

Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Wallace State Office Building
Des Moines, Iowa 50319

IN THE MATTER OF:	)	DIA NO. 08DPHES017
	)	CASE NO. 08-06-06
Joel Weiler	)	
10 Deer Run Drive	)	PROPOSED DECISION
Pella, Iowa 50219	)	

On October 17, 2008, the Department of Public Health-Emergency Medical Services Bureau (Department) issued a Rescission of Denial/Notice of Proposed Action-Probation to Joel Weiler (Appellant), notifying him of the Department's proposed action on his application for EMS certification. The Appellant filed a timely Notice of Appeal on November 13, 2008. An in-person hearing was held before Administrative Law Judge Margaret LaMarche on January 12, 2009 at 2:00 p.m. Assistant Attorney General Heather Adams represented the Department. The Appellant was represented by attorney Holly Logan.

Prior to the commencement of the hearing, Appellant moved for judgment as a matter of law, and the Department resisted. The motion was not granted at that time, but the parties were offered the opportunity to file briefs on the legal issues underlying the motion. The Appellant filed his Post-Hearing Brief In Support of Motion for Judgment as a Matter of Law on January 20, 2009. The Department filed its Resistance to Appellant's Motion for Judgment as a Matter of Law on January 23, 2009.¹

THE RECORD

The record includes the Notice of Telephone Hearing², testimony of the witnesses, the briefs, and the following exhibits:

Department Exhibit 1:	641 IAC 131.7
Department Exhibit 2:	Notice of Proposed Action: Probation, 10/17/08
Department Exhibit 3:	Notice of Appeal, 11/11/08
Department Exhibit 3:	Certification Information

¹ The Department's request for a one-day extension to file its Resistance was granted over Appellant's objection.

² Appellant's request for an in-person hearing was granted.

Department Exhibit 4:	Letter, Appellant to Public Health, 9/5/08
Department Exhibit 5:	Information from Appellant, 6/2/08
Department Exhibit 6:	Complaint and Affidavit; Sentencing Memorandum; Deferral of Judgment
Department Exhibit 7:	Criminal History Information
Department Exhibit 8:	Letter, Boyer to Judge Malloy
Department Exhibit 9:	Order of Discharge from Deferred Judgment Granted, 6/9/08
Department Exhibit 10:	Notice of Proposed Action: Denial, 7/7/08
Department Exhibit 11:	Appeal Letter, 7/11/08 Notice of Appeal, 7/14/08
Department Exhibit 12:	Prior Actions
Appellant Exhibit A:	<u>State v. Farmer</u> , 234 NW2d 89 (Iowa 1975)
Appellant Exhibit B:	State Of Iowa Non-Law Enforcement Record Check Request
Appellant Exhibit C:	Appellant Criminal History
Appellant Exhibit D:	Amended and Substituted Trial Information
Appellant Exhibit E:	Sentencing Memorandum
Appellant Exhibit F:	Deferral of Judgment, 7/24/07
Appellant Exhibit G:	Probation Contract, 8/1/07
Appellant Exhibit H:	Letter, 5/12/08 (Boyer to Judge Malloy)
Appellant Exhibit I:	Order of Discharge from Deferred Judgment
Appellant Exhibit J:	Correspondence, Appellant to Department, 6/2/08
Appellant Exhibit K:	Department's Proposed Actions, 7/7/08, 10/17/08
Appellant Exhibit L:	Appeal Letters
Appellant Exhibit M:	Iowa Code sections 907.1, 907.3

FINDINGS OF FACT

1. The Appellant is currently a 21-year-old senior at Iowa State majoring in Nutritional Science with a pre-med focus. The Appellant is an exceptional student and is attending Iowa State on a National Merit Scholarship. He entered college with sophomore status in the fall of 2006 because he had earned

college credit while in high school. (Testimony of Appellant; Department Exhibit 6; Appellant Exhibit E)

2. During the early morning hours of March 31, 2007, the Appellant received a frantic call from a close female friend (hereinafter, A). A told the Appellant that her new boyfriend (hereinafter, G) had just punched her in the face. A and G lived in the same co-ed dormitory (dorm), and A asked the Appellant if she could come to his dorm because she did not feel safe remaining in her own room. It was approximately 4:00 a.m., and the Appellant and his roommate decided to drive across campus to pick up A. When they arrived, they found A crying and sitting on the curb outside her dorm. Her face was flushed and her makeup was running, but the Appellant did not observe any injuries.

