

BEFORE THE  
EMERGENCY MEDICAL SERVICES AUTHORITY  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

ROBERT GARCIA,

Emergency Medical Technician-Paramedic  
License No. P16764

Respondent.

Case No. 05-0041

OAH No. 2007100866

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by  
the DIRECTOR as HIS Decision in the above-entitled matter.

This Decision shall become effective IMMEDIATELY.

IT IS SO ORDERED.

Date: 9/4/08

  
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**PROPOSED DECISION**

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter July 21 and 22, 2008, in San Diego, California.

David P. Chan, Deputy Attorney General, Office of the Attorney General, State of California, represented complainant Daniel R. Smiley, Chief Deputy Director, Emergency Medical Services Authority, State of California.

Michael D. Schwartz, Attorney at Law, represented respondent Robert Garcia, who was present throughout the administrative hearing.

The matter was submitted on July 22, 2008.

**FACTUAL FINDINGS**

*Emergency Medical Services Authority*

1. Notice is taken that no statewide agency was responsible for ensuring the development and coordination of emergency medical services and programs in California before 1980. Although the many stakeholders in California's emergency medical services (including local administrators, fire agencies, ambulance companies, hospitals, physicians, nurses and others) did not agree on many issues, there was a consensus that a more unified statewide approach to emergency and disaster medical services was needed. As the result of several years of effort to establish a state lead agency and centralized resource to oversee emergency and disaster medical services, the Emergency Medical Services System and Prehospital Emergency Care Personnel Act (SB 125) was passed in 1980. That legislation

created the Emergency Medical Services Authority (EMSA).<sup>1</sup> EMSA is one of 13 departments within California's Health and Human Services Agency.

Among its many responsibilities, EMSA operates the State Paramedic Licensure program, which licenses and conducts disciplinary investigations of paramedics to ensure that the care paramedics provide meets California's high standards for prehospital care.<sup>2</sup>

To be eligible for a paramedic license in California, an individual must: Successfully complete an approved paramedic training program (to be eligible to enroll in a paramedic training program, the individual must be currently certified as an EMT or have been so certified within the past 12 months); complete a course of training that includes 450 hours of didactic and skills training, 160 hours of hospital and clinical training, and a field internship of 480 hours which must include advanced life support patient contacts; pass the National Registry of EMTs (NREMT) written and practical examinations;<sup>3</sup> submit fingerprints for a

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<sup>1</sup> Health and Safety Code section 1797.1 sets forth the legislative findings and provides:

"The Legislature finds and declares that it is the intent of this act to provide the state with a statewide system for emergency medical services by establishing within the Health and Welfare Agency the Emergency Medical Services Authority, which is responsible for the coordination and integration of all state activities concerning emergency medical services."

<sup>2</sup> Health and Safety Code section 1797.2 provides:

"It is the intent of the Legislature to maintain and promote the development of EMT-P paramedic programs where appropriate throughout the state and to initiate EMT-II limited advanced life support programs only where geography, population density, and resources would not make the establishment of a paramedic program feasible."

Under Health and Safety Code section 1797.172, subdivision (c), EMSA "shall be the agency solely responsible for licensure and licensure renewal of EMT-Ps who meet the standards and are not precluded from licensure . . . ."

Health and Safety Code section 1797.84 defines "paramedic" (as well as "Emergency Medical Technician Paramedic," "EMT-P," and "mobile intensive care paramedic") as an individual whose scope of practice to provide advanced life support is according to standards prescribed by this division and who has a valid certificate issued pursuant to this division.

