

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

In the Matter of the Accusation Against:

**KAISER PERMANENTE CORP., DBA
KAISER PERMANENTE PHARMACY
#833,**
Pharmacy Permit No. PHY 46384,

and

DARIN L. SISE, RPH,
Pharmacist-In-Charge
Pharmacist Permit No. RPH 43429,

Respondent.

Case No. 5533

OAH No. 2016040473

DECISION AFTER REJECTION

Administrative Law Judge (ALJ) Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on October 11 and 12, 2016, in Sacramento, California. Leslie A. Burgermyer, Deputy Attorney General, represented complainant Virginia K. Herold, Executive Officer of the Board of Pharmacy (Board), Department of Consumer Affairs of the State of California. Attorney Paul Chan of the Law Offices of Paul Chan represented respondent Darin L. Sise, who was present throughout the hearing.¹ Evidence was received, the record was closed, and the matter was submitted for decision on October 12, 2016. The ALJ prepared a Proposed Decision on October 27, 2016.

On January 5, 2017, pursuant to section 11517 of the Government Code, the Board issued an Order Rejecting the Proposed Decision of the ALJ. On February 13, 2017, the Board issued an order reflecting that the transcript had been received and the deadline for submission of written argument was set for March 15, 2017. Complainant and respondent timely submitted written argument. On April 4, 2017, the Board issued an order extending time within which to issue this decision.

¹ Respondent Kaiser Permanente Corp., dba Kaiser Permanente Pharmacy #833, did not appear at hearing. Complainant entered into a stipulated settlement resolving this matter as to that respondent prior to hearing. Therefore, this Decision pertains to Dr. Sise only, and all future references to "respondent" refer only to him.

The Board, having reviewed and considered the entire record, including the transcript, exhibits and written argument, now issues this decision.

SUMMARY

Respondent Sise was the pharmacist-in-charge at Kaiser Permanente Pharmacy #833 (Kaiser #833) for the relevant periods of this matter. Kaiser #833's inventory of Hydrocodone/APAP 10/325 mg was short by at least 63,310 tablets as of December 10, 2013. The pharmacy discovered a janitor who had been stealing and obtained video evidence that the janitor stole 3,480 of the tablets in the course of only five days. When confronted, the janitor admitted that, over approximately six months, he had stolen an unknown number of Hydrocodone tablets. The pharmacy lacked accurate records of disposition to account for the inventory shortage of the Hydrocodone/APAP 10/325 mg. Complainant seeks to discipline respondent's license based on the absence of the paperwork to determine the amount of the shortage and for his failure to secure the pharmacy. Cause exists to discipline his license. When all the evidence is considered, although his conduct warrants discipline, respondent demonstrated his continued fitness to perform the duties of a licensed pharmacist in a manner consistent with public health, safety, and welfare without any restrictions, and his public reproval is sufficient to ensure public protection.

FACTUAL FINDINGS

Procedural Matters

1. On July 25, 1990, the Board issued Original Pharmacist License No. RPH 43429 to respondent. The license expires March 31, 2018, unless renewed or revoked. There is no history of prior discipline of the license.
2. On February 20, 2016, complainant signed the Accusation solely in her official capacity. The Accusation seeks to discipline respondent's license based upon his alleged failure to secure the prescription department and provide for the effective control against theft or diversion of dangerous drugs from Kaiser #833. Complainant also alleges respondent's failure to maintain and preserve all records of acquisition, disposition, and current inventory of dangerous drugs which resulted in the failure to have records of disposition to account for an inventory shortage of 75,266 tablets of Hydrocodone/APAP 10/325 mg.

Respondent's Background

3. Respondent received his Associates of Arts degree in physical sciences from Modesto Junior College in May 1987. Three years later, he received his Doctorate of Pharmacy from the University of the Pacific, School of Pharmacy. He worked as a pharmacy intern at Dameron Hospital in Stockton, California, while attending pharmacy school.
4. Respondent has worked continuously as a staff pharmacist or pharmacist-in-charge since becoming licensed by the Board. He worked for Payless Drug Stores, Stanislaus Medical Center, Stanislaus Behavior Health Center, and Raley's Pharmacy between July 1990 and December 2004. He began working for Kaiser Permanente Corp. as an outpatient

pharmacy supervisor at Kaiser #833 in December 2004. The following year, he became the pharmacist-in-charge of a Kaiser Permanente Corp. pharmacy located on I Street in Modesto, California. And the year after that, he returned to Kaiser #833 as the pharmacist-in-charge. He left Kaiser #833 to serve as the pharmacist-in-charge at Kaiser Permanente Corp. pharmacies in Modesto and Tracy, California, from December 2008 to December 2010 before returning to Kaiser #833 as the pharmacist-in-charge in December 2010.

5. Respondent resigned his employment with Kaiser #833 on June 20, 2014, after being placed on administrative leave during the investigation of the loss of Hydrocodone discussed further below. The following day, he began employment as the pharmacist-in-charge at a CVS Pharmacy in Turlock, California. Shortly thereafter, he changed positions to staff pharmacist because the Board rejected his designation as the pharmacist-in-charge. He has been working at a Raley's Pharmacy in Modesto, California, since December 29, 2015.

6. Kaiser #833 was open to the public Monday through Friday, from 8:00 a.m. to 6:30 p.m., when respondent was the pharmacist-in-charge from December 2010 through June 20, 2014. His shift was from 9:30 a.m. to 6:00 p.m. The janitors came to clean the pharmacy three times each day, the last time being near the end of respondent's shift. They were never left alone in the pharmacy, because staff was present until 7:00 p.m. each night. Respondent did not know the janitor who stole the Hydrocodone/APAP.

Theft of Hydrocodone/APAP 10/325 mg

7. Between 5:30 p.m. and 6:00 p.m. on December 5, 2013, respondent noticed that the "working supply" of the 100 count Hydrocodone/APAP² 10/325 mg was getting low, and replenished the supply from "overstock." Kaiser #833 dispensed Hydrocodone in bottles containing 30, 50, 60, and 100 tablets. All bottles were shipped to Kaiser #833 prepackaged in the individual bottles ultimately given to the patient, except for the 100s which had to be separated into individual bottles by staff at Kaiser #833. Because of the frequency with which Hydrocodone/APAP was dispensed at Kaiser #833, staff kept a "working supply" of all strengths and tablet counts in unlocked, individual bins in book cases in the front pharmacy area. The remaining "overstock" was locked in the back area of the pharmacy, and was accessible by electronic card key only to pharmacists.

8. Shortly after 9:30 a.m. the following morning, a pharmacy technician asked respondent to replenish the working supply of the 100 count Hydrocodone/APAP 10/325 mg. Respondent obtained more product from overstock, but found it odd that it was necessary to do so since he replenished the working supply the previous evening. He suspected a possible issue with theft, and decided he would review the recordings from the security cameras later that day.

² Hydrocodone/APAP is a commonly prescribed painkiller and is a combination of the drugs hydrocodone and acetaminophen. It comes in the strengths of 5/325, 5/300, 7.5/300, 7.5/325, 10/325, and 10/300. The former number refers to the amount of hydrocodone, and the latter to the amount of acetaminophen. Hydrocodone is an addictive drug; it is frequent target of theft by those seeking to obtain it without a lawful prescription.

9. Before respondent had an opportunity to review the video footage, he received a telephone call from Irene Scott, Outpatient Pharmacy Director with Kaiser Permanente Corp. and respondent's second-level supervisor. Ms. Scott informed respondent she received a telephone call from Lanny Leung, a pharmacy internal auditor with Kaiser Permanente Corp.'s Data Mining Department,³ informing her that electronic records of Kaiser #833's inventory of Hydrocodone/APAP 10/325 mg showed a large discrepancy between the amount acquired and the amount dispensed in mid-August through November 2013 such that there was an unusually large amount in overstock. Ms. Scott explained that the discrepancy raised "red flags" about the possibility of the loss of the drug through theft.

Ms. Scott instructed respondent to work with Mr. Leung in conducting an inventory of all Hydrocodone/APAP 10/325 mg on hand at Kaiser #833. Respondent requested, and received, permission to conduct the audit the following day, a day on which the pharmacy was closed, so as to not raise any suspicions with staff in case there in fact was an issue with employee theft.

10. The following morning, respondent arrived at Kaiser #833 to conduct the inventory as instructed. While waiting for his computer to start, he viewed random video footage from the security cameras, and observed multiple instances of one of the janitors reaching into the working supply of the 100 count Hydrocodone/APAP 10/325 mg, removing numerous bottles of the drug, wrapping them in a cleaning cloth, and walking out of camera range with the cleaning cloth and drugs. Respondent reported his discovery to Ms. Scott, and the information was subsequently relayed to Mr. Leung.

