

**BEFORE THE
EMERGENCY MEDICAL SERVICES AUTHORITY
STATE OF CALIFORNIA**

In the Matter of the Statement of Issues
Against:

KENNETH M. SILVERMAN,

Respondent.

EMS Authority No.: 14-0377

OAH No. 2015034233

PROPOSED DECISION

Administrative Law Judge David B. Rosenman, Office of Administrative Hearings, State of California, heard this matter in Los Angeles, California on January 26, 2016.

Craig Stevenson, Senior Staff Counsel, represented Complainant Sean Trask. Respondent Kenneth M. Silverman was present at the hearing and was represented by David J. Givot, Attorney at Law.

Oral and documentary evidence was received and the matter was submitted for decision on January 26, 2016. At the hearing, the ALJ indicated that confidential information, including respondent's driver's license number and social security number, would be obscured/redacted if observed in any exhibit. After the hearing was over, confidential information was observed in Exhibit 5 and was obscured/redacted.

ISSUES AND SUMMARY

Complainant contends that respondent's application for a certificate as an Emergency Medical Technician-Paramedic (EMT-P) should be denied due to a conviction and misuse of alcohol. Respondent contends that there is no cause to deny his application. It is proposed that respondent receive a probationary certificate.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in his official capacity of Chief, EMS Personnel Division, Emergency Medical Services Authority (EMSA).

2. Respondent submitted to EMSA an application dated December 5, 2014, to obtain a certificate as an EMT-P. EMSA notified respondent the application would be denied. On March 14, 2015, respondent's counsel submitted a letter requesting a hearing.

3. On October 17, 2014, in the Superior Court of California, County of Kern, in Case No. BM832300A, respondent was convicted on his plea of nolo contendere to one count of violating Vehicle Code section 23103.5, subdivision (a), relating to reckless driving. Imposition of sentence was suspended and respondent was placed on informal probation for three years with terms and conditions, including that he pay fees and a fine, which have been paid in full.

4. Respondent was arrested on November 16, 2013, after he had consumed two 12-ounce beers and a one-ounce shot of whisky and later drove his car. Based on observations and testing of respondent, and observations of another police officer who had first observed respondent, the arresting officer recommended that respondent be charged with violating Vehicle Code sections 23152, subdivision (a) ("It is unlawful for a person who is under the influence of any alcoholic beverage to drive a vehicle"), and subdivision (b) ("It is unlawful for a person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle").¹ According to the court records (exhibit 6), these two charges were filed against respondent the same day.

5. The criminal charges were resolved by virtue of a plea bargain. The complaint was amended to add a charge of violating Vehicle Code section 23103, reckless driving, with the addition that there had been consumption of an alcoholic beverage by the defendant in connection with the offense, as authorized under Vehicle Code section 23103.5, subdivision (a). Respondent pleaded nolo contendere to this charge. The charge of violating Vehicle

¹ This information is contained in the arrest report, exhibit 5, which was received in evidence as administrative hearsay. Administrative hearsay is a shorthand reference to the provisions of Government Code section 11513, subdivision (d), to the effect that hearsay evidence that is objected to, and is not otherwise admissible, may be used to supplement or explain other evidence but may not, by itself, support a factual finding. It may be combined with other evidence to provide substantial evidence sufficient to support a finding. (*Komizu v. Gourley* (2002) 103 Cal.App.4th 1001.) As explained in *Lake v. Reed* (1997) 16 Cal.4th 448, although a police report was hearsay, a portion was an exception to the hearsay rule and could be used as direct evidence and for any purpose. The Court noted that the report, although unsworn, was potentially admissible because it was the type of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs, as referenced in Government Code section 11513, subdivision (c). Further, the report was prepared by a public official in the scope of his duties and was therefore an official record under Evidence Code section 1280. As applied here, the arresting officer's observations of respondent are admissible evidence. The arresting officer's recommendation that charges be filed explains and supports the charges that were then filed against respondent.

Code section 23152, subdivision (a), was dismissed in the interest of justice. On the charge of violating Vehicle Code section 23152, subdivision (b), respondent was acquitted.

6. Respondent had been drinking with friends and was driving home. He testified credibly to his belief that he did not exhibit the signs of possible intoxication noted in the police report, such as alcohol on his breath, red eyes or thick speech. Respondent believed he was driving in a normal manner. He was not in uniform nor did he believe there were any indications that the incident was job-related.

