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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.: 15-0024
) OAH No.: 2016030358
)

EMILIO GAONA
License No. P28237

) **DECISION AND ORDER**
)

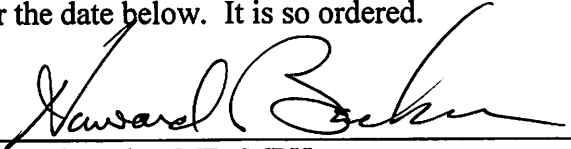
Respondent.
)
)

The attached Proposed Decision is hereby adopted by the Emergency Medical Services Authority as its Decision in this matter.

This decision shall become effective 30 days after the date below. It is so ordered.

DATED:

May 4, 2017


Howard Backer MD, MPH
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:

EMILIO GAONA,

License No. P28237,

Respondent.

EMS Authority No. 15-0024

OAH No. 2016030358

PROPOSED DECISION

Cindy F. Forman, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on April 3, 2017, in Los Angeles, California.

Craig L. Stevenson, Senior Staff Counsel of the Emergency Medical Services Authority (Authority), represented Sean Trask (complainant).

David J. Givot, Attorney at Law, represented Emilio Gaona (respondent), who was present for the hearing.

Oral and documentary evidence was presented at the hearing. The record was closed and the matter was submitted for decision on April 3, 2017.

FACTUAL FINDINGS

1. The Authority issued Emergency Medical Technician-Paramedic (EMT-P) License No. 28237 to respondent on March 2, 2010. Respondent's EMT-P license is due to expire on October 31, 2017.

2. On November 7, 2016, complainant, in his official capacity as Chief of the EMS Personnel Division of the Authority, filed the Amended Accusation, which seeks to discipline respondent's EMT-P license based on respondent's alleged misuse of alcohol. Specifically, the Authority has alleged that respondent misused alcohol on January 29, 2015, and such misuse, when combined with respondent's history of license discipline based on a prior alcohol-related conviction, requires revocation of respondent's EMT-P license.

Alcohol Use

3(a). At the hearing, the Authority presented evidence of respondent's alleged misuse of alcohol on January 29, 2015, through the testimony of Officer Cole Stanhope of the California Highway Patrol and of Ms. Melissa Starrett, a criminalist in the Scientific Investigation Division of the Los Angeles Police Department.

3(b). Officer Stanhope testified that at approximately 12:30 a.m. on January 29, 2015, he initiated a traffic stop after he observed respondent driving 85 miles per hour on a commercial street. Nothing in respondent's driving at the time indicated that he was intoxicated. However, when Officer Stanhope approached respondent, he observed that respondent was nervous, his eyes were red and watery, he exhibited signs of horizontal gaze nystagmus,¹ and his suit was disheveled. Each of these traits alone was not enough to suggest that respondent was intoxicated. However, Officer Stanhope concluded that respondent had been drinking based on these factors when combined with the late hour of the stop, respondent's refusal to perform any field sobriety tests, and his detection of a smell of alcohol when respondent got out of his vehicle. Officer Stanhope then arrested respondent on suspicion of driving under the influence of alcohol.

3(c). According to the Driving Under the Influence Arrest-Investigation Report prepared by Officer Stanhope, respondent provided a blood sample to test his alcohol levels within 90 minutes after his arrest. (Exhibit 4 at 038.) Ms. Starrett analyzed respondent's sample, and she found that respondent's average blood alcohol level was 0.13 percent.

3(d). Respondent was not convicted of any alcohol-related crimes in connection with his January 29, 2015 arrest. Instead, on September 18, 2015, in the Superior Court of the State of California, County of Los Angeles, case number 5MP01619, the court convicted respondent on his plea of nolo contendere to the misdemeanor violation of Vehicle Code section 23109, subdivision (c) (exhibition of speed).² No official records were supplied documenting the conviction itself or the court's sentence for the conviction. According to a certified copy of the Case Summary, dated October 14, 2015, and prepared by the Authority's investigators in connection with the Amended Accusation, the court sentenced respondent to 36 months summary probation provided he serve one day in Los Angeles

¹ Horizontal gaze nystagmus is a condition where the eyes move rapidly and uncontrollably from side to side. Horizontal gaze nystagmus is one of the three standardized field sobriety tests developed by the National Highway Traffic and Safety Administration to identify possible drunk drivers.

² Vehicle Code section 23109, subdivision (c) states in relevant part: "A person shall not engage in a motor vehicle exhibition of speed on a highway, and a person shall not aid or abet in a motor vehicle exhibition of speed on any highway."

county jail with credit for one day actually served, pay fines of \$390 and complete 100 hours of community service.³ (Exhibit 9 at p. 174.)

4. At the hearing, respondent admitted to having six beers at a work party over the course of six hours before his arrest on January 29, 2015. However, he denied that he was drunk when he was driving his car.

Respondent's Prior Conviction and License Discipline

5. Respondent was convicted of violating Vehicle Code section 23103/23103.5 (reckless driving with alcohol involved) in 2009. No evidence was introduced providing any details about either respondent's arrest or conviction.

6. In connection with that conviction, on February 16, 2010, the Authority filed an Amended Statement of Issues (Amended Statement) in case number 09-235 seeking denial of respondent's application for an EMT-P license. Respondent and the Authority agreed to a Stipulated Settlement Agreement and Disciplinary Order, which was adopted by the Authority on February 23, 2010 (Settlement Agreement). (Exhibit 5 at p. 054-061.) Under the terms of the Settlement Agreement, the Authority issued respondent an EMT-P license, which was immediately revoked. The Authority then stayed the revocation and placed respondent's license on probation for three years from the effective date of the Settlement Agreement (March 21, 2009). (*Id.* at p. 056.)

7. Respondent successfully completed the terms of his probation as set forth in the Settlement Agreement, and his full license was reinstated on May 15, 2014. His probation did not include any terms relating to alcohol use, i.e., abstention, biological testing, etc.

Respondent's Evidence

8. Respondent is 31 years old. He was 28 years old at the time of his 2015 arrest. He lives by himself but has plans to get married shortly.

9. Respondent is gainfully employed. He is currently the General Office Manager of First Med Ambulance Services Inc. (First Med) in Sun Valley, California. First Med provides basic life support and specialty care transport ambulance services. Respondent

³ The Case Study was admitted over objection as administrative hearsay. The term "administrative hearsay" is a shorthand reference to the provisions of Government Code section 11513, subdivision (d), to the effect that hearsay evidence that is objected to, and is not otherwise admissible, may be used to supplement or explain other evidence but may not, by itself, support a factual finding. The information in the Case Summary is used herein to supplement the details regarding respondent's January 29, 2015 arrest and subsequent conviction and the direct evidence offered by respondent in his testimony.

has worked for the company for eight years without incident, and he was promoted last year to his present position. His employer knows of his 2015 arrest and criminal conviction.

10. Respondent has never used his EMT-P license. For the past three years, his responsibilities have been administrative only; he has not driven an ambulance or provided direct patient services during this three-year period, nor does his job require him to be able to do so. He is not required to have an EMT-P license for his position at First Med. First Med does not provide Advanced Life Support ambulance services so he has no opportunity to use his EMT-P license at work. Moreover, he cannot provide emergency medical or paramedic services on a free-lance basis or outside of work because he is not affiliated with a hospital or a medical facility.

11. Respondent denied ever having a problem with alcohol. He stopped drinking alcohol altogether almost a year ago as part of a weight loss regimen in which he has thus far lost 30 pounds. He continues to abstain from alcohol and has no intention of resuming any drinking.

12. Respondent believes he has matured quite a bit since his arrest two years ago, and he is now a different person. He realizes that his actions have real consequences. Although he does not use his license, he would like to keep it because he worked hard for it.

13. Respondent is active in the community through his work. He spoke enthusiastically about his regular participation in school and community educational events regarding emergency health care, CPR training, and 911 calls and in Career Days for adults where he discusses emergency medical technician and paramedic work. Although he represents his employer at these events, he does not receive any extra compensation for his participation.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The standard of proof in an administrative action seeking to suspend or revoke a certificate that requires substantial education, training, and testing is “clear and convincing evidence.” (See *Ettinger v. Bd. of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.)

