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BEFORE THE
EMERGENCY MEDICAL SERVICES AUTHORITY
STATE OF CALIFORNIA

In the Matter of the Emergency Medical Technician- Paramedic License of:) Enforcement Matter No.: 08-0361

JOHN R. HARDISTY) **DECISION AND ORDER**
License No. P21650)
Respondent.)

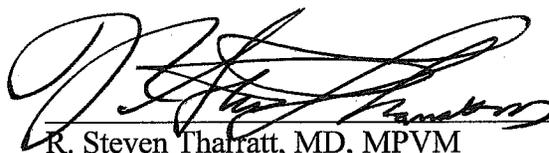
The attached Proposed Decision of Administrative Law Judge Mark E. Harman is adopted by the Emergency Medical Services Authority as its Decision in this matter. The Order For Temporary Suspension Pending Hearing issued January 6, 2009 is hereby vacated immediately.

The remaining provisions of this decision shall become effective 30 days after the date below.

It is so ordered.

DATED:

4/6/09



R. Steven Tharratt, MD, MPVM
Director

Emergency Medical Services Authority

**BEFORE THE
EMERGENCY MEDICAL SERVICES AUTHORITY
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

JOHN R. HARDISTY,
License No. P21650

Respondent.

EMSA No. 08-0361

OAH No. L2009010707

PROPOSED DECISION

This matter was heard by Mark E. Harman, Administrative Law Judge, Office of Administrative Hearings, State of California, on February 18, 2009, in Bakersfield, California.

Cynthia L. Curry, Senior Staff Counsel, Emergency Medical Services Authority (EMSA), represented Nancy Steiner (Complainant).

Seth N. O'Dell, Attorney at Law, represented John R. Hardisty (Respondent), who also appeared.

Oral and documentary evidence was received and the matter was argued. The record was left open until February 27, 2009, for the parties to file written closing briefs. Complainant's closing brief was timely received and marked for identification as Exhibit 10. Respondent's counsel requested a one-day extension to file Respondent's brief, which was granted. Respondent's closing brief was received on February 28, 2009 (a Saturday), and marked for identification as Exhibit F. The record was closed and the matter was deemed submitted on March 2, 2009.

FACTUAL FINDINGS

1a. Respondent was at all times herein the holder of an Emergency Medical Technician-Paramedic (EMT-P) license, no. P21650, which he has held since October 16, 2004. As of the filing of the Accusation, Respondent's EMT-P license was valid through October 31, 2010. Respondent's license has no prior history of discipline.

1b. Respondent's license allows him to perform various medical procedures, including advanced life support procedures, while at the scene of a medical emergency, during transport, or during inter-facility transfer.

2a. On January 6, 2009, Complainant filed the Accusation against Respondent in her official capacity as Chief of the EMS Personnel Division of the EMSA. Concurrently, the Director of the EMSA temporarily suspended Respondent's license under Health and Safety Code¹ section 1798.202, subdivisions (a) and (c). Respondent filed a Notice of Defense, and this matter ensued.

3. On December 11, 2008, Respondent had just gotten off duty after completing a 24-hour shift at the Bakersfield Fire Department. It was a cold and foggy morning. Respondent was exhausted following the shift. While driving on his way home in his Toyota truck, shortly after 8:30 a.m., he took his penis out of his shorts and began to masturbate.

4. As Respondent drove northbound on Oswell Street, he continued masturbating. At the same time, a school bus for the Kern High School District was proceeding in the same direction in an adjacent lane. Respondent's vehicle kept pace alongside the bus for over a quarter of a mile. His vehicle pulled up and stopped next to the bus at three or four red lights. Respondent's vehicle did not pass the bus, but stayed alongside it through several intersections, until he noticed the bus as it was pulling into a crosswalk and he saw the bus driver's arm. Respondent then realized the bus driver could have observed his activity. He quickly covered his penis with his sweater.

5. A female bus driver, who was not carrying any passengers, observed Respondent's actions while stopped at the lights. The bus driver became extremely nervous and started to shake. Normally, her daughter accompanied her when she drove the school bus, but her daughter was not with her that day. The school bus driver edged the bus into the crosswalk so she could see and record the license plate number of Respondent's vehicle. She then radioed the information to base. The dispatcher contacted Bakersfield police, who arrived at Respondent's home between 9:00 and 9:30 a.m. that day. Initially he was hesitant to speak, but after a little while, Respondent told the officers everything about the incident, and he has been consistent and truthful about it every since. He denied that he had been aware that anyone had observed him while he was driving. He did not think anyone could see his exposed penis because his truck rode higher relative to other vehicles on the road.

6. Respondent was cited by the police for indecent exposure. At his criminal court hearing on January 12, 2009 (in Kern County Superior Court, case no. BM743753A), Respondent pled no contest to a misdemeanor violation of Penal code section 314, subdivision (1).² His plea was accepted by the court, and he was found guilty. The court, however, referred Respondent to Western Corrections to be monitored for completion of a

¹ All further statutory references are to the Health and Safety Code, unless specified otherwise.

² Penal Code section 314, subdivision (1), provides that every person who willfully and lewdly exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby, is guilty of a misdemeanor.

deferred entry of judgment program, whereby, if Respondent completed a specified educational training program, the charge would be dismissed. Respondent completed the program and submitted proof of completion to the court on January 14, 2009. Thereafter, the court granted Respondent's motion to withdraw his plea, entered a plea of not guilty, and dismissed the charge in "furtherance of justice." (Exhibit 5.)

7. Respondent has been an employee of the Bakersfield Fire Department since 2002. He offered numerous witnesses who testified regarding his character. In particular, several of his colleagues from the Department spoke highly of Respondent -- a walking encyclopedia, good paramedic, brutally honest -- and could not imagine that he would ever publicly expose himself in a lewd manner. Douglas Greener, the Department's Deputy Fire Chief, who approved a 192-hour suspension (which represents eight shifts at 24 hours per shift) resulting from the misconduct, testified he did not believe that Respondent was a danger to the public in any way. Respondent's father-in-law testified that Respondent is a devoted husband and father, who teaches and increases his education every chance he gets.

8a. Respondent voluntarily submitted to an examination by Bruce Hubbard, M.D., an Associate Clinical Professor of psychiatry at the University of California, San Diego, and a forensic psychiatrist. In Dr. Hubbard's report of January 7, 2009, he opined that Respondent is not a sexual deviant or a danger to society. Dr. Hubbard's findings are relevant to the circumstances surrounding the incident: Respondent "shows evidence of both an acute stress disorder, a post traumatic stress disorder [PTSD], and a major depressive disorder emerging and worsening over the past two years." (Exhibit B.) Respondent's ostensible mental disorders at the time were major factors resulting in his misconduct

8b. Dr. Hubbard considered the incident to be a "lapse of judgment by an individual who has been very stressed." (Exhibit B.) Respondent began taking anti-depressant medication and attending psychotherapy sessions. In Dr. Hubbard's opinion, Respondent's prognosis was quite good for a complete recovery from his depression and PTSD if he continued to participate in the above therapies. In his follow-up report of February 17, 2009, Dr. Hubbard stated Respondent had made major progress in rectifying the underlying problems, and had experienced resolution of most if not all of the symptoms of his disorders. "He has participated fully in therapy and learned from this incident."

9. In addition to his employer's 192-hour suspension, without pay or benefits, Kern County Emergency Medical Services suspended Respondent's EMT-1 (#13430) certification pending the outcome of the EMSA's investigation and action in this matter. Thus, as long as his EMT license is suspended, he is unable to work as a firefighter.

10. Respondent was candid during his testimony. He apologized for his misconduct. He called it a great mistake. He never intended for any other person to see him in his truck. He told the truth when he was questioned about the incident whenever asked. He and his family were extremely embarrassed after the police published the bus driver's allegations in a press release, and it was picked up by a newspaper. Respondent became depressed almost immediately. He has since learned that he was suffering from stress issues,

some of which were related to traumatic events at work. He is addressing these issues through counseling and working less, and he feels confident he will fully recover.

LEGAL CONCLUSIONS

1. The burden of proof in this case is on Complainant. The standard of proof is clear and convincing evidence to a reasonable certainty. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 855-856.) "Clear and convincing" evidence means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the fact[s] for which it is offered as proof. Such evidence requires a higher standard of proof than proof by a preponderance of the evidence." (BAJI No. 2.62, (Spring ed. 2009).)

2. Cause exists to discipline Respondent's EMT-P license under section 1798.200, subdivision (c)(5), for committing a corrupt act that is substantially related to the qualifications, functions, and duties of a person holding a paramedic license, as set forth in factual finding numbers 3 through 5. Respondent's misconduct is a serious deviation from socially accepted norms, but it falls in the moderately shocking range of the corruption scale. Complainant has not established Respondent engaged in any dishonest or execrable acts.

3. Cause does not exist to discipline Respondent's EMT-P license under section 1798.200, subdivision (c)(12), for unprofessional conduct, to wit, for committing any sexually related offense specified under Penal Code section 290, as set forth in factual finding numbers 3 through 5. Complainant seeks to bootstrap Respondent's misconduct onto a provision intended to protect the public from sexual deviants. Respondent's misconduct was certainly reckless and unprofessional, but he is not a sexual deviant. It is important to note the Accusation has never alleged that Respondent was "convicted" of any sexually related offense. Although Complainant has not argued this directly, Complainant suggests Respondent committed a crime in her closing brief by stating "Because Respondent's acts constituting the crime of indecent exposure" (Complainant's Closing Brief, Exhibit 10, page 9) and "No evidence was presented showing other criminal behavior" (Exhibit 10, page 11). Without a conviction, as discussed below, Complainant has the burden to establish each element of a sexually related offense by clear and convincing evidence to a reasonable certainty. Complainant has not met this burden.

DISCUSSION

Complainant maintains that Respondent has admitted to all elements of the crime of indecent exposure, either by his plea of nolo contendere in criminal court,³ or by having waived his right to appeal a notice of suspension issued by his employer. Complainant attempts to

³ A line of cases, beginning with *Cartwright v. Board of Chiropractic Examiners* (1976) 16 Cal.3d 762, have held that a conviction by plea of nolo contendere may not be used in an administrative proceeding to impose discipline absent legislative authorization; but since no conviction has been alleged by the Accusation, it is unnecessary to discuss them.

establish a conclusive presumption from these so-called admissions, similar to invoking the principles of res judicata or collateral estoppel, and to bar Respondent from asserting in this forum that he committed no offense warranting revocation. Complainant's contentions are unconvincing.

Complainant has not established, on this record, a "conviction" of Penal Code section 314, subdivision (1). This is significant, because if Respondent had pled "guilty" or been "convicted" of indecent exposure, the probable resulting discipline would be the revocation of his license under section 1798.200, subdivision (c)(12).⁴ The term conviction, however, does not have a uniform or unambiguous meaning in California. Whereas some licensing disciplinary statutes define a conviction broadly to include the entry of a plea or verdict of guilty, a better rule has been followed by several appellate courts when analyzing cases where a conviction resulted in civil penalties or disabilities. In these cases, the courts have stated that the term conviction takes on its technical meaning, requiring a verdict or guilty plea, and "also the judgment entered thereon."⁵

In *Boyll v. State Personnel Board* (1983) 146 Cal.App.3d 1070, an individual who had applied for a position as a correctional officer was not deemed "convicted," since she had successfully completed a deferred entry of judgment program for drug offenders, no judgment or sentence was ever entered in the case, and the charge against her was dismissed without a prior imposition of sentence. (*Boyll, supra*, 146 Cal.App.3d at 1072.) Here, Respondent was given the opportunity to complete a diversion program, and when he successfully completed the program, his charge was dismissed. No judgment was entered. Respondent has neither been convicted nor has his plea of nolo contendere become a binding admission for purposes of this disciplinary proceeding. (Factual finding number 6.)

Second, Complainant has cited no legal authority in support of her argument that the "finding" set forth in his employer's Notice of Suspension, which Respondent did not contest, somehow constitutes a binding and incontrovertible fact that should automatically result in the revocation of his license in this proceeding. Furthermore, these so-called admissions, like any piece of evidence, may be considered or discarded, but certainly require no particular finding.

The evidence demonstrates that Respondent did not intend to commit an offense as described by Penal Code section 314, since he did not think he would be observed and he did not openly or deliberately attempt to offend or annoy anyone by his misconduct. Respondent's act was the result of negligence rather than willful misconduct. Under these circumstances, revocation is a draconian sanction, and it is not the appropriate result, herein.

4. Since cause for discipline was established, Respondent has the burden to show mitigation and rehabilitation. He is remorseful about his misconduct and considers it a stupid

⁴ (See Cal. Code Regs., tit. 22, § 100173, subd. (a)(1); *Arneson v. Fox* (1980) 28 Cal.3d 440.)

⁵ (*Boyll v. State Personnel Board* (1983) 146 Cal.App.3d 1070, at p. 1073-1076.)

mistake. He was truthful with the police when they asked him to describe what happened. He has a good record as a paramedic at work. Respondent has no prior EMSA discipline.

5. Respondent presented compelling evidence of the opinions of several persons who know him well, and who know of his good character. He has already atoned for much of his misconduct, and is actively working on recovering from his stress disorder and depression. The evidence has not established that Respondent will pose a danger to the public if allowed to retain a restricted license.

6. The EMSA Recommended Guidelines for Disciplinary Orders and Conditions of Probation (7/26/08) (Guidelines) provide for progressive discipline unless the facts and circumstances warrant more substantive discipline. The facts and circumstances of Respondent's misconduct are unique, and militate toward a lesser discipline than what Complainant has urged. The Guidelines also suggest that, when determining the appropriate discipline, the EMSA is required to give credit for discipline imposed by the employer and for any immediate suspension imposed by the local EMS agency of the same conduct, pursuant to Section 1798.211. Respondent has already been under suspension for almost three months, so additional suspension does not appear warranted. A three-year period of probation is all that appears necessary to protect the public. Further, since Respondent has completed the educational course required by the criminal court, it does not appear necessary to impose an additional ethics course as part of Respondent's probation.

