

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

In the Matter of the Accusation Against:

DAVID C. FUNG
1536 Brunswig Lane
Emeryville, CA 94608

Pharmacist License No. RPH 41674

Respondent.

Case No. 4743

OAH No. 2014020763

DECISION AND ORDER

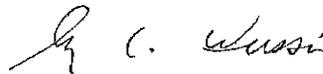
The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Pharmacy, Department of Consumer Affairs, as its Decision in this matter.

This decision shall become effective on December 12, 2014.

It is so ORDERED on November 12, 2014.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By



STAN C. WEISSER
Board President

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PROPOSED DECISION

Administrative Law Judge Dianna L. Albini, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on September 4, 2014.

Char Sachson, Deputy Attorney General, represented complainant.

Kara R. Weisman, Attorney, represented respondent David C. Fung who was present throughout the hearing.

The record was closed and the matter submitted for decision on September 4, 2014.

FACTUAL FINDINGS

1. Complainant Virginia Herold made the accusation in her official capacity as the Executive Officer of the Board of Pharmacy, State of California (Board).
2. On April 23, 1988, the Board issued Pharmacist License Number RPH 41674 to respondent David C. Fung. Respondent's license is current, and will expire on May 31, 2015, unless renewed.
3. On October 10, 2013, in the Superior Court of California, County of Alameda, respondent was convicted, on his plea of guilty, of a violation of Penal Code section 273.5, (willful infliction of corporal injury), a misdemeanor. Respondent was placed on a conditional sentence for a period of 36 months on terms and conditions that included: serving one-day in jail; staying at least 100 yards away from his wife; that he pay fines and fees of approximately \$620; and, that he successfully complete a 52-week domestic violence

class. Respondent remains on probation until October 10, 2016. Respondent has paid all fines and fees and completed the 52-week domestic violence class.

4. The facts and circumstances surrounding the October 10, 2013, conviction are that on June 6, 2013, sometime after midnight, respondent found his wife in a separate room in the home having sex with another man. Respondent and his wife began to argue about her infidelity. Respondent had to work in the morning and they agreed to discuss the matter after work. When respondent returned home from work on June 7, 2013, the conflict culminated in respondent slapping his wife in the face that caused redness of her inner cheek. There were no other visible signs of injuries to her face. Additionally, respondent pushed his wife in the abdomen. Respondent's wife has no other evidence of physical injury.

5. On June 25, 2013, prior to the criminal conviction, at the Board's request, the court issued an order pursuant to Penal Code section 23, that restricted respondent from practicing as a pharmacist pending resolution of the criminal proceeding and the present matter.

Respondent's evidence

6. Respondent admits slapping his wife in the face twice and pushing on her abdomen. Respondent accepts responsibility and regrets his conduct. Respondent's wife claimed that respondent placed a gun in her mouth and threatened to kill her. At no time did the responding officers observe respondent holding a fire arm or other weapon. Respondent vehemently denies threatening to kill his wife with a gun or bury her body parts. The evidence did not establish the contentions contained in the police report that respondent placed a gun in respondent's mouth and threatened to kill her and bury her body parts.

Respondent cooperated with the police officers and showed them where the guns from his collection were located. Respondent had two rifles located in the closet, with the ammunition placed in a Big 5 duffle bag. Respondent also informed the officers that there was a hand gun located between the mattress on his bed, and another handgun in his wife's bedroom, in the night stand dresser drawer located on the side of her bed. The police officers were able to retrieve those weapons. Following his arrest and while respondent was in jail, respondent's wife contacted his family in Hong Kong and told them that respondent was fine, but very busy. Respondent's only family member in the United States was his wife who refused to tell respondent's family that he was in jail or that he needed help.

