

STATE OF NORTH CAROLINA
COUNTY OF YADKIN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12DHR00888

HOWARD GENE WHITAKER PETITIONER, V. N. C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF EMERGENCY MEDICAL SERVICES RESPONDENT.	FINAL DECISION
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THIS MATTER came on for hearing before the undersigned, J. Randall May, Administrative Law Judge, on February 28 and May 24, 2013, in the Washington Courtroom of the Guilford County Courthouse in High Point, North Carolina.

APPEARANCES

For Petitioner: Brian Simpson, Esq.
The Dummit Law Firm
213 West Sixth Street
Winston-Salem, NC 27101

For Respondent: June S. Ferrell
Special Deputy Attorney General
North Carolina Department of Justice
PO Box 629
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ISSUE

Whether Respondent has substantially prejudiced Petitioner's rights and has exceeded its authority of jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule when it revoked Petitioner's Emergency Medical Technician-Paramedic Credential pursuant 10A N.C.A.C. 13P.0701 after Petitioner tested positive for alcohol while on duty with Yadkin County EMS?

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. §§ 131E-155.1, -157, -159 and -162
N.C. Gen. Stat. § 150B-38
10A N.C.A.C. 13P.0701

EXHIBITS

The following exhibits were admitted into the record:

Pet. Ex. 2 – Lab Report
Pet. Ex. 3 – Dismissal Letter
Pet. Ex. 4 – Investigation/Interview Packet for Petitioner
Pet. Ex. 5 – Respondent’s Objections and Responses to Petitioner’s First Set of Requests for Admissions

Resp. Ex. 1 – Letter dated August 10, 2012 from NCOEMS to Petitioner
Resp. Ex. 2 – NCOEMS Investigation/Interview Packet for Petitioner submitted to the Disciplinary Committee
Resp. Ex. 4 – Statement of Rights Form executed by Petitioner
Resp. Ex. 5 – Notice of Intent to Revoke dated December 19, 2012 from NCOEMS to Petitioner
Resp. Ex. 6 – Petitioner’s Statement of Compliance dated January 6, 2012 submitted to Regina Godette-Crawford
Resp. Ex. 7 – Revocation Letter dated January 30, 2012 from NCOEMS to Petitioner
Resp. Ex. 8 – Laboratory Report for Petitioner dated August 14, 2012

WITNESSES

Petitioner Howard Gene Whitaker
Aaron Church, Yadkin County Manager
Keith Vestal, Director of Yadkin County Emergency Services
Regina Godette-Crawford, Chief, North Carolina Office of EMS (“NCOEMS”)
Edward Jordan, Regional Specialist, NCOEMS
Doug Calhoun, Regional Specialist, NCOEMS
Kimberly Sides, Compliance Manager, NCOEMS
Dr. Jason Edsall, Medical Director, Yadkin County EMS

BURDEN OF PROOF

As Petitioner, Howard Gene Whitaker bears the burden in this contested case. *See* N.C. Gen. Stat. §§ 150B-23(a) and -29(a). The petitioner in a contested case hearing in the Office of Administrative Hearings must establish, by a preponderance of the evidence, that the Office of Emergency Medical Services (the State Agency) has deprived the Petitioner, (hereinafter “Whitaker”), of property; has ordered him to pay a fine or civil penalty; or has otherwise substantially prejudiced Whitaker’s rights; and that the State Agency has:

- (1) Exceeded its authority of jurisdiction;
- (2) Acted erroneously;
- (3) Failed to use proper procedure;
- (4) Acted arbitrarily or capriciously; or
- (5) Failed to act as required by law.

See N.C. Gen. Stat. 150B-23(a).

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, the undersigned makes the following findings of fact. In making the findings of fact, the undersigned has weighed all the evidence, or the lack thereof, and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness; any interests, bias, or prejudice the witness may have; the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. The parties received notice of hearing by certified mail more than fifteen (15) days prior to the hearing and each party stipulated on the record that notice was proper.
2. At all times relevant to this matter, Petitioner was an Emergency Medical Technician-Paramedic (EMT-P) for Yadkin County Emergency Medical Services (EMS) in Yadkinville, North Carolina. His duties included using an ambulance to transport patients to hospitals, sometimes providing treatment en route.
3. At all times relevant to this matter Petitioner held a valid North Carolina Emergency Medical Technician-Paramedic credential and as such, was subject to 10A N.C.A.C. 13P.0701. (T Vol I, pp 13-14, 58-59; Vol II, pp 201-202; Resp. Ex. 2)
4. At all times relevant to this matter, Aaron Church served as County Manager for Yadkin County. As such, Mr. Vestal made the decision to terminate Petitioner from Yadkin County EMS.
5. At all times relevant to this matter, Keith Vestal was Interim Director for Yadkin County EMS. As such, Petitioner worked for Mr. Vestal.
6. At all times relevant to this matter, Dr. Jason Edsall was a practicing emergency department physician at Yadkin County Community Hospital. Additionally, Dr. Edsall served as the Medical Director for the Yadkin County EMS System. Dr. Edsall provided medical oversight to the Yadkin County EMS and all credential personnel employed by the same worked under Dr. Edsall's medical license.

7. At all times relevant to this matter, Edward Jordan served as a Regional Specialist for the Central Region of NCOEMS. Yadkin County is located in the Central Region. Mr. Jordan is the person who received the initial complaint from Yadkin County EMS Office regarding Petitioner.
8. At all times relevant to this matter, Doug Calhoun served as the Compliance Specialist and Lead Investigator assigned to the Central Regional EMS Office in Raleigh. He is responsible for all investigations arising in the central 28 counties of North Carolina and coordinates his investigations with Kim Sides, OEMS Compliance Manager.
9. At all times relevant to this matter, Ms. Sides served as the Compliance Manager for the NCOEMS; the co-chair of the OEMS Investigation Committee; Chairperson of the OEMS Case Review Panel; and staff to the EMS Disciplinary Committee. As Compliance Manager, Ms. Sides facilitated the investigation and enforcement process related to Petitioner.
10. At all times relevant to this matter and pursuant to N.C. Gen. Stat. § 143-519, the EMS Disciplinary Committee is charged with the statutory duty of reviewing all substantiated violations of 10A NCAC 13P.0700. *See* N.C. Gen. Stat. § 143-519.
11. At all times relevant to this matter, Regina Godette-Crawford served as the Chief of the NCOEMS. As such, Chief Crawford made the decision to revoke Petitioner's EMS credential.
12. Prior to the July 14, 2011 incident surrounding the revocation of Petitioner's EMT-P credential, the Yadkin County Office of EMS had received complaints against Petitioner. Those complaints were unrelated to this matter. (T Vol. I, pp 32, 50; Resp. Ex. 6)
13. On the morning of July 14, 2011, Petitioner was scheduled to work at the West Yadkin EMS station in Yadkin County. When Petitioner failed to report to work, his shift supervisor called Keith Vestal and explained the situation to him. Mr. Vestal instructed John Matthews, the shift supervisor, to call Petitioner's home and to instruct Petitioner to report to work. After some delay, Petitioner reported to the EMS substation at which time he was instructed to report to the main office of Yadkin County EMS. (T Vol I, p 50)
14. Prior to Petitioner's arrival at the main office, Vestal spoke with Mr. Church about Petitioner. During their conversation, the decision was made to require Petitioner to submit to a drug test. Upon his arrival, Vestal informed Petitioner that he had to submit to a drug test. (T Vol I, p 51)
15. Petitioner, accompanied by his supervisor Mr. Matthews, proceeded to Yadkin County Hospital where Petitioner submitted to a urinalysis test. (T Vol I, p 18)
16. Petitioner testified that he had consumed two alcoholic beverages during the afternoon of the July 13. In addition, prior to going to bed on July 13, Petitioner consumed Nighttime, a generic brand of Nyquil. (T Vol I, pp 21, 34)
17. The Laboratory Report for Petitioner's urine sample showed a positive result for alcohol, ethyl, at .12g/dL. (Resp. Ex. 8)

18. On or about July 25, 2011, Petitioner attended a Pre-dismissal Conference with Mr. Vestal and Lisa Hughes. During the meeting, Petitioner was informed that he would be terminated from his position with Yadkin County EMS due in part to the positive results of his urinalysis test. At the conclusion of the meeting, Petitioner's employment was terminated. (T Vol I, pp 16, 32; Resp. Ex. 6, Notice of: Pre-Dismissal Conference and Dismissal Letter)
19. By letter dated July 28, 2011, Dr. Jason Edsall ("Dr. Edsall"), Medical Director for Yadkin County EMS, indefinitely suspended Petitioner from practicing as an EMT-paramedic in Yadkin County EMS system. (T Vol II, p 212; Resp. Ex. 2)
20. Dr. Edsall has been the Medical Director for Yadkin County EMS since 2010. He testified: "I supervise all levels of medical care that's given by the agency." (T Vol II, p 180) He stated that the most important thing he does is "the quality assurance and quality improvement programs to make sure that the citizens of Yadkin County receive the high level of care I expect my paramedics to provide, and so we participate in that." (T Vol II, pp 179-180)
21. Dr. Edsall had no involvement in the decision of NCOEMS to revoke Petitioner's EMT-P credential. (T Vol II, p 186)
22. Dr. Edsall explained how all credentialed person affiliated with Yadkin County EMS work under his medical license as they provide pre-hospital care to individuals. (T Vol II, p 177)
23. As the medical director for Yadkin County EMS, he is responsible for the quality assurance to the program, approval of local protocols by which medicine is to be practiced and the oversight of the practice of medicine. (*Id.*)
24. During the investigation of Petitioner, Mr. Vestal contacted Dr. Edsall and they discussed the alleged violation of 10A NCAC 13P.0701(e)(3) and (10). (T Vol II, pp 188-190)
25. During NCOEMS' investigation, Mr. Jordan and Mr. Calhoun interviewed Dr. Edsall. With respect to Petitioner, Dr. Edsall expressed his concern as follows: "My standpoint . . . I would feel that any ethanol content could potentially impair EMS personnel. If there was an employee who had any intoxicating substance, I wouldn't let him treat patients." (Resp. Ex. 2, p 10) During the hearing, Dr. Edsall reaffirmed the statements he made to the OEMS investigators. (T Vol II, pp 204-205, ll 7-6) In addition, Dr. Edsall clarified that in his earlier statement to the investigators, when he mentioned intoxicating substance, he was not referring to any specific legal level. Mr. Calhoun showed the UDS results to Dr. Edsall and he stated that the (sic) best of his knowledge, Mr. Whitaker was operating an EMS unit at an impaired level." (Resp. Ex. 2, p 11)
26. Dr. Edsall testified that as the as the medical director for Yadkin County EMS, he spoke with Mr. Vestal "regarding the urine alcohol level and that my concern is that that would represent him potentially being impaired while on duty." (T Vol II, p 193, ll 10-14) Dr. Edsall further testified that as a responsible medical director, he has to consider all persons that practicing medicine under his license and he holds them to the same standard as he holds himself

which he described as: "I do not practice medicine impaired. Now when I say impaired . . . I don't practice with any alcohol in my system at all. (T Vol II, p 195, ll 14-16)

27. When questioned about his concern for protecting the citizens of Yadkin County, Dr. Edsall responded:

Well, you've got to understand that I've - I'm taking a well-trained but still-less-than-a-physician-level certified person and I'm putting them in a six- or seven-ton moving vehicle that has lights and sirens and the ability to disobey traffic laws and putting the driving public at risk as they race to a call. And then when they get to the home, I'm giving them a box that can - that can shock the heart to stop it, I'm giving them medications that can paralyze an individual so that they stop breathing, and giving them medications that can put someone's blood pressure to zero or someone's blood pressure to 300. And I'm asking them to make a very rapid assessment of what's wrong with that patient, then to stabilize them to the best of their ability, and then to secure them in the back of that truck, and then drive real fast again and bring them to an emergency department. That's dangerous business. It's dangerous business to the best of us on the best of our days, and so if I find that I'm concerned about someone doing that while impaired, it's of paramount importance that I protect the citizens of Yadkin County by not allowing him to practice. (T Vol II, pp 201-202, ll 6-6)

When questioned about what concern he would have, if any, if a person operating under his license had a substance in their body which had the potential to impair, he responded:

You know, when you're impaired, you don't make decisions in the same way that you would otherwise. You depart from your training and you may depart from what are accepted standards for practice. So when someone is impaired, then I don't know what their decisions will be, and if that's the case, I'm not sure what - you know, if I'm impaired, I'm not sure what decisions I would make. And if that's the case and I can't trust them to make decisions that will, at least to the standards of medical practice, improve a patient's condition, then I have to stop them from doing that. T Vol II, p 202, ll 12-25)

It is noteworthy to remark that not only was Dr. Edsall's testimony professional and credible, but his true concern for the operation of the Yadkin County EMS was most persuasive.

28. When asked to explain his understanding with respect to the test for ethanol on a UDS, Dr. Edsall responded as follows:

Well, a urine ethanol level is a tricky level to interpret. Urine - alcohol is actually metabolized in the liver, and then byproducts are excreted in the urine that can be measured. So it is clear that when there is urine - when there's alcohol products detected in the urine, that alcohol has been consumed. It is unclear the rate at which that alcohol level dissipates, and so it can be very tricky business. Obviously in my practice as an emergency physician, I tend to rely more on

serum alcohol levels to give me an actual level, *but in this case it's not the actual level that was of concern to me and our concern about the Rule 10A that the complaint was about.* At the time the – *my understanding of the rule is that it stated the presence of any potentially impairing substance.* No specific level was mentioned or necessary, and that being the case, despite the fact that in this case a urine alcohol level was obtained, *it wasn't necessarily the level that concerned me but the presence of a potentially impairing substance.* (T Vol II, pp 203-204, ll 8-4) (Emphasis added)

29. Ethanol at a urine alcohol level of .12 grams/deciliter has the potential to impair a person. (T Vol II, p 210)

30. When NCOEMS receives a complaint against a credentialed individual, NCOEMS completes a Complaint Intake Form, assigns a case number to the complaint and as Compliance Manager, Ms. Sides tracks the investigation. Next the investigative team oversees the investigation of the complaint. Upon completion of the investigation, the investigative report is reviewed by the case review panel. The case review panel decides whether the matter should be forwarded to the NCOEMS Disciplinary Committee. (T Vol I, pp 117-119)

31. Between July 25 and October 14, 2011, the NCOEMS conducted an investigation of the allegations against the Petitioner. This investigation was completed by Mr. Jordan and Mr. Calhoun, Regional Specialists with NCOEMS. The result of the investigation was documented in Respondent's Exhibit 2, Investigation/Interview Packet for Whitaker, Howard E., (EMT-P). The initial findings of the investigation were violations of 10A N.C.A.C. 13P.0701(e)(3) & (10), both based upon the fact that, "Mr. Whitaker tested positive for a substance that would impair the physical or psychological ability of a credentialed EMS personnel while on duty". (T Vol I, pp 80-132; Resp. Ex. 2)

32. On August 10, 2011, Respondent notified Petitioner via certified mail that Respondent had received a complaint alleging Petitioner tested positive for ethanol during a Urine Drug Screen. In the letter, Petitioner was provided contact information in the event he had any questions regarding the investigation. (T Vol I, pp 80-82; Resp. Ex. 1)

34. By letter dated, October 25, 2011, the OEMS Disciplinary Committee requested that Petitioner appear before the Committee to discuss his EMT-P credential. (Resp. Ex 3) Per the request, Petitioner appeared before the Committee on November 8, 2011. (Resp. Ex. 4)

35. In her testimony, Chief Crawford explained how she is removed from the investigative process as well as the review of information that is submitted to the OEMS Disciplinary Committee. Upon receipt of the Disciplinary Committee's recommendation, Chief Crawford and Ms. Sides met to discuss what action, if any, was warranted based upon the evidence before her. (T Vol I, pp 67, 85, 123; Vol II, pp 144-147)

36. Subsequent to her meeting with Ms. Sides, on December 19, 2011, Chief Crawford notified Petitioner, via certified mail that NCOEMS intended to revoke his EMT-P credential based upon having tested positive for ethanol while employed and on duty with Yadkin County

EMS. Petitioner's actions were alleged to be in violation of 10A NCAC 13P.0701(e)(3) and (10). The letter provided Petitioner the opportunity to show compliance with the cited rule within the next 10 business days. (T Vol I, p 132; Resp. Exs. 5 and 7)

37. Within the ten day time period, Counsel for Petitioner submitted Petitioner's Statement of Compliance. (Resp. Ex. 6)

38. Prior to making a final determination, Chief Crawford along with Ms. Sides, reviewed Petitioner's Statement of Compliance. (T Vol. I, pp 149-153; Resp. Ex. 6)

39. Upon completion of her review, on January 30, 2012, Chief Crawford notified Petitioner via certified mail that "the decision to revoke your Emergency Medical Technician-Paramedic credential stands." (Resp. Ex. 7) The basis for the revocation was a substantiated violation of 10A NCAC. 13P.0701(e)(10). (T Vol I, pp 135, 150; Resp. Ex. 7)

40. As required by law, the January 30, 2012 letter advised Petitioner of his right to appeal the Agency Decision. *See* Resp. Ex. 7, p 2.

41. During the contested case hearing, both Mr. Jordan and Mr. Calhoun described the investigative process they followed. They individually interviewed Petitioner, Vestal, Calhoun, and Dr. Edsall. With respect to each interview, a Summary of Interview was prepared. Upon completion of the Investigation/Interview Packet, the matter was submitted to the OEMS Disciplinary Committee. (Resp. Ex. 2)

BASED UPON the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to chapter 150B of the North Carolina General Statutes.

2. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder.

3. As an Emergency Medical Technician-Paramedic with an EMT-P credential, Petitioner is subject to the provisions of 10A N.C.A.C. 13P.0701(e)(10).

4. The pertinent section of the code in effect at the time in question is 10A N.C.A.C. 13P.0701(e)(10), which states that NCOEMS may revoke a licensee's EMT-P credential for "testing positive for any substance, legal or illegal, that is *likely to impair* the physical or psychological ability of the credentialed EMS personnel to perform all required or expected functions while on duty." (Emphasis added)

5. When Petitioner reported to work on July 14, 2011, he tested positive for alcohol, a substance which is likely to cause impairment.

6. Respondent did not exceed its authority of jurisdiction; did not act erroneously; did not use improper procedure; did not act arbitrarily or capriciously; and did not fail to act as required by law or rule when it revoked Petitioner's Emergency Medical Technician-Paramedic Credential pursuant 10A N.C.A.C. 13P.0701(e)(10) after Petitioner tested positive for alcohol while on duty with Yadkin County EMS.

FINAL DECISION

BASED ON the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that Respondent's decision to revoke Petitioner's Emergency Medical Technician-Paramedic credential should be UPHELD.

NOTICE

Under the provisions of North Carolina General Statute 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 5th day of September, 2013.

J. Randall May
Administrative Law Judge