

**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-

**East Tremont Repair Corp., Abdulrahman
Ramadan, Francisco L. Gardinet, Cristian
A. Tejada, Rafael M. De La Cruz, and
Salim M. Eljamal,**

DEC Case No.
CO2-20100615-05

Respondents.

This administrative enforcement proceeding concerns allegations that respondents East Tremont Repair Corp. ("East Tremont"), Abdulrahman Ramadan, Francisco L. Gardinet, Cristian A. Tejada, Rafael M. De La Cruz, and Salim M. Eljamal completed a number of 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.

Staff of the New York State Department of Environmental Conservation ("DEC" or "Department") alleges that these violations occurred at an official emissions inspection station located at 1800 East Tremont Avenue in the Bronx, New York, during the period from June 10, 2008 through August 3, 2009. During this time, DEC staff alleges that East Tremont was a domestic business corporation duly authorized to do business in New York State, respondents Ramadan and Gardinet owned and operated East Tremont, and respondents Tejada, De La Cruz, and Eljamal performed mandatory annual motor vehicle emission inspections at that facility.

Specifically, DEC staff alleges that a device was used to substitute for and simulate the motor vehicle of record on 312

separate occasions. DEC staff contend that, of these inspections, respondent Tejada performed 265 inspections, respondent De La Cruz performed 43 inspections, and respondent Eljamel performed 4 inspections (see Hearing Transcript, at 78). As a result, 310 certificates of inspection were allegedly issued based on these simulated inspections.

In accordance with 6 NYCRR 622.3(a)(3), DEC staff commenced this proceeding against respondents by service of a notice of hearing and complaint dated August 31, 2010. In its complaint, DEC 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 DEC procedures and 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 requests a civil penalty of one hundred fifty-six thousand dollars (\$156,000).

Respondents East Tremont and Ramadan submitted an answer dated December 8, 2010, which denied the allegations alleged in the complaint and requested that the complaint be dismissed. Respondent Tejada, on his own behalf, answered the complaint with a letter dated October 25, 2010, in which he stated that there was insufficient information for him to "form an opinion regarding any of the allegations" (Hearing Exhibit [Exh] 3). Answers were not received from respondents Gardinet, De La Cruz, and Eljamel.

The matter was assigned to Administrative Law Judge ("ALJ") Daniel P. O'Connell. A hearing was held on February 2, 2012. Respondent Tejada appeared and testified at the hearing. None of the other respondents appeared at the hearing.

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

Liability

ALJ O'Connell found respondents East Tremont, Tejada, and De La Cruz liable for violating 6 NYCRR 217-4.2. Additionally, the ALJ found that the alleged violations of 6 NYCRR 217-4.2 should be dismissed as to respondents Ramadan, Gardinet and

Eljamal, and that the alleged violations of 6 NYCRR 217-1.4 should be dismissed as to all respondents.

First Cause of Action (Violations of 6 NYCRR 217-4.2)

I concur with the ALJ's determinations that DEC staff is entitled to a finding of liability with respect to respondent East Tremont for operating an official emissions inspection station using equipment and procedures that are not in compliance with DEC procedures or standards. East Tremont is liable because, at the time the 312 violations occurred, it held the license to operate the official inspection station (see Hearing Report, at 25).

Department staff also identified two individuals (Mssrs. Ramadan and Gardinet) as owners and operators of East Tremont. In addition, Department staff submitted an exhibit identifying these two individuals as corporate officers of East Tremont (see Hearing Exh 4). The first cause of action, however, must be dismissed as against respondent Gardinet because DEC staff did not present any proof to establish that respondent Gardinet was properly served (see Hearing Report, at 15).

Although respondent Ramadan was properly served, DEC staff failed to establish that respondent Ramadan was personally liable for the inspection activities that were performed at the station. In order to find that corporate officers are individually liable, DEC staff must present a legal theory and, as appropriate, evidence that the individual corporate officers were responsible for, or influenced, the corporate actions that constituted the violations (see Hearing Report, at 16).

Prior Commissioner decisions in similar proceedings have established that ownership does not, by itself, impose liability on an individual, even where an individual has a 100 percent ownership interest (see, e.g., Matter of AMI Auto Sales Corp., ALJ Hearing Report, at 20, adopted by Decision and Order of the Commissioner, February 16, 2012). With respect to operator liability, East Tremont held the license to operate, pursuant to the regulations (see, e.g., Matter of Gurabo Auto Sales Corp., ALJ Hearing Report, at 17, adopted by Decision and Order of the Commissioner, February 16, 2012). Moreover, other factual bases necessary for imposing individual liability upon corporate officers were not established (see, e.g., Matter of RGLL, Commissioner's Decision and Order, January 21, 2005, at 4 [addressing, for example, derivative liability, piercing the corporate veil, or personal participation]; see also Matter of

125 Broadway, LLC, Decision and Order of the Commissioner, December 15, 2006, at 4-5 and accompanying ALJ Default Summary Report, at 7-10).¹

Department staff named three inspectors as respondents: Tejada, De La Cruz, and Eljamal. No proof exists in this record that respondent Eljamal was served with the notice of hearing and complaint. Accordingly, no liability can be imposed on him. Service was, however, made on respondents Tejada and De La Cruz, and each should be liable for the violations attributable to the non-compliant inspections that they individually performed. Based on this record, respondent Tejada is liable for performing 265 non-compliant inspections, and respondent De La Cruz is liable for performing 43 non-compliant inspections.²

Second Cause of Action (Violations of 6 NYCRR 217-1.4)

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 because DEC offered no evidence that East Tremont was an official inspection station as defined by 15 NYCRR 79.1(g) (see Hearing Report, at 26; see also Matter of Geo Auto Repairs, Inc., Order of the Commissioner, March 14, 2012, at 3-4; Matter of AMI Auto Sales Corp., Decision and Order of the Commissioner, February 16, 2012, at 3; Matter of Gurabo Auto Sales Corp., Decision and Order of the Commissioner, February 16, 2012, at 3 [addressing violations of 6 NYCRR 217-1.4]). Accordingly, the alleged violations of 6 NYCRR 217-1.4 shall be dismissed as to all respondents.

Civil Penalty

Department staff requested a penalty of one hundred fifty-six thousand dollars (\$156,000). The ALJ concluded that a smaller penalty was warranted based on the penalties that I have assessed in prior decisions and orders (see, e.g., Matter of Geo Auto Repairs, Inc., Order of the Commissioner, March 14, 2012; Matter of AMI Auto Sales Corp., Decision and Order of the Commissioner, February 16, 2012; and Matter of Gurabo Auto Sales Corp., Decision and Order of the Commissioner, February 16, 2012).

¹ With respect to respondent Gardinet, even if he had been properly served in this proceeding, no proof that would support a finding of personal liability was presented.

² DEC staff alleged that respondent Eljamal performed the remaining four (4) non-compliant inspections.

The ALJ recommended that respondent East Tremont be assessed a civil penalty of twenty-seven thousand seven hundred forty dollars (\$27,740), respondent Tejada be assessed a civil penalty of twenty-three thousand five hundred eighty dollars (\$23,580), and respondent De La Cruz be assessed a civil penalty of three thousand eight hundred eighty-five dollars (\$3,885) (see Hearing Report, at 30-31). The recommended civil penalties, although below the statutory maximum, are substantial and are justified by the number of violations that respondents committed.

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

- I. Respondents East Tremont Repair Corp., Cristian A. Tejada, and Rafael M. De La Cruz 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 DEC procedures and standards. Three hundred twelve (312) inspections using noncompliant equipment and procedures were performed at East Tremont Repair Corp., of which Cristian A. Tejada performed two hundred and sixty-five (265) and Rafael M. De La Cruz performed forty-three (43).
- II. DEC staff's charges that respondents Abdulrahman Ramadan, Francisco L. Gardinet, and Salim M. Eljamal (who allegedly performed four [4] inspections) violated 6 NYCRR 217-4.2 are dismissed.
- III. DEC staff's charges that respondents East Tremont Repair Corp., Cristian A. Tejada, Rafael M. De La Cruz, Abdulrahman Ramadan, Francisco L. Gardinet, and Salim M. Eljamal violated 6 NYCRR 217-1.4 are dismissed.
- IV. The following penalties are hereby assessed:
 - A. Respondent East Tremont Repair Corp. is hereby assessed a civil penalty in the amount of twenty-seven thousand seven hundred forty dollars (\$27,740);
 - B. Respondent Cristian A. Tejada is hereby assessed a civil penalty in the amount of twenty-

three thousand five hundred eighty dollars
(\$23,580); and

C. Respondent Rafael M. De La Cruz is hereby
assessed a civil penalty in the amount of three
thousand eight hundred eighty five dollars
(\$3,885).

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 DEC
concerning this order shall be directed to Assistant
Counsel Blaise Constantakes, at the address set forth
in paragraph IV of this order.
- VI. The provisions, terms and conditions of this order
shall bind respondents East Tremont Repair Corp.,
Cristian A. Tejada, and Rafael M. De La Cruz, and
their agents, heirs, successors, and assigns in any
and all capacities.

For the New York State Department
of Environmental Conservation

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

Dated: July 23, 2012
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

East Tremont Repair Corp., Abdulrahman Ramadan,
Francisco L. Gardinet, Cristian A. Tejada,
Rafael M. De La Cruz, and Salim M. Eljamal,

Respondents

Case No. CO2-20100615-05

Hearing Report

- by -

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

July 3, 2012

Proceedings

Pursuant to a notice of hearing and complaint, dated August 31, 2010 (Exhibit 1), Staff of the Department of Environmental Conservation (Department staff) alleged that East Tremont Repair Corp. (East Tremont), Abdulrahman Ramadan, Francisco L. Gardinet, Cristian A. Tejada, Rafael M. De La Cruz, and Salim M. Eljamal (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 emissions from motor vehicles.

The August 31, 2010 complaint asserted two causes of action. In the first, Respondents allegedly violated 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. In the second cause of action, Respondents allegedly 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 were alleged to have occurred from June 10, 2008 to August 3, 2009 at East Tremont, an official emission inspection station, located at 1800 East Tremont Avenue, Bronx, New York. During this period, Department staff alleged, in the August 31, 2010 complaint, that East Tremont was a domestic business corporation duly authorized to do business in New York State, and that Abdulrahman Ramadan and Francisco L. Gardinet owned and operated the inspection station. Department staff alleged further that Mr. Ramadan and Mr. Gardinet, as well as Cristian A. Tejada, Rafael M. De La Cruz, and Salim M. Eljamal worked at the inspection station, and performed mandatory annual motor vehicle emission inspections.¹

According to Department staff, Respondents performed 312 inspections from June 10, 2008 to August 3, 2009 using a device to substitute for and simulate the motor vehicle of record, and issued 310 emission certificates based on these simulated inspections.

¹ Though alleged in the August 31, 2010 complaint, Department staff offered no evidence to show that Messrs. Ramadan and Gardinet were certified inspectors at the time of the alleged violations.

For these alleged violations, Department staff requested a total civil penalty of \$156,000. 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 312 inspections that Respondents illegally performed.

Initially, Kenneth Geller, Esq. (Inwood, New York), represented East Tremont and Mr. Ramadan. On behalf of his clients, Mr. Geller filed an answer dated December 8, 2010 (Exhibit 2), which generally denied the violations alleged in the August 31, 2010 complaint. The December 8, 2010 answer did not assert any affirmative defenses, but requested that the August 31, 2010 complaint be dismissed. Without any explanation, Mr. Geller subsequently withdrew as counsel for East Tremont and Mr. Ramadan.

On his own behalf, Mr. Tejada answered the August 31, 2010 complaint with a letter dated October 25, 2010 (Exhibit 3). In his October 25, 2010 letter, Mr. Tejada stated that he has "insufficient information on all the allegations," and therefore, "can't form an opinion regarding any of the allegations" (Exhibit 3).

