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

In the Matter of the Accusation Against:	Case No. 2969
RAUL A. GUTIERREZ, aka RAUL ARTURO SALCIDO, aka, RAUL GUTIERREZ SALCIDO 1054 Mirada Drive Perris, CA 92571	OAH No. L2006090465
Pharmacy Technician Registration No. TCH 14159	
Respondent.	

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on February 23, 2007, in San Diego, California.

Diane De Kervor, Deputy Attorney General, represented complainant Virginia Herold, the Interim Executive Officer, Board of Pharmacy, State of California.

Fredrick M. Ray, Attorney at Law, represented respondent Raul A. Gutierrez, who was present throughout the administrative proceeding.

On February 23, 2007, the matter was submitted.

FACTUAL FINDINGS

Jurisdictional Matters

1. On August 28, 2006, complainant Virginia Herold, the Interim Executive Officer, Board of Pharmacy (the board), Department of Consumer Affairs, State of California, signed the accusation in her official capacity.

The accusation alleged that respondent Raul A. Gutierrez (respondent or Gutierrez) a registered pharmacy technician, was convicted of driving under the influence of alcohol and possession of cocaine on June 14, 2005, that he was guilty of unprofessional conduct because he had suffered multiple convictions related to his misuse of alcohol, and, in aggravation, he had previously been placed on probation in August 2000 for several criminal convictions and for the failure to disclose those convictions in his application for registration.

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

On February 23, 2007, the record in the administrative proceeding was opened. Jurisdictional documents were presented, sworn testimony and documentary evidence was received, closing arguments were given, the record was closed, and the matter was submitted.

The Pharmacy Technician Registration

2. An applicant for a pharmacy technician registration must establish he or she either (1) holds an associate of arts degree in pharmacy technology, or (2) has completed a specified course of training, or (3) has graduated from an approved or recognized school of pharmacy, or (4) has been certified by the Pharmacy Technician Certification Board (PTCB). No examination is required to obtain a pharmacy technician registration, although an examination is required to obtain certification from the PTCB.

Duties of a Pharmacy Technician

3. Under the direct supervision and control of a pharmacist, a pharmacy technician performs packaging, manipulative, repetitive, and other non-discretionary tasks related to the processing of prescriptions in a licensed pharmacy. To work as a pharmacy technician in California, an individual must possess and maintain a current registration.

Respondent's License History

4. On October 14, 1994, the board issued Pharmacy Technician Registration No. TCH 14159 to Raul A. Gutierrez. That registration expires on June 30, 2008, unless renewed, suspended, or revoked.

5. Respondent's registration was placed on two years probation on July 18, 2000, when the board adopted the proposed decision of Administrative Law Judge Roy W. Hewitt (ALJ Hewitt). No appeal was taken from the decision, which became effective on August 16, 2000. The board's decision in that matter and the related factual findings are binding and conclusive in this matter under the doctrines of res judicata and collateral estoppel.[1]

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[1] The doctrine of res judicata precludes parties from relitigating an issue that has been finally determined by a court of competent jurisdiction. Any issue necessarily decided in such litigation is conclusively determined as to

6. In his proposed decision, ALJ Hewitt found:

"CONDUCT WARRANTING DISCIPLINE

. . .

3. Respondent was convicted of the following crimes, which are substantially related to the qualifications, functions, and duties of a pharmacist technician:

A. On June 4, 1991, in the Los Angeles Municipal Court, Southeast-South Judicial District, County of Los Angeles, respondent was convicted on a plea of guilty of one count of violating Penal Code section 496 (1) (Receiving Stolen Property), a misdemeanor. The facts leading to respondent's conviction are as follows: On May 4, 1991, respondent willfully, unlawfully, and knowingly took possession of a stolen motor vehicle.

B. On May 14, 1992, in the Los Angeles Municipal Court, Southeast-South Judicial District, County of Los Angeles, respondent was convicted on a plea of guilty of one count of violating Vehicle Code section 14601.1(a) (Driving on a Suspended License), a misdemeanor. The facts leading to respondent's conviction are as follows: On April 17, 1992, respondent willfully and unlawfully drove a motor vehicle upon a highway at a time when his driving privilege was suspended and revoked for a reason other than one listed in Vehicle Code sections 14601 and 14601.2, to wit: excessive blood alcohol, and when he had knowledge of such suspension and revocation.

C. On May 27, 1992, in the Los Angeles Municipal Court, respondent was convicted on a plea of guilty of one count of violating Penal Code section 647(f) (Under the Influence in Public: Obstructing Use of Street, Sidewalk, or Other Public Way), a misdemeanor. The facts leading to respondent's conviction are as follows: On January 2, 1992, respondent was found asleep behind the wheel of his car. The engine was running and it was later determined that respondent was under the influence of alcohol.

