

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

In the Matter of the Accusation Against:

ROBERT GARLIN KERLEY
1561 West Median Circle
Porterville, CA 93257

Original Pharmacist License No. RPH 26099

Respondent

Case No. 3110

OAH No. 2008010405

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Pharmacy as its Decision in the above-entitled matter.

This decision shall become effective on May 27, 2009.

It is so ORDERED on April 27, 2009.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By



KENNETH H. SCHELL
Board President

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PROPOSED DECISION

Robert Walker, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter on April 2, 2008, in Sacramento, California, and on February 2, 2009, in Porterville, California.

Jessica M. Amgwerd, Deputy Attorney General, represented the complainant, Virginia K. Herold, Executive Officer, California State Board of Pharmacy.

Robert F. Hahn, Attorney at Law,¹ represented the respondent, Robert Garlin Kerley.

The record was closed on February 2, 2009.

SUMMARY AND ISSUES

Respondent, who was addicted to drugs, entered the board's pharmacist recovery program. As part of that program, he was required to participate in a privately operated drug diversion program. Respondent failed to comply with the drug diversion program and was terminated from it. Complainant filed an accusation seeking suspension or revocation of respondent's license.

Respondent stipulated to an interim suspension of his license pending a decision on the accusation.

¹ Robert F. Hahn, Attorney at Law, 5801 Christie Avenue, Emeryville, California 94608.

Respondent contends that he has been rehabilitated, that the prayer in the accusation should be denied, and that the interim suspension should be lifted. In the alternative, respondent contends that his license should be placed on probation and he should be given a second chance to comply with the drug diversion program.

Has respondent been rehabilitated?

If respondent has not been rehabilitated, should he be given a second chance to comply with the drug diversion program?

There also is an issue as to whether respondent should pay the board's costs and, if so, in what amount.

FACTUAL FINDINGS

BACKGROUND

1. On July 15, 1969, the California State Board of Pharmacy issued Original Pharmacist License No. RPH 26099 to the respondent, Robert Garlin Kerley.

2. For a few years, respondent worked at various pharmacies, and for 11 years, he owned and operated a pharmacy in Porterville. After selling his pharmacy, he worked as a pharmacist at the Porterville Developmental Center for 24 years. While working at the Developmental Center and after retiring from there, he worked part-time as a relief pharmacist.

3. Respondent became addicted to alcohol in 1961,² when he was 18 years old. Thus, at the time the board issued his license, he had been addicted for approximately eight years. From 1971 through 1973, he also was addicted to valium. In 1983 respondent stopped drinking. He regularly attended Alcoholics Anonymous (AA) meetings. He had a sponsor and worked the 12 steps of the AA program.

4. Respondent has never resumed drinking. But, after 20 years in AA, he obtained prescriptions for Xanax and Vicodin and began taking those drugs. That was in 2002. By 2003, respondent was also taking Soma, Phentermine, Norco, Robaxin, and Klonopin, all of which he stole from Warnack's Pharmacy, where he worked part-time. He also took Ambien, which he stole from his wife. All of these are dangerous drugs within the terms of Business and Professions Code section 4022, and all but the Soma and Robaxin are either schedule III or schedule IV drugs within the terms of Health and Safety Code sections 11056 and 11057. Respondent describes himself as having been a walking medicine cabinet.

² All of the dates concerning respondent's alcohol and drug use are approximations.

He continued to attend AA meetings, but until August of 2005, he also continued his extensive, illicit use of drugs, and he continued to steal drugs from his employer.

5. On multiple occasions while working at Warnack's Pharmacy between 2003 and August of 2005, respondent dispensed drugs while under the influence of dangerous drugs and controlled substances.

6. There is no evidence that respondent actually made errors or caused any injury to customers. However, respondent testified, "I was so deep into my disease that I did not think about whether I could perform competently" By stealing drugs, he caused financial injury to Carlos Martinez, the owner of Warnack's Pharmacy.

7. On August 13, 2005, respondent called his AA sponsor and asked for help. On August 17, 2005, respondent's sponsor took him to a hospital that has a detoxification center. Respondent was in the detoxification center for one week.

8. While respondent was in the detoxification center, his physician and his sponsor urged him to advise the board that he had an addiction problem. Respondent acted on that advice, and the board directed him to Maximus, a privately operated drug diversion program to which the board refers a pharmacist who needs to bring an addiction under control.

9. Donald Fensterman was respondent's first case manager at Maximus. Mr. Fensterman drafted a set of "recovery compliance terms," conditions respondent would have to satisfy in order to complete the Maximus program.

10. The terms were as follows: Respondent would agree that his license was suspended until Maximus notified him that he was authorized to return to work. Respondent would complete a nine-week intensive chemical dependency outpatient treatment program.³ Each week, respondent would attend both AA and Narcotics Anonymous (NA) meetings, and every month he would submit documentation that he had attended at least five meetings a week. Each week respondent would attend two health support group meetings, and respondent would cause the facilitator to submit reports to Maximus. Respondent would advise Maximus of any prescription medication he was taking. Respondent would provide body fluid samples at random times as required by Maximus. Respondent would regularly file written reports. There were other standard terms.

11. On October 6, 2005, respondent signed the recovery compliance terms, agreeing that his license was suspended and that he would satisfy the conditions.

³ Originally the requirement was for an inpatient program, but because of respondent's severe financial problems, Mr. Fensterman modified that requirement to permit respondent to complete a less expensive, outpatient program.

RESPONDENT'S FAILURE TO COMPLY WITH THE MAXIMUS PROGRAM

12. Respondent had serious financial, personal, and medical problems. One year before he entered the Maximus program, he had stomach bypass surgery because he weighed 320 pounds. Shortly before he entered the program, he declared bankruptcy. At the time he entered the program, his mother was being treated for the end-stages of cancer. A few months after respondent entered the program, Linda Kerley, to whom respondent had been married for 18 years, left him. During the 20 months respondent was in the program, he was unemployed.

