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

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| In the Matter of the Accusation Against:<br><br>FAYE ANNE INOUE<br><br>Pharmacist License No. RPH 43413<br><br>Respondent. | Case No. 2992<br><br>OAH No. N2006080606 |

## PROPOSED DECISION

This matter was heard on November 1 and November 13, 2006, before Ann Elizabeth Sarli, Administrative Law Judge, State of California, Office of Administrative Hearings, in Sacramento, California.

Complainant, Patricia F. Harris, Executive Officer of the Board of Pharmacy, was represented by Kent Harris, Deputy Attorney General.

Faye Ann Inoue was represented by Steven J. Simas, Attorney at Law.

Oral and documentary evidence was submitted. The record was closed and the matter submitted for decision on November 13, 2006.

## FACTUAL FINDINGS

1. On July 24, 1990, the Board of Pharmacy (Board) issued Pharmacist License Number RHP 343413 to Faye Ann Inoue (respondent). The license was in full force and effect at all times relevant to this proceeding.

2. In July 2006, Patricia F. Harris made and filed the Accusation against respondent in her official capacity as Executive Officer of the Board.

3. Respondent timely filed a Notice of Defense to the Accusation, pursuant to Government Code sections 11505 and 11509. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an

independent adjudicative agency of the State of California, pursuant to Government Code section 11500, et.seq.

4. Respondent earned a doctorate in pharmacy from the University of the Pacific Pharmacy School. She worked for Longs Drugs for ten years as a clerk and then as a pharmacy intern, while she was in college and pharmacy school. She was licensed by the Board in 1990 and worked as a pharmacist at Payless Drugs for eight years. In 1996, she became a supervising manager at Payless Drugs. She then was assigned by Payless Drugs to "clean up" its pharmacies by streamlining personnel and operations in multiple pharmacies.

5. In 1998, respondent took a position at the Kaiser Permanente Pharmacy Call Center (call center), located in Livermore. There are no medications at the call center. Medications are shipped from another facility, located downstairs in the same building, from the call center. The call center has approximately 53 pharmacists on staff. The clerical staff takes calls for prescriptions and refills and enters patient addresses and payment information into a computer data base. The pharmacists consult with doctors and patients on the phone, check incoming prescriptions and checks prescriptions when they are ready to leave the call center for filling in the facility downstairs.

6. The call center's computerized records contained the patients' shipping addresses. At times, a patient would ask that medications be sent to a temporary location, such as a vacation home or relative's home. The computer system allowed the person inputting data to add this secondary shipping address, and delete it at a later point. Likewise, the computer system allowed the person inputting data to change the credit card number used to pay the bill. Respondent had unfettered access to the computerized patient records.

*Respondent's Drug Diversion*

7. Respondent suffered from migraine headaches and was prescribed Imitrex by her family doctor, Lina Dela Cruz, M.D. She was diagnosed as clinically depressed and was placed on Prozac in December of 2003. She also suffered back pain due to scoliosis. In 2004, she picked up a box and "threw out" her back. She missed two months of work and in July 2004, she returned to work.

8. When respondent returned to work in July of 2004, she began abusing her medications. The work environment was stressful and her migraines and back pain were persistent. Dr. Dela Cruz prescribed Hydrocodone/Acetaminophen (Vicodin) 5/500 40 tabs (a six day supply) and Carisoprodol (Soma) 350 mg 50 tablets (a 25-day supply). Respondent filled these prescriptions at the call center. In August 2004, she refilled these prescriptions, obtaining 50 tablets of each medication. On September 13, 2004, she refilled these prescriptions, obtaining 50 tablets of each medication. The next day, she filled a prescription for Hydrocodone/Acetaminophen 5/500 30 tabs, written by another physician, Thomas Field, Jr., M.D. In October 2004, she obtained 100 tablets of each medication by refilling her prescriptions. In the months of November and December 2004, and January

and February 2005, she obtained 50 tablets of each medication by refilling her prescriptions. In March 2005, she filled a Hydrocodone prescription for 30 tablets, written by Maxwell Inong, M.D. In April and May 2005, she received 50 tablets of each by refilling the prescriptions. The Hydrocodone prescription was a new prescription written by Dangci Xie, M.D. She did not refill these medications in June 2005. In July 2005, she received 50 tablets of each medication by refilling the prescriptions.

9. In November of 2004, respondent began diverting patient medications. When prescriptions for the medications she desired came into the call center, respondent "filled" or "refilled" the prescriptions, changed the patient address field to her own address and changed the patient billing credit card to her own. She authorized filling of the prescriptions and altered the patient records to indicate that prescriptions had been filled or refilled and mailed to the patient. After she was certain enough time had passed for the shipping to be accomplished, she changed the credit card data back to the patient's data. She kept a record of the patient records she accessed and of the patient's credit card number; so that she could return to the system and change the credit card data back to the original data.

10. On November 5, 2004, the call center received prescriptions for patient N.S., for Acetaminophen with Codeine 60 mg. 100 tablets, and Carisoprodol 350 mg. 100 tablets. Respondent authorized filling these prescriptions, put her own address in the alternate shipping address field, made a handwritten record of the patient's credit card number, and put her own credit card number in the billing field. As a result of her alterations, the prescriptions were mailed to respondent's home.[1] Seven days later, on November 12, 2004, respondent "refilled" N.S's prescription in the same manner.

11. On December 14, 2004, respondent selected another patient's prescriptions for diversion. L.G. had a prescription for Hydrocodone/Acetaminophine 5/500 150 tablets, Doxycyline (tetracycline) 100 mg. 20 tablets, and Carisoprodol 350 mg. 210 tablets. Respondent went through the same procedure, changing the patient record to reflect that L.G. had refilled these prescriptions and mailing the medications to her own home.

12. On January 20, 2005, respondent selected another patient, A.E. from the call center computer. This patient had a prescription for Hydrocodone/Acetaminophine 5/500 50 tablets, Diazepam (Valium) 5 mg. 50 tablets and Butalbital/APAP/caffeine 100 tablets. Respondent changed this patient's record to reflect that A.E. had refilled these prescriptions, and mailed the medications to her own home.

13. Also on January 20, 2005, respondent returned to patient N.S.'s prescriptions, and "refilled" the patient's Hydrocodone/acetaminophen 5/500 prescription of 100 tablets and the Carsisoprodol 350 mg. prescription for 200 tablets. Again she altered N.S.'s patient record and sent the medications to her own address.

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[1] Respondent billed the patient's co-pay of $33.20 to her own credit card. The evidence is that she billed the patient co-pay for all of the diverted drugs to her own credit card.

14. On February 16, 2005, respondent returned to patient N.S.'s patient record, and "refilled" four of the patient's prescriptions, sending herself 100 tablets of Hydrocodone/Acetaminophen, 200 tablets of Acetaminophen w/codeine, 200 tablets of Carisprodol and 60 tablets of Prochlorperazine (a medication used to control nausea) 10 mg.

15. On February 25, 2005, respondent again accessed patient N.S.'s records and "refilled" the patient's prescriptions, sending herself 100 tablets of Hydrocodone/ Acetaminophen, and 200 tablets of Carisprodol.

16. On April 25, 2005, respondent returned again to N.S.'s patient records and "refilled" the patient's prescriptions, sending herself 100 tablets of Hydrocodone/ Acetaminophen, 200 tablets of Carisprodol, and 100 tablets of Acetaminophen w/codeine.

17. On May 6, 2005, respondent diverted patient M.M.'s prescriptions for Amoxicillin 500 mg. 30 capsules and Hydrocodone/Acetaminophen 5/500, 120 tablets, in the same manner she had diverted prescriptions for N.S., L.G., and A.E.

18. Three days later, on May 9, 2005, respondent located two other patients, G.B. and B.L., who had prescriptions for Hydrocodone/Acetaminophen. She "refilled" their prescriptions, sending 240 tablets to her home.

19. Two days later, on May 11, 2005, respondent accessed the patient records of another patient, N.C., and refilled this patient's prescriptions, sending herself Prochlorperazine (a nausea medication) 10mg. 100 tablets, Belladona ALK W/PB , 200 tablets, Butalbital/APAP/Caffeine (a barbiturate), 180 tablets, and Tramadol (a painkiller with chemical similarities to narcotics) 50 mg. 120 tablets.

20. On July 29, 2005, respondent accessed the patient records of another patient, M.P. and refilled this patient's prescriptions, sending herself, Butalbital/APAP/Caffeine 200 tablets, Carisprodol 350 mg. 300 tablets Gabapentin (a drug used for epilepsy and pain relief) 300 mg., 500 tablets, Imitrex 50 mg. 1 tablet, and Ery-Tab (treatment for bacterial infections) 333 mg. EC 200 tablets.

21. In total, between November 5, 2004 and July 29, 2005, respondent diverted 35 prescriptions for controlled substances and dangerous drugs, totaling 4,855 pills, intended for eight patients. Several of the drugs respondent diverted are dangerous drugs under Business and Professions Code section 4022, and are listed as Schedule III controlled substances under Business and Professions Code section11056. These drugs are Hydrocodone/Acetaminophen (Vicodin), Acetaminophen/Codeine (Tylenol #3, #4), and Diazepam (valium).

22. Several of the drugs respondent diverted are dangerous drugs under Business and Professions Code section 4022, but are not scheduled substances. These drugs are Carisprodal (Soma), Doxycyline(Vibramycin), Proclorperazine (Compazine), Amoxicillin,

Belladona alk w/Phenobarb (Donnatal), Butalbital/Acetaminophen/caffeine (Fioricet), Sumatriptan (Imitrex), Gabapentin (Neurontin) and Erythromycin (Ery-Tab).

23. In May of 2005, a patient called the call center spoke to a clerk. The patient complained that she had not received her medications by mail. The clerk checked the patient shipping address in the computer records and recognized respondent's address as the shipping address. An investigation ensued and respondent's diversions came to light.

24. On August 11, 2005, respondent was confronted by Kaiser Permanente security personnel and, after denying her involvement, admitted her drug diversion. She resigned her position immediately.

*Respondent's Drug Use on Duty*

25. Respondent worked as a pharmacist while under the influence of dangerous and controlled substances. Respondent did not admit this,[2] nor did any drug testing confirm that she worked while under the influence. However, the circumstantial evidence is strong that she did indeed work while under the influence of controlled substances and dangerous drugs.

26. Respondent testified that she diverted Hydrocodone/Acetaminophen (Vicodin) from patients because "I felt I needed Vicodin to get through the day." She testified that she was "only supposed to take one tablet a day" of her own prescription for Vicodin. She testified that she was afraid that if she asked her doctor for more of this medication, she would be viewed as weak. She testified that she never took more than eight tablets a day and "normally ½ a tablet is what I would take in a day."

27. Respondent's testimony as to the extent of her use of Vicodin was unclear, contradictory, in conflict with the nature and extent of her diversion, and thus entitled to no weight. For instance, respondent's prescriptions for Vicodin from Dr. Dela Cruz provided dosages of about six tablets per day. Dr. Inong's prescription for Vicodin provided dosages of 10 to 15 tablets per day of the same dosage. And Dr. Field's prescription allowed for 10 tablets a day. The evidence of respondent's prescribed dosages of Vicodin contradict her testimony that she was only supposed to take one tablet per day and thus was embarrassed to ask for what she felt she really needed to get through the day.

28. The evidence also shows that respondent had in her possession, from filled prescriptions and diverted drugs (the vast majority), the following number of tablets of Vicodin, Carisoprodol (Soma), and other medications which have effects on cognition.

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[2] Respondent implied that she never worked as a pharmacist while under the influence of any of the medications she was prescribed or had diverted. She was not asked directly whether she worked while under the influence.

| Date | Drug | Quantity |
|---|---|---|
| July 2004 | Vicodin | 40 |
| | Soma | 50 |
| August 2004 | Vicodin | 50 |
| | Soma | 50 |
| September 2004 | Vicodin | 80 |
| | Soma | 50 |
| October 2004 | Vicodin | 100 |
| | Soma | 100 |
| November 2004 | Vicodin | 50 |
| | Soma | 250 |
| | Acetaminophen w/Codeine | 200 |
| December 2004 | Vicodin | 200 |
| | Soma | 260 |
| January 2005 | Vicodin | 200 |
| | Soma | 250 |
| | Diazepam(Valium) | 50 |
| | Butalbital/Acetaminophin/Caffeine | 100 |
| February 2005 | Vicodin | 250 |
| | Soma | 450 |
| | Acetaminophin w.Codeine | 200 |
| March 2005 | Vicodin | 30 |
| | | |
| | Diazepam (Valium) | 10 |
| April 2005 | Vicodin | 150 |
| | Soma | 250 |
| | Acetaminophin w/Codeine | 200 |
| May 2005 | Vicodin | 410 |
| | Soma | 50 |
| | Butalbital/Acetaminophin/Caffeine | 180 |
| | Tramadol | 120 |
| | | |
| | | |
| July 2005 | Vicodin | 54 |
| | Soma | 350 |
| | Butalbital/Acetaminophin/Caffeine<br>Gabapentin (Neurontin) | 200<br>500 |

29. There was no evidence that respondent sold, gave away or "stockpiled"[3] these medications. She admitted that she started abusing medications when she returned to work in July of 2004. She admitted that she was addicted to Vicodin and needed it to get through the day. Her addiction, her extensive thefts, and her possession of quantities of up to 1,104 tablets of medications, like Soma and Vicodin, which affect cognition,[4] support a finding that respondent used the medications she was prescribed and the medications she diverted during the work day.

30. There is additional persuasive evidence that respondent used these medications during her workdays. She worked a full week and some weekends. There was little non-working time in which to consume the large quantities of medications she stole. She was so carried away by her addiction that she repeatedly stole patient medications to assuage her habit. It is not reasonable to conclude that she would exercise restraint and use the drugs only during non-work hours.

31. The observations of several co-workers support a finding that respondent worked while under the influence of dangerous and controlled substances. Cynthia Flores observed respondent suffered from migraines "very frequently, at least once a week," and that she worked through the day with these migraines. Ms. Flores could tell "just by looking at her" that respondent was working with a migraine. She observed that respondent was "very stressed out." She attributed respondent's condition to the stresses present in the workplace that year.

32. Gary DeGuire, a pharmacist and the pharmacy call center manager, has worked at the call center since 1998. Between 2004 and 2005, he observed that respondent was "high strung" and she said she had migraines. There were days when she "looked out of it and I assumed she had migraines and continued to work with the headaches." "She seemed impaired and I attributed it to migraines." She had "glassy eyes" which he attributed to migraines and not narcotic use. He described a time when she told him she felt so bad she "felt like driving off the Altamont." He observed that sometimes she would slur her words, and he attributed this to her migraines and medication for migraines.

33. Peter Wong, a pharmacist co-worker, observed that respondent was under a lot of stress at work. She was often emotional and cried on one occasion, but he attributes that to the work place stresses. He testified that he is her close friend and he saw no "signs of addiction" when working with her. He observed that she did leave work at the noon hour with headaches, would take Imitrex, and return. Sometimes she would be unable to return.

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[3] Respondent testified that she diverted the antibiotics and related medications because she often got respiratory infections and it took ten days to get a doctor's appointment. She did not want to lose time from work and wanted these medications on hand to combat infections. Thus, there was some evidence she "stockpiled" these medications. There was no testimony or other evidence that she hoarded the Soma, Vicodin, Valium, Butilbatil, Codeine, Gabapentin or Tramadol.

[4] As set forth in the table above, in late July 2005, respondent had a total 1104 tablets of medications which affect cognition; Vicodin, Soma, Butalbital and Gabapentin (Neurontin). In mid February 2005, she had a total of 900 tablets of Vicodin, Soma and Acetaminophin w. Codeine.

After respondent was apprehended, she admitted to him that she had become addicted to pain medications.

*Factors in Justification, Mitigation, and Aggravation*

34. 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's stresses at work, her "proud and perfectionist personality"[5], and her physical pain, may explain her slide into drug use. However, these are not justifications for her thefts or for her use of drugs on the job. Nor do they mitigate respondent's conduct.

35. It is also not mitigatory, as respondent suggests, that she paid for the drugs rather than allowing the patient to be charged. The fact that a person could have stolen even more from a victim, and chose not to, is not mitigation.[6] Respondent also argues her conduct is mitigated because patients were sent replacement prescriptions for those "lost" in the mail. The evidence was that the call center received at least 10 to 15 calls a day regarding prescriptions lost in the mail and responded by mailing the prescriptions again. Respondent admitted that she did not take replacement prescriptions into consideration when she diverted the patient prescriptions. She did not think about the problems the patients would face getting their medications, because she was concerned only with herself at the time. This factor would only mitigate respondent's conduct if she relied upon this policy to ensure that the patient would get his or her medications immediately. She did not. Not only did she not concern herself with the patient, but victimized patients were subjected to the delays, inconveniences and suspicions about their own drug misuses.

36. In mitigation, respondent had a long period of licensure and no previous record of discipline. She introduced evidence that she has been and remains a skilled pharmacist.

37. In aggravation, respondent's diversion continued for nine months, and all indications are it would have continued had she not been caught. In aggravation, respondent endangered eight call center patients by depriving them of pain and infection fighting medications, often diverting multiple, consecutive prescriptions. In aggravation, respondent subjected the eight call center patients to inconvenience and the risk they would be labeled drug seeking, when they complained that they had not received their medications.

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[5] As set forth in Factual Finding 42, respondent believes has a proud and perfectionist type of personality.

[6] Respondent's counsel argues that respondent did not commit theft because she paid for the medications she diverted. Respondent, herself, did not take this position. Such a rationalization would not speak well of respondent's rehabilitation. Clearly, she was not entitled to receive these medications from Kaiser at the reduced co-pay charged to patients. And even if she had somehow managed to pay Kaiser's full price for these medications, she took them from Kaiser without Kaiser's knowledge or consent.

*Rehabilitation Evidence*

38. Respondent introduced evidence that she has been working toward rehabilitation from the day she resigned from employment at Kaiser. On that day, she signed up for the Maximus Program (Maximus), the diversion and rehabilitation program with which the Board of Pharmacy and other entities contract for diversion services. She entered a residential treatment program on August 26, 2005, at River City Recovery Center-Starlight Program. She successfully completed 30 days of treatment on September 28, 2005. She did not work during this time and after the inpatient treatment. She delayed going back to work for a few more months while she concentrated on her recovery. She began working as a pharmacist at Neighbor Care pharmacy in Lodi six or seven months ago.

Pursuant to respondent's contract with Maximus, she is limited in how many hours she may work and her work is supervised. Her supervisor, the pharmacist in charge, Glen Kaiser, testified as to her excellent work, honesty and good work ethic. Respondent had access to medications at Neighbor Care Pharmacy and there have been no reported problems with missing medications. Respondent ceased working at Neighbor Care Pharmacy in October 2006, due to the concerns of Maximus personnel regarding the matters set forth in the Factual Findings below. Dr. Kaiser would enthusiastically welcome her back to Neighbor Care Pharmacy when she is able to return.

39. Pursuant to respondent's contract with Maximus, she attends individual and group counseling and a 12-step program. In January, the Maximus Clinical Assessment noted that she was doing well in counseling and group and was committed to recovery. She was tested on a schedule of three times a month for prohibited substances and had tested negative each time.

40. In April, May, and June of 2006, respondent's testing for prohibited substances indicated the presence of small amounts of Ethyl Glucuronide (biomarkers for alcohol) in respondent's specimens. Respondent was not advised of these findings until after June 2006. She was able to avoid subsequent positive test results by avoiding the many foods and substances (i.e. Purell lotion) which contain alcohol and are know to increase Ethyl Glucuronide the body. But, as a result of the positive Ethyl Glucuronide readings, respondent's random testing schedule increased to 42 times per year, rather than 36.

41. The testing agency, Compass Vision, required participants to keep a credit card number on file so that payment for all testing services was guaranteed. Twice in 2006, respondent allowed her credit card to reach its limit, so that no further charges could be made against it. Compass Vision would not permit respondent to "test" for several days, until she had made other financial arrangements by mail. Her account was put on hold and as a result, respondent missed testing scheduled for June 24, June 28, July 6 and July 7, 2006.

Respondent again allowed her credit card to reach its limit in September 2006. As a result, she was not permitted to test on testing dates September 22, September 27, October 3 and October 20, 2006. According to Maximus policy, all missed tests were regarded as positive tests.

42. Respondent was evaluated by a psychiatrist, Benjamin Kaufman, on October 27, 2006. His evaluation consisted of a review of respondent's Maximus records and a one-and-a-half hour interview with respondent. He found that she had identified and was working on the psychological problems that led to her self-medication. She realized she had a penchant for perfection and did not tolerate flaws in herself or others. She was learning to be more realistic in her expectations of herself and others. She admitted to him that she had an addictive personality and Dr. Kaufman found respondent to be sincere and enthusiastic about her rehabilitation.

43. Respondent's testimony was also sincere and credible. It is clear she regrets her diversion and drug use. It is clear she is working on her personal problems. However, she did focus extensively on explanations for her conduct, which could be construed as blaming others. For instance, she focused extensively on the personnel problems at work that caused her stress. A manager was having an affair with another employee and this was affecting everyone negatively. She focused on her belief that her Asian upbringing caused her to not want to appear weak and go to the doctor for medications. It is important, of course, for respondent to explore how her upbringing and environment may trigger her desire to self-medicate. But it was unclear, due to respondent's preoccupation with these stressors during her testimony, whether respondent truly understood that life's stressors do not mitigate her misconduct. It was unclear whether respondent understood that her conduct of diverting drugs and working while under the influence would never be an appropriate response to any stressor.

44. Although respondent has made substantial efforts toward rehabilitation, she has not taken seriously her obligation to demonstrate that she is not using drugs. Her failure to keep mindful of her credit card balance in June of 2006 may be attributed to inexperience. But her failure to do so again, in September, is inexcusable and naturally raises suspicions about her sobriety during late September and most of October when she went untested. Additionally, respondent blames Compass Vision and Maximus for her credit issues. She maintains that they test her more often than they should. She blames Maximus for her having to test 40 times a year rather than 36. She claims that if Maximus had told her early on about her positive Ethyl Glucuronide results, she could have avoided contact with contaminants and thus avoided the positive tests that led to her increased testing schedule. She maintained that she would not have missed so much testing if Compass Vision did not take so long to process its mail after she sent it updated credit card information.

Respondent's excuses undermine her otherwise positive rehabilitation evidence. She is not taking responsibility for herself. She is not cognizant of the need to show at all times, particularly during times she is working as a pharmacist, that she may be trusted with medications and is fit to serve the public. Compliance with random fluid testing should be a priority in her life. Negative results on random drug screening, over a sustained period of time, is compelling evidence that one has been able to resist the use of drugs and thus does not pose a risk to the public.[7]

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[7] Respondent's counsel expressed concern that the Board manipulated Maximus employees into revoking respondent's privilege to work while in the program. Respondent's counsel opined that Board employees retaliated

45. Even if respondent had been drug tested consistently since August of 2005, and had negative results, she would be able to demonstrate only 15 months of sobriety. So little time has passed since she began her rehabilitation, it is not yet possible to determine whether respondent can sustain her sobriety through some of life's vagaries.

*Costs*

46. 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 reasonable costs of investigation and prosecution of this matter were $4,197.75. Complainant established that the scope of the investigation was appropriate to the alleged misconduct. Complainant prevailed on all of the charges.

Respondent did not make an argument that she was unable to pay costs. She did testify that she was having financial difficulties because her rehabilitation programs were costing about $1,000 a month that she did not work for seven months after she resigned from Kaiser Permanente, and that her husband works as a chiropractor.

## LEGAL CONCLUSIONS

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

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against respondent because she chose to defend against the Accusation. Respondent's counsel expressed concern that Maximus employees were pressured into revoking respondent's work privilege in order to undermine the evidence of rehabilitation she would present at hearing. It is not relevant in this proceeding what actions Maximus took in its contractual relationship with respondent, or why it took such action. It is not relevant that Maximus decided respondent should not work, just as it is not relevant that Maximus initially allowed respondent to work. The inquiry here is what evidence of rehabilitation respondent presents at hearing, not whether Maximus was justified in taking certain actions under its contract with respondent.

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.)

*Diverting Dangerous Drugs and Controlled Substances*

3. Business and Professions Code section 4301, subdivision (f), provides that the board shall take action against any holder of a license who is guilty of unprofessional conduct, including:

> (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.

It was established by clear and convincing evidence that respondent is subject to discipline under Business and Professions Code section 4301, subdivisions (f), due to her fraudulent diversion of controlled substances and dangerous drugs, as set forth in Factual Findings 1 through 24.

4. 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:

> (j) 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 11173, subdivision (a), provides:

> (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; or (2) by the concealment of a material fact.

It was established by clear and convincing evidence that respondent is subject to discipline under Business and Professions Code section 4301, subdivision (j), and Health and Safety Code section 11173, subdivision (a), due to her fraudulent diversion of controlled substances and dangerous drugs, as set forth in Factual Findings1 through 24.

5. 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:

> (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.

It was established by clear and convincing evidence that respondent is subject to discipline under Business and Professions Code section 4301, subdivision (o), and Health and Safety Code section 11173, subdivision (a), due to her fraudulent diversion of controlled substances and dangerous drugs, as set forth in Factual Findings 1 through 24.

*Unlawful Possession of Controlled Substances*

6. 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...

It was established by clear and convincing evidence that respondent violated Business and Professions Code section 4060, as set forth in Factual Findings 1 through 24.

7. Health and Safety Code section 11350 provides in pertinent part:

> (a) Except as otherwise provided in this division, every person who possesses (1) any controlled substance specified in subdivision (b) or (c), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the state prison.

> (b) Except as otherwise provided in this division, every person who possesses any controlled substance specified in subdivision (e) of Section 11054 shall be punished by imprisonment in the county jail for not more than one year or in the state prison.

It was established by clear and convincing evidence that respondent was subject to criminal prosecution under Health and Safety Code section 11350, for her illegal possession of controlled substances, as set forth in Factual Findings 1 through 24. Respondent is thus subject to discipline under Business and Professions Code section 4301, subdivisions (j) and (o).

*Unlawful Self-Administration of Controlled Substances*

8. Business and Professions Code section 4301, subdivision (h), provides that the board shall take action against any holder of a license who is guilty of unprofessional conduct, including:

> (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, to a person holding a license under this chapter, or to any other person or to 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.

Health and Safety Code section 11170 provides that "No person shall prescribe, administer, or furnish a controlled substance for himself."

It was established by clear and convincing evidence that respondent is subject to discipline under Business and Professions Code section 4301, subdivisions (h), (j) and (o) and Health and safety Code section 11170, as set forth in Factual Findings1 through 33.

*Working as a Pharmacist While Under the Influence*

9. Business and Professions Code section 4327, provides in pertinent part:

> Any person who, while on duty, sells, dispenses or compounds any drug while under the influence of any dangerous drug or alcoholic beverages shall be guilty of a misdemeanor.

It was established by clear and convincing evidence that respondent is subject to discipline under Business and Professions Code sections 4301, subdivision (o), and 4327, as set forth in Factual Findings1 through 33.

*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 Factual Finding 46 the reasonable costs of investigation and prosecution of this mater were established as $4,197.75.

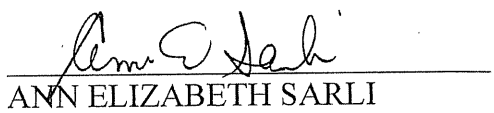
*Rehabilitation*

11. The factors in aggravation were weighed and balanced against the factors in mitigation and rehabilitation. As set forth in Factual Findings 34 through 45, respondent's participation in a residential treatment program and the Maximus diversion program are laudable. Her sincerity is clear. However, respondent has participated in recovery efforts for less than a year and a half. She was involved in drug use and diversion for a lengthy period of time. She used her position as a pharmacist to repeatedly steal drugs destined for multiple patients, and in doing so threatened their health and safety. On balance, given the nature and extent of respondent's conduct, it is too soon in respondent's recovery to issue her a probationary license.

ORDER

License number RPH 43413, issued to respondent Faye Anne Inoue, is revoked pursuant to Legal Conclusions 1 through 9, separately and together. Respondent shall relinquish her 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 her revoked license for one year from the effective date of this decision. Upon reinstatement, respondent shall pay to the board its costs of investigation and prosecution in the amount of $4,197.75. Said amount shall be paid in full prior to the reinstatement of her license. If respondent fails to pay the amount specified, her license shall remain revoked.

Dated: December 11, 2006



ANN ELIZABETH SARLI
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:<br><br>FAYE ANNE INOUE<br>1031 West Lincoln Avenue<br>Stockton, CA 95207<br><br>Respondent. | Case No. 2992<br><br>OAH No. N2006080606 |

**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 February 21, 2007.

IT IS SO ORDERED January 22, 2007.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By William Powers
WILLIAM POWERS
Board President

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Attorneys for Complainant

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

| | |
|---|---|
| In the Matter of the Accusation Against:<br><br>FAYE ANN INOUE<br>1031 West Lincoln Ave.<br>Stockton, CA 95207<br><br>Pharmacist License No. RPH 43413<br><br>Respondent. | Case No. 2992<br><br>**ACCUSATION** |

Complainant alleges:

PARTIES

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

2. On or about July 24, 1990, the Board of Pharmacy issued Pharmacist License Number RPH 43413 to Faye Ann Inoue (Respondent). The Pharmacist License was in full force and effect at all times relevant to the charges brought herein and will expire on September 30, 2007, unless renewed.

## JURISDICTION

3. This Accusation 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 unless otherwise indicated.

4. Section 4301 of the Code states:

"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.

...

"(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, to a person holding a license under this chapter, or to any other person or to 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 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.

5. Section 4022 of the Code states:

"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.

"(b) Any device that bears the statement: "Caution: federal law restricts this device to sale by or on the order of a _____," "Rx only," or words of similar import, the blank to be filled in with the designation of the practitioner licensed to use or order use of the device.

"(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."

5. Section 4327 of the Code states that "Any person who, while on duty, sells, dispenses or compounds any drug while under the influence of any dangerous drug or alcoholic beverages shall be guilty of a misdemeanor"

6. Section 4060 of the Code states:

"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 section shall not apply to the possession of any controlled substance by a manufacturer, wholesaler, pharmacy, physician, podiatrist, dentist, veterinarian, 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.

"Nothing in this section authorizes a certified nurse-midwife, a nurse practitioner, or a physician assistant to order his or her own stock of dangerous drugs and devices."

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

8. Section 118, subdivision (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.

8. Health and Safety Code section 11170 states in pertinent part that no person shall prescribe, administer, or furnish a controlled substance for himself.

9. Health and Safety Code section 11173 states in pertinent part:

"(a) No person shall obtain or attempt to obtain controlled substances...(1) by fraud, deceit, misrepresentation, or subterfuge; or (2) by the concealment of material fact."

10. Health and Safety Code section 11350 states in pertinent part:

"(a) Except as otherwise provided in this division, every person who possesses....(2) any controlled substance classified in Schedule III...unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the state prison."

CONTROLLED SUBSTANCES

11. "Vicodin" is the brand name of the generic drug Hydrocodone/Acetaminophen, used for the control of pain. Vicodin is a dangerous drug under Business and Professions Code section 4022, and a Schedule III Controlled Substance under Health and Safety Code section 11056(e)(4).

12. "Tylenol#3, #4" is the brand name for the generic drug Acetaminophen/Codeine, used for the control of pain. It is a dangerous drug under Business and Professions Code section 4022, and a Schedule III Controlled Substance under Health and Safety Code section 11056(e).

13. "Valium" is the brand name for the generic drug Diazepam, used for the control of nerves. It is a dangerous drug under Business and Professions Code section 4022, and a Schedule III Controlled Substance under Health and Safety Code section 11056(d)(8).

14. "Soma" is the brand name for the generic drug Carsiprodal, used for the control of muscle spasms. It is a dangerous drug under Business and Professions Code section 4022.

15. "Vibramycin" is the brand name for the generic drug Doxycyline, used for the control of infections. It is a dangerous drug under Business and Professions Code section 4022.

16. "Compazine" is the brand name for the generic drug Proclorperazine, used for nausea. It is a dangerous drug under Business and Professions Code section 4022.

17. Amoxicillin is used for the control of infections. It is a dangerous drug under Business and Professions Code section 4022.

18. "Donnatal" is the brand name for the generic drug Belladonna alk w/Phenobarb, used as an anti spasmodic. It is a dangerous drug under Business and Professions Code section 4022.

19. "Fioricet" is the brand name for the generic drug Butilbital/Acetaminophen/Caffeine, used for headaches. It is a dangerous drug under Business and Professions Code section 4022.

20. "Imitrex" is the brand name for the generic drug Sumatriptan, used for headaches. It is a dangerous drug under Business and Professions Code section 4022.

21. "Neurontin" is the brand name for the generic drug Gabapentin, used for the control of seizures. It is a dangerous drug under Business and Professions Code section 4022.

22. "Ery-Tab" is the brand name for the generic drug Erythromycin, used for the control of infections. It is a dangerous drug under Business and Professions Code section 4022.

FIRST CAUSE FOR DISCIPLINE

(Diverting Dangerous Drugs and Controlled Substances)

23. On and between the dates of 11/7/04 and 7/29/05, respondent was employed as a licensed pharmacist at Kaiser Livermore Pharmacy, a large volume, fully automated mail-out center, which serves other Kaiser pharmacies as well as patients. Between the above dates respondent diverted at least 35 prescriptions for controlled substances and dangerous drugs, totaling 4,855 pills intended for at least 8 individual patients[1]. The diversion was accomplished by entering the computer system and fraudulently changing the shipping address for the prescriptions from that of the patients, to her own Stockton address. Respondent paid for the prescriptions using her own credit card in an effort to hide the diversions. Respondent further self-administered the diverted controlled substances and dangerous drugs during the same time period, also working as a licensed pharmacist while under the influence of said drugs.

24. Respondent is subject to disciplinary action under Business and Professions Code sections 4301 (f), (j), and (o) as well as Health & Safety Code section 11173(a) for her fraudulent diversion of controlled substances and dangerous drugs as set forth in paragraph 23 above.

SECOND CAUSE FOR DISCIPLINE

(Unlawful Possession of Controlled Substances)

25. Respondent is subject to disciplinary action under Business and Professions Code sections 4060, 4301 (j), and (o), as well as Health & Safety Code section 11350 for her unlawful possession of controlled substances as set forth in paragraph 23 above.

THIRD CAUSE FOR DISCIPLINE

(Unlawful Self-Administration of Controlled Substances)

26. Respondent is subject to disciplinary action under Business and Professions Code sections 4301(h), (j), and (o), as well as Health & Safety Code section 11170

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1. The diverted drugs were those listed in paragraphs 11 through 22 above.

for her self-administration of controlled substances without a valid prescription as set forth in paragraph 23 above.

FOURTH CAUSE FOR DISCIPLINE

(Working as a Pharmacist While Under the Influence)

27. Respondent is subject to disciplinary action under Business and Professions Code sections 4327 and 4301 (j), and (o), in that she. while on duty, sold, dispensed or compounded drugs while under the influence of controlled substances and/or dangerous drugs, as set forth in paragraph 23 above.

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 43413, issued to Faye Ann Inoue;

2. Ordering Faye Ann Inoue to pay the Board of Pharmacy the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;

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

DATED: 6/29/06

P. F. Harris

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

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