<sup>3</sup> EMSA uses the NREMT paramedic exam as the state licensing exam. Failure to obtain the overall passing score or failure of any part of the examination constitutes a complete failure of the written examination. Candidates failing the written examination may reapply and are allowed three opportunities to pass the written examination. Those candidates applying for the fourth time must submit official documentation verifying they have successfully completed 48 hours of remedial training. If a candidate fails the sixth and final attempt of the written examination, the candidate must complete a new, entire, state approved Paramedic Training Program. Candidates are allowed three full attempts to pass the practical examination (one "full attempt" is defined as completing all six stations and two retests if so entitled). Candidates who fail a full attempt or any portion of a second retest must submit official documentation of remedial training relating to all skills before starting the next full examination. Should a candidate fail the third full and final attempt of the practical examination, the candidate must complete a new, entire, state-approved Paramedic Training Program.

A paramedic certified in another state, territory, or jurisdiction may become a certified California paramedic. Along with a completed application, the applicant must provide documentation that the applicant's

criminal history clearance; submit a completed paramedic license application form and a Statement of Citizenship, Alienage, and Immigration Status for State Paramedic License Application/Renewal with one piece of required documentation; and pay required fees.

### *Jurisdictional Matters*

2. On August 9, 2007, complainant Daniel R. Smiley, Chief Deputy Director, Emergency Medical Services Authority, State of California, signed the Accusation in Case No. 05-0041. The accusation alleged that on January 16, 2004, Robert Garcia (Garcia or respondent), a licensed emergency medical technician-paramedic, mistreated a patient by verbally abusing the patient and kicking him in the ribs. The accusation and other required jurisdictional documents were served on Garcia, who timely filed a notice of defense. The matter was set for a four-day administrative hearing.

On July 21, 2008, the administrative record was opened. Jurisdictional documents were presented. Opening statements were given. On July 21 and July 22, documentary evidence was received and sworn testimony was provided. On July 22, 2008, closing arguments were given, the record was closed, and the matter was submitted.

### *Garcia's License Status*

3. On June 17, 2000, EMSA issued Emergency Medical Technician-Paramedic License No. P16764 to Garcia. That license was in force and effect and all times mentioned herein. That license was renewed in 2008, is current, and it remains in effect until it expires, is renewed, suspended, or revoked.

There is no history of any disciplinary action having been imposed against Emergency Medical Technician-Paramedic License No. P16764.

### *Robert Garcia*

4. In his application for license renewal, Garcia represented he was born on December 2, 1979, and was accredited in Riverside County. He represented that he had lived in California continuously for the past seven years; that he was currently employed as an EMS provider by the "Riverside Co. F.D.," that he had not been convicted of any crimes, and that his paramedic license was currently under investigation. Garcia identified 58 hours of continuing education coursework he had taken immediately before filing his application for renewal of his paramedic license.

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National Registration is current; a paramedic training program completion record; documentation of training hours that meet California requirements; and documentation of current or prior state paramedic licensure or certification.

A currently licensed California paramedic must complete a minimum of 48 hours of continuing education every two years.

Garcia testified he became interested in providing emergency medical services when he was 17 years old, that he worked as a firefighter-paramedic for the City of Los Angeles in South Central Los Angeles for one and a half years, then became employed by California Department of Forestry and Fire Prevention (Cal Fire) in Riverside County as a firefighter-paramedic in October 2003. Garcia has remained employed in that capacity since then.

*The Incident Occurring on January 16, 2004*

5. After being hired by Cal Fire in October 2003, Garcia completed academy training and field training. Thereafter, he began serving as a relief firefighter-paramedic in the Coachella Valley in Riverside County.

On the evening of January 16, 2004, Garcia was working out of the Indian Wells fire station. Around midnight, a dispatch call came in concerning a male patient down on El Dorado Drive just south of Highway 111. Garcia and others in the emergency response team answered the dispatch in a fire engine and a paramedic unit. The incident scene was within a block of the fire station. The fire engine and the paramedic unit arrived at the scene almost simultaneously.

A young Hispanic man was observed lying on his back on the roadway. Riverside County Deputy Sheriff Brian Bickman (Deputy Bickman), who had requested emergency medical assistance, was standing in close proximity the patient, who was lying on his back. The patient had blood on his head and face, an obvious head injury, and appeared to be unconscious. The patient's arms were lying on the street, approximately four to five inches away from the patient's torso. There was a heavy odor of alcohol about the patient. Patient care was assumed by the emergency response team.