11. Mr. Leung made arrangements with respondent to review video footage from the security cameras at Kaiser #833 on December 8, 2013. The following is a summary of what the footage depicts:

a. Between 6:07 p.m. and 6:45 p.m. on December 2, 2013, a janitor reaches into the working supply of Hydrocodone/APAP 10/325 mg and removes a bottle, puts the bottle into a rag, and walks with the rag and bottle into the back of the pharmacy. He does this 13 times, stealing a total of 870 tablets;

b. Between 6:12 p.m. and 6:45 p.m. on December 3, 2013, the same janitor reaches into the working supply of Hydrocodone/APAP 10/325 mg and removes a bottle, puts the bottle into a rag, and walks with the rag and bottle into the back of the pharmacy. He does this eight times, stealing a total of 550 tablets;

c. Between 6:07 p.m. and 6:34 p.m. on December 4, 2013, the same janitor reaches into the working supply of Hydrocodone/APAP 10/325 mg and removes a bottle, puts the bottle into a rag, and walks with the rag and bottle into the back of the pharmacy. He does this 11 times, stealing a total of 600 tablets;

d. Between 6:02 p.m. and 6:35 p.m. on December 5, 2013, the same janitor reaches into the working supply of Hydrocodone/APAP 10/325 mg and removes a

³ The Data Mining Department maintains all records of acquisition, disposition, and inventory of the different drugs carried by Kaiser Permanente, Corp.'s pharmacies.

bottle, puts the bottle into a rag, and walks with the rag and bottle into the back of the pharmacy. He does this nine times, stealing a total of 400 tablets; and

e. Between 6:06 p.m. and 6:47 p.m. on December 6, 2013, the same janitor reaches into the working supply of Hydrocodone/APAP 10/325 mg and removes a bottle, puts the bottle into a rag, and walks with the rag and bottle into the back of the pharmacy. He does this 16 times, stealing a total of 1,060 tablets.

The janitor admitted to stealing an unknown amount of Hydrocodone/APAP 10/325 mg during a subsequent interview with an investigator from Kaiser Permanente Corp.'s National Special Investigations Unit. The janitor acknowledged stealing the Hydrocodone from approximately June 2013 to December 2013.

Respondent's Report of the Loss of Hydrocodone/APAP 10/325 mg

12. Respondent signed correspondence reporting the loss of 64,460 tablets of Hydrocodone/APAP 10/325 mg at Kaiser #833 to the Board on January 8, 2014. The correspondence attributed the loss of 3,480 tablets to theft by the janitor, but did not explain the basis for the loss of the remaining 60,980 tablets. On May 7, 2014, respondent sent the Board correspondence increasing the loss to 77,115 tablets. At hearing, he explained he was not involved in the calculation of the loss reported to the Board on either occasion. Instead, a preprinted letter was presented to him for signature on each occasion.

13. Mr. Leung testified at hearing that he performed an audit of the electronic records showing Kaiser #833's acquisition and disposition of Hydrocodone/APAP 10/325 mg between June 27 and December 10, 2013. He determined Kaiser #833 acquired a total of 406,782 tablets and disposed of 339,969 tablets. After accounting for the starting and ending inventories of 5,540 and 9,043 tablets, respectively, he calculated the net loss to be 63,310 tablets.

14. A subsequent audit performed by Grace Mizuhara, another pharmacy internal auditor in Kaiser Permanente Corp.'s Data Mining Department, for the period of March 17 through December 9, 2013, calculated the total loss of Hydrocodone/APAP 10/325 mg at Kaiser #833 to be 75,266 tablets. Mr. Leung signed a declaration attributing the differences between his calculation and Ms. Mizuhara's to different audit periods, different starting and closing inventories, the latter's consideration of acquisition and disposition records the former did not, and "minor calculation errors."

Discussion

15. Kaiser #833 suffered a shortage of at least 63,310 tablets of Hydrocodone/APAP 10/325 mg while respondent was serving as its pharmacist-in-charge. The exact amount of the loss was not established because of the discrepancies between Mr. Leung's and Ms. Mizuhara's audits, and neither audit matched the loss reported in respondent's January 8, 2014 and May 7, 2014 correspondence. But regardless of the exact loss, only 3,480 tablets were accounted for. Therefore, Kaiser #833 failed to maintain and preserve all records of acquisition, disposition, and current inventory of Hydrocodone/APAP 10/325 mg which resulted in its inability to account for the total shortage. At the time of the

loss, the pharmacy did not have the appropriate records to determine its inventory. As pharmacist-in-charge, respondent was responsible for the operation of the pharmacy.

16. A janitor stole 3,480 tablets of Hydrocodone/APAP 10/325 mg over five days between December 2 through 6, 2013; the same janitor admitted to stealing an unknown quantity of tablets during the six-month period ending December 10, 2013.

Respondent admitted that he filled the working bins several times a month, but did not keep a log of when he used the overstock to replenish the working stock of Hydrocodone. Respondent was aware that Kaiser had a running inventory, which was updated every time a prescription was dispensed. Respondent failed in his responsibilities. Respondent admitted that he didn't do a very good job at reviewing the perpetual log for dispensing the Hydrocodone and he did not know how many tablets had been dispensed on a daily basis. Respondent spent 10 minutes per week reviewing security video footage.

Respondent had a duty to secure the prescription department of Kaiser #833 and failed to provide for the effective control against theft or diversion of dangerous drugs. As pharmacist-in-charge, respondent should have instituted practices or procedures to deter or avert the theft. Respondent testified that he changed his practices after discovery of this loss. He began making daily counts of the Hydrocodone. He also began making weekly counts of other drugs that had a high potential for theft. Had he been so diligent in monitoring the volume of Hydrocodone being dispensed daily, he could have uncovered the losses sooner. Had he identified the losses sooner, he could have conducted an investigation and prevented at least some of the losses from continuing.

Appropriate Penalty

17. The Board has created disciplinary guidelines for consideration when determining the appropriate discipline for a violation or violations of the Pharmacy Law (Bus. & Prof. Code, § 4000 et seq.) or the regulations adopted pursuant to it, and those guidelines are incorporated by reference into California Code of Regulations, title 16, section 1760. The disciplinary guidelines separate the various statutory and regulatory violations into one or more categories, and recommends minimum and maximum discipline for each category.

18. A violation of Business and Professions Code section 4081 has been designated as a Category II violation. The recommended discipline for that violation ranges from revocation stayed, three years' probation, all standard terms and conditions, and all appropriate optional terms and conditions, to outright revocation. A violation of Business and Professions Code section 4105 has been designated as a Category II or a Category III violation. The minimum recommended discipline for a Category III violation ranges from a minimum of revocation stayed, 90 days actual suspension, three to five years' probation, all standard terms and conditions, and all appropriate optional terms and conditions, to a maximum of outright revocation.

19. As noted in its disciplinary guidelines, the board recognizes that individual cases may necessitate a departure from the guidelines. Additionally, the board recognizes that in some cases a licensed premises may well be more culpable than any individual licensed by were registered with the board.

The Board has delineated the following relevant factors for consideration in order to determine the appropriate level of discipline: 1) any actual or potential harm to the public or a consumer; 2) any history of prior discipline or warnings by the Board; 3) the number and variety of current violations; 4) evidence of aggravating or mitigating factors and evidence of rehabilitation; 5) the amount of time that has elapsed since the violations; 6) when the respondent is being held accountable for conduct committed by another, whether he had knowledge of or knowingly participated in such conduct; and 7) any financial benefit the respondent gained from engaging in his misconduct.

20. Here, cause exists to discipline respondent based on Kaiser #833's failure to maintain and preserve all records of acquisition, disposition, and current inventory of Hydrocodone/APAP 10/325 mg. While it was Kaiser #833's duty to maintain and preserve such records as the licensed premises, as the pharmacy's pharmacist-in-charge, respondent is strictly liable for its failure. Cause also exists to discipline respondent for his failure to institute practices to secure the prescription department and failing to provide for the effective control against theft or diversion of dangerous drugs.

21. At all times relevant, Hydrocodone/APAP 10/325 mg was a Schedule III controlled substance, a subset of "dangerous drugs" pursuant to Business and Professions Code section 4022. As evidenced by its designation as a controlled substance, it is a highly addictive drug, and is commonly sold illegally on the street. While there was no evidence of harm to the public or a consumer caused by respondent's inability to prevent or minimize the theft of the estimated 63,310 tablets of Hydrocodone/APAP 10/325 mg, the potential for harm is self-evident. Respondent did not benefit financially from the loss.

22. Respondent readily admitted at hearing that he is ultimately responsible for the loss of Hydrocodone/APAP 10/325 mg at Kaiser #833 discussed above because he was the pharmacist-in-charge at the time. He began making daily counts of the drug immediately upon discovery of the loss. He also began making weekly counts of other drugs that had a high potential for theft. When he began working for Raley's Pharmacy, he noticed the Schedule II controlled substances were not being inventoried monthly as required by law, and he reinstated that requirement and continues to ensure it is followed.

23. Respondent explained at hearing that he obtained a better understanding and appreciation for the responsibilities of a pharmacist-in-charge through his experience at Kaiser #833. He recognized he should have paid closer attention to maintaining the security of the pharmacy instead of focusing on what he referred to as "soft projects" (e.g., employee attendance, employee evaluations, and fostering better working relations with coworkers). Additionally, he has committed himself to improving his knowledge as a pharmacist, and completed more than two-thirds of his biennial requirement for continuing education during the first three weeks of July 2016.

24. Nearly three years have elapsed since the discovery of the loss of Hydrocodone/APAP 10/325 mg at Kaiser #833, and respondent has no history of prior or subsequent discipline or warnings by the Board. He testified candidly and openly about his having replenished the working stock of the drugs on the evening of December 5, 2013, and the subsequent events. He reported the loss of the drugs to the Board immediately upon

calculation of the total loss, and amended his report once it was determined the loss was larger than originally calculated. The Board investigator confirmed at hearing that respondent cooperated with her investigation.

25. At hearing, respondent introduced several character reference letters written by authors who have known him professionally and personally for several years. Each author acknowledged his or her awareness of the pending Accusation, and none stated that such knowledge caused him or her to reevaluate his or her favorable opinion of respondent. In particular, Nam Nguyen wrote the following on July 11, 2016:

I first met Darin in May 2014 while I was serving as CVS Pharmacy District Supervisor for the Modesto/Fresno Region. During his job interview, Darin did disclose an issue regarding theft of Hydrocodone/APAP clue to a janitor at Kaiser Permanent [sic]. At first, this disclosure did alarm me, however, [sic] further discussion with Darin, I realized that Darin took ownership of the incident and followed the proper steps after [sic] once he was aware of the issue. After the interview, I still decided to extend a job offer to Darin for a Pharmacist in Charge position.

During the time I've supervised Darin, I have found him to be a very hard working [sic], honest and competent pharmacist. Darin was very meticulous in his controlled invoice record keeping and made sure he kept me informed with everything going on in the pharmacy or any questions he had.

I was very confident in Darin's ability to be PIC at CVS and I still think highly of Darin as a pharmacist, colleague and health care professional.

Summary

26. Complainant established cause to discipline respondent's license based on Kaiser #833's failure to maintain and preserve all records of its acquisition, disposition, and current inventory of Hydrocodone/APAP 10/325 mg for the reasons explained further in the Legal Conclusions. Respondent was the pharmacist-in-charge during the period those records were not maintained, and is therefore strictly liable for that failure. Complainant also established that respondent failed to secure the prescription department of the pharmacy and failed to provide for the effective control against theft or diversion of drugs. When all the evidence is considered, respondent demonstrated his continued fitness to perform the duties of a licensed pharmacist in a manner consistent with public health, safety, and welfare without any restrictions. Therefore, it is not necessary to place his license on probation to ensure public protection and public reproof of respondent is sufficient.

Costs of Investigation and Enforcement

27. Complainant requested costs of investigation and enforcement in this matter in the total sum of \$4,731.97 pursuant to Business and Professions Code section 123.5. That amount was calculated by allocating to respondent 30 percent of the total costs incurred by the Board for its employee's investigation of this matter (\$6,193.25) and the total costs incurred by the Office of the Attorney General and billed to the Board for enforcing this matter (\$9,580). Complainant introduced evidence establishing costs of investigation and enforcement.

Respondent did not object to any of complainant's evidence of costs of investigation and enforcement, and did not introduce any evidence of his inability to pay those costs. He has been continuously employed as a pharmacist since first being issued his license by the Board on July 25, 1990.

For the reasons explained further in Legal Conclusion 14 below, costs of investigation and enforcement in the amount of \$2,365.99 are awarded.

LEGAL CONCLUSIONS

Applicable Standard/Burden of Proof

1. Complainant has the burden of proving each of the grounds for discipline alleged in the Accusation, and must do so by clear and convincing evidence to a reasonable certainty. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856 [the standard of proof applicable to proceedings for the discipline of professional licenses is clear and convincing evidence to a reasonable certainty].) "The courts have defined clear and convincing evidence as evidence which is so clear as to leave no substantial doubt and as sufficiently strong to command the unhesitating assent of every reasonable mind. [Citations.] It has been said that a preponderance calls for probability, while clear and convincing proof demands a high probability [citations]." (*In re Terry D.* (1978) 83 Cal.App.3d 890, 899; italics original.)

Applicable Law

Classification of Hydrocodone/APAP 10/325 mg

2. At all times relevant, Hydrocodone/APAP 10/325 mg was classified as a Schedule III controlled substance by the Drug Enforcement Administration. (Former 21 C.F.R. § 1308.13, subd. (e)(1)(iii), (iv) (2014), added by 36 Fed.Reg. 7776 (April 24, 1971) and repealed by 79 Fed.Reg. 49682 (Aug. 22, 2014).) It also was classified as a dangerous drug pursuant to Business and Professions Code section 4022.

Pharmacy operations

3. California Code of Regulations, title 16, section 1714, subdivision (d), provides:

Each pharmacist while on duty shall be responsible for the security of the prescription department, including provisions for effective control against theft or diversion of dangerous drugs and devices, and records for such drugs and devices.

Possession of a key to the pharmacy where dangerous drugs and controlled substances are stored shall be restricted to a pharmacist.

4. Business and Professions Code section 4081, subdivision (a), provides:

All records of manufacture and of sale, acquisition, receipt, shipment, or disposition of dangerous drugs or dangerous devices shall be at all times during business hours open to inspection by authorized officers of the law, and shall be preserved for at least three years from the date of making. A current inventory shall be kept by every manufacturer, wholesaler, third-party logistics provider, pharmacy, veterinary food-animal drug retailer, physician, dentist, podiatrist, veterinarian, laboratory, clinic, hospital, institution, or establishment holding a currently valid and unrevoked certificate, license, permit, registration, or exemption under Division 2 (commencing with Section 1200) of the Health and Safety Code or under Part 4 (commencing with Section 16000) of Division 9 of the Welfare and Institutions Code who maintains a stock of dangerous drugs or dangerous devices.

Additionally, “[a]ll records or other documentation of the acquisition and disposition of dangerous drugs in dangerous devices by any entity licensed by the board shall be retained on the licensed premises in a readily retrievable form.” (Bus. & Prof. Code, § 4105, subd. (a).)

5. “‘Pharmacist-in-charge’ means a pharmacist proposed by a pharmacy and approved by the board as the supervisor or manager responsible for ensuring the pharmacy’s compliance with all state and federal laws and regulations pertaining to the practice of pharmacy.” (Bus. & Prof. Code, § 4036.5.) Business and Professions Code section 4113, subdivision (c), provides the following with regard to the duties of the pharmacist-in-charge: “[t]he pharmacist-in-charge shall be responsible for a pharmacy’s compliance with all state and federal laws and regulations pertaining to the practice of pharmacy.”

The Board’s Disciplinary Authority

5. The Board has the authority to discipline a license by revoking or suspending it, placing it on probation with terms and conditions, or “taking any other action in relation to disciplining [the licensee] as the board in its discretion may deem proper.” (Bus. & Prof. Code, § 4300, subd. (b).) The Board has express authority to “publicly reprove a licentiate or certificate holder ... for any act that would constitute grounds to suspend or revoke a license or certificate.” (Bus. & Prof. Code, § 495.)

Legal Cause for Discipline

7. The Board may discipline a license when the holder of that license is guilty of unprofessional conduct, which includes “the violation of any of the statutes of the state, or any other state, or of the United States regulating controlled substances and dangerous drugs.” (Bus. & Prof. Code, § 4301, subd. (j).) Complainant established by clear and convincing evidence cause to discipline respondent’s license pursuant to Business and Professions Code section 4301, subdivision (j), as that statute relates to Business and Professions Code section 4081, subdivision (a), based on Kaiser #833’s failure to maintain and preserve all records of acquisition, disposition, and current inventory of Hydrocodone/APAP 10/325 mg as explained in Factual Findings 12 through 15. Respondent is strictly liable for Kaiser #833’s failure because he was the pharmacist-in-charge at all times relevant.

8. Unprofessional conduct also includes “violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of or conspiring to violate any provision or term of this chapter or of the applicable federal and state laws and regulations governing pharmacy, including regulations established by the board or by any other state or federal regulatory agency.” (Bus. & Prof. Code, § 4301, subd. (o).) Complainant established by clear and convincing evidence cause to discipline respondent’s license pursuant to Business and Professions Code section 4301, subdivision (o), as that statute relates to Business and Professions Code section 4081, subdivision (a), for the reasons discussed in Legal Conclusion 7.