13. Maximus does not do drug testing. Participants are required to register with Compass Vision Laboratory for random drug testing.

14. Respondent was required to pay \$75 a month to Maximus, \$325 a month for the health support group meetings, the cost of the nine-week intensive chemical dependency outpatient treatment program, and the fees Compass Vision charged for random drug testing.

15. As noted above, respondent agreed to the terms of his Maximus program on October 6, 2005. He, however, did not promptly register with Compass Vision for random drug testing. He failed to register for three weeks. He registered on October 27, 2005. He contended he was late in registering because he could not afford to pay the Compass Vision fees. From November 8, 2005, through February 4, 2006, a period of four months, respondent had six tests with negative results. He, however, missed one test. He testified that he missed that test because the Porterville testing center was closed on the day he was directed to test.

16. Respondent did not enter an outpatient treatment program. Again, he claimed he could not afford the cost.

17. By a letter dated October 28, 2005, Maximus sent respondent an application form he could use to request financial assistance. If his request had been approved, Maximus would have arranged a deferral of part of the Compass Vision fees. But respondent did not return the application. Later, the board waived the requirement that respondent pay \$75 per month to Maximus, and the fee for the health support group meetings was reduced from \$325 a month to \$100.

18. From birth, respondent has had problems with his left ankle. By 2006, it was dislocated in three places and extremely painful. In March of 2006, respondent's doctor prescribed Darvocet for pain. Respondent advised Maximus that his doctor had prescribed Darvocet. Respondent's random drug tests on March 20, March 29, April 3, and April 4, 2006, were positive for Darvocet.

19. The health support group meetings respondent was required to attend were held in Fresno. From October of 2005 to May of 2006, respondent attended some of those meetings; but he did not regularly attend twice a week as he had agreed to do. In May of

2006 respondent underwent ankle surgery and was confinement to a wheelchair. After that, he found it extremely difficult to attend the health support group meetings, and from May to October of 2006, he did not attend.

20. Maximus agreed that respondent could remain in the program without drug testing until he had recuperated from his ankle surgery and no longer needed to take medication for pain.

21. In October of 2006, respondent was able to walk, and he resumed attending the health support group meetings; but, as before, he did not attend regularly.

22. While respondent participated in the Maximus program, he frequently failed to file reports, including documentation that he was attending AA and NA meetings.

23. As noted above, Maximus agreed that respondent could remain in the program without drug testing until he had recuperated from his ankle surgery and no longer needed to take medication for pain. However, as of the beginning of April of 2007, which was ten and one-half months after respondent's surgery, he still had not resumed drug testing. Respondent testified that he had stopped taking pain medication in June of 2006 and, as of that time, was completely drug free but had not understood that Maximus expected him to resume drug testing. Respondent also testified that, at some point, he again began taking Darvocet because of pain in his ankle.

24. Mr. Fensterman concluded that respondent "may represent a risk to the public . . . should he elect to return to the practice of pharmacy . . ." Because of respondent's failure to comply with the Maximus program – particularly his failure to resume drug testing and his failure to enter an outpatient treatment program – Maximus terminated his participation. By a letter dated April 3, 2007, Mr. Fensterman advised the board that Maximus had determined that respondent presented a public risk and that Maximus had terminated him from the program.

MR. FENSTERMAN'S TESTIMONY

25. Mr. Fensterman no longer works at Maximus. He has taken a position with Kaiser Hospital in Sacramento overseeing urgent care services in the psychiatry department. He testified concerning respondent's failure to comply with the Maximus program. Mr. Fensterman has a master's degree in social work and extensive training and experience in working with people who suffer from chemical dependencies. He testified that it is possible that respondent could be more successful in the Maximus program if he tried it a second time.

26. Mr. Fensterman testified as to what would have to be included in a drug diversion program for respondent. He testified as follows: Respondent would need to be in a significant inpatient treatment program for at least 30 days – and preferably for 60 days. He would need to submit to random drug testing, participate in a 12 step program, and comply

strictly with the terms of a diversion program. He would need to be suspended from practice until he made a significant demonstration of recovery, and that suspension would need to be for at least four months.

27. Mr. Fensterman said that, unfortunately, taking a legitimately prescribed drug can prevent one from recovering.

28. On cross examination, respondent's counsel asked Mr. Fensterman about his April 2007 determination that respondent "may represent a risk to the public . . . should he elect to return to the practice of pharmacy" Respondent's counsel posed a hypothetical question and asked whether, under those circumstances, Mr. Fensterman would change his opinion about respondent's representing a risk to the public. Mr. Fensterman said he would. The evidence, however, does not support findings of fact consistent with the hypothetical.

COMMUNITY SERVICE

29. Respondent has been very civic minded. In addition to his work with AA, he has served on the boards of various civic and charitable organizations. He was one of the founders of Family Health Care Network, clinics that provide care for low income families.

REHABILITATION

30. Respondent testified that he is an alcoholic but has had his alcoholism under control for 26 years.

31. Respondent testified that he understood that his drug addiction was similar to alcohol addiction in many ways. Both are illnesses. Both can cause changes in personality, obsession, compulsion, craving, and failure. Both can be treated, but neither can be cured.

32. Respondent reads both the AA book and the NA book, and he works the 12 steps.

33. Respondent helps other people who are struggling to maintain their sobriety. He goes to four or five AA meetings a week, and he often provides transportation for people who have no way of getting to the meetings. AA is the focus of respondent's social life.

34. Respondent testified that he now has a better understanding of what the Maximus program entails and, if given a second chance, would comply with it.