The Appellant did not call campus security or the police but decided that he wanted to speak to G before they left. The Appellant and his roommate knocked on the door of G's dorm room. When G's roommate partially opened the door, the Appellant opened the door the rest of the way, and the door apparently made physical contact with G's roommate. The Appellant then struck G two or three times in the head, causing bruising above his hairline.

G reported the assault to the police, and the Appellant was arrested and charged with Burglary in the First Degree, a felony. According to the Appellant, A chose not to file a criminal complaint against G because she did not want to further upset G while the criminal case was pending against the Appellant. (Testimony of Appellant; Appellant Exhibit E; Department Exhibit 6)

3. On June 29, 2007, the charge against the Appellant was amended to Assault Causing Bodily Injury, a serious misdemeanor. (Appellant Exhibit D) On July 3, 2007, the Appellant pled guilty to Assault Causing Bodily Injury. The Court granted Appellant a deferred judgment,³ assessed a civil penalty of \$315

³ A deferred judgment is a sentencing option whereby both the adjudication of guilt and the imposition of a sentence are deferred by the court and whereby the court assesses a civil penalty upon entry of the deferred judgment. The court retains the power to pronounce judgment and impose sentence subject to the defendant's compliance with conditions set by the court as a requirement of the deferred judgment. Iowa Code section 907.1(1) (2007).

and court costs, and placed him on probation for a period of 18 months, subject to conditions that included participation in anger management programming. The Court also ordered the Appellant to have no contact with G or his roommate. (Testimony of Appellant; Department Exhibit 6; Appellant Exhibits D-G)

4. In or about May 2008, the Appellant enrolled in the EMT-Basic course at a local community college, in part because he wanted to obtain medical experience to strengthen his medical school application. The Appellant hopes to volunteer with the EMS service in Story City.

On May 19, 2008, the Appellant completed an electronic EMS certification application form in connection with his course enrollment. Question number 3 on the application form asked the Appellant if he had been convicted, pled guilty, or entered a no contest plea to a misdemeanor or felony, excluding traffic offenses with fines under \$100. The application advised him that he needed to report the information even if it had been expunged. The Appellant truthfully answered question 3 "yes," which prompted a request for him to provide the Department further documentation. (Testimony of Joe Ferrell; Appellant; Department Exhibit 4)

5. On June 2, 2008, the Appellant provided additional information to the Department. The Appellant disclosed his deferred judgment for Assault Causing Injury, as well as two speeding tickets with fines of more than \$100. The Appellant provided copies of the Complaint and Affidavit, Sentencing Memorandum, and Deferral of Judgment for the assault. The Appellant reported that his probation officer had already recommended that the judge release him from probation and expunge his criminal record. (Testimony of Joe Ferrell; Department Exhibits 5, 6)

6. Joe Ferrell is the Department's EMS Regulation Manager and is responsible for overseeing the certification of EMS providers in the state of Iowa. On June 2, 2008, Mr. Ferrell obtained records of the Appellant's deferred judgment through Iowa Courts Online and verified the Appellant's plea to Assault Causing Bodily Injury and the terms of his deferred judgment. (Testimony of Joe Ferrell; Department Exhibit 7)

7. On or about June 6, 2008, the Appellant provided Joe Ferrell with a copy of a May 12, 2008 memorandum from his probation officer to District Associate Judge James B. Malloy. The memorandum informed the judge that the Appellant had been a client of the Center for Creative Justice since July 23, 2007, had paid all court costs and probation supervision fees, and had completed anger management classes. The probation officer requested Appellant's release from conditions of probation. (Testimony of Joe Ferrell; Appellant; Department Exhibit 8)

At hearing, the Appellant explained that the anger management class met for two hours a week over a six week period and included both written material (a book) and class discussion. The Appellant believes that he learned a lot from taking the course. (Testimony of Appellant)

8. The Appellant completed both the classroom and clinical portion of his EMT-B course before the instructor informed him that there was a problem with his certification application. As of the date of the hearing, the Appellant had been approved to take the certification examination but had not yet taken it. (Testimony of Appellant)

9. On July 7, 2008, the Department issued a Notice of Proposed Action-Denial of certification to the Appellant by certified mail, return receipt requested. The Notice cited the following as the basis for the denial:

Knowingly making misleading, deceptive, untrue or fraudulent representations in the practice of the profession or engaging in unethical conduct or practice harmful or detrimental to the public. Proof of actual injury need not be established. Iowa Code section 147A.7(1)f and IAC 641-131.7(2)f.

