

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

In the Matter of the Accusation Against:

CATHY LOIS WHITE

P.O. Box 991
Twain Harte, CA 95383

Pharmacy Technician Registration
No. TCH 15916

Respondent.

Case No. 3501

OAH No. 2010041141

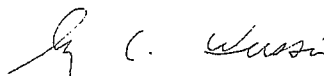
DECISION

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 December 31, 2010.

It is so ORDERED December 1, 2010.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

STANLEY C. WEISSER
Board President

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PROPOSED DECISION

Administrative Law Judge JoAnn Irwin Eshelman, Office of Administrative Hearings, State of California, heard this matter in Sacramento California on September 7, 2010.

Brian S. Turner, Deputy Attorney General, represented complainant Virginia Herold, Interim Executive Officer, Board of Pharmacy (Board), Department of Consumer Affairs (Department), State of California.

Cathy Lois White (Respondent) appeared on her own behalf.

Oral and documentary evidence was received. The record closed and the matter was submitted for decision on September 7, 2010.

SUMMARY

In this matter, the Board seeks to discipline the registration of pharmacy technician Cathy Lois White based on four grounds of unprofessional conduct. The Board alleged that she: 1) committed an act of "gross immorality" by transporting the controlled substance, Hydrocodone; 2) was convicted of violating a California statute prohibiting the transportation of that controlled substance; 3) was convicted of a crime (transportation of a controlled substance) which is substantially related to her work duties; and 4) if an applicant, would have been unfit for registration due to that criminal conviction. At hearing, the Board established cause for discipline due to unprofessional conduct based on grounds two through four. For these reasons, and because Ms. White remains on probation and did not offer persuasive proof of substantial rehabilitation, her registration must be revoked.

FACTUAL FINDINGS

1. The Board issued an Original Pharmacy Technician Registration Number TCH 15916 (registration) to respondent on May 11, 1995. Her registration is in full force and effect until January 31, 2011.

Respondent's Crime and Criminal Conviction

2. Respondent had a friend in Santa Cruz who had cancer and was in pain, but was out of medication and could not afford to buy more. The friend wanted Norco, which is another name for the drug Hydrocodone. Sometime between August 2007 and March 2008, respondent mailed a bottle of 120 Norco pills to her friend. The package was intercepted by the postal service and criminal proceedings followed.

3. Respondent knew that Norco was for pain and that it was a controlled substance under "Schedule III." She was trying to do a favor for her friend and had "no criminal intent" when she mailed the Norco. Respondent sent Norco to her friend one time.

4. On November 7, 2008, in the Superior Court of California, County of Santa Cruz, Respondent was convicted, upon her plea of nolo contendere (no contest), of a violation of Health and Safety Code section 11352, subdivision (a), Sale or Transportation or Offer to Sell a Controlled Substance (Hydrocodone), a felony. The court placed respondent on formal probation for 36 months subject to various terms and conditions, including a 90-day jail sentence, registration as a drug offender under Health and Safety Code section 11590,¹ and payment of several fees and fines. Respondent remains on probation until November 7, 2011.

5. Hydrocodone is a Schedule II controlled substance under Health and Safety Code section 11055, subdivision (b)(1)(J). It may not be dispensed to a patient without a prescription.

Rehabilitation

6. Respondent has worked as a pharmacy technician for 15 years. At the time of her arrest, she was working at Twain Harte Pharmacy, where she had been employed for four years. Respondent was terminated by that employer, but stated that it was not due to this case. She was unable to find work as a pharmacy technician after her conviction. In August

¹ There is a discrepancy in the record concerning this probation condition. The court's preprinted, check-off probation order includes the registration condition, but the minute order does not. The reason for this discrepancy is not clear. Because the probation order is completed in court as the judge pronounces judgment and sentence, it is more reliable and is considered the accurate record of the proceedings.

2010, respondent was hired to work part-time at a "seasonal" restaurant. She earns minimum wage plus tips on that job.

7. Respondent believes that, if she had her pharmacy technician license, she would be able to get a job because she is "well-respected in the community." Respondent provided no corroboration for this claim.

8. Respondent had no criminal record before she was convicted of transporting a controlled substance approximately two years ago.

9. Respondent has fully complied with her probation terms and conditions. She has paid her fines and complied with reporting requirements. Due to her high level of compliance, respondent's probation officer has reduced her reporting requirement from monthly to quarterly.

10. At hearing, respondent expressed remorse for her actions and acknowledged that she made "a huge mistake." She does not dispute her conviction but thinks she should not lose her registration because of it.

11. Respondent chose not to testify on her own behalf. She was called to the witness stand by the Board.

Costs

12. Business and Professions Code section 125.3 allows the Board to recover its reasonable investigation and enforcement costs in this case. Both parties presented evidence for the determination of reasonable costs.

