

If and when a petition for removal of restrictions is filed, all competent evidence of rehabilitation presented by the Respondent will be considered by the Real Estate

Commissioner.

This Decision shall become effective at 12 o'clock noon on JUN 17 2020.

IT IS SO ORDERED 5-20-20

DOUGLAS R. McCAULEY
REAL ESTATE COMMISSIONER

Douglas R. McCauley

**BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA**

In the Matter of the Statement of Issues Against:

JAMES YING MING GEE, Respondent

Agency Case No. H-41529 LA

OAH No. 2019120794

PROPOSED DECISION

Carla L. Garrett, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on February 12, 2020, in Los Angeles, California.

Andrea Bentler, Staff Attorney, represented Maria Suarez, a Supervising Investigator of the State of California (Complainant). James Ying Ming Gee (Respondent) appeared and represented himself.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on February 12, 2020.

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FACTUAL FINDINGS

Jurisdictional Matters

1. On May 21, 2018, Respondent filed an application with the Department of Real Estate (Department) for a real estate salesperson license. That application is now pending.
2. On November 19, 2019, Complainant filed the Statement of Issues in her official capacity as a Supervising Special Investigator of the Department. Respondent timely filed a request for hearing, and this action ensued.

Discipline by the Board of Pharmacy

3. On August 26, 1991, the Board of Pharmacy (Pharmacy Board) issued Pharmacist License Number RPH 44796 to Respondent. The Pharmacy Board also issued pharmacy permits to two of Respondent's pharmacies, Gee's Healthcare Pharmacy, Inc., doing business as Yorba Park Pharmacy, and Gee's Healthcare Pharmacy, Inc., doing business as Cabrillo Park Pharmacy, on April 16, 2002 and September 1, 2009, respectively. On March 21, 2017, the Pharmacy Board issued a Decision and Order, effective April 20, 2017, pursuant to a Stipulated Settlement and Disciplinary Order, accepting the surrender of the permit licenses for Yorba Park Pharmacy and Cabrillo Park Pharmacy, and revoking Respondent's pharmacist license, staying the revocation, and placing Respondent on probation for a period of five and one-half years, under specific terms and conditions, including 120 days' suspension, a mental health examination, psychotherapy, remedial education, and an order to pay \$33,966 in costs, among other conditions.

4. The facts and circumstances underlying the discipline issued by the Pharmacy Board concerned prescriptions filled at Respondent's pharmacies. Specifically, at Cabrillo Park Pharmacy, where Respondent served as the pharmacist-in-charge, Respondent filled prescriptions for controlled substances written by Dr. M.S. from September 24, 2012 through January 11, 2013. The prescriptions listed Dr. M.S.'s address, showing it was 53 miles away from Cabrillo Park Pharmacy, and averaged 65 miles, one-way, from the patients' residence. Dr. M.S. maintained a general practice, with a secondary practice in pediatrics, and did not specialize in pain management.

5. The Pharmacy Board also became concerned about prescriptions Respondent filled at Yorba Park Pharmacy. Specifically, Respondent filled prescriptions for controlled substances written by Dr. M.S. from June 21, 2013 through November 19, 2013. The prescriptions listed Dr. M.S.'s address, showing it was 51 miles away from Yorba Park Pharmacy, and averaged 53 miles, one-way, from the patients' residence.

6. Dr. M.S. wrote his prescriptions for controlled substances in an identical fashion for multiple patients, with no adjustment in the prescribing pattern for sex, age, weight, renal or hepatic function, race, diagnosis, past medications used, or any other patient-related factor. Patients paid for the prescriptions in cash at Respondent's Cabrillo Park Pharmacy and Yorba Park Pharmacy, and did not seek reimbursement from an insurance company or a government agency. These patients also filled prescriptions for controlled substances prescribed by multiple physicians during the same time frame at multiple pharmacies.

7. On February 6, 2014, law enforcement arrested Dr. M.S. and on March 12, 2015, Dr. M.S. suffered a conviction in *People of the State of California v. M.S., et al.* in the Superior Court of California for the County of Ventura, case number 2014004170, pursuant to a plea of guilty, of aiding the unlawful prescription of a control substance

and of sale of controlled substances, in violation of Health and Safety Code sections 11154, subdivision (b), and 11352, subdivision (a), respectively, both felonies. The facts and circumstances underlying the conviction involved Dr. M.S. providing blank, pre-signed controlled substance prescription pads to unlicensed medical professionals.