Violating a statute of this state, or the United States without regard to its designation as either a felony or a misdemeanor, which relates to the provision of emergency medical care, including but not limited to a crime involving dishonesty, fraud, theft, embezzlement, controlled substances, substance abuse, assault, sexual misconduct, or homicide. A copy of the record of conviction or plea of guilty is

conclusive evidence of the violation. Iowa Code section 147A.7(1)j and IAC 641-131.7(2)t.

The following has led to this notice:

On July 24, 2007, you were convicted of assault causing bodily injury.

(Department Exhibit 10; Appellant Exhibit J) On July 14, 2008, the Appellant filed an Appeal from the proposed denial of his certification. (Department Exhibit 11; Appellant Exhibit L)

10. On or about July 16, 2008, the Appellant provided the Department with a copy of the June 9, 2008 court order granting his request for discharge from probation without entry of judgment. Following a review of this order and consideration of the circumstances of the assault, the EMS Bureau Chief decided to grant the Appellant's application for certification but to place him on probation for a period of one year from the date of his certification. On October 17, 2008, the Department issued a Rescission of Denial/Notice of Proposed Action Probation to the Appellant by restricted certified mail, return receipt requested. This notice included the identical legal and factual basis for the proposed probation as the Notice of Denial issued on July 7, 2008. (Department Exhibits 9, 2; Testimony of Joe Ferrell)

CONCLUSIONS OF LAW

The Appellant asserts that the Department lacks legal authority to issue his certification on probation because a deferred judgment is not a conviction. The Appellant further asserts that the Department failed to provide sufficient notice that its proposed action was not based solely on the Appellant's "conviction" but was also based on unethical conduct and/or violation of a statute which relates to the practice of emergency medical care.

I. Legal Authority of the Department to Deny Applications for EMS Certification or to Place Certifications on Probation For Unethical Conduct and Violation of Statute Related to EMS Practice.

A. Statutory Authority

Pursuant to Iowa Code section 147A.7(1)(2007), the Department may deny an application for issuance or renewal of an emergency medical care provider certificate, or suspend or revoke the certificate when it finds that the applicant or certificate holder has committed any of the following acts or offenses:

- Knowingly making misleading, deceptive, untrue or fraudulent representation in the practice of a profession or engaging in unethical conduct or practice harmful or detrimental to the public. Proof of actual injury need not be established.⁴
- Violating a statute of this state, another state, or the United States, without regard to its designation as either a felony or misdemeanor, which relates to the practice of an emergency medical care provider. A copy of the record of conviction or plea of guilty is conclusive evidence of the violation.⁵

The legislature has directed the Department to adopt rules pertaining to the examination and certification of emergency medical care providers.⁶ The Department has adopted rules at 641 IAC chapter 131.

B. Administrative Regulations

641 IAC 131.7(2) provides, in relevant part, that the Department may deny an application for issuance or renewal of an emergency medical care provider certificate, including endorsement, or place on probation, or issue a citation and warning, or suspend or revoke a certificate when it finds that the applicant or certificate holder has committed any of the following acts or offenses:

f. ...Knowingly making misleading, deceptive, untrue or fraudulent representation in the practice of a profession or engaging in unethical conduct or practice harmful or detrimental to the public. Proof of actual injury need not be established. Acts which may constitute unethical conduct include, but are not limited to:

- (1) Verbally or physically abusing a patient or coworker.

⁴ Iowa Code section 147A.7(1)(f)(2007).

⁵ Iowa Code section 147A.7(1)(j)(2007).

⁶ Iowa Code section 147A.4(2)(2007).

(2) Improper sexual contact with or making suggestive, lewd, lascivious or improper remarks or advances to a patient or co-worker.

(3) Betrayal of a personal confidence.

(4) Engaging in a professional conflict of interest.

(5) Falsification of medical records.

...

t. Violating a statute of this state, another state, or the United States, without regard to its designation as either a felony or misdemeanor, which relates to the practice of an emergency medical care, including but not limited to a crime involving dishonesty, fraud, theft, embezzlement, controlled substances, substance abuse, assault, sexual abuse, sexual misconduct, or homicide. A copy of the record of conviction or plea of guilty is conclusive evidence of the violation.

II. Notice Requirements

Notice of denial, issuance of a citation and warning, probation, suspension or revocation shall be effected in accordance with the requirements of Iowa Code section 17A.12. Notice to the alleged violator of denial, probation, suspension or revocation shall be served by certified mail, return receipt requested, or by personal service.⁷ The Appellant was properly served with the Notice of Proposed Action-Probation by restricted certified mail. Iowa Code section 17A.12(2)"c" and "d" provides that a notice shall include a reference to the particular sections of the statutes and rules involved and a short and plain statement of the matters asserted.

At hearing, the Appellant asserted that the Department failed to provide proper notice that its proposed action was not based solely on the allegation that the Appellant had been convicted of Assault Causing Bodily Injury but was also based on allegations of unethical conduct and violation of a statute related to emergency medical services. However, the Notice of Proposed Action-Probation clearly apprised the Appellant of the two statutes and two rules upon which the action was being taken, as well as the Department's assertion that the appellant was convicted of Assault Causing Bodily Injury on July 24, 2007.

⁷ 641 IAC 131.12(6).

The statute and the Department's rules clearly provide that action may be taken for violation of a statute and that a record of conviction or plea of guilty is conclusive evidence of the violation. Therefore, the Appellant had clear notice that entry of a guilty plea would constitute a violation. In addition, the certification application advised the Appellant that he must disclose convictions, even if they have been expunged. If the Appellant was unclear as to the legal or factual grounds stated in the Notice of Proposed Action, he could have requested a more specific statement from the Department.⁸ The Appellant was provided proper notice of the basis for the Department's proposed action.

III. Violation of Statute Related to Provision of Emergency Medical Care

The preponderance of the evidence established that the Appellant has violated a statute that relates to the provision of emergency medical care, in violation of Iowa Code section 147A.7(1)(j) and 641 IAC 131.7(2)"t." Assault is one of the crimes specifically listed in 641 IAC 131.7(2)"t" as a crime that is related to the provision of emergency medical care. The statute and the rule both explicitly provide that a copy of the record of the guilty plea is conclusive evidence of the violation. The Appellant admits that he entered a guilty plea to Assault Causing Bodily Injury, in violation of Iowa Code section 708.2(2), on July 3, 2007. This is all that is required to establish the violation of Iowa Code section 147A.7(1)(j) and 641 IAC 131.7(2)"t." A final judgment is not required.

Citing State v. Farmer, 234 NW2d 89 (Iowa 1975) and Iowa Code sections 907.1 and 907.3(2007), the Appellant argues that it is black letter law that a deferred judgment is not a conviction and suggests that unless the Department is precluded from considering a deferred judgment in making its certification decisions, then the function and purpose of the deferred judgment statute is frustrated. However, subsequent case law from the Iowa Supreme Court refutes this premise by recognizing that deferred judgments may constitute convictions for certain purposes.

⁸ Iowa Code section 17A.12(2)(d) (2007).

In Schilling v. Iowa Department of Transportation, 646 N.W.2d 69 (Iowa 2002), the Iowa Supreme Court examined whether a deferred judgment for eluding a law enforcement vehicle constituted a final conviction, thereby requiring the Department of Transportation to revoke Schilling's driver's license. The Court stated that the word "conviction" is subject to various interpretations and quoting from State v. Kluesner, 389 N.W.2d 370, 372 (Iowa 1986), stated, in relevant part:

[T]echnically the word means the final consummation of the prosecution against the accused including the judgment or sentence rendered pursuant to an ascertainment of his guilt.

In its general and popular sense and frequently in its ordinary legal sense, the word 'conviction' is used in the sense of establishment of guilt prior to and independently of judgment and sentence by a verdict of guilty or plea of guilty.

...

While we have construed the word "conviction" to have a relatively narrow and technical meaning where it appears in statutes used to enhance punishment, we have accepted a broader definition when protection of the public has been at stake.

646 N.W.2d at 71. In Schilling, the Court further held that if the revocation statute was protective in nature, a conviction exists if the following elements are established:

- 1) A judge or jury has found the defendant guilty, or the defendant has entered a plea of guilty;
- 2) The court has ordered some form of punishment, penalty, or restraint on the person's liberty to be imposed;
- 3) A judgment of guilty may be entered if the person violates the terms of probation or fails to comply with the requirements of the court's order; and
- 4) The conviction has become final. A conviction is final if the defendant has exhausted or waived any postorder challenge.

646 N.W.2d at 73. A broad definition of "conviction" was appropriate in Schilling because the driver's license revocation statute is designed for the protection of the public, not for

punishment. The Court further found that all four elements were satisfied because:

- 1) Schilling pled guilty,
- 2) The court imposed a restraint on Schilling's liberty by requiring him to abide by the terms of his deferred judgment agreement,
- 3) Under the deferred judgment order and Iowa Code section 907.1, a judgment of guilt or order of contempt may be entered if Schilling violates the terms of his probation, and
- 4) Schilling's conviction had become final because he is not entitled to appeal the order since there is no judgment from which to appeal.

