COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals
14 Summer Street, 4th Floor
Malden, MA 02148
www.mass.gov/dala

Department of Public Health,
Office of Emergency Medical Services,
Petitioner

v.

Docket No. PHET-24-0081

Mark Fortier,
Respondent

Appearance for Petitioner:

Matt A. Murphy, Esq.
Deputy General Counsel
Office of the General Counsel
Department of Public Health
250 Washington Street
Boston, MA 02108

Appearance for Respondent:

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Administrative Magistrate:

Kenneth Bresler

SUMMARY OF RECOMMENDED DECISION

An Emergency Medical Technician (EMT) responded to the home of a two-week-old baby, decided that his ambulance was not equipped to safely transport the baby, so informed the baby's parents, did not call medical control for an order about the baby, and did not obtain a signed refusal form from either parent. The baby's mother drove the baby to the hospital in her private vehicle. Recommendation is that the petitioner, Department of Public Health, Office of Emergency Medical Services, may discipline the respondent, the EMT.

RECOMMENDED DECISION

The respondent, Mark Fortier, challenges the Notice of Agency Action by the petitioner, Department of Public Health (DPH), Office of Emergency Medical Services (OEMS).

I held a hearing on May 22, 2024 by Webex, which I recorded. At the end of the hearing, DPH opted to argue orally in lieu of a post-hearing brief. In July 2024, Mr. Fortier submitted a post-hearing brief.

Recordings

The Webex hearing was plagued by technical problems, including internet connectivity problems (probably on DALA's end) that kept some hearing participants from hearing or seeing other participants; the hearing was paused until those problems resolved. Webex also created two separate recordings of the hearing, each for a separate part of the hearing, for an unknown reason. The second recording was incomplete; it did not record the beginning of Mr. Fortier's testimony. It is unknown how much of Mr. Fortier's testimony was unrecorded.

On May 23, 2024, the day after the hearing, I sent the two recordings to the parties. Suspecting that the second recording was incomplete, I emailed:

> There may or may not be gaps in the recordings. I do not plan to listen to the recordings soon. If anyone discovers gaps, please let all of us know and we'll consider what we have to do.

When I listened to the recordings in mid-July 2024, I discovered that the second recording was incomplete. Neither party had brought this to my attention, including Mr. Fortier in his brief. Considering that it is not in dispute that Mr. Fortier did not transport the baby in his ambulance, did not call medical control, and did not have either parent of the baby sign a refusal form, I doubt that the incomplete recording matters.

Exhibits

On February 23, 2024, when DALA mailed the notice of hearing to the parties, it enclosed Instructions for Communicating With DALA. The instructions required parties, among other things, to submit all documents longer than two pages in hard copy by U.S. mail. On February 29, 2024, I also emailed the instructions to the parties. On March 27, 2024, at the prehearing conference, I explained the importance of submitting hard copies of documents. I typically explain that if I printed every electronic document that was submitted to me, I'd spend a large part of my day at the printer. On April 9, 2024, in an email, I ordered the parties to send me exhibits in hard copy by May 8, 2024.

On May 22, 2024, the day of the hearing, Mr. Fortier's lawyer emailed me electronic versions of three exhibits. It was 9:07 a.m. The hearing was scheduled to start at 10:00 a.m. Two exhibits were new. The third exhibit was a version of an exhibit with Bates numbers; it had been previously submitted without Bates numbers. At 9:53 a.m., Mr. Fortier's lawyer emailed me electronic versions of still two more exhibits, including the patient care report (PCR).

At the hearing, I admitted Petitioner's Exhibits 1 through 11, which DPH had submitted before the hearing. Petitioner's Exhibit 1 was the Notice of Agency Action, which, among other things, charged Mr. Fortier with making false statements in the PCR. DPH's exhibits did not include the PCR. At the hearing, I admitted Respondent's Exhibits 2 to 8, which Mr. Fortier had submitted before the hearing. Also at the hearing, I told Mr. Fortier's lawyer that I had not had time to review her late-submitted exhibits and would not open my email to view them during the hearing. I said I was flexible and admitted Respondent's Exhibits 9 through 12.

More than an hour into the hearing, Mr. Fortier's lawyer asked that I admit still another exhibit, a YouTube video of Dr. Jonathan Burstein, M.D., the state Emergency Medical Services

(EMS) Medical Director. Later in the hearing, I said that the video should have been offered before I heard testimony but that I was trying to be flexible. I told Mr. Fortier's lawyer to get to me an informal transcript of the video, and said that I would later rule on its admissibility and possibly reopen the hearing if DPH so wanted. Mr. Fortier's lawyer said that she would get the informal transcript to me within a week. I did not hear further from her, which I interpret as her withdrawing her effort to introduce the video.

Mr. Fortier's lawyer did not send me paper copies of Respondent's Exhibits 9 through 12. I admit the PCR as Respondent Exhibit 11 because it is crucial to deciding whether DPH has proved its allegations in the Notice of Agency Action and it would otherwise not be in evidence. However, I retract the admission of Respondent's Exhibits 9, 10, and 12. I tried to accommodate Mr. Fortier's lawyer but my flexibility has limits.

Witnesses

As discussed below in Findings of Fact, this appeal involves Mr. Fortier's response as an EMT with another EMT to a home with a baby who needed medical care. At the home were the baby's mother and father, a third adult associated with the parents (Pet. Ex. 4, p. 5), and three first responders other than Mr. Fortier and the EMT he arrived with. DPH did not call as witnesses any of these people.

DPH was unable to interview one of the other first responders (Pet. Ex. 4, p. 4), so that adult was not a likely witness. DPH emailed the baby's mother and asked her to have the baby's father contact the DPH investigator, but DPH did not hear from the father. After DPH discovered that the father had posted on Facebook about the incident, it messaged the father and asked him to contact the investigator, but he did not. (Pet. Ex. 4, p. 3) Thus, the baby's father was not a likely witness either.

The hearing witnesses were Renée Atherton, an investigator for the Office of Emergency Medical Services (OEMS); Dr. Burstein, the state EMS Medical Director, who writes and updates Massachusetts's Statewide Treatment Protocols (STPs); and Mr. Fortier. Ms. Atherton largely testified about her interviews of the baby's mother and Mr. Fortier. Dr. Burstein testified about DPH's regulations, Statewide Treatment Protocols, and Administrative Requirements, and, in effect, his opinion about what they mean and Mr. Fortier's compliance with them.

Because no one who witnessed the incident testified at the hearing, except for Mr. Fortier, many of the findings of fact below are qualified. *E.g.*, "The mother told Ms. Atherton that…." I was uncertain about the accuracy of some of Mr. Fortier's testimony. Hence, many findings start with "Mr. Fortier testified that…."

Findings of Fact

<u>Overview of incident</u>

1. Mr. Fortier is licensed as a paramedic. (Pet. Ex. 1, p. 2)

2. He worked for the Orange Fire Department in the Town of Orange. (Pet. Ex. 6, p. 1)

3. On January 4, 2024, a mother in New Salem called 911 about her baby. (Pet. Ex. 4, p. 2)

4. Ms. Atherton testified that the mother called 911 on her cell phone (a detail that becomes important later in this decision), although this detail does not appear in Ms. Atherton's report (Pet. Ex. 4) and Ms. Atherton did not testify how she knew this detail.

5. The mother reported that her two-week-old baby had been choking, was not breathing or breathing regularly, was limp, and had passed out. (Pet. Ex. 3)

6. The response to the 911 call from New Salem was eventually assigned to Orange. (Pet. Ex. 1, p. 5)

7. Ms. Atherton testified that Joseph Larson, who was an EMT-Basic and Mr. Fortier's partner, said that he received a dispatch for a two-week-old infant with difficulty breathing. (Pet. Ex. 4, p. 4)

8. Shortly after 1:00 a.m., three first responders from New Salem (not Mr. Fortier and Mr. Larson) arrived at the home. The first responders were possibly firefighters; one may have been an EMT. (Pet. Ex. 4, p. 3, Pet. Ex. 8)

9. At 1:15 a.m., Mr. Fortier and Mr. Larson arrived. (Pet. Ex. 4, p. 4) They assumed control from the New Salem first responders (Pet. Ex. 1, p. 6), although the record does not explain why. (It might have been because the New Salem first responders were not EMTs or that Mr. Fortier was certified at a higher level than they were.)

10. The mother told Ms. Atherton that Mr. Fortier did not want to help her, did not think that the situation was an emergency or anything to worry about, did not take the baby's vital signs, barely looked at the baby, and did not touch or examine the baby. (Pet. Ex. 4, p. 2)

11. The mother told Ms. Atherton that only her baby's face was visible to Mr. Fortier; a blanket covered the rest of the baby. (Atherton testimony)

12. The mother told Ms. Atherton that Mr. Fortier said something like, "The baby is pretty much going to be tossing around in the back of the ambulance. We can take him if you want but we are not really equipped to take a baby so small." (Pet. Ex. 4, p. 2)

13. The mother told Ms. Atherton that Mr. Fortier also told her that it would be safer for her to drive in her vehicle with the baby, secured in his car seat, to the hospital. (Pet. Ex. 4, p. 2)

14. Before the mother took the baby in her vehicle to the hospital, she changed the baby's diaper. (Fortier testimony)

15. Mr. Fortier wanted to make sure that it was not a full diaper that was discomforting

the baby. (Fortier testimony)

16. Mr. Fortier testified that he helped changed the baby's diaper and held the baby. (Fortier testimony)

17. The mother drove the baby to Baystate Franklin Medical Center in Greenfield. (Pet. Ex. 4, p. 2)

18. The mother told Ms. Atherton that she was scared about driving to the hospital because her baby would be in a rear-facing car seat in the back seat and she would not be able to see the baby. The mother told Ms. Atherton that Mr. Fortier had said that if anything happened on the way to the hospital, the mother should stop and call 911. (Pet. Ex. 4, p. 2)

19. The mother told Ms. Atherton that on the way to the hospital, she stopped every few minutes to check on the baby. (Pet. Ex. 4, p. 2)

20. The baby's father remained at home with the couple's other four children. (Atherton, Fortier testimony)

21. After the mother drove the baby to the hospital, the father posted about the incident on Facebook. (Pet. Ex. 5) Later, the mother posted on Facebook, as well. (Pet. Ex. 4, p. 3)

22. The ambulance left at 1:29 a.m., 14 minutes after it had arrived. (Resp. Ex. 11)

23. Although the ultimate health of the baby is not significant to this decision, Ms. Atherton wrote in her Complaint Investigation Report that the baby's mother reported in an interview on January 9, 2024 that

> she was…worried about her husband at home with the other children and did not want to be in Baystate [Franklin] Medical Center without him. She stated [that] after several hours at Baystate Franklin without anyone providing any care to the baby, she left with her baby against the advice of the doctor and went home to her family. She said that she had been caring for her baby at home and has not had any further incidents.

(Pet. Ex. 4, pp. 3-4)

Regulations, Statewide Treatment Protocols, and Administrative Requirements (ARs)

24. In addition to being bound by DPH's regulations, EMTS are bound by Statewide Treatment Protocols and Administrative Requirements (ARs), which DPH issues to elaborate on regulations and Statewide Treatment Protocols. (Burstein testimony)[1]

25. 105 CMR 170.480(A) reads:

> All EMS vehicles shall be equipped and staffed to provide care at the level of service for which the EMS vehicle is put into service, in accordance with the Statewide Treatment Protocols and the applicable service zone plan. When responding to a call, each EMS vehicle shall carry the equipment, supplies and medications required by the Department's administrative requirements for its type or classification.

26. A.R. 19.12 requires a "[c]hild appropriate restraint device to provide safe transport of an infant/pediatric patient >5kg on stretcher." (Resp. Ex. 7). Five kilograms is about 11 pounds.

27. The Administrative Requirements for an ambulance do not include a requirement that an ambulance be able to safely transport a child weighing less than 10 pounds. (Resp. Ex. 7; Fortier testimony)

28. 105 CMR 170.355(A) reads:

> No [ambulance] service, or agent thereof including, but not limited to, its EMS personnel, shall refuse in the case of an emergency to dispatch an available EMS vehicle and to provide emergency response, assessment and treatment, within the service's regular operating area, in accordance with the Statewide Treatment Protocols, at the scene or during transport, or to transport a patient to an

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[1] Mr. Fortier introduced the entire Statewide Treatment Protocols, version 2023.2, effective May 4, 2023. (Resp. Ex. 6). These are the Statewide Treatment Protocols that were in effect on January 4, 2024, the date of the incident. https://www.mass.gov/lists/emergency-medical-services-statewide-treatment-protocols. DPH introduced Statewide Treatment Protocols 1.0 and 7.4, version 2024.1 (Pet. Exs. 10, 9), which became effective on April 22, 2024. https://www.mass.gov/lists/emergency-medical-services-statewide-treatment-protocols. Ms. Atherton testified that the 2024 Statewide Treatment Protocols did not materially differ from the 2023 Statewide Treatment Protocols and I have no reason to doubt her. I also have no reason to cite the Statewide Treatment Protocols that were *not* in effect on January 4, 2023 when I have the Statewide Treatment Protocols that were in effect.

appropriate health care facility in accordance with the applicable service zone plan.

29. 105 CMR 170.345(B) requires in part that

> an ambulance service that does not transport must include in the patient care report the reasons for not transporting including, if applicable, the signed informed refusal form from the patient(s).

30. Statewide Treatment Protocol 1.0, titled "Routine Patient Care, contains an extensive list of "Assessment and Treatment Priorities." (Resp. Ex. 6)

Statewide Treatment Protocol 1.0 also states:

> Under 105 CMR 170.345 of the EMS Systems regulations, each EMS call – including but not limited to those cases in which no treatment is provided, the patient refuses treatment and there is no transport – a PCR must be documented…..If the patient is not transported, then an informed refusal must be documented, in accordance with Protocol 7.5 Refusal of Medical Care and Transportation,[2] and included in the PCR.
>
> ….
>
> • The EMS System regulations require an accurate, concise and properly documented PCR to be completed at the time of the call or as soon as practicable afterwards for all patient encounters.

(Resp. Ex. 6)

31. The CMR and Statewide Treatment Protocols contain no exception for an EMT not to obtain a patient's signed refusal to be transported. (Atherton testimony)

32. Statewide Treatment Protocol 7.4, titled "Pediatric Transport," recognizes that state law requires that all children younger than eight years and shorter than 57 inches who travel in a motor vehicle must be secured in a child passenger restraint, that is, a car seat.

The Statewide Treatment Protocol continues:

> An ill or injured child must be restrained in a manner that minimizes injury in an ambulance crash. The best location for transporting a pediatric patient is on the

[2] I quote this Statewide Treatment Protocol in this decision soon.

ambulance cot.[3] The method of restraint will be determined by various circumstances[,] including the child's medical condition and weight.[4]

ANY EXCEPTIONS TO THIS PROTOCOL REQUIRE REAL-TIME MEDICAL CONTROL ORDERS. Note that exceptions to this protocol will likely result in substantial increased injury risk to the transported child, and Medical Control input will be needed to balance the risks against the risks of delay in transport.

A patient who is a child must be transported with 5-point harness in a device designed for such a purpose.

Attach device securely to cot utilizing upper back straps behind cot and lower straps around cot's frame, or as per manufacturer's instructions.

• 5-point harness must rest snugly against child.

• Adjust head portion of cot according to manufacturer's recommendation.

….

MOTHER AND NEWLY-BORN TRANSPORT

Transport the newly-born in an approved size-appropriate child restraint system that complies with the injury criteria of the Federal Motor Vehicle Safety Standards (FMVSS) No. 213[5] in the rear-facing EMS provider seat/captain's chair that prevents both lateral and forward movement, leaving the cot for the mother.[6] Use a convertible seat with a forward-facing belt path. DO NOT use a rear-facing-only seat in the rear-facing EMS provider's seat. You may also use an integrated child restraint system certified by the manufacturer to meet the injury criteria of FMVSS No. 213.

Statewide Treatment Protocol 7.4. (Resp. Ex. 6)

33. A medical control order entails an EMT calling the emergency room of a designated

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[3] A cot is what a layperson would call a gurney or stretcher. (Fortier testimony)

[4] The Statewide Treatment Protocol contains no definite recommendation about or mention of weight. The Statewide Treatment Protocol does mention "[i]nfants under 5 kilograms who also require temperature regulation," but that provision is about a temperature device, not restraint during transport.

[5] This standard is not in evidence.

[6] This provision seems to apply to situations in which both a mother and a newly-born baby are patients whom an ambulance transports.

hospital and asking an emergency room doctor how to handle a situation that the Statewide Treatment Protocol does not cover. (Atherton testimony)

34. Statewide Treatment Protocol 7.5, Refusal of Medical Care and Ambulance Transport,[7] allows a parent who is on the scene to refuse care for a minor child. One requirement of a "valid refusal of care" is that a patient's or parent's refusal is informed. A patient's or parent's refusal is not informed if the refusal was "suggested/prompted by the EMTs."

35. If a patient or parent refuses transport, Statewide Treatment Protocol 7.5 requires an EMT to prepare "the refusal of…ambulance transport document"; have it signed by the patient or parent; document the refusal of transport in the trip record; and include the signed refusal in the trip record.[8]

<u>What Fortier was expecting when he arrived on the scene</u>

36. When DPH interviewed Mr. Fortier and asked if he knew the nature of the dispatch, namely that he was responding to an infant who was possibly not breathing, he answered that he knew the patient was "14 something; days, weeks, I don't know." (Pet. Ex. 1, p. 8)

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[7] The beginning of this Statewide Treatment Protocol, "Purpose," reads:

> Under the Commonwealth's EMS System regulations, at 105 CMR170.355 (A) "Responsibility to Dispatch, Treat and Transport," ambulance services and their agents may not refuse any of these responsibilities, absent a documented patient refusal. Ambulance services and their EMS personnel must be extremely cautious about accepting patient refusals.

I do not see where 105 CMR 170.355 (A) requires a documented patient refusal. DPH may of course issue and enforce an Statewide Treatment Protocol that so requires. See *e.g.*, 105 CMR 170.940 and 170.330(A)(23), which, in effect, require compliance with the Statewide Treatment Protocols. I see the requirement in Statewide Treatment Protocol 7.5 that EMTs must document a patient's refusal; I do not see the requirement in the regulation that the Statewide Treatment Protocol cites.

[8] The evidence in this appeal did not include information about the trip record. Nor does the Notice of Agency Action allege that Mr. Fortier violated the Statewide Treatment Protocol's requirements about the trip record.

37. Mr. Fortier testified that information that the baby had a respiratory problem was irrelevant to him until he arrived at the scene and laid eyes on the baby. (Fortier testimony)

38. Mr. Fortier testified that it did not dawn on him until he arrived at the scene and saw the baby's size that transporting the baby would be a problem. (Fortier testimony)[9]

The baby's weight[10]

39. Mr. Fortier testified that he held the baby when the mother and he changed the baby's diaper. (Fortier testimony)

40. Mr. Fortier believed that the baby weighed five to seven pounds. (Fortier testimony)

41. He could gauge the baby's weight by comparing it to a gallon of milk, which is 10 pounds. He gauged that the baby was lighter than a gallon of milk. (Fortier testimony; Pet. Ex. 1, p. 9)

42. The ambulance did not contain a scale. (Fortier testimony)

43. Mr. Fortier did not ask the mother how much her baby weighed. He conceded that the mother probably knew the baby's weight, but the baby obviously weighed less than 10 pounds to him from his looking at it. (Fortier testimony)[11]

44. Ms. Atherton testified that Mr. Fortier did not hold the baby to estimate its weight, unwrap the baby to see how much he weighed, or ask the mother about the baby's weight. (Atherton testimony)

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[9] With its questions to Mr. Fortier, DPH seemed to imply that he should have started anticipating the problem when his partner received the dispatch. Ultimately, I conclude below that this issue is not significant.

[10] The baby's weight was a recurring topic of testimony. Ultimately, I conclude below that this issue is not significant.

[11] DPH seemed to imply that Mr. Fortier should have asked the mother how much her baby weighed.

Pediatric Assessment Triangle (PAT)

45. The Pediatric Assessment Triangle (PAT) entails an EMT's initial assessment of threats to a patient's life. It involves an EMT's quick examination of a patient's breathing, circulation, and skin. (Atherton testimony)

46. A PAT is not mandatory. It involves establishing whether a patient is sick or not. If an EMT does not need to act immediately to stabilize the patient, then the EMT may move on to taking the patient's vital signs and collecting the patient's history. (Burstein testimony)[12]

47. In the case of the baby in this incident, a PAT would entail an EMT's inspecting the baby's face and airway, inspecting the chest for retractions (the sinking of skin between ribs), inspecting the stomach for sinking, listening for lung sounds, wheezing, and sounds of the heart, examining the skin for rashes, feeling the baby's extremities for profusions, pulse, and temperature, and measuring oxygen saturation. (Burstein testimony)

48. A PAT of the baby would require an EMT's touching the baby and using instruments, not only looking at the baby. (Burstein testimony)

49. The Statewide Treatment Protocols require an EMT to conduct an adequate and appropriate medical examination, as defined by good medical practice. (Burstein testimony)

50. Mr. Fortier told Ms. Atherton that he had performed a PAT on the baby. (Atherton testimony; Pet. Ex. 4, p. 6)

51. The PCR reads in part: "Initial PAT assessment finds no immediate concerns with appearance, work of breathing or circulation." (Resp. Ex. 11)

52. However, an EMT would not be able to conduct a full PAT if only the baby's face

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[12] It did not sound from Ms. Atherton's and Dr. Burstein's testimony that a PAT entails a checklist.

was showing. (Atherton testimony)

53. An EMT's looking at a child would not be enough to conduct a PAT. If a child was partially covered by a blanket, then any PAT that an EMT conducted would have been partial. (Burstein testimony)

54. Mr. Fortier did not use a stethoscope on the baby. (Fortier testimony)

55 Mr. Fortier testified as follows: At the scene, Mr. Fortier was met by an EMT, who said that the baby was acting and breathing normally. Mr. Fortier and Mr. Larson entered the baby's home to find out what was happening. It did not appear necessary to Mr. Fortier to assess the baby's respiratory condition. He did not continue listening to the baby's lung sounds, because the baby's breathing was not concerning. If the baby appeared to be having respiratory problems, he would have assessed the problems. (Fortier testimony)

Patient Care Report (PCR)

56. Mr. Fortier wrote the PCR. (Fortier testimony; Pet. Ex. 4, p. 7)

57. The "Narrative" portion of the PCR reads in its entirety:

> Called to [street number] Daniel Shays Highway on New Salem for the 2 week old child the parents believe is not acting appropriately and concerned may be not be breathing. A1 responded to the scene from Athol Hospital after clearing the previous call. Upon arrival we find the patient being attended by New Salem fire 1st responders. Initial PAT assessment finds no immediate concerns with appearance, work of breathing or circulation. The chil[d] is interacting with the environment appropriately and crying at times. Hx [history] finds the child had been nursed just prior to events in which the parents were concerned the child had stopped breathing. The parents were reassured that was no longer the situation and the parents agreed the child is now acting more appropriately. When then discussed transporting the child to the hospital and that current EMS equipment was not proper for the size of the child and that children would be better transported safely by proper sized car seat in a personal vehicle. The parents agreed and decided to transport in their personal vehicle. The child was secured in the car seat and transported to a hospital by the mother. As the mother wished to start transport quickly, a refusal signature or demographics were not obtained.

(Resp. Ex. 11)

58. The “Vital Signs” portion of the PCR is entirely blank. (Resp. Ex. 11)

59. Under “Destination Details” in the PCR, opposite “Patient Evaluation and/or Care Disposition,” the PCR stated, “Patient Evaluated and Refused Care.” Opposite “Crew Disposition,” the PCR stated, “Initiated and Continued Primary Care.” Opposite “Transport Disposition,” it stated, “No Transport.” Opposite “Reason for Refusal or Release,” the PRC read, “Patient/Guardian States Intent to Transport by Other Means.” (Resp. Ex. 11)

60. The PCR form, under “Patient/Parent/Legal Guardian Notifications,” states, “Transport by means other than ambulance could be hazardous in light of present illness/injury.” (Resp. Ex. 11) It is unclear whether this is the advice that Mr. Fortier gave the baby’s parents.

61. The PCR did not document Mr. Fortier’s not calling medical control. (Resp. Ex. 11)

DPH’s position on the absence of a refusal form

62. DPH’s position is that, because neither the CMR nor Statewide Treatment Protocol contain an exception to the requirement that EMTs obtain a signed refusal form, the PCR should have had included a form in which one of the baby’s parents refused to have the baby transported to a hospital by ambulance. (Atherton testimony)

Mr. Fortier’s position on the absence of a refusal form

63. Mr. Fortier interpreted the parents’ actions as their partly following his advice to transport the child in a private vehicle. (Fortier testimony)

64. Mr. Fortier testified that he was not going to jump in front of the mother’s moving vehicle, as she left the home to drive her baby to the hospital, to get her signature on the refusal form. (Fortier testimony)

65. Mr. Fortier testified that he did not get the signature of the baby’s father on the refusal form because the mother was driving away and the ambulance followed her. (Fortier

testimony)

66. Mr. Fortier conceded that he could have returned to the baby's home and gotten the father's signature on the refusal form, but Mr. Fortier did not do so. (Fortier testimony)

DPH's position on the baby's transport

DPH's position is as follows:

67. Mr. Fortier should have transported the baby in the ambulance. (Atherton testimony)

68. By telling the mother to transport the baby in her private vehicle, Mr. Fortier failed to exercise reasonable care, judgment, knowledge, or ability in the performance of his duties. (Burstein testimony)

69. It was dangerous for Mr. Fortier to have had the mother transport the baby alone because that did not entail medical care. The baby was not under observation; no one could intervene, such as with oxygen or respiratory support, if the baby needed it. (Burstein testimony)

70. The situation was complicated because no federal standard or national recommendation exists for transporting a child weighing less than 10 pounds. (Burstein testimony)

71. Nonetheless, Mr. Fortier should have transported the baby. (Burstein testimony)

72. Mr. Fortier should have contacted medical control to learn the safest method to transport the baby. (Burstein testimony)

73. The risk of transporting the baby by ambulance had to be weighed against the risk from not transporting the baby. (Burstein testimony)[13]

74. One had to look at commercial devices, such as NeoMate Pediatric Restraint System

[13] Dr. Burstein's testimony was unclear on this point. Who had to do the weighing? The emergency room doctor serving as medical control? Mr. Fortier testified that he did so weigh the risks.

from the Ferno company. See https://www.ferno.com/us/product/neomate-pediatric-restraint-system?hl=en-us ("designed for pediatric patients ranging in size from 5-14 lb").[14]

75. In a worst-case scenario, Mr. Fortier could have offered to go in the mother's private vehicle to tend to the baby as the mother drove to the hospital. (Burstein testimony)[15]

76. The ambulance could have or should have had a NeoMate. (Burstein testimony)

77. For an ambulance crew not to have the right equipment in the ambulance is not an option. (Burstein testimony)

78. For an ambulance crew to respond to a call with an ambulance unequipped to respond to that call is a violation of regulation, is ethically inappropriate, and is the responsibility of the crew. (Burstein testimony)[16]

Mr. Fortier's position on the baby's transport

Mr. Fortier's position is as follows:

79. Mr. Fortier testified that he was certified in car seat installation by Safe Kids Worldwide. (Fortier testimony)

80. It did not dawn on Mr. Fortier until he arrived at scene and saw the baby's size that

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[14] Dr. Burstein's testimony was unclear on this point. Was medical control supposed to have suggested this device? If so, where was Mr. Fortier to have obtained the device after 1:00 a.m. at the baby's home? Was Mr. Fortier supposed to have obtained the device in advance and had it on the ambulance, and was responsible for not having done so? Apparently, so. See below.

[15] Dr. Burstein's testimony was unclear on this point. How does this comport with DPH's position that Mr. Fortier should have transported the baby in the ambulance? Was Mr. Fortier's riding in the mother's private vehicle an acceptable alternative to his transporting the baby in the ambulance if medical control ordered it?

[16] Dr. Burstein's testimony was unclear on this point. How does this comport with DPH's position that Mr. Fortier should have transported the baby in the ambulance? Mr. Fortier should have transported the baby in the ambulance even if it did not have a NeoMate? Was this two separate violations? Mr. Fortier failed to have a NeoMate in the ambulance and failed to transport the baby in the ambulance?

there would be a problem. (Fortier testimony)

81. Mr. Fortier did not think that the equipment on the ambulance could safely transport the baby. (Fortier testimony)

82. Mr. Fortier testified as follows: If the baby was in the ambulance and it got into an accident or had to take evasive action, the baby could have become a projectile. New Salem is a wooded area and the ambulance could have encountered a wild animal, such as a deer, in the road. The highway between Route 2 and the University of Massachusetts is notorious for drunken drivers. The highway can be unsafe, especially in the early morning. (Mr. Fortier did not specify the highway.) (Fortier testimony)

83. The ambulance was equipped with a Pedi Mate, which is only for a child over 10 pounds, while the baby was under 10 pounds. (Fortier testimony) (Mr. Fortier was apparently referring to Pedi Mate + Pediatric Restraint System. https://www.ferno.com/us/product/pedi-mate-plus-pediatric-restraint-system?hl=en-us)[17]

84. Mr. Fortier also testified about the NeoMate. He also testified that Ferno child restraint devices are designed for Ferno cots, whereas Fortier's ambulance was equipped with a Stryker cot. (Fortier testimony)[18]

85. Mr. Fortier testified that Stryker does not make a pediatric restraint device but that Stryker does make brackets so that a Ferno device can be attached to a Stryker cot. However,

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[17] The Ferno company sells one device called a NeoMate and a separate product called a Pedi Mate. Dr. Burstein testified about the NeoMate. See https://www.ferno.com/us/product/neomate-pediatric-restraint-system?hl=en-us ("designed for pediatric patients ranging in size from 5-14 lb"). Mr. Fortier testified about both the NeoMate and the Pedi Mate. https://www.ferno.com/us/product/pedi-mate-plus-pediatric-restraint-system?hl=en-us ("designed for pediatric patients ranging in size from 10-100 lb").

[18] This testimony may not have been significant. Ferno asserts that NeoMate "safely secure[s] young patients to almost any cot" and "[t]hree straps easily attach the NeoMate to any cot." https://www.ferno.com/us/product/neomate-pediatric-restraint-system?hl=en-us

that information is obscure and not widely known. (Fortier testimony; Resp. Ex. 3)[19]

86. Mr. Fortier had to conduct a risk analysis about how to safely transport the baby. If the baby had been in respiratory distress, then maybe he would have risked transporting the baby in the ambulance to a hospital. (Fortier testimony)

87. In the hearing, DPH asked Mr. Fortier if he could have driven the ambulance more slowly to keep the baby safe. He answered that he had not been driving. DPH asked if he could have told his partner to drive slowly. Mr. Fortier answered: Yes, but he could not have instructed a drunken driver not to hit the ambulance. (Fortier testimony)

88. In response to Dr. Burstein's testimony that Mr. Fortier might have been able to transport the baby in his car seat attached to the captain's chair (also called an airway seat) (Resp. Ex. 4 (photographs of the captain's chair in the ambulance that Mr. Fortier responded in)), Mr. Fortier testified as follows: The captain's chair is meant to restrain the attendant,[20] not for other purposes. The chair's straps cannot be disconnected from the chair, so it is not possible to strap them across an infant seat. (Fortier testimony)

89. OEMS does not require ambulances to be equipped with pediatric restraint equipment for babies starting with a weight of five pounds. (Fortier testimony)

90. No ambulance in Massachusetts is equipped to transport an infant under 10 pounds because the ARs do not require such equipment. (Fortier testimony)

91. Mr. Fortier recommended that the baby's parents take the baby to Athol Memorial

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[19] It is unclear how significant it was that the information about the brackets was obscure. It is also unclear whether Mr. Fortier knew about the brackets on January 4, 2024; when he found out them (such as for the hearing); and what, if anything, Mr. Fortier did or has done about equipping the ambulances that he staffs with such brackets. See Resp. Ex. 3 (emails between Mr. Fortier and Stryker, dated February 15 and 18, 2024).

[20] Presumably, an attendant is the EMT who attends the patient while the other EMT drives the ambulance.

Hospital but they preferred Baystate Franklin in Greenfield. (Atherton)

92. Mr. Fortier testified that he tried to convince the mother to transport the baby to the closest hospital, which was Athol Memorial, and offered to follow the mother and baby in her private vehicle to that hospital, but she was adamant about not going there and going to Baystate Franklin Medical Center in Greenfield instead. He interpreted that as a refusal of his recommendation. (Fortier testimony)

93. Mr. Fortier testified that he did follow the mother in her car as she drove away but stopped following when she headed toward Greenfield. (Fortier testimony)

94. Toward the end of the hearing, Mr. Fortier testified that he told the mother to take another adult with her in her car. (Fortier testimony)[21]

DPH's position on medical control

DPH's position is as follows:

95. Mr. Fortier had access to two radio systems: one was hand-held and one was in the ambulance and connected directly with a hospital. (Fortier and Atherton testimony)

96. Mr. Fortier was not carrying the hand-held radio and did not report a problem with the ambulance radio. (Pet. Ex. 4)

97. If neither radio was working, Mr. Fortier should have used his personal cell phone or borrowed a cell phone to call medical control. (Atherton testimony)

98. Ms. Atherton testified that the mother's cell phone would have worked for Mr. Fortier to have called medical control because she had used her cell phone to call 911. (Atherton testimony)

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[21] I do not credit this testimony. This factual allegation did not appear in Ms. Atherton's interview with Mr. Fortier (Pet. Ex. 4) and he mentioned it off-handedly at, as I stated, the end of the hearing.

99. Dr. Burstein testified that had Mr. Fortier called medical control, the emergency room doctor might have proposed several possibilities, as follows:[22] Depending on the circumstances and if the baby's condition was stable, medical control might have considered ordering Mr. Fortier to call another ambulance that had the proper equipment to transport the baby. If the backup ambulance did not have the proper equipment, medical control might have considered ordering Mr. Fortier to call another ambulance service. Medical control might have considered ordering Mr. Fortier to put the baby in the baby's car seat and strap the seat to the captain's chair or stretcher. Finally, medical control might have considered ordering Mr. Fortier or the other EMT with him to accompany the mother in her private vehicle to monitor the baby and provide any care for him. Dr. Burstein testified that medical control might consider these options and that they were not necessarily feasible. (Burstein testimony)

Mr. Fortier's position on medical control

Mr. Fortier's position is as follows:

100. Mr. Fortier testified that he did not carry a radio because the EMT who was with him had one. (Fortier testimony)

101. Mr. Fortier testified that the ambulance had to be within three to five miles of the hospital for the ambulance radio to work. (Fortier testimony)[23]

102. Mr. Fortier testified that he would have loved to have called medical control, but he had been in the middle of nowhere. (Fortier testimony)

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[22] At this point in the hearing, Dr. Burstein testified about what medical control might have considered ordering Mr. Fortier to do, not what Mr. Fortier should have done without calling medical control.

[23] Mr. Fortier implied that he was farther than three to five miles from the hospital, but the distance from the baby's home to the hospital is not in evidence. Also not in evidence is why Mr. Fortier or the other EMT could not have called medical control with the hand-held radio that the other EMT carried.

103. Mr. Fortier testified that while the baby's mother had cell phone service, he did not. (Fortier testimony)

104. Mr. Fortier conceded that he probably could have figured out some way to contact medical control, but he was not going to jump in front of the mother's moving vehicle to ask to use her cell phone. (Fortier testimony)[24]

Notice of Agency Action

105. On February 2, 2024, DPH issued a Notice of Agency Action: Immediate Suspension and Proposed Temporary Revocation of Certification as an Emergency Medical Technician. (Pet. Ex. 1)

106. The introduction to the Notice of Agency Action read:

> The Commissioner of the Department of Public Health ("the Department"), pursuant to M.G.L. c. 111C, §§2(1), 16 and 105 CMR 170.750, immediately suspends the certification of the Respondent, Mark Fortier, as an Emergency Medical Technician (EMT), P871519, at all levels, effective immediately. This summary suspension is based upon evidence that Fortier, *inter alia*[25] violated the Emergency Medical Services (EMS) System regulations and Statewide Treatment Protocols (STPs) by failing to appropriately assess and treat, and refusing to transport, an emergency patient, a 2-week-old infant reported to be having breathing issues, for whom 9-1-1 had been called for, and instead falsely telling the patient's mother that it was safer for her to drive her baby to the hospital

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[24] Of course, if Mr. Fortier had assessed the situation and asked to borrow the mother's cell phone, another adult's cell phone, or whichever telephone the mother had used to call 911, and had called medical control – without announcing that his ambulance was not equipped to transport the baby – the mother would have had no reason to hurry to the hospital in her private vehicle. Mr. Fortier would not have faced the undesirable possibility of stopping the mother from driving away.

[25] I base my decision on what DPH has specified in the Notice of Agency Action, not anything *inter alia* that Mr. Fortier may have done or failed to do. In addition, the Notice of Agency Action contains a section called "Respondent's Past Compliance History." It describes complaints about and DPH investigations into Mr. Fortier in 2012, 2017, 2018, and 2022. (Pet. Ex. 1, p. 12) DPH did not, in the Notice of Agency Action or through its lawyer, explain what, if anything, it wanted me to do with the information, such as to affirm that DPH could discipline Mr. Fortier based on the January 24, 2024 incident as well as a history of violating regulations and other standards. In the absence of any such explanation, I have not read Respondent's Past Compliance History closely and do not consider it in this decision.

because the ambulance was not equipped to safely transport patients of that size.

(Pet. Ex. 1)

107. The Notice of Agency Action stated:

In reaching the above determination, the Department relied upon the following findings:

a. In the absence of a signed, valid refusal of treatment and transport by a parent of this infant patient, the Respondent failed to assess, treat, and transport an emergency patient to the hospital, in violation of 105 CMR 170.355.

b. The Respondent defaulted on his duties as the paramedic member of the dispatched ambulance crew by failing to perform a thorough, paramedic-level assessment of this patient, and failing to use options for transport of an infant patient with which his ambulance was equipped, in violation of the STPs.

c. The Respondent violated the EMS System regulations by documenting a PCR that falsely stated the parents agreed with his assessment that it was safer to take the infant to the hospital in their own car, in violation of 105 CMR 170.345(B) and 105 CMR 170.940(O).

d. The Respondent violated the EMS System regulations by falsely informing the infant patient's parents that the ambulance in which he had responded to their 9-1-1 call was not equipped to transport a patient that small, in violation of 105 CMR 170.940(O).

(Pet. Ex. 1)

108. The Notice of Agency Action further stated:

The following are separate and independent grounds for the revocation of Respondent's EMT certification:

A. Respondent's failure to adhere to the STPs constitutes a failure to exercise reasonable care, judgment, knowledge, or ability in the performance of his duties and to perform those duties within the scope of [his] training and certification, in violation of 105 CMR 170.940(C).

B. Respondent's actions constitute a failure to meet the requirements of 105 CMR 170.800 or 170.900, in violation of 105 CMR 170.940(B).

C. Respondent's actions fail to meet the requirements of 105 CMR 170.800(C) which states, in relevant part "EMS personnel working in connection with a licensed service shall provide care in conformance with the Statewide Treatment Protocols…"

D. Respondent's actions violated the EMS System regulations' duty to assess,

treat and transport emergency patients, as set out in 105 CMR 170.355(A), in violation of 105 CMR 170.940(P).

E. Respondent violated the EMS System regulations by failing to document a PCR accurately, in accordance with 105 CMR 170.345(B); in violation of 105 CMR 170.940(P).

F. Respondent's failure to provide assessment, treatment, and transport to the hospital to an emergency patient, for whom 9-1-1 was called, in the absence of a valid, signed refusal by a parent of this infant patient, in accordance with the STPs, endangers the health or safety of the public, in violation of 105 CMR 170.940(F).

G. Respondent knowingly made false statements, both verbally to the parents of the infant patient, as well as in the PCR, a document filed with or obtained by the Department or any other entity in the EMS system, in violation of 105 CMR 170.940(O).

(Pet. Ex. 1)

109. On February 16, 2024, Mr. Fortier requested a hearing. (Pet. Ex. 2)

Discussion

DPH has the burden of proof by a preponderance of the evidence that it has grounds to revoke Mr. McDonald's certification. *E.g.*, *DPH, Office of Emergency Medical Services v. David Walsh*, PHET-23-0269, 2023 WL 5170541 at *3 (DALA 2023).

A particular challenge in this case was the amount of hearsay. I may give hearsay probative effect if "reasonable persons are accustomed to rely" on similar hearsay "in the conduct of serious affairs." G.L. c. 30A, §11(2). In my estimation, reasonable persons are not accustomed to revoking a professional's license for at least one year (Pet. Ex. 1) after relying on second-hand accounts of what people reported that the licensed professional did and said, when the original accounts were not under oath or subject to cross-examination and clarification.

I discuss both DPH's findings (a through d) and grounds for revocation (A through G) in the Notice of Agency Action because some findings help explain the grounds for revocation. Rather than rearrange the findings and grounds, and consolidate them into related sets of

allegations, I discuss them in the order that they appeared in the Notice.

> [DPH finding] a. In the absence of a signed, valid refusal of treatment and transport by a parent of this infant patient, the Respondent failed to assess, treat, and transport an emergency patient to the hospital, in violation of 105 CMR 170.355.

DPH failed to prove by a preponderance of the evidence what exactly Mr. Fortier was supposed to assess. It does not sound as if the PAT is checklist; it is *not mandatory*. (Burstein testimony) Mr. Fortier told Ms. Atherton that he had performed a PAT, although he did not testify about performing a PAT. DPH failed to prove by a preponderance of the evidence what kind of assessment Mr. Fortier performed and how extensive it was. Details are absent from reliable parts of the record, especially because witnesses other than Mr. Fortier who were present at the incident did not testify. DPH failed to prove by a preponderance of the evidence that the baby needed Mr. Fortier's treatment.

DPH did prove by a preponderance of the evidence that Mr. Fortier, during an emergency, see 105 CMR 170.020 (definition of "emergency"), refused to "transport a patient to an appropriate health care facility." 105 CMR 170.355(A).

> [DPH finding] b. The Respondent defaulted on his duties as the paramedic member of the dispatched ambulance crew by failing to perform a thorough, paramedic-level assessment of this patient, and failing to use options for transport of an infant patient with which his ambulance was equipped, in violation of the STPs.

I interpret the phrase "in violation of the STPs" to modify both parts of this finding: assessing the baby and transporting the baby.

Dr. Burstein testified about what Mr. Fortier should have done: He should have inspected the baby's face and airway, inspected the chest for retractions, inspected the stomach for sinking, listened for lung sounds, wheezing, and sounds of the heart, examined the skin for rashes, felt the baby's extremities for profusions, pulse. and temperature, and measured oxygen saturation. (Burstein testimony) Mr. Fortier failed to do these things. But what Statewide Treatment

Protocol did Mr. Fortier violate?

DPH did not directly specify, but it introduced into evidence only two Statewide Treatment Protocols: Statewide Treatment Protocol 7.4, Patient Transport (Pet. Ex. 9), and Statewide Treatment Protocol 1.0, Routine Patient Care. (Pet. Ex. 10) Statewide Treatment Protocol 1.0, under "Assessment and Treatment Priorities," has 18 bulleted descriptions of things that EMTs should do. I can surmise that this finding about Mr. Fortier refers to Statewide Treatment Protocol 1.0, but problems still remain after I surmise.

Statewide Treatment Protocol 1.0 was not the subject of in-depth testimony and its relationship to this case is not readily apparent. Many of the things in Statewide Treatment Protocol 1.0 apply to only certain patients and not the baby in this case. *E.g.*, "Obtain venous blood samples according to the receiving hospital policies." Although Dr. Burstein did list things that Mr. Fortier should have done, he did not correlate them with Statewide Treatment Protocol 1.0. DPH has left me to surmise that the things that Mr. Fortier should have done are listed in Statewide Treatment Protocol 1.0. As a layperson, I am not capable of doing the correlation that Dr. Burstein did not do. And if the things, or some of them, that Mr. Fortier should have done are not in Statewide Treatment Protocol 1.0, then DPH has left me not knowing the source of Dr. Burstein's opinion.

DPH proved by a preponderance of the evidence that Mr. Fortier "fail[ed] to use options for transport of an infant patient" – but it did not prove that Mr. Fortier "fail[ed] to use options for transport of an infant patient *with which his ambulance was equipped*." DPH failed to prove by a preponderance of the evidence that Mr. Fortier's ambulance was equipped to transport the baby.

[DPH finding] c. The Respondent violated the EMS System regulations by documenting a PCR that falsely stated the parents agreed with his assessment that it was safer to take the infant to the hospital in their own car, in violation of 105 CMR 170.345(B) and 105 CMR 170.940(O).

This finding refers to this part of the PCR:

> [T]hen [Mr. Fortier] discussed transporting the child to the hospital and that current EMS equipment was not proper for the size of the child and that children would be better transported safely by proper sized car seat in a personal vehicle. The parents agreed and decided to transport in their personal vehicle.

(Resp. Ex. 11)

DPH failed to prove by a preponderance of the evidence that this part of the PCR was false; that is, that the parents agreed. DPH so failed because neither parent testified.

In addition, 105 CMR 170.940(O) authorizes DPH to discipline an EMT who "[k]nowingly make[s] an omission of a material fact or a false statement…in any…document filed with or obtained by the Department…." DPH failed to prove by a preponderance of the evidence, not only that the statement in the PCR was false, but that Mr. Fortier knew that it was false. It did not even try to prove Mr. Fortier's knowledge.

Finally, 105 CMR 170.345(B), which the DPH finding cites, requires in part that

> an ambulance service that does not transport must include in the patient care report the reasons for not transporting including, if applicable, the signed informed refusal form from the patient(s).

The PCR *did* include the reason that the ambulance did not transport the baby. DPH has alleged that the reason was false. However, DPH cannot both allege that the PCR did not include the reason that the ambulance did not transport the baby and that the reason was false.

[DPH finding] d. The Respondent violated the EMS System regulations by falsely informing the infant patient's parents that the ambulance in which he had responded to their 9-1-1 call was not equipped to transport a patient that small, in violation of 105 CMR 170.940(O).

This allegation has three flaws. As stated, 105 CMR 170.940(O) authorizes DPH to discipline an EMT who "[k]nowingly make[s] an omission of a material fact or a false statement…in any…document filed with or obtained by the Department…." DPH failed to prove by a preponderance of the evidence that, one, the statement to the parents was false, and two, Mr. Fortier knew that it was false. Three, the regulation did not bar Mr. Fortier from making a false oral statement to the parents. If DPH meant that Mr. Fortier's false oral statement made it into a document that DPH had, then this finding is subsumed in the one immediately preceding it.

> <u>[DPH ground for revocation] A. Respondent's failure to adhere to the STPs constitutes a failure to exercise reasonable care, judgment, knowledge, or ability in the performance of his duties and to perform those duties within the scope of [his] training and certification, in violation of 105 CMR 170.940(C).</u>
>
> 105 CMR 170.940(C) authorizes DPH to discipline an EMT for
>
> [f]ailure to exercise reasonable care, judgment, knowledge, or ability in the performance of duties or to perform those duties within the scope of his or her training and certification, and in accordance with the Statewide Treatment Protocols.
>
> Thus, this ground for revocation restates the regulation.
>
> I interpret the regulation as follows. DPH may discipline an EMT who:
>
> 1. fails to
>
> A. exercise reasonable care, judgment, knowledge, or ability in performing duties;

and

> B. in accordance with Statewide Treatment Protocols;

or

> 2. fails to perform duties
>
> A. within the scope of training and certification; and
>
> B. in accordance with Statewide Treatment Protocols.

DPH left me to surmise if it has invoked the first clause, the second clause, or both. DPH has left me to surmise which Statewide Treatment Protocols Mr. Fortier allegedly violated and how. I surmise below.

> <u>[DPH ground for revocation] B. Respondent's actions constitute a failure to meet the requirements of 105 CMR 170.800 or 170.900, in violation of 105 CMR 170.940(B).</u>

105 CMR 170.940(B) authorizes DPH to discipline an EMT for "[f]ailure to meet the requirements of 105 CMR 170.800 or 170.900."

105 CMR 170.900 does not seem to apply here.

105 CMR 170.800 has seven parts to it, (A) through (G). Parts (A), (B), (D), (E), (F), and (G) do not seem to apply. Part (C) requires EMTs to "provide care in conformance with the Statewide Treatment Protocols." Part (D) broadly requires EMTs to comply

> with M.G.L. c. 111C, 105 CMR 170.000, all other applicable laws and regulations, administrative requirements of the Department, and their service's established policies and procedures that are consistent with 105 CMR 170.000.

In effect, this ground for revocation is that Mr. Fortier violated one or more statutes, regulations, Statewide Treatment Protocols, or administrative requirements. DPH did not specify which ones and how Mr. Fortier allegedly violated them. I surmise below.

> <u>[DPH ground for revocation] C. Respondent's actions fail to meet the requirements of 105 CMR 170.800(C) which states, in relevant part "EMS personnel working in connection with a licensed service shall provide care in conformance with the Statewide Treatment Protocols…"</u>

This ground for revocation is subsumed in the previous ground. As with the previous ground, DPH did not specify which Statewide Treatment Protocol Mr. Fortier allegedly violated and how. I surmise below.

[DPH ground for revocation] D. Respondent's actions violated the EMS System regulations' duty to assess, treat and transport emergency patients, as set out in 105 CMR 170.355(A), in violation of 105 CMR 170.940(P).

As I state above in my discussion of DPH finding a, DPH did prove by a preponderance of the evidence that Mr. Fortier refused to "transport a patient to an appropriate health care facility." 105 CMR 170.355(A).

[DPH ground for revocation] E. Respondent violated the EMS System regulations by failing to document a PCR accurately, in accordance with 105 CMR 170.345(B); in violation of 105 CMR 170.940(P).

105 CMR 170.940(P) authorizes DPH to discipline an EMT for "[f]ailure to complete a patient care report, as required by 105 CMR 170.345." As quoted above, 105 CMR 170.345(B) requires in part that

> an ambulance service that does not transport must include in the patient care report the reasons for not transporting including, if applicable, the signed informed refusal form from the patient(s).

As I state above in my discussion of DPH finding c, the PCR *did* include the reason that the ambulance did not transport the baby.

[DPH ground for revocation] F. Respondent's failure to provide assessment, treatment, and transport to the hospital to an emergency patient, for whom 9-1-1 was called, in the absence of a valid, signed refusal by a parent of this infant patient, in accordance with the STPs, endangers the health or safety of the public, in violation of 105 CMR 170.940(F).

105 CMR 170.940(F) is a broad regulation. It authorizes DPH to discipline EMTs for "[a]ny condition or action that endangers the health or safety of the public." DPH did not prove by a preponderance of the evidence that Mr. Fortier's non-transport of the baby endangered the health or safety of the baby, let alone the public.

[DPH ground for revocation] G. Respondent knowingly made false statements, both verbally to the parents of the infant patient, as well as in the PCR, a document filed with or obtained by the Department or any other entity in the EMS system, in violation of 105 CMR 170.940(O).

I discussed this regulation above in my discussion of DPH findings c and d.

DPH's findings and grounds for revocation, in sum

In sum, DPH seems to have six factual allegations against Mr. Fortier:

He did not assess the baby.

He did not transport the baby.

He did not call medical control.

He told a falsehood to the baby's parents.

He included a falsehood in the PCR.

He did not get either of the baby's parents to sign a refusal form.

Some of these factual allegations appear toward the end of the Notice of Agency Action in DPH's findings, which I have quoted, but all appear in the Notice.

I recommend that DPH not discipline Mr. Fortier for not assessing the baby because it did not prove by a preponderance of the evidence what that assessment should have entailed.

I recommend that DPH may discipline Mr. Fortier for not transporting the baby in the ambulance. It may or may not have been safe for Mr. Fortier to have transported the baby in the ambulance, but under a strict reading of 105 CMR 170.355(A), that is not an issue and Mr. Fortier refused to "transport a patient to an appropriate health care facility."

I recommend that DPH may discipline Mr. Fortier for not calling medical control. Statewide Treatment Protocol 7.4 does not exempt the transportation of patients weighing less than 10 pounds. It does require that any exemptions be the subject of real-time medical control orders. As DPH pointed out in its closing argument, the requirement to call medical control is in bold and all capital letters in Statewide Treatment Protocol 7.5 for a reason. When Mr. Fortier decided that transporting the baby would not be safe, he should have called medical control.

Mr. Fortier may or may not have had access to two radios. His cell phone may or may not

have worked. His partner's cell phone may or may not have worked; no evidence exists on this point. The baby's mother may or may not have called 911 on a cell phone. Mr. Fortier may or may not have been able to borrow the mother's cell phone, the father's cell phone, the cell phone of the third adult present in the baby's home, or the telecommunications equipment, including cell phones, of any of the other first responders. In any event, the mother called 911 on *a* telephone. (Pet. Ex. 3) Mr. Fortier did not ask to use it.

I recommend that DPH not discipline Mr. Fortier for allegedly telling a falsehood to the baby's parents or including a falsehood in the PCR.

I recommend that DPH may discipline Mr. Fortier for not getting either of the baby's parents to sign a refusal form. After the ambulance followed the mother and baby in her private vehicle to a certain point, Mr. Fortier could have returned in the ambulance to the baby's home to ask the father to sign a refusal form. However, even if Mr. Fortier had obtained a signed refusal form, it would not have been informed and thus valid. A patient's or parent's refusal is not informed if the refusal was "suggested/prompted by the EMTs." (Resp. Ex. 6 (Statewide Treatment Protocol 7.5))

I recommend that DPH may discipline Mr. Fortier under ground for revocation A: failing to exercise reasonable judgment by not calling medical control; ground for revocation B: failing to comply with 105 CMR 170.800(C), which requires adherence to Statewide Treatment Protocols, including Statewide Treatment Protocol 7.4, which required Mr. Fortier to transport the baby or call medical control; ground for revocation C: failing to comply with 105 CMR 170.800(C); and ground for revocation D, failing to comply with 105 CMR 170.355(A), which required Mr. Fortier to transport the baby.

Recommended decisions by the Division of Administrative Law Appeals in EMT cases

do not include recommendations on the extent of DPH's discipline. However, I do provide a disinterested perspective on this situation. I encourage DPH to weigh how fair it would be to discipline Mr. Fortier for not transporting the baby in an ambulance that may have not been equipped to transport a baby under 10 pounds, when no ambulance in Massachusetts may have been so equipped.

Miscellaneous issues

The analysis of the factual allegations, regulations, and Statewide Treatment Protocols, immediately above, make it apparent that, ultimately, the baby's weight and whether Mr. Fortier held the baby do not matter.   No matter the baby's weight, whether or Mr. Fortier was correct that the baby weighed less than 10 pounds, he did not transport it or call medical control.

Did Mr. Fortier hold the baby? Probably not. The mother seems to have lost faith in him. If so, she would be less likely to let him hold her baby. Mr. Fortier also said he judged the baby's weight by looking at it. Whether Mr. Fortier held the baby does not matter.

Whether Mr. Fortier should have planned how to handle a patient under 10 pounds after hearing about the dispatch is ultimately not significant. His ambulance may not have been equipped to safely transport the baby, no ambulance in Massachusetts may have been so equipped, but the significant fact is that Mr. Fortier did not call medical control.

Conclusion and Order

I recommend that DPH may proceed with its Notice of Agency Action and discipline Mr. Fortier.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/

Kenneth Bresler
Administrative Magistrate

Dated: September 12, 2024