

BEFORE THE
RESPIRATORY CARE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against:

ALDEN EDWARD CLARK

Respondent.

Case No. S-374

OAH No. L2007040790

DECISION AFTER NONADOPTION

Robert S. Eisman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on July 30, 2007, at Los Angeles, California. Judith T. Alvarado, Deputy Attorney General, represented Stephanie Nunez, Executive Officer of the Respiratory Care Board of California, Department of Consumer Affairs (complainant). Alden Edward Clark (respondent) appeared and represented himself. The matter was submitted on July 30, 2007.

On August 13, 2007, the Respiratory Care Board ("Board") received the Proposed Decision of the Administrative Law Judge. On September 10, 2007, the Board issued a Notice of Nonadoption of Proposed Decision. On October 12, 2007, the Board received the transcript and exhibits from the hearing. After review of the transcript, exhibits, and written argument, the Board hereby renders the following Decision After Nonadoption:

FINDINGS OF FACT

1. Complainant filed the Statement of Issues in her official capacity.

2. On November 7, 2005, the Respiratory Care Board (Board) received an application for a respiratory care practitioner license from respondent. In his application, dated October 3, 2005, respondent certified under penalty of perjury to the truthfulness of all statements, answers, and representations in his license application.

Item 19 in the application asked respondent if he had ever been arrested, charged or convicted, or had a conviction expunged, dismissed, reduced or diverted by the court. Respondent answered "Yes."

3. In a letter dated November 9, 2006, the Board notified respondent that it denied his application for a license as a respiratory care practitioner due to prior convictions. Respondent appealed the denial and this hearing ensued.

4. On February 13, 1987, in the Superior Court of the State of California, County of Los Angeles, in Case No. A 706865, *People v. Alden Edward Clark*, pursuant to a negotiated plea the court convicted respondent of violating Penal Code sections 664 and 187, subdivision (a), attempted murder, a felony offense.

The court denied probation and imposed a sentence that included imprisonment in state prison for a period of five (5) years, with credit for 73 days served and good time/work time, and payment of a restitution fine in the sum of \$100.

In August 1989, respondent began a three-year period of parole for this conviction.

5. On August 29, 1991, in the Superior Court of the State of California, County of Los Angeles, in Case No. MA003133, *People v. Alden Edward Clark*, the court convicted respondent of violating Penal Code section 12021, subdivision (a), possession of a firearm by a felon, a felony offense.

On October 4, 1991, the court denied probation and sentenced respondent to imprisonment in the California Institution for Men – Chino for a period of two years, less 92 days served and good time/work time, and payment of a restitution fine in the sum of \$100. The sentence was to run concurrent with any other sentence.

When respondent was convicted for this offense, he was on parole for his earlier conviction for attempted murder. For the current offense, respondent served 14 months in prison and then began a two-year period of parole.

6. On July 29, 1994, in the Municipal Court of Van Nuys Courthouse Judicial District, County of Los Angeles, in Case No. 94P05901, *People v. Alden Edward Clark*, the court convicted respondent on a plea of nolo contendere of violating Penal Code section 415, disturbing the peace, a misdemeanor offense.

The court ordered respondent to pay a fine of \$60 plus a state penalty fund assessment of \$102, or serve two days in the county jail, and ordered respondent to obey all laws and further orders of the court.

At the time of this conviction, respondent was still on parole for his prior convictions. Although the current offense was considered a minor misdemeanor, it stemmed from actual conduct involving the battery to and resisting arrest by a public officer. As a result of this conviction, the court extended respondent's period of parole for another eight months.

Respondent completed this last period of parole in 1995.

7. On September 27, 1994, in the Municipal Court of Van Nuys Courthouse Judicial District, County of Los Angeles, in Case No. LA018340, *People v. Alden Clark*, the court convicted respondent on a plea of nolo contendere of violating Penal Code section 273.5, subdivision (a), inflicting corporal injury to a spouse/cohabitant/child's parent, a misdemeanor offense.

The court suspended imposition of sentence and placed respondent on summary probation for a period of 24 months with terms and conditions, including that he serve 120 days in the Los Angeles County jail; not annoy, harass or molest anyone involved in the case; not threaten or use force against anyone; obey all laws and further orders of the court; and enroll in a six-month batterer's counseling program and comply with the terms of that program. The court subsequently required that respondent enroll in a domestic violence counseling program and pay court costs in the sum of \$100.

8. On June 12, 1998, in the Municipal Court of Compton Courthouse Judicial District, County of Los Angeles, in Case No. 8CM03133, *People v. Alden Edward Clark*, the court convicted respondent on pleas of nolo contendere of violating Vehicle Code sections 23152, subdivision (b), driving with 0.08 percent or more by weight of alcohol, and 2800.1, subdivision (a), evading arrest, both misdemeanor offenses.

The court suspended imposition of sentence and placed respondent on summary probation for a period of 36 months with terms and conditions, including that he serve two days in the county jail, with credit for two days served; serve 41 days in an electronic monitoring program; enroll and participate in and successfully complete a first-offender alcohol and other drug education and counseling program; comply with various court-ordered driving restrictions; not refuse to take a chemical/breath test for alcohol or drug consumption when requested by a peace officer; report to an approved alcohol treatment program; and obey all laws and orders of the court and all rules and regulations of the probation department.

9. Since his 1998 conviction for driving with a blood-alcohol level above the legal limit and evading arrest, respondent has had no negative or adverse contacts with law enforcement personnel.

10. None of respondent's past convictions have been expunged. However, he has filed a certificate of rehabilitation for his 1987 (attempted murder) and 1991 (possession of a firearm by a felon) felony convictions.

11. Respondent is 43 years old (date of birth: October 6, 1964). He lives with his mother and aunt in Palmdale, California, and for approximately one year has worked as a sleep technologist at Midway Sleep Center (a facility that evaluates patients for sleep disorders). Respondent testified that he helps his mother and supports his four daughters, ages 5, 7, 22 and 23.

Respondent's support for his five year-old daughter is court-imposed, but the support he provides to his seven year-old daughter is not by way of a court order. Although respondent routinely sees his seven year-old daughter, he does not see his five year-old daughter because "she is too young."

Respondent supported his 22 year-old daughter's education by helping fund a trip to Italy, which was part of her schooling. She recently graduated from the University of California, Santa Barbara, with a degree in psychology.

Respondent is also helping his 25 year-old daughter pay for college. She has two years of college remaining before she can graduate with a degree in nursing and seek licensure as a registered nurse.

12. Although respondent's past criminal conduct is not recent, it was highly egregious. Twenty years ago, at age 22, respondent was convicted for attempted murder; sixteen years ago, at age 26, respondent was convicted for firearm possession by a felon; thirteen years ago, at age 30, respondent was convicted for both inflicting corporal injury on a spouse and disturbing the peace; and nine years ago, at age 33, respondent was convicted for driving with a blood alcohol content above the legal limit and evading arrest.

13. Respondent did not grow up in a healthy environment. When he lived in Detroit, his father supplemented his income by selling heroin. Respondent and his twin brother observed his father and mother battling each other and he became accustomed to domestic violence. When respondent was young, he considered himself a "tough guy" who was willing to engage in criminal activity. Having known the brother of a drug dealer who sold cocaine, respondent and an accomplice conspired to relieve the drug dealer of his money and cocaine. Since respondent and the drug dealer knew each other, when respondent and his accomplice arrived at the drug dealer's home, they were let in through the front door. Respondent then proceeded to tie up the victim, after which his accomplice drew a handgun and shot the drug dealer in the head. The accomplice subsequently turned himself in and implicated respondent in the crime, resulting in respondent's 1987 conviction.

14. After being incarcerated for his past offenses, respondent now feels that he could endure any hardship and deal with any problem. He also feels that he was helped by having to attend and complete a court-ordered domestic violence program. He now sees striking his ex-wife or teens as being an act of cowardice.

Respondent testified that he is now a totally different person and wants to move forward as a respiratory care practitioner. He plans to subsequently seek additional licenses in health care.

15. Since 2000, respondent has volunteered to assist as an usher in his church. He is not currently involved in any educational or vocational program and admits that he sometimes drinks wine.

16. Respondent brought no supporting witnesses but did testify on his own behalf. He offered the following certificates that were received in evidence: a diploma from Platt College, dated April 23, 1998, certifying that respondent completed a course of study and practice in graphic design; a Bachelor of Science degree in multimedia design technology, dated March 21, 2004, conferred on respondent at Mt. Sierra College; a certificate from Avid Authorized Education, dated March 29, 2004, indicating respondent's successful completion of "101 Avid Intro to Media Composer Editing"; a certificate of achievement, dated September 23, 2005, for perfect attendance during the second quarter of 2005 at Concorde Career College; an Associate of Science degree in Respiratory Therapy, dated October 10, 2005, conferred on respondent at Concorde Career College; a certificate, dated November 23, 2005, from the National Board of Respiratory Care, recognizing respondent as a certified respiratory therapist; and two Respiroics certificates of continuing education, both dated June 6, 2007, for completion of two contact hours in the program, "A Guide to Selection and Fit" and one and one-half contact hours in the program, "Titration 101: How to Titrate with C-Flex and Bi-Flex."

17. Respondent also offered the following letters of reference that were received in evidence: a letter dated June 27, 2006, from Carlton Jeter, a police officer who has known respondent for over 25 years; a letter dated July 2, 2007, from Janice Lewis, an acquaintance who has known respondent for over six years; a letter dated July 6, 2007, from Gerald Swayne, Head of Helps Ministries at Body of Christ Community Church, who has known respondent for approximately six to seven years; a letter dated July 5, 2007, from Reinada Swayne, Owner/Administrator of Canyon Kids School & Camp, who has know respondent for approximately six years; and three patient satisfaction surveys, one dated in November 2006 and two dated in March 2007, which pertain to the interaction the patients had with respondent. In sum, the letters and surveys portray respondent as one who took responsibility for his past mistakes, is an inspiration and role model, as exemplified by his earning A.S. and B.S. degrees; and as being dependable, caring and a dedicated father who deserves a chance to achieve his life goals. Patients have described respondent as professional, personable and able to make them comfortable during the administration of sleep studies.

Respondent did not establish that those who wrote letters and completed surveys were fully aware of his past convictions.

18. Respondent passed his board examination as a respiratory care practitioner in 2005. He now asks for lenience regarding restrictions because he needs to start earning money as a Board-licensed respiratory care practitioner as soon as possible.

19. During the administrative hearing, respondent was well-dressed, articulate, and cooperative. His demeanor was appropriate and respondent did not display any hostility, was not argumentative or evasive, and promptly responded to questions. During his testimony, respondent provided a brief description of his upbringing, evidenced pride in the educational pursuits and academic achievements of his two older daughters, and expressed his desire to be given a chance to show that he would be a good health care provider. In particular, respondent explained that being incarcerated in prison was "a lifetime memory he will never forget."

20. Complainant incurred costs in the total amount of \$4,326 for the investigation and prosecution of this matter by the Office of the Attorney General.

CONCLUSIONS OF LAW

1. Business and Professions Code section 3710 provides that the Respiratory Care Board of California shall enforce and administer the Respiratory Care Practice Act (Bus. & Prof. § 3700 et seq.).

2. Business and Professions Code section 3718 states:

The board shall issue, deny, suspend, and revoke licenses to practice respiratory care as provided in this chapter.

3. Business and Professions Code section 3732, states:

(a) The board shall investigate an applicant for a license, before a license is issued, in order to determine whether or not the applicant has the qualifications required by this chapter.

(b) The board may deny an application, or may order the issuance of a license with terms and conditions, for any of the causes specified in this chapter for suspension or revocation of a license, including, but not limited to, those causes specified in Sections 3750, 3750.5, 3752.5, 3752.6, 3755, 3757, 3760, and 3761.

4. Business and Professions Code section 3750 states, in pertinent part:

The board may order the denial, suspension, or revocation of, or the imposition of probationary conditions upon, a license issued under this chapter, for any of the following causes:

[¶] . . . [¶]

(d) Conviction of a crime that substantially relates to the qualifications, functions, or duties of a respiratory care practitioner. The record of conviction or a certified copy thereof shall be conclusive evidence of the conviction.

5. Business and Professions Code section 3752 states, in pertinent part:

A plea or verdict of guilty or a conviction following a plea of nolo contendere made to a charge of any offense which substantially relates to the qualifications, functions, or duties of a respiratory care practitioner is deemed to be a conviction within the meaning of this article. The board shall order the license suspended or revoked, or may decline to issue a license, when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under Section 1203.4 of the Penal Code allowing the person to withdraw his or her plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, information, or indictment.

6. Business and Professions Code section 3752.5 states, in pertinent part:

A crime involving bodily injury or attempted bodily injury shall be considered a crime substantially related to the qualifications, functions, or duties of a respiratory care practitioner.

7. California Code of Regulations, title 16, section 1399.370 states, in pertinent part:

For the purposes of denial, suspension, or revocation of a license, a crime or act shall be considered to be substantially related to the qualifications, functions or duties of a respiratory care practitioner, if it evidences present or potential unfitness of a licensee to perform the functions authorized by his or her license or in a manner inconsistent with the public health, safety, or welfare. Such crimes or acts include but are not limited to those involving the following:

[¶] . . . [¶]

(c) Conviction of a crime involving driving under the influence or reckless driving while under the influence.

8. Respondent's application for a respiratory care practitioner license is subject to denial pursuant to Business and Professions Code sections 3732, 3750, 3752, and 3752.5, and California Code of Regulations, title 16, section 1399.370, in that respondent was convicted of crimes substantially related to the qualifications, functions, or duties of a respiratory care practitioner. (Factual Findings 4 through 8.)

9. California Code of Regulations, title 16, section 1399.372, states:

When considering the denial, petition for reinstatement, modification of probation, suspension or revocation of an RCP license the board will consider the following criteria in evaluating the rehabilitation of such person and his or her eligibility for a license:

- (a) The nature and severity of the act(s) or offense(s).
- (b) The total criminal record.
- (c) The time that has elapsed since the commission of the act(s) or offense(s).
- (d) Compliance with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against such person.
- (e) Evidence of any subsequent act(s) or crime(s) committed.
- (f) Any other evidence of rehabilitation submitted that is acceptable to the board, including:
 - (1) Successful completion of respiratory care courses with a "C" or better, as determined by the institution;
 - (2) Active continued attendance or successful completion of rehabilitative programs such as 12-step recovery programs or psychotherapy counseling;
 - (3) Letters relating to the quality of practice signed under penalty of perjury from licensed health care providers responsible for the supervision of his/her work.
- (g) Statements, letters, attestations of good moral character, or references relating to character, reputation, personality, marital/family status, or habits shall not be considered rehabilitation unless they relate to quality of practice as listed in section (f).

10. Respondent's past convictions were based on serious, egregious conduct. His criminal record demonstrates acts of violence and a wanton disregard for the health, safety, and welfare of others. Respondent demonstrated, on repeated occasions, that he could not comply with conditions of parole.

Although respondent's most recent conviction was nine years ago, his past criminal activity covered a period from 1987 to 1998; a span of 11 years during which he was convicted of two felony and three misdemeanor offenses.

Letters received in evidence were not signed by its authors under penalty of perjury and none of these letters were from a licensed health care provider or from respondent's employer or immediate supervisor.

Although respondent provided letters of reference attesting to his character, personality, and ability to turn his life around, none of the letters addressed the criteria of rehabilitation that relate to the expected quality of practice as listed in California Code of Regulations, title 16, section 1399.372, subdivision (f).

11. Mitigating circumstances include the passage of nine years since his last conviction without an adverse law enforcement contact or subsequent conviction, which demonstrates that he has taken some corrective action to prevent recurrence of his past conduct. Respondent was also forthcoming in reporting his past convictions in his application for licensure.

12. In aggravation, respondent lacked accountability when testifying about his criminal past. He testified in detail about the crime he committed on Christmas Eve 1986 when he and his partner followed through with their plan to enter the home of a known drug dealer and rob the man of his drugs. He expressed no remorse during his testimony whatsoever for the man's wellbeing. Instead, he testified that this experience, including his incarceration, taught him how to deal with difficult people. As to the DUI conviction in 1998, he blamed that conviction on someone spiking his drink at a bar after graduating from school. An unlikely scenario that shows that respondent does not accept responsibility for past misconduct nor have any insight as to what caused him to commit these crimes. His testimony about his family background could be characterized as "an excuse" for his conduct as opposed to understanding why he acted in such a violent manner. Based on respondent's lack of insight, failure to accept responsibility for his actions, and insufficient evidence of rehabilitation, the Board cannot safely predict his behavior in the future. Respiratory care practitioners provide care to the most vulnerable of populations, namely children and the elderly. Respondent's history of committing violent crimes along with his lack of rehabilitation render him currently unfit to be trusted to care for the children and elderly that need respiratory care services.

13. Pursuant to the Board's Disciplinary Guidelines, dated March 2002,¹ the grounds that subject respondent's license application to denial relate to convictions for crimes that involve the intemperate use of alcohol and the infliction of bodily injury or attempted bodily injury upon another. These grounds justify a range of "discipline" from a maximum of license denial to a minimum of a license denial that is stayed and issuance of a license that is subject to terms and conditions of probation for a period ranging from two to five years.

14. The objective of a proceeding to deny an application for a license is to protect the public, the licensed profession or occupation, maintain integrity and high standards, and preserve public confidence in respiratory care practitioners.² The purpose of proceedings of this type is not to punish respondent. The statutes relating to respiratory care practitioners are designed to protect the public from any potential risk of harm.³ The law looks with favor upon those who have been properly reformed. Respondent bears the burden of establishing his rehabilitation against a series of criminal convictions. To that end, respondent has not demonstrated that he should be issued a license.

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See California Code of Regulations, title 16, section 1399.374. The Board's disciplinary guidelines were designed for use by Administrative Law Judges, attorneys, licensees and others involved in the Board's disciplinary process and are to be followed in all disciplinary actions involving the Board. Recommended penalties and conditions of probation contained in the disciplinary guidelines are merely guidelines. Aggravating or mitigating circumstances, rehabilitation and other factors may justify deviation from these guidelines in a particular case.

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Camacho v. Youde (1975) 95 Cal.App.3d 161, 165; *Clerici v. Department of Motor Vehicles* (1990) 224 Cal.App.3d 1016, 1030-1031; *Fahmy v. Medical Board of California* (1995) 38 Cal.App.4th 810, 816.

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Lopez v. McMahon (1988) 205 Cal.App.3d 1510 1510, 1516; *Arneson v. Fox* (1980) 28 Cal.3d 440.

15. Business and Professions Code section 3753.5, subdivision (a), states:

In any order issued in resolution of a disciplinary proceeding before the board, the board or the administrative law judge may direct any practitioner or applicant found to have committed a violation or violations of law to pay to the board a sum not to exceed the costs of the investigation and prosecution of the case. A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the official custodian of the record or his or her designated representative shall be prima facie evidence of the actual costs of the investigation and prosecution of the case.

16. Business and Professions Code section 3753.7 states:

For purposes of this chapter, costs of prosecution shall include attorney general or other prosecuting attorney fees, expert witness fees, and other administrative, filing, and service fees.

17. The reasonable costs of investigation and prosecution of this matter is in the sum of \$4,326. (Factual Finding 20.)

18. The Board is entitled to recover from respondent its reasonably incurred costs of investigation and prosecution of this matter. Under *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.App.4th 32, 45, a Board must exercise its discretion to reduce or eliminate cost awards in a manner which will ensure that the statutes do not deter licensees or license applicants with potentially meritorious claims or defenses from exercising their right to a hearing. "Thus the Board may not assess the full costs of investigation and prosecution when to do so will unfairly penalize a [licensee or license applicant] who has committed some misconduct, but who has used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed." (*Id.*) The Board, in imposing costs in such situations, must consider the licensee's [or license applicant's] subjective good faith belief in the merits of his or her position and the Board must consider whether or not the licensee [or license applicant] has raised colorable claim. The Board must consider the licensee's [or license applicant's] ability to make payment.

19. Based on the foregoing principles, it is found that it would be unduly punitive to assess respondent with the Board's costs of investigation and prosecution of this matter.

ORDER

The application of respondent Alden Edward Clark for a respiratory care practitioner license is hereby denied.

The effective date of this Order and Decision is January 15, 2008.

IT IS SO ORDERED this 8th day of January, 2008.

Original signed by:

LARRY L. RENNER, SB, RRT, RCP, RPFT
PRESIDENT, RESPIRATORY CARE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA