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BEFORE THE
EMERGENCY MEDICAL SERVICES AUTHORITY
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

EUGENE T. ERLIKH
License No. P32126

Respondent.

) Enforcement Matter No.: 16-0014

) OAH No.: 2016060627

) **DECISION AND ORDER**

The attached Proposed Decision and order dated December 28, 2016, is hereby adopted by the
Emergency Medical Services Authority as its Decision in this matter. The decision shall
become effective 30 days after the date of signature.

It is so ordered.

DATED:

January 5, 2017



Howard Backer, MD, MPH, FACEP

Director

Emergency Medical Services Authority

BEFORE THE
EMERGENCY MEDICAL SERVICES AUTHORITY
STATE OF CALIFORNIA

In the Matter of the Emergency Medical
Technician-Paramedic License Held by:

EUGENE T. ERLIKH
License No. P32126,

Respondent.

Enforcement Matter 16-0014

OAH Number 2016060627

PROPOSED DECISION

The hearing in the above-captioned matter took place on November 28, 2016, at Los Angeles, California, before Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings.

Complainant Sean Trask was represented by Stephan Egan, Staff Counsel III-Retired Annuitant. Respondent appeared with his attorney, David Givot.

Evidence was received and argument was heard, and the matter was submitted for decision on the hearing date. Based thereon, the ALJ makes the following factual findings, legal conclusions, and orders.

FACTUAL FINDINGS

1. Complainant filed the Accusation and maintained this proceeding while acting in his official capacity as Chief of the EMS Personnel Division, of the Emergency Medical Services Authority (Authority) of the State of California.
2. Respondent Eugene T. Erlich is licensed as an Emergency Medical Technician—Paramedic (EMT-P) by the Authority, holding license number P32126. He was first licensed on April 2, 2013, and his license is valid through April 30, 2017.
3. The Authority has the authority to discipline licenses issued to EMT-Ps such as Respondent under the Emergency Medical Services System and the Prehospital Emergency Medical Care Personnel Act, Health and Safety Code section 1797, et seq.,

hereafter the EMS-Act.¹ After Complainant served the Accusation, Respondent filed a Notice of Defense, and this hearing ensued. All jurisdictional requirements have been met.

4. On April 11, 2016, Respondent was convicted of aggravated theft in violation of Ohio Revised Code section 2913.02(A)(2). The conviction was entered against him in the Cuyahoga County Court of Common Pleas, based on Respondent's plea of guilty. By his plea Respondent was convicted of a misdemeanor.

5. The court sentenced Respondent to serve two days in jail, and gave him credit for two days served. He was ordered to pay restitution to the City of Cleveland (Cleveland) in the amount of \$505, and he produced evidence that he had paid the restitution on April 11, 2016. The court also ordered Respondent to pay court costs of \$353.40. Respondent testified at the hearing in this matter that the court costs have been paid.

6. (A) The facts and circumstances of the crime are as follows. Respondent was formerly employed by the City of Cleveland as a probationary Emergency Medical Technician. On February 7, 2013, a meeting took place with Respondent and others, to discuss his overall progress.

(B) On February 8, 2013, Cleveland gave Respondent written notice that he was terminated from his position as a probationary Emergency Medical Technician. He was required by the letter of termination to appear for a separation interview and to "return all of the City of Cleveland owned equipment and training manuals . . . received as a result of [his] appointment . . ." (Ex. 6.) Respondent was told to immediately contact Deputy Commissioner Miller, and he was informed that if he failed to do so by February 14, 2013, such failure would "result in the city owned equipment being deducted from your final paycheck." (*Id.*)

(C) Respondent did not turn in the equipment. On February 20, 2013, Deputy Commissioner Miller reported the matter to the police as a theft, rather than taking steps to deduct the value of the property, which amounted to uniforms, manuals, and two badges, from Respondent's final paycheck. Later, Respondent, through his attorney, returned some of the property to Miller, but not all of it.

(D) Respondent believed that money had been deducted from his paycheck, as his final check was less than he expected. That check was issued on February 27, 2013, in an amount just over \$206.

7. Respondent relocated from Cleveland to Southern California. He has been employed as a paramedic, and is currently employed at Emergency-1 Response, Inc. He has been working for that firm since June 2013. Respondent is also going to school, working to obtain an A.A. degree in emergency medicine.

¹ All statutory citations shall be to the Health and Safety Code unless otherwise noted.

8. Respondent has no other criminal record. There is no record of any other discipline by the Authority, or any employer or local agency. At the same time, several co-workers, and a supervisor from his employer, wrote letters that speak highly of his skills, work ethic, and overall character. Another letter was written by a person who had worked with Respondent at a non-profit that assists in providing donor and tissue donations for those in need of such medical interventions.

9. Respondent was credible in his testimony, responding to questions in a straightforward manner. He explained his side of the story but at the same time appeared respectful of the Authority and the proceeding.

10. It appears that Respondent's wrongdoing was an aberrant act, unlikely to occur again. It does not appear that he would act dishonestly toward any patient, medical professional or medical institution in the future.

