

BOARD ORDER #E-09-008
SOAH DOCKET NO. 515-10-0512

RE: IN THE MATTER OF
DENNIS MARTIN GEORGE
(PHARMACIST LICENSE #31603)

BEFORE THE TEXAS STATE
BOARD OF PHARMACY

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*BOARD ORDER #E-09-008
SOAH DOCKET NO. 515-10-0512*

RE: IN THE MATTER OF
DENNIS MARTIN GEORGE
(PHARMACIST LICENSE #31603)

BEFORE THE TEXAS STATE
BOARD OF PHARMACY

On this day came on to be considered by the Texas State Board of Pharmacy (hereinafter referred to as "Board") the matter of pharmacist license number 31603, issued to Dennis Martin George.

After proper and timely notice was given, the matter was heard in public hearing on January 19, 2010, before Bill Zukauckas, Administrative Law Judge, State Office of Administrative Hearings, who issued a Proposal for Decision, containing Findings of Fact and Conclusions of Law, which was properly served on all parties. All parties were given an opportunity to file exceptions and replies. Board staff filed exceptions on May 19, 2010. Judge Zukauckas issued a response to the exceptions on June 4, 2010, with no changes to the Proposal for Decision, as noted herein. The Board, after consideration of the Proposal for Decision and argument of the parties, makes and adopts the following Findings of Fact and Conclusions of Law of the Administrative Law Judge contained in the Proposal for Decision and does not adopt Conclusion of Law, Number (10), of the Administrative Law Judge, as noted herein. A copy of the Proposal for Decision is attached as Exhibit "A" and incorporated by reference as though fully set forth herein. All proposed Findings of Fact and Conclusions of Law submitted by any party which are not specifically adopted herein are denied.

FINDINGS OF FACT

1. On February 23, 1990, the Texas Board of Pharmacy (Board) issued Texas pharmacist license number 31603 to Dennis Martin George (Respondent). That license remains in effect.

2. Between 2001 and 2005, Respondent was the owner and staff pharmacist of Foodarama Pharmacy (the pharmacy), which was located at various locations during this time period, including 1603 Cartwright Road Missouri City, Texas, 5809 Airline Drive, Houston, Texas, 5308 West Bellfort Street, Houston, Texas, and 3223 South Main Street, Stafford Texas.
3. On September 29, 2009, and October 5, 2009, Staff mailed a Complaint to Respondent advising him in writing of the allegations against him; the relief sought against him; the relevant laws and statutes; and the date, time, and place of hearing.
4. Respondent received timely and adequate notice of the charges against him.
5. By Order dated November 20, 2009, the parties were advised that a hearing on the merits of this matter would be held on January 19, 2010, at the State Office of Administrative Hearings.
6. The hearing on the merits was convened on January 19, 2010, in Austin, Texas, by Administrative Law Judge (ALJ) Bill Zukauckas.
7. Litigation Counsel Julie Hildebrand represented the Staff for the Board (Staff). Attorney Jon Porter represented Respondent.
8. The record closed on March 10, 2010, following the submission of written closing arguments by the parties.
9. In 2001, Respondent entered into a business relationship with Rudy Lopez to co-own the pharmacy that opened in July 2001.
10. Shortly after opening, Alonzo Peters, III, M.D., approached Respondent and asked Respondent if the pharmacy would fill prescriptions for his patients.
11. Dr. Peters told Respondent about his clinic, but did not tell him about the nature of the prescriptions that he would be issuing to his patients.
12. Respondent agreed that the pharmacy would give Dr. Peters' patients a discount for filling the prescriptions.
13. At first the pharmacy filled 60 to 90 prescriptions per day from Dr. Peters, but that eventually escalated to 200-250 prescriptions per day.

14. Within a few weeks, Respondent noticed that the majority of Dr. Peters' prescriptions were for controlled substances and questioned whether he was doing the right thing by filling these prescriptions.
15. As a result of his concerns, Respondent called Dr. Peters and was assured by Dr. Peters that the prescriptions were valid because he dealt primarily with pain management.
16. Throughout the time Respondent co-owned the pharmacy (2001-2005), Respondent worked full time as a pharmacist employee at Wal-Mart and worked part-time at the pharmacy.
17. Respondent and Mr. Lopez hired a pharmacist-in-charge to run the day-to-day operations of the pharmacy, Benson Jules.
18. In November 2002, the Drug Enforcement Agency (DEA) arrived at the pharmacy and confiscated the prescription files, downloaded the computer hard-drive, and took all the cash in the pharmacy register, but did not charge or arrest Respondent.
19. Respondent confirmed with the DEA that the pharmacy could continue to operate.
20. After the DEA arrived, Respondent only stopped by the pharmacy once or twice a week leaving Mr. Jules in charge of the pharmacy.
21. Between January 24 and May 14, 2004, Mr. Jules, through the pharmacy, sold and shipped 1,528 internet prescriptions for controlled substances and dangerous drugs issued by several different physicians to customers in 48 states and Washington D.C. as the pharmacist-in-charge of the pharmacy.
22. In 2006, Respondent was indicted for the federal offense of conspiracy to unlawfully distribute and dispense hydrocodone and hydrocodone products outside the scope of professional practice and not for a legitimate medical purpose due to his business relationship with Dr. Peters through the pharmacy in 2001 and 2002.
23. On June 25, 2007, Staff sent Respondent preliminary notice of its intent to take disciplinary action against his license for allowing the pharmacy to fill invalid prescriptions—prescriptions that were issued without a proper physician-patient relationship, without a physical examination, and without appropriate diagnostic and laboratory testing.
24. Respondent did not dispense, deliver, or fill any internet prescriptions, but as an owner of the pharmacy, was responsible for all business conducted by the pharmacy.

25. Respondent cooperated with the federal prosecutor, Cedric Joubert, during the DEA's investigation and was honest and forthright beyond that experienced by Mr. Joubert in 28 years of practice.
26. On October 9, 2007, Respondent pled guilty to one federal felony count, specifically for engaging in a conspiracy to unlawfully distribute and dispense hydrocodone and hydrocodone products without a legitimate medical purpose.
27. Respondent told Staff that he had been indicted for this federal offense.
28. On May 7, 2008, Respondent entered into Agreed Board Order #J-06-005 (Agreed Board Order) as a result of the internet prescriptions filled by the pharmacy between January 24 to May 14, 2004, in which his license was suspended for 4 months with an additional five-year probated suspension and he required to pay a probation fee of \$1,200.
29. On November 24, 2008, in the case styled, *United States of America v. Dennis Martin George*, Case number 4:06CR00232-003, in the United States District Court, Houston Division of the Southern District of Texas, Respondent was adjudicated guilty of violating 21 U.S.C. §§ 841 (a)(1) and (b)(1), and § 846 for engaging in a "conspiracy to unlawfully distribute and dispense, outside the scope of professional practice and not for legitimate medical purposes, various amounts of a mixture and substances known as hydrocodone and hydrocodone products, and various other drugs and substances." Respondent was sentenced to three years probation and fined \$2,000.
30. Respondent filled very few of the prescriptions issued by Dr. Peters.
31. Respondent committed a serious crime that is directly related to the licensed occupation.
32. Respondent fully cooperated with the investigation into his participation into the federal violation of the Comprehensive Drug Abuse Prevention and Control Act of 1970 through his business dealings with Dr. Peters.
33. The federal prosecutor, Mr. Joubert, did not find any reason to oppose permitting Respondent from continuing to serve the public as a pharmacist at any time during the investigation, plea bargaining, or sentencing of Respondent because Respondent had been so honest and forthright during the investigation.
34. Respondent does not have a prior criminal record and until he owned the pharmacy had no prior disciplinary history with the Board.
35. Eight years has elapsed since Respondent's criminal activity in 2001 and 2002.

36. Following the Agreed Board Order and his federal convictions, Respondent paid \$197,000 to the federal government, chose not to own another pharmacy, disclosed his criminal conviction to his employers and friends, and chose not to work at any pharmacy that dispensed a great deal of controlled substances.
37. Respondent is fully compliant with all of the terms and conditions of his criminal probation and the Agreed Board Order.
38. Respondent has been employed for more than 20 years as a pharmacist.
39. Respondent has been gainfully employed as a pharmacist since his criminal conviction in 2008, other than time off following his indictment, and due to the requirements of his probation and the Agreed Board Order.
40. Respondent has been responsible and conscientious in his performance as a pharmacist since his indictment and has a good working relationship with his employers and his customers.
41. Respondent is remorseful for his criminal activities in 2001 and 2002.
42. The public health and safety will not be at risk if Respondent is allowed to continue working as a pharmacist.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter pursuant to TEX. OCC. CODE § 565.001 *et seq.* (the Act).
2. The State Office of Administrative Hearings has jurisdiction over all matters related to conducting a contested case in this matter, including the preparation of a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ch. 2003.
3. Timely and proper notice of the hearing was sent to Respondent as required by TEX. GOV'T CODE . ch. 2001.
4. Staff has the burden to prove by a preponderance of the evidence that grounds for discipline exist. 22 TEX. ADMIN. CODE (TAC). § 281.31(a).
5. The Board is authorized to take disciplinary action against a pharmacist who has violated the Pharmacy Act and the Board rules, including being convicted of a felony or for violating the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. §§ 801 *et seq.* pursuant to §§ 565.001(a)(6)(B), and (a)(9)(A) of the Act.

6. Authorized discipline includes license revocation and suspension, probated suspension, restrictions, reprimand, and imposition of an administrative penalty pursuant to § 565.051 of the Act.
7. Based on Respondent's federal felony conviction as set out in the Findings of Fact, Respondent violated §§ 565.001(a)(6)(B) and (a)(9)(A) of the Act.
8. The crime committed by Respondent directly related to the duties and responsibilities of a pharmacist pursuant to 22 TEX. ADMIN. CODE. § 281.63(i).
9. In reaching a decision on the imposition of a disciplinary sanction, the Board shall determine the person's fitness to perform the duties and discharge the responsibilities of the licensed occupation pursuant to TEX. OCC. CODE § 53.023 and 22 TEX. ADMIN. CODE §§ 281.63 and 281.64.
10. *Based on the above Findings of Fact and Conclusions of Law, the Board should take the following disciplinary action against Respondent's license:*
 - a. *Respondent's pharmacist license be suspended for eight years from the date of the Board Order is entered with all but the first six months following his criminal probation being probated;*
 - b. *Respondent be prohibited from owning or having partial ownership in a pharmacy;*
 - c. *Respondent's employer will issue quarterly reports detailing his performance during the periods of suspension and probation;*
 - d. *Respondent will not fill more than 10 percent of the total prescriptions he fills per month with controlled substances, specifically Schedule II and III drugs;*
 - e. *Respondent will pay within 6 months of the date of the Board an administrative penalty of \$5,000.*

The Board rejects Conclusion of Law #10 because it is the Administrative Law Judge's (ALJ) recommended sanction rather than a true conclusion of law. The ALJ improperly characterized her recommended sanction as a conclusion of law. Pursuant to §281.60 of the Texas Pharmacy Board Rules (Rules), the ALJ's recommended sanction should not have been characterized as a conclusion of law. Courts have held that an ALJ's recommended sanction is not the same as a finding of fact or conclusion of law. Granek at 781 ("Board is

not required to give presumptively binding effect to an ALJ's recommendations regarding sanctions in the same manner as with other findings of fact and conclusions of law"), Grotti at 9 ("the mere labeling of a recommended sanction as a finding of fact is insufficient to presumptively bind the Board and implicate §2001.058(e)), Brown at 697 ("The Board, not the ALJ, is the decision maker concerning sanctions in this case.").

CONSTRUCTION

It is the intent of the Texas State Board of Pharmacy that any Findings of Fact that are properly construed as Conclusions of Law should be treated as Conclusions of Law and that any Conclusions of Law that are properly construed as Findings of Fact should be treated as Findings of Fact.

ORDER OF THE BOARD

THEREFORE, PREMISES CONSIDERED, the Texas State Board of Pharmacy (hereinafter referred to as "BOARD") does hereby ORDER that pharmacist license number 31603 held by Dennis Martin George (hereinafter referred to as "Respondent") shall be, and such license is hereby suspended until six (6) months after his criminal probation is completed, with such period to commence upon the entry of this Order. It is further ORDERED that Respondent:

- (a) shall not practice pharmacy in this state or have access to prescription drugs during the period pharmacist license number 31603 is suspended; and
- (b) shall upon the entry of this Order, surrender to the BOARD, Enforcement Division, pharmacist license number 31603 and any renewal certificate and personal identification card pertaining to pharmacist license number 31603.

It is further ORDERED that immediately following the initial suspension period, pharmacist license number 31603 held by Respondent shall be suspended until eight (8) years after the entry of this Order. It is further ORDERED that such suspension be probated under the conditions that Respondent abide by and obey the terms of this Order, all Federal

laws and laws of the State of Texas with respect to pharmacy, controlled substances, dangerous drugs, and all rules and regulations adopted pursuant to the above-mentioned statutes.

It is further ORDERED that Respondent shall pay a probation fee of one thousand two hundred dollars (\$1,200). This probation fee is due ninety (90) days after Respondent's probationary period begins.

It is further ORDERED that:

- (1) Respondent shall not hold a direct or indirect ownership interest in any pharmacy during the period of time Respondent's license is restricted, suspended, or under probated suspension under this Order;
- (2) Respondent shall authorize and request his supervising pharmacist to provide written quarterly reports concerning the status and conduct of Respondent to the BOARD, Enforcement Division, and shall not hold any of the individuals providing reports to the BOARD liable in any manner for the contents of such reports; and
- (3) During the period of probation, Respondent shall not fill more than 10 percent of the total prescriptions he fills per month with controlled substances, specifically Schedule II and III drugs.

It is further ORDERED that Respondent shall pay an administrative penalty of five thousand dollars (\$5,000) due ninety (90) days after the entry of this Order.

It is further ORDERED that any cost associated with compliance with the terms of this Order shall be the responsibility of Respondent.

It is further ORDERED that Respondent shall allow the staff of the BOARD, Enforcement Division, to directly contact Respondent on any matter regarding the enforcement of this Order.

It is finally ORDERED that failure to comply with any of the terms and conditions in this Order constitutes a violation and shall be grounds for further disciplinary action against the Texas pharmacist license held by Respondent.

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Dennis Martin George
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Passed and approved at the regular meeting of the Texas State Board of Pharmacy on the 10th day of August 2010.

THIS ORDER IS A PUBLIC RECORD.

SIGNED AND ENTERED ON THIS 10th day of August 2010.

MEMBER, TEXAS STATE BOARD OF PHARMACY

ATTEST:

Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy

Kerstin E. Arnold
General Counsel
Texas State Board of Pharmacy

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additional five-year probated suspension and he required to pay a probation fee of \$1,200.

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32. Respondent fully cooperated with the investigation into his participation into the federal violation of the Comprehensive Drug Abuse Prevention and Control Act of 1970 through his business dealings with Dr. Peters.
33. The federal prosecutor, Mr. Joubert, did not find any reason to oppose permitting Respondent from continuing to serve the public as a pharmacist at any time during the investigation, plea bargaining, or sentencing of Respondent because Respondent had been so honest and forthright during the investigation.
34. Respondent does not have a prior criminal record and until he owned the pharmacy had no prior disciplinary history with the Board.
35. Eight years has elapsed since Respondent’s criminal activity in 2001 and 2002.
36. Following the Agreed Board Order and his federal convictions, Respondent paid \$197,000 to the federal government, chose not to own another pharmacy, disclosed his criminal conviction to his employers and friends, and chose not to work at any pharmacy that dispensed a great deal of controlled substances.
37. Respondent is fully compliant with all of the terms and conditions of his criminal probation and the Agreed Board Order.
38. Respondent has been employed for more than 20 years as a pharmacist.
39. Respondent has been gainfully employed as a pharmacist since his criminal conviction in 2008, other than time off following his indictment, and due to the requirements of his probation and the Agreed Board Order.

40. Respondent has been responsible and conscientious in his performance as a pharmacist since his indictment and has a good working relationship with his employers and his customers.
41. Respondent is remorseful for his criminal activities in 2001 and 2002.
42. The public health and safety will not be at risk if Respondent is allowed to continue working as a pharmacist.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter pursuant to TEX. OCC. CODE § 565.001 *et seq.* (the Act).
2. The State Office of Administrative Hearings has jurisdiction over all matters related to conducting a contested case in this matter, including the preparation of a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ch. 2003.
3. Timely and proper notice of the hearing was sent to Respondent as required by TEX. GOV'T CODE . ch. 2001.
4. Staff has the burden to prove by a preponderance of the evidence that grounds for discipline exist. 22 TEX. ADMIN. CODE (TAC). § 281.31(a).
5. The Board is authorized to take disciplinary action against a pharmacist who has violated the Pharmacy Act and the Board rules, including being convicted of a felony or for violating the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. §§ 801 *et seq.* pursuant to §§ 565.001(a)(6)(B), and (a)(9)(A) of the Act.
6. Authorized discipline includes license revocation and suspension, probated suspension, restrictions, reprimand, and imposition of an administrative penalty pursuant to § 565.051 of the Act.
7. Based on Respondent's federal felony conviction as set out in the Findings of Fact, Respondent violated §§ 565.001(a)(6)(B) and (a)(9)(A) of the Act.
8. The crime committed by Respondent directly related to the duties and responsibilities of a pharmacist pursuant to 22 TEX. ADMIN. CODE. § 281.63(i).
9. In reaching a decision on the imposition of a disciplinary sanction, the Board shall determine the person's fitness to perform the duties and discharge the responsibilities of the licensed occupation pursuant to TEX. OCC. CODE § 53.023 and 22 TEX. ADMIN. CODE §§ 281.63 and 281.64.

