

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

In the Matter of the Accusation Against:

TIM RISHWAIN
3909 E. Scottsdale Rd.
Lodi, CA 95246
Pharmacist License No. RPH 38329

Respondent.

Case No. 4102

OAH No. 2011100300

**ORDER DENYING
RECONSIDERATION**

ORDER DENYING RECONSIDERATION

The effective date of the decision in the above-entitled matter having heretofore been stayed until May 29, 2012 for the purpose of permitting respondent to file a petition for reconsideration of said decision, and no action having been taken by the Board before the stay dissolved and the Decision and Order took effect, pursuant to Government Code Section 11521, the Petition for Reconsideration is hereby deemed denied by operation of law.

The Decision and Order with an effective date of May 29, 2012, is the Board of Pharmacy's final decision in this matter.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By



STANLEY C. WEISSER
Board President

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

In the Matter of the Accusation Against:

Case No. 4102

OAH No. 2011100300

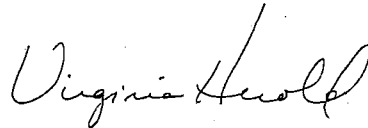
TIMOTHY RISHWAIN
3909 E. Scottsdale Road
Lodi, CA 95246

Pharmacist License No. RPH 38329

Respondent.

STAY OF EFFECTIVE DATE

Respondent filed a Petition for Reconsideration in the above-entitled matter on May 11, 2012. In accordance with the provisions of Section 11521 of the Government Code, and for the sole purpose of considering the Petition for Reconsideration, the effective date of the Decision is hereby stayed until May 29, 2012.



Virginia K. Herold
Executive Officer
Board of Pharmacy
Department Of Consumer Affairs
State Of California

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

In the Matter of the Accusation Against:

TIM RISHWAIN
3909 E. Scottsdale Road
Lodi, CA 95246

Pharmacist License No. RPH 38329

Respondent.

Case No. 4102

OAH No. 2011100300

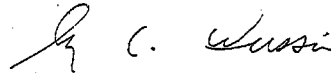
DECISION AND ORDER

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Pharmacy, Department of Consumer Affairs, as its Decision in this matter.

This decision shall become effective on May 18, 2012.

It is so ORDERED on April 18, 2012.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

STANLEY C. WEISSER
Board President

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

In the Matter of the Accusation Against:

TIM RISHWAIN
Lodi, California 95246

Pharmacist License No. RPH 38329

Respondent.

Case No. 4102

OAH No. 2011100300

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, State of California, Office of Administrative Hearings, in Sacramento, on January 30, 2012.

Anahita S. Crawford, Deputy Attorney General, represented Virginia Herold (complainant), Executive Officer, Board of Pharmacy (Board), Department of Consumer Affairs.

Tim Rishwain (respondent) was present. He was represented by David R. LeBeouf and Lori Whittaker, Attorneys at Law.

Evidence was received, the record was closed, and the matter was submitted for decision on January 30, 2012.

FACTUAL FINDINGS

1. Complainant brought this Accusation in her official capacity.
2. On March 19, 1984, the Board issued Pharmacist License Number RPH 38329 to respondent. The Pharmacist License was in full force and effect at all times relevant to this matter, and was due to expire on November 30, 2011. The Pharmacist License was suspended on August 30, 2011, pursuant to an Interim Suspension Order issued on August 23, 2011.

3. The parties entered into a stipulation at the time of hearing agreeing to the facts set forth in the First through Fifth Causes for Discipline, with minor amendments; to the dismissal of the Sixth Cause for Discipline; and to certain other facts, the terms of which are all set forth below:

First Cause for Discipline (Criminal Conviction)

a. Respondent is subject to disciplinary action under Business and Professions Code section 4301, subdivision (l) in that on or about January 27, 2011, in a criminal proceeding entitled *People v. Timothy Edward Rishwain*, in San Joaquin Superior Court, Case Number LF012351A, respondent was convicted of violating Penal Code section 503 (embezzlement), a misdemeanor.

The circumstances are as follows: Beginning in or about 2007 through November 16, 2010, respondent stole in excess of 600 tablets of various dangerous drugs and controlled substances, valued at approximately \$8,000. The controlled substances included approximately 20 Lomotil, a prescription diarrhea medication classified as a narcotic; approximately 240 tablets of Ambien and approximately 20 tablets of Xanax, drugs classified as depressants. Respondent also stole 15 to 20 tablets of Phentermine, a diet drug classified as a stimulant which respondent began using a couple of months prior to his arrest. Respondent also stole approximately 340 erectile dysfunction medications which primarily included Viagra, as well as Cialis and Levitra. On one occasion, respondent stole Tessalon, a cough medicine.¹

Respondent stole the tablets from Rite Aid Pharmacy 6000, Lodi, California, the pharmacy at which he was employed since 1997, and for which he was the Pharmacist-in-Charge. Respondent was terminated shortly after Rite Aid discovered the thefts. Respondent admitted to the thefts, and that he stole the tablets for personal use.

