

State of Iowa
Board of Pharmacy

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BOARD MEMBERS

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Villisca

JAMES MILLER, R. Ph.
Dubuque

JUDITH M. TRUMPY
Ames

EDWARD L. MAIER, R. Ph., Mapleton
Chairperson

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Executive Director

BOARD MEMBERS

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Urbandale

LADONNA GRATIAS
Clive

EDWARD J. McKENNA, R. Ph.
Storm Lake

TELECONFERENCE MINUTES
March 31, 2015

The special meeting of the Iowa Board of Pharmacy was held on Tuesday, March 31, 2015, at 2:00 p.m., via teleconference pursuant to the provisions of Iowa Code section 21.8. An in-person meeting was impractical due to the travel distances of members of the Board, the limited agenda, and the need for immediate action. Chairperson Maier called the meeting to order at 2:05 p.m.

MEMBERS PRESENT

Edward L. Maier, Chair
James Miller, Vice-Chair
Susan M. Frey
LaDonna Gratias
Edward J. McKenna
Sharon K. Meyer
Judith M. Trumpy

STAFF PRESENT

Meghan Gavin, Esq., Assistant Attorney General
Therese Witkowski, Executive Officer
Debbie Jorgenson, Administrative Assistant
Becky Hall, Secretary

Appointment of Interim Executive Director

Terry Witkowski reminded the Board's Search Committee Members to review the proposed position description questionnaire for the Executive Director's position that was previously sent to them. Once the Search Committee Members have reviewed and approved the position description questionnaire Ms. Witkowski will forward it to the Department of Administrative Services, Human Resources Enterprise, for a final review and approval.

Lloyd Jessen retired from the Executive Director's position with the Iowa Board of Pharmacy on March 27, 2015. The Board discussed appointing an Interim Director to fill the position.

Terry Witkowski, Executive Officer with the Iowa Board of Pharmacy was recommended to fill the position until the Board appoints a new Executive Director. When asked Ms. Witkowski agreed to accept the position as Interim Director.

Motion by Edward McKenna, seconded by LaDonna Gratias, the Board voted unanimously by roll call vote to appoint Terry Witkowski as Interim Director of the Iowa Board of Pharmacy until the Board appoints a new Executive Director.

At 2:21 p.m. Meghan Gavin disconnected from the teleconference call.

Closed Session

At 2:22 p.m., motion by Susan Frey, seconded by Edward McKenna, the Board voted unanimously by roll call vote to move into closed session to review Findings of Fact, Conclusions of Law, Decision and Order pursuant to Iowa Code Section § 21.5(1)(f) to discuss the decision to be rendered in a contested case.

At 2:25 p.m., while still in closed session, motion by James Miller, seconded by Edward McKenna, the Board voted unanimously by roll call vote to move into open session. Motion approved unanimously.

In open session, the following action was taken:

Motion by James Miller, seconded by Susan Frey, to approve Findings of Fact, Conclusions of Law, Decision and Order for John Doe II. Motion approved unanimously. A copy of the Findings of Fact, Conclusions of Law, Decision and Order is attached as Addendum A.

At 2:27 p.m., Susan Frey disconnected from the teleconference call and Debbie Jorgenson left the room.

Closed Session

At 2:28 p.m. motion by James Miller, seconded by Sharon Meyer, the Board voted unanimously by roll call vote to move into closed session to review a Board Order pursuant to Iowa Code Section § 21.5(1)(f) to discuss the decision to be rendered in a contested case.

At 2:32 p.m., while still in closed session, motion by Edward McKenna, seconded by Judith Trumpy, the Board voted unanimously by roll call vote to move into open session. Motion approved unanimously.

In open session, the following action was taken:

Motion by Edward McKenna, seconded by James Miller, to approve Board Order Granting

Renewal Application for Pharmacy License No. 222, Subject to Additional Conditions of Probation for Bauder Pharmacy, Inc. Motion approved unanimously. A copy of the Board Order Granting Renewal Application for Pharmacy License No. 222, Subject to Additional Conditions of Probation is attached as Addendum B.

Motion by Judith Trumpy, seconded by Edward McKenna, to adjourn at 2:35 p.m. on March 31, 2015.

Becky Hall
Becky Hall
Recording Secretary

Therese Witkowski
Therese Witkowski
Executive Officer

Edward L. Maier
Edward L. Maier
Board Chair

APPROVED THIS 28th DAY OF April, 2015.

ADDENDUM A

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
DECISION AND ORDER**

JOHN DOE II

BEFORE THE IOWA BOARD OF PHARMACY

IN THE MATTER OF THE)	
CONFIDENTIAL EVALUATION ORDER)	CASE NO: 2013-167
FOR PHARMACIST:)	DIA NO: 14PHB062
)	
JOHN DOE II,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Respondent)	DECISION AND ORDER
)	[CONFIDENTIAL]

On November 19, 2014, the Iowa Board of Pharmacy (Board) issued a Confidential Order for Evaluation to John Doe II (Respondent). Respondent filed an appeal (objection) to the Order for Evaluation on December 13, 2014. A hearing was held before the Board on March 10, 2015. The hearing was closed to the public, pursuant to Iowa Code sections 272C.6(1), 272C.6(4), and 657 IAC 36.17(4). The hearing was recorded by a certified court reporter. The following members of the Board presided at the hearing: Edward Maier, Chairperson; Susan Frey; Edward McKenna; James Miller; Sharon Meyer; and LaDonna Gratiias. Respondent appeared and was self-represented. Assistant Attorney General Laura Steffensmeier represented the state. Administrative Law Judge Margaret LaMarche assisted the Board in conducting the hearing.

THE RECORD

The record includes the testimony of Jean Marie Rhodes, John Doe II, and State Exhibits 1-10.

FINDINGS OF FACT

Respondent's Licensing History, Criminal History, and Board Investigation Leading to Confidential Evaluation Order

Respondent was initially licensed as a pharmacist in the state of Iowa in 2003, and his license as a pharmacist is current. Since his licensure, Respondent has primarily been employed in retail pharmacy. (State Exhibits 2, 5, 10)

On November 19, 2014, the Board issued a Confidential Order for Evaluation requiring Respondent to submit to a comprehensive gambling, mental health, and substance

abuse evaluation at a Board approved facility. Respondent filed a timely appeal. (State Exhibits 1, 2)

The evaluation order was issued based on a Board investigation, which followed the Board's receipt of a complaint from an anonymous law enforcement officer on September 3, 2013. The complaint alleged that Respondent was arrested for first-degree theft after writing numerous checks on insufficient funds. The complaint further alleged that Respondent had gambling losses exceeding \$50,000 and had engaged in some unusual financial transactions. Respondent had reportedly self-banned himself from all Iowa casinos except Meskwaki. (State Exhibits 1, 5, 6; Testimony of Jean Rhodes)

A review of Respondent's criminal history on Iowa Courts Online revealed that Respondent had a number of misdemeanor convictions that he had not reported on any of his applications for licensure as a pharmacist. These included two simple misdemeanor convictions prior to his initial licensure as a pharmacist (5th Degree Theft in 2000 and Open Container in 2001); a simple misdemeanor for Disorderly Conduct-Loud and Raucous Noise in 2005; and a simple misdemeanor for Driving While License Denied, Suspended, Cancelled, or Revoked in 2013. In addition, as reported in the anonymous complaint, Respondent had been charged with Theft 1st Degree, a Class C Felony, on September 27, 2012. This criminal charge was later resolved when Respondent pled guilty to Theft 3rd Degree (Aggravated Misdemeanor) and was granted a Deferred Judgment and placed on probation for one year. (State Exhibits 6, 7, 8; Testimony of Jean Rhodes)

On June 5, 2014, Board Compliance Officer Jean Rhodes attempted to contact Respondent at the telephone number on file at the Board's office. The phone number had been disconnected. Ms. Rhodes then went to the address that was on file for Respondent. Ms. Rhodes reports that an older couple at the residence told her that they had lived at the address for several years and did not know Respondent. Ms. Rhodes then called Respondent's employer and was told that he was on vacation until June 14th. When Ms. Rhodes visited Respondent's place of employment on June 23rd, she was informed that he was no longer employed by the pharmacy and had been terminated effective June 15. The former employer gave Ms. Rhodes Respondent's cell phone number. (Testimony of Jean Rhodes; State Exhibit 5)

Ms. Rhodes contacted Respondent on his cell phone and informed him of the pending complaint and the Board's concerns about convictions that he had not reported. Respondent agreed to provide a statement concerning the convictions but declined to

meet with Ms. Rhodes in-person. Ms. Rhodes reminded Respondent that he was required to notify the Board within 10 days of changes of address or employment. Respondent acknowledged that he had not been living at the address on file with the Board, but told Rhodes that it was his father's address and that he used it for mailing purposes.¹ (Testimony of Jean Rhodes; State Exhibit 5)

On July 24, 2014, Respondent provided a written statement to the Board explaining his criminal convictions. On July 29, 2014, Respondent updated his address, phone number, and employment information with the Board. Respondent reported that he was currently without an employer. (Testimony of Jean Rhodes; State Exhibits 5, 10)

Evidence at Hearing

At hearing, Respondent described his 5th Degree Theft conviction in 2000 as the result of his inadvertent shoplifting of a nut and bolt from a discount store. Respondent explained that the Open Container charge and conviction occurred after he was pulled over for a broken tail light while driving home with friends from a camping trip. One of the passengers had an open container of alcohol and everyone in the vehicle was issued citations for open container. As the driver, Respondent was required to take a breathalyzer test, but he had not consumed any alcohol. Respondent testified that he did not report these convictions on his initial application because he did not realize that these were considered misdemeanors, and he did not think of the open container as being an "alcohol-related" offense. (Testimony of Respondent; State Exhibit 10)

Respondent described his Disorderly Conduct conviction in 2005, which was originally charged as Domestic Abuse Assault; as involving an argument following a late night basketball game with a group of friends and his wife. (Testimony of Respondent)

Respondent testified that he was going through a difficult time in 2012. He had become upset with his employer, had voluntarily left his job of ten years, and then had a difficult time finding work. He had three children to support, was having marital difficulties, and became very depressed. Respondent testified that he made a poor decision when he started gambling. Over a period of three days he lost a large sum of money at the casino in Tama and then wrote insufficient fund checks to cover the losses. Respondent assured the casino that he did have the money in his 401K to cover the

¹ Respondent disputes this statement from the Investigative Report. He testified that his father lives in Ohio and that this was the address of his now ex-stepfather. He testified that he used this as his mailing address when he first got out of college but that his address of record should have been changed to his family's home address. (Testimony of Respondent; State Exhibit 2)

losses, but he did not have immediate access to the money. Respondent thought he had an agreement with the casino that he would pay what he owed, but then criminal charges were filed against him. Respondent testified that he paid the insufficient fund checks within two weeks. (Testimony of Respondent; State Exhibit 2)

Respondent submitted a letter from the Assistant Tama County Attorney who prosecuted him. The letter states that Respondent took full responsibility for his actions from the beginning and has made full restitution. In the opinion of the Assistant County Attorney, Respondent fully acknowledges what he did wrong, regrets his actions, and has learned some hard lessons. (State Exhibit 2)

Respondent testified that he does not have a gambling problem, but he did attend three months of counseling for gambling at MECCA in order to alleviate his wife's concerns and to try to save his marriage. Respondent found these sessions to be helpful. Respondent also voluntarily banned himself from all of the casinos in Iowa. (Testimony of Respondent; State Exhibit 2)

