

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

In the Matter of the First Amended Accusation Against:

MOHAMED SAYEDHAFEZ A. ISMAEIL Respondent.

Pharmacist License No. RPH 78558

Agency Case No. 6641

OAH No. 2021050036

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 at 5:00 p.m. on April 27, 2022.

It is so ORDERED on March 28, 2022.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

A handwritten signature in black ink, appearing to read "Seung W. Oh". The signature is written in a cursive style with a large initial "S".

Seung W. Oh, Pharm.D.
Board President

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In the Matter of the First Amended Accusation Against:

MOHAMED SAYEDHAFEZ A. ISMAEIL Respondent.

Pharmacist License No. RPH 78558

Agency Case No. 6641

OAH No. 2021050036

PROPOSED DECISION

Administrative Law Judge Chantal M. Sampogna, Office of Administrative Hearings, State of California, heard this matter by videoconference on December 6, 2021.

Deputy Attorney General Leslie A. Walden appeared by videoconference and represented complainant Anne Sodergren, Executive Officer of the Board of Pharmacy (Board), Department of Consumer Affairs (Department).

Respondent Mohamed Sayedhafez A. Ismaeil appeared by videoconference and represented himself.

Testimony and documents were received in evidence. The record was held open until January 24, 2022, for complainant to submit court certified documents of

respondent's most recent criminal conviction and for respondent to submit documents from his drug rehabilitation program and therapy program. The record remained open until February 7, 2022, for the parties to submit written objections to the additional evidence.

Complainant timely filed certified court documents from the Superior Court of California, County of Kern, for Case Numbers BM963714A, BM931769A, and BM927280A, marked as Exhibit 9. Respondent did not submit additional evidence or written objections. Exhibit 9 was admitted into evidence. The record was closed and the matter was submitted for decision on February 7, 2022.

STATEMENT OF THE CASE

On September 26, 2020, complainant filed the Accusation against respondent alleging four causes to discipline respondent's pharmacist license related to his possession of heroin on January 22, 2019, and falsely reporting a crime on September 10, 2018. Respondent timely filed a notice of defense. At the time of the Accusation, a criminal complaint had been filed against respondent for these acts, but respondent had not been convicted of the crimes.

On November 11, 2021, complainant filed the First Amended Accusation against respondent, amending the fourth cause for discipline to reflect respondent's October 29, 2021 criminal conviction for reporting a false crime, and adding a fifth cause for discipline related to respondent's October 29, 2021 criminal convictions for driving under the influence of drugs and driving on a suspended license.

ISSUES

1. Whether respondent engaged in unprofessional conduct by committing the following acts:

- Administering heroin to himself;
- Violating the Pharmacy Law (Bus. & Prof. Code, § 4000, et seq.) which prohibits a pharmacist from being in possession of heroin without a prescription;
- Violating California law which prohibits possession and self-administration of heroin without a valid prescription;
- Violating, and suffering a criminal conviction for, Penal Code section 148.5, subdivision (a), by making a false report to a police officer; and
- Violating, and suffering criminal convictions for, Vehicle Code sections 21352, subdivision (b), driving while under the influence of drugs and 14601.1, subdivision (a), driving on a suspended license.

2. Whether cause exists to revoke or suspend respondent's license.

3. Whether protection of the public requires suspension or revocation of respondent's license.

4. Whether respondent is ordered to pay reasonable costs of investigation and enforcement pursuant to section 125.3.

SUMMARY

Complainant established by clear and convincing evidence respondent engaged in unprofessional conduct through his possession and self-administration of controlled substances and possession of drug paraphernalia, his false report of a crime, and his related criminal convictions. Respondent failed to present sufficient evidence to establish his rehabilitation. Protection of the public requires respondent's pharmacist license be revoked. Respondent is ordered to pay reduced costs of \$8,524.30 as a condition precedent to any reinstatement of his pharmacist license.

FACTUAL FINDINGS

Jurisdiction

1. On June 21, 2018, the Board issued Pharmacist License number RPH 78558 to respondent. Respondent's license expired on August 31, 2021.
2. On September 26, 2020, complainant brought the Accusation in her official capacity. Respondent timely filed a notice of defense.
3. On November 11, 2021, complainant brought the First Amended Accusation in her official capacity.

Respondent's Criminal Convictions

OCTOBER 2021 CONVICTION FOR VEHICLE CODE OFFENSES AND ARREST FOR HEALTH AND SAFETY CODE OFFENSES

4. On October 29, 2021, in the Superior Court of California, County of Kern, in Case Number BM963714A, respondent pled nolo contendere to, and was convicted of, violating Vehicle Code sections 23152, subdivision (f), driving while under the influence of a drug, and 14601.1, subdivision (a), driving on a suspended license, misdemeanors. Respondent was also charged with violating Health and Safety Code sections 11733, subdivision (a), possession of a controlled substance, methamphetamine, and 11364, possession of paraphernalia used for unlawfully injecting or smoking a controlled substance. The court dismissed the Health and Safety Code charges in the interest of justice.

5. The court suspended imposition of sentence and placed respondent on three year's court probation and ordered him to serve 24 days in county jail with credit for 24 days served, to attend 10 Narcotics Anonymous (NA) meetings by April 29, 2022, and to pay fines totaling \$1,914.

6. The facts and circumstances underlying respondent's criminal convictions began on October 17, 2021, at approximately 11:15 p.m., and continued through approximately 2:00 a.m. on October 18, 2021, in the parking lot outside of Superior Groceries, located in Bakersfield, California. A store security guard had escorted respondent out of the store due to respondent's attempted shoplifting. Respondent drove away from the store. Soon after, respondent returned to the store parking lot, driving erratically and nearly hitting a pedestrian, and then stopped his vehicle. The security guard detained respondent and called the Bakersfield Police Department.

Once they arrived, the police officers determined respondent's driver's license was suspended and that two warrants for respondent's arrest on misdemeanor charges were outstanding.

7. While questioning respondent, one officer observed respondent's hands were jerking, and he was acting erratically. The officer suspected respondent was under the influence of drugs and had him perform Standard Field Sobriety Tests (FST). Based on respondent's performance on the FST, the officer determined respondent was under the influence of a drug and placed him under arrest. During an inventory search of respondent's vehicle the officer found the following: two used syringes in the back-passenger side storage compartment; one baggy of a white crystalline substance consistent with methamphetamine in the side storage compartment; one used syringe half filled with liquid methamphetamine and blood inside the driver's side door storage compartment; a spoon with brown residue and burn marks on the bottom next to a lighter; several cotton balls stained with a white and yellow substance; and several napkins with blood.

JANUARY 2019 ARREST FOR VIOLATIONS OF THE HEALTH AND SAFETY CODE

8. On October 29, 2021, in the Superior Court of California, County of Kern, in Case Number BM931769A, on condition of respondent's plea entered in Case Number BM963714A (Factual Finding 4), the court dismissed January 2019 charges for violating Health and Safety Code sections 11350, possession of a controlled substance, heroin, and 11364, possession of paraphernalia used for unlawfully injecting or smoking a controlled substance. Respondent was arrested for the underlying criminal behavior on January 22, 2019. Subsequently, between February 21 and October 23, 2019, respondent failed on multiple occasions to appear at court hearings and the court twice issued a bench warrant. The warrant was finally served on October 18,

2021, when respondent was arrested for Vehicle Code and Health and Safety Code violations (Factual Findings 6-7).

9. The facts and circumstances underlying respondent's arrest occurred on January 22, 2019. At 7:30 a.m., respondent was at an Autozone in Bakersfield. Respondent unplugged an unknown individual's phone from a charging source and plugged his own phone into the charger. An argument ensued and the individual unplugged respondent's phone from the charger. Respondent called the Bakersfield Police Department and reported a robbery.

10. Bakersfield Police Officer Nathan Madrigal responded to the call. During respondent's interview with Officer Madrigal, respondent pulled out his phone from his pocket and a cut plastic straw fell out onto the floor. Officer Madrigal observed the straw was approximately 4-inches long, burned on one end and had black residue inside of it. Based on his training, he suspected respondent had used the straw to inhale heroin or methamphetamine. Officer Madrigal arrested respondent and conducted a search, during which he recovered two additional straws with black tar residue, and a cigarette box in respondent's shirt pocket which contained burnt foil and a black tar like substance that smelled like vinegar wrapped inside the foil. Officer Madrigal tested the tar substance and the test returned positive for heroin.

11. During his interview, respondent waived his Miranda rights and admitted the following: the heroin was his; he used the straws to inhale the heroin; he had last used heroin at approximately 6:00 a.m. that morning; and he had recently been laid off from his pharmacist job and was now homeless and frequently used heroin. Officer Madrigal testified at hearing and confirmed his observations of, and interview with, respondent, as he documented in his police report (Exh. 5).

OCTOBER 9, 2018 ARREST AND SUBSEQUENT CONVICTION FOR VIOLATION OF THE PENAL CODE

12. On October 29, 2021, in the Superior Court of California, County of Kern, in Case Number BM927280A, respondent pled nolo contendere to, and was convicted of, violating Penal Code section 148.5, subdivision (a), willfully and knowingly reporting to a sheriff that a misdemeanor had been committed, knowing such report to be false, a misdemeanor. Respondent was arrested for the underlying criminal behavior on October 9, 2018. Subsequently, between, November 21, 2018, and December 20, 2020, respondent had multiple failures to appear in court hearings and the court issued a bench warrant four times. The bench warrant was finally served on October 18, 2021, when respondent was arrested for Vehicle Code and Health and Safety Code violations (Factual Findings 6-7).

13. The court suspended imposition of sentence and placed respondent on one year's court probation, and ordered him to serve 24 days in county jail with credit for 24 days served, and to pay fines of \$265.

14. The facts and circumstances underlying respondent's criminal behavior occurred on October 9, 2018, at approximately 10:00 p.m. Respondent called the Kern County Sheriff's Department and reported a robbery. A sheriff's deputy arrived at respondent's home and respondent reported the following: three subjects approached him at his vehicle and started an argument with respondent; they pulled him out of his car and assaulted him, one subject hitting respondent's arm three times with a baseball bat, and one subject taking a speaker out respondent's car. The sheriff's deputy asked to see respondent's arm and did not observe any bruising. However, he did observe track marks, signs of injection of illegal narcotics into respondent's body. After further investigation, the sheriff's deputy interviewed the individual respondent

claimed had stolen his speaker and determined she and respondent had a previous dating relationship, she owned the speaker, and respondent had made a false report against her in an attempt to get her arrested.