7. At the time of the incident, respondent had been working for four months for the Bakersfield Fire Department as an emergency medical technician and was attending the training academy. He thought he might be fired and instead resigned from the job and the academy to focus on his criminal case. He worked as a confined space rescue technician for Ancon Marine from December 2013 until October 2015. Respondent returned to paramedic school in January 2014, completed school in September 2014, and passed the tests to become nationally registered as a paramedic. As part of the school program, respondent completed 20 shifts with the Pasadena Fire Department. In November 2015, he became employed by the Federal Bureau of Prisons as a health technician paramedic and is assigned to the prison facility in Lompoc. He received a one-month evaluation that he was meeting performance expectations.

8. Respondent is 31 years old. He stated he had no other convictions but has had speeding tickets. His arrest and the criminal case was a humbling experience for him. He did not think he was drunk, did not know what the end result would be, and tried not to be down about the events. He stated he is a good paramedic who treats his patients with respect and professionalism, wants to be a firefighter/paramedic, and that it would be a disservice to the public if he was not able to be licensed. When asked what he learned about drinking and driving, respondent answered that no matter what he thought of his ability to drive after drinking, it “would never be OK” to do so. He has seen the consequences and would not take the risk. If he had drinks, he would not drive. Instead, he has used taxis or ride share services like Uber.

LEGAL CONCLUSIONS

1. These proceedings are governed by the Emergency Services Act, Health and Safety Code section 1797 et seq., and applicable regulations.² EMSA has the authority to develop standards for EMT-P qualifications and has jurisdiction over EMT-P licensure. (Section 1797.172, subs. (a) and (c).)

² All further statutory references are to the Health and Safety Code unless otherwise noted. All regulations are found in the California Code of Regulations, title 22, and are referred to as “Regulation.”

2. Under the Emergency Services Act, a licensed EMT-P may perform specified medical procedures, including advanced life support procedures, while at the scene of a medical emergency or during transport of a patient, and in a hospital emergency department when authorized to practice as an EMT-P by the local emergency medical services agency. The scope of practice of an EMT-P is found in sections 1797.52 and 1797.172, and Regulation 100146.

3. The Statement of Issues cites the following portions of section 1798.200 as the legal bases upon which EMSA may deny respondent's application for an EMT-P certificate. Subdivision (c) provides in pertinent part:

“Any of the following actions shall be considered evidence of a threat to the public health and safety and may result in the denial, suspension, or revocation of a certificate or license issued under this division, or in the placement on probation of a certificate holder or licenseholder under this division: [¶] . . . [¶]

“(6) Conviction of any crime which is substantially related to the qualifications, functions, and duties of prehospital personnel. The record of conviction or a certified copy of the record shall be conclusive evidence of the conviction.” [¶] . . . [¶]

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

4. Whether a crime is substantially related to the qualifications, functions, and duties of an EMT-P is covered in Regulation 100175, subdivision (a), which states, in relevant part: “A crime or act shall be considered to be substantially related to the qualifications, functions, or duties of a paramedic if to a substantial degree it evidences present or potential unfitness of a paramedic to perform the functions authorized by her/his license in a manner consistent with the public health and safety.” Under subdivision (b), “the record of conviction or a certified copy of the record shall be conclusive evidence of such conviction. ‘Conviction’ means the final judgement on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere.”

5. Regulation 100174 lists standards under which an EMT-P application shall or may be denied. Respondent's acts do not fall within any of the listed standards. However, the regulation specifically states that it does not prevent EMSA from taking action under section 1798.200, referenced above.

6. Respondent's conviction is substantially related to the qualifications, functions, or duties of a certificate holder because, to a substantial degree, respondent's conduct evidences unfitness of a certificate holder to perform the functions authorized by the certificate in that his conduct poses a threat to the public health and safety. California courts have determined that a conviction involving the consumption of alcohol is substantially related to the licensed activity of a health care provider. In *Griffiths v. Superior Court* (2002) 96 Cal.App.4th, 757, 770, the court stated: “Convictions involving alcohol consumption

reflect a lack of sound professional and personal judgment that is relevant to a physician's fitness and competence to practice medicine. Alcohol consumption quickly affects normal driving ability, and driving under the influence of alcohol threatens personal safety and places the safety of the public in jeopardy. It further shows a disregard of medical knowledge concerning the effects of alcohol on vision, reaction time, motor skills, judgment, coordination and memory, and the ability to judge speed, dimensions, and distance." Although *Griffiths* relates to a physician and multiple convictions for drunk driving, the quoted language is applicable to respondent's circumstances as well.