LEGAL CONCLUSIONS

1. Jurisdiction to proceed in this matter pursuant to section 1797.200, subdivision (b), was established, based on Factual Findings 1 through 3.

2. (A) Section 1798.200, subdivision (b), authorizes the Authority to deny, suspend, or revoke any EMT-P license, or to place a license holder on probation for any of the actions set forth in section 1798.200, subdivision (c).

(B) Subdivision (c), in turn, states:

Any of the following actions shall be considered evidence of a threat to the public health and safety and may result in the denial, suspension, or revocation of a certificate or license issued under this division, or in the placement on probation of a certificate holder or licenseholder (sic) under this division:

(1) Fraud in the procurement of any certificate or license under this division.

[¶] . . . [¶]

(5) The commission of any fraudulent, dishonest, or corrupt act that is substantially related to the qualifications, functions, and duties of prehospital personnel.

(6) Conviction of any crime which is substantially related to the qualifications, functions, and duties of prehospital personnel. The

record of conviction or a certified copy of the record shall be conclusive evidence of the conviction.

[¶] . . . [¶]

(C) Complainant's first cause for license discipline asserts section 1798.200, subdivision (c)(5), commission of a fraudulent, dishonest or corrupt act, and/or violation of subdivision (c)(6), conviction of a substantially related crime, as grounds for discipline.

3. Cause was established to discipline Respondent's EMT-P license pursuant to section 1798.200, subdivision (c)(5), for his commission of a dishonest act, based on his conviction for theft, as established by Factual Finding 4. Theft, even petty theft, is obviously an act of dishonesty.

4. Cause was established to discipline Respondent's EMT-P license because he was convicted of a crime that is substantially related to the duties, qualifications, and functions of a paramedic. Such licensees must be honest, so that their medical reports, which must be relied on by others, will have currency. Further, it is obvious that a paramedic, while treating a sick or injured party, would have the opportunity to purloin personal property or important private information in the course of care and treatment. This Conclusion is based on Factual Finding 4.

5. In his second cause for discipline, Complainant pleads one of the Authority's regulations, found at California Code of Regulations (CCR), title 22, section 100174, subdivision (b).² (Accusation, Ex. 1, p. 005.) However, that regulation does not create an independent ground to discipline Respondent. Instead, that regulation, titled "Denial/Revocation Standards" appears to act as a discipline guideline. Therefore, a separate cause for discipline was not established.

6. The pleading of CCR section 100174 highlights the main dispute between the parties, as to what discipline is appropriate. That is because CCR section 100174, subdivision (b), provides in pertinent part that "the authority shall deny/ revoke a paramedic license, if any apply to the applicant: . . . (5) has been convicted within the preceding five (5) years of any theft related misdemeanor." Complainant asserts that this regulation mandates the revocation of Respondent's license, regardless of any other circumstances.

7. (A) The aforementioned regulation does not control in this matter, and adds to some potential confusion in cases before the Authority. First, each subdivision of section 100174 uses the wording, "if any of the following apply to the applicant." Thus, while the regulation mixes denial and revocation, the more specific language focuses on license applicants.

(B) Furthermore, CCR section 100173, at subdivision (d), provides that:

² Further references to the CCR shall be to title 22 thereof.

The administrative law judge shall use the “EMS Authority Recommended Guidelines for Disciplinary Orders and Conditions of Probation”, dated July 26, 2008, [Guidelines] as a guide for making any recommendations for the Authority for discipline of a paramedic applicant or license holder found in violation of Section 1798.200 of Division 2.5 of the Health and Safety Code.

(C) CCR section 100173, subdivision (c), provides that the Authority shall use the same discipline guidelines “as the standard in settling disciplinary matters when a paramedic applicant or license holder is found to be in violation of section 1798.200”

(D) Among the statutes set out as authority for CCR sections 100173 and 100174 is section 1798.204, which states that proceedings for probation, suspension, revocation, or denial of a certificate, or a denial of a renewal of a certificate, shall be conducted in accordance with guidelines established by the Authority.

(E) The aforementioned Guidelines were marked as exhibit 9 and the ALJ takes official notice of them. Section III, pertaining to “violations and recommended disciplinary actions,” at part B thereof, number 6, does not mandate revocation for a licensee found to have committed a misdemeanor involving theft. (Ex. 9, p. 6.) Nor for that matter, do the Guidelines mandate revocation for commission of a fraudulent, dishonest or corrupt act. (*Ibid.*) Instead, the maximum discipline for conviction of a theft-related crime is revocation, and the minimum is revocation stayed with one year of probation. No recommended discipline is set out; instead, the Guidelines provide that the recommended discipline is “variable depending on the nature of the crime with terms and conditions.” (*Ibid.*)

9. CCR section 100174, subdivision (b)(5), conflicts with the Guidelines that the ALJ must look to for guidance, and which the Authority must look to when considering settlement. Furthermore, CCR section 100174, subdivision (b)(5), conflicts with the core statute, section 1798.200. This is because that statute does not use the mandatory term “shall,” but rather uses the permissive term “may” when speaking to the Authority’s power to discipline for the conviction of a substantially related crime. That is, section 1798.200, subdivision (c), states in pertinent part that dishonest acts or misdemeanor theft crimes “*may result* in the denial, suspension, or revocation of a certificate or license issued under this division, or in the placement on probation of a certificate holder or licenseholder (sic)” (Emphasis added.)

10. (A) CCR section 100174, subdivision (b)(5), as read by Complainant, tends to alter the statute, section 1798.200, subdivisions (b) and (c), by taking away the Authority’s discretion, and mandating a result contrary to that statute, and the Guidelines.

(B) It is fundamental that an agency may not, through rule making, alter or amend a statute. As reiterated by the Supreme Court more than 40 years ago,

“Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations. [Citations omitted.]” (*Morris v. Williams* (1967) 67 Cal.2d 733, 748.) The vitality of this rule remains undiminished. (See, e.g., *Sabatasso v. Superior Court* (2008) 167 Cal.App.4th 791, 796; see also Gov. Code, § 11342.2.)

(C) While an administrative law judge (or agency) may not declare a law invalid or unconstitutional (Cal.Const., art. III, § 3.5), he or she is not barred from declaring a regulation unenforceable. (*Goldwin v. Public Utilities Commission* (1979) 23 Cal.3d. 638, 669 fn.18; *Lewis-Westco & Co. v. Alcoholic Bev. etc.Appeals Bd.* (1982) 136 Cal.App.3d 829, 840 fn.12.) Given the conflict between the two regulations and the statute, the ALJ cannot be bound by CCR section 100174, subdivision (b)(5).

(D) To be sure, the aforementioned analysis does not establish that the Authority, or the ALJ who acts with the Authority’s power during the proceeding,³ is barred from revoking a paramedic’s license when he or she has been convicted of a theft related misdemeanor. It only means that they are not bound to do so by the conviction alone.

11. (A) The Guidelines provide that the following factors shall be considered when determining the appropriate discipline:

1. Nature and severity of the act(s), offense(s), or crime(s) under consideration;
2. Actual or potential harm to the public;
3. Actual or potential harm to any patient;
4. Prior disciplinary record;
5. Prior warnings on record or prior remediation;
6. Number and/or variety of current violations;
7. Aggravating evidence;
8. Mitigating evidence;
9. Any discipline imposed by the paramedic's employer for the same occurrence of that conduct;
10. Rehabilitation evidence;
11. In case of a criminal conviction, compliance with terms of the sentence and/or court-ordered probation;
12. Overall criminal record;
13. Time that has elapsed since the act(s) or offense(s) occurred;
14. If applicable, evidence of expungement proceedings pursuant to Penal Code 1203.4.

(Ex. 9, pp. 1-2.)

(B) In this case, the severity of the crime is moderate. It is Respondent’s only conviction, and over three years have passed since the wrongful acts occurred. (Factors 1,

³ Government Code section 11512, subdivision (b).

12, and 13.) There was some harm to the public, in the form of the City of Cleveland, but no actual or potential harm to a patient. (Factors 2, 3.) There is no prior disciplinary record, and none imposed by an employer. (Factors 4, 9.) Respondent complied with the sentence, having served his two days, and having paid restitution and court costs. (Factor 11.)

(C) In terms of mitigating evidence, factor 8, and rehabilitation evidence, factor 10, there is some mitigation in the fact Respondent was told, in writing, that he would essentially be billed, and not prosecuted, if he did not return his gear and manuals. In terms of mitigation and rehabilitation, Respondent has been working as a paramedic for the same employer for over three years. A supervisor and co-worker provided letters that indicate he is competent in his work, and that he engages in community service and education. These are examples of mitigation under the Guidelines. (Ex. 9, pp. 9-10.)⁴ They also tend to establish rehabilitation.

12. The purpose of a license discipline proceeding of this type is not to punish an errant licensee—the province of the courts, who have already acted—but to protect the public. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 784-786; *Bryce v. Board of Medical Quality Assurance* (1986) 184 Cal.App.3d 1471, 1476; *Camacho v. Youde* (1979) 161 Cal.App.3d 161, 164.) The appropriate disciplinary order in this case is revocation stayed, with probation for a period of two years. Respondent appears unlikely to break the law again, and the order that follows will protect the public without being unduly punitive against Respondent.

ORDER

License number P32126, issued to Respondent Eugene T. Erlikh, is revoked, pursuant to Legal Conclusions 1 through 4. However, such revocation is stayed and the respondent is placed on probation for two 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 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

⁴ The ALJ recognizes that the letters were not submitted under penalty of perjury, but they were of the type of character evidence typically received in evidence in proceedings before OAH, conducted under Government Code section 11500 et seq. (See also Gov. Code, § 11513, subd. (c).)

the terms and conditions of the probationary order. The respondent shall be responsible for all of his 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 probation. If the respondent submits his 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 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 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 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 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 probation sufficient to warrant termination of probation and implementation of actual 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.

December 28, 2016

DocuSigned by:
Joseph D. Montoya
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Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings