

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

In the Matter of the Petition to Revoke
Probation Against:

GARY MAC MULLEN,

Pharmacist License No. RPH 30639,

Respondent.

Case No. 3183

OAH No. 2007110133

DECISION AFTER NONADOPTION

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on June 23, August 4 and 31, and October 27, 2009, in San Diego, California.

Kathleen B.Y. Lam, Deputy Attorney General, Department of Justice, represented complainant Virginia Herold, Executive Officer of the Board of Pharmacy.

Gregory P. Matzen, Lewis Brisbois Bisgaard & Smith LLP, represented respondent Gary Mac Mullen, who was present throughout the hearing.

The matter was submitted on October 27, 2009.

The proposed decision of the Administrative Law Judge was submitted to the California State Board of Pharmacy ("Board") on December 1, 2009. After due consideration thereof, the Board declined to adopt said proposed decision and thereafter on January 26, 2010 issued an Order of Non-adoption. Subsequently, on March 15, 2010, the Board issued an Order Fixing Date for Submission of Written Argument.

Written argument having been received from both parties and the time for filing written argument in this matter having expired, and the entire record, including the transcript of said hearing having been read and considered, the Board of Pharmacy pursuant to Section 11517 of the Government Code hereby makes the following decision and order:

FACTUAL FINDINGS

Jurisdictional Matters

1. On September 30, 1976, the board issued to respondent Original Pharmacist License No. RPH 30639. Effective September 24, 2004, respondent's license was placed on probation for three years.

2. On September 21, 2007, complainant, in her official capacity, signed the petition to revoke probation. On the same date, the petition and other required jurisdictional documents were served on respondent. On October 8, 2007, respondent signed and thereafter submitted a notice of defense. On May 6, 2008, complainant signed and thereafter served on respondent the first amended petition to revoke probation. On February 19, 2009, complainant served on respondent a notice of continued hearing. On September 2, 2009, complainant signed and thereafter served on respondent the second amended petition to revoke probation.

3. On June 23, 2009, the record was opened and jurisdictional documents were received. On June 23 and August 4, 2009, sworn testimony was given and documentary evidence was introduced. On August 31, 2009, documentary evidence was introduced, complainant's motion to amend the accusation was granted, and respondent's motion to continue the hearing was granted. On October 27, 2009, closing argument was presented and the matter was submitted.

The Prior Disciplinary Proceeding

4. On August 20, 2003, Patricia F. Harris, then Executive Director of the board, signed in her official capacity an accusation in agency case 2608, OAH Case No. L2003090503. The accusation alleged ten causes for discipline relating to respondent's alleged unprofessional conduct in the filling of prescriptions for certain patients, including furnishing a prescription without physician authorization, furnishing drugs without a prescription, issuing a false prescription and issuing prescriptions in violation of laws related to the practice of pharmacy. In addition, the accusation alleged causes for discipline related to the failure to keep current inventory and maintain disposition records.

5. On August 25, 2004, the board adopted a Stipulated Settlement and Disciplinary Order that respondent had signed on July 8, 2004. The disciplinary order became effective on September 24, 2004.

Pursuant to the settlement, respondent agreed that "some of the charges and allegations" in the accusation, "if proven at a hearing, constitute cause for imposing discipline upon his Pharmacist License" and that complainant "could establish a factual basis for some of the charges in the Accusation"

The disciplinary order provided that respondent's license was revoked, but that the revocation was stayed and respondent was placed on probation for three years under certain terms and conditions. The terms of probation included, in pertinent part:

a. **Obey All Laws.** Respondent shall obey all state and federal laws and regulations substantially related to or governing the practice of pharmacy. (Condition 2.)

b. **Reporting to the Board.** Respondent shall report to the Board quarterly. The report shall be made either in person or in writing, as directed. Respondent shall state under penalty of perjury whether there has been compliance with all the terms and conditions of probation. If the final probation report **is not** made as directed, probation shall be extended automatically until such time as the final report is made and accepted by the Board. (Condition 3.)

c. **Notice to Employers.** Respondent shall notify all present and prospective employers of the decision in case number 2608 and the terms, conditions and restrictions imposed on Respondent by the decision. Within 30 days of the effective date of this decision, and within 15 days of Respondent undertaking new employment, Respondent shall cause his direct supervisor, pharmacist-in-charge and/or owner to report to the Board in writing acknowledging the employer has read the decision in case number 2608.

If Respondent works for or is employed by or through a pharmacy employment service, Respondent must notify the direct supervisor, pharmacist-in-charge, and/or owner at every pharmacy of the and terms conditions of the decision in case number 2608 in advance of the Respondent commencing work at each pharmacy.

"Employment" within the meaning of this provision shall include any full-time, part-time, temporary, relief or pharmacy management service as a pharmacist, whether the Respondent is considered an employee or independent contractor. (Condition 7.)

d. **No Supervision.** Respondent shall not supervise any ancillary personnel, including, but not limited to, registered pharmacy technicians or exemptees, of any entity licensed by the Board. (Condition 17.)

The Petition to Revoke Probation

6. The petition to revoke probation alleged the following violations:

a. Respondent failed to provide the Board with a work schedule in his quarterly reports as requested (violation of Condition 3).

b. Respondent (i) failed to have his direct supervisors, pharmacists-in-charge, and owners report to the Board, within 15 days of undertaking new employment, acknowledging that the employer had read the decision in case 2608; and (ii) while

employed by an employment service, failed to notify the direct supervisor, pharmacist-in-charge and/or owner at every pharmacy of the terms and conditions of the decision in case 2608 before commencing work at each pharmacy (violation of Condition 7).

c. Respondent failed to notify the pharmacist-in-charge that he was not allowed to supervise pharmacy technicians (violation of Condition 17).

d. Respondent, on or about August 10, 2005, was cited by the Board and fined \$250 for dispensing a prescription incorrectly on March 1, 2005, in violation of Title 16, California Code of Regulations, section 1716 (variation from prescriptions) (violation of Condition 2).

Quarterly Reports (Condition 3)

7a. According to Condition 3 of the terms and conditions of respondent's probation, respondent was required to report to the board "quarterly" and the report was required to be "either in person or in writing, **as directed.**" (Emphasis added.) The Board typically schedules probationers for an "initial probation conference" with their probation monitor within a month of the effective date of the probation. (AR June 23, 2009 75:1-2.) At this initial conference, a board staff person goes over each term and condition of probation to make sure it is understood. (AR June 23, 2009 76:11-13.)

7b. In October 2004, board personnel met with respondent after he was placed on probation to discuss all of the terms and conditions of his probation (AR June 23, 2009 76:1-6, 109:12-15; August 4, 2009 81:2-7.) Respondent was also provided with a quarterly report instruction sheet. The sheet stated that quarterly reports "are due to the board by the 10th of January, April, July, and October of each year during which you are on probation." Among other matters, the sheet specified for inclusion in quarterly reports, "Number of hours you work, work schedule for the next quarter, and general description of your duties and responsibilities." The sheet further stated, in bold face type, "Quarterly reports must be signed and dated." At the completion of respondent's initial conference, respondent executed a declaration stating that the terms and conditions of his probation had been fully explained to him and that he understood them. (AR June 23, 2009 77:1-7; Ex. 10, p. 228.) At hearing, respondent admitted that he understood the terms and conditions of his probation when he signed the declaration. (AR August 4, 2009 85:1-8.)

8. Respondent submitted reports to the board as follows:

a. On April 17, 2005, respondent submitted a quarterly report, stating that he worked at a Rite Aid pharmacy "mostly" in Coalinga, about 60 hours per week for the preceding year, "and will continue to work during the next quarter if not the next 2 years plus."

b. On August 2, 2005, respondent submitted a quarterly report, stating that he worked full time at a Rite Aid pharmacy in Coalinga "and hope to continue."

c. On November 2, 2005, respondent submitted a quarterly report, stating that he was working at a Rite Aid pharmacy in Dinuba, California, between 36 to 60 hours per week "and will be working that shift for the next quarter." He described his duties as taking, filling, processing and consulting on prescriptions.

d. On February 15, 2006, respondent submitted a quarterly report, stating that he worked between 36 and 55 hours per week "and will be working that same shift for the next quarter." He described his duties in the same manner as above.

e. On May 5, 2006, respondent submitted a quarterly report, stating that he had been working at a Rite Aid pharmacy in Dinuba, California, between 30 to 60 hours per week, and describing his duties in the same manner as above. He added, "I have been looking for alternative pharmacy work near my home and family but due to my restriction I am having problems finding new employment."

f. On August 14, 2007,¹ respondent submitted a quarterly report, stating that he worked "in the field of pharmacy," between 36 and 50 hours per week "and hope to continue while physically able." He described his duties as above.

g. On an unknown date, respondent submitted a quarterly report, stating that he worked at a Rite Aid pharmacy "mostly" in Coalinga, about 60 hours per week for the preceding year, "and will continue to work during the next quarter if not the next 2 years plus."

9. The board sent respondent several letters in reference to Condition 3. A letter dated January 24, 2005, stated, "Pursuant to Term 3, you are required to report to the board quarterly. Board records indicate that you failed to submit your first quarterly report that was due by January 10, 2005. I have enclosed is [sic] an outline for quarterly reporting, you must submit your first quarterly report within 15 days." A letter dated April 14, 2005, stated, "Additionally, as you are working at several different Rite Aid locations, please submit to the board, on a monthly basis a work schedule prior to each month. This will allow board inspectors to schedule probation monitoring inspections while you are at your place of employment. A letter dated May 31, 2005, contained the same statement. A letter dated August 30, 2005 stated, "Additionally, your quarterly reports do not include the required information as stated on the Quarterly Report outline." A letter dated May 24, 2006, had a statement nearly identical to that contained in the April 14 and May 31, 2005 letters. Board inspectors Rick Iknioan and Joan Coyne also met face-to-face with respondent in June 2006 and August 2007 to discuss respondent's continued noncompliance with his terms and conditions of probation. (AR June 23, 2009 109:12-25,

¹ The report itself is not dated, but bears a board-received stamp of August 14, 2007. Several other documents were contained in the board's files that were identical to this report, except that they do not bear the board stamp. Respondent testified that at some point after he attended a board meeting, he copied and submitted several quarterly reports at once, along with probation monitoring fees that had accumulated since his last submission. In light of the August 14, 2007, date of one of these reports, it is inferred that the copies in the board's file were in fact submitted at the same time as the original.

110:1-17; 199:2-25, 200:1-4, 13-21, 220:5-21, 221:16-20; August 4, 2009 100:4-18, 104:16-24, 105:1-3.)

10. Respondent was required to submit quarterly statements to the board, which were to include, inter alia, a work schedule for the quarter. It was permissible for respondent to provide this information to the board on a month-by-month basis. Respondent's quarterly reports generally referenced his employment at particular pharmacies and the approximate number of hours per week he expected to be working there during the upcoming quarter. Although two reports (those of April 17, 2005 and the undated report) merely report that he "mostly" worked at a particular pharmacy, the reports were silent as to where other work may be performed during the next quarter. Three of the reports (those of August 2, 2005, May 5, 2006 and August 14, 2007) were more general and lacked any prospective work schedule. In particular, the August 2, 2005 and August 14, 2007 reports merely recite that respondent would "hope to continue" or "hope to continue while physically able" without any report of where respondent expected to be working or the hours he expected to work during the next quarter.

