

**BEFORE THE
RESPIRATORY CARE BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Accusation and Petition to
Revoke Probation Against:

RAYMOND JOSEPH AUGUSTINUS
1971 Church Street, #2
Costa Mesa, CA 92627

Case No.: 7002015000361

OAH No.: 2015040813

DECISION AND ORDER

The attached proposed Decision of the Administrative Law Judge is hereby adopted by the Respiratory Care Board of California, Department of Consumer Affairs, as its Decision in the above entitled matter.

This Decision shall become effective on February 23, 2016.

It is so ORDERED February 16, 2016.

Original signed by: _____

ALAN ROTH, MS, MBA, RRT-NPS, FAARC
PRESIDENT, RESPIRATORY CARE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

BEFORE THE
RESPIRATORY CARE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation and Petition
to Revoke Probation of:

RAYMOND JOSEPH AUGUSTINUS,

Respiratory Care Practitioner
License No. 10983

Respondent.

Case No. 7002015000361

OAH No. 2015040813

REVISED PROPOSED DECISION¹

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on November 16, 2015, in San Diego, California.

Lori Forcucci and Michael Yun, Deputies Attorney General, Office of the Attorney General, represented complainant, Stephanie Nunez, Executive Officer, Respiratory Care Board, Department of Consumer Affairs, State of California.

Respondent represented himself.

The matter was submitted on November 16, 2015.

¹ On January 5, 2016, the board requested various technical edits and minor changes in the proposed decision pursuant to California Code of Regulations, title 1, section 1040. Any corrections made are reflected in this decision in bold font. Certain requested corrections were not technical or not supported by the evidence presented at the hearing. In those instances, a footnote was added to indicate why the change was not made.

FACTUAL FINDINGS

Respondent's License History

1. On May 8, 1987, the board issued respiratory care practitioner license number 10983 to respondent. Respondent's license will expire on August 31, 2016, unless renewed, suspended, or revoked.

2013 ACCUSATION

2. On May 28, 2013, the board's executive officer filed an accusation against respondent in case number 1H-2010-590, alleging that respondent committed a fraudulent, dishonest or corrupt act when he engaged in a heated argument with his wife, committed domestic battery, and left threatening voice mail messages on her answering machine.

The accusation alleged that respondent violated a restraining order that was issued by the court following the instance of domestic battery when he contacted his wife telephonically on multiple occasions, drove past her house, harassed her in the courthouse during pending divorce proceedings, and attempted to contact her at the home of a friend. The accusation alleged that respondent pushed and punched his wife's friend.

The accusation also alleged that respondent obtained, possessed, used, or administered a controlled substance to himself and committed unprofessional conduct when he used marijuana² on August 1, 2010, consumed alcoholic beverages at or near the time he committed domestic battery against his wife on **August 17, 2010, following an argument on August 16, 2010**, and drank in public on April 2, 2012.

3. Respondent signed a stipulated settlement and disciplinary order to resolve the accusation and admitted the truth of the allegations. Effective July 4, 2014, the board issued a decision and order adopting the stipulated settlement. The board revoked respondent's license, stayed the revocation, and placed respondent on probation for three years.

4. The terms and conditions of respondent's probation required that he: contact the approved laboratory daily to see if he was randomly selected to provide a biological fluid sample (condition no. 3); abstain from ingesting mood altering substances including alcoholic beverages and substances that contain trace amounts of alcohol (condition no. 4); pay all costs of probation monitoring during the period of probation (condition no. 9); reimburse the board its costs of investigation and prosecution in the amount of \$3,915 (condition no. 14); and not violate any condition of probation (condition no. 17).

² Official notice is taken that marijuana is a Schedule I controlled substance under state and federal law. (Health & Saf. Code, § 11054, subd. (d); 21 U.S.C. § 812.) It is also a dangerous drug under state law. (Health & Saf. Code, § 4022.)

Condition no. 17 also provided that, if respondent violated any terms and conditions of probation, the board would be authorized to set aside the stay order and revoke respondent's license.

2015 ACCUSATION AND PETITION TO REVOKE PROBATION

5. On March 5, 2015, complainant signed the **accusation** and petition to revoke probation alleging that respondent failed to comply with the conditions of probation as required by condition no. 17 because he: failed to contact the laboratory on September 21, 2014, to see if he was randomly selected for biological fluid testing (condition no. 3); failed to abstain from the use of mood altering substances on September 17, 2014, and October 16, 2014 (condition no. 4); failed to **make payments towards** the \$3,915³ **balance of** costs (condition no. 14); and failed to make payments of \$100 per month towards probation monitoring costs (condition no. 9).

6. Complainant seeks to revoke respondent's license.

Violations of Probation Condition Numbers 3 and 4

7. Craig Martinez, a probation monitor with the board's enforcement unit, testified at the hearing.

8. Mr. Martinez met with respondent on July 14, 2014. He discussed each of the conditions of probation imposed on respondent in the disciplinary order that became effective on July 4, 2014.⁴ Respondent placed his initials next to each condition, indicating that he understood the requirements imposed by each condition.

9. At their meeting, respondent also signed a Statement of Understanding regarding the board's drug and alcohol testing program that provided detailed information regarding the daily check-in requirements, collection services at the appointed laboratory, payment information, and consequences for noncompliance with the biological fluid testing provision of respondent's probation. Respondent initialed each of the 34 paragraphs contained in the Statement of Understanding, indicating that he understood the requirements imposed by each condition.

At the meeting, respondent also signed a form indicating that he understood that the biological fluid testing program tested, among other things, Ethylglucuronide and Ethylsulfate, both metabolites of alcohol. The form warned that substances like over-the-

³ At the time of the filing of the petition to revoke probation, respondent was \$226.25 in arrears.

⁴ The board requested that this date be changed to July 14, 2014. The board's Decision and Order, however, provides that it is effective July 4, 2014.

counter cough medicine, non-alcoholic beer, and certain food products contain alcohol metabolites and therefore care should be taken to avoid them.

10. On September 17, 2014, respondent contacted the laboratory and learned that he was randomly selected to provide a biological fluid sample. He provided the sample and the sample tested positive for alcohol metabolites.

11. On September 21, 2014, respondent failed to contact the laboratory to see if he was required to provide a biological fluid sample.

12. On September 29, 2014, Mr. Martinez sent respondent a warning letter advising him that failing to call into the laboratory daily will result in a violation of probation. The letter further advised that probation violations might also result in a cease-practice order.⁵

13. On October 1, 2014, respondent contacted the laboratory and learned that he was randomly selected to provide a biological fluid sample. He provided the sample, and the sample tested positive for alcohol metabolites.

The 2014 Cease Practice Order

14. On October 9, 2014, the board issued a cease practice order to respondent ordering him to immediately cease the practice of respiratory care, pursuant to California Code of Regulations, title 16, section 1399.375.⁶ The letter that explained the cease practice order indicated that the order was based on the two positive biological fluid sample tests, which constituted violations of condition no. 4 of respondent's probation.

15. Respondent filed a written appeal of the cease practice order. In the written appeal, respondent wrote about his 28 year history in the field of respiratory care; his dedication and commitment to the profession; his perceived lack of a criminal record; and the fact that he felt he had bad legal advice that led to the signing of the stipulated settlement and that he felt he should have proceeded to an administrative hearing because "bad things happen to good people" and he deserved a "second chance."

Respondent did not provide any explanation of why the two biological fluid samples would have tested positive for alcohol metabolites. To the contrary, he did not even mention the two tests.

⁵ The letter did not contain a warning about the positive September 17, 2015, biological fluid sample test because the results of that test were not released until October 7, 2015.

⁶ Condition no. 17 of respondent's probation also authorized the board to order respondent to cease practice and provides that respondent may appeal the cease practice order within ten days of the notice.

16. Given that respondent provided no explanation regarding the two biological fluid sample tests, the board upheld the cease practice order, which became effective on October 24, 2014. The cease practice order advised respondent that he was still required to comply with all terms and conditions of probation.

Violations of Probation Condition Numbers 9 and 14

17. Respondent is required pursuant to condition no. 9 to make \$100 per-month payments for the cost of probation monitoring every month of probation no later than the 4th calendar day of each month. Respondent made the August 4, 2014, and September 4, 2014, payments. To date, respondent has not made any further monthly payments for the costs of probation monitoring.⁷

18. Respondent is also required to pay the \$3,915 costs of investigation and enforcement in \$326.25 per-month increments pursuant to condition no. 14. To date, respondent has paid only \$100.

Respondent's Testimony and Other Evidence

19. Respondent testified that he did not continue making payments for the cost of probation monitoring or the costs of investigation and enforcement because, after the board issued the cease practice order, he was unable to work. Respondent did not explain why he failed to make the October 4, 2014, payment for his probation monitoring or the required \$326.25 per-month payments to the board in July 2014, August 2014, September 2014, and October 2014, which were all due before the cease practice order was issued.

20. Respondent stated that the real "issue" to be addressed in the hearing was "why am I even here?" Respondent said he is an asset to the field of respiratory care and that to revoke his license would be a "slap in the face" to the profession.

21. Respondent said that he made some bad choices in his personal life in connection with a bad marriage and that all of the conduct alleged in the 2013 accusation was "fabricated." Respondent said he does not have a problem with alcohol and never used marijuana. However, respondent later admitted hitting his wife with a pillow as alleged in the 2013 accusation, and violating the restraining orders on multiple occasions. Respondent said he did so in order to "plead" with her to salvage the marriage because he had 22 years invested in the marriage. He added that his violations of the restraining order were all "peaceful." Regarding the charge of public intoxication, respondent said that he was drinking a beer in his front yard and somehow received a citation for drinking in public.

⁷ The prosecution of an **accusation** and petition to revoke probation alleged that respondent failed to make the October 4, 2014, payment, but did not include any subsequent failures to pay the probation monitoring costs because probation monitoring terminated when the cease practice order was issued.

22. Respondent testified that all of the “issues” alleged in the 2013 accusation arose in his “personal life” and therefore they should have no bearing on his “professional life.” Respondent said that he has “no idea” why he was even put on probation when there are people in the respiratory care field who have done far worse than what he was alleged to have done. Respondent stated continuously throughout the hearing that he had “no criminal history,” despite the undisputed evidence that he was arrested on multiple occasions for the conduct alleged in the 2013 accusation.

23. Following the issuance of the cease practice order, respondent applied for, and obtained, licenses to practice in the field of respiratory care in Texas and Montana. Respondent testified that he disclosed his prior disciplinary history to each state.

24. Respondent is currently employed with the federal government in New Mexico, where he is a respiratory care therapist for Indian Health Services at the Northern Navajo Medical Center. The position is not full-time; rather, he works in two to three month increments as needed, and as appointed by the federal government on a case-by-case basis. Prior to working in New Mexico, respondent worked as a respiratory care therapist at Norton Sound Regional Hospital in Alaska.

25. Respondent testified that the disciplinary process has taken a toll on him. He stated that the only thing he is “guilty” of is choosing a vindictive partner in life who cheated on him and provoked him to act the way he did.

26. Respondent said that it is “pretty sad” that he is “being judged” and wants to work in California again so that he can support his autistic son. Respondent testified that he is not being treated fairly, and he does “not know why [he] is being treated harshly.”

27. Respondent currently drinks beer or wine two to three times a week. Respondent admitted to drinking beer at the time of the two positive biological fluid samples. However, he admitted to drinking beer only around the time of the October 1, 2014, test. Regarding the earlier positive test in September, respondent said that he “may have taken NyQuil or something.”

28. Respondent said he deserves a second chance because in the “grand scheme of things” there are “bigger fish to fry.”

Costs of Investigation and Enforcement

29. Business and Professions Code section 3753.5, subdivision (a), authorizes complainant to seek recovery of the actual costs incurred in the investigation and prosecution of an **accusation** and petition to revoke probation.

Complainant submitted a declaration of costs for work performed by attorneys and paralegals at the Office of the Attorney General in 2014 and 2015 in connection with the petition to revoke probation. The declaration contained a general description of the tasks

performed, the time spent by each employee, and the hourly rate charged for the work of each employee. The declaration of costs submitted in this matter established that the Office of the Attorney General billed \$7,135 for 43 hours expended on the case at a rate of \$170 per hour for attorneys and \$120 per hour for paralegals.

The declaration of costs also contained a prayer for an award of \$1,531.25 as the outstanding balance from the cost award ordered in the July 4, 2014, decision and order.⁸

30. The declaration of costs satisfied the requirements of California Code of Regulations, title 1, section 1042, subdivision (b), and supports a finding that costs in the amount of \$7,135 are reasonable in both the nature and extent of the work performed.

31. Respondent testified that he recently filed for bankruptcy and does not have the money to pay costs of investigation and prosecution in this matter.

LEGAL CONCLUSIONS

Applicable Law

1. Protection of the public is the highest priority for the board in exercising its licensing, regulatory, and disciplinary functions. (Bus. & Prof. Code, § 3710.1.) Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public is paramount. (*Ibid.*)

2. The board is authorized to place a licensee on probation, impose terms and conditions of probation, and impose discipline on the license for a violation of the terms and conditions of probation. (Bus. & Prof. Code, §§ 3718, 3754; *Sandarg v. Dental Bd. of California* (2010) 184 Cal.App.4th 1434, 1441.)

3. The board is also authorized under Condition No. 17 of respondent's probation to revoke his probation and carry out the disciplinary order that was stayed in the earlier disciplinary proceeding.

Burden and Standard of Proof

4. The burden of proof in a proceeding to revoke probation is on the board to prove the allegations in the petition to revoke probation. The standard of proof is a preponderance of the evidence. (*Sandarg* 184 Cal.App.4th at 1441-1442; Evid. Code, §

⁸ The evidence established that respondent paid \$100 towards the costs of investigation and prosecution awarded in the 2014, order, leaving a balance of \$3,815. The declaration did not state why complainant was seeking only \$1,535. In the requested edits the board explained why they were seeking only \$1,535; however, this information was not submitted as evidence at hearing.

115.) A preponderance of the evidence means that the evidence on one side outweighs or is more than the evidence on the other side, not necessarily in number of witnesses or quantity, but in its persuasive effect on those to whom it is addressed. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Cause Exists to Revoke Respondent's Probation

5. Cause exists to revoke respondent's probation and suspend or revoke respondent's license based on the following: respondent failed to contact the laboratory to see if he needed to submit a biological fluid sample on September 21, 2014, in violation of condition no. 3; respondent's biological fluid samples tested positive for alcohol metabolites on September 17, 2014, and October 1, 2014, in violation of condition number 4; respondent failed to make the required \$100 payment for the cost of probation monitoring on October 4, 2014, as required by condition no. 9; and respondent failed to make the required \$326.25 monthly payments for the cost of investigation and enforcement as required by condition no. 14. Collectively, these violations of probation constitute a violation of condition no. 17.

Evaluation

6. Respondent violated the probation imposed in connection with his previous disciplinary matter in multiple respects. Accordingly, the issue is whether respondent should be permitted to remain on probation or should have his license revoked.

The misconduct that led to respondent's probation was serious. He not only engaged in misconduct involving alcoholic beverages, on several occasions, he showed a willful disregard for orders issued by a superior court. The board could have revoked respondent's license as a result of that misconduct. Instead, the board placed respondent on a short period of probation along with certain terms and conditions that addressed the misconduct at issue in order to protect the public.

Respondent violated multiple terms and conditions of his probation within just a few months of being placed on probation. When faced with the cease practice order, he provided no explanation as to why the two biological fluid samples tested positive. Even before the board issued the cease practice order, respondent failed to make required payments for probation monitoring or the costs of investigation and.

Currently, respondent consumes alcoholic beverages several times a week. He has done nothing to show that he is interested in abstaining from alcoholic beverages or to otherwise prove to the board that he is willing to comply with the condition requiring abstinence. He did not provide any evidence of employment beyond his own testimony and did not provide any character letters or witnesses to help establish that he is ready, willing, and able to comply with probation.

Appropriate Resolution

7. The purpose of probation is to enable the board to monitor probationers in order to protect the public from further misconduct. The evidence established that respondent was unwilling to comply with very simple terms and conditions of probation in multiple respects, and respondent did not present any evidence to demonstrate that he would be likely to comply with the same terms and conditions if his probation were extended. Indeed, respondent was upset and resentful at being placed on probation in the first place; disputed the misconduct that led to the imposition of probation even though he agreed to each term and condition of probation prior to signing the stipulated settlement; and exhibited a complete lack of appreciation as to the effect that poor choices in one's personal life can have on professional licensure. As a result, respondent is no longer a viable candidate for probation.

Costs of Investigation and Enforcement

8. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45, the California Supreme Court set forth five factors to be considered in determining whether a particular licensee should be ordered to pay the reasonable costs of investigation and prosecution under statutes like Business and Professions Code section 3753.5. Those factors are: whether the licensee has been successful at hearing in getting charges dismissed or reduced, whether the licensee's had a subjective good faith belief in the merits of his or her position, whether the licensee has raised a colorable challenge to the proposed discipline, whether the licensee has the financial ability to pay, and whether the scope of the investigation was appropriate in light of the alleged misconduct. (*Ibid.*)

Applying the *Zuckerman* factors to this case leads to the following conclusions: respondent was not successful in getting any of the charges dismissed or reduced; he did exhibit a subjective good faith belief in the merits of his position, although incorrect; respondent did not raise a colorable challenge to the petition; and the scope of the investigation was appropriate in light of the alleged misconduct.

9. In light of the revocation of respondent's license, he will not be ordered to pay costs at this time. Should respondent petition for his license to be reinstated and should the board grant his petition, the board may order him to pay the \$7,135 in costs as a condition of reinstatement, as required by Business and Professions Code section 3753.5, subdivision (d)(1).

Although complainant requested \$1,531.25 in unpaid costs awarded in the July 4, 2014, disciplinary order, and \$100 in unpaid probation monitoring costs, neither the board nor an administrative law judge has the authority to make an award of unpaid costs. (Bus. & Prof. Code, §§ 3753.5, subd. (b), 3753.7.) Therefore, the request for \$1,531.25 in unpaid costs from the July 4, 2014, disciplinary order and \$100 in unpaid probationary monitoring costs, is denied.

ORDER

1. The stay of revocation previously imposed in Case No. 1H-2010-590, by Decision and Order effective July 4, 2014, is vacated and the order of revocation is reinstated.
2. Respiratory care practitioner license number 10983, issued to respondent, is revoked.
3. If respondent petitions to have his license reinstated and if the board grants his petition, the board may order him to pay \$7,135 in costs of investigation and prosecution as a condition of reinstatement.

DATED: January 26, 2016

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KIMBERLY J. BELVEDERE
Administrative Law Judge
Office of Administrative Hearings