

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

In the Matter of the Statement of Issues Against:

Case No. 3285

JUSTIN MILLER
1601 Heskett Way, Apt #8
Sacramento, CA 95825

Respondent.

DECISION AND ORDER

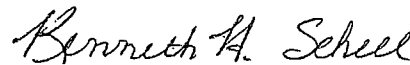
The Proposed Decision is hereby adopted by the Board of Pharmacy, Department of Consumer Affairs, as its Decision in this matter.

This decision shall become effective on April 21, 2010.

It is so ORDERED on March 22, 2010.

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 Statement of Issues
Against:

JUSTIN MARVIN MILLER

Sacramento, California 95825

Respondent.

Case No. 3285

OAH No. 2009070428

PROPOSED DECISION

This matter was heard before Dian M. Vorters, Administrative Law Judge, Office of Administrative Hearings, State of California, on November 30, 2009, in Sacramento, California.

Anahita S. Crawford, Deputy Attorney General, represented Virginia K. Herold (complainant), Executive Officer, Board of Pharmacy (Board), Department of Consumer Affairs.

Brian D. McGinity, Attorney at Law,¹ represented respondent who was present.

The record was closed and the matter was submitted on November 30, 2009.

FACTUAL FINDINGS

1. Complainant made and filed the Statement of Issues in her official capacity.
2. On September 18, 2008, respondent filed his application for registration as a pharmacy technician. He disclosed in the appropriate place that he had been convicted of a criminal offense. On November 7, 2008, the Board denied respondent's application on the basis of his criminal conviction pursuant to Business and Professions Code section 480,

¹ Brian D. McGinity, Attorney at Law, 700 University Avenue, Suite 130, Sacramento, California 95825.

subdivisions (a)(1) and (3). Respondent timely appealed the Board's decision and requested an administrative hearing in the matter.

3. On June 6, 2002, respondent was convicted in the Superior Court of California, County of Del Norte, in Case No. CR-M-02-9299, on his plea of guilty to violating Penal Code section 261.5, subdivision (c) (unlawful sexual intercourse with a minor),² a misdemeanor. Imposition of sentence was suspended, and respondent was placed on three years informal probation, with terms and conditions, including that he complete a program on safe sexual practices, attend school full-time or seek employment, stay away from the victim, not be in the presence of minor females unless adults are present, obey all laws, and pay fines/restitution. Respondent was not required to register as a sex offender. Respondent successfully completed his term of probation in June 2005. On December 16, 2005, the Superior Court dismissed the complaint and conviction pursuant to Penal Code section 1203.4.³

4. The facts and circumstances of the offense as described in the Del Norte County Sheriff's Department Report are that on or about July 4, 2001, respondent went to a party on the beach. There he met and was told by E.T. that she was 17 years of age. Tahnee S. and other friends at the party told respondent that E.T. was 17 years of age. After some time, respondent found himself sitting alone by the campfire with E.T. They kissed and engaged in sexual relations including intercourse. They slept on the beach until morning and did not see each other after that date. Respondent told law enforcement that this had been his first sexual encounter.

Tahnee S., a friend of respondent's, was interviewed by law enforcement. She recalled talking to respondent earlier on the day of the party about E.T. Tahnee S. knew that E.T. was 14 years of age. Tahnee S. admitted that she was present when "when [E.T.] told [respondent] that she was seventeen and that [Tahnee S.] went along with [Emily T's] story."

5. Respondent testified that his friends Tahnee S. and Leanna had invited him to the July 4th family beach party. They told him that a cousin, E.T., would also be there and that this cousin was 17 years of age. When he arrived at the party, Tahnee S.'s parents were retiring. Tahnee S. obtained permission from her parents for respondent to join the family beach party. Her parents subsequently retired to their camper. Tahnee S. introduced respondent to her cousin, E.T. Respondent thought that E.T. looked like she "could have been older than 17," based partially on the "way she wore her makeup." He asked her if she had a boyfriend and she stated that she did and her boyfriend was in his 20s. Respondent described E.T. as the aggressor. He stated that she unzipped his pants and engaged in oral copulation. This led to his first sexual encounter.

