

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

In the Matter of the Accusation Against:

MARC JOSEPH PENA

13184 Pageant Ave.
San Diego, CA 92129

Pharmacy Technician Registration
No. TCH 77759

Respondent.

Case No. 3310

OAH No. 2009091369

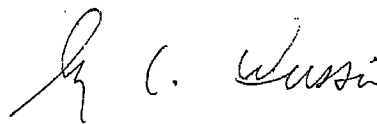
DECISION

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 July 23, 2010.

It is so ORDERED June 23, 2010.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

STANLEY C. WEISSER
Board President

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Respondent.

PROPOSED DECISION

On January 26, 2010, in San Diego, California, Alan S. Meth, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Marichelle S. Tahimic, Deputy Attorney General, represented the complainant.

Respondent did not appear at the hearing although he was properly served with the Notice of Hearing. The matter proceeded as a default pursuant to Government Code 11520.

The matter was submitted on January 26, 2010.

FACTUAL FINDINGS

1. On August 17, 2009, Virginia Herold, Executive Officer, Board of Pharmacy, Department of Consumer Affairs, State of California (hereafter, "Board") filed Accusation No. 3310 in her official capacity. Respondent filed a timely Notice of Defense.

2. On August 3, 2007, the Board issued Original Pharmacy Technician Registration Number TCH 77759 to respondent to work as a pharmacy technician in California.

3. On January 6, 2008 at approximately 12:50 a.m., Officer Michael Duncan of the San Diego State University Police Department was on regular patrol when he observed a white Honda parked in a parking lot on campus. Because of the unusual way the car was

parked, Officer Duncan approached the vehicle and contacted the driver. When the driver opened the door, Officer Duncan noticed a strong odor of alcohol coming from inside the vehicle.

At about this time, Sgt. Joshua Mays arrived at the scene to act as a cover officer. He walked to the passenger side of the vehicle. Respondent was the passenger. Sgt. Mays observed respondent lean forward toward the floorboard. Sgt. Mays told respondent to stop reaching for the floorboard but respondent ignored him. Sgt. Mays observed respondent had a white pill bottle in his right hand and he was trying to stuff the bottle into his right shoe to conceal it. Sgt. Mays opened the car door and removed the pill bottle from respondent's hand. He later gave the pill bottle to Officer Duncan and told the officer what he had seen.

Officer Duncan had respondent exit the car and with respondent's consent, searched him. The officer found a white plastic pen housing converted into a smoke pipe with OxyContin residue inside it. He also found car keys for an Acura in respondent's pants. Officer Duncan examined the contents of the pill bottle and found two OxyContin pills, a broken OxyContin pill, two Xanax pills, and three Lexapro pills. The officer confiscated the pills, the pill box, and the pipe. The officer then searched respondent's Acura and found one Suboxone pill in a Ziploc bag in a storage area in the center of the dashboard, one sheet of aluminum foil with burned OxyContin residue under the passenger seat, and a small scale.

Officer Duncan transported respondent to SDSU Police Headquarters and questioned him. Respondent said that when the officer pulled up, he was about to smoke OxyContin, but dashed it out and put it into his father's prescription bottle. He said the Suboxone found in the Acura was his and that it blocked the "crave" for OxyContin. He said he got the Suboxone from a friend and he bought the OxyContin for \$7.00 a pill. Respondent said he smoked the Oxycontin through the pens and that smoking it produced burn marks on the foil. Respondent said he sometimes could not get the medications he needed.

4. OxyContin, the brand name for oxycodone, is a dangerous drug pursuant to Business and Professions Code section 4022 and a Schedule II controlled substance. It is a narcotic analgesic and considered a street drug. Xanax, the brand name for alprazolam is a dangerous drug and a Schedule IV controlled substance. It is used to treat anxiety disorder. Lexapro, the brand name of escitalopram, is a dangerous drug and is used as an antidepressant and to alleviate the symptoms of a drug withdrawal. Suboxone, the brand name for buprenorphine/naloxone, is a dangerous drug and a Schedule V controlled substance. It is used in the treatment of drug and alcohol addiction.