9. Complainant established by clear and convincing evidence cause to discipline respondent’s license pursuant to Business and Professions Code section 4301, subdivision (j), as that statute relates to Business and Professions Code section 4105, subdivision (a), for the reasons discussed in Legal Conclusion 7.

10. Complainant established by clear and convincing evidence cause to discipline respondent’s license pursuant to Business and Professions Code section 4301, subdivision (o), as that statute relates to Business and Professions Code section 4105, subdivision (a), for the reasons discussed in Legal Conclusion 7.

11. Complainant established by clear and convincing evidence cause to discipline respondent’s license pursuant to Business and Professions Code section 4301, subdivisions (j) and (o), as that statute relates to violation of California Code of Regulations, title 16, section 1714, subdivision (d), as a result of respondent’s failure to institute practices to secure the prescription department, including instituting provisions for the effective control against theft or diversion of dangerous drugs and devices. This is based on Factual Findings 7 through 11 and 16.

Conclusion

12. Cause exists to discipline respondent’s license for the reasons explained in Legal Conclusions 7 through 11, individually and collectively. When all the evidence is considered, respondent demonstrated his continued fitness to perform the duties of a licensed pharmacist in a manner consistent with public health, safety, and welfare without any

restrictions for the reasons explained in Factual Findings 17 through 26. Therefore, a letter of public reproof is the appropriate discipline.

Award of Costs

13. Business and Professions Code section 125.3, subdivision (a), permits cost recovery. 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. Those 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.)

14. The ALJ considered the relevant evidence and the pertinent *Zuckerman* factors, and reduced the total amount of costs of investigation and enforcement. The ALJ ordered respondent to pay costs in the amount of \$2,365.99; that amount is reasonable and is awarded as set forth in the Order below.

ORDER

1. Respondent Darin L. Sise, holder of Original Pharmacist License No. RPH 43429, is hereby publicly reproofed.

2. Respondent Darin L. Sise shall pay to the Board costs associated with its investigation and enforcement pursuant to Business and Professions Code section 125.3 in the amount of \$2,365.99.

This Decision shall become effective June 29, 2017.

IT IS SO ORDERED on this 30th day of May, 2017.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

Deborah Veale, RPh
Board Vice President

BEFORE THE
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Respondents.

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OAH Nos. 2016040473

**ORDER EXTENDING TIME FOR
ISSUANCE OF A DECISION AFTER REJECTION**

Pursuant to section 11517 of the Government Code, the California State Board of Pharmacy (hereinafter "board") rejected the Proposed Decision of the administrative law judge in the above matter by Order dated January 5, 2017.

YOU ARE HEREBY NOTIFIED that, pursuant to Government Code section 11517(c)(2)(E)(iv), the time for issuance of a decision in this matter must be extended for 30 days to give the board adequate time to prepare and approve its decision after rejection.

For the above-state reasons, the board's decision after rejection shall be issued no later than May 30, 2017.

IT IS SO ORDERED this 4th day of April, 2017.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

Deborah Veale, RPh, Board Vice President

¹ The portion of the accusation against pharmacy permit number PHY 46384 was addressed by a prior Decision of the board and was not addressed in the Proposed Decision.

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Pharmacist Permit No. RPH 43429

Respondents.

TO ALL PARTIES AND THEIR ATTORNEY OF RECORD:

ORDER SETTING DATE FOR SUBMISSION OF WRITTEN ARGUMENT

The administrative record of the hearing in the above-entitled matter having now become available, the parties are hereby notified of the opportunity to submit written argument in accordance with the Order Rejecting the Proposed Decision dated January 5, 2017.

Written argument shall be filed with the Board of Pharmacy, 1625 N. Market Blvd., Suite N-219, Sacramento, California, 95834 on or before 3:00 p.m., March 15, 2017. **No new evidence may be submitted.**

IT IS SO ORDERED February 13, 2017.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

Deborah Veale, RPh, Board Vice President

¹ The portion of the accusation against pharmacy permit number PHY 46384 was addressed by a prior Decision of the board and was not addressed in the Proposed Decision.

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

In the Matter of the Accusation Against¹:

KAISER PERMANENTE CORP, DBA KAISER
PERMANENTE PHARMACY #833,
Pharmacy Permit No. PHY 46384

and

DARIN L. SISE, RPH
Pharmacist Permit No. RPH 43429

Respondents.

Case No. 5533

OAH No. 2016040473

ORDER REJECTING PROPOSED DECISION

Pursuant to section 11517 of the Government Code, the Proposed Decision of the Administrative Law Judge in the above-entitled matter is rejected. The California State Board of Pharmacy (hereinafter "board") will decide the case upon the record, including the transcript(s) of the hearing, and upon such written argument as the parties may wish to submit.

Although the right to argue is not limited, the board is particularly interested in arguments directed to the question whether the penalty is appropriate to protect the public in light of the board's Disciplinary Guidelines. The parties will be notified of the date for submission of such argument when the transcript of the above-mentioned hearing becomes available.

It is so ORDERED on January 5, 2017.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By _____

Deborah Veale, RPh, Board Vice President

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Respondent

and

DARIN L. SJSE, RPH, PHARMACIST-IN-
CHARGE,

Pharmacist Permit No. RPH 43429

Respondent.

Case No. 5533

OAH No. 2016040473

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on October 11 and 12, 2016, in Sacramento, California.

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

Attorney Paul Chan of the Law Offices of Paul Chan represented respondent Darin L. Sise, who was present throughout the hearing.

No one appeared for or on behalf of Kaiser Permanente Corp., dba Kaiser Permanente Pharmacy #833.¹

¹ Complainant entered into a stipulated settlement resolving this matter as to Kaiser Permanente Corp dba Kaiser Permanente Pharmacy #833 prior to hearing. Therefore, this Proposed Decision pertains to Dr. Sise only, and all future references to "respondent" refer only to him.

Evidence was received, the record was closed, and the matter was submitted for decision on October 12, 2016.

SUMMARY

Kaiser Permanente Corp., dba Kaiser Permanente Pharmacy #833's (Kaiser #833) inventory of Hydrocodone/APAP 10/325 mg was short by at least 63,310 tablets as of December 10, 2013. It was able to account for 3,480 of those tablets as having been stolen by a janitor, but could not provide the paperwork to account for the remaining shortage. Respondent was the pharmacist-in-charge at the time. Complainant seeks to discipline respondent's license based on the absence of the paperwork to account for the entire shortage and his purported failure to secure the pharmacy. Cause exists to discipline his license based on the former grounds only. When all the evidence is considered, respondent demonstrated his continued fitness to perform the duties of a licensed pharmacist in a manner consistent with public health, safety, and welfare without any restrictions, and his public reproval is sufficient to ensure public protection

FACTUAL FINDINGS

Procedural Matters

1. On July 25, 1990, the Board issued Original Pharmacist License No. RPH 43429 to respondent. The license expires March 31, 2018, unless renewed or revoked. There is no history of prior discipline of the license.

2. On February 20, 2016, complainant signed the Accusation solely in her official capacity. The Accusation seeks to discipline respondent's license based upon his alleged failure to secure the prescription department and provide for the effective control against theft or diversion of dangerous drugs from Kaiser #833. Complainant also alleges respondent's purported failure to maintain and preserve all records of acquisition, disposition, and current inventory of dangerous drugs which resulted in the failure to have records of disposition to account for an inventory shortage of 75,266 tablets of Hydrocodone/APAP 10/325 mg.

Respondent's Background

3. Respondent received his Associates of Arts degree in physical sciences from Modesto Junior College in May 1987. Three years later, he received his Doctorate of Pharmacy from the University of the Pacific, School of Pharmacy. He worked as a pharmacy intern at Dameron Hospital in Stockton, California, while attending pharmacy school.

4. Respondent has worked continuously as a staff pharmacist or pharmacist-in-charge since becoming licensed by the Board. He worked for Payless Drug Stores, Stanislaus Medical Center, Stanislaus Behavior Health Center, and Raley's Pharmacy between July 1990

and December 2004. He began working for Kaiser Permanente Corp. as an outpatient pharmacy supervisor at Kaiser #833 in December 2004. The following year, he became the pharmacist-in-charge of a Kaiser Permanente Corp. pharmacy located on I Street in Modesto, California. And the year after that, he returned to Kaiser #833 as the pharmacist-in-charge. He left Kaiser #833 to serve as the pharmacist-in-charge at Kaiser Permanente Corp. pharmacies in Modesto and Tracy, California, from December 2008 to December 2010 before returning to Kaiser #833 as the pharmacist-in-charge in December 2010.

