

1
2 BEFORE THE
3 EMERGENCY MEDICAL SERVICES AUTHORITY
4 STATE OF CALIFORNIA

5 In the Matter of the Accusation Against:) Enforcement Matter No.: 12-0061
6) OAH No. 2013030145
7 **RICHARD F. ARCHIBALD**)
8 License No. P14588)
9 Respondent.)
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14) **DECISION AND ORDER**
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9 I. INTRODUCTION

10 This matter was heard on January 30, 2014, by Howard Backer MD, MPH, FACEP,
11 Director of the State of California Emergency Medical Services Authority (“Authority”),
12 pursuant to the provisions of the Administrative Procedure Act (“Act”)¹, subsequent to the
13 hearing held on August 6 and 7, 2013, by Administrative Law Judge Nancy Rasmussen of the
14 Office of Administrative Hearings.
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16 II. PARTIES

17 1. Howard Backer MD, MPH, FACEP, is the Director of the Authority. The Director
18 makes this decision in his official capacity as Director of the Authority, and not otherwise.

19 2. Respondent holds Emergency Medical Technician-Paramedic (“EMT-P”) license
20 number P14588 which was first issued on March 10, 1998, and is valid through March 31,
21 2016, unless revoked or suspended according to law.

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25 ¹ The Act is codified at California Government Code Section 11370 et. seq.

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III. JURISDICTION

The power to adopt, modify or reject a proposed decision is granted to the Authority directly by the provisions of California Government Code, Section 11517, which provides:

“11517. (a) A contested case may be originally heard by the agency itself and subdivision (b) shall apply. Alternatively, at the discretion of the agency, an administrative law judge may originally hear the case alone and subdivision (c) shall apply.

(b) If a contested case is originally heard before an agency itself, all of the following provisions apply:

(1) An administrative law judge shall be present during the consideration of the case and, if requested, shall assist and advise the agency in the conduct of the hearing.

(2) No member of the agency who did not hear the evidence shall vote on the decision.

(3) The agency shall issue its decision within 100 days of submission of the case.

(c) (1) If a contested case is originally heard by an administrative law judge alone, he or she shall prepare within 30 days after the case is submitted to him or her a proposed decision in a form that may be adopted by the agency as the final decision in the case. Failure of the administrative law judge to deliver a proposed decision within the time required does not prejudice the rights of the agency in the case. Thirty days after the receipt by the agency of the proposed decision, a copy of the proposed decision shall be filed by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney. The filing and service is not an adoption of a proposed decision by the agency.

(2) Within 100 days of receipt by the agency of the administrative law judge's proposed decision, the agency may act as prescribed in subparagraphs (A) to (E), inclusive. If the agency fails to act as prescribed in subparagraphs (A) to (E), inclusive, within 100 days of receipt of the proposed decision, the proposed decision shall be deemed adopted by the agency. The agency may do any of the following:

(A) Adopt the proposed decision in its entirety.

(B) Reduce or otherwise mitigate the proposed penalty and adopt the balance of the proposed decision.

(C) Make technical or other minor changes in the proposed decision and adopt it as the decision. Action by the agency under this paragraph is limited to a clarifying change or a change of a similar nature that does not affect the factual or legal basis of the proposed decision.

(D) Reject the proposed decision and refer the case to the same administrative law judge if reasonably available, otherwise to another administrative law judge, to take additional evidence. If the case is referred to an administrative law judge pursuant to this subparagraph, he or she shall prepare a revised proposed decision, as provided in paragraph (1), based upon the additional evidence and the transcript and other papers that are part of the record of the prior hearing. A copy of the revised proposed decision shall be furnished to each party and his or her attorney as prescribed in this subdivision.

1 (E) Reject the proposed decision, and decide the case upon the record, including the
2 transcript, or upon an agreed statement of the parties, with or without taking additional
3 evidence. By stipulation of the parties, the agency may decide the case upon the record
4 without including the transcript. If the agency acts pursuant to this subparagraph, all of
5 the following provisions apply:

6 (i) A copy of the record shall be made available to the parties. The agency may require
7 payment of fees covering direct costs of making the copy.

8 (ii) The agency itself shall not decide any case provided for in this subdivision without
9 affording the parties the opportunity to present either oral or written argument before the
10 agency itself. If additional oral evidence is introduced before the agency itself, no agency
11 member may vote unless the member heard the additional oral evidence.

12 (iii) The authority of the agency itself to decide the case under this subdivision includes
13 authority to decide some but not all issues in the case.

14 (iv) If the agency elects to proceed under this subparagraph, the agency shall issue its
15 final decision not later than 100 days after rejection of the proposed decision. If the
16 agency elects to proceed under this subparagraph, and has ordered a transcript of the
17 proceedings before the administrative law judge, the agency shall issue its final decision
18 not later than 100 days after receipt of the transcript. If the agency finds that a further
19 delay is required by special circumstance, it shall issue an order delaying the decision for
20 no more than 30 days and specifying the reasons therefor. The order shall be subject to
21 judicial review pursuant to Section 11523.”

22 IV. HISTORY

23 Pursuant to an appeal of the Accusation issued against Respondent's license, a hearing
24 was noticed and held in this matter on August 6 and 7, 2013, before an Administrative Law
25 Judge with the Office of Administrative Hearings in Oakland, California. Respondent appeared
at this hearing and was represented by counsel.

On or about September 20, 2013, the Authority received a copy of the Proposed Decision
and Order which was dated September 17, 2013. The Authority served a copy of the proposed
decision on Respondent via registered mail on October 1, 2013, and informed him at that time
that it had not adopted the Proposed Decision and Order. The Authority then ordered a copy of
the transcript of the hearing. Upon receiving the transcript, the Authority sent notice to the
Respondent on December 18, 2013, that Respondent could present written argument to the
Director on or before January 19, 2014. Respondent, through counsel, requested an extension to

1 January 30, 2014, and the requested was granted. Respondent, through counsel, submitted
2 additional written argument on that date.

3 V. EVIDENCE SUBMITTED AT WRITTEN HEARING

4 Pursuant to the notice of hearing, Respondent was allowed to submit any evidence in writing
5 to support his argument for adoption or modification of the Proposed Decision up to one
6 business day prior to the hearing, or January 30, 2014. The Authority considered all evidence
7 submitted by the Respondent, which included Respondent's Written Argument in Response to
8 Notice of Concerning Proposed Decision and Written Hearing. The original Accusation, the
9 official transcripts from the hearing, the evidence submitted at the hearing, the Administrative
10 Law Judge's proposed decision, and the additional written argument submitted by Respondent
11 were considered in this Decision and Order.

13 VI. DISCUSSION

14 Respondent's license was subject to discipline by the Authority due to an incident
15 involving the direct provision of patient care. The particular facts of the incident and the parties
16 are referred to in the Accusation and official transcript of the hearing, and will not be repeated
17 here. This discussion will focus solely on the Administrative Law Judge's (hereinafter "ALJ")
18 proposed decision and the conclusions therein.

19 1. Legal conclusion #2, page 10, proposed decision.

20 The ALJ stated: "It was not established that respondent's conduct constituted gross
21 negligence, so no cause for license discipline exists under this section". This finding was error
22 for the below described reasons:

23 A. **Failure to obtain adequate history.** Respondents did not obtain a full history from
24 the Moore (patient's son), nor did they attempt to elicit the same from the patient
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1 (Factual Findings, decision page 4.). Even a casual question of relationship and
2 history would have revealed the basic facts of the patient's dementia, and that further
3 assessment was necessary.

4 **B. Failure to determine complete oriented status/capacity to object to treatment.**

5 Respondent failed to ask questions or make a complete assessment as to the patient's
6 mental status. This is highlighted by the patient's laying on the floor and refusal to
7 get up to be examined. It is not reasonable to assume, given the totality of the facts,
8 that it would be normal for an 80 year old woman to lay on the floor, incontinent
9 (decision page 4), and refuse to get up on her own if at all possible. Further
10 questions should have been asked of the patient and her son to determine her
11 complete mental status and competency. Dementia or Alzheimer's patients can often
12 seem lucid, but upon further questioning the extent of their incapacity can typically
13 be determined. Respondents were experienced paramedics, and should have known
14 to continue questioning the patient to determine a complete orientation status.
15 Furthermore, the ALJ found that the Respondent's testimony regarding how he
16 determined how long the patient had been on the floor was not credible, furthering
17 the allegation that a complete history and orientation status was not obtained.
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19 2. Legal conclusions #3, and 4, pages 10 and 11 of proposed decision.

20 In regards to these conclusions, the ALJ stated:
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22 "It was not established that respondents violated any of these protocols and policies,
23 because they properly considered Criner not to be a medical patient. However, even if
24 these violations had been established, they would not constitute cause for license
25 discipline under Health and Safety Code section 1798.200, subdivision (b) and
subdivision (c)(7). Subdivision (c)(7) pertains to "provisions of this division or the
regulations adopted by the authority," which means state statutes or EMSA regulations.
SFEMSA" protocols and policies are not within the scope of this subdivision."

1 This legal conclusion is incorrect and not support by statute, regulation, or even common
2 sense. Under the auspices of the EMS act as codified in the California Health and Safety
3 code, The Emergency Medical Services Authority is the only entity in the state of
4 California authorized by statute to license, and to discipline the license of, an EMT-P.
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6 While a Local EMS agency may refer a case of paramedic misconduct to the EMS
7 Authority for investigation and potential action, they have no authority to take action on
8 their own against an EMT-P license. Local EMSA agencies have developed local
9 protocols and alternate scopes of practice to augment the state standards for treatment of
10 patients in their respective jurisdictions. Pre-hospital care providers consisting of
11 EMT's and EMT-P's must follow these local standards. To follow the ALJ's reasoning
12 in this legal conclusion would lead to the absurd circumstance that a paramedic could
13 violate or simply ignore some or all local patient treatment protocols, (i.e transport
14 destination protocols, administration of certain medications, etc.) and face no
15 disciplinary action at all for their failure to comply with the local protocol.
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17 Respondent violated local protocol by failing to properly assess the patient, and that
18 initial failure lead to further failures to properly assess the patient's mental capacity,
19 properly treat the patient, and transport the patient to a proper facility.

20 The facts of these instances, when taken in totality, are evidence of gross negligence on
21 the part of Respondent. It is the most basic duty of a paramedic to determine the history and
22 mental status and competency of a patient to object to treatment upon making initial contact,
23 supplementing with information that is available from family members or witnesses.

24 Paramedics must not rely alone on the statements of family members or others, or even patients
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1 themselves, in determining patient status and treatment criteria. Paramedics must utilize their
2 own training, experience, and local protocols as the primary components in determining what
3 treatment a patient needs. In this instance, Respondent failed in that duty. It strains credulity to
4 believe that Respondent, upon finding an 80 year old woman on the floor, incontinent, with a
5 potential history of cardiac issues and at least some indication from a relative of an altered
6 mental status, did not think it necessary to perform a thorough physical assessment, perform an
7 assessment to determine mental status or capacity, or consider this person not to be a "patient".
8 Additionally, the ALJ essentially determined that all testimony from the patient's son, Mr.
9 Moore, lacked credibility. While Mr. Moore may not have been the most sophisticated or
10 educated witness, there was no overriding reason to dismiss his testimony as not credible. Mr.
11 Moore had no motive to embellish or alter his testimony, and indeed did not appear to
12 significantly do so from his prior statements during the investigatory stage.

14 License discipline is not a punishment on the individual Paramedic; it is to ensure that
15 unacceptable conduct is checked and that the public's health and safety is safeguarded to the
16 utmost that it can be. Licensees who fail to provide adequate care and do not follow local
17 protocol show a lack of judgment and disregard of the regulations designed to protect the public
18 and place the public's health and safety at an unacceptable risk if they are not strictly monitored.

19 VII. DECISION AND ORDER

20 The Director of the Authority therefore finds the following:

21 WHEREAS, the PROPOSED DECISION of the Administrative Law Judge and the NOTICE
22 CONCERNING PROPOSED DECISION in this matter were served upon Respondent in
23 accordance with Government Code section 11517; the Authority notified Respondent that the
24 Authority considered, but did not adopt, the PROPOSED DECISION; and
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1 and evaluation of Respondent's compliance with the terms and conditions of this ORDER.

2 Respondent will immediately execute and submit to the Authority all Release of Information
3 forms that the Authority may require of Respondent.

4 **(3) Employment/LEMSA Notification:** During the probationary period, Respondent shall
5 continuously update the Authority as to his EMS employment/LEMSA accreditation with the
6 following measures:

7 (a) Within ten days of the effective date of this ORDER, Respondent will submit the name,
8 address and telephone number of his current EMS employer(s), and all Local Emergency
9 Medical Services Agencies (LEMSA) where Respondent is accredited, to the Authority.

10 (b) Within ten days of any change in EMS employment or accrediting LEMSA, Respondent will
11 notify the Authority of such change and will provide the Authority with the employer's name,
12 address, and telephone number, and the name of the new accrediting LEMSA.

13 (c) Notification of Termination: Respondent will notify the Authority in writing within 72
14 hours of his resignation or termination, for any reason, from any EMS employment. Respondent
15 will provide in the notification letter a full and detailed explanation of the reasons for and the
16 circumstances of his resignation or termination.

17 **(4) Personal Appearances:** As directed by the Authority, Respondent will appear in person for
18 interviews, meetings, and evaluations of Respondent's compliance with the terms and conditions
19 of this ORDER. Respondent is responsible for all of his costs associated with this requirement.

20 **(5) Quarterly Report Requirements:** Respondent will submit quarterly reports, due on or
21 before January 15, April 15, July 15, and October 15, for each preceding quarter, to the
22 Authority wherein Respondent certifies under penalty of perjury that he has met the terms and
23 conditions of his probation. Respondent will provide whatever documentation is necessary to
24 document compliance with the terms and conditions of probation. If Respondent fails to meet
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1 any of the terms or conditions, Respondent will provide the Authority with a written explanation
2 for such failure.

3 **(6) Maintain Active License:** Respondent will maintain an active license with the Authority in
4 order for the probationary period to run. Should Respondent's license lapse or expire by
5 operation of law or otherwise during the probationary period, upon renewal or reinstatement, the
6 license will be subject to any and all terms and conditions of this probation that remain
7 unsatisfied.

8 **(7) Obey All Related Laws:** Respondent shall obey all federal, state and local laws, statutes and
9 regulations, written policies, protocols and rules governing the practice of medical care as a
10 paramedic. Respondent shall not engage in any conduct that constitutes grounds for disciplinary
11 action pursuant to EMS Act section 1798.200. Within 72 hours of being arrested, cited or
12 charged for any offense, Respondent shall submit to the Authority a full and detailed account of
13 the circumstances thereof.

14 The Authority shall determine whether the offense constitutes a violation of any federal, state or
15 local laws, written policies, protocols or rules governing the practice of medical care as a
16 paramedic. To permit monitoring of compliance with this term, if Respondent has not submitted
17 fingerprints to the Authority in the past as a condition of licensure, Respondent shall submit his
18 fingerprints by Live Scan and pay the appropriate fees within forty-five days of the effective date
19 of this ORDER.

20 **(8) Notifications/Submissions:** Any and all notifications and submissions to the Authority shall
21 be sent by certified mail or e-mail. When emailing notifications and submissions, Respondent
22 must receive a return e-mail from the Authority to assure the notification or submission was
23 timely received.

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1 **B. Completion of Probation:** Respondent's license shall have unrestricted status upon
2 successful completion of probation. Successful completion entails complying with all terms and
3 conditions listed in paragraph A., above.

4 **C. Violation of Probation:**

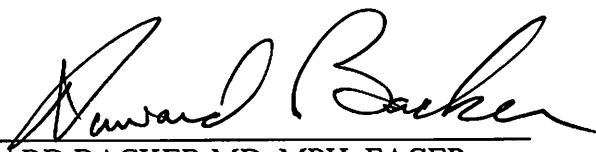
5 (1) Respondent understands and agrees that if during the period of probation he fails to comply
6 with any term or condition of probation, the Authority will initiate action to terminate probation
7 and proceed with actual license denial, suspension or revocation. Upon initiation of such an
8 action, or upon giving notice to Respondent of the Authority's intent to initiate such an action,
9 the probationary period shall remain in effect until the Authority has adopted a decision on the
10 matter. An action to terminate probation and implement actual license denial, suspension or
11 revocation shall be initiated and conducted pursuant to the hearing provisions of the California
12 Administrative Procedure Act.

13 (2) If such an action ensues, the issues to be resolved at the hearing shall be limited to whether
14 Respondent has violated any term of his probation sufficient to warrant termination of the
15 probation and implementation of license denial suspension or revocation.

16 This ORDER shall become effective thirty (30) days from the date of signature below.

17 Dated:

18 March 27, 2014



19 HOWARD BACKER MD, MPH, FACEP
20 Director
21 Emergency Medical Services Authority
22 State of California
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