BEFORE THE
EMERGENCY MEDICAL SERVICES AUTHORITY
STATE OF CALIFORNIA

In the Matter of the Accusation Against: SCOT GRAHAM,
License No.: P04381

Respondent.

) Enforcement Matter No.: 07-0213
) OAH No. 2009030843

DECISION AND ORDER

I. INTRODUCTION

This matter was heard on December 2, 2009, by R. Steven Tharratt MD, MPVM, Director of the State of California Emergency Medical Services Authority ("Authority"), pursuant to the provisions of the Administrative Procedure Act ("Act")\(^1\), subsequent to the hearing held on June 15, 2009, by Administrative Law Judge Perry Johnson of the Office of Administrative Hearings.

II. PARTIES

1. R. Steven Tharratt MD, MPVM, is the Director of the Authority. The Director makes this decision in his official capacity as Director of the Authority.

2. On or about September 17, 1990, the Emergency Medical Services Authority, State of California, issued Emergency Medical Technician-Paramedic (EMT-P) License No. P04381 to SCOT GRAHAM (Respondent). The license was in full force and effect at all times relevant to the proceedings herein and will expire by natural operation on August 31, 2010, unless suspended or renewed.

\(^1\) The Act is codified at California Government Code Section 11370 et. seq.
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 provide:

"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.

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

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

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

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

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

IV. HISTORY

Pursuant to a notice of defense timely tendered by Respondent, a hearing was noticed and held in this matter on June 15, 2009, before Perry Johnson, an Administrative Law Judge with the Office of Administrative Hearings in Oakland, California. Respondent appeared at this hearing and was represented by counsel Carmela Woll. Senior Staff Counsel Cynthia Curry represented the Authority.

On or about July 20, 2009, the Authority received a copy of the Proposed Decision and Order which was dated July 16, 2009. The Authority served a copy of the proposed decision on Respondent via registered mail on August 13, 2009, 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, and on or about October 8, 2009, the Authority received a copy of the transcript.
The Authority sent notice to the Respondent on October 12, 2009, that it was not adopting the proposed decision of the Administrative Law Judge, and that Respondent could present written argument to the Director on or before November 17, 2009. Respondent’s counsel requested an extension to respond to December 1, 2009, which request was granted. On December 1, 2009, Respondent’s counsel submitted written argument for consideration by the Director. The original Accusation, the transcripts from the hearing, the evidence submitted at the hearing, the Administrative Law Judge’s proposed decision, and the written argument from Respondent’s counsel submitted on December 1, 2009, were considered in this Decision and Order.

V. DISCUSSION

Respondent’s license was subject to discipline for criminal acts that Respondent had been convicted of. The Administrative Law Judge determined that Respondent’s convictions for violating California Penal Code Section 422 (Threats to commit a crime resulting in great bodily injury or death) were substantially related to the duties and functions of a licensee (Proposed Decision, Page 4, Paragraph 11). These convictions were undisputed by the Respondent at the hearing.

The Administrative Law Judge found that the Authority posited a restrictive view of California Code of Regulations Section 100173(g), relating to the granting of a license to a person otherwise precluded from having one.

The Administrative Law Judge determined that Respondent was convicted of misdemeanors related to force, violence, threat or intimidation within the preceding five years, and also found that such convictions were substantially related to the duties and functions of a licensee (Proposed Decision Page 4, Paragraph 11), and a cause for discipline (Proposed Decision, Page 9, Paragraphs 2 and 3).
The Administrative Law Judge made a finding that Respondent had two convictions (Proposed Decision, Page 4, Paragraph 13). However, he determined that the two convictions should be treated as one conviction.

APPLICABILITY OF CCR 100173(g)

California Code of Regulations, Title 22 Section 100173(g), cited by the Administrative Law Judge and by Respondent’s written argument, is inapplicable to the instant case. Section 100173(g) of Title 22, Division 9, Chapter 4, Article 9, California Code of Regulations specifically provides:

“The director may grant a license to anyone otherwise precluded under subsections (a) and (b) of this section if the director believes that extraordinary circumstances exist to warrant such an exemption.” (emphasis added)

This section is applicable only to applicants for an initial paramedic license. To proffer otherwise is to ignore the plain language of the regulation itself. The section is applicable to applicants for an initial paramedic license by the specific inclusion of the language “may grant a license...”, and is not applicable to currently licensed paramedics. The Director cannot “grant” a license to an individual who already has one. An individual who already has obtained a license may have it disciplined, suspended or revoked; the Director cannot grant or give something that an individual already has a right to possess. A licensed Paramedic, such as Respondent, is not “otherwise precluded” from having a license; he has already met the requirements for licensure and has been issued a license which is considered a property right. The language here clearly relates to the potential issuance of a license to a person who does not already have one, and not to the mitigation of, or excuse from, imposition of license discipline for a person who already has a vested right in continued possession of one. For that reason, this section is neither
applicable to Respondent’s case nor open to such a broad reading as espoused by the
Administrative Law Judge and Respondent.

VI. DECISION AND ORDER

The Director of the Authority therefore finds the following:

WHEREAS, the PROPOSED DECISION of the Administrative Law Judge and the NOTICE
CONCERNING PROPOSED DECISION in this matter were served upon Respondent in
accordance with Government Code section 11517; the Authority notified Respondent that the
Authority considered, but did not adopt, the PROPOSED DECISION; and

WHEREAS, the Respondent was afforded the opportunity to present written argument,
and exercised the opportunity through counsel; and

WHEREAS, the Director of the Emergency Medical Services Authority has considered
the record, including the transcript, and now finds that;

GOOD CAUSE APPEARING THEREFORE, the PROPOSED DECISION of the
Administrative Law Judge is hereby adopted by the Director of the Emergency Medical Services
Authority as its Decision in this matter, EXCEPT FOR: Paragraph 5, Page 9; and Paragraph 8,
Pages 11, 12 and 13. In addition, the following portions of the ORDER are NOT ADOPTED by
the Director, the following being substituted therefore:

ORDER

“Emergency Medical Technician-Paramedic (EMT-P) license No. P04381 of Respondent SCOT
GRAHAM is hereby revoked by reason of Legal Conclusion 3; however, the revocation is
stayed during a four-year period of probation under the following terms and conditions:”

The following paragraphs are added to the ORDER immediately after Paragraph 11 on
Page 15:
“12. Abstinence from the Use of Illegal Drugs or Alcoholic Beverages: The Respondent shall abstain from the use or possession of all illegal drugs; and shall abstain from the use of alcoholic beverages during the probationary period.

13. Biological Fluid Testing: The Respondent shall submit to routine and random biological fluid testing or drug/alcohol screening as directed by the EMSA or its designee. Respondent may use a lab pre-approved by the EMSA or may provide to the EMSA the name and location of an independent laboratory or licensed drub/alcohol testing facility for approval by the EMSA. The EMSA shall have sole discretion for lab approval based on criteria regulating professional laboratories and drub/alcohol testing facilities. When the EMSA requests a random test, the 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 EMSA requests a random test, the respondent shall ensure that any positive test results are conveyed telephonically by the lab to the EMSA within 48 hours, and all written positive or negative results are provided directly by the lab to the EMSA within 10 days. The Respondent shall be responsible for all costs associated with the drug/alcohol screening.

At the EMSA’s sole discretion, the EMSA may allow the random drug testing to be conducted by the 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 EMSA in the time frames described above.”

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

Dated: 1/25/10

R. STEVEN THARRAFT, MD, MPVM
Director
Emergency Medical Services Authority
State of California