5. Respondent resigned his employment with Kaiser #833 on June 20, 2014, after being placed on administrative leave during the investigation of the loss of Hydrocodone/APAP 10/325 mg discussed further below.² The following day, he began employment as the pharmacist-in-charge at a CVS Pharmacy in Turlock, California. Shortly thereafter, he changed positions to staff pharmacist because the Board rejected his designation as the pharmacist-in-charge. He has been working at a Raley's Pharmacy in Modesto, California, since December 29, 2015.

6. Kaiser #833 was open to the public Monday through Friday, from 8:00a.m. to 6:30 p.m., when respondent was the pharmacist-in-charge from December 2010 through June 20, 2014. His shift was from 9:30a.m. to 6:00p.m. The janitors came to clean the pharmacy three times each day, the last time being near the end of respondent's shift. They were never left alone in the pharmacy, because staff was present until 7:00p.m. each night. Respondent did not know the janitor who stole the Hydrocodone/APAP.

Theft of Hydrocodone/APAP 10/325 mg

7. Between 5:30 p.m. and 6:00p.m. on December 5, 2013, respondent noticed that the "working supply" of the 100 count Hydrocodone/APAP 10/325 mg was getting low, and replenished the supply from "overstock."³

8. Shortly after 9:30 a.m. the following morning, a pharmacy technician asked respondent to replenish the working supply of the 100 count Hydrocodone/ APAP 10/325 mg. Respondent obtained more product from overstock, but found it odd that it was necessary to do so since he replenished the working supply the previous evening. He suspected a possible issue with theft, and decided he would review the recordings from the security cameras later that day.

² Hydrocodone/APAP is a commonly prescribed painkiller and is a combination of the drugs hydrocodone and acetaminophen. It comes in the strengths of 5/325, 5/300, 7.5/300, 7.5/325, 10/325, and 10/300. The former number refers to the amount of hydrocodone, and the latter to the amount of acetaminophen.

³ Kaiser #833 dispensed the drug in bottles containing 30, 50, 60, and 100 tablets. All bottles were shipped to Kaiser #833 prepackaged in the individual bottles ultimately given to the patient, except for the 100s which had to be separated into individual bottles by staff at Kaiser #833. Because of the frequency with which Hydrocodone/APAP was dispensed at Kaiser #833, staff kept a "working supply" of all strengths and tablet counts in individual bins in book cases in the front pharmacy area. The remaining "overstock" was locked in the back area of the pharmacy, and was accessible by electronic card key only to pharmacists.

9. But before respondent had an opportunity to review the video footage, he received a telephone call from Irene Scott, an Outpatient Pharmacy Director with Kaiser Permanente Corp. and respondent's second-level supervisor. Ms. Scott informed respondent she received a telephone call from Lanny Leung, a pharmacy internal auditor with Kaiser Permanente Corp.'s Data Mining Department,⁴ informing her that electronic records of Kaiser #833's inventory of Hydrocodone/APAP 10/325 mg showed a large discrepancy between the amount acquired and the amount dispensed in mid-August through November 2013 such that there was an unusually large amount in overstock. Ms. Scott explained that the discrepancy raised "red flags" about the possibility of the loss of the drug through theft.

Ms. Scott instructed respondent to work with Mr. Leung in conducting an inventory of all Hydrocodone/APAP 10/325 mg on hand at Kaiser #833. Respondent requested, and received, permission to conduct the audit the following day, a day on which the pharmacy was closed, so as to not raise any suspicions with staff in case there in fact was an issue with employee theft.

10. The following morning, respondent arrived at Kaiser #833 to conduct the inventory as instructed. While waiting for his computer to start, he viewed random video footage from the security cameras, and observed multiple instances of one of the janitors reaching into the working supply of the 100 count Hydrocodone/APAP 10/325 mg, removing numerous bottles of the drug, wrapping them in a cleaning cloth, and walking out of camera range with the cleaning cloth and drugs. Respondent reported his discovery to Ms. Scott, and the information was subsequently relayed to Mr. Leung.

11. Mr. Leung made arrangements with respondent to review video footage from the security cameras at Kaiser #833 on December 8, 2013. The following is a summary of what the footage depicts:

a. Between 6:07 p.m. and 6:45p.m. on December 2, 2013, a janitor reaches into the working supply of Hydrocodone/APAP 10/325 mg and removes a bottle, puts the bottle into a rag, and walks with the rag and bottle into the back of the pharmacy. He does this 13 times, stealing a total of 870 tablets;

b. Between 6:12 p.m. and 6:45p.m. on December 3, 2013, the same janitor reaches into the working supply of Hydrocodone/APAP 10/325 mg and removes a bottle, puts the bottle into a rag, and walks with the rag and bottle into the back of the pharmacy. He does this eight times, stealing a total of 550 tablets;

c. Between 6:07 p.m. and 6:34p.m. on December 4, 2013, the same janitor reaches into the working supply of Hydrocodone/APAP 10/325 mg and removes a bottle, puts the bottle into a rag, and walks with the rag and bottle into the back of the pharmacy. He does this 11 times, stealing a total of 600 tablets;

⁴ The Data Mining Department is responsible for maintaining all records of acquisition, disposition, and inventory of the different drugs carried by Kaiser Permanente, Corp.'s, pharmacies.

d. Between 6:02p.m. and 6:35p.m. on December 5, 2013, the same janitor reaches into the working supply of Hydrocodone/APAP 10/325 mg and removes a bottle, puts the bottle into a rag, and walks with the rag and bottle into the back of the pharmacy. He does this nine times, stealing a total of 400 tablets; and

e. Between 6:06p.m. and 6:47 p.m. on December 6, 2013, the same janitor reaches into the working supply of Hydrocodone/APAP 10/325 mg and removes a bottle, puts the bottle into a rag, and walks with the rag and bottle into the back of the pharmacy. He does this 16 times, stealing a total of 1,060 tablets.

The janitor admitted to stealing an unknown amount of Hydrocodone/APAP 10/325 mg during a subsequent interview with an investigator from Kaiser Permanente Corp.'s National Special Investigations Unit.

Respondent's Report of the Loss of Hydrocodone/APAP 10/325 mg

12. Respondent signed correspondence reporting the loss of 64,460 tablets of Hydrocodone/APAP 10/325 mg at Kaiser #833 to the Board on January 8, 2014. The correspondence attributed the loss of 3,480 tablets to theft by the janitor, but did not explain the basis for the loss of the remaining 60,980 tablets. On May 7, 2014, respondent sent the Board correspondence increasing the loss to 77,115 tablets. At hearing, he explained he was not involved in the calculation of the loss reported to the Board on either occasion. Instead, a preprinted letter was presented to him for signature on each occasion.

13. Mr. Leung testified at hearing that he performed an audit of the electronic records showing Kaiser #833's acquisition and disposition of Hydrocodone/APAP 10/325 mg between June 27 and December 10, 2013. He determined Kaiser #833 acquired a total of 406,782 tablets and disposed of 339,969 tablets. After accounting for the starting and ending inventories of 5,540 and 9,043 tablets, respectively, he calculated the net loss to be 63,310 tablets.

14. A subsequent audit performed by Grace Mizuhara, another pharmacy internal auditor in Kaiser Permanente Corp.'s Data Mining Department, for the period of March 17 through December 9, 2013, calculated the total loss of Hydrocodone/APAP 10/325 mg at Kaiser #833 to be 75,266 tablets. Mr. Leung signed a declaration attributing the differences between his calculation and Ms. Mizuhara's to different audit periods, different starting and closing inventories, the latter's consideration of acquisition and disposition records the former did not, and "minor calculation errors."

Discussion

15. Kaiser #833 suffered a shortage of at least 63,310 tablets of Hydrocodone/APAP 10/325 mg while respondent was serving as its pharmacist-in-charge. The exact amount of the loss was not established because of the discrepancies between Mr. Leung's and Ms. Mizuhara's audits, and neither audit matched the loss reported in respondent's January 8, 2014 and May 7, 2014 correspondence. But regardless of the exact loss, only 3,480 tablets were accounted for.

Therefore, Kaiser #833 failed to maintain and preserve all records of acquisition, disposition, and current inventory of Hydrocodone/ APAP 10/325 mg which resulted in its inability to account for the total shortage.

16. A janitor stole 3,480 tablets of Hydrocodone/APAP 10/325 mg during a six-month period ending December 10, 2013. But there was insufficient evidence that any thefts occurred while respondent was on duty. Instead, the evidence established that all the thefts occurred after 6:00p.m. on December 2 through 6, 2013, and there was no evidence respondent worked a shift other than his normal shift on any of those days. Therefore, complainant failed to prove respondent failed to secure the prescription department of Kaiser #833 and failed to provide for the effective control against theft or diversion of dangerous drugs while on duty.

The Board's Disciplinary Guidelines

17. The Board has created disciplinary guidelines for consideration when determining the appropriate discipline for a violation or violations of the Pharmacy Law (Bus. & Prof. Code, § 4000 et seq.) or the regulations adopted pursuant to it, and those guidelines are incorporated by reference into California Code of Regulations, title 16, section 1760. The disciplinary guidelines separate the various statutory and regulatory violations into one or more categories, and recommends minimum and maximum discipline for each category.

18. For example, a violation of Business and Professions Code section 4081 has been designated as a Category II violation. And the recommended discipline for that violation ranges from revocation stayed, three years' probation, all standard terms and conditions, and all appropriate optional terms and conditions, to outright revocation. A violation of Business and Professions Code section 4105 has been designated as a Category II or a Category III violation. The minimum recommended discipline for a Category III violation ranges from a minimum of revocation stayed, 90 days actual suspension, three to five years' probation, all standard terms and conditions, and all appropriate optional terms and conditions, to a maximum of outright revocation.

19. But "the board recognizes that individual cases may necessitate a departure from these guidelines," and in those instances "the mitigating or aggravating circumstances shall be detailed in any proposed decision or any transmittal memorandum accompanying a proposed stipulation, especially where Category III violations are involved." Additionally, "the board recognizes that in some cases a licensed premises may well be more culpable than any individual licensed by were registered with the board."

And the Board has delineated the following relevant factors for consideration in order to determine the appropriate level of discipline: 1) any actual or potential harm to the public or a consumer; 2) any history of prior discipline or warnings by the Board; 3) the number and variety of current violations; 4) evidence of aggravating or mitigating factors and evidence of rehabilitation; 5) the amount of time that has elapsed since the violations; 6) when the respondent is being held accountable for conduct committed by another, whether he had knowledge of or knowingly participated in such conduct; and 7) any financial benefit the respondent gained from engaging in his misconduct.

20. Here, cause exists to discipline respondent based on Kaiser #833's failure to maintain and preserve all records of acquisition, disposition, and current inventory of Hydrocodone/APAP 10/325 mg. While it was Kaiser #833's duty to maintain and preserve such records as the licensed premises, respondent is strictly liable for its failure as the pharmacist-in-charge. Maintenance of the records was the responsibility of Kaiser Permanente Corp.'s Data Mining Department, and respondent had no knowledge of, and did not participate in, its failure to maintain and preserve the records.

21. At all times relevant, Hydrocodone/APAP 10/325 mg was a Schedule III controlled substance, and was classified as a "dangerous drug" pursuant to Business and Professions Code section 4022. It is a highly addictive drug, and is commonly sold illegally on the street. There was no evidence of any actual harm to the public or a consumer caused by the loss of at least 63,310, tablets of Hydrocodone/APAP 10/325 mg, but the potential for harm was self-evident. Respondent did not benefit financially from the loss. Though complainant argued that respondent benefited from the loss because his financial advisor wrote a character reference for him, that argument was not persuasive.

22. Respondent readily admitted at hearing that he is ultimately responsible for the loss of Hydrocodone/APAP 10/325 mg at Kaiser #833 discussed above because he was the pharmacist-in-charge at the time. He began making daily counts of the drug immediately upon discovery of the loss. He also began making weekly counts of other drugs that had a high potential for theft. When he began working for Raley's Pharmacy, he noticed the Schedule II controlled substances were not being inventoried monthly as required by law, and he reinstated that requirement and continues to ensure it is followed.

23. Respondent explained at hearing that he obtained a better understanding and appreciation for the responsibilities of a pharmacist-in-charge through his experience at Kaiser #833. He recognized he should have paid closer attention to maintaining the security of the pharmacy instead of focusing on what he referred to as "soft projects" (e.g., employee attendance, employee evaluations, and fostering better working relations with coworkers). Additionally, he has committed himself to improving his knowledge as a pharmacist, and completed more than two-thirds of his biennial requirement for continuing education during the first three weeks of July 2016.

24. Nearly three years have elapsed since the discovery of the loss of Hydrocodone/APAP 10/325 mg at Kaiser #833, and respondent has no history of prior or subsequent discipline or warnings by the Board. He testified candidly and openly about his having replenished the working stock of the drugs on the evening of December 5, 2013, and the subsequent events. He reported the loss of the drugs to the Board immediately upon calculation of the total loss, and amended his report once it was determined the loss was larger than originally calculated. The Board investigator confirmed at hearing that respondent cooperated with her investigation.

25. At hearing, respondent introduced several character reference letters written by authors who have known him professionally and personally for several years. Each author

acknowledged his or her awareness of the pending Accusation, and none stated that such knowledge caused him or her to reevaluate his or her favorable opinion of respondent. In particular, Nam Nguyen wrote the following on July 11, 2016:

I first met Darin in May 2014 while I was serving as CVS Pharmacy District Supervisor for the Modesto/Fresno Region. During his job interview, Darin did disclose an issue regarding theft of Hydrocodone/APAP clue to a janitor at Kaiser Permanent [sic]. At first, this disclosure did alarm me, however, [sic] further discussion with Darin, I realized that Darin took ownership of the incident and followed the proper steps after [sic] once he was aware of the issue. After the interview, I still decided to extend a job offer to Darin for a Pharmacist in Charge position.

During the time I've supervised Darin, I have found him to be a very hard working [sic], honest and competent pharmacist. Darin was very meticulous in his controlled invoice record keeping and made sure he kept me informed with everything going on in the pharmacy or any questions he had.

I was very confident in Darin's ability to be PIC at CVS and I still think highly of Darin as a pharmacist, colleague and health care professional.

Summary

26. Complainant established by clear and convincing evidence the existence of cause to discipline respondent's license based on Kaiser #833 's failure to maintain and preserve all records of its acquisition, disposition, and current inventory of Hydrocodone/APAP 10/325 mg for the reasons explained further in the Legal Conclusions. Respondent was the pharmacist-in-charge during the period those records were not maintained, and is therefore strictly liable for that failure. When all the evidence is considered, respondent demonstrated his continued fitness to perform the duties of a licensed pharmacist in a manner consistent with public health, safety, and welfare without any restrictions. Therefore, it is not necessary to place his license on probation to ensure public protection and public reproof of respondent is sufficient.

Costs of Investigation and Enforcement

27. Complainant requested costs of investigation and enforcement in this matter in the total sum of \$4,731.97 pursuant to Business and Professions Code section 123.5. That amount was calculated by allocating to respondent 30 percent of the total costs incurred by the Board for its employee's investigation of this matter (\$6,193.25) and the total costs incurred by the Office of the Attorney General and billed to the Board for enforcing this matter (\$9,580). Complainant introduced the Certification of Prosecution Costs: Declaration of Leslie A. Burgermyer in support of the latter costs. Attached to the Certification is a document entitled Matter Time Activity By Professional Type which itemizes the costs incurred by the Office of the Attorney

General.

Complainant also introduced a Certification of Investigative Costs: Declaration of Manisha Shafir in support of the costs incurred directly by the Board. Dr. Shafir declared she spent a total of 58.25 hours investigating this matter, and the Board incurred costs in the amount of \$6,193.25 for her time. She explained she billed an hourly rate of \$102 for her first 45 hours, and \$121 for the remaining 13.25 hours. She itemized her total time as follows: 22 hours of investigation, 6.75 hours of travel, 19.50 hours of report preparation, and 10 hours of hearing preparation.⁵

Respondent did not object to any of complainant's evidence of costs of investigation and enforcement, and did not introduce any evidence of his inability to pay those costs. He has been continuously employed as a pharmacist since first being issued his license by the Board on July 25, 1990.

Under the particular circumstances of this matter, and for the reasons explained further in Legal Conclusion 14 below, costs of investigation and enforcement in the amount of \$2,365.99 only are reasonable.

LEGAL CONCLUSIONS

Applicable Standard/Burden of Proof

1. Complainant has the burden of proving each of the grounds for discipline alleged in the Accusation, and must do so by clear and convincing evidence to a reasonable certainty. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856 [the standard of proof applicable to proceedings for the discipline of professional licenses is clear and convincing evidence to a reasonable certainty].) "The courts have defined clear and convincing evidence as evidence which is so clear as to leave no substantial doubt and as sufficiently strong to command the unhesitating assent of every reasonable mind. [Citations.] It has been said that a preponderance calls for probability, while clear and convincing proof demands a high probability [citations]." (*In re Terry D.* (1978) 83 Cal.App.3d 890, 899; italics original.)

Applicable Law

⁵ "Investigation" included: reviewing and prioritizing assignment upon receipt; communicating with complainant; contacting and interviewing witness(es) and/or the licensee; preparing correspondence and/or declarations; collecting, organizing, and evaluating documentation and other physical evidence; performing audit(s); inspection; research, conferring with supervisor; and other. There was a line after "other," which contained no information. "Travel" was described as the time spent traveling to and from the locations necessary to conduct the activities identified under investigation. "Report preparation" included organizing the file, preparing the draft investigation report, and editing and preparing the final investigation report. "Hearing preparation" was time spent reviewing the file and preparing for hearing with the Office of the Attorney General.