No answers were received from Mr. Gardinet, Mr. De La Cruz, and Mr. Eljamal.

With a cover letter dated October 3, 2011, Blaise W. Constantakes, Esq., Assistant Counsel, filed a statement of readiness of the same date, on behalf of Department staff. Department staff requested that the Office of Hearings and Mediation Services schedule this matter for hearing. By letter of October 5, 2010, 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 10:00 a.m. at the Department's Region 2 office in Long Island City, New York, and concluded on that date.

Department staff offered two witnesses. 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 14). 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 57).

Mr. Tejada appeared at the hearing, cross-examined Department staff's witnesses, and testified on his own behalf. The other Respondents did not appear at the hearing.

With a letter dated February 16, 2012, Mr. Constantakes provided certified copies of the charge sheets/alleged violations notice from the New York State Department of Motor Vehicle (NYS DMV). The February 16, 2012 cover letter and charge sheets are identified as Exhibit 17 in the hearing record, and are received into evidence a business records (see 6 NYCRR 622.1[a][6]).

On February 22, 2012, the record of the hearing closed upon receipt of the hearing transcript. The hearing record includes 94 pages of transcript and 17 hearing exhibits. A copy of the exhibit list is attached to this hearing report as Appendix A.

FINDINGS OF FACT

I. The Licensee

1. East Tremont Repair Corp. (East Tremont) 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 1800 East Tremont Avenue in the Bronx. The facility number assigned by NYS DMV to East Tremont was 7104777. (Tr. at 21-22; Exhibit 4.)
2. In order 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 22). 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 22, 46-48.)

3. The licensee who operates a motor vehicle inspection station is responsible for all activities of the certified inspectors and must supervise them accordingly (Tr. at 23-24).
4. At the time of its application to NYS DMV, Abdulrahman Ramadan was East Tremont's president, vice president and treasurer. Francisco L. Gardinet was East Tremont's secretary. Mr. Ramadan held 100% of the ownership interest in East Tremont. (Exhibit 4.) Department staff offered no evidence to show that Messrs. Ramadan and Gardinet were certified inspectors 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 found at 40 CFR Part 51. (Tr. at 57-58.)
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 58.)
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 17-18.)
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 hardware 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 transmittal of electronic data from the inspection station to NYS DMV. (Tr. at 20, 61-62.)

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 22.)

III. Inspector Training and Certification

10. On October 19, 2004, Mr. 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 31-32; Exhibit 5.) The information on Mr. Tejada's certificate includes his name and date of birth, and that he is authorized to conduct inspections for Groups 1, 2, 3 and D. The certification card expired on August 31, 2010. There is a bar code on the front of the certificate. (Tr. at 42.)
11. In March 2007, Mr. De La Cruz applied to NYS DMV for certification as a motor vehicle inspector. Upon approval of his application, NYS DMV assigned Mr. De La Cruz certificate number 6MP7. (Tr. at 32; Exhibit 6.)
12. On June 1, 2009, Mr. Eljamal applied to NYS DMV for certification as a motor vehicle inspector. Upon approval of his application, NYS DMV assigned Mr. Eljamal certificate number 8CZ3. (Tr. at 33; Exhibit 7.)
13. Each candidate who applies for certification as a motor vehicle 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 29-31.)

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 29, 62.)

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 16, 41, 62.)
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 16, 62.)
17. Based on the vehicle information, the NYVIP work station makes a determination as to what type of inspection the vehicle should receive in light of its age and weight, and a call, 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 63-64.)
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 II system has not found a fault. If the light remains on, it indicates an emissions failure. (Tr. at 18, 63.)

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 15-16, 40.)
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. The two MIL checks and the electronic communication of information between the work station and the vehicle are typically accomplished in five minutes. (Tr. at 18-19, 63-64.)
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 19-20, 65-66.)

V. Simulator Usage

22. Department staff reviewed all of the NYVIP inspection data for the 10,000 to 11,000 facilities located throughout the State. From September 2004 to February 28, 2008, Department staff reviewed some 18.5 million inspection records, and found that no vehicles matched the 15-data field signature characterized by simulator usage. A review of the inspection records collected from March 2008 to July 2010, however, showed a simulator signature at 44 inspection facilities, including East Tremont. After July 2010, the electronic signature for the simulator did not appear in any inspection data, which is subsequent to when the enforcement initiative commenced. (Tr. at 68-70.)
23. Data collected from the OBD II inspections performed at East Tremont from June 2008 through September 2009 show that two different simulators were used at East Tremont. (Tr. at 71-72.)
24. One simulator used at East Tremont is called the "ozen" (Tr. at 69-70). The second simulator is known as the "AGV-MINI-SIM 10-0-14-0," and is also known as "AGV-MINI-V.1.3" (Tr. at 75).
25. From June 10, 2008 to August 3, 2009, inspectors at East Tremont performed a total of 312 inspections using a device to substitute for, and simulate, the motor vehicles of record. Of these 312 inspections, Mr. Tejada performed 265, Mr. De La Cruz performed 43, and Mr. Eljamal performed 4 inspections. (Tr. at 78-79; Exhibit 9.)

Discussion

According to the August 31, 2010 complaint, East Tremont and its certified inspectors, Mr. Tejada, Mr. De La Cruz, and Mr. Eljamal, did not check the OBD II systems as part of their inspections of 312 motor vehicles from June 10, 2008 through August 3, 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 it will implement and enforce its program. 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 improved enforcement of the NYVIP program. (Tr. at 57-60, 66-67.)

Determining the Simulator Signature

According to Mr. Clyne, in September 2008, NYS DMV alerted Department staff to what DMV staff believed was fraud involving the use of simulators within the greater New York metropolitan area. DMV staff's concern was based on what it considered to be very repetitive, 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 1100. However, some recorded RPM readings were in excess of 5,000, and repeated from inspection to inspection. Mr. Clyne explained that such readings were unusual because each vehicle should produce a different RPM reading. (Tr. at 67-68.)

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, one of which included East Tremont, that were reporting very high RPM readings (Tr. at 68). Then, with the assistance of other agencies (Exhibit 13), Department staff initiated an undercover investigation of these facilities in July 2009 to monitor vehicles during inspections (Tr. at 68).

Concluding that a high RPM value alone was not a sufficient indicator of simulator use, Department staff undertook an extensive data analysis in an attempt to identify a better profile. Department staff focused on 15 data fields, other than

the RPM values which, together, constitute an electronic signature for a simulated OBD II inspection. Department staff reviewed all of the NYVIP inspection data for 10,000 to 11,000 facilities. From September 2004 to February 28, 2008, Department staff reviewed some 18.5 million inspection records, and found that no vehicles matched the 15-data field signature. A review of the inspection records collected from March 2008 to July 2010, however, showed a simulator profile at 44 inspection facilities, including East Tremont. After July 2010, the electronic signature for the simulator did not appear in any inspection data, which is subsequent to when the enforcement initiative commenced. (Tr. at 68-70.)

Exhibits 8 and 9 are abstracts of data collected from the OBD II inspections performed at East Tremont from June 2008 through September 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 two simulators were used at East Tremont. (Tr. at 71-72.)

Referring to Exhibits 8 and 9, Mr. Clyne identified the column labeled "DMV_FACILITY_NUM," which is the inspection facility. Only the facility identification number for the East Tremont facility (7104777 [Exhibit 4]) appears in this column. (Tr. at 71.) Mr. Clyne also identified the column labeled "CI_NUM," which provides the identification numbers for the inspectors (Tr. at 73).

From more than 100 fields generated during the course of an inspection, Mr. Clyne selected the data fields shown in Exhibits 8 and 9 (Tr. at 73). From left to right across the top of each page on Exhibits 8 and 9, 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 71047777, which

is the number that appears in the upper left hand corner of the first page of East Tremont's original facility application (Exhibit 4).

ODOMETER_READING is recorded manually by the inspector.

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

CI_NUM (certified inspector number) is the unique alphanumeric identifier the NYS DMV assigns to each inspector. Mr. Tejada's certificate number is 4KR8 (Exhibit 5). Mr. De La Cruz's certificate number is 6MP7 (Exhibit 6), and Mr. Eljamal's certificate number is 8CZ3 (Exhibit 7). 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 8 and 9; the first is B000006972, and the second is B000011897.

Mr. Clyne testified that to the right of these headings on Exhibits 8 and 9, 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 73-74).

One simulator is called the "ozen," and was used at the East Tremont facility. With the ozen simulator, Mr. Clyne stated that the reported RPM value was 6138, and noted that such a value is not possible. 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" ²
PIC_CNT2	"0"
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"

(Tr. at 69-70, 73-75, 77.)

Mr. Clyne provided an example of an inspection (see Exhibit 9, page 1 of 10), where the ozen simulator was used. Mr. Clyne said that the 15-field signature appears in relation to the inspection on June 25, 2008 at 18:33 (*i.e.*, 6:33 p.m.) of a 1998 Lincoln Town Car. Furthermore, in Exhibit 9 on page 5 of 10, Mr. Tejada (Certification No. 4KR8) inspected a Chrysler PT

² With respect to the third and fourth data fields of the electronic signature (see Exhibits 8 and 9), Mr. Clyne testified that "[t]he third one, PID_CNT1 which stands for PID count one. The next one is PIC_CNT2 which stands for PID count two. Even though it's ... listed as PIC, it still means PID" (Tr. at 74).

Cruiser on September 3, 2008 at 11:37 a.m. that failed the OBD II inspection due to the fifth criteria, which is the readiness evaluation. Mr. Tejada (Certification No. 4KR8) re-inspected the same vehicle on September 5, 2008 at 15:01 (*i.e.*, 3:01 p.m.); however, the 15-field electronic signature characteristic of the ozen profile is reported. (Tr. at 79.)

The second simulator used at East Tremont is known as the "AGV-MINI-SIM 10-0-14-0." The headings, and the respective entries (shown here in quotation marks) that are consistent with the profile for the AGV-MINI-SIM 10-0-14-0 (as known as AGV-MINI-V.1.3 [Tr. at 75]) simulator are as follows:

PCM_ID1	"10"
PCM_ID2	"0"
PID_CNT1	"14" ³
PIC_CNT2	"0"
RR_COMP_COMPONENTS	"U"
RR_MISFIRE	"U"
RR_FUEL_CONTROL	"U"
RR_CATALYST	"U"
RR_02_SENSOR	"U"
RR_EGR	"U"
RR_EVAP_EMISS	"U"
RR_HEATED_CATA	"U"
RR_02_SENSOR_HEAT	"U"
RR_SEC_AIR_INJ	"U"
RR_AC	"U"

(Tr. at 74-75.)

For the purposes of illustration, Mr. Clyne provided an example of an inspection from the data abstracts for East Tremont's OBD II inspections (see Exhibit 9, page 1 of 10), where the AGV-MINI-SIM 10-0-14-0 simulator was used. Mr. Clyne said that the 15-field signature, as noted above, appears on

³ See footnote 2.

June 11, 2008 at 12:42 p.m. in relation to the inspection of a 2001 Mitsubishi Galant. (Tr. at 79).

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 vehicle identification number reported electronically during the OBD II inspection. Finally, when the AGV-MINI-SIM 10-0-14-0 simulator was used during an inspection at East Tremont, Mr. Clyne stated that the reported RPM value was 8184, and noted that such a value is not possible. (Tr. at 75-77; Exhibits 8 and 9).

According to Mr. Clyne, the 15-field data signatures for the two simulators appear a total of 312 times in Exhibits 8 and 9. Mr. Clyne said that he was able to sort the data to determine who performed these inspections. For certification No. 4KR8 (see Exhibit 5), Mr. Tejada performed 265 inspections. For certification No. 6MP7 (see Exhibit 6), Mr. De La Cruz performed 43 inspections. For certification No. 8CA3 (see Exhibit 7), Mr. Eljamal performed the remaining 4 inspections. (Tr. at 78-79.)

VI. Proof of Service

When, as here, some of Respondents do not appear at the administrative hearing, there is a threshold question of 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.

Initially, East Tremont Repair Corp. and Abdulrahman Ramadan were represented by counsel, who filed an answer dated December 8, 2010 on their behalf (Exhibit 2). The answer acknowledged receipt of the notice of hearing and complaint. Consequently, I conclude that Department staff duly served East Tremont and Mr. Ramadan with a copy of the notice of hearing and

complaint dated August 31, 2010 in a manner consistent with 6 NYCRR 622.3(a)(3).

Though not represented by counsel, Mr. Tejada filed a letter dated October 25, 2010, which acknowledged receipt of the notice of hearing and complaint concerning the captioned matter (Exhibit 3). In addition, Mr. Tejada appeared at the February 2, 2012 hearing. Therefore, there is no issue about whether Department staff duly served Mr. Tejada with a copy of the August 31, 2010 notice of hearing and complaint.

In the August 31, 2010 notice of hearing and complaint, Department staff asserted that Francisco Gardinet owned and operated East Tremont. According to Exhibit 4, Mr. Gardinet serves as East Tremont's corporate secretary, but does not own any portion of the business or hold any stock. The December 8, 2010 answer was not filed on behalf of Mr. Gardinet, even though he is one of the facility's corporate officers. Mr. Gardinet did not file an answer individually. In the absence of any answer or appearance by Mr. Gardinet, Department staff had an obligation to demonstrate that Staff served the August 31, 2010 complaint in a manner consistent with 6 NYCRR 622.3(a)(3).

Staff, however, did not provide any proof of service. Therefore, I conclude that Mr. Gardinet did not receive notice of the captioned administrative enforcement matter, and the Commissioner should dismiss the charges alleged in the complaint.⁴

According to the August 31, 2010 notice of hearing and complaint, Rafael De La Cruz was a certified motor vehicle emission inspector at East Tremont from June 10, 2008 to August 3, 2009. To demonstrate service of the August 31, 2010 notice of hearing and complaint upon Mr. De La Cruz, Department staff offered an affidavit of personal service (Exhibit 12). Based on this affidavit, Environmental Conservation Officer M.J. Clemens personally served a copy of the August 31, 2010 notice of hearing and complaint upon Mr. De La Cruz on December 20, 2010. Because personal service is authorized by 6 NYCRR 622.3(a)(3), I conclude that Department staff duly served the August 31, 2010 complaint upon Mr. De La Cruz.

⁴ Whether Mr. Gardinet can be held individually liable as a corporate officer of East Tremont for the alleged violations is addressed below.

Salim M. Eljamal is alleged to be the third certified motor vehicle emission inspector at East Tremont. Mr. Eljamal did not answer the August 31, 2010 complaint or appear at the administrative hearing on February 2, 2012. Absent any answer or appearance by Mr. Eljamal, Department staff had an obligation to demonstrate that Staff served the August 31, 2010 complaint in a manner consistent with 6 NYCRR 622.3(a)(3).

Staff did not provide any proof of service. Therefore, I conclude that Mr. Eljamal did not receive notice of the captioned administrative enforcement matter, and the Commissioner should dismiss the charges alleged in the complaint.

VII. Individual Corporate Officer Liability

According to the August 31, 2010 complaint, Messrs. Ramadan and Gardinet owned and operated East Tremont at the time of the alleged violations (¶¶ 3 and 4, Exhibit 1). At the hearing, Department staff offered Exhibit 4, which is a certified copy of the original facility application (DMV form VS-1) filed by East Tremont. With this application, East Tremont sought, and subsequently received, a license to inspect motor vehicles from NYS DMV. Mr. Ramadan is identified on page 2 of 4 of the application (see Exhibit 4) as the president, vice-president and treasurer of East Tremont, and holds 100% of the stock or ownership, and Mr. Gardiner is identified as the secretary of the corporation. Therefore, Exhibit 4 connects Messrs. Ramadan and Gardinet to East Tremont, as corporate officers. However, East Tremont, as a corporation, exists as a separate legal entity independent of its ownership.

In order to find that the corporate officers are 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 officers were responsible for, or influenced, the corporate actions that constituted the violations. In this case, Department staff offered nothing to show that Mr. Ramadan and Mr. Gardinet, as the corporate officers, were personally liable for the illegal inspections performed by Mr. Tejada, Mr. De La Cruz, and Mr. Eljamal.

In the absence of such a showing, I cannot conclude that Messrs. Ramadan and Gardinet are personally liable for any of the violations alleged in the complaint. Accordingly, the Commissioner should dismiss the charges alleged in the complaint against these corporate officers.

VIII. Mr. Tejada's Defenses

In his letter dated October 25, 2010 (Exhibit 3), which serves as his answer in this matter (see 6 NYCRR 622.4), Mr. Tejada states that he received five notices from the Department alleging violations at five different facilities. The facilities identified by Mr. Tejada are: (1) East Tremont Repair Corp., (2) Sugar Hill Service Station, Inc., (3) Dyre Auto Repair Corp., (4) San Miguel Auto Repair Corp., and (5) RV Auto Repairs, Inc.

Except for the RV Auto Repairs, Inc. matter, the foregoing matters were assigned to me. The adjudicatory hearing for the Dyre Auto Repair Corp., matter was held on February 2, 2012; the hearing was completed on that date. The hearing for the San Miguel Auto Repair Corp. matter convened on March 9, 2012, and was completed on June 21, 2012. The hearing concerning the Sugar Hill Service Station, Inc., matter convened on March 16, 2012. Neither Mr. Tejada nor Department staff offered any information about the RV Auto Repairs, Inc. matter.

In his closing statement, Mr. Tejada reiterated that he received five notices of hearing and complaints from Department staff concerning five different facilities. Mr. Tejada argued that he could not conduct motor vehicle inspections at five different motor vehicle facilities at the same time. (Tr. at 89-90.)