¹ The controlled substances and dangerous drugs at issue in this matter include the following:

1) "Ambien," a brand name for Zolpidem, a depressant and Schedule IV controlled substance; 2) "Xanax," a brand name for Alprazolam, a depressant and Schedule IV controlled substance; 3) "Lomotil," a brand name for Diphenoxylate, a narcotic diarrhea medication and Schedule V controlled substance; 4) "Phentermine," a stimulant diet drug and Schedule IV controlled substance; 5) "Methamphetamine," a Schedule II controlled substance; 6) "Tessalon," a brand name for Benzonatate, a cough medicine and dangerous drug in that its procurement requires a prescription; 7) "Viagra," a brand name for Sildenafil Citrate; 7) "Cialis," a brand name for Tadalafil; and 8) "Levitra," a brand name for vardenafil. Viagra, Cialis and Levitra are dangerous drugs within the meaning of Business and Professions Code section 4022, in that procurement requires a prescription.

Respondent was arrested for the above offenses on November 16, 2010. He was convicted on January 27, 2011, and placed on three years probation, the terms of which included payment of restitution to Rite Aid, and performing 120 hours of community service.

Second Cause for Discipline (Dishonest Acts)

b. Respondent is subject to disciplinary action under Business and Professions Code section 4301, subdivision (f), in that respondent committed dishonest acts when he stole prescription tablets from his employer, Rite Aid Pharmacy, as set forth in Finding 3a.

Third Cause for Discipline (Self Administration of Dangerous Drugs and Controlled Substances)

c. Respondent is subject to disciplinary action under Business and Professions Code section 4301, subdivision (h), in that respondent self-administered drugs and controlled substances, as set forth in Finding 3a. Respondent voluntarily entered the California State Board of Pharmacy, Pharmacists Diversion Program through Maximus CA Diversion Program, on or about March 1, 2011, subsequent to his January 27, 2011 criminal conviction. On March 17, 2011, respondent tested positive for amphetamine and methamphetamine, pursuant to a hair follicle test administered as part of the Diversion program. Respondent admitted to occasional methamphetamine use, with his last use being in January 2011. On or about June 10, 2011, respondent withdrew from the Diversion program.

Fourth Cause for Discipline (Unlawful Use/Possession of Dangerous and Controlled Substances)

d. Respondent is subject to disciplinary action under Business and Professions Code section 4301, subdivision (j), in that respondent unlawfully used/possessed dangerous drugs and controlled substances, in violation of Health and Safety Code section 11173, subdivision (a), and Business and Professions Code section 4022, as set forth in Findings 3a and 3c.

Fifth Cause for Discipline (Violation of Pharmacy Laws)

e. Respondent is subject to disciplinary action under section 4301, subdivision (o), in that respondent violated the laws and regulations regulating pharmacists, as set forth in Findings 3a through 3d.

f. The parties further stipulated that respondent's urinalysis tests on March 15 and 23, 2011, were negative for all substances.

Background

4. Respondent studied at Loyola Marymount College, and then at the University of the Pacific School of Pharmacy, graduating in 1983. He was first employed as a pharmacist at Country Drug in Elk Grove, and later employed as a staff pharmacist at K-Med in Stockton. When Rite Aid bought out K-Med Pharmacy, respondent was employed by Rite Aid from about 1997 through 2010. He worked as a staff pharmacist at a Rite Aid in Galt, and then as a staff pharmacist at a Rite Aid Pharmacy in Lodi. He became the Pharmacist-in-Charge at this location. In 2010, respondent received the Rite Aid "Favored Pharmacist Award." Respondent has had no other criminal history, and no other disciplinary action taken against him by the Board.

5. On November 16, 2010, respondent was confronted by Rite Aid's loss prevention manager, Tim Henderson. Mr. Henderson advised respondent that video surveillance of his activities at the store showed him removing pills from bottles he had taken from store shelves, and putting the pills into his pocket. Respondent admitted to Mr. Henderson that he had taken pills for personal use from the store over the past three years. Respondent estimated at that time that he had taken approximately 300 Viagra (100 mg), 20 Viagra (50 mg), 150 to 200 Zolpidem (5 mg), Levitra (20 mg), Cialis (10 mg), 20 Benzonatate (100 mg), 30 Diphenoxylate, and 30 Alprazolam. Respondent provided the following statement and explanation to Rite Aid at that time:

I have never sold or given any of these drugs to anyone. My reasons for these actions were not only irresponsible, but extremely lacking good judgment. Words cannot begin to describe how bad I feel about my actions. I have been employed with Rite Aid since 1997 and absolutely love the company. They have always been fair with me and in turn I've been a hard working dedicated employee. My actions here are inexcusable, however I hope I can make retribution and continue to work as a Rite Aid Pharmacist. I am deeply and sincerely sorry for my actions ... I have never profited at all from these actions. The last 3 years have been trying times for me on a personal level. This is no excuse for my actions however it is somewhat an explanation. Please, please find it possible to forgive me for this is my only time ever I've done something like this. For this I'm sorry.

Rehabilitation

6. As a part of his criminal sentence, respondent paid restitution in the amount of \$7,902.64 to Rite Aid. He completed 123 hours of community service through St. Mary's Interfaith Dining Room & Community Services in Stockton, between February 1 and July 19, 2011. He has also paid \$340 in court ordered fines. Respondent remains on criminal

probation through January 27, 2014. He has been compliant with all other terms and conditions of his criminal probation.

