

BEFORE THE
EMERGENCY MEDICAL SERVICES AUTHORITY
STATE OF CALIFORNIA


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In the Matter of the Emergency Medical Technician- Paramedic License of:) Enforcement Matter No.: 16-0308
) OAH No.: 2017091106
)
JOSHUA R. FUNK) **DECISION AND ORDER**
License No. P32762)
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:
MARCH 22, 2018



Howard Backer MD, MPH
Director
Emergency Medical Services Authority

BEFORE THE
EMERGENCY MEDICAL SERVICES AUTHORITY
STATE OF CALIFORNIA

In the Matter of the Accusation and Petition
to Terminate Probation Against:

JOSHUA R. FUNK

EMT-P License No. P32762,

Respondent.

Case No. 16-0308

OAH No. 2017091106

PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on March 6, 2018, in Los Angeles. The record was closed and the matter submitted for decision at the conclusion of the hearing.

Cheryl Hsu, Staff Counsel, represented Sean Trask (complainant).

Joshua R. Funk (respondent) was present and represented himself.

Complainant seeks to revoke respondent's paramedic license based on allegations that he violated conditions of his probation with the Emergency Medical Services Authority (EMSA), including a 2016 arrest for disorderly conduct in public related to the misuse of alcohol. Respondent admits he violated some conditions of his probation, with explanations, but denies most of the allegations concerning his 2016 arrest. It was established by clear and convincing evidence that respondent's arrest was the result of his misuse of alcohol and disorderly conduct in public, and that he violated various conditions of his EMSA probation. Since respondent was on probation with the EMSA due to a prior conviction for driving under the influence of alcohol, his subsequent misuse of alcohol and multiple probation violations warrant termination of his probation and revocation of his license.

FACTUAL FINDINGS

1. Complainant brought the Accusation and Petition to Terminate Probation in his official capacity as EMSA's Chief of the EMS Personnel Division. Respondent timely requested a hearing to contest the pleading.

2. The EMSA issued to respondent Emergency Medical Technician- Paramedic (EMT-P) license number P32762 on October 4, 2013; it was valid through October 31, 2017, at which time the license lapsed. Respondent has not renewed it.

Respondent's Prior Discipline

3. On November 23, 2013, less than two months after his license was issued, respondent was arrested by an officer of the Fullerton Police Department for driving under the influence of alcohol. The arrest was based on respondent exhibiting symptoms of alcohol consumption after a traffic enforcement stop by the officer; respondent's admission he had consumed alcohol before driving; his failure to properly execute a series of field sobriety tests; and the results of a preliminary alcohol screening (PAS) device, which indicated respondent probably had a blood alcohol concentration level above the legal limit.

4. On July 9, 2014, in the Superior Court of the State of California, Orange County, respondent was convicted upon his plea of violating Vehicle Code section 23152, subdivisions (a) [driving under the influence of an alcoholic beverage] and (b) [driving with a blood alcohol level of 0.08 percent or above], both misdemeanors. Imposition of sentence was suspended and respondent was placed on three years of probation, under terms including he pay fines and fees, and complete a three-month first-offender alcohol program.

5. On March 12, 2015, the EMSA Director, pursuant to a voluntary stipulated settlement agreement in EMSA case number 13-0284, issued a Decision and Order placing respondent's license on probation for three years. The Decision and Order became effective on April 11, 2015, and includes, in pertinent part, the following conditions:

A. License Revoked; Revocation Stayed; Probation: It is hereby ordered that an EMT-P License P32762 issued to Respondent be revoked. However, such revocation is stayed and Respondent's license is placed on probation for three (3) consecutive calendar years from the effective date of this Agreement, subject to the following probationary terms and conditions:

(1) Probation Compliance: Respondent will fully comply with all terms and conditions of this Agreement. Respondent will fully cooperate with the Authority in its monitoring, investigation, and evaluation of Respondent's compliance with the terms and conditions of this Agreement. Respondent will immediately execute and submit to the Authority all Release of Information forms that the Authority may require of Respondent.

(2) Abstinence from the Consumption of Alcohol and Drugs: Respondent shall abstain from the consumption of any and all alcoholic beverages and non-prescription drugs during the entire term of the probationary period. . . .