After spending approximately four months in jail, respondent was contacted by his manager from Safeway who was concerned that he had not been at work or in contact with anyone. When his manager learned of the situation, she then contacted respondent's sister in Hong Kong who hired a criminal lawyer. Respondent remained in jail for 125 days. Approximately six-days after respondent's incarceration, respondent's wife flew to Hong Kong and withdrew substantial sums of money from a bank account and liquidated other assets.

7. Following his conviction, respondent's wife refused to allow him to retrieve his possessions from his home. Because his wife's mother lived in respondent's second home, located less than 100 yards from the home occupied by his wife, respondent could not occupy one of his homes without violating the terms of the stay away order. Additionally, due to the June 2013 restriction on his license, respondent had no way to financially support himself. With court approval, respondent returned to Hong Kong where he would be closer to his family and receive their moral and financial support. While in Hong Kong, respondent sought psychological counseling and completed his 52 week domestic violence program. Respondent continues to live in Hong Kong because he has been unable to work since June 2013 and relies on his family for financial support. Respondent desires to return to California and continue his work as a pharmacist.

8. Respondent met his wife in approximately 2000 while living in Boston. At the time of this incident respondent and his wife had been married for more than eight years. When respondent and his wife decided to move to California, he moved his mother-in-law to California as well, and supported her financially so that she had a home. Respondent and his wife slept in separate bedrooms due to their conflicting work schedules. At that time, respondent worked in San Francisco and would not return home until approximately midnight, which would disturb his wife's sleep.

9. Respondent has been a pharmacist for more than 26 years in the State of California. He has no record of prior disciplinary action or prior criminal convictions. Respondent graduated Summa Cum Laude from Massachusetts College of Pharmacy in 1986, with a specialty in radiopharmacy and membership in the Rho Chi honor society and Massachusetts Society of Hospital Pharmacists. After graduation, from 1990 to 1992, respondent worked for Harvard University in Massachusetts General Hospital. Following this, respondent worked for Rite Aid in Boston as the pharmacy manager. After his move to California, from 2006 through 2011, respondent worked for Target and performed freelance work for independent pharmacies in Concord, El Sobrante and Oakland, California. In early 2012 respondent went to work for the Northern California Division of Safeway on Market Street, in San Francisco, California. In December 2012 respondent transferred to the Safeway in El Cerrito, California, that was closer to his residence. Respondent remained employed at the El Cerrito Safeway until June 25, 2013, when his license was restricted. Respondent's passion in life comes from his work as a pharmacist and the interaction with his customers.

10. In 2014, respondent earned approximately 15-hours of continuing education credits related to the field of pharmacy.

11. An August 21, 2014, report from Paul Pang, Psy.D., was submitted at hearing. Dr. Pang is a licensed psychologist in the State of New York and the city of Hong Kong. Dr. Pang conducted the court ordered domestic violence program at his facility in Hong Kong. Respondent participated in Dr. Pang's program, Battery Intervention Program (program), that met weekdays from December 2, 2013 through June 30, 2014. In addition to the program's classes, respondent also received 54 hours of face-to-face psycho-education and

psychotherapy. Dr. Pang noted that respondent successfully completed the recovery program and met all of his treatment goals, including emotional control, safety issues, two-way communication, ethics, stress management, abstinence, and active listening. Dr. Pang found respondent to be candid, forthright and honest in his description of the events surrounding his conviction. Dr. Pang observed that over the course of his program, that respondent demonstrated behavioral changes, studied boundaries, worked on his communication skills, and addressed self-esteem and assertiveness issues. Dr. Pang opined that the program respondent completed provided him with insight into his past mistake and that respondent learned coping skills in rational thinking and emotional control. Additionally, respondent has learned the efficacy of seeking help from professionals if facing difficulty. In Dr. Pang's opinion, respondent is in the low risk range for reoccurring domestic violence. According to Dr. Pang, based on respondent's current condition, his high awareness of public interest, welfare, and safety, respondent poses no threat to his pharmacist clients and is capable of safely executing his duties as a pharmacist.

