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8	BEFORE THE BOARD OF PHARMACY	
	DEPARTMENT OF CONSUMER AFFAIRS STATE OF CALIFORNIA	
9	STATE OF C	CALIFORNIA
10	In the Matter of the Accusation and Petition to	Case No. 4141
11	Revoke Probation Against:	
12	GARY VICTOR MANTESE 3895 Holly Hills	FIRST AMENDED ACCUSATION AND
13	St. Louis, Missouri 63116	PETITION TO REVOKE PROBATION
14	Pharmacist License No. RPH 47841	
15	Respondent.	
16	Complainant alleges:	
17	<u>PARTIES</u>	
18	1. Virginia Herold (Complainant) brinş	gs this Accusation and Petition to Revoke
19	Probation solely in her official capacity as the Executive Officer of the Board of Pharmacy,	
20	Department of Consumer Affairs.	
21	2. On or about May 5, 1995, the Board of Pharmacy issued Pharmacist License Number	
22	RPH 47841 to Gary Victor Mantese (Respondent). The License was in full force and effect at al	
23	times relevant to the charges brought herein and will expire on August 31, 2012, unless renewed	
24	3. In a disciplinary action titled "In the	Matter of the Accusation against Gary Victor
25	Mantese," Case No. 3890, the Board of Pharmacy issued a Decision and Order, effective	
26	September 5, 2011, in which Respondent's Pharmacist License was revoked, with the revocation	
27	stayed and Respondent placed on probation for a period of three (3) years with certain terms and	
28	conditions. A copy of that decision is attached as exhibit A and is incorporated by reference.	

## **JURISDICTION**

- 4. This Accusation and Petition to Revoke Probation is brought before the Board of Pharmacy (Board), Department of Consumer Affairs, under the authority of the following laws. All section references are to the Business and Professions Code (Code), unless indicated.
- 5. Section 4011 of the Code provides that the Board shall administer and enforce both the Pharmacy Law [Bus. & Prof. Code, § 4000 et seq.] and the Uniform Controlled Substances Act [Health & Safety Code, § 11000 et seq.].
- 6. Section 4300(a) of the Code provides that every license issued by the Board may be suspended or revoked.
- 7. Section 118(b) of the Code provides, in pertinent part, that the suspension, expiration, surrender, or cancellation of a license shall not deprive the Board of jurisdiction to proceed with a disciplinary action during the period within which the license may be renewed, restored, reissued or reinstated. Section 4402(a) of the Code provides that any pharmacist license that is not renewed within three years following its expiration may not be renewed, restored, or reinstated and shall be canceled by operation of law at the end of the three-year period. Section 4402(e) of the Code provides that any other license issued by the Board may be canceled by the Board if not renewed within 60 days after its expiration, and will require a new application.

## STATUTORY AND REGULATORY PROVISIONS

- 8. Section 4301 of the Code provides, in pertinent part, that the Board shall take action against any holder of a license who is guilty of "unprofessional conduct," defined to include, but not be limited to, any of the following:
- (f) The commission of any act involving moral turpitude, dishonesty, fraud, deceit, or corruption, whether the act is committed in the course of relations as a licensee or otherwise, and whether the act is a felony or misdemeanor or not.
- (h) The administering to oneself, of any controlled substance, or the use of any dangerous drug or of alcoholic beverages to the extent or in a manner as to be dangerous or injurious to oneself, [another licensee, person, or the public], or to the extent that the use impairs the ability of the person to conduct with safety to the public the practice authorized by the license.

- (j) The violation of any of the statutes of this state, of any other state, or of the United States regulating controlled substances and dangerous drugs.
- (o) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of or conspiring to violate any provision or term of this chapter or of the applicable federal and state laws and regulations governing pharmacy, including regulations established by the board or by any other state or federal regulatory agency.
  - 9. California Code of Regulations, title 16, section 1770, states:

"For the purpose of denial, suspension, or revocation of a personal or facility license pursuant to Division 1.5 (commencing with Section 475) of the Business and Professions Code, a crime or act shall be considered substantially related to the qualifications, functions or duties of a licensee or registrant if to a substantial degree it evidences present or potential unfitness of a licensee or registrant to perform the functions authorized by her license or registration in a manner consistent with the public health, safety, or welfare."

- 10. Section 4059 of the Code, in pertinent part, prohibits furnishing of any dangerous drug or dangerous device except upon the prescription of an authorized prescriber.
- 11. Section 4060 of the Code provides, in pertinent part, that no person shall possess any controlled substance, except that furnished upon a valid prescription/drug order.
- 12. Health and Safety Code section 11170 provides that no person shall prescribe, administer, or furnish a controlled substance for himself or herself.
- 13. Health and Safety Code section 11350, in pertinent part, makes it unlawful to possess any controlled substance listed in Schedule II (Health and Safety Code section 11055), subdivision (b) or (c), or any narcotic drug in Schedules III-V, absent a valid prescription.
- 14. Health and Safety Code section 11550, in pertinent part, makes it unlawful for any person to use or be under the influence of any controlled substance in Schedule II (Health and Safety Code section 11055), subdivision (c), or any narcotic drug in Schedules III-V, except when administered by or under the direction of an authorized licensee.

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#### COST RECOVERY

15. Section 125.3 of the Code provides, in pertinent part, that the Board may request the administrative law judge to direct a licentiate found to have committed a violation of the licensing act to pay a sum not to exceed its reasonable costs of investigation and enforcement.

## CONTROLLED SUBSTANCES / DANGEROUS DRUGS

Section 4021 of the Code states:

"Controlled substance' means any substance listed in Chapter 2 (commencing with Section 11053) of Division 10 of the Health and Safety Code."

17. Section 4022 of the Code states, in pertinent part:

"Dangerous drug' or 'dangerous device' means any drug or device unsafe for self use, except veterinary drugs that are labeled as such, and includes the following:

- "(a) Any drug that bears the legend: 'Caution: federal law prohibits dispensing without prescription, 'Rx only,' or words of similar import. . . .
- "(c) Any other drug or device that by federal or state law can be lawfully dispensed only on prescription or furnished pursuant to Section 4006."
- Cocaine is a Schedule I (in base/rock/crack form) or Schedule II controlled substance as designated by Health and Safety Code sections 11054(f)(1) and 11055(b)(6) and a dangerous drug as designated by Business and Professions Code section 4022. It is a narcotic drug.

## FACTUAL BACKGROUND

- 19. Between on or about June 29, 2009 and on or about July 1, 2011, Respondent worked as a contract pharmacist (through Intuitive Health Services in Atascadero, CA) at Coalinga State Hospital (HPE 47182) in Coalinga, CA. During that time, Respondent lived in Coalinga, CA.
- 20. On or about April 11, 2011, Respondent was served with an Accusation in the case titled "In the Matter of the Accusation Against Gary Victor Mantese," Case No. 3890 before the Board of Pharmacy. The Accusation alleged four causes for discipline based on discipline against Respondent's pharmacist licenses held in four (4) other states (Missouri, Louisiana, Texas, and Illinois). The underlying cases were based on, inter alia, Respondent's use of crack cocaine.

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- 21. On or about June 8, 2011, a settlement offer was extended to Respondent regarding Case No. 3890. Respondent signed and returned the Stipulated Settlement and Disciplinary Order on or about June 13, 2011, stipulating to the allegations in the Accusation, and agreeing to terms including required enrollment in and completion of the Pharmacists Recovery Program (PRP).
- 22. In anticipation of adoption by the Board of Pharmacy of the Stipulated Settlement and Disciplinary Order, Respondent contacted the PRP and began enrollment processes. On or about June 29, 2011, Respondent submitted a hair sample for drug testing. That test came back with a confirmed positive for **cocaine** metabolites, showing Respondent's preceding use thereof. On or about July 5, 2011, that positive test result was communicated to Respondent by the PRP.
- 23. On or about July 5, 2011, in communications with PRP representatives, Respondent adamantly denied any use of **cocaine**, and challenged the result(s) of the test. Respondent informed the PRP that he would be leaving the program and the state immediately, as he was moving back to Missouri to live with family. A Texas-based attorney acting on his behalf sent a letter to PRP representatives on or about July 6, 2011 stating that Respondent was en route to Missouri, and also stating that Respondent's "employment contract was recently terminated."
- 24. On or about July 7, 2011, Respondent was terminated from the PRP and classified as a potential public risk. As of on or about that date, his PRP casefile was closed.
- 25. In the meantime, sometime before on or about July 8, 2011, Respondent contacted his supervisor(s) at Coalinga State Hospital and admitted that he had used **cocaine** earlier in the year, and that his use had been detected. He said that he was moving back to Missouri, and would no longer be accepting any shifts for employment at Coalinga State Hospital.
- 26. On or about July 21, 2011, Respondent contacted Board staff, saying that his sudden decision to move back to Missouri was made in a "panic," that he now realized he had made "a terrible mistake" and was "truly sorry," and that he wished to return to California and return to work as a pharmacist at Coalinga State Hospital.
- 27. Respondent ultimately decided to remain resident in Missouri, and has not moved back to California. This has led to non-compliance with terms and conditions of his probation.

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controlled substance, by fraud, deceit, subterfuge, or concealment of material fact.

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#### SIXTH CAUSE FOR DISCIPLINE

(Unlawful Use of Narcotic Controlled Substances)

33. Respondent is subject to discipline under section 4301(j) and/or (o) of the Code, and/or Health and Safety Code section 11550, in that, as described in paragraphs 19 to 27 above, Respondent used or was under the influence of, conspired to use/be under the influence of, and/or assisted in or abetted use/being under the influence of, certain identified controlled substances, not administered by or under the direction of an authorized licensee.

## SEVENTH CAUSE FOR DISCIPLINE

(Unprofessional Conduct)

34. Respondent is subject to discipline under section 4301 of the Code in that Respondent, as described in paragraphs 19 to 33 above, engaged in unprofessional conduct.

## FIRST CAUSE TO REVOKE PROBATION

(Failure to Timely Submit Quarterly Report(s))

35. At all times after the effective date (September 5, 2011) of the Decision and Order imposing probation on Respondent's License, Term and Condition 2 of that Order required that Respondent report to the Board quarterly, on a schedule as directed by the Board or its designee, either in person or in writing, as directed. Respondent was directed to report quarterly, in writing, with the first report due on or before January 10, 2012. No quarterly reports have been received from Respondent during probation, including the quarterly report due on January 10, 2012. This failure to timely submit quarterly report(s) subjects Respondent's License to revocation.

## SECOND CAUSE TO REVOKE PROBATION

(Failure to Appear In Person for Board Interview(s))

36. At all times after the effective date (September 5, 2011) of the Decision and Order imposing probation on Respondent's License, Term and Condition 3 of that Order required that Respondent appear in person for interviews with the Board or its designee, as directed, and stated that failure to appear for any scheduled interview without prior notice, or failure to appear for two (2) or more scheduled interviews, would be considered a violation of probation.

37. On or about August 12, 2011, Respondent was directed to appear at the offices of the Board on August 25, 2011 for a probation office conference/interview. On or about August 16, 18, and/or 19, 2011, Respondent stated that he was living in Missouri, and would be unable to attend the scheduled conference/interview. On or about September 15, 2011, Respondent was directed to appear at the Board offices on September 29, 2011 for an office conference/interview. On or about September 23 and/or September 26, 2011, Respondent stated that he would not be attending the scheduled conference/interview. On or about September 29, 2011, Respondent was directed to appear at the Board offices on October 26, 2011 for an office conference/interview. A second written notification was sent to Respondent on or about October 14, 2011. Respondent did not attend the August 25, September 29, or October 26, 2011 conference(s)/interview(s). This failure to attend scheduled, noticed interview(s) subjects Respondent's License to revocation.

## THIRD CAUSE TO REVOKE PROBATION

(Failure to Timely Enroll in Pharmacists Recovery Program (PRP))

38. At all times after the effective date (September 5, 2011) of the Decision and Order imposing probation on Respondent's License, Term and Condition 14 of that Order required that within thirty (30) days (i.e., by October 5, 2011) Respondent contact the Pharmacists Recovery Program (PRP) for evaluation, and immediately thereafter enroll, participate in, and complete the treatment contract and any subsequent addenda recommended by the PRP. Per paragraphs 22 to 24 above, Respondent failed to complete evaluation, enrollment, and/or participation in the PRP program within thirty days after September 5, 2011, and has never re-entered the PRP since his departure to Missouri. This failure to timely submit to evaluation, to complete enrollment, and/or to participate in the PRP, subjects Respondent's License to revocation.

## FOURTH CAUSE TO REVOKE PROBATION

(Failure to Cooperate with Board Staff)

39. At all times after the effective date (September 5, 2011) of the Decision and Order imposing probation on Respondent's License, Term and Condition 4 of that Order required that Respondent cooperate with the Board's inspection program and with the Board's monitoring and investigation of Respondent's compliance with terms and conditions of his probation.

40. Per paragraphs 35-38 above, Respondent failed to timely cooperate on one or more occasions. His failure(s) to cooperate as required subject Respondent's License to revocation.

#### OTHER MATTERS – EXTENSION OF PROBATION

41. At all times after the effective date (September 5, 2011) of the Decision and Order imposing probation on Respondent's License, Term and Condition 19 of that Order required:

#### 19. Violation of Probation.

If a respondent has not complied with any term or condition of probation, the board shall have continuing jurisdiction over respondent, and probation shall automatically be extended, until all terms and conditions have been satisfied or the board has taken other action as deemed appropriate to treat the failure to comply as a violation of probation, to terminate probation, and to impose the penalty that was stayed.

If respondent violates probation in any respect, the board, after giving respondent notice and an opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. Notice and opportunity to be heard are not required for those provisions stating that a violation thereof may lead to automatic termination of the stay and/or revocation of the license. If a petition to revoke probation or an accusation is filed against respondent during probation, the board shall have continuing jurisdiction, and the period of probation shall be automatically extended until the petition to revoke probation or accusation is heard and decided.

42. Pursuant to the operation of Term and Condition 19 of the probation order applicable to Respondent's License, probation is automatically extended by the filing hereof, and/or by Respondent's failure to comply with the terms and conditions of probation, until such time as this Accusation and Petition to Revoke Probation is heard and decided, or until the Board has taken other action as deemed appropriate to treat the failure to comply as a violation of probation.

#### **PRAYER**

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Board of Pharmacy issue a decision:

1. Revoking or suspending Pharmacist License Number RPH 47841, issued to Gary Victor Mantese (Respondent);

# Exhibit A

Decision and Order
Board of Pharmacy Case No. 3890