8. Respondent's pharmacies maintained drug inventories that contained discrepancies, and failed to maintain a lockable storage cabinet for controlled substances. Instead, controlled substances were stored in a desk. Respondent suffered the loss of controlled substances, including 734 tablets of hydrocodone and 20 tablets of hydromorphone, which Respondent failed to report to the Pharmacy Board as required. Respondent's pharmacies suffered losses of 6,332 tablets of oxycodone, 44,111 tablets of hydrocodone, 14,183 tablets of alprazolam, and 105 pints of promethazine with codeine. Respondent did not report the losses to the Pharmacy Board until prompted to do so by a Pharmacy Board inspector.

9. Respondent was subject to disciplinary action by the Pharmacy Board for the following: (1) failing to comply with his corresponding responsibility to ensure that controlled substances were dispensed for a legitimate medical purpose, in that Respondent furnished prescriptions for controlled substances even though "red flags" existed, indicating those prescriptions were not issued for a legitimate medical purpose, in violation of Health and Safety Code section 11153, subdivision (a); (2) excessively furnishing controlled substances, in violation of Health and Safety Code section 11153, subdivision (a); (3) dispensing prescriptions for controlled substances that contained significant errors, omissions, irregularities, uncertainties, ambiguities, or alterations, in violation of California Code of Regulations, title 16, section 1761, subdivisions (a) and (b); (4) dispensing prescriptions for drugs, without review of patients' medical records, before delivering each prescription drug; (5) dispensing

controlled substances that deviated from the requirements of the prescriptions without the prior consent of the prescribers and dispensing controlled substances on prescriptions prescribed by one physician, but signed by a different physician, in violation of California Code of Regulations, title 16, section 1716; (6) dispensing controlled substances from prescriptions that lacked the signature of the prescriber, in violation of Health and Safety Code section 11164, subdivision (a)(1); (7) failing to exercise or implement his best professional judgment or corresponding responsibility when dispensing controlled substances, in violation of Business and Professions Code section 4306.5, subdivision (a) and (b); and (8) engaging in unprofessional conduct, in violation of Business and Professions Code section 4301.

Respondent's Testimony

10. Respondent served as the owner and the pharmacist-in-charge of his two pharmacies for 10 and 16 years. His professional problems began when a husband of one of Respondent's staff members approached Respondent and told him that he knew of a physician who was trying to wean patients off of oxycontin, and asked Respondent if he wanted to participate in filling prescriptions for that physician. Respondent agreed, although he admitted at the hearing that the prescriptions did not seem to be for a legitimate medical purpose. Respondent's pharmacies filled approximately 100 prescriptions per month for approximately one year, 2012-2013. Some of the patients were selling the drugs (i.e., oxycontin, hydrocodone, and Xanax) filled by Respondent's pharmacies, and others were taking the drugs.

11. In 2013, Respondent's mother became sick and died in Canada. Respondent went to Canada from November 2013 to December 2013 to execute his mother's estate. When Respondent returned in December 2013, he noticed some medications had been stolen from his pharmacy, particularly oxycontin. Respondent

suspected one of his staff members had stolen the drugs, because Respondent observed her exhibit signs of narcotics abuse. Consequently, Respondent terminated the employment of that staff member. Thereafter, the husband of the terminated staff member contacted the Pharmacy Board and alleged Respondent had engaged in illegal activity at the pharmacy, which prompted the Pharmacy Board to initiate an investigation and inspect both of his pharmacies. The inspectors found prescriptions that were not of legitimate medical use, resulting in the Pharmacy Board's discipline of Respondent's pharmacist license. Respondent's misconduct did not result in any police involvement.

12. Thus far, Respondent has complied with all conditions of his probation imposed by the Pharmacy Board, including seeking psychiatric help, completing continuing education courses, and working 40 hours per month in a pharmacy. Additionally, he has been paying his costs in monthly payments approved by the Pharmacy Board. Respondent's probation is scheduled to terminate on September 20, 2022.

13. Respondent acknowledged he had no excuse for engaging in misconduct, but explained that in addition to dealing with the pain and distraction of his mother's death, Respondent had been dealing with the illness of his teenage daughter. Specifically, in 2010, Respondent's 15-year-old daughter was diagnosed with a brain cyst. The cyst caused paralysis on the left side of her body. His daughter underwent brain surgery, which resulted in the successful removal of most of the cyst, as well as blood on her brain. It took more than three years for his daughter to recover, but she suffered short-term memory problems, which she still contends with today.

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14. Respondent has experienced great anxiety since his daughter's illness, his mother's death, and the subsequent investigation and discipline by the Pharmacy Board. Respondent began treating with Samira Vafadar, PsyD., in 2015 or 2016, who diagnosed Respondent with Attention Deficit Hyperactivity Disorder. Respondent treated with Dr. Vafadar once per week, and then once per month beginning in 2017. Respondent still treats with Dr. Vafadar, and according to a December 15, 2019 letter submitted by Dr. Vafadar to the Pharmacy Board, Respondent "is currently stable emotionally; his symptoms are stable" (Ex. A.)

15. From May 28, 2019 to August 29, 2019, Respondent, of his own volition, attended nine Narcotics Anonymous meetings. Respondent explained at hearing that he attended the meetings to understand how the effects of opioid medications impacted people throughout the country. Respondent also completed an ethics course before the Pharmacy Board imposed discipline.

16. Respondent expressed great remorse regarding his past misconduct. While he is on probation with the Pharmacy Board, Respondent cannot find a job as a paid pharmacist. As a condition of his probation, Respondent volunteers 40 hours per month as a staff pharmacist under the auspices of the County of Orange Health Care Agency Emergency Medical Services and Public Health. Respondent's immediate supervisor there, Mark Chew, Pharm.D., rated Respondent's quality of work as excellent.

17. Respondent would like his real estate salesperson license because he has always been interested in real estate, and because he wishes to support his family.

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Character Evidence

18. Robert B. Frankel, M.D. of St. Joseph Heritage Medical Group wrote a letter of reference on Respondent's behalf. Dr. Frankel has known Respondent as a pharmacist since 2001. Dr. Frankel described Respondent as honest, dedicated, and well-liked by Dr. Frankel's patients.

19. Dr. Chew wrote a letter of reference on Respondent's behalf. Dr. Chew has known Respondent professionally since 2001 and stated that Respondent "demonstrate[d] compassion and concern for patient safety . . ." and was "a committed professional." (Ex. B.)

LEGAL CONCLUSIONS

Standard of Proof

1. The burden of proof is on the applicant to establish he is entitled to the license. (*Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205; *Southern Cal. Jockey Club v. California Horse Racing Bd.* (1950) 36 Cal.2d 167.) The standard of proof is a preponderance of the evidence. "'Preponderance of the evidence means evidence that has more convincing force than that opposed to it.'" (Citations omitted.) The sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the quality of the evidence. The quantity of evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325).) To meet the burden of proof by a preponderance of the evidence, Respondent "must produce substantial evidence, contradicted or uncontradicted, which supports the finding." (*In re Shelley J.* (1998) 68 Cal.App.4th 322 at p. 329.)

Relevant Statutes and Regulations

2. Business and Professions Code section 10177, subdivision (f), provides that the Real Estate Commissioner may deny a real estate salesperson license to an applicant for acting or conducting themselves in a manner that would have warranted the denial of their application for a real estate license, or either had a license denied or had a license issued by another agency of this state, another state, or the federal government revoked, surrendered, or suspended for acts that, if done by a real estate licensee, would have resulted in discipline.
3. Business and Professions Code section 10177, subdivision (g), provides that the Real Estate Commissioner may deny a real estate salesperson license to an applicant for demonstrating negligence or incompetence in performing an act for which the officer, director, or person is required to hold a license.
4. Business and Professions Code section 10177, subdivision (j), provides that the Real Estate Commissioner may deny a real estate salesperson license to an applicant for engaging in any other conduct, whether of the same or of a different character than specified in this section, that constitutes fraud or dishonest dealing.
5. Cause exists to deny Respondent's application for a real estate sales license, pursuant to Business and Professions Code section 10177, subdivision (f), in that another state agency disciplined Respondent's license, evidenced by the Pharmacy Board's revocation of Respondent's pharmacist license, staying the revocation, and then imposing five and one-half years of probation with conditions, including a 120-day suspension, as set forth in Factual Finding 3.
6. Cause exists to deny Respondent's application for a real estate sales license, pursuant to Business and Professions Code section 10177, subdivision (g), for

demonstrating negligence or incompetence in performing as a licensed pharmacist, evidenced by Respondent's actions set forth in Factual Findings 3 through 9.

7. Cause does not exist to deny Respondent's application for a real estate sales license, pursuant to Business and Professions Code section 10177, subdivision (j), in that Respondent's conduct described in Factual Findings 3 through 9, though negligent, did not constitute fraud or dishonest dealing.

Rehabilitation

8. California Code of Regulations, title 10, section 2911 contains the criteria to which the Department looks in evaluating the rehabilitation of an applicant for whom cause exists to deny a license application. The regulation provides, in relevant part, the following:

(a) The following criteria have been developed and will be considered by the Bureau pursuant to Section 482 of the Business and Professions Code for the purpose of evaluating whether or not an applicant is rehabilitated for purposes of issuance or for reinstatement of a license:

(1) The time that has elapsed since commission of the acts(s) or offense(s):

(A) The passage of less than two years after the most recent criminal conviction or act of the applicant that is a cause of action in the Bureau's Statement of Issues against the applicant is inadequate to demonstrate rehabilitation.

(B) Notwithstanding subdivision (a)(1)(A), above, the two year period may be increased based upon consideration of the following:

(i) The nature and severity of the crime(s) and/or act(s) committed by the applicant.

(ii) The applicant's history of criminal convictions and/or license discipline that are "substantially related" to the qualifications, functions, or duties of a real estate licensee. However, no rehabilitation shall be required where the sole proven basis or bases for denial of an application is an expunged conviction as described in Business and Professions Code Section 480(c).

(2) Restitution to any person who has suffered monetary losses through "substantially related" acts or omissions of the applicant, or escheat to the State of these monies or other properties if the victim(s) cannot be located.

(3) Expungement of criminal convictions.

(4) Expungement or discontinuance of a requirement of registration pursuant to the provisions of Section 290 of the Penal Code.

(5) Successful completion or early discharge from probation or parole.

(6) Abstinence from the use of controlled substances and/or alcohol for not less than two years if the conduct which is the basis to deny the Bureau action sought is attributable in part to the use of controlled substances and/or alcohol.

(7) Payment of the fine and/or other monetary penalty imposed in connection with a criminal conviction or quasi-criminal judgment.

(8) Stability of family life and fulfillment of parental and familial responsibilities subsequent to the conviction or conduct that is the basis for denial of the Bureau action sought.

(9) Completion of, or sustained enrollment in, formal education or vocational training courses for economic self-improvement.

(10) Discharge of, or bona fide efforts toward discharging, adjudicated debts or monetary obligations to others.

(11) Correction of business practices resulting in injury to others or with the potential to cause such injury.

(12) Significant or conscientious involvement in community, church or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.

(13) New and different social and business relationships from those which existed at the time of the conduct that is the basis for denial of the Bureau action sought.

(14) Change in attitude from that which existed at the time of the conduct in question as evidenced by the following:

(A) Testimony and/or other evidence of rehabilitation submitted by the applicant.

(B) Evidence from family members, friends and/or other persons familiar with applicant's previous conduct and with his or her subsequent attitudes and/or behavioral patterns.

(C) Evidence from probation or parole officers and/or law enforcement officials competent to testify as to applicant's social adjustments.

(D) Evidence from psychiatrists or other persons competent to testify with regard to neuropsychiatric or emotional disturbances.

(E) Absence of subsequent felony convictions, misdemeanor convictions, or other conduct that provides grounds to discipline a real estate licensee, which reflect an inability to conform to societal rules when considered in light of the conduct in question.

[¶ . . . ¶]

9. The Pharmacy Board imposed significant discipline on Respondent nearly three years ago, in April 2017, for his engagement in serious misconduct in 2012 and 2013. However, Respondent has no prior history of discipline or misconduct, and has engaged in no misconduct since. Additionally, while Respondent has not yet earned an early release from probation, the evidence shows that he has been complying with all conditions of his probation, including paying costs, taking continuing education courses, and engaging in psychotherapy. Respondent's therapist, Dr. Vafador, advised the Pharmacy Board three months ago that Respondent was stable emotionally, after, according to Respondent, he began receiving therapy for anxiety stemming from his misconduct, and from the distracting factors that contributed to his misconduct (i.e., the illness of his teenage daughter and the death of his mother). Moreover, given the excellent review of Respondent's work as a volunteer staff pharmacist, issued by Respondent's immediate supervisor, Dr. Chew, Respondent has demonstrated an apparent change in business practices. Finally, Respondent took steps of his own volition to ensure he understood the perils of the opioid crisis by attending Narcotics Anonymous meetings, demonstrating a change in attitude from the obvious apathy he exhibited by his repeated acts of negligence.

10. Remorse for one's conduct and the acceptance of responsibility are the cornerstones of rehabilitation. Rehabilitation is a "state of mind" and the law looks with favor upon rewarding with the opportunity to serve one who has achieved "reformation and regeneration." (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) Fully acknowledging the wrongfulness of past actions is an essential step toward rehabilitation. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940.) Mere remorse does not demonstrate rehabilitation. A truer indication of rehabilitation is sustained conduct over an extended time. (*In re Menna* (1995) 11 Cal.4th 975, 991.) The evidentiary significance of misconduct is greatly diminished by the passage of

time and by the absence of similar, more recent misconduct. (*Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1070.)

11. Although artificial acts of contrition are not required in an administrative action (*Calaway v. State Bar* (1986) 41 Cal.3d 743, 747-748; *Hall v. Committee of Bar Examiners* (1979) 25 Cal.3d 730, 744-745), acceptance of responsibility for one's wrongdoing is. Respondent accepted responsibility for his actions by entering into a Stipulated Settlement with the Pharmacy Board when he admitted the facts set forth in the stipulation, and has complied with all conditions of the discipline imposed on him. He also acknowledged his responsibility and remorse at the hearing in this matter.

12. The purpose of an administrative disciplinary case such as this one is not to punish the respondent, but to protect the public. (*Ibid.* See also, *Small v. Smith* (1971) 16 Cal.App.3d 450, 457.) Given the above, particularly Respondent's acknowledgement of responsibility, his demonstration of remorse for his wrongdoing, and his strong showing of rehabilitation, the public safety, welfare and interest will be adequately protected if Respondent is granted a restricted license.

ORDER

The application of Respondent James Yin Ming Gee for a real estate salesperson license is denied; provided, however, a restricted real estate salesperson license shall be issued to Respondent pursuant to section 10156.5 of the Business and Professions Code. The restricted license issued to Respondent shall be subject to all of the provisions of section 10156.7 of the Business and Professions Code and to the following limitations, conditions, and restrictions imposed under authority of section 10156.6 of the Business and Professions Code.

1. The license shall not confer any property right in the privileges to be exercised, and the Real Estate Commissioner may by appropriate order suspend the right to exercise any privileges granted under this restricted license in the event of:
 - (a) The conviction of Respondent (including a plea of nolo contendere) of a crime which is substantially related to Respondent's fitness or capacity as a real estate licensee; or
 - (b) The receipt of evidence that respondent has violated provisions of the California Real Estate Law, the Subdivided Lands Law, Regulations of the Real Estate Commissioner or conditions attaching to this restricted license.
2. Respondent shall not be eligible to apply for the issuance of an unrestricted real estate license nor the removal of any of the conditions, limitations or restrictions attaching to the restricted license until three years have elapsed from the date of issuance of the restricted license to Respondent.
3. With the application for license, or with the application for transfer to a new employing broker, Respondent shall submit a statement signed by the prospective employing real estate broker on a form RE 552 (Rev. 4/88) approved by the Department of Real Estate which shall certify as follows:
 - (a) That the employing broker has read the Decision which is the basis for the issuance of the restricted license; and
 - (b) That the employing broker will carefully review all transaction documents prepared by the restricted license and otherwise exercise close

supervision over the licensee's performance of acts for which a license is required.

DATE: March 13, 2020

DocuSigned by:
Carla L. Garrett
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CARLA L. GARRETT

Administrative Law Judge
Office of Administrative Hearings