

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

In the Matter of the Accusation Against:

DONALD FRANK LIPONI, RPH
5234 Soledad Road
San Diego, CA 92129

Original Pharmacist License No. RPH 35891

Respondent.

Case No. 2718

OAH No. L2004090114

PROPOSED DECISION

On April 11, 2005, Steven V. Adler, Presiding Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Diego, California.

Susan Fitzgerald, Deputy Attorney General, represented complainant Patricia F. Harris, the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs, State of California (complainant).

Donald Frank Liponi (respondent) is represented by M. Gayle Askren, Attorney at Law. Neither Mr. Askren nor respondent was present at the administrative hearing.

The matter was submitted on April 11, 2005.

FACTUAL FINDINGS

Jurisdictional Matters

1. On August 10, 2004, complainant signed the Accusation in Case No. 2718. The Accusation and other required jurisdictional documents were served on respondent.

Respondent timely filed a Notice of Defense.

On April 11, 2005, the administrative record was opened. Jurisdictional documents were presented. Other evidence was presented, including a license history certification, a stipulation to interim suspension, a Stipulation of the Parties re Administrative Hearing, letters from the Diversion Program and a cost certification. The record was closed, and the matter was submitted.

License History

2. On August 9, 1980, the Board of Pharmacy (the Board) issued respondent Original Pharmacist License No. RPH 35891.

Respondent's registered pharmacist license was in full force and effect at all times mentioned herein and is renewed through May 31, 2006.

There is no history of any administrative discipline against respondent's registered pharmacist license.

Possession and Self-Administration of Controlled Substances

3. Morphine is a dangerous drug under Business and Professions Code section 4022 and is a Schedule II controlled substance under Health and Safety Code section 11055.

Butalbital is a barbiturate, a dangerous drug under Business and Professions Code section 4022 and is a Schedule III controlled substance under Health and Safety Code section 11056.

Nordiazepam is a benzodiazepine, a dangerous drug under Business and Professions Code section 4022 and is a Schedule IV controlled substance under Health and Safety Code section 11057.

4. On July 31, 2002, respondent was employed as a pharmacist at Scripps Memorial Hospital pharmacy in La Jolla, California. That day, respondent stole an intravenous (IV) bag of morphine from the hospital for his own use. When interviewed about the morphine, respondent admitted taking it and said that he'd been using drugs for ten years.

5. On or about August 2, 2002, respondent illegally possessed a 16-gauge hypodermic needle in his pocket. Respondent admitted he had used the needle to inject the morphine on July 31, 2002. On the same day, respondent tested positive for morphine, nordiazepam and butalbital.

6. On or about March 17, 2004, respondent was convicted by guilty plea of a violation of Vehicle Code section 23152, subdivision (b), driving with a blood alcohol level of 0.08% or greater. (*People v. Donald Frank Liponi*, Case No. 03 SM 03715 M A, Superior Court, Orange County.) Respondent was placed on informal probation for three years, ordered to pay fines and fees and required to attend and successfully complete an alcohol treatment program and a MADD Victim's Impact Panel.

The parties agreed that this conviction is factually substantially related to the qualifications, functions or duties of a pharmacist.

7. On October 20, 2004, a representative of the Board's Diversion Program contractor, "MAXIMUS," notified complainant that respondent had been terminated from the program for "failure to benefit." The letter recited that respondent had relapsed on alcohol on the following dates.

- September 18, 2003
- June 3, 2004
- June 17 and 18, 2004
- August 20 and 21, 2004
- October 19, 2004

8. On August 31, 2004, respondent stipulated that his Pharmacist's License be suspended pending the hearing on the Accusation which is the subject of this Proposed Decision.

The Appropriate Measure of Discipline

9. Respondent came to the attention of complainant as a result of illegal drug possession directly related to his employment. At that time, 2002, respondent admitted to a history of drug abuse stretching back ten years. However, drugs are not respondent's sole problem; he is also an abuser of alcohol. Alcohol abuse is conclusively established by respondent's conviction for drunk driving and, even more damning, by his inability to abstain while participating in the Board Diversion Program.