12. Siu Hung Leung was present and testified at hearing. Leung lives in Hong Kong. Leung, a friend of respondent's sister, met respondent approximately 10 years ago. Respondent's sister sought Leung's assistance with hiring a California criminal lawyer to represent respondent in his criminal matter as well as securing respondent's release from jail. Leung is also working with a Hong Kong lawyer and the Hong Kong police regarding allegations that respondent's wife misappropriated approximately \$700,000 from respondent's Hong Kong bank account and other holdings. Leung finds respondent to be honest and of good character.

13. Larry Yuen was present and testified at hearing. Yuen has known respondent for approximately eight years. Yuen and respondent belong to the same athletic club and were badminton partners. Yuen is aware of the circumstances surrounding respondent's arrest. Yuen finds respondent to be a nice, quiet, and nonviolent person. Yuen observed respondent's willingness to teach other, less skilled badminton players, various techniques and methods of improving their game.

14. An affidavit dated September 3, 2014, from Rose Gin, Pharmacy Manager of the Northern California Division of Safeway was submitted at hearing. Gin is respondent's supervisor and has known him since 2012. Gin is aware of respondent's conviction and the surrounding circumstances. Gin stated that respondent was a Staff Pharmacist who was the acting Pharmacy Manager when Gin was off work. Gin finds respondent to be very knowledgeable as a pharmacist, flexible in his ability to work any shift, professional and eager to work when scheduled. Gin believes respondent is the "ideal pharmacist" because he complies with every request he receives. Additionally, respondent has assisted Gin with complex issues that included implementing a new government program requiring the creation of policies and procedures to dispense and accommodate "underprivileged or poverty stricken individuals" without interrupting the workflow. During this process, respondent taught Gin about inventory and profit gain. Gin stated that respondent graciously explained issues and put them in perspective for her to understand. Gin was impressed by respondent's ability to deal with difficult customers in a calm and patient manner. Gin stated

respondent did not lose his temper, even in stressful situations. Gin found respondent to be generous with his advice, and accommodating to foreign customers by speaking their language. Gin finds respondent to have a good moral character.

15. An affidavit dated July 1, 2014, from Pharmacist Anita Tam was submitted at hearing. During 2012 Tam was respondent's co-worker at the San Francisco Safeway Pharmacy. Tam found respondent to be a very knowledgeable pharmacist who loved his customers.

16. An affidavit dated June 28, 2014, from Pharmacist John Cuddy was submitted at hearing. Cuddy has known respondent since 2012 when they were co-workers at the San Francisco Safeway Pharmacy. Cuddy finds respondent to be a careful and meticulous pharmacist who always exercised good judgment.

17. An affidavit dated June 6, 2014, from Kevin Kin San Cheng, Assistant General Manager and Head of the Compliance Department for the Bank of Tokyo-Mitsubishi, in Hong Kong, was submitted at hearing. Cheng and respondent have been best friends for more than 40 years. Cheng is aware of respondent's conviction and the surrounding circumstances. Cheng finds respondent to be honest, reliable, professional, emotionally stable and of high moral integrity. Over the 40 years of their friendship, Cheng has never known respondent to be a violent person.

18. Several other character affidavits were submitted by co-workers and long-time friends of respondent. The consistent theme throughout was that the affiants found respondent to be honest, caring toward others, nonviolent and of high moral character.

Costs

19. The Board incurred prosecution costs in the amount of \$2,347.50.

LEGAL CONCLUSIONS

Conviction of a substantially related crime

1. Pursuant to Business and Professions Code sections 490, subdivision (a), and 4301, subdivision (l), the Board shall take action against any licensee who is guilty of unprofessional conduct which includes the conviction of a crime substantially related to the qualifications, functions and/or duties of a licensee.

California Code of Regulation, title 16, section 1770, defines the substantial relationship criteria as a crime or act that evidences to a substantial degree, the 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. Respondent's conviction for willful infliction of corporal punishment is substantially related to the qualifications,

functions and/or duties of a pharmacist licensee because it presents a potential unfitness and lack of judgment when dealing with pharmacy clients.

By reason of the matters set forth in Factual Findings 3 and 4, cause for disciplinary action exists pursuant to Business and Professions Code sections 490, subdivision (a), 4301, subdivision (l), and California Code of Regulation, title 16, section 1770.

Unprofessional conduct

2. Pursuant to Business and Professions Code section 4301, subdivision (f), respondent's conduct of assaulting his wife constitutes unprofessional conduct in that it constitutes an act involving moral turpitude. Consequently, by reason of the matters set forth in Factual Findings 3 and 4, cause for disciplinary action exists pursuant to Business and Professions Code section 4301, subdivision (f).

Mitigating factors and rehabilitation

3. Rehabilitation is a "state of mind" and the law looks with favor upon rewarding with the opportunity to serve one who has achieved "reformation and regeneration." (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) Fully acknowledging the wrongfulness of past actions is an essential step towards rehabilitation. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940.) Mere remorse does not demonstrate rehabilitation. A truer indication of rehabilitation is sustained conduct over an extended period of time. (*In re Menna* (1995) 11 Cal.4th 975, 991.) The evidentiary significance of misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct. (*Kwasnik v. State Bar* (1990) 50 Cal 3d 1061, 1070.)

The evidence did not establish that respondent had a history of assault, or any other violence. The evidence established quite the contrary, that respondent's offense can rightly be characterized as an aberration, a one-time act of poor judgment. Since then, respondent has fully atoned for his conduct. Until his license was restricted, respondent had a stellar work history. His employer knows of his conviction yet has expressed no concern that respondent is likely to reoffend. Most importantly, respondent has demonstrated the requisite mental state that establishes rehabilitation and thus the likelihood that the public safety will not be put at risk by his continued licensure. Remorse for one's conduct and the acceptance of responsibility are the cornerstones of rehabilitation. By reason of the matters set forth in Factual Findings 5 through 18, the evidence has established that respondent is rehabilitated and that he would not be a danger to the public were he allowed to maintain his license.

4. Not every violation of the Pharmacy Law requires that a pharmacist be put on probation in order to protect the public and allow the Board to monitor his performance and rehabilitation. In a case such as this, where respondent may be said to be fully rehabilitated

from his crime, protection of the public will be served by a disciplinary order that does not mandate a period of probation. Business and Professions Code section 495, provides, “[n]otwithstanding any other provision of law, any entity authorized to issue a license or certificate pursuant to this code may publicly reprove a licentiate . . . , for any act that would constitute grounds to suspend or revoke a license or certificate.” Issuance of a public reproof or reprimand is the appropriate discipline to be imposed upon respondent and is sufficient in this case to protect the public.

5. Pursuant to Factual Finding 19, the Board has requested costs in the amount of \$2,347.50. In *Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth the standards by which a licensing board must exercise its discretion to reduce or eliminate cost awards to ensure that it does not deter licensees with potentially meritorious claims from exercising their right to an administrative hearing. The court held that a licensing Board may not assess the full costs of investigation and prosecution when a licensee, who has committed some misconduct, has used the hearing process to obtain a dismissal of other charges or a reduction in the severity of the discipline imposed. (*Zuckerman, supra*, 29 Cal.4th at p. 45.) The Board must consider the licensee’s “subjective good faith belief” in the merits of the licensee’s position and whether the licensee has raised a “colorable challenge” to the proposed discipline. The Board must consider whether the licensee will be “financially able to make later payments.” Lastly, the Board may not assess full costs of investigation and enforcement when it has conducted a disproportionately large investigation to prove that the licensee engaged in “relatively innocuous misconduct.” (*Ibid.*) The *Zuckerman* factors have been considered.

