

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

In the Matter of the Accusation Against:

Randy Lovejoy
314 Bluebell Avenue
Placentia, CA 92870

Pharmacist License No. RPH 32175

Respondent.

Case No. 4603

OAH No. 2014010374

DECISION AND ORDER

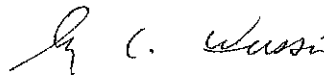
The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Pharmacy, Department of Consumer Affairs, as its Decision in this matter.

This decision shall become effective on January 28, 2015.

It is so ORDERED on December 29, 2014.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By



STAN C. WEISSER
Board President

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

In the Matter of the Accusation Against

RANDY RAY LOVEJOY,

Original Pharmacist License No.
RPH 32175

Respondent.

Case No. 4603

OAH No. 2014010374

PROPOSED DECISION

Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on October 28, 2014, in San Diego, California.

Carl W. Sonne, Deputy Attorney General, represented complainant Virginia Herold, Board of Pharmacy, Department of Consumer Affairs, State of California.

Randy Ray Lovejoy, respondent, represented himself and was present throughout the administrative proceeding.

The matter was submitted on October 28, 2014.

SUMMARY

Respondent has a long history of alcohol abuse that resulted in four misdemeanor convictions arising from two arrests for driving under the influence of alcohol with enhancement for driving with a blood alcohol content (BAC) over 0.20 percent. At the time of his first arrest respondent admitted to driving while intoxicated about fifty to one hundred times per year and drinking alcohol daily. Respondent also admitted during the hearing that he drank alcohol while he worked as a pharmacist in 2007.

Clear and convincing evidence established that respondent's alcohol-related convictions are substantially related to the qualifications, functions, and duties of a pharmacist. Though respondent has demonstrated some elements of rehabilitation regarding his alcohol related convictions, in light of his history of alcoholism, he provided insufficient

evidence to establish that his sobriety can be maintained. Insufficient time has elapsed to establish that respondent has undergone a meaningful and sustained period of recovery. The only measure of discipline that will protect the public is the outright revocation of respondent's pharmacist license.

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent Randy Ray Lovejoy became licensed as a pharmacist in California on August 7, 1978. His license expires on March 31, 2016. No prior disciplinary action has been taken on respondent's license.

2. On September 19, 2013, Virginia Herold, complainant, signed the Accusation in her official capacity as Executive Officer of the Board of Pharmacy (board). The Accusation and other required documents were served on respondent. Respondent timely filed a Notice of Defense.

Respondent's Convictions

3. On December 11, 2012, respondent was convicted in the Superior Court of California, County of Orange, in Case No. 12NM05742 of violating Vehicle Code, section 23152, subdivision (a), driving under the influence of alcohol; Vehicle Code section 23152, subdivision (b), driving with a BAC of 0.08 percent or more, with an enhancement pursuant to Vehicle Code, section 23538, subdivision (b)(2), driving with a BAC of 0.20 percent or more by weight. Each of these misdemeanor convictions arose as a result of respondent's actions on March 9, 2012.

As a result of these convictions, respondent was placed on three years' informal probation with various terms and conditions, including to consume no alcoholic beverages and not be present in any establishment where the primary items for sale are alcoholic beverages, to attend and complete an eighteen-month Multiple Offender Alcohol Program and attend and complete a Mothers Against Drunk Driving (MADD) Impact Panel.

4. On December 11, 2012, respondent was also convicted in the Superior Court of California, County of Orange, in Case No. 12HM06506 of violating Vehicle Code, section 23152, subdivision (a), driving under the influence of alcohol; Vehicle Code section 23152, subdivision (b), driving with a BAC of 0.08 percent or more, with an enhancement pursuant to Vehicle Code, section 23538, subdivision (b)(2), driving with a BAC of 0.20 percent or more by weight. Each of these misdemeanor convictions arose as a result of respondents actions on April 9, 2012.

As a result of this conviction, respondent was ordered to serve seventy-five days in the Orange County Jail, and he was placed on five years' informal probation with various

terms and conditions. These terms and conditions prohibited him from consuming alcoholic beverages; being present in any establishment where the primary items for sale are alcoholic beverages; requiring him to attend and complete an eighteen-month Multiple Offender Alcohol Program, and requiring him to attend and complete a Mothers Against Drunk Driving (MADD) Impact Panel. The probation was to run concurrent with the probation in Case No. 12NM05742.

Circumstances of the Convictions

THE MARCH 9, 2012, ARREST

5. On March 9, 2012, respondent began drinking vodka at about 9:00 a.m. and continued to drink until about 2:00 p.m.¹ During that period, respondent consumed about 750 mL of vodka, a.k.a., a fifth of a gallon. At about 3:00 p.m. that day he got into his car to drive to a pharmacy to pick up medications for his mother. After picking up the medications, he drove home. During his drive home, he made a u-turn on a residential street and hit the curb with the tires on the passenger side of his vehicle. After he made the u-turn, respondent fell asleep in his car.

6. When police arrived on the scene, the officer observed that respondent was unable to stand without assistance. Respondent had a strong odor of alcohol emanating from him, had thick, slurred speech, and red watery eyes. When asked if he had consumed alcohol, respondent stated that he had three vodka drinks and two cans of beer that day. Respondent was unable to operate the key to lock the door of his car. When asked if he would be able to perform a field sobriety test, respondent stated "No, I'm drunk." Respondent was then arrested and taken to the police station.

7. When police arrived at the police station, paramedics were called to examine respondent because he was not able to get out of the police car. After he was checked by paramedics, taken into the jail and read his Miranda rights, officers questioned respondent. Respondent told the officers that he drinks alcohol every day and estimated that he drove drunk about fifty to one hundred times a year. Respondent further stated that about half of the time that he drives his car, he drives with an open alcoholic beverage in the car.

8. At the jail, respondent agreed to have a blood test and a preliminary alcohol screening (PAS) (breathalyzer test) for alcohol. The results of two breathalyzer tests taken were 0.30 percent and 0.30 percent BAC. At about 4:30 p.m. that day, respondent's blood was taken to conduct a blood BAC. The result of that test was that respondent had a BAC of 0.35 percent.

¹ These factual findings are based in part on information included in the police report and received under *Lake v. Reed* (1997) 16 Cal.4th 448, which held that portions of a law enforcement officer's report are admissible in an administrative proceeding over a hearsay objection, including the officer's observations and the party's admissions.

THE APRIL 9, 2012, ARREST

9. On April 9, 2012, respondent had been drinking at home from about 11:00 a.m. to about 4:00 p.m. before he drove to the airport to pick up his wife. At about 8:00 p.m. he drove to John Wayne Airport and parked his car at the passenger loading zone next to the curb line. An observer at the airport called the sheriff's department to evaluate respondent as a possible drunk driver. Respondent got out of his car and sat on a bench in front of a terminal of the airport. When the deputy sheriff arrived, he observed that respondent appeared flushed with bloodshot watery eyes, smelled of alcohol, slurred his speech and had an unsteady gait.

10. The deputy sheriff asked respondent if he had been drinking, and respondent told him that he had about four beers earlier that day and was picking up his wife from the airport. When asked to produce his driver's license, respondent provided a copy of a notice regarding the suspension of his driver's license from when he was arrested about one month earlier on March 8, 2012. The deputy sheriff administered field sobriety tests to respondent as well as a PAS by breathalyzer, and respondent failed the field sobriety test and blew 0.286 percent and 0.298% BAC on his breathalyzer test. Respondent was thereafter arrested and taken to the Orange County jail where blood was taken from respondent for alcohol testing. The results of the blood test showed that respondent had a BAC of 0.30 percent by average of two determinations.

Testimony of Christine Acosta, Pharm.D.

11. Christine Acosta received her Doctor of Pharmacy (Pharm.D.) degree in May 2006 from Western University of Health Sciences and is currently employed by the California Board of Pharmacy as a Supervising Inspector. She was promoted to that position in July 2014 from her previous position as an Inspector for the board, which was a position she held from December 2011 to July 2014. As part of her duties as the Supervising Inspector, Dr. Acosta oversees inspectors who investigate and inspect about two hundred to two hundred fifty hospitals and clinics to ensure that they are in compliance with applicable regulations. She received her pharmacist's license from the state of California in July 2006, and she worked as a pharmacist at CVS Pharmacy and Scripps Memorial Hospital from 2006 to December 2011 when she became an inspector.

12. Dr. Acosta did not conduct the investigation of respondent's criminal convictions in this case, but she did review his criminal convictions and all of the documents provided by respondent to the board as part of this matter. Dr. Acosta testified that driving under the influence of alcohol is dangerous to the public and demonstrates poor judgment, characteristics that are directly adverse to the practice of a pharmacist. Pharmacists are trusted to make judgment calls and to give the correct drug in the correct form and frequency and must follow all laws regarding controlled substances. She further testified that the improper exercise of judgment by a pharmacist could harm patients and the public.

Respondent's Testimony

13. Respondent is sixty years old, has been married for twenty-three years and has two adult children from a previous marriage. He received his Bachelor of Science degree in pharmacy from Idaho State University in 1978 and has been practicing as a pharmacist for about thirty-six years. Respondent has worked for various pharmacies and once owned and operated his own pharmacy. About four years ago respondent had periods of time when he was not working at all as a pharmacist and was taking care of his elderly mother. At the time of the incidents that resulted in his convictions, respondent was not employed as a pharmacist. Since June 2013, respondent has been working as an independent contractor pharmacist and is currently working as a pharmacist in Rancho Cucamonga, California.

14. Respondent drank alcohol daily from at least 2007 to May 23, 2012. Respondent testified that he was fired in 2007 from a pharmacist position that he held because he had been drinking alcohol during his lunch hour. Respondent testified that every day for a few months he would drink alcohol during his lunch hour and then return to work as a pharmacist. His employer noticed that he had been drinking and fired him.

