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

In the Matter of the Accusation Against: RICHARD O. CASTANEDA 7061 ½ N. Figueroa Los Angeles, CA 90042 Original Pharmacy Technician Registration No. TCH 51709 Respondent.	Case No. 3121 OAH No. 2008040944

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 November 5, 2008 .

It is so ORDERED on October 6, 2008 .

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By

KENNETH H. SCHELL
Board President

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

In the Matter of the Accusation Against:	Case No. 3121
RICHARD O. CASTANEDA,	OAH No. 2008040944
Respondent.	

PROPOSED DECISION

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on July 18, 2008, in Los Angeles, California.

Susan M. Wilson, Deputy Attorney General, Department of Justice, represented complainant Virginia Herold, Executive Officer of the Board of Pharmacy.

Respondent Richard O. Castaneda represented himself and was present throughout the hearing.

The matter was submitted on July 31, 2008.

FACTUAL FINDINGS

Jurisdictional Matters

1. On December 16, 2003, the board issued to respondent Pharmacy Technician Registration No. TCH 51709. Respondent's registration is in full force until December 31, 2009.

2. On February 15, 2008, complainant signed the accusation in her official capacity. On February 20, 2008, the accusation and other required jurisdictional documents were served on respondent. On March 11, 2008, respondent signed and thereafter filed a notice of defense. On May 22, 2008, complainant served on respondent a notice of hearing.

3. On July 18, 2008, the record was opened, jurisdictional documents were received, sworn testimony was given, documentary evidence was introduced, and closing arguments were presented. The matter was submitted on July 31, 2008.[1]

The Driving Under the Influence Conviction

4. On August 10, 2005, respondent entered a plea of no contest and was convicted of one count of violating Vehicle Code section 23152, subdivision (b), driving with a blood alcohol content of 0.08% or greater, a misdemeanor. Respondent was placed on summary probation for three years. The terms of probation included payment of $1,550 in fines and fees and completion of a first-offender alcohol counseling program and a "hospital and morgue (HAM) program." The underlying incident occurred on June 15, 2005.

Respondent's probation was revoked and reinstated five times, as a result of his failures to appear at scheduled court hearings. Respondent remains on probation.

The Alcohol-Related Reckless Driving Conviction

5. On February 25, 2004, respondent pled no contest and was convicted of one count of violating Vehicle Code section 23103, pursuant to section 23103.5, alcohol-related reckless driving, a misdemeanor. Respondent was placed on summary probation for two years. The terms of probation included payment of $1,056 in fines and fees, or, in the alternative, the performance of 195 hours of community service and payment of $195 in fines.

Respondent's probation was revoked and reinstated four times, as a result of his failures, *inter alia*, to enroll in the alcohol program and to appear at scheduled court hearings. Respondent remains on probation.

6. The conviction was based on an incident that occurred on December 28, 2003, when respondent drove a vehicle with a blood alcohol content of at least 0.08 percent. Respondent was stopped by a police officer who observed respondent driving somewhat erratically at a speed of about 90 miles per hour.

---

[1] At respondent's request, the record was left open at the conclusion of the hearing, to permit him to offer letters of reference written by third parties on his behalf. On July 25, 2008, the Office of Administrative Hearings received two such letters, which were marked collectively as Exhibit A. By letter dated July 31, 2008, complainant objected to the receipt in evidence of the two letters, on the ground that they constituted hearsay. While, as complainant argues, the letters constitute hearsay, they may properly be used "for the purpose of supplementing or explaining other evidence." (Gov. Code, § 11513, subd. (d).) Accordingly, complainant's objection is overruled; the letters are received as administrative hearsay. The additional arguments expressed in complainant's July 31, 2008, letter relate not to admissibility of the letters, but to the weight to be accorded them. The record was closed and the matter deemed submitted on July 31, 2008.

The Spousal Abuse Conviction

7. On January 21, 2004, respondent was convicted of one count of violating Penal Code section 273.5, subdivision (a), willful infliction of corporal injury on a spouse or cohabitant, a misdemeanor. Respondent was placed on three years summary probation. The terms of probation included payment of fines and fees totaling $1,450 and completion of a 12-month batterer's counseling program.

Respondent's probation was revoked and reinstated four times, as a result, *inter alia*, of respondent's failure to appear at scheduled court hearings.