RECOMMENDATIONS

35. Terry Cotton has known respondent for 25 years. Respondent submitted Mr. Cotton's declaration dated March 4, 2008. Mr. Cotton knows respondent through AA. Mr. Cotton wrote that he came to respect respondent's sobriety and his willingness to help others. Mr. Cotton said respondent has struggled to recover from his relapse and is attending

meetings, sharing with others, and working the steps. Mr. Cotton is confident that respondent will continue to be successful in his recovery.

36. Rick Hardt, DDS, is a dentist licensed by the State of California. Respondent submitted Dr. Hardt's declaration dated September of 2008. Dr. Hardt has known respondent through their AA attendance for the past three years. Dr. Hardt declares that respondent attends meetings regularly and participates honestly and genuinely. Dr. Hardt says two things lead him to conclude that respondent will not relapse. First, respondent had a terribly difficult time with detoxification in 2005 and would be afraid to risk having to go through detoxification again. Second, respondent has weathered enormous stress over the past three years without relapsing.

37. W. Paul Curtis wrote a letter dated September 9, 2008. Mr. Curtis also testified. Mr. Curtis has been the sales manager of an automobile dealership for 30 years. He has known respondent for 20 years. They first met when respondent and Mr. Curtis's wife worked together at the Developmental Center. Mr. Curtis has been very active in civic affairs in Porterville and, as a result of being president of the Family Health Care Network, has been active in the National Association of Community Health Centers. Mr. Curtis wrote that, in all of his extensive civic work, he has never heard a negative remark about respondent. Mr. Curtis came to know respondent personally in 1987 when Mr. Curtis became active in AA. He said respondent was a mentor and an inspiration. Mr. Curtis wrote that respondent has been vigorous in dealing with his alarming relapse. He attends AA regularly. He works with a sponsor. He helps others. He is a stout member of AA. Respondent and Mr. Curtis, in addition to seeing each other at AA meetings, get together at least once a week.

38. Donald Roulsten is a minister in Porterville. Respondent submitted Reverend Roulsten's declaration dated January 31, 2009. Reverend Roulsten and respondent served on a board of directors for a woman's shelter in Porterville. Reverend Roulsten wrote that respondent was a responsible and committed member of the board who helped fulfill the goals of the organization.

39. Linda Kerley testified that in 2003 she became aware that respondent had an addiction problem. He did not tell her he had a problem. But his personality changed, and she concluded that he was addicted to something. After respondent and Ms. Kerley separated in May of 2006, they had a trial reconciliation but, ultimately, were divorced. They, however, have continued to visit each other. Ms. Kerley is of the opinion that respondent is the person he used to be before his addiction. She trusts him and knows him to be reliable.

40. Mr. Martinez, the pharmacist from whom respondent stole drugs, testified that respondent performs well as a pharmacist. He is good at filling prescriptions, supervising pharmacy technicians, counseling customers, and maintaining logs. Mr. Martinez also testified, however, that he would not use respondent as a relief pharmacist in his pharmacy again. It is a small pharmacy with only one pharmacist on duty, and because of respondent's

addiction, Mr. Martinez would not be comfortable leaving him in charge without another pharmacist to supervise him.

41. Merle Feleay, a doctor of osteopathic medicine, has known respondent since 1979. Dr. Feleay came to know respondent well in 1983 when respondent stopped drinking and started attending AA meetings. Dr. Feleay became respondent's sponsor and recalls that respondent was faithful and compliant for 20 years. After respondent relapsed, Dr. Feleay again became his sponsor. Dr. Feleay is confident that respondent is committed to his recovery and is professionally and morally responsible. Dr. Feleay commends respondent for his service to other in AA.

MATTERS IN MITIGATION AND EXTENUATION

42. As noted above, there is no evidence that respondent actually made errors or caused any injury to customers.

43. There is no record of any past disciplinary action against respondent.

44. As noted above, respondent had serious financial, personal, and medical problems. One year before he entered the Maximus program, he had stomach bypass surgery. Shortly before he entered the program, he declared bankruptcy. At the time respondent entered the program, his mother was being treated for the end-stages of cancer. A few months after respondent entered the program, his wife left him. During the 20 months he was in the program, he was unemployed.

MATTER IN AGGRAVATION

45. After April of 2007, which was when Maximus terminated respondent from the program, respondent worked part-time as a relief pharmacist. He did that in spite of having agreed that his license was suspended until Maximus notified him that he was authorized to return to work. He continued working part-time until July 31, 2008, when, in connection with the present matter, he stipulated to an interim suspension of his license pending a decision on the accusation.

46. Respondent was not sure that his agreement with Maximus had any effect after Maximus terminated him from the program. He, however, did not inquire of the board regarding that matter.

COST RECOVERY

47. Complainant submitted a costs certification showing costs for the Attorney General's services in the amount of \$2,093 and costs for the board's inspector of \$975. Rick Iknoian, Pharm. D., an inspector for the board, spent more than 15 hours on this matter. Dr. Iknoian reviewed the Maximus records, met with respondent in Porterville, met with Mr. Martinez, and wrote a report.

48. The total costs are \$3,068. It is found that those costs were incurred and are reasonable.

LEGAL CONCLUSIONS

THERE ARE GROUNDS TO SUSPEND OR REVOKE RESPONDENT'S LICENSE

1. By reason of the matters set forth in Finding 4, it is determined that between 2003 and August of 2005, respondent, while on duty as a pharmacist, stole substantial quantities of dangerous drugs and controlled substances from Warnack's Pharmacy. Thus, pursuant to Business and Professions Code section 4300, subdivision (a), and section 4301, subdivision (f), there are grounds to suspend or revoke respondent's license.

2. By reason of the matters set forth in Finding 5, it is determined that, on multiple occasions while working at Warnack's Pharmacy between 2003 and August of 2005, respondent was under the influence of controlled substances. Thus, pursuant to Business and Professions Code section 4300, subdivision (a), and section 4301, subdivision (f), there are grounds to suspend or revoke respondent's license.