Whether these facts constitute a violation of Condition 3 depends on whether respondent reported "as directed" by the board. Based upon the common understanding of the term, a "schedule" would necessarily include respondent's plan of work to be done during a particular time period.² In this case, the board directed respondent to report his "work schedule for the next quarter." As explained above, respondent failed on many occasions to report to the board his plan of work for the next quarter. Clearly, vague statements that he would "hope to continue" working without further clarification are not sufficient to be considered any sort of a report of a work schedule. A contrary interpretation would render this term and condition of probation nugatory.

Additionally, board inspectors met several times with respondent to discuss compliance and deficiencies and provided him written guidelines in an effort to ensure respondent understood what he needed to report to the board. (AR June 23, 2009 74:6-16, 77:15-25, 78:1-10, 108:4-6; August 4, 2009 41:2-6, 88:17-25, 89:1, 90:19-25, 91:1, 17-25, 100:4-18, 104:16-24, 105:1-3, 105:9-12, 125:10-23.) Further, respondent had ample opportunities both in person and in writing to seek clarification on why his reporting was deemed inadequate. (AR August 4, 2009 94:5-14, 95:12-24.) However, respondent never asked the board to provide such guidance or expressed any confusion about what he needed to report in the way of a work schedule. (AR August 4, 2009 85:1-8, 94:5-14, 95:3-8, 100:11-18, 101:2-4, Ex. 6.) Although respondent's employment was through a pharmacy register, he still could have provided, at a minimum, the names of current work places and an anticipated work schedule and then provided updates as needed, but failed to do so. Finally, an evaluation of respondent's compliance with Condition 3 must be viewed in the context of the purpose of the condition, i.e., to permit the board to monitor respondent's progress on probation by, inter alia, conducting site visits at facilities where

² "Schedule" means "a series of things to be done or of events to occur at or during a particular time or period." (Dictionary.com Unabridged. Source location: Random House, Inc. <http://dictionary.reference.com/browse/schedule>. Available: <http://dictionary.reference.com>. Accessed: May 17, 2010. (Random House Dictionary, 2010.))

respondent was working. Respondent's inadequate reporting undermines that objective. In short, the evidence reflects that respondent did not try very hard to provide a meaningful work schedule, or at times, any sort of work schedule at all.

Based on the foregoing considerations, it is found that respondent's efforts to provide to the board a prospective work schedule were inadequate. In particular, and at a minimum, the reports of August 2, 2005, May 5, 2006 and August 14, 2007 cannot reasonably be characterized as providing any sort of prospective work schedule.

Accordingly, respondent violated Condition 3 of his probation.³

Notice to Employers (Condition 7)

11. Since 2000, and during the entirety of respondent's probationary period, respondent has been employed by Cameron and Company, a pharmacist registry. Cameron pays respondent's salary and provides his benefits. Respondent's work schedules during the period from January 2004 through August 2007 were received in evidence. They reflect the following work assignments, at approximately 70 different pharmacy locations:

a. From January 2004⁴ through February 2006, respondent worked at numerous Rite Aid Pharmacy locations, the two most frequent of which were located in Coalinga and in Dinuba, California. During this period of time, respondent did not work at any pharmacies apart from those operated by Rite Aid.

b. From March through August 2006, and in November 2006, respondent worked at numerous Longs Drugs locations.

c. From August 2006 through December 2006, respondent worked at numerous Stater Bros. Pharmacies locations.

d. In August 2006, October 2006 to April 2007, July 2007, and September 2007, respondent worked at numerous Vons Pharmacy locations.

e. From September 2006 to January 2007, March 2007, and July 2007, respondent worked at two Costco Pharmacy locations.

f. From September to November 2006, and in January and February 2007, respondent worked at Brandy's Pharmacy, in Blythe.

³ Evidence was offered with regard to other violations of Condition 3, e.g., the untimeliness of respondent's reports. Since such evidence was outside the scope of the allegations in the petition to revoke probation, it need not be considered here.

⁴ The records reflect respondent's assignment to Rite Aid Pharmacies from January 2004. No records for years prior to 2004 were proffered.

g. From April to August 2007, and continuing as of the dates of the hearing, respondent worked at the Colorado River Medical Center Pharmacy in Needles.⁵

h. In March and April 2006, and in January through April 2007, respondent worked for brief periods at other pharmacies, e.g., Sav-On Pharmacy, Albertsons Pharmacy, Foundation Pharmacy.

12. Respondent's work assignments required astonishingly extensive travel within the following southern and central California counties: Fresno (Coalinga, Fresno, Selma); Kern (Bakersfield); Los Angeles (Studio City, Lakewood, Lancaster); Mono (Mammoth Lakes); Riverside (Beaumont, Blythe, Cathedral City, Corona, Desert Hot Springs, Hemet, Indio, La Quinta, Moreno Valley, Murrietta, Palm Springs, Rancho Mirage, Riverside, Sun City, Temecula, Wildomar, Winchester); San Bernardino (Adelanto, Apple Valley, Barstow, Chino Hills, Del Rosa, Fontana, Hesperia, Needles, Redlands); San Luis Obispo (Nipomo, Paso Robles); Santa Barbara (Montecito, Santa Maria); Tulare (Dinuba); and Ventura (Thousand Oaks, Ventura) Counties. Infrequently, respondent was assigned to locations within San Diego County (La Jolla, National City, Oceanside, San Diego), where he resides.

13. Although respondent was employed through a pharmacy employment service, according to Condition 7, respondent was required to "...notify the direct supervisor, pharmacist-in-charge, and/or owner at every pharmacy of the and terms conditions of the decision in case number 2608 **in advance** of the Respondent commencing work at each pharmacy." (Emphasis added.) Such notification could be made orally or in writing (AR June 23, 2009 127:17-19). Nevertheless, the board's staff provided "Verification of Employment" forms to probationers, including respondent. Such forms were provided to ensure that: (1) the pharmacy where he was working was aware that he was on probation; and, (2) the pharmacy understood the working environment that it needed to provide the pharmacist to avoid any violation of the terms and conditions of his probation (AR June 23, 2009 84:19-25, 85:1-12). Typically, a probationer would submit these forms to the board after notifying the appropriate pharmacy personnel of the terms and conditions of their disciplinary decision. (AR June 23, 2009 95:21-25.) Verification of Employment forms were proffered at the hearing with regard to approximately 20 of the 70 locations identified in respondent's work schedules provided by Cameron. Of these 20, about eight were signed by a pharmacy representative within 15 days of the date respondent commenced his employment at the location in question, about six were signed within six weeks after the date respondent's employment commenced, about two were signed more than six weeks after, and the remaining forms do not bear a signature date. Respondent's employment at most of the 50 pharmacies for which no verification form was submitted was very limited (i.e., one to three dates). In most instances, the pharmacist in charge signed the form; in some instances an "owner/corporate representative" signed the form.

⁵ No records for months or years after August 2007 were proffered.

Considering these forms and comparing them with his work schedules on a pharmacy-by-pharmacy basis, respondent worked at: (i) about 13 Rite Aid locations, and forms were submitted for two of them, signed at different times by both PICs and corporate representatives;⁶ (ii) about 16 Longs locations, and forms were submitted for about eight of them, seven signed by PICs or "pharmacy managers";⁷ (iii) about eight Stater locations, and forms were submitted for three of them, all signed by PICs; (iv) about 18 Longs locations, 12 in 2006, six more (new ones) in 2007, and forms were submitted for (a total of) five of them, two of which were signed by PICs, and three of which were signed, in 2007, by corporate representatives;⁸ (v) two Costco locations, and a form was submitted for one of them, signed by a PIC; and (vi) about six Albertsons locations, and forms were submitted for none of them.

14. Respondent began working at a Rite Aid location in Coalinga in January 2004 or earlier. Prior to September 2004, when probation became effective, respondent disclosed to Rite Aid's pharmacy district manager (PDM) James Kurihara that he had settled the board's accusation, and that he was to be placed on probation. In early September 2004, respondent reviewed with Kurihara the specific terms and conditions of his probation.

15. On August 17, 2006, board inspector Rick Iknoian interviewed Hanhthao Nguyen, pharmacist in charge at Rite Aid's Hemet store. Nguyen told Iknoian that she had no idea respondent was on probation until Iknoian told her at the time of the interview.

16a. Orriette "Cooky" Quandt, Pharm.D., was Director of Pharmacy Compliance for Longs Drug Stores ("Longs") from 2006 to May 25, 2009 and previously was a Manager of Pharmacy compliance for Longs from May of 1999 until 2006. (AR June 23, 2009 12:12-24, 13:9-13.) She testified that Longs had a procedure in place for hiring probationers that required both placement services and pharmacists to disclose a pharmacist's probation with the Board before Longs would consider hiring them. (AR June 23, 2009 29:24-25, 30:1-12, 38:7-9, 52:23-25, 53:1-4.) As Director of Compliance, it was her job to be aware of all the pharmacists working at the Longs who were on probation. She was not aware respondent was on probation until after an inspection was conducted in August of 2006 at the Longs' Hemet store where respondent was working. At that time, board inspector Rick Iknoian notified her by phone of the terms and conditions of respondent's probation. (AR June 23, 2009 17:19-23; 216:15-21.) Ms.

⁶ The two identified locations were Dinuba and Coalinga. An additional form had the word "various" inserted as the "location." See below for further details as to the forms submitted by Rite Aid.

⁷ Five were signed by PICs. Two were signed by "Pharmacy Managers," who signed their names on the PIC line, not the corporate representative line. In the eighth instance (San Bernardino), the quality of the photocopy submitted as evidence was too poor to discern the title of the individual who signed the form.

⁸ Those signed by corporate representatives were located in Mammoth Lakes, Sun City and Barstow. The first two bear signature dates in 2007, the third does not bear a signature date. However, since Cameron's records reflect that respondent did not work at any of these three locations until 2007, it is inferred that the Barstow form was also signed in 2007.

Quandt testified that all Longs stores employed technicians to assist pharmacists in the dispensing of prescriptions. As a result, after learning that respondent was prohibited from supervising technicians, Ms. Quandt became concerned that Longs' pharmacy license could be put in "jeopardy" if respondent was supervising a technician when he was prohibited from doing so. (AR June 23, 2009 18:11-19.) The next day, Ms. Quandt contacted Cameron, respondent's placement service, to advise them that respondent would not be working at Longs stores in the future (AR June 23, 2009 23:12-25). Based upon his probation terms, Ms. Quandt testified that she would not have hired respondent if she had been notified properly of his probation. (AR June 23, 2009 38:13-18.)