7. On March 1, 2011, respondent voluntarily entered into a pharmacist recovery program through the Maximus CA Diversion Program. Maximus is a third-party vendor that contracts with the Department of Consumer Affairs to oversee the Board's diversion program. Maximus works in tandem with the Board's Pharmacy Review Committee (PRC) to develop an assessment and treatment program for pharmacists referred to the program with chemical dependency, professional impairment and other issues. Respondent entered into a contract with Maximus whereby he made a commitment to the program including participation in the following activities: 1) weekly attendance at two 1.5-hour group therapy sessions at Maximus; 2) weekly attendance at three 1.5-hour outpatient sessions through San Joaquin County; and 3) attendance at daily Narcotics and Alcoholics Anonymous (NA/AA) sessions. The NA/AA sessions were one-hour meetings. In addition, respondent agreed to participate and follow random drug testing protocols consisting of calling in to Maximus every day, and completing two to three drug tests per week. He was assigned to clinical case manager Linda Ryan.

8. Maximus established as respondent's date of sobriety the first negative random drug test (RDT) reported to Maximus, which was on March 22, 2011. Between March 22 and June 6, 2011, respondent submitted to 11 RDTs by urine specimen, all of which were negative. On March 17, 2011, respondent also submitted to an RDT by hair follicle test. This test was positive for methamphetamine and amphetamine. A hair follicle test allows for a longer detection period, up to four months; whereas a test by urine sample detects from two to seven days. Respondent confirmed that he had used methamphetamine over a two-day period in December 2010. He averred that a friend provided it to him, that he had ingested five to six lines, and that he exercised bad judgment at the time. Respondent indicated that prior to this incident, the last time he used methamphetamine was in college, and that he did so at the time to help keep up with his studies. Respondent denied using methamphetamine while he was employed as a pharmacist. He noted that he was not employed as a pharmacist in December 2010.

9. The PRC recommended that respondent complete a three-day clinical evaluation, which respondent arranged to have done at Hazeldon Springbrook (Hazeldon). The evaluation was performed in Newberg, Oregon over the period May 22 through 25, 2011. While traveling to Oregon, respondent missed an RDT call-in on May 21, 2011. In fact, he had advised his clinical case manager, Linda Ryan, that he was traveling to Oregon and respondent believed that he would be excused from calling in between May 21 and 25, 2011.

10. Following the three-day drug evaluation, Hazeldon recommended that the optimum treatment for respondent would be a 30 to 90-day inpatient treatment program for impaired health professionals. However, the Hazeldon treatment team also supported respondent's then treatment schedule comprised of an intensive outpatient program, 12-step and sponsor meetings, health support group meetings and the random drug testing. When

respondent returned from Hazeldon, he learned that he was assigned to a new clinical case manager, Anita Mireles. Respondent received a non-compliance letter relating to his missing the RDT call-in on May 21, 2011. Ms. Mireles did not excuse his failure to call that date and refused to retract the letter of non-compliance.

11. On June 3, 2011, Ms. Mireles informed respondent that the PRC determined that respondent should complete a 30 to 90-day inpatient rehabilitation program at Hazeldon in Oregon, Betty Ford Clinic in Rancho Mirage, California, or Talbotts in Georgia. All three programs cost in excess of \$30,000 per month to attend. Respondent advised Ms. Mireles that he was financially unable to afford these programs. On June 8, 2011, respondent requested, as an alternative, that he attend a San Joaquin County inpatient rehabilitation program. He understood that other Maximus members had done so in the past. Ms. Mireles denied this request and advised respondent that he needed to be in a program by the end of the week.

On June 10, 2011, respondent terminated his diversion contract with Maximus. He wrote to Maximus at that time that his decision was based upon finances, that he had been out of work for seven months, that he had no source of income and that he had expressed these facts repeatedly throughout his participation in the program. At hearing, respondent provided documentation of Maximus program expenses he incurred totaling \$7,066 through the time that he terminated his contract.² This was in addition to \$7,902 he paid in restitution to Rite Aid. At hearing, respondent indicated that he is now living on savings, and benefiting from the support and generosity of his very close family.

12. Ms. Mireles testified at hearing. She noted that on June 3, 2011, respondent called and expressed concerns that a drink he had taken one day prior to an RDT might result in a positive for alcohol. Respondent suggested that he was careless in taking a drink from someone else's glass without knowing its contents. Ms. Mireles believes this evidenced a degree of laxness on respondent's part in protecting his sobriety. She discussed the matter with respondent and suggested that he discuss it further with his health support group. Ms. Mireles also discussed this incident with the PRC project manager along with the clinical recommendation from Hazeldon that respondent complete a 30 to 90-day inpatient chemical dependency recovery program.

The PRC recommended that respondent enter an inpatient program. This recommendation was made in part out of concerns related to the June 3 call. Ms. Mireles further explained that the PRC wished respondent to attend an inpatient program because Hazeldon had recommended it as "optimum" treatment and this was in accord with PRC's belief that an optimum program provided a stronger foundation for recovery. Respondent's suggestion that he attend the San Joaquin County inpatient program was not accepted

² Expenses included CDCC Outpatient monthly fees (\$329), Facilitator Fees (\$1,400), Maximus fees (\$400), RDT laboratory and testing fees (\$1,297), and Hazeldon Springbrook evaluation costs (\$3,640).

because that program did not have a history of treating health care professionals, whereas the three recommended programs do.

