BEFORE THE
BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: ERIK T. BERGMAN, Pharmacy Technician Registration No. TCH 27598 Respondent.	Case No. 2803 OAH No. L2005030498

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on November 21, 2005, in San Diego, California.

Linda K. Schneider, Deputy Attorney General, represented complainant Patricia F. Harris, the Executive Officer of the California State Board of Pharmacy.

M. Gayle Askren, Attorney at Law, represented respondent Erik T. Bergman, who was present throughout the administrative proceeding.

On December 5, 2005, the matter was submitted.

FACTUAL FINDINGS

Jurisdictional Matters

1. On February 22, 2005, complainant Patricia F. Harris, the Executive Officer of the California State Board of Pharmacy (the Board), Department of Consumer Affairs, State of California, signed the Accusation in her official capacity.

The Accusation alleged that on two occasions between January and March 15, 2004, respondent Erik T. Bergman (Bergman or respondent), a registered pharmacy technician, stole a total of 93 10-mg. Valium/Diazepam tablets from a Sav-On Drugs pharmacy and possessed and self-administered some of that medication without a valid prescription.

The Accusation and other required jurisdictional documents were served on Bergman, who timely filed a notice of defense.

On November 21, 2005, the record in the administrative hearing was opened. Jurisdictional documents were presented, including a written stipulation in which Bergman admitted the truth of all allegations contained in the Accusation. Sworn testimony and documentary evidence was received and closing arguments were given. The record remained open through December 5, 2005, to permit complainant the opportunity to provide proof of costs and to permit respondent an opportunity to respond. On December 5, 2005, the record was closed and the matter was submitted.

License History

2. Pharmacy technicians are issued a registration based on minimal education and/or training requirements. No examination is required for the issuance of a pharmacy technician registration. Pharmacy technicians are not independent practitioners and are required to work under the supervision of a registered pharmacist.

3. On November 3, 1998, the Board issued Original Pharmacy Technician Registration No. TCH 27598 to Erik T. Bergman, authorizing him to act as a pharmacy technician in California. Bergman's pharmacy technician's registration is renewed through July 31, 2006, unless suspended or revoked.

There is no history of any administrative discipline against Bergman's pharmacy technician's registration.

Bergman's Background and Experience

4. Bergman is 29 years old. He is single and currently lives in Clairemont Mesa, San Diego County, California. He is employed by Sears, Roebuck & Company in University Town Center, where he sells water heaters and water softeners.

Bergman graduated from San Dieguito High School in 1994. He enjoyed fencing, soccer, art, music and photography while he was in high school. After graduating from high school, Bergman attended San Diego Mesa College, taking general education courses. He developed an interest in cooking.

5. Bergman began working as a retail clerk at the Pacific Beach outlet of Sav-On Drugs in 1996. He was promoted from general sales to the pharmacy where he worked as a clerk and cashier. His responsibilities in the pharmacy included delivering prescriptions to customers and obtaining their signatures, filing prescriptions, contacting physicians' offices to verify prescription refills and working as a cashier.

In 1998, Bergman became a registered pharmacy technician. He continued his clerical duties in the pharmacy area and took on the added responsibility of filling prescriptions. Bergman's salary was increased.

6. Bergman moved from San Diego to Portland, Oregon, in January 2002 for a change of scenery and to spend time with family living in the area. He worked for a Kaiser pharmacy in the Portland area as a registered pharmacy technician. Berman came back to the San Diego area in June 2002.

7. Bergman returned to work at the Pacific Beach Sav-On Drugs outlet after moving back to San Diego. He continued working there until March 15, 2004.

8. Bergman testified one of the registered pharmacists working in the Pacific Beach pharmacy was quite volatile. He extremely was abusive to Bergman and other Sav-On employees. From time to time, when he was upset, the pharmacist threw and broke objects in the pharmacy area. Bergman said the pharmacist's behavior put him under a great deal of stress. Bergman did not report the pharmacist's conduct to his supervisors or others because the pharmacist's reputation was well known. Bergman did not seek any medical attention for what he described as stress and an inability to sleep at nights because of the stress.

Bergman's Theft and Self-Administration of Valium

9. Sometime in January or February 2004, Bergman stole 50 10-mg. tablets of Valium[1] from the pharmacy. Bergman testified he had taken Valium only once before in his life, when he was 21 years old, as an experiment, and it had made him feel relaxed. Bergman said he took the Valium tablets in January or February 2004 with the hope the Valium would help him to relax and sleep. Bergman did not have a prescription for Valium and he did not contact a physician to discuss his stress and insomnia.

