BEFORE THE
EMERGENCY MEDICAL SERVICES AUTHORITY
STATE OF CALIFORNIA

In the Matter of the Accusation against: **KENNETH W. KEATING,** Paramedic License No. P27248 Respondent	Enforcement Matter No. 18-0085 OAH No. 2019051206 **DECISION AND ORDER**

I. INTRODUCTION

This matter was heard on August 5, 2020, by Dave Duncan, MD, 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 December 19, 2019, by Administrative Law Judge Thomas Heller of the Office of Administrative Hearings. Supplemental briefings were submitted and the record was closed on March 3, 2020.

II. PARTIES

1. Dave Duncan MD is the Director of the Authority. The Director makes this decision in his official capacity as Director of the Authority, and not otherwise.

2. Respondent holds Emergency Medical Technician-Paramedic ("EMT-P") license number P27248 which was first issued on May 1, 2009 and is valid through May 31, 2021.

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[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 an appeal of the issuance of an Accusation, a hearing was noticed and held in this matter on December 19, 2019, before Administrative Law Judge Thomas Heller with the Office of Administrative Hearings in Los Angeles, California. Respondent appeared at this hearing and was represented by counsel Jennifer Krikorian. Attorney Cheryl Hsu represented the Authority.

On or about April 5, 2020, the Authority received a copy of the proposed decision. On or about May 4, 2020, the Authority served Respondent with a copy of the Administrative Law Judge's proposed decision and order and informed him that it had not adopted the Proposed Decision and Order. The Authority ordered a copy of the transcript and set the matter for a written hearing. Respondent was informed that he could present written argument to the Director on or before July 15, 2020, the date set for the written hearing. Respondent did not submit further argument. The original Accusation, the evidence submitted at the Administrative

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hearing, the Administrative Law Judge's proposed decision, and a copy of the hearing transcript were all considered in this Decision and Order.

V. DISCUSSION

Respondent's license was subject to discipline for violating California Health and Safety Code Section 1798.200(c)(4), incompetence. This charge was related to an incident of patient care that happened on or about March 29, 2018.

The Administrative Law Judge found under Analysis of Evidence, Page 9 Paragraph 18 that "The evidence was clear and convincing that Keating and Talbert did not perform an appropriate assessment or provide appropriate paramedic care to the patient." And additionally "Neither Keating nor Talbert performed a hands-on assessment of the patient as they should have, and the call was much more about Keating's frustration with being called to the jail than about assessing and caring for the patient."

However, the ALJ found that despite the clear deviation from the standard of care ("Dr. Stratton's testimony about those missed signs was credible, and established that Keating and Talbert departed from the standard of care for paramedic professionals."), that a single incidence of misconduct does not rise to the level of incompetence (proposed decision, Page 11, Paragraph 4). The Director does not agree.

As support for the decision that a single act does not give rise to incompetence, the ALJ cited *Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040. However, the Kearl case also cited to *Pollack v. Kinder* (1978) 85 Cal.App.3d 833, 839, which states: "**While it is conceivable that a single act of misconduct may be sufficient to reveal a general lack of ability to perform the licensed duties, thereby supporting a finding of incompetency**, a single, honest failing, without more, generally does not constitute the functional equivalent of incompetency."(emphasis added). Thus, it is recognized that a single act can in fact support a finding of incompetency.

Here, there was no "honest failing" on the part of the Respondent. Respondent did not mistakenly or honestly fail to perform an act as part of the duties of a paramedic - he acted incompetently by failing to do anything at all. If completely failing to perform your duties is not a deviation from the standard of care (proposed decision Page 9 Paragraph 18), then no acts can be considered to be incompetent.

It is the opinion of the Director that the Respondent's act of failing to perform a patient assessment and failing to provide appropriate patient care does in fact constitute incompetence within the meaning of the statute, notwithstanding the fact that it is a single occurrence. The Director therefore believes that the dismissal of the action as set forth in the Administrative Law Judge's proposed decision should not be adopted.

