08). Certified copy of Original Facility Application filed by Dyre Avenue Auto Repair Corporation. (pages 1 of 6 and 2 of 6). Received
7. DMV form VS-120 (6/06). Certified copy of Application for Certification as a Motor Vehicle Inspector filed by Haro Luis Lantigua dated August 23, 2006 (pages 1 and 2 of 2). Received
8. DMV form VS-120 (11/07). Certified copy of Application for Certification as a Motor Vehicle Inspector filed by Genelly Cornelio dated March 1, 2008 (pages 1 and 2 of 2). Received
9. DMV form VS-120 (9/01). Certified copy of Application for Certification as a Motor Vehicle Inspector filed by Cristian A. Tejada dated October 19, 2004 (pages 1 and 2 of 2). Received

10. Cover letter dated January 20, 2010 from Brad Hanscom, DMV Records Access Officer, and attached certified database printout (9 pages) beginning with an inspection conducted on June 5, 2009. Received
11. Cover letter dated October 13, 2010 from Brad Hanscom, DMV Records Access Officer, and attached certified database printout (5 pages) beginning with an inspection conducted on September 10, 2009. Received
12. Certified database printout (9 pages) beginning with an inspection conducted on June 5, 2009 (see Exhibit 10), with various highlighted inspections. Received
13. Certified database printout (5 pages) beginning with an inspection conducted on September 10, 2009 (see Exhibit 11), with various highlighted inspections. Received
14. Affidavit of Service by Environmental Conservation Officer Shea Mathis upon Haro L. Lantigua. Received
15. Affidavit of Service by Environmental Conservation Officer Shea Mathis upon Minelly L. De la Hoz. Received
16. State of New York, Department of State, Receipt for Service upon "DYRE AVE AUTO REPAIR CORP." dated September 9, 2010. Received
17. Cover letter dated October 28, 2010 from Blaise W. Constantakes to Cristian A. Tejada, and enclosed Notice to Admit (CPLR § 3123) concerning the information presented in Mr. Tejada's Application for Certification as a Motor Vehicle Inspector dated October 19, 2004 (see Exhibit 9). Received
18. NYS DMV Finding Sheet dated August 4, 2010, for Case Nos. 2-IP0-09671, 2-IN0-09803, 2-IN0-09804. (Certified Copy). Received

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|-----|--|-----------------|
| 19. | Copies of Certified Records from New York State Department of Motor Vehicles (Dyre Ave Auto Repair Corp.) | Received |
| 20. | Mr. Tejada's Inspector Certification Certification No. 4KR8.
Expiration date 08/31/2010. | Not
Received |
| 21. | Mr. Tejada's Inspector Certification Certification No. 8UX2.
Date of Issue 07/19/2010.
Expiration date 08/31/2010. | Not
Received |
| 22. | Spread Sheet: Dyre Ave.xlsx (Ms. Cornelio's Hours Worked from June 30, 2009 to August 3, 2009), and pay check stubs. | Received |
| 23. | Letter dated February 8, 2012 from Winston Support Services, LLC (Ms. Cornelio's employment agency). | Received |
| 24. | Copy of a cover letter dated February 16, 2012 from Mr. Constantakes with enclosed certified copies of the NYS DMV Charge Sheet/Alleged Violations Notice (Dyre Ave Auto Repair Corp., Haro L. Lantigua, and Cristian Tejada). | Received |

Official Notice (6 NYCRR 622.11[5]) taken of:

1. 15 NYCRR Part 79 (Motor Vehicle Inspection), and
2. New York State Implementation Plan: New York Metropolitan Area Enhanced Inspection/Maintenance Program. Proposed Revision, June 2009.