² Penal Code section 261.5, subdivision (c) makes it unlawful for any person to engage in sexual relations with a minor who is more than three years younger than the perpetrator. The offense can be charged as a misdemeanor or felony ("a wobbler") depending upon the facts presented.

³ The dismissal pursuant to Penal Code section 1203.4 did not relieve respondent of his obligation to disclose the conviction on an application for state licensure.

6. Respondent's testimony was credible and supported by other evidence. He admitted telling police initially that he had not engaged in sexual relations with E.T., because he was scared. He then provided a full account of the evening. Other witnesses corroborated his account that E.T. told him she was 17 years of age. He was surprised to learn from law enforcement that she was 14 years of age and not older. Supplemental police reports indicate that E.T. admitted engaging in consensual sexual relations with two other male partners prior to meeting respondent. One of the males was 26 years of age. This evidence serves to corroborate respondent's account that E.T. told him she had a boyfriend who was in his 20s. At the time of the incident, respondent was entering his senior year in high school and had turned 18 six weeks prior to the incident. At hearing, respondent appeared remorseful for his conduct.

7. Brenda Barnard has been an inspector with the Board of Pharmacy since 1998. Her work involves the licensing of wholesalers, pharmacy technicians, and pharmacists. She is responsible for monitoring drug diversion clients, performing site inspections, and investigating complaints and other issues for the Board. She believes sexually related crimes are related to the practice of pharmacy technicians as there are non-retail settings such as hospitals where patients need to be protected. She stated that judgment and ethics are factors that the Board assesses when reviewing criminal convictions.

8. In assessing respondent's licensing matter, Ms. Barnard noted that no drugs or alcohol were involved in respondent's crime. She observed respondent's testimony and he did not appear dishonest. He used poor judgment during the July 4th encounter, but has led an exemplary life subsequently. In her opinion, based on the testimony provided, she would not consider respondent to be unethical or untrustworthy.

Mitigation / Rehabilitation

9. At the time of the offense, respondent mistakenly believed that if the sexual encounter was consensual and the partner was 17, it was legal. He was a senior in high school when he pled to the charge. He was not ordered to register as a sex offender. He completed the terms of his probation and successfully petitioned the court for dismissal. He does not use drugs and alcohol and does not associate with people who do stating, "I didn't want to be around them because it related to my mother."

10. Respondent lived in an unstable home growing up. His mother abused drugs and allowed her drug associates to be in the home. His brother is 13 years younger than respondent and still lives with their mother in Crescent City. Respondent recalled having to take care of his brother and mother including feeding her and "dumpster diving" for food. On the day of the July 4th incident, he left home after a fight with his mother over the household money going "to her drug use." He believes his mother stopped using drugs in 2008 due to health complications. When asked if he loved his mother, respondent stated without hesitation, "Very much so." Respondent presented as mature, aware, and humble in addressing the consequences of his childhood and personal choices.

11. Respondent has never met his biological father. His step-father introduced him to beer when respondent was eight years of age. He recalled, "I asked him if there was anything to drink and he gave me the can. I took one sip and spit it out." His next drink was at age 21. He stated that his mother's drug use made him more aware of things going on around him. He feels responsibility toward his mother and his younger brother, "because she is sick." She has been diagnosed with chronic obstructive pulmonary disease (COPD) and emphysema. He speaks to her almost daily. His brother tells him that their mother is off drugs and "doing okay." At hearing, he expressed appropriate empathy and emotion for her 26-year addiction and apparent recovery.

12. He entered the Boston Reed College Pharmacy Technician Program in 2007. He performed at the top of his class and graduated as class valedictorian. He has completed 240 hours of instruction as required by regulation. (Cal. Code Regs., tit 16, §1793.6, subd. (c).) One of his instructors, Kirsten J. Rockwood, wrote a letter on his behalf. She confirmed that respondent was a top performer and had perfect attendance. She described him as a hard worker who will succeed in the pharmacy field. In 2007, respondent sought out and obtained an externship at Rite Aid Pharmacy in Sacramento where he received "above average" marks in his evaluation. Regina Lum is the Rite Aid Pharmacy Manager who worked with respondent. In a letter, she described his tenaciousness in seeking the position and his initiative on the job in positive terms.

