



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2012 APR 26 P 12:42

HEARINGS OFFICE

BOARD OF PHARMACY
OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of the) PHA 2008-38-L
Pharmacist's License of)
) BOARD'S FINAL ORDER
DENNIS R. BIRK,)
)
Respondent.)
_____)

BOARD'S FINAL ORDER

On March 5, 2012, the duly appointed Hearings Officer issued her proposed Findings of Fact, Conclusions of Law and Recommended Order in the above-entitled matter. The parties were given an opportunity to file written exceptions; however, no exceptions were filed.


Upon review of the entire record of this proceeding, the Board of Pharmacy ("Board") adopts the Hearings Officer's proposed decision as the Board's Final Order and finds and concludes that Respondent violated HRS §§ 461-21(a)(2), 461-21(a)(5), 461-21(a)(7) and 461-21(a)(10).

For the violations found, the Board orders that Respondent be monitored, at his own expense, in a manner and for a time period approved by the Board. Within twenty (20) days from the date of the Board's Final Order, Respondent shall provide the Board with a monitoring plan. Within thirty (30) days from the receipt of the proposed monitoring plan, the Board shall notify Respondent if the plan is sufficient or whether changes are necessary. If a monitoring plan is not in place within four (4) months of the Board's Final Order, then Respondent's license shall be automatically revoked. The Board also orders that Respondent's license be on probation from the date of the Board's Final Order until Respondent completes his monitoring program and that Respondent pay a fine in the amount

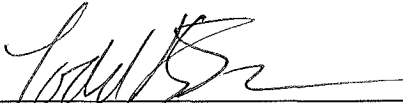
of \$1,000.00 within ninety (90) days of the Board's Final Order. If Respondent attempts to restore his license prior to December 31, 2012, the Board may impose any other requirement in addition to those set forth in HRS § 461-8(b).

DATED: Honolulu, Hawaii, April 19, 2012.


MARK E. BROWN
Chairperson



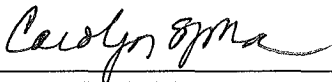
PATRICK ADAMS
Vice Chairperson



TODD INAFUKU
Board Member



GARRETT A. LAU
Board Member



CAROLYN S.J. MA
Board Member



JILL OLIVEIRA GRAY
Board Member

LYDIA KUMASAKA
Board Member



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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HEARINGS OFFICE

BOARD OF PHARMACY
OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of the)	PHA 2008-38-L
Pharmacist's License of)	
)	ERRATA
DENNIS R. BIRK,)	
)	
Respondent.)	
<hr/>		

ERRATA

Findings of Fact No. 4 on page 2 of the Hearings Officer's Findings of Fact, Conclusions of Law and Recommended Order issued on March 5, 2012 should read:

4. On October 23, 2008, Respondent cooperated with PharMerica's investigation and admitted that he diverted the controlled substance for personal use. Respondent was terminated from employment. Respondent relocated to the mainland to seek addiction treatment services.

DATED: Honolulu, Hawaii, APR 05 2012

SHERYL LEE A. NAGATA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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HEARINGS OFFICE

BOARD OF PHARMACY
OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of the)	PHA 2008-38-L
Pharmacist's License of)	
DENNIS R. BIRK,)	HEARINGS OFFICER'S FINDINGS OF
)	FACT, CONCLUSIONS OF LAW AND
)	RECOMMENDED ORDER
Respondent.)	
_____)	

HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDED ORDER

I. INTRODUCTION

On June 29, 2010, the Department of Commerce and Consumer Affairs, through its Regulated Industries Complaints Office ("Petitioner") filed a petition for disciplinary action against the pharmacist's license of Dennis R. Birk ("Respondent"). The matter was set for hearing pursuant to Hawaii Revised Statutes ("HRS") Chapters 91, 92 and 461, and the Notice of Hearing and Prehearing Conference ("Notice") was transmitted to the parties. Respondent received the Petition and Notice by certified mail on August 4, 2010. The hearing was rescheduled from October 19, 2010 to January 20, 2011 by agreement of the parties.

On January 20, 2011, the hearing was conducted by the undersigned Hearings Officer. Diane R. Corn, Esq. represented Petitioner. Respondent was represented by Roy F. Epstein, Esq. At the conclusion of the hearing, the parties informed the Hearings Officer that the case may be resolved through a settlement agreement and a recommended decision would not be necessary. On December 28, 2011, a Settlement Agreement After Filing Petition for Disciplinary Action and Board's Final Order was transmitted to the Board of Pharmacy

("Board"). By an email dated January 13, 2012, Petitioner's attorney informed the Hearings Officer that the Board rejected the Settlement Agreement and requested that a recommended decision be issued.

Having reviewed and considered the evidence and arguments presented at the hearing, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and recommended order.

II. FINDINGS OF FACT

1. The Board of Pharmacy ("Hawaii Board") licensed Respondent as a pharmacist on August 10, 1976, License No. PH 538. Respondent's license expired on December 31, 2009 and will be forfeited on December 31, 2012.

2. On October 17, 2008, the Pharmacy Operations Manager of PharMerica's Hilo long term care pharmacy observed Respondent outside the designated pharmacy area with a bulk bottle of Tylenol 300 mg with codeine 30 mg. When questioned, Respondent responded in a suspicious manner, which indicated possible diversion.

3. Upon investigation, PharMerica identified an inventory shortage of approximately 1,968 tablets going back to May 6, 2008.

4. On October 23, 2008, Respondent cooperated with PharMerica's investigation and admitted that he diverted the controlled substance for personal use. Respondent was terminated from employment. Respondent relocated to the mainland to seek addiction treatment services.

5. In a letter dated December 12, 2008 to Petitioner's investigator, Respondent admitted diverting Tylenol #3 for his own use. This letter states in part:

I greatly regret this action on my part. I was in fact under the care of a physician in Hilo, and had been prescribed Tylenol #3 for my own use due to chronic pain related to a traumatic back injury (crushed T12 vertebrae) I suffered about four years ago. I have no explanation for my using the medications from the pharmacy when I was able to get the same medications from my physician. Possibly it was an effort on my part to obscure the true extent of my chronic pain issues from my family, my employers and my physician. I also ignored the advice I received from my immediate supervisor about job burn out and tried, albeit unsuccessfully to shoulder entirely too much of the day to day work related to my job in Hilo. This too I regret.

6. On August 27, 2010, Respondent began intensive outpatient treatment with Lakeside-Milam Recovery Centers in Edmonds, Washington (“Lakeside-Milam”). Respondent transferred to Phase II treatment on September 30, 2010. Respondent must attend 1½ hour group sessions once per week for 26 weeks. Random urinalyses and verification of a minimum of two 12-step meetings per week are required.

7. The November 26, 2010 status report from Lakeside-Milam indicates that Respondent is in Phase II of treatment. The Statement of Progress is “compliant” and his estimated completion date is “pending”. Respondent stated that Phase II treatment lasts six months and Phase III treatment lasts another six months. Respondent would not object to extending the length of time he is in Phase II or Phase III treatment.

8. Respondent testified that he took the Tylenol #3 with codeine as was prescribed to him—a maintenance dosage that did not inhibit his work at PharMerica. As of the date of the hearing, Respondent does not take controlled substances for pain and although he has a prescription for pain medication, he rarely uses the medication.

9. Beginning in January 2009, Respondent began working at Pacific Medical Centers. His job title is “Pharmacist-Infusion”. Respondent’s February 2010 performance review “exceeds target”. At the time of the hearing, Respondent worked in a chemo infusion suite from 8:00 a.m. to 4:30 p.m. Monday to Friday.

III. CONCLUSIONS OF LAW

Respondent admitted that his conduct violated HRS §§ 461-21(a)(2), 461-21(a)(5), 461-21(a)(7), 461-21(a)(10) which provide:

§ 461-21 Disciplinary action. (a) In addition to any other actions authorized by law, the board shall have the power to deny, revoke, or suspend any license or permit applied for or issued by the board in accordance with this chapter, and to fine or otherwise discipline a licensee or permit holder for any cause authorized by law, including but not limited to the following:

...

(2) Professional misconduct, gross carelessness, or manifest incapacity;

...
(5) Violation of any state or federal drug, controlled substance, or poison law;

...

(7) Any other conduct constituting fraudulent or dishonest dealings;

...

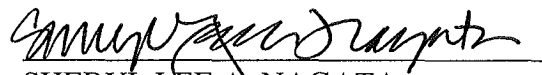
(10) Habitual intemperance or addiction to the use of habit-forming drugs.

IV. RECOMMENDED ORDER

Based on the above, the Hearings Officer recommends that the Hawaii Board find and conclude that Respondent violated HRS §§ 461-21(a)(2), 461-21(a)(5), 461-21(a)(7), 461-21(a)(10).

For the violations found, the Hearings Officer recommends that Respondent be monitored, at his own expense, in a manner and for a time period approved by the Board. Within twenty (20) days from the date of the Board's Final Order, Respondent shall provide the Board with a monitoring plan. Within thirty (30) days from the receipt of the proposed monitoring plan, the Board shall notify Respondent if the plan is sufficient or whether changes are necessary. If a monitoring plan is not in place within four (4) months of the Board's Final Order, then the Hearings Officer recommends that Respondent's license be automatically revoked. The Hearings Officer also recommends that Respondent's license be put on probation from the date of the Board's Final Order until Respondent completes his monitoring program and that he be ordered to pay a fine in the amount of \$1,000.00 within ninety (90) days of the Board's Final Order. If Respondent attempts to restore his license prior to December 31, 2012, the Board may impose any other requirement in addition to those set forth in HRS § 461-8(b).

DATED: Honolulu, Hawaii, MAR - 5 2012.


SHERYL LEE A. NAGATA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs