

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

In the Matter of the Accusation Against:

MICHAEL RONALD KISTER, a.k.a.
MICHAEL R. KISTER

Pharmacist License No. RPH 30052,

Respondent.

Case No. 4192

OAH No. 2014030873

DECISION AFTER RECONSIDERATION

The Board of Pharmacy, having granted reconsideration, and reviewed and considered the entire record, including the transcript, exhibits and written argument of the parties, now issues the following decision:

The attached Proposed Decision issued by the administrative law judge on January 20, 2015, is hereby adopted by the Board as its Decision in this matter.

This decision shall become effective on August 31, 2015.

It is so ORDERED on July 30, 2015.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

Amarylis (Amy) Gutierrez, Pharm.D.
Board President

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

In the Matter of the Accusation Against:

MICHAEL RONALD KISTER
2836 Robinwood Avenue
Clovis, CA 93611

Pharmacist License No. RPH 30052

Respondent.

Case No. 4192

OAH No. 2014030873

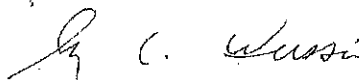
TO ALL PARTIES AND THEIR ATTORNEY OF RECORD:

ORDER FIXING DATE FOR SUBMISSION OF ARGUMENT

The transcript of the hearing in the above-entitled matter having now become available, the parties are hereby notified of the opportunity to submit written arguments in accordance with the Order Granting Petition for Reconsideration and Stay of Execution of the Effective Date of Decision and Order dated March 12, 2015. In addition to any arguments the parties may wish to submit, the board is interested in argument directed at the following issue: If cause for discipline exists, what penalty, if any, should be applied in this case.

Pursuant to said Order written argument shall be filed with the Board of Pharmacy, 1625 N. Market Blvd, Suite N-219, Sacramento, California, on or before June 1, 2015. **No new evidence may be submitted.**

IT IS SO ORDERED this 30th day of April 2015.



STAN C. WEISSER
President, Board of Pharmacy
Department of Consumer Affairs

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

In the Matter of the Accusation Against:

MICHAEL RONALD KISTER a.k.a
MICHAEL R. KISTER
2836 Robinwood Avenue
Clovis, CA 93611

Pharmacist License No. RPH 30052

Respondent.

Case No. 4192

OAH No. 2014030873

**ORDER GRANTING
PETITION FOR
RECONSIDERATION AND
STAY OF EXECUTION OF
THE EFFECTIVE DATE OF
DECISION AND ORDER**

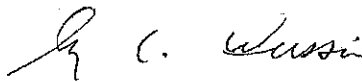
Respondent having requested reconsideration of the decision in the above-entitled matter, and good cause appearing, IT IS HEREBY ORDERED:

- (1) That reconsideration be, and is, hereby granted, said reconsideration to be solely on whether to reject the Proposed Decision and Disciplinary Order.
- (2) That the parties will be notified of the date for submission of any written argument they may wish to submit when the transcript of the above-mentioned hearing becomes available; and;
- (3) The Decision of the Board in this matter issued on February 11, 2015, is hereby stayed until the Board renders its decision on reconsideration.

The board itself will decide the case upon the record, including the exhibits and written argument of the parties, without taking additional evidence.

IT IS SO ORDERED this 12th day of March 2015.

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:

MICHAEL RONALD KISTER a.k.a.
MICHAEL R. KISTER,

Pharmacist License No. RPH 30052

Respondent.

Case No. 4192

OAH No. 2014030873

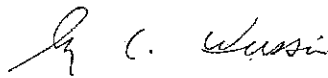
DECISION AND ORDER

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 March 13, 2015.

It is so ORDERED on February 11, 2015.

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:

MICHAEL RONALD KISTER a.k.a.
MICHAEL R. KISTER,

Pharmacist License No. RPH 30052

Respondent.

Case No. 4192

OAH No. 2014030873

PROPOSED DECISION

This matter was heard by Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, on November 18 and December 30, 2014, in Sacramento, California.

Leslie A. Burgermyer, Deputy Attorney General, represented complainant Virginia K. Herold, Executive Officer, Board of Pharmacy (Board), Department of Consumer Affairs (Department), State of California.

Respondent Michael Ronald Kister a.k.a. Michael R. Kister represented himself.

Evidence was received, the record was closed, and the matter was submitted for decision on December 30, 2014.

SUMMARY

Complainant seeks to discipline respondent's license on the grounds that he violated various provisions of the Pharmacy Law (Bus. & Prof. Code, § 4000 et seq.). For the reasons discussed below, cause exists to discipline his license. Respondent did not sufficiently demonstrate that he is capable of working in a licensed capacity in a manner consistent with public health, safety, and welfare, even on a restricted basis. Therefore, his license should be revoked.

FACTUAL FINDINGS

1. The Board issued Pharmacist License No. 30052 (license) to respondent on December 29, 1975. The license expires January 31, 2015, unless renewed or revoked. The license was previously placed on probation for five years, and respondent was required to participate in the Pharmacist Recovery Program. The license was fully reinstated on July 7, 2003.

2. On February 9, 2014, complainant signed an Accusation solely in her official capacity. The Accusation alleges that cause exists to discipline the license based on respondent's two criminal convictions and the underlying criminal conduct.