Iowa Courts Online indicates that Respondent violated his probation on the 3rd Degree Theft. Respondent pled guilty to a probation violation on August 29, 2014 and was resentenced. Respondent testified that he violated his probation by failing to contact his probation officer. Respondent testified that after he received his Deferred Judgment, no one told him that he was on probation and that he was supposed to contact his probation officer. Respondent testified that following the probation violation he was put on "self-probation" and has been told that the 3rd Degree Theft will now be expunged from his record in May. (Testimony of Respondent; State Exhibit 7)

Since September 2014, Respondent has been employed as a pharmacy manager for a company that provides pharmacy services to long-term care facilities. Respondent stated that this is exactly the position as a pharmacist that he had always hoped to have and that he does not want to do anything to jeopardize his employment. Respondent further testified that he does not drink alcohol or use drugs and that the gambling problem in 2012 was an isolated incident. (Testimony of Respondent; State Exhibit 2)

CONCLUSIONS OF LAW

A pharmacist, pharmacist-intern, pharmacy technician, or pharmacy support person who is licensed or registered by the board is, as a condition of licensure or registration, under a duty to submit to a mental or physical examination within a time period specified by the board. Such examination may be ordered upon a showing of probable

cause and shall be at the expense of the pharmacist, pharmacist-intern, pharmacy technician, or pharmacy support person.²

A licensee who is the subject of a board order and who objects to the order may file a request for hearing, which shall specifically identify the factual and legal issues upon which the licensee bases the objection.³ Any hearing on an objection to the examination order shall be closed pursuant to Iowa Code section 272C.6(4).⁴

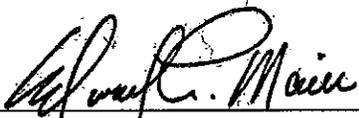
Probable cause is not defined in the statute or the Board's rule, but the Iowa Supreme Court has applied the criminal definition of probable cause in the administrative context.⁵ See *Eaton v. Iowa Employment Appeal Board*, 602 N.W.2d 553, 557 (Iowa 1999). The Supreme Court defined probable cause as a "reasonable ground for belief" in the proposition asserted.⁶

Upon review of the entire record, the Board concluded that there is insufficient evidence to require Respondent to complete a confidential evaluation for substance abuse, mental health, or gambling. Respondent has made some poor decisions in the past, but the evidence is insufficient to provide probable cause to believe that he suffers from substance abuse, a mental health condition, or a gambling addiction.

DECISION AND ORDER

IT IS THEREFORE ORDERED that the Objection to the Confidential Evaluation Order, filed by Respondent John Doe II, is hereby SUSTAINED and the Confidential Evaluation Order issued on November 19, 2014 is hereby RESCINDED.

Dated this ^{31st} day of *March*, 2015.



Edward Majer, Chairperson
Iowa Board of Pharmacy

cc: Laura Steffensmeier, Assistant Attorney General

² 657 IAC 36.17; Iowa Code section 272C.9(1)(2013).

³ 657 IAC 36.17(2).

⁴ 645 IAC 36.17(3).

⁵ *Eaton v. Iowa Employment Appeal Board*, 602 N.W.2d 553, 557 (Iowa 1999).

⁶ *Id.*

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.

ADDENDUM B

**BOARD ORDER GRANTING
RENEWAL APPLICATION FOR
PHARMACY LICENSE NO. 222,
SUBJECT TO ADDITIONAL CONDITIONS OF
PROBATION**

**BAUDER PHARMACY, INC.
PHARMACY LICENSE NO. 222
DES MOINES, IOWA**

BEFORE THE IOWA BOARD OF PHARMACY

IN THE MATTER OF:

Pharmacy License of
BAUDER PHARMACY, INC.
License No. 222

) BOARD ORDER GRANTING
) RENEWAL APPLICATION FOR
) PHARMACY LICENSE NO. 222,
) SUBJECT TO ADDITIONAL¹
) CONDITIONS OF PROBATION

On December 10, 2014, the Iowa Board of Pharmacy (Board) issued a Notice of Intent to Deny the issuance of a new or renewal pharmacy license to Bauder Pharmacy, Inc. Bauder Pharmacy filed a timely Notice of Appeal and Request for Hearing. A hearing was held on March 11, 2015 before the following members of the Board: Edward Maier, Chairperson; James Miller; Edward McKenna; Sharon Meyer; and LaDonna Gratiias. The state was represented by Assistant Attorneys General Meghan Gavin and Laura Steffensmeier. Bauder Pharmacy, Inc. was represented by attorneys Guy Cook and Adam Zenor. Administrative Law Judge Margaret LaMarche assisted the Board in conducting the hearing. The hearing was open to the public, pursuant to Iowa Code section 272C.6(1) and 657 IAC 36.4, at the election of Bauder Pharmacy, Inc.

THE RECORD

The record includes the testimony of Andrew Funk, Kim Robertson, Chris Gage, and Thomas Suttie. The record also includes State Exhibits 1-16 and Bauder Pharmacy Exhibits 1-23.

FINDINGS OF FACT

Licensing and Disciplinary Background

Bauder Pharmacy, Inc. is the corporate owner of a pharmacy business and an ice cream business, which are operated under the business name of "Bauder Pharmacy" from a single retail location at 3802 Ingersoll Avenue in Des Moines, Iowa. There has been a pharmacy at this location since 1925. The pharmacy was originally operated by pharmacist Carolyn Bauder, and pharmacist Charles Graziano joined her as a partner in 1947. Charles Graziano and his wife, Corrine Graziano, later purchased the entire

¹ The terms of indefinite probation established in the Board's November 5, 2013 Decision and Order issued on November 5, 2013 remain in full force and effect.

pharmacy business in 1963. Members of the Graziano family have been the owners and operators of Bauder Pharmacy since that time. After Charles Graziano passed away, Bauder Pharmacy was jointly operated by two of his children, Mark Graziano and Kim Graziano Robertson, both of whom were licensed pharmacists. Bauder Pharmacy, Inc. was owned by Mark Graziano (majority owner), Kim Graziano Robertson, and Corrine Graziano. Corrine Graziano owns the building where Bauder Pharmacy is located. (Testimony of Kim Robertson; Bauder Exhibit 15)

Bauder Pharmacy and Mark Graziano have a significant disciplinary history with this Board. An inspection of Bauder Pharmacy on March 16, 2012 found 27 areas of non-compliance with Board rules. On May 10, 2012, the Board issued an immediate suspension of Bauder Pharmacy's controlled substance registration. Mark Graziano was the pharmacist-in-charge of Bauder Pharmacy at that time, and Kim Robertson was a full-time staff pharmacist. (State Exhibit 5; Testimony of Kim Robertson)

On April 5, 2013, the Board issued initial Findings of Fact, Conclusions of Law, Decision and Order against Bauder Pharmacy, Inc. and Mark Graziano in Case No. 2012-52. The Board's Decision and Order found approximately 20 violations against Mark Graziano, who at the time was the 68% owner of Bauder Pharmacy, Inc. Numerous violations were also found against Bauder Pharmacy. Following a limited remand from the district court, the Board's initial order was upheld in its entirety on November 5, 2013, with only minor factual amendments. (State Exhibits 15, 16)

The Board's Decision and Order in Case No. 2012-52 permanently revoked the pharmacist license of Mark Graziano, revoked the controlled substance registration issued to Bauder Pharmacy, Inc., and issued a Citation and Warning to Bauder Pharmacy, Inc. for the violations established in the Decision and Order. In addition, the Decision and Order placed the pharmacy license issued to Bauder Pharmacy, Inc. (number 222) on indefinite probation. In part, the terms and conditions of indefinite probation:

- required Bauder Pharmacy, Inc. to pay a \$25,000 civil penalty within 30 days;
- prohibited Bauder Pharmacy from performing any sterile compounding, unless otherwise ordered and approved by the Board;
- required Bauder Pharmacy to submit a written plan of action for correcting all remaining deficiencies; to submit policies and procedures for all operations of the pharmacy; and to submit a Quality Control Improvement (CQI) plan. These documents were to be submitted for Board approval within 30 days of the Board's Decision and Order;

- required Bauder Pharmacy to obtain Board approval for every pharmacist in charge of the pharmacy; and
- required quarterly inspections of Bauder Pharmacy to be conducted by a Board approved consultant at the pharmacy's expense, in order to ensure full compliance with the rules governing pharmacy practice. The consultant was required to submit quarterly reports to the Board not later than March 5, June 5, September 5, and December 5 of each year of the indefinite probation. The pharmacy was required to comply with all recommendations made by the consultant.

(State Exhibit 16)

The terms and conditions of probation also specified that: "Mark Graziano shall be allowed no access to the pharmacy department or to prescription drugs within the pharmacy." (State Exhibit 16, p. 44)

The United States Department of Justice conducted a two-year investigation into the diversion of controlled substances at Bauder Pharmacy. On September 24, 2014, Mark Graziano was indicted by a federal grand jury on 16 counts of Conspiracy to Distribute Controlled Substances and on two counts of Tax Evasion. On October 15, 2014, Assistant United States Attorney Kevin E. VanderSchel issued a letter to Attorney J. Keith Rigg stating that the federal investigation showed no involvement by Kim Robertson in the drug diversion of controlled substances at Bauder Pharmacy and that the government has concluded that Kim Robertson was the victim of her brother's manipulation of the pharmacy's financial records, as alleged in the wire fraud counts of the indictment returned by the grand jury. Mr. VanderSchel advised Mr. Rigg to feel free to share his letter with any person, company or agency that may believe that Kim Robertson was, or is, the subject of the federal investigation. (Bauder Exhibits 14, 20)

On October 20, 2014, the Board issued a Corrected Notice of Hearing and Statement of Charges against Bauder Pharmacy, Inc., which alleged four counts: Unethical Behavior or Practice Harmful or Detrimental to the Public, Having an Owner Who Has Violated Iowa Code Chapter 155A and Board Rules, Violation of a Board Order in a Disciplinary Case, and Failure to Maintain Security. The Factual Circumstances cited by the Board in support of these charges state, in part, that:

- Mark Graziano was listed as an owner of the pharmacy on the December 5, 2013 pharmacy license renewal;
- Mark Graziano continued to have access to the pharmacy department, including having keys and the alarm code for the pharmacy;

- no secure, physical barrier exists between the pharmacy department and the drug store/soda fountain;
- Bauder Pharmacy had only submitted two of the six required quarterly reports to date; and
- other requirements of the Board's Order, including submission of a corrective action plan, Continuous Quality Improvement plan, and payment of the \$25,000 civil penalty were not completed in a timely manner.

(State Exhibit 15)

On October 28, 2014, Bauder Pharmacy, Inc. and the Board entered into a Settlement Agreement and Final Order, in resolution of the October 20, 2014 charges. Mark Graziano signed the Settlement Agreement and Final Order as the representative for Bauder Pharmacy, Inc. By signing the Settlement Agreement and Final Order, Bauder Pharmacy, Inc. chose not to contest the allegations in the Statement of Charges and waived any objections to the terms of the Settlement Agreement and Final Order. Bauder Pharmacy, Inc. also agreed to dismiss with prejudice the judicial review of the Board's prior disciplinary order. (State Exhibit 6, pp. 16-19)

Pursuant to the signed Settlement Agreement, Bauder Pharmacy, Inc. agreed, in relevant part, that:

- Within 30 days of Board approval of the Settlement Agreement and Final Order, Mark Graziano will divest himself of his ownership interest in Bauder Pharmacy, Inc. Upon proof of divestment and application for licensure, the Board will issue a new pharmacy license in the name of the new owner/s, provided the application complies with Iowa law. If Bauder Pharmacy, Inc. fails to comply with this provision, the Board may refuse to issue a renewal of the pharmacy license under the authority of Iowa Code section 155A.15(2)(c);
- Within 30 days of Board approval of the Settlement Agreement and Final Order, Bauder Pharmacy, Inc. will construct a secure, physical barrier separating the pharmacy department from the remainder of the business. The secure barrier shall meet the requirements set forth in 657 IAC 6.7 and 8.5.² Board compliance officers shall verify compliance;

² 657 IAC 6.7 generally requires the pharmacist(s) on duty to be responsible for the security of the prescription department, including provisions for effective control against theft, diversion, or unauthorized access to prescription drugs. 657 IAC 8.5(3) pertains to the requirement of a secure barrier that allows the pharmacy department to be closed and secured in the absence of a pharmacist, except as provided in subrules 6.7 and 7.6. To ensure secure closure, the pharmacy department shall be surrounded by a physical barrier capable of being securely locked to prevent entry when the department

- Respondent shall comply with the terms of its probation set forth in the Board's April 5, 2013 Decision and Order and reaffirmed in its Decision and Order following remand from the district court;
- The terms of Bauder Pharmacy, Inc.'s probation and this settlement agreement survive the change in ownership and issuance of the new pharmacy license.

The deadline for the divestment of ownership by Mark Graziano and for installation of the secure barrier was November 27, 2014. (State Exhibit 6; Testimony of Andrew Funk)

Non-Compliance With October 21, 2014 Settlement Agreement

The October 21, 2014 Settlement Agreement required an immediate inspection of Bauder Pharmacy by the Board's compliance officers. Board Compliance Officer Andrew Funk, who is a registered pharmacist, made several visits to Bauder Pharmacy to verify compliance with the Settlement Agreement. Mr. Funk conducted an inspection of Bauder Pharmacy on November 4, 2014 and found only a few minor deficiencies at that time. Mr. Funk testified that the deficiencies were promptly rectified by Kim Robertson and did not warrant disciplinary action. Mr. Funk also reviewed the pharmacy's current policies and procedures, which he described as adequate. (Testimony of Andrew Funk; Kim Robertson; State Exhibits 5, 7)

Mark Graziano has been present within the soda fountain area of Bauder Pharmacy during most of Mr. Funk's visits. At hearing, Kim Robertson testified that in the past two years, Mark Graziano has probably been present on Bauder's premises, running the day to day operation of the soda fountain and ice cream business, on a daily basis. (Testimony of Andrew Funk; Kim Robertson)

Andrew Funk and Compliance Officer James Wolfe visited Bauder Pharmacy the morning of December 5, 2014 to ensure that a physical barrier had been constructed to isolate the pharmacy department from the rest of Bauder Pharmacy's business activities. At this visit, Compliance Officers Funk and Wolfe noted that construction of a secure barrier had not yet begun. Mr. Funk spoke to Kim Robertson, who was the designated pharmacist-in-charge. Ms. Robertson questioned the need for the secure barrier because Bauder Pharmacy is only open when a pharmacist is present.

is closed. A secure barrier may be constructed of other than a solid material with a continuous surface if the openings in the material are not large enough to permit removal of items from the pharmacy department by any means. Any material used in the construction of the barrier shall be of sufficient strength and thickness that it cannot be readily or easily removed, penetrated, or bent.

Ms. Robertson told Funk that other independent pharmacies were not required to have a security gate and that she felt that Bauder Pharmacy was being "singled out" by the Board with this requirement. (Testimony of Andrew Funk, Kim Robertson; State Exhibits 5, 7)

When asked if Mark Graziano had divested his ownership interest in Bauder Pharmacy, Ms. Robertson responded that it had been "taken care of" and that his ownership interest had been transferred to her. Ms. Robertson conceded, however, that she had not yet filed this information with the Board and had not yet filed a new pharmacy application. (Testimony of Andrew Funk; State Exhibit 5)

The afternoon of December 5, 2014, Kim Robertson emailed Andrew Funk and reported that a security company had advised her to install a locking gate to secure off the pharmacy area from the front of the store at the time of closing. Mr. Funk asked Robertson if she could describe the gate and she responded: "They said to run a security gate in front of pharmacy section to pull shut and lock upon closing to secure off the pharmacy area." Robertson emailed Funk a 1.25" x 1.5" example photo of the gate. On Sunday, December 7, 2014, Mr. Funk responded to Robertson by email and wrote: "From the picture, this appears to be an acceptable solution. Is there a rear entrance to the building? If so, there would need to be an additional gate at the rear of the pharmacy as well." Ms. Robertson responded that there were rear doors that cannot be accessed from the outside and can only be used as exit doors. There is no evidence in the record of any further response from Andrew Funk. Ms. Robertson interpreted Funk's email to constitute his approval of the gate that she intended to install. (Testimony of Andrew Funk; Kim Robertson; State Exhibits 7, 8; Bauder Exhibit 3)

As of December 8, 2014, the Board had not received any documentation of the divestment of Mark Graziano's ownership in Bauder Pharmacy nor had it received a new license application from Kim Robertson and Bauder Pharmacy. On December 8, 2014, Assistant Attorney General Gavin sent an email to Bauder's attorneys and its pharmacy consultant. AAG Gavin reminded them that it had been 40 days since the approval of the Settlement Agreement and that the Board had not received proof of Mark Graziano's divestment of ownership and had not received a license application from the new owners. The email further noted that Bauder had not yet complied with the secure barrier requirement, although they had submitted plans for the barrier. This was apparently in reference to the December 5, 2014 emails between Andrew Funk and Kim Robertson. One of Bauder's attorneys responded to AAG Gavin's December 8 email stating: "Divestment has occurred. Paperwork will be supplied to you (perhaps yet today, or tomorrow)." The email further stated that the security gate had to be approved by Inspector Funk prior to the order, that Inspector Funk authorized the gate

on Sunday, December 7, that the gate had been ordered that day, and that it would be installed the day it arrived. (Testimony of Andrew Funk; Bauder Exhibit 2; State Exhibit 5)

As of December 10, 2014, the Board still had not received proof of ownership divestment by Mark Graziano, and Bauder Pharmacy still had not filed a new pharmacy application in the names of the new owners. On December 10, 2014, the Board issued its Notice of Intent to Deny the issuance of a new or renewal application to Bauder Pharmacy. The Notice of Intent to Deny was based on Bauder Pharmacy's failure to comply with the terms of the Settlement Agreement by providing proof of divestment of ownership by Mark Graziano, by filing a new pharmacy application in the names of the new owners, and by constructing a secure, physical barrier separating the pharmacy department from the remainder of the business. (State Exhibit 1)

On December 10, 2014 at 2:06 p.m., a legal assistant to Bauder's attorneys sent a copy of the Special Meeting of Shareholders of Bauder Pharmacy, Inc. to AAG Gavin by email. (Bauder Exhibit 7 p. 1) The Minutes of the Special Meeting of Shareholders states that the meeting was held on November 22, 2014 at the office of Bauder Pharmacy, Inc., that all shareholders were present or being represented, and that Kim Robertson acted as Chairman of the meeting. The minutes further state that the following resolution was unanimously adopted:

BE IT RESOLVED: All the shares held by Mark Graziano will be gifted to Kim Robertson.

If Mark Graziano can find his shares, he will sign them over to Kim Robertson.

BE IT FURTHER RESOLVED, the next reporting requirement to the Iowa Secretary of State, Kim Robertson will be responsible for filing the report showing Mark Graziano has no interest in Bauder Pharmacy, Inc. nor holds any offices, and will register Kim Robertson as registered agent.

BE IT FURTHER RESOLVED, that Kim Robertson was unanimously elected to the following offices:

President

Vice-President

Treasurer

BE IT FURTHER RESOLVED, that Corrine R. Graziano, will continue to be the Secretary.

BE IT FURTHER RESOLVED, that Bauder's Ice Cream was not part of this transaction and Bauder's Ice Cream will remain with Mark Graziano.

(Bauder Exhibits 2, 6; State Exhibit 3)

Kim Robertson also signed a Statement of Change of Registered Office and/or Registered Agent for Bauder Pharmacy, Inc. The month (November) and year (2014) were typed on the form, and the day of the month (22) was handwritten. The form was later filed with the Iowa Secretary of State on December 29, 2014. (Bauder Exhibit 6A)

On December 15, 2014, the Board received an Application for Iowa Pharmacy License from Bauder Pharmacy, Inc. for the license period from January 1, 2015 through December 31, 2015. The application was signed by Kim Robertson as the President of Bauder, Inc. The application states that Bauder Pharmacy, Inc.:

- is open seven days a week (Monday-Friday, 8:30-6:00); Saturday 9:00-3:00, and Sunday (10:00-2:00);
- is owned by Kim Robertson (who is its President, Vice-President, and Treasurer) and by Corrine Graziano (who is the Secretary);
- currently employs two pharmacists: Kim Robertson, License No. 15845, who works an average of 50+ hours per week, and Chris Gage, License No. 15016, who works an average of 4 hours per week;
- currently employs three Pharmacy Support Staff, who work 25 hours, 15 hours, and 15 hours per week on average; and
- is on probation and dispenses only non-narcotic legend drugs and is awaiting reinstatement of its DEA license.

The application further indicated that owner Kim Graziano has pending charges before a licensing authority and that Mark Graziano has a felony, has had his license revoked, and has been removed from corporate ownership. (State Exhibit 2)

On December 22, 2014, Bauder Pharmacy, Inc. filed a Notice of Appeal and Request for Hearing on the Board's Notice of Intent to Deny License. In its Notice of Appeal, Bauder Pharmacy stated that:

- there had been procedural hurdles to the installation of the physical barrier, which was now "underway." Bauder Pharmacy attached copies of correspondence with Andrew Funk as well as the Order Confirmation for the Physical Barrier. (State Exhibit 3; Bauder Exhibits 3, 4, 9)
- Mark Graziano's divestment of his Bauder ownership "was timely and was thereafter provided to the Board." Bauder Pharmacy attached the Minutes of Special Meeting of Shareholders to the Notice of Appeal. (State Exhibit 3; Bauder Exhibit 6); and

- the application for a new pharmacy license had been filed on or about December 11, 2014 along with the requisite fee payment. (State Exhibit 3; Bauder Exhibit 8).

The confirmation order for the security gate and the email correspondence between Mark Graziano and Steve May of Cisco-Eagle (the manufacturer of the security gate) established that the gate was ordered by Mark Graziano on December 10, 2014, which was 13 days after the deadline established in the Settlement Agreement for the physical barrier to be installed. The confirmation order further indicates that the cost of the gate (\$2,940.49) was paid for with a Bauder Pharmacy credit card issued in the name of Mark Graziano. The emails indicate that there was a delay in shipping the gate because the factory was closed for holiday break. (Bauder Exhibits 3, 4, 9; State Exhibit 11)

The security gate was eventually installed at Bauder Pharmacy on Saturday, January 17, 2015, which was 51 days after the November 27, 2014 deadline. On January 20, 2015, Kim Robertson sent an email to Andrew Funk informing him that the gate had been installed. Mr. Funk responded that he would be stopping by sometime that week to inspect the security gate and take some photos. (State Exhibit 7, p. 22)

On January 21, 2015, Andrew Funk visited Bauder Pharmacy to inspect the security gate and to take photos of it. Kim Robertson was the pharmacist on duty at the time of the inspection, and she demonstrated the gate's operation for Mr. Funk. There are two gates that fold out on tracks attached to the ceiling and the floor. The two gates are then secured with a padlock. Ms. Robertson reported that only she and staff pharmacist Chris Gage have keys to the padlock. Mr. Funk determined that the materials used to construct the gate were sufficient to satisfy the strength requirements of 657 IAC 8.5(3). Although there were gaps in the gate large enough for an arm to pass through, only over the counter vitamins and no prescription medications could be reached by an arm when the gate was closed. (Testimony of Andrew Funk; State Exhibits 7, 9)

Mr. Funk had concerns about the gate's placement because it failed to completely separate the pharmacy department from the ice cream fountain business. Specifically, the booths for lunch patrons, the ice cream prep-area, and the walk-in freezer were located within the area secured by the gate. In order to enter these work areas for the ice cream business, a person would have access to the secured pharmacy department. (Testimony of Andrew Funk; State Exhibits 7, 9, 10)

On January 26, 2015, Andrew Funk returned to Bauder Pharmacy with Compliance Officer Jim Wolfe to obtain his opinion concerning the adequacy of the security gate that had been installed on January 17, 2015. During this visit, Kim Robertson

demonstrated the security gate for Mr. Wolfe, and Mr. Funk videotaped the demonstration. During the demonstration, Ms. Robertson continued to question why it was necessary for Bauder Pharmacy to install the security barrier. At the time of this inspection, Mark Graziano was present in the soda fountain area of Bauder Pharmacy and was video recording the interaction between Robertson and Wolfe. (State Exhibits 7, 12; Testimony of Andrew Funk)

Compliance Officer Wolfe observed that the Settlement Agreement specifically stated that "Respondent will construct a secure, physical barrier separating the Respondent's pharmacy department from the remainder of the business." Wolfe noted that the constructed barrier separates the front of the store from the rear of the store but only partially separates the two businesses. The pharmacy department, as designated by the security gate, also includes the ice cream freezer, the ice cream preparation area, and the booths for customers of the soda fountain. He further noted that Mark Graziano continued to have access to the pharmacy department and continued to provide direction to Kim Robertson regarding the business of the pharmacy. The current gate served no purpose during business hours and does not separate the two businesses to allow them to operate independently of one another. In order to separate the two businesses and comply with the Settlement Agreement, Mr. Wolfe suggested that a secure barrier be constructed with a lockable glass enclosure (top of the pharmacy counter to the ceiling or header with track) surrounding the entire front and sides of where prescription drugs are kept, with a sturdy lockable door on the side. For added security, a wraparound gate could be utilized during the closed hours of the pharmacy, in addition to the glass enclosure. (State Exhibit 7, pp. 22-23; State Exhibits 9, 10; Testimony of Andrew Funk)

On February 20, 2015, Mark Graziano entered a guilty plea to two federal felonies: one count of Conspiracy to Distribute Controlled Substances and one count of Tax Evasion. The remaining 16 counts were dismissed as part of a plea agreement. Mark Graziano was sentenced to 24 months of incarceration in a federal correctional institution on both counts, to be served concurrently. Upon his release from imprisonment, Mr. Graziano will be on supervised release for a term of three years. He was also required to pay restitution totaling \$577,505 to the Internal Revenue Service and to the Iowa Department of Revenue. Mr. Graziano has been ordered to report to the United States Marshall's Office on March 26, 2015 to begin his two year term of incarceration. According to Ms. Robertson, the federal judge recognized that she would need Mark Graziano's help in preparing to assume responsibility for all of the Bauder Pharmacy business functions during his incarceration. Ms. Robertson testified that while Mark has had no role in the pharmacy department since the revocation of his license, he has continued to be solely responsible for most of the Bauder Pharmacy ice cream business,

including its state fair booth, and for Bauder Pharmacy's banking. (Bauder Exhibits 12, 20, 22; Testimony of Kim Robertson)

As of February 26, 2015, Mark Graziano was still listed as the President of Bauder Pharmacy, Inc. on the Iowa Secretary of State's website. (State Exhibit 14) A printout from the Secretary of State's website, however, shows that the list of officers for Bauder Pharmacy, Inc. no longer included Mark Graziano as of March 10, 2015. "Kim Graziano" is now listed as the President and Treasurer of Bauder Pharmacy, Inc. and Corrine Graziano was listed as the Secretary. (Bauder Exhibit 21)

Thomas Crabb, who is both a licensed pharmacist and a lawyer, has been serving as the Board approved consultant for Bauder Pharmacy. The record includes Mr. Crabb's March 5, 2015 Consultant Quarterly Report of Compliance. This report states that the pharmacy was in compliance with items A through G of the Board's April 5, 2013 Order. Mr. Crabb's report states that he had been "informed" that the paperwork for Mark Graziano's divestiture was complete and had been submitted to the Board as requested. Mr. Crabb's report further stated that Ms. Robertson had informed him that the locks and security system codes have been changed and that Mark Graziano does not have a key or the security code. (Testimony of Kim Robertson; Bauder Exhibits 11, 19)

If the Board determines that Bauder Pharmacy must have a new pharmacy consultant, Kim Robertson is willing to name Thomas G. Suttie as the pharmacy's new consultant, and Mr. Suttie is willing to serve in this capacity. Thomas G. Suttie has over 39 years of experience in retail and hospital pharmacies and has never been subject to any license discipline. (Testimony of Kim Robertson; Thomas Suttie; Bauder Exhibit 18)

Chris Gage has been employed by Bauder Pharmacy as a part-time pharmacist since November 2012. When he was first hired, Mr. Gage was working approximately 30 hours per week but has recently been working on an "as needed" basis. Mr. Gage has 38 years of experience as a pharmacist, including experience as a compounding pharmacist, as a retail pharmacist, as a pharmacy owner, and as a pharmacist-in-charge. Mr. Gage's pharmacist license has never been subject to discipline. Kim Robertson testified that she would be willing to name Chris Gage as the pharmacist-in-charge of Bauder Pharmacy if the Board determines that a change of the pharmacist-in-charge is necessary. Mr. Gage is willing to assume the role of pharmacist-in-charge of Bauder Pharmacy. (Testimony of Kim Robertson; Chris Gage; Bauder Exhibit 17)

CONCLUSIONS OF LAW

Iowa Code section 155A.15(2)(c)(2013) provides, in relevant part, that the Board may refuse to issue or renew a license if the Board finds that the applicant or licensee has violated any provision of Iowa Code chapter 155A or any rule adopted under this chapter or that any owner or employee of the pharmacy has violated any provision of Iowa Code chapter 155A or any rule adopted under this chapter. 657 IAC 36.1(4)(i) specifically authorizes the Board to discipline a licensee for violating a lawful order of the board in a disciplinary hearing.

The October 28, 2014 Settlement Agreement and Final Order resolved the Statement of Charges filed against Bauder Pharmacy, Inc. on October 20, 2014 and constitutes a lawful order of the board in a disciplinary hearing. Moreover, the Settlement Agreement and Final Order provided that if Respondent violated or failed to comply with the terms and conditions of the Settlement Agreement and Final Order, the Board may refuse to issue a renewal of Respondent's pharmacy license, pursuant to Iowa Code section 155A.15(2)(c), or may take action to revoke, suspend, or take other disciplinary action against the pharmacy license, as authorized by Iowa Code chapters 155A, 272C and 657 IAC chapter 36.

The preponderance of the evidence in this record established that Bauder Pharmacy, Inc. failed to comply, in a timely manner, with all of the terms and conditions of the October 28, 2014 Settlement Agreement and Final Order. The Settlement Agreement and Final Order required Mark Graziano to divest himself of his ownership interest in Bauder Pharmacy, Inc. by November 27, 2014. It further required Bauder Pharmacy, Inc. to provide proof of Mr. Graziano's divestment of ownership and to file an application for a pharmacy license in the name(s) of the new owners. Representatives of Bauder Pharmacy, Inc. were reminded of these requirements on December 5, 2014 and again on December 8, 2014.

Although Ms. Robertson verbally informed Andrew Funk on December 5, 2014 that Mark Graziano had divested his ownership interest in Bauder Pharmacy, she did not state when this occurred and did not provide any documentation of the ownership transfer. Documentation of divestment of Mr. Graziano's ownership was not received by the Board until after the Notice of Intent to Deny was issued on December 10, 2014. The documentation consisted of Minutes of a November 22, 2014 Special Meeting of the three shareholders of Bauder Pharmacy, Inc. The Minutes were signed by all three shareholders and state, in part: "All the shares held by Mark Graziano will be gifted to Kim Robertson. If Mark Graziano can find his shares, he will sign them over to Kim Robertson." The Minutes further state that "Bauder's Ice Cream was not part of this

transaction and Bauder's Ice Cream will remain with Mark Graziano." The Board has been given no explanation for the 18 day delay in providing this documentation if in fact the divestment occurred on November 22, 2014 as stated in the Minutes. In addition, the new pharmacy license application was not submitted to the Board by Kim Robertson until December 15, 2014.

The Settlement Agreement and Final Order further required the construction of a "secure, physical barrier separating the pharmacy department from the remainder of the business." The barrier was to be constructed no later than November 27, 2014. Bauder Pharmacy, Inc. did not even order the barrier, which consists of a sliding gate that can be padlocked, until December 10, 2014. The gate was not installed until January 17, 2015. Upon inspection of the gate, it was apparent to the Board's Compliance Officers that significant portions of the ice cream business, i.e. the ice cream prep area and the walk-in freezer, were within the same physical area that is enclosed by the gate. By its design and placement, the gate is only to be closed and locked at the close of the business day and provides no separation of the pharmacy and ice cream business when Bauder Pharmacy is open.

By the terms of probation imposed on Bauder Pharmacy, Inc. in the Board's November 5, 2013 Decision and Order, Mark Graziano "shall be allowed no access to the pharmacy department or to prescription drugs within the pharmacy." The gate installed by Bauder Pharmacy does nothing to provide a secure separation of the pharmacy business and the ice cream business, which continues to be owned by Mark Graziano. As observed by the Board's Compliance Officer and testified to by Kim Robertson, Mark Graziano continued to be on the premises on an almost daily basis and to actively operate the Bauder Pharmacy ice cream business after his license as a pharmacist was revoked. Although Mr. Graziano will soon be incarcerated for two years, there is no reason to believe that he will not continue to own and operate the ice cream business upon his release from prison. The Board continues to have very serious concerns about the security of Bauder's pharmacy department given the co-location of pharmacy business with the ice cream business owned by Mark Graziano.

DECISION AND ORDER

IT IS THEREFORE ORDERED that the application for an Iowa Pharmacy License filed on behalf of Bauder Pharmacy, Inc. on December 15, 2014 is hereby GRANTED, subject to the following additional terms and conditions:

- A. Within 30 days of the issuance of this Order granting the pharmacy license, Bauder Pharmacy, Inc. shall name a new pharmacist-in-charge, who has

been pre-approved by the Board. Based on the presentation at hearing, the Board would approve Chris Gage as the new pharmacist-in-charge.

B. Within one (1) year of the issuance of this Order granting the pharmacy license, any business owned and/or operated by Mark Graziano, including Bauder Ice Cream, may no longer be co-located in the same retail space as the pharmacy department of Bauder Pharmacy, Inc.

C. Bauder Pharmacy, Inc. will be subject to random inspections by Board staff for its compliance with all requirements of the Board's November 5, 2013 Decision and Order and for its compliance with the requirements of this Order of the Board. The frequency of inspections will be determined by the Board, in its discretion.

The Board will not require Bauder Pharmacy, Inc. to retain a different pharmacy consultant and may continue to use Thomas Crabb as its Board-approved pharmacy consultant. Bauder Pharmacy, Inc. may retain a different consultant, so long as the consultant is Board-approved. The Board would approve Thomas Suttie as a pharmacy consultant.

Dated this 31st day of March, 2015.



Edward Maier, Chairperson
Iowa Board of Pharmacy

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.