D. On February 21, 1995, in the Whittier Municipal Court, County of Los Angeles, respondent was convicted on a plea of nolo contendere of one count of violating Vehicle Code section 23103 (Reckless Driving/No Injury), a misdemeanor. The facts leading to respondent's conviction are as follows:

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the parties or their privies if it is involved in a subsequent action. Three elements must be met: (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question; (2) was there a final judgment on the merits; (3) was the party against whom the plea is asserted a party to or in privity with a party to the prior adjudication? A sister doctrine of res judicata is collateral estoppel, under which a prior judgment between the same parties operates as an estoppel as to those issues actually and necessarily decided in the prior action. (*Estate of McAdams* (2002) 104 Cal.App.4th 1221, 1226.)

On January 20, 1995, respondent was caught driving his car while under the influence of alcohol.

E. On August 12, 1996, in the Rio Hondo Municipal Court, County of Los Angeles, respondent was convicted on a plea of nolo contendere of one count of violating Vehicle Code section 23152 (b) (Driving With a Blood Alcohol Level at 0.08% or Higher), a misdemeanor. The facts leading to respondent's conviction are as follows: On March 17, 1996, respondent drove his car while having a blood alcohol level in excess of 0.08%.

4. On April 18, 1994, respondent filed his application with the board for registration as a pharmacy technician. In his application, respondent checked "no" to the question "have you ever been convicted of or pled no contest to a violation of any law . . . ." By checking "no" to this question, respondent committed an act of dishonesty, deceit and fraud, acts involving moral turpitude directly related to the qualifications, functions and duties of a licensee.

CONDUCT NOT WARRANTING DISCIPLINE

5. On January 24, 1997, respondent failed to appear for a Pre-Trial Hearing in the Los Angeles Municipal Court. A bench warrant in the amount of $15,000.00 was issued. As soon as respondent found out about the bench warrant, he immediately appeared in court and the warrant was recalled. Such conduct does not evidence moral turpitude, dishonesty, deceit, nor an act substantially related to the qualifications, functions, or duties of a licensee.

6. On April 4, 1997, in the Los Angeles Municipal Court, respondent was convicted on a plea of guilty of one count of violating Penal Code section 166(A) (Contempt of Court), a misdemeanor. The facts leading to respondent's conviction are as follows: From July 1, 1996 through November 1, 1996, respondent failed to comply with the court's order to pay child support arrearages. As of the date of the instant hearing, respondent is current on his child support payments, accordingly, his past failures to pay child support does not evidence moral turpitude, dishonesty, deceit, nor acts substantially related to the qualifications, functions, or duties of a licensee.

EVIDENCE IN MITIGATION AND OF REHABILITATION

7. Respondent was born on June 26, 1967. He is presently thirty- two years old, married and the father of two children, ages 2 and 11. On August 31, 1986, when respondent was 19 years old, his mother and older brother were killed in the "Cerritos" airplane crash. After the death of his mother and brother, respondent's father returned to Mexico leaving respondent and his two older sisters in Southern California where they raised respondent's 12 year old sister. Respondent's young age in combination with the trauma of losing his mother, older brother and being left by his father led respondent to begin abusing alcohol. Respondent's alcohol abuse led to

a series of alcohol-related arrests and convictions. A review of respondent's criminal convictions reveals that with the exception of the 1991 conviction for receiving stolen property, the other convictions related to the qualifications, functions and duties of a licensee all involve alcohol/alcohol abuse (Finding 3.) On May 21, 1998, respondent completed an 18-month alcohol treatment program and is currently clean and sober.

8. Respondent complied with the terms and conditions of his criminal probations and is not currently on probation for any convictions, which were substantially related to his qualifications, functions, or duties as a licensee.

9. Respondent's most recent conviction for a crime substantially related to the qualifications, functions and duties of a licensee occurred on August 12, 1996, approximately four years ago. Since then, respondent has completed an alcohol treatment program and, as long as he remains clean and sober there is no evidence he poses an actual or potential risk of harm to the public or any consumer.

10. Respondent did not benefit from any of his crimes, including the incident, which resulted in his 1991 conviction for receiving stolen property. That conviction resulted from respondent's conduct in buying a stolen car from a friend.[2] Respondent did not know the car was stolen, however, on advice of counsel, respondent entered a guilty plea to receiving stolen property to avoid the cost and uncertainty of going to trial on the charges.

11. None of respondent's criminal conduct was directly related to quality of care or services provided while acting as a licensee, therefore, his past conduct does not evidence incompetence.

12. Respondent's failure to disclose his 1991 and 1992 misdemeanor convictions on his 1994 application for licensure occurred during the period in respondent's life when he was abusing alcohol. It occurred approximately six years ago and respondent now realizes his failure to disclose was a mistake and he apologizes to the board for his lack of candor.

13. For the past three years respondent has been continually employed by Neighboring Pharmacy as a Pharmacy Technician, where he is considered a valued employee.

14. On February 26, 1998, respondent completed basic training in "Medic First Aid," including CPR.

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[2] At the hearing, Gutierrez testified he did not purchase a stolen car, but instead that he had unknowingly purchased stolen car seats. Gutierrez testified that he entered a plea to the receiving stolen property offense because he did not know any better at the time and simply wanted to get the matter over with. As previously indicated, ALJ Hewitt's factual finding was not appealed and is now final. In addition, Gutierrez was precluded from impeaching his prior conviction by means of an inquiry into the circumstances surrounding the offense in this administrative proceeding. (*Arneson v. Fox* (1980) 28 Cal.3d 440, 449.)