8. The conviction was based on an incident that occurred on December 12, 2003, when respondent got into an argument with his girlfriend (the victim), who had come home late the previous evening. Respondent struck her in the head multiple times with a clenched fist, threw her to the ground, jumped on top of her, started hitting her in the face with an open hand, swore at her, and started choking her with both hands around her neck. The victim blacked out for approximately 30 seconds. Responding police officers observed redness and swelling to the victim's eye, a raised bump to her forehead, redness to her neck, and bruising to her forearms.

The Public Intoxication Arrest

9. On or about October 20, 2005, respondent was allegedly seen standing outside of a bar and "verbally threatening bar patrons as they exited the bar at closing time." A police officer thereafter contacted and arrested respondent, whom he considered to be unable to care for himself or others, for public intoxication in violation of Penal Code section 647, subdivision (f).

The only evidence offered in support of the allegation that respondent was publicly intoxicated in violation of section 647, subdivision (f) was a police report, based largely on hearsay statements of third parties and on observations of the officer described in his report in fairly sketchy terms. Respondent denied the allegations.

It is found, based on the applicable burden and standard of proof, that respondent did not engage in conduct in violation of Penal Code section 647, subdivision (f) on the date in question.

Pharmacy Technician

10. Pharmacy technicians assist pharmacists in the preparation of prescriptions. They select products for and fill prescriptions; they prepare records with regard to prescriptions. They also may enter prescriptions into computerized databases and inventory drugs. In order to become a pharmacy technician, an individual must accumulate a substantial number of hours of experience. Respondent had 320 hours of experience before he became a technician.

Valerie Knight, a licensed pharmacist and board inspector (i.e., investigator) testified that a driving-under-the-influence or alcohol-related reckless driving conviction shows a present or potential unfitness for registration as a pharmacy technician, since the use of alcohol can impair one's judgment, and affect one's body in many different ways. She testified that a conviction under Penal Code section 273.5 also shows present or potential unfitness for registration as a pharmacy technician, since a pharmacy technician must work with people and could potentially cause an injury to a customer or another licensee. Knight was of the opinion that all three of respondent's convictions were substantially related to the qualifications, duties, and functions of a pharmacy technician.

Knight testified that the board expects an individual on probation to complete and comply with the conditions of probation, and that if the probationer fails to do so, a petition to revoke probation will be instituted.

Background, Rehabilitation, and Present Circumstances

11. Respondent testified that he has two children, ages five and three, with a third one "on the way." He is engaged to the mother of his children.

12. Respondent testified that for the past year he has worked as a pharmacy technician for Shiloh Family Pharmacy. He previously worked as an outpatient pharmacy technician at Martin Luther King Hospital for possibly a year and a half.[2] He has had no other employment as a pharmacy technician.

Respondent testified that he is a good pharmacy technician, and that he is the principal technician at Shiloh. He fills 300 to 400 prescriptions per day.

13. Respondent testified that his mother passed away in December 2006, and that this affected his behavior. He became aware of his mother's illness (she died of cancer) in 2004.

14. Respondent testified that he does not engage in any of the behavior which led to his convictions while on the job. He stated that he was not working at the time of any of the three convictions.

15. Respondent testified that "I need this job to survive," explaining that working as a pharmacy technician is the only profession he knows.

16. Respondent testified that he has paid all fines ordered in connection with his convictions and completed the 52-week domestic violence class and the two alcohol counseling programs required pursuant to the terms of his several criminal probations. Respondent explained his numerous probation violations as the result of his inability to make his court appearances, since there was "so much going on" in terms of income and family

[2] His testimony was unclear as to precisely when he worked at Martin Luther King Hospital.

problems, and the death of his mother. He stated that he is "a little older now, a little wiser now," and is trying to focus and "be good."

17. Respondent testified that he plans to enroll in a visual communications program at the IDT school at some unspecified future time.

18. Respondent testified that he attends church on Sundays, and that he "helps around the church." He was unable to provide the exact name of his church, though he believed the name was something along the lines of the "Filipino Native American Church."

19. Two letters of reference were submitted on respondent's behalf:

a. In a letter dated August 25, 2008,[3] Diana Arenson, Manager, Shiloh Family Pharmacy, stated that respondent has been employed with Shiloh since August 2007. Arenson referred to respondent as "a knowledgeable and responsible employee," who was "a good citizen and always showed interest and need in his work."

b. In a letter dated August 25, 2008, Alan Brown, Pharm. D., "the pharmacist in charge at Shiloh Family Pharmacy" in Los Angeles, wrote that during the several months he had worked with respondent, respondent "has always been punctual, diligent, efficient, alert, and very knowledgeable in the field." Dr. Brown also noted that respondent was the pharmacy's only bilingual employee and that it would be difficult to replace him. He added that respondent "always arrives on time, well dressed, groomed and eager to work." In Dr. Brown's opinion, respondent "is among the best" pharmacy technicians that he has worked with during his 48-year career as a pharmacist.

Costs of Investigation and Prosecution

20. The actual investigatory and prosecutorial costs incurred by complainant total $9,385, which represents 41.5 hours of attorney work and 28.0 hours of paralegal work on this case.

LEGAL CONCLUSIONS

The Burden and Standard of Proof

1. "The basic reason for disciplinary action in matters of this kind . . . is the protection of the public against unethical and dishonest conduct on the part of those engaged in the real estate business." (*Small v. Smith* (1971) 16 Cal.App.3d 450, 456, quoting from *Marks v. Watson* (1952) 112 Cal.App.2d 196, 200.)[4] "The purpose of an administrative

---

[3] Though both letters are dated August 25, 2008, it is inferred that the actual date of composition was July 25, 2008, and that the references to August were inadvertent errors.

[4] *Small* involved a real estate broker's license. The same principle should apply to other kinds of licenses, including pharmacy technician registrations.

proceeding concerning the revocation or suspension of a license is not to punish the individual; the purpose is to protect the public from dishonest, immoral, disreputable or incompetent practitioners." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.)

2. Absent a statute to the contrary, the burden of proof in disciplinary administrative proceedings rests upon the party making the charges. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113; Evid. Code, § 115.) The burden of proof in this proceeding is thus on complainant.

3. Neither of the parties cited, nor has the ALJ been able to find, any authority specifically addressing the standard of proof to be applied in disciplinary proceedings against pharmacy technicians. More generally, however, courts have typically drawn a distinction between professional and nonprofessional licenses.[5] With regard to nonprofessional licenses, a preponderance of the evidence standard applies. (*Mann v. Department of Motor Vehicles* (1999) 76 Cal.App.4th 312, 318-319; *San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1892-1895.) With regard to professional licenses, the standard is "clear and convincing evidence standard to a reasonable certainty." (*Ettinger v. Board of Medical Quality Assurance* (1982) 139 Cal.App.3d 853, 856-857; *Furman v. State Bar* (1938) 12 Cal.2d 212, 229.)

The evidence reflects that a substantial amount of training (i.e., hours of experience) is required in order for an individual to become a pharmacy technician. Complainant's counsel agreed that the clear and convincing evidence standard applies. It is so concluded.

4. "The key element of clear and convincing evidence is that it must establish a high probability of the existence of the disputed fact, greater than proof by a preponderance of the evidence." (*People v. Mabini* (2001) 92 Cal.App.4th 654, 662.) This standard is less stringent than proof beyond a reasonable doubt. (*Ettinger v. Board of Medical Quality Assurance, supra*, 135 Cal.App.3d at 856.) 'Clear and convincing' evidence "requires a finding of high probability." The evidence must be "so clear as to leave no substantial doubt" and "sufficiently strong to command the unhesitating assent of every reasonable mind." (*In re Angelina P* (1981) 28 Cal.3d 908, 919; citations omitted.)

Applicable Statutes

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

> "(a) In addition to any other action that a board is permitted to take against a licensee, a board may suspend or revoke a license on the ground that the licensee has

---

[5] Because this distinction between professional and nonprofessional licenses is "provided by law," Evidence Code section 115 does not here operate to impose the preponderance of the evidence standard of proof.

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.

(b) Notwithstanding any other provision of law, a board may exercise any authority to discipline a licensee for conviction of a crime that is independent of the authority granted under subdivision (a) only if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the licensee's license was issued.

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

(d) The Legislature hereby finds and declares that the application of this section has been made unclear by the holding in Petropoulos v. Department of Real Estate (2006) 142 Cal.App.4th 554, and that the holding in that case has placed a significant number of statutes and regulations in question, resulting in potential harm to the consumers of California from licensees who have been convicted of crimes. Therefore, the Legislature finds and declares that this section establishes an independent basis for a board to impose discipline upon a licensee, and that the amendments to this section made by Senate Bill 797 of the 2007-08 Regular Session do not constitute a change to, but rather are declaratory of, existing law."

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 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, 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.

* * *

(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. The board may take action when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under Section 1203.4 of the Penal Code allowing the person to withdraw his or her plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, information, or indictment."

Applicable Regulations

7. California Code of Regulations, title 16, section 1770 provides as follows:

"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."

8. The board's Manual of Disciplinary Guidelines and Model Disciplinary Orders provides in part:

"INTRODUCTION

The Board of Pharmacy is responsible for the enforcement of statutes and regulations related to the practice of pharmacy. The board serves the public by:

- protecting the health, safety, and welfare of the people of California with integrity and

- honesty;
- advocating the highest quality of affordable pharmaceutical care;
- providing the best available information on pharmaceutical care; and
- promoting education, wellness and quality of life.

Pharmacists are patient advocates who provide pharmaceutical care for the citizens of California enlightening them about their drug therapy through effective communicating and listening, assessing, collaborating, understanding and intervening. In addition, enforcement officials are provided the resources to act quickly, consistently and efficiently in the public's interest.

The board recognizes the importance of ensuring the delivery of dangerous drugs and controlled substances for therapeutic purposes. At the same time, and given the historical and current abuse and diversion of drugs, particularly controlled substances, the board believes there should be no tolerance for licensees who traffic in drugs or who, in the absence of appropriate evidence of rehabilitation, personally abuse drugs.

In accordance with section 1760 of the California Code of Regulations, the board has produced this booklet for those involved in and affected by the disciplinary process: the general public, attorneys from the Office of the Attorney General, administrative law judges from the Office of Administrative Hearings, defense attorneys, board licensees, the courts, board staff and board members who review and vote on proposed decisions and stipulations.

These guidelines are to be followed in Board of Pharmacy disciplinary actions. The board has the final authority over the disposition of its cases, and, to complete its work, it uses the services of the Office of the Attorney General and the Office of Administrative Hearings. The board recognizes that individual cases may necessitate a departure from these guidelines. In such cases, the mitigating circumstances shall be detailed in any proposed decision or any transmittal memorandum accompanying a proposed stipulation, especially where Category III violations are involved.

The board has found that accusations are rarely filed except in serious cases. In general, the position of the board is that revocation should always be an option whenever grounds for discipline are found to exist. Board policy is that revocation is generally an appropriate order where a respondent is in default, such as when he or she fails to file a notice of defense or fails to appear at a disciplinary hearing.

Board policy is that a suspension, where imposed, should be at least 30 days for an individual and at least 14 days for a licensed premises.

The board seeks recovery of all investigative and prosecution costs up to the hearing in all disciplinary cases. This includes all charges of the Office of the Attorney General, including, but not limited to, those for legal services, and includes charges by expert consultants. The board believes that the burden of paying for disciplinary

cases should fall on those whose conduct requires investigation and prosecution, not upon the profession as a whole.

The board recognizes there may be situations where an individual licensee deserves a stronger penalty than the pharmacy for which he or she works, but the board also believes in holding a pharmacy owner responsible for the acts of their employees who operate the pharmacy. Similarly, the board recognizes that in some cases a licensed premises may well be more culpable than any individual licensed by or registered with the board.

For purposes of these guidelines "board" includes the board and or its designees.

FACTORS TO BE CONSIDERED IN DETERMINING PENALTIES

Section 4300 of the Business and Professions Code provides that the board may discipline the holder of, and suspend or revoke, any certificate, license or permit issued by the board.

In determining whether the minimum, maximum, or an intermediate penalty is to be imposed in a given case, factors such as the following should be considered:

1. actual or potential harm to the public
2. actual or potential harm to any consumer
3. prior disciplinary record, including level of compliance with disciplinary order(s)
4. prior warnings of record(s), including citation(s) and fine(s)
5. number and/or variety of current violations
6. nature and severity of the act(s), offense(s) or crime(s) under consideration
7. mitigating evidence
8. rehabilitation evidence
9. compliance with terms of any criminal sentence
10. overall criminal record
11. if applicable, evidence of proceedings for case being set aside and dismissed pursuant to section 1203.4 of the Penal Code
12. time passed since the act(s) or offense(s)
13. whether the conduct was intentional or negligent, demonstrated incompetence, or, if the respondent is being held to account for conduct committed by another, the respondent had knowledge of or knowingly participated in such conduct
14. financial benefit to the respondent from the misconduct.

No single or combination of the above factors is required to justify the minimum and maximum penalty as opposed to an intermediate one.

MITIGATING EVIDENCE

A respondent is permitted to present mitigating circumstances at a hearing or in the settlement process and has the burden of demonstrating any rehabilitative or

corrective measures he or she has taken. The board does not intend, by the following references to written statements, letters, and reports, to waive any evidentiary objections to the form of such evidence. The respondent must produce admissible evidence in the form required by law in the absence of a stipulation by the complainant.

