

**BEFORE THE
BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the First Amended Accusation and
Petition to Revoke Probation Against:

DALE L. HERRING
7048 Hudson Hill Road
Gosport, IN 47433

Pharmacist License No. RPH 36500

Respondent

Case No. 2574

OAH No. 2008050641

DECISION

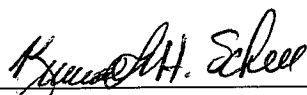
The attached Proposed Decision of the Administrative Law Judge is hereby adopted
by the Board of Pharmacy as its Decision in the above-entitled matter.

This decision shall become effective on April 8, 2009.

It is so ORDERED on March 9, 2009.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By



KENNETH H. SCHELL
Board President

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PROPOSED DECISION

This matter was heard on December 16, 2008, before Ann Elizabeth Sarli, Administrative Law Judge, State of California, Office of Administrative Hearings, in Sacramento, California.

Complainant, Virginia Herold, Executive Officer of the Board of Pharmacy, was represented by Kent D. Harris, Deputy Attorney General.

Dale L. Herring appeared and represented himself.

Oral and documentary evidence was submitted. The record was closed and the matter submitted for decision on December 17, 2008.

FACTUAL FINDINGS

Procedural History

1. On August 18, 1981, the Board of Pharmacy (Board) issued Pharmacist License Number RHP 36500 to Dale L. Herring (respondent).

2. On April 28, 1986, in a prior disciplinary action,¹ the Board revoked respondent's license with revocation stayed, and he was placed on probation under terms and conditions for three years. The revocation was based on violations of Business and

¹ Case Number 1289

Professions Code ² sections 4350.5, 4230 and 4353. During 1984 and 1985 respondent had used cocaine, morphine and Demerol, which he had diverted from the hospital pharmacy where he was employed. On March 18, 1988, respondent's probation was revoked³ and his license was revoked because of his failure to comply with the terms of probation. On November 2, 1989, respondent's license was reinstated on a three year probationary basis. Respondent completed probation and his license was fully reinstated in 1992.

3. On February 16, 2002, the Board revoked respondent's license,⁴ revocation was stayed and respondent's license was placed on probation for five years on terms and conditions. The discipline was based upon respondent's practice for over two years on an expired license, and on respondent's conduct on October 21, 1996. On that date, he used a stun-gun on a prostitute in San Francisco. A police search of his car found the stun-gun, three hypodermic needles and syringes, a vial of injectable liquid Diazepam (Valium), a knife, sexual restraints including a ball-gag, and sexual "toys."

4. Respondent did not comply with any of the terms of the Board's February 16, 2002, probationary order. On March 9, 2002, he filed a petition for writ of mandate in Marin County Superior Court seeking to overturn the Board's decision. The petition was denied on May 9, 2002. The Court did not stay the Board's probationary order during the pendency of the writ proceeding. Nevertheless, respondent did not comply with the terms of probation during the pendency of the writ proceeding or after the Court denied the writ.

5. On July 6, 2002, Rohnert Park police arrested respondent on numerous felony charges including rape, domestic violence, kidnapping, false imprisonment and attempted murder against Kim R. During an ensuing search of respondent's residence, police and Board investigators found 24 triplicate prescription documents for 20 patients. None of the triplicate prescriptions had been transmitted to the Department of Justice (DOJ). They also found a mortar and pestle with a razor blade inside and a residue of amphetamine, methamphetamine, methylphenidate, lidocaine and oxycodone. Each of these drugs, with the exception of lidocaine, is a Schedule II controlled substance as designated by Health and Safety Code section 11055. Upon his arrest, respondent's blood was drawn and tested positive for marijuana.

6. On July 8, 2002, while respondent was in custody, Kim R. was found dead in her bathtub. The cause of death was determined to be drowning with acute Fentanyl toxicity. Kim R. had injected a Fentanyl solution, which she had created by warming Fentanyl patches in hot water and drawing the solution out with a syringe.

7. On July 12, 2002, the Board made a special appearance at respondent's arraignment in the Sonoma County Superior Court pursuant to Penal Code section 23 to request that respondent be prohibited from licensed practice as a condition of any grant of

² All statutory references are to the California Business and Professions Code unless otherwise stated.

³ Case number 1321

⁴ Case number 2068

bail or any order of probation the Court may issue. The Court granted the Board's request. However, respondent was not granted bail or probation and remained in jail throughout his trial.

8. On April 9, 2003, a jury convicted respondent of four felony counts: forcible rape, attempted sodomy by use of force, assault by means likely to produce great bodily injury and false imprisonment by violence. On November 4, 2003, respondent was sentenced to serve 17 years in state prison.

9. On June 11, 2004, the original accusation and petition to revoke probation was filed in the instant case and was served on respondent on June 17, 2004, in state prison. On July 1, 2004, respondent filed a request for continuance of a least one year. Complainant treated this request as a notice of defense. On August 13, 2004, respondent's license was summarily suspended by the Board, pursuant to Business and Professions Code section 4311, subdivision (a), due to his felony convictions and incarceration.

10. On April 17, 2005, the California Court of Appeals, 1st District, in an unpublished decision,⁵ reversed respondent's convictions because several of Kim R's statements, which were admitted in evidence in the trial, were inadmissible hearsay. The People petitioned for review to the California Supreme Court. On October 15, 2007, the California Supreme Court dismissed the People's petition for review, thereby releasing respondent from prison. The Sonoma County District Attorney's Office declined to re-try respondent.

11. On May 4, 2008, respondent's license was canceled pursuant to Business and Professions Code section 4402, subdivision (a). That section 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. Pursuant to subdivision (d), this section shall not affect the authority of the Board to proceed with any accusation that has been filed prior to the expiration of the three-year period. As set forth above, the Board's initial accusation was filed June 11, 2004, within the timelines prescribed by this section.

12. On December 8, 2008, Virginia Herold made and filed the instant First Amended Accusation⁶ (Accusation) and Petition to Revoke Probation (Petition) against respondent, in her official capacity as Executive Officer of the Board. Respondent timely filed a notice of defense in this matter was set for hearing pursuant to Government Code section 11505.

⁵ 2005 Cal. App. Unpub. LEXIS 3748.

⁶ The First Amended Accusation was amended at hearing to include a prayer for reimbursement of costs pursuant to section 125.3

Allegations

13. The instant Accusation alleges that respondent committed multiple violations of law, and that these violations constitute grounds for revocation of his license. The instant Petition alleges that these violations of law constitute violations of the February 16, 2002, probationary order imposed in case number 2068 (probationary order). Additionally, the Petition alleges that respondent has not complied with the terms and conditions of the probationary order.⁷

Dispensing to Kim R.

14. At the time of his arrest on July 6, 2002, respondent was working as a pharmacist at a Rite Aid Pharmacy in Rohnert Park, California. He and Kim R. had a relationship for several years. They lived together, taking turns living in each other's apartments. Kim R. had several prescriptions from different physicians for Duragesic Patches, a trade name for the generic Fentanyl transdermal, a potent opioid analgesic for the control of chronic pain. On several occasions between the dates of January 14, 2002, and May 21, 2002, respondent dispensed Duragesic patches to Kim R. He filled many of her Duragesic prescriptions too early, before her previous supply was to have run out. On January 14, he filled a prescription 28 days early and on January 21, refilled the prescription 23 days early. On February 1, he filled a prescription 19 days early. On March 11, he filled two prescriptions, one for a 50 mcg patch and one for a 74 mcg patch; each prescription was 22 days early. On May 17, he filled a prescription two days early.

During this time, respondent also filled new Duragesic prescriptions for Kim R. She was also receiving prescriptions for Duragesic patches in strengths from 25 mcg to 100 mcg from three physicians. Respondent did not contact Kim R.'s prescribers to get authorization for filling prescriptions early or to advise them of the multiple prescriptions or dosages. On occasion, respondent paid for Kim R.'s prescriptions.

The evidence established that respondent knew that Kim R. was receiving Duragesic prescriptions from multiple doctors and that he knew that she was taking far more Duragesic than her physicians prescribed. At hearing, respondent maintained that he did not know Kim R. was abusing Duragesic until just a few days before his arrest. He maintained that Kim R. was a "con artist" who had deceived him into believing that she was suffering from cancer, and that he believed her prescriptions were legitimate. He maintained that he had not seen any evidence of drug abuse until just before his arrest. He explained that he never contacted Kim R.'s physicians regarding the early refills because he believed they were legitimate and because Kim R. had blocked his access to all of her physicians by telling them not to answer his calls. Respondent was not credible. Even if he had been "conned" into believing that Kim R. was not an addict, he was regularly faced with irregular prescriptions. Expert opinion established that a pharmacist has a duty to investigate, document, and refrain from

⁷ Respondent's 2003 criminal convictions are not alleged as a basis for the Accusation or Petition, due to the fact that the convictions were overturned on appeal.

dispensing irregular or questionable prescriptions until the regularities and discrepancies are resolved and documented.

Triplicate prescription documents

15. As set forth in Finding 5, when police arrested respondent on July 6, 2002, police and Board investigators found 24 triplicate prescription documents for 20 patients on a table in respondent's home. Most were dated April 2002, with a few from March and a few from February, 2002. None of the triplicate prescriptions had been transmitted to the DOJ.

Respondent maintained that he brought the prescriptions home to mail to the DOJ because he did not have an envelope and a stamp at Rite Aid. As evidence of his intent to mail the prescriptions, he pointed to the fact that there was a piece of paper on top of the prescriptions with a post office mailing address on it and the caption "State Bureau of Narc. Enf." He maintained that the prescriptions were as secure at his home as they would be at the pharmacy, because he kept his home locked and no one had access to his home but him. Respondent was not credible. The pharmacy is responsible for mailing triplicate prescriptions to DOJ within 30 days of filling. Assuming respondent had brought pharmacy prescriptions home for the purpose of mailing them, respondent did not establish why most of the prescriptions were over two months old, and there were no prescriptions that had been issued within 30 days. He failed to explain why, if he was doing a mailing, he would have so few to mail from a large pharmacy like Rite Aid. Moreover, it is clear that respondent's home was not secure. Kim R. lived in his home at times.

Even if respondent's explanation was credible, expert opinion established that respondent violated pharmacy laws by removing confidential patient information in the form of the triplicate prescriptions from the pharmacy premises to an unsecured location, potentially subjecting that information to unauthorized disclosure. Expert opinion also established that respondent violated pharmacy laws by failing to forward the triplicate prescriptions to DOJ.

Illegal drugs

16. As set forth in Finding 5, when police arrested respondent on July 6, 2002, Board investigators administered a blood test to determine the presence of illegal substances. Respondent's blood tested positive for marijuana. The police searched his home and confiscated a mortar and pestle with a razor blade inside and a residue of amphetamine, methamphetamine, methylphenidate, lidocaine and oxycodone. Respondent did not have a legal prescription for marijuana, amphetamine, methamphetamine, methylphenidate, or oxycodone.

Respondent contends that he did not "knowingly" take any illegal substances and that Kim R. planted the drugs and drug paraphernalia in his home prior to the search. He testified that he had discovered that Kim R. had been deceiving him and spending his money. For instance, she told him she was going out of state to have cancer surgery and instead took a

cruise to Mexico. When he confronted her about that, and about his recent discovery of her drug use, she decided to "get back at him."

According to respondent, Kim R. planned the events of July 6. She began her scheme by putting marijuana in something that he ate, and since she was a nurse she was probably smart enough to put a long-lasting component of marijuana in his food. Respondent testified that THC and its metabolites have a very long transit time through the body, so Kim R. could have placed marijuana in something he ate over a month before the drug test. After assuring that he would test positive for marijuana, respondent speculates that Kim R. went to his house and placed the mortar and pestle, razor blade and drug residue in his home. She then returned to her house, where he was waiting, and tried to get him to attack her. Ultimately, she attacked him and in the course of defending himself he inflicted bruises around her neck and on her arms.⁸ Her plan was to report that he beat her, raped her and kept her in her apartment against her will, knowing he would be arrested, drug tested, and his apartment would be searched.

Respondent's account of how marijuana came to be in his blood and how controlled substances came to be in his home was fantastic and simply incredible.

Violations of probation

17. As set forth in Findings 4 and 5, the Board imposed terms and conditions of probation upon respondent's license in a February 16, 2002, probationary order. The Board's probation monitor met with him in April 2002, in an initial probation conference. They discussed the terms and conditions of probation, and respondent indicated that he understood them. Respondent failed to comply with any of the conditions of probation. He made initial contact with the Pharmacist Recovery Program, but did not make an appointment. Respondent was arrested and jailed on July 6, 2002, and at that point would have been unable to comply with the terms and conditions of probation. Subsequent to his release from jail on October 15, 2007, respondent did not comply with the terms and conditions of probation. Respondent violated the terms and conditions of probation as follows:

Obey all Laws

Condition "a" states: "Respondent shall obey all federal and state laws and regulations substantially related or governing the practice of pharmacy."

Respondent violated condition "a" by violating Business and Professions Code sections 4059, subdivision (a); 4060; 4301, subdivisions (j),(o), and (q); California Code of Regulations, title 16, sections 1714 and 1761; and Health and Safety Code section 11164, subdivision (f), and 11350.

⁸ Kim R. also had significant bruising in the vaginal area, indicating forced sexual intercourse. Kim R. had cervical cancer, and respondent gave a statement and testified at his criminal trial that he and Kim R. did not have a sexual relationship. Evidence was introduced at the criminal trial that Kim R.'s epithelial cells were scraped from respondent's penis.

Report to Board

Condition "b" states: "Respondent shall report to the Board or its designee quarterly. The report shall be made either in person or in writing, as directed. If the final probation report is not made as directed, probation shall be extended automatically until such time as the final report is made."

Respondent violated condition "b" in that he is failed to make any reports to the Board during the period of his probation.

Notification to Employers

Condition "g" states: "Respondent shall notify all present and prospective employers of the decision in this case and the terms, conditions and restrictions imposed on respondent by the decision. Within thirty (30) days of the effective date of this decision, and within fifteen (15) days of respondent undertaking new employment, respondent shall cause his employer to report to the board in writing acknowledging the employer has read the decision in this case."

Respondent violated condition "g." Between February 16, 2002 and July 11, 2002, respondent was employed as the pharmacist in charge at the Rite Aid Pharmacy in Rohert Park. He did not notify his employer of the Board's decision and the terms, conditions and restrictions of probation. He did not cause his employer to acknowledge that it had been provided with the decision and order.

Reimbursement to the Board

Condition "h" states: "Respondent shall pay to the Board its costs of investigation and prosecution in the amount of \$5,370.75. Respondent may make monthly payments as determined by the Board or its designee. If respondent fails to pay the costs as specified by the Board and on or before the date(s) determined by the Board, the Board shall, without affording the respondent notice and the opportunity to be heard, revoke probation and carry out the disciplinary order that was stayed."

Respondent violated condition "h." He failed to pay any costs as required by the Board.

Expired License

Condition "j" states: "Respondent shall, at all times while on probation, maintain an active current license with the Board, including any period during which suspension or probation is tolled".

Respondent violated condition "j" in that he failed to renew his license since it expired on October 31, 2003.

Psychiatric Examination

Condition "p" states: "Within thirty (30) days of the effective date of this decision, and on a periodic basis as may be required by the Board, or its designee, respondent shall undergo, at his own expense, psychiatric evaluation by a Board - approved psychiatrist or psychotherapist. Respondent shall sign a release which authorizes the evaluator to furnish the Board a current diagnosis and written report regarding the respondent's judgment and ability to function independently as a pharmacist with safety to the public. If the psychiatrist or psychotherapist recommends and the Board or its designee directs respondent to undergo psychotherapy, respondent shall, within thirty (30) days of written notice of the need for psychotherapy, submit to the Board or its designee for its prior approval, the recommended program for ongoing psychotherapeutic care. Respondent shall undergo and continue psychotherapy, at respondent's own expense, until further notice from the Board. Respondent shall have the treating psychotherapists submit quarterly reports to the Board, or its designee."

Respondent violated condition "p." He failed to undergo psychiatric evaluation and failed to comply with any other portion of condition "p." Respondent argued at hearing that he was forced to undergo psychiatric evaluations in connection with the criminal prosecution for rape and false imprisonment. He believes these evaluations satisfy the Board requirements. He is in error.

Contact Pharmacist Recovery Program (PRP)

Condition "q" states: "Within thirty (30) days of the effective date of this decision, respondent shall contact the Pharmacist Recovery Program for evaluation and shall successfully participate in and complete the treatment contract and any subsequent addendum as recommended and provided by the PRP and as approved by the Board. The costs for PRP participation shall be borne by the respondent. Probation shall be extended automatically until respondent successfully completes his treatment contract."

Respondent violated condition "q." He failed to arrange for evaluation or treatment through the PRP program and failed to participate or complete a treatment contract with PRP.

Abstain from Drug Use

Condition "s" states: "Respondent shall abstain completely from the personal use or possession of controlled substances and dangerous drugs. This order does not apply in instances where the medications are lawfully prescribed to the respondent for a legitimate illness..."

As set forth in Finding 16, respondent violated condition "s" in that, without a lawful prescription, he possessed and used a controlled substance; marijuana, and he possessed controlled substances; amphetamine, methamphetamine, methylphenidate, and oxycodone.

Ethics Course

Condition "t" states: "Within sixty (60) days of the effective date of this decision respondent shall submit to the Board for its approval a course in ethics which respondent shall successfully complete during the first year of probation."

Respondent violated condition "t." He never submitted a course in ethics, to the Board for its approval. Nor did he complete a course in ethics. Respondent argued at hearing that his time in jail and his legal difficulties leading up to his imprisonment constitute a "course in ethics." He was not persuasive.

Factors in Justification, Mitigation, and Aggravation

18. In order to determine whether and to what extent it is appropriate to discipline respondent's license, it is necessary to weigh and balance respondent's violations of law, as well as factors in justification, aggravation, mitigation and rehabilitation. There were no factors which justify respondent's conduct. Respondent introduced no evidence of mitigation or rehabilitation. In aggravation, respondent has a lengthy history of discipline and has been granted probation on two occasions, despite his violations, and despite his drug abuse.

Costs

19. Complainant established that the reasonable costs of investigation and prosecution of this matter were \$31,031.

At hearing, the parties were advised that the Administrative Law Judge would take evidence relating to the factors set forth in *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal. 4th 32. The parties were advised that these factors would be considered in determining the reasonableness of costs. These factors include: whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate to the alleged misconduct.

Complainant established that the scope of the investigation was appropriate to the alleged misconduct. Complainant prevailed on all of the charges. Respondent argued that he was unable to pay costs, due to the extent of his legal bills and the fact he had not been

working for years. He did not have a colorable defense to the charges or to the discipline sought.

LEGAL CONCLUSIONS

Accusation

1. Business and Professions Code section 4300, provides that the Board may suspend or revoke any certificate, license, permit, registration, or exemption, and may suspend the right to practice or place the licensee on probation.

2. The standard of proof in an administrative disciplinary action seeking the suspension or revocation of a professional license is "clear and convincing evidence." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 583.) "Clear and convincing evidence" means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered as proof. "Clear and convincing evidence" is a higher standard of proof than proof by a "preponderance of the evidence." *BAJI* 2.62. "Clear and convincing evidence" requires a finding of high probability. It must be sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re David C.* (1984) 152 Cal.App.3d 1189.)

Failure to transmit triplicate prescription documents to DOJ

3. Business and Professions Code section 4301, subdivision (j), provides that the Board shall take action against any holder of a license who is guilty of unprofessional conduct, including the violation of any of the statutes of this state or of the United States regulating controlled substances and dangerous drugs.

Health and Safety Code section 1164, subdivision (f)⁹ provides in pertinent part that any practitioner dispensing controlled substances classified in Schedule II... shall prepare a written record thereof on the official forms of the Department of Justice... and shall transmit the original to the Department of Justice...

As set forth in Findings 5 and 15, complainant has established by clear and convincing evidence that respondent's license is subject to discipline under these statutes.

Failure to maintain security of pharmacy records

4. Business and Professions Code section 4301, subdivision (o), provides that the Board shall take action against any holder of a license who is guilty of unprofessional conduct, including violating or attempting to violate directly or indirectly... any provision or

⁹ This section was operative until July 1, 2004 and was in force at the time of respondent's violation.

term of this chapter or of the applicable federal and state laws and regulations governing pharmacies, including regulations established by the Board...

California Code of Regulation, title 16, section 1714, subdivision (d), provides that each pharmacist shall be responsible for the security of the prescription department, including provisions for the effective control against theft of records.

As set forth in Findings 5 and 15, complainant has established by clear and convincing evidence that respondent's license is subject to discipline under these statutes.

Dispensing prescriptions which contain significant irregularities

6. California Code of Regulation, title 16, section 1761, subdivision (a), provides in pertinent part:

No pharmacist shall... dispense any prescription which contains any significant error, omission, irregularity, uncertainty, ambiguity or alteration...

As Set Forth in Finding 14, complainant established by clear and convincing evidence that respondent violated title 16, section 1761, subdivision (a). He is thus subject to discipline under Business and Professions Code section 4301, subdivision (o).

Obtain, possess, and self administer marijuana without a valid prescription

7. Business and Professions Code section 4060, provides in pertinent part:

No person shall possess any controlled substance, except that furnished to a person upon the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor pursuant to Section 3640.7, or furnished pursuant to a drug order issued by a certified nurse-midwife pursuant to Section 2746.51, a nurse practitioner pursuant to Section 2836.1, a physician assistant pursuant to Section 3502.1, a naturopathic doctor pursuant to Section 3640.5, or a pharmacist pursuant to either subparagraph (D) of paragraph (4) of, or clause (iv) of subparagraph (A) of paragraph (5) of, subdivision (a) of Section 4052. This section shall not apply to the possession of any controlled substance by a manufacturer, wholesaler, pharmacy, pharmacist, physician, podiatrist, dentist, optometrist, veterinarian, naturopathic doctor, certified nurse-midwife, nurse practitioner, or physician assistant, when in stock in containers correctly labeled with the name and address of the supplier or producer...

Health and Safety Code section 11350, provides in pertinent part that possession of controlled substances without a prescription is a crime.

As set forth in Findings 5 and 16, complainant established by clear and convincing evidence that respondent's license is subject to discipline under Business and Professions Code section 4301, subdivision (j), in conjunction with Health and Safety Code section 11350, and Business and Professions Code section 4060, in that he obtained, possessed and self administered marijuana without a valid prescription.

Obtain and possess controlled substances without a valid prescription

8. As set forth in Findings 5 and 16, complainant established by clear and convincing evidence that respondent's license is subject to discipline under Business and Professions Code section 4301, subdivision (j), in conjunction with Health and Safety Code section 11350, and Business and Professions Code section 4060, in that he obtained and possessed controlled substances (methylphenidate, methamphetamine, amphetamine and oxycodone) without a valid prescription.

Petition to Revoke Probation

9. Pursuant to Business and Professions Code section 4300, subdivision (d), the Board may initiate disciplinary proceedings to revoke or suspend any probationary certificate of licensure for any violation of the terms and conditions of probation. As set forth in Findings 4, 5 and 17, complainant has established by clear and convincing evidence that respondent violated each term and condition of the Board's February 16, 2002, probationary order. Said violations constitute nine separate causes for the imposition of discipline.

Costs

10. Business and Professions Code section 125.3, provides that the Board may request the Administrative Law Judge to direct a licentiate found to have committed violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case. As set forth in Finding 19 the reasonable costs of investigation and prosecution of this matter were established as \$31,031. It was established that respondent is unable to make a lump sum payment.

Rehabilitation

11. As set forth in the Findings, respondent continues to pose a significant risk to the health and safety of the public due to his continuing involvement with illegal drugs. He is not a candidate for a probationary license, because he poses a significant risk to the public, and because he has abused the opportunities the Board has provided him to rehabilitate himself while maintaining licensure.

ORDER

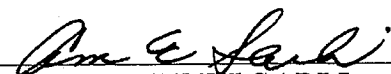
1. License number RPH 36500, issued to respondent Dale L. Herring, is REVOKED pursuant to Legal Conclusions 1 through 9, separately and together.

2. Complainant's Petition to Revoke respondent's probationary license is GRANTED, pursuant to Legal Conclusions 1 through 9, separately and together.

3. Respondent shall relinquish his wall license and pocket renewal license to the Board within ten days of the effective date of this decision. Respondent may not petition the board for reinstatement of his revoked license for one year from the effective date of this decision.

4. Respondent shall pay to the Board its costs of investigation and prosecution in the amount of \$31,031. Respondent may make periodic payments to the Board, according to a schedule and payment approved by the Board. Said amount shall be paid in full prior to any reinstatement of the license. If respondent fails to pay the amount specified, his license shall remain revoked.

Dated: January 14, 2009


ANN ELIZABETH SARLI
Administrative Law Judge
Office of Administrative Hearings

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BOARD OF PHARMACY

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8
9 **BEFORE THE**
10 **BOARD OF PHARMACY**
11 **DEPARTMENT OF CONSUMER AFFAIRS**
12 **STATE OF CALIFORNIA**

11 In the Matter of the Accusation and Petition to
12 Revoke Probation Against:

Case No. 2068

OAH No. 2008050641

13 DALE L. HERRING
14 7048 Hudson Hill Road
15 Gosport, Indiana 47433

**FIRST AMENDED ACCUSATION
AND PETITION TO REVOKE
PROBATION**

15 Pharmacist License No. RPH 36500

16 Respondent.

17
18 Complainant alleges:

19 **PARTIES**

20 1. Virginia Herold (Complainant) brings this First Amended Accusation and
21 Petition to Revoke Probation solely in her official capacity as the Executive Officer of the Board
22 of Pharmacy, Department of Consumer Affairs.

23 2. On or about August 18, 1981, the Board of Pharmacy issued Pharmacist
24 License No. RPH 36500 to Dale L. Herring (Respondent). The license expired on October 31,
25 2003, and has not been renewed.

26 **FACTS AND PROCEDURAL HISTORY**

27 3. On April 28, 1986, in a prior disciplinary action entitled In the Matter of
28 the Accusation Against Dale L. Herring before the Board of Pharmacy, in Case No. 1289,

1 Respondent's license was revoked with said revocation stayed and placed on probation under
2 terms and conditions for three (3) years. The revocation was based on violations of code sections
3 4350.5, 4230, and 4353, in that during 1984 and 1985, respondent diverted Cocaine, Morphine
4 and Demerol from the hospital pharmacy where he was employed, for his personal use.

5 4. On March 18, 1988, the above mentioned probation was revoked and
6 respondents' license was revoked outright for failure to comply with the terms of the previously
7 imposed probation in Case No. 1321.

8 5. On November 2, 1989, respondents' license was reinstated by the Board
9 on a probationary basis, under terms and conditions. Respondent successfully completed that
10 probation period (3 years) in 1992.

11 6. On June 7, 2000, an accusation was filed in a disciplinary action entitled
12 "In the Matter of Accusation Against Dale L. Herring," Case No. 2068. The pertinent facts and
13 circumstances of the causes for discipline alleged in Case No. 2068 were that on October 21,
14 1996 respondent admittedly stun-gunned a prostitute in downtown San Francisco and was
15 subsequently pulled over by police. A search of his vehicle found, among other things, a stun-
16 gun, three hypodermic needles and syringes with a clear, water-like substance inside, one vial of
17 injectable liquid Diazepam (Valium), a knife, sex toys (dildos), and sexual restraints, including a
18 ball-gag. Respondent was also charged with practicing with an expired license.

19 7. On February 16, 2002 the Board of Pharmacy made effective the decision
20 in Case No. 2068 in which Respondent's Pharmacist License was revoked. However, the
21 revocation was stayed and Respondent's license was placed on probation for a period of five (5)
22 years with certain terms and conditions. A copy of that decision is attached as Exhibit A and is
23 incorporated by reference. Since the effective date of the decision, respondent has made no
24 substantive efforts to comply with the terms of probation therein.

25 8. On March 18, 2002, respondent filed a petition for writ of mandate in
26 Marin County Superior Court seeking to overturn the decision in Case No. 2068. The petition
27 was denied in its entirety on May 9, 2002.

28

1 9. Between January and July of 2002, respondent had a personal relationship
2 with Kim R. and was aware that she filled numerous prescriptions for Fentanyl patches through
3 both himself as a pharmacist as well as through other pharmacists at several pharmacies. Her
4 prescription profile, which was available to respondent, as well as respondent's own knowledge
5 of the situation reflected Kim R's significant over- use of Fentanyl, beyond the frequency set
6 forth in the prescriptions.

7 10. On or about July 6, 2002, the Rohnert Park police arrested respondent for
8 numerous felony charges including rape, domestic violence, kidnaping, battery, false
9 imprisonment, and attempted murder against Kim R.. Said acts allegedly took place July 5th and
10 6th, 2002. During a subsequent search of respondent's residence, 24 triplicate prescription
11 documents were discovered for 20 different patients, none of which had been transmitted to DOJ
12 as required by law. Also found in his apartment was a mortar & pestle with a pink powdery
13 substance and a razor blade inside. Subsequent testing of the powdery substance was positive for
14 a mixture of amphetamine, methamphetamine, methylphenidate, lidocaine and oxycodone. The
15 presence of cocaine was indicated but not confirmed.

16 11. On July 6, 2002, upon his arrest, respondent had blood drawn which tested
17 positive for marijuana.

18 12. On July 8, 2002, while respondent was in custody, Kim R. was found
19 deceased in her bathtub. The cause of death was determined to be drowning with "acute Fentanyl
20 toxicity".

21 13. On July 12, 2002, the Board made a special appearance at respondent's
22 arraignment in the Sonoma County Superior Court pursuant to Penal Code section 23 to request
23 that respondent be prohibited from licensed practice as a condition of any grant of bail or any
24 order of probation the court may issue. The court granted said request. However, respondent
25 was not subsequently granted any bail or probation and remained in jail throughout his trial.

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21. Section 4300 of the Code states in pertinent part:

“(a) Every license issued may be suspended or revoked...”

“(d) The board may initiate disciplinary proceedings to revoke or suspend any probationary certificate of licensure for any violation of the terms and conditions of probation...”

22. Section 4301 of the Code states in pertinent part:

“The board shall take action against any holder of a license who is guilty of unprofessional conduct... Unprofessional conduct shall include, but is not limited to, any of the following:

(j) The violation of any of the statutes of this state... or the United States regulating controlled substances and dangerous drugs.

(o) Violating or attempting to violate directly or indirectly...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...”

23. Section 4059 of the Code states, in pertinent part, that a person may not furnish any dangerous drug except upon the prescription of a physician, dentist, podiatrist, optometrist, veterinarian or naturopathic doctor...”

24. Section 4060 of the Code states, in pertinent part: “No person shall possess any controlled substance, except that furnished to a person upon the prescription of a physician... This section shall not apply to the possession of any controlled substance by a ...pharmacist... when in stock in containers correctly labeled with the name and address of the supplier or producer...”

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1 **FOURTH CAUSE FOR DISCIPLINE**

2 (Obtain, possess, and self-administer Marijuana without a valid prescription)

3 39. Respondent has further subjected his license to discipline under Code
4 Section 4060 in conjunction with Code Section 4301 (j) and Health & Safety Code section 11350
5 in that on July 6, 2002, respondent tested positive for marijuana in his blood as set forth in
6 paragraph 11 above. Respondent obtained, possessed, and self-administered marijuana without a
7 valid prescription.

8 **FIFTH CAUSE FOR DISCIPLINE**

9 (Obtain and possess controlled substances without a valid prescription)

10 40. Respondent has further subjected his license to discipline under Code
11 Section 4060 in conjunction with 4301 (j) and Health & Safety Code section 11350 in that on
12 and before July 6, 2002 respondent obtained and possessed a mixture of Methylphenidate,
13 Methamphetamine, Amphetamine, and Oxycodone without having valid prescriptions therefor,
14 as set forth in paragraph 10 above.

15 **PETITION TO REVOKE PROBATION**

16 41. As set forth in paragraph 3 above, respondent's license to practice
17 pharmacy was placed on probation for five (5) years, commencing on February 16, 2002, under
18 certain terms and conditions. Respondent has violated those terms and conditions as follows:

19 **FIRST CAUSE TO REVOKE PROBATION**

20 (Obey all laws)

21 42. At all times after the effective date of respondent's probation, Condition
22 "a" of the terms and conditions of probation stated: "Respondent shall obey all federal and state
23 laws and regulations substantially related or governing the practice of pharmacy."

24 43. Respondent violated condition "a" by violating B&P code sections
25 4059(a), 4060, 4301(j),(o), and (q); Regulations 1714, and 1761; and H&S code 11164(f) and
26 11350, as set forth above in paragraphs 1-40.

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1 designee. If respondent fails to pay the costs as specified by the Board and on or before the
2 date(s) determined by the Board, the Board shall, without affording the respondent notice and the
3 opportunity to be heard, revoke probation and carry out the disciplinary order that was stayed.”

4 49. Respondent has violated condition “h” in that he has failed to pay any
5 costs as required by the Board.

6 FIFTH CAUSE TO REVOKE PROBATION

7 (Expired License)

8 50. At all times after the effective date of respondent’s probation, Condition
9 “j” of the terms and conditions of probation stated in pertinent part: “ Respondent shall, at all
10 times while on probation, maintain an active current license with the Board, including any period
11 during which suspension or probation is tolled.

12 51. Respondent has violated Condition “j” in that he has failed renew his
13 license since it expired on October 31, 2003.

14 SIXTH CAUSE TO REVOKE PROBATION

15 (Psychiatric Examination)

16 52. At all times after the effective date of respondent’s probation, Condition
17 “p” of the terms and conditions of probation stated: “ Within thirty (30) days of the effective date
18 of this decision, and on a periodic basis as may be required by the Board or its designee,
19 respondent shall undergo, at his own expense, psychiatric evaluation by a Board-approved
20 psychiatrist or psychotherapist. Respondent shall sign a release which authorizes the evaluator to
21 furnish the Board a current diagnosis and written report regarding the respondent’s judgement
22 and ability to function independently as a pharmacist with safety to the public. If the psychiatrist
23 or psychotherapist recommends and the Board or its designee directs respondent to undergo
24 psychotherapy, respondent shall, within thirty (30) days of written notice of the need for
25 psychotherapy, submit to the Board or its designee for its prior approval, the recommended
26 program for ongoing psychotherapeutic care. Respondent shall undergo and continue
27 psychotherapy, at respondent’s own expense, until further notice from the Board. Respondent
28 shall have the treating psychotherapist submit quarterly reports to the Board , or its designee”.

1 53. Respondent has violated Condition "p" in that he has failed to undergo
2 psychiatric evaluation, and has failed to comply with any other portion of Condition "p".

3 **SIXTH CAUSE TO REVOKE PROBATION**

4 (Contact Pharmacist Recovery Program (PRP))

5 54. At all times after the effective date of Respondent's probation, Condition
6 "q" of the terms and conditions of probation stated: "Within thirty (30) days of the effective date
7 of this decision, respondent shall contact the Pharmacist Recovery Program for evaluation and
8 shall successfully participate in and complete the treatment contract and any subsequent
9 addendum as recommended and provided by the PRP and as approved by the Board. The costs
10 for PRP participation shall be borne by the respondent. Probation shall be extended
11 automatically until respondent successfully completes his treatment contract".

12 55. Respondent has violated Condition "q" in that he has failed to comply
13 with any portion of it.

14 **SEVENTH CAUSE TO REVOKE PROBATION**

15 (Abstain from Drug Use)

16 56. At all times after the effective date of respondent's probation, Condition
17 "s" of the terms and conditions of probation stated in pertinent part: "Respondent shall abstain
18 completely from the personal use or possession of controlled substances and dangerous drugs.
19 This order does not apply in instances where the medications are lawfully prescribed to the
20 respondent for a legitimate illness..."

21 57. Respondent has violated Condition "s" as set forth in paragraphs 10 and
22 11, above.

23 **EIGHTH CAUSE TO REVOKE PROBATION**

24 (Ethics course)

25 58. At all times after the effective date of respondent's probation, Condition
26 "t" of the terms and conditions of probation stated: "Within sixty (60) days of the effective date
27 of this decision respondent shall submit to the Board for its approval a course in ethics which
28 respondent shall successfully complete during the first year of probation."

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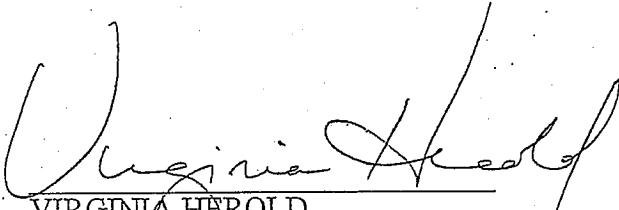
59. Respondent has violated Condition "t" in that he has failed to comply with any portion of it.

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 the probation that was granted by the Board of Pharmacy in Case No. 2068 and imposing the disciplinary order that was stayed thereby revoking Pharmacist License No. RPH 36500 issued to Dale L. Herring ;
- 2. Revoking or suspending Pharmacist License No. RPH 36500, issued to Dale L. Herring based in the allegations contained in the foregoing accusation;
- 3. Taking such other and further action as deemed necessary and proper.

DATED: 12/8/08



VIRGINIA HEROLD
Executive Officer
Board of Pharmacy
Department of Consumer Affairs
State of California
Complainant

SA2002AD1128
Herring first amended petition.wpd
kdh:12/5/08