16b. In August 2007, Ms. Quandt began receiving contacts from pharmacists regarding respondent's requests to have his employment verification forms completed nearly a year after his employment (AR June 23, 2009 26:9-12, 27:2-4, 28:22-25, 29:1-11). On August 6, 2007, Ms. Quandt sent an email to the Longs' Pharmacy Area Supervisors, the Regional Pharmacy Manager and the Vice President of Pharmacy Operations instructing them to contact all pharmacy managers where respondent may have worked. The email she sent asked them to instruct staff to contact her if a pharmacy manager was called by respondent and signed his paperwork. (AR June 23, 2009 31:2-9; Ex. 11 -- AGO 231.) A number of emails were proffered at the hearing, to and from Ms. Quandt. These emails described respondent's requests in August 2007 to have pharmacy managers at various Longs locations where respondent worked during the 2004 to 2006 period retroactively sign and fax back to him employment verification forms. The pharmacist managers in question for the most part reported that, during the period respondent worked at their locations, he never advised them that he was on probation, and/or never provided them with the board decision or the terms and conditions of his probation. About nine verifications were involved.

17. In a declaration executed on June 19, 2009, Peter W.Chan, pharmacist in charge at Colorado River Medical Center, stated, "I have been informed and are [sic] aware of the terms and conditions of Mr. MacMullen's probation," including those relating to the supervision of technicians. Mr. Chan became aware of these matters when he became the pharmacist in charge at Colorado River.⁹ Respondent testified that he similarly notified the two previous pharmacists in charge at Colorado River.

18. The board sent respondent several letters in reference to Condition 7 and also met in person with respondent to discuss compliance with this condition.

a. On January 24, 2005, respondent was advised that a completed employment verification form had not yet been received by the board, and that a form had to be completed for each location where respondent worked.

⁹ The declaration does not specify when that occurred.

b. By letter dated April 14, 2005, respondent was advised that the board had received an employment verification form completed by Pharmacy District Manager James Kurihara, but that the pharmacist in charge was also required to complete the form.

c. By letter dated May 31, 2005, respondent was advised that "the Pharmacist in charge at every Rite Aid pharmacy where you are working must complete an employment verification form" and that to date no such forms had been received. It was reiterated that a form signed by the pharmacy district manager was not sufficient.

d. On August 30, 2005, respondent was advised that although he had been working at Rite Aid Coalinga, the board had not received an employment verification form from that location. Respondent was asked to have the completed form submitted "immediately." The records proffered at the hearing reflect that verification forms had previously been submitted by corporate representatives of Rite Aid Coalinga on February 4 (James Kurihara, PDM) and June 30, 2005 (Bao Le, no title provided).

e. On May 24, 2006, respondent was advised that although he had been working at four Longs and one Rite Aid location (the specific locations were identified by Cameron and Company customer number), the board had not received employment verification forms from those locations. Respondent was asked to submit the completed forms by June 5, 2006. Respondent subsequently submitted verification forms for three of the four Longs locations (two on or about June 12, 2006, the third on an unknown date, since the form is undated). The Rite Aid location identified by customer number 5685 appears to have been in error, since respondent's work schedules do not reflect that he worked at that location during the probationary period.

f. In addition, respondent was repeatedly apprised of his compliance obligations regarding this condition in face-to-face meetings with staff. In the initial office conference on October 5, 2004, all the terms and conditions of his probation were discussed with respondent. At a board site visit conducted on or about August 17, 2006, board inspector Iknioan informed him that he was "out of compliance" and specifically mentioned not notifying the pharmacist in charge that he was on probation (AR August 101:2-17, 24-25, 102:1-2). On or about August 15, 2007, board inspectors Coyne and Iknioan met with respondent to review with respondent his terms of probation, the need for his compliance and to clarify any misunderstandings he may have (AR June 23, 2009 199:8-25). Board inspector Iknioan emphasized respondent's noncompliance with Condition 7 and the importance of notifying the pharmacist in charge, and not his placement service, of the terms and conditions of his probation (AR June 23, 2009 200:1-8, 201:1-15). Board inspector Iknioan testified that, at that meeting, respondent reported that he "understood that" and assured the inspectors "that he would comply with it." (AR June 23, 2009 201:4-16.) Respondent admitted that he was informed at this meeting of the inspectors' concerns about his verification of employment forms. (AR August 4, 2009 105:1-8.) Although given an opportunity, Respondent did not ask any questions of staff regarding compliance with this term. (AR August 4, 2009 105:19-24.)

19. Respondent testified that he did not have employment verification forms submitted each time he was assigned to a new pharmacy, because he did not have a change of employment, i.e., Cameron remained his employer. At another point, he testified that he thought all he needed to do was to notify the area supervisor (e.g., Rite Aid's Jim Kurihara, or the Longs district supervisor) instead of the pharmacist in charge at each location. He explained that such individuals, not pharmacists in charge, were his direct supervisors. He admitted that, in the case of Longs, he did not disclose the terms of his probation to the area supervisor until after he began working at Longs.

If respondent had not had numerous meetings and contact with the Board's staff, respondent's claim that he believed he was only required to have district or area supervisors submit verification forms might, giving the benefit of every doubt, be supported by the documentation concerning Rite Aid. In the case of most pharmacies, however, respondent's claim is clearly inconsistent with and inadequate in light of the documentation. With regard to Longs, for example, the forms were usually if not always filled out by PICs or the equivalent. With regard to Vons, the forms were, until 2007, filled out only by PICs. In both instances, forms were not submitted for numerous locations. As to Albertson's, no forms were *ever* submitted as to *any* locations.

20. Viewing the evidence in its entirety, respondent made some efforts to secure the submission of verification forms for the pharmacy locations where he worked. On the whole, however, these efforts were inconsistent and inadequate, and did not reflect diligence on respondent's part. His actions clearly reflect that he did not give the submission of verification forms a high priority in his professional life.

However, a question arises as to whether respondent was in fact required to submit verification forms. Condition 7 is not without ambiguity, but it appears to draw a distinction between pharmacists employed directly by a pharmacy (first paragraph of Condition 7) and those employed by a pharmacy register (second paragraph of Condition 7). As to the former, the pharmacy's PIC or other representative is to submit a report, e.g., the verification form. As to the latter, however, no such report or form is required: the pharmacist is merely required to notify the PIC or other pharmacy representative of the terms of probation. Accordingly, respondent's failure to have verification forms submitted by the majority of pharmacies where he worked is not in and of itself a violation of his probation.¹⁰

However, respondent's frequent failure to have verification forms submitted is still relevant, as it is one component of the overall evidence bearing on the question directly at issue here—whether respondent notified each pharmacy location before he started working there of the existence and terms of his probation. Based on the entirety of the evidence as described above, including respondent's failure in most instances to have pharmacy representatives submit a verification form, the testimony and accompanying

¹⁰ That board personnel instructed respondent to submit verification forms, and that he in fact in about 20 instances did so, cannot be deemed in effect to have expanded the terms of probation beyond those specified in the settlement.

documentation of Longs' Quandt, respondent's inadequate explanation as to his notification to particular pharmacies of his probation, and his (corresponding) failure in many instances to testify that he did in fact notify pharmacy representatives¹¹ of the existence and terms of his probation, it is found that in many cases respondent failed to provide such notification in advance of his commencing work at each pharmacy.

Accordingly, respondent violated Condition 7 of his probation.

Supervision of Pharmacy Technicians (Condition 17)

21. The board's inspector Iknoian testified that in July 3, 2005, he conducted an unannounced monitoring inspection visit to a Rite Aid facility in Coalinga where respondent was working. During the visit, Iknoian observed a pharmacist technician, Veronica Covarrubias, behind the counter, pulling medicines off the shelf and filling prescriptions. Iknoian watched Veronica for about 15 minutes before he introduced himself. Respondent was the only pharmacist on site at the time.

Iknoian interviewed respondent during his visit. Respondent stated that he was the regular full-time pharmacist at the Coalinga location, that there was generally no other pharmacist present at that location, and that a technician was frequently on duty there with respondent.

Iknoian also interviewed Covarrubias, who told him that she had been the regular technician at the Coalinga location for about a year, and that she performed technician duties under respondent's supervision. Covarrubias also told Iknoian that no pharmacist in charge was employed at the Coalinga store at that time. On July 3, 2009, Covarrubias executed a declaration, confirming these matters, stating she carried out "all functions pharmacy technicians do," including preparing prescription refills, under respondent's supervision. She added that respondent never told her and she did not know that he was on probation. Another Coalinga technician, Teresia Balderaz, in a declaration she, too, signed on July 3, 2009, also stated that respondent supervised her while she was engaged in technician duties, and that she did not know he was on probation.

22. Iknoian testified that his next inspection visit with respondent was at the Rite Aid store in Dinuba on January 27, 2006. The visit was again unannounced.

Cameron records reflected that respondent first worked at the Dinuba Rite Aid on October 3, 2005, that he worked there for most of that month, and then again in January and February 2006.

¹¹ Respondent's contention that he was not required to notify the PIC in particular, but could instead notify any appropriate pharmacy representative, including a corporate representative responsible for multiple pharmacy locations, was valid, due to the "and/or" language in Condition 7, which board personnel did not have the authority to broaden to "and" during the probationary period itself. Accordingly, the finding here that respondent violated Condition 7 is not based on any purported failure to notify the "right" pharmacy representative(s) of his probationary terms.

On this particular visit, a pharmacist in charge (Mike Rooney) was present. Accordingly, Iknoian was unable to determine that respondent was supervising technicians at that time. Iknoian interviewed Rooney, who told Iknoian that he was aware respondent was on probation, but had not seen and did not know the actual terms thereof.

23. Iknoian testified that his next visit with respondent was on August 17, 2006, at the Rite Aid Rancho Mirage pharmacy. At the time of Iknoian's visit, another pharmacist was on duty, as well as ancillary staff. Iknoian could not discern at this time whether respondent was supervising any technicians. Iknoian spoke to respondent, who admitted that he had supervised technicians at a Hemet location. Iknoian reminded respondent that this was not permitted; respondent stated that it was difficult to find work at a facility where the supervision of technicians could be avoided.

24. In a declaration dated August 17, 2006, Hanhthao Nguyen stated that she had worked as a full-time pharmacist at Longs Hemet since November 2004. Nguyen became the pharmacist in charge on July 21, 2006. Respondent began working at Longs Hemet as a contract pharmacist in April 2006. On the following occasions, respondent was the lone pharmacist on duty at Longs Hemet: (i) April 27, 2006 (respondent's first day of work), from 4:00 to 9:00 p.m.; (ii) April 28, 2006, from 9:00 a.m. to 12:30 p.m.; (iii) July 19, 2006, from 4:00 to 9:00 p.m.; (iv) July 20, 2006, from 4:00 to 9:00 p.m.; (v) August 10, 2006, from 7:30 a.m. to 9:00 p.m. On all five of these occasions, a pharmacy technician was also present and on duty.