Respondent's Evidence

15. Respondent testified at hearing. Respondent's demeanor during his testimony was irregular and agitated. When cross-examining Officer Madrigal, respondent inquired about a previous encounter between them at a Walmart. Officer Madrigal acknowledged the encounter related to a suspected incident of disturbing the peace. Upon further questioning, Officer Madrigal acknowledged that during that encounter respondent called Officer Madrigal "white trash." Respondent then insisted during his questioning and closing argument that Officer Madrigal's 2019 arrest of respondent was not based on fact, but rather was retaliatory. During his cross-examination of Officer Madrigal and during his own testimony, respondent also became incredulous and irate at the fact that in 2019 even though he reported a robbery, respondent was arrested rather than the individual who respondent claimed had stolen respondent's phone.

16. Respondent admits that over the past few years he has had a drug problem, frequently using heroin and methamphetamine until his claimed sobriety date, October 19, 2021. He further testified he has complied with the court order to attend 10 NA meetings and that he has attended an additional 10 meetings. Respondent claims that since October 2021 he has voluntarily attended therapy twice per week at Aegis Treatment Center. Respondent requested the record remain open to submit proof of therapy and NA attendance, but he failed to submit proof. Though respondent's admission of addiction to drugs is a positive first step towards sobriety, based on respondent's demeanor during hearing and his criminal history of dishonest

acts, respondent's testimony regarding his compliance with court orders and sobriety is not credited.

17. Respondent has not worked as a pharmacist since approximately January 2019. Respondent is currently employed at a fast-food establishment. He did not have sufficient funds to renew his pharmacy license and has spent much of his income on court fees. Respondent valued his pharmacist license and would like to resume his pharmacist career.

Costs of Investigation and Enforcement

18. Pursuant to Business and Professions Code section 125.3, complainant requests costs of investigation and enforcement in the total amount of \$17,488.60. This amount consists of costs incurred directly by the Board (\$3,327.50), as well as costs incurred by the Office of the Attorney General and for which the Board has been billed (\$14,161.10).

19. At hearing, complainant introduced an August 5, 2021 Declaration of Board Supervising Inspector Joan Coyne. Coyne supervised Board Inspector Diann Potter during Potter's inspection of this matter and reviewed Potter's time entries into the Board's time reporting system. Coyne found Potter performed 27.5 hours of work on this matter at a rate of pay of \$121 per hour, amounting to total investigative costs of \$3,327.50. Complainant also introduced her own August 5, 2021 Certification of Costs of Investigation by Agency Executive Officer in Case No. 6641. Complainant reviewed the costs incurred by the Board in the investigation of this matter and affirmed the costs totaled \$3,327.50.

20. Complainant introduced an August 15, 2021 Certification of Prosecution Costs: Declaration of Leslie A. Walden (Prosecution Costs Declaration), which requests

enforcement costs in the amount of \$14,161.10. Ms. Walden was assigned to the matter on August 15, 2019. Attached to Ms. Walden's Certification is a printout of a Matter Time Activity by Professional Type, which describes tasks performed by the Office of the Attorney General on this matter through August 10, 2021, and for which the Bureau has been billed the total sum of \$14,161.10.

21. In review of the Prosecution Costs Declaration, it appears at least two hours, at a rate of \$220 per hour, were spent preparing a request for continuance due to the unavailability of complainant's witness, totaling \$440. (Exh. 3, p. 8 of 17.) The evidence of costs also establishes the investigation and preparation of this matter required more time than similar cases due, in part, to the number of respondent's unresolved criminal matters which were due to his failures to appear for court dates. Accordingly, costs of investigation and enforcement in the total amount of \$17,048.60, accounting for the costs requested less the \$440 spent towards the request for continuance, are reasonable in light of the issues involved in this matter.

LEGAL CONCLUSIONS

Authority

1. The Board administers and enforces the Pharmacy Law. (Bus. & Prof. Code, § 4001.) (Undesignated statutory references are to the Business and Professions Code.)

2. Protection of the public is the Board's highest priority in exercising its licensing, regulatory, and disciplinary functions. (§ 4001.1.) "[W]hen that goal is inconsistent with other interests, the public's protection is paramount." (*Oduyale v.*

California State Bd. of Pharmacy (2019) 41 Cal.App.5th 101, 118; *Sternberg v. California State Bd. of Pharmacy* (2011) 239 Cal.App.4th 1159, 1168-1169.)

3. Every pharmacist license issued may be suspended or revoked. (§ 4300, subd. (a).) When disciplining a license, the Board may suspend judgment, place the licensee on probation, suspend the licensee's right to practice for a period not to exceed one year, revoke the license, or take other action the Board deems appropriate. (*Id.* at subd. (b).)

4. The expiration of a Board-issued license by operation of law or by order or decision of the Board or a court of law does not deprive the Board of jurisdiction to commence or proceed with any investigation of, or action or disciplinary proceeding against, the licensee or to render a decision suspending or revoking the license. (§ 4300.1.) Accordingly, the Board may proceed with disciplinary proceedings against respondent despite respondent's expired license. (Factual Finding 1.)

Burden and Standard of Proof

5. As the party bringing administrative charges and seeking discipline against respondent, complainant bears the burden of proof. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113; *Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, 175-176.)

6. In an action seeking disciplinary action against a professional license, the governing agency bears the burden of establishing cause for discipline by clear and convincing proof to a reasonable certainty. (*Ettinger v. Board of Med. Quality Assurance* (1982) 135 Cal.App.3d 853, 856.)

7. Rehabilitation is akin to an affirmative defense, and respondent bears the burden of proof by a preponderance of the evidence to establish that he has been rehabilitated. (*Whetstone v. Board of Dental Examiners* (1927) 87 Cal.App.156, 164; Evid. Code, § 115.)

Pharmacy and Controlled Substance Law

8. The Pharmacy Law prohibits a licensee from possessing any controlled substance unless furnished to the licensee upon an authorized prescription. (§ 4060.)

9. Heroin is a Schedule I controlled substance. (Health & Saf. Code, § 11054, subd. (c)(11).)

10. Methamphetamine is a Schedule II controlled substance. (Health & Saf. Code, § 11055, subd. (d)(2).)

11. Health and Safety Code section 11170 prohibits an individual from prescribing, administering, or furnishing a controlled substance for himself.

12. Health and Safety Code, section 11173, subdivision (a), prohibits an individual from obtaining or attempting to obtain controlled substances, or procuring the administration of controlled substances, by fraud or deceit.

13. Section 4301 requires the Board to take action against a licensee who engages in unprofessional conduct, which includes the following:

(f) The commission of any act involving moral turpitude, dishonesty, fraud, deceit, or corruption, whether the act is committed in the course of relations as a licensee or

otherwise, and whether the act is a felony or misdemeanor or not. ¶. . . ¶

(h) The administering to oneself, of any controlled substance ¶. . . ¶

(j) The conviction of a crime substantially related to the qualifications, functions, and duties of a licensee under [the Pharmacy Law]. The record of conviction of a violation of . . . the statutes of this state regulating controlled substances or dangerous drugs shall be conclusive evidence of unprofessional conduct. In all other cases, the record of conviction shall be conclusive evidence only of the fact that the conviction occurred. The board may inquire into the circumstances surrounding the commission of the crime, in order to fix the degree of discipline or, in the case of a conviction not involving controlled substances or dangerous drugs, to determine if the conviction is of an offense substantially related to the qualifications, functions, and duties of a licensee under this chapter. A plea or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning of this provision. . . . ¶. . . ¶

(o) 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.

SUBSTANTIALLY RELATED CRIME

14. California Code of Regulations, title 16 (Regulations), section 1770, subdivision (a), provides that a crime, professional misconduct, or act is considered substantially related to the qualifications, functions or duties of the practice, profession, or occupation that may be performed under the pharmacist license held if to a substantial degree it evidences present or potential unfitness of a licensee to perform the functions authorized by the license in a manner consistent with the public health, safety, or welfare.

15. Regulations, section 1770, subdivision (b), provides that to determine if a crime is substantially related to the profession of a licensed pharmacist, the Board must consider the nature and gravity of the offense, the number of years elapsed since the date of the offense; and the nature and duties of the practice, profession, or occupation that may be performed under the license held.

16. Regulations, section 1770, provides a substantially related crime, professional misconduct, or act includes a crime involving dishonesty, fraud, deceit, or corruption related to money, items, documents, or personal information (subd. (c)(4)), or involves a conviction for driving under the influence of drugs or alcohol (subd. (c)(5).)

17. The Board alleged that respondent's criminal convictions for reporting a false crime, driving under the influence of a drug, and driving on a suspended license are substantially related crimes. Three years have elapsed since respondent reported a false crime, the crime involved dishonesty to the sheriff's department and false

allegations against respondent's ex-girlfriend. Respondent's crime did not place others at risk of harm. The gravity of respondent's criminal behavior was moderate. Three months have elapsed since respondent's Vehicle Code violations. Respondent's act of driving under the influence of methamphetamine and accompanying erratic driving placed the public at risk of harm and the offense was grave. Evidence was not presented as the cause of respondent's suspended driver's license. Respondent's act of driving on a suspended license did not pose a substantial risk to the public and the gravity was minimal.

18. Respondent's pharmacist license provides him access to a variety of medications and controlled substances for the purpose of dispensing these drugs to the public pursuant to medical prescriptions. Complainant established by clear and convincing evidence respondent's criminal convictions for reporting a false crime and driving under the influence of a drug evidence his present unfitness to perform the functions authorized by his license in a manner consistent with the public health, safety, or welfare, and are criminal convictions for substantially related crimes. (Regulations, § 1770, subds. (a), (b), & (c)(4) & (5).) (Factual Findings 4-7, 12-14.) Complainant failed to establish by clear and convincing evidence that respondent's criminal conviction for driving on a suspended license is a conviction for a substantially related crime.

Cause for Discipline

19. Complainant established by clear and convincing evidence cause exists under sections 4060 and 4301, subdivisions (h), and (o), to suspend or revoke respondent's license. On January 22, 2019, in violation of Health and Safety Code, sections 11170 and 11173, respondent engaged in unprofessional conduct when he administered himself heroin, a controlled substance, and was in possession of heroin

without a valid prescription, in violation of the Pharmacy Law. (§§ 4060, 4301, subds. (h) & (o).) (Factual Findings 8-11; Legal Conclusions 8, 11 & 12).

20. Complainant established by clear and convincing evidence cause exists under section 4301, subdivisions (f) and (j), to suspend or revoke respondent's license because on October 29, 2021, respondent was convicted of violating Penal Code section 148.5, making a false report of a crime to a peace officer. The crime involved dishonesty and was substantially related to the functions, duties, and qualifications of a pharmacist. (Factual Findings 12-14; Legal Conclusion 18.)

21. Complainant established by clear and convincing evidence cause exists under sections 4060 and 4301, subdivision (j), to suspend or revoke respondent's license because on October 29, 2021, respondent engaged in unprofessional conduct when he was convicted of violating Vehicle Code section 23152, subdivision (f), driving under the influence of a drug, a crime substantially related to the qualifications, functions, and duties of a pharmacist. (Factual Findings 4-7; Legal Conclusion 18.)

Assessment of Discipline

22. In reaching a decision on a disciplinary action under the Administrative Procedure Act (Gov. Code, § 11400 et seq.), the Board must consider the disciplinary guidelines entitled: "Disciplinary Guidelines A Manual of Disciplinary Guidelines and Model Disciplinary Orders" (rev 2/2017) (Guidelines), which are incorporated in Regulations, section 1760.

23. The Guidelines divide violations into four categories for purposes of determining the appropriate disciplinary action. Category I violations are the least serious, and Category IV are the most serious. The recommended range of discipline within each category "assume[s] a single violation of each listed statute or regulation."

(Guidelines, p. 8.) When there are “multiple violations, the appropriate penalty shall increase accordingly.” (*Ibid.*)

24. Category III discipline is recommended for violations that involve knowingly or willfully dispensing or distributing dangerous drugs or dangerous devices or controlled substances, and most criminal convictions involving alcohol, dangerous drugs, or dangerous devices or controlled substances. Violations in this category may include: violations of laws governing controlled substances, dangerous drugs, or dangerous devices, or alcohol, including repeat or serious diversion or self-administration, or abuse; and repeat or serious unlawful possessions of dangerous drugs or dangerous devices, controlled substances, hypodermic needles or syringes, or drug paraphernalia. (Guidelines, p. 16.) The maximum recommended discipline for a category III violation is revocation. Based on respondent’s multiple violations of laws governing controlled substances and repeat unlawful possession of dangerous drugs, Category III discipline is appropriate in this matter.

25. Page 7 of the Guidelines provides the following factors to be considered when determining whether the minimum, maximum, or an intermediate penalty is to be imposed in a given case:

1. actual or potential harm to the public
2. actual or potential harm to any consumer
3. prior disciplinary record, including level of compliance with disciplinary order(s)

4. prior warning(s), including but not limited to citation(s) and fine(s), letter(s) of admonishment, and/or correction notice(s)
5. number and/or variety of current violations
6. nature and severity of the act(s), offense(s) or crime(s) under consideration
7. aggravating evidence
8. mitigating evidence
9. rehabilitation evidence
10. compliance with terms of any criminal sentence, parole, or probation
11. overall criminal record
12. if applicable, evidence of proceedings for case being set aside and dismissed pursuant to Section 1203.4 of the Penal Code
13. time passed since the act(s) or offense(s)
14. whether the conduct was intentional or negligent, demonstrated incompetence, or, if the respondent is being held to account for conduct committed by another, the respondent had knowledge of or knowingly participated in such conduct

15. financial benefit to the respondent from the misconduct

16. other licenses held by the respondent and license history of those licenses

17. Uniform Standards Regarding Substance-Abusing Healing Arts Licensees (see Business and Professions Code Section 315)

26. Respondent's prevalent illegal use of controlled substances presents an actual harm to the public and to any consumer. Respondent does not have a disciplinary record or prior warnings. Respondent presents with five causes for discipline, which stem from his addiction to heroin and methamphetamine, controlled substances. (Factual Findings 4-14, 16; Legal Conclusion 9 & 10.)

27. The nature and severity of respondent's offenses ranged from minimal to grave, as provided in Legal Conclusion 15. Respondent repeatedly acted irrationally and disturbed others while under the influence of drugs, and though he did not directly physically harm others, he placed others at risk when driving under the influence of a drug. There was no evidence submitted tending to demonstrate respondent was under the influence of drugs during his practice as a pharmacist. (Factual Findings 4-14.)

28. Factors in aggravation of respondent's crimes include his erratic, confrontational, and unsafe interactions with the public, as demonstrated by his argument in Autozone, unsafe driving in the Super Groceries parking lot, and admitted argumentative accusations against Officer Madrigal, as well as his retaliatory behavior against a previous girlfriend. Complainant did not establish by clear and convincing evidence aggravating factors. Respondent failed to establish mitigating evidence

presented. Respondent's testimony as to his sobriety and compliance with court orders was not credited and respondent failed to present documentary or corroborating evidence, such as from a drug program counselor, in support of these claims. Respondent did not establish his compliance with terms of any criminal sentence, parole, or probation. (Factual Findings 4-17.)

29. Respondent suffered three criminal convictions just three months ago, all related to the illegal use of controlled substances and one involving dishonesty, criminal behavior which occurred over the past four years. Only three months have passed since respondent's most recent criminal behavior involving the illegal use of controlled substances. (Factual Findings 4-14.)

30. The evidence did not establish that respondent's criminal behavior was entirely intentional, as he was influenced by heroin and methamphetamine at or near the time he committed his crimes. Nor did the evidence establish respondent obtained any financial benefit from his misconduct. Respondent does not have other licenses. (Factual Findings 4-17.)

