

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

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

CHARLES BENAJAN
Box 111 D Cohasset Stage Road
Chico, CA 95973
Respiratory Care Practitioner License
No. 23106

Respondent.

Case No. R-1985

OAH No. N2005100198

PROPOSED DECISION

On December 9, 2005, in Sacramento, California, Leonard L. Scott, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Catherine Santillan, Senior Legal Analyst, represented complainant.

Charles Louis Benajan, respondent, appeared in his own behalf.

Evidence was received, the record was closed and the matter was submitted.

FACTUAL FINDINGS

1. Stephanie Nunez, Executive Officer of the Respiratory Care Board of California (Board), Department of Consumer Affairs, State of California, filed the First Amended Accusation and Petition to Revoke Probation against respondent. Nunez acted in

her official capacity.

2. On or about April 24, 2002, respondent submitted an application for a respiratory care practitioner license to the Board. On or about January 14, 2003, the Board denied the application. Respondent appealed the denial and a hearing was held.

Effective November 27, 2003, the Board adopted as its Decision the Proposed Decision of an Administrative Law Judge in the case entitled *In the Matter of the Accusation Against: Charles L. Benajan*, Case Number S-322 (OAH No. N2003050494).

The Decision noted that respondent had the following criminal convictions:

a. On May 14, 1994, in the Municipal Court, County of Sutter, State of California, in the matter entitled *People v. Charles Louis Benajan*, case number 94CRM1062, respondent was convicted on his plea of nolo contendere of violations of Fish and Game Code section 2006 (possession of loaded firearm in vehicle) and Health and Safety Code section 11357, subdivision (b) (possession of less than one ounce of marijuana), misdemeanors. Respondent's crimes are substantially related to the qualifications, functions and duties of the licensed activity.

The facts and circumstances of respondent's crime are that, on February 14, 1994, respondent was stopped while driving a motor vehicle on a public road, and found to have marijuana and a loaded weapon in the vehicle.

b. On October 13, 1994, in the Superior Court, County of Butte, State of California, in the matter entitled *People v. Louis Charles Benajan*, case number CM004867, respondent was convicted on his plea of nolo contendere of violating Health and Safety Code section 11358, subdivision (b) (marijuana cultivation), a felony. Respondent's crime is substantially related to the qualifications, functions and duties of the licensed activity.

The facts and circumstances of respondent's crime are that, on July 14, 1994, a probation search discovered that respondent was growing marijuana.

c. On March 28, 1995, in the Municipal Court, County of Butte, State of California, in the matter entitled *People v. Louis Charles Benajan*, case number CR66263, respondent was convicted on his plea of nolo contendere of violating Vehicle Code sections 23103 and 23103.5 (alcohol related reckless driving), a misdemeanor. Respondent's crime is substantially related to the qualifications, functions and duties of the licensed activity.

The facts and circumstances of respondent's crime are that respondent drank

alcohol and then erratically operated a motor vehicle on the public roads.

The Decision found cause to deny the application for licensure for violations of Business and Professions Code sections 475, subdivision (a)(2) and (4), 480, subdivision (a)(1) and (3), 3750, subdivision (g)(2), and 3750.5, subdivision (a), in conjunction with California Code of Regulations, title 16, section 1399.370, subdivision (a).

The Decision denied respondent's application for licensure, but stayed the denial, and, upon payment of all applicable fees, granted a probationary Respiratory Care Practitioner License for a period of five years, subject to several limitations, conditions and restrictions.

Pursuant to the Decision, on December 3, 2003, the Board issued Probationary Respiratory Care Practitioner License Number 23106 to respondent. The license will expire on August 31, 2006, if not renewed.

On December 5, 2003, the Board served a written copy of the limitations, conditions and restrictions of probation on respondent. Respondent admitted receiving the document.

3. The limitations, conditions and restrictions in the Decision were:

1. **OBEY ALL LAWS** Respondent shall obey all laws, whether federal, state, or local. Respondent shall also obey all regulations governing the practice of respiratory care in California. Respondent shall notify the Board in writing within 14 days of any incident resulting in his arrest, or charges filed against, or a citation issued against, respondent.

2. **QUARTERLY REPORTS** Respondent shall file quarterly reports of compliance under penalty of perjury, on forms to be provided, to the probation monitor assigned by the Board. Omission or falsification in any manner of any information on these reports shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against respondent's respiratory care practitioner license. Quarterly report forms will be provided by the Board. Respondent is responsible for contacting the Board to obtain additional forms if needed. Quarterly reports are due for each year of probation and the entire length of probation as follows:

A. For the period covering January 1st through March 31st, reports are to be completed and submitted between April 1st and April 7th.

B. For the period covering April 1st through June 30th, reports are

to be completed and submitted between July 1st and July 7th.

C. For the period covering July 1st through September 30th, reports are to be completed and submitted between October 1st and October 7th.

D. For the period covering October 1st through December 31st, reports are to be completed and submitted between January 1st and January 7th.

Failure to submit complete and timely reports shall constitute a violation of probation.

3. **PROBATION MONITORING PROGRAM** Respondent shall comply with requirements of the Board appointed probation monitoring program, and shall, upon reasonable request, report to or appear to a local venue as directed. Respondent shall claim all certified mail issued by the Board, respond to all notices of reasonable requests timely, and submit Annual Reports, Identification Update reports or other reports similar in nature, as requested and directed by the Board or its representative. Respondent is encouraged to contact the Board's Probation Program at any time he has a question or concern regarding his/her terms and conditions of probation. Failure to appear for any scheduled meeting or examination, or cooperate with the requirements of the program, including timely submission of requested information, shall constitute a violation of probation and will result in the filing of an accusation and/or a petition to revoke probation against respondent's respiratory care practitioner license.

4. **PROBATION MONITORING COSTS** All costs incurred for probation monitoring during the entire probation shall be paid by respondent. The monthly cost may be adjusted as expenses are reduced or increased. Respondent's failure to comply with all terms and conditions may also cause this amount to be increased. All payments for costs are to be sent directly to the Respiratory Care Board and must be received by the date(s) specified. (Periods of tolling will not toll the probation monitoring costs incurred.) If respondent is unable to submit costs for any month, he/she shall be required, instead to submit an explanation of why he is unable to submit the costs, and the date(s) he will be able to submit the costs including payment amount(s). Supporting documentation and evidence of why respondent is unable to make such payment(s) must accompany this submission. Respondent understands that failure to submit costs timely is a violation of probation and submission of evidence demonstrating financial hardship does not preclude the Board from pursuing further disciplinary action. However, respondent understands that by

providing evidence and supporting documentation of financial hardship it may delay further disciplinary action. In addition to any other disciplinary action taken by the Board, an unrestricted license will not be issued at the end of the probationary period and the respiratory care practitioner license will not be renewed, until such time all probation monitoring costs have been paid. The filing of bankruptcy by respondent shall not relieve respondent of his responsibility to reimburse the Board for costs incurred.

5. **EMPLOYMENT REQUIREMENT** Respondent shall be employed a minimum of 24 hours per week as a respiratory care practitioner for a minimum of 2/3 of his/her probation period. Respondent may substitute successful completion of a minimum of thirty (30) additional continuing education hours, beyond that which is required for license renewal, for each 8 months of employment required. Respondent shall submit proof to the Board of successful completion of all continuing education requirements. Respondent is responsible for paying all costs associated with fulfilling this term and condition of probation.

6. **NOTICE TO EMPLOYER** Respondent shall be required to inform his employer, and each subsequent employer during the probation period, of the discipline imposed by this decision by providing his supervisor and director and all subsequent supervisors and directors with a copy of the decision and order, and the Statement of Issues in this matter prior to the beginning of or returning to employment or within 14 days from each change in a supervisor or director. If respondent is employed by or through a registry [and is not restricted from working for a registry], respondent shall make each hospital or establishment to which he is sent aware of the discipline imposed by this decision by providing his direct supervisor and administrator at each hospital or establishment with a copy of this decision, and the Statement in this matter prior to the beginning of employment. This must be done each time there is a change in supervisors or administrators. The employer will then inform the Board, in writing, that he is aware of the discipline, on forms to be provided to respondent. Respondent is responsible for contacting the Board to obtain additional forms if needed. All reports completed by the employer must be submitted from the employer directly to the Board. Respondent shall execute a release authorizing the Board or any of its representatives to review and obtain copies of all employment records and discuss and inquire of the probationary status with any of respondent's supervisors or directors.

7. **CHANGES OF EMPLOYMENT OR RESIDENCE**
Respondent shall notify the Board, and appointed probation monitor, in writing, of any and all changes of employment, location, and address within 14

days of such change. This includes but is not limited to applying for employment, termination or resignation from employment, change in employment status, change in supervisors, administrators or directors. Respondent shall also notify his probation monitor AND the Board IN WRITING of any changes of residence or mailing address within 14 days. P.O. Boxes are accepted for mailing purposes, however respondent must also provide his physical residence address as well.

8. **COST RECOVERY** Respondent shall pay to the Board a sum not to exceed the costs of the investigation and prosecution of this case. That sum shall be \$1,344 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 will not be tolled. If respondent is unable to submit costs timely, he shall be required, instead to submit an explanation of why he is unable to submit these costs in part or in entirety, and the date(s) he will be able to submit the costs including payment amount(s). Supporting documentation and evidence of why respondent is unable to make such payment(s) must accompany this submission. Respondent understands that failure to submit costs timely is a violation of probation and submission of evidence demonstrating financial hardship does not preclude the Board from pursuing further disciplinary action. However, respondent understands that by providing evidence and supporting documentation of financial hardship may delay further disciplinary action. Consideration to financial hardship will not be given should respondent violate this term and condition, unless an unexpected and unavoidable hardship is established from the date of this order to the date payment(s) is due. The filing of bankruptcy by the respondent shall not relieve the respondent of his responsibility to reimburse the Board for these costs.

9. **TOLLING FOR OUT-OF-STATE RESIDENCE OR PRACTICE** Periods of residency or practice outside California, whether the periods of residency or practice are temporary or permanent, will toll the probation period but will not toll the cost recovery requirement, nor the probation monitoring costs incurred. Travel out of California for more than 30 days must be reported to the Board in writing prior to departure. Respondent shall notify the Board, in writing, within 14 days, upon his return to California and prior to the commencement of any employment where representation as a respiratory care practitioner is/was provided.

10. **VALID LICENSE STATUS** Respondent shall maintain a current, active and valid license for the length of the probation period. Failure to pay all fees and meet continuing education requirements prior to his license

expiration date shall constitute a violation of probation.

11. **VIOLATION OF PROBATION** 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.

12. **COMPLETION OF PROBATION** Upon successful completion of probation, respondent's license shall be fully restored.

13. **WORK SCHEDULES** Respondent shall be required to submit to the probation monitor work schedules on a weekly/monthly basis (as set by the probation monitor) for the length of probation. Respondent shall ensure the Board has a copy of his current work schedule at all times for each place of employment. Failure to submit current work schedules on a continuous basis, shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against respondent's respiratory care practitioner license.

14. **BIOLOGICAL FLUID TESTING** 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, or any drug screening program approved by the Board. Test costs range from \$21.00 to \$200.00 each. The length of time shall be for the entire probation period. The frequency and location of testing will be determined by the Board. At all times respondent shall fully cooperate with the Board or any of its representatives, and shall, when directed, appear for testing as requested and submit to such tests and samples for the detection of alcohol, narcotics, hypnotic, dangerous drugs or other controlled substances.

If respondent is unable to provide a specimen in a reasonable amount of time from the request, while at the work site, Respondent understands that any Board representative may request from the supervisor, manager or director on duty to observe Respondent in a manner that does not interrupt or jeopardize patient care in any manner until such time Respondent provides a specimen acceptable to the Board. Failure to submit to testing or appear as requested by any Board representative for testing, as directed shall constitute a violation of

probation and shall result in the filing of an accusation and/or a petition to revoke probation against respondent's respiratory care practitioner license.

15. **ABSTENTION FROM USE OF MOOD ALTERING SUBSTANCES** Respondent shall completely abstain from the possession or use of any and all mood altering drugs, substances and their associated paraphernalia, except when the drugs are lawfully prescribed by a licensed practitioner as part of a documented medical treatment. Respondent shall execute a release authorizing the release of pharmacy and prescribing records as well as physical and mental health medical records. Respondent shall also provide information of treating physicians, counselors or any other treating professional as requested by the Board. Respondent shall ensure that he is not in the presence of or in the same physical location as individuals who are using illegal substances, even if Respondent is not personally ingesting the drug(s). Any positive result that registers over the established laboratory cutoff level shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against respondent's respiratory care practitioner license. Respondent also understands and agrees that any positive result that registers over the established laboratory cutoff level shall be reported to each of respondent's employers.

16. **ALCOHOL AND DRUG TREATMENT** Respondent, at his expense, shall successfully complete a treatment regime at a recognized and established program in California of at least six months duration approved by the Board. The treatment program shall be successfully completed within the first nine months of probation. The program director, psychiatrist or psychologist shall confirm that Respondent has complied with the requirement of this decision and shall notify the Board immediately if he believes the Respondent cannot safely practice. Respondent shall execute a release authorizing divulgence of this information to the Board. Respondent shall inform the program director, psychiatrist or psychologist, of his probationary status with the Board, and shall cause that individual to submit monthly reports to the Board providing information concerning respondent's progress and prognosis. Such reports shall include results of biological fluid testing. Positive results shall be reported immediately to the Board and shall be used in administrative discipline.

4. Respondent violated limitation, condition and restriction number 1, in that on or about February 15, 2005, in the Superior Court, County of Butte, State of California, in the matter entitled *People v. Louis Charles Benajan*, case number SCR46358, respondent was convicted on his plea of nolo contendere of violating Vehicle Code sections 23103 and 23103.5 (alcohol related reckless driving), a misdemeanor. Respondent's crime is

substantially related to the qualifications, functions and duties of the licensed activity.

The facts and circumstances of respondent's crime are that on August 11, 2004, respondent drank alcohol and then drove a motor vehicle on the public roads at speeds well in excess of the posted speed limits while weaving through traffic and following too closely.

5. Respondent violated limitation, condition and restriction number 15. On or about February 4, 2004, he completed a Drug Questionnaire as part of his probationary requirements. In response to the question, "Have you used or ingested any prescribed medication, narcotic or drug?" he answered "No." In response to the question, "In the last three months, have you consumed alcohol?" he answered "Yes", and wrote that he had drank beer prior to December 3, but failed to admit any later consumption of alcoholic beverages. He signed the Questionnaire under penalty of perjury.

On the next day, February 5, 2004, respondent admitted to his probation monitor that he drank a couple of beers on the evening of February 3, 2004. He also admitted taking a friend's Vicodin, a controlled substance, a few weeks earlier, and failing to disclose this on the Questionnaire. Respondent claimed that he took the Vicodin for pain from a long term back problem. However, pain from a long-term back problem would not justify illegally obtaining and using Vicodin without a prescription. If respondent's treating physician had felt respondent needed Vicodin, that physician could have prescribed it.

On June 10, 2005, respondent provided a urine sample for random drug testing. Evaluation of the sample determined that he had consumed a significant quantity of an alcoholic beverage within five days of providing the urine sample.

6. Respondent violated limitation, condition and restriction number 2. Respondent failed to file the required Quarterly Reports of Compliance for the following periods of time: April 1 through June 30, 2004, due July 1 through 7, 2004; July 1 through September 30, 2004, due October 1 through 7, 2004; October 1 through December 31, 2004, due January 1 through 7, 2005; and April 1 through June 30, 2005, due July 1 through 7, 2005.

7. Respondent violated limitation, condition and restriction number 14, which required him to submit to random biological fluid testing. He did this by failing to comply with the directive to telephone an automated, toll free telephone number each day to learn if he was required to report for random testing, and then reporting for such testing. During 2004, respondent failed to telephone the toll free number on June 26; July 18, 24 and 25; August 1, 30 and 31; September 22; October 20, 22, 25 and 30; November 3, 4, 19 and 23; and December 1, 2, 3, 5, 7, 9, 10 and 30. During 2005 through the filing of this Accusation, respondent failed to telephone the toll free number on January 2, 23 and 26; February 3 and

25; March 11, 18 and 24; April 7 and 14; May 1 and 4; June 5; and July 7.

In addition, on December 28, 2004, respondent telephoned the toll free number at 9:13 a.m., and was instructed to provide a specimen that day. However, he failed to comply on December 28, but did provide a specimen on December 29. The specimen was negative for alcohol or drugs.

The clinic where respondent was required to give specimens closed early on December 28, 2004, and had closed for the day when respondent went there late in the afternoon. Of course, he could have gone there earlier in the day because he received the instruction at 9:13 a.m.

On February 3, 2005, respondent failed to call the toll free number, so he failed to comply with the instruction to provide a specimen.

While on probation, all of respondent's tests have been negative except for the specimen given on June 10, 2005, which was positive for alcohol.

8. Respondent violated limitation, condition and restriction number 4 by failing to timely pay the probation monitoring costs. At the time of the filing of the Accusation, he was \$2,100 in arrears for payments due for the months February 2004 through October 2005.

9. Respondent violated limitation, condition and restriction number 8 by failing to timely pay \$296 of the \$1,344 in costs of investigation and prosecution. That payment was due on November 27, 2004.

10. Respondent stated that he has been unable to find employment in respiratory care and has found it difficult to support himself. He explained his failure to pay the various costs on the basis that he was not working in respiratory care and was unable to afford to make the payments with his current income. His explanation would have been more persuasive if he had, at least, made partial payments, and if he had contacted the Board and requested an extension of time to pay.

Respondent admitted that he had not "strictly" complied with the requirements of his probation regarding consumption of alcohol, but attempted to justify his failure to comply on the basis that, since he was not working in respiratory care, he did not endanger patients. Unfortunately for respondent, the prohibition against consumption of alcoholic beverages was not contingent upon his working in respiratory care.

Respondent presented some evidence to attempt to rebut complainant's evidence regarding specific alleged violations on specific dates, but, in general, failed to present

evidence regarding most of the allegations, and failed to attempt to rebut the evidence in support of those allegations.

At the hearing, respondent promised to fully comply with all of the requirements of probation if his probationary license is continued, but his promise was not persuasive considering his failure to comply with several of the requirements of probation over the last approximately two years.

Considering the variety and seriousness of respondent's violations of probation, he failed to justify a continuation of his probation or of the probationary license.

11. The Board entered into evidence a Certification of Costs for the investigation and prosecution of this matter through the filing of the Accusation. The total certified costs were \$4,185.25. The reasonableness of such costs is discussed below in the Legal Conclusions.

LEGAL CONCLUSIONS

1. Cause for discipline of respondent's license and for revocation of his probation for violation of condition number 1 was established for violation of Business and Professions Code sections 3750, subdivisions (d) and (g), and 3752, in conjunction with California Code of Regulations, title 16, section 1399.370, subdivisions (a) and (c), as found in Findings 3 and 4.

2. Cause for revocation of his probation for violation of limitation, condition and restriction number 15 was established, as found in Finding 3 and 5.

3. Cause for revocation of his probation for violation of limitation, condition and restriction number 2 was established, as found in Findings 3 and 6.

4. Cause for revocation of his probation for violation of limitation, condition and restriction number 14 was established, as found in Findings 3 and 7.

5. Cause for revocation of his probation for violation of limitation, condition and restriction number 4 was established, as found in Findings 3 and 8.

6. Cause for revocation of his probation for violation of limitation, condition and restriction number 8 was established, as found in Findings 3 and 9.

7. Pursuant to Business and Professions Code sections 3753.1, 3753.5 and 3753.7, if a licensee is found to have committed a violation or violations, the Board can

recover its reasonable costs of investigation and enforcement. In order to determine whether the costs were reasonable, this matter was evaluated pursuant to the factors for determining reasonableness of costs set forth by the appellate court in *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32. Those factors include:

a. Whether respondent has been successful at hearing in getting charges dismissed or reduced. Respondent was unsuccessful in challenging the allegations against him and all of them were proven and are cause for license discipline.

b. Consideration must be given to whether respondent has subjective good faith belief in the merits of his or her position. Respondent presented some limited evidence regarding some of the specific instances contained in the allegations, but overall failed to attempt to rebut most of complainant's evidence of respondent's violations. Instead, he asked for another chance upon his promise that he would comply with the terms and conditions of probation in the future. His position was decidedly less than subjective good faith belief in the merits of his position.

c. Whether respondent has raised a colorable challenge to the proposed discipline. As explained above, respondent failed to raise a colorable challenge to the proposed discipline.

d. Whether respondent has the financial ability to pay the costs. Respondent presented some evidence that he is experiencing financial difficulties due to difficulty finding well paying employment and would have difficulty paying the costs unless allowed to do so over a period of time.

e. Whether the scope of the investigation was appropriate to the alleged misconduct. Respondent failed to challenge the scope of the investigation and there was no evidence that it, or the costs of prosecution, was unreasonable or excessive.

Therefore, pursuant to the above analysis, the reasonable costs of investigation and enforcement were \$4,185.25, as found in Finding 11, so long as respondent is allowed sufficient time to pay and is allowed to pay on an installment basis.

ORDER

1. The probation granted to respondent Charles Louis Benajan, in prior Case Number S-322, is revoked and the denial of a license, that was stayed in that Decision, is imposed, pursuant to Legal Conclusions 1 through 6, separately and for all of them.

2. Probationary Respiratory Care Practitioner License Number 23106, that was

issued to respondent Charles Louis Benajan, is revoked, pursuant to Legal Conclusions 1 through 6, separately and for all of them.

3. Respondent Charles Louis Benajan shall pay \$4,185.25 to the Board for the reasonable costs of investigation and enforcement pursuant to Legal Conclusion 7. He shall be allowed sufficient time to pay and may pay on an installment basis.

Dated: _____

LEONARD L. SCOTT
Administrative Law Judge
Office of Administrative Hearings