

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

In the Matter of the Petition to Revoke
Probation Against:

CARL CACCONIE
3007 Estepa Drive, Unit A
Cameron Park, CA 95682

Case No.: 7002015000363

OAH No.: 2015031186

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 September 21, 2015.

It is so ORDERED September 14, 2015.

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 Petition To Revoke
Probation Against:

CARL CACCONIE,

Respiratory Care Practitioner License No.
21206

Respondent.

Case No. 7002015000363

OAH No. 2015031186

PROPOSED DECISION

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California, on August 6, 2015.

Greg W. Chambers, Deputy Attorney General, appeared on behalf of complainant Stephanie Nunez.

Although properly served, respondent Carl Cacconie did not appear and was not otherwise represented.

Evidence was received and the matter was submitted on August 6, 2015.

FACTUAL FINDINGS

1. Complainant Stephanie Nunez filed the Petition to Revoke Probation solely in her official capacity as Executive Officer, Respiratory Care Board (Board), Department of Consumer Affairs, State of California.

2. On or about January 6, 2000, the Board issued Respiratory Care Practitioner License Number 21206 to respondent Carl Cacconie (respondent). The Respiratory Care Practitioner License was in full force and effect at all times relevant to the charges brought within the accusation and expired on March 31, 2015. The license was suspended on July 15, 2014, and October 14, 2014, when the Board issued Cease Practice Orders, pursuant to

California Code of Regulations, title 16, section 1399.375. The circumstances underlying the Cease Practice Orders are described below.

Disciplinary History

3. On January 10, 2005, the Board filed an Accusation against respondent alleging, as causes for discipline, respondent's October 8, 2004, convictions for two counts of violating Penal Code section 272, subdivision (b)(i), persuading or luring a minor 12 years or younger. Effective December 18, 2006, through a stipulated settlement, respondent's license was revoked with revocation stayed and respondent placed on probation for two years. Respondent successfully completed probation on December 18, 2008.

4. On January 22, 2013, the Board filed an Accusation against respondent alleging, as a cause for discipline, respondent's conviction of violating Vehicle Code section 23152, subdivision (b), driving with a blood alcohol level of .08 percent or higher. Effective July 5, 2013, through a stipulated settlement, respondent's license was revoked with the revocation stayed and respondent placed on probation for three years. The terms and conditions of probation included a 12-day suspension from practice and random biological fluid testing.

5. On December 11, 2013, the Board filed a Petition to Revoke Probation alleging that respondent had violated the probation requirement that he serve a 12-day suspension. Effective June 17, 2014, following an administrative hearing, the Board adopted the Administrative Law Judge's Corrected Proposed Decision, and revoked respondent's license, but stayed the revocation and placed respondent on a new four year term of probation with certain terms and conditions.

Findings on First Cause to Revoke Probation

6. Probationary condition number 16, titled "Abstention from Use of Mood Altering Substances," reads in pertinent part:

For purposes of these terms and conditions, a banned substance includes alcohol.... Respondent shall completely abstain from the possession or use of all banned substances.

7. Probation Condition 15, titled "Biological Fluid Testing," reads, in pertinent part:

Respondent, at his expense, shall participate in random testing, including but not limited to biological fluid testing (i.e. urine, blood, saliva), breathalyzer, hair follicle testing, and/or any drug screening program approved by the Board....

If Respondent tests positive for a banned substance (including testing positive for ETG), the Board will contact the Respondent and his employers, human resources personnel, directors, managers, supervisors, and/or contractors and notify them of the positive test, including the substance(s) and levels detected....

8. Respondent violated probationary condition 15 in that he failed to make the required daily contact with Fortes' automated toll-free number or online check-in system on July 14, 2014. This was the established protocol agreed upon by respondent to determine if he was required to submit a biological fluid testing on any particular day. The Board issued the first of the two Cease Practice Orders referenced in Factual Finding 2 for this omission.

9. Respondent violated probationary conditions 15 and 16 in that on September 23, 2014, he tested positive for Ethylglucuronide (EtG) and Ethyl Sulfate (EtS), both biomarkers for alcohol. Respondent's EtG level was 3,208 nanograms per milliliter and respondent's EtS level was 465.0 nanograms per milliliter. Based on the positive results for alcohol, the Board issued the second Cease Practice Order referenced in Factual Finding 2.

Findings on Second Cause to Revoke Probation

10. Probationary Condition 4, titled "Probation Monitoring Costs," reads, in pertinent part: "All costs incurred for probation monitoring during the entire probation shall be paid by respondent."

11. Respondent violated probationary condition 14 in that he has failed to pay monthly probation costs since the inception of the probationary period.

Findings on Third Cause to Revoke Probation

12. Probationary Condition 9, titled "Cost Recovery," reads:

Respondent shall pay to the Board a sum not to exceed the costs of investigation and prosecution of the case. That sum shall be \$8, 532.50, and shall be paid in full directly to the Board, in equal quarterly payments, within 12 months from the effective date of this decision. Cost recovery shall not be tolled. These costs are in addition to any outstanding balance owed to the Board from the costs awarded in the July 5, 2013 Decision in Case Number 1H 2012 266.

13. Respondent violated probationary condition 9 in that respondent has failed to pay cost recovery since the inception of the most recent probationary period.

Costs in this Matter

14. The actual costs of investigation and prosecution of this matter were \$6,261.44 for attorney and paralegal services provided by the California Office of the Attorney General. The reasonableness of such costs is addressed in the Legal Conclusions below.

LEGAL CONCLUSIONS

1. Respondent's probation is subject to revocation by reason of his violation of Probationary Terms 15 and 16 as set forth in Factual Findings 6 through 9.

2. Respondent's probation is subject to revocation by reason of his violation of Probationary Term 4 as set forth in Factual Findings 10 and 11.

3. Respondent's probation is subject to revocation by reason of his violation of Probationary Term 9 as set forth in Factual Findings 12 and 13.

4. Business and Professions Code section 3753.5, subdivision (a), reads:

In any order issued in resolution of a disciplinary proceeding before the board, the board or the administrative law judge may direct any practitioner or applicant found to have committed a violation or violations of law or any term and condition of board probation to pay to the board a sum not to exceed the costs of the investigation and prosecution of the case. A certified copy of the actual costs, or a good-faith estimate of cost where actual costs are not available, signed by the official custodian of the record or his or her designated representative shall be prima facie evidence of the actual costs of investigation and prosecution of the case.

5. Business and Professions Code section 3753.7 reads: "For purposes of the Respiratory Care Practice Act, costs of prosecution shall include Attorney General or other prosecuting attorney fees, expert witness fees and other administrative, filing and service fees."

6. The actual costs of investigation and prosecution of this matter were \$6,261.44, and respondent is subject to an order directing him to pay such costs in accordance with Business and Professions Code sections 3753.5 and 3753.7 if such costs are reasonable.¹ The case of *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th

¹ Unlike the statutory provision addressed by the California Supreme Court in the *Zuckerman* decision discussed below, the Board's statutes do not include the word "reasonable". However, the award of costs is, by the language of the statutes, discretionary,

32, sets forth the factors to be considered in determining the reasonableness of costs. Those factors include whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of his or her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay and whether the scope of the investigation was appropriate to the alleged misconduct. In this matter, respondent did not appear at the administrative hearing to contest the charges or the proposed discipline of probation revocation. There was no evidence presented regarding respondent's ability to pay the costs. The amount sought is not unreasonable based on the scope of the allegations in this matter. In summary, the costs are reasonable and should be assessed against respondent in accordance with Business and Professions Code section 3753.5, subdivision (a), authorizing costs for violations of probationary terms and conditions.

7. The appropriate disposition in this matter is vacating the stay of revocation of respondent's license and the outright revocation of respondent's Respiratory Care Practitioner's License. This is the second time that respondent has violated terms and conditions imposed by the Board when the Board stayed the revocation of respondent's license for violations of applicable law. These violations include acts and omissions directly related to the alcohol abuse for which respondent was placed on probation and established that respondent has not yet come to grips with the substance abuse that led to the most recent disciplinary action.

ORDER

1. The stay of revocation in the Board's June 17, 2014 Decision (Case number D1 2012 266) is vacated and Respiratory Care Practitioner License Number 21206 issued to respondent Carl Cacconie is REVOKED.

2. Respondent shall pay all outstanding costs for probation monitoring and those imposed for investigation and prosecution in the June 17, 2014 Decision.

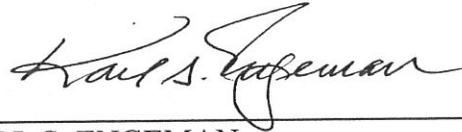
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and the *Zuckerman* decision found that such cost provisions do not violate the licensee/applicant's right to due process so long as the reasonableness criteria articulated by the Court are considered.

3. Respondent shall pay, in addition to the costs imposed for the prior disciplinary actions (both D1 2012 266 and 1H 2012 266), the amount of \$6, 261.44 as the actual and reasonable costs of investigation and prosecution of this matter.

Dated: August 26, 2015



KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings

FILED

STATE OF CALIFORNIA

RESPIRATORY CARE BOARD

SACRAMENTO February 23, 20 15

BY  ANALYST

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

10 In the Matter of the Petition to Revoke
 11 Probation Against:

Case No. 7002015000363

PETITION TO REVOKE PROBATION

12 CARL CACCONIE
 3007 Estepa Drive, Unit A
 13 Cameron Park, CA 95682

14 Respiratory Care Practitioner License
 No. 21206

Respondent.

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 18 Complainant alleges:

19 PARTIES

20 1. Stephanie Nunez (Complainant) brings this Petition to Revoke Probation solely in her
 21 official capacity as the Executive Officer of the Respiratory Care Board (Board) of California,
 22 Department of Consumer Affairs.

23 2. On or about January 6, 2000, the Board issued Respiratory Care Practitioner License
 24 Number 21206 to Carl Cacconie (Respondent). The Respiratory Care Practitioner License was in
 25 full force and effect at all times relevant to the charges brought herein and will expire on March
 26 31, 2015, unless renewed. Respiratory Care Practitioner License No. 21206 was suspended on
 27 October 14, 2014, when the Board issued a Cease Practice Order, pursuant to California Code of
 28 Regulations section 1399.375.

1 DISCIPLINARY HISTORY

2 3. On January 10, 2005, the Board filed Accusation Number R-1966 against Respondent
3 as a result of his October 8, 2004 convictions for two violations of Penal Code section 272(b)(i)
4 [persuade or lure a minor 12 years of age or younger.] Effective December 18, 2006, through a
5 stipulated settlement, the Board placed Respondent on probation for two years. Respondent
6 completed probation on December 18, 2008.

7 4. On January 22, 2013, the Board filed Accusation Number 1H 2012 266, based on
8 Respondent's July 27, 2012 conviction for violating Vehicle Code section 23152(b) [driving with
9 a blood alcohol content of .08% or higher.] Effective July 5, 2013, through a stipulated
10 settlement, Respondent's license was placed on probation for three years with certain terms and
11 conditions, including a twelve-day suspension from the practice of respiratory care, and required
12 daily contact with a biological fluid testing lab. The revocation of Respondent's license was
13 stayed pending his successful completion of the terms and conditions of his probation.

14 5. On December 11, 2013, the Board filed a Petition to Revoke Probation in Case
15 Number D1 2012 266, because Respondent violated the suspension from practice condition of
16 probation. Effective June 17, 2014, the Board adopted the Administrative Law Judge's Corrected
17 Proposed Decision, and Respondent was placed on probation for four years with terms and
18 conditions. A copy of the decision in Petition to Revoke Probation Case Number D1 2012 266 is
19 attached as **Exhibit A** and is incorporated by reference.

20 JURISDICTION

21 6. This Petition to Revoke Probation is brought before the Respiratory Care Board,
22 Department of Consumer Affairs, under the authority of the following laws. All section
23 references are to the Business and Professions Code unless otherwise indicated.

24 7. Section 3710 of the Code states: "The Respiratory Care Board of California, hereafter
25 referred to as the board, shall enforce and administer this chapter [Chapter 8.3, the Respiratory
26 Care Practice Act]."
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1 14. Probation Condition 15, titled “Biological Fluid Testing,” provides in part as follows:
2 “Respondent, at his expense, shall participate in random testing, including but not limited to
3 biological fluid testing (i.e. urine, blood, saliva), breathalyzer, hair follicle testing, and/or any
4 drug screening program approved by the Board

5 If Respondent tests positive for a banned substance (including testing positive for ETG), the
6 Board will contact the Respondent and his employers, human resources personnel, directors,
7 managers, supervisors, and/or contractors and notify them of the positive test, including the
8 substance(s) and levels detected”

9 15. Respondent’s probation is subject to revocation because he failed to comply with
10 Probation Condition 15 in that he failed to make daily contact with Fortes’ automated toll-free
11 number or online check-in system on July 14, 2014.

12 16. Respondent’s probation is subject to revocation because he failed to comply with
13 Probation Conditions 15 and 16 in that on September 23, 2014, he tested positive for
14 Ethylglucuronide (EtG) and Ethyl Sulfate (EtS), both alcohol biomarkers. Respondent’s test
15 results indicated an EtG level of 3,208 nanograms per milliliter (ng/ml) and an EtS level of 465.0
16 ng/ml. Based on Respondent’s positive test results, on October 14, 2014, the Board issued a
17 Cease Practice Order.

18 SECOND CAUSE TO REVOKE PROBATION

19 17. Probation Condition 4, titled “Probation Monitoring Costs,” in the Decision and
20 Order in Case Number D1 2012 266 provides in part as follows:

21 “All costs incurred for probation monitoring during the entire probation shall be paid by
22 Respondent.”

23 18. Respondent’s probation is subject to revocation because he has failed to pay
24 monthly probation costs since the inception of probation.

25 THIRD CAUSE TO REVOKE PROBATION

26 19. Probation Condition 9, titled “Cost Recovery,” in the Decision and Order in Case
27 Number D1 2012 266 provides in part as follows:

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7. Taking such other and further action as deemed necessary and proper.

DATED: February 23, 2015



STEPHANIE NUNEZ
Executive Officer
Respiratory Care Board of California
Department of Consumer Affairs
State of California
Complainant

SF2014410431