

BEFORE THE
EMERGENCY MEDICAL SERVICES AUTHORITY
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

VINCENT VALDIVIA

License No. P15655

Respondent.

Case No. 06-0098

OAH No. 2008030164

PROPOSED DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in San Diego, California on July 1 and 2, 2008.

David Chan, Deputy Attorney General, represented Complainant David R. Smiley, Chief Deputy Director, Emergency Medical Services Authority, State of California.

Respondent was present and represented himself.

The matter was submitted on July 2, 2008.

FACTUAL FINDINGS

1. David R. Smiley (Complainant) filed Accusation, Case No. 06-0098, dated September 24, 2007, against Vincent Valdivia (Respondent) in his official capacity as Chief Deputy Director, Emergency Medical Services Authority (EMSA), State of California.
2. On April 16, 2006, EMSA issued Emergency Medical Technician – Paramedic (EMT-P) Number P15655 to Respondent. At all times relevant herein said license was in full force and effect and will expire on April 30, 2009, unless renewed.
3. On October 25, 2006, in the case entitled *Superior Court of California, County of Orange, Harbor Justice Center v. Vincent Eric Valdivia*, Case Number 06HF1001, on his plea of guilty, Respondent was convicted of violating:
 - Penal Code section 245, subdivision (a)(2) [assault with a firearm], a felony,

- Penal Code section (a)(2)(F) [carrying a loaded unregistered firearm in public], a felony,
- Penal Code section 242 [battery], a misdemeanor, and
- Vehicle Code section 23152, subdivision (a)[driving under the influence of alcohol (DUI)], a misdemeanor

4. The facts and circumstances underlying the conviction are that on May 4, 2006, Respondent was involved in a fight; ultimately, he was arrested by the City of Costa Mesa Police Department (CMPD).

Prior to the fight, Respondent had been at a local bar for dinner with Craig Gilbert (Gilbert), a friend that Respondent had not seen for many years. After eating dinner and drinking alcoholic beverages, Respondent drove his Toyota Land Cruiser (SUV), followed by Gilbert, driving a white Dodge Ram. On the way home, Respondent followed the vehicle owned by Scott Newman (Newman) too closely. Newman and Respondent stopped, got out of their vehicles and had a verbal and physical altercation. In addition to Gilbert, other men that knew Newman were involved in the fight.

Thereafter, Respondent and Gilbert each drove away in his vehicle. When he arrived home, Respondent discovered that his watch was lost during the fight. He and Gilbert returned in Respondent's SUV to retrieve his watch. When he arrived, Respondent asked about his watch. Newman put it on the ground. Respondent got out of his vehicle with a revolver and retrieved the watch; he and Gilbert departed and returned to Respondent's home.

One of the witnesses to the fight recorded Respondent's license tag number and called CMPD; when law enforcement officers arrived, with his license tag number, Officer Fair, of the CMPD, obtained Respondent's residence address and contacted the Newport Beach Police Department (NBPD) for assistance.

The law enforcement officers went to Respondent's residence. Respondent was interviewed by CMPD Officer Fair and identified by Newman and other witnesses as the individual involved in the fight.

The law enforcement officers observed a revolver, later determined to be unregistered, in plain view in Respondent's vehicle. When questioned about the firearm, initially Respondent denied having a gun and then gave conflicting stories to the Officers Abreu and Fair about it.

CMPD officers determined that Respondent had been driving his SUV. Respondent displayed objective signs and symptoms of alcohol intoxication. Officer Rieckhoff administered the standardized field sobriety test. Based on the results of the field sobriety test and the foregoing facts, Officer Rieckhoff concluded that Respondent had driven a motor vehicle while under the influence of alcohol, arrested him and charged him with DUI.

5. As a consequence of the conviction, the Court sentenced Respondent to three years formal probation, ordered him to serve 135 days in jail, to attend and complete the First Offender Alcohol Program, pay \$757.00 in fines and fees and to have no contact or communication with Newman, Neil Lourks, Jason Drexel, Loren Baker and/or Heather Stone. Respondent spent 90 days in the Newport Beach City Jail, committed in November 2006 and released in February 2007.

6. Despite entry of the pleas in his criminal case, Respondent argued that he should have gone to trial because of the misconduct of the "victims"; during the hearing, he did not deny or dispute his role in the incident that resulted in his arrest and conviction.

7. The crimes of which Respondent was convicted are substantially related to the qualifications, functions and duties of pre-hospital personnel within the meaning of Health and Safety Code section 1798.200, subdivision (c)(6) and California Code of Regulations, title 22, section 100174.

8. Respondent's use of alcohol while operating a vehicle constituted excessive use and/or the misuse of alcohol.

9. Respondent provided evidence of explanation, mitigation and rehabilitation.

10. When he testified, though he disputed the role of the "victims" in the incident, Respondent admitted the most significant facts in his criminal case. He explained that he returned to the scene of the accident for the watch because it had sentimental value; he purchased the watch for a new job with money that he earned while working in New Orleans after Hurricane Katrina; when he returned to the site of the altercation, there were a group of men, including those involved in the fight; Respondent was afraid because he had just been involved in the fight with them, and he did not know what to do. Now he understands that, instead, he should have called the police and asked for their assistance in retrieving the watch.

Respondent's convictions have had a tremendous impact on him. He treasures his career as a firefighter/paramedic. He enjoyed the respect he received in this capacity among his colleagues and in the community. He has tried to be a role model for firefighters and his children, age 11 and 8 years. He is humiliated by his misconduct and devastated by its effect on his career.

11. Respondent is remorseful for his misconduct. He accepts responsibility for and appreciates the wrongfulness of his bad behavior. He understands that he made mistakes and exercised poor judgment. He has taken steps to understand the reasons for his acts and to assure that such misconduct does not occur in the future.

On May 17, 2006, Respondent voluntarily enrolled in the Anger Control Training Program at C.A.R.E. Counseling Center because "he was trying to make himself better for the mistake he made".

Respondent described some of the lessons that he learned in the anger management classes and techniques that he has implemented to maintain self control. He understands that everyone gets angry, and it is socially acceptable to do so, if handled in an appropriate manner. Now, he is more humble, more patient, has learned coping skills and how to control his anger, using techniques such as meditation, talking and "turning the other cheek".

On June 2 and 9, 2006, he received individual counseling from Janet Hamilton (Hamilton), an MFCC¹; previous to his arrest, she had provided couples therapy for Respondent and his common law wife. Regarding the facts and circumstances underlying his conviction, Hamilton listened to him, provided feedback and advice regarding dealing with the situation and reasons the incident happened. Recently he spoke to her to help him cope with this disciplinary proceeding.

Between May 17 and June 16, 2006, Respondent had five counseling sessions through the City of Corona's Employee Assistance Program to obtain advice and feedback from a counselor, Richard Mehl, MFT².

On June 28, 2008, he enrolled a second time in anger management classes. Again, it will include 10 group sessions.

He attended the Court ordered First Offender Alcohol Program and attended Alcoholics' Anonymous meetings. He has learned the consequences of drinking and driving. Since his arrest, he no longer drinks in public but rather at home when he knows that he will not be leaving. He does not drink if he knows that there is a possibility that he will get in his car and drive.

Respondent grew up in Idaho around guns. He testified that there are no longer guns in his home and never will be.

12. Respondent has complied with the terms and conditions of his criminal probation, including incarceration in the NBPJ jail. Respondent described his time in custody as one of the lowest times in his life but he made the best of a bad situation. He found some safety issues in the jail that could have caused serious injuries to staff and was instrumental in rectifying these problems. He assisted in performing tasks and assignments without hesitation or complaining. He demonstrated that he was a leader and had a strong work ethic. While in jail, Respondent was respectful and showed concern for others. In

¹ Marriage, Family and Child Counselor

² Marriage and Family Therapist

addition to his own testimony, he offered letters from three NBPD jail employees in support of the foregoing facts.

13. Prior to and since his conviction, Respondent has participated in community service. Among other things:

- along with some friends, he took clothes, toys and helped to build an addition to a Mexican orphanage;
- he is active in the lives of his children and other children in his community;
- he volunteered in the classrooms of his children, on the playground and goes on their school field trips; he coached various sports, such as roller hockey, flag football and basketball.

14. Since his conviction, Respondent has completed 60 hours of continuing education between May 2007 and January 2008. The courses included a variety of topics.

15. Respondent described his career and future as a fire fighter and/or paramedic. He became a firefighter and a paramedic because he wanted to help people.

In 1990 he was employed by the Corona Fire Department (CFD) as a fire fighter. Over the years, he received a variety of training and promotions.

In addition to his license as an EMT-P, Respondent is a hazard materials specialist, background and fire investigator, fire line EMT and has held trainee positions as medical unit leader and strike team leader. Among other things, he led and assisted with numerous fire investigations and performed several background checks; in 2005, he was deployed as a medical specialist to Hurricane Katrina where he spent 19 days; and, he has been deployed as a fire line EMT on several large wild land incidents.

Pursuant to California Code of Regulations, title 22, section 10166, Respondent submitted an application for accreditation as an EMT-P in Riverside County Emergency Medical Services Agency (Riverside County EMSA), the local agency for CFD. By letter, dated November 30, 2007, Humberto Ochoa M.D. (Dr. Ochoa), the agency's medical director, notified Respondent that the time to process his application would be extended, until resolution of the pending disciplinary proceeding before California EMSA (based on his convictions); thereafter Riverside County EMSA will finalize review and make a determination on his application to work as a fully accredited paramedic within the agency's jurisdiction; in the interim, Dr. Ochoa authorized Respondent to practice in the basic scope of practice as a second paramedic while in the presence of another accredited paramedic functioning as a field evaluator/preceptor; the accredited paramedic would be responsible for patient care.³

³ California Code of Regulations, title 22, section 10166

Subsequent to Respondent's conviction and completion of jail time, CFD began an investigation of the incident that resulted in arrest and conviction. Respondent resigned on June 16, 2006 prior to conclusion of the CFD investigation. On the date that he resigned from CFD, Respondent was a fire captain/paramedic.

Respondent has been accredited by the San Diego County EMSA. Between May and August 2007, he was employed as a firefighter/paramedic with Cal Fire/California Department of Forestry (CDF). Respondent was employed by Cal Fire/CDF in Riverside County in August 2007 but fired in December 2007.

Since release from custody of the NBPD, Respondent has made a diligent effort to obtain employment as a firefighter and/or paramedic and is continuing to do so. At the appropriate time in the application/employment process, he has disclosed his convictions and discussed the facts and circumstances underlying the criminal offenses. He has some applications pending. Despite his excellent professional reputation and his willingness to take any job as a fire fighter and/or paramedic, once the applications are processed, they have been denied because of his convictions.

16. Respondent is respected among his colleagues and in his community. Nine CFD employees testified on his behalf. These witnesses included the CFD fire chief, one of the two CFD battalion chiefs, CFD's Emergency Medical Services (EMS) nurse educator, a firefighter who has served as a preceptor more than 10 years and two firefighters who have been paramedics 18 years or more. Letters of support were written on Respondent's behalf from more than 25 CFD employees, from patients or family of patients who benefited from medical services provided by Respondent.

All who testified have known Respondent at least five years; most have known him more than 15 years. The witnesses were aware of Respondent's conviction and at least some of the most relevant facts and circumstances underlying the conviction, including the fight, his possession of a revolver and the DUI. They have worked with Respondent in various capacities, including as a firefighter and/or paramedic; in addition to a work relationship, most have observed him at work related social events, and some had a social relationship with Respondent; each expressed an opinion about his skills as a firefighter and/or paramedic, character and work ethic.

Respondent is described as an outstanding firefighter and/or paramedic; he is knowledgeable, skillful and compassionate, provides excellent patient care and is a mentor to more junior firefighters, an asset to any fire agency that employs him and to any community which he serves. There is no evidence that he has been disciplined previously. No substantiated complaint has been filed against him. There is no evidence that he has violated protocols. No one believes that Respondent is a violent person, that he has a problem with alcohol or that the episode that resulted in his arrest and conviction is an accurate indication of the kind of person he is. Not one of the witnesses has seen Respondent drink alcohol in a public setting since his arrest. Each observed that he is remorseful, has suffered tremendously, has been humbled and has learned from the experience, has changed and is

working diligently toward rehabilitation. Some testified specifically that they were shocked by the incident that resulted in his conviction. Many who testified believe that the misconduct was isolated and will not occur in the future. Each witness is of the opinion that it would be contrary to the public interest to revoke his license.

David Waltemeyer (Chief Waltemeyer), became the CFD fire chief on July 4, 2008. As he participated in the investigation of Respondent's case by CFD, including reviewing the police report, he had more specific knowledge of the underlying incident than the other witnesses. He has reviewed some of Respondent's evaluations; of those that he reviewed, Chief Waltemeyer testified that Respondent met or exceeded performance standards. He agreed with the facts in the foregoing paragraph. If authorized by the CFD Human Resources Department and his felonies are reduced to misdemeanors and his name is on the list of prospective employees, Chief Waltemeyer will recommend that Respondent be rehired by CFD. It is noted the director of CFD Human Resources submitted a letter on behalf of Respondent.

17. With the exception of the convictions that are the subject of this disciplinary proceeding, there is no evidence Respondent has suffered any other conviction or has engaged in violent conduct or any other misconduct that could result in discipline of his EMT-P license.

18. There is no evidence of:

- actual or potential harm to a patient,
- prior discipline by EMSA or any local agency or fire department that has employed Respondent,
- prior warnings on record or prior remediation

LEGAL CONCLUSIONS

1. Complainant seeks to discipline Respondent's license as a paramedic because he has been convicted of two felonies and two misdemeanors; Complainant argued that the crimes are substantially related to the qualifications functions or duties of a paramedic because "to a substantial degree, the convictions evidence 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".⁴

In *Griffiths v. Medical Board of California* (2002) 96 Cal.App.4th 757, [117 Cal.Rptr.2d 445], the Court described the nexus between the misconduct that forms the basis for a physician's conviction and the practice of medicine.

In *Griffiths*, the Medical Board filed an Accusation against a physician alleging a violation of Business and Professions Code section 2239. Section 2239 provides that, if a

⁴ California Code of Regulations, title 22, section 100174

physician sustained two or more misdemeanor convictions involving the consumption of alcoholic beverages, those convictions constitute unprofessional conduct. The physician entered a plea of nolo contendere, and his license was suspended. Thereafter he filed a petition for a writ, asserting that the evidence did not support the Medical Board's finding. Also, he claimed that Section 2239 was unconstitutional as applied. Rejecting his claims, the appellate court held that a logical connection existed between the convictions and the physician's fitness to practice medicine and stated, in pertinent part:

"We conclude that convictions involving alcohol consumption do have a logical connection to a physician's fitness to practice medicine

Convictions involving alcohol consumption reflect a lack of sound professional and personal judgment that is relevant to a physician's fitness 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

Driving under the influence of alcohol also shows an inability or unwillingness to obey the legal prohibition against drinking and driving and constitutes a breach of a duty owed to society Repeated convictions involving alcohol use, two of which violated Griffith's probation, reflect poorly on Griffith's common sense and professional judgment, which are essential to the practice of medicine, and tend to undermine public confidence in and respect for the medical profession."

The issue is whether such convictions have a 'logical connection' to a physician's fitness or competence to practice medicine."

Though *Griffiths* involved a physician, the Court's analysis is appropriate in this case. Respondent's crimes involved violence, threat or intimidation, misuse of alcohol and driving a vehicle while under the influence of alcohol. Given the foregoing and Respondent's misconduct, to a substantial degree, Respondent's convictions demonstrate present or potential unfitness to perform his duties as a paramedic in a manner consistent with the public health and safety.

2. Respondent has been convicted of crimes which are substantially related to the qualifications, functions and duties of prehospital personnel within the meaning of Health and Safety Code section 1798.200, subdivision (c)(6) and California Code of Regulations, title 22, section 100174, by reason of Findings 3, 4, 5, 6 and 7 and Legal Conclusion 1.

3. Respondent's use of alcohol while operating a vehicle constituted excessive use of alcohol and/or the misuse of alcohol in violation of Health and Safety Code section 1798.200, subdivision (c)(9), by reason of Findings 3, 4, 5, 6 and 8.

4. California Code of Regulations title 22, section 100173 sets forth the disciplinary standards of EMSA. Considering Findings 3, 4, 5, 6, 7 and 8, and Legal

Conclusions 1 and 2, pursuant to California Code of Regulations, title 22, section 100173, subdivisions (a) and (b), cause exists to revoke Respondent's license in that he:

- has been convicted of two or more felonies,
- is on parole or probation for the felonies,
- has been convicted and released from incarceration for said offense within the past 10 years for offenses punishable as felonies, and
- has been convicted of two misdemeanors related to force, violence, threat or intimidation.

5. Administrative proceedings to revoke, suspend or impose discipline professional licenses are not intended to punish the licensee, but rather to protect the public. (*Fahmy v. Medical Board of California* (1995) 38 Cal.App.4th 810, [45 Cal.Rptr.2d 486]; *Hughes v. Bd of Architectural Examiners* (1998) 17 Cal.App.4th 763, [72 Cal.Rptr.2d 624]).

6. California Code of Regulations, title 22, section 100173, subdivision (g), authorizes the Medical Director to grant Respondent an exemption if there is evidence that "extraordinary circumstances" exist in his case. In making a determination regarding the foregoing, EMSA's disciplinary criteria⁵ have been considered.

Respondent's crimes involved serious misconduct that involved violence, alcohol misuse and acts that potentially threatened his safety and the safety of others. His misconduct occurred two years ago. There is significant evidence of rehabilitation (Findings 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18). Particularly persuasive was the confirmation of Respondent's rehabilitative efforts by CFD firefighters, particularly Chief Waltemeyer. The potential bias of his fellow firefighters has been considered. However, it is noted that each had a reasonable basis for his/her opinion. In addition, the fire chief demonstrated that he appreciates his obligation to public safety and the reputation of CFD; nevertheless, he supported Respondent retaining his EMT-P license

Considering the foregoing, there is sufficient evidence of rehabilitation, and "extraordinary circumstances" for the Medical Director to grant an exemption exist. It would not be contrary to the public interest to grant Respondent a properly conditioned license at this time.

ORDER

License Number P15655 issued to Respondent Vincent Valdivia is revoked. Provided, however, said revocations is stayed, and Respondent is placed on probation for three (3) years on the following terms and conditions.

⁵ California Code of Regulations, title 22, section 100175

1. Respondent shall comply with all terms and conditions of this probationary order. He shall cooperate with the EMSA in the monitoring, investigation and evaluation of his compliance with the terms and conditions of this probationary order.

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

2. As directed by the EMSA, Respondent shall appear in person for interviews, meetings, and/or evaluations of his compliance with the terms and conditions of this probationary order. Respondent shall be responsible for all of his costs associated with this requirement.

3. During the period of probation, Respondent shall submit quarterly reports covering each calendar quarter; he shall certify, under penalty of perjury, and document compliance by him with all terms and conditions of his probation. If he submits his quarterly reports by mail, he shall do so by certified mail.

4. During the period of probation, Respondent shall notify EMSA, in writing, of (a) any EMS employment and (b) the name and address of any prospective EMS employer prior to accepting employment.

Additionally, Respondent shall submit proof, in writing, to EMSA, of disclosure to the current and any prospective EMS employer of the reasons for and terms and conditions of his probation.

Respondent shall authorize 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.

All notifications to EMSA shall be by means of certified mail.

5. Within seventy-two (72) hours after termination by his prehospital medical care employer, for any reason, Respondent shall notify EMSA. Respondent shall provide a full, detailed written explanation of the reasons and circumstances of his termination.

All notifications to EMSA shall be by means of certified mail.

6. The period of probation shall be tolled during any period of time that Respondent is not practicing as a paramedic within the jurisdiction of California.

During the probationary period, if Respondent leaves the jurisdiction of California to practice as a paramedic, Respondent must immediately notify EMSA, in writing, of the date of such departure and, if he returns, the date of return.

All notifications to EMSA shall be by means of certified mail.

7. Respondent shall submit to routine and random biological fluid testing or drug/alcohol screening as directed by EMSA. Respondent may use a laboratory pre-approved by EMSA or may provide the name and location of an independent laboratory or licensed drug/alcohol testing facility for approval by EMSA. EMSA shall have sole discretion for laboratory 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 laboratory to EMSA within ten (10) days. Respondent shall be responsible for all costs associated with the drug/alcohol screening.

All notifications to EMSA shall be by certified mail.

8. Prior to completion of probation, if Respondent's criminal convictions are expunged pursuant to Penal Code section 1203.4, he shall provide documentary evidence of the foregoing or a written statement that it has not been.

Prior to release from probation, Respondent shall provide documentary evidence to EMSA that he has successfully completed probation in his criminal case (*People of the State of California v. Vincent Eric Valdivia*, Case Number 06HF1001).

9. 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, he shall submit his fingerprints by Live Scan or by fingerprint cards and pay the appropriate fees within forty-five (45) days of the effective date of this Decision.

Within seventy-two (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 as to whether he violated any federal, state, local laws, statutes, regulations, written policies, protocols or rules governing the practice of medical care as a paramedic.

All notifications to EMSA shall be by means of certified mail.

10. During the period of probation, if Respondent fails to comply with any term of probation, EMSA may initiate action to terminate probation and implement actual license revocation. Upon initiation of such an action or the giving of 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.

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

DATED: August 8, 2008


VALLERIA JOHNSON
Administrative Law Judge
Office of Administrative Hearings