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, but did not present further written argument; and

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

GOOD CAUSE APPEARING THEREFORE, the PROPOSED DECISION of the Administrative Law Judge is hereby not adopted by the Director of the Emergency Medical Services Authority as its Decision in this matter, and is replaced with the following:

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ORDER

A. Emergency Medical Technician-Paramedic License No. P27248 issued to Respondent **KENNETH W. KEATING** is revoked; however, such revocation is stayed and Respondent's license is placed on probation until November 1, 2021, with the following terms and conditions:

(1) **Patient Care Report Audits:** Respondent shall have all of his patient care reports audited by his employer during the entire time of the term of his probation. Respondent shall immediately report to the Authority any negative findings or corrective actions that are recommended in the audits. Respondent shall provide a copy of the audits to the Authority with his quarterly probation reports described below.

(2) **Preceptor requirement:** During the first six months of the probationary period, Respondent shall be under the supervision of a paramedic preceptor. The preceptor shall document any patient care issues or deviation of protocol. Respondent shall provide proof that he was monitored by a preceptor with his first two probation reports.

(3) **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.

(4) **Employment/LEMSA Notification**: During the probationary period, Respondent shall continuously update the Authority as to his EMS employment/LEMSA accreditation with the following measures:

(a) Within ten (10) days of the effective date of this Decision, Respondent will submit the name, address and telephone number of his current EMS

employer(s), and all Local Emergency Medical Services Agencies (LEMSA) where Respondent is accredited, to the Authority.

(b) Within ten (10) days of any change in EMS employment or accrediting LEMSA, Respondent will notify the Authority of such change and will provide the Authority with the employer's name, address, and telephone number, and the name of the new accrediting LEMSA.

(c) Respondent will notify his EMS employer and all LEMSAs where Respondent is accredited, of the terms and conditions of this Agreement by providing to them a copy of this Decision. Within ten (10) days of the effective date of this Decision, Respondent will submit proof to the Authority that he has made these notifications.

(d) Respondent shall, within ten (10) days of applying for any new EMS employment or applying for accreditation with a new LEMSA, submit proof to the Authority that he has notified the prospective EMS employer or LEMSA of these terms and conditions by providing a copy of this Decision to the prospective employer or LEMSA. Respondent shall inform the Authority in writing of the name and address of any prospective EMS employer prior to accepting new employment or any new LEMSA where Respondent receives accreditation.

(e) Notification of Termination: Respondent will notify the Authority in writing within 72 hours of his resignation or termination, for any reason, from any EMS employment. Respondent will provide in the notification letter a full and detailed explanation of the reasons for and the circumstances of his resignation or termination.

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(5) **Personal Appearances:** As directed by the Authority, Respondent will appear in person for interviews, meetings, and evaluations of Respondent's compliance with the terms and conditions of this Agreement. Respondent is responsible for all of his costs associated with this requirement.

(6) **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 fails to meet any of the terms or conditions, Respondent will provide the Authority with a written explanation for such failure.

(7) **Maintain Active License:** Respondent will maintain an active license with the Authority in order for the probationary period to run. Should Respondent's license lapse or expire by operation of law or otherwise during the probationary period, upon renewal or reinstatement, the license will be subject to any and all terms and conditions of this probation that remain unsatisfied.

(8) **Obey All Related Laws:** Respondent shall obey all federal, state and local laws, statutes and regulations, written policies, protocols and rules governing the practice of medical care as a paramedic. Respondent shall not engage in any conduct that constitutes grounds for disciplinary action pursuant to EMS Act 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. The Authority shall determine whether the offense constitutes a violation of any federal, state or local laws, written policies, protocols or rules governing the practice of medical care as a paramedic. 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, Respondent shall submit his fingerprints by Live Scan and pay the appropriate fees within forty-five days of the effective date of this Agreement.

(9) **Notifications/Submissions**: Any and all notifications and submissions to the Authority shall be sent by certified mail or e-mail. When emailing notifications and submissions, Respondent must receive a return e-mail from the Authority to assure the notification or submission was timely received.

B. Completion of Probation: Respondent's license shall have unrestricted status upon successful completion of probation. Successful completion entails complying with all terms and conditions listed in paragraph A., above.

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 or revocation. Upon initiation of such an action, or upon giving notice to Respondent of the Authority's intent to initiate such an action, the probationary period shall remain in effect until the Authority has adopted a decision on the matter. An action to terminate probation and implement actual license suspension or revocation shall be initiated and conducted pursuant to the hearing provisions of the California Administrative Procedure Act.

(2) If such an action ensues, 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 license suspension or revocation. At

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the hearing, 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.

This DECISION and ORDER shall become effective 30 days after the date of signature below.

Dated:
9/11/2020

Dave Duncan, MD,
Director
Emergency Medical Services Authority
State of California

BEFORE THE
EMERGENCY MEDICAL SERVICES AUTHORITY
STATE OF CALIFORNIA

In the Matter of the Accusation against:

KENNETH W. KEATING

License No. P27248

Respondent

Agency Case No. 18-0085

OAH No. 2019051206

PROPOSED DECISION

Thomas Heller, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on December 19, 2019, in Los Angeles, California. It was consolidated for hearing with *In the Matter of the Accusation against David Brian Talbert*, Agency Case No. 18-0084, OAH No. 2019051205. A separate proposed decision is being issued in each case. (Cal. Code Regs., tit. 1, § 1016, subd. (d).)

Cheryl W. Hsu, Staff Attorney, Emergency Medical Services Authority (EMSA), State of California, represented complainant Sean Trask, Chief of the EMS Personnel Division of EMSA.

Jennifer Krikorian, Esq., Adams, Ferrone & Ferrone, APLC, represented respondent Kenneth W. Keating.

Oral and documentary evidence was received. After the hearing, the record was held open for briefing until February 11, 2020. On complainant's motion, the briefing schedule was later extended until March 3, 2020. The briefs were marked for identification as exhibit 15 (complainant's brief), exhibit A (Keating's and Talbert's brief), and exhibit 16 (complainant's reply brief).

The record was closed and the matter was submitted for decision on March 3, 2020.

SUMMARY

Complainant requests revocation of Keating's paramedic license for incompetence due to his alleged failure to provide care and properly assess a patient during a paramedic call in March 2018. Keating asserts that he acted competently. While Keating's performance during the paramedic call was deficient, complainant did not present clear and convincing evidence supporting a finding of incompetence. Since no other cause for discipline was alleged, the Accusation will be dismissed.

FACTUAL FINDINGS

Jurisdictional Matters

1. On May 1, 2009, EMSA first issued EMT-P License No. P27248 to Keating. The paramedic license was last renewed on May 14, 2019, and is valid through May 31, 2021, with no record of prior disciplinary action.

2. On April 16, 2019, complainant filed an Accusation in his official capacity requesting that EMSA revoke Keating's license for incompetence due to his alleged failure to provide care and properly assess a patient during a paramedic call in March 2018.

3. Keating submitted a Notice of Defense dated May 2, 2019.

Paramedic Call on March 29, 2018

4. On March 29, 2018, at about 10:47 a.m., Martha Martinez, a correctional nurse at the Orange County Men's Central Jail, called 911 and requested an ambulance transfer for a 64-year-old male patient. Keating and David Brian Talbert, both firefighter/paramedics for the Orange County Fire Authority (OCFA), arrived on scene at about 10:52 a.m. along with other OCFA first responders. Keating was the "patient man" for the call, i.e., the paramedic who was responsible for directly caring for the patient. Talbert was the "radio man," i.e., the paramedic who gathered documentation and acted as the historian for the incident. He was also Keating's supervisor.

5. Two guards brought the patient out from a holding cell and sat him down on a concrete bench in front of the triage counter in the inmate reception area. The patient had a history of alcoholism and was scheduled to be released, but showed signs of confusion and distress, was unsteady on his feet, and had defecated on himself. Medical staff at the jail wanted him to be assessed at a hospital rather than to be released directly from jail.

6. Keating and Talbert stood near the patient and observed him briefly as the guards sat him down. Moments later, Martinez came out from behind the triage counter, and Keating turned his attention to her, complaining that this was not a paramedic run and asking why Martinez was "dumping" the patient on him. Talbert

stood next to Keating, and neither he nor Keating asked Martinez any questions about the patient, who was hunched forward on the bench with his arms on his legs and his head down.

7. Martinez explained that her supervisor told her to call 911 because a regular ambulance was not available within an hour, the time frame within which the patient seemed safe and stable enough to transport by regular ambulance. Waving and gesturing with his hands, Keating continued to complain about being called for the patient, and Lynn Manges, the nurse practitioner who supervised Martinez, came out from behind the triage counter and stood behind Martinez. Manges listened to Keating and also spoke to another OCFA first responder, who was using a tablet computer. Martinez handed Keating some paperwork about the patient, and Keating scanned it while still complaining to Manges and Martinez that he did not appreciate having a regular ambulance call dumped on him. Talbert brought some medical equipment a few moments later and placed it near the patient, but neither paramedic ever used it on the patient. Talbert then left the triage area and returned to the OCFA fire truck.

