

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

In the Matter of the Accusation Against:

MICHAEL WAYNE LOWERY, Respondent

Designated Representative Certificate No. EXC 26286

Agency Case No. 7639

OAH No. 2023120859

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 September 12, 2024.

It is so ORDERED on August 13, 2024.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By

A handwritten signature in black ink, appearing to read "Seung W. Oh". The signature is fluid and cursive, with the first name "Seung" and last name "Oh" clearly visible.

Seung W. Oh, Pharm.D.
Board President

**BEFORE THE
BOARD OF PHARMACY
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In the Matter of the Accusation Against:

**MICHAEL WAYNE LOWERY,
Designated Representative Certificate No. EXC 26286
Respondent.**

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PROPOSED DECISION

Administrative Law Judge Juliet E. Cox, State of California, Office of Administrative Hearings, heard this matter on May 2, 2024, by videoconference.

Deputy Attorney General Anahita S. Crawford represented complainant Anne Sodergren, Executive Officer of the Board of Pharmacy.

Respondent Michael Wayne Lowery represented himself.

The matter was submitted for decision on May 2, 2024.

FACTUAL FINDINGS

1. On July 21, 2021, the Board of Pharmacy issued Designated Representative Certificate Number EXC 26286 to respondent Michael Wayne Lowery. At the time of the hearing, this certificate was active and was scheduled to expire on July 1, 2024.

2. Acting in her official capacity as Executive Officer of the Board, complainant Anne Sodergren filed an accusation against respondent in late 2023. Respondent returned a timely notice of defense.

3. Complainant asks the Board to revoke respondent's certificate because of two allegedly unprofessional acts. First, respondent drove while intoxicated by alcohol, a crime for which he was convicted in December 2022. Second, when respondent renewed his certificate in May 2023, he did not report this conviction, reporting instead falsely that he had not been convicted of any crime since his prior renewal.

Professional Experience

4. Respondent works at a CVS Pharmacy distribution center in Patterson. He has worked there for more than 14 years, in increasingly responsible roles. Currently, respondent works as an inventory control supervisor, and is responsible for inventory counts and for audits and investigations into inventory shortages or overages.

5. Respondent obtained his Designated Representative certificate for his employer's convenience, because his duties sometimes include receiving and accounting for shipments, or sorting drugs for delivery to retail stores. Several other employees in respondent's workplace also hold Designated Representative certificates. The employer pays these employees' certificate renewal fees.

6. After the incident and conviction described below in Findings 7 and 8, respondent told some colleagues and his operational manager that he had been convicted of a crime. He testified credibly that he did not give details, and that the manager did not ask for any. Respondent's duties did not change, and he experienced no employee discipline because of his arrest or conviction.

Crime and Conviction

7. On January 21, 2022, respondent spent time in the evening at a bar. He left the bar near closing time, shortly before 2:00 a.m. on January 22, 2022. When he left the bar he believed he was capable of driving safely, but on the way home (after stopping for a snack) he caused a collision. A Modesto Police Department officer arrested respondent at the scene on suspicion of driving while under the influence of alcohol; a preliminary breath screening about 30 to 40 minutes after the collision estimated respondent's blood alcohol concentration at 0.15 percent.

8. On December 22, 2022, respondent was convicted in Stanislaus County of a misdemeanor violation of Vehicle Code section 23152, subdivision (b), and Vehicle Code section 23758 (together, driving with a blood alcohol concentration of 0.15 percent or more). The court ordered respondent to spend 15 days in jail or in the county's Alternative Work Program, to spend 36 months on informal probation, to complete a three-month first-offender drinking driver program, and to pay fines and fees totaling about \$1,800.

9. Respondent attempted to report for the Alternative Work Program immediately after his conviction, but the clerical staff member with whom respondent interacted misplaced his file. Because of this error, the sheriff's department notified the criminal court that respondent had failed to report timely for service, and respondent

had to go back to the criminal court to seek an extension of his deadline. After the court granted the extension, respondent completed the service on weekends in fall 2023. Respondent also has completed payment of all court-ordered fines and fees.

10. Respondent delayed starting the three-month first-offender drinking driver program because he needed to save enough money for the program fee (about \$650) after depleting his available cash to pay the court-ordered fines and fees. He testified credibly that he now expects to complete the program in summer 2024. If he completes the three-month program as he expects and does not violate probation in any other respect, respondent's 36-month informal criminal probation will end in December 2025.

May 2023 Certificate Renewal

11. Respondent received notice by mail in spring 2023 that he needed to renew his Designated Representative certificate. The printed notice included a place for him to indicate whether he had been convicted of a crime since his last renewal, and to sign the document to affirm that his answers were true.

12. Respondent testified credibly that he indicated on the printed notice that he had been convicted, and signed it. He turned in the notice with his answer and signature to his employer's personnel office, expecting that someone in that office either would return the document to the Board along with payment for respondent's certificate renewal or would ask him for more information about the conviction if necessary to complete the renewal.

13. Rather than mailing in respondent's notice, the person who renewed respondent's certificate for him did so using the Board's electronic renewal and payment system. If this person had reported to the Board on respondent's behalf that

respondent had been convicted of a crime since respondent's prior renewal, the renewal and payment system would have prompted the person for additional information about the crime and conviction. Instead, however, the person reported to the Board on respondent's behalf that respondent had not been convicted of any crime since his prior renewal.

14. Information about respondent's arrest on January 22, 2022, already had reached the Board by February 9, 2022. On that date, a Board staff member issued a request to the Modesto Police Department for information about the arrest. Respondent did not receive notice about this inquiry. The evidence does not establish when or how Board staff members learned that respondent's arrest in January 2022 had resulted in conviction in December 2022.

Additional Evidence

15. Respondent testified credibly that he was shocked and dismayed to have caused a collision while driving after drinking alcohol. He views this event as a serious lapse in judgment about which he remains remorseful.

16. According to his testimony, respondent has abstained from alcohol since his arrest, because he does not wish to risk further negative consequences. Although uncorroborated, this testimony is credible. Neither the details of respondent's crime nor any other evidence shows respondent to have misused or overused alcohol, or to have driven while under its influence, before or since his arrest in January 2022.

17. Board Inspector Jessica Cudmore, Pharm.D., testified about a Designated Representative's professional responsibilities. A Designated Representative supervises a wholesale, rather than a retail, pharmacy. Such a person must be present whenever regulated pharmaceutical products are moving into or out of the facility, and is

responsible for ensuring accurate record-keeping as well as secure storage. To fulfill these responsibilities, a person certified as a Designated Representative must be honest and ethical, with sound practical judgment.

18. Respondent expressed pride and satisfaction in his current role with CVS. He explained that even though only some of his duties require certification as a Designated Representative, all of his duties require careful supervision of other employees and meticulous record-keeping. He understands why the circumstances of his crime and conviction would be of potential concern to the Board, but does not believe that he is at risk of neglecting his responsibilities as a Designated Representative.

19. Because of his conviction, the Department of Motor Vehicles suspended respondent's driver's license, with restoration contingent on his completing the same three-month first-offender program the criminal court had ordered. He has not driven since December 2022 and relies on his wife or on friends to transport him to and from his workplace.

20. Respondent is married, with two children. His household depends financially on respondent's income.

Costs

21. Through May 1, 2024, the Board had incurred \$3,890 in costs for legal services provided to complainant by the Department of Justice in this matter. Complainant's claim for reimbursement of these costs is supported by a declaration that complies with California Code of Regulations, title 1, section 1042, subdivision (b)(2). These costs are reasonable.

LEGAL CONCLUSIONS

1. The Board may suspend or revoke respondent's Designated Representative certificate if a preponderance of evidence shows him to have committed unprofessional conduct. (Bus. & Prof. Code, §§ 4300, 4301.)

First Cause for Discipline: Dangerous Alcohol Use

2. Use of alcohol in a manner that is dangerous to oneself or to the public is unprofessional conduct for a pharmacy licensee, and is cause for discipline. (Bus. & Prof. Code § 4301, subds. (h), (o).) The matters stated in Finding 7 constitute cause for the Board to suspend or revoke respondent's Designated Representative certificate.

Second Cause for Discipline: Criminal Conviction

3. A criminal conviction for actions that relate substantially to a pharmacy licensee's duties also is unprofessional conduct. (Bus. & Prof. Code § 4301, subds. (l), (o).) Criminal actions relate substantially to licensed duties if they show "present or potential unfitness of an applicant or licensee to perform the functions authorized by the license in a manner consistent with the public health, safety, or welfare." (Cal. Code Regs., tit. 16, § 1770, subd. (a).) Although the matters stated in Findings 7 and 8 do not show any present unfitness to perform a Designated Representative's duties, they show potential unfitness. These matters constitute cause for the Board to suspend or revoke respondent's Designated Representative certificate.

Third Cause for Discipline: False Statement

4. The Board may discipline a licensee for "knowingly making or signing any certificate or document that falsely represents the existence or nonexistence of a state

of facts.” (Bus. & Prof. Code § 4301, subds. (g), (o).) The matters stated in Finding 13 show that a fellow CVS Pharmacy employee, not respondent, made a false report to the Board on respondent’s behalf. The matters stated in Findings 11 and 12 show that respondent made and signed a renewal application that stated truthfully that he had been convicted of a crime; moreover, the matters stated in Findings 4 through 6 show that respondent relied reasonably on his employer’s other employees to transmit his renewal application faithfully to the Board, and had no authority over the person who misreported respondent’s renewal information to the Board. Because respondent did not knowingly make a false statement, these circumstances do not constitute cause for discipline against respondent.

Disciplinary Considerations

5. Though the events summarized in Findings 7 and 8 satisfy two distinct statutory criteria for discipline, they represent a single incident. Some incidents of driving after consuming alcohol indicate chronic alcohol misuse that may compromise professional judgment. In this case, however, the matters stated in Findings 9, 10, 15, 16, 18, and 19 do not indicate such chronic alcohol misuse by respondent. Respondent’s error in judgment on January 22, 2022, does not demonstrate that he is at any higher ongoing risk than any other certified Designated Representative of failing in his professional responsibilities.

6. Further, as summarized in Findings 11 through 13 and in Legal Conclusion 4, respondent’s employer rather than respondent bears primary responsibility for having failed to give the Board accurate information regarding respondent’s December 2022 conviction. Although the matters stated in Findings 6 and 12 do not show respondent to have been especially diligent in ensuring that the Board received correct information, these matters also do not show respondent to

have been negligent. If respondent's employer needs employees in respondent's position to hold Designated Representative certificates, it should take greater responsibility to ensure that its actions do not cause disciplinary consequences for those employees.

7. Respondent's misconduct does not warrant revocation of his certificate, and continuing public safety does not require the Board or respondent to undertake probation. Under all circumstances of this case, the Board may protect public welfare and indicate its disapproval of respondent's unprofessional conduct by publicly reprimanding him for having driven on January 22, 2022, while intoxicated by alcohol. (Bus. & Prof. Code, § 495.)

Costs

8. The Board may recover its reasonable enforcement costs from a licensee found to have committed a violation or violations of the licensing act. (Bus. & Prof. Code, § 125.3, subd. (a).) The matters stated in Finding 21 establish that these costs for this matter total \$3,890.

9. In *Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth the standards by which a licensing board or bureau must exercise its discretion to reduce or eliminate cost awards, to ensure that the board or bureau does not deter licensees with potentially meritorious claims from exercising their administrative hearing rights. The court held that a licensing board requesting reimbursement for costs relating to a hearing must consider the licensee's subjective good faith belief in the merits of his position and whether the licensee has raised a colorable challenge to the proposed discipline. (*Id.*, at p. 45.) The board also must consider whether the licensee will be financially able to make later payments.

(Ibid.) Last, the board may not assess full costs of investigation and enforcement when it has conducted a disproportionately large investigation. *(Ibid.)*

10. All of these matters have been considered. The matters stated in Findings 5, 10, 19, and 20 and in Legal Conclusions 4 through 7 justify waiver of respondent's cost reimbursement obligation.

ORDER

It is hereby ordered that a public reproof be issued against respondent Michael Wayne Lowery, Designated Representative Certificate Number EXC 26286. Respondent must report this reproof as a disciplinary action.

DATE: 05/08/2024


JULIET E. COX

Administrative Law Judge

Office of Administrative Hearings

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

12 In the Matter of the Accusation Against:

Case No. 7639

13 **MICHAEL WAYNE LOWERY**
14 2400 Keystone Pacific Parkway, Suite B
Patterson, CA 95363

ACCUSATION

15 **Designated Representative Certificate**
16 **No. EXE 26286**

17 Respondent.

18
19 **PARTIES**

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

22 2. On or about July 21, 2021, the Board issued Designated Representative Certificate
23 Number EXE 26286 to Michael Wayne Lowery (Respondent). The Designated Representative
24 Certificate was in full force and effect at all times relevant to the charges brought herein and will
25 expire on July 1, 2024, unless renewed.

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JURISDICTION

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

4. Code section 4011 provides that the Board shall administer and enforce both the Pharmacy Law [Bus. & Prof. Code §§ 4000, *et seq.*] and the Uniform Controlled Substances Act [Health & Safety Code §§ 11000, *et seq.*].

5. Section 4300 of the Code states:

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

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

(1) Suspending judgment.

(2) Placing him or her upon probation.

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

(4) Revoking his or her license.

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

...

(e) The proceedings under this article shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of the Government Code, and the board shall have all the powers granted therein. The action shall be final, except that the propriety of the action is subject to review by the superior court pursuant to Section 1094.5 of the Code of Civil Procedure.

6. Section 4300.1 of the Code states:

The expiration, cancellation, forfeiture, or suspension of a board-issued 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 a licensee shall 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.

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STATUTORY PROVISIONS

7. Section 4301 of the Code states:

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

...

(g) Knowingly making or signing any certificate or other document that falsely represents the existence or nonexistence of a state of facts.

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

...

(i) The conviction of a crime substantially related to the qualifications, functions, and duties of a licensee under this chapter. The record of conviction of a violation of Chapter 13 (commencing with Section 801) of Title 21 of the United States Code regulating controlled substances or 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. The board may take action when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under Section 1203.4 of the Penal Code allowing the person to withdraw his or her plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, information, or indictment.

...

(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.

COST RECOVERY

8. Section 125.3 of the Code provides, in pertinent part, that the Board may request the administrative law judge to direct a licensee 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, with failure of the licensee to comply subjecting the license to not being
3 renewed or reinstated. If a case settles, recovery of investigation and enforcement costs may be
4 included in a stipulated settlement.

5 **FACTUAL ALLEGATIONS**

6 9. On or about January 22, 2022, at approximately 2:17 a.m., Respondent was arrested
7 by a Modesto Police Department officer after admittedly driving under the influence of alcohol,
8 and crashing his automobile into another vehicle, which injured the other driver. Respondent
9 submitted two breath samples beginning at 2:50 a.m., which resulted in blood alcohol
10 concentration (BAC) readings of .15.

11 10. On or about December 22, 2022, Respondent was convicted on his plea of no contest
12 to violating Vehicle Code section 23152, subdivision (b), a misdemeanor, following his arrest the
13 night of January 22, 2022. Respondent also admitted to the special allegation under Vehicle Code
14 section 23758 of having a blood alcohol content of .15 at the time of his arrest.

15 11. On or about May 23, 2023, Respondent renewed his designated representative license
16 on-line through the Board's website. One of the questions was "HAVE YOU BEEN
17 DISCIPLINED BY A PUBLIC AGENCY OR CONVICTED OF A CRIME SINCE THE LAST
18 RENEWAL CYCLE?" Respondent knowingly failed to disclose his December 22, 2022
19 conviction for violating Vehicle Code section 23152, subdivision (b) by selecting the following
20 response: "No, since my last renewal, I have not had a license disciplined by another
21 governmental agency and have not been convicted as defined in Section 490 of the Business and
22 Professions Code, or any violation of the law in this or any other state, the United States or other
23 country."

24 **FIRST CAUSE FOR DISCIPLINE**

25 (Unprofessional Conduct – Dangerous Use of Alcoholic Beverages)

26 12. Respondent is subject to disciplinary action under Code section 4301, subdivisions
27 (h) and/or (o), for using alcoholic beverages to the extent, or in a manner, as to be dangerous or
28 injurious to oneself or others. As set forth in paragraph 9, incorporated herein, on or about

1 January 22, 2022, Respondent was arrested by a Modesto Police Department officer after
2 admittedly driving under the influence of alcohol, and crashing his automobile into another
3 vehicle, which injured the other driver.

4 **SECOND CAUSE FOR DISCIPLINE**

5 (Unprofessional Conduct – Criminal Conviction)

6 13. Respondent is also subject to disciplinary action under Code section 4301,
7 subdivisions (l) and/or (o). As set forth in paragraph 9, incorporated herein, on or about
8 December 22, 2022, in *People v. Lowery*, case number CR-22-003476 in the Superior Court of
9 California for the County of Stanislaus, Respondent was convicted on his plea of no contest to
10 violating Vehicle Code section 23152, subdivision (b), a misdemeanor, following his arrest the
11 night of January 22, 2022. Respondent also admitted to the special allegation under Vehicle Code
12 section 23758 of having a blood alcohol content of .15 at the time of his arrest.

13 **THIRD CAUSE FOR DISCIPLINE**

14 (Unprofessional Conduct – False Representation)

15 14. Respondent is also subject to disciplinary action under Code section 4301,
16 subdivisions (g) and/or (o), for knowingly making or signing a document that falsely represents
17 the existence of a state of facts. As set forth in paragraph 10, incorporated herein, Respondent
18 knowingly made a false representation of fact when renewing his designated representative
19 license or about May 23, 2023 by failing to disclose his December 22, 2022 conviction.

20 **PRAYER**

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

23 1. Revoking or suspending Designated Representative Certificate Number EXE 26286,
24 issued to Michael Wayne Lowery;

25 2. Ordering Michael Wayne Lowery to pay the Board of Pharmacy the reasonable costs
26 of the investigation and enforcement of this case, pursuant to Business and Professions Code
27 section 125.3; and,

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

DATED: 10/31/2023

Sodergren,
Anne@DCA

Digitally signed by
Sodergren, Anne@DCA
Date: 2023.10.31 20:10:45
-07'00'

ANNE SODERGREN
Executive Officer
Board of Pharmacy
Department of Consumer Affairs
State of California
Complainant