10. *Based on the above Findings of Fact and Conclusions of Law, the Board should take the following disciplinary action against Respondent's license:*
- a. *Respondent's pharmacist license be suspended for eight years from the date of the Board Order is entered with all but the first six months following his criminal probation being probated;*
 - b. *Respondent be prohibited from owning or having partial ownership in a pharmacy;*
 - c. *Respondent's employer will issue quarterly reports detailing his performance during the periods of suspension and probation;*
 - d. *Respondent will not fill more than 10 percent of the total prescriptions he fills per month with controlled substances, specifically Schedule II and III drugs;*
 - e. *Respondent will pay within 6 months of the date of the Board an administrative penalty of \$5,000.*

The Board rejects Conclusion of Law #10 because it is the Administrative Law Judge's (ALJ) recommended sanction rather than a true conclusion of law. The ALJ improperly characterized his recommended sanction as a conclusion of law. Pursuant to Section 281.60 of the Texas Pharmacy Board Rules (Rules), the ALJ's recommended sanction should not have been characterized as a conclusion of law. Courts have held that an ALJ's recommended sanction is not the same as a finding of fact or conclusion of law. Granek at 781 ("Board is not required to give presumptively binding effect to an ALJ's recommendations regarding sanctions in the same manner as with other findings of fact and conclusions of law"), Grotti at 9 ("the mere labeling of a recommended sanction as a finding of fact is insufficient to presumptively bind the Board and implicate Section 2001.058(e)), Brown at 697 ("The Board, not the ALJ, is the decision maker concerning sanctions in this case.").

Additionally, the Board is changing the ALJ's recommended sanction for three reasons. First, unlike the ALJ, the Board is authorized to determine the penalty for a violation of the Texas Pharmacy Act (Act). Second, revocation is the appropriate remedy under the Board's rules relating to disciplinary sanctions. Third, a consistent precedent must be enforced. Courts have found that the Board may change a finding of fact or conclusion of law if it complies with Section 2001.058(e) of the Administrative Procedure Act. Granek v. Texas State Board of Medical Examiners, 172 S.W.3d 761, 780 (Tex.App.-Austin, 2005), Grotti v. Texas State Bd. of Medical Examiners, No. 03-04-00612-CV, WL 2464417, 9 (Tex. App.-Austin Oct. 6, 2005), Pierce v. Texas Racing Commission, 212 S.W.3d 745, 752 (Tex.App.-Austin 2006, pet. denied), and Brown v. Texas State Board of Dental Examiners, 281 S.W.3d 692, 697 (Tex.App.-Corpus Christi 2009).

Pursuant to Sections 551.002, 554.001, 554.002, 565.001, and 565.051 of the Act and Section 281.60 of the Rules, the Board has the responsibility to assess sanctions against licensees who are found to have violated the Act. No such authority has been granted to the ALJ.

Respondent's commission of a felony involving the delivery of a controlled substance, which was directly related to the duties and responsibilities of a pharmacist, is a serious violation of the Act warranting severe disciplinary action. Disciplinary action for violations of the Act that involve criminal offenses is based on punishing the violator and deterring others from violations of this nature. The ALJ did not properly apply the factors set forth in Sections 281.64(c)(2)(A)(i) and 281.63(g) of the Rules, which indicate that revocation of Respondent's pharmacist license is appropriate. Section 281.64(c)(2)(A)(i) states that Respondent's pharmacist license should be revoked because he is currently on probation for a felony offense involving the delivery of a controlled substance that occurred less than two years ago. In adopting Section 281.64, the Board considered the mitigating factors in Section 281.63(g) in the light most favorable to the licensee and "determined that the nature and seriousness of certain crimes outweigh other factors to be considered in §281.63(g) . . . and necessitate the disciplinary action" set forth in Section 281.64. Because this offense was a felony involving delivery of a controlled substance, and involved Respondent's actions that occurred while he was practicing pharmacy in a pharmacy that he owned, it is of a very serious nature and of great concern to the Board due to its relation to a pharmacist's responsibility to ensure that a controlled substance is dispensed pursuant to a legitimate prescription. Additionally, sufficient time has not passed since the criminal action occurred and Respondent has previously been disciplined by the Board for similar behavior. Section 281.62 indicates that a revocation is the appropriate sanction and the mitigating factors listed above by the ALJ in the Findings of Fact do not outweigh the seriousness of the offense and the aggravating factors to the extent that a revocation would not be appropriate.

Section 281.64(d)(2)(A)(i) of the Rules memorializes a precedent that has been established by the Board regarding felonies involving the delivery of a controlled substance. A consistent precedent must be enforced. It would be unfair for one licensee to receive a different sanction than other licensees merely because the ALJ had a different opinion than the Board.

CONSTRUCTION

It is the intent of the Texas State Board of Pharmacy that any Findings of Fact that are properly construed as Conclusions of Law should be treated as Conclusions of Law and that any Conclusions of Law that are properly construed as Findings of Fact should be treated as Findings of Fact.

ORDER OF THE BOARD

THEREFORE, PREMISES CONSIDERED, the Texas State Board of Pharmacy (hereinafter referred to as "BOARD") does hereby ORDER that pharmacist license number 31603 held by Dennis Martin George (hereinafter referred to as "Respondent") shall pay an administrative penalty of five thousand dollars (\$5,000) due ninety (90) days after the entry of this Order.

It is further ORDERED that effective thirty (30) days after the entry of this Order, pharmacist license number 31603 held by Respondent shall be, and such license is hereby revoked.

It is finally ORDERED that Respondent:

- (1) shall not practice pharmacy in this state or have access to prescription drugs during the period pharmacist license number 31603 is revoked; and
- (2) shall surrender to the BOARD, Enforcement Division, the wall certificate for pharmacist license number 31603 and any renewal certificate and personal identification card pertaining to pharmacist license number 31603 within thirty (30) days after the entry of this Order.

*Board Order #E-09-008
Dennis Martin George
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Passed and approved at the regular meeting of the Texas State Board of Pharmacy on the 10th day of August 2010.

THIS ORDER IS A PUBLIC RECORD.

SIGNED AND ENTERED ON THIS 10th day of August 2010.

MEMBER, TEXAS STATE BOARD OF PHARMACY

ATTEST:

Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy

Kerstin E. Arnold
General Counsel
Texas State Board of Pharmacy

EXHIBIT A

SOAH DOCKET NO. 515-10-0512

**THE TEXAS STATE BOARD
OF PHARMACY,
Petitioner**

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BEFORE THE STATE OFFICE

v.

OF

**DENNIS MARTIN GEORGE,
LICENSE NO. 31603
Respondent**

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Staff for the Texas State Board of Pharmacy (Board) requests the revocation of Dennis Martin George's (Respondent's) pharmacist license based on Respondent's November 24, 2008, federal felony conviction (felony conviction) for conspiring to unlawfully distribute and dispense hydrocodone and hydrocodone products, and various other drugs from 2001-2002.¹ Staff maintains that Respondent's felony conviction violates Sections 565.001(a)(6)(B) and (a)(9)(A) of the Texas Pharmacy Act (the Act), TEX. OCC. CODE. ch. 565. Because Respondent entered into an Agreed Board Order on May 7, 2008, for allegedly similar conduct, Staff argues that revocation of his license and the imposition of a \$5,000 administrative penalty are warranted.²

Respondent does not dispute that he has a felony conviction for his participation in the conspiracy to unlawfully distribute invalid prescriptions in 2001 and 2002, but argues that mitigating circumstances exist justifying a lesser sanction. Respondent urged that his conduct before and after his criminal conduct, indictment, and felony conviction indicate that he is presently fit to serve as a licensed pharmacist.

Based on the credible evidence in this case and the law, the Administrative Law Judge (ALJ) recommends that Respondent's pharmacist license be suspended for eight years from the date the Board order is entered with all but the first six months following the end of his criminal probation

¹ Staff Ex. 3 at Bate stamp 000011.

² The Act §§ Sections 565.051 and 566.002 and Ch. 53 of the Texas Occupations Code.

being probated; that Respondent satisfy the terms and conditions set out in the conclusions of law; and that he pay an administrative penalty of \$5,000 within six months of the date the Board order is entered.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

A contested case hearing on this matter was held on January 19, 2010, at the State Office of Administrative Hearings (SOAH) in Austin, Texas, before ALJ Bill Zukauckas. Assistant general counsel Julie Hildebrand represented Staff. Attorney Jon Porter represented Respondent. After the hearing, the parties submitted written closing arguments and the record closed on March 10, 2010.

There were no disputed issues of jurisdiction or notice; consequently, those matters will be set forth in the Findings of Fact and Conclusions of Law without further discussion.

II. DISCUSSION

A. Background

Respondent was issued a Texas pharmacist license, Number 31603, by the Board on February 23, 1990. Until May 2008, Respondent had no history of violating the Act or the Board rules.

1. Investigations Leading to the Criminal Conviction and the Agreed Board Order

Respondent and Rudy Lopez, a licensed pharmacist, opened a pharmacy in Foodarama called Foodarama Pharmacy (the pharmacy)³ on July 9, 2001. Initially business was "extremely slow," but within a short period, Alonzo Peters, III, M.D. approached Respondent and asked if the pharmacy would fill his prescriptions. Respondent and his partner agreed to give Dr. Peters' patients a

³ The pharmacy was moved several times to locations in Missouri, Texas; Houston, Texas; and Stafford, Texas. Staff Ex. 3 at Bate Stamp 000017.

discount to fill the prescriptions. At first Dr. Peters sent 60-90 prescriptions per day to the pharmacy to fill. Later, Respondent recalled, the pharmacy was filling as many as 200-250 prescriptions per day for Dr. Peters' patients.⁴

Respondent testified that after a few weeks he questioned whether he was doing the right thing because most of prescriptions issued by Dr. Peters were for controlled substances.⁵ Respondent called Dr. Peters and questioned him about the high volume of prescriptions he was issuing for controlled substances. Dr. Peters assured him that the prescriptions were medically necessary because he had a pain management clinic. Respondent accepted Dr. Peters' assurances about the validity of the prescriptions and allowed the pharmacy to continue filling these prescriptions. But, he was candid that "there was always something on the inside telling me that something was not right."⁶

Mr. Lopez staffed the pharmacy together with Benson Jules, the pharmacist-in-charge that Respondent and he hired because Respondent worked full-time at Wal-Mart as a pharmacist. A few months after opening the pharmacy, the Board conducted a routine inspection. The inspector pointed out to Respondent that the pharmacy had some deficiencies, one of which was that the pharmacy had excessive refills. The Board's inspector told Respondent that the pharmacy had a month to correct the deficiencies and to file a written response to the Board. After doing so, Respondent said that he believed the pharmacy was "doing things legally."⁷

In November 2002, the Drug Enforcement Agency (DEA) arrived at the pharmacy and confiscated the prescription files. The DEA downloaded the pharmacy computer's hard drive and took all the cash in the register.⁸ Respondent was not arrested or charged with any crime. After the

⁴ Tr. at 155.

⁵ Tr. at 126.

⁶ Tr. at 138.

⁷ Tr. at 128.

⁸ Tr. at 157.

DEA left the pharmacy, Respondent called one of the DEA agents, Connie Overton, to confirm that he could continue operating the pharmacy and was assured he could.

Respondent explained that by this time he had lost interest in the pharmacy and was only stopping by once or twice a week. Mr. Jules, as the pharmacist-in-charge, was left to operate the pharmacy as though he was the owner. During this time, Mr. Jules began to fill internet prescriptions. These internet prescriptions resulted in the Agreed Board Order.⁹ Respondent and Mr. Lopez turned in the pharmacy's license in 2004-2005.¹⁰

On July 27, 2006, Respondent was indicted for the federal felony of conspiracy to fill invalid prescriptions issued by Dr. Peters in 2001-2002. Respondent cooperated with the DEA investigation and Cedric Joubert, the federal prosecutor.¹¹ The next year, the Staff notified Respondent of its intent to take disciplinary action against Respondent for the internet prescriptions Mr. Jules sold at the pharmacy between January 24 and May 14, 2004. Respondent also cooperated with the Board's investigation.¹²

2. Agreed Board Order and Criminal Conviction

During an audit of the pharmacy, Staff found evidence that the pharmacy sold 1,528 internet prescriptions for controlled substances and dangerous drugs to various customers in 48 states and Washington D.C. between January 24 and May 14, 2004. Mr. Jules, as the pharmacist-in-charge, actually processed and mailed these invalid prescriptions, of which 1,263 were for controlled substances and 265 were for dangerous drugs.¹³ The prescription drugs orders were invalid because

⁹ Tr. at 129.

¹⁰ Tr. at 133.

¹¹ Tr. at 134.

¹² Tr. at 131.

¹³ Staff Ex. 2 at Bate Stamp 000005.

they were issued without a proper physician-patient relationship, without a physical examination, and without appropriate diagnostic and laboratory testing.¹⁴

Staff sent Respondent preliminary notice of its intent to take disciplinary action against his license on June 25, 2007. On May 7, 2008, Respondent entered into Agreed Board Order #J-06-005 (Board Order). According to the terms of the Board Order, Respondent neither admitted nor denied the allegations set out in the Agreed Board Order.¹⁵ Nevertheless, Respondent agreed to the probated suspension of his license for five years, a four month suspension, and the payment of a probation fee of \$1,200.¹⁶

Prior to the entry of the Agreed Board Order, Respondent notified Staff that he had been indicted for the federal felony offense of conspiracy to unlawfully distribute and dispense hydrocodone and hydrocodone products outside the scope of professional practice and not for a legitimate medical purpose. He pled guilty to this charge on October 9, 2007, prior to entering into the Agreed Board Order.

On November 24, 2008, in the case styled, *United States of America v. Dennis Martin George*, Case number 4:06CR00232-003, in the United States District Court, the Houston Division of the Southern District of Texas, Respondent was adjudicated guilty of violating 21 U.S.C. §§ 841(a)(1) and (b)(1), and § 846 for engaging in a “conspiracy to unlawfully distribute and dispense, outside the scope of professional practice and not for legitimate medical purposes, various amounts of a mixture and substances known as hydrocodone and hydrocodone products, and various other drugs and substances.” Respondent was sentenced to three years probation and fined \$2,000.¹⁷

¹⁴ *Id.* at Bate Stamp 000004.

¹⁵ *Id.* at Bate Stamp 000007.

¹⁶ Staff Ex. 2 at Bate Stamp 000008-000009.

¹⁷ Staff Ex. 3.

3. Respondent's Position

Respondent asserts that under the Act the Board is not required to revoke his license automatically because of his felony conviction. The Board can consider all the events before, during and after the conviction including any mitigating circumstances¹⁸ that justify lesser sanctions. Respondent requests consideration of the following mitigating circumstances: (1) that he took responsibility for his actions from 2001-2002 by cooperating with law enforcement and forfeiting \$197,000; (2) that he has no history of such crimes before or after 2001 to 2002; (3) that he implemented remedial measures to ensure he does not end up in a similar situation; (4) that he has rehabilitative potential as indicated by his continued employment as a pharmacist; and (5) that he is a present value to the community.

Respondent claims that his problems occurred because he tried to co-own a pharmacy. When he is employed by a pharmacy as the pharmacist, Respondent has no problems. Respondent maintains that he is a good pharmacist, just not a good pharmacy owner. Respondent noted that the pharmacy did not fill internet prescriptions until Mr. Jules was left in charge. Although Respondent accepted responsibility for the internet prescriptions sold at the pharmacy he co-owned, he emphasized that he did not fill one internet prescription.¹⁹ Even during the DEA investigation, the Board's investigation, and after he pled guilty to the felony charge, the Board, the DEA, and the federal prosecutor allowed him to continue working as a licensed pharmacist with no violations of any kind and no harm to the public.

According to Respondent, he is presently fit to practice as a licensed pharmacist because his conduct after his indictment, the Agreed Board Order, and his felony conviction shows that he is unlikely to commit any criminal acts with his license in the future. Respondent explained that he was embarrassed by his conduct and is remorseful for his actions; that he knows he brought shame to

¹⁸ 22 TAC § 281.62(2).

¹⁹ Tr. at 130.

his family and his profession; and that he jeopardized his ability to support them. He recognizes that his conduct justifies some disciplinary action, but asked that all the circumstances related to his conduct before, during, and after the events be considered prior to making that determination.

4. Staff's Position

Staff argues that the seriousness of Respondent's felony conviction and his prior Agreed Board Order for a similar type violation justify the revocation of Respondent's pharmacist license. Staff points out that Respondent recognized the questionable nature of these prescriptions, yet continued to sell the drugs for another 12 months.²⁰ Stressing that dispensing controlled substances based on invalid prescriptions can only be committed with a pharmacist's license Staff asserts that it is one of the most serious violations that a licensed pharmacist can commit.

After the DEA confiscated the pharmacy's prescription files, Staff contends that Respondent should have been more vigilant about the pharmacy's business. Instead, by failing to properly monitor the business Respondent gave Mr. Jules the opportunity to fill invalid internet prescriptions for controlled substances and dangerous drugs. Respondent's criminal conviction directly relates to the practice of pharmacy. Respondent's felony conviction, coupled with his conduct that resulted in the Agreed Board Order, Staff maintains, justifies the revocation of Respondent's license and the imposition of a \$5,000 administrative penalty.

B. Applicable Law

The purpose of the Act is to "promote, preserve, and protect the public health, safety, and welfare" by controlling the practice of pharmacy.²¹ A pharmacist is required to determine, in the exercise of sound professional judgment, that a prescription is valid.²² A pharmacist may not

²⁰ Tr. at 58-61; Staff's Closing Argument at 1.