3. At hearing, complainant moved to amend the Accusation by interlineation as follows:

a. Page 2, line 22: add "Yes" under the column "**Dangerous Drug (BP Code § 4022);**" (bold in original)

b. Page 5, line 24: change "Hydrocodone" to "Acetaminophen;" and

c. Page 7, line 15: change "4066" to "4060."¹

Criminal Proceedings

4. On October 30, 2007, in the Superior Court of the State of California, in and for the County of Fresno, Case No. M07002083, respondent pled no contest to, and was convicted of, a misdemeanor violation of Vehicle Code section 23103.5, reckless driving involving alcohol. Imposition of judgment and sentence was suspended, and respondent was placed on informal probation for three years. He was ordered to serve 90 days in the Fresno County Jail, all of which was suspended except for one day. He was also ordered to pay fines, penalties, and assessments, and to complete a 12-hour Alcohol and Drug Program.

5. The factual basis for respondent's conviction arose out of his arrest by the Clovis Police Department for suspicion of driving under the influence of alcohol or drugs or the combination of alcohol and drugs. On July 15, 2007, at approximately 3:29 p.m., an officer from the Clovis Police Department responded to a citizen's complaint of a reckless driver. The citizen reported having observed the driver traveling at an idling speed and swerving from side to side in the parking lot for a Food Maxx store. The citizen further reported seeing the driver crash into a posted stop sign at a slow speed while exiting the parking lot.

The responding officer located a vehicle matching the description provided by the citizen, and initiated a traffic stop in the parking lot of a Kmart store. The officer contacted

¹ Respondent did not object to the motion, and the motion was granted.

the driver, later identified as respondent, and noticed a confused look on his face and the odor of alcohol emanating from his person. Respondent's movements were slow and hesitant and his speech pattern mumbled while talking to the officer. The officer determined that respondent was under the influence of alcohol or drugs or the combination of alcohol and drugs, placed him under arrest, and transported him to the Clovis Police Department for processing.

While the police officer was asking respondent for personal information during the booking process, respondent began speaking unintelligibly about an unknown topic. At times, he looked at the officer with a blank stare, closed his eyes and paused, and then acted as if he was surprised to see the officer standing there when he opened his eyes seconds later. When respondent later drank a glass of water, he was unable to do so without using two hands to guide the cut to his mouth. Additionally, he spilled water on his shirt.

A subsequent chemical analysis of a sample of respondent's blood tested positive for hydrocodone.

6. On June 14, 2013, in the Superior Court of the State of California, in and for the County of Fresno, Case No. F12906250, respondent pled guilty to a felony violation of Health and Safety Code section 11350, subdivision (a), unlawful possession of a controlled substance. Entry of judgment of conviction was deferred pursuant to Penal Code section 1000, criminal proceedings were suspended, and respondent was ordered to enroll in and complete a drug treatment program.

Respondent also pled no contest to a misdemeanor violation of Vehicle Code section 23152, subdivision (b), driving with a blood alcohol content of .08 percent or greater, and admitted a sentencing enhancement under Vehicle Code section 23540 based on his prior conviction for violating Vehicle Code section 23103.5. The matter was continued for entry of judgment and sentencing. On August 9, 2013, respondent was convicted of violating Vehicle Code section 23152, subdivision (b). Imposition of judgment and sentence was suspended, and respondent was placed on informal probation for three years. He was ordered to serve 20 days in the Fresno County Jail, with the condition that the probation department may convert all jail time to 400 hours of community service if respondent did not qualify for the Adult Offender Work Program. Respondent was further ordered to pay fines, penalties, and fees, and to enroll in and complete an 18-month Multiple Offender Alcohol Program.

7. On December 15, 2014, the court found that respondent had successfully completed a drug treatment program, reinstated criminal proceedings as to the felony charge of violating Health and Safety Code section 11350, subdivision (a), withdrew respondent's guilty plea to that charge, and dismissed that charge pursuant to Penal Code section 1000.3.

8. The factual basis for the criminal charges against respondent discussed in Factual Finding 6 arose out of his arrest by the California Highway Patrol on September 6, 2011, for suspicion of driving under the influence of alcohol or drugs or the combined

influence of alcohol and drugs and the unlawful possession of a controlled substance. That day, the California Highway Patrol responded to a report of a non-injury traffic accident. When the officer arrived at the accident scene, he contacted the driver, who was later identified as respondent. When talking to respondent, the officer noticed that he was speaking slowly with slurred, deliberate speech. He was also drooling and unable to maintain his balance. The officer formed the opinion that respondent was under the influence of alcohol or drugs or the combined influence of alcohol and drugs, and placed him under arrest. The officer found two tablets of codeine in respondent's right front pants pocket during a subsequent search. While respondent denied at hearing that he had the tablets on him when he was arrested, he admitted that he did not have a prescription for them. The officer's observations were the more credible evidence of respondent's possession of codeine.

9. During a subsequent, more thorough search of respondent by another California Highway Patrol officer, the following dangerous drugs and controlled substances were found either in respondent's clothing or in a pillbox that was in his possession at the time of his arrest:

| Generic Name | Dangerous Drug Per Business and Professions Code section 4022 | Controlled Substance Per Health and Safety Code | Valid Prescription |
|---|--|--|--|
| Hydromorphone HCl 4 mg (two tablets) | Yes | 11055, subdivision (b)(1)(J) | No |
| Tramadol Hydrochloride 50 mg (13 tablets) | Yes | 11057, subdivision (d)(1) | Yes (filled on August 10, 2011, for 90 day supply) |
| Lorazepam 2 mg (two tablets) | Yes | 11057, subdivision (d)(16) | Yes (filled on July 15, 2011, for 90 day supply) |

10. The officer also found five tablets of acetaminophen 500 mg and two tablets of caffeine 200 mg. No evidence was introduced that either drug was a "dangerous drug" pursuant to Business and Professions Code section 4022 or a controlled substance pursuant to the Health and Safety Code. Nor was any evidence introduced that either drug requires a prescription.