Classification of Hydrocodone/APAP 10/325 mg

2. At all times relevant, Hydrocodone/APAP 10/325 mg was classified as a Schedule III controlled substance by the Drug Enforcement Administration. (Former 21 C.F.R. § 1308.13(e)(1)(iii), (iv) (2014), added by 3,6 Fed.Reg. 7776 (April 24, 1971) and repealed by 79 Fed.Reg. 49682 (Aug. 22, 2014).) It also was classified as a dangerous drug pursuant to Business and Professions Code section 4022.

Pharmacy operations

3. California Code of Regulations, title 16, section 1714, subdivision (d), provides:

Each pharmacist while on duty shall be responsible for the security of the prescription department, including provisions for effective control against theft or diversion of dangerous drugs and devices, and records for such drugs and devices. Possession of a key to the pharmacy where dangerous drugs and controlled substances are stored shall be restricted to a pharmacist.

(Italics added.)

4. Business and Professions Code section 4081, subdivision (a), provides:

All records of manufacture and of sale, acquisition, receipt, shipment, or disposition of dangerous drugs or dangerous devices shall be at all times during business hours open to inspection by authorized officers of the law, and shall be preserved for at least three years from the date of making. A current inventory shall be kept by every manufacturer, wholesaler, third-party logistics provider, pharmacy, veterinary food-animal drug retailer, physician, dentist, podiatrist, veterinarian, laboratory, clinic, hospital, institution, or establishment holding a currently valid and unrevoked certificate, license, permit, registration, or exemption under Division 2 (commencing with Section 1200) of the Health and Safety Code or under Part 4 (commencing with Section 16000) of Division 9 of the Welfare and Institutions Code who maintains a stock of dangerous drugs or dangerous devices.

Additionally, all records or other documentation of the acquisition and disposition of dangerous drugs in dangerous devices by any entity licensed by the board shall be retained on the licensed premises in a readily retrievable form." (Bus. & Prof. Code. § 4105, subd. (a).)

5. "'Pharmacist-in-charge' means a pharmacist proposed by a pharmacy and approved by the board as the supervisor or manager responsible for ensuring the pharmacy's compliance with all state and federal laws and regulations pertaining to the practice of

pharmacy." (Bus. & Prof. Code, § 4036.5.) Business and Professions Code section 4113, subdivision (c), provides the following with regard to the duties of the pharmacist-in-charge: "the pharmacist-in-charge shall be responsible for a pharmacy's compliance with all state and federal laws and regulations pertaining to the practice of pharmacy."

The Board's Disciplinary Authority

5. The Board has the authority to discipline a license by revoking or suspending it, placing it on probation with terms and conditions, or "taking any other action in relation to disciplining [the licensee] as the board in its discretion may deem proper." (Bus. & Prof. Code, § 4300, subd. (b).) The Board has express authority to "publicly reprove a licentiate or certificate holder ... for any act that would constitute grounds to suspend or revoke a license or certificate." (Bus. & Prof. Code, § 495.)

Legal Cause for Discipline

7. The Board may discipline a license when the holder of that license is guilty of unprofessional conduct, which includes "the violation of any of the statutes of the state, or any other state, or of the United States regulating controlled substances and dangerous drugs." (Bus. & Prof. Code, § 4301, subds. (j).) Complainant established by clear and convincing evidence cause to discipline respondent's license pursuant to Business and Professions Code section 4300.1, subdivision (j), as that statute relates to Business and Professions Code section 4081, subdivision (a), based on Kaiser #833's failure to maintain and preserve all records of acquisition, disposition, and current inventory of Hydrocodone/APAP 10/325 mg as explained in Factual Findings 12 through 15. Respondent is strictly liable for Kaiser #833's failure because he was the pharmacist-in-charge at all times relevant.

8. Unprofessional conduct also includes "violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of or conspiring to violate any provision or term of this chapter or of the applicable federal and state laws and regulations governing pharmacy, including regulations established by the board or by any other state or federal regulatory agency." (Bus. & Prof. Code, § 4301, subd. (o).) Complainant established by clear and convincing evidence cause to discipline respondent's license pursuant to Business and Professions Code section 4301, subdivision (o), as that statute relates to Business and Professions Code section 4081, subdivision (a), for the reasons discussed in Legal Conclusion 7.

9. Complainant established by clear and convincing evidence cause to discipline respondent's license pursuant to Business and Professions Code section 4300.1, subdivision (j), as that statute relates to Business and Professions Code section 4105, subdivision (a), for the reasons discussed in Legal Conclusion 7.

10. Complainant established by clear and convincing evidence cause to discipline respondent's license pursuant to Business and Professions Code section 4300.1, subdivision (o), as that statute relates to Business and Professions Code section 4105, subdivision (a), for the reasons discussed in Legal Conclusion 7.

11. There was insufficient evidence that the theft of the Hydrocodone/APAP 10/325 mg occurred while respondent was on duty as explained in Factual Findings 6, 11, and 16. Therefore, complainant failed to establish by clear and convincing evidence that respondent violated California Code of Regulations, title 16, section 1714, subdivision (d), and no cause exists to discipline his license pursuant to Business and Professions Code section 4300.1, subdivisions (j) or (o), as either relate to the regulation.

Conclusion

12. Cause exists to discipline respondent's license for the reasons explained in Legal Conclusions 7 through 10, individually and collectively. When all the evidence is considered, respondent demonstrated his continued fitness to perform the duties of a licensed pharmacist in a manner consistent with public health, safety, and welfare without any restrictions for the reasons explained in Factual Findings 3 through 6 and 17 through 26. Therefore, a letter of public reproof should be issued as discussed in the Order below.

Award of Costs

13. Business and Professions Code section 125.3, subdivision (a), states:

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.

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 cost, 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,

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(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. Those 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.)

14. After considering the relevant evidence and the pertinent *Zuckerman* factors, a reduction of the total amount of costs of investigation and enforcement sought by complainant is appropriate. Specifically, respondent was successful in getting one of the two causes for discipline dismissed. Therefore, costs should be further reduced by one-half, and costs in the amount of \$2,365.99 are reasonable and are awarded as set forth in the Order below.

ORDER

1. Respondent Darin L. Sise, holder of Original Pharmacist License No. RPH 43429, is hereby publicly reprovved.

2. Respondent Darin L. Sise shall pay to the Board costs associated with its investigation and enforcement pursuant to Business and Professions Code section 125.3 in the amount of \$2,365.99.

DATED: October 27, 2016

DocuSigned by:

Coren D. Wong

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COREN D. WONG

Administrative Law Judge

Office of Administrative Hearings

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

11 In the Matter of the Accusation Against:

12 **KAISER PERMANENTE CORP.,**
13 **DBA KAISER PERMANENTE PHARMACY #833**
3800 Dale Rd.
14 P. O. Box 577680
Modesto, CA 95357

15 Pharmacy Permit Number PHY 46384

16 And

17 **DARIN L. SISE, RPH**
18 **Pharmacist-In-Charge**
P. O. Box 578987
19 Modesto, CA 95357

20 Pharmacist Permit Number RPH 43429

21 Respondents.

Case No. 5533

ACCUSATION

22 Complainant alleges:

23 **PARTIES**

- 24 1. Virginia Herold ("Complainant") brings this Accusation solely in her official
25 capacity as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.
26 2. On or about April 17, 2003, the Board of Pharmacy, Department of Consumer
27 Affairs, ("Board") issued Pharmacy Permit Number PHY 46384 to Kaiser Permanente Corp.,
28 doing business as Kaiser Permanente Pharmacy #833, ("Respondent Kaiser"). The Pharmacy

1 Permit was in full force and effect at all times relevant to the charges brought herein and will
2 expire on November 1, 2016, unless renewed.

3 3. On or about July 25, 1990, the Board issued Pharmacist Permit Number RPH 43429
4 Darin L. Sise ("Respondent Sise"). The Pharmacist Permit was in full force and effect at all times
5 relevant to the charges brought herein and will expire on March 31, 2018, unless renewed. From
6 November 21, 2010, to June 20, 2014, Respondent Sise was the Pharmacist-in-Charge of Kaiser
7 Permanente Corp., doing business as Kaiser Permanente Pharmacy #833, within the meaning of
8 Business and Professions Code section 4113.

9 4. As used herein, "Respondents" shall collectively refer to Respondent Kaiser and
10 Respondent Sise.

11 **JURISDICTION**

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

15 6. Section 4300 of the Code states, in pertinent part:

16 (a) Every license issued may be suspended or revoked.

17 (b) The board shall discipline the holder of any license issued by the board,
18 whose default has been entered or whose case has been heard by the board and found
guilty, by any of the following methods:

19 (1) Suspending judgment.