The following are examples of appropriate evidence a respondent may submit to demonstrate his or her rehabilitative efforts and competency:

a. Recent, dated written statements and/or performance evaluations from persons in positions of authority who have on-the-job knowledge of the respondent's current competence in the practice of pharmacy including the period of time and capacity in which the person worked with the respondent. Such reports must be signed under penalty of perjury and will be subject to verification by board staff.
b. Recent, dated letters from counselors regarding the respondent's participation in a rehabilitation or recovery program should include at least a description and requirements of the program, a psychologist's diagnosis of the condition and current state of recovery and the psychologist's basis for determining rehabilitation.
c. Recent, dated letters describing the respondent's participation in support groups, (e.g., Alcoholics Anonymous, Narcotics Anonymous, professional support groups, etc.).
d. Recent, dated laboratory analyses or drug screen reports, confirming abstention from drugs and alcohol.
e. Recent, dated physical examination or assessment report by a licensed physician, confirming the absence of any physical impairment that would prohibit the respondent from practicing safely."

9. The Guidelines provide, with exceptions not applicable here, for a minimum three-year probationary period. Terms of probation "are imposed to provide consumer protection and to allow the probationer to demonstrate rehabilitation."

Violations of Business and Professions Code section 4301, subdivisions (h) and (l) are considered "Category II" violations. For such violations, the minimum penalty is revocation stayed and three years probation. The maximum penalty is revocation.

Violations of Business and Professions Code section 4301, subdivision (k) are considered "Category III" violations. For such violations, the minimum penalty is revocation stayed, a 90-day actual suspension, and three years probation. The maximum penalty is revocation.

More specifically with regard to pharmacy technicians, 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
- 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."

Analysis

10. The foregoing authority may be summarized as follows in the context of the facts found above in this proceeding:

a. The board may impose discipline on a licensee or registrant who: (i) has been convicted of a crime that is substantially related to the qualifications, functions or duties of a pharmacy technician; (ii) has used alcohol to the extent or in a manner as to be dangerous or injurious to oneself or another, or such that the use impairs the ability of the individual to conduct with safety the practice of pharmacy technician; or (iii) has been convicted of more than one misdemeanor involving the use of alcohol. (Bus. & Prof. Code, §§ 490, subd. (a) and 4301, subds. (h), (k) and (l).)

b. A crime is substantially related to the qualifications, functions, or duties of a pharmacy technician if to a substantial degree it evidences present or potential unfitness to perform the functions authorized by the license. (Cal. Code Regs., tit. 16, § 1770.)

c. The Guidelines may be construed to contemplate that revocation is the only appropriate penalty when grounds to discipline a pharmacy technician exist. Such a construction would, however, be inconsistent with Business and Professions Code section 4313, which provides that the board "shall" consider evidence of rehabilitation when determining whether or not to discipline a license. Accordingly, it is incumbent upon the administrative law judge to consider evidence of rehabilitation in any case involving a licensee, in order to determine whether, for example, probation may be imposed in lieu of outright revocation.

Whether a licensee has been rehabilitated depends on a number of factors, including recent, dated statements from persons in positions of authority with on-the-job knowledge of the individual's current competence, counselors, psychologists and persons with knowledge of respondent's participation in rehabilitation and recovery programs.

11. Legal grounds to revoke respondent's registration exist by virtue of his two alcohol-related driving convictions because they are substantially related to the qualifications, functions, and duties of a licentiate. Legal grounds to revoke respondent's registration do not exist by virtue of respondent's spousal abuse conviction, since it was not established that such a conviction is substantially related to the qualifications, functions or duties of a licentiate. Legal grounds to revoke respondent's registration do not exist by virtue of respondent's arrest for violating Penal Code section 647, subdivision (f), since it was not established that respondent engaged in such conduct.

12. Since legal grounds exist to impose discipline on respondent's registration, whether and what level of discipline should be imposed must now be considered.

With regard to rehabilitation, it is noted that respondent has only had his registration for a relatively short period of time. He has had two substantially-related convictions during that relatively short period. The convictions, involving the use of alcohol in circumstances posing great danger to both himself and others, were serious. He violated his criminal probations on numerous occasions. He remains on probation at the present time. He provided two references letters, but these were not signed under penalty of perjury and no witnesses testified on his behalf. No evidence was presented with regard to any on-going participation in Alcoholics Anonymous or any similar support group, and no witnesses testified on his behalf with regard to his current condition vis-à-vis alcohol.

Accordingly, respondent has not established that he has been rehabilitated, no reasonable basis for deviating from the guidelines is apparent from the record, and the revocation of respondent's certificate is the appropriate penalty to impose in this case *at this time*. In the event that respondent in the future applies for reinstatement of his registration, he is encouraged to carefully review the "Evidence of Mitigation" section of the board's guidelines (see Legal Conclusion 9 above), so that he may take action and provide documentation and other evidence to address the matters set forth therein.

13. By reason of Factual Findings 1 through 19 and Legal Conclusions 1 through 13, cause exists to revoke respondent's pharmacy technician registration.

Costs of Investigation and Enforcement

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

> "(a) . . . in any order issued in resolution of a disciplinary proceeding before any board within the department . . . 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 investigation and enforcement of the case.

* * *

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

15. Cause exists under Business and Professions Code section 125.3 to issue an order requiring respondent to pay the board's reasonable costs of investigation and prosecution in the amount of $2,000. This amount takes into account that complainant failed to prevail with regard to a substantial portion of the allegations alleged in the accusation. It also takes into account respondent's substantial inability to pay complainant's costs that will result from the revocation of his registration. To require respondent to pay more than the amount indicated would, under all of the circumstances, unconstitutionally chill respondent's right to seek a hearing. (*Zuckerman v. State Board of Chiropractors* (2002) 29 Cal.4th 32, 44-45.)

Accordingly, there is hereby issued the following:

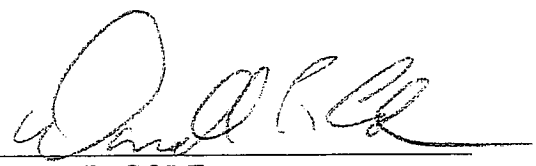
ORDER

Technician Registration No. TCH 51709, issued to respondent Richard O. Castaneda on December 16, 2003, is revoked. Respondent shall relinquish his or her pocket technician registration to the board within ten days of the effective date of this decision. Respondent may not petition the board for reinstatement of his revoked technician registration for three years from the effective date of this decision.

A condition of reinstatement shall be that the respondent is certified by the Pharmacy Technician Certification Board (PTCB) and provides satisfactory proof of certification to the board.

A further condition of reinstatement shall be that prior to reinstatement of his technician registration, respondent shall have reimbursed the board for its costs of investigation and prosecution in the amount of $2,000. If the respondent fails to pay the amount specified, his or her technician registration shall remain revoked.

DATED: 8-26-08



DONALD P. COLE
Administrative Law Judge
Office of Administrative Hearings

EDMUND G. BROWN JR., Attorney General
of the State of California
GREGORY J. SALUTE
Supervising Deputy Attorney General
SUSAN MELTON WILSON, State Bar No. 106902
Deputy Attorney General
300 So. Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-4942
Facsimile: (213) 897-2804

Attorneys for Complainant

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

In the Matter of the Accusation Against: RICHARD O. CASTANEDA 7061 ½ N. Figueroa St. Los Angeles, CA 90042 Pharmacy Technician Registration No. TCH 51709 Respondent.	Case No. 3121 **ACCUSATION**

Complainant alleges:

PARTIES

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

2. On or about December 16, 2003, the Board issued Pharmacy Technician Registration No. TCH 51709 to Richard O. Castaneda (Respondent). The Pharmacy Technician Registration was in full force and effect at all times relevant to the charges brought herein and will expire on December 31, 2009, unless renewed.

///

///

///

JURISDICTION

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. Section 118, subdivision (b) states:

The suspension, expiration, or forfeiture by operation of law of a license issued by a board in the department, or its suspension, forfeiture, or cancellation by order of the board or by order of a court of law, or its surrender without the written consent of the board, shall not, during any period in which it may be renewed, restored, reissued, or reinstated, deprive the board of its authority to institute or continue a disciplinary proceeding against the licensee upon any ground provided by law or to enter an order suspending ore revoking the license or otherwise taking disciplinary action against the licensee on any such ground.

5. Section 4300 of the Code provides, in pertinent part, that every license issued by the Board is subject to discipline, including suspension or revocation.

6. 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:

"(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.

"(k) The conviction of more than one misdemeanor or any felony involving the use, consumption of 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. The board may take action when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under Section 1203.4 of the Penal Code allowing the person to withdraw his or her plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, information, or indictment.

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

7. Section 490 of the Code states:

"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. Any action which a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has

been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code."

8. 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."

9. 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.

FIRST CAUSE FOR DISCIPLINE

(Conviction of Substantially Related Crimes)

10. Respondent is subject to disciplinary action under sections 490 and 4301, subdivision (l) of the Code, as defined in California Code of Regulations, title 16, section 1770, in that Respondent was convicted of crimes substantially related to the qualifications, functions or duties of a pharmacy technician, as follows:

DRIVING UNDER INFLUENCE (ALCOHOL) - 2005

A. On or about August 10, 2005, Respondent was convicted by the Court on a plea of nolo contendere for violating one count of 23152, subdivision (b), (driving with a blood alcohol content of 0.08% or greater), a misdemeanor, in the Los Angeles Superior Court, County of Los Angeles, State of California, Downey Judicial District, Case No. 5DW05217 entitled *The People of the State of California v. Richard Octavio Castaneda.*

///

///

B. The circumstances of the conviction are that on or about June 15, 2005, Respondent drove a motor vehicle with a blood alcohol content of 0.08% or greater.

C. At the time of his June 2005 arrest underlying this conviction, Respondent was on probation from two prior criminal convictions, and had outstanding bench warrants in both cases, issued for failure to comply with court ordered conditions of probation.

D. On August 10, 2005, at the time of Respondent's conviction, imposition of sentence was suspended pending completion of a thirty-six (36) months probation on specified terms, including enrollment in an alcohol counseling program. Respondent has failed to completed probation as follows:

(1) On September 29, 2005, Respondent's probation was revoked and a bench warrant issued due to his failure to appear in court and present proof of enrollment in a court ordered treatment program. On October 25, 2005, after a bench warrant hearing in which Respondent admitted violation(s) of probation, Respondent's sentence was modified to include additional fines, and probation was reinstated.

(2) On December 19, 2005, Respondent's probation was again revoked and a bench warrant issued when he failed to appear for a court hearing or present proof of compliance with prior court orders. On or about February 27, 2006, after bench warrant hearing, Respondent's probation was reinstated with modification.[1]

(3) On March 13, 2006, Respondent's probation was again revoked and a bench warrant issued when he failed to appear for a court hearing. On March 14, 2006, Respondent's probation was reinstated.

///

///

///

---

1. During the bench warrant hearing on February 27, 2006, Respondent advised the court that the Department of Motor Vehicles (due to his two alcohol related convictions) was requiring him to enroll in an 18 month "second offender program." Respondent's probation order was thus amended to substitute participation in the 18 month program in lieu of the 3 month 'first offender' program included in the original sentencing order.

(4) On September 25, 2006, Respondent's probation was revoked and a bench warrant issued when he failed to appear for a court hearing. On May 29, 2007, after bench warrant hearing, Respondent's sentence was modified to include 18 days in county jail and additional fees, however, probation was reinstated.

(5) On November 14, 2007, Respondent's probation was revoked and a bench warrant issued due to Respondent's failure to complete court ordered alcohol treatment. *This warrant is current and outstanding*[2].

RECKLESS DRIVING - 2004

E. On or about February 25, 2004, Respondent was convicted by the Court on a plea of nolo contendere for violating one count of 23103, (reckless driving), in the Los Angeles Superior Court, County of Los Angeles, State of California, El Monte Judicial District, Case No. 4RH00865 entitled *The People of the State of California v. Richard Octavio Castaneda.*

F. The circumstances of the conviction are that on or about December 28, 2003, Respondent drove a motor vehicle upon a highway with a blood alcohol content of .08% (per testing). Respondent was also driving without a valid driver's license.

G. On February 25, 2004, at the time of Respondent's conviction, imposition of sentence was suspended pending completion of twenty-four (24) months probation on specified terms, including enrollment in an alcohol counseling program. Respondent has failed to complete probation as follows:

(1) On October 19, 2004, Respondent's probation was revoked due to violations of probation; but probation was immediately reinstated.

(2) On March 22, 2005, a bench warrant issued due to possible violation of probation as Respondent failed to enroll in the court-ordered program. Respondent's probation was subsequently reinstated.

///

///

---

2. Court records in this matter are current through January 9, 2008.

(3) On September 28, 2005 Respondent's probation was revoked and a bench warrant issued due to Respondent's failure to enroll in a court ordered program. On October 24, 2005, after a bench warrant hearing, Respondent's sentence was modified to include seven days in county jail, however probation was reinstated.

(4) On January 5, 2006 Respondent's probation was again revoked and a bench warrant issued due to his failure to appear for a court hearing and show compliance with previous court orders. On January 30, 2006, after bench warrant hearing, probation was reinstated.

INFLICTION OF CORPORAL INJURY (SPOUSAL) - 2004

H. On or about January 21, 2004, Respondent was convicted by a Jury of violating one count of Penal Code section 273.5, subdivision (a), a misdemeanor (inflicting corporal injury on spouse), in the Los Angeles Superior Court, County of Los Angeles, State of California, Central Judicial District, Case No. 3CR15987 entitled *The People of the State of California v. Richard Octavio Castaneda.*

I. The circumstances of the conviction are that on or about December 12, 2003, Respondent was arrested by Los Angeles Police department officers after he attacked and beat his girlfriend, striking her in the head multiple times with a clenched fist, then striking her on the face with an open hand, all the while cursing and verbally berating her. Respondent then wrapped both hands around her neck and chocked her until she blacked out.

J. At time of sentencing on January 21, 2004, Respondent was given a term of 180 days in county jail, suspended pending completion of thirty-six (36) months of probation on specified terms. Respondent has failed to complete probation as follows:

(1) On May 2, 2005, Respondent's probation was revoked and a bench warrant issued, due to his failure to comply with various conditions of probation. On May 6, 2005, after a bench warrant hearing in which Respondent stipulated he was in violation of probation. Probation was reinstated.

///

///

(2) On August 26, 2005, Respondent's probation was again revoked and a bench warrant issued when he failed to appear for a court hearing. On or about September 9, 2005, Respondent's probation was reinstated.

(3) On September 16, 2005, Respondent's probation was again revoked and a bench warrant issued when he failed to appear for a court hearing. On October 26, 2005, after a bench warrant hearing in which Respondent again stipulated he was in violation of probation, Respondent's sentence was modified to include 10 days in county jail and additional fees, however, probation was reinstated.

(4) On January 31, 2006, Respondent's probation was revoked due to his failure to appear for a court hearing and a bench warrant hold issued. On February 17, 2006, Respondent's probation was reinstated.

SECOND CAUSE FOR DISCIPLINE

(Use of a Dangerous Drug or Alcoholic Beverage)

11. Respondent is subject to disciplinary action under sections 4300 and 4301, subdivisions (h) and (o), on the grounds of unprofessional conduct, in that Respondent used an alcoholic beverage to the extent or in a manner as to be dangerous or injurious to oneself, as follows:

A. On or about October 20, 2005, Respondent was arrested in the city of Pasadena, California for public intoxication in violation of Penal Code section 647, subdivision (f), a misdemeanor (disorderly conduct: under the influence of alcohol/drugs), while loitering outside a bar, after pretending he had a weapon concealed in the waistband of his pants and making loud verbal threats to other patrons of the bar. Respondent was not criminally prosecuted for this misconduct. However, as more fully described in paragraph 10 above, Respondent was on probation from two alcohol related criminal convictions at the time of his arrest.

B. On or about June 15, 2005, Respondent violated Vehicle Code section 23152, subdivision (b), a misdemeanor (driving with a blood alcohol content of 0.08% or greater). Respondent subsequently obtained a criminal conviction for this misconduct.

///

C. On or about December 28, 2003, Respondent violated Vehicle Code section 23103, a misdemeanor (reckless driving). Respondent subsequently obtained a criminal conviction for this misconduct. Per court findings at time of conviction, Respondent had a tested blood alcohol content of 0.08% at the time of his arrest.

THIRD CAUSE FOR DISCIPLINE

(Conviction of Multiple Crimes Involving Consumption of Alcohol)

12. Respondent is subject to disciplinary action under sections 4300 and 4301, subdivisions (k) and (o), on the grounds of unprofessional conduct, in that Respondent has been convicted of more than one misdemeanor involving the use or consumption of alcohol as follows:

A. As described more fully above at paragraph 10(A), on or about August 10, 2005, Respondent was convicted by the Court on a plea of nolo contendere for violating one count of 23152, subdivision (b), (driving with a blood alcohol content of 0.08% or greater), a misdemeanor, in the Los Angeles Superior Court.

B. As described more fully above at paragraph 10(E), on or about February 25, 2004, Respondent was convicted by the Court on a plea of nolo contendere for violating one count of 23103, (reckless driving), in the Los Angeles Superior Court, County of Los Angeles, State of California. Per court findings at time of conviction, Respondent had a tested blood alcohol content of 0.08% at the time of his arrest.

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 or suspending Pharmacy Technician Registration No. TCH 51709, issued to Richard O. Castaneda;

2. Ordering Richard O. Castaneda to pay the Board the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;

///

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

DATED: 2/15/08

VIRGINIA HEROLD
Executive Officer
Board of Pharmacy
State of California
Complainant

60270625
LA2007601671