Under all of the circumstances, respondent would presently pose a risk if he were permitted to practice pharmacy in California, even on terms and conditions of probation requiring his attendance and participation in support group meetings and requiring random biological fluid testing, psychological counseling, and practice monitoring. If respondent cannot comply with the requirements of the Diversion Program, there is absolutely no reason to conclude that he will comply with terms and conditions of probation.

Costs of Investigation and Enforcement

10. Complainant filed a Certification of Prosecution Costs by the Attorney General. It establishes that \$2,057.75 in attorney costs has been or will be paid by complainant. The amount is reasonable based on the detailed explanation included in the Certification.

LEGAL CONCLUSIONS

The Burden and Standard of Proof

1. The standard of proof in an administrative disciplinary action seeking the suspension or revocation of a pharmacist license is "clear and convincing evidence." See, *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. Such evidence requires 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, 1208.

Respondent's License Is Subject to License Discipline

2. Clear and convincing evidence established cause to revoke respondent's pharmacist's license under Business and Professions Code section 4300, subdivision (b).¹ Respondent, by his admission to the truth of Paragraphs 5 through 11 of the Accusation, has established the following.

Section 4301, subdivision (f), authorizes disciplinary action against any licensee who engages in the commission of any act involving moral turpitude, dishonesty, fraud, deceit or corruption whether or not the act is committed in the course of relations as a licensee. Respondent stole an IV bag of morphine from the hospital where he worked; his goal was to use the drugs he stole to support a habit of drug abuse stretching back many years. The theft of the IV bag of morphine constitutes an act of moral turpitude as set forth in section 4301, subdivision (f).

Section 4301, subdivision (j) authorizes disciplinary action against any licensee who violates state or federal statutes regulating controlled substances and dangerous drugs. Respondent stole the IV bag of morphine, illegally possessed a syringe for the purpose of

¹ All references are to the Business and Professions Code.

injecting himself with drugs, and tested positive for controlled substances. He is subject to discipline under this subdivision.

Section 4301, subdivision (l) authorizes disciplinary action against any licensee who is a convicted of a crime substantially related to the qualifications, functions or duties of a pharmacist. Respondent's conviction for driving under the influence is such a crime, and he is subject to discipline under this subdivision.

Section 4301, subdivision (o) authorizes disciplinary action against any licensee who violates or attempts to violate laws governing pharmacy. Respondent stole an IV bag of morphine, was under the influence of controlled substances and was guilty of driving under the influence, and is subject to discipline under this subdivision.

These conclusions are based on Legal Conclusions 1-2 and on Factual Findings 3-9.

Costs of Investigation and Enforcement

3. Business and Professions Code section 125.3 authorizes an administrative law judge to direct a licensee who has violated the applicable licensing act to pay a sum not to exceed the reasonable costs of investigation and prosecution.

4. Cause exists under Business and Professions Code section 125.3 to direct respondent to pay to the Board its reasonable costs of investigation prosecution of \$2,057.75.


This conclusion is based on Legal Conclusion 2 and on Factual Finding 10.

ORDER

Original Pharmacist License No. RPH 35891 issued to Donald Frank Liponi is revoked.

Donald Frank Liponi shall pay \$2,057.75 to the Board of Pharmacy.

DATED: April 13, 2005



STEVEN V. ADLER
Presiding Administrative Law Judge
Office of Administrative Hearings

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

In the Matter of the Accusation Against:

DONALD FRANK LIPONI, RPH
5234 Soledad Road
San Diego, CA 92129

Original Pharmacist License No. RPH 35891

Respondent.

Case No. 2718

OAH No. L2004090114

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 June 3, 2005.

IT IS SO ORDERED.

Date: May 4, 2005

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By


STANLEY W. GOLDENBERG
Board President

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

12 In the Matter of the Accusation Against:

Case No. 2718

13 DONALD FRANK LIPONI, RPH
5234 Soledad Rd
14 San Diego, CA 92129

A C C U S A T I O N

15 Original Pharmacist License No. RPH 35891

16 Respondent.
17

18 Complainant alleges:

19 **PARTIES**

20 1. Patricia F. Harris (Complainant) brings this Accusation solely in her
21 official capacity as the Executive Officer of the Board of Pharmacy, Department of Consumer
22 Affairs.

23 2. On or about August 9, 1980, the Board of Pharmacy issued Original
24 Pharmacist License Number RPH 35891 to Donald Frank Liponi, RPH (Respondent). The
25 Original Pharmacist License was in full force and effect at all times relevant to the charges
26 brought herein and will expire on May 31, 2004, unless renewed.

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JURISDICTION

3. This Accusation is brought before the Board of Pharmacy (Board), Department of Consumer Affairs, under the authority of the following sections of the Business and Professions Code:

A. 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 or whose license has been procured by fraud or misrepresentation or issued by mistake. Unprofessional conduct shall include, but is not 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.

"...

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

"(l) The conviction of a crime substantially related to the qualifications, functions, or duties of a licensee under this chapter. . .

"(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.

"..."

C. 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, dentist, podiatrist, or veterinarian, 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, or a physician assistant pursuant to Section 3502.1. This

1 section shall not apply to the possession of any controlled substance by a manufacturer,
2 wholesaler, pharmacy, physician, podiatrist, dentist, veterinarian, certified nurse-midwife, nurse
3 practitioner, or physician assistant, when in stock in containers correctly labeled with the name
4 and address of the supplier or producer."

5 D. Section 4022 of the Code states in pertinent part:

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

8 "...

9 "(c) Any other drug or device that by federal or state law can be lawfully
10 dispensed only on prescription or furnished pursuant to Section 4006."

11 E. Section 4142 of the Code states:

12 "Except as otherwise provided by this article, no hypodermic needle or
13 syringe shall be sold at retail except upon the prescription of a physician, dentist, veterinarian, or
14 podiatrist."

15 F. Section 4326 of the Code states in pertinent part:

16 "(a) Any person who obtains a hypodermic needle or hypodermic
17 syringe by a false or fraudulent representation or design or by a forged or fictitious name, or
18 contrary to, or in violation of, any of the provisions of this chapter, is guilty of a misdemeanor.

19 "..."

20 G. Section 125.3 of the Code states in pertinent part that the
21 Board may request the administrative law judge to direct a licensee found to have committed a
22 violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the
23 investigation and enforcement of the case.

24 4. This Accusation is brought before the Board also under the authority of the
25 following sections of the Health & Safety Code:

26 A. H&S Code section 11170 states that "[n]o person shall prescribe,
27 administer, or furnish a controlled substance to himself."

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B. H&S Code section 11173 states in pertinent part:

“(a) No person shall obtain or attempt to obtain controlled substances, or procure or attempt to procure the administration of or prescription for controlled substances, (1) by fraud, deceit, misrepresentation, or subterfuge. . .

“...”

C. H&S Code section 11350(a) states that it is illegal to possess narcotic Schedule I controlled substances or any narcotic drugs in Schedules II, III, IV, or V without a legitimate prescription.

DRUGS

5. The following are all dangerous drugs, pursuant to Business & Professions Code section 4022 and are also controlled substances, if so identified below:

A. Morphine sulfate is a narcotic and a Schedule II controlled substance under H&S Code section 11055.

B. Butalbital is a barbiturate and a Schedule III controlled substance under H&S Code section 11056.

C. Nordiazepam is a benzodiazepine and a Schedule IV controlled substance under H&S Code section 11057.

CHARGES AND ALLEGATIONS

6. On July 31, 2002, Respondent was employed as a pharmacist at Scripps Memorial Hospital pharmacy in La Jolla, California.

7. On July 31, 2002, Respondent stole an intravenous (IV) bag of morphine from the hospital for his own use.

8. When interviewed about the missing morphine, Respondent admitted that he had taken it and to drug usage of ten years duration.

9. On or about August 2, 2002, Respondent illegally had a 16-gauge hypodermic needle in his pants pocket, which he admitted he had used to inject the morphine on July 31, 2002.

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1 10. On August 2, 2002, Respondent drug tested positive for morphine,
2 nordiazepam and butalbital.

3 11. On or about March 17, 2004, in Superior Court of Orange County Case
4 No. 03SM03715 M A, *People v. Donald Frank Liponi, Jr.*, Respondent sustained a misdemeanor
5 conviction (by a guilty plea) for driving with a blood alcohol level of 0.08 or greater, a violation
6 of Vehicle Code section 23152(b). Respondent was placed on three years informal probation,
7 ordered to pay various fines and fees, to attend and successfully complete an alcohol treatment
8 program and a MADD Victim’s Impact Panel.

9 This conviction is substantially related to the qualifications, functions, or duties of
10 a pharmacist.

11 **FIRST CAUSE FOR DISCIPLINE**

12 **(Unprofessional Conduct: Illegal Possession of Morphine)**

13 12. Respondent is subject to disciplinary action under both section 4301(o) in
14 conjunction with section 4060 and section 4301(j) in conjunction with H&S Code §11350(a) in
15 that, on or about July 31, 2002, Respondent illegally possessed morphine (i.e., without a valid
16 prescription), as more particularly alleged in paragraphs 6-8 above and incorporated herein by
17 reference.

18 **SECOND CAUSE FOR DISCIPLINE**

19 **(Unprofessional Conduct: Violation of H&S Code §11170)**

20 13. Respondent is subject to disciplinary action under section 4301(j) in
21 conjunction with H&S Code §11170 in that he furnished and administered morphine,
22 nordiazepam, and butalbital to himself, as more particularly alleged in paragraphs 6-10 above
23 and incorporated herein by reference. The furnishing or administering of each of these drugs is
24 separate and independent cause for discipline.

25 **THIRD CAUSE FOR DISCIPLINE**

26 **(Unprofessional Conduct: Illegal Possession of Hypodermic Needle)**

27 14. Respondent is subject to disciplinary action under section 4301(o) in
28 conjunction with section 4326(a) in that he illegally possessed a hypodermic needle, as more

1 particularly alleged in paragraphs 9 above and incorporated herein by reference.

2 **FOURTH CAUSE FOR DISCIPLINE**

3 **(Unprofessional Conduct: Obtaining Controlled Substance by Fraud, Deceit, Etc.)**

4 15 Respondent is subject to disciplinary action under section 4301(j) in
5 conjunction with H&S Code §11173 in that on or about July 31, 2002, Respondent obtained
6 morphine by fraud, deceit, or subterfuge, as more particularly alleged in paragraphs 6-10 above
7 and incorporated herein by reference.

8 **FIFTH CAUSE FOR DISCIPLINE**

9 **(Unprofessional Conduct: Moral Turpitude, Dishonesty, Corruption)**

10 16. Respondent is subject to disciplinary action under section 4301(f) in that
11 the allegations in paragraphs 6-10 above, and incorporated herein by reference, demonstrate
12 moral turpitude, dishonesty, and corruption.

13 **SIXTH CAUSE FOR DISCIPLINE**

14 **(Unprofessional Conduct: Substantially Related Criminal Conviction)**

15 17. Respondent is subject to disciplinary actions under section 4301(l) in that
16 the allegations in paragraph 11 above, and incorporated herein by reference, establish that
17 Respondent has been convicted of a crime substantially related to the qualifications, functions, or
18 duties of a Board licensee.

19 **PRAYER**

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

22 1. Revoking or suspending Original Pharmacist License Number RPH
23 35891, issued to Donald Frank Liponi, RPH;

24 2. Ordering Donald Frank Liponi, RPH to pay the Board of Pharmacy the
25 reasonable costs of the investigation and enforcement of this case, pursuant to Business and
26 Professions Code section 125.3;

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3. Taking such other and further action as deemed necessary and proper.

DATED: 8/10/04

P. F. Harris
PATRICIA F. HARRIS
Executive Officer
Board of Pharmacy
Department of Consumer Affairs
State of California
Complainant