A member of the emergency response team who arrived in the fire engine, most likely firefighter-EMT Randy Carpenter (Carpenter), knelt by the patient's head and manually provided cervical support. Firefighter-paramedic Joseph Fajardo (Fajardo), who arrived at the scene in the paramedic unit with Garcia, knelt by the patient's side and began obtaining vital signs and examining the patient for additional injuries. Firefighter-EMT Sichel Lakes (Lakes), who arrived in the fire engine, was in the immediate area to provide assistance in packaging the patient for transport to a hospital, but was not stationed at the patient's side. Fire Apparatus Engineer Lucas Spelman (Spelman) provided security for the patient and the emergency response team in the area where the fire engine and paramedic unit were parked.

6.A. Carpenter testified that while he was providing manual cervical spine support, Garcia walked up to the patient, stood over the patient and straddled the patient with his legs, loudly told the patient "Hey, quit fucking around and tell me what happened," and then kicked the patient in the ribs. Carpenter testified that the patient moaned after being kicked. Carpenter testified that Fajardo was attempting to clean blood from the patient's head and face at the time of this incident.

In an immediate response to what he believed had occurred, Carpenter testified he loudly warned Garcia, "Hey man, this is not L.A. City, we don't treat patients this way, you understand me?"

6.B. On cross-examination, Carpenter testified that Garcia's leg action in kicking the patient was "not like kicking a soccer ball" but was more than a "nudge." Carpenter could not recall in his testimony at the administrative hearing if Garcia kicked the patient with the toe or the side of his foot. Carpenter testified Garcia's blow landed on the patient's ribs near the flank area.

The patient, who was Spanish speaking, was packaged onto a gurney and was transported in the paramedic unit to the Desert Regional Medical Center in Palm Springs, where emergency medical treatment was provided.

Carpenter was a credible witness, and there is no doubt that he believed in the truth of all matters to which he testified.

6.C. Carpenter was so upset by what he perceived had occurred that he reported the incident to Spellman, his immediate supervisor, immediately after the incident. Spellman directed Carpenter to prepare a written report, and Carpenter promptly prepared a one and a half page narrative report concerning the incident. Carpenter's written report contained the information contained in Factual Finding 6.A., except that the report did not mention that the patient moaned after being kicked.

7. In late summer or early fall 2005, Cal Fire Battalion Chief Travis U. Witten (Chief Witten) was notified of the alleged incident and began an investigation. Chief Witten obtained narrative reports from Spellman, Carpenter, Lakes, and Fajardo. He interviewed Garcia. None of these persons, other than Carpenter, observed Garcia kick the patient. None of these persons, other than Carpenter, reported that Garcia had used profanity during the encounter. Several persons described Garcia as being upset and/or frustrated at the time, acting forcefully, and yelling at the patient. Some witnesses recalled conversation about the incident over coffee the next morning, but could not recall the specifics of the conversation. Garcia told Chief Witten he could not recall anything about the incident.

8. Jeffrey S. Virnoche (Investigator Virnoche), a Senior Special Investigator with EMSA, began his investigation in May 2005. Investigator Virnoche reviewed the deputy sheriff's report, the paramedic's patient care report, the narrative statements provided to Chief Witten, and a transcript of Chief Witten's interview with Garcia. The narrative to the sheriff's report stated the emergency room physician, Dr. McArthur, described the patient's head injury "as two large bruises on the forehead" and reported that Dr. McArthur saw "no other injuries on [the patient's] body."

Investigator Virnoche conducted additional telephonic interviews which did not disclose additional relevant information, other than a telephonic interview with Carpenter taking place on July 7, 2005, in which Carpenter "described the kick similar to kicking a

soccer ball with more of the tip and side of his shoe . . . forceful enough to push the patient's upper torso a little and causing him to moan."

