

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Board of Registration
in Pharmacy

In the Matter of)
Hai Huynh, R.Ph.)
PH License No. 24888)
License Expires: 12/31/10)
_____)

Docket No. PH 07-064

FINAL DECISION AND ORDER AFTER RECONSIDERATION¹

Procedural Background

This matter comes before the Board of Registration in Pharmacy ("Board") for a determination of an appropriate sanction and issuance of a Final Decision and Order. On August 3, 2007, the Board issued its Order to Show Cause ("OTSC") in this matter.²

Respondent Hai Huynh, R.Ph. ("Respondent") submitted an Answer to the Order to Show Cause and a Request for a Hearing on September 4, 2007.

On February 9, 2009, after multiple rescheduled sanction hearing dates, Prosecuting Counsel and Respondent filed a joint request for a hearing on sanctions only ("joint request"). In that joint request, Respondent waived his right to a full hearing on the merits. Respondent and Prosecuting Counsel agreed to all proposed exhibits.

¹ Because the hearing in this matter was not evidentiary in nature, pursuant to 801 CMR 1.01(11), the Board was not required to issue a tentative decision in the first instance.

² The Board's Order to Show Cause is incorporated by reference herein.

On February 11, 2009, Prosecuting Counsel and Respondent filed a Revised Stipulation Agreement agreeing to the following stipulations ("Stipulations"):

1. The facts as alleged in paragraphs 1 through 8 of the Order to Show Cause issued In Dkt. No. PH 07-064 have been agreed upon by the parties and may be accepted by the Hearing Officer and the Board as true;³
2. The Parties agree that the only controlled substances taken or obtained by the Respondent were Schedule VI medications and Respondent did not take or obtain any Schedule I-V controlled substances;
3. The Parties agree that the Respondent, by his conduct, violated the Board regulations and statutes cited in paragraph 9 of the Order to Show Cause issued in Dkt. No. PH 07-064;
4. The Parties agree that the Respondent, by his conduct, violated the Board regulations cited in paragraph 10, subparts (a) through (c) and (e), of the Order to Show Cause issued in Dkt. No. PH 07-064; and
5. The Parties agree that the Respondent, by his conduct, violated the standards of practice established by Massachusetts case law cited in paragraph 11 of the Order to Show Cause issued in Dkt. No. PH 07-064.

Pursuant to G.L. c. 30A and the Standard Rules of Adjudicatory Practice and Procedure at 801 CMR 1.00 *et seq.*, a hearing limited to sanctions (Sanction Hearing) was convened April 7,

³ Those allegations included: that Respondent stole antibiotics from Brooks Pharmacy between 2003 and 2006; that in furtherance of that theft, Respondent entered false prescription and billing information into the computer system and filed false claims through the Brooks employee insurance plan in Respondent's name and the names of various co-workers; and that Respondent stole approximately \$20,000 worth of prescription medication and general merchandise from Brooks Pharmacy.

2009 by Administrative Hearings Counsel ("AHC") and Presiding Officer Mitchell Goldstein. David F. Michelman, Esq. represented Respondent at the Sanction Hearing. Richard Banks, Esq. was Prosecuting Counsel during the proceeding.

As of April 24, 2009, Presiding Officer Goldstein discontinued employment at the Department of Public Health, Division of Health Professions Licensure. On August 21, 2009, the Board issued a Final Decision and Order ("Decision") in this matter pursuant to which Respondent's pharmacist registration was suspended for a minimum three year period with other terms and conditions ordered regarding his license. By letter dated September 21, 2009 (Board Counsel Susan Manning with copy to Prosecuting Counsel Banks), in response Atty. Michelman's inquiry regarding representations made by AHC Goldstein that he would issue a tentative decision to the parties following the Sanction Hearing, the Board permitted Respondent to submit a Motion for Reconsideration of the Decision, in accordance with 801 CMR 1.01(7)(l).

On October 14, 2009, Respondent filed a Motion of Reconsideration ("Motion") with the Board; copies were provided to Hearing Officer Goldstein and Prosecuting Counsel Banks. By letter dated October 26, 2009 (with copies to Prosecuting Counsel Banks and AHC Goldstein), the Board notified Respondent that: (1) the scope of the comments in the Motion were appropriate for the Board to also consider the Motion as Respondent's objections to a tentative decision filed in accordance with 801 CMR 1.01(11)(c); and (2) Respondent was permitted to submit any additional written objections to the Decision to the Board in addition to the objections to the Decision included in the Motion. The Board's October 26, 2009 letter also requested AHC Goldstein to provide comment to the Board regarding the Decision; specifically his comment on the Board's summary of mitigating factors that Respondent presented at the Sanction Hearing and the Board's discussion of that information in the Decision. On October 30,

2009, Respondent submitted Additional Objections to the Decision, with copy provided to AHC Goldstein.

By letter dated November 12, 2009, with copies provided to Atty. Michelman and Prosecuting Counsel Banks, AHC Goldstein advised the Board that he had reviewed the Decision, Motion and Additional Objections and that he agreed "with the Summary of Testimony Presented and Order issued by the Board" in the Decision; stating: "If I had issued a tentative or proposed decision after the hearing on sanctions, I would have made the same or similar credibility determinations after evaluation of the mitigating circumstances presented by Hai Huynh as appear in the Final Decision and Order issued by the Board."

At a meeting of the Board on November 17, 2009, the Board granted the Motion and reconsidered the Decision. The Board denied Respondent's request for a hearing on the Motion and objections to the Decision, in accordance with 801 CMR 1.01(7)(a)2. In its reconsideration, the Board reviewed the record of the Sanction Hearing, the Decision, the Motion and attachments, and the Additional Objections and attachments filed by Respondent. After discussion, the Board voted on November 17, 2009 to issue this *Final Decision and Order after Reconsideration*.

LIST OF EXHIBITS PRESENTED AT SANCTION HEARING

The parties agreed to the admission of the following exhibits:

1. Order to Show Cause, issued August 3, 2007, Respondent's Answer and Request for Hearing, filed September 4, 2007
2. Letter Banks to Michelman, November 2, 2007 with list of diverted medications
3. Certified Copy of Court Docket Sheet

4. Respondent Statement to Board Investigator Sam Penta, undated, unsigned
5. Letter, Michelman to Banks, July 31, 2007 with list of diverted medications, names and diagnoses of individuals receiving medications
6. 23 photographs of individuals in Vietnam described as receiving assistance from Respondent
7. 19 letters from individuals stating they received assistance from Respondent
8. Letters (2) from individuals who transported medications to Vietnam for Respondent
9. Copies of cancelled checks/ receipts for restitution paid
10. Affidavit of Trooper Joseph A. Tetreault, Massachusetts State Police ("State Police"), January 18, 2008
11. Affidavit of Trooper Laurence R. La Fleche, State Police, April 24, 2008
12. Letter, Michelman to Assistant District Attorney Corrinne Rock with Affidavit of Hai Huynh dated April 24, 2007
13. Statements (4) from Respondent's co-workers at Brooks Pharmacy and Affidavit of Richard J. Seligman dated January 23, 2009
14. Letter from Kathy Welch, January 2, 2001
15. Chart of Board decisions
16. Record of Standing of Respondent
17. Brooks Pharmacy Loss Prevention Incident Report (7 pages)
18. Brooks Pharmacy Supplemental Loss Prevention Incident Report (2 pages), January 11, 2007

19. Letter from Rite Aid Corporation (successor owner Brooks Pharmacy) identifying over-the-counter (general merchandise) items on the list of diverted items, July 2, 2007
20. Letter from Board Investigator Penta to Respondent dated January 31, 2007
21. CD Rom containing images of Respondent concealing items which were purchased through store registers
22. Stipulation of the Parties, February 11, 2009
23. Waiver of right to hearing on the merits, February 9, 2009

The following witnesses testified at the hearing:

1. redacted
2. Hai Huynh, Respondent

SUMMARY OF TESTIMONY PRESENTED

Respondent and redacted presented the following testimonial information for the Board to consider in determining sanctions:

Respondent is currently a registered pharmacist in the Commonwealth of Massachusetts ("Commonwealth"). Respondent graduated from Massachusetts College of Pharmacy and Health Sciences ("MCP") in 2001 with a Bachelor of Science degree in pharmacy. Between 2003 and 2006, Respondent worked as a pharmacist for Brooks Pharmacy ("Brooks") in Springfield, Massachusetts. Respondent is currently employed at the Wal-Mart Pharmacy in Springfield. Respondent is married and the father of one daughter. Respondent's wife recently

earned her degree in pharmacy from the MCP (Worcester Campus) and is employed as a pharmacist for a small independent chain.

Respondent was born in Vietnam and with the assistance and sacrifice of his parents, aunt and other extended family members, escaped from Vietnam with his father. Respondent and his father arrived in the United States sometime prior to 1990 and resided in California. In order to facilitate the escape of Respondent and his father from Vietnam, Respondent's mother was forced to sell the family home to pay for their transportation by boat.

When Respondent's mother, aunt, sister redacted and three other siblings arrived in the United States, Respondent moved in with his mother in Springfield. After Respondent moved in with his mother, he, as the first son of the family, assumed responsibility for the family. Because his mother worked two jobs and generally did not return from work until 7:00 p.m., Respondent did the laundry, the marketing, the cooking, and ensured that his siblings attended school. After Respondent graduated from MCP, he helped his mother in putting four siblings through Catholic schools and colleges. To date, Respondent still provides his mother and his seriously-ill aunt with financial assistance. Respondent has always maintained a sense of obligation to the family members remaining in Vietnam who had sacrificed to ensure his escape from Vietnam and his arrival in the US.

Respondent stated he was aware that medications in Vietnam were scarce and that many of his family members were suffering from illnesses such as tuberculosis, diabetes, and malnutrition. As a result, commencing during his employment at Brooks, Respondent began securing medications from Brooks for his family in Vietnam. Those medications included pain relievers, antibiotics, analgesics, topical antifungal medication, and two medications for diabetes, Glucophage (metformin) and Glucotrol (glipizide). Originally, Respondent obtained and sent the

medications to very close relatives only including his grandmother, her thirteen children, Respondent's aunt and uncle as well as numerous children. Respondent sent medications for specific relatives with specific ailments and marked those medications accordingly. Respondent usually used a black marker to write instructions in Vietnamese on the medication bottles as to recipient and purpose. Respondent acknowledges he was making assessments with respect to diagnoses and required medications.

Despite the humanitarian motives that Respondent ascribed to his behavior, Respondent also admitted that he was frustrated, angry, and unhappy with his employer. In addition to the prescription drugs that he diverted from Brooks, Respondent admits that he also took over-the-counter medications such as Benadryl, "Red Bull" energy drinks and food items. Respondent acknowledges that, unlike prescription medications, these were items he could have purchased rather than taking them from Brooks. Respondent also acknowledged that during the three year period he was stealing medications from Brooks, he never considered the wrongfulness of his conduct. As such, Respondent agreed his behavior suggests the lack of a good moral compass and the lack of an enhanced sense of right and wrong.

Respondent testified that as word spread in the Vietnamese community, the requests for medications expanded from family members to members of the general Vietnamese community and "snowballed out of control." Community members considered United States medications better than the Chinese herbs, Korean medications and/or other remedies on which they usually relied. Respondent represented that he was not in a position to assist the Vietnamese community with money and hence, provided assistance by obtaining and sending medications. Respondent stated he also sent multivitamins, topical antifungal medications, and anesthetics to an orphanage and a blind center in Vietnam.

redacted

redacted

redacted

redacted

redacted

On two occasions, at Respondent's request, redacted

redacted transported medications from Respondent to Vietnam. redacted described

Respondent as redacted who was always very committed to his family and who willingly

accepted his duty to provide financial assistance for the education of his siblings. redacted

also noted Respondent's concern for the friends and relatives who remain in Vietnam and his

efforts to provide medical assistance for those relatives and certain members of the general

Vietnamese community.

Respondent described financial obligations related to the education of his brother and sister as well as the support of his wife and daughter asserted that he will not commit such an infraction in the future.

Respondent submitted numerous letters of support from relatives, former colleagues, law enforcement officials, and recipients of Respondent's largesse. Massachusetts State Police officers attested to Respondent's assistance in an investigation, after the date of the conduct at issue, of the diversion of pharmaceuticals by various individuals. Several letters describe poor living conditions, lack of medical care, and inadequate supplies of essential medication that existed in Vietnam at the time of Respondent's intervention.

In his closing statement, Counsel for Respondent ("Counsel") cited six mitigating factors that the Board should consider in determining an appropriate sanction including: 1) all the

medications stolen were Schedule VI and no medications in Schedules I through V were misappropriated; 2) Respondent's intent in the theft of these medications was humanitarian; 3) Respondent has accepted responsibility in this venue as well as criminally; 4) Respondent has paid full restitution over the course of two years; 5) Respondent has cooperated with law enforcement authorities by assisting with other investigations related to the illicit drug trade and 6) Respondent's current personal circumstances and financial hardships militate against a sanction involving a lengthy suspension from the practice of pharmacy. Counsel suggests that where mitigating factors exist and the nature of the offense permits, the Board has exercised leniency.

DISCUSSION

The role of the boards of registration in the over-all statutory scheme is to take primary responsibility in the regulation of the practices of various professions in the Commonwealth in order to promote the public health, welfare, and safety. *Kvitka v. Board of Registration in Medicine*, 407 Mass. 140, 143 (1990). The courts have conferred upon boards considerable latitude in shaping appropriate sanctions and the discretion to impose sanctions that will best protect the public. *Levy v. Board of Registration & Discipline in Medicine*, 378 Mass. 519, 525 (1979); *Arthurs v. Board of Registration in Medicine*, 383 Mass. 299 (1981). Moreover, the boards of registration have broad authority to regulate the conduct of professionals including the ability to sanction professionals for conduct that undermines public confidence in the integrity of the profession. *Kvitka, supra* at 142.

Although Respondent's purpose in misappropriating prescription medications from Brooks Pharmacy may have been altruistic, his motives notwithstanding, Respondent

accomplished these magnanimous goals by filing false claims through the Brooks employee insurance plan and by entering false prescription information and fraudulent billing information into the computer system. Respondent, in providing what he described as humanitarian relief to his family and friends in Vietnam, ultimately stole prescription medications in the amount of \$20,000 from his employer. Moreover, his behavior in acting as a medication prescriber failed to consider the limitations of his expertise, training and license category as well as the concerns of medical professionals regarding the overuse or misuse of antibiotics and the potential for the growth of drug-resistant bacteria

While Respondent's may claim his intent was noble, the deceit and subterfuge used in perpetrating the thefts is of great concern to this Board. The Board also notes that in addition to the medications Respondent stole, he also stole food items, energy drinks, and over-the-counter medications and it is not clear that the theft of these items was in furtherance of any humanitarian purpose.

The Board, in making its determination on sanctions, must weigh the seriousness of the violation, and its effect on the public's perception of the profession. An appropriate sanction should reflect the seriousness of the infraction, should serve as a means to protect the health, safety, and welfare of the public while preserving the integrity of the profession. In this case, Respondent's conduct represents an egregious offense. His expressed humanitarian motives were considered by the Board in its determination of the sanction for his conduct. The deceit employed by Respondent in perpetrating the offense and the risk at which Respondent placed his friends, family, and the general public was also considered by the Board in determining the appropriate sanction in these matters.

Pharmacists have an obligation to not only ensure the health and well-being of their patients but to act within the statutory and regulatory authority and scope of practice of a pharmacist licensed to practice in the Commonwealth . By providing medications to individuals without a valid prescription, Respondent may have placed these friends and relatives at risk and thereby implicated the health, safety and welfare of these individuals and the general public. By employing fraud and deception in furtherance of his distribution scheme, Respondent failed to conduct himself in accordance with multiple statutes and regulations pertaining to the practice of pharmacy as well and the ethical codes of conduct expected of all Board licensees. Respondent's conduct constitutes deceit and gross misconduct in the practice of the profession of pharmacy. The Board also concludes that Respondent's conduct represents such poor and unsound judgment that the Board questions Respondent's fitness to continue in the practice of pharmacy.

Respondent's objections in his Motion and Additional Objections allege that AHC Goldstein, had he issued a tentative decision, would have issued a decision substantively different from the decision by the Board; thereby resulting in a different sanction regarding Respondent's conduct. As noted, in response to the Motion and at the Board's request, AHC Goldstein has advised the Board that he "would have made the same or similar credibility determinations after evaluation of the mitigating circumstances presented by Hai Huynh as appear in the Final Decision and Order issued by the Board." Respondent's objections argue that the Board made improper credibility determinations regarding Respondent's or other witness's statements expressing humanitarian motivation and alternatively, that the Board ascribed inadequate weight to his humanitarian motivation in determining the sanction.

In response to these objections, the Board clarifies that it made no credibility determinations relating to Respondent's or other witness's expressed humanitarian motivation

and that the weight the Board gives to this or any other proffered motivation for any Board licensee's conduct is within the purview of the Board. After careful consideration of ALL of the information Respondent presented in mitigation, including supporting testimony AND documentary information, prior to issuing the Decision and, after reviewing that information on reconsideration prior to voting to issue this *Final Decision and Order after Reconsideration*, the Board confirmed that the Order set forth in the Decision remains appropriate and that the specific terms and conditions of the Order are necessary for Respondent to resume practice as a Pharmacist in the Commonwealth in the future. Respondent should be aware that the Board had, in fact, considered a harsher sanction in this matter in its discussion related to the issuance of the Decision.

Pursuant to the Board's duty to protect the public health, safety, and welfare, the Board enters the following Order:

ORDER

On November 17, 2009, the Board voted to issue this *Final Decision and Order after Reconsideration* and SUSPEND Respondent's Pharmacist registration for a minimum three year period (the "Suspension Period"), commencing August 31, 2009 (the date Respondent's pharmacist registration was of suspended pursuant to the Decision), including the below described terms and conditions, by the following vote: In favor: Stanley B. Walczyk, R.Ph.; Steven Budish, Public Member; Joanne M. Trifone, R.Ph.; William A. Gouveia, R.Ph., M.S., George A. Cayer, R.Ph., Kathy J. Fabiszewski, Ph.D., N.P., Sophia Pasedis, R.Ph., Pharm.D., Donald D. Accetta, M.D., Michael Tocco, R.Ph., and James T. DeVita, R.Ph. Opposed: None. Absent: None

During the Suspension Period, Respondent may not be employed as a pharmacist or pharmacy technician or be employed in any capacity in any pharmacy setting. Not sooner than three years from the effective date of this Final Decision and Order, Respondent may petition the Board to terminate the Suspension Period, provided he submits official documentation of passing scores (75% or higher) on both the North American Pharmacist Licensure Examination (NAPLEX) and the Multistate Pharmacy Jurisprudence Examination (MPJE) with his petition. Respondent will also be required to provide information to the Board regarding his employment or other activities during the Suspension Period and may also be required to appear before the Board regarding any such petition. Should the Board grant Respondent's petition to terminate the Suspension Period, the Board will reinstate his pharmacist registration on probationary status for a five year period with terms and conditions, including but not be limited to, supervised experience and practice restrictions as the Board may determine to be necessary and appropriate.

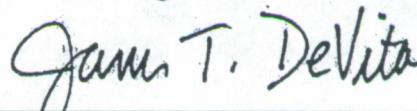
EFFECTIVE DATE OF ORDER

This *Final Decision and Order after Reconsideration* becomes effective on the tenth (10th) day from the date it is issued (see "Date Issued" below).

RIGHT TO APPEAL

Respondent is hereby notified of his right to appeal this *Final Decision and Order after Reconsideration* to the Supreme Judicial Court pursuant to G.L. c. 112, § 64 within thirty days of receipt of notice of this *Final Decision and Order after Reconsideration*.

Board of Registration in Pharmacy



James T. DeVita
President

Date Issued: November 23, 2009

Notices to:

By First Class and Certified Mail # 7008 3230 0002 4164 4231
Return Receipt Requested

David F. Michelman, Esq.
Michelman & Bricker, PC
51 Clairmont Street
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By Hand

Richard Banks, Prosecuting Counsel
Division of Health Professions Licensure
239 Causeway Street
Boston, MA 02114

Dec. No. 1505