Mr. Tejada argued further that the simulators allegedly used at East Tremont are available on the internet for anybody to purchase and use. Based on the widespread availability of the simulators, Mr. Tejada made two claims. First, he asserted that an owner could install a simulator in his or her motor vehicle before presenting it for inspection, and that an inspector, such as Mr. Tejada, could unwittingly connect the NYVIP work station to the simulator rather than to the vehicle's onboard diagnostic computer. Second, he asserted that anybody could download software from the internet and re-create the bar

code on an inspector's certification card based on the information presented on the sign posted in the facility concerning the inspectors. (Tr. at 90.) Mr. Tejada's defenses are discussed below.

A. 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 at the facilities 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

The data in Exhibit 9 is presented in chronological order from June 9, 2008 through September 9, 2009. According to Exhibit 9 (at 7 of 10), the last inspection that Mr. Tejada performed at East Tremont was on October 2, 2008. With respect to any of Mr. Tejada's actions as a certified inspector, all allegations associated with the other facilities identified above occurred subsequent to October 2, 2008. Details relative to the time frames in the other enforcement actions are discussed below.

Department staff alleges that violations occurred at the Sugar Hill Service Station, Inc., from October 14 through 27, 2008. Within this period, OBD II inspections were performed at East Tremont on October 16, 23 (2 inspections), 25 and 27 (2 inspections). However, the certified inspector who performed all of these inspections is identified by ID No. 6MP7. This is Rafael De La Cruz's certificate number (Exhibit 6). Mr. De La

Cruz performed all the inspections on October 16, 23, 25 and 27, 2008, at East Tremont, in a manner consistent with the Department's procedures and standards.

At Dyre Auto Repair Corp., Department staff alleges that violations occurred from June 9, 2009 through October 29, 2009. Upon review of the data presented in Exhibit 9 (at 8 of 10 through 10 of 10), numerous motor vehicle emission inspections were performed at East Tremont during this period. Of those, 13 inspections, performed from July 30, 2009 to August 3, 2009, were not performed in a manner consistent with the Department's procedures and standards. Based on Exhibit 9, Mr. De La Cruz (Certificate No. 6 MP7 [see Exhibit 6]) and Mr. Eljamal (Certificate No. 8CZ3 [see Exhibit 7]), rather than Mr. Tejada, performed all of the inspections at East Tremont from June 9, 2009 through October 29, 2009.

Department staff alleges that violations occurred at San Miguel Auto Repair Corp., from February 14, 2009 through July 20, 2010. On page 8 of 10 in Exhibit 9, OBD II inspections were performed at East Tremont in November 2008 and on December 1 and 2, 2008. The next inspection recorded in Exhibit 9 was performed on June 5, 2009. Therefore, based on Exhibit 9, neither Mr. Tejada nor any of the other inspectors identified in the captioned matter performed OBD II inspections at East Tremont during February, March, April and May 2009.

Furthermore, Mr. Tejada did not perform any OBD II inspections at East Tremont subsequent to June 5, 2009. Rather, Mr. De La Cruz (Certificate No. 6 MP7 [see Exhibit 6]) and Mr. Eljamal (Certificate No. 8CZ3 [see Exhibit 7]) performed these inspections. The last inspection presented in Exhibit 9 occurred on September 9, 2009. (Exhibit 9, pages 8 of 10 through 10 of 10.) Therefore, Mr. Tejada's activities at East Tremont from September 9, 2009 to July 20, 2010, if any, are not relevant to this proceeding.

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 produce evidence there was a conflict concerning when the dates of the alleged violations took place at East Tremont and RV Auto Repairs (see 6 NYCRR 622.11[b][2]). Absent any showing, Mr. Tejada did not meet that burden with respect to RV Auto Repairs.

Mr. Tejada's claim, that he is not liable for the violations alleged in this matter because he could not conduct motor vehicle inspections at five different motor vehicle facilities at the same time, is without merit. Relative to the period alleged in the complaint concerning the captioned matter, Mr. Tejada performed OBD II inspections at East Tremont from June 10, 2008 through October 2, 2008. The period during which Mr. Tejada performed OBD II inspections at East Tremont precedes the periods identified in the other enforcement actions where Mr. Tejada is identified as a respondent.

B. Simulator Usage

As noted above, Mr. Tejada asserted that the simulators allegedly used at East Tremont are available on the internet for anybody to purchase and use. This argument was confirmed by Mr. Clyne's testimony. During his cross-examination, Mr. Clyne said that he has not handled the AGV simulator, but has seen a picture of it on the internet. Based on his review of the picture, Mr. Clyne estimated that the AGV simulator would be about 5 inches by 5 inches by 2 inches. With respect to the ozen simulator, Mr. Clyne said that it is about the same size as the AGV, and has several knobs to control variables, such as RPM. According to Mr. Clyne, an ozen simulator was recovered during the joint undercover investigation. (Tr. at 81-82; Exhibit 13.)

However, Mr. Tejada offered no evidence to support his assertion that an owner could purchase a simulator on the internet, and install it in his or her motor vehicle before presenting it for inspection. Moreover, Mr. Tejada did not offer any evidence to show how a duly trained inspector could unwittingly connect the NYVIP work station to the secretly installed simulator rather than to the vehicle's onboard diagnostic computer. Messrs. Devaux and Clyne testified about the unique nature of the diagnostic link connector and the circumstances associated with connecting the vehicle's onboard diagnostic computer to the NYVIP work station via the connector (Tr. at 17-18, 63). In the absence of any supporting evidence, I do not find Mr. Tejada's assertion credible.

C. Fake Certifications

As noted in the Findings of Fact, the sign posted at the facility, as required by the regulations (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 sign is created on the NYVIP work station and it is printed out for posting. 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 22, 46-48.)

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. Mr. Tejada's claim is supported by Mr. Devaux, who provided a qualified acknowledgement that one could recreate bar codes on a personal computer with software downloaded from the internet (Tr. at 43).