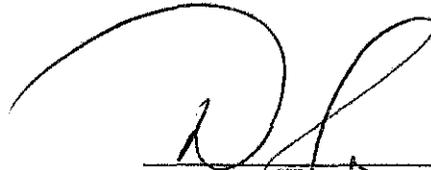
Respondent presented sufficient evidence to justify a significant of the discipline sought against him at hearing. Respondent incurred substantial costs in his defense and there is substantial evidence of his rehabilitation. The evidence established respondent is not a danger to the general public or his clients. In view of the *Zuckerman* factors, the Board’s request for cost recovery is reduced to \$1,000.

ORDER

1. The written decision in this matter shall serve as a public reprimand to respondent David C. Fung, Pharmacy License Number RPH 41674, for violation of Business and Professions Code sections 490, subdivision (a), and 4301, subdivisions (f) and (l).

2. The Board's request for recovery of costs is reduced to \$1,000.

DATED: October 1, 2014



DIANNA L. ALBINI
Administrative Law Judge
Office of Administrative Hearings

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

10
11 In the Matter of the Accusation Against:

Case No. 4743

12 **DAVID C. FUNG**
13 **1536 Brunswig Lane**
Emeryville, CA 94608

ACCUSATION

14 **Pharmacist License No. RPH 41674**

15 Respondent.

16
17 Complainant alleges:

18 PARTIES

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

21 2. On or about April 23, 1988, the Board of Pharmacy issued Pharmacist License
22 Number RPH 41674 to David C. Fung (Respondent). The Pharmacist License was in full force
23 and effect at all times relevant to the charges brought herein and will expire on May 31, 2015,
24 unless renewed.

25 JURISDICTION

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

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COST RECOVERY

10. Section 125.3 of the Code provides, in pertinent part, that the Board may request the administrative law judge to direct a licentiate found to have committed a violation of the licensing act to pay a sum not to exceed its reasonable costs of investigation and enforcement.

FIRST CAUSE FOR DISCIPLINE

(Conviction of Substantially Related Crime)

11. Respondent is subject to discipline under section 4301(l) and/or section 490 of the Code, by reference to California Code of Regulations, title 16, section 1770, for the conviction of a substantially related crime, in that on or about October 10, 2013, in the criminal case *People v. David Chikin Fung*, Case No. 587813-2 in Alameda County Superior Court, Respondent was convicted of violating Penal Code section 245(a)(1) (felony assault with a deadly weapon) and Penal Code section 273.5 (misdemeanor willful infliction of corporal injury). Imposition of sentence was suspended in favor of three years probation, 126 days of jail time, fines and fees and an order that Respondent stay 100 yards from the victim.

a. The circumstances of the conviction are that on or about June 6, 2013, Respondent slapped his wife in the mouth and struck her in the throat. Subsequently, he threatened to kill her and bury her body parts, put a gun to her head, and put the barrel of a shotgun in her mouth. Respondent's wife feared for her life during this ordeal. Respondent also forced his wife to walk to a third floor balcony, and ordered her to jump (she was able to persuade him to let her back inside). Once they were back inside their residence, Respondent ordered his wife to kneel on the ground at knifepoint, while he described how he would decapitate her.

SECOND CAUSE FOR DISCIPLINE

(Unprofessional Conduct)

12. Respondent is subject to discipline under section 4301 of the Code in that, as described in paragraphs 11 and 11.a above, Respondent engaged in unprofessional conduct.

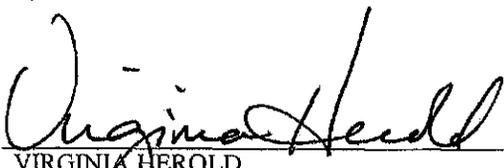
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PRAYER

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

1. Revoking or suspending Pharmacist License Number RPH 41674, issued to David C. Fung;
2. Ordering David C. Fung to pay the Board of Pharmacy the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;
3. Taking such other and further action as deemed necessary and proper.

DATED: 12/16/13



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

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