25. In August 2006, it came to the attention of Longs' Quandt that respondent had been working at Longs pharmacies while on probation, and that one of the terms of respondent's probation was that he not supervise technicians. Because all Longs pharmacies employ pharmacy technicians who assist in the filling of prescriptions, and because of the potential that a single pharmacist could be on duty alone with pharmacy technicians, Quandt notified Cameron that respondent could no longer work at Longs pharmacies.

26. In an interoffice email to Quandt dated August 22, 2007, Longs Del Rosa pharmacy manager Jake Jacobsen wrote, "I checked our QC log book for May 1 & May 2, 2006, and Mr. MacMullen DID IN FACT supervise techs. Numerous prescriptions were filled by a tech and QC's by him." Quandt testified that no other Longs pharmacists in charge specifically told her that respondent had actually been supervising technicians.

27. In a declaration dated August 20, 2009, Kurihara stated that at no time while he was Rite Aid PDM for the geographical areas where respondent worked did respondent serve as a pharmacist in charge, nor was he ever considered the direct supervisor or involved in the supervision of any ancillary help. At all times, respondent was instead a "relief" pharmacist, not a Rite Aid employee. Respondent's responsibility was to check and document the accuracy of prescription orders, "which were filled by any pharmacy technicians before such medications were dispensed to a patient, as required by law."

28. Respondent admitted at the hearing that he had verified the prescriptions filled by technicians, at least during a limited period of time at the Coalinga Rite Aid location. He explained that a technician may not fill prescriptions, and that when he was the only pharmacist on duty, his duties required that he sign off on technician-filled prescriptions. Respondent also stated more generally that he discussed with Cameron, and with Rite Aid district managers Kurihara and Le, his concern about being placed at pharmacies where he was the only pharmacist on duty. He added that until he took a position at Colorado River (in April 2007), the pharmacies where he worked all had technicians present at least 80 percent of the time. He estimated that during 2005, other pharmacists were on duty with him about 20 to 30 percent of the time. In 2006, it was "probably 50 percent." In 2007 (until May), it was about 20 percent. Respondent felt that when he was the only pharmacist on duty at a location where Cameron sent him, he had only two options: to work under those conditions, or to close the pharmacy. He chose the former. He conceded that he supervised technicians on those occasions when he was the lone pharmacist at a facility. He acknowledged that on one occasion Iknoian expressed his concern about respondent being the only pharmacist on duty at facilities.

Respondent stated that, since 2000 when he became a Cameron employee, he has never served as a pharmacist in charge at any location where he has worked.

29. Respondent testified that he is the sole pharmacist who works at Colorado River Medical Center and that no technicians, interns, or other ancillary personnel work there.

30. Based on the foregoing evidence, it is beyond question that respondent supervised technicians while on duty at various pharmacies during his probationary period. That respondent did not exercise any supervisory control over such employment matters as hiring, firing, and scheduling of technicians is not critical. In light of the board's public protection role, the kind of supervision that is of primary concern to the board relates not to the employment relationship per se, but to the filling and dispensing of prescriptions to members of the public.¹²

Respondent's defense that it was very difficult for him to find positions in which he was not required to oversee the filling of prescriptions by technicians, and that once he reported for work at a particular pharmacy, he was faced with a Hobson's choice of either closing the pharmacy or supervising technicians, is unavailing. First, he failed, in many cases, to disclose the existence of the terms of his probation to pharmacy representatives. It may be that some accommodation could have been made. Second, it does not appear that respondent ever raised this concern with Iknoian or other board personnel, despite Iknoian's repeated encouragement that respondent contact him if he had any questions.

¹² Although not specifically considered in this matter, the Board notes that section 4023.5 of the Business and Professions Code states: "[f]or the purposes of this chapter, 'direct supervision and control' means that a pharmacist is on the premises at all times and is fully aware of all activities performed by either a pharmacy technician or intern pharmacist." Additionally, although also not specifically considered in this matter, 16 CCR section 1793 states, "Pharmacy technician" means an individual who, under the direct supervision and control of a pharmacist, performs packaging, manipulative, repetitive, or other nondiscretionary tasks related to the processing of a prescription in a pharmacy..."

Third, as reflected in respondent's own testimony, and as confirmed most recently by his Colorado River experience, there have indeed been numerous opportunities for respondent to work at facilities at times when other pharmacists were also present on duty.

While it is probably true that respondent's options for pharmacy work were narrower than those of an individual not on probation, that did not justify respondent's ignoring the terms of his probation.

Accordingly, respondent violated Condition 17 of his probation.

Obey All Laws (Condition 2)

31. On August 10, 2005, the board issued respondent a citation in connection with an incident of March 2, 2005, when respondent dispensed a particular prescription filled with clonazepam 2 mg, when clonazepam 1 mg had been prescribed. Respondent was assessed a fine in the amount of \$250. The patient took the 2 mg tablets for about a month before she noticed the error. As a result, she "was sleeping 16 to 20 hours, [had] headaches, lightheadedness, and chest tightness." No further problems were reported. Respondent admitted the error during the course of the investigation.

Accordingly, respondent violated Condition 2 of his probation.

Respondent's Meetings with Board Personnel

32. On October 5, 2004, June 13, 2006, and August 15, 2007, respondent appeared before board representatives to discuss the terms and conditions of his probation. On each occasion, respondent signed a pre-printed declaration stating:

"The terms and conditions of my probation have been fully explained to me by the board representatives. I hereby acknowledge that I thoroughly understand these terms and conditions as set forth in the disciplinary action and that failure to comply may result in further disciplinary action."

The October 5, 2004, meeting was the initial probation meeting, when the terms of probation were explained to respondent. The second and third meetings were held to address the board's concerns with respondent's progress on probation. Respondent's non-compliant reports, the supervision of technicians, the notification to pharmacists in charge of the terms of probation, and the submission to the board of employment verification forms, were discussed. Respondent stated that it was difficult to find locations that did not require the supervision of technicians. Aside from that comment, and despite the opportunities consistently given to him by board personnel, respondent never asked any questions of Iknoian or other board personnel in order to clarify the meaning of the conditions of probation.

Background, Rehabilitation, and Present Circumstances

33. Respondent resides in Carlsbad, California, in San Diego County. He has been employed by Cameron since about 2000. Since that time, he has never been an employee of any of the pharmacies where he has worked.

34. In his declaration, Colorado River's Peter Chan stated that he had no complaints or concerns about respondent's performance as a pharmacist at that facility. In a declaration executed on June 19, 2009, Ronald G. Cameron, owner of Cameron and Co., Inc., wrote, "I consider Mr. MacMullen to be a great employee with a good, solid employment record maintained since his hiring."

Costs of Investigation and Prosecution

35. The actual prosecution costs incurred by complainant total \$12,403, which represents 78.5 hours of attorney work at \$158 per hour. Based on a review of the supporting documentation initially submitted by Complainant, and taking into account the complexity of the case, as well as the diligence and professionalism exhibited by counsel for Complainant, the Administrative Law Judge in this matter determined that the amount claimed was reasonable.

LEGAL CONCLUSIONS

The Burden and Standard of Proof

1. "The purpose of an administrative proceeding concerning the revocation or suspension of a license is not to punish the individual; the purpose is to protect the public from dishonest, immoral, disreputable or incompetent practitioners." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.)

2. Absent a statute to the contrary, the burden of proof in disciplinary administrative proceedings rests upon the party making the charges. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113; Evid. Code, § 115.) The burden of proof in this proceeding is thus on complainant.

3. The standard of proof applicable to disciplinary proceedings against professional licenses is "clear and convincing evidence standard to a reasonable certainty." (*Ettinger v. Board of Medical Quality Assurance* (1982) 139 Cal.App.3d 853, 856-857; *Furman v. State Bar* (1938) 12 Cal.2d 212, 229.) However, whether this standard, or the lesser preponderance of the evidence standard, is applicable to probation violations is unclear.¹³ A determination in this regard need not be made here, since each of the violations found above was established by clear and convincing evidence.

¹³ See California Administrative Hearing Practice (2d ed., Cal. CEB 2009), pp. 380, 545.

4. "The key element of clear and convincing evidence is that it must establish a high probability of the existence of the disputed fact, greater than proof by a preponderance of the evidence." (*People v. Mabini* (2001) 92 Cal.App.4th 654, 662.) This standard is less stringent than proof beyond a reasonable doubt. (*Ettinger v. Board of Medical Quality Assurance*, supra, 135 Cal.App.3d at 856.) 'Clear and convincing' evidence "requires a finding of high probability."

5. Business and Professions Code section 4300 provides in pertinent part:

"(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. Upon satisfactory completion of probation, the board shall convert the probationary certificate to a regular certificate, free of conditions."

6. The board has issued a Manual of Disciplinary Guidelines and Model Disciplinary Orders. At the time respondent was placed on probation, and at the time of his violations of probation found above, a version of the Guidelines was in effect that has since (in October 2007) been superseded. The version of the Guidelines in effect during the time of the operative acts in this case will be applied.¹⁴ The Guidelines reflect the board's primary responsibility as public protection, but they also reflect an appropriate concern for the rehabilitation of licensees. The Guidelines set forth a number of factors to be considered in determining whether a minimum, maximum, or intermediate penalty is to be imposed in a given case. The Guidelines also set forth examples of mitigating evidence that may be presented by the respondent. The Guidelines set forth a number of standard conditions of probation, which are generally to be applied in every case, and a number of optional conditions, to be applied as appropriate in a particular case. The Guidelines set forth four categories of violations, with recommended penalties for each. Category IV, involving what the board considers the most serious violations, includes probation violations. The recommended penalty for Category IV violations is revocation. The Guidelines wisely provide, however, that "individual cases may necessitate a departure from these guidelines," in which case, "the mitigating circumstances shall be detailed in any proposed decision. . . ."

Analysis

7. Protection of the public is the Board's highest priority. The Board imposes discipline to fulfill its public protection mandate. It is very important that the Board's licensees are aware of and abide by the standards of pharmacy practice, applicable pharmacy laws, and the Board's decisions implementing those laws. The public is protected when pharmacists are knowledgeable about their responsibilities and discharge those duties responsibly and with integrity. As found above, respondent has violated the terms of his probation. As a result, discipline may be imposed pursuant to Business and Professions Code section 4300. The recommended discipline is outright revocation. The

¹⁴ The revisions to the Guidelines are, in any event, on the whole relatively minor.

question to be addressed is whether, based on the entirety of the record, there are mitigating factors sufficient to warrant a departure from the board's Guidelines.

8. The entirety of the record in this case involves not only mitigating, but also aggravating factors. In particular, respondent violated four different provisions of his probation, and, especially with regard to Conditions 7 and 17, the violations can be characterized as fairly widespread. Respondent's original violations that led to the discipline of his license demonstrated a flagrant disrespect for Pharmacy Law and the rules and regulations that govern the practice of pharmacy. The nature and extent of respondent's current violations of his probation continue to reflect that disrespect and a total disregard for the Board's disciplinary decision. Further, respondent's, at times, inconsistent rationales for his noncompliance and his unpersuasive attempts to explain his noncompliance also demonstrate a lack of personal responsibility for the violations in this case. Additionally, respondent's violations were serious, in that they undermined the board's ability to monitor his progress on probation. Respondent's attempts retroactively in 2007 to secure verification forms from Longs PICs for whom he worked in earlier years are also of great concern to the Board. Such conduct undermines respondent's credibility and calls into question respondent's integrity.

9. In mitigation, respondent did make some (albeit inconsistent) efforts to comply with his probationary terms at issue. Further, the fact that he was assigned by Cameron to so many different facilities in so many different geographical locations undoubtedly made it more difficult to comply with the probationary terms in question than if he had simply been employed by and worked at one or two different pharmacies during the probationary term. Stated differently, the nature of his employment resulted in a far greater burden on respondent's part with regard to these conditions of probation than would be the case with pharmacists employed under different circumstances. That he often found himself in a position where he was the only pharmacist on duty, while not an excuse for failing to comply with Condition 17, is nonetheless a factor in mitigation. Also, respondent's willingness to travel extensively throughout the Southern California area in search of work reflects a strong and laudable commitment on respondent's part to the pharmacy profession. Further, no evidence of harm to any patient was proffered in connection with respondent's significant probation violations.¹⁵ Finally, respondent's present situation, at the Colorado River facility, is one in which successful compliance with probation seems much more likely, and the record reflects that respondent is in fact doing quite well at that facility.

10. Ultimately, the appropriate question is whether a sanction less severe than outright revocation is consistent with public protection. Based on all of the evidence presented, it is concluded that such a sanction, involving a severe period of suspension and a lengthy period of probation to underscore the seriousness of respondent's violations and the importance of complying consistently with all conditions of probation, as well as certain substantially stricter conditions of probation than were imposed in the original proceeding, does exist. In particular, additional probationary terms will be imposed that:

¹⁵ The patient involved in respondent's violation of Condition 2 experienced temporary symptoms.

(i) permit respondent to work as a pharmacist only at times when other pharmacists are on duty or no pharmacy technicians are on duty; (ii) require respondent, on the day he commences work at a particular pharmacy, to provide to his direct supervisor, pharmacist in charge and owner a copy of the final decision in the original proceeding as well as the final decision in the present proceeding; and (iii) require respondent, on a monthly basis, to provide to the board in writing a work schedule for the upcoming month, which sets forth with specificity his expected work schedule, as well as an exact record of his actual work schedule for the preceding month. It is believed that the inclusion of these additional conditions of probation will effectively address the three main issues that led to the present proceeding and provide for the protection of the public while permitting respondent to continue his practice as a pharmacist.¹⁶

11. By reason of Factual Findings 1 through 34 and Legal Conclusions 1 through 10, cause exists to revoke respondent's pharmacist license, and to stay that revocation on appropriate conditions of probation for a period of five years. This means that a new disciplinary order shall issue. The order shall be prospective; respondent shall be required to serve a new probationary term subject to new terms and conditions.

Costs of Investigation and Enforcement

12. Business and Professions Code section 125.3 provides in pertinent part:

"(a) . . . in any order issued in resolution of a disciplinary proceeding before any board within the department . . . the board may request the administrative law judge to direct a licentiate found to have committed a violation . . . of the licensing act to pay a sum not to exceed the reasonable costs of investigation and enforcement of the case.

* * *

(d) The administrative law judge shall make a proposed finding of the amount of the reasonable costs of investigation and prosecution of the case when requested pursuant to subdivision (a). . . ."

13. By reason of Factual Finding 35 and Legal Conclusion 9, cause exists under Business and Professions Code section 125.3 to issue an order requiring respondent to pay the board's reasonable costs of investigation and prosecution in the amount of \$12,403. Pursuant to Business and Professions Code section 125.3(a), the Board may recover costs "in resolution of a disciplinary proceeding before" the Board. A petition to revoke probation is, in fact, a disciplinary proceeding. Notwithstanding that fact and the provisions of Section 125.3, Complainant's counsel has represented that she withdrew her certifications in support of the cost award at the hearing in this matter (Exs. 3 and 4). This

¹⁶ The conditions of probation shall be worded pursuant to the October 2007 revision of the Guidelines.

information, therefore, is no longer in evidence before the Board. As a result, the Board has decided to eliminate this cost award from its order.

Accordingly, there is hereby issued the following:

ORDER

The Board's Disciplinary Order in Case No. 2608 (OAH No. L-2003090503) shall terminate on the effective date of this Order. A new Disciplinary Order shall issue on the effective date of this Decision as follows and shall operate prospectively:

License No. RPH 30639, issued to respondent GARY MAC MULLEN is REVOKED; however, the revocation is STAYED and respondent is placed on PROBATION for five years upon the following terms and conditions:

1. Suspension

As part of probation, respondent is suspended from the practice of pharmacy for 180 days beginning the effective date of this decision.

During suspension, respondent shall not enter any pharmacy area or any portion of the licensed premises of a wholesaler, veterinary food-animal drug retailer or any other distributor of drugs which is licensed by the board, or any manufacturer, or where dangerous drugs and devices or controlled substances are maintained. Respondent shall not practice pharmacy nor do any act involving drug selection, selection of stock, manufacturing, compounding, dispensing or patient consultation; nor shall respondent manage, administer, or be a consultant to any licensee of the board, or have access to or control the ordering, manufacturing or dispensing of dangerous drugs and devices or controlled substances.

Respondent shall not engage in any activity that requires the professional judgment of a pharmacist. Respondent shall not direct or control any aspect of the practice of pharmacy. Respondent shall not perform the duties of a pharmacy technician or a designated representative for any entity licensed by the board.

Subject to the above restrictions, respondent may continue to own or hold an interest in any licensed premises in which he or she holds an interest at the time this decision becomes effective unless otherwise specified in this order.

Failure to comply with this suspension shall be considered a violation of probation.

2. Obey All Laws

Respondent shall obey all state and federal laws and regulations. Respondent shall report any of the following occurrences to the board, in writing, within seventy-two

(72) hours of such occurrence: (i) an arrest or issuance of a criminal complaint for violation of any provision of the Pharmacy Law, state and federal food and drug laws, or state and federal controlled substances laws; (ii) a plea of guilty or nolo contendere in any state or federal criminal proceeding to any criminal complaint, information or indictment; (iii) a conviction of any crime; (iv) discipline, citation, or other administrative action filed by any state or federal agency which involves respondent's pharmacist license or which is related to the practice of pharmacy or the manufacturing, obtaining, handling, distributing, billing, or charging for any drug, device or controlled substance.

Failure to timely report such occurrence shall be considered a violation of probation.

3. Report to the Board

Respondent shall report to the board quarterly, on a schedule as directed by the board or its designee. The report shall be made either in person or in writing, as directed. Among other requirements, respondent shall state in each report under penalty of perjury whether there has been compliance with all the terms and conditions of probation. Failure to submit timely reports in a form as directed shall be considered a violation of probation. Any period(s) of delinquency in submission of reports as directed may be added to the total period of probation. Moreover, if the final probation report is not made as directed, probation shall be automatically extended until such time as the final report is made and accepted by the board.

4. Interview with the Board

Upon receipt of reasonable prior notice, respondent shall appear in person for interviews with the board or its designee, at such intervals and locations as are determined by the board or its designee. Failure to appear for any scheduled interview without prior notification to board staff, or failure to appear for two (2) or more scheduled interviews with the board or its designee during the period of probation, shall be considered a violation of probation.

5. Cooperate with Board Staff

Respondent shall cooperate with the board's inspection program and with the board's monitoring and investigation of respondent's compliance with the terms and conditions of his or her probation. Failure to cooperate shall be considered a violation of probation.

6. Continuing Education

Respondent shall provide evidence of efforts to maintain skill and knowledge as a pharmacist as directed by the board or its designee.

7. Notice to Employers

During the period of probation, respondent shall notify all present and prospective employers of the decision in case number 3183 and the terms, conditions and restrictions imposed on respondent by this decision, as follows:

Within thirty (30) days of the effective date of this decision, and within fifteen (15) days of respondent undertaking any new employment, respondent shall cause his or her direct supervisor, pharmacist-in-charge (including each new pharmacist-in-charge employed during respondent's tenure of employment) and owner to report to the board in writing acknowledging that the listed individual(s) has/have read the decision in case number 3183, and terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that his or her employer(s) and/or supervisor(s) submit timely acknowledgment(s) to the board.

If respondent works for or is employed by or through a pharmacy employment service, respondent must notify his or her direct supervisor, pharmacist-in-charge, and owner at every entity licensed by the board of the terms and conditions of the decision in case number 3183 in advance of the respondent commencing work at each licensed entity and must provide a copy of the decision in case 3183 to his or her direct supervisor, pharmacist-in-charge, and owner at every entity licensed by the board no later than the first day on which respondent works at each licensed entity. A record of this notification must be provided to the board upon request.

Furthermore, within thirty (30) days of the effective date of this decision, and within fifteen (15) days of respondent undertaking any new employment by or through a pharmacy employment service, respondent shall cause his or her direct supervisor with the pharmacy employment service to report to the board in writing acknowledging that he or she has read the decision in case number 3183 and the terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that his or her employer(s) and/or supervisor(s) submit timely acknowledgment(s) to the board.

Failure to timely notify present or prospective employer(s) or to cause that/those employer(s) to submit timely acknowledgments to the board shall be considered a violation of probation.

"Employment" within the meaning of this provision shall include any full-time, part-time, temporary, relief or pharmacy management service as a pharmacist or any position for which a pharmacist license is a requirement or criterion for employment, whether the respondent is an employee, independent contractor or volunteer.

8. No Supervision of Interns, Serving as Pharmacist-in-Charge (PIC), Serving as Designated Representative-in-Charge, or Serving as a Consultant

During the period of probation, respondent shall not supervise any intern pharmacist, be the pharmacist-in-charge or designated representative-in-charge of any

entity licensed by the board nor serve as a consultant unless otherwise specified in this order. Assumption of any such unauthorized supervision responsibilities shall be considered a violation of probation.

9. Probation Monitoring Costs

Respondent shall pay any costs associated with probation monitoring as determined by the board each and every year of probation. Such costs shall be payable to the board on a schedule as directed by the board or its designee. Failure to pay such costs by the deadline(s) as directed shall be considered a violation of probation.

10. Status of License

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. Failure to maintain an active, current license shall be considered a violation of probation.

If respondent's license expires or is cancelled by operation of law or otherwise at any time during the period of probation, including any extensions thereof due to tolling or otherwise, upon renewal or reapplication respondent's license shall be subject to all terms and conditions of this probation not previously satisfied.

11. License Surrender While on Probation/Suspension

Following the effective date of this decision, should respondent cease practice due to retirement or health, or be otherwise unable to satisfy the terms and conditions of probation, respondent may tender his or her license to the board for surrender. The board or its designee shall have the discretion whether to grant the request for surrender or take any other action it deems appropriate and reasonable. Upon formal acceptance of the surrender of the license, respondent will no longer be subject to the terms and conditions of probation. This surrender constitutes a record of discipline and shall become a part of the respondent's license history with the board.

Upon acceptance of the surrender, respondent shall relinquish his or her pocket and wall license to the board within ten (10) days of notification by the board that the surrender is accepted. Respondent may not reapply for any license from the board for three (3) years from the effective date of the surrender. Respondent shall meet all requirements applicable to the license sought as of the date the application for that license is submitted to the board, including any outstanding costs.

12. Notification of a Change in Name, Residence Address, Mailing Address or Employment

Respondent shall notify the board in writing within ten (10) days of any change of employment. Said notification shall include the reasons for leaving, the address of the new employer, the name of the supervisor and owner, and the work schedule if known.

Respondent shall further notify the board in writing within ten (10) days of a change in name, residence address, mailing address, or phone number.

Failure to timely notify the board of any change in employer(s), name(s), address(es), or phone number(s) shall be considered a violation of probation.

13. Tolling of Probation

Except during periods of suspension, respondent shall, at all times while on probation, be employed as a pharmacist in California for a minimum of 80 hours per calendar month. Any month during which this minimum is not met shall toll the period of probation, i.e., the period of probation shall be extended by one month for each month during which this minimum is not met. During any such period of tolling of probation, respondent must nonetheless comply with all terms and conditions of probation.

Should respondent, regardless of residency, for any reason (including vacation) cease practicing as a pharmacist for a minimum of 80 hours per calendar month in California, respondent must notify the board in writing within ten (10) days of the cessation of practice, and must further notify the board in writing within ten (10) days of the resumption of practice. Any failure to provide such notification(s) shall be considered a violation of probation.

It is a violation of probation for respondent's probation to remain tolled pursuant to the provisions of this condition for a total period, counting consecutive and non-consecutive months, exceeding thirty-six (36) months.

"Cessation of practice" means any calendar month during which respondent is not practicing as a pharmacist for at least 80 hours, as defined by Business and Professions Code section 4000 et seq. "Resumption of practice" means any calendar month during which respondent is practicing as a pharmacist for at least 80 hours as a pharmacist as defined by Business and Professions Code section 4000 et seq.

14. Violation of Probation

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

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

period of probation shall be automatically extended until the petition to revoke probation or accusation is heard and decided.

15. Completion of Probation

Upon written notice by the board or its designee indicating successful completion of probation, respondent's license will be fully restored.

16. No Supervision of Ancillary Personnel

During the period of probation, respondent shall not supervise any ancillary personnel, including, but not limited to, pharmacy technicians or designated representatives in any entity licensed by the board.

Further, respondent shall work as a pharmacist at any entity licensed by the board except at such times as other pharmacists are present or no pharmacy technicians are present.

Failure to comply with this provision shall be considered a violation of probation.

17. No Ownership of Licensed Premises

Respondent shall not own, have any legal or beneficial interest in, or serve as a manager, administrator, member, officer, director, trustee, associate, or partner of any business, firm, partnership, or corporation currently or hereinafter licensed by the board. Respondent shall sell or transfer any legal or beneficial interest in any entity licensed by the board within ninety (90) days following the effective date of this decision and shall immediately thereafter provide written proof thereof to the board. Failure to timely divest any legal or beneficial interest(s) or provide documentation thereof shall be considered a violation of probation.

18. Tolling of Suspension

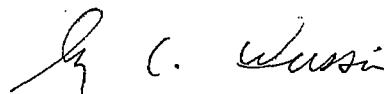
During the period of suspension, respondent shall not leave California for any period exceeding ten (10) days, regardless of purpose (including vacation). Any such absence in excess of the (10) days during suspension shall be considered a violation of probation. Moreover, any absence from California during the period of suspension exceeding ten (10) days shall toll the suspension, i.e., the suspension shall be extended by one day for each day over ten (10) days respondent is absent from California. During any such period of tolling of suspension, respondent must nonetheless comply with all terms and conditions of probation.

Respondent must notify the board in writing within ten (10) days of departure, and must further notify the board in writing within ten (10) days of return. The failure to provide such notification(s) shall constitute a violation of probation. Upon such departure and

return, respondent shall not resume the practice of pharmacy until notified by the board that the period of suspension has been satisfactorily completed.

This Decision shall become effective on July 2, 2010.

IT IS SO ORDERED this 2nd day of June 2010.

A handwritten signature in cursive script, appearing to read "S. C. Weisser".

Stanley Weisser
President, Board of Pharmacy
Department of Consumer Affairs

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5 San Diego, CA 92101

6 P.O. Box 85266
San Diego, CA 92186-5266
7 Telephone: (619) 645-2091
Facsimile: (619) 645-2061

8 Attorneys for Complainant
9

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

12
13 In the Matter of the Petition to Revoke Probation
Against:

Case No. 3183

14 GARY MAC MULLEN
3305 Cadencia Street
15 Rancho La Costa, CA 92009

OAH No. L-2007110133

16 Original Pharmacist License No. RPH 30639

**SECOND AMENDED PETITION TO
REVOKE PROBATION**

17 Respondent.
18
19

20 Complainant alleges:

21 PARTIES

22 1. Virginia Herold (Complainant) makes and files this Second Amended
23 Petition to Revoke Probation solely in her official capacity as the Executive Officer of the Board
24 of Pharmacy (Board). This Second Amended Petition to Revoke Probation supersedes and
25 replaces *nunc pro tunc* the Petition to Revoke Probation heretofore filed.

26 2. On or about September 20, 1976, the Board issued Original Pharmacy
27 License No. RPH 30639 to Gary Mac Mullen (Respondent). The license expires on May 31,
28 2010, unless renewed.

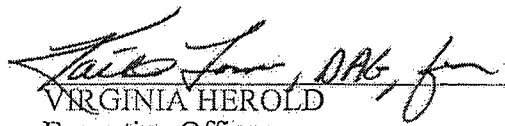
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2. Revoking or suspending Original Pharmacist License No. 30639 issued to

Gary Mac Mullen; and

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

DATED: 9/2/09



VIRGINIA HEROLD
Executive Officer
Board of Pharmacy
State of California

Complainant

SD2007802414
70209930.wpd

Exhibit A
Decision and Order
Board of Pharmacy Case No. 2608

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

In the Matter of the Accusation Against:

GARY MAC MULLEN
3305 Cadencia Street
Rancho La Costa, CA 92009

Pharmacist License No. RPH 30639

Respondent.

Case No. 2608

OAH No. L-2003090503

DECISION AND ORDER

The attached Stipulated Settlement and Disciplinary Order is hereby adopted by the Board of Pharmacy, as its Decision in this matter.

This Decision shall become effective on September 24, 2004.

It is so ORDERED August 25, 2004.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By



STANLEY W. GOLDENBERG
Board President

1 BILL LOCKYER, Attorney General
of the State of California
2 JAMES M. LEDAKIS, State Bar No. 132645
Deputy Attorney General
3 California Department of Justice
110 West "A" Street, Suite 1100
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Facsimile: (619) 645-2061
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8 Attorneys for Complainant

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

12 In the Matter of the Accusation Against:

13 GARY MAC MULLEN
3305 Cadencia Street
14 Rancho La Costa, CA 92009
15
16 Pharmacist License No. RPH 30639

17 Respondent.

Case No. 2608

OAH No. L-2003090503

**STIPULATED SETTLEMENT AND
DISCIPLINARY ORDER**

18
19 In the interest of a prompt and speedy settlement of this matter, consistent with the public
20 interest and the responsibility of the Board of Pharmacy, the parties hereby agree to the following
21 Stipulated Settlement and Disciplinary Order which will be submitted to the Board for approval
22 and adoption as the final disposition of the Accusation.

23 PARTIES

24 1. Patricia F. Harris (Complainant) is the Executive Officer of the Board of
25 Pharmacy. She brought this action solely in her official capacity and is represented in this matter
26 by Bill Lockyer, Attorney General of the State of California, by James M. Ledakis, Deputy
27 Attorney General.

28 /

1 CULPABILITY

2 8. Respondent understands and agrees that some of the charges and
3 allegations in Accusation No. 2608, if proven at a hearing, constitute cause for imposing
4 discipline upon his Pharmacist License.

5 9. For the purpose of resolving the Accusation without the expense and
6 uncertainty of further proceedings, Respondent agrees that, at a hearing, Complainant could
7 establish a factual basis for some of the charges in the Accusation, and that Respondent hereby
8 gives up his right to contest those charges.

9 10. Respondent agrees that his Pharmacist License is subject to discipline and
10 he agrees to be bound by the Board's imposition of discipline as set forth in the Disciplinary
11 Order below.

12 RESERVATION

13 11. The admissions made by Respondent herein are only for the purposes of
14 this proceeding, or any other proceedings in which the Board or other professional licensing
15 agency is involved, and shall not be admissible in any other criminal or civil proceeding.

16 CONTINGENCY

17 12. The parties understand and agree that facsimile copies of this Stipulated
18 Settlement and Disciplinary Order, including facsimile signatures thereto, shall have the same
19 force and effect as the originals.

20 13. In consideration of the foregoing admissions and stipulations, the parties
21 agree that the Board may, without further notice or formal proceeding, issue and enter the
22 following Disciplinary Order:

23 DISCIPLINARY ORDER

24 IT IS HEREBY ORDERED that Pharmacist License No. RPH 30639 issued to
25 Respondent GARY MAC MULLEN (Respondent) is revoked. However, the revocation is stayed
26 and Respondent is placed on probation for three (3) years on the following terms and conditions.

27 1. **Actual Suspension - Pharmacist.** License number RPH 30639, issued to
28 Respondent GARY MAC MULLEN is suspended for a period of (30) thirty days. Respondent is

1 suspended from the practice of pharmacy beginning the effective date of this decision.

2 During suspension, Respondent shall not enter any pharmacy area or any portion
3 of the licensed premises of a wholesaler, veterinary food-animal drug retailer or any other
4 distributor of drugs which is licensed by the Board, or any manufacturer, or where dangerous
5 drugs and devices or controlled substances are maintained. Respondent shall not practice
6 pharmacy nor do any act involving drug selection, selection of stock, manufacturing,
7 compounding, dispensing or patient consultation; nor shall Respondent manage, administer, or
8 be a consultant to any licensee of the Board, or have access to or control the ordering,
9 manufacturing or dispensing of dangerous drugs and devices or controlled substances.

10 Respondent shall not engage in any activity that requires the professional
11 judgment of a pharmacist. Respondent shall not direct or control any aspect of the practice of
12 pharmacy. Respondent shall not perform the duties of a pharmacy technician or an exemptee for
13 any entity licensed by the Board. Subject to the above restrictions, Respondent may continue to
14 own or hold an interest in any pharmacy in which he holds an interest at the time this decision
15 becomes effective unless otherwise specified in this order.

16 2. **Obey All Laws.** Respondent shall obey all state and federal laws and
17 regulations substantially related to or governing the practice of pharmacy.