11. A subsequent analysis of a sample of respondent's urine taken at the time of his arrest was positive for the presence of alprazolam and hydrocodone, both of which are dangerous drugs pursuant to Business and Professions Code section 4022 and controlled substances pursuant to Health and Safety Code sections 11055, subdivision (b)(1)(I) (hydrocodone), and 11057, subdivision (d)(1) (alprazolam). The sample was also positive for the presence of lorazepam, tramadol, and codeine. Codeine is a dangerous drug under

Business and Professions Code section 4022 and a controlled substance under Health and Safety Code section 11055, subdivision (b)(1)(G). While no evidence of respondent's blood alcohol content at the time of his arrest was introduced, a reasonable inference is drawn from the crime for which he was convicted that it was at least .08 percent.

At hearing, respondent admitted that he had taken alprazolam and hydrocodone either on the day of the accident (September 6, 2011) or shortly before. While he claimed to have had a valid prescription for hydrocodone for dental work he had done shortly before the accident, copies of his prescription history show he last filled a prescription for hydrocodone on December 9, 2010, and it was for a three-day supply. Therefore, the more credible evidence is that respondent had no valid prescription for hydrocodone on September 6, 2011. Respondent admitted he did not have a valid prescription for alprazolam at the time of the accident.

Substantial Relationship

12. Respondent's convictions for reckless driving involving alcohol and drunk driving discussed in Factual Findings 4 and 6,² respectively, are substantially related to the qualifications, functions, and duties of a licensed pharmacist. (Cal. Code Regs., tit. 16, § 1770 ["[A] crime or act shall be considered substantially related ... if to a substantial degree it evidences present or potential unfitness of a licensee ... to perform the functions authorized by his license ... in a manner consistent with the public health, safety, or welfare."]) His underlying criminal conduct demonstrates a lack of respect for, and an unwillingness and/or inability to comply with, laws designed for the protection of the public, such as those which regulate the qualifications, functions, and duties of a pharmacist. Furthermore, respondent's conduct reflects poorly on his common sense and professional judgment, qualities essential to his profession, and tends to undermine public confidence in and respect for the profession. (See, *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 770-771 [analyzing factors used to determine whether a crime is substantially related to the qualifications, functions, and duties of particular profession].)

Evidence of Self-Administration of Controlled Substances and Dangerous Drugs in a Manner Dangerous to Self or Others, Etc.

13. While the evidence established that respondent had self-administered hydrocodone, alprazolam, lorazepam, codeine, and tramadol on September 6, 2011, or shortly before that date, as discussed in Factual Finding 11, there was insufficient evidence to establish that he did so in a manner dangerous or injurious to himself or the public or to the extent that made him unable to perform his licensed duties in a manner consistent with public safety. His drunk driving conviction discussed in Factual Finding 6 was based on his consumption of alcohol only, and there was insufficient evidence that the amount of drugs detected in his urine sample was of a sufficient quantity to influence his behavior and/or

² For the reasons discussed in Legal Conclusion 2, the criminal charge for violating Health and Safety Code section 11350, subdivision (a), did not result in a conviction.

conduct. And while two of respondent's former coworkers attested to him having engaged in strange behavior and not being able to stand up on his own while at work on the day of the accident, there was insufficient evidence that such behavior was caused by the controlled substances he had consumed.

On the other hand, evidence of respondent's convictions for reckless driving involving alcohol and drunk driving was sufficient evidence of his self-administration of alcoholic beverages in a matter dangerous to himself and others. The dangers of driving while under the influence of alcohol are well known. (See, *Griffiths v. Superior Court, supra*, 96 Cal.App.4th 757, 770 ["Alcohol consumption quickly affects normal driving ability, and driving under the influence of alcohol threatens personal safety and places the safety of the public in jeopardy."].)

Factors in Aggravation, Mitigation, or Rehabilitation

14. A substantial portion of respondent's hearing testimony was disjointed, convoluted, rambling, and difficult to follow. He had extreme difficulty focusing on answering the question being asked, often digressing to some other unrelated topic.

15. Respondent did explain, however, that he has paid all of his court-ordered fines, penalties, and fees imposed as a result of his drunk driving conviction discussed in Factual Finding 6. His entire jail sentence was converted to community service as a reasonable accommodation for a disability he suffers from. However, he has yet to begin performing community service "because I have all that time to complete [400 hours] and am entirely too busy." While respondent is currently enrolled in an 18-month Multiple Offender Alcohol Program, it is questionable whether that program has actually been beneficial to him. He testified to learning "not much" from the program, and then proceeded to make jokes about various law enforcement jargon he has learned during the program (i.e., explaining that "B&E" means breaking and entering). Respondent remains on criminal probation until August 8, 2016

16. Respondent has been attending Alcoholics Anonymous (AA) meetings three times each week continuously since July 2007. He identified June 13, 2013, as his date of sobriety from drugs and alcohol, but introduced no corroborating evidence. He has had a sponsor since he began attending AA meetings, and speaks with him by telephone usually once a week. The sponsor did not testify on respondent's behalf, nor did he author a character reference letter.

17. As an aggravating factor, complainant alleged and proved that respondent's license has previously been disciplined. On January 2, 1998, respondent stipulated to his license being placed on probation for five years. A condition of that probation was that he participate in the Pharmacist Recovery Program. The Board issued its Decision adopting the stipulation, effective July 7, 1998. Respondent successfully completed his probation, and his license was fully reinstated on July 7, 2003.

18. At hearing, respondent explained that his license was previously disciplined because he had taken prescription medication from the shelf of a pharmacy at which he was working without a valid prescription and for his own personal consumption. One of the medications was hydrocodone.

19. The Board has adopted criteria for consideration when evaluating a licensee's rehabilitation since committing the criminal conduct underlying the convictions for which discipline is sought. (Cal. Code Regs., tit. 16, § 1769.) And while those criteria are not directly applicable when evaluating causes for discipline not based on a criminal conviction, they are nonetheless helpful in assessing the licensee's overall fitness for licensure. Two such criteria which are relevant here are the nature and severity of the convictions and any evidence of rehabilitation introduced by the licensee. (Cal. Code Regs., tit. 16, § 1769, subds. (b)(1), (5).)

Here, the Board seeks to discipline respondent's license because he was convicted of reckless driving involving alcohol and driving a vehicle with a blood alcohol content of .08 percent or greater. Discipline is also sought based on his consumption and possession of controlled substances and dangerous drugs while engaging in the conduct that led to the latter conviction. Such overall conduct causes the Board grave concern since the overindulgence in alcohol and abuse of controlled substances and dangerous drugs has the strong potential for impairing a pharmacist's ability to perform his licensed duties in a manner consistent with public health, safety, and welfare. Additionally, giving a pharmacist who misuses controlled substances and dangerous drugs unfettered access to such substances is inconsistent with the Board's duty and obligation to protect the public from unscrupulous licensees. Respondent previously abused the trust the Board places in its licensee when he took controlled substances from the pharmacy in which he worked for his own personal consumption and without a valid prescription.

Respondent previously participated in the Pharmacist Recovery Program as part of the Board's prior discipline of his license. Additionally, he has been attending AA meetings continuously since July 2007. Nonetheless, he suffered a relapse on September 6, 2011, which led to his drunk driving conviction. Respondent's participation in the 18-month Multiple Offender Alcohol Program does not appear to have helped him gain sufficient insight into his abuse of alcohol and misuse of controlled substances as demonstrated by the substance of his testimony. Overall, respondent failed to demonstrate sufficient insight into his substance abuse problem. This lack of insight was highlighted by his closing argument that it would set a bad precedent for the Board to condemn somebody "for actions that did not occur."

20. Cause exists to discipline respondent's license for the reasons explained in the Legal Conclusions below. When considering all the evidence discussed above, respondent failed to demonstrate that he is capable of performing his licensed duties in a manner consistent with public health, safety, and welfare, even on a restricted basis. Therefore, his license should be revoked.

Costs of Investigation and Enforcement

21. Pursuant to Business and Professions Code section 125.3, complainant has requested cost of investigation and enforcement in the total amount of \$16,116. This amount consists of costs incurred directly by the Board (\$10,370.50), as well as costs incurred by the Office of the Attorney General and billed to the Board (\$5,737.50). At hearing, complainant introduced, without objection, a Certification of Costs of Investigation by Agency in support of the investigation costs incurred directly by the board. The Certification identifies "Inspector's cost for 101.75 hours at \$102.00 per hour," for total costs of \$10,378.50. No information about the general tasks performed or the amount of time spent on each particular task was included. (Cal. Code Regs., tit. 1, § 1042, subd. (b)(1) [cost declarations must include or attach sufficient information to "describe the general tasks performed, the time spent on each task and the method of calculating the cost."])

Complainant also introduced, without objection, a Certification of Prosecution Costs; Declaration of Leslie A. Burgermyer, which requests costs in the amount of \$5,737.50. Attached to the Certification is a printout of a Matter Time Activity by Professional Type, which describes tasks performed by the Office of the Attorney General in the amount of \$5,737.50. The entire amount requested by the Office of the Attorney General is reasonable in light of the description of the work performed.

22. Respondent did not introduce any evidence of his inability to pay costs.

23. Only the costs the Board incurred for work performed by the Office of the Attorney General (\$5,737.50) are reasonable in light of the issues involved in this matter as discussed in Legal Conclusion 15 below.

LEGAL CONCLUSIONS

Applicable Law

1. Health and Safety Code section 11350, subdivision (a), makes it unlawful for a person to possess a controlled substance without a valid prescription. With certain exceptions not applicable here, Business and Professions Code section 4060 prohibits the same.

2. A person charged with violating Health and Safety Code section 11350, subdivision (a), who satisfies certain prerequisites is entitled to have the criminal proceedings stayed while he participates in a drug diversion program. (Pen. Code, § 1000.1.) The person is required to plead guilty to all charges and waive time for the pronouncement of judgment. If he successfully completes the drug treatment program, "the court shall dismiss the charge or charges against the defendant." (Pen. Code, § 1000.1, subd. (a)(3).) Furthermore, the arrest upon which judgment was deferred shall be deemed to have never occurred." (Pen. Code, § 1000.4, subd. (a).)

3. As discussed in Factual Finding 6, respondent pled guilty to a felony violation of Health and Safety Code section 11350, subdivision (a), unlawful possession of a controlled substance, on June 14, 2013. Entry of judgment of conviction was deferred, criminal proceedings were stayed, and he was ordered to enroll in and complete a drug treatment program.

On December 15, 2014, the court found that respondent had successfully completed a drug treatment program, reinstated criminal proceedings, withdrew his guilty plea to violating Health and Safety Code section 11350, subdivision (a), and dismissed that charge pursuant to Penal Code section 1000.3. Therefore, respondent was never convicted of violating Health and Safety Code section 11350, subdivision (a). (See, *B.W. v. Board of Medical Quality Assurance* (1985) 169 Cal.App.3d 219, 229-232 [drug diversion program under Pen. Code, §§ 1000 – 1000.5 applies to both license applicants and licensees facing discipline].)

While the Legislature adopted Business and Professions Code section 492 to ameliorate the effects of the decision in *B.W.*, that statute merely allows the government agency to take disciplinary action against a licensee or deny an application for licensure for professional misconduct “notwithstanding that evidence of that misconduct may be recorded in a record pertaining to an arrest.” (Bus. & Prof. Code, § 492.) And while Business and Professions Code section 4301, subdivision (l), defines a criminal conviction as “a plea or verdict of guilty,” Penal Code section 1000.1, subdivision (d), specifically provides that a guilty plea entered pursuant to that statute “shall not constitute a conviction for any purpose unless a judgment of guilty is entered pursuant to Section 1000.3.” (Pen. Code, § 1000.1, subd. (d).) Under well-settled rules of statutory construction, the provisions of Penal Code section 1000.1, subdivision (d), take precedence over those of Business and Professions Code section 4301, subdivision (l). (*People v. Barrett* (2003) 109 Cal.App.4th 437, 450 [“[T]he terms of the more specific statute take precedence over those of the more general statute.”])

Cause for Discipline

4. A pharmacist license may be disciplined if the licensee has engaged in unprofessional conduct. Unprofessional conduct includes the conviction of a crime that is substantially related to the qualifications, functions, and duties of a licensee. (Bus. & Prof. Code, § 4301, subd. (l).) For the reasons discussed in Factual Findings 4, 6, and 12, cause exists to discipline respondent’s license pursuant to Business and Professions Code section 4301, subdivision (l), based on his convictions for reckless driving involving alcohol and drunk driving.

5. For the reasons explained in Factual Findings 6 and 7 and Legal Conclusions 2 and 3, no cause exists to discipline respondent’s pharmacist license pursuant to Business and Professions Code section 4301, subdivision (l), based on the criminal charge of violating Health and Safety Code section 11350, subdivision (a).

6. Unprofessional conduct includes “the conviction of more than one misdemeanor ... involving the use, consumption, or self-administration of any dangerous drug or alcoholic beverage, or any combination of those substances.” (Bus. & Prof. Code, § 4301, subd. (k).) For the reasons explained in Legal Conclusion 4, cause exists to discipline respondent’s pharmacist license pursuant to Business and Professions Code section 4301, subdivision (k).

7. Unprofessional conduct includes “the commission of any act involving moral turpitude, dishonesty, fraud, deceit, or corruption, whether the act is committed in the course of relations as a licensee or otherwise, and whether the act is a felony or misdemeanor or not.” (Bus. & Prof. Code, § 4301, subd. (f).) Respondent committed corrupt acts when he possessed two codeine tablets and two tablets of Hydromorphone 4 mg without valid prescriptions as discussed in Factual Findings 8 and 9. He also committed corrupt acts by having consumed codeine, hydrocodone, and alprazolam on September 6, 2011, even though he did not have a valid prescription for any of those drugs as discussed in Factual Finding 11. Therefore, cause exists to discipline his pharmacist license pursuant to Business and Professions Code section 4301, subdivision (f).

8. Unprofessional conduct includes “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.” (Bus. & Prof. Code, § 4301, subd. (h).) On July 15, 2007, respondent chose to drive his vehicle after having consumed alcohol as discussed in Factual Findings 5 and 13. Additionally, he chose to drive his vehicle on September 6, 2011 while under the influence of alcohol as discussed in Factual Findings 8, 11, and 13. Therefore, cause exists to discipline respondent’s pharmacist license pursuant to Business and Professions Code section 4301, subdivision (h).

9. No cause exists to discipline respondent’s pharmacist licensed pursuant to Business and Professions Code section 4301, subdivision (h), based on his self-administration of hydrocodone, alprazolam, lorazepam, codeine, or tramadol on September 6, 2011, or shortly before that date, for the reasons explained in Factual Finding 13.

10. Unprofessional conduct includes “the violation of any of the statutes of this state, or any other state, or the United States regulating controlled substances and dangerous drugs.” (Bus. & Prof. Code, § 4301, subd. (j).) For the reasons explained in Factual Findings 8, 9, and 11 and Legal Conclusion 1, respondent violated Business and Professions Code section 4060 and Health and Safety Code section 11350, subdivision (a), on September 6, 2011, by possessing codeine, hydrocodone, hydromorphone, and alprazolam without a valid prescription. Therefore, cause exists to discipline respondent’s pharmacist license pursuant to Business and Professions Code section 4301, subdivision (j), as that statute relates to Business and Professions Code section 4060 and Health and Safety Code section 11350, subdivision (a).

11. While respondent also possessed lorazepam on September 6, 2011, he did so pursuant to a valid prescription as explained in Factual Finding 9. Therefore, no cause exists to discipline his pharmacist license pursuant to Business and Professions Code section 4301, subdivision (j), as that statute relates to Business and Professions Code section 4060 and/or Health and Safety Code section 11350, subdivision (a), based on his possession of that medication.

12. Unprofessional conduct includes the violation of any provisions of the Pharmacy Law. (Bus. & Prof. Code, § 4301, subd. (o).) Cause exists to discipline respondent's pharmacist license pursuant to Business and Professions Code section 4301, subdivision (o), for the reasons explained in Legal Conclusions 4, 6, 7, 8, and 10, individually and collectively.

Conclusion

13. Cause exists to discipline respondent's pharmacist license for the reasons explained in Legal Conclusions 4, 6, 7, 8, 10, and 12, individually and collectively. When all the evidence discussed above is considered, respondent failed to sufficiently demonstrate his continued ability to perform the duties of a pharmacist in a manner consistent with public health, safety, and welfare, even on a restricted basis, for the reasons discussed in Factual Findings 19 and 20 above. Therefore, his license should be revoked.

Award of Costs

14. Business and Professions Code section 125.3 states, in pertinent part:

(a) Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before any board within the department or before the Osteopathic Medical Board, 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.

[¶]...[¶]

(c) A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the entity bringing the proceeding or its designated representative shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.

California Code of Regulations, title 1, section 1042, subdivision (b), states the following about cost recovery:

Except as otherwise provided by law, proof of costs at the Hearing may be made by Declarations that contain specific and sufficient facts to support findings regarding actual costs incurred and the reasonableness of the costs, which shall be presented as follows:

(1) For services provided by a regular agency employee, the Declaration may be executed by the agency or its designee and shall describe the general tasks performed, the time spent on each task and the method of calculating the cost. For other costs, the bill, invoice or similar supporting document shall be attached to the Declaration.

(2) For services provided by persons who are not agency employees, the Declaration shall be executed by the person providing the service and describe the general tasks performed, the time spent on each task and the hourly rate or other compensation for the service. In lieu of this Declaration, the agency may attach to its Declaration copies of the time and billing records submitted by the service provider.

In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and Professions Code section 125.3. These factors include: 1) the licentiate's success in getting the charges dismissed or reduced; 2) the licentiate's subjective good faith belief in the merits of his or her position; 3) whether the licentiate raised a colorable challenge to the proposed discipline; 4) the licentiate's financial ability to pay; and 5) whether the scope of the investigation was appropriate in light of the alleged misconduct. (*Id.*, at p. 45.)

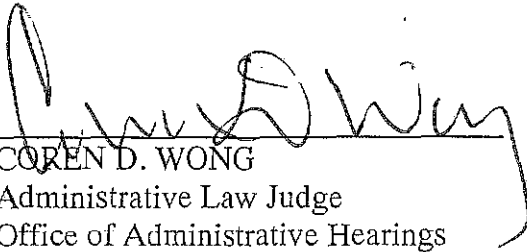
15. The declaration signed by Ms. Burgermyer constitutes prima facie evidence of the reasonableness of the costs incurred by the Office of the Attorney General and billed to the Board (\$5,737.50). (Bus. & Prof., § 125.3, subd. (c).) Respondent failed to rebut such evidence. There is insufficient evidence, however, to support a finding about the reasonableness of the remaining \$10,378.50 incurred directly by the Board for the reasons discussed in Factual Finding 21. Therefore, after considering the relevant evidence and the pertinent *Zuckerman* factors, costs in the amount of \$5,737.50 are reasonable and are awarded as set forth in the Order below.

ORDER

1. Pharmacist License No. RPH 30052 issued to respondent Michael Ronald Kister a.k.a. Michael R. Kister 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 revoked license, respondent shall reimburse the Board for its costs of investigation and prosecution in the amount of \$5,737.50. Said amount shall be paid in full prior to the reapplication or reinstatement of his license, unless otherwise ordered by the board.

DATED: January 20, 2015


COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings

1 KAMALA D. HARRIS
Attorney General of California
2 KENT D. HARRIS
Supervising Deputy Attorney General
3 LESLIE A. BURGERMYER
Deputy Attorney General
4 State Bar No. 117576
1300 I Street, Suite 125
5 P.O. Box 944255
Sacramento, CA 94244-2550
6 Telephone: (916) 324-5337
Facsimile: (916) 327-8643
7 *Attorneys for Complainant*

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

11 In the Matter of the Accusation Against:
12 **MICHAEL RONALD KISTER**
aka MICHAEL R. KISTER
13 2836 Robinwood Ave.
Clovis, CA 93611-3422
14
15 Pharmacist License No. RPH 30052
16 Respondent.

Case No. 4192
ACCUSATION

17
18
19
20 Complainant alleges:

21 **PARTIES**

- 22 1. Virginia Herold ("Complainant") brings this Accusation solely in her official capacity
23 as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs, ("Board").
24 2. On or about December 29, 1975, the Board issued Pharmacist License No. RPH
25 30052 to Michael Ronald Kister, also known as Michael R. Kister, ("Respondent"). The
26 Pharmacist License was in full force and effect at all times relevant to the charges brought herein
27 and will expire on January 31, 2015, unless renewed.

28 ///

1 JURISDICTION

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

5 4. Section 4300 of the Code states that every license issued by the Board may be
6 suspended or revoked.

7 5. Section 4300.1 of the Code states:

8 The expiration, cancellation, forfeiture, or suspension of a board-issued
9 license by operation of law or by order or decision of the board or a court of
10 law, the placement of a license on a retired status, or the voluntary surrender
11 of a license by a licensee shall not deprive the board of jurisdiction to
12 commence or proceed with any investigation of, or action or disciplinary
proceeding against, the licensee or to render a decision suspending or
revoking the license.

13 STATUTORY PROVISIONS

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

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

...

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

...

21 (h) The administering to oneself, of any controlled substance, or the
22 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
23 license under this chapter, or to any other person or to the public, or to the
24 extent that the use impairs the ability of the person to conduct with safety to
the public the practice authorized by the license.

...

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

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

3 (l) The conviction of a crime substantially related to the qualifications,
4 functions, and duties of a licensee under this chapter. The record of con-
5 viction of a violation of Chapter 13 (commencing with Section 801) of Title
6 21 of the United States Code regulating controlled substances or of a
7 violation of the statutes of this state regulating controlled substances or
8 dangerous drugs shall be conclusive evidence of unprofessional conduct. In
9 all other cases, the record of conviction shall be conclusive evidence only of
10 the fact that the conviction occurred. The board may inquire into the
11 circumstances surrounding the commission of the crime, in order to fix the
12 degree of discipline or, in the case of a conviction not involving controlled
13 substances or dangerous drugs, to determine if the conviction is of an offense
14 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.

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

18 7. Code section 4022 states:

19 "Dangerous drug" or "dangerous device" means any drug or device
20 unsafe for self-use in humans or animals, and includes the following:

21 (a) Any drug that bears the legend: "Caution: federal law prohibits
22 dispensing without prescription," "Rx only," or words of similar import.

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

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

27 ///

28

1 8. Code section 4060 states, in pertinent part:

2
3 No person shall possess any controlled substance, except that
4 furnished to a person upon the prescription of a physician, dentist, podiatrist,
5 optometrist, veterinarian, or naturopathic doctor pursuant to Section 3640.7.,
6 or furnished pursuant to a drug order issued by a certified nurse-midwife
7 pursuant to Section 2746.51, a nurse practitioner pursuant to Section 2836.1,
8 a physician assistant pursuant to Section 3502.1, a naturopathic doctor
9 pursuant to Section 3640.5, or a pharmacist pursuant to either Section 4052.1
10 or 4052.2. . . .

11 9. Health and Safety Code section 11350, subdivision (a), provides, in pertinent part, it
12 is unlawful to possess Schedule II controlled substances as designated in Health and Safety Code
13 section 11055, subdivision (b), or any controlled substances designated as Schedule III, IV, or V
14 which are narcotic drugs, unless upon the written prescription of a physician, dentist, podiatrist,
15 or veterinarian licensed to practice in this state.

16 10. **DRUGS**

| 17 Brand Name | 18 Generic Name | 19 Dangerous Drug (BP Code §4022) | 20 Controlled Substance (H&S Code) | 21 Indications For Use |
|----------------------|--------------------------------|--|---|-------------------------------|
| 22 Vicodin, Norco | 23 Hydrocodone / Acetaminophen | 24 Yes | 25 Schedule III – Health & Safety Code sec. 11056(e)(4) | 26 Pain |
| 27 Dilaudid | 28 Hydromorphone | Yes | Schedule II – Health & Safety Code sec. 11055(b)(1)(J) | Pain |
| Alprazolam | Alprazolam | Yes | Schedule IV – Health & Safety Code sec. 11057(d)(1) | Nerves |
| Lorazepam | Lorazepam | | Schedule IV – Health & Safety Code sec. 11057(d)(16) | Nerves |
| Codeine | Codeine | Yes | Schedule II – Health & Safety Code sec. 11055(b)(1)(G) | Pain |
| Ultram | Tramadol | Yes | No | Pain |

///

1 COST RECOVERY

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

6 FIRST CAUSE FOR DISCIPLINE

7 (Conviction of Crimes)

8 12. Respondent's license is subject to disciplinary action under Code section 4301,
9 subdivision (I), in that Respondent has been convicted of crimes substantially relating to the
10 qualifications, functions, and duties of a licensed pharmacist as set forth below in paragraphs 13,
11 and 14, and all of their subparts, incorporated by reference.

12 13. On or about June 14, 2013, in the case titled *People v. Michael Ronald Kister, aka*
13 *Michael R. Kister*, Fresno County Superior Court Case No. F12906250, Respondent was con-
14 victed on his plea of guilty to violating Health and Safety Code section 11350, subdivision (a)
15 [unlawful possession of a controlled substance], a felony, and plea of nolo contendere to violating
16 Vehicle Code section 23152, subdivision (b) [unlawful to drive a vehicle with a blood alcohol
17 level of .08% or more]¹, a misdemeanor. Respondent admitted prior convictions as to his
18 Vehicle Code section 23152, subdivision (b), conviction. He also admitted all priors and
19 enhancements.

20 a. The underlying circumstances are: On or about September 6, 2011, Respondent
21 drove his vehicle in Fresno, California, while under the influence of drugs, resulting in a solo car
22 traffic collision. Prior to driving his vehicle, Respondent had ingested numerous medications.
23 According to the arrest report, at the time of his arrest, Respondent possessed Codeine, two
24 tablets of Hydromorphone 4mg, five tablets of Hydrocodone 500mg, thirteen tablets of Tramadol,
25 and two tablets of Lorazepam 2mg, without lawful prescriptions, and three tablets of Caffeine
26

27 ¹ The original charge was violation of Vehicle Code section 23152, subdivision (a)
28 [driving under the influence of alcohol and/or drugs, or their combined effect].

1 200mg. Respondent's urine sample tested positive for Hydrocodone and Alprazolam, for which
2 he had no lawful prescriptions.

3 14. On or about October 30, 2007, in the case titled *People v. Michael R. Kister*, Fresno
4 County Superior Court Case No. M07002083, Respondent was convicted on his plea of nolo
5 contendere to violating Vehicle Code section 23103, subdivision (a) [reckless driving], and
6 23103.5 [reckless driving substituted for violation of section 23152], a misdemeanor.

7 a. The underlying circumstances are: On or about July 15, 2007, Respondent
8 drove his vehicle in Clovis, California, while under the influence of alcohol and/or drugs, or their
9 combined influence. Respondent tested presumptively positive for Hydrocodone and his blood
10 alcohol level tested at .07%.

11 **SECOND CAUSE FOR DISCIPLINE**

12 **(Convictions of Misdemeanors or Felony Involving Use, Consumption, or**
13 **Self-Administration of Dangerous Drugs, Alcohol, or Combined)**

14 15. Respondent's license is subject to disciplinary action under Code section 4301,
15 subdivision (k), in that Respondent was convicted of more than one misdemeanor or any felony
16 involving the use, consumption, or self-administration of any dangerous drug or alcoholic
17 beverage, or any combination of those substances, as set forth above in paragraphs 12, 13, and 14,
18 and all of their subparts, incorporated by reference.

19 **THIRD CAUSE FOR DISCIPLINE**

20 **(Committed Acts of Moral Turpitude, Dishonesty,**
21 **Fraud, Deceit, or Corruption)**

22 16. Respondent's license is subject to disciplinary action under Code section 4301,
23 subdivision (f), on the grounds of unprofessional conduct, in that Respondent committed acts of
24 moral turpitude, dishonesty, fraud, deceit, or corruption. The underlying circumstances are set
25 forth above in paragraphs 12, 13, and 14, and all of their all of their subparts, incorporated by
26 reference.

27 ///

28 ///

1 **FOURTH CAUSE FOR DISCIPLINE**

2 **(Self-Administration of Controlled Substance; Used Dangerous Drugs**
3 **Dangerous or Injurious to Self or Public, and Unable to Practice Safely)**

4 17. Respondent's license is subject to disciplinary action under Code section 4301,
5 subdivision (h), on the grounds of unprofessional conduct, in that Respondent self-administered
6 and used controlled substances, dangerous drugs, and/or alcoholic beverages, to the extent or in a
7 manner as to be dangerous or injurious to himself or the public, or to the extent that the use
8 impaired his ability to conduct with safety to the public the practice of pharmacy, as set forth
9 above in paragraphs 12, 13, and 14, and all of their subparts, incorporated by reference.

10 **FIFTH CAUSE FOR DISCIPLINE**

11 **(Violation of Laws Regulating Controlled Substances and/or Dangerous Drugs)**

12 18. Respondent's license is subject to disciplinary action under Code section 4301,
13 subdivision (j), on the grounds of unprofessional conduct, in that Respondent possessed the
14 controlled substances Codeine, Hydrocodone, Hydromorphone, Alprazolam, and Lorazepam
15 without a lawful prescription for each drug, in violation of Code section 4066 and Health and
16 Safety Code section 11350, subdivision (a), as set forth above in paragraphs 12, 13, and 14, and
17 all of their subparts, incorporated by reference.

18 **SIXTH CAUSE FOR DISCIPLINE**

19 **(Violated or Attempted to Violate Pharmacy Laws)**

20 19. Respondent's license is subject to disciplinary action under Code section 4301,
21 subdivision (o), on the grounds of unprofessional conduct, in that Respondent violated or
22 attempted to violate, directly or indirectly, or assisting in or abetting the violation of or conspiring
23 to violate any provision or term of pharmacy laws, as set forth in paragraphs 12, 13, 14, 15, 16,
24 17, and 18, and all of their subparts, above, incorporated by reference.

25 **DISCIPLINARY CONSIDERATIONS**

26 20. In order to determine the degree of discipline, Complainant requests the following to
27 be considered:
28

1 a. In the *Matter of the Accusation Against: Michael Ronald Kister*, Board Case
2 No. 1921, the Board disciplined Respondent, effective July 7, 1998, by revoking his pharmacist
3 license, immediately stayed, and placing him on probation for the period of five years subject to
4 certain terms and conditions, including his mandatory participation in the Pharmacist Recovery
5 Program, random fluid testing, and abstain from drug use. The license was fully reinstated on or
6 about July 7, 2003.

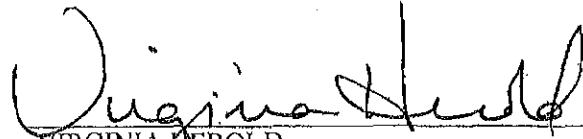
7 **WHEREFORE**, Complainant requests that a hearing be held on the matters herein alleged,
8 and that following the hearing, the Board of Pharmacy issue a decision:

9 1. Revoking or suspending Pharmacist License No. RPH 30052 issued to Michael
10 Ronald Kister, also known as Michael R. Kister;

11 2. Ordering Michael Ronald Kister, also known as Michael R. Kister, to pay the Board
12 of Pharmacy the reasonable costs of the investigation and enforcement of this case, pursuant to
13 Business and Professions Code section 125.3; and

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

15
16 DATED: 2/19/14



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

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