13. Ms. Mireles was aware of respondent's financial situation. However, she believes that it was important for respondent to at least make an effort to contact the three treatment programs and inquire whether he might qualify for scholarships and/or other discounts based upon financial hardship. Ms. Mireles noted that PRC does not believe patients should dictate the type of treatment they receive, that the recommendation was based upon the Hazeldon report and evaluation, and that if respondent was ultimately unable to pay, the PRC could have met and conferred regarding alternative programs. Ms. Mireles also indicated that there were concerns over respondent's failure to disclose his history of taking methamphetamine on intake at Maximus.³ At hearing, respondent admitted to taking methamphetamine only over the two days in December 2010. He further averred that he last took methamphetamine in college, and then only to assist in his studies. This statement was belied by his more recent report on December 27, 2011, to the San Joaquin County Substance Abuse Services program. In this program's intake document respondent reported that his drug of choice is methamphetamine. If this is the case, respondent clearly needed to report this to Maximus at the time he entered into diversion. If this is not the case, respondent needed to explain what he meant by identifying methamphetamine as his drug of choice, particularly since he admitted to taking it only once since college.

14. Respondent has not participated in any type of rehabilitation or treatment program since terminating his diversion contract in June 2011.

15. At hearing, respondent acknowledged responsibility and remorse for his actions. He cooperated with Rite Aid's loss prevention personnel when confronted. Although he believes he took a lesser amount of the drugs, he accepted and paid restitution for the amounts claimed to have been stolen from Rite Aid. Respondent feels that he has let down his family, Rite Aid and customers. He has complied with his criminal probation and he intends to have the conviction expunged when he completes probation. He self-referred into the Board's diversion program, and would have continued but for financial reasons. He has maintained his continuing education for his pharmacist license. Respondent avers that he has abstained from drugs and alcohol since December 2010. However, he does not believe that he would benefit by participating further in a recovery or treatment program. He currently works part time in his sister's court reporting firm.

Respondent indicated that when he stole from Rite Aid, he knew that what he was doing was wrong. He explained that he was under financial stress, and that this was compounded on the occasion of his daughter's wedding. He is a single parent. He avers that he took drugs to help him sleep and to address his anxiety. He took other drugs for erectile dysfunction. When asked why he did not obtain medications lawfully by prescription from a

³ Respondent also failed to disclose his history of methamphetamine use to Board Inspector Rick Iknoian, Pharm.D. prior to the positive methamphetamine test.

physician, he merely characterized his behavior as “poor judgment,” and indicated that he would obtain medications properly through prescription in the future. Respondent does not believe he will engage in improper behavior again because he now knows to reach out to others for help. He also never again wants to let his family and others down as he has.

16. Respondent submitted 15 character reference letters, and they were considered to the extent allowable in evaluating his rehabilitation.⁴ By all accounts, respondent is very highly thought of by customers he served within the Lodi community. He holds a reputation as a trusted and knowledgeable advisor on medications. He showed compassion and concern for customers. He served a number of individuals and families for years, and had a loyal following. Most individuals submitting references were aware of his criminal offense from news or other accounts. They urged that he be given a second chance. One of his customers is also a physician. Jill Sorbera, M.D. wrote: “Tim notices how people are feeling and his compassion shows. I have seen him put a comforting arm around many a troubled customer. Tim has a genuine concern for the well-being of others that no busy pharmacy can cover – his thoughtful, unpretentious and heartfelt ways are immediately evident.”

Discussion

17. That respondent is remorseful and that he has made a positive impact over the years he has worked as a pharmacist in Lodi is apparent. He has suffered the loss of his job, income and reputation within his community. He now benefits from the support and encouragement of his very close family. Respondent has complied with all terms and conditions of his criminal probation. He self-referred into the Board’s diversion program, and left primarily because he believed he could not afford what Maximus required of him, admission into a 30 to 90-day inpatient rehabilitation program at a cost of \$30,000 per month. He has no other criminal history or disciplinary action before the Board.

18. Respondent’s actions must be viewed in context of his position as the Pharmacist-in-Charge. He was in a position of trust and overall responsibility for management of the Rite Aid pharmacy. This included ensuring compliance with all laws and regulations governing the operation of the pharmacy. His practice of diverting medications for personal use was not an isolated event. He engaged in this activity over a period of three years, and would likely have continued had he not been caught. While he did not resell medications, he still profited from not having to pay for drugs with a retail value approximating \$7,902 based upon restitution to Rite Aid. Respondent’s actions, in a significant way, betrayed the trust placed in him by his employer, coworkers and customers. He was dishonest. He stole medications for personal use. He did so regularly.

⁴ Government Code section 11513, subdivision (d) provides: “Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.”