Id.

Emergency Medical Services provider certification laws also serve primarily to protect the public and not to punish applicants or providers. In its capacity of regulating emergency medical providers and services, the Department's EMS Bureau constitutes a professional licensing board. Iowa Code section 272C.1(6)"ad." The purpose and mission of the 272C professional licensing boards is to protect the public by ensuring competency and ethical practice on the part of the health care providers regulated by those boards. See Doe v. Iowa Board of Medical Examiners, 733 N.W.2d 705, 712 (Iowa 2007); Burns v. Board of Nursing, 495 N.W.2d 698, 701 (Iowa 1993).

The Appellant's deferred judgment for Assault To Commit Bodily Injury satisfies each of the four elements outlined by the Iowa Supreme Court in Schilling:

- 1) Appellant pled guilty,
- 2) The court restrained Appellant's liberty by placing him on probation for 18 months and required him to comply with his deferred judgment contract, including payment of a civil penalty, court costs, participation in anger management classes, and compliance with the no contact orders,
- 3) Failure to comply with the terms of probation could have resulted in a final judgment being entered, and

- 4) The Appellant was not entitled to appeal the deferred judgment order so the conviction was final.

Therefore, the fact that the Appellant was granted a deferred judgment and the fact that the deferred judgment was expunged prior to the issuance of the Notice of Proposed Action Probation, does not prevent the EMS Bureau from considering the deferred judgment as a conviction in making certification decisions.

IV. Unethical Conduct

The Department also alleges that the Appellant's assault of G constituted unethical conduct, pursuant to Iowa Code section 147A.7(1)"f" and 641 IAC 131.7(2)"f." 641 IAC 131.7(2)"f" provides a non-exclusive list of five acts which may constitute unethical conduct, all of which involve professional practice in some way. Although the list is non-exclusive, the facts of the Appellant's assault of G do not appear to fit within the rubric of unethical conduct, except in the most general sense that all illegal activity is unethical. The Department failed to establish, by a preponderance of the evidence, that the Appellant's deferred judgment for Assault Causing Bodily Injury constituted unethical conduct, in violation of Iowa Code section 147A.7(1)"f" and 641 IAC 131.7(2)"f."

V. Probation Proposal

The Appellant argues that since he has satisfied all of the conditions of his deferred judgment, including the completion of the anger management classes, the Department's proposed probation is unnecessary and unwarranted. Joe Ferrell explained the Department's rationale for its proposal to grant Appellant certification subject to a one year period of probation. EMS providers work in a unique high stress environment with minimal supervision. They may be called to respond to situations involving domestic abuse or assault. It is therefore essential for EMS providers to have good critical thinking skills, judgment, and impulse control. A recent assault reflects poorly on the Appellant's critical thinking, judgment, and impulse control. In addition, it is important for the public to have confidence that EMS providers certified by the Department are trustworthy and will behave in an appropriate manner in stressful situations. The Department believes it would reflect

poorly on the Department if a person with Appellant's recent history of assault is certified as an EMS provider without any supervision or oversight.

To his credit, the Appellant acknowledges that he exercised poor judgment when he assaulted G and acknowledges that he benefitted from the anger management classes. The Appellant has learned an important lesson from this unfortunate incident, and it is likely that he will control his temper and conduct himself appropriately in the future. Nevertheless given the recency of the assault causing bodily injury and the Department's obligation to protect the public it is reasonable to place the Appellant's EMT-B certification on probation, in order to allow some additional oversight during his first year as an EMT.

ORDER

IT IS THEREFORE ORDERED that the Notice of Proposed Action-Probation, issued by the department to Appellant Joel Weiler on October 17, 2008, is hereby AFFIRMED.

Dated this 2nd day of February, 2009.

Margaret LaMarche

Margaret LaMarche
Administrative Law Judge
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This proposed decision and order becomes the department's final agency action without further proceedings ten days after it is received by the aggrieved party unless an appeal to the director of the Department of Public Health is taken as provided in subrule 131.12(11). Any appeal to the director for review of this proposed decision and order shall be filed in writing and mailed to the director of the Department of Public Health by certified mail, return receipt requested, or delivered by personal service within ten days after the receipt of the administrative law judge's proposed decision and order by the aggrieved party. A copy of the appeal shall also be sent to the administrative law judge. Any request for appeal shall state the reason for the appeal. 641 IAC 131.12(11).

