

**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:

HECTOR E. ARCE  
10241 San Nicholas Court  
Rancho Cucamonga, CA 91730

---

Case No.: D1 2005 320

OAH No.: 2009030762

**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 August 6, 2009.

It is so ORDERED July 30, 2009.

Original signed by:

\_\_\_\_\_  
LARRY L. RENNER, BS, RRT, RCP, RPFT  
PRESIDENT, RESPIRATORY CARE BOARD  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

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:

HECTOR E. ARCE, R.C.P.,

Respiratory Care Practitioner License No. 22505,

Respondent.

Case No. D1-2005-320

OAH No. 2009030762

**PROPOSED DECISION**

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on May 15, 2009, in San Diego, California.

Susan Fitzgerald, Deputy Attorney General, Office of the Attorney General, State of California, represented complainant Stephanie Nunez, Executive Director, Respiratory Care Board of California, Department of Consumer Affairs, State of California.

Hector E. Arce, R.C.P., represented himself and was present throughout the administrative hearing.

The matter was submitted on May 15, 2009.

**FACTUAL FINDINGS**

*Jurisdictional Matters*

1. On March 9, 2009, the Accusation in Case No. D1-2005-320 was signed on behalf of complainant Stephanie Nunez, Executive Director, Respiratory Care Board of California (the Board), Department of Consumer Affairs, State of California.

The accusation alleged that on March 17, 2008, the Board imposed discipline against Respiratory Care Practitioner License No. 22505 that the Board had issued to Hector E. Arce, R.C.P. (Arce or respondent); Arce's license was revoked, but the order of revocation was stayed and Arce was placed on three years probation on specified terms and conditions.

The accusation further alleged that Arce violated terms and conditions of his probation by failing to submit current work schedules (first cause to revoke probation), by failing to comply with biological fluid testing (second cause to revoke probation), by failing to abstain from the consumption of mood altering substances (third cause to revoke probation), by failing to file quarterly reports (fourth cause to revoke probation), by failing to pay probation monitoring costs (fifth cause to revoke probation), and by failing to pay the Board's costs of investigation and prosecution (sixth cause to revoke probation).

The accusation and other required jurisdictional documents were served on Arce, who timely filed a notice of defense. The matter was set for hearing.

On May 15, 2009, the record in this disciplinary matter was opened, jurisdictional documents were presented, documentary evidence was introduced, sworn testimony was received, stipulations were recited, closing arguments were given, the record was closed, and the matter was submitted.

### *License History*

2. On August 15, 2002, the Board issued Respiratory Care Board No. 22505 to Hector E. Arce.

3. On March 28, 2007, the Accusation in Case No. R-2067 entitled *In the Matter of the Accusation Against: Hector E. Arce, etc.*, was filed with the Board. That accusation alleged that on August 4, 2005, Arce was convicted of violating Vehicle Code section 23152, subdivision (b) (DUI - driving a motor vehicle with a blood alcohol level of 0.08 percent or higher) in the Superior Court of California, County of Los Angeles (first cause for discipline) and that Arce committed a dishonest act by failing to disclose his DUI conviction in a license renewal application that Arce submitted to the Board on September 26, 2005 (second cause for discipline).

On January 21, 2008, Arce signed a Stipulated Settlement and Disciplinary Order. In that stipulation, Arce admitted the truth of each and every charge in Case No. R-2067, he agreed that his license was subject to discipline, and he agreed to the revocation of Respiratory Care Practitioner License No. 22505, subject to the revocation being stayed and his being placed on probation for three years.

Agreed terms and conditions of probation included: Serving a 30 day suspension (condition 1); submitting current work schedules to his probation monitor for all places of employment (condition 2), participating in random biological fluid testing at his own expense, with the frequency and location of the testing to be determined by the Board, and with the specific understanding that his failure to submit to testing or to appear as requested by any Board representative would constitute a violation of probation (condition 3); abstaining completely from the possession or use of alcohol, controlled substances, dangerous drugs, and other mood altering substances except when lawfully prescribed by a licensed health care practitioner, with the specific understanding that any positive result would constitute a violation of probation (condition 4); submitting quarterly reports

documenting his compliance with terms and conditions of probation, with the specific understanding that the omission or falsification of any information would constitute a violation of probation (condition 7); paying probation monitoring costs, with the understanding that if he could not pay costs for any month he was required to submit an explanation and to provide the date(s) on which payment could be made (condition 9); and paying the Board \$2,189 for the Board's costs of investigation and prosecution, with the specific understanding that if he could not pay costs for any month he was required to submit an explanation and he was required to provide the date(s) on which payment could be made, with the specific understanding that his submission of such an explanation would not preclude the Board from pursuing further disciplinary action (condition 14).

Condition 17 of the probationary order provided:

“If Respondent violates any term of the probation in any respect, the Board, after giving Respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If a petition to revoke probation is filed against Respondent during probation, the Board shall have continuing jurisdiction and the period of probation shall be extended until the matter is final. No petition for modification of penalty shall be considered while there is an accusation or petition to revoke probation or other penalty pending against Respondent.”

On March 6, 2008, the Board adopted the Stipulated Settlement and Disciplinary order as its Decision in the matter. On March 17, 2008, the Decision became effective.

#### *Violations of Terms and Conditions of Probation*

The declaration of Jocelyn Campos, who is an experienced Board probation monitor, was received under Government Code section 11514 and established the following:

4. On April 16, 2008, Campos and Craig Martinez, another Board probation monitor, met with Arce and reviewed each and every probationary condition with Arce, who stated he understood the terms and conditions of his probation. Arce was advised that biological fluid testing would be conducted by Compass Vision, Inc. Campos' declaration established the following violations of probation through the date the accusation in this disciplinary matter was filed.

Before the accusation and petition to revoke probation was filed, Campos sent at least four warning letters to Arce, each letter advising Arce that he was not complying with the terms and conditions of his probation. Those letters specifically mentioned the probationary conditions with which Arce failed to comply.

5. Condition 2: Arce was required to submit to the probation monitor work schedules on a weekly/monthly basis for the length of his probation. He was required to provide a copy of his current work schedule for each place of employment.

From at least July 2008 through and December 2008, Arce did not provide work schedules to his probation monitor.

6. Condition 3: Arce was required to participate in random biological fluid testing at his own expense, with the frequency and location of testing to be determined by the Board and its representatives. In this regard, Arce was required to cooperate with the Board, to appear for testing as requested, and to submit to such tests as directed for the detection of alcohol, narcotics, hypnotics, dangerous drugs or other controlled substances. Under his agreement, Arce was required to contact the testing entity on a daily basis by telephone to determine if testing was required that day.

A. On September 12, 2008, Arce was required to provide a urine sample for testing that day. He failed to do so.

B. On November 3, 2008, Arce was required to provide a urine sample for testing that day. He failed to do so.

C. On November 26, 2008, Arce was required to provide a urine sample for testing that day. He failed to do so.

D. On December 4, 2008, Arce was required to provide a urine sample for testing that day. He failed to do so.

E. On December 23, 2008, Arce was required to provide a urine sample for testing that day. He failed to do so.<sup>1</sup>

F. On January 6, 2009, Arce was required to provide a urine sample for testing that day. He failed to do so.

G. Arce failed to call in on the following dates to see if he was required to test: May 11, 2008, June 14, 2008, September 11, 2008, October 8 through 20, 2008, November 9 and 27, 2008, December 12-31, 2008, and January 1-11, 2009.

H. On February 17, 2009, Arce was required to provide a urine sample for testing that day. He failed to do so.

I. On March 4, March 19, and April 10, 2009, Arce provided samples as requested.

7. Condition 4: Arce was required to completely abstain from the possession or use of alcohol, controlled substances, dangerous drugs, and any and all other mood altering

---

<sup>1</sup> On December 30, 2008, Arce advised Campos by telephone that he was unable to provide a biological fluid sample in November 2008 because he lost his wallet and did not have photo identification. Arce further stated in that telephone conversation that he was unable to pay probation monitoring costs because his paycheck was being garnished for delinquent bills.

drugs, substances and their associated paraphernalia, except when lawfully prescribed by a licensed practitioner as part of a documented medical treatment. Any positive test result that registered over the established laboratory cutoff level would constitute a violation of probation.

On July 12, 2008, Arce tested positive for Ethyl Glucuronide (ETG), an indicator of alcohol use.

The positive ETG test arose out of an analysis of a urine sample Arce provided. A thorough written chain of custody established that Arce provided the urine sample; that the sample was received by National Medical Services (NMS); that NMS was a certified testing agency; that the sample Arce provided was analyzed by liquid chromatography tandem mass spectrometry and was above the minimum reporting level of 250 ng/ml; that the test of Arce's sample showed 4,300 ng/ml. John Treuting, Ph.D. (Dr. Treuting), a reputable and experienced clinical and forensic toxicologist, testified that a sample showing 4,300 ng/ml of ETG was a significant result that involved the purposeful consumption of alcohol.

Arce admitted that he consumed alcoholic beverages on occasion in 2008, and he did not offer any explanation for or dispute the positive test results for ETG.

8. Condition 7: Arce was required to file quarterly reports with the Board of his compliance under penalty of perjury on forms to be provided to the probation monitor. For the quarter from October 1st through December 31st, reports were to be completed and submitted between January 1st and January 7th.

A. Arce failed to file his quarterly report for the period October 1 through December 31, 2008, by January 7, 2009.

B. Arce failed to file his quarterly report for the period January 1 through March 31, 2009, by April 7, 2009.

9. Condition 9: Arce was required to pay monthly probation monitoring costs. All payments for costs were required to be sent directly Board. If Arce was unable to submit costs for any month, then he was required instead to submit an explanation for the reason he was unable to submit the costs and to provide the date(s) he would be able to submit the costs.

A. Arce failed to make some of his probation monitoring costs payments, the last payment having been received on or about April 25, 2008, and when the accusation in this matter was filed, Arce was \$900.00 in arrears. By the time of the hearing, Arce was \$1,200 in arrears.

B. Arce did not submit a written explanation or any evidence to explain why he was unable to pay probation monitoring costs payments in a timely fashion.

10. Condition 14: Arce was required to pay to the Board \$2,189 for its costs of investigation and enforcement in equal quarterly payments, with full payment to be made within 12 months from the effective date of this decision placing Arce on probation. If Arce was unable to pay costs in a timely manner, then he was required to submit an explanation for the reason he was unable to pay costs in part or in entirety, to provide a date on which he would be able to submit the costs, and to provide the Board with supporting documentation and evidence for the reason he was unable to make such payment.

A. Arce failed to make payments due in June, September, and December of 2008 and was \$1,641.75 in arrears when the accusation in this matter was filed. By the time of the hearing, Arce was \$2,189 in arrears.

B. Arce did not submit any written explanation or evidence to explain why he was unable make cost recovery payments.

#### *Arce's Testimony*

11. Arce was born in Los Angeles in July 1980. He grew up in Southern California, graduating from Chaffey High School in 1998. After high school, Arce briefly attended Chaffey College where he took general education courses. Arce became employed in retail sales, and then enrolled in California Paramedical and Technical College in Riverside, California, to obtain the education and training necessary to become a licensed respiratory care practitioner. After two years of training, Arce obtained his certification. He then took and passed the examination required to become licensed in California.

After his licensure, Arce was employed at the Robert F. Kennedy Medical Center in Hawthorne for approximately one and a half years, with several registries for two years, at Whittier Community Hospital for two years, and then at Children's Hospital of Orange County, where he continues to practice.

Arce lives in Rancho Cucamonga, where he commutes to work with a co-worker. He lives with a cousin, a flight attendant, and does not own a car. His parents, who are in their 50s, live nearby in Alta Loma and have significant health issues. Arce provides his parents with personal and financial support.

Arce testified that he did not pay taxes when he was employed by the registries, and ended up owing the federal government about \$20,000 in back taxes and penalties. As a result, his wages were garnished at the rate of about \$1,000 per month. At the time of the hearing, he owed only \$250 in back taxes.

Arce testified that he very much enjoys being a licensed respirator care therapist, and that with his employment at the Children's Hospital, he believed he found his calling. He loves working with children and greatly appreciates the important care he provides to them.

Arce testified that he simply forgot to give his probation monitor his current work schedules. Arce admitted that he consumed alcohol in 2008 (about four alcoholic beverages

every other weekend with friends, according to Arce) and that he failed to show up for testing on some occasions for that reason and that he failed to show up for testing on several other occasions because he did not have the money to pay for testing. Arce claimed that he was not well organized and that was the reason he failed to file a quarterly compliance report and that was the reason he failed to provide the Board with an explanation for his inability to pay probation monitoring costs and the Board's costs of investigation and prosecution. Arce said he sent several emails to his probation monitor to explain his situation, but she claimed she did not receive them.

At the hearing in this matter, Arce provided a copy of one email, dated February 14, 2009, in which Arce introduced himself to Campos, explained that a "few things that have come up during my probation . . .," stated how much he enjoyed working as a licensed respiratory therapist, and represented that he did not make payments to the Board because the IRS was garnishing his paycheck, and requested leniency. At the hearing, Arce produced a paystub that showed the IRS was, in fact, garnishing his paycheck.

Arce testified he was participating in an alcohol education program. On further examination, it was established that Arce was enrolled in a first offender drinking driver program, usually scheduled to be a three month program completed within the first year of probation following a DUI conviction, that arose out of Arce's August 2005 DUI conviction.

12. Arce did not provide letters of reference, work evaluations or other written documentation. Arce did not offer any testimony to support his claim of current fitness to serve as a licensed respiratory therapist.

13. Arce testified he took full responsibility for his failure to comply with the terms and conditions of probation, and that he was now better organized and was financially capable of meeting those terms and conditions of probation.

#### *The Board's Guidelines*

14. The Board enacted disciplinary guidelines. Those guidelines observe that the Board's mission is to protect and serve the consumer by enforcing the Respiratory Care Practice Act and its regulations, to expand the delivery and availability of services, and to promote the profession by increasing public awareness of respiratory care as a profession and by supporting the development and education of all respiratory care practitioners.

The Board strives to ensure that only eligible, qualified, capable and competent individuals are licensed, and it seeks to expeditiously respond to all consumer complaints by efficiently and effectively investigating every complaint and pursuing disciplinary action in all appropriate cases. Finally, the guidelines state that the Board strives to ensure that appropriate post-disciplinary monitoring occurs.

The guidelines state that the purpose of the probation monitoring program is to maintain public protection by proactively monitoring probationers to ensure terms and

conditions are met. The purpose is not for the Board to rehabilitate the probationer. The guidelines specifically state that probation is a privilege afforded by the Board which:

- “(1) Allows for the probationer’s rehabilitation if that is his choice;
- (2) allows the probationer an opportunity to practice in a professional manner with restrictions and guidance from a community support system and designated probation monitor to prevent future occurrences, and
- (3) allows for education of the individual as to the responsibilities, requirements and professionalism mandated of a respiratory care practitioner.”

If a probationer is found to be in violation of any term of probation at any time during the probation, the Board must be notified of the violation immediately so that disciplinary action may be considered.

In reaching a decision to impose discipline, the Board recommends the following matters be considered in aggravation and mitigation. Examples of evidence in aggravation of penalty includes: Patient’s trust, health, safety or well-being was jeopardized; patient’s or employer’s trust was violated (i.e. theft, embezzlement, fraud, etc.); the violations involved or were in the presence of children; a history of prior discipline; patterned behavior (the respondent has a history of one or more violations or convictions related to the current violation(s)); perjury on official Board forms, violent nature of crime or act; violation of Board probation; the failure to provide a specimen for testing in violation of terms and conditions of probation. Examples of evidence in mitigation of penalty includes: Recognition by respondent of his or her wrongdoing and demonstration of corrective action to prevent recurrence; respondent was forthcoming and reported violation or conviction to the Board; a substantial amount of time since the violation or conviction (generally four or more years) occurred; no prior criminal or disciplinary history.

#### *The Appropriate Measure of Discipline*

15. In aggravation, Arce had a history of prior discipline, he violated probation, he failed to provide biological specimens for testing, and he demonstrated a pattern of knowingly failing to comply with the terms and conditions of probation. While Arce claimed he took responsibility for his wrongdoing, his conduct did not demonstrate that he took any meaningful corrective action. Arce was not cooperative with his probation monitor and the violations of probation are recent and continuing.

The Board placed Arce on probation to enable him to demonstrate his rehabilitation, to practice in a professional manner with restrictions and guidance from a regulatory support system, to educate himself concerning the responsibilities, requirements and professionalism mandated of a respiratory care practitioner, and to demonstrate his current fitness to practice.

Under all of the circumstances, an outright revocation of Arce’s license is the only measure of discipline that will protect the public.

## LEGAL CONCLUSIONS

### *Purpose of Physician Discipline*

1. The purpose of the regulatory act is to assure the high quality of professional practice; in other words, to keep unqualified and undesirable persons and those guilty of unprofessional conduct out of the profession. (*Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 574.)

The purpose of license discipline is not to punish, but to protect the public by eliminating practitioners who are dishonest, immoral, disreputable or incompetent. (*Fahmy v. Medical Board of California* (1995) 38 Cal.App.4th 810, 817.)

### *The Standard of Proof*

2. The standard of proof in an administrative action seeking to suspend or revoke a professional license is “clear and convincing evidence.” (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) Clear and convincing evidence requires a finding of high probability, or evidence so clear as to leave no substantial doubt; sufficiently strong evidence to command the unhesitating assent of every reasonable mind. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594.)

### *Imposing License Discipline*

3. Business and Professions Code section 3710.1 provides:

“Protection of the public shall be the highest priority for the Respiratory Care Board of California in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.”

4. Business and Professions Code section 3718 provides:

“The board shall issue, deny, suspend, and revoke licenses to practice respiratory care as provided in this chapter.”

5. Business and Professions Code section 3750 provides in part:

“The board may order the . . . revocation of, or the imposition of probationary conditions upon, a license issued under this chapter, for any of the following causes:

...

(d) Conviction of a crime that substantially relates to the qualifications, functions, or duties of a respiratory care practitioner. The record of conviction or a certified copy thereof shall be conclusive evidence of the conviction.

...

(j) The commission of any fraudulent, dishonest, or corrupt act which is substantially related to the qualifications, functions, or duties of a respiratory care practitioner.

...

(o) Incompetence in his or her practice as a respiratory care practitioner. . . .”

6. Business and Professions Code section 3753.1 provides in part:

“(a) An administrative disciplinary decision imposing terms of probation may include, among other things, a requirement that the licensee-probationer pay the monetary costs associated with monitoring the probation.

(b) The board shall not renew or reinstate the license of any licensee who has failed to pay all of the costs ordered under this section once a licensee has served his or her term of probation.”

7. Business and Professions Code section 3773 provides in part:

“At the time of application for renewal of a respiratory care practitioner license, the licensee shall notify the board of all of the following:

(a) Whether he or she has been convicted of any crime subsequent to the licensee’s previous renewal. . . .”

*Cause Exists to Revoke Probation*

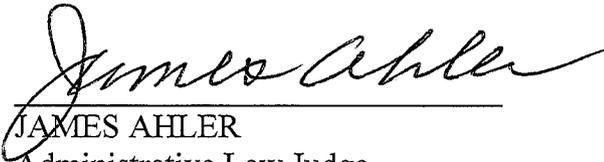
8. The clear and convincing evidence established cause to revoke the probation previously granted to Hector E. Arce on March 17, 2008, to vacate the order staying the order of revocation, and to impose the order of revocation that was stayed. Hector E. Arce violated probation by failing to submit current work schedules to his probation monitor for all places of employment (condition 2); by failing to participate in random biological fluid testing as required (condition 3); by failing to abstain completely from the possession and use of alcohol (condition 4); by failing to submit quarterly reports to the Board to document his compliance with terms and conditions of probation (condition 7); by failing to pay probation monitoring costs (condition 9); and by failing to pay any of the Board’s costs of investigation and prosecution (condition 14). Arce failed to establish any reasonable explanation or any justification for these violations of probation. Under all the circumstances, an outright revocation is the only measure of discipline that will protect the public.

This conclusion is based on all factual findings and on all legal conclusions.

ORDER

Respiratory Care Practitioner License No. 22505 issued to respondent Hector E. Arce, R.C.P., is revoked.

DATED: 6/9/09.

  
\_\_\_\_\_  
JAMES AHLER  
Administrative Law Judge  
Office of Administrative Hearings