

SUFFOLK COUNTY

In the Matter of
David Trinks, R.Ph.
PH License No. 19795
License Expired 12/31/04

1. The parties enter into this Consent Agreement for Probation ("Agreement") in order to resolve disputed matters arising out of the complaint pending against Registrant before the Board as Docket No. PH-05-025 (the "Complaint").
2. Registrant agrees that this Agreement has been entered into as a result of his having pled guilty to and having been convicted of five counts of larceny (the "Convictions") on or about May 27, 2005 in Norfolk Superior Court (Docket No. NOCR-04-0456). Registrant had previously surrendered his license to practice pharmacy in the Commonwealth of Massachusetts to the Board pursuant to the terms of that certain Consent Agreement executed by Registrant and the Board effective March 10 2005 (the "2005 Consent Agreement").
3. Pursuant to the terms of the 2005 Consent Agreement, the Board accepted the Registrant's contract with the Massachusetts Professional Recovery System ("MPRS") dated December 7, 2004 ("the Contract"), the conditions of the Contract being incorporated into the terms of this Agreement.
4. The Board issued an Order to Show Cause dated April 12, 2006 (the "Order") regarding the Convictions. On September 10, 2007, the Board issued its *Board Ruling on Cross Motions for Summary Decision* granting the Prosecutor's motion as set forth therein.
5. Accordingly, to resolve disputed matters relating to the Order and the Convictions, the Registrant freely agrees to the following:

- a. The Registrant agrees that his conduct described in Paragraph 2 above constitutes professional misconduct warranting Board disciplinary action pursuant to G.L. c. 112, §§ 42A and 61 and Board Regulations 247 CMR 9.01(1);
 - b. Within six months of the date Registrant executes this Agreement, Registrant shall pass (grade of 75% or more) the Multistate Professional Jurisprudence Examination (MPJE);
 - c. Registrant shall have completed a minimum of 45 continuing education units (CEUs) credits in compliance with 247 CMR 4.03(4);
 - d. Upon receipt of official documentation of Registrant's completion of MPJE and required CEUs, the Board will reinstate Registrant's license on PROBATIONARY STATUS, continuing for a minimum five (5) year period (the "Probation Period"); and
 - e. Termination of the Probation Period shall be governed by Paragraph 7 of this Agreement. The Registrant may be required to appear before the Board in connection with any petition to terminate the Probation Period.
6. During the Probation Period, the Registrant agrees:
- a. to undergo monitoring by MPRS in accordance with the Contract, including random drug/alcohol screenings as may be required by MPRS or the Board;
 - b. to refrain from the consumption of alcohol and the use of all controlled substances unless specifically prescribed by a treating physician and approved by the Board, who has been informed of the Registrant's history, for the purpose of prescribing for a legitimate medical purpose and in the usual course of the physician's practice;
 - c. that he may not self-prescribe controlled substances and shall adhere to all laws and regulations pertaining to the dispensing, administration and distribution of controlled substances;
 - d. that he must notify the Board in writing of any change in his current address of record within seven (7) calendar days of such changes; and
 - e. that he hereby waives any privileges concerning any and all information, reports and records relating to the Contract and this Agreement and the disclosure of such information to the Board. This release includes the Registrant's waiver of any privileges and immunities he may possess regarding all material covered by 42 CFR Part 2 and the Criminal Offender Records Information (CORI) Act (G.L. c. 6, §§ 167-178) and authorizes the Board to have access to all such information and records.

7. Registrant agrees that the termination of the Probation Period shall be granted only if he has met the following conditions:
 - a. Registrant must apply in writing to the Board for termination of the Probation Period. The Board will not consider such a request without a recommendation from MPRS, and the Board may request a conference to discuss the merits of such request; and
 - b. Registrant has fully complied with all terms and conditions of the Contract and this Agreement and meets all other requirements for licensure.
8. This Agreement and its contents shall be incorporated into the records maintained by the Board, are matters of public record, subject to disclosure, without limitation, to the public and equivalent state licensing boards.
9. The Board agrees that in return for the Registrant's execution of this Agreement, the Board will not advance the prosecution of the Registrant pursuant to the Complaint. Any and all other rights of the Board to take action within the scope of its authority are expressly reserved.
10. The Registrant understands and agrees that his failure to comply with the terms of this Agreement shall nullify the representations contained in Paragraph 9, and permit the Board to initiate formal adjudicatory action under the State Administrative Procedure Act, G.L. c. 30A, and the Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.00 *et seq.*
11. The Registrant understands and agrees that, at any time during the Probation Period, upon a determination by the Board of any violation of any of the terms and conditions of the Contract or this Agreement or any violation of the applicable laws, rules and regulations governing the practice of pharmacy, the Board may immediately suspend the Registrant's license to practice pharmacy without the requirement of further proceedings pursuant to G.L. c. 30A, for such period and on such terms as the Board may deem necessary and appropriate..
12. The Registrant understands and agrees that should he be found to have violated any of the statutes and/or regulations governing the practice of pharmacy for conduct occurring during the Probation Period, the Board may consider the conduct of the Registrant described in Paragraph 2 and more fully described in Complaint Docket No. PH-05-025 in determining an appropriate sanction for the subsequent offense.
13. The Registrant understands and agrees that any of the following may be considered by the Board to be a violation of this Agreement and a basis for disciplinary action by the Board:
 - a. A sample of the Registrant's blood, breath or other substance is found to contain

any evidence of alcohol or any controlled substance in violation of the Contract or this Agreement;

- b. the Board has other reliable evidence that the Registrant has used alcohol or any controlled substance in violation of the Contract or this Agreement;
 - c. the Registrant misses, or fails to call for any random screening tests, excluding an administrative or laboratory error beyond the control of the Registrant;
 - d. the Registrant refuses to cooperate with MPRS in its monitoring; or
 - e. the Registrant withdraws any waiver or release provided and/or filed in connection with the Contract or this Agreement.
14. The Registrant understands and agrees that his decision to enter into this Agreement and to accept the terms and conditions herein described is a final act and is not subject to reconsideration or judicial review.
15. The Registrant states that he has used legal counsel in connection with his decision to enter into this Agreement or, if he did not, that he had an opportunity to do so and that his decision to enter into this Agreement was made of his own free will.
16. The Registrant certifies that he has read this document entitled "Consent Agreement". The Registrant understands that, by executing this Agreement, he is waiving his right to a formal hearing at which he would possess the rights to confront and cross-examine witnesses, to call witnesses, to present evidence, to testify on his own behalf, to contest the allegations, to present oral argument, to appeal to court in the event of an adverse ruling, and all other rights set forth in G.L. c. 30A and 801 CMR 1.01 *et seq.* Registrant states that he further understands that in executing this document entitled "Consent Agreement", he is knowingly and voluntarily waiving his right to a formal hearing and to all of the above listed rights.

Erin Browne 10/24/07
Witness (sign name and date)

Erin Browne
Witness (print name)

David Trinks 10/24/07
David Trinks, R.Ph. (sign and date)

Board of Registration in Pharmacy
James T. DeVita
James T. DeVita, R.Ph., Pres.
Effective Date: 11/1/07

Certified Mail No. 7006 2760 0003 7733 2720
Decision No.



DEVAL PATRICK
GOVERNOR

TIMOTHY MURRAY
LIEUTENANT GOVERNOR

JUDYANN BIGBY, MD
SECRETARY

JOHN AUERBACH
COMMISSIONER

The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Department of Public Health
Division of Health Professions Licensure

Board of Registration in Pharmacy
239 Causeway Street, Suite 200, 2nd Floor
Boston, MA 02114
(800) 414-0168
<http://www.mass.gov/reg/boards/ph>

September 10, 2007

VIA FAX, FIRST CLASS AND CERTIFIED MAIL

RETURN RECEIPT REQUESTED NO. 7003 1010 0003 3509 8697

Francis J. DiMento, Jr.
7 Faneuil Marketplace, 3rd Floor
Boston, MA 02109

VIA INTEROFFICE DELIVERY

Eugene Langner, Prosecuting Counsel
Office of Prosecutions
Division of Health Professions Licensure
Department of Public Health
239 Causeway Street
Boston, MA 02114

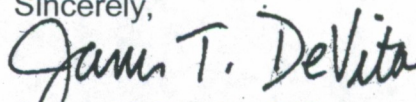
**RE: In the Matter of David Trinks ("Respondent")
Board of Registration in Pharmacy ("Board"), Docket No. PH-05-025**

Dear Counsel:

Enclosed is the *Board Ruling on Cross Motions for Summary Decision* ("Ruling") issued on September 10, 2007 by the Board of Registration in Pharmacy (Board) in connection with the above-referenced matter. Respondent has a right to a hearing on the issue of sanctions. He will waive this right if the enclosed sanction hearing request form is not completed and filed with the Administrative Hearings Counsel within seven (7) days of the date of this letter.

Upon receipt of a timely filed request for a sanction hearing, the Board will issue a notice setting the date of the hearing.

Sincerely,

A handwritten signature in black ink that reads "James T. DeVita". The signature is written in a cursive style with a large, stylized "J" and "D".

James T. DeVita, R.Ph.
President
Board of Registration in
Pharmacy

Enc.

cc: Susan Manning, Board Counsel

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK COUNTY

BOARD OF REGISTRATION
IN PHARMACY

IN THE MATTER OF)
DAVID TRINKS)
LICENSE NO. 19795)
(LICENSE EXP. DATE 12/31/04))
_____)

DOCKET NO. PH-05-025

**BOARD RULING ON CROSS
MOTIONS FOR SUMMARY DECISION**

I. Introduction

This matter comes before the Board of Registration in Pharmacy ("Board") on cross motions for summary decision filed by David Trink's ("Respondent") and Prosecuting Counsel pursuant to 801 Code of Massachusetts Regulations ("CMR") 1.01 (7) (h). Prosecuting Counsel's Motion for Summary Decision asserts that summary decision should be granted in his favor based on Respondent's five (5) criminal convictions for violating G.L. c. 266, § 30 (larceny of property). Respondent's Motion for Summary Decision asserts that he is entitled to entry of summary decision in his favor on the grounds that the terms of a March 4, 2005 Consent Agreement Respondent entered into with the Board ("Consent Agreement") preclude the Board from disciplining him for his criminal convictions.

II. Rulings

For the reasons stated below, the Board is not precluded by the Consent Agreement from disciplining Respondent for his five criminal convictions for violations of G.L. c. 266, § 30, which convictions occurred after the execution of the Consent Agreement. The Board grants Prosecuting Counsel's motion, denies Respondent's motion, and notifies Respondent of his right to request a hearing on sanctions.¹

III. Background

Respondent admits that in 2004, while working as a pharmacist, he engaged in: (1) the unauthorized use of controlled substances; and (2) larceny of property (hereinafter "larceny" or "theft"). Respondent and the Board executed

¹ The evidence in this summary decision proceeding, consisting of Exhibits 1-5 of the record on summary decision, was before the Board. Therefore, no tentative decision is required. 801 CMR 1.01 (11).

