

**STATE OF CONNECTICUT
CONNECTICUT EXAMINING BOARD FOR BARBERS,
HAIRDRESSERS AND COSMETICIANS**

Paul C. LaChance, III

Petition No. 2010-199

MEMORANDUM OF DECISION
Procedural Background

The Department of Public Health (“the Department”) presented the Connecticut Examining Board for Barbers, Hairdressers and Cosmeticians (“the Board”) with a Motion for Summary Suspension (“the Motion”) and a Statement of Charges (“the Charges”) against Paul C. LaChance, III (“respondent”) dated April 26, 2010. Bd. Exh. 3.

Based on the Charges and the affidavits and reports accompanying the Motion, the Board granted the Motion, finding that respondent’s continued practice as a licensed hairdresser presented a clear and immediate danger to public health and safety and ordered, on April 26, 2010, pursuant to §§ 4-182(c) and 19a-17(c) of the Connecticut General Statutes (“the Statutes”), that respondent’s hairdresser license be summarily suspended pending a final determination by the Board of the allegations contained in the Charges (“the Order”). Bd Exh. 3.¹

On April 26, 2010, the Charges, the Order, and a Notice of Hearing were sent to respondent by certified mail, return receipt requested, and first class mail. Bd. Exh. 3.

On May 10, 2010, respondent filed an Answer to the Charges. Bd. Exh. 2.

After one continuance, the Board held an administrative hearing on June 7 and 21, 2010 to adjudicate respondent’s case. On June 21, 2010, the Department filed a Motion to Amend the Charges, which was denied. Bd. Exh. 5. At the hearing, John Kardaras, Esq. represented respondent; Attorney Joelle Newton, Esq., represented the Department. Both parties were given opportunity to present evidence and argument on all issues and conduct cross-examination

The Board conducted the hearing in accordance with Chapter 54 of the Statutes (the Uniform Administrative Procedure Act) and §§19a-9-1 *et seq.* of the Regulations of Connecticut State Agencies (“the Regulations”). All Board members involved in this decision received copies of the entire record and attest that they have heard the case or read the record in its entirety. This decision is based entirely on the record. To the extent that the findings of fact actually represent conclusions of law, they should be so considered, and vice versa. *SAS Inst. Inc. v. S&H Computer Systems, Inc.*, 605 F.Supp. 816 (M.D. Tenn. 1985).

¹ On July 19, 2010, the Board vacated the Summary Suspension of respondent’s license and reinstated his license to probation, subject to the terms of the Consent Order, dated May 29, 2009.

Allegations

Count One

1. In paragraph 1 of the Charges, the Department alleges that respondent of Manchester, Connecticut is, and has been at all times referenced in the Charges, the holder of Connecticut hairdresser license number 046168.
2. In paragraph 2 of the Charges, the Department alleges that on or about February 23, 2010, respondent abused or utilized morphine to excess.
3. In paragraph 3 of the Charges, the Department alleges that respondent's abuse of morphine does and/or may affect, his practice as a hairdresser.
4. In paragraph 4 of the Charges, the Department alleges that the above facts constitute grounds for disciplinary action pursuant to §20-263 of the Statutes, including, but not limited to § 20-263(2).

Count Two

5. In paragraph 5 of the Charges, the Department incorporates paragraphs 1 through 4 of the Charges by reference as if set forth in full.
6. In paragraph 6 of the Charges, the Department alleges that on or about May 29, 2009, the Department ordered a Reinstatement Consent Order in Petition No. 2008-112-020-033 ("the Consent Order") that placed respondent's license on probation for two years.
7. In paragraph 7 of the Charges, the Department alleges that the Consent Order prohibits respondent from obtaining or using alcohol or legend drugs unless prescribed for a legitimate therapeutic purpose by a licensed health care professional authorized to prescribe medications. The Consent Order also requires that all of respondent's random urine screens shall be negative for drugs and alcohol.
8. In paragraph 8 of the Charges, the Department alleges that on or about February 23, 2010, respondent tested positive for morphine. Gas chromatograph/mass spectrometer ("GC/MS") testing confirmed the presence of morphine at a level of 838 ng/ml.²
9. In paragraph 9 of the Charges, the Department alleges that respondent's conduct as described above constitutes violations of the terms of probation as set forth in the Consent Order, and subjects respondent's license to revocation or other disciplinary action authorized by §§19a-17 and 20-263 of the Statutes.

Findings of Fact

Count One

1. Respondent of Manchester, Connecticut is, and has been at all times referenced in the Charges, the holder of Connecticut hairdresser license number 046168. Bd. Exh. 2.

² The term "ng/ml" is an abbreviation for nanogram per milliliter. A nanogram is equivalent to one thousandth of a part per million or one billionth of a gram. Tr. 6/21/10, p. 65.

2. The evidence is insufficient to establish that on or about February 23, 2010, respondent abused or utilized morphine to excess. Dept. Exh. 3 (under seal); Resp. Exhs. 1 (under seal), 5; Tr. 6/7/10, pp. 55, 58, 61-63, 79, 81-82, 99; Tr. 6/21/10, pp. 65-75, 79-80, 82, 100, 102-103, -108, 111, 116, 118, 125-135, 142-143.
3. The evidence is insufficient to establish that respondent's practice as a hairdresser is and/or may be affected by his abuse of morphine. Resp. Exhs. 1 (under seal), 5; Tr. 6/21/10, pp. 65-75, 79-80, 82, 100, 102-103, 108, 111, 116, 118, 125-135, 142-143.

Count Two

4. On or about May 29, 2009, the Department ordered the Consent Order that placed respondent's license on probation for two years. Dept. Exh. 1.
5. The Consent Order prohibited respondent from obtaining or using alcohol or legend drugs unless prescribed for a legitimate therapeutic purpose by a licensed health care professional authorized to prescribe medications. The Consent Order also required that all of respondent's random urine screens shall be negative for drugs and alcohol. Dept. Exh. 1.
6. On or about February 23, 2010, respondent tested positive for morphine. GC/MS testing confirmed the presence of morphine at a level of 838 ng/ml. Dept. Exh. 1; Tr. 6/21/10, pp. 65-66.

Discussion and Conclusions of Law

The Department bears the burden of proof by a preponderance of the evidence in this matter. *Goldstar Medical Services, Inc., et al. v. Department of Social Services*, 288 Conn. 790 (2008); *Steadman v. Securities and Exchange Commission*, 450 U.S. 91, 101 S.Ct. 999, *reh'g denied*, 451 U.S. 933 (1981); *Swiller v. Commissioner of Public Health*, CV 950705601, Superior Court, J.D. Hartford/New Britain at Hartford, Memorandum filed October 10, 1995. The Department sustained its burden of proof with regard to the allegations contained in paragraphs one, six, seven, and eight of the Charges. The Department failed to sustain its burden with regard to all other allegations.

The Board relied on the training and experience of its members in making its findings of fact and conclusions of law. *Pet v. Department of Health Services*, 228 Conn. 651, 667 (1994).

The Department alleges that respondent's license is subject to disciplinary action pursuant to § 20-263 of the Statutes, which provides in pertinent part, that:

“[t]he board may take any of the actions set forth in section 19a-17, for any of the following reasons: . . . (2) abuse or excessive use of drugs, including alcohol, narcotics or chemicals; . . .”

The gravamen of the Charges is that respondent's license is subject to disciplinary action based on his alleged abuse or excessive use of morphine in violation of § 20-263 of the Statutes and the terms and conditions of his probation. In support of its case, the Department presented its investigative report, respondent's progress notes, laboratory reports, and reports from one of respondent's therapists. In his defense, respondent presented testimony from Jason Gazsi, counselor at the Hartford Dispensary, a methadone clinic; Julianne Harlow, licensed substance abuse counselor; J. Todd Schuder, licensed alcohol and drug counselor and licensed professional counselor; and, Dr. James Woodford, an expert witness in the field of drug testing methodology and research. In rebuttal, the Department presented the testimony of an expert witness, Dr. William Closson, Director of Laboratories at Bendiner & Schlesinger.

Respondent admits the allegation in paragraph 1 of the Charges, that he is and has been at all times referenced in the Charges, the holder of Connecticut license number 046168 to practice as a hairdresser.

With respect to the allegations in Count One that respondent abused or utilized morphine to excess on February 23, 2010, the Department did not sustain its burden of proof. The Department claims that respondent's undisputed positive screen for morphine at 838ng/ml on February 23, 2010, is sufficient to establish the allegation. While acknowledging the positive screen, respondent claims it was the result of his ingestion of poppy seed bagels, not his use of morphine, and he presented additional test results and testimony that undermined the Department's evidence. Considering the totality of the evidence, the evidence was insufficient to establish that the positive screen was more likely than not the result of respondent's use of morphine.

The Department's expert witness, Dr. Closson, testified that there are two equally valid, FDA-approved, minimum levels that are used to detect morphine in urine samples: a 300ng/ml level and a 2000 ng/ml level. For individuals participating in drug treatment programs, the 300 ng/ml minimum level is generally used since it is the most sensitive; however, the evidence also establishes that the 300 ng/ml level is also more prone to false positives. The 2000 ng/ml minimum level is generally used for employment, licensing, and other similar purposes, *i.e.*, when the "population is less likely to be opiate abusers than individuals who are in drug treatment programs." Tr. 6/21/10, p. 126. Respondent's test result of 838 ng/ml is not positive using the 2000 ng/ml level. However, since respondent was in a drug treatment program at the time of the screen, the 300 ng/ml level should be applied in this case. Applying this standard,

respondent's screen was positive for morphine. However, the inquiry does not end here. The board must next determine whether the Department has proved the allegation that the ingestion of morphine caused the positive result. The Board concludes that the department has not so proved.

Additional evidence in the record undermines the Department's claim that the ingestion of morphine caused the positive test result. Dr. Closson, the Department's witness, explained that,

“[t]here are several possibilities that would have resulted in an 800 plus nanogram per ML of testing for morphine. One is the individual used morphine. Two is the individual used heroin. [Morphine is a metabolite of heroin.] Three is there was a dietary exposure to morphine through something, such as poppy seeds.” Each of those three possibilities exist, and the laboratory testing cannot tell which one of those possibilities resulted in the testing.” Tr. 6/21/10, pp. 128-129.

When asked whether the laboratory could rule out the ingestion of poppy seeds when the individual is in treatment for heroin abuse, Dr. Closson replied that,

“[e]ven in the population, where a person is in treatment for heroin abuse, where it is more likely than in the general population the results resulted from that heroin abuse, from a laboratory perspective, you can't rule out the possibility that those results came from dietary sources, so just looking at the urine drug results, you can't assign a probability one way or the other.” Tr. 6/21/10, pp. 134-135.

Neither Dr. Closson nor respondent's expert witness, Dr. Woodford, could rule out the possibility that the results for morphine were not attributable to some other source such as poppy seeds, poppy seed oil or OTC cough or cold medicines, *etc.* (*see*, Resp. Exh. 5).

Two other tests were also conducted in an effort to confirm respondent's use of morphine: (1) a thebaine test that is used to determine whether the positive morphine results were attributable to poppy seeds; and, (2) a hair shaft test that would establish whether respondent used morphine during the relevant time period. The thebaine test was negative and inconclusive in establishing whether the positive morphine screen was attributable to the ingestion of poppy seeds.³ The hair shaft test results were negative for opiates, including morphine. *See*, Resp. Exh. 2.

³ In a similar line of questioning, Dr. Woodford, testified that the thebaine test is outmoded and it has been replaced by a more definitive and reliable test, called the six monoacetylmorphine (“6 MAM”) test. This test is used specifically to determine whether an individual has used morphine (as a metabolite of heroin) or heroin, rather than testing for exposure to or ingestion of poppy seeds in poppy seed oil, food, or in the gel of over the counter medicines. However, the 6 MAM test was not performed, and both expert witnesses agree that without this test, it cannot be determined with scientific certainty whether respondent used morphine, heroin or ate poppy seed bagels.

Finally, the record is also devoid of any evidence that respondent manifested clinical symptoms of morphine use. All of respondent's three health care providers, including the two licensed substance abuse counselors, testified that respondent exhibited no symptoms of heroin or morphine use during this time period.

Based on the totality of the evidence, the evidence is insufficient to establish that respondent abused or utilized morphine to excess, as alleged.

With respect to the allegation in paragraph 6 of the Charges, the Board finds that on or about May 29, 2009, the Department ordered the Consent Order that placed respondent's license on probation for two years. Under the terms of the Consent Order, respondent agreed "to refrain from ingesting poppy seeds in any food substances, mouthwash and over the counter cough or cold medicines or remedies . . ." (Dept. Exh. 1), and that any ingestion of poppy seeds does not constitute a defense to a positive drug screen. As previously discussed, respondent admits that he ate poppy seed bagels, although he claims he was unaware of the prohibition against doing so in the Consent Order. The Board finds that his claim is not credible. Nevertheless, the Board does not order any disciplinary action on respondent's license for this violation of the Consent Order.

With respect to the allegations concerning the alleged positive screen, the evidence establishes that the Consent Order required that all of respondent's random urine screens be negative for drugs and alcohol, and that on February 23, 2010, respondent violated the terms of the Consent Order when he tested positive for morphine at a level of 838 ng/ml, regardless of its source. Thus, the Department sustained its burden of proof with regard to that allegation in paragraph 8 of the Charges, regardless of the cause of the test result.

The Board concludes that respondent's conduct as alleged in paragraphs one, six, seven and eight of the Charges is proven by a preponderance of the evidence presented; however, the Department failed to prove by a preponderance of the evidence the allegations in paragraphs two and three of the Charges.

The Board finds that respondent can continue to practice as a licensed hairdresser with reasonable skill and safety under the terms of this order. Thus, the Board will not suspend or revoke his license at this time.

Nonetheless, in light of an earlier violation of the Consent Order that resulted in the issuance of the Memorandum of Decision dated June 7, 2010, in Petition No. 2009-20091455 as

well as this violation of the Consent Order, additional disciplinary action is warranted pursuant to §§20-263(2), and 19a-17(c) of the Statutes. Therefore, the board enters the following order.

Order

Pursuant to the authority vested in it by §§19a-17 and 20-263 of the Statutes, the Board orders with respect to hairdresser license number 046168 issued to Paul LaChance, III, in Petition No. 2010-199, that:

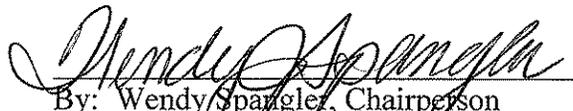
1. This Order incorporates the Reinstatement Consent Order of May 29, 2009 in Petition No. 2008-1112-020-033 as modified below and that consent order is hereby superseded in all other respects beginning from the effective date of this decision].
2. Respondent's license shall be on probation until May 29, 2012, under the following terms and conditions:
 - a. Respondent shall participate in regularly scheduled therapy at his own expense with a licensed psychiatrist, psychologist or substance abuse counselor, pre-approved by the Department ("therapist").
 - (1) Respondent shall provide a copy of this Decision to his therapist.
 - (2) Respondent's therapist shall furnish written confirmation to the Department of his or her engagement in that capacity and receipt of a copy of this Decision within 15 days of receipt.
 - (3) If the therapist determines that therapy is no longer necessary, that a reduction in frequency of therapy sessions is warranted, or that respondent should be transferred to another therapist, the therapist shall advise the Department, and the Department shall pre-approve said termination of therapy, reduction in frequency of therapy sessions, and/or respondent's transfer to another therapist.
 - (4) The therapist shall submit reports once per month for the entire period of probation, which shall address, but not necessarily be limited to, respondent's ability to practice as a hairdresser in an alcohol and substance free state safely and competently. Said reports shall continue until the therapist determines that therapy is no longer necessary or the period of probation has terminated.

- (5) The therapist shall immediately notify the Department in writing if the therapist believes respondent's continued practice poses a danger to the public or if respondent discontinues therapy and/or terminates his or her services.
- b. During the entire probationary period, respondent shall refrain from the ingestion of alcohol in any form and the ingestion, inhalation, injection or other use of any controlled substance and/or legend drug unless prescribed or recommended for a legitimate purpose by a licensed health care professional authorized to prescribe medications. In the event a medical condition arises requiring treatment utilizing controlled substances, legend drugs, or alcohol in any form, respondent shall notify the Department and, upon request, provide such written documentation of the treatment as is deemed necessary by the Department.
- (1) During the entire probationary period, respondent shall submit to biweekly random observed urine screens for alcohol, controlled substances, and legend drugs. Respondent shall submit to such screens on a more frequent basis if requested to do so by the therapist, the Department, or the Board. Said screens shall be administered by a facility approved by the Department. All such random screens shall be legally defensible in that the specimen donor and chain of custody shall be identified throughout the screening process. All laboratory reports shall state that the chain of custody procedure has been followed.
 - (2) Respondent shall cause to have the facility provide monthly reports to the Department on the urine screens for alcohol, controlled substances and legend drugs. All such screens shall be negative for alcohol, controlled substances, and legend drugs, except for medications prescribed by respondent's physician. If respondent has a positive urine screen, the facility shall immediately notify the Department. All positive random drug and alcohol screens shall be confirmed by gas chromatograph/mass spectrometer testing.
 - (3) Respondent understands and agrees that if he fails to submit a urine sample when requested by his monitor, such missed screen shall be deemed a positive screen.

- (4) Respondent shall notify each of his health care professionals of all medications prescribed for him by any and all other health care professionals.
 - c. Respondent is hereby advised that the ingestion of poppy seeds may produce a positive drug screen result indicating the presence of opiates/morphine and that the ingestion of mouthwash may produce a positive result indicating the presence of alcohol. For that reason, any food substance containing poppy seeds, and mouthwash should be avoided during the probationary period. In the event that a drug/alcohol screen is positive for opiates/morphine and/or alcohol, the ingestion of poppy seeds and/or mouthwash shall not constitute a defense to such positive screen.
 - d. Respondent shall attend "anonymous" or support group meetings on an average of four times per month, and shall provide monthly reports to the Department concerning his record of attendance.
 - e. During the period of probation, respondent shall report to the Department any arrest under the provisions of §14-227a of the Statutes. Such report shall occur within 15 days of such event.
- 3. The Board must be informed in writing prior to any change of address.
 - 4. All correspondence and reports are to be addressed to:

Bonnie Pinkerton, Nurse Consultant
Department of Public Health
Division of Health Systems Regulation
410 Capitol Avenue, MS#12HSR
P. O. Box 340308
Hartford, CT 06134-0308
- Ms. Pinkerton can also be contacted at the following email address:
bonnie.pinkerton@ct.gov.
- 5. Respondent shall pay all costs necessary to comply with this Decision.

1/10/11
Date


By: Wendy Spangler, Chairperson
Connecticut Examining Board for
Barbers, Hairdressers and Cosmeticians

CERTIFICATION

I hereby certify that, pursuant to Connecticut General Statutes § 4-180(c), a copy of the foregoing Memorandum of Decision was sent this 11th day of JANUARY 2011, by certified mail, return receipt requested to:

John Kardaras, Esq.
124 Jefferson Street
Hartford, CT 06106

Certified Mail RRR #91-7108-2133-3932-0556-3061

and via email to:

Matthew Antonetti, Principal Attorney
Legal Office
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410 Capitol Avenue, MS #12LEG
Hartford, CT 06134-0308



Jeffrey A. Kardys

Administrative Hearings Specialist/Board Liaison
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