[¶] . . . [¶]

(7) Quarterly Report Requirements: Respondent will submit quarterly reports, due on or before January 15, April 15, July 15, and October 15, for each preceding quarter, to the Authority wherein Respondent certifies under penalty of perjury that he has met the terms and conditions of his probation. Respondent will provide whatever documentation is necessary to document compliance with the terms and conditions of probation. If Respondent has not met any of the terms or conditions, Respondent will provide a written explanation for failing to do so.

[¶] . . . [¶]

(9) 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. Within 72 hours of being arrested, cited, or charged for any offense, Respondent shall submit to the Authority a full and detailed account of the circumstances thereof. . . .

[¶] . . . [¶]

C. Violation of Probation:

(1) Respondent understands and agrees that if during the period of probation he fails to comply with any term or condition of probation, the Authority will initiate action to terminate probation and proceed with actual license suspension/revocation. Upon initiation of such an action, or the giving of notice to Respondent of the Authority's intent to initiate such an action, the probationary period 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.

(2) If, for good cause, the Authority brings an action to terminate Respondent's probation, the issues to be resolved at the hearing shall be limited to whether Respondent has violated any term of his probation sufficient to warrant termination of the probation and implementation of actual suspension/revocation. Respondent agrees that in an action by the Authority to terminate probation, the charges and allegations in Accusation No. 13-0394 shall be deemed true and fully admitted. At the hearing on a petition to terminate probation, Respondent and the Authority shall be bound to the admissions contained in the terms of probation and neither party shall have a right to litigate the validity or invalidity of such admissions.

Respondent's Arrest in 2016

6. On November 12, 2016, Officer Gonzales of the Huntington Beach Police Department (HBPD) was at the Hotel Huntington Beach speaking to the hotel manager about a group of people creating a disturbance in the lobby. Respondent entered the lobby area and attempted to check in at the hotel. Officer Gonzales noticed respondent when he began arguing with hotel staff. Officer Gonzales observed respondent was having difficulty standing; at one point he braced respondent with his arm because he thought respondent might fall. Officer Gonzales also detected an odor of alcohol coming from respondent, and that he was slurring his speech. Officer Gonzales asked respondent his name, which respondent refused to provide. Officer Gonzales spoke to respondent for approximately 10 minutes, but respondent did not seem to comprehend what he was told by the officer. Respondent eventually gave his cellphone to the officer and told him to find his hotel confirmation. Officer Gonzales could not locate any such information. Respondent was loud and disruptive in the lobby. The hotel manager decided to refuse a room to respondent, even if he had a reservation. Officer Gonzales explained the situation to respondent. Respondent refused to leave the property after being denied service and instructed to leave.

7. Officer Gonzales decided to arrest respondent. Officers Thomas and Kennefick from HBPD arrived to assist Officer Gonzales. Respondent was placed under arrest for violating Penal Code section 647, subdivision (f) [disorderly conduct, public intoxication]. Respondent told the officers he did not understand why he was being arrested. The officers had to force respondent into the rear of the patrol car because he resisted being placed there. Officer Gonzales later heard a loud thump come from inside the patrol car. He thought respondent had kicked the door or window of the patrol car; during the hearing, respondent testified he had hit his head against the window to try to get the officers' attention, who were standing outside the car. Respondent was removed from the vehicle, restrained, and put back inside with a violent prisoner restraint seatbelt.¹

8. On January 9, 2017, in the Superior Court of the State of California, Orange County, respondent pled guilty to a misdemeanor violation of Penal Code section 647, subdivision (f) [disorderly conduct, public intoxication]. Respondent was granted a Deferred Entry of Judgment Agreement under terms that he complete a six hour educational program; pay all associated costs and fees of the program; commit no new law violations; provide a state DNA sample and prints for the state DNA Database; and provide a DNA sample, prints, and photograph for the local DNA Database. Respondent successfully performed these conditions and no conviction was entered against him. His case was dismissed.

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¹ No findings are made concerning the other allegations about respondent's conduct while in the patrol car. Those events are subject to sharp dispute between Officer Gonzales and respondent. Moreover, findings regarding those allegations are not necessary to decide the remaining allegations or resolve this case.