the Consent Agreement (Exhibit 4A) on March 4, 2005. The Consent Agreement was entered into "as a result of [Respondent's] unauthorized personal use of ... controlled substances." Thereafter, on May 27, 2005, Respondent was convicted of five (5) counts of larceny in violation of G.L. c. 266, § 30 (Exhibit 2B). On April 12, 2006, the Board issued an Order to Show Cause charging that Respondent's license to practice as a Registered Pharmacist in the Commonwealth of Massachusetts is subject to discipline based on his (1) convictions for five (5) counts of larceny; and (2) in-court admissions that he possessed drugs with the intent to distribute.² The Order to Show Cause does not allege unauthorized drug use. On May 4, 2006, Respondent filed an Answer largely admitting the factual allegations as to his criminal conduct and asserting affirmative defenses. On July 12, 2006, Prosecuting Counsel filed a Motion for Summary Decision, with Exhibits A-E attached thereto. On July 12, 2006, Respondent filed a Motion for Summary Decision, with Exhibit A attached thereto. Both parties filed oppositions. Respondent filed the Consent Agreement as an attachment to his opposition. By agreement of counsel, Respondent also filed Exhibit 5. Upon Respondent's request, the Board held a hearing on December 12, 2006 on the parties' cross motions for summary decision. Both sides presented oral arguments. There is one tape of the hearing.

IV. Exhibits

The following exhibits are entered into the record on summary decision as Exhibits 1 through 5.

Exhibit 1: Respondent's Motion for Summary Decision filed July 12, 2006, with the following exhibit attached:

A: *Board Ruling on Prosecuting Counsel's Motion for Summary Decision*, dated May 12, 1998, Board of Registration in Pharmacy Docket No. PH-96-102, In the Matter of Edmund F. Ahearn, Jr.;

Exhibit 2: Prosecuting Counsel's Motion for Summary Decision filed July 12, 2006, with the following exhibits attached:

² The Order to Show Cause charges Respondent with being convicted of theft (five counts) and admitting in court that he possessed drugs with the intent to distribute. Prosecuting Counsel's motion and legal arguments only address the first allegation as to the convictions and do not address the second allegation as to his in-court admission, other than attaching as an exhibit the relevant criminal docket sheets. Therefore, the Board treats Prosecuting Counsel's motion as a motion for partial summary decision as to the convictions only. Given the ruling in this matter that Respondent's license is subject to discipline based on his convictions for five (5) counts of larceny, the Board dismisses without prejudice the remaining allegation in the Order to Show Cause as to Respondent's criminal admissions. It does so for the purpose of allowing this matter to proceed directly to a sanction hearing and final decision and order without waiting for the completion of a full adjudicatory hearing on the merits of that remaining allegation.

- A: Respondent's Record of Standing with the Board, dated July 11, 2006;
- B: *Commonwealth v. David Trinks*, NOCR 2004-00456, Counts 001 through 005, Norfolk Superior Court, Department of the Trial Court of Massachusetts, Certified Copies of Indictments, Case Summary and Criminal Docket Sheet;
- C: *Commonwealth v. David Trinks*, Docket No. 0453CR910, Counts 1 through 3, Woburn District Court, Department of the Trial Court of Massachusetts, Certified Copy of Criminal Docket Sheet;
- D: Order to Show Cause, Docket No. PH-05-025, dated April 12, 2006; and
- E: Answer of Respondent filed May 4, 2006.

Exhibit 3: Prosecuting Counsel's Response to Respondent's Motion for Summary Decision, filed July 24, 2006;

Exhibit 4: Respondent's Response to Prosecuting Counsel's Motion for Summary Decision, filed July 26, 2006, with the following exhibit attached:

- A: Consent Agreement between Respondent and the Board dated March 4, 2005.

Exhibit 5: 11 pages of documents.

V. Record on Summary Decision: Findings of Fact

Set out below are the facts viewed in the light most favorable to Respondent. In addition, these facts have been established by a preponderance of the evidence:

A. Findings as to Jurisdiction and Notice

1. At all times relevant hereto, Respondent was a pharmacist licensed to practice in the Commonwealth or had a license subject to renewal. The Board issued him a license to practice as a Registered Pharmacist in Massachusetts, PH License No. 19795, on or about January 28, 1986. His license expired on December 31, 2004 and has not been renewed. (Exhibits 1, 2)
2. Respondent has been duly notified of these disciplinary proceedings. He is represented by counsel who has actively participated in these proceedings. He has filed an answer and other pleadings. (Exhibits 1, 2, and 4)

B. Undisputed Facts

3. During the first six months of 2004, while engaged in the practice of his profession as a pharmacist at Heights Pharmacy in Needham, Massachusetts, Respondent:

(1) engaged in the unauthorized personal use of controlled substances (Roxicet, Vicodin, Xanax, Depo-Testosterone and OxyContin) (Exhibit 4A); and

(2) was indicted on (5) counts of stealing a controlled substance from persons authorized to dispense or possess in violation of G.L., c. 94C ("Chapter 94C"), § 37. (Exhibit 2B)

4. On December 7, 2004, Respondent entered into a treatment contract with the Massachusetts Professional Recovery System ("MPRS"), the Board's substance abuse rehabilitation program. (Exhibit 4A).

5. On March 4, 2005, the Board and Respondent entered into the Consent Agreement, which provides as follows, in pertinent part:

1: The parties enter into this Consent Agreement in order to resolve disputed matters arising out of the complaint pending against Registrant (hereinafter "Respondent") before the Board as Docket No. PH-05-025 ("Complaint").

2. Respondent agrees that this Agreement has been entered into as a result of his unauthorized personal use of the controlled substances: Roxicet, Vicodin, Xanax, Depo-Testosterone and OxyContin, on diverse [sic] dates during 2004, while employed at Heights Pharmacy (Permit No. 10398) 882 Highland Avenue, Needham, Massachusetts, 02194.

3. The Board ...[accepts] Respondent's contract with the Massachusetts Professional Recovery System ("MPRS") dated December 7, 2004 ("Contract") [and incorporates] the conditions of the Contract... into the terms of this Agreement.

4 (a). Respondent agrees that his conduct in Paragraph 2 constitutes professional misconduct warranting Board disciplinary action pursuant to G.L. c. 112, § 61 and Board Regulations 247 CMR 9.01 (1) and 9.01 (6).

...

4 (c). Respondent agrees that during the twelve months of the Contract Period, or such longer period as the Board may determine to be appropriate, Respondent shall surrender his pharmacist license to the Board (the "Surrender Period"). After the first twelve

months of the Contract Period, Respondent may petition the Board to terminate the Surrender Period. Registrant shall be required to be in compliance with the terms and conditions of the Contract and this Agreement to petition the Board to terminate the Surrender Period. If the Respondent is determined to be in compliance with all required terms of this Agreement and the Contract, the Board will terminate the Surrender Period and place Respondent's license on probationary status for a minimum four-year period commencing on the date of the termination of the Surrender Period (the "Probation Period"). The Respondent may be required to appear before the Board in connection with any petition to terminate the Surrender Period. The Board will not consider such a petition without a recommendation by the MPRS Committee.

...

8. The Board agrees that in return for the Respondent's execution of the Agreement, the Board will not advance the prosecution of the Respondent pursuant to the Complaint. Any and all other rights of the Board to take action within the scope of its authority are expressly reserved.

...

(Exhibit 4A)

6. Respondent's pharmacist license was surrendered to the Board pursuant to the terms of the Consent Agreement. (Exhibit 4A)

7. On or about May 27, 2005, in Norfolk Superior Court Docket No. NOCR-04-0456, Respondent pled guilty to five (5) counts of larceny of property. The court sentenced Respondent to five years probation, conditions of which include completion of the MPRS program, payment of ninety dollars (\$90) to the victim witness fund, and payment of a monthly supervision fee at the discretion of the probation department. Thus, Respondent was convicted of five (5) counts of larceny. (Exhibits 2D and 2E)

VI. Conclusions of Law

1. Based on Finding of Fact at ¶ 1, above, the Board has jurisdiction to hear this disciplinary matter involving Respondent's license to practice as a pharmacist in Massachusetts, PH License No. 19795. *Wang v. Board of Registration in Medicine*, 405 Mass. 15, 19 - 20 (1989) (where professional's license to practice in the Commonwealth has expired, board had jurisdiction based on professional's inchoate right to renew license).

2. Based on Finding of Fact at ¶ 2, above, Respondent has been duly notified of this proceeding.

3. Based on Finding of Fact at ¶ 7 above, each of Respondent's five (5) criminal convictions constitute gross misconduct, deceit and an offense against the laws of the Commonwealth, warranting discipline under G.L. c. 112, §§ 42A and 61 and Board regulation 247 CMR 9.00 for violation of the Code of Professional Conduct for Registered Pharmacists, Pharmacies and Pharmacy Departments, specifically: (a) 247 CMR 9.01 (1) for failure to conduct professional activities in conformity with federal, state, and municipal laws, ordinances, and regulations.

4. Based on Finding of Fact at ¶ 7 above, each of Respondent's five (5) criminal convictions demonstrates a lack of good moral character as required for licensure as a pharmacist in the Commonwealth pursuant to Board regulation 247 CMR 3.01 (1) (a) (4) and constitutes conduct that undermines public confidence in the integrity of the pharmacy profession, warranting discipline under G.L. c. 112, §§ 42A and 61. *Sugarman v. Board of Registration in Medicine*, 422 Mass. 338 (1996); *Kvitka v. Board of Registration in Medicine*, 407 Mass. 140, 143, cert. denied, 498 U.S. 823 (1990); *Raymond v. Board of Registration in Medicine*, 387 Mass. 708, 712-713 (1982).

Discussion

The standard governing summary decision in an administrative proceeding corresponds to that articulated in the Massachusetts Rules of Civil Procedure, Rule 56. *Caitlin v. Board of Registration of Architects*, 414 Mass. 1, 7 (1992). Summary decision should be entered 1) when there is no genuine issue of material fact; and 2) when there is substantive law under which such decision may be entered for the moving party. *Theran v. Rokoff*, 413 Mass. 590, 591 (1992). A party moving for summary decision assumes the burden of affirmatively demonstrating that there is no genuine issue of fact on every relevant issue raised by the pleadings. *Attorney General v. Bailey*, 386 Mass. 371 (1982); *Mack v. Cape Elizabeth School Bd.*, 553 F.2d 720, 722 (1st Cir. 1977). All doubt as the existence of a genuine issue of material fact must be resolved against the party moving for summary decision. *Noble v. Goodyear Tire & Rubber Co.*, 34 Mass. App. Ct. 397, 402 (1993). Administrative regulation 801 CMR 1.01 (7) (h) of the Standard Adjudicatory Rules of Practice and Procedure, codified at 801 CMR 1.00 *et seq.*, parallels the standards applicable to summary decision set out above. Both parties agree that there are no genuine issues of material fact in dispute and that this matter may be resolved as a matter of law.

The issue before the Board is does the Consent Agreement preclude the Board from prosecuting Respondent for the five criminal convictions that occurred after the parties executed the Consent Agreement?

Prosecuting Counsel has moved for summary judgment based on Respondent's undisputed criminal convictions. The gravamen of Prosecuting Counsel's motion and opposition to Respondent's Motion for Summary Decision

is that the Board has the statutory and regulatory authority to take disciplinary action against Respondent for his May 2005 criminal convictions and that neither the terms of the Agreement nor the doctrine of estoppel bar the Board from doing so. Prosecuting Counsel submits that Respondent's convictions for larceny of property constitute deceit, gross misconduct, and offenses against the laws of the Commonwealth, warranting discipline under G.L. c. 112, §§ 42A and 61 and Board regulation 247 CMR 9.00 for violation of the Code of Professional Conduct for Registered Pharmacists, Pharmacies and Pharmacy Departments, specifically: (a) 247 CMR 9.01 (1) for failure to conduct professional activities in conformity with federal, state, and municipal laws, ordinances, and regulations, demonstrate a lack of good moral character as required for licensure as a pharmacist in the Commonwealth pursuant to Board regulation 247 CMR 3.01 (1) (a) (4) and constitute conduct that undermines public confidence in the integrity of the pharmacy profession, warranting discipline under G.L. c. 112, §§ 42A and 61. *Sugarman v. Board of Registration in Medicine*, 422 Mass. 338 (1996); *Kvitka v. Board of Registration in Medicine*, 407 Mass. 140, 143, cert. denied, 498 U.S. 823 (1990); *Raymond v. Board of Registration in Medicine*, 387 Mass. 708, 712-713 (1982). Prosecuting Counsel asks the Board to grant his motion and revoke Respondent's license to practice as a pharmacist in the Commonwealth, including his right to renew.

Respondent's motion and response to Prosecuting Counsel's Motion for Summary Decision assert that the Board should deny Prosecuting Counsel's motion and grant his motion because (1) the Consent Agreement resolved both his unauthorized personal use of drugs matter and criminal matters that were pending when he signed the Consent Agreement; and (2) the Consent Agreement provided for the return of his license after the one year surrender period and the Board is bound by its agreement to return his license to him and estopped from deviating from its terms. He states that the Consent Agreement provides that so long as he is in compliance with its terms and his MPRS contract (which he asserts he is)³, he may petition the Board to: terminate the one year surrender period; return his license to him; and put him on four years of probation. He further submits that the one-year surrender period has expired and that he is entitled to the return of his license, regardless of his subsequent convictions.

The Board is charged with the responsibility of protecting the public health, safety, and welfare and to that end, insuring that pharmacists practice in a safe, competent, and professional manner. The Board has broad authority to regulate the conduct of the profession and broad discretion in determining an appropriate sanction. *Sugarman v. Board of Registration in Medicine*, 422 Mass. 338, 342

³ For purposes of summary decision, Prosecuting Counsel did not challenge this assumption. However, the record on summary decision contains no evidence of these assertions, particularly Respondent's compliance with the requirements of the substance abuse rehabilitation program or that he has petitioned the Board to terminate the suspension. Such evidence could be relevant to disposition and Respondent may choose to present it at any hearing on sanctions which is held.

(1996); see also *Kvitka v. Board of Registration in Medicine*, 407 Mass. 140, cert. denied, 498 U.S. 823 (1990); *Raymond v. Board of Registration in Medicine*, 387 Mass. 708, 713 (1982). The Board is responsible to the public for the discipline of pharmacists who abuse their obligations and responsibilities of their profession. *Arthurs v. Board of Registration in Medicine*, 383 Mass. 299, 316 (1981) (acknowledging that a board must "provide itself with the flexibility it needed to investigate and to determine whether the public interest requires the revocation of a [professional's] license", consistent with the requirements of due process and G.L. c. 30A), citing *Levy v. Board of Registration and Discipline in Medicine*, 378 Mass. 519, 526 (1979). Boards have broad latitude in shaping appropriate sanctions as to each subsequent case that may occur against the same professional. *Matter of Saab*, 406 Mass. 315, 326-327 (1989). (the totality of the circumstances, including prior discipline, may be taken into consideration on the question of sanction). Boards have a mandate to police the profession and take appropriate disciplinary action against those members of the profession "who do not live up to the solemn nature of their public trust." *Arthurs v. Board of Registration in Medicine*, 383 Mass. 299, 316 (1981).

Respondent's first contention is that the Board is bound by its contracts and that, by its terms, the Consent Agreement comprehensively resolved both his unauthorized personal use of drugs matter and criminal matters that were pending when the parties signed the Agreement. There is no doubt that the Board is bound by its contracts and that the Consent Agreement is a contract. However, the Consent Agreement is not as comprehensive as Respondent contends. The Consent Agreement states that Respondent is entering into it as a result of his unauthorized personal use of controlled substances while employed as a pharmacist and that he acknowledges that his license is subject to discipline for this unauthorized drug use. It imposes a sanction appropriate to addressing Respondent's substance abuse conduct, including a requirement that he be fully compliant with his MPRS contract. Reading the Consent Agreement as a whole, it is a document that addresses Respondent's unauthorized drug use. Notably, it does not include a reference to any criminal charges or criminal convictions.

In return for Respondent's signing of the Consent Agreement, the Board agreed not to prosecute Respondent pursuant to the pending "Complaint PH-05-025." Respondent argues that in agreeing to not prosecute him "pursuant to the Complaint," the Board was agreeing to not prosecute him not only for the unauthorized drug use to which he admitted in the Consent Agreement, but for any subsequent criminal convictions for larceny of property. Although the Consent Agreement does not clearly define Complaint, a reasonable interpretation, in looking at the document as a whole, is that it refers to Respondent's unauthorized drug use described in Paragraph 2. What is clear is that the Board's agreement to not prosecute Respondent "pursuant to the Complaint" could not have included an agreement to not prosecute him for the subsequent convictions, because those convictions had not yet occurred. They

did not exist at the time the parties executed the Consent Agreement and could not have been the subject of the pending "Complaint."⁴ See *Kobrin v. Board of Registration in Medicine*, 444 Mass 837 (2005).⁵ On the topic of future claims, the Consent Agreement states that the Board expressly retains its authority to seek further relief against Respondent. (Consent Agreement, ¶¶ 8 and 10). Moreover, it does not contain an agreement that the Board will not prosecute Respondent for future matters. The Board finds that the express terms of the Consent Agreement do not bar the Board from prosecuting Respondent for the subsequent convictions.