ORDER

License number P21650 issued to Respondent John R. Hardisty is revoked pursuant to legal conclusion number 2. However, such revocation is stayed, and Respondent is placed on probation for three years, upon the following terms and conditions:

1. Probation Compliance

The respondent shall fully comply with all terms and conditions of the probationary order. The respondent shall fully cooperate with the EMSA in its monitoring, investigation, and evaluation of the respondent's compliance with the terms and conditions of his/her probationary order.

The respondent shall immediately execute and submit to the EMSA all Release of Information forms that the EMSA may require of the respondent.

2. Personal Appearances

As directed by the EMSA, the respondent shall appear in person for interviews, meetings, and/or evaluations of the respondent's compliance with the terms and conditions of the probationary order. The respondent shall be responsible for all of his/her costs associated with this requirement.

3. Quarterly Report Requirements

During the probationary period, the respondent shall submit quarterly reports covering each calendar quarter which shall certify, under penalty of perjury, and document compliance by the respondent with all the terms and conditions of his/her probation. If the respondent submits his/her quarterly reports by mail, it shall be sent as Certified Mail.

4. Employment Notification

During the probationary period, the respondent shall notify the EMSA in writing of any EMS employment. The respondent shall inform the EMSA in writing of the name and address of any prospective EMS employer prior to accepting employment.

Additionally, the respondent shall submit proof in writing to the EMSA of disclosure, by the respondent, to the current and any prospective EMS employer of the reasons for and terms and conditions of the respondent's probation.

The respondent authorizes any EMS employer to submit performance evaluations and other reports which the EMSA may request that relate to the qualifications, functions, and duties of prehospital personnel.

Any and all notifications to the EMSA shall be by certified mail.

5. Notification of Termination

The respondent shall notify the EMSA within seventy-two (72) hours after termination, for any reason, with his/her prehospital medical care employer. The respondent must provide a full, detailed written explanation of the reasons for and circumstances of his/her termination.

Any and all notifications to the EMSA shall be by certified mail.

6. Functioning as a Paramedic

The period of probation shall not run anytime that the respondent is not practicing as a paramedic within the jurisdiction of California.

If the respondent, during his/her probationary period, leaves the jurisdiction of California to practice as a paramedic, the respondent must immediately notify the EMSA, in writing, of the date of such departure and the date of return to California, if the respondent returns. Any and all notifications to the EMSA shall be by certified mail.

7. Obey All Related Laws

The respondent shall obey all federal, state and local laws, statutes, regulations, written policies, protocols and rules governing the practice of medical care as a paramedic. The respondent shall not engage in any conduct that is grounds for disciplinary action pursuant to Section 1798.200. To permit monitoring of compliance with this term, if the respondent has not submitted fingerprints to the EMSA in the past as a condition of licensure, then the respondent shall submit his/her fingerprints by Live Scan or by fingerprint cards and pay the appropriate fees within 45 days of the effective date of this decision.

Within 72 hours of being arrested, cited or criminally charged for any offense, the respondent shall submit to the EMSA a full and detailed account of the circumstances thereof. The EMSA shall determine the applicability of the offense(s) as to whether the respondent violated any federal, state and local laws, statutes, regulations, written policies, protocols and rules governing the practice of medical care as a paramedic. Any and all notifications to the EMSA shall be by certified mail.

8. Completion of Probation

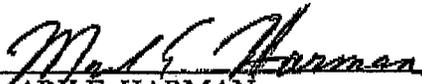
The respondent's license shall be fully restored upon successful completion of probation.

9. Violation of Probation

If during the period of probation the respondent fails to comply with any term of probation, the EMSA may initiate action to terminate probation and implement actual license suspension/revocation. Upon the initiation of such an action, or the giving of a notice to the respondent of the intent to initiate such an action, the period of probation shall remain in effect until such time as a decision on the matter has been adopted by the EMSA. An action to terminate probation and implement actual license suspension/revocation shall be initiated and conducted pursuant to the hearing provisions of the California Administrative Procedure Act.

The issues to be resolved at the hearing shall be limited to whether the respondent has violated any term of his/her probation sufficient to warrant termination of probation and implementation of actual suspension/revocation. At the hearing, the respondent and the EMSA shall be bound by the admissions contained in the terms of probation and neither party shall have a right to litigate the validity or invalidity of such admissions.

DATED: April 2, 2009



MARK E. HARMAN
Administrative Law Judge
Office of Administrative Hearings