7. "One who willfully consumes alcoholic beverages to the point of intoxication, knowing that he thereafter must operate a motor vehicle . . . reasonably may he held to exhibit conscious disregard of the safety of others." (*People v. Watson* (1981) 30 Cal.3d 290, 300-301.) Respondent was employed as an emergency medical technician and in training to be a paramedic at the time of his offense. His crime evidences a potential unfitness to carry out the duties of a paramedic in a manner consistent with the public health and safety, and is therefore substantially related to the qualifications, functions and duties of a licensee.

8. Respondent's duties as an EMT-P involve providing health care to persons in need of basic and emergency medical care on a daily basis, and may require him to drive emergency vehicles as an integral part of his duties. The consumption of alcohol by a paramedic impairs his or her ability to operate a vehicle and provide medical care in a safe and effective manner.

9. Respondent's conviction was for reckless driving and involved the consumption of alcohol, and of the two original charges related to driving under the influence of alcohol, one was dismissed and respondent was acquitted of the second. Nevertheless, respondent consumed enough alcohol that, despite his belief otherwise, a reasonable person would conclude that the alcohol impaired his ability to drive safely. The arresting officer reached that conclusion, too.

10. Under Regulation 100176, EMSA is authorized to evaluate the rehabilitation of an applicant and may issue a license subject to terms and conditions. The criteria to be considered are summarized as follows:

- a. The nature and severity of the act or crime.
- b. Any subsequent acts or crimes which also could be considered grounds for denial under section 1798.200.
- c. The time that has elapsed since commission of the act or crime in issue.
- d. The extent to which the person has complied with any court-ordered terms of probation.
- e. Expungement of the conviction under Penal Code section 1203.4.
- f. Evidence of rehabilitation.

11. EMSA has developed "Recommended Guidelines for Disciplinary Orders and Conditions of Probation" dated July 26, 2008 (Guidelines), which are incorporated by reference into Regulation 100173 and were marked as exhibit 8 at the hearing. The Guidelines include factors to be considered when determining appropriate discipline. The factors include the criteria listed above in Legal Conclusion 10, as well as other factors, summarized as follows:

- a. Actual or potential harm to the public or any patient.
- b. Prior disciplinary record.
- c. Prior warnings or prior remediation.
- d. Aggravating and mitigating evidence.
- e. Any discipline imposed by the paramedic's employer for the conduct.

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

13. Cause exists to deny respondent's application for an EMT-P certificate pursuant to section 1798.200, subdivision (c)(6) and (9), in that respondent has been convicted of a crime that is substantially related to the qualifications, functions, and duties of pre-hospital personnel and has misused alcohol, by reason of Factual Findings 3, 4, 5 and 6, and Legal Conclusions 3, 4, 6, 7, 8 and 9.

14. Mitigating circumstances may include the absence of a prior disciplinary record, the demonstration of honesty and trustworthiness in a position of responsibility, an individual's youth at the time of the misconduct, and the recognition of wrongful conduct, the expression of regret and cooperation with authorities. (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 888.) A licensee who displays candor, cooperation and remorse throughout a disciplinary proceeding, and a willingness to accept punishment and to rehabilitate himself, may be a significant mitigating factor. (*Hipolito v. State Bar* (1989) 48 Cal.3d 621, 626.)

15. Rehabilitation is a state of mind and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved reformation and regeneration. (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) The evidentiary significance of a licensee's misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct. (*Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1070.)

16. It must be determined whether respondent has demonstrated mitigation and rehabilitation from the conviction and misuse of alcohol which are causes to deny his application. There was a single conviction of a lesser offense than charged, and the conviction was not for drunk driving. Respondent exercised poor judgment. There was no

actual harm to the public or to any patient, but there was the potential for public harm. There was no evidence of any other convictions, warnings or discipline against respondent. The first step is to evaluate the crime itself. Respondent was convicted of reckless driving involving the use of alcohol, not drunk driving. Respondent admitted the circumstances to arresting officers and has complied with the probation terms ordered by the court. Respondent has had continued work in the field and completed coursework and exams to be placed on the national registry.