31. Pages 8 through 9 of the Guidelines provide examples of appropriate evidence, or letters, respondents may submit to demonstrate rehabilitative efforts and competency. These letters should be recent and dated and are subject to verification by the Board. Examples include: written statements or performance evaluations; letters from counselors regarding respondent's participation in a rehabilitation or recovery program; letters describing respondent's participation in support groups, such as Narcotics Anonymous; laboratory analyses or drug screen reports confirming abstinence from drugs and alcohol; letters from probation or parole officers regarding respondent's participation in and compliance with terms and conditions of probation or parole; or letters signed under penalty of perjury from persons familiar with

respondent in either a personal or professional capacity regarding their knowledge of: the respondent's character. Respondent did not submit such evidence of his rehabilitative efforts or competency. (Factual Finding 15-17.)

32. Based on respondent's recent and prevalent illegal use of controlled substances and failure to establish any level of rehabilitation, and in consideration of the Guidelines and Category III disciplinary options, protection of the public requires revocation of respondent's license.

Award of Costs

33. In any order issued in resolution of a disciplinary proceeding, at the request of the Board, the Administrative Law Judge may direct the licentiate found to have committed a violation to pay a sum not to exceed the reasonable costs of investigation and enforcement. A certified copy of the actual costs, signed by the Board or its designated representative, is prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges by the Attorney General. (§ 125.3, subds. (a), (c); Cal. Code Regs., tit. 1, § 1042, subd. (b).)

34. The declarations signed by Ms. Walden, complainant, and Ms. Coyne constitute prima facie evidence of the reasonable costs incurred for investigation and enforcement of this matter less \$440, accounting for time spent on the request for continuance, for a total sum of \$17,048.60. (§ 125.3, subd. (c).) (Factual Finding 8-21.)

35. The Board must exercise its discretion to reduce or eliminate cost awards in order to not deter licensees with meritorious claims or defenses from exercising their right to a hearing and must not assess full costs when to do so would unfairly

penalize the respondent. (*Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45.) Factors to be considered in determining whether the Board must assess the full costs sought pursuant to section 125.3 include: the licentiate's success in getting the charges dismissed or reduced; the licentiate's subjective good faith belief in the merits of his or her position; whether the licentiate raised a colorable challenge to the proposed discipline; the licentiate's financial ability to pay; and whether the scope of the investigation was appropriate in light of the alleged misconduct. (*Id.*)


36. The merits of respondent's position were not reasoned, and respondent did not present colorable challenges to complainant's request for license revocation. (Factual Findings 4-17.) However, respondent's presentation of evidence and arguments as to the merits of his case were not made in bad faith, but rather are understandable given his very recent and prevalent use of heroin and methamphetamine. Respondent presented evidence that his financial ability to pay is limited based on his extended unemployment from the pharmaceutical profession and current employment at a fast-food establishment. In consideration of these factors, assessing the full costs would unfairly penalize respondent. A 50 percent reduction in costs results in reasonable costs in the amount of \$8,524.30. (Factual Findings 16-19.) Respondent is ordered to pay this amount as a condition precedent to any reinstatement of pharmacist's license number RPH 78558, in the discretion of the Board.

ORDER

1. Pharmacist License Number RPH 78558, issued to respondent Mohamad Sayedhafez A. Ismaeil, is revoked.

2. Respondent must pay to the Board of Pharmacy costs associated with its investigation and enforcement pursuant to Business and Professions Code section 125.3 in the amount of \$8,524.30 as a condition precedent to any reinstatement of his pharmacist's license, in the discretion of the Board.

DATE: 02/07/2022


Chantal Sampogna (Feb 7, 2022 13:53 PST)

CHANTAL M. SAMPOGNA

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

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11 In the Matter of the Accusation Against:

12 **MOHAMED SAYEDHAFEZ A. ISMAEIL**
13 **217 Angelus St.**
Turlock, CA 95381

14 **Pharmacist License No. RPH 78558**

15 Respondent.

Case No. 6641

OAH No. 2021050036

FIRST AMENDED ACCUSATION

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19 **PARTIES**

20 1. Anne Sodergren (Complainant) brings this First Amended Accusation solely in her
21 official capacity as the Executive Officer of the Board of Pharmacy, Department of Consumer
22 Affairs (Board).

23 2. On or about June 21, 2018, the Board issued Pharmacist License No. RPH 78558 to
24 Mohamed Sayedhafez A. Ismaeil (Respondent). The Pharmacist License was in full force and
25 effect at all times relevant to the charges brought herein and expired on August 31, 2021.

26 **JURISDICTION**

27 3. This First Amended Accusation is brought before the Board, under the authority of
28 the following laws. All section references are to the Business and Professions Code unless

1 otherwise indicated.

2 4. Section 4300, subdivision (a), states that “[e]very license issued may be suspended or
3 revoked.”

4 5. Section 4300.1 states:

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

10 **STATUTORY PROVISIONS**

11 6. Section 4060 states:

12 “No person shall possess any controlled substance, except that furnished to a person upon
13 the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor
14 pursuant to Section 3640.7, or furnished pursuant to a drug order issued by a certified
15 nurse-midwife pursuant to Section 2746.51, a nurse practitioner pursuant to Section 2836.1, or a
16 physician assistant pursuant to Section 3502.1, or naturopathic doctor pursuant to Section 3640.5,
17 or a pharmacist pursuant to either subparagraph (D) of paragraph (4) of, or clause (iv) of
18 subparagraph (A) of paragraph (5) of, subdivision (a) of Section 4052. This section shall not
19 apply to the possession of any controlled substance by a manufacturer, wholesaler, pharmacy,
20 pharmacist, physician, podiatrist, dentist, optometrist, veterinarian, naturopathic doctor, certified
21 nurse-midwife, nurse practitioner, or physician assistant, when in stock in containers correctly
22 labeled with the name and address of the supplier or producer.

23 “Nothing in this section authorizes a certified nurse-midwife, a nurse practitioner, a
24 physician assistant, or a naturopathic doctor, to order his or her own stock of dangerous drugs and
25 devices.”

26 7. Section 4301 states:

27 “The board shall take action against any holder of a license who is guilty of unprofessional
28 conduct or whose license has been issued by mistake. Unprofessional conduct shall include, but is

1 not limited to, any of the following:

2

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

6

7 “(h) The administering to oneself, of any controlled substance, or the use of any dangerous
8 drug or of alcoholic beverages to the extent or in a manner as to be dangerous or injurious to
9 oneself, to a person holding a license under this chapter, or to any other person or to the public, or
10 to the extent that the use impairs the ability of the person to conduct with safety to the public the
11 practice authorized by the license.

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

14

15 (l) The conviction of a crime substantially related to the qualifications, functions, and
16 duties of a licensee under this chapter. The record of conviction of a violation of Chapter 13
17 (commencing with Section 801) of Title 21 of the United States Code regulating controlled
18 substances or of a violation of the statutes of this state regulating controlled substances or
19 dangerous drugs shall be conclusive evidence of unprofessional conduct. In all other cases, the
20 record of conviction shall be conclusive evidence only of the fact that the conviction occurred.
21 The board may inquire into the circumstances surrounding the commission of the crime, in order
22 to fix the degree of discipline or, in the case of a conviction not involving controlled substances
23 or dangerous drugs, to determine if the conviction is of an offense substantially related to the
24 qualifications, functions, and duties of a licensee under this chapter. A plea or verdict of guilty
25 or a conviction following a plea of nolo contendere is deemed to be a conviction within the
26 meaning of this provision. The board may take action when the time for appeal has elapsed, or
27 the judgment of conviction has been affirmed on appeal or when an order granting probation is
28 made suspending the imposition of sentence, irrespective of a subsequent order under Section

1 1203.4 of the Penal Code allowing the person to withdraw his or her plea of guilty and to enter a
2 plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, information,
3 or indictment.

4

5 “(o) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the
6 violation of or conspiring to violate any provision or term of this chapter [the Pharmacy Law] or
7 of the applicable federal and state laws and regulations governing pharmacy, including
8 regulations established by the board or by any other state or federal regulatory agency. . . .”

9

10 “(p) Actions or conduct that would have warranted denial of a license.”

11”

12 **DRUG STATUTES**

13 8. Health and Safety Code section 11170 states that “[n]o person shall prescribe,
14 administer, or furnish a controlled substance for himself.”

15 9. Health and Safety Code section 11173, subdivision (a), provides that it is illegal to
16 possess a controlled substance without a valid prescription.

17 **REGULATORY PROVISIONS**

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

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

25 **COST RECOVERY**

26 11. Section 125.3 provides that the Board may request the administrative law judge to
27 direct a licensee found to have committed a violation or violations of the licensing act to pay a
28 sum not to exceed the reasonable costs of the investigation and enforcement of the case.

1 **CONTROLLED SUBSTANCE / DANGEROUS DRUG**

2 12. Heroin, a semisynthetic drug derived from morphine, is a Schedule I controlled
3 substance pursuant to Health and Safety Code section 11054(c)(11), and is a dangerous drug
4 pursuant to the Business and Professions Code.

5 13. Methamphetamine is a Schedule II Controlled Substance pursuant to Health and
6 Safety Code section 11055, and is a dangerous drug pursuant to the Business and Professions
7 Code.

8 **FIRST CAUSE FOR DISCIPLINE**

9 **(Administration of a Controlled Substance – Heroin)**

10 14. Respondent is subject to disciplinary action under section 4301, subdivision (h), on
11 the grounds of unprofessional conduct, in that Respondent administered to himself heroin, a
12 controlled substance. The facts and circumstances are that on or about January 22, 2019, law
13 enforcement officers found Respondent in possession of heroin wrapped in foil and illegal
14 controlled substance paraphernalia straws. Respondent informed law enforcement officers that
15 the heroin was his, he uses a lighter and foil to heat-up the heroin and the straws to inhale the
16 fumes, and he last self-administered the heroin earlier in the morning. On or about January 25,
17 2019, charges were file in in the criminal proceeding entitled *The People of the State of*
18 *California v. Mohamed Ismaeil* (Kern County Sup. Ct., No. BM931769A), alleging two
19 misdemeanor counts of violating Health and Safety code sections 11350(a) [possess narcotic
20 controlled substance] and 11364 [possess controlled substance paraphernalia]. The matter was
21 dismissed in the furtherance of justice on October 29, 2021.

22 **SECOND CAUSE FOR DISCIPLINE**

23 **(Violating Pharmacy Law,**

24 **Possession of Heroin Without a Valid Prescription)**

25 15. Respondent is subject to disciplinary action under sections 4301, subdivision (o) and
26 4060, on the grounds of unprofessional conduct, in that on or about January 22, 2019, Respondent
27 violated the Pharmacy Law when he was in possession of heroin, a controlled substance, without
28 a valid prescription. Complainant refers to and by this reference incorporates the allegations set

1 forth above in paragraph 14, inclusive, as though set forth fully.

2 **THIRD CAUSE FOR DISCIPLINE**

3 **(Violating State Statutes Regulating Controlled Substances,**
4 **Self-Administering and Possession of Heroin Without a Valid Prescription)**

5 16. Respondent is subject to disciplinary action under section 4301, subdivision (h), and
6 Health and Safety Code sections 11170 and 11173, subdivision (a) on the grounds of
7 unprofessional conduct, in that on or about January 22, 2019, Respondent violated statutes of this
8 state when he self-administered and was in possession of heroin, a controlled substance without a
9 valid prescription. Complainant refers to and by this reference incorporates the allegations set
10 forth above in paragraph 14, inclusive, as though set forth fully.

11 **FOURTH CAUSE FOR DISCIPLINE**

12 **(Violating Pharmacy Law, Conviction of a Substantially Related Crime)**

13 17. Respondent is subject to disciplinary action under section 4301, subdivisions (f) and
14 (l), on the grounds that on or about on or about October 29, 2019, he was convicted of a crime
15 involving moral turpitude, dishonesty, fraud, deceit, or corruption. Specifically, in the criminal
16 proceeding entitled *The People of the State of California v. Mohamed Ismaeil* (Kern County Sup.
17 Ct., No No. BM927280A), filed October 9, 2018, Respondent pled nolo contendere to violating
18 Penal Code section 148.5, subdivision (a) for making a false report of a crime to peace officers.
19 Respondent was sentenced to 24 days in jail.

20 18. The circumstances were such that, on or about September 10, 2018, Respondent
21 telephoned law enforcement officers and reported a robbery. Respondent informed the
22 responding officers that he was involved in a verbal dispute with three others, with one standing
23 to the side having a handgun while the others pulled him out of his vehicle, assaulted him with
24 their hands, feet and a baseball bat, took a speaker out of his vehicle and went into their nearby
25 residence. He left the scene in his vehicle and returned via another vehicle before he called 911.
26 Upon being questioned about the incident details and damage to his arms from the assault,
27 Respondent presented the inside of his arms revealing injection track marks along both arms and
28 lack of bruising from the assault. Respondent was unable to provide specific details to the

1 incident and became agitated with law enforcement questions. Law enforcement officers located
2 the alleged speaker inside the designated residence and spoke with a female who formerly had a
3 relationship with Respondent. The female told officers that the speaker belonged to her, and that
4 she and a girlfriend were at Respondent's residence where Respondent became jealous of the
5 girls' intimate relationship and told them to leave. They went home and Respondent telephoned
6 her in a rage with claims of coming to her residence to take her away because she did not need to
7 be with anyone but him. Respondent was subsequently arrested for filing a false police report
8 under Penal Code section 148.5, subdivision (a).

9 **FIFTH CAUSE FOR DISCIPLINE**

10 **(Violating Pharmacy Law,**

11 **Conviction of a Substantially Related Crimes)**

12 19. Respondent is subject to disciplinary action under section 4301, subdivision (l), and
13 section 4060, on the grounds that he engaged in unprofessional conduct on or about October 29,
14 2021 when he was convicted of two (2) misdemeanor crimes substantially related to the duties
15 functions and qualifications of the practice of pharmacy. Specifically, in the criminal proceeding
16 entitled *The People of the State of California v. Mohamed Ismaeil* (Kern County Sup. Ct., No.
17 BM963714A), filed on or about October 20, 2021, Respondent pled nolo contendere to two
18 misdemeanor violations of Vehicle Code section 23152 subdivision (f) (Driving under the
19 influence of drugs) and Vehicle Code section 14601.1 subdivision (a) (Driving with a suspended
20 license). Respondent was sentenced to 24 days in jail, placed on probation for three (3) years
21 and fined \$1,914.00.

22 20. The circumstances are such that, on or about October 17, 2021, Respondent was
23 observed by a security guard driving erratically after he left a convenient store. Respondent was
24 later detained by the security officer, who placed him in handcuffs. The Bakersfield Police
25 Department was called to the scene. An officer made contact with the Respondent who
26 exhibited objective signs of being under the influence of a controlled substance. Field sobriety
27 tests were performed, which Respondent failed. His vehicle was searched and three (3) syringes
28 were found in the vehicle along with a baggy filled with a white crystalline substance consistent

1 with methamphetamine. One of the syringes had a white substance mixed with what appeared to
2 be human blood in it. Respondent was given his rights and consented to a chemical blood test.
3 Respondent was placed under arrest for violation of Vehicle Code sections 23152 subdivision (a)
4 and 14601.1 subdivision (a), and Health and Safety Code sections 11377 subdivisions (a) and
5 11364.1 subdivision (a). It was also determined by the officers that Respondent had two (2)
6 outstanding misdemeanor arrest warrants in Bakersfield Super Court Case numbers BM927280A
7 and BM931769A, the disposition of which are set forth above paragraphs 14 through 18, and are
8 incorporated herein as though set forth in full.

9 **PRAYER**

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

- 12 1. Revoking or suspending Pharmacist License No. RPH 78558, issued to Mohamed
13 Sayedhafez A. Ismaeil;
 - 14 2. Ordering Mohamed Sayed Hafez A. Ismaeil to pay the Board the reasonable costs of
15 the investigation and enforcement of this case, pursuant to section 125.3; and,
 - 16 3. Taking such other and further action as deemed necessary and proper.
- 17
18

19 DATED: 11/11/2021

Signature on File

20 ANNE SODERGREN
21 Executive Officer
22 Board of Pharmacy
23 Department of Consumer Affairs
24 State of California
25 *Complainant*

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