15. Respondent also testified that sometime in 2010, while he was working as a pharmacist, one of the pharmacy technicians working with him suspected that he had been drinking alcohol at work. As a result of the pharmacy technician complaining to the store manager, the store insisted that respondent be tested for alcohol at a laboratory. When respondent refused to go for testing, he was fired from his position as a pharmacist. Respondent stated that he drank alcohol the night before, but did not drink alcohol on the job that day.

16. Respondent began attending Alcoholics Anonymous (AA) meetings on May 23, 2012, and has been sober since May 23, 2012. Additionally, on June 1, 2012, respondent had a voluntary surgical procedure to implant a capsule of Naltrexone, a slow release medication that assists with cravings for alcohol, into his abdomen in an effort to address his alcoholism. The implant of Naltrexone provides medicinal effects for up to one year.

17. After receiving his implant from Lucien Alexandre, M.D., of Fresh Start Private, d/b/a Start Fresh Alcohol Recovery Clinic, respondent attended seven life-coaching sessions with a counselor, Oliver Maxwell, and psychologist Luis Guerrero beginning on June 7, 2012, at Start Fresh Alcohol Recovery Clinic. Mr. Maxwell provided a letter of support for respondent dated November 27, 2012, in which he states that respondent has made a commitment to keep his sobriety a priority in his life and continues to work to achieve that goal.

18. On February 21, 2013, respondent completed the court-ordered Victim Impact Panel conducted by MADD.

19. On July 9, 2014, respondent completed court-ordered, eighteen month Driving Under the Influence (D.U.I.) education classes.

20. As a result of his convictions, respondent's driver's license was revoked. On March 28, 2013, respondent received a restricted driver's license allowing him to drive only to and from work and to and from any court ordered D.U.I. programs. His was required to have an Ignition Interlock Device (IID) in his car until December 11, 2014. The IID was installed on respondent's vehicle on March 13, 2013, and requires that respondent blow into the device so that it may determine if respondent has any measurable amount of alcohol in his system. If the IID detects alcohol in respondent, the ignition of the car will be locked, and respondent will be prevented from starting the car.

21. Respondent currently attends AA meetings and testified that he is currently on Step four of the twelve-step program. Respondent testified that he has already completed the twelve-step program once but is repeating the twelve steps because the first time he completed the steps he did so in less than a year with his first sponsor, which is far too fast to be effective. Respondent's first AA sponsor moved to Arizona, and his second AA sponsor relapsed and is now drinking alcohol. As of June 2014, respondent obtained a third AA sponsor, Tim O'Neil, who provided a letter of support for respondent.

22. Respondent is not currently seeking therapy from a counselor, psychiatrist or psychologist regarding his alcoholism. He remains on probation for his convictions until December 11, 2017, and is currently in compliance with all of the terms of his probation.

Respondent's Other Evidence

23. Respondent provided five character reference letters from various individuals. All but one of those letters were drafted by people who were aware of respondent's convictions. One letter was drafted in 2010 as a job reference by a previous employer prior to respondent's convictions. One letter was written by respondent's wife, one by his AA sponsor, and another by a family friend of twenty-five years. One letter was written on November 27, 2012, by respondent's life coach, Mr. Maxwell.

24. Respondent's current annual income is approximately \$50,000. Respondent provided documentation showing his income and expenses for 2014, as well as typical monthly expenses, including paying for the residential care home for his eighty-eight year old mother.

Costs

25. The Attorney General's Office filed a Certification of Prosecution Costs pursuant to Business and Professions Code section 125.3 seeking cost recovery in the amount of \$2,670.00 in legal fees.

26. In determining whether respondent should be compelled to pay the board's costs, one must consider whether the costs are reasonable. The declaration submitted by the Deputy Attorney General in support of the costs of prosecution describes the tasks performed, identifies who performed them, and specifies the time spent on the tasks. Based

upon the nature of this case and the amount of time spent on the case, the cost of prosecution of \$2,670.00 is reasonable. Complainant provided no evidence regarding any costs specifically related to investigation.

Evaluation

27. On March 9, 2012, and on April 9, 2012, respondent consumed alcohol and drove a vehicle in a manner that was potentially injurious and dangerous to himself and to others. On those dates, he had consumed a substantial amount of alcohol (with a BAC of 0.35 and 0.30 percent) that made him unable to drive safely.

28. Respondent has a long history of alcoholism. At the time of his first arrest respondent admitted to police that he drank alcohol every day and estimated that he drove drunk about fifty to one hundred times a year; and about half of the time that he drove his car, he did so with an open alcoholic beverage in the car.

29. Respondent is commended for his efforts to seek recovery for his addiction to alcohol through his surgical implantation of Naltrexone and his attendance at AA. Notably, respondent admitted that the Naltrexone implant is no longer effective and has a life of only about one year. Respondent is not currently seeking any other treatment to prevent relapse or to control his alcoholism other than attendance at AA. Recently he started repeating the twelve steps of AA and is on Step 4 with a new sponsor as of June 2014. He testified that he has been sober and has not consumed any alcohol since May 23, 2012, but had no evidence other than his own testimony to support that assertion. Respondent has a very long history with alcoholism dating back to at least 2007, but has been sober for only a little over two years, which is a relatively short time. Respondent admitted to drinking alcohol while working as a pharmacist in 2007, further demonstrating his lack of control and the fact that he has been a threat to public safety. He only recently completed his court-ordered, eighteen month D.U.I. classes and remains on criminal probation for another three years or so. As a result, it cannot be concluded that respondent is currently able to practice as a pharmacist safely because a pharmacist has access to controlled substances and dangerous drugs and must be able to exercise sound judgment. It would, thus, be contrary to public interest to allow respondent to practice as a pharmacist at this time, even on a probationary basis. The outright revocation of respondent's license is the only measure of discipline that will ensure public protection.

LEGAL CONCLUSIONS

The Burden and Standard of Proof

1. An individual who holds a license to practice a particular profession has a fundamental vested right to continue in that licensed activity. Procedural due process requires a regulatory board or agency seeking to suspend or revoke a professional license to

prove the allegations of an accusation by clear and convincing evidence rather than proof by a preponderance of the evidence. (*Owen v. Sands* (2009) 176 Cal.App.4th 985, 991-992.) The burden of proof in this matter was on Complainant to establish the allegations in the accusation by clear and convincing evidence.

2. Clear and convincing evidence requires a finding of high probability; the evidence must be so clear as to leave no substantial doubt; it must be sufficiently strong to command the unhesitating assent of every reasonable mind. This requirement presents a heavy burden, far in excess of the preponderance of evidence standard that is sufficient for most civil litigation. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 84.)

Imposing License Discipline

3. The suspension or revocation of a license to engage in a profession is not penal; its purpose is to protect the public from incompetence and lack of integrity in those practicing the profession. The business of compounding prescriptions and selling drugs is intimately connected with and has a vital relationship to the health, safety, and welfare of the public. Public safety must be regarded as superior to private rights. (*Brodsky v. California State Board of Pharmacy* (1959) 173 Cal.App.2d 680, 688-689.)

4. Business and Professions Code section 4101.1 provides:

Protection of the public shall be the highest priority for the California State Board of Pharmacy in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.

Applicable Statutes

5. Business and Professions Code section 490 provides in part:

(a) In addition to any other action that a board is permitted to take against a licensee, a board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued.

(b) Notwithstanding any other provision of law, a board may exercise any authority to discipline a licensee for conviction of a crime that is independent of the authority granted under subdivision (a) only if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the licensee's license was issued.

(c) A conviction within the meaning of this section means a plea . . . of guilty. . . . Any action that a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed. . . .

6. Business and Professions Code section 4300 provides in part: “(a)Every license issued may be suspended or revoked.”

7. Business and Professions Code section 4301 provides in part:

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

...

(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.

...

(k) The conviction of more than one misdemeanor or any felony involving the use, consumption, or self-administration of any dangerous drug or alcoholic beverage, or any combination of those substances.

...

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

Substantial Relationship

8. To justify the imposition of discipline, there must be some nexus between an act or omission and the professional’s fitness or competence to practice. The Legislature has established such a nexus with respect to certain acts or omissions even where the acts or omissions do not actually impair a professional’s ability to practice. It does so by expressly

identifying the act or omission as an instance of “unprofessional conduct.” (*Medical Bd. of California v. Superior Court (Liskey)* (2003) 111 Cal.App.4th 163, 174.)

A determination that a licensee’s conviction justifies discipline cannot rest on the moral reprehensibility of the underlying conduct, but requires a reasoned determination that the conduct was in fact substantially related to the licensee’s fitness to engage in the profession. Licensing authorities enjoy unfettered discretion to determine on a case-by-case basis whether a given conviction is substantially related to the relevant professional qualifications. Business and Professions Code section 481 requires each licensing agency to “develop criteria to aid it . . . to determine whether a crime or act is substantially related to the qualifications, functions, or duties of the business or profession it regulates.” (*Donaldson v. Department of Real Estate of State of Cal.* (2005) 134 Cal.App.4th 948, 955-956.)

9. California Code of Regulations, title 16, section 1770, provides:

For the purpose of denial, suspension, or revocation of a personal or facility license . . . crime or act shall be considered substantially related to the qualifications, functions or duties of a licensee or registrant if to a substantial degree it evidences present or potential unfitness of a licensee or registrant to perform the functions authorized by his license or registration in a manner consistent with the public health, safety, or welfare.

10. Dr. Acosta testified that pharmacists must scrupulously exercise good judgment, particularly with regard to dangerous substances and alcohol. The Legislature specifically provided in Business and Professions Code section 4301, subdivision (h), that the use of alcoholic beverages to the extent or in a manner as to be dangerous or injurious to oneself or others, is grounds for license discipline. California Code of Regulations, title 16, section 1770 provide that any crime or act shall be considered substantially related to the qualifications of a licensee if to a substantial degree it evidences present or potential unfitness.

On the basis of the expert testimony, the express language of Business and Professions Code section 4301, subdivisions (h) and (l), and the clear intent of the regulation, respondent’s four misdemeanor D.U.I. convictions, constituted unprofessional conduct and are substantially related to the qualifications, functions and duties of a pharmacist. This conclusion is based on factual findings and on legal conclusions set forth herein.

Cause Exists to Impose Discipline Against Respondent’s License

11. First Cause for Discipline: Cause exists under Business and Professions Code sections 490 and 4301, subdivision (l), to impose discipline on respondent’s license. The clear and convincing evidence established that respondent was convicted of two misdemeanor offenses for driving under the influence of alcohol with enhancement for having a BAC over 0.20 percent, from his actions on March 9, 2012, and that these crimes

were substantially related to the qualifications, functions and duties of a pharmacist. This conclusion is based on the factual findings and legal conclusions herein.

12. Second Cause for Discipline: Cause exists under Business and Professions Code sections 490 and 4301, subdivision (l), to impose discipline on respondent's license. The clear and convincing evidence established that respondent was convicted of two misdemeanors offenses for driving under the influence of alcohol with enhancement for having a BAC over 0.20 percent, from his actions on April 9, 2012, and that these crimes were substantially related to the qualifications, functions and duties of a pharmacist. This conclusion is based on the factual findings and legal conclusions herein.

13. Third Cause for Discipline: Cause exists under Business and Professions Code sections 490 and 4301, subdivision (h), to impose discipline on respondent's license. The clear and convincing evidence established that respondent used alcoholic beverages in a manner and to an extent that was dangerous or injurious to himself and to the public. This conclusion is based on the factual findings and legal conclusions herein.

14. Fourth Cause for Discipline: Cause exists under Business and Professions Code sections 490 and 4301, subdivision (k), to impose discipline on respondent's license. The clear and convincing evidence established that respondent was convicted of four misdemeanors from two separate cases for crimes related to driving under the influence of alcohol. This conclusion is based on the factual findings and legal conclusions herein.

Rehabilitation

15. Title 16, California Code of Regulations, section 1769 sets forth criteria for rehabilitation. It provides in part:

(c) When considering the suspension or revocation of a facility or a personal license on the ground that the licensee or the registrant has been convicted of a crime, the board, in evaluating the rehabilitation of such person and his present eligibility for a license will consider the following criteria:

(1) Nature and severity of the act(s) or offense(s).

(2) Total criminal record.

(3) The time that has elapsed since commission of the act(s) or offense(s).

(4) Whether the licensee has complied with all terms of parole, probation, restitution or any other sanctions lawfully imposed against the licensee.

(5) Evidence, if any, of rehabilitation submitted by the licensee.

16. Rehabilitation is a state of mind and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved reformation and regeneration. (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) The evidentiary significance of misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct. (*Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1070.)

Disciplinary Guidelines

17. California Code of Regulations, title 16, section 1760, provides that in reaching a decision in a disciplinary action under the Administrative Procedure Act, the board must consider its Recommended Guidelines for Disciplinary Orders and Conditions of Probation (guidelines). Deviation from the guidelines is appropriate when the board, in its sole discretion, determines that the facts of the particular case warrant such a deviation, for example: the presence of mitigating factors, the age of the case, or evidentiary problems in the case.

18. Under the guidelines, the recommended discipline for violation of Business and Professions Code section 4301, subdivisions (h) and (l), unprofessional conduct, ranges from a minimum discipline of revocation, stayed, three years' probation, to a maximum disciplinary order of revocation. The recommended discipline for violation of Business and Professions Code section 4301, subdivision (k), unprofessional conduct consisting of the conviction of more than one misdemeanor involving the consumption of alcohol, ranges from a minimum of revocation, stayed, 90 days actual suspension, three to five years' probation, to a maximum of revocation.

19. The board's guidelines provide criteria to consider in determining the appropriate level of discipline, including: the nature and severity of the acts under consideration, the number and/or variety of current violations, the actual or potential harm to the public, the actual or potential harm to any consumer, respondent's prior disciplinary record, evidence of mitigation and rehabilitation, and the amount of time that has passed since the occurrence of the acts under consideration.

20. The guidelines permit respondent to present evidence demonstrating his rehabilitative or corrective efforts and competency, such as:

A) Recently dated written statements from persons in positions of authority who have on-the-job knowledge of the respondent's current competence in the practice of pharmacy. Each statement should include the period of time and capacity in which the person worked with the respondent and should be signed under the penalty of perjury and subject to verification.

B) Recently dated letters from counselors regarding respondent's participation in a rehabilitation or recovery program. These should include a description of the program, a psychologist's diagnosis of respondent's condition and current state of recovery, and the psychologist's basis for determining rehabilitation.

C) Recently dated letters describing respondent's participation in support groups, e.g., Alcoholics Anonymous, Narcotics Anonymous, professional support groups, etc.

D) Recently dated laboratory analyses or drug screen reports, confirming abstinence from drugs and alcohol.

E) Recently dated physical examination or assessment report by a licensed physician confirming the absence of any physical impairment that would prohibit respondent from practicing safely.

F) Recently dated letters from probation or parole officers regarding respondent's participation in and/or compliance with terms and conditions of probation or parole. The letter should include a description of the terms and conditions and the officer's basis for determining compliance.

The Application of Facts to Law

21. Respondent was dependent upon alcohol until at least May 23, 2012. His judgment became so impaired as a result of his escalating alcohol use that he drove a car with a BAC of 0.30 percent and again with a BAC of 0.35 percent. Respondent admitted to police officers at the time of his first arrest that he had driven a car while drunk at least fifty to one hundred times per year. Respondent testified that in 2007 he drank alcohol during his lunch hour every day and would return to work as a pharmacist in the afternoon. The extent and frequency of his use of alcohol resulted in potential harm to the public. Even though respondent's has made efforts toward establishing and maintaining his sobriety over the past two years, he has provided no evidence to corroborate his asserted sobriety date, no evidence from any persons who have knowledge of his on-the-job performance since his asserted sobriety date, and no evidence of any continuing therapy from a counselor or therapist regarding his current state of sobriety. Other than attending AA meetings, respondent currently takes no steps to ensure that he will not relapse. Respondent also failed to provide any recent records of attending AA meetings, and offered no insight into the reasons for his alcoholism.

The mitigating evidence that respondent produced and his evidence of rehabilitation were insufficient to support a conclusion that he presently possesses the sobriety required to

practice pharmacy safely, even on a probationary basis. Public safety need not be placed at risk to enable respondent to establish that he has changed his ways. The laws are designed to protect the public before a licensee harms a patient rather than after harm has occurred. (*Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 770-771.). The safer approach is to have respondent establish his rehabilitation outside of the profession and to place the burden on respondent to file a request for reinstatement when he has become rehabilitated.

No sanction other than an outright revocation is supported by this record.

Costs of Prosecution

22. Business and Professions Code section 125.3 provides in part:

(a) Except as otherwise provided by law . . . upon request of the entity bringing the proceeding, the administrative law judge may direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

23. *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 held that the regulation imposing costs for investigation and enforcement under Title 16, California Code of Regulations, section 317.5 (which is similar to Bus. & Prof. Code § 125.3) did not violate due process in a case involving the discipline of a chiropractor. But, it was incumbent on the State Board of Chiropractic Examiners to exercise its discretion to reduce or eliminate cost awards in a manner that ensured that section 317.5 did not “deter chiropractors with potentially meritorious claims or defenses from exercising their right to a hearing.”

The Supreme Court set forth four factors that the State Board of Chiropractic Examiners was required to consider in deciding whether to reduce or eliminate costs: (1) whether the chiropractor used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed; (2) whether the chiropractor had a “subjective” good faith belief in the merits of his position; (3) whether the chiropractor raised a “colorable challenge” to the proposed discipline; and (4) whether the chiropractor had the financial ability to make payments.

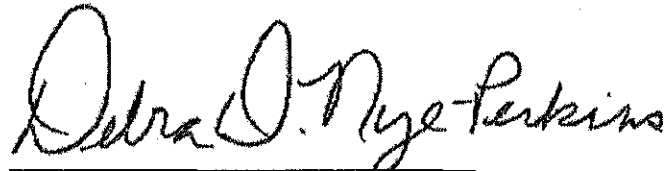
The *Zukerman* criteria were applied in this matter, and it is concluded that issuing an order directing respondent to pay the Board’s costs of prosecution in this matter will not have a chilling effect on future respondents’ exercise of their right to a hearing.. Respondent shall be required to pay \$2,670.00 in prosecution costs. The costs shall be payable as a condition precedent to re-licensure.

ORDER

1. License Number RPH 32175, issued to respondent Randy Ray Lovejoy, is revoked. Respondent shall relinquish his wall license and pocket renewal license to the board within 10 days of the effective date of this decision. Respondent may not reapply or petition the board for reinstatement of his revoked license for three years from the effective date of this decision.

2. As a condition precedent to reinstatement of his license, respondent shall reimburse the board for its costs of investigation and prosecution in the amount of \$2,670. Said amount shall be paid in full prior to the reapplication or reinstatement of his license unless otherwise ordered by the board.

DATED: November 26, 2014



DEBRA D. NYE-PERKINS

Administrative Law Judge

Office of Administrative Hearings

1 KAMALAD. HARRIS
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9 **BEFORE THE**
10 **BOARD OF PHARMACY**
11 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA

12 **In the Matter of the Accusation Against:**
13 **RANDY RAY LOVEJOY**
314 Bluebell Avenue
14 Placential, CA 92870
15 **Pharmacist License No. RPH 32175**
16 **Respondent.**

Case No. 4603
ACCUSATION

17
18 Complainant alleges:

19 **PARTIES**

- 20 1. Virginia Herold (Complainant) brings this Accusation solely in her official capacity
21 as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.
22 2. On or about August 7, 1978, the Board of Pharmacy issued Pharmacist License
23 No. RPH 32175 to Randy Ray Lovejoy (Respondent). The Pharmacist License was in full force
24 and effect at all times relevant to the charges brought herein and will expire on March 31, 2014,
25 unless renewed.

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9. 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:

....

(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.

....

(k) The conviction of more than one misdemeanor or any felony involving the use, consumption, or self-administration of any dangerous drug or alcoholic beverage, or any combination of those substances.

....

(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. In all other cases, the record of conviction shall be conclusive evidence only of the fact that the conviction occurred. 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.

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REGULATORY PROVISIONS

10. California Code of Regulations, title 16, section 1769, states:

.....

(b) When considering the suspension or revocation of a facility or a personal license on the ground that the licensee or the registrant has been convicted of a crime, the board, in evaluating the rehabilitation of such person and his present eligibility for a license will consider the following criteria:

(1) Nature and severity of the act(s) or offense(s).

(2) Total criminal record.

(3) The time that has elapsed since commission of the act(s) or offense(s).

(4) Whether the licensee has complied with all terms of parole, probation, restitution or any other sanctions lawfully imposed against the licensee.

(5) Evidence, if any, of rehabilitation submitted by the licensee.

11. California Code of Regulations, title 16, section 1770, states:

For the purpose of denial, suspension, or revocation of a personal or facility license pursuant to Division 1.5 (commencing with Section 475) of the Business and Professions Code, a crime or act shall be considered substantially related to the qualifications, functions or duties of a licensee or registrant if to a substantial degree it evidences present or potential unfitness of a licensee or registrant to perform the functions authorized by his license or registration in a manner consistent with the public health, safety, or welfare.

COSTS

12. Section 125.3 of the Code provides, in pertinent part, that the Board may request the administrative law judge to direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case, with failure of the licentiate to comply subjecting the license to not being renewed or reinstated. If a case settles, recovery of investigation and enforcement costs may be included in a stipulated settlement.

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1 FIRST CAUSE FOR DISCIPLINE

2 (December 11, 2012 Criminal Conviction for DUI, Driving With Blood Alcohol of 0.08% or
3 More [0.35% BAC] on March 9, 2012)

4 13. Respondent has subjected his license to discipline under sections 490 and 4301,
5 subdivision (l) of the Code in that he was convicted of a crime that is substantially related to the
6 qualifications, duties, and functions of a pharmacist. The circumstances are as follows:

7 14. On or about December 11, 2012, in a criminal proceeding entitled *People of the State*
8 *of California v. Randy Ray Lovejoy*, in the Superior Court of California, County of Orange, North
9 Justice Center, Case No. 12NM05742, Respondent was convicted on his plea of guilty of
10 violating Vehicle Code sections 23152(a) (DUI), 23152, subdivision (b) (driving with a blood
11 alcohol content of 0.08% or more [.35% BAC]), misdemeanors, with an enhancement allegation
12 pursuant to Vehicle Code section 23538(b)(2) (blood alcohol concentration of 0.20% or more by
13 weight).

14 15. As a result of the conviction Respondent was placed on three years informal
15 probation and ordered to violate no laws, obey all orders, rules and regulations and directives of
16 the Court, Jail, and Probation, submit person and property, including any residence, premises,
17 container or vehicle to search and seizure, consume no alcoholic beverages and not be present in
18 any establishment where the primary items for sale are alcoholic beverages, not drive a motor
19 vehicle with a measurable amount of alcohol in his blood and submit to chemical test of blood on
20 demand of any peace officer, use no unauthorized drugs, narcotics or controlled substances,
21 cooperate with probation officer in any plan for counseling and/or treatment, not drive without
22 a valid driver's license in his possession, not drive without proof of valid auto liability insurance,
23 use true name and date of birth at all times, disclose terms and conditions of probation when
24 asked by any law enforcement or probation officer, pay various fees and fines, attend and
25 complete an 18-month Multiple Offender Alcohol Program concurrent with Case
26 No. 12HM06506, attend and complete a MADD Impact Panel.

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1 16. The circumstances surrounding the conviction are that on or about March 9, 2012, at
2 approximately 3:00 p.m., Placentia Police Department Officers received a report of a possible
3 drunk driver at 314 Bluebell in Placentia, California. The reporting party (R.P.) advised that the
4 driver was now possibly asleep at the wheel. Upon arrival, officers observed Respondent exiting
5 the vehicle from the driver's door and could see keys in Respondent's right hand. Officers exited
6 their vehicle and had to immediately help Respondent maintain his balance as he was about to
7 fall. Officers smelled a very strong odor of an alcoholic beverage on his breath and person and
8 noticed his speech was very thick and difficult to understand. Officers also observed that
9 Respondent's eyes were red and watery. Officers asked Respondent if he had any medical
10 problems and if he had been drinking alcoholic beverages, and Respondent told officers that he
11 was taking medication for high blood pressure and had drank 3 Vodka drinks and 2 cans of beer
12 that day between 9:00 a.m. and 2:00 p.m.

13 17. Officers made contact with the RP, who told officers that she had observed
14 Respondent drive from McDonald's to their present location, and that Respondent was all over
15 the road and was driving like he was drunk. When officers asked Respondent if he thought he
16 would be able to perform field sobriety tests, Respondent responded, "No, I'm drunk." The R.P.
17 chose to place Respondent under citizen's arrest for driving under the influence of alcohol.
18 Officers placed handcuffs on Respondent and transported him to the county jail. Upon arrival at
19 the county jail, Respondent was so intoxicated that he could not get out of the patrol vehicle and
20 officers had to call paramedics to check on him. Respondent submitted to a blood test and told
21 officers that he drinks alcoholic beverages every day and estimated that he drove drunk about 50-
22 100 times a year. Respondent told officers that he had drank a fifth of Vodka that day. While
23 waiting for the blood technician, Respondent completed a PAS test and the results were 0.30%.
24 The blood test result returned a 0.35% BAC.

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1 SECOND CAUSE FOR DISCIPLINE

2 **(December 11, 2012 Criminal Conviction for DUI, Driving With Blood Alcohol of 0.08% or**
3 **More [0.30% BAC], and Driving on a Suspended License on April 19, 2012)**

4 18. Respondent has subjected his license to discipline under sections 490 and 4301,
5 subdivision (l) of the Code in that he was convicted of a crime that is substantially related to the
6 qualifications, duties, and functions of a pharmacist. The circumstances are as follows:

7 19. On or about December 11, 2012, in a criminal proceeding entitled *People of the State*
8 *of California v. Randy Ray Lovejoy*, in the Superior Court of California, County of Orange,
9 Harbor Justice Center, Newport Beach Facility, Case No. 12HM06506, Respondent was
10 convicted on his plea of guilty of violating Vehicle Code sections 23152(a) (DUI), 23152,
11 subdivision (b) (driving with a blood alcohol content of 0.08% or more [.30% BAC]), and
12 14601.5(a) (driving on a suspended license), misdemeanors, with an enhancement allegation
13 pursuant to Vehicle Code section 23538(b)(2) (blood alcohol concentration of 0.20% or more by
14 weight).

15 20. As a result of the conviction Respondent was placed on five years informal probation
16 and ordered to serve 75 days in the Orange County Jail. Respondent was also ordered to violate
17 no laws, obey all orders, rules and regulations and directives of the Court, Jail, and Probation,
18 submit person and property, including any residence, premises, container or vehicle to search and
19 seizure, consume no alcoholic beverages and not be present in any establishment where the
20 primary items for sale are alcoholic beverages, not drive a motor vehicle with a measurable
21 amount of alcohol in his blood and submit to chemical test of blood on demand of any peace
22 officer, use no unauthorized drugs, narcotics or controlled substances, cooperate with probation
23 officer in any plan for counseling and/or treatment, not drive without
24 a valid driver's license in his possession, not drive without proof of valid auto liability insurance,
25 use true name and date of birth at all times, disclose terms and conditions of probation when
26 asked by any law enforcement or probation officer, pay various fees and fines, attend and
27 complete an 18-month Multiple Offender Alcohol Program concurrent with Case
28

1 No. 12NM05742, attend and complete a MADD Impact Panel concurrent with Case No.
2 12NM05742.

3 21. The circumstances surrounding the conviction are that on or about April 9, 2012, at
4 approximately 8:40 p.m., Orange County Sheriff's Office deputies made contact with Respondent
5 at John Wayne Airport. Respondent was sitting on a concrete bench in front of Terminal "A".
6 Deputies observed that Respondent had a bright red face and stated he was picking up his wife.
7 Deputies asked Respondent if he had been drinking and he replied that he had drank about four
8 beers. Deputies could smell the odor of an alcoholic beverage on his breath and could see that his
9 eyes and cheeks were red. Deputies asked Respondent if he had ever been arrested for driving
10 under the influence of alcohol and he replied, "yes, about a month ago." Respondent did not have
11 a driver's license in his possession. Respondent blew 0.286% and 0.298% BAC on the PAS.
12 Deputies placed Respondent under arrest for driving under the influence of alcohol and
13 transported him to the Orange County Jail where he was booked.

14 **THIRD CAUSE FOR DISCIPLINE**

15 **(Use of Alcoholic Beverages in a Manner Dangerous & Injurious to Oneself & the Public)**

16 15. Respondent has subjected his license to disciplinary action under section 4301,
17 subdivision (h) of the Code in that on or about March 9, 2012 and April 19, 2012, Respondent
18 drove a vehicle while under the influence of alcoholic beverages, which posed a serious risk of
19 injury and/or death to himself and to the public, as detailed in paragraphs 13 through 21, above,
20 which are incorporated here by reference.

21 **FOURTH CAUSE FOR DISCIPLINE**

22 **(Multiple Convictions Involving the Use of Alcoholic Beverages)**

23 16. Respondent has subjected his license to disciplinary action under section 4301,
24 subdivision (k) of the Code in that on or about December 11, 2012, Respondent was convicted in
25 two separate cases on charges involving the consumption of alcoholic beverages, as detailed in
26 paragraphs 13 and 21, above, which are incorporated here by reference.

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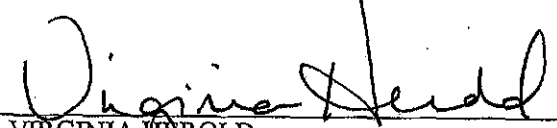
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PRAYER

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

1. Revoking or suspending Pharmacist License Number RPH 32175 issued to Randy Ray Lovejoy;
2. Ordering Randy Ray Lovejoy 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: 9/19/13



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

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