

BEFORE THE IOWA BOARD OF
PHYSICIAN ASSISTANT EXAMINERS

IN THE MATTER OF THE)	CASE NO. 04-013; 05-003
STATEMENT OF CHARGES AGAINST:)	DIA NO. 06DPHPA001
)	
CHERI BUSH-MCCLELLAND)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Respondent)	DECISION AND ORDER

On May 17, 2006, the Iowa Board of Physician Assistant Examiners (Board) issued a Notice of Hearing and Statement of Matters Asserted (Confidential) to Cheri Bush-McClelland (Respondent) charging her with:

COUNT I: Conviction of a felony related to the profession or occupation of the licensee or the conviction of any felony that would affect the licensee's ability to practice within the profession, in violation of Iowa Code section 147.55(5), 272C.10(5) and 645 IAC 329.2(11).

COUNT II: Revocation, suspension, or other disciplinary action taken by a licensing authority of this state, another state, territory, or country; or failure by the licensee to report in writing to the board revocation, suspension, or other disciplinary action taken by a licensing authority within 30 days of the final action, in violation of 645 IAC 329.2(13).

The hearing was held on July 19, 2006 at 9:30 a.m. at the Lucas State Office Building, Fifth Floor Conference Room, Des Moines, Iowa. Respondent Cheri Bush-McClelland did not personally appear for the hearing but was represented by attorney Eric Parrish. Assistant Attorney General Emily Kimes-Schwiesow represented the state of Iowa.

The following Board members served as the presiding officers for the hearing: Edward Friedmann, PA, Chairperson; Patricia Weishaar, PA; John H. Olson, PA; Fred Strickland, DO; and Mara Swanson and Mary Charlton, public members. The hearing was closed to the public at Respondent's request, pursuant to Iowa Code section 272C.6(1). The hearing was recorded by a certified court reporter. Administrative Law Judge Margaret LaMarche assisted the Board in conducting the hearing. Following the hearing, the Board convened in closed executive session,

pursuant to Iowa Code section 21.5(1)(f), to deliberate their decision. Following deliberations, the Board returned to open session and approved a motion revoking Respondent's license. The Board directed the administrative law judge to prepare the Findings of Fact, Conclusions of Law, Decision and Order, in conformance with their deliberations. The Board's chairperson was authorized to sign the Board's decision, following review by the Board.

THE RECORD

The parties stipulated to State Exhibits 1-8 (see Exhibit Index for description). No testimony was offered.

FINDINGS OF FACT

1. On June 22, 2001, Respondent was issued license number 600-001358 by the Board to engage in the practice of a physician assistant, subject to the laws of the state of Iowa and the rules of the Board. Respondent's license is active and expires on September 30, 2007. (State Exhibits 3, 8)

2. Respondent has a history of prior discipline by this Board. On January 24, 2002, Respondent pled guilty to the felony, "Use and Attempt to Use, With the Intent to Defraud, an Unauthorized Access Device (Credit Card)", in the United States District Court for the Southern District of Iowa. Respondent was sentenced to three years federal probation and ordered to complete a mental health evaluation and pay \$22,500 in restitution.

On October 15, 2003, Respondent and the Board entered into a Combined Statement of Charges, Settlement Agreement, Consent Order and Final Order, based on this felony conviction. The Consent Order placed Respondent's physician assistant license on probation until January 2005 or until she was released from the terms of probation imposed by the federal court. Respondent agreed to complete 30 contact hours of continuing education applicable to professional ethics and to file quarterly reports with the Board. Respondent also agreed to refrain from any conduct that would violate the statutes and rules governing the practice of a physician assistant in the state of Iowa. (State Exhibit 8)

3. On December 8, 2005, Respondent entered a guilty plea¹, to three felonies: the Class C Felony of Obtaining or Attempting to Obtain a Prescription Drug by Fraud, Deceit, Misrepresentation or Subterfuge and two Class D Forgery felonies. Fourteen other counts were dismissed as part of a plea bargain. On February 22, 2006, Respondent was sentenced in Polk County District Court to be imprisoned for a total period of 20 years. However, the sentence was suspended and Respondent was placed on probation for a period of five years, subject to terms and conditions. The terms and condition of probation included, but were not limited to: completion of a substance abuse evaluation and mental health evaluation and follow through on any treatment recommendations. Respondent was also ordered to pay restitution and fined \$1000. (State Exhibits 4, 6)

4. On March 8, 2006, the Iowa Board of Pharmacy Examiners revoked Respondent's controlled substances registration based in part on its finding that Respondent had stolen a prescription form from a medical clinic that had terminated her employment and then used the form to write a controlled substances prescription for a person who was not a patient of the clinic. (State Exhibits 5, 7)

CONCLUSIONS OF LAW

Count I

Iowa Code section 147.55(5) provides, in relevant part:

A license to practice a profession shall be revoked or suspended when the licensee is guilty of any of the following acts or offenses:

...

5. Conviction of a felony related to the profession or occupation of the licensee or the conviction of any felony that would affect the licensee's ability to practice within a profession. A copy of the record of conviction or plea of guilty shall be conclusive evidence.

Accord, Iowa Code section 272C.10(5) and 645 IAC 329.2(11).

The preponderance of the evidence established that Respondent violated Iowa Code sections 147.55(5), 272C.10(5), and 645 IAC 329.2(11) when she was convicted of three felonies that were

¹ Respondent's guilty plea was entered pursuant to North Carolina v. Alford, 400 U.S. 25 (1970)

related to her practice as a physician assistant. Respondent conceded that the evidence in the record supports this count.

COUNT II

645 IAC 329.2(13) provides, in relevant part:

645-329.2(148C,272C) Grounds for discipline. The board may impose any of the disciplinary sanctions provided in rule 645-329.3(272C) when the board determines that the licensee is guilty of any of the following acts or offenses:

...
329.2(13) Revocation, suspension, or other disciplinary action taken by a licensing authority of this state;...

The preponderance of the evidence established that Respondent violated 645 IAC 329.2(13) when the Iowa Board of Pharmacy Examiners revoked her controlled substances registration on March 8, 2006.

SANCTION

In determining an appropriate sanction, the Board considered the serious nature of the violations, including the number and nature of the felony convictions; Respondent's prior disciplinary violation/felony in 2002; and Respondent's failure to personally appear before the Board. 645 IAC 329.4. These factors amply support the Board's decision to revoke Respondent's license.

DECISION AND ORDER

IT IS THEREFORE ORDERED that license number 600-001358 issued to Respondent Cheri Bush-McClelland is hereby **REVOKED**.

IT IS FURTHER ORDERED that before the Board will consider an application for reinstatement, Respondent must establish:

1. That she has fulfilled all of the requirements imposed on her by the Polk County District Court and has been discharged from probation.
2. That she has no pending criminal charges;

3. That she has completed mental health and substance abuse evaluations at facilities approved by the Board and has fully complied with any recommendations made as a result of the evaluations.

IT IS FURTHER ORDERED that Respondent will be required to personally appear before the Board on any application for reinstatement. At that time, the burden of proof will be on Respondent to establish that that the basis for the revocation no longer exists, and that it is in the public interest for her license to be reinstated. 645 IAC 11.31.

FINALLY, IT IS ORDERED that the Respondent shall pay a \$75.00 hearing fee and the \$45.00 fee for the court reporter. The \$120.00 shall be paid within thirty (30) days of receipt of this decision. If a transcript is ordered, the cost will be charged to the party requesting it. Iowa Code section 272C.6(6); 645 IAC 11.23.

Dated this 30th day of August, 2006.

Ed Friedmann
Edward Friedmann, PA *(Signature)*
Chairperson
Iowa Board of Physician Assistant Examiners

cc: Emily Kimes Schwiesow, Assistant Attorney General
Eric Parrish, Respondent's Attorney

Any appeal to the district court from a decision in a contested case shall be taken within 30 days from the date of issuance of the decision by the board. Iowa Code section 17A.19; 645 IAC 11.29.

BEFORE THE BOARD OF PHARMACY EXAMINERS
OF THE STATE OF IOWA

Re: Controlled Substance)	CASE NO. 2005-67
Registration of:)	DIA NO. 05PHB032
)	
CHERI BUSH-McCLELLAND, PA-C)	
Registration No. 5100664)	ORDER REGARDING ORDER TO
)	SHOW CAUSE
Respondent.)	

This matter concerns an October 6, 2005 order to show cause directed to respondent Cheri Bush-McClelland. Respondent has worked as a physicians' assistant. She also held a controlled substance registration. The State alleged that respondent stole a blank prescription form from her employer after she was terminated, and used the form to write a prescription for an individual who was not a patient of the clinic.

The case was set for hearing before the board on January 26, 2006. The following board members were present for the hearing: Katherine Linder, Vernon Benjamin, Michael Seifert, Lemman Olson, Paul Abramowitz, and Barbara O'Rourke. Jeffrey Farrell, an administrative law judge from the Iowa Department of Inspections and Appeals, assisted the board. Scott Galenbeck, an assistant attorney general, represented the public interest. Respondent represented herself.¹

THE RECORD

The state's exhibits 1-7 were admitted. Jennifer Mallicoat and Debbie Jorgenson testified on the state's behalf. Respondent testified on her own behalf.

FINDINGS OF FACT

Investigative findings: Respondent worked as a physician's assistant at the Iowa Pain Management Center (IPMC). The clinic told the board's investigator it terminated respondent's

¹ Respondent stated that her attorney could not appear because he was in a trial in Sioux City that went longer than expected. She stated she was uncomfortable proceeding without him. Neither she nor her attorney made a written or verbal request to continue. Her attorney has not entered an appearance in this case.

employment on June 24, 2005. The clinic gave no reason for the termination. (Exhibit 5; Mallicoat testimony).

On June 27, 2005, respondent called in an emergency prescription to a local pharmacy on behalf of patient Gordon Shinn. The prescription was for 4 mg of hydromorphone. Hydromorphone is a schedule II controlled substance used to manage moderate to severe pain. (Exhibit 5(A)).

On July 7, 2005, the pharmacy sent a fax to IPMC requesting a hard copy of the June 27 prescription. IPMC sent a fax back to the pharmacy reporting that respondent was no longer employed at the clinic, and that Mr. Shinn was not a patient of the clinic. (Exhibit 5(A)).

On July 8, 2005, respondent returned to IPMC to return an office laptop. IPMC told the board's investigator that respondent asked for a blank prescription form so she could provide a hard copy to cover her telephone prescription on June 27. IPMC refused because she had been terminated three days before she called in the prescription. Respondent then asked to retrieve a book she had left behind. Respondent went back into another area of the office to retrieve the book. IPMC later learned that respondent had filed a written prescription with the pharmacy to back up the prescription she called in June 27. The prescription was on an IPMC form. IPMC contended that respondent stole a blank prescription form while retrieving her book on July 8. (Exhibit 5(B), (C)).

Respondent's testimony: Respondent told a different tale. Respondent worked at IPMC for approximately four months. She became concerned about the clinic's prescription practice and the manner in which it distributed drug samples. Respondent testified that one of the business managers, Joe Majors, walked around with a white coat and took patients into rooms. She stated that Mr. Majors may have been leading patients to believe he was a licensed nurse or doctor. Respondent testified that that she was documenting her concerns in writing. She kept her file at the clinic.

Respondent testified that she was actually terminated on July 1, not June 24. She stated that IPMC told her she was let go due to financial issues. However, respondent had earlier found her documentation file missing. She speculated that she was terminated due to her documentation of the clinic's practices.

Respondent testified that Gordon Shinn was a clinic patient. She stated that she met Mr. Shinn informally through another acquaintance. Mr. Shinn indicated he might seek services through IPMC. Mr. Shinn appeared at IPMC during office hours, but, the clinic physician, Dr. John Peppin, was out of the office. Respondent stated that Dr. Peppin counseled her to create a chart and prescribe any needed medication.

Respondent testified that her attorney has requested the chart. IPMC responded that no file exists. Respondent contended that this is further evidence of IPMC's wrongful action.

Respondent testified that she received a call from Mr. Shinn at or around 10:00 p.m. on June 27, 2005. He was in severe pain and needed medication. Respondent called Dr. Peppin, who advised her to call in a prescription. Respondent then called the pharmacy.

Respondent claimed that, after she was terminated on July 1, 2005, she remembered that she had to file a hard copy of the prescription she called in on June 27. She testified that she called Mr. Majors to ask for a form so she could verify the prescription in writing. Mr. Majors said he would refuse to give her a form.

Respondent again asked IPMC for a form when she returned her laptop on July 8. She said that Joe told her that he knew she was going to "rat them out." She said she got a blank prescription form in his presence, and left the clinic to deliver the form to the pharmacy. Respondent testified that she felt she had to complete the form to prevent herself and the clinic from violating the regulations.

Criminal charges: Mr. Majors reported his concerns to the West Des Moines Police Department, who completed a report. (Exhibit 5(K)). Ms. Mallicoat's supplemental report stated that the county attorney had previously charged respondent with 16 crimes relating to controlled substances, forgery of medical records, falsifying public documents, and identity theft. The state provided a copy of the list of charges in case number FE 194114. (Exhibit 6). The court record listed the date of the offenses as August 18, 2004, September 8, 2004, and February 10, 2005. The June 27, 2005 incident is not listed as a date of offense in FE 194114.

The State provided an updated record from the Iowa Courts Online System (ICOS) at the time of the hearing. (Exhibit 7). The ICOS record stated that respondent entered an Alford guilty plea on June 27, 2005, to two of the forgery charges in FE 194114, and a charge under Iowa Code section 155A.23 in a second case (number FE 196342). Section 155A.23 generally prohibits individuals from using false means to obtain prescription drugs. The record listed June 27, 2005 as the offense date in case number FE 196352.

Respondent testified that her attorney is filing a motion to withdraw her plea. She stated that she initially was willing to plea to put this episode behind her, but changed her mind and decided to take the case to trial. The ICOS record does not show any filing relating to withdrawing the plea. The last filing shown on the record is a January 9, 2006 order to continue the sentencing hearing. The state printed the ICOS record on January 24, 2006, two days before the hearing.

CONCLUSIONS OF LAW

Regulatory framework: The board is responsible to register individuals who seek to manufacture, distribute, or dispense controlled substances within the state.² "Dispense" is defined to include the delivery of a controlled substance to an ultimate user by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery.³ Physicians assistants are among the classes of professionals who may register.⁴

The board may suspend, revoke, or restrict a registration if the registrant has committed acts that are inconsistent with standards established in Iowa Code section 124.303.⁵ Section 124.303 sets forth seven factors that the board shall consider when deciding an application for registration. The factors include compliance with applicable state and federal laws, convictions related to controlled substances, and any other factors relevant to and consistent with the public health and safety.

² Iowa Code section 124.302(2).

³ Iowa Code section 124.101(9).

⁴ 657 IAC 10.1.

⁵ Iowa Code section 124.304(1)(d).

SANCTION

The board finds that revocation is the only justifiable sanction in this case. Respondent's violation is directly related to her registration. The board has been given the responsibility to safeguard the interests of the public by closely supervising the means by which controlled substances are dispensed. Respondent's actions are wholly inconsistent with the public interest.

The board gives one proviso to its sanction. In the event respondent is able to successfully withdraw her guilty plea, and if she is thereafter successful in obtaining an acquittal or dismissal of all criminal charges, the board would consider a new application for registration. The board would consider the new application in light of the conclusion of criminal charges, the investigative report that was submitted in this case, and any other relevant evidence produced by respondent and the state.

DECISION AND ORDER

The Iowa Board of Pharmacy Examiners revokes the controlled substances registration held by Cheri Bush-McClelland, registration no. 5100664, effective immediately. Respondent shall immediately return her registration to the Iowa Board of Pharmacy Examiners, 400 SW 8th St., Suite E, Des Moines, Iowa 50309-4688.

Respondent shall pay \$75.00 for fees associated with conducting the disciplinary hearing. In addition, the executive secretary/director of the board may bill respondent for any witness fees and expenses or transcript costs associated with this disciplinary hearing. Respondent shall remit for these expenses within thirty days of receipt of the bill.

Dated this 8th day of March, 2006.



Michael J. Seifert, Chairperson
Iowa Board of Pharmacy Examiners

The board is required to provide procedural due process to a registrant through a show cause hearing before considering disciplinary action.⁶ The board follows its regular contested case hearing process when considering orders to show cause.⁷

Analysis: There is no question that the factual allegations, if true, would constitute a violation of the statute. Respondent, as a physician's assistant, would have no authority to write a prescription on behalf of the clinic after her employment was terminated. Further, she would have no authority to write a prescription for a person who was not a patient of the clinic. This amounts to an unauthorized person enabling a person with no documented medical need to obtain a controlled substance. Respondent's conduct, if true, strikes directly against the integrity of our state's regulation of controlled substances.

The only real question is whether the state's evidence is more believable than appellant's testimony. On this issue, the board primarily focused on respondent's Alford guilty plea. The plea was accepted by the district court on December 8, 2005. She could file a motion in arrest of judgment to withdraw her plea.⁸ However, she is going to have at least two obstacles to successfully withdraw her plea. First, there is no evidence that she filed a motion within the 45 day period following her plea, as required by the rules. Second, respondent will be required to show a due process violation to successfully withdraw her plea.⁹ Respondent will not be allowed to withdraw her plea simply by claiming a change of heart.

The board finds that the court-accepted guilty plea shows a violation of a criminal provision directly related to prescribing controlled substances. The plea concerns the same factual pattern that is at issue in this case. The plea is corroborated by the documentary evidence and the statements from employees of IPMC. Further, respondent has also pled to two forgery counts. The factual basis for the forgery pleas is not known, but it raises very similar concerns. The forgery pleas are not as directly related to the prescribing practice as the prescription drug charge, but they raise very similar concerns.

⁶ Iowa Code section 124.305.

⁷ 657 IAC 10.12(6).

⁸ Iowa Rule of Criminal Procedure 2.8(2)(d); 2.24(3).

⁹ See *State v. Speed*, 573 N.W.2d 594, 597 (Iowa 1998).

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cc: Scott Galenbeck, Assistant Attorney General

Notice

Any aggrieved or adversely affected party may seek judicial review of this decision and order of the board, pursuant to Iowa Code section 17A.19.