20 (2) Placing him or her upon probation.

21 (3) Suspending his or her right to practice for a period not exceeding one
22 year.

23 (4) Revoking his or her license.

24 (5) Taking any other action in relation to disciplining him or her as the
board in its discretion may deem proper. . . .

25 7. Section 4300.1 of the Code states:

26 The expiration, cancellation, forfeiture, or suspension of a board-issued
27 license by operation of law or by order or decision of the board or a court of law, the
placement of a license on a retired status, or the voluntary surrender of a license by
28 a licensee shall not deprive the board of jurisdiction to commence or proceed with

1 any investigation of, or action or disciplinary proceeding against, the licensee or to
2 render a decision suspending or revoking the license.

3 **STATUTORY PROVISIONS**

4 8. Code section 4301 states, in pertinent part:

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

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

12 9. Section 4022 of the Code states

13 "Dangerous drug" . . . means any drug or device unsafe for self-use in humans
14 or animals, and includes the following:

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

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

19 10. Code section 4081 states, in pertinent part:

20 (a) All records of manufacture and of sale, acquisition, receipt, shipment, or
21 disposition of dangerous drugs or dangerous devices shall be at all times during
22 business hours open to inspection by authorized officers of the law, and shall be
23 preserved for at least three years from the date of making. A current inventory shall
24 be kept by every manufacturer, wholesaler, third-party logistics provider, pharmacy,
25 veterinary food-animal drug retailer, physician, dentist, podiatrist, veterinarian,
26 laboratory, clinic, hospital, institution, or establishment holding a currently valid
27 and unrevoked certificate, license, permit, registration, or exemption under Division
28 2 (commencing with Section 1200) of the Health and Safety Code or under Part 4
(commencing with Section 16000) of Division 9 of the Welfare and Institutions
Code who maintains a stock of dangerous drugs or dangerous devices.

11. Code section 4105 states:

(a) All records or other documentation of the acquisition and disposition of
dangerous drugs and dangerous devices by any entity licensed by the board shall be
retained on the licensed premises in a readily retrievable form.

(b) The licensee may remove the original records or documentation from the
licensed premises on a temporary basis for license-related purposes. However, a
duplicate set of those records or other documentation shall be retained on the licensed
premises.

(c) The records required by this section shall be retained on the licensed
premises for a period of three years from the date of making.

1 (d)(1) Any records that are maintained electronically shall be maintained so
2 that the pharmacist-in-charge, or the pharmacist on duty if the pharmacist-in-charge is
3 not on duty, shall, at all times during which the licensed premises are open for
4 business, be able to produce a hardcopy and electronic copy of all records of
5 acquisition or disposition or other drug or dispensing-related records maintained
6 electronically.

7 12. Code section 4113 states, in pertinent part:

8 (c) The pharmacist-in-charge shall be responsible for a pharmacy's compliance
9 with all state and federal laws and regulations pertaining to the practice of
10 pharmacy.

11 REGULATORY PROVISIONS

12 13. California Code of Regulations, title 16, section 1714 states, in pertinent part:

13 (b) Each pharmacy licensed by the board shall maintain its facilities, space,
14 fixtures, and equipment so that drugs are safely and properly prepared, maintained,
15 secured and distributed. The pharmacy shall be of sufficient size and unobstructed
16 area to accommodate the safe practice of pharmacy.

17 (d) Each pharmacist while on duty shall be responsible for the security of the
18 prescription department, including provisions for effective control against theft or
19 diversion of dangerous drugs and devices, and records for such drugs and devices.
20 Possession of a key to the pharmacy where dangerous drugs and controlled
21 substances are stored shall be restricted to a pharmacist.

22 DRUGS

23 14. Hydrocodone/APAP 10/325mg, the generic name for the brand name Norco, is a
24 Schedule II controlled substance as designated by Health and Safety Code section 11055,
25 subdivision (b)(1)(I), and a dangerous drug within the meaning of Code section 4022. The drug
26 contains a combination of Acetaminophen (a pain reliever that increases the effects of
27 Hydrocodone) and Hydrocodone (an opioid pain medication) and is used to treat pain.

28 15. Zolpidem, a generic name for the brand Ambien, is a Schedule IV controlled
substance as designated by Health and Safety Code section 11057, subdivision (d)(32), and a
dangerous drug within the meaning of Code section 4022. The drug is a sedative used to treat
insomnia.

COST RECOVERY

16. Section 125.3 of the Code states, in pertinent part, that the Board may request the
administrative law judge to direct a licentiate found to have committed a violation or violations of

1 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
2 enforcement of the case.

3 **BACKGROUND**

4 17. On or about December 6, 2013, Respondent Sise discovered a low inventory of
5 Hydrocodone/APAP 10/325 mg on Respondent Kaiser's drug shelf; the shelf had been full the
6 previous night.

7 18. From on or about December 7 through 9, 2013, Respondent Kaiser's internal
8 investigation and surveillance disclosed that janitor A.G. was stealing the Hydrocodone/APAP
9 10/325 mg from the shelves of Respondent Kaiser. A.G. confessed he had been stealing the drug
10 for the past six months for self-use and for supplying to his friends. A.G. was terminated on or
11 about January 6, 2014. Respondents' internal investigation revealed a shortage of 64,460 tablets
12 of Hydrocodone/ APAP 10/325mg for the period of June 27, 2013, to December 10, 2013.

13 19. On or about January 9, 2014, Respondents notified the Board that Respondent
14 Pharmacy had experienced a loss of 64,460 tablets of Hydrocodone/APAP 10/325mg. On or
15 about May 7, 2014, Respondent Kaiser submitted an amended report of loss of controlled
16 substances indicating the amended loss of 77,115 tablets of Hydrocodone/APAP 10/325mg.

17 20. From on or about January 14, 2014, through May 13, 2015, the Board's assigned
18 inspector conducted an investigation of Respondents reported drug loss.

19 21. On or about August 27, 2014, the inspector received Respondent's acquisition and
20 disposition records for Hydrocodone/APAP 10/325mg for the period of March 17, 2013 to
21 December 9, 2103. Based upon those records, the inspector's audit results concluded that
22 Respondents' actual shortage of Hydrocodone/APAP 10/325 mg was 75,266 tablets.

23 22. On or about May 13, 2015, the Board issued a notice of non-compliance to
24 Respondent Kaiser and Respondent Sise due to their failure to maintain their dangerous drugs in a
25 safe and secure manner and failure to have records of disposition to account for the inventory
26 shortage of 75,266 tablets of Hydrocodone/APAP 10/325 mg.

27 ///

28 ///

1 **FIRST CAUSE FOR DISCIPLINE**

2 **(Failure to Maintain Dangerous Drugs in Safe and Secure Manner)**

3 23. Respondent Kaiser is subject to disciplinary action under Code sections 4300 and
4 4301, subdivisions (j) and (o), in conjunction with California Code of Regulations, title 16,
5 section 1714, subdivision (b), in that Respondent Kaiser failed to maintain its facilities, space,
6 fixtures, and equipment so that drugs in its stock were safely and properly prepared, maintained,
7 secured and distributed. Respondent Kaiser's failures resulted in the loss of 75,266 tablets of the
8 dangerous drug Hydrocodone/ APAP 10/325mg as set forth in paragraphs 17 through 22, above,
9 incorporated herein by reference.

10 24. Respondent Sise, the Pharmacist-in-Charge, is subject to disciplinary action sections
11 4300 and 4300.1, subdivisions (j) and (o), in conjunction with California Code of Regulations,
12 title 16, section 1714, subdivision (d), in that Respondent Sise failed to secure the prescription
13 department of Respondent Kaiser and failed to provide for the effective control against theft or
14 diversion of dangerous drugs resulting in the loss of 75,266 tablets of Hydrocodone/APAP
15 10/325mg as set forth in paragraphs 17 through 22, above, incorporated herein by reference.

16 **SECOND CAUSE FOR DISCIPLINE**

17 **(Failure to Maintain Records of Disposition of Dangerous Drugs)**

18 25. Respondent Kaiser and Respondent Sise, the Pharmacist-in-Charge, are subject to
19 disciplinary action under Code sections 4300 and 4300.1, subdivisions (j) and (o), in conjunction
20 with Code sections 4081, subdivision (a), and 4105, in that they failed to maintain and preserve
21 all records of acquisition, disposition, and current inventory of dangerous drugs which resulted in
22 their failure to have records of disposition to account for an inventory shortage of 75,266 tablets
23 of the dangerous drug Hydrocodone/APAP 10/325mg as set forth in paragraphs 17 through 22,
24 above, incorporated herein by reference.

25 **DISCIPLINARY CONSIDERATION**

26 26. In determining the level of discipline to be imposed on Respondent Kaiser,
27 Complainant respectfully requests that the following be considered:

