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BEFORE THE
EMERGENCY MEDICAL SERVICES AUTHORITY
STATE OF CALIFORNIA

In the Matter of the Emergency Medical Technician- Paramedic License of:) Enforcement Matter No.: 10-0203
) OAH Case # 2010080893
)
JOHN A. ARMSTRONG) **DECISION AND ORDER**
License # P20453)
Respondent.)
_____)

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Emergency Medical Services Authority as its Decision in this matter.

This decision shall become thirty days after the date below. It is so ordered.

DATED:
2/2/2012



Howard Backer, MD, MPH, FACEP
Director
Emergency Medical Services Authority

BEFORE THE
EMERGENCY MEDICAL SERVICES AUTHORITY
STATE OF CALIFORNIA

In the Matter of the Emergency Medical
Technician – Paramedic License Held by:

JOHN A. ARMSTRONG,

License Number P20453,

Respondent.

Enforcement Matter No. 10-0203

OAH Case No. 2010080893

PROPOSED DECISION

This matter was heard by Mark Harman, Administrative Law Judge with the Office of Administrative Hearings, on July 18, 2011, in Los Angeles, California.

Cynthia L. Curry, Senior Staff Counsel, represented Complainant, Sean Trask, Chief, EMS Personnel Division, California Emergency Medical Services Authority.

Ronald Richards, Attorney at Law, represented John A. Armstrong (Respondent), who was present throughout the proceeding.

Evidence was received by oral stipulations, documents, and testimony at the hearing. The record was left open to allow the parties to file closing and rebuttal briefs. On July 29, 2011, both parties submitted closing briefs, which were marked for identification as Exhibits 8 and B. On August 5, 2011, Complainant submitted a rebuttal brief, which was marked as Exhibit 9. The matter was deemed submitted for decision on August 5, 2011.

FACTUAL FINDINGS

1. On or about July 30, 2010, Complainant filed the Accusation. On or about August 10, 2010, Respondent filed the Notice of Defense.

2a. The California Emergency Medical Services Authority (the Authority or EMSA) issued emergency medical technician – paramedic license number P20453 to Respondent on October 15, 2003. The license expired on October 31, 2009, though as noted in factual finding number 2(b), *post*, Respondent’s license has been suspended pending the Authority’s decision in this matter.

2b. On August 11, 2010, R. Steven Tharratt, M.D., MPVM, the Director of the Authority, issued an Order for Temporary Suspension Pending Hearing. The Director was apprised of facts as alleged in the Accusation and found that Respondent “engaged in acts that constitute grounds for revocation of his [paramedic] license and that permitting him to engage in the activity allowed by his . . . license would present an imminent threat to the public health and safety.”

3. The parties agree on many relevant facts. Complainant seeks to discipline Respondent’s emergency medical technician – paramedic (EMT-P) license on the grounds that he was convicted of a crime that is substantially related to the qualifications, functions, and duties of prehospital personnel. Complainant argues separately that outright revocation of Respondent’s license is the only penalty that can be imposed in this proceeding, because Respondent’s conduct underlying his conviction constitutes the commission of an offense specified in Penal Code section 290.¹ Complainant has offered a certified copy of the record of Respondent’s conviction as the primary evidence in support for these contentions. Respondent asserts his innocence. He contends that his conviction, which was based on a plea of guilty pursuant to *People v. West* and *North Carolina v. Alford*,² does not constitute an express admission of guilt of the charged offense, and therefore, the record of his conviction cannot be a grounds for disciplining his license. Respondent also asserts that his conviction establishes no new facts that warrant disciplinary action.

What is the effect, in this proceeding, of a prior administrative decision involving the same parties and some of the identical factual issues?

4a. The Authority previously filed an Accusation against Respondent’s license and put him on probation in 2009 (OAH case number 2009100019). ALJ Daniel Juárez heard the previous matter on October 23, 2009, and wrote a Proposed Decision, in which he recommended to the Authority that Respondent’s license be revoked, that the revocation be stayed, and that Respondent be granted a three-year probationary license. ALJ Juárez concluded that the facts established by the evidence at the hearing did not require outright revocation. On December 2, 2009, the Authority adopted ALJ Juárez’s Proposed Decision as its Decision in the matter, effective December 30, 2009 (the 2009 Decision). The 2009 Decision is now final, and its findings and conclusions, to which the parties have stipulated in the present proceeding, are referenced herein, in factual finding numbers 7 and 8, *post*.

4b. Neither party has argued an important legal doctrine raised by the facts in this matter, i.e., whether the 2009 Decision, which followed an adversarial hearing involving these same parties, and in which Respondent’s conduct was not found to constitute the

¹ (Cal. Code Regs., tit. 22, § 100173, subd. (a)(1).)

² Respondent’s plea of guilty pursuant to *People v. West* (1970) 3 Cal.3d 595 (*West*), and *North Carolina v. Alford* (1970) 400 U.S. 25, is analyzed in the Discussion section, *post*.

commission of a specified sexually related offense, precludes the Authority from relitigating, in this proceeding, the identical issue that was necessarily decided in the prior proceeding.

The criminal conviction

5. On July 7, 2010, in the Superior Court of California for the County of Riverside, in case number INM200300, Respondent was convicted, based on his plea of guilty, of violating Penal Code section 647.6, subdivision (a)(1) (annoying or molesting a child under 18 years of age),³ a misdemeanor. This crime, is substantially related to the qualifications, functions, and duties of a paramedic because, to a substantial degree, it evidences present or potential unfitness of a paramedic to perform the functions authorized by his license in a manner consistent with the public health and safety. (Cal. Code Regs., tit. 22, § 100174.)

6. The court granted Respondent summary probation for a period of 36 months on certain terms and conditions, including obey all laws, ordinances, and court orders; incarceration for 90 days; completion of the Sheriff's labor program; payment of fines, fees and assessments in the amount of \$160; attendance at 20 Alcoholics Anonymous meetings or an approved alternative program; prohibition against having any direct or indirect contact with the victim or her parents; submission to immediate search of person, automobile, home, or similar premises, with or without cause; and, payment of the cost for the pre-sentence report. On Respondent's motion, the court reviewed a court-designated psychologist's report, heard the victim's parents in open court, and heard oral arguments by the parties' counsel, including a vigorous opposition by the Deputy District Attorney, and determined Respondent was not required to register as a sex offender under Penal Code section 290.

7. The facts and circumstances underlying the conviction, as set forth in the 2009 Decision, are as follows (the paragraphs are numbered as in the original):

"5. On May 30, 2009, Respondent was participating in work-related training, and spent the night at the house of a colleague, in or around Palm Desert, California. Respondent was 36 years old at that time. During the evening, while at the house, Respondent drank approximately nine beers over five hours. The evidence did not establish that Respondent was inebriated. Respondent interacted with his colleague and his colleague's 16-year-old daughter, among others.

"6. In the evening, on May 30, 2009, Respondent laid down on the living room floor to sleep. Respondent's colleague had originally offered Respondent his daughter's bedroom to sleep in, while his daughter would sleep in the living room, but Respondent declined and arranged to sleep in the living room himself. In the late evening, the daughter

³ Penal Code section 647.6, subdivision (a)(1), provides that: "Every person who annoys or molests any child under 18 years of age shall be punished by a fine not exceeding five thousand dollars (\$5,000), by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment.

entered the living room presuming she would sleep there. Respondent explained that he intended to sleep in the living room, and told her she could return to her room. The girl stayed in the living room and she and Respondent began to talk about general matters.

“7(a). At hearing, Respondent admitted to making several comments to the girl and touching her as set forth below.

“7(b) Respondent talked to the girl about her boyfriend and inquired whether she was sexually active or abstinent. During this discussion, Respondent told the girl, “if you can masturbate, you can wait.” He explained that this was a phrase he recalled from his time in the Navy. He claimed that by saying this to the girl, he was promoting abstinence. He denied asking the girl if she masturbated.

“7(c). Respondent told the girl she was attractive and stated that she was “smoking hot.” He explained that he used those words to make her feel good about herself. He further explained that he used the same words (smoking hot) to describe work-related things, like his firefighter boots and embers, and so such words were part of his common speech.

“7(d). Respondent stated that he accidentally touched the girl’s buttocks. He explained that in getting up from the floor, while the girl was on a sofa just above Respondent, Respondent pushed himself up from the floor and his arm and/or elbow brushed the girl’s buttocks inadvertently. He apologized to her and continued to rise. He denied intentionally grabbing her buttocks in any way.

“7(e). Respondent stated that he touched the girl in the region of her stomach and belly button. He explained that, at one point during their conversation, he jabbed at her stomach area with his fingers, as if to awaken her or ensure she was listening to him. He denied that there was any sexual nature to such touching.

“7(f). Respondent stated that he touched the region of the girl’s knee, as they discussed knee surgeries. He explained that his touching was more like palpations as they discussed surgically placed pins in his own knee, and the type of knee surgery the girl had had in the recent past. He denied touching her thigh.

“7(g). Respondent kissed the girl’s hand. He explained that he did so to say goodnight.

“7(h). Respondent denied ever touching the girl’s breasts in any way.

“8. The 16-year-old girl did not testify.

“9. In or about June 2009, an investigator for the Riverside County Sheriff’s Office Sexual Assault/Child Abuse Unit investigated Respondent’s actions regarding the events of the evening of May 30, 2009.

“10. During two pre-text telephone calls (fn. omitted) on June 10 and 11, 2009, between Respondent and the 16-year-old girl’s father, Respondent explained his actions with respect to the girl. During the telephone calls, he stated that he had kissed the girl’s buttocks in a playful manner and did not do so in a sexual way. He stated that he accidentally touched the girl’s breast with his hand. At hearing, Respondent did not deny his statements on the pre-text telephone calls and failed to explain the inconsistency between the statements he made during the pre-text telephone calls and his testimony (regarding how he touched the girl’s buttocks and whether he touched the girl’s breast at all).

“11. On June 12, 2009, Respondent met with the Sheriff’s investigator at the fire station where Respondent is employed. He admitted that he told the girl she had “a nice set of cans,” referring to her breasts. He explained to the investigator that he meant the comment as a compliment, a confidence-builder that he believed a 16-year-old girl would like to hear. In explaining his kissing of the girl’s buttocks, he stated, “I was being a smart ass and joking around.” He further stated he was “just playing grab ass” with her, then said, “not grab ass” but “just bull shitting with a girl.” In explaining his touching of the girl’s stomach area and belly button area, he stated, “I thought she would giggle and chuckle and I could make light of the conversation . . . like a tickle.” He admitted to the investigator that the conversation with the girl made him feel “horny” at the time.

“12. Respondent is married and has a four-year-old child. His wife considers him a good husband and father. Respondent’s wife testified on his behalf, however, her testimony is not given full weight, as she has motivation to show her husband in the best light possible. (Evid. Code, § 780, subd. (f).)

“13. Respondent has a reputation as a good paramedic and overall good employee. There was no evidence that he has a drinking problem. He has never been disciplined at work, nor does he have a criminal record. Respondent has repeatedly apologized to the girl’s father, and has consistently asserted that he did not mean to disrespect the girl or his colleague.”

8a. The specific issues determined in the 2009 Decision included the following: Respondent engaged in highly inappropriate touching and conversation with a girl who was a minor; his conduct constituted a corrupt act that was substantially related to the qualifications, functions, and duties of prehospital personnel within the meaning of Health and Safety Code section 1798.200, subdivision (c)(5); and, therefore, cause existed to revoke or suspend his paramedic license. It also was determined that, although Respondent’s conduct carried a sexual connotation, the evidence failed to establish that Respondent intended to have sex with the girl or to induce her to act sexually with him in any way. Therefore, the evidence did not establish that Respondent’s actions constituted unprofessional conduct within the meaning of Health and Safety Code section 1798.200, subdivision (c)(12)(C). Specifically, the evidence failed to establish that Respondent’s actions met the definition of sexual battery (Pen. Code, § 243.4) or of annoying or molesting a minor under the age of 18 (Pen. Code, § 647.6), and therefore, it was not established that any of Respondent’s acts against the girl constituted any sexually related offense specified

under Penal Code section 290. ALJ Juárez noted that, at the time of the administrative hearing, Respondent had not been convicted of any crime.

8b. Complainant did not present the testimony of the victim at the administrative hearing before ALJ Juárez; therefore, ALJ Juárez concluded that the tenor of Respondent's acts could not be determined, despite evidence calling into question Respondent's honesty regarding his explanations of the incident. Nevertheless, ALJ Juárez concluded that the facts warranted discipline "to emphasize the highly inappropriate nature of Respondent's actions against an under-aged girl." The Authority adopted the Proposed Decision, thereby imposing a period of license probation, along with a 60-day suspension.

Additional background and rehabilitation findings

9. Respondent spent 10 years in the Navy. He was a hospital corpsman upon his discharge from the service, when he transitioned to emergency medical technician. He was working as a paramedic for six and one-half years prior to May 2009. He has no prior discipline of his license. Respondent paid the court-ordered fines and completed the jail time. He has had no contact with the victim, whatsoever. He has committed no other offenses or been subject to any other arrests.

10. Respondent admits that he used poor judgment, that alcohol had compromised his thinking processes, and that he acted immaturely on the night of the incident. He quit drinking alcohol, obtained an Alcoholics Anonymous (AA) sponsor, and has attended an AA meeting once per month. He attends meetings of a group called Seeking Strength, to help address problems mostly related to the stress he experienced during his time in the service.

11. Respondent is married. He submitted that this home life has been going well, and he feels that he has been happy and productive.

STATUTORY PROVISIONS

1. Health and Safety Code⁴ section 1798.200 states, in pertinent part, that:

[¶] ... [¶]

(b) The authority may deny, suspend, or revoke any EMT-P license issued under this division, or may place any EMT-P license issued under this division, or may place any EMT-P licenseholder on probation upon the finding by the director of the occurrence of any of the actions listed in subdivision (c). Proceedings against any EMT-P license or licenseholder shall be held in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of

⁴ All undesignated statutory references hereafter are to the Health and Safety Code, unless specified otherwise.

Division 3 of Title 2 of the Government Code [the California Administrative Procedure Act].

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

[¶] . . . [¶]

(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.

[¶] . . . [¶]

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

[¶] . . . [¶]

(C) The commission of any sexually related offense specified under Section 290 of the Penal Code.

2. California Code of Regulations, title 22, section 100173, states in part:

(a) The authority shall deny/revoke a paramedic license if any of the following apply to the applicant:

(1) Has committed any sexually related offense specified under Section 290 of the Penal Code.

[¶] . . . [¶]

(g) 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.

3. California Code of Regulations, title 22, section 100174, states in part:

(a) For purposes of . . . placement on probation, suspension, or revocation, of a license, pursuant to Section 1798.200 of the Health and Safety Code . . . a crime or act shall be substantially related to the qualifications, functions and/or duties of a person holding a paramedic license 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.

(b) For the purposes of a crime, the record of conviction or a certified copy of the record shall be conclusive evidence of such conviction. "Conviction" means the final judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere.

4. California Code of Regulations, title 22, section 100175, states in part:

(a) At the discretion of the EMS Authority, the EMS Authority may issue a license subject to specific provisional terms, conditions, and review. When considering the . . . placement on probation, suspension, or revocation of a license pursuant to Section 1798.200 of the Health and Safety Code . . . the EMS Authority in evaluating the rehabilitation of the applicant and present eligibility for a license, shall consider the following criteria:

(1) The nature and severity of the act(s) or crime(s).

(2) Evidence of any act(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for . . . placement on probation, suspension, or revocation which also could be considered grounds for denial, placement on probation, suspension, or revocation under Section 1798.200 of the Health and Safety Code.

(3) The time that has elapsed since commission of the act(s) or crime(s) referred to in subsection (1) or (2) of this section.

(4) The extent to which the person has complied with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against the person.

(5) If applicable, evidence of expungement proceedings pursuant to Section 1203.4 of the Penal Code.

(6) Evidence, if any, of rehabilitation submitted by the person.

DISCUSSION

Respondent raises several issues regarding Complainant's evidence and the legal effect of Respondent's plea and conviction. First, he objects to the admission of the certified record of his conviction (Exhibit 4) on hearsay grounds. Analytically, a judgment of conviction is hearsay evidence if offered to prove that a person committed a crime, i.e., it is a

statement of the court offered to prove the truth of the matter asserted. Respondent relies on a line of cases that have held that the record of the conviction is not admissible in subsequent matters because it is hearsay, and as such, cannot be used as evidence to establish that the defendant committed the acts that were charged as offenses. The traditional reasons for excluding hearsay are its potential unreliability and the lack of an opportunity to cross-examine the hearsay declarant. Both the Legislature and the courts, however, have developed exceptions to the hearsay rule based on policy considerations, or when the nature and circumstances of the out-of-court statement provide sufficient indices of reliability.

Respondent's hearsay objection is overruled and Exhibit 4 is admitted. The Legislature has authorized the use of "official acts" of the courts or "official court records" as proof of convictions. Official acts of the courts, and court records, may be officially noticed under Evidence Code section 452. Evidence Code section 1280 establishes a general exception to the hearsay rule for official records and writings. Moreover, in 1996, Evidence Code section 452.5 was enacted, which specified that computer-generated court records are official records, and authorized the use of a certified record of conviction, in particular, "to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record."⁵ In this matter, the disciplinary statute itself specifically authorizes such use and overcomes any hearsay objection. "The record of conviction or a certified copy of the record shall be conclusive evidence of the conviction." (§ 1798.200, subd. (c)(6).) The Authority also has promulgated a regulation which states in part: "(b) For the purposes of a crime, the record of conviction or a certified copy of the record shall be conclusive evidence of such conviction. 'Conviction' means the final judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere." (Cal. Code Regs., tit. 22, § 100174, subd. (b).) Respondent has cited cases for the proposition that misdemeanor convictions offered for the purpose of impeachment at a criminal trial are inadmissible over hearsay objections, but these cases are distinguishable, because the Legislature clearly has authorized the use of convictions as grounds for disciplining EMT-P licenses.

⁵ Evidence Code section 452.5, provides that:

(a) The official acts and records specified in subdivisions (c) and (d) of Section 452 include any computer-generated official court records, as specified by the Judicial Council which relate to criminal convictions, when the record is certified by a clerk of the superior court pursuant to Section 69844.5 of the Government Code at the time of computer entry.

(b) An official record of conviction certified in accordance with subdivision (a) of Section 1530 is admissible pursuant to Section 1280 to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record.

Can a conviction following a 'West plea' be the basis for administrative discipline?

Respondent next contends that the Authority may not impose discipline on the basis of his conviction because of the kind of plea involved, i.e., Respondent's conviction followed his "West plea." As stated above, section 1798.200, subdivision (c)(6), clearly indicates that a possible result of any criminal conviction that is substantially related to the qualifications, functions, and duties of prehospital personnel is license suspension or revocation. This provision does not distinguish those convictions based on any particular kind of plea. Respondent argues that, only where the criminal defendant has expressly admitted guilt of the charged offense, can the Authority initiate an administrative disciplinary action against his license. Respondent's contention is not persuasive.

Respondent represents that he relied on counsel's advice when he made his *West* plea to the court. He was motivated to plea bargain because the judge had ruled that he was not required to register as a sex offender. It appears he also believed that a *West* plea would result in no further discipline by the Authority. Respondent's proposition -- that a "West plea" is not an admission of guilt and cannot be used for any purpose other than the criminal case -- is not a part of the holding of the *West* case. This common misconception, however, is routinely expressed by many of the respondents and their counsel who appear at hearings before the Office of Administrative Hearings, to no avail. Finally, it is questionable whether the principles of *West* are even involved, because Respondent pled to the original charge, a violation of Penal Code section 647.6, subdivision (a)(1), not to a lesser charge.

The *West* case, inter alia, stands for the propositions that a plea bargain, if voluntary and disclosed openly in court, is an accepted and integral part of the administration of justice, and that a court may accept a bargained plea of guilty or nolo contendere to any lesser offense reasonably related to the offense charged in the accusatory pleading. (*West, supra*, 3 Cal.3d 595.) In *North Carolina v. Alford, supra*, the United States Supreme Court similarly has held that a federal court has authority to impose a sentence after accepting a plea of nolo contendere, a plea by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty.⁶ A *West* plea also has come to signify a plea which "does not constitute an express admission of guilt but only a consent to be punished as if guilty." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1374.) The holding in *West*, however, does not connote this meaning nor change the case law with regard to the effect of a guilty plea. (Cf. *In re Hawley* (1967) 67 Cal.2d 824, 828, quoting *People v. Outcault* (1949) 90 Cal.App.2d 25, 29 ["The plea of guilty 'constitutes an admission of every element entering into the offense charged, and constitutes a conclusive admission of defendant's guilt.'].) "A defendant who knowingly and voluntarily pleads guilty or nolo contendere can hardly claim that he is unaware that he might be convicted of the offense to which he pleads; his plea demonstrates

⁶ "Throughout its history ... the plea of nolo contendere has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency." (*North Carolina v. Alford, supra*, 400 U.S. at p. 36, fn. 8.)

that he not only knows of the violation but is also prepared to admit each of its elements.” (*West, supra*, 3 Cal.3d at p. 612.)

Under Penal Code section 1016, there are only six kinds of pleas to an indictment or an information, or to a complaint charging a misdemeanor or infraction, only three of which are relevant here: guilty, not guilty, and nolo contendere. “A person who does not plead guilty may enter one or more of the other pleas.” (*Ibid.*) This statute does not authorize a so-called *West* plea or otherwise distinguish a simple guilty plea from a guilty plea made pursuant to *West*. Under California case law, convictions based on nolo contendere pleas (nolo convictions) may not be used as grounds for administrative discipline unless the Legislature had specifically authorized consideration of nolo convictions. The rationale underlying this case law is similar to the arguments being proffered by Respondent, i.e., if convictions pursuant to *West* pleas and nolo convictions are not reliable indicators of guilt, then Respondent must be afforded the opportunity to relitigate the issue of his guilt.

In *Cartwright v. Board of Chiropractic Examiners* (1976) 16 Cal.3d 762 (*Cartwright*), a chiropractor had pled nolo contendere and been convicted of keeping a disorderly house, a misdemeanor. Section 10, subdivision (b), of the Chiropractic Act authorized suspension or revocation of a chiropractic license on the grounds of a conviction of a crime involving moral turpitude. The California Supreme Court recognized that, under California decisional law, a conviction based on a plea of nolo contendere would not be allowed as a ground for discipline or other adversary consequences authorized by a statute for convictions generally.

“Moreover, the legislative purpose of including ‘conviction’ of certain crimes as grounds for discipline in section 10 of the Chiropractic Act and similar statutes is not merely to single out persons who have been the subject of certain procedural formalities but to reach those who have actually committed the underlying offenses. The conviction is significant in the statutory scheme only in so far as it is a reliable indicator of actual guilt. When the conviction rests on the verdict or finding of a trier of fact after trial, it means that guilt has been established beyond a reasonable doubt and when the conviction rests on a plea of guilty, it means that the defendant has voluntarily admitted guilt for all purposes. But when the conviction is based on a nolo contendere plea, its reliability as an indicator of actual guilt is substantially reduced both because of the defendant’s reservations about admitting guilt for all purposes and because the willingness of the district attorney to agree to and the court to approve the plea tends to indicate weakness in the available proof of guilt.” (*Cartwright, supra*, 16 Cal.3d at p. 774, italics added.)

The *Cartwright* case, however, recognizes that the Legislature could determine that such pleas are sufficiently reliable, and therefore, where the Legislature has authorized consideration of nolo convictions as a ground for administrative discipline, the statutory provision overrides the case law excluding convictions based on such pleas. The *Cartwright* case was followed by the Court’s opinion in *Arneson v. Fox* (1980) 28 Cal.3d 440 (*Arneson*). There, the Court held that a nolo contendere plea resulting in a conviction may be the basis for disciplining a real estate broker’s license in an administrative proceeding, where the

Legislature has determined that such convictions are sufficiently reliable indicators of actual guilt. In that case, a real estate licensee who had been convicted of a federal conspiracy charge involving fraud and misrepresentation argued that his plea of nolo contendere was insufficient to establish his guilt of the offense for purposes of revoking his license in an administrative disciplinary proceeding. The *Arneson* court held that, so long as it was established that the conviction was substantially related to the qualifications for licensure, the statute was constitutionally sound. (*Arneson, supra*, 28 Cal.3d at pp. 448-450.)

The *Arneson* Court indicated that a licensee still should be permitted to introduce evidence of extenuating circumstances by way of mitigation or explanation, as well as any evidence of rehabilitation. (*Arneson, supra*, 28 Cal.3d at p. 449.) In fact, most licensing agencies in California are required by statute, when considering suspension or revocation of a license, to evaluate matters such as the nexus between the conviction and the qualifications, functions, and duties of a licensee, as well as the rehabilitation of the licensee. The *Arneson* decision does not provide much guidance on the nature or scope of this part of the inquiry, probably because the number of possible factual situations facing an administrative law judge in disciplinary proceedings, although not infinite, borders on the immeasurable. *Arneson* simply holds that the circumstances surrounding the offense should not form the basis of impeaching the conviction. “Regardless of the various motives which may have impelled the plea, the conviction which was based thereon stands as conclusive evidence of appellant’s guilt of the offense charged. To hold otherwise would impose upon administrative boards extensive, time-consuming hearings aimed at relitigating criminal charges which had culminated in final judgments of conviction.” (*Arneson, supra*, 28 Cal.3d at p. 449.)

Respondent argues that *Arneson* is inapplicable because it involved a federal felony conviction, whereas Respondent’s crime was a misdemeanor. Respondent also contrasts the Legislature’s authorization to use felony pleas, either guilty or nolo contendere, or any admissions required by the court during any inquiry it makes as to the voluntariness of and factual basis for the plea, against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based, in comparison with the absence of such authorization for similar usage of misdemeanor nolo contendere pleas. (Pen. Code, § 1016, subd. 3.) Both *Cartwright* and *Arneson*, however, make clear that the Penal Code section 1016 is not controlling authority with regard to the effect of a plea, be it a guilty plea or a nolo contendere plea, in a license disciplinary action. Both cases have suggested there is a distinction between “collateral” proceedings and civil lawsuits. Further, until *Arneson*, a plea used as an admission in a collateral proceeding presumably would receive the same treatment as it would receive in a civil suit, i.e., the admission would constitute but one piece of evidence, which would be weighed with any other evidence offered by the defendant.⁷

⁷ A party’s guilty plea in a criminal action is not conclusive in a subsequent civil action. It is simply evidence against the party which may be explained away. (*Teitelbaum Furs, Inc. v. Dominion Ins. Co.* (1962) 58 Cal.2d 601.)

Arneson, however, chose a practical general policy to relieve licensing agencies of the necessity to relitigate the underlying charges, similar to the principle of *res judicata*. Under *Arneson*, the conviction, itself, is conclusive evidence (not even a rebuttable presumption) of appellant's guilt of the offense charged. Finally, it must be noted that Respondent pled guilty, not *nolo contendere*. A plea of guilty is an admission of guilt of every element of the crime. (*Arenstein v. California State Bd. of Pharmacy* (1968) 265 Cal.App.2d 179, 190.) A conviction based on a plea of guilty as authorized by *West* is none the less a conviction, and may be used in a collateral proceeding as a basis for license discipline.

Should the Authority be estopped from relitigating the issue of Respondent's conduct?

In general, collateral estoppel precludes a party from relitigating issues. (*People v. Sims* (1982) 23 Cal.3d 468, 477.) Traditionally, it is applied only when several threshold requirements are met. First, the issue sought to be precluded must be identical to that decided in a former proceeding. Second, the issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. In situations such as the present, it may also be necessary to determine if application of the doctrine would be contrary to the public protection policies embodied in the licensing statutory scheme for disciplining the licensee.

The 2009 Decision determined, as cause for discipline, that Respondent engaged in a corrupt act, but it did not find that he committed a sexually related offense under Penal Code section 290. The Authority had alleged the latter as cause for discipline, but following a full evidentiary hearing, decided that Respondent's conduct did not fit the elements of the crime. The issue was fully litigated in an adversarial administrative hearing. Both parties had the opportunity to examine and cross-examine witnesses under oath and offer other evidence and argument. California case law recognizes that collateral estoppel may be applied to prior decision made by administrative agencies when the agency acts in a judicial capacity and resolves disputed issues of fact properly before it. (*People v. Sims, supra.*) This issue of Respondent's underlying conduct was actually litigated in the former proceeding and the 2009 Decision is final. All of the elements of collateral estoppel are present.

There are two conflicting interests: Complainant seeks to "estop" Respondent from relitigating the underlying criminal charges under the holding of *Arneson*, and Respondent seeks to bar Complainant from relitigating the issue of his misconduct that underlies his conviction under the principle of collateral estoppel. Both positions are supported by the facts and both rely on equally strong but contravening public policies. Administrative agencies need to be able to impose discipline for criminal wrongdoing without having to relitigate issues that were resolved by final judgments in criminal cases. Conversely, licensees who have been disciplined by agencies after fair and impartial administrative hearings also have legitimate expectations of the finality of the agencies' decisions.

In this proceeding, Complainant seeks to discipline Respondent's license on two separate bases: the conviction of a crime and the commission of sexually related

misconduct. In the former proceeding, the Authority found that Respondent did not commit a sexually related offense, although it found his conduct had a sexual connotation. Here, Complainant established the fact of the conviction. Practically speaking, Complainant already litigated the issue of Respondent's conduct in the former proceeding, which eliminates the burden to relitigate the underlying charges. Complainant has demonstrated no compelling argument for reconsidering its findings in the 2009 Decision and imposing additional discipline in this proceeding, except that it has authority to do so. It is indisputable that Respondent's conviction is a new fact that may subject him to discipline in this proceeding, but that is not the same as demonstrating that the revocation of his license is in the public interest. In fact, it seems, no public protection policies would be violated if the Authority were to apply collateral estoppel and be precluded from relitigating the same issues in this proceeding as were necessarily decided in 2009. In sum, Respondent should be granted the collateral estoppel aspect of *res judicata* with regard to his misconduct.

Finally, even assuming *arguendo* that collateral estoppel cannot apply to these facts, the conflicts exposed by this proceeding represent an extraordinary circumstance under California Code of Regulations, section 100173, subdivision (g), whereby the Authority should consider all of the pertinent facts and exercise discretion, rather than automatically impose the mandatory revocation provided by section 100173, subdivision (a)(1), the harshest sanction possible as a result of the conviction. Respondent established certain facts through a fair adversary administrative proceeding that resulted in a final decision adopted by the Authority in 2009. In the course of the plea bargaining in the criminal proceeding, he was granted an opportunity to avoid registration as a sex offender as a condition of his plea. His attorney falsely represented that a *West* plea would protect Respondent from further litigation in the administrative arena. In this context, for reasons of fundamental fairness, his conviction pursuant to a plea bargain should not be deemed conclusive evidence, such that the result is automatic revocation of his license, without any opportunity for him to mitigate the circumstances of the underlying conduct.

The holding in *Arneson* certainly does not prohibit the Authority from making its own determination regarding the facts and circumstances underlying Respondent's crime. In fact, *Arneson* commends a further analysis of the facts to determine the appropriate discipline. In this light, in considering the record of the former administrative proceeding and the misapprehensions surrounding Respondent's criminal plea, an extraordinary situation exists that warrants deviation from the mandatory sanction under California Code of Regulations, section 100173, subdivision (a)(1), and allows the Authority to examine all of the facts and circumstances, so that it may make its own determination of the appropriate penalty necessary to satisfy the public interest. (Cal. Code Regs., tit. 22, § 100173, subd. (g).)

LEGAL CONCLUSIONS

1. Cause exists to revoke or suspend Respondent's EMT-P certificate under section 1798.200, subdivision (c)(6), for conviction of a crime that is substantially related to the qualifications, functions, and duties of an EMT-P and is evidence of a threat to the public health and safety, as set forth in factual finding number 5.

2. Cause does not exist to revoke or suspend Respondent's EMT-P certificate under section 1798.200, subdivision (c)(12), for unprofessional conduct, as demonstrated by the commission of a sexually related offense under Penal Code section 290, for the reasons set forth in factual finding number 7 and in the Discussion, and based on the principles of collateral estoppel.

3. Cause does not exist to revoke or suspend Respondent's EMT-P certification under California Code of Regulations, title 22, section 100173, subdivision (a)(1), for commission of a sexually related offense under Penal Code section 290, for the reasons set forth in factual finding number 7 and the Discussion, and the principles of collateral estoppel. Even assuming arguendo that collateral estoppel does not apply, Respondent has demonstrated the extraordinary circumstances required by California Code of Regulations, section 100173, subdivision (g), to warrant deviation from a mandatory revocation.

4. Respondent has submitted substantial evidence of his rehabilitation since his conviction. He has completed most of the terms of his probation, he has quit drinking alcohol, and he is making progress with having a productive life, despite his inability to work as a paramedic. Most importantly, he continues to acknowledge the wrongfulness of his misconduct. Although he insists he did not intend his misconduct as a prelude to sexual activity or as an inducement for the victim to have sexual relations with him, it seems he understands the consequences of any such future conduct. The record is sufficient to find that Respondent does not pose a threat to the public health and safety so long as he remains on probation for a significant period of time. Therefore, the following order is recommended as appropriate and in the public interest.

ORDER

1. License number P20453 issued to Respondent John A. Armstrong, shall remain subject to the terms of probation, and the revocation previously stayed will remain stayed, for a period of three years from the date of this Decision, upon the following terms and conditions:

Probation Compliance

(a) Respondent shall fully comply with all terms and conditions of the probationary order. Respondent shall fully cooperate with the EMSA in its monitoring, investigation, and evaluation of Respondent's compliance with the terms and conditions of his probationary order.

(b) Respondent shall immediately execute and submit to the EMSA all Release of Information forms that the EMSA may require of Respondent.

Personal Appearances

(c) As directed by the 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.

Quarterly Report Requirements

(d) 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.

Employment Notification

(e) During the probationary period, Respondent shall notify the EMSA in writing of any EMS employment. Respondent shall inform the EMSA in writing of the name and address of any prospective EMS employer prior to accepting employment.

(f) Additionally, Respondent shall submit proof in writing to the 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.

(g) Respondent authorizes any EMS employer to submit performance evaluations and other reports which the EMSA may request that relate to the qualifications, functions, and duties of prehospital personnel.

(h) Any and all notifications to the EMSA shall be by certified mail.

Notification of Termination

(i) Respondent shall notify the EMSA within 72 hours after termination, for any reason, with his prehospital medical care employer. Respondent must provide a full, detailed written explanation of the reasons for and circumstances of his termination.

(j) Any and all notifications to the EMSA shall be by certified mail.

Functioning as a Paramedic

(k) The period of probation shall not run anytime that Respondent is not practicing as a paramedic within the jurisdiction of California.

(l) If Respondent, during his probationary period, leaves the jurisdiction of California to practice as a paramedic, Respondent must immediately notify the EMSA, in

writing, of the date of such departure and the date of return to California, if Respondent returns.

- (m) Any and all notifications to the EMSA shall be by certified mail.

Obey all Related Laws

(n) 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 Section 1798.200. To permit monitoring of compliance with this term, if Respondent has not submitted fingerprints to the 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.

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

- (p) Any and all notifications to the EMSA shall be by certified mail.

Violation of Probation

(q) If during the period of probation Respondent fails to comply with any term of probatio, the EMSA may initiate action to terminate probation and implement actual license suspension/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 the EMSA. 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.

(r) 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 suspension/revocation. At the hearing, Respondent and the 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.

Completion of Probation

(s) Respondent's license shall be fully restored upon successful completion of probation.

Dated: January 3, 2012



MARK HARMAN
Administrative Law Judge
Office of Administrative Hearings