Moreover, certification cards issued by NYS DMV subsequent to 2009 include two features not present on Mr. Tejada's certification card effective during the period in question. The first feature is a photo of the inspector on the front of the certification card. The second relates to the back of the certification card where two bar codes are located -- one along the top and one along the bottom. The bar code along the bottom of the certification card has a red background. For OBD II inspections, the inspector scans the bar code on the bottom of the certification card. According to Mr. Devaux, the red background on the bar code is a security measure to prevent the bar code from being photocopied. (Tr. at 50-52.)

Based on the record of this proceeding, however, I find that Mr. Tejada did not demonstrate that someone recreated 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 used the fake certificate, and how someone could access the NYVIP work station at East Tremont.

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 bar code on the certification card must be scanned into the work station to perform any OBD II inspection. In instances when vehicles passed the OBD II inspection, the inspector must 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 16, 19-20, 28-29).

Mr. Devaux's testimony demonstrates that access to any NYVIP work station is restricted and would be limited to the inspectors employed by the facility. Accordingly, Mr. Tejada failed to explain how someone could walk into East Tremont from off 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. Also, I note, that Mr. Tejada did not accuse Mr. De La Cruz or Mr. Eljamal of using Mr. Tejada's certification card to perform the illegal OBD II inspections, which is expressly prohibited by the regulations (see 15 NYCRR 79.17[c][2]).

Finally, Mr. Tejada offered no proof to show that the work station at East Tremont (see Exhibit 9, column heading entitled, "NYVIP_UNIT_NUM" [B000006972]) had been lost or stolen, and was 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 19-20).

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.

IX. Department staff's Proof

Department staff's case relies on the OBD II data (Exhibits 8 and 9), as well as the application documents maintained by NYS DMV (Exhibits 4, 5, 6 and 7), 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 8 and 9, because those exhibits do not identify them by name.

Department staff demonstrated that, as charged, Mr. Tejada, and Mr. De La Cruz used a simulator for over 300 OBD II inspections at the East Tremont facility between June 10, 2008 and August 3, 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 8 and 9).

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

There is no question that the inspections documented in Exhibits 8 and 9 are attributable to East Tremont because its NYS DMV-assigned facility number (7104777 [see Exhibit 4]), which had been scanned into the NYVIP work station, appears in relation to each of the inspections. Also, there is no question that Mr. Tejada (4KR8 [see Exhibit 5]), Mr. De La Cruz (6MP7 [see Exhibit 6]), and Mr. Eljamal (8CZ3 [see Exhibit 7]) performed the inspections because their certificate numbers are the only ones that appear in the inspection data.

X. 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

"[n]o person shall operate an official emissions inspection station using equipment and/or procedures that are not in compliance with Department [DEC] procedures and/or standards."

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) states that a license to operate an official inspection station shall 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 will be properly conducted.

I conclude that East Tremont violated 6 NYCRR 217-4.2 on 312 separate occasions by allowing its inspectors to use a simulator to perform OBD II emissions inspections. Of that number, Cristian A. Tejada preformed 265 illegal inspections with a simulator. Rafael M. De La Cruz performed 43 illegal inspections, and Salim Eljamal performed 4 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 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.

East Tremont is liable for all 312 violations because, at the time the inspections were conducted, 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 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 also 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 8 and 9, and Mr. Clyne's testimony (Tr. at 78-79), Mr. Tejada performed 265 non-compliant inspections. Mr. De La Cruz performed 43 non-compliant inspections, and Mr. Eljamal performed 4 non-compliant inspections.⁵

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

⁵ For the reasons discussed above, the Commissioner should dismiss the charges alleged against Mr. Eljamal.

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 which 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 *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 *Geo*, *AMI* and *Gurabo*, 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 *Geo*, *AMI* and *Gurabo*, East Tremont 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.

XI. Civil Penalty

In the August 31, 2010 complaint, Department staff requested that the Commissioner assess a total civil penalty of \$156,000. Staff did not apportion the requested civil penalty between the two causes of action, or among Respondents. The Commissioner has determined 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

10, 2008 to August 3, 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 requested a civil penalty of \$500 per simulated inspection ($\$156,000 \div 312$ violations = \$500 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 seven 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 57-61). 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.

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 offered testimony to show how he cooperated by complying with the NYS DMV regulations (see 15 NYCRR 79.17[c][3]), that require certified inspectors to notify NYS DMV when they suspect that their certification has been lost or stolen. After he received notification by mail from Department staff of alleged violations at five different inspection facilities, Mr. Tejada testified that he advised NYS DMV that his certification card was missing. Mr. Tejada testified further that he requested a new certification card, which NYS DMV subsequently issued with a different certification number. (Tr. at 55, 87-88.) Mr. Tejada's testimony, though credible, does not establish mitigation because he did not notify NYS DMV that his certification card was lost or stolen until *after* the Department commenced administrative enforcement proceedings.

Department staff offered Exhibits 10, 11 and 17 to show that some of the inspectors had a prior history of non-compliance. Exhibit 17 is a set of NYS DMV charge sheets/alleged violations notices for the East Tremont facility (No. 7104777 [see Exhibit 4]), and the following motor vehicle inspectors: Cristian Tejada (No. 4KR8 [see Exhibit 5]), and Rafael De La Cruz (No. 6 MP7 [see Exhibit 6]).

Based on Exhibit 17 (NYS DMV Case No. IN8-16412), NYS DMV alleged that Mr. Tejada failed to follow OBD II test procedures on eight separate occasions during June and July 2008 in violation of 15 NYCRR 79.24(b)(3). Subsequently, Mr. Tejada waived his right to an administrative hearing and agreed to pay a civil penalty of \$1,000 (Exhibit 10).

Based on Exhibit 17 (NYS DMV Case No. IN8-16412), NYS DMV also alleged that Mr. De La Cruz failed to follow OBD II test procedures on five separate occasions during June and July 2008 in violation of 15 NYCRR 79.24(b)(3). After an administrative adjudicatory hearing, the NYS DMV administrative law judge concluded that Mr. De La Cruz violated 15 NYCRR 79.24(b)(3) as

alleged in the charge sheet, and assessed a total civil penalty of \$250 (Exhibit 11).

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 Messrs. Tejada and De La Cruz.

Finally, DEE-1 states that the Commissioner may consider the ability of a violator to pay a 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 *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 penalty.

The civil penalty assessed against East Tremont should be equal to the aggregate penalty imposed on the individual respondent inspectors. East Tremont is the domestic business corporation at which all 312 motor vehicle inspections using noncompliant equipment and procedures were conducted. Consequently, the Commissioner should assess a total civil penalty of at least \$27,740 against East Tremont.

The basis for the recommended civil penalty for East Tremont includes the four inspections performed by Mr. Eljamal. For the reasons discussed above, the Commissioner should dismiss the charges against Mr. Eljamal due to improper service of the August 31, 2010 notice of hearing and complaint. Nevertheless, Department staff demonstrated that Mr. Eljamal used a simulator to performed four OBD II inspections and, pursuant to 15 NYCRR

79.8(b), the licensee who operates a motor vehicle inspection station is responsible for all activities of the certified inspectors and must supervise them accordingly (see also 15 NYCRR 79.17[c][1]; Tr. at 23-24).

In this matter Mr. Tejada and Mr. De La Cruz 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. Tejada performed 265. For these violations, the Commissioner should assess Mr. Tejada a total civil penalty of \$23,580. Mr. De La Cruz is responsible for 43 violations, and should be assessed a total civil penalty of \$3,885.

Conclusions

1. By their attorney, East Tremont and Abdulrahman Ramadan, who was president of East Tremont at the time of the alleged violations, jointly filed an answer dated December 8, 2010. Therefore, Department staff served a copy of the August 31, 2010 notice of hearing and complaint upon East Tremont and Mr. Ramadan in a manner consistent with 6 NYCRR 622.3(a)(3).
2. Department staff did not serve a copy of the August 31, 2010 notice of hearing and complaint upon Francisco L. Gardinet, who was East Tremont's secretary at the time of the alleged violations, 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 Cristian A. Tejada in a manner consistent with 6 NYCRR 622.3(a)(3).
4. Department staff served a copy of the August 31, 2010 notice of hearing and complaint upon Rafael M. De La Cruz in a manner consistent with 6 NYCRR 622.3(a)(3).
5. Department staff did not serve a copy of the August 31, 2010 notice of hearing and complaint upon Salim M. Eljamal in a manner consistent with 6 NYCRR 622.3(a)(3).
6. Between June 10, 2008, and August 3, 2009, East Tremont allowed its inspectors, Cristian A. Tejada, Rafael M. De La

Cruz, and Salim M. Eljamal to use a simulator to perform a total of 312 separate OBD II inspections.

7. 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.
8. Department staff failed to show that Messrs. Ramadan and Gardinet, as Tremont's corporate officers, are personally liable for the violations alleged in the August 31, 2010 complaint.

Recommendations

1. For the reasons discussed above, the Commissioner should dismiss the charges alleged in the August 31, 2010 complaint against Abdulrahman Ramadan and Francisco L. Gardinet, who were corporate officers of East Tremont, and Salim M. Eljamal, who was a certified inspector at East Tremont.
2. For 312 violations of 6 NYCRR 217-4.2, the Commissioner should assess East Tremont a total civil penalty of at least \$27,740.
3. For 265 violations of 6 NYCRR 217-4.2, the Commissioner should assess Mr. Tejada a total civil penalty of \$23,580.
4. For 43 violations of 6 NYCRR 217-4.2, the Commissioner should assess Mr. De La Cruz a total civil penalty of \$3,885.
5. All civil penalties should be paid within 30 days of service of the Commissioner's order.
6. The Commissioner should dismiss the second cause of action against all Respondents, which alleges violations of 6 NYCRR 217-1.4.

Exhibit List
East Tremont Repair Corp., et al.

DEC Case No: CO2-20100615-05

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| 1. | Notice of Hearing and Complaint dated August 31, 2010. | Identification Only |
| 2. | Answer dated December 8, 2010 on behalf of East Tremont Repair Corp., and Abdulrahman Ramadan. | Identification Only |
| 3. | Letter dated October 25, 2010 from Cristian A. Tejada | Identification Only |
| 4. | DMV form VS-1 (6/06). Certified copy of Original Facility Application filed by East Tremont Repair Corporation. (pages 1 of 4 and 2 of 4). | Received |
| 5. | 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, and page 1 of 3). | Received |
| 6. | DMV form VS-120 (1/05). Certified copy of Application for Certification as a Motor Vehicle Inspector filed by Rafael M. De la Cruz filed on March 21, 2007 (pages 1 and 2 of 2). | Received |
| 7. | DMV form VS-120 (1/09). Certified copy of Application for Certification as a Motor Vehicle Inspector filed by Salim M. Eljamal dated June 1, 2009 (pages 1 and 2 of 2). | Received |
| 8. | Cover letter dated January 20, 2010 from Brad Hanscom, DMV Records Access Officer, and attached certified database printout (10 pages) beginning with an inspection conducted on June 9, 2008. | Received |
| 9. | Certified database printout (10 pages) beginning with an inspection conducted on June 9, 2008 (see Exhibit 8), with various highlighted inspections. | Received |
| 10. | Certified copies of documents from DMV Waiver of Hearing dated September 30, 2008 for Case No. 2-IN8-16412 signed by Mr. Tejada on November 2, 2008. | Received |

11. NYS DMV Finding Sheet dated May 22, 2009, for Case No. 2-IN8-16411 (Certified Copy). Received
12. Affidavit of Service by Environmental Conservation Officer Clemens, affirmed on November 8, 2010, upon Rafael De la Cruz-Concpcion [sic]. Received
13. Press Release from the New York State Attorney General's Office dated New York, New York, October 29, 2009 Received
14. 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 5). Received
15. Mr. Tejada's Inspector Certification Certification No. 4KR8. Expiration date 08/31/2010. Not Received
16. Mr. Tejada's Inspector Certification Certification No. 8UX2. Date of Issue 07/19/2010. Expiration date 08/31/2010. Not Received
17. 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. 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.