2. An EMT-P licensee in California must be educated and trained in all elements of prehospital advanced life support. (Cal. Code Regs., tit. 22, (CCR) § 100139.) Thus, substantial education, training, and experience are required to obtain an EMT-P license, including classroom, hospital and internship training, and the applicant must pass a nationwide written and practical qualifying examination before licensure. (CCR, §§ 100140, 100141, 100149 - 100162.) A licensee also must meet continuing education requirements after licensure. (CCR § 100167, subd. (b).)

3. Clear and convincing evidence requires a finding of high probability; the evidence must be so clear as to leave no substantial doubt; it must be sufficiently strong to command the unhesitating assent of every reasonable mind. This requirement presents a heavy burden, far in excess of the preponderance of evidence standard that is sufficient for most civil litigation. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 84.)

Applicable Law

4. Health and Safety Code⁴ section 1798.200 authorizes the Authority to take disciplinary action against an EMT-P license for acts that constitute a threat to the public health and safety. Section 1798.200 provides, in relevant part, the following:

(c) 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 or license holder under this division:

[¶] ... [¶]

(9) Addiction to the excessive use of, or the misuse of, alcoholic beverages, narcotics, dangerous drugs, or controlled substances.

5. Whether a crime is substantially related to the qualifications, functions, and duties of an EMT-P is covered in CCR, section 100175, subdivision (a), which states, in relevant part: “A crime or act shall be considered to be substantially related to the qualifications, functions, or duties of a paramedic if to a substantial degree it evidences present or potential unfitness of a paramedic to perform the functions authorized by her/his license in a manner consistent with the public health and safety.”

Discipline

6. Cause exists to discipline respondent’s license, pursuant to Section 1798.200, subdivision (c)(9), and CCR, section 100175, subdivision (a), in that respondent misused alcohol on January 29, 2015, and in connection with his conviction in 2009, and such misuse evidences present or potential unfitness to perform the functions of an EMT-P in a manner consistent with the public health and safety.

7(a). The fact that respondent was not convicted of an alcohol-related offense in 2015 does not excuse him from discipline; nor is respondent excused because his alcohol use or his arrest was outside of the work environment. The stricture in Section 1798.200,

⁴ All further statutory references are to the Health and Safety Code unless otherwise stated.

subdivision (c)(9), pertains to alcohol *misuse*, and is not limited to a criminal conviction based on alcohol misuse or to a work-related arrest. Respondent acknowledged that within six hours of his arrest on January 29, 2015, he drank six beers, and he then decided to drive a vehicle knowing how much he had drunk. And after he started to drive, he drove at a speed approximating 85 miles per hour. Respondent also admitted that in 2009 he was convicted of driving recklessly when under the influence of alcohol.

7(b) As the court in *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 770, stated: “Alcohol consumption quickly affects normal driving ability, and driving under the influence of alcohol threatens personal safety and places the safety of the public in jeopardy. It further shows a disregard of medical knowledge concerning the effects of alcohol on vision, reaction time, motor skills, judgment, coordination and memory, and the ability to judge speed, dimensions, and distance.” Although *Griffiths* relates to a physician, the quoted language is applicable to respondent’s circumstances as well. In other words, getting into a car after drinking excessive amounts of alcohol evidences a potential unfitness to carry out the duties of a paramedic in a manner consistent with the public health and safety, and is therefore substantially related to the qualifications, functions and duties of a licensee. (See *Clare v. State Bd. of Accountancy* (1992) 10 Cal.App.4th 294, 302 [license can be revoked “if the conduct upon which the revocation is based relates to the practice of the particular profession and thereby demonstrates an unfitness to practice such profession”].)

7(c). Section 1798.200, subdivision (c)(9), and CCR section 100175, subdivision (a), also do not require that respondent exhibit evidence of intoxication. Thus, the fact that respondent was not driving erratically before he was arrested in January 2015 and did not exhibit certain characteristics of intoxication does not preclude the Authority from disciplining respondent’s license. Respondent’s blood alcohol level was found to be 0.13 percent in a sample drawn less than two hours after his arrest, and no evidence was adduced to support respondent’s suggestion that the blood alcohol test administered to respondent or its analysis was improper in any way. It is not only unsafe but also unlawful to drive with a blood alcohol level that high, regardless of whether the person exhibits signs of intoxication. (See *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 267 [“Scientific evidence and sad experience demonstrate that any driver with 0.10 percent blood alcohol is a threat to the safety of the public and to himself.”]; Vehicle Code, § 23152, subd. (b) [“It is unlawful for a person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.”].)

8. In support of his claim that his license should not be disciplined, respondent places much weight on the facts that he is not a practicing paramedic and that he has never used his EMT-P license in his present position (nor could he). (See CCR, § 100146, subd. (b) [paramedic must be affiliated with an approved paramedic service provider in order to perform the scope of practice].) However, respondent indicated that he wanted to keep his license, and there is nothing to preclude respondent from taking a job where a paramedic license would be required.

Rehabilitation

9. The Authority has developed “Recommended Guidelines for Disciplinary Orders and Conditions of Probation” dated July 26, 2008 (Guidelines), which were marked as Exhibit 8 at the hearing. According to the Guidelines, the following factors should be considered when determining appropriate license 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. Rehabilitation evidence;
10. In case of a criminal conviction, compliance with terms of the sentence and/or court-ordered probation;
11. Overall criminal record;
12. Time that has elapsed since the act(s) or offense(s) occurred;
13. If applicable, evidence of expungement proceedings pursuant to Penal Code 1203.4.

(Guidelines at page 1.)

10. The Guidelines also must be considered in fixing the level of discipline to be imposed. Under the Guidelines, the maximum recommended discipline for conviction of a substantially-related crime is license revocation, and the minimum recommended action is a stayed revocation with one year of probation. For the misuse of alcoholic beverages, the maximum recommended discipline is again revocation, but the minimum recommended discipline is stayed revocation and three years’ probation. The Guidelines set forth recommended terms and conditions of probation.

11. Under the foregoing factors to determine the appropriate discipline for this matter, it is noted that the misuse of alcohol is a serious offense and directly interferes with a paramedic's ability to perform his or her duties. The evidence shows that respondent first misused alcohol eight years ago and then again a little more than two years ago. His actions caused potential harm to the public but no actual harm. No patients were threatened with harm or actually harmed as a result of his conduct. Although respondent had prior discipline taken against his license in connection with his first alcohol-related conviction, he successfully completed probation, and his license was reinstated. His employer promoted him knowing of his criminal conviction, and there is no evidence suggesting that respondent drank alcohol while working. Respondent has changed his habits since his last conviction, and for almost a year has not drunk any alcohol and he has no intention to start.

12. Pursuant to the Guidelines' recommendations and in light of the lack of any actual harm to the public or to any patient as a result of respondent's misuse of alcohol, an imposition of the minimum proposed discipline for alcohol misuse -- stayed revocation and three years' probation -- would be sufficient to ensure the protection of the public. Respondent's two instances of misuse approximately six years apart, however, are not conclusive evidence that respondent has an addiction problem warranting imposition of all of the alcohol-related probation terms set forth in the Guidelines. To determine whether respondent suffers from alcohol addiction, the Order adopts the assessment tool found in Appendix A of the Authority's Recommended Guidelines for Disciplinary Orders and Conditions of Probation for EMT (Basic) and Advanced EMT (EMT Guidelines), effective April 1, 2010. The assessment tool, set forth in more detail in paragraph 2 of the Order, requires that respondent obtain a medical evaluation by a physician specializing in addiction issues. If the physician finds no signs of alcohol impairment, probation terms as provided by the Guidelines requiring biological fluid testing (paragraph 3 of the Order) are waived.

ORDER

The EMT-P license No. P28237 of respondent Emilio Gaona is revoked; however, the order of revocation is stayed and respondent's license is placed on three years' probation under the following terms and conditions of probation.

1. Abstinence from the Use of Alcoholic Beverages: Respondent shall abstain from the use of alcoholic beverages.

2. Medical Examination: Within 30 days of the effective date of this decision, respondent shall obtain a medical evaluation by a physician certified in addiction medicine by the American Society of Addiction Medicine (ASAM) or the American Board of Psychiatry and Neurology at respondent's expense. If the physician finds no signs of impairment, random biological testing as described in paragraph 3 below will be waived. If the physician finds signs of impairment, respondent will be required to comply with the terms of paragraph 3 of this Order.

3. Biological Fluid Testing: Respondent shall submit to routine and random biological fluid testing or drug/alcohol screening as directed by the Authority or its designee. Respondent may use a lab pre-approved by the Authority or may provide to the Authority the name and location of an independent laboratory or licensed drug/alcohol testing facility for approval by the Authority. The Authority shall have sole discretion for lab approval based on criteria regulating professional laboratories and drug/alcohol testing facilities. When the Authority requests a random test, respondent shall provide the required blood/urine sample by the time specified or within 12 hours of the request if no time is specified. When the Authority requests a random test, respondent shall ensure that any positive test results are conveyed telephonically by the lab to the Authority within 48 hours, and all written positive or negative results are provided directly by the lab to the Authority within 10 days. Respondent shall be responsible for all costs associated with the drug/alcohol screening. At the Authority's sole discretion, the Authority may allow the random drug testing to be conducted by respondent's employer to meet the requirement of random drug testing as set forth above. The results of the employer's random drug testing shall be made available to the Authority in the time frames described above.

4. Probation Compliance: Respondent shall fully comply with all terms and conditions of the probationary order. Respondent shall fully cooperate with the Authority in its monitoring, investigation, and evaluation of the respondent's compliance with the terms and conditions of his/her probationary order. Respondent shall immediately execute and submit to the Authority all Release of Information forms that the Authority may require of respondent.

5. Personal Appearances: As directed by the Authority, respondent shall appear in person for interviews, meetings, and/or evaluations of respondent's compliance with the terms and conditions of the probationary order. Respondent shall be responsible for all of his costs associated with this requirement.

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

7. Employment Notification: During the probationary period, respondent shall notify the Authority in writing of any EMS employment. The respondent shall inform the Authority in writing of the name and address of any prospective EMS employer prior to accepting employment. Additionally, respondent shall submit proof in writing to the Authority of disclosure, by respondent, to the current and any prospective EMS employer of the reasons for and terms and conditions of respondent's probation. Respondent authorizes any EMS employer to submit performance evaluations and other reports which the Authority may request that relate to the qualifications, functions, and duties of prehospital personnel. Any and all notifications to the Authority shall be by certified mail.

8. Notification of Termination: Respondent shall notify the Authority within seventy-two (72) hours after termination, for any reason, with a pre-hospital medical care employer. Respondent must provide a full, detailed written explanation of the reasons for and circumstances of his termination. Any and all notifications to the Authority shall be by certified mail.

9. Functioning as a Paramedic: The period of probation shall not run anytime that respondent is not practicing as a paramedic within the jurisdiction of California. If respondent, during his probationary period, leaves the jurisdiction of California to practice as a paramedic, respondent must immediately notify the Authority, in writing, of the date of such departure and the date of return to California, if respondent returns. Any and all notifications to the Authority shall be by certified mail.

10. Obey All Related Laws: 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. Respondent shall not engage in any conduct that is grounds for disciplinary action pursuant to Health and Safety Code section 1798.200. To permit monitoring of compliance with this term, if respondent has not submitted fingerprints to the Authority in the past as a condition of licensure, then 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, respondent shall submit to the Authority a full and detailed account of the circumstances thereof. The Authority shall determine the applicability of the offense(s) as to whether respondent violated any federal, state and local laws, statutes, regulations, written policies, protocols and rules governing the practice of medical care as a paramedic.

11. Completion of Probation: Respondent's license shall be fully restored upon successful completion of probation.

12. Violation of Probation: If during the period of probation respondent fails to comply with any term of probation, the Authority 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 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 Authority. 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

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be limited to whether respondent has violated any term of his probation sufficient to warrant termination of probation and implementation of actual suspension/revocation. At the hearing, respondent and the Authority 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: May 1, 2017

DocuSigned by:
Cindy F. Forman

CINDY F. FORMAN
Administrative Law Judge
Office of Administrative Hearings