3. Complainant alleges that respondent's failure to comply with the Maximus recovery terms constituted moral turpitude, dishonesty, fraud, deceit, or corruption within the meaning of Business and Professions Code section 4301, subdivision (f). That allegation is not upheld. The evidence shows that respondent put forth an effort to comply. He failed. Perhaps he should have put forth a greater effort, but his failure is not evidence of dishonesty or corruption.

4. By reason of the matters set forth in Finding 4, it is determined that on multiple occasions between 2003 and August of 2005, respondent, in violation of Business and Professions Code section 4060 and Health and Safety Code section 11350, possessed controlled substances without a prescription. Thus, pursuant to Business and Professions Code section 4300, subdivision (a), and section 4301, subdivision (j), there are grounds to suspend or revoke respondent's license.

5. By reason of the matters set forth in Finding 5, it is determined that, on multiple occasions while on duty at Warnack's Pharmacy between 2003 and August of 2005, respondent, in violation of Business and Professions Code section 4327, dispensed drugs while under the influence of dangerous drugs. Thus, pursuant to Business and Professions Code section 4300, subdivision (a), and section 4301, subdivision (j), there are grounds to suspend or revoke respondent's license.

6. By reason of the matters set forth in Findings 4, 7, and 8, it is determined that, on multiple occasions while on duty at Warnack's Pharmacy between 2003 and August of 2005, respondent administered controlled substances to himself to an extent as to be dangerous or injurious to him. Thus, pursuant to Business and Professions Code section

4300, subdivision (a), and section 4301, subdivision (h), there are grounds to suspend or revoke respondent's license.

7. Complainant alleges that respondent's failure to comply with the Maximus recovery terms constituted the administration of drugs to himself within the meaning of Business and Professions Code section 4301, subdivision (h). That allegation is not upheld.

REHABILITATION

8. Respondent is to be congratulated for the progress he has made toward rehabilitation. And the confidence his friends and acquaintances express concerning his continuing success is significant. Their expressions of confidence and respondent's expression of confidence, however, are not sufficient evidence to support a finding that it would be in the public interest for respondent to work as a pharmacist without completing the board's pharmacist recovery program.

WHAT LICENSE DISCIPLINE IS APPROPRIATE?

9. While there are grounds to revoke respondent's license outright, there is evidence that respondent has made progress toward rehabilitation and that he now is ready to comply with the board's pharmacist recovery program. When he previously attempted to comply with that program, he faced numerous obstacles. While those obstacles did not prevent him from complying with the program, they certainly tend to mitigate his failure to succeed. And Mr. Fensterman, who is extremely knowledgeable concerning these matters, testified that it is possible that respondent could be more successful in the Maximus program if he tried it a second time.

10. Respondent's transgressions are very serious. Stealing drugs and dispensing drugs while under the influence are extremely serious matters. But there is evidence that respondent should be given another opportunity to rehabilitate himself. He has been licensed for almost 40 years. There is no evidence of his having made errors or of his having caused injury to customers. There is no evidence of other disciplinary action against him. He has been civic minded and helpful to others. On balance, it is determined that respondent should be provided another opportunity to comply with the board's pharmacist recovery program.

11. Protection of the public requires that respondent's license be suspended until he has demonstrated significant compliance with the board's pharmacist recovery program. Respondent's license will be suspended until a representative of the board's pharmacist recovery program certifies in writing that respondent has substantially complied with the program for four months.

COST RECOVERY

12. By reason of the matters set forth in Findings 47 and 48, it is determined that the board's costs in this matter were \$3,068 and that, within the terms of Business and Professions Code section 125.3, those costs were reasonable.

13. In *Zuckerman v. State Board of Chiropractic Examiners*,⁴ a case in which the State Board of Chiropractic Examiners had disciplined a license, the Supreme Court of California dealt with the issue of cost recovery. The court held that "the Board must exercise its discretion to reduce or eliminate cost awards in a manner that will ensure that ... [cost recovery] does not deter chiropractors with potentially meritorious claims or defenses from exercising their right to a hearing." The court established five rules that an agency must observe in assessing the amount to be charged. To some extent, these rules are similar to matters one would consider in determining whether costs are reasonable. The court's rules, however, go beyond considerations of whether the costs are reasonable. The court said:

[T]he Board must not assess the full costs of investigation and prosecution when to do so will unfairly penalize a chiropractor who has committed some misconduct but who has used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed. The Board must consider the chiropractor's "subjective good faith belief in the merits of his or her position" [citation] and whether the chiropractor has raised a "colorable challenge" to the proposed discipline [citation]. Furthermore, as in cost recoupment schemes in which the government seeks to recover from criminal defendants the cost of their state-provided legal representation [citation] the Board must determine that the chiropractor will be financially able to make later payments. Finally the Board may not assess the full costs of investigation and prosecution when it has conducted a disproportionately large investigation and prosecution to prove that a chiropractor engaged in relatively innocuous misconduct.⁵

14. In this case, respondent did engage in the conduct that is the primary focus of the accusation. Respondent, however, had a legitimate interest in pursuing a hearing. He established that he has demonstrated sufficient progress toward rehabilitation that he should be provided with another opportunity to participate in the board's pharmacist recovery program. Respondent, however, offered no evidence that assessing the full costs of investigation and prosecution would constitute an unfair penalty.

⁴ *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32.

⁵ *Id.* at p. 45.

15. It is determined that this was not a case in which the agency conducted a disproportionately large investigation and prosecution to prove relatively innocuous misconduct.

16. That leaves one final matter to be considered. Will respondent be financially able to make payments to reimburse the agency for its costs? Respondent did not present evidence that would support a finding of inability to pay the cost recovery. There is evidence of respondent's 2005 bankruptcy, of his long unemployment, and of his claims that he could not afford various aspects of the Maximus program. But respondent offered none of the documentation that would be required to support a finding that he is unable to pay the cost recovery.