5. On June 16, 2008, respondent pled no contest to one count of violating Business and Professions Code section 4060, possession of a controlled substance, a misdemeanor. The court granted respondent's application for deferred entry of judgment for 18 months pursuant to Penal Code section 1000.

6. The Board incurred costs for the investigation and enforcement of this matter in the amount of \$4,818.50 for the services of the Attorney General and \$1,938.00 in investigative costs. The total amount of \$6,756.50 is reasonable.

LEGAL CONCLUSIONS

1. 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 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, of any other state, or of the United States regulating controlled substances and dangerous drugs.

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

(a) A person may not furnish any dangerous drug, except upon the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor pursuant to Section 3640.7. A person may not furnish any dangerous device, except upon the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor pursuant to Section 3640.7.

3. 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 pursuant to Section 3640.7 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, a physician assistant pursuant to Section 3502.1, a naturopathic doctor pursuant to Section 3640.5, or a pharmacist pursuant to either subparagraph (D) of paragraph (4) of, or clause (iv) of subparagraph (A) of paragraph (5) of, subdivision (a) of Section 4052.

4. Health and Safety Code section 11170 provides:

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

5. Health and Safety Code section 11350 provides in part:

(a) Except as otherwise provided in this division, every person who possesses (1) any controlled substance specified in subdivision (b) or (c), or paragraph (1) of subdivision (f) of Section 11054, or specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the state prison.

(b) Except as otherwise provided in this division, every person who possesses any controlled substance specified in subdivision (e) of Section 11054 shall be punished by imprisonment in the county jail for not more than one year or in the state prison.

6. Cause to revoke or suspend respondent's pharmacy technician registration pursuant to Business and Professions Code section 4301, subdivision (j) for violating section 4059, and Health and Safety Code section 11170 by furnishing controlled substances to himself without a valid prescription was established by Findings 3 and 4.

7. Cause to revoke or suspend respondent's pharmacy technician registration pursuant to Business and Professions Code section 4301, subdivision (j) for violating section 4060, and Health and Safety Code section 11150 by possessing controlled substance without a valid prescription was established by Findings 3 and 4.

8. Cause to revoke or suspend respondent's pharmacy technician registration pursuant to Business and Professions Code section 4301, subdivision (h), by administering controlled substances to himself was established by Findings 3 and 4.

9. Respondent did not appear at the hearing and no evidence of rehabilitation was presented. Based upon the evidence of respondent's conduct on January 6, 2008, the only appropriate disciplinary order is revocation of respondent's pharmacy technician registration.

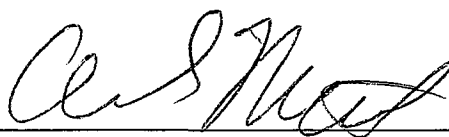
10. Cause to order respondent to reimburse the Board for its costs of investigation and enforcement of this matter in the amount of \$6,756.50 was established by reason of Finding 6.

ORDER

1. Pharmacy Technician Registration No. TCH 77759 issued to respondent Marc Joseph Pena is revoked.

2. Respondent shall pay to the Board costs associated with its investigation and enforcement pursuant to Business and Professions Code section 125.3 in the amount of \$6,756.50.

DATED: 4/15/2010



ALAN S. METH
Administrative Law Judge
Office of Administrative Hearings

Exhibit A
Accusation No. 3310

1 EDMUND G. BROWN JR.
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2 LINDA K. SCHNEIDER
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Attorneys for Complainant

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

11 In the Matter of the Accusation Against:

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13 **13184 Pageant Ave.**
14 **San Diego, CA 92129**

A C C U S A T I O N

15 **Pharmacy Technician Registration No.**
16 **77759**

17 Respondent.

18 Complainant alleges:

19 **PARTIES**

- 20 1. Virginia Herold (Complainant) brings this Accusation solely in her official capacity
21 as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.
22 2. On or about August 3, 2007, the Board of Pharmacy issued Original Pharmacy
23 Technician Registration Number TCH 77759 to Marc Joseph Pena (Respondent). Said
24 registration will expire on September 30, 2010, unless renewed.

25 **JURISDICTION**

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

1 4. Section 4300, subdivision (a) of the Code states that every license issued may be
2 suspended or revoked.

3 5. Section 118, subdivision (b), of the Code provides that the suspension, expiration,
4 surrender or cancellation of a license shall not deprive the Board of jurisdiction to proceed with a
5 disciplinary action during the period within which the license may be renewed, restored, reissued
6 or reinstated.

7 **STATUTORY REFERENCES**

8 6. Section 492 states:

9 Notwithstanding any other provision of law, successful completion of any
10 diversion program under the Penal Code, or successful completion of an alcohol and
11 drug problem assessment program under Article 5 (commencing with Section
12 23249.50) of Chapter 12 of Division 11 of the Vehicle Code, shall not prohibit any
13 agency established under Division 2 (commencing with Section 500) of this code, or
14 any initiative act referred to in that division, from taking disciplinary action against a
15 licensee or from denying a license for professional misconduct, notwithstanding that
16 evidence of that misconduct may be recorded in a record pertaining to an arrest. This
17 section shall not be construed to apply to any drug diversion program operated by any
18 agency established under Division 2 (commencing with Section 500) of this code, or
19 any initiative act referred to in that division.

16 7. Section 4202(d) of the Code states:

17 ...

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

20

21
22 8. Section 4301 of the Code states:

23 The board shall take action against any holder of a license who is guilty of
24 unprofessional conduct Unprofessional conduct shall include, but is not limited
25 to, any of the following:

25 ...

26 (h) The administering to oneself, of any controlled substance, or the use of any
27 dangerous drug or of alcoholic beverages to the extent or in a manner as to be
28 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.

1 ...
2 (j) The violation of any of the statutes of this state, or any other state, or of
3 the United States regulating controlled substances and dangerous drugs.
4 ...

5 9. Section 4059 of the Code states:

6 (a) A person may not furnish any dangerous drug, except upon the prescription
7 of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor
8 pursuant to Section 3640.7. A person may not furnish any dangerous device, except
9 upon the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or
10 naturopathic doctor pursuant to Section 3640.7.
11 ...

12 10. Section 4060 of the Code states:

13 No person shall possess any controlled substance, except that furnished to a
14 person upon the prescription of a physician, dentist, podiatrist, optometrist,
15 veterinarian, or naturopathic doctor pursuant to Section 3640.7, or furnished
16 pursuant to a drug order issued by a certified nurse-midwife pursuant to Section
17 2746.51, a nurse practitioner pursuant to Section 2836.1, a physician assistant
18 pursuant to Section 3502.1, a naturopathic doctor pursuant to Section 3640.5, or a
19 pharmacist pursuant to either subparagraph (D) of paragraph (4) of, or clause (iv) of
20 subparagraph (A) of paragraph (5) of, subdivision (a) of Section 4052. This section
21 shall not apply to the possession of any controlled substance by a manufacturer,
22 wholesaler, pharmacy, pharmacist, physician, podiatrist, dentist, optometrist,
23 veterinarian, naturopathic doctor, certified nurse-midwife, nurse practitioner, or
24 physician assistant, when in stock in containers correctly labeled with the name and
25 address of the supplier or producer. Nothing in this section authorizes a certified
26 nurse-midwife, a nurse practitioner, a physician assistant, or a naturopathic doctor,
27 to order his or her own stock of dangerous drugs and devices.

28 11. Section 4022 states:

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

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

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

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

1 12. Health and Safety Code section 11170 states:

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

3 13. Health and Safety Code section 11350 states:

4 (a) Except as otherwise provided in this division, every person who
5 possesses:

6 (1) any controlled substance specified in subdivision (b) or (c), or paragraph
7 (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of
8 subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section
9 11055, or specified in subdivision (h) of Section 11056, or

10 (2) any controlled substance classified in Schedule III, IV, or V which is a
11 narcotic drug, unless upon the written prescription of a physician, dentist,
12 podiatrist, or veterinarian licensed to practice in this state, shall be punished by
13 imprisonment in the state prison.

14 (b) Except as otherwise provided in this division, every person who possesses any
15 controlled substance specified in subdivision (e) of Section 11054 shall be punished by
16 imprisonment in the county jail for not more than one year or in the state prison.

17

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

22 DRUGS

23 15. Cannabinoids, also known as Marijuana, is a Schedule I controlled substance under
24 Health and Safety Code section 11054, subdivision (d)(13), and is classified as a dangerous drug
25 pursuant to Business and Professions Code section 4022.

26 16. Oxycodone, also known by the brand name OxyContin, is a Schedule II controlled
27 substance under Health and Safety Code section 11055, subdivision (b)(1)(N), and is classified as
28 a dangerous drug pursuant to Business and Professions Code section 4022.

17. Alprazolam, also known by the brand names Xanax and Nivaram, is a Schedule IV
controlled substance under Health and Safety Code section 11057, subdivision (d)(1), and is
classified as a dangerous drug pursuant to Business and Professions Code section 4022.

///

1 18. Buprenorphine/Naloxone, also known by the brand name Suboxone, is a Schedule V
2 controlled substance under Health and Safety Code section 11058, subdivision (d), and is
3 classified as a dangerous drug pursuant to Business and Professions Code section 4022

4 19. Escitalopram, also known by the brand name Lexapro, is not a scheduled drug, but is
5 classified as a dangerous drug pursuant to Business and Professions Code section 4022.

6 FACTS

7 20. On January 6, 2008, at approximately 12:50 a.m., two men were seen sitting in a
8 parked car in a parking lot at San Diego State University by an officer of the San Diego State
9 University Police Department. The car was parked in an unusual manner with the engine running
10 and the headlights turned off. Respondent was sitting in the passenger's seat.

11 21. The officer approached the car and identified the driver. A second officer arrived and
12 observed respondent stuff a white pill bottle into his shoe.

13 22. Respondent was asked to step out of the vehicle and consented to a search of his
14 person. The officer retrieved the pill bottle. The bottle listed the patient name as E.P., which is
15 not respondent's name. The contents of the pill bottle contained two tablets of OxyContin, two
16 tablets of Xanax and three tablets of Lexapro.

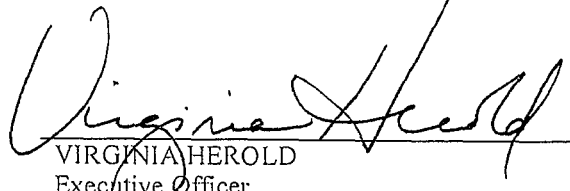
17 23. The officer also found a white plastic pen housing converted into a smoking pipe
18 containing OxyContin residue on respondent's person. Respondent was arrested. Respondent
19 informed the officer that his car was parked a few stalls away. The officer conducted a search of
20 respondent's car subsequent to the arrest.

21 24. A search of respondent's car revealed one orange Suboxone tablet in a zip lock bag.
22 The car also contained one sheet of aluminum foil with burned OxyContin residue inside the
23 vehicle's center console and another sheet of aluminum foil with burned OxyContin residue under
24 the vehicle's front seat. The officer also found a small black digital scale behind the front
25 passenger seat that he determined might have been used to weigh Marijuana.

26 25. Respondent told the officer that he was about to smoke the OxyContin when the first
27 officer pulled up. Respondent told the officer he paid a friend \$7.00 for the OxyContin and that
28 he smoked it through a pen or on foil.

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1. Revoking or suspending Pharmacy Technician's Registration Number 77759, issued to Marc Joseph Pena;
2. Ordering Marc Joseph Pena to pay the Board of Pharmacy the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3; and
3. Taking such other and further action as deemed necessary and proper.

DATED: 8/17/09 

VIRGINIA HEROLD
Executive Officer
Board of Pharmacy
Department of Consumer Affairs
State of California
Complainant

SD2009803856
accusation.rtf