²¹ TEX. OCC. CODE ANN. § 551.002 (c).

²² 22 TEX. ADMIN. CODE § 291.34.

dispense a controlled substance if he or she knows or should have known that the prescription was issued without a valid patient-practitioner relationship.²³

The Board may take disciplinary action, including revocation of a license, against a licensed pharmacist who has:

(6) been convicted of or placed on deferred adjudication community supervision or deferred disposition or the applicable federal equivalent for: . . .

(B) a felony; . . .

(9) violated any provision of:

(A) Chapter 481 or 483, Health and Safety Code, or the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. Section 801 et seq.), or rules relating to one of those laws; . . .²⁴

To determine if the offense directly relates to the duties and responsibilities of a pharmacist and the appropriate sanction for criminal offenses, the Board promulgated rules under 22 TEX. ADMIN. CODE §§ 281.62- 281.65. The Board has determined that a federal felony offense under the Comprehensive Drug Abuse Prevention and Control Act (which includes 21 U.S.C. §§ 841(a)(1), 841(b)(1)(D) and 846) directly relates to the duties and responsibilities of a pharmacist.²⁵

The Board rules also take into consideration the factors set out in Section 53.023 of the Texas Occupations Code in weighing the nature and seriousness of certain crimes, aggravating and mitigating factors, and the severity of sanctions to impose, including revocation and administrative penalties.²⁶ According to the Board rules, "the nature and seriousness of certain crimes outweigh other factors to be consider in § 281.63(g) of this title (relating to Consideration for Criminal

²³ Texas Controlled Substances Act, TEX. HEALTH & SAFETY CODE ANN. § 481.074(a)(2).

²⁴ The Act §§ 565.001(a).

²⁵ 22 TAC § 281.63(i)(6).

²⁶ 22 TAC §§ 281.63- 281.65.

Offenses) and necessitate the disciplinary action listed below.” For federal criminal offenses involving drug-related offenses for the delivery of drugs the sanction is revocation.²⁷ The Board rules also provide for the imposition of an administrative penalty of up to \$5,000 for a felony conviction.²⁸

C. Evidence

Staff presented only documentary evidence during their direct case. Therefore, the ALJ will discuss Respondent’s evidence first.

1. Respondent’s Evidence

Respondent’s testimony

Respondent testified that when he was indicted by the federal government for conspiracy to sell invalid prescriptions along with Dr. Peters, Ansa Hogan, and Terry Green, he turned himself into the DEA. Respondent pled guilty to one felony count on October 9, 2007. On May 7, 2008, Respondent entered into the Agreed Board Order and on November 24, 2008, the United States District Court entered the judgment on his criminal case.

After his indictment, Respondent said that he was very depressed and remained housebound for almost six months before returning to work. He was then, and still is, very remorseful for what had happened and has done all he knows to do to take responsibility for and correct his part in Dr. Peters’ scheme. He cooperated with the DEA’s investigation, giving them honest and forthright information; continued to work and support his family; and he complied with terms of the Board Order and the terms of his felony probation.

²⁷ 22 TAC § 281.64 (c)(2)(A)(i).

²⁸ 22 TAC § 281.65(1)(U).

With the exception of the first six months following his indictment, Respondent continued working as pharmacist. After his indictment, Respondent elected not to work for any pharmacy that dispensed large quantities of controlled substances because of the problems he encountered while he owned the pharmacy. Equally important, when he suspects the validity of a prescription Respondent calls the doctor or talks to the patient, and if he is not satisfied with the answers he tells the patient that the drug is out of stock.²⁹

Respondent asks the Board to consider when the criminal activity occurred (2001 and 2002) rather than the conviction date (2008) because during the intervening years he has not engaged in any criminal activity, helped with the criminal investigation, and took full responsibility for his criminal activity. Respondent also points out that he was never charged with illegally dispensing and distributing controlled substances, but was charged with conspiracy to unlawfully distribute and dispense hydrocodone and hydrocodone products because of his business relationship with Dr. Peters. As for the Agreed Order, Respondent points out that because he was a co-owner of the pharmacy he took responsibility for Mr. Jules' violation of the Board rules. But at no time did he fill internet prescriptions.

Finally Respondent echoed the testimony of several of his witnesses: the community has a need for pharmacists. Respondent explained that the nation is experiencing a shortage of pharmacist overall, but the valley, where he works, the shortage is severe. Respondent asserts that he has suffered the consequences of his actions and never wants to endure that experience again. He is a good pharmacist who until the time he owned the pharmacy enjoyed an excellent reputation. Respondent attests he will never own a pharmacy again and ask that the Board consider some disciplinary action other than revocation so he can move on with his life, support his family, and provide the needed pharmacist services to his community.

²⁹ Tr. at 147 -148.

In his closing arguments, Respondent proposed disciplinary actions he believes adequately sanction him for his conduct in 2001 and 2002 that resulted in his 2008 felony conviction. The terms Respondent proposed include the following: (1) his pharmacist license be suspended until his criminal probation is lifted whereupon the license will be automatically be reinstated upon presenting proof of the termination of his criminal probation; (2) that his license remain suspended for an additional three years and probated for this entire time; (3) that he be prohibited from owning or having partial ownership in a pharmacy; (4) that during the period of suspension and probation his employer will issue quarterly reports detailing his performance; (5) that he not fill more than fifteen percent (15%) of the total prescriptions filled per month with controlled substances, specifically Schedule II and III drugs; and that he pay a fine of \$1,000.

The Federal Prosecutor and the Probation Officer

Mr. Joubert, an attorney with the United States Department of Justice in Houston, Texas, prosecuted the criminal case against Respondent.³⁰ Mr. Joubert explained that this case involved a physician and three pharmacists, one of whom was Respondent, for issuing and filling invalid prescriptions in 2001-2002. The physician, Dr. Peters, gave his patients prescriptions for promethazine with codeine and hydrocodone products without a medical purpose. He then sent these patients to one of the three pharmacies.

Mr. Joubert, confirmed that Respondent got caught up in Dr. Peters' scheme. Dr. Peters wrote prescriptions to patients without a medical need for the controlled substances and approached three pharmacists to fill those prescriptions. Mr. Joubert agreed that Respondent's pharmacy filled the fewest number of Dr. Peters' prescriptions, and further that Respondent filled the fewest of Dr. Peters' prescriptions of those filled at the pharmacy.³¹

³⁰ Mr. Joubert testified that in his official capacity he could not give an opinion, but could testify as to the facts of the criminal case.

³¹ Tr. at 59.

Mr. Joubert testified that in his 28 years as a prosecutor, Respondent was the most forthcoming and honest defendant he had experienced. Mr. Joubert verified that Respondent's criminal conviction did not prohibit his from practicing as a pharmacist.³² Although the federal court had the ultimate authority to determine the terms of probation, Mr. Joubert explained, as the prosecutor he had no objection to permitting Respondent to work as a licensed pharmacist. He took this position because Respondent was honest and forthright during the investigation and after the indictment, and because Respondent took responsibility for his conduct.³³

Respondent's probation officer, Jose Luis Mata, reported that Respondent is gainfully employed as a pharmacist, that gainful employment is a condition of his probation, and that Respondent has complied with the terms and conditions of his probation. In his opinion, Respondent is remorseful for his criminal conduct and is unlikely to engage in any further criminal activity because Respondent values his family and because Respondent is a good pharmacist.³⁴

Respondent's Employers

Jason Bruce works for a temporary employment agency that places licensed pharmacists. In 2007, Mr. Bruce began placing Respondent in temporary pharmacist positions and received favorable feedback about Respondent's work. Mr. Bruce's clients put a list together of the best pharmacists that he had placed and Respondent was on this preferred list.³⁵ Although Respondent did not tell him initially about his criminal history, a short time later Respondent did tell him and explained what had happened. Mr. Bruce believes Respondent has taken full responsibility for his criminal conduct, and maintains that because Respondent is such a great pharmacist he is a benefit to the community.³⁶

³² Tr. at 55.

³³ Tr. at 56.

³⁴ Tr. at 20-24.

³⁵ Tr. at 44.

³⁶ Tr. at 45-49.

Respondent's current employer, Paula Fraser, a licensed pharmacist, expounded on Respondent's good character and his relationship with her customers. According to Ms. Fraser, Respondent was hired in February 2009. Since then Respondent has never called in sick or been late to work. Her customers find Respondent to be very helpful, so much so that the older women customers "love him." Ms. Fraser acknowledged that her pharmacy only recently began handling narcotic prescriptions.³⁷

Ms. Fraser candidly acknowledged that 20 years ago she had her pharmacist license revoked for 11 years. She explained that she hired Respondent knowing he had a felony conviction and an Agreed Board Order resulting from his work as a pharmacist, but believes he should be given a second chance. As Respondent's employer, she is confident that Respondent understands what he can lose if he engages in that type of criminal activity again and will not jeopardize his license by doing so.³⁸

Friends

Several friends testified to Respondent's good character, his rehabilitative potential, and requested that he be permitted to keep his pharmacist's license. David Child has known Respondent since 1986. Respondent has dealt with him in an ethical manner. Although Mr. Child knows about Respondent's felony conviction, he asserts that Respondent has rehabilitative potential because he is interested in learning, wants to support his family, and because he continues to serve the community as a pharmacist since he was involved in the felony offense of conspiracy to dispense invalid drugs in 2002.

Other friends who testified in support of Respondent included Leslie Weir, Michael Alexander, Matthew Baptiste, Kenroy Gordon, Robert Seals, Earle Thornhill, M.D., and Timothy

³⁷ Tr. at 37-38.

³⁸ Tr. at 40.

Daniel. Respondent has been honest with his friends about his criminal conviction. Mr. Weir has known Respondent for 10 years and testified that Respondent is ethical, hard-working, and has rehabilitative potential.³⁹ Mr. Gordon, an electrical engineer, is a childhood friend of Respondent. He knows Respondent to be an ethical person, and was surprised when Respondent was convicted. He testified that the conviction is something Respondent is not proud of and is working to overcome. In his opinion, Respondent made a mistake, took responsibility for this mistake, paid dearly for this mistake, and is very remorseful about this mistake. In his opinion, Respondent should be given a second chance.⁴⁰

Mr. Baptiste, the owner of a corporate and legal library, has known Respondent over 40 years. After his indictment, Mr. Baptiste testified that Respondent came to his home and was inconsolable for several days. Mr. Baptiste reported that he saw Respondent go through this difficult period of remorse, take full responsibility for his actions, and then take action to make sure he never repeated this error in judgment.⁴¹

Mr. Alexander first met Respondent 30 years ago when they worked together as teachers during their late 20s.⁴² They have since remained friends. Throughout the 30 years, Mr. Alexander said that Respondent has been an ethical person despite Respondent's criminal conviction. In Mr. Alexander's opinion, Respondent demonstrated that he was rehabilitated when he did everything that law enforcement asked of him during the criminal investigation and accepted the consequences of his conduct. Respondent is serving his sentence, is supporting his family, is a good pharmacist, and in his opinion, Respondent's pharmacist license should not be revoked.⁴³

³⁹ Tr. at 64-65.

⁴⁰ Tr. at 99-103.

⁴¹ Tr. at 107-113.

⁴² Tr. at 69.

⁴³ Tr. at 70-74.

Respondent and Earle Thornhill, M.D., have been friends since childhood—40 years. Dr. Thornhill maintains that until Respondent's criminal conviction for his actions in 2001 and 2002, Respondent never had any problems with the law. In his opinion, Respondent is an ethical person and the criminal conviction is the result of an atypical incident. Dr. Thornhill is emphatic in his belief that Respondent has rehabilitative potential, particularly given Respondent's behavior after his indictment. He pointed out that Respondent took responsibility for his error in judgment, became more conservative, and remains remorseful for his conduct.⁴⁴

Mr. Seals, a pharmacy owner and manager, has known Respondent since they served together in the U.S. Army 15 years ago.⁴⁵ Mr. Seals stated that he knows about Respondent's felony drug conviction, but still maintains that Respondent is a responsible, ethical man, who has rehabilitative potential and is a present value to the community. He worked with Respondent as a pharmacist until 2000, and knows Respondent goes out of his way to help his customers. Mr. Seals explained that Respondent has shown him ways to improve the pharmacy and to prevent mistakes since Mr. Seals opened a pharmacy a couple of years ago.

Respondent's last character witness was Timothy Daniel, M.D., a friend he has known since childhood. Dr. Daniel also asserts that despite Respondent's felony conviction, Respondent is an ethical person who cares about others. He relayed some of his experiences where Respondent stepped up to help others and insisted that Respondent has rehabilitative potential. According to Dr. Daniel, when Respondent was indicted he became depressed and very regretful for what he had done and deserves a second chance.

⁴⁴ Tr. at 81-83.

⁴⁵ Houston South Side Pharmacy, Houston, Texas.

2. Staff's Evidence

On rebuttal Staff called two witnesses to testify, Robert Ebram, Jr., Board Chief Investigator, and Carol Fisher, Board Director of Enforcement. Mr. Ebram was called to rebut Mr. Seal's testimony, a character witness called by Respondent. According to Mr. Ebram, Mr. Seal's owns a pharmacy that is under investigation by the Board. During a Board audit of Mr. Seal's pharmacy, the Board discovered that 115,000 doses of controlled substances were missing. Mr. Seal's is not challenging the audit. Mr. Ebram confirmed that Respondent was not involved in this incident.

Ms. Fisher, Staff's expert, testified about the Board's policies and the applicable law. Ms. Fisher reviewed the criminal judgment entered against Respondent and explained that Dr. Peters issued prescriptions that were not for a legitimate medical purpose. Most were for controlled substances, primarily hydrocodone, which is a highly abused drug because of its addictive nature and high street value—\$5.00 to \$10.00 per tablet. Consequently, she clarified, the purchase and sale of hydrocodone and hydrocodone products are highly regulated.⁴⁶

According to Ms. Fisher, Respondent's criminal conviction directly relates to his occupation as a pharmacist and contributes to the illicit use of hydrocodone drugs.⁴⁷ Any felony drug conviction, she explained, is grounds for disciplinary action under § 565.001(a)(6) of the Act. But, Respondent is also subject to disciplinary action under § 565.001(a)(9) because Respondent's criminal conviction is due to his violation of the federal Comprehensive Drug Abuse Prevention and Control Act of 1970. The only question remaining then is the appropriate sanction to impose.⁴⁸

⁴⁶ Tr. at 171.

⁴⁷ 22 TAC § 281.63(i)(6); Tr. at 179.

⁴⁸ Chapter 53 of the Texas Occupations Code applies to the Board of Pharmacy unless the licensee is convicted of a felony under Chapter 481 or 483 or 485.033, Health and Safety Code. Respondent was convicted of a federal felony, therefore, Chapter 53 applies to this proceeding.

To ensure consistency and provide notice to licensed pharmacist of the consequences of certain violations, the Board established guidelines for determining the appropriate sanctions for violations of the Board rules and the Act. Specific to this case is 22 TAC § 281.64 entitled "Sanctions for Criminal Offenses."⁴⁹ The Board rules also include a penalty matrix to reflect the nature and seriousness of each crime.

Ms. Fisher noted that Respondent's violation of the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 is addressed in 22 TAC § 281.64(c)(2)(A)(i), with the specified sanction being the revocation of his license. Revocation is appropriate, she asserted, because a pharmacist license is necessary to engage in this criminal conduct. This violation, she testified, also justifies the imposition of an administrative penalty under 22 TAC § 281.65(1)(u) of up to \$5,000.

Ms. Fisher addressed the factors set out in Chapter 53 of the Texas Occupations Code because Respondent was convicted of a federal felony offense. As noted above, Respondent's criminal conduct occurred while serving in his capacity as a licensed pharmacist and directly relate to this occupation.⁵⁰ She stressed that a pharmacist must verify that the doctor is a legitimate doctor, who has had a face-to-face consultation with the patient and made a diagnosis establishing a patient-doctor relationship, and that the prescription is for a legitimate medical purpose.⁵¹ When Respondent noticed that they were dispensing 250 prescriptions for Dr. Peters per day, Ms. Fisher opined that a red flag should have gone up for Respondent because no doctor can treat that many patients in one day if it is a legitimate medical practice.⁵²

Ms. Fisher recognized that with the exception of his 2008 conviction, Respondent has no other criminal history. But, she argues that when the DEA arrived to investigate the pharmacy "a big

⁴⁹ Tr. at 175-177.

⁵⁰ Tr. at 180.

⁵¹ Tr. at 181.

⁵² Tr. at 182.

bell” should have gone off for Respondent to “walk the straight and narrow after that.”⁵³ Instead, between January 24 and May 14, 2004, Respondent, as a co-owner of the pharmacy and a staff pharmacist, was not involved enough to know that Mr. Jules filled 1,528 internet prescriptions from various doctors for controlled substances or dangerous drugs to patients in 48 states and Washington D.C.⁵⁴ Ms. Fisher testified that as the owner of the pharmacy Respondent was responsible for all drugs sold because he should have known what was going on particularly after DEA arrived to investigate in 2002.⁵⁵

In response to Respondent’s argument that more than nine years have transpired since his criminal activities, Ms. Fisher explained that it is the Board’s procedure to wait until the criminal conviction is final before taking action. She acknowledged that when the Board entered into the Agreed Board Order, the Board was aware of Respondent’s indictment. But, explained that the Board does not generally interfere with a DEA investigation.⁵⁶ Because it has only been a little over a year since Respondent’s federal felony conviction and Respondent was still on felony probation, this is an aggravating factor to consider under the Board rules.

Of primary concern to the Board, is the increased potential of harm to the public should Respondent be permitted to retain his pharmacist license. Ms. Fisher explained that people addicted to drugs do things they should not do under the influence of the drugs and to procure these drugs. Getting controlled substances or dangerous drugs from a pharmacist without a valid medical reason is harmful to the public even if the patients do not complain because of the risk of an overdose and death. If anyone complains, it usually is the patient’s family. Moreover, Respondent admitted in his criminal case that he “conspired” with others to sell invalid prescriptions.

⁵³ Tr. at 196.

⁵⁴ Staff Ex. 2; Tr. at 184 and 196.

⁵⁵ Tr. at 186.

⁵⁶ Tr. at 187-188.

Ms. Fisher testified that she considered all the mitigating circumstances presented by Respondent at the hearing. But, because filling invalid prescriptions is such a serious violation, these mitigating factors do not offset the serious nature of the violations. In her opinion, Respondent's license should be revoked consistent with the disciplinary action taken by the Board against other pharmacists convicted of this type of crime.

D. ALJ's Analysis

The Board is charged with the responsibility of regulating the practice of pharmacy to instill confidence in the public and to promote, preserve, and protect the public health, safety, and welfare.⁵⁷ This responsibility must be balanced against a licensee's right to continue practicing in this profession. In evaluating the appropriate sanctions to impose for various violations, the Board set out guidelines for imposing sanctions which reflect the Board's interpretation of the severity of certain violations. However, the facts of each case must be evaluated utilizing the Board's rules.

The facts regarding Respondent's criminal conviction from prescriptions filled in 2001 and 2002 and the Agreed Board Order for the internet prescriptions filled in 2004, are not really disputed. As verified by the federal prosecutor, Respondent's participation in the conspiracy was minimal—in fact Respondent filled very few of Dr. Peters' prescriptions himself. Likewise, Respondent's conduct that resulted in the Agreed Board Order was based on his failure to maintain oversight of the pharmacy that he co-owned. Respondent did not fill any internet prescriptions, but as a co-owner he was responsible for Mr. Jules' activities while serving as the pharmacist-in-charge. He accepted that responsibility and the sanctions.

Respondent's conduct before, during, and after his felony conviction are important to consider. The criminal activity occurred in 2001-2002. During the DEA investigation and after his indictment, Respondent was honest, forthright, and helpful. Neither the DEA nor the federal

⁵⁷ The Act § 551.002.

prosecutor had any concerns about permitting Respondent to continue to serve as a licensed pharmacist not only during the investigation, but also after Respondent's indictment, guilty plea, and conviction.

Likewise, Staff knew about the federal investigation and Respondent's guilty plea prior to entering into the Agreed Board Order yet permitted Respondent to continuing serving the public as a pharmacist for almost another two years. The Act authorizes the Board to temporarily suspend the license of a licensee who the Board believes is an immediate threat to the health and safety of the public.⁵⁸ Clearly, the Staff did not believe Respondent to be a threat to the public or Staff would have or should have taken action to protect the public in the 10 years since Respondent was engaged in this conspiracy.

But, Staff also has a responsibility to regulate the profession to instill confidence in the public that licensed pharmacists meet certain standards as set out in the Act and the Board rules. Respondent clearly violated the Act and the Board rules and he recognizes that the violations were serious and warrant disciplinary action. The question is whether Respondent's conduct warrants revocation or a lesser sanction.

Generally, the guidelines call for the revocation of a pharmacist's license when the pharmacist is convicted of a felony, particularly one related to the duties and responsibilities of a pharmacist. However, these are guidelines and the Board has discretion to consider the facts of each case, and has done so in the past. Respondent is not a drug addict and does not have a history of delivering or dispensing drugs illegally. What Respondent did was to fill Dr. Peters' prescriptions that he knew or should have known were invalid.

Respondent acknowledged that despite Dr. Peters' assurances to him that the prescriptions for controlled substances were medically necessary for his pain management cases, Respondent

⁵⁸ The Act § 565.059.

suspected otherwise. Yet, he decided to fill and allow the pharmacy to fill these prescriptions for almost a year. Respondent decision to ignore his own judgment was a poor decision that has cost him dearly. Rather than pretend he did not suspect Dr. Peters of issuing invalid prescriptions, when the DEA began investigating Dr. Peters and the pharmacy, Respondent's good character prevailed and he was not only honest, but worked with the federal prosecutor and cooperated fully.

Mr. Joubert, the federal prosecutor, could not have been more emphatic in his opinion that Respondent was always honest and forthright in dealing with him. Mr. Joubert testified that he never objected to Respondent being permitted to serve the public as a pharmacist, and does not now. Respondent's probation officer also attested to his remorsefulness for his conduct and for his compliance with his probation. Mr. Mata opined that Respondent is unlikely to engage in any further criminal activity if permitted to continue to hold his license.

Respondent has paid substantially for his participation in Dr. Peters' criminal issuance of invalid prescriptions and demonstrated his remorse and good character. Respondent is up-front about his felony conviction with his employers, colleagues, and friends. Respondent had a diverse group of people testify as to his good character and his contribution to the community as a pharmacist. Each knew of his conviction, yet each was willing to affirm that Respondent had made a serious mistake, learned his lesson, and should be given a second chance. Both his employers attested to his stellar performance as a pharmacist, his concern for the customers he serves, and his efforts to avoid any situation that could jeopardize his license.

To his credit, Respondent recognizes that while a good pharmacist, he was not a good pharmacy owner. He admits he lacks the business acumen and oversight necessary to own and manage a pharmacy, trusting too much to those who worked for him to properly manage the business. He is agreeable to an order that prohibits him from any ownership interest in a pharmacy. Similarly, Respondent has chosen not to work for those pharmacies that heavily fill controlled substances because of his experience in dealing with Dr. Peters.

The ALJ believes that revocation of Respondent's pharmacist license after Respondent has demonstrated for almost ten years that he is not a threat to the public, but instead is a good, conscientious pharmacist, who made serious mistakes while owning the pharmacy, is not warranted. But, Respondent's lapse in good judgment while he owned the pharmacy warrants prolonged scrutiny and serious sanctions. Ms. Fisher's testimony that Respondent's violations were serious and could have been harmful to the public, while years ago, supports an extended suspension and the imposition of the requested administrative penalty.

In addition, the factors set out in Chapter 53 of the Texas Occupations Code must be considered in determining the present fitness of a person who has been convicted of a crime to hold the license. The relevant factors that must be considered in evaluating Respondent's fitness to perform the duties and discharge the responsibilities of a licensed pharmacist include:

- (1) the extent and nature of the person's past criminal activity; . . .
- (3) the amount of time that has elapsed since the person's last criminal activity;
- (4) the conduct and work activity of the person before and after the criminal activity;
- (5) evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release; and
- (6) other evidence of the person's fitness, including letters of recommendation from:
 - (A) prosecutors and law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person;
 - (B) the sheriff or chief of police in the community where the person resides; and
 - (C) any other person in contact with the convicted person.⁵⁹

Respondent's only criminal activity is this conviction which resulted from his minimal conspiracy involvement with Dr. Peters. This occurred almost 10 years ago. Since that time, Respondent has been an exemplary citizen, and while not a good pharmacy owner, he has been a good pharmacist. Respondent's efforts at rehabilitation were expounded by his friends, his colleagues, the federal prosecutor, and his parole officer. Respondent took responsibility for his part in Dr. Peters' conspiracy. Respondent's employers since his indictment speak highly of his work ethic, his desire to be of service to those he serves, and is a good pharmacist. Respondent

⁵⁹ TEX. OCC. CODE § 53.023(a).

recognizes his own limitations when it comes to running a pharmacy and has no intentions of ever doing so in the future. Under the factors set out in Chapter 53, the evidence establishes that Respondent has the fitness to perform the duties and discharge the responsibilities of a licensed pharmacist.

Respondent is currently under an Agreed Board Order for the internet prescriptions filled in 2004 that places him on a probated suspension for five years. Therefore, the ALJ recommends the following:

- ◆ Respondent's pharmacist license be suspended for eight years from the date of the Board Order is entered. After Respondent has completed his criminal probation, Respondent's pharmacist licenses should be suspended for an additional six months, with the remaining time being probated;
- ◆ Respondent be prohibited from owning or having partial ownership in a pharmacy;
- ◆ Respondent's employer must issue quarterly reports detailing his performance during the periods of suspension and probation;
- ◆ Respondent be prohibited from filling more than 10 percent of the total prescriptions he fills per month with controlled substances, specifically Schedule II and III drug;
- ◆ Respondent pay within 6 months of the date of the Board Order an administrative penalty of \$5,000.

III. FINDINGS OF FACT

1. On February 23, 1990, the Texas Board of Pharmacy (Board) issued Texas pharmacist license number 31603 to Dennis Martin George (Respondent). That license remains in effect.
2. Between 2001 and 2005, Respondent was the owner and staff pharmacist of Foodarama Pharmacy (the pharmacy), which was located at various locations during this time period, including 1603 Cartwright Road Missouri City, Texas, 5809 Airline Drive, Houston, Texas, 5308 West Bellfort Street, Houston, Texas, and 3223 South Main Street, Stafford Texas.

3. On September 29, 2009, and October 5, 2009, Staff mailed a Complaint to Respondent advising him in writing of the allegations against him; the relief sought against him; the relevant laws and statutes; and the date, time, and place of hearing.
4. Respondent received timely and adequate notice of the charges against him.
5. By Order dated November 20, 2009, the parties were advised that a hearing on the merits of this matter would be held on January 19, 2010, at the State Office of Administrative Hearings.
6. The hearing on the merits was convened on January 19, 2010, in Austin, Texas, by Administrative Law Judge (ALJ) Bill Zukauckas.
7. Assistant General Counsel Julie Hildebrand represented the Staff for the Board (Staff). Attorney Jon Porter represented Respondent.
8. The record closed on March 10, 2010, following the submission of written closing arguments by the parties.
9. In 2001, Respondent entered into a business relationship with Rudy Lopez to co-own the pharmacy that opened in July 2001.
10. Shortly after opening, Alonzo Peters, III, M.D., approached Respondent and asked Respondent if the pharmacy would fill prescriptions for his patients.
11. Dr. Peters told Respondent about his clinic, but did not tell him about the nature of the prescriptions that he would be issuing to his patients.
12. Respondent agreed that the pharmacy would give Dr. Peters' patients a discount for filling the prescriptions.
13. At first the pharmacy filled 60 to 90 prescriptions per day from Dr. Peters, but that eventually escalated to 200-250 prescriptions per day.
14. Within a few weeks, Respondent noticed that the majority of Dr. Peters' prescriptions were for controlled substances and questioned whether he was doing the right thing by filling these prescriptions.
15. As a result of his concerns, Respondent called Dr. Peters and was assured by Dr. Peters that the prescriptions were valid because he dealt primarily with pain management.
16. Throughout the time Respondent co-owned the pharmacy (2001-2005), Respondent worked full time as a pharmacist employee at Wal-Mart and worked part-time at the pharmacy.

17. Respondent and Mr. Lopez hired a pharmacist-in-charge to run the day-to-day operations of the pharmacy, Benson Jules.
18. In November 2002, the Drug Enforcement Agency (DEA) arrived at the pharmacy and confiscated the prescription files, downloaded the computer hard-drive, and took all the cash in the pharmacy register, but did not charge or arrest Respondent.
19. Respondent confirmed with the DEA that the pharmacy could continue to operate.
20. After the DEA arrived, Respondent only stopped by the pharmacy once or twice a week leaving Mr. Jules in charge of the pharmacy.
21. Between January 24 and May 14, 2004, Mr. Jules, through the pharmacy, sold and shipped 1,528 internet prescriptions for controlled substances and dangerous drugs issued by several different physicians to customers in 48 states and Washington D.C. as the pharmacist-in-charge of the pharmacy.
22. In 2006, Respondent was indicted for the federal offense of conspiracy to unlawfully distribute and dispense hydrocodone and hydrocodone products outside the scope of professional practice and not for a legitimate medical purpose due to his business relationship with Dr. Peters through the pharmacy in 2001 and 2002.
23. On June 25, 2007, Staff sent Respondent preliminary notice of its intent to take disciplinary action against his license for allowing the pharmacy to fill invalid prescriptions—prescriptions that were issued without a proper physician-patient relationship, without a physical examination, and without appropriate diagnostic and laboratory testing.
24. Respondent did not dispense, deliver, or fill any internet prescriptions, but as an owner of the pharmacy, was responsible for all business conducted by the pharmacy.
25. Respondent cooperated with the federal prosecutor, Cedric Joubert, during the DEA's investigation and was honest and forthright beyond that experienced by Mr. Joubert in 28 years of practice.
26. On October 9, 2007, Respondent pled guilty to one federal felony count, specifically for engaging in a conspiracy to unlawfully distribute and dispense hydrocodone and hydrocodone products without a legitimate medical purpose.
27. Respondent told Staff that he had been indicted for this federal offense.
28. On May 7, 2008, Respondent entered into Agreed Board Order #J-06-005 (Agreed Board Order) as a result of the internet prescriptions filled by the pharmacy between January 24 to May 14, 2004, in which his license was suspended for 4 months with an additional five-year probated suspension and he required to pay a probation fee of \$1,200.

29. On November 24, 2008, in the case styled, *United States of America v. Dennis Martin George*, Case number 4:06CR00232-003, in the United States District Court, Houston Division of the Southern District of Texas, Respondent was adjudicated guilty of violating 21 U.S.C. §§ 841 (a)(1) and (b)(1), and § 846 for engaging in a “conspiracy to unlawfully distribute and dispense, outside the scope of professional practice and not for legitimate medical purposes, various amounts of a mixture and substances known as hydrocodone and hydrocodone products, and various other drugs and substances.” Respondent was sentenced to three years probation and fined \$2,000.
30. Respondent filled very few of the prescriptions issued by Dr. Peters.
31. Respondent committed a serious crime that is directly related to the licensed occupation.
32. Respondent fully cooperated with the investigation into his participation into the federal violation of the Comprehensive Drug Abuse Prevention and Control Act of 1970 through his business dealings with Dr. Peters.
33. The federal prosecutor, Mr. Joubert, did not find any reason to oppose permitting Respondent from continuing to serve the public as a pharmacist at any time during the investigation, plea bargaining, or sentencing of Respondent because Respondent had been so honest and forthright during the investigation.
34. Respondent does not have a prior criminal record and until he owned the pharmacy had no prior disciplinary history with the Board.
35. Eight years has elapsed since Respondent’s criminal activity in 2001 and 2002.
36. Following the Agreed Board Order and his federal convictions, Respondent paid \$197,000 to the federal government, chose not to own another pharmacy, disclosed his criminal conviction to his employers and friends, and chose not to work at any pharmacy that dispensed a great deal of controlled substances.
37. Respondent is fully compliant with all of the terms and conditions of his criminal probation and the Agreed Board Order.
38. Respondent has been employed for more than 20 years as a pharmacist.
39. Respondent has been gainfully employed as a pharmacist since his criminal conviction in 2008, other than time off following his indictment, and due to the requirements of his probation and the Agreed Board Order.
40. Respondent has been responsible and conscientious in his performance as a pharmacist since his indictment and has a good working relationship with his employers and his customers.
41. Respondent is remorseful for his criminal activities in 2001 and 2002.

42. The public health and safety will not be at risk if Respondent is allowed to continue working as a pharmacist.

IV. CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter pursuant to TEX. OCC. CODE § 565.001 *et seq.* (the Act).
2. The State Office of Administrative Hearings has jurisdiction over all matters related to conducting a contested case in this matter, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ch. 2003.
3. Timely and proper notice of the hearing was sent to Respondent as required by TEX. GOV'T CODE ch. 2001.
4. Staff has the burden to prove by a preponderance of the evidence that grounds for discipline exist. 22 TEX. ADMIN. CODE (TAC). § 281.31(a).
5. The Board is authorized to take disciplinary action against a pharmacist who has violated the Pharmacy Act and the Board rules, including being convicted of a felony or for violating the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. §§ 801 *et seq.* pursuant to §§ 565.001(a)(6)(B), and (a)(9)(A) of the Act.
6. Authorized discipline includes license revocation and suspension, probated suspension, restrictions, reprimand, and imposition of an administrative penalty pursuant to § 565.051 of the Act.
7. Based on Respondent's federal felony conviction as set out in the Findings of Fact, Respondent violated §§ 565.001(a)(6)(B) and (a)(9)(A) of the Act.
8. The crime committed by Respondent directly related to the duties and responsibilities of a pharmacist pursuant to 22 TEX. ADMIN. CODE. § 281.63(i).
9. In reaching a decision on the imposition of a disciplinary sanction, the Board shall determine the person's fitness to perform the duties and discharge the responsibilities of the licensed occupation pursuant to TEX. OCC. CODE § 53.023 and 22 TEX. ADMIN. CODE §§ 281.63 and 281.64.
10. Based on the above Findings of Fact and Conclusions of Law, the Board should take the following disciplinary action against Respondent's license:

- a. Respondent's pharmacist license be suspended for eight years from the date of the Board Order is entered with all but the first six months following his criminal probation being probated;
- b. Respondent be prohibited from owning or having partial ownership in a pharmacy;
- c. Respondent's employer will issue quarterly reports detailing his performance during the periods of suspension and probation;
- d. Respondent will not fill more than 10 percent of the total prescriptions he fills per month with controlled substances, specifically Schedule II and III drugs;
- e. Respondent will pay within 6 months of the date of the Board an administrative penalty of \$5,000.

SIGNED May 10, 2010.



BILL ZUKAUCKAS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS