

**BEFORE THE IOWA BOARD OF PHARMACY**

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Re:	)	Case No. 2012-22
Pharmacist License of	)	
<b>ANTHONY CARSON</b>	)	<b>STATEMENT OF CHARGES</b>
License No. 21356,	)	<b>&amp; NOTICE OF HEARING</b>
Respondent.	)	

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**COMES NOW** the Iowa Board of Pharmacy (Board) and files this Notice of Hearing and Statement of Charges pursuant to Iowa Code sections 17A.12(2) and 17A.18(3). Respondent was issued Iowa license 21356. Respondent’s license is currently active.

**A. TIME, PLACE, AND NATURE OF HEARING**

Hearing. A disciplinary contested case hearing shall be held on January 13, 2014, before the Iowa Board of Pharmacy. The hearing shall be held during the morning session, beginning at 9:00 a.m. and shall be located in the Board conference room located at 400 S.W. 8<sup>th</sup> Street, Des Moines, Iowa.

Presiding Officer. The Board shall serve as presiding officer, but the Board may request an Administrative Law Judge from the Department of Inspections and Appeals make initial rulings on prehearing matters, and be present to assist and advise the board at hearing.

Hearing Procedures. The procedural rules governing the conduct of the hearing are found at 657 Iowa Administrative Code rule 35.19. At hearing you will be allowed the opportunity to respond to the charges against you, to produce evidence on your behalf, cross-examine witnesses, and examine any documents introduced at hearing. You may appear personally or be represented by counsel at your own expense. The hearing may be open to the public or closed to the public at your discretion.

Prosecution. The office of the Attorney General is responsible for representing the public interest (the State) in this proceeding. Pleadings shall be filed with the Board and copies should be provided to counsel for the State at the following address.

Meghan Gavin  
Assistant Attorney General  
Iowa Attorney General’s Office  
2<sup>nd</sup> Floor Hoover State Office Building  
Des Moines, Iowa 50319.

Ms. Gavin can also be reached by phone at (515)281-6736 or e-mail at [Meghan.Gavin@iowa.gov](mailto:Meghan.Gavin@iowa.gov).

Communications. You may contact the Board office (515)281-5944 with questions regarding this notice and other matters relating to these disciplinary proceedings. However, you

may NOT contact individual members of the Board to discuss these proceedings by phone, letter, facsimile, email, or in person. Board members can only receive information about the case when all parties have notice and an opportunity to participate, such as at the hearing or in pleadings you file with the Board office and serve upon all parties in the case. You may also direct questions relating to settlement of these proceedings to Assistance Attorney General Meghan Gavin at (515)281-6736.

## **B. LEGAL AUTHORITY AND JURISDICTION**

Jurisdiction. The Board has jurisdiction in this matter pursuant to Iowa Code chapters 17A, 147, 155A, and 272C (2013).

Legal Authority. If any of the allegations against you are founded, the Board has authority to take disciplinary action against you under Iowa Code chapters 17A, 147, 148C, and 272C (2011) and 657 Iowa Administrative Code chapter 36.

Default. If you fail to appear at the hearing, the Board may enter a default decision or proceed with the hearing and render a decision in your absence, in accordance with Iowa Code section 17A.12(3) and 657 Iowa Administrative Code rule 35.21.

## **C. CHARGES**

### **Count I**

#### **VIOLATION OF A BOARD ORDER**

Respondent is charged with violating the terms of a previous Board order in violation of Iowa Code sections 155A.12(1) and 272C.3(a) and 657 Iowa Administrative Code rule 36.1(4)(i).

## **D. FACTUAL CIRCUMSTANCES**

1. On June 27, 2012, the Board issued a Confidential Order for Evaluation to the Respondent. The Order contained a notice to the Respondent, informing him of his right to a hearing should he object to the Order.

2. The Respondent exercised his right to a hearing. A confidential hearing was held before the Board on March 12, 2013.

3. On April 24, 2013, the Board issued a Confidential Findings of Fact, Conclusions of Law, Decision, and Order. The Board upheld its earlier Evaluation Order and ordered the Respondent to “fully comply with all of the requirements of the Confidential Order for Evaluation.” Respondent was further directed to schedule the required evaluations within ten days.

4. On May 3, 2013, the Respondent requested ten additional days to file a report to the Board “concerning filing an appeal or designating an evaluator.”

5. On June 10, 2013, the Respondent filed a Petition for Judicial Review of the Board's April 24<sup>th</sup> Decision and Order in the Iowa District Court in and For Polk County.

6. Although Respondent has filed a Petition for Judicial Review, he has not filed nor been granted a stay of the Board's April 24<sup>th</sup> Decision and Order.

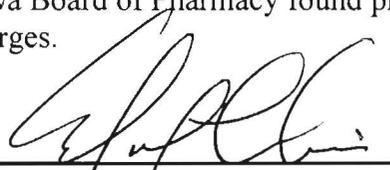
7. More than six months have elapsed since issuance of the Board's order. Respondent, however, has not scheduled an appointment for an evaluator/s, undergone the required evaluation/s, nor sent the Board copies of the evaluation/s.

#### **E. SETTLEMENT**

This matter may be resolved by settlement agreement. The procedural rules governing the Board's settlement process are found at 657 Iowa Administrative Code rule 36.3. If you are interested in pursuing settlement of this matter, please contact Assistant Attorney General Meghan Gavin.

#### **F. PROBABLE CAUSE FINDING**

On this 5<sup>th</sup> day of Nov., 2013, the Iowa Board of Pharmacy found probable cause to file this Notice of Hearing and Statement of Charges.



EDWARD MAIER, Chairperson  
Iowa Board of Pharmacy  
400 SW Eighth Street, Suite E  
Des Moines, Iowa 50309-4688

cc: Meghan Gavin  
Assistant Attorney General  
Hoover State Office Building  
Des Moines, Iowa

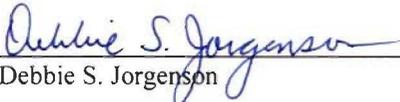
Alfredo Parrish  
2910 Grand Avenue  
Des Moines, Iowa 50312  
ATTORNEY FOR RESPONDENT

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon Respondent to the above cause by:

- |  |   |
|--|---|
| <input type="checkbox"/> personal service                                    | <input type="checkbox"/> first class mail |
| <input checked="" type="checkbox"/> certified mail, return receipt requested | <input type="checkbox"/> facsimile        |
| Article Number <u>917199999170310413695</u>                                  | <input type="checkbox"/> other _____      |
| on the <u>7th</u> day of <u>November</u> , 20 <u>13</u>                      |   |

I declare that the statements above are true to the best of my information, knowledge and belief.

  
\_\_\_\_\_  
Debbie S. Jorgenson

BEFORE THE IOWA BOARD OF PHARMACY

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IN THE MATTER OF:	)	
	)	Docket No. 2012-22
Pharmacist License of	)	DIA No. 13PHB070
<b>ANTHONY CARSON</b>	)	
License No. 21356,	)	<b>FINDINGS OF FACT,</b>
	)	<b>CONCLUSIONS OF LAW,</b>
Respondent.	)	<b>DECISION, AND ORDER</b>
	)	

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**STATEMENT OF THE CASE**

On November 5, 2013, the Iowa Board of Pharmacy (Board) found probable cause to file a Statement of Charges & Notice of Hearing against Respondent Anthony Carson, alleging that he violated the terms of a previous Board order in violation of Iowa Code sections 155A.12(1) and 272C.3(a) and 657 Iowa Administrative Code rule 36.1(4)(i).

The hearing was held on January 13, 2014. The following members of the Board presided at the hearing: Edward Maier, Chairperson; James Miller; LaDonna Gratias; Susan Frey; Judith Trumpy; and Sharon Meyer. Respondent appeared and was represented by attorney Alfredo Parrish. Assistant attorney general Meghan Gavin represented the state. The hearing was closed to the public at the licensee's election, pursuant to Iowa Code section 272C.6(1). The hearing was recorded by a certified court reporter. Administrative Law Judge Laura Lockard assisted the Board in conducting the hearing and was instructed to prepare the Board's written decision in accordance with its deliberations.

*Motion to Continue*

On January 13, 2014, the morning of the hearing, Respondent filed Respondent Anthony Carson's Answer and Motion to Continue. In the motion to continue, Respondent asserts that the Statement of Charges & Notice of Hearing, which was issued November 7, 2013, was mailed via certified mail to Respondent's attorney using the incorrect zip code; Respondent's attorney's zip code is 50312, but Respondent asserts that the certified mail was sent to zip code 50311. Respondent asserts that the mail never reached his attorney. Respondent asserts that his attorney did not learn of the Statement of Charges and hearing until January 6, 2014, one week prior to the hearing. Respondent asserts that his attorney was unable to adequately prepare for the hearing given the lack of notice. Respondent acknowledged during argument based on the motion that Respondent himself received the Statement of Charges & Notice of Hearing shortly after it was issued by the Board.

Respondent attached a USPS Tracking printout to the motion. The printout shows the tracking number of a certified mail item, which matches the tracking number shown in

the certificate of service for the mail to Respondent's counsel. The printout also indicates that the item was delivered. The printout does show a location of "Des Moines, IA 50311." It appears that the Respondent's assertion that the certified mail was not received is based at least in part upon this printout showing a location that contains the 50311 zip code. The certificate of service, in contrast, shows Respondent's counsel's address with a 50312 zip code. With this evidence, it is impossible to determine whether the document mailed to Respondent's counsel was actually addressed with a 50311 zip code or whether the 50311 zip code on the tracking printout is a data entry error by the postal service.

The State objected to the Respondent's request for continuance. The State argued that a continuance is not in the public interest due to concerns regarding Respondent's license to practice pharmacy being current and active after his admitted failure to obtain a mental and physical evaluation demonstrating competence to practice pharmacy. The State also noted the lengthy period of time between the initial Board order for confidential evaluation in June, 2012 and today. The State pointed as well to the narrow scope of the issue before the Board.

The Board's regulations provide that a written application for continuance shall be made at the earliest possible time and no less than seven days before the hearing except in case of unanticipated emergencies.<sup>1</sup> In determining whether to grant a continuance, the presiding officer may consider:

- a. Prior continuances;
- b. The interests of all parties;
- c. The likelihood of informal settlement;
- d. The existence of an emergency;
- e. Any objection;
- f. Any applicable time requirements;
- g. The existence of a conflict in the schedules of counsel, parties, or witnesses;
- h. The timeliness of the request; and
- i. Other relevant factors.<sup>2</sup>

The Board denied Respondent's motion for continuance. Respondent himself received notice of the hearing and it is unclear on this record whether Respondent's counsel received notice or not. The tracking printout from the postal service appears to indicate that the mail to Respondent's counsel was delivered. Even if Respondent's counsel was unaware of the hearing until January 6, no motion to continue was filed until the morning of the hearing, January 13, 2014. Respondent was aware of the hearing seven days prior and could have requested a timely continuance; Respondent did not make the request for continuance at the earliest possible time, as required by the Board's regulations.

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<sup>1</sup> 657 Iowa Administrative Code (IAC) 35.16(1)(a).

<sup>2</sup> 657 IAC 35.16(2).

## THE RECORD

The record includes the Statement of Charges & Notice of Hearing and Respondent Anthony Carson's Answer and Motion to Continue. The record also includes the State's Exhibits 1 through 6, which were admitted as evidence. The record includes testimony from Respondent Anthony Carson.

## FINDINGS OF FACT

On October 19, 2010, the Board issued Respondent Anthony Carson a license to practice pharmacy in the state of Iowa. Respondent's license is current and active until June 30, 2014. (Exh. 2).

On June 27, 2012, the Board found probable cause to support a comprehensive physical and mental health evaluation for Respondent and issued a Confidential Order for Evaluation. Probable cause was based upon a complaint the Board received in January, 2012 related to Respondent's mental and physical health and upon the Board's subsequent investigation of the complaint. The order required Respondent to schedule a physical and mental health evaluation within 10 days of the date of the Order, to be completed at Respondent's expense. The Order included a list of five evaluators, but also indicated that another facility could be used if preapproved by the Board. The Order also required Respondent to notify the Board no less than five days prior to the evaluation in order to allow the Board to provide the evaluator with information regarding the purpose and scope of the evaluation. The Order required that the evaluation include an assessment of Respondent's physical and mental condition, and ability to safely practice pharmacy. (Exh. 1).

On July 6, 2012, Respondent filed an Objection to the Confidential Order for Evaluation. Respondent asserted in the objection that obtaining an evaluation from one of the evaluators listed in the Board's Order would impose an undue hardship on Respondent. Respondent asked the Board to accept an evaluation from a local professional. (Exh. 2).

As part of the proceedings related to the Objection, Respondent submitted to the Board a substance abuse evaluation dated August 29, 2012, completed by Victor F. Cowles, B.S., C.A.D.C./Assessment Counselor. The evaluation consists of three paragraphs and states that Respondent was referred for evaluation subsequent to arrest for OWI 1<sup>st</sup>. The report states it is based upon a client interview, ASAM criteria, Substance Abuse Subtle Screening Inventory (SASSI), and counselor interpretation. The evaluation concludes that Respondent does not meet the criteria for having a substance abuse disorder. Respondent reported alcohol use one to two times per week, with two drinks per occasion. (Exh. 2).

On April 24, 2013, the Board issued a Decision and Order denying Respondent's Objection to the Confidential Order for Evaluation.<sup>3</sup> The Board reiterated in the Order

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<sup>3</sup> Because of the confidential nature of the evaluation order, Respondent is identified as John Doe in the April 24, 2013 Decision and Order.

its belief that probable cause existed to require Respondent to undergo a physical and mental examination. The Board concluded that the substance abuse evaluation and report completed by Victor Cowles did not satisfy the requirements of the Board's Order. Specifically, the Board had no prior notice of the evaluation; the evaluation was limited solely to the issue of substance abuse and did not address Respondent's physical or mental health or his ability to safely practice pharmacy; and the report primarily relied on information or responses volunteered by Respondent that appeared to be inconsistent with information gathered during the Board's investigation from, among others, Respondent's supervising pharmacist. The Board concluded that the Order did not present an undue hardship to Respondent in light of the Board's legitimate concerns. (Exh. 2).

Respondent subsequently filed a Petition for Judicial Review to the district court regarding the Board's April 24, 2013 Decision and Order. Respondent did not seek a stay of enforcement from the Board or from the district court, nor was any stay granted. The district court issued a ruling on December 19, 2013 upholding the agency's April 24, 2013 Decision and Order requiring Respondent to submit to a physical and mental health evaluation. (Exh. 5).

On November 7, 2013, the Board issued a Statement of Charges & Notice of Hearing charging Respondent with violating the terms of a previous Board order. The Statement of Charges asserts that more than six months have elapsed from the Board's April 24, 2013 Decision and Order and Respondent has not scheduled an appointment with an evaluator, undergone the required evaluation, or provided the Board with the results of the evaluation. (Exh. 4).

Respondent is currently employed at Hy-Vee; his job duties include answering the telephone. He currently earns \$13.95 per hour. (Carson testimony).

Respondent has not arranged for nor undergone any formal physical, mental health, or substance abuse evaluation since the evaluation performed by Victor Cowles in August, 2012. Respondent testified that he did not know how to go about scheduling an evaluation and relied upon information from his counsel in this regard. (Carson testimony).

Respondent has applied for jobs as a pharmacist as recently as January, 2013. He has had at least one interview for a pharmacist job, but has not been offered any of the jobs for which he applied. (Carson testimony).

## CONCLUSIONS OF LAW

### A. Violation of Board Order

The Board is authorized to revoke, restrict, cancel, or suspend a license based on a licensee's failure to comply with a decision of the Board.<sup>4</sup> There is no factual dispute in this case that Respondent failed to comply with the Board's April 24, 2013 Decision and Order requiring that he comply with all of the requirements of the June 27, 2012 Confidential Order for Evaluation and reiterating those requirements.

While Respondent argues that he was not required to comply with the order while his Petition for Judicial Review was pending, this is incorrect. Iowa Code Chapter 17A provides:

The filing of the petition for review does not itself stay execution or enforcement of any agency action. Unless precluded by law, the agency may grant a stay on appropriate terms or other temporary remedies during the pendency of judicial review.<sup>5</sup>

Chapter 17A further provides that if the agency refuses to grant an application for stay, the district court may grant relief after a consideration of factors including the likelihood of success on the merits, the potential for irreparable injury, the potential harm to other parties if a stay is granted, and the extent to which the public interest is sufficient to justify the agency's action.<sup>6</sup>

The Board's decision was issued April 24, 2013 and the district court ruled on Respondent's Petition for Judicial Review on December 19, 2013. During the nearly eight months that Respondent's district court appeal was pending, he neither sought nor was granted a stay of enforcement from the Board or the district court. As such, the Board's order was in full effect during that time period; the order continues in full effect based on the district court having upheld the order. The preponderance of the evidence establishes that Respondent violated Iowa Code § 272C.3(2)(a) by failing to comply with the requirements of the Board's April 24, 2013 Decision and Order.

### B. Sanction

The Board may consider a number of factors in determining the nature and severity of the disciplinary sanction to be imposed, including the relative seriousness of the violation as it relates to assuring a high standard of professional care; the facts of the violation; any extenuating circumstances; and whether remedial action has been taken.<sup>7</sup>

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<sup>4</sup> Iowa Code §§ 155A.12(1); 272C.3(2)(a) (2013).

<sup>5</sup> Iowa Code § 17A.19(5)(a) (2013).

<sup>6</sup> Iowa Code § 17A.19(5)(c) (2013).

<sup>7</sup> 657 IAC 36.1(3).

In this case, the Board has grave concerns regarding the fact that there is currently no restriction on Respondent's ability to practice pharmacy in the state of Iowa. The issues that the Board discovered after receiving a complaint about Respondent and subsequently conducting an investigation were extremely serious. Respondent was initially ordered to obtain a comprehensive physical and mental health evaluation by the Board on June 27, 2012. After objection by Respondent and a contested case hearing, the Board affirmed that Order on April 24, 2013. To date, Respondent has not scheduled an evaluation.<sup>8</sup> In both the June 27, 2012 and April 24, 2013 Orders, the Board gave Respondent 10 days from the date of the order to schedule a comprehensive evaluation. For approximately one and one-half years, Respondent has now failed to do so. Respondent's eleventh-hour assertion at hearing that he intends to schedule an evaluation is not enough for the Board to forego discipline based on this violation.

While Respondent has presented the issue of financial hardship as a potential mitigating factor, Respondent has provided no evidence of the cost of a physical and mental evaluation at any of the sites the Board suggested, or at any alternate sites that Respondent himself has investigated. The fact that Respondent now asserts that he can pay for an evaluation at a site in Des Moines, Iowa cuts against Respondent's argument that financial hardship was the reason for his noncompliance.

Additionally, the Board notes that, although Respondent argued at hearing that he does not intend to practice pharmacy until he has fully complied with the Board's order for a comprehensive mental and physical health assessment, the Board did not find this assertion credible as Respondent testified that he continued to apply for jobs as a pharmacist even after the Board initially ordered him to obtain the evaluation. By the Respondent's own admission, his not practicing pharmacy currently is based largely on his inability to obtain a job as a pharmacist rather than a decision not to seek such a position.

Given Respondent's recalcitrance in obtaining an evaluation and the fact that he continued to apply for pharmacy jobs even after the Board initially ordered the confidential evaluation, the Board does not feel it can adequately assure the safety of the public without prohibiting Respondent from practice until such time as he is willing to comply with the Board's previous orders and demonstrate that he is competent to practice pharmacy.

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<sup>8</sup> Respondent offered testimony at hearing that he was prepared to go to Mecca, a facility in Des Moines, on the date of hearing for an evaluation if the Board allowed him to do so. Nevertheless, Respondent had not taken any action prior to the date of hearing to actually schedule an evaluation or follow through with the requirements of the Board (for example, informing the Board of the date at least five days in advance of the evaluation).

### DECISION AND ORDER

IT IS THEREFORE ORDERED that Respondent's license to practice pharmacy shall be suspended. In order to have his license reinstated upon application to the Board, Respondent shall comply in full with the Board's April 24, 2013 Decision and Order.<sup>9</sup> In order to be considered for reinstatement, the evaluation Respondent provides pursuant to that order must conclude that Respondent is competent to practice pharmacy. Respondent must also meet the prerequisites for reinstatement outlined in 657 Iowa Administrative Code 36.13.

IT IS FURTHER ORDERED pursuant to Iowa Code section 272C.6 and 657 Iowa Administrative Code 36.18(2), that Respondent shall pay \$75 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 30 days of receipt of the bill.

Dated this 14<sup>th</sup> day of January, 2014



Edward Maier  
Chairperson, Iowa Board of Pharmacy

cc: Meghan Gavin, Assistant Attorney General  
Alfredo Parrish, Attorney for Respondent

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<sup>9</sup> At hearing, Respondent's counsel and Board staff had discussions regarding potential evaluation sites that the Board might consider approving, including Mecca in Des Moines. Prior to obtaining any evaluation, Respondent must still comply with the mandate of the April 24, 2013 Order to get preapproval from the Board. At this point, the Board's position is that no facility has been preapproved.