9. Deputy Bickman, Lakes, and Fajardo – all of whom were in the vicinity of the patient at the time of the alleged incident – testified. These witnesses did not observe Garcia kick the patient and they did not hear Garcia use profanity. Each witness was in a position to see kicking if the witness had been looking towards the patient. Each was in a position to hear any profanity despite engine and ambient noise, particularly Fajardo who was kneeling by the patient's side. Most importantly, Fajardo who had close physical contact with the patient, never saw Garcia straddling the patient and he was unaware of any kicking or profanity. It was not possible for Garcia to have kicked, much less nudged, the patient with his foot given the manner in which Fajardo recalled Garcia was positioned throughout the encounter. The testimony of these witnesses was credible.

10. Garcia denied kicking the patient or swearing at the patient during the January 16, 2004, incident. Garcia's testimony was credible.

Although Garcia told Cal Fire Captain Brad Smith (Captain Smith), a colleague, that it was possible he could have nudged the patient with his foot and that he might even have yelled loudly at the patient in an effort to determine the patient's level of consciousness, since that was consistent with the training he received with the City of Los Angeles in dealing with persons who appeared to be intoxicated and homeless, Garcia's statement to Captain Smith did not establish either that Garcia kicked the patient or used profanity. Garcia credibly testified that when he worked in South Central Los Angeles, the procedure he and other paramedics sometimes used when encountering intoxicated vagrants was to nudge the vagrants with the toe of their boot to determine if the patient was awake and alert; it was not wise to reach down and touch such persons with a hand, or be in close physical proximity to such persons, because they were often armed and might use knives or other weapons to defend themselves from what they perceived as an assault or robbery.

Garcia testified that the patients he encounters in the Coachella Valley are much different than the patients he encountered in Los Angeles. His move to Riverside County and his observation of those with whom he works in Riverside County resulted in a change in his practice, and he no longer nudges patients with his boot. This testimony was believable.

Garcia credibly established that he was absolved of any wrongdoing and unprofessional conduct in connection with several other incidents that were not alleged in the accusation, either directly or in aggravation, which counsel for complainant unsuccessfully attempted to portray as a "pattern of misconduct."

11. Captain Smith and Cal Fire Engineer-Paramedic Patrick O'Donoghue (O'Donoghue) have worked closely with Garcia for the past several years, and they have observed Garcia interact with patients and others. Each believed Garcia was a competent paramedic who treats patients and others in a professional fashion. O'Donoghue's testimony was particularly compelling as he had worked side-by-side in an ambulance with Garcia on 72-hour shifts for more than a year.

### *Complainant's Expert Witness*

12. Humberto Ochoa, M.D. (Dr. Ochoa) obtained a medical degree from the University of Utah in June 1983, completed an internship in Internal Medicine in June 1984, and completed a residency in Emergency Medicine in June 1986. Dr. Ochoa is licensed to practice medicine in California and is board certified in Emergency Medicine. He is the Medical Director of Emergency Medical Services for the Riverside County.

Dr. Ochoa established that it is not within the standard of care for an emergency medical service provider to kick a patient, except possibly in self-defense. Dr. Ochoa defined a "kick" as an action involving the "forceful movement of the leg" and that an injury to a patient or a patient's complaint of pain following a kick was a relevant factor to consider in determining if there was a departure from the standard of care. Dr. Ochoa testified that the use of profanity towards a patient constituted conduct falling below the standard of care.

13. Other emergency medical response providers, including Garcia, agreed with Dr. Ochoa's opinion that it was a violation of the standard of care to kick a patient or to use abusive language towards a patient.

### *Evaluation*

14. While there was probable cause for EMSA to investigate and prosecute this disciplinary action, based on Carpenter's accounts and some evidence that Garcia had acted forcefully and loudly in his interactions with the patient, the clear and convincing evidence did not establish grounds for discipline.

Carpenter, Fajardo, Lakes, Garcia, and Deputy Bickman all had knowledge related to this case and were percipient witnesses. Carpenter, Fajardo, and Garcia were in the best position to see the incident allegedly involving Garcia kicking the patient. Each of these percipient witnesses was in a position to hear any use of profanity. Each percipient witness recalled what happened and described what he or she observed and heard. Each percipient witness was respectful toward the proceeding and of the obligation to tell the truth. Garcia had a personal stake in the outcome, but bias was not readily apparent in his testimony. His failure to recall the event specifically when speaking with Chief Witten in September 2005 did not constitute an adoptive admission, and it did not prevent his recollection from being refreshed over time; it certainly had no impact on his recollection that it was not his practice to kick patients or to swear at them, and that he had never done so.

Carpenter observed something occur around midnight on January 16, 2004, that disturbed him to the extent he spoke with his supervisor about the situation and prepared a written report. Carpenter thereafter provided several accounts that differed with his written report. These inconsistencies do not imply that Carpenter was deliberately untruthful, but simply that his observations and memory were a product of perception. It is well known that two people may observe the same event but remember it much differently.

The credible testimony of Fajardo, Lakes, Deputy Bickman, and Garcia raised questions about Carpenter's perceptions, and made his testimony somewhat less than clear and convincing. Based on a consideration of all the relevant evidence, it cannot be concluded that it is highly probable that Garcia kicked the patient or was verbally abusive towards the patient or used profanity.

## LEGAL CONCLUSIONS

### *The 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." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.)

2. A preponderance of the evidence standard requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence. Clear and convincing evidence requires a finding of high probability, or evidence so clear as to leave no substantial doubt; sufficiently strong to command the unhesitating assent of every reasonable mind. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594.)

3. Substantial education, training, and experience is required to apply for a paramedic license in California, and the applicant must pass a nationwide written and practical qualifying examination before licensure; a licensee must meet continuing education requirements after licensure (see, footnotes 2 and 3). On this basis, the clear and convincing standard of proof applies in this disciplinary proceeding.

### *Relevant Statutory Authority*

4. Health and Safety Code section 1798.200 provides in part:

"(b) The authority may . . . suspend, or revoke any EMT-P license issued under this division, or may place any EMT-P license issued under this division, or may place any EMT-P licenseholder on probation upon the finding by the director of the occurrence of any of the actions listed in subdivision (c) . . .

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

...

(12) Unprofessional conduct exhibited by any of the following:

(A) The mistreatment or physical abuse of any patient resulting from force in excess of what a reasonable and prudent person trained and acting in a similar capacity while engaged in the performance of his or her duties would use if confronted with a similar circumstance . . . .”

*Measuring the Standard of Care*

5. A professional standard of care must be established by expert testimony. (*Elcome v. Chin* (2003) 110 Cal.App.4th 310, 317.) With regard to a standard of care, the process of deriving a standard of care necessarily requires some evidence of an ascertainable practice. (*Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 305.)

*Cause Does Not Exist to Impose Discipline*

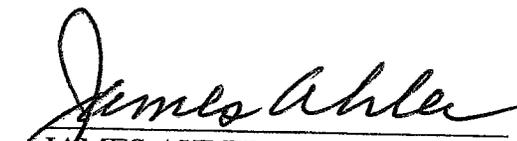
6. Cause does not exist under Health and Safety Code section 1798.200, subdivision (c)(12)(A) to impose discipline against the paramedic license issued to Robert Garcia for acts allegedly involving the mistreatment or physical abuse of any patient from the use of force in excess of what a reasonable and prudent person trained and acting in a similar capacity while engaged in the performance of his or her duties would use if confronted with a similar circumstance of gross negligence. The clear and convincing evidence did not establish the allegations set forth in Accusation in Case No. 05-0041.

This conclusion is based on all factual findings and on all Legal Conclusions.

ORDER

The Accusation in Case No. 05-0041 filed against Robert Garcia is dismissed.

DATED: 8/28/08

  
JAMES AHLER  
Administrative Law Judge  
Office of Administrative Hearings