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

12 In the Matter of the Statement of Issues Against:

Case No. 3318

13 BRYAN JESSE AVALOS

14 Respondent.

15 **STATEMENT OF ISSUES**

16
17 Complainant alleges:

18 **PARTIES**

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

22 2. On or about September 17, 2007, the Board of Pharmacy (Board) received
23 an application for registration as a pharmacy technician from Bryan Jesse Avalos (Respondent).
24 On or about August 28, 2007, Bryan Jesse Avalos certified under penalty of perjury to the
25 truthfulness of all statements, answers, and representations in the application. The Board denied
26 the application on November 7, 2008.

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1 **JURISDICTION**

2 3. This Statement of Issues is brought before the Board of Pharmacy under
3 the authority of the following laws. All section references are to the Business and Professions
4 Code (Code) unless otherwise indicated.

5 4. Section 4300(c) of the Code states:

6 "The board may refuse a license to any applicant guilty of unprofessional
7 conduct. The board may, in its sole discretion, issue a probationary license to any applicant for a
8 license who is guilty of unprofessional conduct and who has met all other requirements for
9 licensure. The board may issue the license subject to any terms or conditions not contrary to
10 public policy, including, but not limited to, the following:

11 "(1) Medical or psychiatric evaluation.

12 "(2) Continuing medical or psychiatric treatment.

13 "(3) Restriction of type or circumstances of practice.

14 "(4) Continuing participation in a board-approved rehabilitation program.

15 "(5) Abstention from the use of alcohol or drugs.

16 "(6) Random fluid testing for alcohol or drugs.

17 "(7) Compliance with laws and regulations governing the practice of pharmacy.

18 5. Section 477 of the Code states:

19 As used in this division:

20 "(a) "Board" includes "bureau," "commission," "committee," "department,"
21 "division," "examining committee," "program," and "agency."

22 "(b) "License" includes certificate, registration or other means to engage in a
23 business or profession regulated by this code."

24 **STATUTORY PROVISIONS AND REGULATIONS**

25 6. Section 475 of the Code states:

26 "(a) Notwithstanding any other provisions of this code, the provisions of this
27 division shall govern the denial of licenses on the grounds of:

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1 “(1) Knowingly making a false statement of material fact, or knowingly omitting
2 to state a material fact, in an application for a license.

3 “(2) Conviction of a crime.

4 “...

5 7. Section 480 of the Code states, in pertinent part:

6 “(a) A board may deny a license regulated by this code on the grounds that the
7 applicant has one of the following:

8 “(1) Been convicted of a crime. A conviction within the meaning of this section
9 means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action
10 which a board is permitted to take following the establishment of a conviction may be taken
11 when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal,
12 or when an order granting probation is made suspending the imposition of sentence, irrespective
13 of a subsequent order under the provisions of Section 1203.4 of the Penal Code.

14 “(2) Done any act involving dishonesty, fraud, deceit with the intent to
15 substantially benefit himself or another, or substantially injure another; or

16 “(3) Done any act which if done by a licentiate of the business or profession in
17 question, would be grounds for suspension or revocation of license.

18 “The board may deny a license pursuant to this subdivision only if the crime or
19 act is substantially related to the qualifications, functions or duties of the business or profession
20 for which application is made.

21 “....”

22 8. Section 4301(l) of the Code authorizes the Board to take action against
23 any holder of a license who is guilty of unprofessional conduct by being convicted of a crime
24 substantially related to the qualifications, functions and duties of a licensee.

25 9. Section 493 of the Code states:

26 “Notwithstanding any other provision of law, in a proceeding conducted by a
27 board within the department pursuant to law to deny an application for a license or to suspend or
28 revoke a license or otherwise take disciplinary action against a person who holds a license, upon

1 the ground that the applicant or the licensee has been convicted of a crime substantially related
2 to the qualifications, functions, and duties of the licensee in question, the record of conviction of
3 the crime shall be conclusive evidence of the fact that the conviction occurred, but only of that
4 fact, and the board may inquire into the circumstances surrounding the commission of the crime
5 in order to fix the degree of discipline or to determine if the conviction is substantially related to
6 the qualifications, functions, and duties of the licensee in question.

7 "As used in this section, 'license' includes 'certificate,' 'permit,' 'authority,' and
8 'registration.'"

9 10. Title 16, of the California Code of Regulations, section 1770, defines
10 "substantially related" as follows:

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

17 11. Section 482 of the Code states:

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

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

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

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

24 12. Title 16, of the California Code of Regulations, section 1769 sets forth the
25 following factors to consider with regard to evidence of rehabilitation:

26 "(a) When considering the denial of a facility or personal license under Section
27 480 of the Business and Professions Code, the board, in evaluating the rehabilitation of the

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1 applicant and his present eligibility for licensing or registration, will consider the following
2 criteria:

3 “(1) The nature and severity of the act(s) or offense(s) under consideration as
4 grounds for denial.

5 “(2) Evidence of any act(s) committed subsequent to the act(s) or crime(s) under
6 consideration as grounds for denial under Section 480 of the Business and Professions Code.

7 “(3) The time that has elapsed since commission of the act(s) or crime(s) referred
8 to in subdivision (1) or (2).

9 “(4) Whether the applicant has complied with any terms of parole, probation,
10 restitution or any other sanctions lawfully imposed against the applicant.

11 “(5) Evidence, if any, of rehabilitation submitted by the applicant.”

12 **FIRST CAUSE FOR DENIAL OF APPLICATION**

13 **(November 8, 2005 Conviction for Battery on a Police Officer on July 16, 2005)**

14 13. Respondent's application is subject to denial under Code sections
15 480(a)(1) and 480(a)(3) in conjunction with section 4301(l) for conviction of a crime that is
16 substantially related to the qualifications, functions and duties of a registered pharmacy
17 technician in that on or about November 8, 2005, in *People v. Bryan Jesse Avalos*, San Diego
18 County Superior Court-North County Division, Case Number CN198366, Respondent was
19 convicted on his guilty plea of violation of Penal Code section 243(b), battery on a police officer,
20 a misdemeanor.

21 14. The facts leading to the conviction are that on July 16, 2005, an officer
22 from the San Diego Sheriff's Department received a radio call to investigate a report of a person
23 detained at Harrah's Casino who was suspected of being drunk in public. This person was later
24 identified as Respondent. Because Respondent refused to leave the casino and became agitated
25 and argumentative, he was detained. When the officer arrived at the casino, he observed
26 Respondent to have bloodshot eyes, an unsteady gait, difficulty sitting up straight, incoherent
27 speech and the heavy odor of alcohol on his breath. The officer arrested Respondent and seated
28 him in the front passenger seat of the patrol car to bring him to the Vista jail. Respondent could

1 not be seated in the back seat because it was occupied by the service canine's kennel. During
2 transport to the Vista jail, Respondent began calling out expletives and became more agitated.
3 He spat in the officer's face and attempted to do so again but the officer was able to get a spit
4 sock over Respondent's head.

5 15. On November 8, 2005, upon Respondent's guilty plea, he was sentenced
6 to summary probation for 3 years, required to pay a fine in the amount of \$850 and he was
7 required to attend and complete an anger management class.

8 **SECOND CAUSE FOR DENIAL OF APPLICATION**

9 **(March 22, 2007 Conviction for DUI on February 27, 2007)**

10 16. Respondent's application is subject to denial under Code sections
11 480(a)(1) and 480(a)(3) in conjunction with section 4301(l) for conviction of a crime that is
12 substantially related to the qualifications, functions and duties of a registered pharmacy
13 technician in that on or about March 22, 2007, in *People v. Bryan Jesse Avalos*, San Diego
14 County Superior Court-North County Division, Case Number CN225669, Respondent was
15 convicted by his plea of guilty to violation of Penal Code section 23152(b), driving under the
16 influence of alcohol with a blood alcohol content of 0.08% or greater, a misdemeanor.

17 17. The circumstances that led to the conviction are that on February 7, 2007,
18 California Highway Patrol officers in a marked car observed a vehicle weaving from side to side
19 in the number two lane of San Marcos Boulevard, in San Marcos. The vehicle then began to
20 straddle the number one and two lanes several times. The vehicle then came to a stop at a red
21 traffic light on Grand Avenue eight feet past the limit line. It proceeded to make an illegal right
22 turn and then an illegal U-turn, during the course of which the vehicle's right rear tire went over
23 the raised curb. Prior to completing the U-turn, the driver looked over his shoulder in the
24 officers' direction, briefly accelerated hard, then came to a stop partially in the intersection of
25 Grand and San Marcos Boulevard.

26 18. The driver's door of the vehicle immediately opened and Respondent,
27 exited the vehicle, took off his sweatshirt exposing his bare upper torso, raised his hands in the
28 air and began walking towards the patrol car shouting, "I'm done...I'm done...take me in!"

1 Respondent did not comply with the officers' instructions to get back in his vehicle but
2 continued to advance toward the officers. Respondent then lowered his right hand and began to
3 reach into his right front pocket. One of the officers removed his service weapon and pointed it
4 in Respondent's direction and ordered him to get on the ground. Respondent raised his hands
5 again and stated, "I'm done...I'm done." After a brief struggle, one of the officers was able to
6 handcuff Respondent and detain him in the back of the patrol vehicle.

7 19. Shortly thereafter, one of the officers opened the patrol vehicle's rear
8 door. Respondent immediately stated, "I'm sorry. I've been drinking a little too much and lost
9 my head. I'll be cool. My bad...my bad." The officer assisted Respondent out of the vehicle,
10 removed his handcuffs and returned his sweatshirt to him. The officer detected the odor of
11 alcohol on Respondent's breath, noted his bloodshot eyes and slurred speech. Respondent
12 admitted he drank four pints of beer that night. Respondent had difficulty maintaining his
13 balance while standing. He failed the field sobriety tests that were conducted. Respondent
14 agreed to submit to a breath test and was transported to the Vista Detention Facility. The results
15 of the breath tests taken at the Facility were 0.18% and 0.18%. He was charged with violation of
16 Penal Code 23152(a), driving under the influence, and 23152(b), driving under the influence
17 with a blood alcohol content of 0.08% or higher.

18 20. On March 22, 2007, upon Respondent's guilty plea to count 2, driving
19 under the influence with a blood alcohol content of 0.08% or higher, the first count was
20 dismissed. He was sentenced to summary probation for 5 years, required to pay a fine in the
21 amount of \$1,750, complete 5 days of public service work and participate in a First Conviction
22 Program for 3 months.

23 THIRD CAUSE FOR DENIAL OF APPLICATION

24 (Failure to Disclose November 8, 2005 Conviction on License Application)

25 21. Respondent's application is subject to denial under Code section 480(a)(2),
26 for knowingly omitting to state a material fact in an application for a license. The application for
27 registration as a pharmacy technician asks:

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1 "Have you ever been convicted of or pled no contest to a violation of any law of a
2 foreign country, the United States or any state laws or local ordinances? You must include all
3 misdemeanor and felony convictions, regardless of the age of the conviction, ... If "yes", attach
4 an explanation including the type of violation, the date, circumstances, location and the complete
5 penalty received. In addition to this written explanation, please provide the Board of Pharmacy
6 with certified copies of all pertinent court documents or arrest reports relating to this
7 conviction."

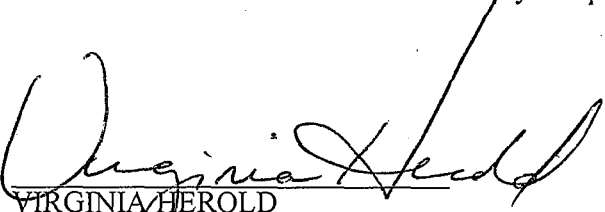
8 22. In Respondent's application dated August 28, 2007, Respondent marked
9 "Yes" to having been convicted of a crime. Respondent attached copies of court documents
10 regarding his March 22, 2007 conviction for driving under the influence with a blood alcohol
11 content of 0.08% or greater. However, Respondent failed to disclose that on November 8, 2005,
12 in *People v. Bryan Jesse Avalos*, San Diego County Superior Court-North County Division, Case
13 Number CN198366, he was convicted on his guilty plea of violation of Penal Code section
14 243(b), battery on a police officer.

15 **PRAYER**

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

- 18 1. Denying the application of Bryan Jesse Avalos for a pharmacy technician
19 license; and,
20 2. Taking such other and further action as deemed necessary and proper.

21
22 DATED: 7/27/09

23 
24 VIRGINIA HEROLD
25 Executive Officer
26 Board of Pharmacy
27 Department of Consumer Affairs
28 State of California
Complainant

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