9. A. In his written statement to the EMSA (ex. 7) and testimony during the hearing, respondent denies being either intoxicated or disorderly. Respondent believes Officer Gonzales mistakenly concluded respondent was intoxicated because he erroneously associated respondent with the rowdy group of people in the hotel lobby who were intoxicated. Respondent believes the officer also leapt to the wrong conclusion about respondent's sobriety because his female date was passed out and vomiting in the hotel lobby. Respondent did not want to leave the hotel when requested because he was fearful for the safety of his date and did not want to abandon her before she was taken to an emergency room for treatment.

B. Respondent's denial of being publically intoxicated was not convincing. He admitted he and his date had previously been to lunch or brunch with a number of other people who were drinking. By his own admission, his date that day drank so heavily as to later require emergency medical attention. Respondent also admits he had "two or three sips" of a cocktail. It is doubtful respondent would drink so little when everyone else he was with had been drinking more, including his date. Respondent's EMSA probation prohibited him from drinking any alcohol at all. Once he decided to drink the day in question and violate his probation, there is no reason to believe he stopped at only a few sips. In any event, Officer Gonzales was persuasive and clear in both his testimony and police report (ex. 8) that respondent was obviously intoxicated, impaired, and a threat to his own safety. No good reason was offered suggesting Officer Gonzales had a motive to give false testimony; or that he did not have the ability to observe and perceive respondent's state of sobriety.

C. Respondent's denial of being disorderly was also not convincing. He admits initially refusing to identify himself to Officer Gonzales. He also admits he did not want to leave the hotel when requested, because he wanted to stay with his date before she was taken to the hospital. Respondent's excuses for not complying with the officer's lawful requests were not justified. Though respondent submitted a document from Hotels.com (ex. A) which shows a reservation for the hotel on the night in question, the document does not identify in whose name the reservation was made. In any event, it is undisputed that Officer Gonzales could not locate such information on respondent's cellphone on the night in question, and that hotel staff did not find a reservation for respondent either. Officer Gonzales was clear and convincing in his report and testimony that respondent was loud and disorderly while in the hotel and that he subsequently resisted being arrested. While respondent denies resisting his arrest, he admitted a number of acts which, in totality, suggest he was not compliant with the officers' efforts, including that he did not want to leave the premises without his date; complained frequently about his handcuffs; told the officers several times he just wanted to stay and protect his date; and banged his head on the window while inside the patrol car to get the officers' attention.

Respondent's Probation Violations

10. On November 13, 2016, EMSA's Enforcement Unit received an arrest notification from the Department of Justice regarding respondent's arrest the prior evening. The EMSA did not receive any subsequent notification about the arrest from respondent,

even though probation Condition A.9. required that within 72 hours of being arrested, cited, or charged for any offense, respondent would submit a full and detailed account of such an incident. In fact, respondent did not advise the EMSA about his arrest until after his EMSA probation monitor sent him an email on February 28, 2017, advising him that the EMSA had been notified of his arrest by other sources. Respondent provided a written account in response on March 1, 2017.

11. It was not clearly and convincingly established, as alleged, that respondent violated probation Condition A.7. by failing to submit any quarterly report after March 8, 2016. While respondent admits some of his quarterly reports were late, he testified that, to his knowledge, he has submitted all required quarterly reports. The only evidence presented by complainant in support of this allegation is the declaration of respondent's EMSA probation monitor, who declared, in conclusory fashion, that respondent violated his probation regarding "[t]imely submission of quarterly reports;" she failed to identify any quarterly report she did not receive. (Ex. 10, p. 64.)

12. Based on the observations of Officer Gonzales, it is clear that respondent had consumed an excess amount of alcohol on the day in question. During the hearing, even respondent admitted that he had "two or three sips" of an alcoholic beverage when he was with a large group of people earlier in the day. Respondent therefore violated probation Condition A.2., which required complete abstinence from consuming any alcohol during his entire probationary period.