17. *Zuckerman* requires that, in assessing costs, an agency must consider a licensee's "subjective good faith belief in the merits of his or her position" and must consider whether the licensee has raised a "colorable challenge" to the proposed discipline. In compliance with this requirement, it is determined that the cost recovery in this case should be reduced to \$2,000.

18. The board, as is required by *Zuckerman*, must determine whether a payment schedule is necessary so that respondent will be financially able to pay the board's costs.

ORDER

Respondent's license is revoked. The revocation is stayed, however, for three years, and a probationary license shall be issued on the following conditions:

1. Beginning the effective date of this decision, respondent is suspended from the practice of pharmacy. The suspension shall remain in effect until a representative of the board's pharmacist recovery program certifies in writing that respondent has substantially complied with the program for four months. During suspension, respondent shall not enter any pharmacy area or any portion of the licensed premises of a wholesaler, veterinary food-animal drug retailer, or any other distributor of drugs that is licensed by the board. He shall not enter any manufacturer or any place where dangerous drugs and devices or controlled substances are maintained. Respondent shall not practice pharmacy or do any act involving drug selection, selection of stock, manufacturing, compounding, dispensing, or patient consultation. Respondent shall not manage, administer, or be a consultant to any licensee of the board. Respondent shall not have access to or control the ordering, manufacturing, or dispensing of dangerous drugs and devices or controlled substances. Respondent shall not engage in any activity that requires the professional judgment of a pharmacist. Respondent shall not direct or control any aspect of the practice of pharmacy. Respondent shall not perform the duties of a pharmacy technician or an exemptee for any entity licensed by the board. Subject to the above restrictions, respondent may continue to own or hold an interest in any pharmacy in which he or she holds an interest at the time this decision becomes effective unless otherwise specified in this order.

2. Respondent shall obey all state and federal laws and regulations substantially related to or governing the practice of pharmacy.

3. Respondent shall report any of the following occurrences to the board, in writing, within 72 hours of the occurrence: An arrest or issuance of a criminal complaint for violation of any provision of the pharmacy law, state or federal food and drug laws, or state or federal controlled substances laws; a plea of guilty or nolo contendere in any state or federal criminal proceeding to any criminal complaint, information, or indictment; conviction of any crime; discipline, citation, or other administrative action filed by any state or federal agency that involves respondent's pharmacy license; discipline, citation, or other administrative action filed by any state or federal agency that is related to the practice of pharmacy or to manufacturing, obtaining, handling, distributing, billing for, or charging for any drug, device, or controlled substance.

4. Respondent shall report to the board quarterly. The report shall be made either in person or in writing, as directed. Respondent shall state under penalty of perjury whether he has complied with all the terms and conditions of probation. If respondent fails to make the final probation report as directed, probation shall be extended automatically until such time as respondent makes the final report and the board accepts it.

5. On receipt of reasonable notice, respondent shall appear in person for interviews with the board on request at a location to be determined by the board.

6. Respondent shall cooperate with the board's inspection program and the board's monitoring and investigation of respondent's compliance with the conditions of probation.

7. Respondent shall provide evidence of efforts to maintain skill and knowledge as a pharmacist as the board directs.

8. Respondent shall notify all present and prospective employers of the decision in this case and the conditions and restrictions imposed by the decision. If, on the date this decision becomes effective, respondent is working in any health care profession, respondent shall, within 30 days of that date, cause petitioner's direct supervisor, pharmacist-in-charge, or owner to report to the board in writing acknowledging that he or she has read this decision. Before respondent undertakes new employment, he or she shall cause the prospective employer to report to the board in writing acknowledging that he or she has read this decision.

9. If respondent works for or is employed by or through a pharmacy employment service, respondent must notify the direct supervisor, pharmacist-in-charge, or owner at every pharmacy in which respondent plans to work of the conditions and restrictions imposed by this decision. Respondent shall provide that notice before commencing work at each pharmacy. "Employment" within the meaning of this provision shall include any full-time, part-time, temporary, relief or pharmacy management service as a pharmacist, whether

the respondent is considered an employee or independent contractor.

10. Respondent shall not supervise any intern pharmacist or perform any of the duties of a preceptor. Respondent shall not be the pharmacist-in-charge of any entity licensed by the board unless otherwise specified in this order.

11. Respondent shall pay to the board its costs of investigation and prosecution in the amount of \$2,000. Respondent may apply to the board for permission to pay those costs in installments. The board will determine whether a payment schedule is necessary so that respondent will be financially able to pay the costs. The filing of bankruptcy shall not relieve respondent of the responsibility to reimburse the costs.

12. Respondent shall pay the costs associated with probation monitoring as determined by the board each year of probation. Such costs shall be payable to the board at the end of each year of probation.

13. Respondent shall, at all times while on probation – including any period during which suspension or probation is tolled – maintain an active, current license with the board. If respondent's license expires or is cancelled by operation of law or otherwise, respondent's license, on renewal or reapplication, shall be subject to all of the conditions of this probation not previously satisfied.

14. Within 30 days of the effective date of this decision, respondent shall contact the Pharmacist Recovery Program (PRP) for evaluation and shall successfully participate in and complete the treatment contract and any subsequent addendums as recommended and provided by the PRP and as approved by the board. Respondent shall bear the costs of PRP participation.

15. If respondent is currently enrolled in the PRP, said participation is now mandatory and is no longer considered a self-referral under Business and Professions Code section 4363. Respondent shall successfully participate in and complete the current contract and any subsequent addendums with the PRP. Probation shall be automatically extended until respondent successfully completes the treatment contract. Any person terminated from the program shall be automatically suspended upon notice by the board. Respondent may not resume the practice of pharmacy until notified by the board in writing. The board shall retain jurisdiction to institute action to terminate probation for any violation of this term.

16. Respondent, at respondent's expense, shall participate in random testing, including but not limited to biological fluid testing (urine, blood), breathalyzer, hair follicle testing, or a drug screening program approved by the board. The length of time shall be for the entire probation period, and the frequency of testing will be determined by the board. At all times respondent shall fully cooperate with the board and shall, when directed, submit to tests and samples for the detection of alcohol, narcotics, hypnotics, dangerous drugs, or other controlled substances. Failure to submit to testing as directed shall constitute a violation of probation. Any confirmed positive drug test shall result in the immediate suspension of

practice by respondent. Respondent may not resume the practice of pharmacy until notified by the board in writing.

17. Respondent shall completely abstain from the possession or use of alcohol, controlled substances, dangerous drugs, and their associated paraphernalia except when the drugs are lawfully prescribed by a licensed practitioner as part of a documented medical treatment. On request of the board, respondent shall provide documentation from the licensed practitioner that the prescription was legitimately issued and is a necessary part of respondent's treatment. Respondent shall ensure that he or she is not in the presence of or in the same physical location as individuals who are using illicit substances even if respondent is not personally ingesting the drugs.

18. Respondent shall practice only under the supervision of a pharmacist not on probation with the board. Respondent shall not practice until the board approves the supervisor. The supervision shall be, as required by the board, either: (1) Continuous - 75% to 100% of a work week; (2) Substantial - At least 50% of a work week; (3) Partial - At least 25% of a work week; or (4) Daily Review - Supervisor's review of probationer's daily activities within 24 hours.

19. Within 30 days of the effective date of this decision, respondent shall have his or her supervisor submit notification to the board in writing stating that the direct supervisor and pharmacist-in-charge have read the decision in this case and are familiar with the level of supervision as determined by the board. If respondent changes employment, respondent shall have his or her new supervisor, within 15 days after employment commences, submit notification to the board in writing stating that the direct supervisor and pharmacist-in-charge have read the decision in this case and are familiar with the level of supervision as determined by the board.

20. Within 10, days of leaving any employment, respondent shall notify the board in writing.

21. Respondent shall maintain a separate file of all records pertaining to the acquisition or disposition of all controlled substances.

22. Respondent shall submit quarterly reports to the board regarding the total acquisition and disposition of such controlled substances as the board may direct. Respondent shall specify the manner of disposition (e.g., by prescription, due to burglary, etc.) or acquisition (e.g., from a manufacturer, from another retailer, etc.) of such controlled substances. Respondent shall report on a quarterly basis or as directed by the board. The report shall be delivered or mailed to the board no later than 10 days following the end of the reporting period.

23. Following the effective date of this decision, if respondent ceases to practice due to retirement or health, or if respondent is otherwise unable to satisfy the conditions of probation, respondent may tender his or her license to the board for surrender. The board

shall have discretion regarding whether to grant the request for surrender or take any other action it deems appropriate and reasonable. If the board formally accepts a surrender of the license, respondent will no longer be subject to the conditions of probation. On the board's acceptance of the surrender, respondent shall relinquish his or her pocket license to the board within 10 days of notification by the board that the surrender is accepted. Respondent may not reapply for any license from the board for three years from the effective date of the surrender. Respondent shall meet all requirements applicable to the license sought as of the date the application for that license is submitted to the board.

24. Respondent shall notify the board in writing within 10 days of any change of employment. The notification shall include the reasons for leaving the prior employment. It shall also include the address of the new employer, supervisor, or owner and respondent's new work schedule if known. Respondent shall notify the board in writing within 10 days of a change in name, mailing address, or phone number.

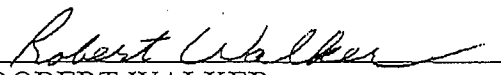
25. In order to be engaged in the full-time practice of pharmacy, respondent must practice pharmacy for a minimum of 20 hours a month. If respondent, regardless of residency, for any reason ceases practicing pharmacy for a minimum of 20 hours per calendar month in California, respondent must notify the board in writing within 10 days that he or she has ceased the full-time practice of pharmacy. And if respondent resumes the full-time practice of pharmacy, he or she must notify the board in writing within 10 days of petitioner's resumption of the practice of pharmacy. Periods when respondent is not engaged in the full-time practice of pharmacy shall not apply to the reduction of the probation period. It is a violation of probation for respondent's probation to remain tolled pursuant to the provisions of this condition for a period exceeding three years. "Cessation of practice" means any period of time exceeding 30 days in which respondent is not engaged in the practice of pharmacy as defined in Business and Professions Code section 4052 for at least 20 hours a month.

26. If respondent violates any condition of probation in any respect, the board, after giving respondent notice and an opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If a petition to revoke probation or an accusation is filed against respondent during probation, the board shall have continuing jurisdiction, and the period of probation shall be extended until the petition to revoke probation or accusation is heard and decided.

27. If respondent fails to satisfy any condition of probation, the board shall have continuing jurisdiction over respondent, and probation shall automatically be extended until all conditions have been satisfied or the board has taken other action as deemed appropriate to treat the failure as a violation of probation, to terminate probation, and to impose the penalty that was stayed.

28. On respondent's successful completion of probation, respondent's license will be fully restored.

DATED: March 3, 2009


ROBERT WALKER
Administrative Law Judge
Office of Administrative Hearings

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8 Attorneys for Complainant
9

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

12 In the Matter of the Accusation Against:

Case No. **3110**

13 **ROBERT GARLIN KERLEY,**
1561 W. Median Cir
14 Porterville, CA 93257

ACCUSATION

15 **Original Pharmacist License No. RPH 26099**

16 Respondent.

17 Complainant alleges:

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

21 2. On or about July 15, 1969, the Board of Pharmacy ("Board") issued
22 Original Pharmacist License Number RPH 26099 to Robert Garlin Kerley ("Respondent"). The
23 license will expire on April 30, 2008, unless renewed.

24 **I.**

25 **STATUTORY PROVISIONS**

26 3. Under Business and Professions Code ("Bus. & Prof. Code") section 4300
27 the Board may discipline any license, for any reason provided in the Pharmacy Law, (i.e., Bus. &
28 Prof. Code section 4000 et. seq.)

1 4. Bus. & Prof. Code section 4301 states, in pertinent part:

2 **§ 4301. Unprofessional conduct; licenses procured through**
3 **misrepresentation, fraud, or mistake**

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

8

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

13 ...

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

21 ...

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

24

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

 ...

 5. Bus. & Prof. Code section 4060 states as follows:

§ 4060. Controlled substances; possession

 No person shall possess any controlled substance, except that furnished to
 a person upon the prescription of a physician, dentist, podiatrist,
 optometrist, veterinarian, or naturopathic doctor pursuant to Section
 3640.7, or furnished pursuant to a drug order issued by a certified nurse-
 midwife pursuant to Section 2746.51, a nurse practitioner pursuant to
 Section 2836.1, a physician assistant pursuant to Section 3502.1, a
 naturopathic doctor pursuant to Section 3640.5, or a pharmacist pursuant
 to either subparagraph (D) of paragraph (4) of, or clause (iv) of
 subparagraph (A) of paragraph (5) of, subdivision (a) of Section 4052.
 This section shall not apply to the possession of any controlled substance
 by a manufacturer, wholesaler, pharmacy, pharmacist, physician,

1 podiatrist, dentist, optometrist, veterinarian, naturopathetic doctor,
2 certified nurse-midwife, nurse practitioner, or physician assistant, when in
3 stock containers correctly labeled with the name and address of the
4 supplier or producer.

6. Health and Safety Code section 11350, in pertinent part, as follows:

5 **§ 11350. Possession of designated controlled substances;
6 punishment and fine**

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

11 7. Health and Safety Code section 11377(a), in pertinent part, as follows

12 **§ 11377. Unauthorized possession; punishment**

13 (a) Except as otherwise provided in subdivision (b) or in Article 7
14 . . . , every person who possesses any controlled substance which is
15 (1) classified in Schedule III, IV, or V, and which is of a narcotic
16 drug, (2) specified in subdivision (d) of Section 11054, except
17 paragraphs (13), (14), (15), and (20) of subdivision (d), (3)
18 specified in paragraphs (2) or (3) of subdivision (f) of Section
11054, or (4) specified in subdivision (d), (e), or (f) of Section
11055, unless upon the prescription of a physician, dentist,
podiatrist, or veterinarian, licensed to practice in this state, shall be
punished by imprisonment in the county jail for a period of not
more than one year or the state prison.

19 8. Bus. & Prof. Code section 4327 of the Code provides:

20 **§ 4327. Operation under influence of drugs or alcohol; sale,
21 dispensing or compounding drugs**

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

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

25 "For the purpose of denial, suspension, or revocation of a personal
26 or facility license pursuant to Division 1.5 (commencing with
27 Section 475) of the Business and Professions Code, a crime or act
28 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

1 registration in a manner consistent with the public health, safety, or
2 welfare."

3 10. Section 125.3 of the Code provides that the Board may request the
4 administrative law judge to direct a licentiate found to have committed a violation or violations
5 of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
6 enforcement of the case.

7 **II.**

8 **DRUGS**

9 11. "Hydrocodone" is a Schedule III controlled substance as designated by
10 Health and Safety Code section 11056, subdivision (e)(4), and is a dangerous drug, within the
11 meaning of Bus. & Prof. Code 4022, that requires a prescription under federal law.

12 12. "Diazepam," is a Schedule IV controlled substance as designated by
13 Health and Safety Code section 11057, subdivision (d)(9), and is a dangerous drug, within the
14 meaning of Bus. & Prof. Code 4022, that requires a prescription under federal law.

15 13. "Phentermine," is a Schedule IV controlled substance as designated by
16 Health & Safety Code section 11057, subdivision (f)(4), and is a dangerous drug, within the
17 meaning of Bus. & Prof. Code 4022, that requires a prescription under federal law.

18 14. "Alprazolam," is a Schedule IV controlled substance as designated by
19 Health and Safety Code section 11057(d)(1), and is a dangerous drug, within the meaning of Bus.
20 & Prof. Code 4022, that requires a prescription under federal law.

21 15. "Methocarbamol," is a dangerous drug, within the meaning of Bus. & Prof.
22 Code 4022, that requires a prescription under federal law.

23 16. "Carisoprodol," is a dangerous drug, within the meaning of Bus. & Prof.
24 Code 4022, that requires a prescription under federal law.

25 17. "Zolpidem," is a Schedule IV controlled substance as designated by Health
26 & Safety Code section 11057, subdivision (d)(32), and is a dangerous drug, within the meaning
27 of Bus. & Prof. Code 4022, that requires a prescription under federal law.

28 ///

1 18. "Clonazepam," is a Schedule IV controlled substance as designated by
 2 Health and Safety Code section 11057(d)(7), and is a dangerous drug, within the meaning of Bus.
 3 & Prof. Code 4022, that requires a prescription under federal law.

4 19. "Propoxyphene with acetaminophen," is a Schedule IV controlled
 5 substance as designated by Health and Safety Code section 11057(c)(2), and is a dangerous drug,
 6 within the meaning of Bus. & Prof. Code 4022, that requires a prescription under federal law.

BRAND NAME	GENERIC NAME	DANGEROUS DRUG PER B&PC 4022	CONTROLLED SUBSTANCE PER H&S CODE	INDICATIONS FOR USE
Phentermine	Phentermine	Yes	Yes-C4 HSC 11057(f)(4)	Diet Stimulant
Valium	Diazepam	Yes	Yes-C4 HSC 11057 (d)(9)	Nerves
Vicodin Norco	Hydrocodone/ acetaminophen	Yes	Yes-C3 HSC 11056 (e)(4)	Pain
Xanax	Alprazolam	Yes	Yes-C4 HSC 11057(d)(1)	Nerves
Robaxin	Methocarbamol	Yes	N/A	Muscle Spasm
Soma	Carisoprodol	Yes	N/A	Muscle Spasm
Ambien	Zolpidem	Yes	Yes-C4 HSC 11057 (d)(32)	Sleep
Klonopin	Clonazepam	Yes	Yes-C4 HSC 11057(d)(7)	Nerves
Darvocet	Propoxyphene with acetaminophen (APAP)	Yes	Yes-C4	Pain H&S 11057(c)(2)

23 **III.**

24 **GENERAL BACKGROUND**

25 20. From 2003 through July 2005, Respondent stole substantial quantities of
 26 medications from Warnack's Pharmacy, including: (1) Xanax, Klonopin, phentermine (Schedule
 27 IV controlled substances); (2) various Hydrocodone-containing Schedule III controlled
 28

1 substances; (3) Robaxin and Soma (dangerous drugs); and (4) Ambien from his wife's
2 prescription vials (Schedule IV controlled substance.) Additionally, Respondent was under the
3 influence of these stolen controlled substances while working as a pharmacist at Warnack's
4 Pharmacy, preparing prescriptions and providing patient care.

5 21. On August 9, 2005, Respondent voluntarily entered into a Pharmacist
6 Recovery Program (PRP). Respondent was non-compliant with the terms of the PRP contract.

7 The noncompliance includes the following:

- 8 • Refusing to set up an account for random drug testing verification with Compass
9 Vision lab from August 29, 2005 through October 27, 2005.
- 10 • Failing to perform multiple required drug testing with his program enrollment.
- 11 • Testing positive on four drug tests from March 20, 2006 to April 4, 2006, for
12 propoxyphene/acetaminophen (APAP), a Schedule IV controlled substance.
- 13 • Refusing to enter an inpatient detox program as required under his Maximus
14 contract.
- 15 • Failing to have drug tests performed since April 4, 2006, due to lack of payment
16 for drug testing.
- 17 • Failing to provide documentation related to attendance at 12-step meetings and
18 monthly assessment reports to Maximus.
- 19 • Blaming his non-compliance on financial hardship but refusing to submit a
20 financial assistance application to Maximus.

21 22. Due to his noncompliance with the PRP contract, Respondent was
22 determined to be a public risk, and on April 3, 2007, Respondent was terminated from the PRP
23 program.

24 IV.

25 VIOLATIONS

26 B&P SECTION 4301(f)

27 (Acts involving moral turpitude, dishonesty, fraud, deceit, or corruption)

28 23. Paragraphs 20 through 22 are incorporated herein by reference.

Respondent is subject to disciplinary action pursuant to Bus. & Prof. Code section 4301,
subdivision (f), on the grounds of unprofessional conduct. More specifically, Respondent

///

1 engaged in the following acts which involve moral turpitude, dishonesty, fraud, deceit, or
2 corruption:

- 3 a. Between 2003 through July 2005, Respondent, while on
4 duty as a pharmacist, stole substantial quantities of
5 medications from Warnack's Pharmacy as alleged in
6 paragraph 20.
- 7 b. Respondent was under the influence of stolen controlled
8 substances while working as a pharmacist at Warnack's
9 Pharmacy, preparing prescriptions and providing patient
10 care.
- 11 c. Respondent was non-compliant with the terms of the PRP
12 contract as alleged in paragraph 21.

13 **(B&P SECTION 4301(j/o)**

14 (Violation of State Statutes/Laws and Regulations)

- 15 24. Paragraphs 20 through 22 are incorporated herein by reference.

16 Respondent is subject to disciplinary action on the grounds of unprofessional conduct, pursuant
17 to Bus. & Prof. Code section 4301, subdivision (j), for violating the state statutes, and
18 subdivision (o) for violating laws and regulations. More specifically, the violations are based
19 upon the following acts:

- 20 a. Respondent violated Bus. & Prof. Code section 4060(a) and
21 Health and Safety Code section 11350, by stealing and
22 possessing narcotics/controlled substances from 2003
through July 2005, without a prescription from Warnack's
Pharmacy, as alleged in paragraph 20.
- b. Respondent sold, dispensed, or compounded drugs while on
duty as a pharmacist at Warnack's Pharmacy while under
the influence of Hydrocodone, thereby violating Bus. &
Prof. Code section 4327.

23 **(B&P SECTION 4301(h)**

24 (Unlawful self-administration of a controlled substance)

- 25 25. Paragraphs 20 through 22 are incorporated herein by reference.

26 Respondent is subject to disciplinary action pursuant to Bus. & Prof. Code section 4301,
27 subdivision (h), on the grounds of unprofessional conduct, due to the following: (1)
28 administering to himself without a prescription, a controlled substances from 2003 through July

1 2005, while working as a pharmacist; (2) non-compliance with the terms of the PRP contract, as
2 alleged in paragraphs 21 and 22.

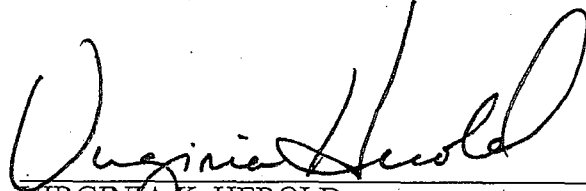
3 V.

4 PRAYER

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

- 7 1. Revoking or suspending Original Pharmacist License Number RPH 26099
- 8 issued to Robert Garlin Kerley;
- 9 2. Ordering Robert Garlin Kerley to pay the reasonable costs incurred by the
- 10 Board in the investigation and enforcement of this case pursuant to section 125.3 of the Code;
- 11 and,
- 12 3. Taking such other and further action as deemed necessary and proper.

13
14 DATED: 11/21/07



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

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