Respondent's second argument is that the Board made a deal with him to return his license to him in one year and the Board should be estopped from reneging on that deal. He argues that the Board's conduct of seeking to revoke his license for the convictions is a breach of the Board's agreement, contained in the Consent Agreement, to return his license to him after a minimum of one year. The doctrine of estoppel may be used to preclude a party from asserting a position in one legal proceeding that is contrary to a position it had asserted in another proceeding. Any estoppel argument by Respondent fails because it is premised on the incorrect, and legally unsupported, assumption that it is unfair or inconsistent for the Board to initiate a second disciplinary action based on subsequent convictions when Respondent is already under a Consent Agreement based on earlier offenses and is making progress on satisfying the sanction requirements of that Consent Agreement. The Board's conduct is neither unfair nor inconsistent. First, as made clear in *Kobrin v. Board of Registration in Medicine*, 444 Mass 837 (2005) the Board has the regulatory and statutory authority to resolve one matter while indictments are pending and then commence a separate action based on a subsequent conviction. Indeed, the

⁴ Respondent submitted as Exhibit 5 a packet of apparently Board-generated documents, predating the Consent Agreement, one page of which is entitled complaint. To the extent that Respondent argues that Exhibit 5 supports his claim that the Complaint referenced in the consent Agreement encompassed the convictions, such argument fails. Those documents refer to pending criminal charges, not convictions.

⁵ The Board finds the case of *Kobrin v. Board of Registration in Medicine*, 444 Mass 837 (2005) instructive in addressing the issues before it, although neither party cited to it. In that case the Supreme Judicial Court ("SJC") implicitly recognized that the Board of Registration in Medicine acted in a manner consistent with its statutory and regulatory authority, and did not run afoul of one of its licensee's due process rights, when it brought a second disciplinary action against licensee Dr. Kobrin based on subsequent convictions, after it brought then closed an earlier disciplinary action against Dr. Kobrin when he was under indictment. Dr. Kobrin argued that the board was barred from proceeding against him based on the convictions because the convictions stemmed from conduct that was before the board in the first proceeding. The SJC rejected his arguments and emphasized that the board had the authority to discipline the doctor based simply on the convictions (as does the Board in this action), despite the earlier matter. The SJC held that because the convictions had not yet occurred at the time that the first matter was resolved, the board was not precluded from going forward on the convictions once they did occur. In *Kobrin*, the first matter against Dr. Kobrin was dismissed whereas in the instant case the Board resolved the first matter against Respondent by Consent Agreement. Nonetheless, the decision underscores that it is a proper use of a board's authority to proceed with a second disciplinary action based on a subsequent occurring conviction.

Board has a statutory obligation to resolve matters before it and not wait until after the disposition of related criminal charges.⁶ Second, as pointed out by Prosecuting Counsel, Respondent fails to acknowledge that the one year time period was not firm, but subject to Board discretion: The Board retained the final authority to determine how long the Respondent would be prohibited from practicing. The Board is not deviating from the terms of the contract by exercising that discretion.⁷

The [Respondent] agrees that during the twelve months of the Contract Period, or such longer period as the Board may determine to be appropriate, [Respondent] shall surrender his license to the Board (the "Surrender Period") (emphasis added). (Exhibit 4A, Paragraph 4 (c)).

Respondent's argument assumes, incorrectly, that having imposed a sanction for one offense, the Board is precluded from imposing a different sanction for a different and subsequent offense. This is simply not so.⁸ The Board has the authority to impose a separate sanction appropriate to each subsequent offense. The Board is not deviating from the terms of the Consent Agreement. It is proceeding with a separate disciplinary action based on a subsequent violation and seeking to impose a new sanction appropriate to that violation.

Third, Respondent challenges the Board's authority to discipline him based solely on convictions. Respondent argues that because Respondent admitted to his wrongful conduct, the "fact that Respondent was convicted is

⁶ G.L. c. 112, § 63, entitled *Pendency of Action Before Criminal Court no Ground for Delay, or Vice Versa*, provides that professional licensing boards shall not defer disciplinary action pending resolution of criminal proceedings. Consistent with this statute and its goal of avoiding delay, the Board resolved the unauthorized drug use matter without waiting for the resolution of the criminal matters. It would be inconsistent with the goal of the statute if the Board's prompt action in resolving Respondent's admitted drug use matter precluded it from seeking further discipline based on subsequent convictions. It would not further the purpose of the statute, and the Board's overall public protection mission, to hold that by resolving the drug abuse matter, the Board is precluded from prosecuting Respondent based on subsequent occurring convictions. The statute anticipates that a licensee could be subject to an initial disciplinary action and sanction based on conduct other than the conviction, and then, if the criminal matters result in convictions, to a subsequent disciplinary action and sanction.

⁷ Given the seriousness of Respondent's five convictions, and the Board's mission to protect the public and the public's confidence in the integrity of the profession, the convictions could well constitute appropriate grounds for extending the Surrender Period.

⁸ The Board's purpose in seeking to discipline Respondent's license for both his personal drug use and his subsequent and serious multiple criminal convictions is remedial and in furtherance of its mission to protect the public and the public's confidence in the integrity of the pharmacy profession. *See Kvitka v. Board of Registration in Medicine*, 407 Mass. 140, 143, cert. denied, 498 U.S. 823 (1990) (double jeopardy does not bar board from shaping appropriate remedial sanctions such as ordering a licensee to undergo a course of remedial action (drug rehabilitation in the instant case) and suspending or revoking the license; moreover, for purposes of double jeopardy, suspension of a professional license by a board is considered remedial not punitive.)

wholly irrelevant to our inquiry in this case." (Exhibit 4). Respondent's argument is legally incorrect. It is well-established that the Board has the statutory and regulatory authority to discipline pharmacists based solely on convictions. Respondent's convictions, be they felonies or misdemeanors, constitute "offenses against the laws of the Commonwealth" warranting discipline under G.L. c. 112, §§ 42A and 61 and violate Board regulation 247 CMR 9.01 (1) for failure to conduct professional activities in conformity with federal, state, and municipal laws, ordinances, and regulations.

As discussed above the Board finds that neither the terms of the Consent Agreement nor the other arguments raised by Respondent preclude the Board from proceeding with this disciplinary action. The Consent Agreement does not preclude the Board from proceeding as to the subsequent criminal convictions. Respondent's license is subject to discipline as a matter of law. The Board grants Prosecuting Counsel's motion as to the convictions to the extent set out in this ruling and denies Respondent's motion.

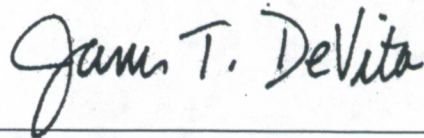
The Board has broad authority in arriving at a sanction that will protect the public health, safety, and welfare. *Strasnick v. Board of Registration in Pharmacy*, 408 Mass. 654, 659-660 (1990). The Board could properly determine that a sanction in addition to and different from that provided for in the Consent Agreement is warranted given the seriousness of the crimes of which he was convicted. Any disposition should take into account the sanction the Board previously imposed and Respondent's compliance therewith.

At its meeting on September 5, 2007, the Board voted to (1) grant Prosecuting Counsel's Motion for Summary Decision as set forth herein; and (2) deny Respondent's Motion for Summary Decision by the following vote: In favor: James T. DeVita, R.Ph., Pres., George A. Cayer, R.Ph., Karen Ryle, R.Ph., Joel R. Berman, R.Ph., Sophia Pasedis, R.Ph., Pharm.D., William A. Gouveia, R.Ph. M.S., Kathy J. Fabiszewski, Ph.D., R.N., Steven Budish, Public Member and Marilyn M. Barron, MSW, Public Member. Opposed: None. Absent: Donald D. Accetta, M.D. Abstained: None.

Respondent is hereby notified that he has a right to a hearing on the issue of sanctions. *Veksler v. Board of Registration in Dentistry*, 429 Mass. 650 (1999). Respondent will waive this right if he or his attorney does not complete and file the enclosed form with the Administrative Hearings Counsel within seven (7) days of the date of the issuance of this ruling. Respondent's failure to request a sanction hearing by timely returning the enclosed form will result in the Board deciding on a sanction without Respondent's input. If Respondent fails to request a sanction hearing in a timely manner, the Board may proceed to revoke, suspend, or take other disciplinary action against Respondent's license to

practice as a registered pharmacist in the Commonwealth of
Massachusetts, or his right to renew such license.

Board of Registration in Pharmacy



James T. DeVita, R.Ph.
President

Date Issued: September 10, 2007
Enc: Sanction Hearing Request Form
Notified:

VIA FIRST CLASS AND CERTIFIED MAIL

RETURN RECEIPT REQUESTED NO. 7003 1010 0003 3509 8697

Francis J. DiMento, Jr.
7 Faneuil Marketplace, 3rd Floor
Boston, MA 02109

VIA INTEROFFICE DELIVERY

Eugene Langner, Prosecuting Counsel
Office of Prosecutions
Division of Health Professions Licensure
Department of Public Health
239 Causeway Street
Boston, MA 02114

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK COUNTY

BOARD OF REGISTRATION IN PHARMACY

In the Matter of)
David W. Trinks, R.Ph.)
Pharmacist Registration No. 19795)
_____)

Docket No. PH-05-025

CONSENT AGREEMENT

The Board of Registration in Pharmacy ("Board") and David W. Trinks, R.Ph. ("Registrant"), a pharmacist registered by the Board (Pharmacist Registration No. 19795), do hereby stipulate and agree that the following information shall be entered into and become a permanent part of the file of Registrant which is maintained by the Board:

1. The parties enter into this Consent Agreement ("Agreement") in order to resolve disputed matters arising out of the complaint pending against Registrant before the Board as Docket No. PH-05-025 (the "Complaint").
2. The Registrant agrees that this Agreement has been entered into as a result of his unauthorized personal use of the controlled substances: Roxicet, Vicodin, Xanax, Depo-Testosterone and OxyContin, on divers dates during 2004, while employed at Heights Pharmacy (Pemit No. 10398), 882 Highland Avenue, Needham, Massachusetts, 02194.
3. The Board complaint committee reviewed the Complaint investigative report on November 09, 2004, and subsequently reviewed and accepted Registrant's contract with the Massachusetts Professional Recovery System ("MPRS") dated December 07, 2004 ("Contract"), the conditions of the Contract being incorporated into the terms of this Agreement.
4. Accordingly, the Registrant freely agrees to the following:
 - a. the Registrant agrees that his conduct described in Paragraph 2 above constitutes professional misconduct warranting Board disciplinary action pursuant to G.L. c. 112, § 61 and Board Regulations 247 CMR 9.01(1) and 9.01(6);
 - b. the Registrant agrees to an abide by all of the terms and conditions of the Contract for the five year duration of the Contract ("Contract Period") unless sooner dissolved by the MPRS Committee ("Committee") and the Board;

- c. the Registrant agrees that during the twelve months of the Contract Period, or such longer period as the Board may determine to be appropriate, Registrant shall surrender his pharmacist license to the Board (the "Surrender Period"). After the first twelve months of the Contract Period, Registrant may petition the Board to terminate the Surrender Period. Registrant shall be required to be in compliance with the terms and conditions of the Contract and this Agreement to petition the Board to terminate the Surrender Period. If the Registrant is determined to be in compliance with all required terms of this Agreement and the Contract, the Board will terminate the Surrender Period and place Registrant's license on probationary status for a minimum four-year period commencing on the date of the termination of the Surrender Period (the "Probation Period"). Termination of the Probation Period shall be governed by Paragraph 6 of this Agreement. The Registrant may be required to appear before the Board in connection with any petition to terminate the Surrender Period. The Board will not consider such a petition without a recommendation by the MPRS Committee; and
- d. the Registrant agrees to return a signed copy of this Agreement to the Board within ten (10) days of receipt.

5. During the Probation Period, the Registrant agrees:

- a. to undergo monitoring by the Board which shall include random drug/alcohol screenings as required by MPRS or the Board;
- b. to refrain from the consumption of alcohol and the use of all controlled substances unless specifically prescribed by a treating physician and approved by MPRS, who has been informed of the Registrant's history, for the purpose of prescribing for a legitimate medical purpose and in the usual course of the physician's practice;
- c. that he may not self prescribe controlled substances and shall adhere to all laws and regulations pertaining to the dispensing, administration and distribution of controlled substances; and
- d. that he hereby waives any privileges concerning and all information, reports and records relating to his MPRS contract and the disclosure of such information to the Board. This release includes the Registrant's waiver of any privileges and immunities he may possess regarding all material covered by 42 CFR Part 2 and the Criminal Offender Records Information (CORI) Act (G.L. c. 6, §§ 167-178) and authorizes the Board to have access to all such information and records.

6. Registrant agrees that the termination of the Probation Period shall be granted only if he has met the following conditions:

- a. Registrant must apply in writing to the Board for termination of the Probation Period. The Board will not consider such a request without a recommendation by

the MPRS Committee and the Board may request a conference to discuss the merits of such request;

- b. Registrant has provided documentation, satisfactory to the Board that he has successfully completed the Contract; and
- c. Registrant has fully complied with all terms and conditions of this Agreement and meets all other requirements for licensure.

7. This Agreement and its contents shall be incorporated into the records maintained by the Board, are matters of public record, subject to disclosure, without limitation, to the public and equivalent state licensing boards.

8. The Board agrees that in return for the Registrant's execution of this Agreement, the Board will not advance the prosecution of the Registrant pursuant to the Complaint. Any and all other rights of the Board to take action within the scope of its authority are expressly reserved.

9. The Registrant understands and agrees that his failure to comply with the terms of this Agreement shall nullify the representations contained in Paragraph 8, and permit the Board to initiate formal adjudicatory action under the State Administrative Procedure Act, G.L. c. 30A, and the Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.00 *et. seq.*

10. The Registrant understands and agrees that, at any time during the Contract or Probation Periods, upon a determination by the Board of any violation of any of the terms and conditions of this Agreement or the Contract, or any violation of the applicable laws, rules and regulations governing the practice of pharmacy, the Board may seek to immediately suspend the Registrant's license to practice pharmacy without the requirement of further proceedings pursuant to G.L. c. 30A, for not less than ninety (90) days and continuing until full compliance with this Agreement and the Contract is achieved by the Registrant.

11. The Registrant understands and agrees that should he be found to have violated any of the statutes and/or regulations governing the practice of pharmacy for conduct occurring during the Probation Period, the Board may consider the conduct of the Licensee described in Paragraph 2. and more fully described in Complaint Docket No. PH-05-025 in determining an appropriate sanction for the subsequent offense.

12. The Registrant understands and agrees that any of the following may be considered by the Board to be a violation of this Agreement and a basis for disciplinary action by the Board:

- a. A sample of the Registrant's blood, breath or other substance is found to contain any evidence of alcohol or any controlled substance in violation of this Agreement or the Contract;
- b. the Board or MPRS has other reliable evidence that the Registrant has used alcohol or any controlled substance in violation of this Agreement or the

Contract;

- c. the Registrant misses, or fails to call for any random screening tests, excluding an administrative or laboratory error beyond the control of the Registrant;
- d. the Registrant refuses to cooperate with MPRS in its monitoring; or
- e. the Registrant withdraws any waiver or release provided and/or filed in connection with this Agreement or the Contract.

13. The Registrant understands and agrees that his decision to enter into this Agreement and to accept the terms and conditions herein described is a final act and is not subject to reconsideration or judicial review.

14. The Registrant states that he has used legal counsel in connection with his decision to enter into this Agreement or, if he did not, that he had an opportunity to do so and that his decision to enter into this Agreement was made of his own free will.

15. The Registrant certifies that he has read this document entitled "Consent Agreement". The Registrant understands that, by executing this Agreement, he is waiving his right to a formal hearing at which he would possess the rights to confront and cross-examine witnesses, to call witnesses, to present evidence, to testify on his own behalf, to contest the allegations, to present oral argument, to appeal to court in the event of an adverse ruling, and all other rights set forth in G.L. c. 30A and 801 CMR 1.01 *et seq.* Registrant states that he further understands that in executing this document entitled "Consent Agreement", he is knowingly and voluntarily waiving her right to a formal hearing and to all of the above listed rights.

Francis J. DiMento Jr.
Witness (sign name)

Francis J. DiMento Jr.
Witness (print name)

David W. Trinks
David W. Trinks, R.Ph.

Date: 3/4/05

BOARD OF REGISTRATION
IN PHARMACY

By: Karen M Ryle
Karen Ryle, R.Ph.
President
Date: 3/10/05

Decision No. 1030

Eff. Date: March 10, 2005