15. On June 18, 1998, respondent completed his accreditation as "an Order Entry Technician" from Vitalink Pharmacy Services, Inc."

7. ALJ Hewitt found cause to impose discipline against Gutierrez's registration and issued an order revoking Gutierrez's registration; however, the order of revocation was stayed and Gutierrez was placed on two years probation on condition that his registration be suspended until he became certified by the PTCB and provided satisfactory proof of such certification, that he obey all laws, that he cooperate while on probation, that he give notice of the board's decision to present and prospective employers, and that he reimburse the board its costs of investigation and prosecution in the amount of amount of $4,947.75.

Gutierrez successfully completed probation.

The June 14, 2005 Convictions

8. On June 14, 2005, Gutierrez was convicted on his plea of guilty of violating Health and Safety Code section 11350, subdivision (a) (Possession of a Controlled Substance – Cocaine), a felony, and Vehicle Code section 12152, subdivision (a) (Driving Under the Influence of Alcohol), a misdemeanor, in the Superior Court of California, County of Orange, North Justice Center, in Case No. 05NF1658 entitled *People of the State of California v. Raul Arturo Gutierrez, aka Raul Arturo Salcido, aka Raul Guteirrez Salcido.*

On the possession of a controlled substance conviction, entry of judgment was deferred and Gutierrez was enrolled in a drug program in accordance with Penal Code section 1000. He was ordered to pay a $150 diversion program administrative fee, the payment of which was stayed.

On the driving under the influence conviction, imposition of sentence was suspended and Gutierrez was placed on three years informal probation. Terms and conditions of probation required that he not drive a motor vehicle with a measurable amount of alcohol or drugs in his blood, not drive without a valid driver's license, not use unauthorized substances, submit to chemical testing on request, pay fines and fees of approximately $600, attend and complete a first offender drinking driver program, and obey all laws. On July 27, 2005, the conditions of probation were modified to require that Gutierrez attend and complete an 18-month multiple offender alcohol program, with that requirement to run concurrent with sentencing related to another DUI conviction.

9. On December 27, 2006, the court determined Gutierrez successfully completed the drug diversion program. His plea of guilty to a violation of Health and Safety Code section 11350, subdivision (a) (Possession of a Controlled Substance – Cocaine) was ordered withdrawn, the judgment was vacated, and charges were dismissed.

10. On January 27, 2007, Gutierrez completed the 18-month drinking driver program. According to his counselor, Gutierrez "made excellent lifestyle changes." Gutierrez remains on informal probation for the June 14, 2005, driving under the influence conviction. Probation is set to expire on June 13, 2008.

Circumstances of the Offense

11. Gutierrez developed a serious alcohol problem which resulted in most of the convictions referred to in Factual Finding 6. He stopped consuming alcoholic beverages in 1996, except on rare social occasions, but he relapsed and began drinking heavily again in early 2005. In addition, he began using cocaine. While his use of cocaine was sporadic, his consumption of alcoholic beverages to excess occurred at least every weekend. Gutierrez attributed his 2005 relapse to various factors including his father's health, child custody issues, stress, and depression.

On the evening of April 13, 2005, Gutierrez went to the Shamrock, a bar and grill in Huntington Park. According to Gutierrez, he had four or five mixed drinks with friends, and then decided to drive back to his home in Perris, about 70 miles away. Before leaving, he told an acquaintance that he was depressed. The acquaintance handed Gutierrez a bindle of cocaine and told him to take it because it would make him feel better. Gutierrez put the cocaine in his wallet and left to drive home. He admitted his decision to drive home was "reckless behavior" under the circumstances.

Gutierrez was traveling eastbound in his 1996 Chevrolet Tahoe on Highway 91 in the vicinity of Corona the early morning of April 14, 2005, when he decided to pull over to the side of the highway to take a nap. He parked his Tahoe on the side of the highway and fell asleep. At approximately 2:50 a.m., a CHP officer stopped, approached Gutierrez's vehicle, and attempted to awaken Gutierrez by knocking on the window and shining his flashlight in Gutierrez's face. Gutierrez did not awaken. The CHP officer opened the driver's door and awakened Gutierrez by poking him in the arm and shaking him. Because there was an odor of alcohol about Gutierrez, because he exhibited other signs of being under the influence of alcohol, and because he admitted he had been driving before parking and going to sleep, a field sobriety test was administered. Gutierrez failed the field sobriety test, was arrested, and was transported to the Orange County Jail where he was booked. During the booking process, the bindle of cocaine Gutierrez's wallet was discovered.

Gutierrez testified his blood alcohol level was "about twice the limit."

Evidence in Explanation, Extenuation, Mitigation and Rehabilitation

12. Gutierrez was born in Chihuahua, Mexico, on June 26, 1967. He came to the United States with his family in 1980. His family settled in Oxnard, California, where his father was a farm worker. His mother was not employed outside the home. Several brothers and sisters also lived in the family home. Much of Gutierrez's history was described by ALJ Hewitt in the proposed decision referred to in Factual Finding 6 (ALJ Hewitt's factual findings 7-15).

Additional matters not previously referred to included Gutierrez's 1997 marriage, which ended in a divorce in 2004, the birth of a son (now 9 years old), his continuing support of a daughter (now 18 years old, living in Fontana), and the purchase of a home in Perris.

13. Gutierrez did not remain clean and sober. Gutierrez attributed his relapse in early 2005 to various matters including concerns over his father's health, child visitation issues, stress, and depression. He did not draw any connection to his occasional "social" use of alcohol at family parties and his relapse.

14. Gutierrez claims he has been clean and sober since April 15, 2005, the day after his most recent arrest. He is a member of AA and attends about four meetings a week, primarily at the La Esperanza de Vivir meeting in Perris. Gutierrez has an AA sponsor, William G., who has been sober for more than 35 years and who works in the substance abuse recovery field. Gutierrez's AA sponsor was also his counselor in the 18-month multiple offender drinking driver program provided by Riverside Recovery Resources, Inc. According to Gutierrez, he has worked all twelve steps of the AA program, and he relies on those steps, his sponsor, his meetings, and his Higher Power to maintain his sobriety.

15. Gutierrez testified he has never purchased cocaine, and he only used it at parties a handful of times when it was given to him. His record of convictions is consistent with his being an alcoholic. His record of criminal convictions is inconsistent with his being a drug addict, and his testimony that he is not a drug addict is credited as being truthful.

16. Gutierrez was employed by Pharmerica Pharmacy. His supervising pharmacist found him to be hardworking, punctual, resourceful, and well liked by colleagues and customers. In August 2006, Gutierrez resigned his employment with Pharmerica to pursue employment closer to his home in Perris.

Gutierrez currently works full-time at Skilled Nursing Pharmacy, where he earns $20 per hour as a data input clerk. He also works part-time at Pharmacy Advantage, where he earns $17.50 per hour. Gutierrez's supervisors at Pharmacy Advantage are aware of his criminal history, and while his employers at Skilled Nursing Pharmacy may know of his record by virtue of a background check, Gutierrez did not advise them of it. Gutierrez does not know if he can maintain his current employment with Skilled Nursing Pharmacy if his registration is suspended or revoked, even though his employment duties do not require him to possess a pharmacy technician registration.

Gutierrez is very highly regarded by all of his employers, receiving the highest marks for productivity, initiative, cooperation, dependability, attendance and orderliness in a recent job performance evaluation. He is not drug tested at work. He is not exposed to drugs in the workplace, engaging in data entry only. Gutierrez contributes a large part of his monthly income to the support of his son, his daughter, and his father.

17. As a result of the board placing him on probation in 2000, Gutierrez obtained certification from the PTCB on July 31, 2000, as a certified pharmacy technician (CPhT). Since then, Gutierrez has renewed his CPhT certification every two years by meeting the professional education required for renewal, even though the board has not required him to remain certified for the past six years.

18. Veronica Gutierrez, respondent's sister, testified that she was aware of her brother's problems with alcohol and believed them to be a thing of the past. Before his most recent arrest, respondent attended family functions, drank to excess, and cried a lot. Since April 2005, she has seen "a dramatic change" and has never seen him under the influence. Gutierrez spends a great deal of time with his children and is a good father, he works hard, he contributes to the support of his children and his father, and is responsible and trustworthy. She described herself as being a part of respondent's support group.

19. Gutierrez's lifestyle changes have included his completion of the drug diversion program, his completion of the 18-month multiple offender drinking driver program, his new employment, his increased involvement in the lives and activities of his two children, spending more time with his brothers and sisters, attending church, daily prayer, and his involvement in AA. Gutierrez spent five hours in custody and he testified he never wants to experience that again. Gutierrez said he would comply with any term and condition of probation to retain his registration.

Other Matters

20. Joan Coyne, Pharm.D., a supervising inspector employed by the board, is involved in investigations involving the abuse of controlled substances by licensees and oversees the board's probation monitoring program and the Pharmacist's Recovery Program.

According to Coyne, while "random drug testing" is identified in the disciplinary guidelines as an optional condition of probation, the board presently has no ability to administer "random drug testing" or to monitor the results of such testing.

Coyne discussed the duties of a registered pharmacy technician and she testified a registered pharmacy technician must wear an identification badge while on duty, is subject to strict supervision by the pharmacist on duty, and is subject to an employing pharmacy's written policies.

Disciplinary Guidelines

21. The board enacted comprehensive disciplinary guidelines by regulation.[3] The board recognizes that individual cases may necessitate a departure from these guidelines; in such cases, the mitigating circumstances should be detailed, especially where a Category III violation is involved.

With regard to a registered pharmacy technician, the guidelines state in part:

> "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) . . .

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[3] California Code of Regulations, title 16, section 1760.

- Possession of dangerous drugs and/or controlled substances
- Use of dangerous drugs and/or controlled substances
- 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 . . . Pharmacy technicians are not independent practitioners and must work under the supervision of a pharmacist. To place a pharmacy technician on probation places an additional burden on the pharmacist (who may or may not be on probation) to ensure that the respondent pharmacy technician complies with the terms and conditions of his or her probation."

The Appropriate Measure of Discipline

22. Gutierrez is a highly competent registered pharmacist technician. His most recent conviction resulted in no actual harm to the public or to any consumer. Gutierrez has a significant prior disciplinary record involving the imposition of two years of probation for virtually the same kinds of misconduct that gave rise to this disciplinary action. While he successfully completed probation, Gutierrez did not appear to learn a lasting lesson from it. Indeed, it appears he first began using cocaine on a very limited basis after completing probation, after which he used alcohol socially and then had a full blown alcoholic relapse. While there is only one new offense giving rise to this disciplinary action, it must be viewed within context with the five criminal convictions preceding it, Gutierrez's unsuccessful struggle with alcoholism, and the fact that he remains on criminal probation.

Gutierrez's testimony and his sister's testimony concerning his rehabilitation and recovery following his April 2005 arrest in April 2005 were impressive. Gutierrez has remained gainfully employed, he sought and completed mandated counseling concerning his substance abuse, he attends 12-step meetings, and he has not possessed or used drugs and alcohol since April 15, 2005. Gutierrez's testimony about his rehabilitation was credible, but it was not supported by the kinds of verification recommended in the disciplinary guidelines.

While Gutierrez made a strong showing in rehabilitation, it is reluctantly determined that not enough time has passed to conclude that he will remain clean and sober given his past history. There is no reason in this matter to deviate from the recommendations in the disciplinary guidelines.

Costs of Investigation and Enforcement

23. A declaration of the deputy attorney general who prosecuted this matter was submitted to support a claim of costs of approximately $6,380. No objection was made to the cost declaration or to its contents. The matter took about a half day to try to conclusion.

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 $6,380 for its reasonable costs of 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.[4]

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. The board's rules and regulations do not allow a pharmacy technician to perform any discretionary act or any act requiring the exercise of professional judgment which must be performed by a registered pharmacist. (*Californians for Safe Prescriptions v. California State Board of Pharmacy* (1993) 19 Cal.App.4th 1136, 1149-1150.)

Pertinent Disciplinary Statutes and Regulations

5. Business and Professions Code section 490 provides in part:

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

"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."

"A board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued . . ."

6. Business and Professions Code section 493 provides in part:

"Notwithstanding any other provision of law, in a proceeding . . . to suspend or revoke a license or otherwise take disciplinary action against a person who holds a license, upon the ground that . . . 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 to fix the degree of discipline or to determine if the conviction is substantially related to the qualifications, functions, and duties of the licensee in question.

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

7. 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."

8. 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 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:

. . .

(h) The administering to oneself, of any controlled substance, or the use of any dangerous drug or of alcoholic beverages to the extent or in a manner as to be dangerous or injurious to oneself . . .

. . .

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

(k) The conviction of more than one misdemeanor or any felony involving the use, consumption, or self-administration of any dangerous drug or alcoholic beverage, or any combination of those substances.

(l) The conviction of a crime substantially related to the qualifications, functions, and duties of a licensee under this chapter. The record of conviction . . . of a violation of the statutes of this state regulating controlled substances or dangerous drugs shall be conclusive evidence of unprofessional conduct . . ."

9. 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 . . ."

10. Health and Safety Code section 11170 provides:

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

Use of the DUI Convictions – Substantial Relationship

11. In *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, a physician suffered two alcohol-related driving convictions. The physician's medical license was disciplined under Business and Professions Code section 2239 (which provided two or more alcohol related convictions constituted unprofessional conduct). On appeal, the appellate court found a logical connection (i.e., a substantial relationship) between the alcohol-related convictions and the physician's fitness to practice medicine. The appellate court wrote:

> "Driving while under the influence of alcohol . . . shows an inability or unwillingness to obey the legal prohibition against drinking and driving and constitutes a serious breach of a duty owed to society . . . Knowledge of such repeated conduct by a physician, and particularly of its propensity to endanger members of the public, tends to undermine public confidence in and respect for the medical profession . . . Repeated convictions involving alcohol use, two of which violated Griffiths' probation, reflect poorly on Griffiths' common sense and professional judgment, which are essential to the practice of medicine, and tend to undermine public confidence in and respect for the medical profession." *Id.*, at pp. 770-771.

The same reasoning applies in this matter with regard to Gutierrez's several alcohol-related convictions.

Use of the Diversion Program Conviction

12. Penal Code section 1000 states the diversion statutes (§§ 1000-1000.5) apply to cases involving certain designated drug offenses when the accused meets various criteria including no prior drug offense convictions and the offense charged did not involve a crime of violence.

Penal Code section 1000.3 provides in pertinent part: "If the divertee has performed satisfactorily during the period of diversion, at the end of the period of diversion, the criminal charges shall be dismissed."

Penal Code section 1000.4 provides in part:

> "(a) Any record filed with the Department of Justice shall indicate the disposition in those cases deferred pursuant to this chapter. Upon successful completion of a deferred entry of judgment program, the arrest upon which the judgment was deferred shall be deemed to have never occurred. The defendant may indicate in response to any question concerning his or her prior criminal record that he or she was not arrested or granted deferred entry of judgment for the offense, except as specified in subdivision (b). A record pertaining to an arrest resulting in successful completion of a deferred entry of judgment program shall not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate."

13. In *B. W. v. Board of Medical Quality Assurance* (1985) 169 Cal.App.3d 219, a physician, was arrested for possession of cocaine. The physician successfully completed a Penal Code section 1000 drug diversion program, after which the case was dismissed and his arrest record was expunged. Later that year, the board placed the physician on three years' probation based on his illegal possession of cocaine. The physician filed a petition for termination of probation on the ground that the board had used information from his record of arrest as the sole basis to institute disciplinary proceedings against him, which was in violation of Penal Code section 1000.5 [now Penal Code section 1000.4]. The board denied his petition and on a writ the trial court upheld the denial, finding Penal Code section 1000.5 did not apply to protect licensees from disciplinary action.

The Court of Appeal reversed, reasoning that one of the purposes of the diversion statutes was to restore the divertee to productive citizenship without the lasting stigma of a criminal conviction. Under the original diversion statutory scheme, if the defendant successfully completed the diversion program, the charges were dismissed. However, that was the extent of the protection provided, and the arrest record and ultimate disposition of the case remained available for use in the files of the Bureau of Criminal Identification and Investigation. In order to provide more protection to the successful divertee, in 1975, the Legislature enacted Penal Code section 1000.5. (*B.W. v. Board of Medical Quality Assurance*, *supra*, 169 Cal.App.3d at pp.226-228.)

The appellate court noted the statute was remedial in nature and under well-settled rules of judicial construction it was to be liberally construed to promote the objects to be accomplished by it. (*B.W. v. Board of Medical Quality Assurance*, *supra*, 169 Cal.App.3d at pp.230.) Further, the Legislature's use of the words, "shall not be used" and "in any way," in referring to the record of arrest of a successful divertee, was indicative of its intent that the protection of Penal Code section 1000.5 be given the broadest application. (*B.W.*, *supra*, at p. 232.) Since the board initiated disciplinary proceedings based solely on information

obtained from B. W.'s record of arrest after he completed the diversion program, he was entitled to the protections of Penal Code section 1000.5. (*B. W.*, *supra*, at pp.232-233.)

14. Business and Professions Code section 492 provides in part:

> "Notwithstanding any other provision of law, successful completion of any diversion program under the Penal Code . . . shall not prohibit any agency established under Division 2 (commencing with Section 500) of this code . . . from taking disciplinary action against a licensee or from denying a license for professional misconduct, notwithstanding that evidence of that misconduct may be recorded in a record pertaining to an arrest.
>
> This section shall not be construed to apply to any drug diversion program operated by any agency established under . . . this code, or any initiative act referred to in that division."

15. It is concluded that the board was permitted to use Gutierrez's possession of a controlled substance conviction for disciplinary purposes.

Cause Exists to Impose Administrative Discipline

16. Cause exists to revoke Gutierrez's registration as a pharmacy technician.

Taken collectively, Gutierrez's several alcohol-related convictions constituted unprofessional conduct and established Gutierrez used alcoholic beverages in a manner dangerous to himself. Taken together, these alcohol-related convictions are substantially related to the qualifications, functions, and duties of a registered pharmacy technician.

As an independent basis for discipline, Gutierrez's June 14, 2005, possession of a controlled substance conviction constituted evidence of unprofessional conduct because he violated statutes regulating controlled substances by possessing cocaine. The conviction is substantially related to the qualifications, functions, and duties of a registered pharmacy technician and is conclusive evidence of Gutierrez's unprofessional conduct by statute.

While Gutierrez made a strong showing in rehabilitation, he remains on informal probation on the most recent driving under the influence conviction. Not enough time has passed to conclude that it is likely that Gutierrez will remain clean and sober given his past history and his recent relapse. There is no reason in this matter to deviate from the recommendations set forth in the disciplinary guidelines.

Gutierrez is commended for his rehabilitative efforts and he is encouraged to continue them. He should reapply for registration when he completes his informal criminal probation.

This conclusion is based on all Factual Findings 4-22 and on Legal Conclusions 1-15.

Recovery of Costs of Investigation and Prosecution

17. 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) . . ."

18. Cause exists under Business and Professions Code section 125.3 to direct Gutierrez reimburse the Board its reasonable costs of investigation and enforcement in the amount of $6,380.

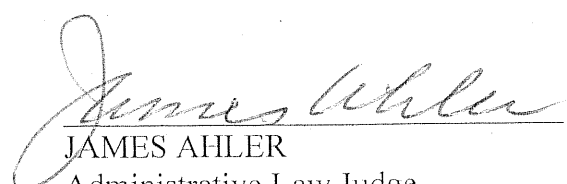
This conclusion is based on Factual Findings 23 and on Legal Conclusions 16 and 17.

ORDERS

Pharmacy Technician Registration No. TCH14159 issued to Raul A. Gutierrez is revoked.

Raul A. Gutierrez shall pay $6,380 to the Board of Pharmacy.

DATED: 3/7/07



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: RAUL A. GUTIERREZ, aka RAUL ARTURO SALCIDO, aka, RAUL GUTIERREZ SALCIDO 1054 Mirada Drive Perris, CA 92571 Pharmacy Technician Registration No. TCH 14159 Respondent.	Case No. 2969 OAH No. L2006090465

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 May 11, 2007.

IT IS SO ORDERED.

Date: April 11, 2007

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By William Powers
WILLIAM POWERS
Board President

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Attorneys for Complainant

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

In the Matter of the Accusation Against: **RAUL A. GUTIERREZ, TCH, aka,** **RAUL ARTURO SALCIDO, aka** **RAUL GUTEIRREZ SALCIDO** 1054 Mirada Drive Perris, CA 92571 Pharmacy Technician Registration No. 14159 Respondent.	Case No. 2969 OAH No. **ACCUSATION**

Complainant alleges:

PARTIES

1. Virginia Herold (Complainant) brings this Accusation solely in her official capacity as the Interim Executive Officer of the Board of Pharmacy (Board).

2. On or about October 14, 1994, the Board issued Pharmacy Technician Registration Number 14159 to Raul A. Gutierrez (Respondent). The Pharmacy Technician Registration Number will expire on June 30, 2008, if it is not renewed.

JURISDICTION AND STATUTORY PROVISIONS

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

4. Code section 118, subdivision (b), states, in pertinent part, that the expiration of a license shall not deprive the Board of jurisdiction to proceed with a disciplinary action during the period within which the license may be renewed, restored, reissued or reinstated.

5. Code section 482 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."

6. Section 490 of the Code states, in pertinent part:

"A board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued. A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. . . . "

7. Code section 493 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 to fix the degree of discipline or to determine if the conviction is substantially related to the qualifications, functions, and duties of the licensee in question.

"As used in this section, 'license' includes 'certificate,' 'permit,' 'authority,' and

'registration.'"

8. Section 4300 of the Code states:

"(a) Every license issued may be suspended or revoked.

". . . ."

9. Section 4301 of the Code states:

"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:

". . . .

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

". . . .

"(h) The administering to oneself, of any controlled substance, or the use of any dangerous drug or of alcoholic beverages to the extent or in a manner as to be dangerous or injurious to oneself, to a person holding a license under this chapter, or to any other person or to the public, or to the extent that the use impairs the ability of the person to conduct with safety to the public the practice authorized by the license.

". . . .

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

"(k) The conviction of more than one misdemeanor or any felony involving the use, consumption, or self-administration of any dangerous drug or alcoholic beverage, or any combination of those substances.

"(l) The conviction of a crime substantially related to the qualifications, functions, and duties of a licensee under this chapter. The record of conviction of a violation of Chapter 13 (commencing with Section 801) of Title 21 of the United States Code regulating controlled

substances or of a violation of the statutes of this state regulating controlled substances or dangerous drugs shall be conclusive evidence of unprofessional conduct. In all other cases, the record of conviction shall be conclusive evidence only of the fact that the conviction occurred. The board may inquire into the circumstances surrounding the commission of the crime, in order to fix the degree of discipline or, in the case of a conviction not involving controlled substances or dangerous drugs, to determine if the conviction is of an offense 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. . . .

". . . ."

10. Section 4060 of the Code states:

"No person shall possess any controlled substance, except that furnished to a person upon the prescription of a physician, dentist, podiatrist, or veterinarian, or furnished pursuant to a drug order issued by a certified nurse-midwife pursuant to Section 2746.51, a nurse practitioner pursuant to Section 2836.1, or a physician assistant pursuant to Section 3502.1. This section shall not apply to the possession of any controlled substance by a manufacturer, wholesaler, pharmacy, physician, podiatrist, dentist, veterinarian, certified nurse-midwife, nurse practitioner, or physician assistant, when in stock in containers correctly labeled with the name and address of the supplier or producer.

"Nothing in this section authorizes a certified nurse-midwife, a nurse practitioner, or a physician assistant to order his or her own stock of dangerous drugs and devices."

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

"For the purpose of denial, suspension, or revocation of a personal or facility license pursuant to Division 1.5 (commencing with Section 475) of the Business and Professions Code, a crime or act shall be considered substantially related to the 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."

12. 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.

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

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

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

COST RECOVERY

13. 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.

DRUGS

14. **Cocaine**, an illegal narcotic, is a dangerous drug per Code section 4022 and a Schedule II controlled substance per Health and Safety Code section 11056(b)(6).

FIRST CAUSE FOR DISCIPLINE

(June 14, 2005 Criminal Conviction - Driving Under the Influence of Alcohol and Possession of a Controlled Substance (Cocaine) on April 14, 2005)

15. Grounds exist to revoke Respondent's license under sections 480, 490, 493, and 4300, 4301 (f), (h), (j), and (l) for a criminal conviction that is substantially related to the qualifications, functions, and duties of a registered pharmacy technician. On or about June 14, 2005 in the Superior Court for the County of Orange, North Justice Center, in a case entitled *People vs. Raul Arturo Gutierrez, aka Raul Arturo Salcido, aka Raul Guteirrez Salcido* (Sup. Ct.,

Orange, 2005, Case No. 05NF1658), respondent pled guilty to a violation of Health and Safety Code section 11350(a), Possession of a controlled substance (Cocaine), a felony and Vehicle Code section 23152(a), Driving Under the Influence of Alcohol, a misdemeanor. The circumstances of the conviction are as follows:

16. On or about April 14, 2005, at 2:50 a.m., a Highway Patrol Officer pulled over to check on a vehicle on the side of the road. Respondent was sleeping in the driver's seat, with the keys of the car in the ignition. The hood of the car was warm to the touch reflecting that the car had been driven recently. After over five minutes of yelling and prodding by the Officer to wake him, Respondent finally awoke. Respondent had to be assisted out of the vehicle and with walking, spoke in a slurred manner, had red eyes, and smelled of alcohol. Respondent had difficulty answering the officer's questions, but stated that he had been stopped for one hour. Respondent was unable to extract his driver's license from his wallet. After he failed the field sobriety test, Respondent was arrested. An inventory of Respondent's property produced a bindle with approximately .5 grams of **cocaine**. Respondent's subsequent blood test reflected a blood alcohol level of .16% by weight of alcohol in Respondent's blood.

17. On or about June 14, 2005, Respondent entered into a Plea Agreement as to the two charges against him. As to the Vehicle Code violation, Respondent was sentenced to three (3) years of probation, ordered to enroll in an 18 month Multiple Offender Program, to pay fines and fees in the amount of $597.00, and his license was suspended for 90 days. As to the Health and Safety Code violation, Respondent was granted a deferred entry of judgment, he was ordered to enroll in a Drug Program pursuant to Penal Code section 1000, and he was ordered to pay a $150.00 fee (stayed).

18. On July 29, 2005, the court revoked Respondent's probation after he failed to enroll in the Alcohol Program. A bench warrant in the amount of $15,000 was issued. On September 9, 2005, the bench warrant was recalled and probation reinstated.

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SECOND CAUSE FOR DISCIPLINE

(Possession of a Controlled Substance)

19. Grounds exist to revoke Respondent's license under section 4060 for possession of a controlled substance, cocaine. On or about June 14, 2005 in the Superior Court for the County of Orange, North Justice Center, in a case entitled *People vs. Raul Arturo Gutierrez, aka Raul Arturo Salcido, aka Raul Guteirrez Salcido* (Sup. Ct., Orange, 2005, Case No. 05NF1658), respondent pled guilty to a violation of Health and Safety Code section 11350(a), Possession of a controlled substance (Cocaine), a felony. Cocaine, an illegal narcotic, is a dangerous drug per Code section 4022 and a controlled substance per Health and Safety Code section 11019(e). The facts and circumstances supporting this cause are in paragraphs 16-18 above and are incorporated by reference herein.

THIRD CAUSE FOR DISCIPLINE

(Unprofessional Conduct - Multiple Convictions Involving Use of Alcohol)

20. Respondent is subject to disciplinary action under section 4301(k) in that he has had multiple convictions involving the use of alcohol, including his most recent conviction as well as four previous convictions that were the basis of previous discipline against Respondent:

A. June 14, 2005 conviction for violating Vehicle Code section 23152(a), Driving Under the Influence of Alcohol, a misdemeanor.

B. August 12, 1996 conviction for violating Vehicle Code section 23152(b), Driving With a Blood Alcohol Level of .08% or Higher, a misdemeanor.

C. February 21, 1995, conviction for violating Vehicle Code section 23103, Reckless Driving, a misdemeanor, for driving his car while under the influence of alcohol.

D. May 27, 1992, conviction for violating Penal Code section 647(f), Under the Influence in Public, a misdemeanor, for being intoxicated and asleep behind the wheel of his car with the engine

running.

DISCIPLINE CONSIDERATIONS

21. To determine the degree of discipline, if any, to be imposed on Respondent, Complainant alleges that on or about August 16, 2000, in a prior disciplinary action entitled In the Matter of the Accusation Against Raul Arturo Gutierrez before the Board, Case Number 2170, Respondent's license was revoked, revocation stayed, and he was placed upon two years probation for five criminal convictions, all of which were found to be substantially related to the qualifications, functions, and duties of a pharmacist as well as a false statement on his 1994 application for licensure as a Pharmacy Technician, wherein Respondent checked "no" to the question whether he had ever been convicted of or pled no contest to a violation of any law. Respondent successfully completed probation on August 15, 2002. That decision is attached hereto as Exhibit A is now final and is incorporated by reference as if fully set forth.

PRAYER

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

A. Revoking or suspending Pharmacy Technician Number TCH 14159, issued to Raul Arturo Gutierrez.

B. Ordering Raul Arturo Gutierrez to pay the Board the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;

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

DATED: 8/28/06

VIRGINIA HEROLD
Interim Executive Officer
Board of Pharmacy
State of California
Complainant

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