8. Keating remained standing in front of the patient, and at one point clapped his hands in front of the patient's face. The patient looked up at Keating and then lowered his head again while giving some verbal responses. Martinez and Manges walked back behind the triage counter, and Keating stayed in front of the patient for about another 10 minutes, talking to the patient occasionally and also talking to the guards. The patient responded to questions and sometimes gestured with his hands, but remained hunched forward with his head down much of the time, often with his forearms or hands resting on his legs.

9. Keating and Talbert turned over the patient to a Basic Life Support (BLS) ambulance transport crew after being on scene for a total of about 15 or 20 minutes. Neither Keating nor Talbert touched the patient during the entire encounter. The BLS crew transported the patient on a stretcher to the ambulance, and noted that the patient had been incontinent and was lethargic. The BLS crew transported the patient to the nearest acute care hospital where he was admitted to inpatient telemetry with a diagnosis of congestive heart failure and to rule out a non-ST elevation acute myocardial infarction.

County Referral to EMSA

10. Manges complained in writing to her supervisor that Keating was loud, angry, intimidating, and demeaning to Martinez, expressing hope that the incident would be investigated. On April 20, 2018, Samuel Stratton, M.D., the Medical Director of the Orange County Emergency Medical Services Agency, sent a letter to EMSA with video from the jail and call documentation outlining possible violations by Keating and Talbert of the disciplinary statute for paramedics (Health & Saf. Code, § 1798.200). The letter identified the issues for consideration as gross negligence; incompetence; the commission of a fraudulent, dishonest, and corrupt act;[1] and demonstration of irrational behavior. EMSA investigated and asked Keating and Talbert to respond to the allegations; both denied any improper conduct. Complainant concluded otherwise and filed the Accusation, charging Keating with incompetence but not with the other

[1] According to Dr. Stratton, this issue involved "generating a medical record (patient contact report) when in fact video footage of the incident show[ed] no assessment, physical or verbal, of the patient which would allow for generating such a medical record." (Exhibit 5.)

possible violations that Dr. Stratton identified. Complainant filed a similar Accusation against Talbert.

Complainant's Case

MARTHA MARTINEZ

11. Martinez described her interactions with Keating and Talbert during the incident, and testified that Keating was intimidating during their exchange. Her credible testimony was supported by the video evidence from the jail, which complainant also introduced into evidence. The video recordings from the jail do not have sound, but Martinez supplied additional details in her testimony about the incident and Keating's behavior. Martinez also testified she was not thinking the patient was having cardiac issues during the incident, although that was the later diagnosis at the hospital. Instead, she thought the patient was suffering from alcohol withdrawal.

SAMUEL STRATTON, M.D.

12. Dr. Stratton testified he has retired from Orange County Emergency Medical Services Agency, but remains board certified in emergency medical services. Testifying as an expert in emergency medical services, he opined that Keating and Talbert did not assess the patient despite signs that the patient was experiencing acute respiratory distress suggesting a possible cardiac emergency, including tripoding (i.e., leaning forward while seated with his arms or hands on his legs for support), labored breathing, and orthopnea (i.e., difficulty breathing while lying down, as suggested by his resistance to lying horizontally on the stretcher). Dr. Stratton observed these signs of acute respiratory distress in the video evidence from the jail, and testified that Keating and Talbert never recognized them, although they should have been apparent

even to a basic emergency medical technician. According to Dr. Stratton, the patient should have undergone a primary assessment and hands-on evaluation, and also met the criteria for a cardiac assessment, none of which Keating or Talbert performed.

Keating's and Talbert's Case

DONNA CLOE

13. Donna Cloe, a registered nurse and emergency medical services educator for OCFA, testified that the patient's available medical documentation indicated he had stable vitals and no complaints of chest pain or difficulty breathing. She also testified she had known Talbert and Keating for about 20 years and 7 years, respectively, and had never known them to fall below the standard of care for paramedics. Cloe had not seen the video evidence from the jail before the hearing, but viewed some of that evidence during the hearing. Afterwards, Cloe testified she "would potentially have some concerns" about the lack of a hands-on assessment, but disagreed with Dr. Stratton that the patient was tripoding or had labored breathing.

RYAN MCCULLOCH

14. Ryan McCulloch, a fire captain paramedic for OCFA, has supervised Keating since January 2019. McCulloch testified that Keating is a very good paramedic, and that McCulloch has no doubts about his competency. McCulloch had seen the video of the patient contact in the triage area, and testified he could not say it was "100 percent perfect" because it was not a hands-on assessment. However, McCulloch himself has not performed perfect assessments every time, and the triage area at the jail is very chaotic and not an ideal environment to assess a patient. McCulloch also testified that the patient's vitals were consistent with BLS transport, and opined that the jail should not have called paramedics for the patient.

TALBERT

15. Talbert testified he retired from OCFA in March 2019, and was Keating's supervisor for three years, during which Keating always performed above the standard of patient care for paramedics. According to Talbert, he did not perceive the incident to be an acute call; the patient appeared intoxicated, and Talbert and Keating were also told the patient was intoxicated. Talbert did not observe the patient having a cardiac event, or see a need to administer an echocardiogram (EKG) for a cardiac assessment. While Talbert testified it is always good to put hands on a patient, an assessment involves more than just touching a patient. Furthermore, Talbert has never experienced a perfect assessment of a patient.

KEATING

16. Keating testified he has been a firefighter for 15 years and a firefighter/paramedic for about 10 years. Recalling the incident, Keating testified it was not normal for a patient with a medical emergency to come out of a jail cell, which suggested to him that the call was not an emergency. Keating observed the patient walk about 20 feet by himself before sitting down, and Keating was asking the patient questions when Martinez came out from behind the triage counter. Keating believed the chief issue with the patient was alcohol intoxication, and the patient's responses were within normal limits given that issue. Keating testified he assumed the jail had done an EKG on the patient; furthermore, no one at the scene thought the patient had a cardiac issue.

17. According to Keating, the patient was just complaining about being arrested, not about any respiratory distress, and showed no signs of a myocardial infarction. Keating clapped in front of the patient's face to make sure the patient was

alert and oriented, and assessed the patient by observing and talking to him. Keating told Martinez that calling paramedics for BLS calls made the paramedics unavailable for actual emergencies, and Keating did not think his tone or hand gestures were intimidating. He testified he gets teased about talking with his hands.

Analysis of Evidence

18. The evidence was clear and convincing that Keating and Talbert did not perform an appropriate assessment or provide appropriate paramedic care to the patient. Based on Martinez's testimony and the video evidence, Keating and Talbert quickly decided that the call was not an emergency, and Keating began complaining to Martinez and Manges that the jail had "dumped" a non-emergency call on him. Neither Keating nor Talbert performed a hands-on assessment of the patient as they should have, and the call was much more about Keating's frustration with being called to the jail than about assessing and caring for the patient. Talbert spent only a few minutes with the patient before leaving the triage area, and Keating's interaction with the patient did not come close to a proper paramedic assessment. In Keating's frustration and Talbert's brief interaction, both of them missed signs of acute respiratory distress indicating that the patient was experiencing a medical emergency. Dr. Stratton's testimony about those missed signs was credible, and established that Keating and Talbert departed from the standard of care for paramedic professionals.

19. What is less clear is whether Keating's and Talbert's conduct demonstrated incompetence as alleged in their respective Accusations. The incident involved a single paramedic call involving one patient that lasted only about 20 minutes. Keating and Talbert performed deficiently on the call, but that single incident is not clear and convincing evidence of a general lack of ability to perform the licensed duties of a paramedic professional, as described below.

LEGAL CONCLUSIONS

General Legal Standards

1. The EMSA may suspend or revoke Keating's EMT-P license, or place him or the license on probation, "upon a finding by the director of the occurrence of any of the actions listed in subdivision (c)" of Health and Safety Code section 1798.200. (Health & Saf. Code, § 1798.200, subd. (b).) Subdivision (c) of Health and Safety Code section 1798.200 enumerates various actions that "shall be considered evidence of a threat to the public health and safety," including incompetence, which is the sole cause for discipline alleged in the Accusation. (Health & Saf. Code, § 1798.200, subd. (c)(4).)

2. "Incompetence" is defined as a lack of knowledge or professional ability. (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1054 (*Kearl*).) The term "incompetency" generally indicates "an absence of qualification, ability or fitness to perform a prescribed duty or function. [Citations.]" (*Pollack v. Kinder* (1978) 85 Cal.App.3d 833, 837.) Incompetency is distinguishable from negligence; one "may be competent or capable of performing a given duty but negligent in performing that duty." (*Id.* at p. 838.) Thus, "'a single act of negligence . . . may be attributable to remissness in discharging known duties, rather than . . . incompetency respecting the proper performance.' [Citation.]" (*Ibid.*.) While it is conceivable that a single act of misconduct may be sufficient to reveal a general lack of ability to perform the licensed duties, thereby supporting a finding of incompetency, a single, honest failing, without more, generally does not constitute the functional equivalent of incompetency. (*Id.* at p. 839.) However, several acts or decisions with a single patient can show incompetency. (*Kearl, supra*, 189 Cal.App.3d at p. 1056.) This includes flawed reasoning that leads to a negligent act. (*Ibid.*)

3. A licensed paramedic is a health care professional. (Health & Saf. Code, § 1798.6, subd. (a).) The standard of proof for disciplinary action against a professional license is clear and convincing evidence to a reasonable certainty. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9; *Imports Performance v. Dept. of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916; *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) Clear and convincing evidence "requires a finding of high probability," and has been described as "requiring that the evidence be '"so clear as to leave no substantial doubt"; "sufficiently strong to command the unhesitating assent of every reasonable mind."' [Citation.]" (*In re Angelia P.* (1981) 28 Cal.3d 908, 919.) "Evidence of a charge is clear and convincing so long as there is a 'high probability' that the charge is true. [Citations.] The evidence need not establish the fact beyond a reasonable doubt." (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090.)

Analysis

4. Complainant did not present clear and convincing evidence of Keating's or Talbert's incompetence to perform the general duties and functions of licensed paramedics. The record includes evidence of only a single incident of nonfeasance that falls short of a demonstrated ability to perform those general duties and functions. Keating and Talbert did a poor job with a single patient during a single paramedic call that lasted about 20 minutes. Their nonfeasance involved failing to perform a proper assessment of the patient and failing to provide proper paramedic care, but those failings were not so separate and distinct as to amount to clear and convincing evidence of incompetence. In *Kearl*, the incompetence at issue involved "several acts or decisions" by an anesthesiologist that were improper, and flawed reasoning that led to the anesthesiologist's negligent administration of a certain type of anesthesia.

(*Kearl, supra*, 189 Cal.App.3d at p. 1056.) In this case, Keating's and Talbert's nonfeasance was not proven to be the product of flawed reasoning leading to a negligent act, or otherwise shown to be the product of "several acts or decisions." (*Ibid.*)

5. In his post-hearing brief, complainant cites *Shenouda v. Veterinary Medical Board* (2018) 27 Cal.App.5th 500 (*Shenouda*), and an unreported appellate decision (*Leizerovitz v. Dental Board of California* (Cal. Ct. App., Apr. 23, 2019, No. B282679) 2019 WL 1771709), in support of complainant's charge that Keating and Talbert were incompetent. But *Shenouda* involved several acts or decisions with respect to each charge of incompetence (27 Cal.App.5th at pp. 503-509), and *Leizerovitz*, involved both a failure to diagnose a dental condition and a failure to timely perform surgical procedures while the patient was under anesthesia. (2019 WL 1771709, at p. *2). Furthermore, *Leizerovitz*, may not be cited as precedent in California courts, and will not be relied on as precedent this case.

6. Under Health and Safety Code section 1798.200, incompetence is not the only grounds for disciplinary action against a paramedic. But complainant only charged Keating and Talbert with incompetence, and "[d]isciplinary action cannot be founded upon a charge not made." (*Wheeler v. State Board of Forestry* (1983) 144 Cal.App.3d 522, 527.) Because complainant did not prove that sole charge by clear and convincing evidence, the disciplinary action cannot stand.

ORDER

The Accusation against respondent Kenneth W. Keating is dismissed.

DATE: April 2, 2020

DocuSigned by:
Thomas Heller
THOMAS HELLER

Administrative Law Judge

Office of Administrative Hearings