17. It is troubling that respondent did not present outside verification of his actions, such as his national registration or his work evaluation, or letters of support from family, friends or colleagues. However, respondent was firm in his statement that drinking and driving is not acceptable, and there are workable alternatives.

18. Given the mitigating circumstances and sufficient evidence of respondent's rehabilitation, the certificate should be granted but placed on probation for a period of three years. Terms and conditions of probation will require respondent to remain law abiding, to report any arrest within 72 hours, to disclose the fact of the probationary status of his EMT-P certification and the reason for it to his employer and immediate supervisor. This measure of discipline will adequately protect the public.

19. Certain optional terms suggested in the Guidelines are added; i.e., abstaining from the use of alcohol and biological fluid testing. However, three optional terms are not. Condition 1 (Abstinence from Drug Possession and Use) and Condition 10 (Psychiatric/Medical Evaluation) are not justified by the simple nature of respondent's conviction and misuse of alcohol and the other relevant facts. Condition 4 (Drug/Detoxification/Diversion Program) states that it is used in instances of alcohol abuse. Here, it is found that respondent misused alcohol, but the evidence does not support the conclusion that he suffers from alcohol abuse.

ORDER

The application of respondent Kenneth M. Silverman for an Emergency Medical Technician-Paramedic certificate is granted. The certificate shall be immediately revoked; however, the order of revocation is stayed and respondent's certificate is placed on three years' probation under the following terms and conditions of probation.

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

2. **Biological Fluid Testing:** Respondent shall submit to routine and random biological fluid testing or drug/alcohol screening as directed by EMSA or its designee. Respondent may use a lab pre-approved by EMSA or may provide to EMSA the name and location of an independent laboratory or licensed drug/alcohol testing facility for approval by EMSA. EMSA shall have sole discretion for lab approval based on criteria regulating

professional laboratories and drug/alcohol testing facilities. When EMSA requests a random test, respondent shall provide the required blood/urine sample by the time specified or within 12 hours of the request if no time is specified. When EMSA requests a random test, respondent shall ensure that any positive test results are conveyed telephonically by the lab to EMSA within 48 hours, and all written positive or negative results are provided directly by the lab to EMSA within 10 days. Respondent shall be responsible for all costs associated with the drug/alcohol screening. At EMSA's sole discretion, EMSA may allow the random drug testing to be conducted by respondent's employer to meet the requirement of random drug testing as set forth above. The results of the employer's random drug testing shall be made available to EMSA in the time frames described above.

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

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

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

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

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

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

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. To permit monitoring of compliance with this term, if respondent has not submitted fingerprints to EMSA in the past as a condition of licensure, then respondent shall submit his fingerprints by Live Scan or by fingerprint cards and pay the appropriate fees within 45 days of the effective date of this decision. Within 72 hours of being arrested, cited or criminally charged for any offense, respondent shall submit to EMSA a full and detailed account of the circumstances thereof. EMSA shall determine the applicability of the offense(s) as to whether respondent violated any federal, state and local laws, statutes, regulations, written policies, protocols and rules governing the practice of medical care as a paramedic.

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

11. **Violation of Probation:** If during the period of probation respondent fails to comply with any term of probation, EMSA may initiate action to terminate probation and implement actual license revocation. Upon the initiation of such an action, or the giving of a notice to respondent of the intent to initiate such an action, the period of probation shall remain in effect until such time as a decision on the matter has been adopted by EMSA. An action to terminate probation and implement actual license revocation shall be initiated and conducted pursuant to the hearing provisions of the California Administrative Procedure Act. The issues to be resolved at the hearing shall be limited to whether respondent has violated any term of his probation sufficient to warrant termination of probation and implementation of actual revocation. At the hearing, respondent and EMSA shall be bound by the admissions contained in the terms of probation and neither party shall have a right to litigate the validity or invalidity of such admissions.

DATED: February 2, 2016

DocuSigned by:
David B. Rosenman
DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings

BEFORE THE
EMERGENCY MEDICAL SERVICES AUTHORITY
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against:

KENNETH M. SILVERMAN,

Respondent.

EMS Authority No. 14-0377

OAH No. 2015031233

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Emergency Medical Services Agency as its Decision in the above-entitled matter.

This Decision shall become effective February 4, 2016.

IT IS SO ORDERED _____.

EMERGENCY MEDICAL SERVICES AGENCY
STATE OF CALIFORNIA

By Edward Baker

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