After taking the 50 tablets, Bergman self-administered one or two tablets on a nightly basis. A month or so later, Bergman stole 43 more 10-mg. tablets of Valium. Bergman said he had several tablets left from the initial theft, and he took the second batch to replenish his dwindling supply. At the time of the second theft, Bergman was somewhat concerned that he might have become dependent upon Valium.

10. On March 15, 2004, Bergman was stopped by the pharmacist on duty and was asked why he had a handful of tablets. Bergman honestly told the pharmacist what he had done. The pharmacist immediately contacted a loss prevention manager who interviewed Bergman. Bergman again honestly told the loss prevention manager the truth about the two

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[1] Valium, a brand name for Diazepam, is a dangerous drug under Business and Professions Code section 4022 and a Schedule IV controlled substance under Health and Safety Code section 11057, subdivision (d)(9).

thefts. The loss prevention manager was given the 43 tablets that had been stolen earlier that day. Berman's employment was immediately terminated, but the police were not contacted.

Bergman testified he went home after being fired and immediately flushed the remaining tablets in his possession down the toilet.

11. Bergman said that he may have experienced an adverse physical reaction after he abruptly stopped taking Valium. In addition to being embarrassed and ashamed, he had an upset stomach, headaches, slight tremors and a loss of appetite. Bergman did not contact a physician to determine if his symptoms were the result of a drug dependency.

Evidence in Explanation, Extenuation, Mitigation and Rehabilitation

12. Bergman presented as a hardworking, respectful and contrite young man. Bergman gave every appearance of being absolutely candid during his testimony. However, Bergman's testimony was not corroborated by any documentary evidence, nor was it corroborated by the testimony of any other witness.

13. Bergman said he obtained work as a cashier and a clerk with Sears, Roebuck & Company a couple weeks after his employment with Sav-On was terminated. He managed to turn what was initially offered as seasonal employment into full-time employment.

14. Shortly after his employment with Sav-On Drugs was terminated, Bergman saw Dr. Tracey Hanson, a psychiatrist, for counseling. Some of the counseling was related to his relationship with his then fiancée, but most of the counseling was related to his theft and use of Valium. Bergman saw Dr. Hanson on a monthly basis through December 2004, when his insurance coverage for counseling ran out. According to Bergman, Dr. Hanson taught him several methods to better manage his stress. She did not prescribe medications.

Dr. Hanson referred Bergman to Dr. Michael Monroe, another psychiatrist, whose therapy was affordable. Through Dr. Monroe, Bergman began participating in a 12-step program. Bergman sees Dr. Monroe on a monthly basis. Bergman testified he attends 12-step meetings on a weekly basis.

15. Although Bergman attends 12-step meetings and said he had completed the first three of the 12 recovery steps, he could not recall what was involved in the second or third steps. His sponsor, Kenny, recently left town and Bergman was without a sponsor at the time of the hearing. Bergman testified he found the 12-step meetings helpful to his sobriety because they provided him with a chance to meet and speak honestly with others similarly situated, but he also admitted that he continued to drink a couple of beers a week (a practice that was not endorsed by his 12-step program) and he conceded he did not disclose this practice to others attending the 12-step meetings. Bergman claimed a sobriety date of March 15, 2004, which he said was the first day he did not take Valium after having taken it continuously for 30-45 days.

16. Bergman broke up with his fiancée in May 2005. According to Bergman, "It was pretty hard to take, but I dealt with it and moved on." Bergman said he did not drink alcohol or use any drugs as a result of the stress associated with that breakup.

17. Bergman said he consumes one or two beers a week, depending on how much he barbecues for friends. He does not consume wine or distilled spirits.

18. Bergman has never had any problem with chemical dependency – except for the brief period from January through March 2004 – and his lack of any criminal history is consistent with his not having a substance abuse problem. Bergman has never been arrested or convicted of any crime.

19. Bergman said had no immediate plan to return to work as a registered pharmacy technician. He would like to move to Portland, get a job, and attend a culinary school there. After graduating from culinary school, Bergman would like to work as a chef and he ultimately hopes to open his own restaurant. Bergman expressed a great interest in having a family of his own.

20. Bergman said he was disappointed and ashamed of himself. His expression of remorse was sincere. Bergman brought the matter to a hearing in the hope that the circumstances surrounding his theft and his brief use of Valium could be explained honestly and that his sincere efforts to rehabilitate himself would be recognized.

Disciplinary Guidelines

21. The Board enacted comprehensive regulatory guidelines[2] which are to be followed in all disciplinary actions. The Board recognizes that individual cases may necessitate a departure from these guidelines; in such cases, the mitigating circumstances should be detailed in any proposed decision, especially where a Category III violation is involved.

With regard to a pharmacy technician, the guidelines state:

"The board files cases against pharmacy technicians where the violation(s) involve significant misconduct on the part of the licensee. The board believes that revocation is the appropriate penalty when grounds for discipline are found to exist. Grounds for discipline include, but are not limited to the following violation(s) of law(s) involving:

- Possession of dangerous drugs and/or controlled substances
- Use of dangerous drugs and/or controlled substances

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2 California Code of Regulations, title 16, section 1760.

- Possession for sale of dangerous drugs and/or controlled substances
- Personal misuse of drugs or alcohol

If revocation is not imposed, the board recommends a minimum of a Category III level of discipline be imposed on the pharmacy technician. This would include suspension and probation.

In addition, a pharmacy technician would be required to obtain certification from the Pharmacy Technician Certification Board (PTCB) prior to resuming work as a pharmacy technician. The board believes that certification prior to resuming work is always warranted in cases where a pharmacy technician registration is disciplined but not revoked."

22. Under the Board's guidelines, the minimum discipline which should be imposed in this matter is an order of revocation, stayed, with 90 days actual suspension, and five years probation with appropriate terms and conditions; under the Board's guidelines, the maximum discipline which should be imposed in this matter is an outright revocation. Under the Board's guidelines, the circumstances surrounding the misconduct and mitigating factors must be considered in determining the most appropriate measure of discipline.

The Appropriate Measure of Discipline

23. In this matter, respondent's unprofessional conduct involved a very slight risk of harm to the public, a risk that would have increased had he not been caught and had he continued to use Valium; respondent has no prior disciplinary record; the unprofessional conduct involved two thefts of Valium and a one to two month period in which respondent self-administered relatively small amounts of Valium without a prescription; no criminal action was filed and respondent has no criminal record.

Respondent's testimony concerning his rehabilitation and recovery after March 15, 2004, was very impressive. Respondent has remained gainfully employed; he sought and received appropriate counseling concerning his substance abuse; he attends 12-step meetings; and, respondent said he has not possessed or used drugs since March 15, 2004. Respondent's testimony concerning his rehabilitation and recovery was credible, but it was not supported by any verification as recommended in the disciplinary guidelines.

24. The primary purpose of this disciplinary proceeding is to protect the public.

While Bergman would likely be eligible for a grant of probation if he had an interest in returning to work as a pharmacy technician, that is not his current circumstance. Placing Bergman on probation would burden Bergman, who would be required to obtain certification from the PTCB and who would be required to resume work as a pharmacy technician while on probation for five years. Placing Bergman on probation would burden the pharmacist required to supervise Bergman. Finally, placing Bergman on probation would impose an undue burden on the Board, which would be required to monitor Bergman throughout the

period of probation. Under these circumstances, there is no compelling reason not to revoke Bergman's registration as a pharmacy technician.

Should Bergman become interested in resuming work as a registered pharmacy technician, he may seek reinstatement of his registration in accordance with the provisions of Government Code section 11522. If he does so, this Proposed Decision will help guide the Board in considering his petition for reinstatement. Bergman should make certain written verification of his efforts to rehabilitate himself accompany his petition.

Costs of Investigation and Enforcement

25. A certification of costs signed by the Board's executive officer and a declaration of the deputy attorney general who prosecuted this matter were submitted to support a claim of costs in the total amount of approximately $4,900.

Counsel for respondent objected to the claim of costs on the basis (1) little or no investigation was required in this matter since respondent admitted everything and (2) the substitution of one deputy attorney general for another was for the convenience of the agency and resulted in a duplication of costs which respondent should not be required to bear.

Respondent's arguments were well taken. The matter took about a half day to try to conclusion. The hearing did not involve complicated legal or factual matters. As usual, the deputy attorney general who prosecuted the matter was well prepared and professional, as was respondent's counsel.

Under all the circumstances, it would not be unjust to award the agency $2,500 for its reasonable costs of investigation and enforcement.

LEGAL CONCLUSIONS

Registration as a Pharmacy Technician

1. Business and Professions code section 4038 defines "pharmacy technician" to mean an individual who assists a pharmacist in a pharmacy in the performance of his or her pharmacy related duties as specified in section 4115.

2. Business and Professions Code section 4115 sets forth various tasks which a pharmacy technician may perform. For example, subdivision (a) provides: "a pharmacy technician may perform packaging, manipulative, repetitive, or other nondiscretionary tasks, only while assisting, and while under the direct supervision and control of, a pharmacist." The duties a pharmacy technician may perform are further subject to regulation.[3]

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[3] California Code of Regulations, title 16, section 1793.2 provides:

3. Business and Professions Code section 4115, subdivision (e) provides:

"No person shall act as a pharmacy technician without first being registered with the board as a pharmacy technician as set forth in Section 4202."

4. When read properly, these rules and regulations do not allow a pharmacy technician to perform any discretionary act or any act requiring the exercise of professional judgment by a registered pharmacist. *Californians for Safe Prescriptions v. California State Board of Pharmacy* (1993) 19 Cal.App.4th 1136.

5. Business and Professions Code section 4202 provides in part:

"(d) The board may suspend or revoke a registration issued pursuant to this section on any ground specified in Section 4301."

Pertinent Disciplinary Statutes and Regulations

6. Business and Professions Code section 4301 provides in part:

"The board shall take action against any holder of a license who is guilty of unprofessional conduct . . . Unprofessional conduct shall include, but is not limited to[4], any of the following:

. . .

(j) The violation of any statues of this state . . . regulating controlled substances and dangerous drugs.

. . .

"Nondiscretionary tasks" as used in Business and Professions Code section 4115, include:

(a) removing the drug or drugs from stock;
(b) counting, pouring, or mixing pharmaceuticals;
(c) placing the product into a container;
(d) affixing the label or labels to the container;
(e) packaging and repackaging."

4 The phrase "including but not limited to" as set forth in Business and Professions Code section 4301 (previously Bus. & Prof. Code § 4305.5) was considered in *Smith v. State Board of Pharmacy* (1995) 37 Cal.App.4th 229, 246, where the appellate court reasoned:

"The gross negligence designation is simply one of several items that are specified as included for purposes of determining what is unprofessional conduct. The list of items expressly 'is not limited to' those specified."

(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 . . ."

7. Business and Professions Code section 4060 provides in part:

"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 . . . or furnished pursuant to a drug order issued by a certified nurse-midwife . . . a nurse practitioner . . . a physician assistant . . . a naturopathic doctor . . . or a pharmacist . . ."

8. Health and Safety Code section 11170 provides:

"No person shall prescribe, administer, or furnish a controlled substance for himself."

9. Business and Professions Code section 4059 provides in part:

"(a) A person may not furnish any dangerous drug, except upon the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor . . ."

Cause Exists to Impose Administrative Discipline

10. Cause exists under Business and Professions Code section 4301 to revoke Bergman's registration as a pharmacy technician. On two occasions between January 2004 and March 16, 2004, Bergman, a registered pharmacy technician, stole a total of 93 10-mg. Valium tablets from a Sav-On Drugs pharmacy and possessed and self-administered some of that medication without a valid prescription. That conduct constituted general unprofessional conduct under Business and Professions Code section 4301 and constituted unprofessional conduct under Business and Professions Code section 4301, subdivisions (j) and (o). Under the circumstances described in the Factual Findings, it is reluctantly concluded that an outright revocation is the most appropriate measure of discipline even though Bergman was remorseful and made a compelling showing in rehabilitation.

This conclusion is based on Factual Findings 1-24 and on Legal Conclusions 1-9.

Recovery of Costs of Investigation and Prosecution

11. Business and Professions Code section 125.3 provides in pertinent part:

"(a) Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding . . . the board may request the administrative law judge to direct a licentiate found to have committed a violation . . . of the licensing act to pay a

sum not to exceed the reasonable costs of the investigation and enforcement of the case . . .

. . .

(d) The administrative law judge shall make a proposed finding of the amount of reasonable costs of investigation and prosecution of the case when requested pursuant to subdivision (a) . . ."

12. Cause exists under Business and Professions Code section 125.3 to direct Bergman reimburse the Board its reasonable costs of investigation and enforcement in the amount of $2,500.

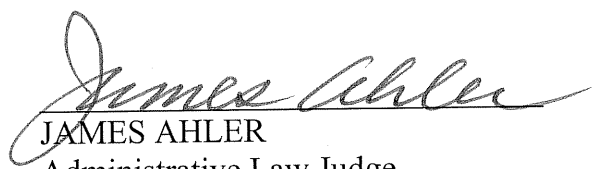
This conclusion is based on Factual Findings 25 and on Legal Conclusions 11 and 12.

ORDERS

Pharmacy Technician Registration No. TCH 27598 issued to Erik T. Bergman is revoked.

Erik T. Bergman shall pay $2,500 to the California State Board of Pharmacy.

DATED: 12/7/05.



JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings

BEFORE THE
BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: ERIK T. BERGMAN Pharmacist Technician Registration No. TCH 27598 Respondent.	Case No. 2803 OAH No. L2005030498

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Pharmacy as its Decision in the above-entitled matter.

This decision shall become effective on February 17, 2006.

It is so ORDERED on January 18, 2006.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By

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BEFORE THE
BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: ERIK T. BERGMAN 2121 Thomas Ave. 6 San Diego, CA 92109 Pharmacy Technician License No. TCH 27598 Respondent.	Case No. 2803 **A C C U S A T I O N**

Complainant alleges:

PARTIES

1. Patricia F. Harris ("Complainant") brings this Accusation solely in her official capacity as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.

2. On or about November 3, 1998, the Board of Pharmacy issued Pharmacy Technician License Number TCH 27598 to Erik T. Bergman ("respondent"). The license was in full force and effect at all times relevant to the charges brought herein and will expire on July 31, 2006, unless renewed.

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JURISDICTION

3. This Accusation is brought before the Board of Pharmacy (Board), under the authority of the following sections of the Business and Professions Code (Code).

4. Section 4301 of the Code states, in pertinent part:

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

. . .

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

. . .

"(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 [Chapter 9 (commencing with Section 4000) of the Business and Professions Code] or of the applicable federal and state laws and regulations governing pharmacy, including regulations established by the Board."

5. Section 125.3 of the Code states, in pertinent part, that the Board may request the administrative law judge to direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

6. Section 4060 of the Code states, in part, that: "No person shall possess any controlled substance, except that furnished to a person upon the prescription of a physician, dentist, podiatrist, optometrist, or veterinarian, or furnished pursuant to a drug order issued by a certified nurse-midwife . . . a nurse practitioner . . . or a physician assistant . . . ."

7. Section 4059 of the Code states, in pertinent part, that no person shall furnish any dangerous drug, except upon the prescription of a physician, dentist, podiatrist, optometrist, or veterinarian.

8. Section 11170 of the Health and Safety Code states that "No person shall prescribe, administer, or furnish a controlled substance for himself."

9. 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.

DRUGS

10. Valium, a brand name for Diazepam, is a dangerous drug pursuant to Business and Professions Code section 4022 and a Schedule IV controlled substance pursuant to Health and Safety Code section 11057(d)(9).

FIRST CAUSE FOR DISCIPLINE

(Possession of Controlled Substance Without Prescription)

11. Respondent has subjected his license to discipline pursuant to Code sections 4301(o) and 4060 in that he possessed a controlled substance (Valium/Diazepam) without a valid prescription. The circumstances of the violation are as follows:

12. In or about January or February, 2004, while working as a pharmacy technician at Sav On Drugs Number 9106, respondent stole 50 Valium/Diazepam tablets from the pharmacy supplies for his personal use. Respondent did not have a valid prescription for Valium/Diazepam.

13. On or about March 15, 2004, while working as a pharmacy technician at Sav On Drugs Number 9106, respondent took 43 Valium/Diazepam 10 mg. tablets from the pharmacy

supplies, intending to steal them for his personal use. Respondent was caught with the tablets in his hand. He admitted that he possessed and self-administered Valium/Diazepam without a valid prescription.

SECOND CAUSE FOR DISCIPLINE

(Self-Administration of a Controlled Substance)

14. Respondent's conduct, as more particularly alleged in paragraphs 11 through 13 above, violated Code section 4301(j) in that he self-administered Valium/Diazepam without a valid prescription in violation of Health and Safety Code section 11170.

THIRD CAUSE FOR DISCIPLINE

(Furnishing Dangerous Drugs Without Prescription)

15. Respondent's conduct, as more particularly alleged in paragraphs 11 through 13 above, violated Code section 4301(o) in that he furnished dangerous drugs to himself without a valid prescription in violation of Code section 4059.

FOURTH CAUSE FOR DISCIPLINE

(General Unprofessional Conduct)

16. Respondent's conduct, as more particularly alleged in paragraphs 11through 13 above, constituted unprofessional conduct in violation of Code section 4301 in that respondent stole and attempted to steal controlled substances from his employer for the purpose of self-administration.

PRAYER

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

1. Revoking, suspending or taking other disciplinary action against Pharmacy Technician License Number TCH 27598 issued to respondent;

2. Ordering respondent to pay the Board the reasonable costs of the investigation and enforcement of this case, pursuant to Code section 125.3;

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

DATED: 2/22/05.

P. F. Harris

PATRICIA F. HARRIS
Executive Officer
Board of Pharmacy
Department of Consumer Affairs
State of California
Complainant