Character Witnesses

13. George Kostyko, respondent's maternal uncle, testified and wrote a letter on respondent's behalf. He is Chief of Office Communications for the California Department of Corrections and Rehabilitation (CDCR) where he has worked for ten years. He has a close relationship with respondent, especially since respondent's move back to Sacramento. In 1994, Mr. Kostyko's sister, who is respondent's mother, move with her two sons to Crescent City. Mr. Kostyko described his sister as a poor role model who provided an unstable life style for her children. He describes respondent as honest, responsible, and hard working. He stated that respondent helps the maternal grandmother by doing odd jobs and construction projects around her house. Mr. Kostyko stated that he was excited when respondent returned to Sacramento, went to Pharmacy School, performed at the top of his class, and entered into an internship. It was a disappointment when respondent was denied due to the criminal conviction. He stated that respondent took responsibility for having engaged in intimate relations with the girl. Respondent never denied or said that the girl was lying.

14. Vicki Kostyrko, respondent's maternal grandmother, testified and wrote a letter on respondent's behalf. She is retired from California State University Sacramento (CSUS) as the Student Affairs Coordinator and currently performs grant work for CSUS and CDCR on a part-time basis. She described her relationship with respondent as very close. She has tried to be a mother and a grandmother to him as his mother was "unfit." After her daughter moved to Crescent City with her grandsons, she kept in contact by telephone and has made referrals to Child Protective Services regarding their welfare. She described respondent as truthful, intelligent, responsible, and hard working. She talks to him regularly by telephone and sees him at least once a week when he comes over for dinner or to help her

and his grandfather at their home. Respondent has discussed the July 4th incident with her and she is aware of the facts of the case. She stated that he has never lied to her about his role in the incident. She feels that she can rely on him.

15. Amber Bean, respondent's girlfriend, testified on his behalf. She has been platonic friends with respondent since the Summer of 2001. She graduated from high school in 2003 and entered a certified nurses assistant (C.N.A.) program of study. In 2004, at age 18, Ms. Bean began dating respondent. She has worked with respondent at Northside Health Care, in Crescent City and Woodside Health Care, in Sacramento, where he was employed as a dietary assistant. In late 2004, they moved to Sacramento together and initially lived with his grandmother. Most of her colleagues at work are other female C.N.A.s. She has never seen or heard of respondent being disrespectful or inappropriate with staff. She described respondent as honest, reliable, and helpful at work and in the community; mowing lawns and helping maintain the land.

Ms. Bean recalled that respondent told her about the incident after he was first questioned by law enforcement. They were friends and neighbors at that time. She stated that he had never been emotionally or physically aggressive towards her. He helps around the house, does not gawk at other women, or pay inappropriate attention to young girls. She trusts him, believes he possesses high moral character, and described him as "an overall outstanding gentleman who would never do anything to harm anybody. He is wonderful to be with, generous with his time, and takes on responsibility."

Ms. Bean met respondent's mother in Crescent City. She described his mother as "very unstable," using drugs, and allowing "random men" to visit the home. Ms. Bean observed respondent remove his younger brother from the home on several occasions to reduce his exposure to bad influences. Respondent would take his brother to the market, or playground, or to get something to eat.

16. While in pharmacy school, Ms. Bean stated that respondent studied every moment that he could. She described him as proud to go to college and do something with himself. As a dietary technician, he was hard working. She has heard co-workers comment on his diligent efforts cleaning and prepping the kitchen at Woodside Health Center. Two co-workers at Woodside, Janice Cameron, L.V.N. and Nicole McMillen, wrote letters on respondent's behalf. Respondent informed both Ms. Cameron and Ms. McMillen about his criminal history and the Board proceedings before asking them to write letters. Their letters reflect a high regard for respondent's "caring," "respectful and generous" disposition and strong work ethic.

LEGAL CONCLUSIONS

Applicable Laws

1. Business and Professions Code section 480, subdivision (a)(1) provides that the Board may deny a license if the applicant has been convicted of a crime. The crime must

be substantially related to the qualifications, functions or duties of the business or profession for which the application is made.

2. Business and Professions Code section 4300, subdivision (c), states that the board may refuse a license to any applicant found to be guilty of unprofessional conduct. The board may issue a probationary license to any applicant for a license who is guilty of unprofessional conduct and has met all other requirements for licensure.

3. Business and Professions Code section 4301 defines unprofessional conduct to include:

(f) Any act involving moral turpitude, dishonest, 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.

[¶]...[¶]

(l) The conviction of a crime substantially related to the qualifications, functions, and duties of a licensee under this chapter.

4. Pursuant to Business and Professions Code 4307, subdivision (a), any person who has been denied a license or whose license has been revoked, or suspended shall be prohibited from serving as a manager, administrator, owner, member, officer, director, associate, or partner of a licensee. Where a probationary license is issued, the prohibition shall remain in effect for a period not to exceed five years. Where the license is denied or revoked, the prohibition shall continue until the license is issued or reinstated. (Bus. & Prof. Code, § 4307, subd. (a)(1) and (2).)

5. Pursuant to California Code of Regulations, title 16, section 1770, 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.

Cause for Denial

6. The crime of engaging in unlawful sexual intercourse with a minor is substantially related to the qualifications, functions or duties of a licensee for the reasons stated in Factual Findings 3 and 7.

7. The crime of engaging in unlawful sexual relations with a minor in violation of Penal Code section 261.5, subdivision (c), is considered a crime of moral turpitude. (*People v. Fulcher* (1987) 194 Cal.App.3d 749, 754.)

8. Cause for denial of respondent's application for a pharmacy technician license exists pursuant to Business and Professions Code sections 480, 4300, subdivision (c), and 4301, subdivisions (f) and (1), in conjunction with California Code of Regulations, title 16, section 1770, by reason of Finding 3, and Legal Conclusions 6 and 7.

Rehabilitation

9. The department has developed guidelines for use in evaluating the rehabilitation of an applicant for issuance of a license, which are set forth in California Code of Regulations, title 16, section 1769, subd. (a). Factors to consider include the nature and severity of the act or offense, evidence of any subsequent crimes or misconduct, the time that has elapsed since commission of the crime/act, compliance with the terms of probation, and evidence of rehabilitation.

10. In consideration of these guidelines, respondent's criminal history consists solely of his June 2002 conviction for unlawful sexual intercourse with a minor. In assessing the nature and severity of the crime, the facts support respondent's reasonable belief that E.T. was 17 years of age. Though a sexual encounter between an 18 and 17-year old would still be considered unlawful, the offense could only be charged as a misdemeanor (Pen. Code, § 261.5, subd. (b)), as opposed to a "wobbler."⁴ Hence, the criminal penalty is less stringent.

Further, though consent is not a defense to violations of Penal Code section 261.5 in criminal court, consent is a relevant factor in license discipline matters. (*Donaldson v. Dpt. of Real Estate* (2005) 134 Cal.App.4th 948.) Though the "concept of consent, whether legal or actual, is actually *irrelevant* to the determination of whether those statutes have been violated, ...the question before the Commissioner was ... whether it furnished a defense to the disciplinary charge-which it clearly did unless shown to be absent." (*Ibid*, Italics in original.) In the present case, the facts support a reasonable belief that the act was consensual between the parties. There are no facts to support otherwise. Finally, respondent was himself still in high school and appeared to be, at minimum, unsophisticated in his understanding of the law.

Eight and one-half years have passed since the conduct occurred in July 2001. There is no evidence that respondent has engaged in any subsequent unlawful or inappropriate conduct. Respondent complied with the terms of probation and the criminal matter has been dismissed. He was honest in disclosing the charge on his application for licensure and he testified with candor and openness regarding his conduct. Witnesses testified about his childhood hurdles and his ability to overcome them. As stated by Ms. Barnard, outside of this offense, respondent "has led an exemplary life subsequently." (Factual Finding 8.) He has the support of family, friends, and colleagues. He has demonstrated a level of maturity and drive in obtaining his education and assisting others that is noteworthy.

⁴ A charge is referred to as a "wobbler" if it is punishable as either a misdemeanor or felony.

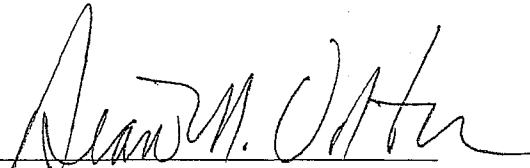
Conclusion

11. All of the evidence presented in this matter has been considered. (Factual Findings 3 through 16.) Though legal grounds for denial exist pursuant to Legal Conclusion 8, respondent has demonstrated substantial rehabilitation pursuant to Legal Conclusions 9 through 10. Though normally, all of the standard terms and conditions of probation are imposed, it would not be against the public interest to allow respondent to practice as a licensed pharmacy technician, without restrictions. Given the overwhelming evidence of rehabilitation, probation would serve no public interest in this case.

ORDER

A Pharmacy Technician Registration Number shall be issued to Justin Marvin Miller.

DATED: January 11, 2010



DIAN M. VORTERS
Administrative Law Judge
Office of Administrative Hearings

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 of the State of California
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8 **BEFORE THE**
BOARD OF PHARMACY
 9 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA

11 In the Matter of the Statement of Issues Against:

Case No. 3285

12 **JUSTIN MARVIN MILLER**
 1601 Heskett Way, Apt #8
 13 Sacramento, Ca 95825

STATEMENT OF ISSUES

14 Respondent.

16 Complainant alleges:

17 **PARTIES**

18 1. Virginia K. Herold (Complainant) brings this Statement of Issues solely in
 19 her official capacity as the Executive Officer of the Board of Pharmacy.

20 2. On or about September 18, 2008, the Board of Pharmacy received an
 21 application for Registration as a Pharmacy Technician from Justin Marvin Miller (Respondent).
 22 On or about September 16, 2008, Justin Marvin Miller certified under penalty of perjury to the
 23 truthfulness of all statements, answers, and representations in the application. The Board denied
 24 the application on November 7, 2008.

25 **JURISDICTION**

26 3. This Statement of Issues is brought before the Board of Pharmacy, under
 27 the authority of the following laws. All section references are to the Business and Professions
 28 Code unless otherwise indicated.

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SECOND CAUSE FOR DENIAL

(Acts That Give Cause for Discipline of a Licensee)

9. Respondent is subject to denial of his application pursuant to Code section 480, subdivision (a)(3)(A), and 4300, subdivision (c), in that Respondent committed acts which, if done by a licentiate, would be grounds for revocation or suspension of their license under Code sections 4301, subdivisions (f) and (l), as set forth in paragraph 8 above.

OTHER MATTERS

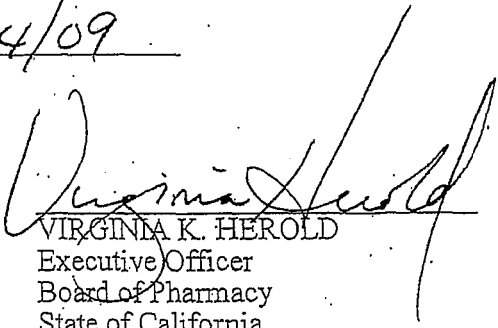
5. Pursuant to Code section 4307, if the application of Respondent for registration as a pharmacy technician is denied, Respondent shall be prohibited from serving as a manager, administrator, owner, member, officer, director, associate, or partner of any licensee.

PRAYER

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

- 1. Denying the application of Justin Marvin Miller for Registration as a Pharmacy Technician;
- 2. Prohibiting Justin Marvin Miller from serving as a manager, administrator, owner, member, officer, director, associate, or partner of any licensee; and
- 3. Taking such other and further action as deemed necessary and proper.

DATED: 5/14/09


 VIRGINIA K. HEROLD
 Executive Officer
 Board of Pharmacy
 State of California
 Complainant