19. Respondent suggested that he was prevented from continuing in the diversion program because of the prohibitive costs associated with entering into the recommended inpatient rehabilitation program. Even if this were the case respondent still has not completed any type of rehabilitation program from the time he terminated his diversion contract and left Maximus in June 2011. This is surprising. He has not attended NA/AA meetings. He has not pursued other outpatient or inpatient programs, even alternatives such as the San Joaquin County program he identified. He has not continued meeting in any health support group or individual counseling sessions. He has not pursued psychotherapy. He has not been part of any program promoting accountability, such as random drug testing.

20. Respondent suggested that his problems with diverting drugs at work had more to do with stress and dishonesty, than it did with chemical dependency or addiction. He expressed little insight into why he engaged in this pattern of conduct over period of several years.

The Board is reasonably concerned about respondent's history of methamphetamine use. He admitted to only using methamphetamine that one weekend in December 2010, and not having done so before that since college. Respondent used methamphetamine within a month after he was confronted at work about diverting drugs for personal use. Respondent had also just submitted a declaration to the Board on December 16, 2010, so he understood that he was under investigation at the time he used methamphetamine. He merely explained at hearing that he was in a party situation and that he took five to six lines of methamphetamine over a single weekend. His statement that this was the only time that he took methamphetamine since college rings hollow, particularly given that he identified methamphetamine as his drug of choice in December 27, 2011. (Finding 13.) Respondent failed to disclose his methamphetamine use when he entered the Board's diversion program. He did not disclose it in early interviews with Board Inspector Rick Iknoian. Of particular note, respondent diverted Phentermine from Rite Aid, but he did not disclose this particular medication, as he had disclosed the other medications, during the course of his interviews with Rite Aid's loss prevention manager or with the Lodi Police. Phentermine is a psychostimulant drug used medically as an appetite suppressant. It has a pharmacology similar to amphetamine. It appears that his failure to disclose past amphetamine and phentermine use on the above occasions was purposeful.

21. Respondent engaged in a prolonged course of dishonest conduct at work. He diverted drugs for personal use while working as a pharmacist, and more recently as the Pharmacist-in-Charge. It is absolutely incumbent upon respondent to now demonstrate that he is rehabilitated prior to consideration being given to placing him on probation with the Board.

Respondent has not participated in any type of recovery program since leaving the Board's diversion program. He has neither provided a satisfactory explanation for why he diverted medications over such a long period of time at work, nor developed and completed a drug rehabilitation program to address his issues. Rick Iknoian explained that methamphetamine is almost immediately addictive. It is a highly addictive, potent and

centrally acting drug. Its toxic effects include paranoia, confusion and lack of judgment. It can permanently change one's judgment, and can cause permanent brain damage. Dr. Iknoian further noted that addiction can crossover into other areas such as gambling or sex. Respondent acknowledged taking over 300 pills for erectile dysfunction, approximately 85 percent of the value of drugs he diverted from Rite Aid. It is not clear whether addiction was a factor in respondent diverting drugs for personal use. However, the burden is upon respondent to satisfactorily address remaining questions about his sobriety and rehabilitation. He has not done so in this case.

22. Consideration has been given to respondent's practice as a pharmacist for over 26 years, and to his strong professional relationships within his community. However, he remains on criminal probation and needs additional time to complete a rehabilitation program, and to demonstrate that he is safe and can be trusted to practice pharmacy. While respondent's work history is praiseworthy, the recency of his conviction and the other concerns detailed above make it inconsistent with the public interest to allow him to retain his pharmacist license. When respondent has established that he has completed a rehabilitation program and a longer period of sobriety, positive consideration may then be given to any application for reinstatement of his license.

23. Complainant has requested costs of investigation and enforcement pursuant to Business and Professions Code section 125.3 in the total amount of \$7,106. In support of this request, complainant submitted a Declaration from the Deputy Attorney General and a computer printout of the tasks performed by the Office of the Attorney General. From the information presented, the time spent was reasonable, and the activities conducted were necessary and appropriate to the development and presentation of the case. There were no charges by the Office of the Attorney General related to the interim suspension order. Complainant also seeks as part of the total amount, \$1,071 for inspector's costs. (10.5 hours @ \$102/hour.)

LEGAL CONCLUSIONS

1. Pursuant to Business and Professions Code section 4301, the Board may take action against the holder of any license who has engaged in unprofessional conduct, including:

(f) The commission any act involving moral turpitude, dishonesty, fraud, deceit, or corruption, whether the act is committed in the course of relations as a licensee or otherwise, and whether the act is a felony or misdemeanor or not.

[¶] ... [¶]

(h) The administering to oneself, of any controlled substance, or the use of any dangerous drug or of alcoholic beverages to the

extent or in a manner as to be dangerous or injurious to oneself, to a person holding a license under this chapter, or to any other person or to the public, or to the extent that the use impairs the ability of the person to conduct with safety to the public the practice authorized by the license.

[¶] ... [¶]

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

[¶] ... [¶]

(l) The conviction of a crime substantially related to the qualifications, functions, and duties of a licensee under this chapter. The record of conviction of a violation of Chapter 13 (commencing with Section 801) of Title 21 of the United States Code regulating controlled substances or of a violation of the statutes of this state regulating controlled substances or dangerous drugs shall be conclusive evidence of unprofessional conduct. ... The board may inquire into the circumstances surrounding the commission of the crime, in order to fix the degree of discipline or, in the case of a conviction not involving controlled substances or dangerous drugs, to determine if the conviction is of an offense substantially related to the qualifications, functions, and duties of a licensee under this chapter. A plea or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning of this provision. The board may take action when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under Section 1203.4 of the Penal Code allowing the person to withdraw his or her plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, information, or indictment.

[¶] ... [¶]

(o) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of or conspiring to violate any provision or term of this chapter or of the applicable federal and state laws and regulations governing pharmacy, including regulations established by the board or by any other state or federal regulatory agency.

2. Respondent was convicted of embezzlement, a crime substantially related to the qualifications, responsibilities and duties of a pharmacy technician. (Finding 3a.) Complainant therefore established cause to discipline respondent's license pursuant to Business and Professions Code section 4301, subdivision (l).

3. For approximately three years respondent committed dishonest acts when he stole prescription tablets from his employer. (Finding 3b.) Complainant established cause to discipline respondent's license pursuant to Business and Professions Code section 4301, subdivision (f).

4. Respondent self-administered dangerous drugs and controlled substances to an extent and in a manner dangerous and injurious to himself and others. (Finding 3c.) Complainant established cause to discipline respondent's license pursuant to Business and Professions Code section 4301, subdivision (h).

5. Respondent is subject to disciplinary action under Business and Professions Code section 4301, subdivision (j), in that respondent unlawfully used/possessed dangerous drugs and controlled substances, in violation of Health and Safety Code section 11173, subdivision (a), and Business and Professions Code section 4022, as set forth in Findings 3a and 3c.

6. Respondent is subject to disciplinary action under section 4301, subdivision (o), in that respondent violated the laws and regulations regulating pharmacists, as set forth in Findings 3a through 3d, and Legal Conclusions 2 through 5.

7. The matters set forth in Findings 17 through 22 have been considered. Respondent has not met his burden of demonstrating that he is substantially rehabilitated. He requires additional time to complete a rehabilitation program, and to demonstrate that he is safe and can be trusted to practice pharmacy. While respondent's work history within the Lodi Community is laudable, the recency of his conviction and the several other concerns detailed in the Factual Findings make any consideration of issuing him a probationary license premature. When respondent has established that he has completed a rehabilitation program and a longer period of sobriety, positive consideration should be given to any future application for reinstatement of his license.

It would be contrary to the public interest to issue respondent a probationary license at this time.

8. Pursuant to Business and Professions Code section 125.3, a licensee found to have violated a licensing act may be ordered to pay the reasonable costs of investigation and prosecution of a case. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and Professions Code section 125.3. These factors include whether the licensee has been

successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of his or her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate in light of the alleged misconduct.

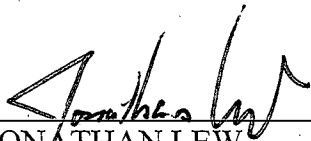
9. As set forth in Finding 23, complainant has requested costs of investigation and enforcement pursuant to Business and Professions Code section 125.3 in the total amount of \$7,106. These costs are reasonable. The matters set forth in Finding 11 have been considered. Respondent is living off his savings. He has only limited income from part-time employment with his sister's firm. He was unable to pay for a comprehensive inpatient rehabilitation program. Respondent demonstrated that he is not financially able to pay the reasonable costs associated with the investigation and prosecution of this case.

Under these circumstances respondent should be excused from paying the costs associated with the investigation and enforcement of this case.

ORDER

Pharmacist License Number RPH 38329 issued to Tim Rishwain is revoked pursuant to Legal Conclusions 2 through 6, jointly and individually.

DATED: February 9, 2012



JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings

1 KAMALA D. HARRIS
Attorney General of California
2 JANICE K. LACHMAN
Supervising Deputy Attorney General
3 ANAHITA S. CRAWFORD
Deputy Attorney General
4 State Bar No. 209545
1300 I Street, Suite 125
5 P.O. Box 944255
Sacramento, CA 94244-2550
6 Telephone: (916) 322-8311
Facsimile: (916) 327-8643
7 *Attorneys for Complainant*

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

11 In the Matter of the Interim Suspension Order
Against:

Case No. 4102

12 **TIM RISHWAIN**
13 **3909 E. Scottsdale Road**
14 **Lodi, CA 95246**
Pharmacist License No. RPH 38329

OAH No. 2011070550

A C C U S A T I O N

15 Respondent.

16
17 Complainant alleges:

18 **PARTIES**

19 1. Virginia Herold (Complainant) brings this Accusation solely in her official capacity
20 as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.

21 2. On or about March 19, 1984, the Board of Pharmacy issued Pharmacist License
22 Number RPH 38329 to Tim Rishwain (Respondent). The Pharmacist License was in full force
23 and effect at all times relevant to the charges brought herein and will expire on November 30,
24 2011, unless renewed.

25 **JURISDICTION**

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

1 4. Section 118, subdivision (b), of the Code provides that the
2 suspension/expiration/surrender/cancellation of a license shall not deprive the Board of
3 jurisdiction to proceed with a disciplinary action during the period within which the license may
4 be renewed, restored, reissued or reinstated.

5 **STATUTORY PROVISIONS**

6 5. Section 4301 of the Code states, in part:

7 The board shall take action against any holder of a license who is guilty of
8 unprofessional conduct or whose license has been procured by fraud or
9 misrepresentation or issued by mistake. Unprofessional conduct shall include, but is
not limited to, any of the following:

10 ...

11 (f) The commission of any act involving moral turpitude, dishonesty, fraud,
12 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.

13 ...

14 (h) The administering to oneself, of any controlled substance, or the use of any
15 dangerous drug or of alcoholic beverages to the extent or in a manner as to be
16 dangerous or injurious to oneself, to a person holding a license under this chapter, or
to any other person or to the public, or to the extent that the use impairs the ability of
the person to conduct with safety to the public the practice authorized by the license.

17 ...

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

19 ...

20 (l) The conviction of a crime substantially related to the qualifications,
21 functions, and duties of a licensee under this chapter. The record of conviction of a
22 violation of Chapter 13 (commencing with Section 801) of Title 21 of the United
23 States Code regulating controlled substances or of a violation of the statutes of this
24 state regulating controlled substances or dangerous drugs shall be conclusive
25 evidence of unprofessional conduct. In all other cases, the record of conviction shall
26 be conclusive evidence only of the fact that the conviction occurred. The board may
27 inquire into the circumstances surrounding the commission of the crime, in order to
28 fix the degree of discipline or, in the case of a conviction not involving controlled
substances or dangerous drugs, to determine if the conviction is of an offense
substantially related to the qualifications, functions, and duties of a licensee under this
chapter. A plea or verdict of guilty or a conviction following a plea of nolo
contendere is deemed to be a conviction within the meaning of this provision. The
board may take action when the time for appeal has elapsed, or the judgment of
conviction has been affirmed on appeal or when an order granting probation is made
suspending the imposition of sentence, irrespective of a subsequent order under
Section 1203.4 of the Penal Code allowing the person to withdraw his or her plea of

1 guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or
2 dismissing the accusation, information, or indictment.

3 (o) Violating or attempting to violate, directly or indirectly, or assisting in or
4 abetting the violation of or conspiring to violate any provision or term of this chapter
5 or of the applicable federal and state laws and regulations governing pharmacy,
including regulations established by the board or by any other state or federal
regulatory agency.

6 6. Code section 4022 states:

7 "Dangerous drug" or "dangerous device" means any drug or device unsafe
8 for self-use in humans or animals, and includes the following: (a) Any drug that bears
9 the legend: "Caution: federal law prohibits dispensing without prescription," "Rx
10 only," or words of similar import. (b) Any device that bears the statement: "Caution:
11 federal law restricts this device to sale by or on the order of a _____," "Rx only," or
12 words of similar import, the blank to be filled in with the designation of the
13 practitioner licensed to use or order use of the device. (c) Any other drug or device
14 that by federal or state law can be lawfully dispensed only on prescription or
15 furnished pursuant to Section 4006.

12 7. Health and Safety Code section 11173, subdivision (a) states, in part:

13 No person shall obtain or attempt to obtain controlled substances, or procure
14 or attempt to procure the administration of or prescription for controlled substances,
15 (1) by fraud, deceit, misrepresentation, or subterfuge; or (2) by the concealment of a
16 material fact. . . .

16 8. Code section 4360 states:

17 The board shall operate a pharmacists recovery program to rehabilitate
18 pharmacists and intern pharmacists whose competency may be impaired due to abuse
19 of alcohol, drug use, or mental illness. The intent of the pharmacists recovery
20 program is to return these pharmacists and intern pharmacists to the practice of
21 pharmacy in a manner that will not endanger the public health and safety.

20 9. Code section 4362 states:

21 (a) A pharmacist or intern pharmacist may enter the pharmacists recovery
22 program if:

23 . . .

24 (2) The pharmacist or intern pharmacist voluntarily elects to enter the
pharmacists recovery program.

25 (b) A pharmacist or intern pharmacist who enters the pharmacists recovery
26 program pursuant to paragraph (2) of subdivision (a) shall not be subject to discipline
27 or other enforcement action by the board solely on his or her entry into the
28 pharmacists recovery program or on information obtained from the pharmacist or
intern pharmacist while participating in the program unless the pharmacist or intern
pharmacist would pose a threat to the health and safety of the public. However, if the
board receives information regarding the conduct of the pharmacist or intern

1 pharmacist, that information may serve as a basis for discipline or other enforcement
by the board.

2 10. Code section 4369 states:

3 (a) Any failure to comply with the treatment contract, determination that the
4 participant is failing to derive benefit from the program, or other requirements of the
5 pharmacists recovery program may result in the termination of the pharmacist's or
6 intern pharmacist's participation in the pharmacists recovery program. The name and
license number of a pharmacist or intern pharmacist who is terminated from the
pharmacists recovery program and the basis for the termination shall be reported to
the board.

7 (b) Participation in the pharmacists recovery program shall not be a defense
8 to any disciplinary action that may be taken by the board.

9 (c) No provision of this article shall preclude the board from commencing
10 disciplinary action against a licensee who is terminated from the pharmacists
recovery program.

11 **CONTROLLED SUBSTANCES AND DANGEROUS DRUGS AT ISSUE**

12 11. "Ambien," a brand name for Zolpidem, a depressant, is a Schedule IV controlled
13 substance as designated my Health and Safety Code section 11057, subdivision (d)(32) and a
14 dangerous drug within the meaning of Code section 4022, in that its procurement requires a
15 prescription.

16 12. "Xanax," a brand name for Alprazolam, a depressant, is a Schedule IV controlled
17 substance as designated my Health and Safety Code section 11057, subdivision (d)(1) and a
18 dangerous drug within the meaning of Code section 4022, in that its procurement requires a
19 prescription.

20 13. "Lomotil," a brand name for Diphenoxylate, a narcotic diarrhea medication, is a
21 Schedule V controlled substance as designated my Health and Safety Code section 11058,
22 subdivision (c)(4) and a dangerous drug within the meaning of Code section 4022, in that its
23 procurement requires a prescription.

24 14. "Phentermine," a stimulant diet drug, is a Schedule IV controlled substance as
25 designated my Health and Safety Code section 11057, subdivision (f)(4) and a dangerous drug
26 within the meaning of Code section 4022, in that its procurement requires a prescription.

27 15. "Methamphetamine" is a Schedule II controlled substance as designated by
28 Health and Safety Code section 11055, subdivision (d)(2).

1 Respondent stole the tablets from Rite Aid Pharmacy 6000, Lodi, Ca, the pharmacy at
2 which he was employed since 1997 and for which he was the Pharmacist-in-Charge (PIC).
3 Respondent was terminated shortly after Rite Aid discovered his thefts. Respondent admitted to
4 the theft and that he stole the tablets for personal use.

5 Respondent was arrested for the above offenses on November 16, 2010, and on January 27,
6 2011 was convicted of violating Penal Code section 503 (embezzlement), a misdemeanor.
7 Respondent was placed on three years of probation, ordered to pay restitution to Rite Aid, and to
8 perform 120 hours of community service.

9 **SECOND CAUSE FOR DISCIPLINE**

10 **(Dishonest Acts)**

11 22. Respondent is subject to disciplinary action under section 4301, subdivision (f), in
12 that Respondent committed dishonest acts when he stole prescription tablets from his employer,
13 Rite Aid Pharmacy, as more fully set forth in paragraph 21, above.

14 **THIRD CAUSE FOR DISCIPLINE**

15 **(Self Administration of Dangerous Drugs and Controlled Substances)**

16 23. Respondent is subject to disciplinary action under section 4301, subdivision (h), in
17 that Respondent self administered dangerous drugs and controlled substances, as further set forth
18 in paragraph 21, above, and paragraph 26, below.

19 **FOURTH CAUSE FOR DISCIPLINE**

20 **(Unlawful Use/Possession of Dangerous Drugs and Controlled Substances)**

21 24. Respondent is subject to disciplinary action under section 4301, subdivision (j), in
22 that Respondent unlawfully used/possessed dangerous drugs and controlled substances, in
23 violation of Health and Safety Code section 11173, subdivision (a), and Business and Professions
24 Code section 4022, as more fully set forth in paragraphs 21 and 23, above, and paragraph 26,
25 below.

26 //

27 //

28 //

1 **FIFTH CAUSE FOR DISCIPLINE**

2 **(Violation of Pharmacy Laws)**

3 25. Respondent is subject to disciplinary action under section 4301, subsection (o) in that
4 Respondent violated the laws and regulations regulating pharmacists, as more fully set forth in
5 paragraph 21-24, above and paragraph 26, below.

6 **SIXTH CAUSE FOR DISCIPLINE**

7 **(Unsuccessful Completion of Diversion Program)**

8 26. Respondent is subject to disciplinary action under section 4362, subdivision (b) and
9 section 4369, subdivision (c), in that Respondent was terminated from the Pharmacists Diversion
10 Program and admitted to staff that he had previously been using methamphetamines. The
11 circumstances are as follows:

12 Respondent entered the California State Board of Pharmacy, Pharmacists Diversion
13 Program through Maximus CA Diversion Program, on or about March 1, 2011, subsequent to his
14 criminal conviction on January 27, 2011. On March 17, 2011, Respondent tested positive for
15 amphetamine and methamphetamine pursuant to a hair follicle test. Respondent admitted to
16 Diversion Program personnel that he was using methamphetamines (a stimulant) periodically,
17 two to three times per month for the last six months just prior to entering Maximus. On or about
18 June 11, 2011, Respondent requested withdrawal from the diversion program and stopped all
19 further contact with the program. On June 15, 2011, the diversion program terminated
20 Respondent from the program and classified him a public risk.

21 **PRAYER**

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

24 1. Revoking or suspending Pharmacist License Number RPH 38329, issued to Tim
25 Rishwain

26 //

27 //

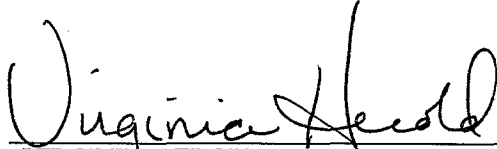
28 //

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

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

DATED: 8/31/11



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

SA2011101607
10741973.doc