13. The Board's total costs of investigation and enforcement were \$2,465. That entire cost was incurred by the Office of the Attorney General, Department of Justice (Department) for its preparation of the case up to the day of hearing. Most of the cost (\$1,955) was for the attorney's work on the case from November 2009 through August 31, 2010, requiring 11.5 hours at \$170 per hour. The attorney estimated additional preparation and travel costs of \$510 from September 1, up to the date of hearing on September 7, 2010.

14. Respondent is struggling financially and in debt. She owes \$2,768 to the Employment Development Department (EDD) for an unemployment insurance overpayment. She has been given a repayment plan by EDD which requires a \$115 minimum payment per month. Respondent also owes \$140 to the court for her probation supervision. Because she is paid minimum wage on a part-time schedule, Respondent has little income. For the two-week pay period from August 2, through 15, 2010, respondent earned net pay of \$164.94. For the last two weeks in August 2010, she worked more hours and earned about twice that amount (\$367.10). Respondent recently moved in with her sister for financial reasons.

LEGAL CONCLUSIONS

1. The Board proved by clear and convincing evidence that respondent committed unprofessional conduct by violating three disciplinary sections of the Business and Professions Code.² The Board failed to prove that respondent violated a fourth disciplinary section of that code.

Unprofessional Conduct—Violation of Controlled Substances' Statute

2. Under section 4301, subdivision (l), "a violation of the statutes of this state regulating controlled substances or dangerous drugs shall be conclusive evidence of unprofessional conduct." Here, respondent was convicted of violating a California statute which regulates controlled substances by prohibiting their sale or transportation. Her conviction for transporting a controlled substance (Findings 4 and 5) is thus conclusive evidence of unprofessional conduct. Respondent has violated the "conclusive evidence" provision in section 4301, subdivision (l).

Unprofessional Conduct-- Criminal Conviction Substantially Related to Work Duties

3. Under other language in section 4301, subdivision (l), a pharmacy technician may also commit unprofessional conduct if she is convicted of a crime "substantially related to the qualifications, function and duties of a licensee [registrant]." California Code of Regulations, title 16, section 1770 defines substantial relationship as "... present or potential unfitness of a ... registrant to perform the functions authorized by his ... registration in a manner consistent with the public health, safety, or welfare."

4. A pharmacy technician's functions and duties involve assisting in the preparation and handling of various drugs. In so doing, the technician has daily access to many types of drugs, including controlled substances such as Hydrocodone. A technician convicted of a drug offense shows that she is unfit to perform her job duties because she has exploited her access to that drug by using it for a personal reason. Such conduct is dangerous to members of the public as the technician is essentially prescribing medication without a license.

5. Respondent exploited her access to Hydrocodone for personal reasons (Findings 2 through 5), showing that she was unfit to perform her job duties. The conviction she sustained as a result of this conduct is substantially related to the qualifications, functions, and duties of a pharmacy technician, as defined in California Code of Regulations, title 22, section 1770. Respondent has committed unprofessional conduct and violated the "substantial relationship" provision in section 4301, subdivision (l).

² All further statutory references are to the Business and Professions Code unless otherwise stated.

Unprofessional Conduct—If an Applicant

6. Under section 4301, subdivision (p), a pharmacy technician commits unprofessional conduct if her “Actions or conduct ... would have warranted denial of a licensé [registration].” Section 480, subdivision (a), allows a board to deny an application for licensure [or registration] if the applicant has been convicted of a crime.

7. In this case, if respondent were applying for registration as a pharmacy technician she would have to show that she had no criminal convictions. The presence of a conviction on her record would be basis, under section 480, subdivision (a), for denial of her registration application. Respondent has committed unprofessional conduct under section 4301, subdivision (p).

Unprofessional Conduct – Respondent’s Crime

8. Under section 4301, subdivision (a), a pharmacy technician commits unprofessional conduct if she has shown “gross immorality.” The statute does not define gross immorality and the Board cited no cases which have applied this phrase to specific factual circumstances. Immoral has been defined as “morally evil; impure; unprincipled; vicious; or dissolute,” and gross as “out of all measure; beyond allowance; not to be excused; flagrant; shameful.” (Black’s Law Dict. (Rev. 4th ed. 1968) pp. 885 and 832, respectively.) Thus, for respondent’s conduct to reflect gross immorality the Board would have to prove that her actions were flagrantly unprincipled, or vicious and dissolute “beyond allowance.”

9. In furnishing Norco or Hydrocodone to her friend (Findings 2 through 5), Respondent used her access to the drug for an unlawful purpose. However, this unlawful purpose was not so debased as to amount to gross immorality, as defined above. There was no evidence that respondent was selling the drug or that she provided the drug to her friend more than once. Instead, respondent provided the drug in a misguided attempt to help her ill friend. There was no evidence that respondent wanted to corrupt her friend, to get her “hooked” on a narcotic or to accomplish some other immoral purpose. Respondent also was not attempting to benefit herself through her criminal conduct. Under these facts, Respondent’s conduct and related criminal conviction cannot be characterized as reflecting gross immorality. Therefore, she did not violate section 4301, subdivision (a). The Board failed to prove this ground for disciplinary action.

Rehabilitation

10. California Code of Regulations, title 16, section 1769, subdivision (b), contains the Board’s five criteria for evaluating rehabilitation: (1) Nature and severity of the act(s) or offense(s); (2) Total criminal record; (3) The time that has elapsed since commission of the act(s) or offense(s); (4) Whether the licensee [registrant] has complied with all terms of ... probation, ...; and (5) Evidence, if any, of rehabilitation submitted by the licensee [registrant].

11. Applying these criteria to respondent's case shows that she has not yet achieved substantial rehabilitation. Respondent's offense was a serious felony, although her underlying conduct was not particularly egregious (Findings 2 and 3). Respondent has no other criminal record, and more than two years have passed since the offense occurred (Finding 8). Respondent has complied with her probationary terms (Finding 9). She expressed remorse for her actions and acknowledged that she had made a mistake (Finding 10). These criteria show that respondent has achieved some rehabilitation. However, she showed no understanding of the harm she could have caused her friend by providing a powerful drug without a prescription and apparently without medical supervision. She also did not seem concerned that she had violated the trust of her employer by taking the drug for a personal use. Respondent's failure to understand the impact of her conduct on others indicates that she has not accepted full responsibility for her actions. Accepting responsibility is a key preliminary step toward rehabilitation. Under the five regulatory criteria, respondent has not achieved substantial rehabilitation.

Costs

12. In determining reasonable costs of investigation and enforcement under section 125.3, the Board must consider four factors set forth in *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32. Those factors include: 1) whether Respondent used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed; 2) respondent's subjective good faith belief in the merits of her position and whether she has raised a colorable challenge to the proposed discipline; 3) the financial ability of respondent to pay; and 4) whether the scope of the investigation was appropriate to the alleged misconduct.

13. Here, respondent did not use the disciplinary hearing process to obtain dismissal of other charges or to seek a reduction in the proposed discipline. She did not present a colorable or meaningful challenge and had no clear position, other than wishing that her license would not be revoked. Respondent's financial ability to pay is limited and she presented evidence indicating that she is in debt (Finding 14). The scope of the investigation was appropriate to the alleged misconduct. Based on these factors, the costs of \$2,465 for investigation and enforcement are reasonable. However, considering respondent's financial circumstances, it is recommended that the Board allow her to pay these costs in a payment plan approved by the Board.


ORDER

1. Pharmacy technician registration number TCH 15916, issued to Respondent Cathy Lois White is revoked for reasons set forth in Legal Conclusions 1, 2, 5, 7, and 11. Respondent shall relinquish her technician registration to the Board within ten (10) days of the effective date of this decision. Respondent may not reapply or petition the Board for reinstatement of her revoked technician registration for three (3) years from the effective date of this decision.

2. A condition of reinstatement shall be that the respondent is certified as defined in section 4202, subdivision (a)(4), and provides satisfactory proof of certification to the Board.

3. As a condition precedent to reinstatement of her revoked technician registration Respondent shall reimburse the Board for its costs of investigation and prosecution in the amount of \$2,465 (Legal Conclusion 13). This amount shall be paid in full prior to the reapplication or reinstatement of her revoked technician license, unless otherwise ordered by the Board. Nothing in this provision shall be construed to prohibit the Board from reducing the amount of cost recovery upon reinstatement of respondent's license.

DATED: October 18, 2010



~~JOANN IRWIN ESHELMAN~~

Administrative Law Judge

Office of Administrative Hearings

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Pharmacy Technician Registration No. TCH
15916

Respondent.

Case No. 3501

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, Department of Consumer Affairs.
2. On or about May 11, 1995, the Board of Pharmacy issued Pharmacy Technician Registration Number TCH 15916 to Cathy Lois White (Respondent). The Pharmacy Technician Registration was in full force and effect at all times relevant to the charges brought herein and will expire on January 31, 2011, unless renewed.

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STATUTORY AND REGULATORY PROVISIONS

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

4. Section 490 of the Code provides, in pertinent part, that a board may suspend or revoke a license on the ground that the licensee has been convicted of a crime substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued.

5. Section 492 of the Code states:

“Notwithstanding any other provision of law, successful completion of any diversion program under the Penal Code, or successful completion of an alcohol and drug problem assessment program under Article 5 (commencing with section 23249.50) of Chapter 12 of Division 11 of the Vehicle Code, shall not prohibit any agency established under Division 2 ([Healing Arts] commencing with Section 500) of this code, or any initiative act referred to in that division, from taking disciplinary action against a licensee or from denying a license for professional misconduct, notwithstanding that evidence of that misconduct may be recorded in a record pertaining to an arrest.

6. Section 493 of the Code states:

“Notwithstanding any other provision of law, in a proceeding conducted by a board within the department pursuant to law to deny an application for a license or to suspend or revoke a license or otherwise take disciplinary action against a person who holds a license, upon the ground that the applicant or the licensee has been convicted of a crime substantially related to the qualifications, functions, and duties of the licensee in question, the record of conviction of the crime shall be conclusive evidence of the fact that the conviction occurred, but only of that fact, and the board may inquire into the circumstances surrounding the commission of the crime in order to fix the degree of discipline or to determine if the conviction is substantially related to the qualifications, functions, and duties of the licensee in question.

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8. Section 4300 provides in relevant part:

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

9. Section 4301 provides in relevant part:

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

“(a) Gross immorality.

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

(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.

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

p) Actions or conduct that would have warranted denial of a license.”

10. Section 11352(a) of the Health and Safety Code provides in relevant part.

(a) Except as otherwise provided in this division, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this State, sell, furnish, administer, or give away, or attempts to import into this State, sell, furnish, administer, or give away, or attempts to import into this State or transport (1) any controlled substance specified in subdivision (b)

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or (c) of Section 11055....unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed..."

COST RECOVERY

11. Section 125.3 of the Code provides, in pertinent part, that the Board/Registrar/Director 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.

CONTROLLED SUBSTANCE AT ISSUE

12. Hydrocodone is a Schedule II controlled substance as designated by Health and Safety Code section 11055, subsection (b)(1)(J).

FIRST CAUSE FOR DISCIPLINE
(Unprofessional Conduct)

13. Respondent is subject to disciplinary action under section 4301(a) in that respondent transported, or sold or offered to sell the drug hydrocodone. The circumstances are as follows:

14. On or about or between August 3, 2007 and March 3, 2008 respondent unlawfully transported, imported, sold, furnished, administered and gave away or offered to perform all these acts with the controlled substance Hydrocodone in or about the County of Santa Cruz, California. On or about November 7, 2008, respondent was convicted by a plea of no contest to a violation of Health and Safety Code section 11352(A), a felony, based on the facts set forth in this Paragraph.

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SECOND CAUSE FOR DISCIPLINE
(Conviction of Crime)

15. Respondent is subject to disciplinary action under section 4301(j) in that respondent was convicted of a violation of California statute concerning controlled substances. The circumstances are as follows:

16. Paragraphs 13 and 14 are incorporated herein as though set forth at length. Respondent was convicted of a violation of Health and Safety Code section 11352(A), crime involving controlled substances.

THIRD CAUSE FOR DISCIPLINE
(Conviction of a Crime Substantially Related)

17. Respondent is subject to disciplinary action under section 4301(l) in that respondent was convicted of a crime substantially related to the duties and qualifications of a pharmacist technician licensee. The circumstances are as follows:

18. Paragraphs 13 and 14 are incorporated herein as though set forth at length. Respondent's conviction of violating Health and Safety code section 11352(A) evidences present or potential unfitness to perform the functions of a licensee consistent with public health, safety or welfare.

FOURTH CAUSE FOR DISCIPLINE
(Unprofessional Conduct)

19. Respondent is subject to disciplinary action pursuant to section 4301(p) in that respondent committed acts that would warrant denial of a license. The circumstances are as follows:

20. Paragraphs 13 and 14 are incorporated herein as though set forth at length. The acts leading to respondent's conviction evidences unfitness for licensure as a pharmacist technician and would warrant denial of a pharmacist technician's license.

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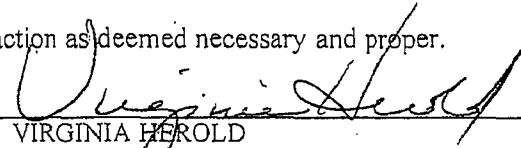
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PRAYER

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. Revoking or suspending Pharmacy Technician Registration Number TCH 15916, issued to Cathy Lois White.
2. Ordering Cathy Lois White 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;
3. Taking such other and further action as deemed necessary and proper.

DATED: 3/16/10


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

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