

1 KAMALA D. HARRIS
Attorney General of California
2 LINDA K. SCHNEIDER
Supervising Deputy Attorney General
3 State Bar No. 101336
AMANDA DODDS
4 Senior Legal Analyst
110 West "A" Street, Suite 1100
5 San Diego, CA 92101
P.O. Box 85266
6 San Diego, CA 92186-5266
Telephone: (619) 645-2141
7 Facsimile: (619) 645-2061
Attorneys for Complainant

8
9 **BEFORE THE**
BOARD OF PHARMACY
10 **DEPARTMENT OF CONSUMER AFFAIRS**
11 **STATE OF CALIFORNIA**

12 In the Matter of the Accusation Against:

Case No. 4731

13 **MIKE ANTHONY GUTIERREZ JR.**
14 **1620 49th Street**
San Diego, CA 92102

A C C U S A T I O N

15 **Pharmacy Technician Registration**
16 **No. TCH 67717**

17 Respondent.

18
19 Complainant alleges:

20 **PARTIES**

21 1. Virginia Herold (Complainant) brings this Accusation solely in her official capacity
22 as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.

23 2. On or about February 21, 2006, the Board of Pharmacy issued Pharmacy Technician
24 Registration Number TCH 67717 to Mike Anthony Gutierrez Jr., also known as Michael Anthony
25 Gutierrez (Respondent). The Pharmacy Technician Registration was in full force and effect at all
26 times relevant to the charges brought herein and will expire on June 30, 2015, unless renewed.

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JURISDICTION

3. This Accusation is brought before the Board of Pharmacy (Board), Department of Consumer Affairs, under the authority of the following laws. All section references are to the Business and Professions Code unless (Code) otherwise indicated.

4. Section 4300, subdivision (a) of the Code states "Every license issued may be suspended or revoked."

5. Section 4300.1 of the Code states:

The expiration, cancellation, forfeiture, or suspension of a board-issued license by operation of law or by order or decision of the board or a court of law, the placement of a license on a retired status, or the voluntary surrender of a license by a licensee shall not deprive the board of jurisdiction to commence or proceed with any investigation of, or action or disciplinary proceeding against, the licensee or to render a decision suspending or revoking the license.

STATUTORY PROVISIONS

6. Section 482 of the Code states:

Each board under the provisions of this code shall develop criteria to evaluate the rehabilitation of a person when:

(a) Considering the denial of a license by the board under Section 480; or

(b) Considering suspension or revocation of a license under Section 490.

Each board shall take into account all competent evidence of rehabilitation furnished by the applicant or licensee.

7. Section 490 of the Code provides, in pertinent part, that a board may suspend or revoke a license on the ground that the licensee has been convicted of a crime substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued.

8. Section 493 of the Code states:

Notwithstanding any other provision of law, in a proceeding conducted by a board within the department pursuant to law to deny an application for a license or to suspend or revoke a license or otherwise take disciplinary action against a person who holds a license, upon the ground that the applicant or the licensee has been convicted of a crime substantially related to the qualifications, functions, and duties of the licensee in question, the record of conviction of the crime shall be conclusive evidence of the fact that the conviction occurred, but only of that fact, and the board may inquire into the circumstances surrounding the commission of the crime in order

1 to fix the degree of discipline or to determine if the conviction is substantially related
2 to the qualifications, functions, and duties of the licensee in question.

3 As used in this section, "license" includes "certificate," "permit," "authority,"
4 and "registration."

5 9. Section 4301 of the Code states:

6 The board shall take action against any holder of a license who is guilty of
7 unprofessional conduct or whose license has been procured by fraud or
8 misrepresentation or issued by mistake. Unprofessional conduct shall include, but is
9 not limited to, any of the following:

10

11 (f) The commission of any act involving moral turpitude, dishonesty, fraud,
12 deceit, or corruption, whether the act is committed in the course of relations as a
13 licensee or otherwise, and whether the act is a felony or misdemeanor or not.

14

15 (j) The violation of any of the statutes of this state, or any other state, or of the
16 United States regulating controlled substances and dangerous drugs.

17

18 (l) The conviction of a crime substantially related to the qualifications,
19 functions, and duties of a licensee under this chapter. The record of conviction of a
20 violation of Chapter 13 (commencing with Section 801) of Title 21 of the United
21 States Code regulating controlled substances or of a violation of the statutes of this
22 state regulating controlled substances or dangerous drugs shall be conclusive
23 evidence of unprofessional conduct. In all other cases, the record of conviction shall
24 be conclusive evidence only of the fact that the conviction occurred. The board may
25 inquire into the circumstances surrounding the commission of the crime, in order to
26 fix the degree of discipline or, in the case of a conviction not involving controlled
27 substances or dangerous drugs, to determine if the conviction is of an offense
28 substantially related to the qualifications, functions, and duties of a licensee under this
chapter. A plea or verdict of guilty or a conviction following a plea of nolo
contendere is deemed to be a conviction within the meaning of this provision. The
board may take action when the time for appeal has elapsed, or the judgment of
conviction has been affirmed on appeal or when an order granting probation is made
suspending the imposition of sentence, irrespective of a subsequent order under
Section 1203.4 of the Penal Code allowing the person to withdraw his or her plea of
guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or
dismissing the accusation, information, or indictment.

.....

(o) Violating or attempting to violate, directly or indirectly, or assisting in or
abetting the violation of or conspiring to violate any provision or term of this chapter
or of the applicable federal and state laws and regulations governing pharmacy,
including regulations established by the board or by any other state or federal
regulatory agency.

.....

10. Section 4022 of the Code states

"Dangerous drug" or "dangerous device" means any drug or device unsafe for self-use in humans or animals, and includes the following:

(a) Any drug that bears the legend: "Caution: federal law prohibits dispensing without prescription," "Rx only," or words of similar import.

(b) Any device that bears the statement: "Caution: federal law restricts this device to sale by or on the order of a _____," "Rx only," or words of similar import, the blank to be filled in with the designation of the practitioner licensed to use or order use of the device.

(c) Any other drug or device that by federal or state law can be lawfully dispensed only on prescription or furnished pursuant to Section 4006.

11. Section 4059 of the Code states, in pertinent part, that a person may not furnish any dangerous drug except upon the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor pursuant to Section 3640.7.

12. Section 4060 of the Code provides, in pertinent part, that no person shall possess any controlled substance, except that furnished to a person upon the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor.

13. United States Code, title 21, section 843 states, in pertinent part:

(a) It shall be unlawful for any person knowingly or intentionally --

....

(3) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

....

REGULATORY PROVISIONS

14. California Code of Regulations, title 16, section 1769, states:

....

(b) When considering the suspension or revocation of a facility or a personal License on the ground that the licensee or the registrant has been convicted of a crime, the board, in evaluating the rehabilitation of such person and his present eligibility for a license will consider the following criteria:

(1) Nature and severity of the act(s) or offense(s).

(2) Total criminal record.

1 (3) The time that has elapsed since commission of the act(s) or offense(s).

2 (4) Whether the licensee has complied with all terms of parole, probation,
3 restitution or any other sanctions lawfully imposed against the licensee.

4 (5) Evidence, if any, of rehabilitation submitted by the licensee.

5 15. California Code of Regulations, title 16, section 1770, states:

6 For the purpose of denial, suspension, or revocation of a personal or facility
7 license pursuant to Division 1.5 (commencing with Section 475) of the Business and
8 Professions Code, a crime or act shall be considered substantially related to the
9 qualifications, functions or duties of a licensee or registrant if to a substantial degree
it evidences present or potential unfitness of a licensee or registrant to perform the
functions authorized by his license or registration in a manner consistent with the
public health, safety, or welfare.

10 COSTS

11 16. Section 125.3 of the Code provides, in pertinent part, that the Board may request the
12 administrative law judge to direct a licentiate found to have committed a violation or violations of
13 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
14 enforcement of the case, with failure of the licentiate to comply subjecting the license to not being
15 renewed or reinstated. If a case settles, recovery of investigation and enforcement costs may be
16 included in a stipulated settlement.

17 DRUG

18 17. Hydrocodone is a Schedule II controlled substance as designated by Health and
19 Safety Code section 11055, subdivision (b)(1)(I), and is a dangerous drug pursuant to Business
20 and Professions Code section 4022.

21 FIRST CAUSE FOR DISCIPLINE

22 **(February 2, 2012 Criminal Convictions for Possession of a Controlled Substance & Burglary)**

23 18. Respondent has subjected his registration to discipline under sections 490 and 4301,
24 subdivision (l) of the Code in that he was convicted of crimes that are substantially related to the
25 qualifications, duties, and functions of a pharmacy technician. The circumstances are as follows:

26 a. On or about February 2, 2012, in a criminal proceeding entitled *People of the*
27 *State of California v. Michael Anthony Gutierrez*, in San Diego County Superior Court, case
28 number CD238397, Respondent was convicted on his plea of guilty to violating Health and

1 Safety Code section 11350, subdivision (a), possession of a controlled substance, to wit,
2 hydrocodone, a misdemeanor; and Penal Code section 459, second degree burglary, a felony.
3 Pursuant to Respondent's plea agreement, the court dismissed an additional count of petty theft
4 (Pen. Code, § 484).

5 b. As a result of the convictions, on or about February 2, 2012, Respondent was
6 granted three years probation to the court, and sentenced to serve four days in jail, with credit for
7 four days. Respondent was further ordered to complete 15 days of community service, pay fees,
8 fines, and restitution, submit to a Fourth Amendment waiver, and to comply with probation terms.

9 c. The facts that led to the convictions are that on or about December 27, 2011, a
10 CVS Pharmacy Loss Prevention Manager contacted the Drug Enforcement Administration's San
11 Diego Field Division's Tactical Diversion Squad (TDS) to report that one of their pharmacy
12 technicians (Respondent) was seen on video surveillance stealing one bottle of hydrocodone
13 10/660 mg from their pharmacy during his scheduled shift on December 21, 2011. The Loss
14 Prevention Manager provided seven photographs depicting Respondent selecting a bottle of
15 hydrocodone off the shelf and concealing it inside his pants. On January 4, 2012, agents from the
16 TDS met with the Loss Prevention Manager to review the video surveillance footage, and
17 arrangements were made to allow the Loss Prevention Manager to obtain a statement from
18 Respondent. In Respondent's written statement, he admitted that for the past year, he had stolen
19 full stock bottles and individual tablets of hydrocodone 10/600 and hydrocodone 5/325 for his
20 personal use. Respondent signed a promissory note in the amount of \$351.47. The TDS agents
21 arrived and placed Respondent under arrest. Respondent discussed his written statement with the
22 TDS agents and confirmed the thefts.

23 **SECOND CAUSE FOR DISCIPLINE**

24 **(Commission of Acts Involving Dishonesty, Fraud, Deceit & Corruption)**

25 19. Respondent has subjected his registration to discipline under section 4301,
26 subdivision (f) of the Code for unprofessional conduct in that on or between December 2010 and
27 December 2011, Respondent stole controlled substances and dangerous drugs from his
28 employer/pharmacy using fraud, deceit, and dishonesty, as described in paragraph 18, above.

1 **THIRD CAUSE FOR DISCIPLINE**

2 **(Violation of California Statutes Regulating Controlled Substances)**

3 20. Respondent is subject to disciplinary action under section 4301, subdivision (j) of the
4 Code for unprofessional conduct in that on or between December 2010 and December 2012,
5 Respondent knowingly violated Business and Professions Code sections 4022, 4059, and 4060, as
6 described in paragraph 18, above.

7 **FOURTH CAUSE FOR DISCIPLINE**

8 **(Violating Federal & State Laws & Regulations Governing Pharmacy)**

9 21. Respondent is subject to disciplinary action under section 4301, subdivision (o) of the
10 Code for unprofessional conduct in that on or between December 2010 and December 2012,
11 Respondent violated Title 21 U.S.C. section 843, subdivision (a)(3), Board of Pharmacy
12 Regulations (California Code of Regulations, Title 16, Section 1700, et seq.), and the California
13 Uniform Controlled Substances Act (Health and Safety Code 11000, et seq.), when he obtained
14 controlled substances using fraud and deceit, as described in paragraph 18, above.

15 **PRAYER**

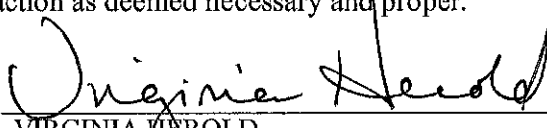
16 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
17 and that following the hearing, the Board of Pharmacy issue a decision:

18 1. Revoking or suspending Pharmacy Technician Registration Number TCH 67717,
19 issued to Mike Anthony Gutierrez Jr.;

20 2. Ordering Mike Anthony Gutierrez Jr. to pay the Board of Pharmacy the reasonable
21 costs of the investigation and enforcement of this case, pursuant to Business and Professions
22 Code section 125.3;

23 3. Taking such other and further action as deemed necessary and proper.

24 DATED: 10/21/13

25 
26 VIRGINIA HEROLD
27 Executive Officer
28 Board of Pharmacy
Department of Consumer Affairs
State of California
Complainant

SD2013705498