18 Respondent shall report any of the following occurrences to the Board, in writing,
19 within 72 hours of such occurrence:

- 20 • an arrest or issuance of a criminal complaint for violation of any provision of the
21 Pharmacy Law, state and federal food and drug laws, or state and federal
22 controlled substances laws
- 23 • a plea of guilty or nolo contendere in any state or federal criminal proceeding to
24 any criminal complaint, information or indictment
- 25 • a conviction of any crime
- 26 • discipline, citation, or other administrative action filed by any state and federal
27 agency which involves Respondent's license or which is related to the practice
28 of pharmacy or the manufacturing, obtaining, handling or distribution or billing
or charging for any drug, device or controlled substance.

26 3. **Reporting to the Board.** Respondent shall report to the Board
27 quarterly. The report shall be made either in person or in writing, as directed. Respondent
28 shall state under penalty of perjury whether there has been compliance with all the terms and

1 conditions of probation. If the final probation report is **not** made as directed, probation shall
2 be extended automatically until such time as the final report is made and accepted by the
3 Board.

4 4. **Interview with the Board.** Upon receipt of reasonable notice,
5 Respondent shall appear in person for interviews with the Board upon request at various
6 intervals at a location to be determined by the Board. Failure to appear for a scheduled
7 interview without prior notification to Board staff shall be considered a violation of probation.

8 5. **Cooperation with Board Staff.** Respondent shall cooperate with the
9 Board's inspection program and in the Board's monitoring and investigation of Respondent's
10 compliance with the terms and conditions of his probation. Failure to comply shall be
11 considered a violation of probation.

12 6. **Continuing Education.** Respondent shall provide evidence of efforts
13 to maintain skill and knowledge as a pharmacist as directed by the Board.

14 7. **Notice to Employers.** Respondent shall notify all present and
15 prospective employers of the decision in case number 2608 and the terms, conditions and
16 restrictions imposed on Respondent by the decision. Within 30 days of the effective date of
17 this decision, and within 15 days of Respondent undertaking new employment, Respondent
18 shall cause his direct supervisor, pharmacist-in-charge and/or owner to report to the Board in
19 writing acknowledging the employer has read the decision in case number 2608.

20 If Respondent works for or is employed by or through a pharmacy employment
21 service, Respondent must notify the direct supervisor, pharmacist-in-charge, and/or owner at
22 every pharmacy of the and terms conditions of the decision in case number 2608 in advance of
23 the Respondent commencing work at each pharmacy.

24 "Employment" within the meaning of this provision shall include any full-time, part-
25 time, temporary, relief or pharmacy management service as a pharmacist, whether the
26 Respondent is considered an employee or independent contractor.

27 8. **No Preceptorships, Supervision of Interns, Being Pharmacist-in-
28 Charge (PIC), or Serving as a Consultant.** Respondent shall not supervise any intern

1 pharmacist or perform any of the duties of a preceptor, nor shall Respondent be the
2 pharmacist-in-charge of any entity licensed by the Board unless otherwise specified in this
3 order.

4 9. **Reimbursement of Board Costs.** Respondent shall pay to the Board
5 its costs of investigation and prosecution in the amount of \$5,500. Respondent shall make
6 said payments on a quarterly basis with payment made in full prior to completion of probation.

7 The filing of bankruptcy by Respondent shall not relieve Respondent of his
8 responsibility to reimburse the Board its costs of investigation and prosecution.

9 10. **Probation Monitoring Costs.** Respondent shall pay the costs
10 associated with probation monitoring as determined by the Board each and every year of
11 probation. Such costs shall be payable to the Board at the end of each year of probation.
12 Failure to pay such costs shall be considered a violation of probation.

13 11. **Status of License.** Respondent shall, at all times while on probation,
14 maintain an active current license with the Board, including any period during which
15 suspension or probation is tolled.

16 If Respondent's license expires or is canceled by operation of law or otherwise,
17 upon renewal or reapplication, Respondent's license shall be subject to all terms and
18 conditions of this probation not previously satisfied.

19 12. **License Surrender while on Probation/Suspension.** Following the
20 effective date of this decision, should Respondent cease practice due to retirement or health, or
21 be otherwise unable to satisfy the terms and conditions of probation, Respondent may tender
22 his license to the Board for surrender. The Board shall have the discretion whether to grant
23 the request for surrender or take any other action it deems appropriate and reasonable. Upon
24 formal acceptance of the surrender of the license, Respondent will no longer be subject to the
25 terms and conditions of probation.

26 Upon acceptance of the surrender, Respondent shall relinquish his pocket
27 license to the Board within 10 days of notification by the Board that the surrender is accepted.
28 Respondent may not reapply for any license from the Board for three years from the effective

1 date of the surrender. Respondent shall meet all requirements applicable to the license sought
2 as of the date the application for that license is submitted to the Board.

3 13. **Notification of Employment/Mailing Address Change.** Respondent
4 shall notify the Board in writing within 10 days of any change of employment. Said
5 notification shall include the reasons for leaving and/or the address of the new employer,
6 supervisor or owner and work schedule if known. Respondent shall notify the Board in
7 writing within 10 days of a change in name, mailing address or phone number.

8 14. **Tolling of Probation.** Should Respondent, regardless of residency, for
9 any reason cease practicing pharmacy for a minimum of 80 hours per calendar month in
10 California, Respondent must notify the Board in writing within 10 days of cessation of the
11 practice of pharmacy or the resumption of the practice of pharmacy. Such periods of time
12 shall not apply to the reduction of the probation period. It is a violation of probation for
13 Respondent's probation to remain tolled pursuant to the provisions of this condition for a
14 period exceeding three years.

15 "Cessation of practice" means any period of time exceeding 30 days in which
16 Respondent is not engaged in the practice of pharmacy as defined in Section 4052 of
17 the Business and Professions Code.

18 15. **Violation of Probation.** If Respondent violates probation in any
19 respect, the Board, after giving Respondent notice and an opportunity to be heard, may revoke
20 probation and carry out the disciplinary order which was stayed. If a petition to revoke
21 probation or an accusation is filed against Respondent during probation, the Board shall have
22 continuing jurisdiction and the period of probation shall be extended, until the petition to
23 revoke probation or accusation is heard and decided. If Respondent has not complied with
24 any term or condition of probation, the Board shall have continuing jurisdiction over
25 Respondent, and probation shall automatically be extended until all terms and conditions have
26 been satisfied or the Board has taken other action as deemed appropriate to treat the failure to
27 comply as a violation of probation, to terminate probation, and to impose the penalty which
28 was stayed.

1 16. **Completion of Probation.** Upon successful completion of probation,
2 Respondent's license will be fully restored.

3 17. **No Supervision.** Respondent shall not supervise any ancillary
4 personnel, including, but not limited to, registered pharmacy technicians or exemptees, of any
5 entity licensed by the Board.

6 18. **No Ownership of Premises.** Respondent shall not own, have any legal
7 or beneficial interest in, or serve as a manager, administrator, member, officer, director,
8 associate, or partner of any business, firm, partnership, or corporation currently or hereinafter
9 licensed by the Board. Respondent shall sell or transfer any legal or beneficial interest in any
10 entity licensed by the Board within 90 days following the effective date of this decision and
11 shall immediately thereafter provide written proof thereof to the Board.

12 19. **Tolling of Suspension.** If Respondent leaves California to reside or
13 practice outside this state, for any period exceeding 10 days (including vacation), Respondent
14 must notify the Board in writing of the dates of departure and return. Periods of residency or
15 practice outside the state - or any absence exceeding a period of 10 days shall not apply to the
16 reduction of the suspension period.

17 Respondent shall not practice pharmacy upon returning to this state until
18 notified by the Board that the period of suspension has been completed.


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ACCEPTANCE

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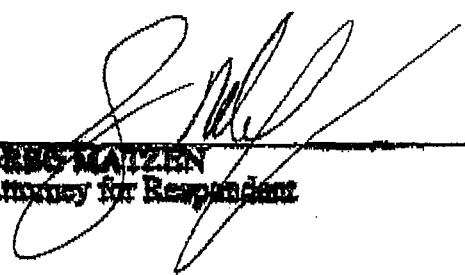
I have carefully read the above Stipulated Settlement and Disciplinary Order and have fully discussed it with my attorney, Gregory Matzen. I understand the stipulation and the effect it will have on my Pharmacist License. I enter into this Stipulated Settlement and Disciplinary Order voluntarily, knowingly, and intelligently, and agree to be bound by the Decision and Order of the Board.

DATED: July 8, 2004.


GARY MACMILLAN (Respondent)
Respondent

I concur with this stipulated settlement.

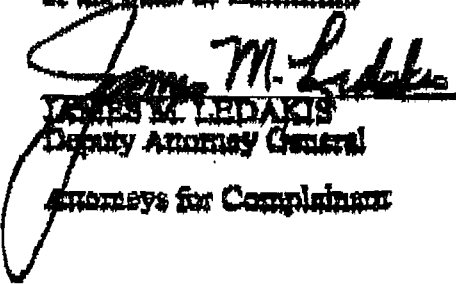
DATED: July 9, 2004.


GREG MATZEN
Attorney for Respondent

ENDORSEMENT

The foregoing Stipulated Settlement and Disciplinary Order is hereby respectfully submitted for consideration by the Board.

DATED: July 2, 2004.

BILL LOCKYER, Attorney General
of the State of California

JAMES M. LEDAKIS
Deputy Attorney General
Attorneys for Complainant

Doc Number: SD2004AD0052
0020244.00pd

Exhibit A
Accusation No. 2608

1 BILL LOCKYER, Attorney General
of the State of California
2 JAMES M. LEDAKIS, State Bar No. 132645
Deputy Attorney General
3 California Department of Justice
110 West "A" Street, Suite 1100
4 San Diego, CA 92101

5 P.O. Box 85266
San Diego, CA 92186-5266
6 Telephone: (619) 645-2105
Facsimile: (619) 645-2061

7 Attorneys for Complainant
8

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

12 In the Matter of the Accusation Against:

13 GARY J. MAC MULLEN
14 3305 Cadencia Street
Rancho La Costa, CA 92009

15 License No. RPH 30639

Respondent.

OAH No.

Administrative Case 2608

ACCUSATION

16
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 September 20, 1976, the Board of Pharmacy issued
24 Pharmacist License No. RPH 30639 to GARY J. MAC MULLEN (Respondent). At all times
25 material herein, Respondent MacMullen was and currently is licensed by the Board as a
26 registered pharmacist. The license expires on May 31, 2004, unless renewed.

27 /

28 /

JURISDICTION

1
2 3. This Accusation is brought before the Board of Pharmacy (Board),
3 Department of Consumer Affairs, under the authority of the following laws. All section
4 references are to the Business and Professions Code unless otherwise indicated.

5 4. Business & Professions Code Section 4022(a) states in pertinent part:

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

9 a) Any drug that bears the legend: "Caution: Federal law prohibits dispensing
10 without prescription," "RX only," or "words of similar import".

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

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

17 5. Hydrocodone is a Schedule III drug as classified by Health & Safety Code
18 11056 section.

19 6. Vicodin is a controlled substance under Health & Safety Code section
20 11056(e)(4).

21 7. Serzone, Fioricet, Lugols Solution and Imitrex are prescription drugs as
22 defined in section 4022 above.

23 8. Lorazepam is a Schedule IV drug as classified by Health & Safety Code
24 section 11057.

25 9. Section 4059 of the Code states, in pertinent part, that a person may not
26 furnish any dangerous drug except upon the prescription of a physician, dentist, podiatrist,
27 optometrist, or veterinarian. A person may not furnish any dangerous device, except upon the
28 prescription of a physician, dentist, podiatrist, optometrist, or veterinarian.

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10. Section 4040, Prescription; Electronic transmission prescription states, in pertinent part:

- a) Prescription means an oral, written, or electronic transmission order that is both of the following:
 - 1) Given individually for the person or persons for whom ordered that includes all of the following:
 - A) The name or names and addresses of the patient or patients.
 - ...
 - C) The date of issuance.

11. Section 4063 of the Code states, in pertinent part:

No prescriptions for any dangerous drug or dangerous device may be refilled except upon authorization of the prescriber. The authorization may be given orally at any time of giving the original prescription. No prescription for any dangerous drug that is a controlled substance may be designated refillable as needed.

12. Section 4081 of the Code states:

(a) All records of manufacture and of sale, acquisition, or disposition of dangerous drugs or dangerous devices shall be at all times during business hours open to inspection by authorized officers of the law, and shall be preserved for at least three years from the date of making. A current inventory shall be kept by every manufacturer, wholesaler, pharmacy, veterinary food-animal drug retailer, physician, dentist, podiatrist, veterinarian, laboratory, clinic, hospital, institution, or establishment holding a currently valid and unrevoked certificate, license, permit, registration, or exemption under Division 2 (commencing with Section 1200) of the Health and Safety Code or under Part 4 (commencing with Section 16000) of Division 9 of the Welfare and Institutions Code who maintains a stock of dangerous drugs or dangerous devices.

(b) The owner, officer, and partner of any pharmacy, wholesaler, or veterinary food-animal drug retailer shall be jointly responsible, with the pharmacist-in-charge or exemptee, for maintaining the records and inventory described in this section.

(c) The pharmacist-in-charge or exemptee shall not be criminally responsible for acts of the owner, officer, partner, or employee that violate this section and of which the pharmacist-in-charge or exemptee had no knowledge, or in which he or she did not knowingly participate.

13. 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.

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...
(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.

(p) Actions or conduct that would have warranted denial of a license.

14. Section 4306.5, Acts or omissions constituting unprofessional conduct states in pertinent part:

Unprofessional conduct for a pharmacist may include acts or omissions that involve, in whole or in part, the exercise of his or her education, training, or experience as a pharmacist, whether or not the act or omission arises in the course of the practice of pharmacy or the ownership, management, administration, or operation of a pharmacy or other entity licensed by the board.

15. Section 4332, Dangerous drugs or devices, records; failure to maintain; failure to produce, falsification states in pertinent part:

Any person who fails, neglects, or refuses to maintain the records required by Section 4081 or who, when called upon by an authorized officer or a member of the board, fails neglects, or refuses to produce or provide the records within a reasonable time, or who willfully produces or furnishes records that are false, is guilty of a misdemeanor.

16. California Code of Regulations section 1718, states in pertinent part:

Current inventory as used in section 4081 of the Business & Professions code shall be considered to include complete accountability for all dangerous drugs handled by every licensee enumerated in section 4081. The controlled substances inventories required by Title 21, CFR, section 1304 shall be available for inspection upon request for at least three years after the date of the inventory.

17. California Code of Regulations section 1761, states in pertinent part:

a) No pharmacist shall compound or disperse any prescriptions which contains any significant error, omission, irregularity, uncertainty, ambiguity or alteration. Upon receipt of any such prescription, the pharmacist shall contact the prescriber to obtain the information needed to validate the prescription . . .

18. Health & Safety code section 11200, Restrictions on Disposing or Refilling; Refill of Schedule II Prescription Barred, states in pertinent part:

a) No person shall dispense or refill a controlled substance prescription more than six months after the date thereof . . .

1 19. Health & Safety code section 11208, Prima Facie Evidence of Violation of
2 Controlled Substance Act, states in pertinent part as follows:

3 In a prosecution under this division, proof that a defendant received or has had in
4 his possession at any time a greater amount of controlled substances than is accounted for
5 by any record required by law or that the amount of controlled substances possessed by
the defendant is a lesser amount than is accounted for by any record required by law is
prima facie evidence of guilt.

6 20. Section 125.3 of the Code provides, in pertinent part, that the Director may
7 request the administrative law judge to direct a licensee found to have committed a violation or
8 violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation
9 and enforcement of the case.

10 FIRST CAUSE FOR DISCIPLINE

11 (Furnishing a Prescription Without Physician Authorization)

12 21. Respondent is subject to disciplinary action under section 4063 and 4059
13 in that Respondent did write and furnish prescriptions for Patient JC for Serzone without
14 authorization from a physician. The circumstances are as follows:

15 22. On or about September 21, 2001, prescription Rx # 10039 for Patient JC
16 was filled by Respondent for #40 Lorazepam 1 mg. The documentation for this prescription
17 stated that it was a transfer from Kaiser Hospital. Thereafter, pharmacist KS telephoned the
18 prescribing doctor, Dr G, and learned that the original prescription for Patient JC was for #30
19 Ativan 1 mg.

20 23. Seven weeks later on November 8, 2001, Respondent filled prescription
21 Rx #100161 for #60 Serzone 200 mg. Thereafter, pharmacist KS telephoned the prescribing
22 doctor, Dr. G, and learned that no prescription for Serzone was authorized for patient JC.

23 SECOND CAUSE FOR DISCIPLINE

24 (Furnishing an Uncertain Prescription)

25 24. Respondent is subject to disciplinary action under section 4306.5 and
26 California Code of Regulations section 1761 in that Respondent did fill an uncertain prescription
27 for Fioricet for patient OH. The circumstances are as follows:
28

1 25. On or about May 1, 2001, Respondent filled prescription Rx #100153
2 Fioricet #150 for Patient OH which was written by two different persons and was not filled until
3 November 30, 2001. There was no documentation to indicate whether the doctor actually wrote
4 the prescription or whether he still wanted it filled.

5 THIRD CAUSE FOR DISCIPLINE

6 (Furnishing Dangerous Drugs Without a Prescription)

7 26. Respondent is subject to disciplinary action under section 4040(c) in that
8 RPH Mac Mullen filled a prescription for a controlled substance that was not faxed directly from
9 a physician's office. The circumstances are as follows:

10 27. On or about May 1, 2001, Respondent filled Rx #100154 for Hydrocodone
11 10/325 (Norco) #360 for Patient OH originating from a fax from Ralph's Thrifty in the state of
12 Washington.

13 FOURTH CAUSE FOR DISCIPLINE

14 (Filling a Prescription in Excess of Six Months Old)

15 28. Respondent is subject to disciplinary action under section 4301(j) for
16 unprofessional conduct in that Respondent violated Health & Safety section 11200 when he filled
17 patient OH's prescription for Fioricet that was in excess of six months old.
18 The circumstances are as follows:

19 29. On or about May 1, 2001, prescription Rx #100153 was issued. On
20 November 30, 2001, Respondent filled the prescription for patient OH without any
21 documentation that Dr. G wanted the prescription filled.

22 FIFTH CAUSE FOR DISCIPLINE

23 (Issuing a False Prescription)

24 30. Respondent is subject to disciplinary action under section 4301(f) for
25 unprofessional conduct for attempting to forge and fill a prescription for Lugols Solution for
26 patient RM without authorization from a physician. The circumstances are as follows:

27 31. On or about December 20, 2001, Respondent spoke to patient RM on the
28 telephone and questioned her about her symptoms and thereafter Respondent consulted a

1 reference book and wrote a prescription for Lugo's Solution. When Respondent was questioned
2 about his actions, he explained that Dr. S requested the Lugo's Solution for employee/ patient
3 RM. Thereafter, Pharmacist KS telephoned Dr. S's office and learned that there was no
4 employee/patient RM at their office. This prescription was not filled.

5 SIXTH CAUSE FOR DISCIPLINE

6 (Issuing a Prescription in Violation of Regulations)

7 32. Respondent is subject to disciplinary action under section 4040 in that
8 Respondent filled prescriptions for patient GM from a medication profile which was faxed from
9 a different pharmacy. The circumstances are as follows:

10 33. On or about December 3, 2001, Respondent filled a prescription for 50
11 Vicodin, a controlled substance, which was faxed to Respondent and did not meet the
12 requirements for a prescription and he filled a prescription for a controlled substance from a
13 preprinted multiple check off prescription blank.

14 SEVENTH CAUSE FOR DISCIPLINE

15 (Issuing a Prescription in Violation of Regulations)

16 34. Respondent is subject to disciplinary action under section Health & Safety
17 code section 11164, related to the form and content required for dispensing controlled substances
18 in that Respondent filled a controlled substance prescription for patient GM that did not meet the
19 requirements of a prescription. The circumstances are as follows:

20 35. Respondent incorporates by reference paragraph 33, above.

21 EIGHTH CAUSE FOR DISCIPLINE

22 (Failure to Keep Current Inventory)

23 36. Respondent is subject to disciplinary action under section 4081 and
24 California Code of Regulations section 1718 in that Respondent as the pharmacist in charge did
25 not maintain a current inventory for all dangerous drugs.

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1 NINTH CAUSE FOR DISCIPLINE

2 (Failure to Maintain Disposition Records)

3 37. Respondent is subject to disciplinary action under section 4332 in that
4 Respondent did not maintain disposition records as required under section 4081.

5 TENTH CAUSE FOR DISCIPLINE

6 (Inadequate Record Keeping)

7 38. Respondent is subject to disciplinary action under Health & Safety code
8 section 11208 in that Respondent had in his possession a lesser amount of controlled substances
9 than is accounted for by his record keeping that is required by law.

10 PRAYER

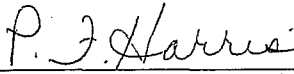
11 WHEREFORE, Complainant requests that a hearing be held on the matters herein
12 alleged, and that following the hearing, the Board of Pharmacy issue a decision:

13 A. Revoking or suspending Pharmacist License No. RPH 30639 issued to
14 GARY J. MAC MULLEN;

15 B. Ordering GARY J. MAC MULLEN to pay the Board of Pharmacy the
16 reasonable costs of the investigation and enforcement of this case, pursuant to Business and
17 Professions Code section 125.3;

18 C. Taking such other and further action as deemed necessary and proper.

19 DATED: 8/20/03

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21 
22 PATRICIA F. HARRIS
23 Executive Officer
24 Board of Pharmacy
25 Department of Consumer Affairs
26 State of California
27 Complainant
28