13. Although respondent's completion of his Deferred Entry of Judgment Agreement meant he was not convicted of violating Penal Code section 647, subdivision (f), it was clearly and convincingly established by the persuasive testimony of Officer Gonzales and his police report, as well as respondent's concessions described above, that respondent had misused alcohol on the day in question. By doing so, respondent violated probation Condition A.9., which prohibited him from engaging in any conduct that is grounds for disciplinary action pursuant to Health and Safety Code section 1798.200. (See Legal Conclusion 3 below.)

14. Respondent's excuses for violating his EMSA probation are concerning. Respondent indicates he did not report his arrest because he had not read his probation conditions carefully, and thought he only had to report a conviction. Because he believed his guilty plea would not result in a conviction due to his deferred entry of judgment, he did not see the need to notify the EMSA about his pending criminal case. This excuse suggests once the criminal case was dismissed, respondent would have never notified the EMSA. He also testified he drank alcohol the day he was arrested in 2016 despite the abstinence condition of his probation because he "let my guard down," did not plan on getting drunk, and was close to the end of his criminal probation from his 2014 conviction. This excuse shows a cavalier attitude about compliance with his EMSA probation and suggests an inability to abstain from alcohol. As explained above, respondent's denials to being drunk in public and disorderly were not convincing. Even though it was not established that respondent failed to submit some of his quarterly reports, he still admits he was late submitting many of them.

Rehabilitation and Other Relevant Evidence

15. Respondent is 31 years old. He is single and has a young daughter, who he helps to support.

16. While being licensed, respondent worked for two different employers as a paramedic. Respondent allowed his license to lapse in 2017 because he decided to change careers and go back to school to become certified to administer radiographic medical imaging, such as x-rays and MRIs. Respondent is now enrolled in a local junior college. He has no intention of renewing his EMSA license.

17. When questioned why he drank alcohol on the day of his 2016 arrest, even though his probation required complete abstinence, respondent testified that he has “some kind of addiction or something that causes me, after just one drink, [to not] carry myself normally.” This testimony, in conjunction with two arrests and criminal prosecutions for crimes involving consumption of alcohol, tends to suggest respondent has a more profound problem with alcohol. This is concerning for someone who holds a paramedic license.

18. The factors established by the EMSA to be considered in determining discipline of a licensee are applied to respondent as follows:²

a. Nature and severity of the act(s), offense(s), or crime(s) under consideration. Respondent’s actions demonstrate a problem with alcohol and willingness to violate his EMSA probation, which is concerning.

b. Actual or potential harm to the public. Only potential harm to the public was established.

c. Actual or potential harm to any patient. Respondent was not involved in patient care on the night in question.

d. Prior disciplinary record. Respondent has a prior history of discipline with the EMSA. It is important to note that the circumstances supporting that prior discipline occurred less than two months after he received his license; and that respondent went well less than two years before violating his probation. In short, respondent twice engaged in acts supporting discipline of his license within the five years he has possessed his license.

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² These factors are part of the EMSA’s “Recommended Guidelines for Disciplinary Orders and Conditions of Probation,” dated July 26, 2008 (Guidelines), established pursuant to California Code of Regulations, title 22, section 100172, subdivision (d).

e. Prior warnings on record or prior remediation. No evidence shows respondent received a prior warning from the EMSA.

f. Number and/or variety of current violations. The number and variety of violations in this matter are concerning, in that they indicate an alcohol problem and an inability to comply with EMSA laws, regulations, and conditions of probation.

g. Aggravating evidence. By respondent's own admission, he was late submitting several quarterly reports; he also violated probation by allowing his license to lapse.

h. Mitigating evidence. None was established.

i. Rehabilitation evidence. Respondent presented no evidence of rehabilitation, other than that he completed terms required for dismissal of his criminal case related to his 2016 arrest and has had no known subsequent contacts with law enforcement.

j. Compliance with terms of the sentence and/or court-ordered probation. Respondent's criminal probation from his 2014 conviction was terminated after he completed the required terms. As discussed above, respondent complied with the terms of the Deferred Entry of Judgment Agreement from his 2017 plea agreement.

k. Overall criminal record. Respondent has only the 2014 conviction.

l. Time that has elapsed since the acts or offenses occurred. The proven misconduct is recent, having occurred in 2016.

m. If applicable, evidence of expungement proceedings pursuant to Penal Code section 1203.4. Respondent's 2014 conviction has not been expunged.

LEGAL CONCLUSIONS

1. Complainant bears the burden of proof in this case. The standard of proof for the Accusation is clear and convincing evidence to a reasonable certainty. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 855-856.)³

³ It is inconsequential that the petition to terminate probation uses the lower preponderance of the evidence standard. (*Sandarg v. Dental Bd. of California* (2010) 184 Cal.App.4th 1434, 144.) In this case, all the factual findings were established by clear and convincing evidence to a reasonable certainty.

2. A. Health and Safety Code section 1798.200, subdivision (c)(5), allows the EMSA to discipline a licensee for “the commission of any fraudulent, dishonest, or corrupt act that is substantially related to the qualifications, functions, and duties of prehospital personnel.”

B. In this case, it was not established that cause exists to discipline respondent’s license pursuant to section 1798.200, subdivision (c)(5). While respondent was refused service at a public establishment, the hotel, and later failed to cooperate with law enforcement when he was arrested for disorderly conduct, it was not clearly and convincingly established that in doing so he engaged in acts constituting corruption, dishonesty or fraud. Respondent was simply drunk and disorderly. (Factual Findings 6-9.)

3. A. Health and Safety Code section 1798.200, subdivision (c)(9), allows the EMSA to discipline a licensee for “addiction to, the excessive use of, or the misuse of, alcoholic beverages, narcotics, dangerous drugs, or controlled substances.”

B. In this case, cause exists to discipline respondent’s license pursuant to section 1798.200, subdivision (c)(9), because it was clearly and convincingly established that respondent misused alcohol to the extent that he became publically intoxicated, disorderly, and resisted efforts of police officers. (Factual Findings 6-9.)

4. By the terms of respondent’s probation, as stated in the Decision and Order in EMSA case number 13-0284, respondent’s violation of conditions of his probation establishes cause to terminate the probation and impose the stayed revocation of his license. In this case, it was clearly and convincingly established that respondent violated conditions of his probation pertaining to timely reporting his arrest (Condition A.9.), abstaining from alcohol (Condition A.2.), and not engaging in conduct that would be grounds for disciplinary action pursuant to Health and Safety Code section 1798.200 (Condition A.9.). (Factual Findings 6 through 14.)

5. Good cause exists for revocation of respondent’s license as the result of his violation of Health and Safety Code section 1798.200, subdivision (c)(9), as well as the termination of his probation due to his violation of several probation conditions. Respondent’s disorderly conduct due to public intoxication and his resisting arrest constitute a threat to the public health and safety because of the necessity for a paramedic to provide medical care to the public and cooperate with law enforcement. Respondent’s actions also reflect a lack of sound professional and personal judgment that is relevant to a paramedic’s fitness to perform his duties. Respondent’s unwillingness to abide by the terms of his probation also demonstrates his lack of fitness to perform the functions authorized by his license in a manner consistent with public safety. (Factual Findings 1-14.)

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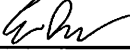
6. The EMSA's Guidelines recommend serious discipline for the misconduct established in this case. The maximum discipline for respondent's misuse of alcohol is revocation, while the minimum recommended discipline is three years of probation. In this case, respondent has demonstrated an inability to comply with his probation and a lack of desire to maintain his license. Respondent produced little rehabilitation evidence. He presented none of the mitigating evidence the EMSA describes in its Guidelines, such as statements of support from employers, character references letters, evidence of counseling or substance abuse treatment, or performance of community service. (Ex. 14, pp. 151-152.) Respondent is currently involved in an educational program so he can leave the field of emergency medical service. That does not seem to be the type of mitigation evidence contemplated by the EMSA. In short, respondent has not proven that discipline other than revocation in this case is warranted. The interests of public protection require the order below. (Factual Findings 1-18.)

ORDER

The petition to terminate the probation of respondent Joshua R. Funk is granted, and the EMSA may impose the discipline that was stayed in the Decision and Order in EMSA case number 13-0284.

EMT-P License No. P32762, issued to respondent Joshua R. Funk, is revoked, pursuant to Legal Conclusions 3 through 6, jointly and separately.

DATED: March 20, 2018

DocuSigned by:

200817779042
ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings