

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

In the Matter of the Accusation Against:

SIMONE GIZELLE MCGEE
7493 Shoreline Dr.
Stockton, CA 95219

Case No. 3705

OAH No. 2010110626

Pharmacy Technician License No. TCH 70844

Respondent.

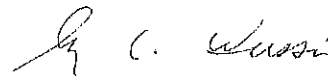
DECISION

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 October 27, 2011.

It is so ORDERED September 27, 2011.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

STANLEY C. WEISSER
Board President

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Case No. 3705

SIMONE GIZELLE MC GEE

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Pharmacy Technician
License No. TCH 70844

Respondent.

PROPOSED DECISION

This matter was heard on June 28, 2011, before Ann Elizabeth Sarli, Administrative Law Judge, State of California, Office of Administrative Hearings (OAH), in Stockton California.

Complainant, Virginia Herold, Executive Officer of the Board of Pharmacy, was represented by Sterling Smith, Deputy Attorney General.

Simone Gizellee McGee represented herself.

Oral and documentary evidence was submitted. The record was closed and the matter submitted for decision on June 28, 2011.

FACTUAL FINDINGS

1. On September 19, 2006, the Board of Pharmacy (Board) issued Pharmacy Technician License Number TCH 70844 to Simone Gizellee McGee (respondent). The pharmacy technician registration was in full force and effect at all times relevant to this proceeding.

2. On June 9, 2010, Virginia Herold made the Accusation against respondent in her official capacity as Executive Officer of the Board. The Accusation was filed with OAH on November 17, 2010.

3. Respondent timely filed a Notice of Defense to the Accusation, pursuant to Government Code sections 11505 and 11509. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500 et seq.

4. On August 30, 2008 detective Greg Beall of the Manteca Police Department was on patrol when he observed a gray 1988 BMW stopped at a stop sign, with no front license plate and a cracked windshield. He recognized the passenger in the rear of the vehicle as a parolee. Respondent was the driver and owner of the vehicle. Officer Beall detained the parolee and conducted a search of his person and the vehicle. During the search, he located a "crank pipe" in the glove box. Respondent told Officer Beall that she uses methamphetamine and uses a pipe to ingest methamphetamine, but that this pipe was not hers. Respondent told him that she had used methamphetamine the previous day. The two passengers denied that they owned the pipe and respondent was cited for possession of the pipe, but was not prosecuted. Officer Beall testified credibly at hearing.

5. Respondent testified that she "does not remember" telling Officer Beall that she had used methamphetamine the day before. She explained that at the time she was cited for possession of the pipe, she was suffering from undiagnosed bipolar disorder and severe migraine headaches. She was treating at Kaiser and she had not yet been diagnosed or properly medicated. She met two people that day and "impulsively" drove them to a store. On the way home she got pulled over because the police recognized the man in the back seat. She did not know anything about either of these people. Respondent's statement that the crank pipe was not hers was not persuasive.

6. Respondent admitted that she began using methamphetamine in 2005. She had a boyfriend who was just released from jail and he had a drug problem. Respondent was "really stressed out." Her boyfriend told her that smoking methamphetamine would make her feel better. She smoked it and began using it "every other day for a couple of weeks." She feels she did not become addicted to it. She stopped using methamphetamine after seeing photographs of methamphetamine addicts on an internet site. Later in her testimony, respondent stated that she had last used methamphetamine in 2008.

7. Respondent explained her rocky personal and employment history before she was properly diagnosed and medicated for bipolar illness and other disorders. After she graduated from high school, she worked in the fast food industry, but did not fare well because she was "mistreated." She went to school for a pharmacy technician license from Boston Reed College and graduated in 2006. She worked part time at a Kmart pharmacy for a month as part of her training. She took a job at a Target pharmacy in Lodi for a year and eight months. She "had to leave" because she had a "mental breakdown" after three family members died within a month of each other. Her human resources manager was "constantly harassing" her and she was being called in to the manager's office each week. She does not remember what she was being harassed about or what the manager's complaints had been.

8. Respondent then worked at the Duell Vocational Institute for about a month as a temporary pharmacy technician. Thereafter, she was unable to find a job because the Accusation was pending against her license. She was unaware the Accusation was pending and spent two years looking for work until somebody called her and told her about the Accusation. She has not worked since August 2008.

9. Respondent was "kicked out" of her religion in 2006 because of her sexual relationship with her boyfriend and her methamphetamine use. As a result, fellow worshipers were not permitted to communicate with her.

10. At an unspecified time, respondent was placed in a rehabilitation center for psychiatric illness. She was on a four-day psychiatric hold because she called the police and told them she did not want to live. Later, she was placed in a County outpatient treatment program (County) and is now seeing a psychiatrist every six months. She feels she is now being properly treated for her physical and psychiatric challenges.

11. At the County program, respondent was diagnosed with bipolar disorder, anxiety disorder, personality disorder, migraines and fibromyalgia. She is prescribed methadone and Percocet/oxycodone (one to three times a day) for the pain of fibromyalgia. She also takes multiple psychiatric medications, including Depakote, Geodonin/Ziprasidone and Klonopin.

12. Respondent never received treatment for methamphetamine use and she believes she never became addicted to methamphetamine. She periodically has drug tests through the County to demonstrate that she is not taking medications other than those prescribed. She introduced into evidence her last test results, January 7, 2011, which were negative for amphetamines, cocaine, PCP, cannabis, opioids and barbiturates.

13. On cross examination, respondent admitted that within that last year she smoked marijuana and took Valium. She testified that "yes I have taken Valium. I do not take it now." When asked when she last used Valium she testified "maybe a week ago, for anxiety." She acknowledged that she did not have a prescription for Valium. She acknowledged that she usually does not take Valium every day, maybe once a week, and that her mother has a prescription for it and gives it to her.

14. Respondent maintained that she is able to safely function in a pharmacy, despite her use of prescribed medications. She feels more productive when she is working and would never take any controlled substances from a pharmacy. Although she had been taking her prescription medications when she was working at the Target pharmacy, she felt she was still able to function. Her "mental breakdown" occurred after she was called into the human resource manager's office. She was taken by ambulance from the pharmacy. Although she does not remember the circumstances of being called into the office, she believes the manager was being rude, and had no compassion for the deaths of her family members. She then testified that she had been "kind of out of it" because she did not have the correct medications and had not yet been referred to County.

15. Respondent testified that she did not take a job in another type of work because it was "really tough" for her to be awake during the day due to her depression. She also had a hard time "doing things" with the fibromyalgia. She also had been mistreated in other occupations, like her prior fast food position. However, now that her medications are correct she does not feel depressed and she is able to get out of bed in the morning. The pain from her fibromyalgia is very bad, but she is being treated for this.

17. Respondent's testimony was rambling and contradictory. She could not establish a timeline for events. Her speech was slow and deliberate and she had difficulty remembering things. Her mother assisted her in answering questions. It was clear she was not trying to be evasive. Rather, her inability to participate effectively in the hearing seemed to be related to her medical conditions and the medications she was taking.

18. Richard Iknoian has been an inspector for the Board for 11 years. He is a registered pharmacist in California and Nevada and holds a Doctorate in Pharmacology, with an emphasis on interpretation of clinical materials, direct patient contact, disease processes and toxicology. Dr. Iknoian testified persuasively that methamphetamine is a highly addictive narcotic and has a number of adverse physical and psychological effects. Methamphetamine substantially decreases the ability of the person to reason. Additionally, if the methamphetamine is ingested by smoking, it produces a quicker and stronger "high," and is more conducive to physical and psychological addiction. Smoking methamphetamine also causes more damage to mental functioning. Among Board probationers, there is a significant amount of recidivism for methamphetamine users, when compared to users of other narcotics. Persons with methamphetamine addictions also are apt to steal drugs from pharmacies

19. Dr. Iknoian explained that methamphetamine impairs the ability to function at a level expected to ensure public safety and the pharmacy environment. The abilities to learn and to perform fine motor functions are impaired. Methamphetamine use also changes and distorts perception and memory. Persons using methamphetamine become extremely interested in anything attracting their attention, and then lose focus and move on to other things. Reasoning decays to a point resembling psychosis. Perception and judgment are not normal or rational. Obviously, this kind of impairment is not compatible with ensuring the safety of patients in the pharmacy setting.

20. In respondent's questioning of Dr. Iknoian on cross-examination she attempted to make the point that a person could take methamphetamine for three weeks or so and not become addicted. She maintained that: (1) she was not addicted to methamphetamine; (2) she did not have a craving for it or even an interest in it; and (3) her mental state was not affected adversely by her brief use. Dr. Iknoian testified persuasively that even a three-week use, every other day, would affect cognition and create an addiction. More importantly though, respondent testified that she used methamphetamine in 2005 and used it every other day for three weeks and then stopped. However, she also testified she stopped using methamphetamine in 2008 and she told the police officer that she had used

methamphetamine the day before she was cited for possession of the crack pipe. The evidence is persuasive that respondent used methamphetamine in 2008 as well as 2005.

21. Dr. Iknoian testified persuasively that respondent's current use of prescribed medications creates a risk to patient safety. Percocet/oxycodone is an opioid narcotic. It is addictive, causes drowsiness and impairment, and reduces the ability to make judgments. Geodonin/Ziprasidone (for bipolar disorder) creates multiple side effects. This drug has effects on perception and wakefulness, causing increased drowsiness. Methadone is an opioid synthetic and has severe side effects. It is highly addictive and causes drowsiness. When used in doses to control pain, it causes a decrease in perception and reduction in judgment. Klonopin affects judgment at normal levels, but does not affect perception. Depakote has a side effect of increased drowsiness and can reduce the ability to use good judgment.

22. Dr. Iknoian testified that assuming respondent took all of these medications on a regular basis, as her testimony indicated, the drug "cocktail" will affect her judgment and perception.

23. Dr. Iknoian testified that the multitude of disorders respondent suffers from and the medications she is prescribed would prevent the Board from being able to monitor her drug use and ensure that she is capable of working safely as a pharmacy technician. Even random drug testing would be useless, because respondent would test positive for these medications.

24. The evidence is persuasive that respondent's past use of methamphetamine creates a risk to patients in that she would be unable to safely fulfill the duties of a pharmacy.

25. Respondent bears the burden of proving that she has been rehabilitated from her use of methamphetamine and that she can practice safely. She was unable to meet this burden because her current prescription drug regimen precludes her from safely fulfilling the duties of a pharmacy technician.¹

Costs

26. Complaint established the reasonable costs of investigation and prosecution of this matter were \$5,397.50.

¹ The Accusation does not allege that respondent cannot safely practice because of prescription drug use. Respondent revealed her present physical and psychiatric conditions at hearing. Complainant did not move to amend the Accusation. Accordingly, the Findings regarding respondent's prescription drug use do not constitute cause for discipline. Rather, these Findings are relevant only to establish that respondent cannot currently practice safely.

27. Pursuant to *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal. 4th 32, it would be inequitable to impose costs of investigation or prosecution upon respondent. Respondent is 27 years old, is not married and lives with her parents. She has no income and has not worked since 2008. She has applied for Social Security disability benefits, and that application is pending. She has severe psychiatric and physical illnesses. Her pharmacy technician license will be revoked, pursuant to the Legal Conclusions and Order. Her inability to work at this time appears to be due to psychiatric and physical illnesses and the medications she requires, independent of her past use of methamphetamine. Respondent is in no position, through no fault of her own, to reimburse the complainant for the reasonable costs of investigation and prosecution of this matter.

LEGAL CONCLUSIONS

1. Business and Professions Code section 4300 provides that the Board may suspend or revoke any certificate, license, permit, registration, or exemption, and may suspend the right to practice or place the licensee on probation.

2. The standard of proof in an administrative disciplinary action seeking the suspension or revocation of a professional license is "clear and convincing evidence." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 583.) "Clear and convincing evidence" means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered as proof. "Clear and convincing evidence" is a higher standard of proof than proof by a "preponderance of the evidence." (*BAJI* 2.62.) "Clear and convincing evidence" requires a finding of high probability. It must be sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re David C.* (1984) 152 Cal.App.3d 1189.)

3. Business and Professions Code section 4301, subdivisions (h), (j), and (p), provide that the Board shall take action against any holder of a license, who is guilty of unprofessional conduct, including:

(h) administering to oneself, of any controlled substance, or the use of any dangerous drug or 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 the public, or to the extent that the use impairs the ability of a 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.

[¶] ... [¶]

(p) Actions or conduct that would have worn to denial of a license.

4. Pursuant to Business and Professions Code section 4021 and Health and Safety Code section 11055, subdivision (d)(2), Methamphetamine is a Schedule II controlled substance.

5. Health and Safety Code section 11170 provides that it is unlawful to self administer a controlled substance. Penal Code section 11364, subdivision (a), provides that is unlawful to possess a device unlawfully used for smoking controlled substances.

6. California Code of Regulations, title 16, section 1170 provides in pertinent part that an act shall be considered to be substantially related to the qualifications, functions, or duties of a licensee or registrant if to a substantial degree the act evidences a present or potential unfitness to perform the functions authorized by the license in a manner consistent with the public health, safety and welfare. Respondent's acts of self administering methamphetamine and possessing a device for smoking methamphetamine evidence a present and potential unfitness to perform the duties of a pharmacy technician safely.

Violation of Drug Laws above California and Act that would Warrant Denial of a License

7. As set forth in the Findings, it was established by clear and convincing evidence that respondent is subject to discipline under Business and Professions Code section 4301, subdivisions (j) and (p), in that on or about August 30, 2008, respondent possessed a crank pipe in violation of Penal Code section 11364, and on or about August 29, 2008, respondent utilized a crank pipe to self administer methamphetamine in violation of Health and Safety Code section 11070.

Self- Administration of Controlled Substances to Extent or in a Manner Dangerous

8. As set forth in the Findings, it was established by clear and convincing evidence that respondent is subject to discipline under Business and Professions Code section 4301, subdivisions (h) and (p), in that on or about August 29, 2008, respondent utilized a crank pipe to smoke methamphetamine in violation of Health and Safety Code section 11070, and self administer a controlled substance to an extent or in a manner dangerous to respondent and impairing her ability to conduct with safety her practice as a pharmacy technician.

9. As set forth in the Findings, respondent is did not demonstrate that she is rehabilitated and can practice safely as a pharmacy technician.

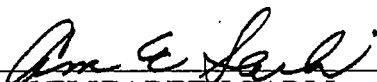
Costs

9. Business and Professions Code section 125.3, provides that the Board may request the Administrative Law Judge to direct a licensee found to have committed violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case. As set forth in the Findings, no costs are imposed upon respondent.

ORDER

Pharmacy Technician License Number TCH 70844, issued to respondent Simone Gizellee McGee is revoked pursuant to Legal Conclusions 1 through 9. Respondent shall relinquish 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 her revoked license for three years from the effective date of this decision. A condition of reinstatement shall be that respondent is certified by the Pharmacy Technician Certification Board and provides satisfactory proof of certification to the Board.

Dated: July 28, 2011



ANN ELIZABETH SARLI
Administrative Law Judge
Office of Administrative Hearings

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

12 In the Matter of the Accusation Against:

Case No. 3705

13 **SIMONE GIZELLE MCGEE**
4114 Misty Trail Drive
Stockton, California 95206

A C C U S A T I O N

14 **Pharmacy Technician License No. TCH**
15 **70844**

16 Respondent.

17
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 September 19, 2006, the Board of Pharmacy issued Pharmacy Technician
23 License No. TCH.70844 to Simone Gizelle McGee (Respondent). The Pharmacy Technician
24 License was in full force and effect at all times relevant to the charges brought herein and will
25 expire on March 31, 2012, unless renewed.

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28 ///

JURISDICTION

1
2 3. This Accusation is brought before the Board of Pharmacy (Board), Department
3 of Consumer Affairs, under the authority of the following laws. All section references are to the
4 Business and Professions Code unless otherwise indicated.

5 4. Section 4300 of the Code states, in pertinent part:

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

7 “(b) The board shall discipline the holder of any license issued by the board, whose
8 default has been entered or whose case has been heard by the board and found guilty, by any of
9 the following methods:

10 “(1) Suspending judgment.

11 “(2) Placing him or her upon probation.

12 “(3) Suspending his or her right to practice for a period not exceeding one year.

13 “(4) Revoking his or her license.

14 “(5) Taking any other action in relation to disciplining him or her as the board
15 in its discretion may deem proper.

16 5. Section 4301 of the Code states, in pertinent part:

17 “The board shall take action against any holder of a license who is guilty of
18 unprofessional conduct or whose license has been procured by fraud or misrepresentation or
19 issued by mistake. Unprofessional conduct shall include, but is not limited to, any of the
20 following:

21 ...
22 (h) The administering to oneself, of any controlled substance, or the use of any
23 dangerous drug or of alcoholic beverages to the extent or in a manner as to be dangerous or
24 injurious to oneself, to a person holding a license a license under this chapter, or to any other
25 person or to the public, or to the extent that the use impairs the ability of the person to conduct
26 with safety to the public the practice authorized by the license.

27 ...
28 ///

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

3 ...
4 (p) Actions or conduct that would have warranted denial of a license.”

5 6. Business & Professions Code section 4300, subdivision (c), provides that
6 “the board may refuse a license to any applicant guilty of unprofessional conduct”.

7 7. Health and Safety Code section 11170 provides “that no person shall
8 prescribe, administer or furnish a controlled substance for himself.”

9 8. Business & Professions Code section 4021 provides that “‘controlled
10 substance’ means any substance listed in Chapter 2 (commencing with Section 11053 of Division
11 10 of the Health & Safety Code”.

12 9. Penal Code section 11364(a) provides, “it is unlawful to possess an
13 opium pipe or any device, contrivance, instrument, or paraphernalia used for unlawfully injecting
14 or smoking (1) a controlled substance specified in subdivision (b), (c), or (e), or paragraph (1) of
15 subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of
16 Section 11054, specified in subdivision (b) or (c) of Section 11055, or specified in paragraph (2)
17 of subdivision (d) of Section 11055, or (2) a controlled substance that is a narcotic drug classified
18 in Schedule III, IV, or V.”

19 10. Methamphetamine is a Schedule II controlled substance pursuant to
20 Health and Safety Code section 11055(d)(2).

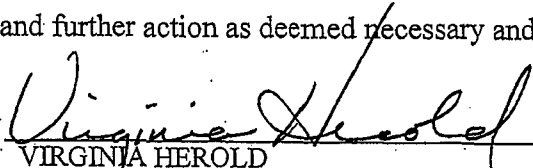
21 11. Section 111, subdivision (b) provides in pertinent part that “the
22 suspension, expiration, or forfeiture by operation of law of a license issued by a board in the
23 department, or its suspension, forfeiture, or cancellation by order of the board or by order of a
24 court of law, or its surrender without the written consent of the board, shall not, during any period
25 in which it may be renewed, restored, reissued, or reinstated, deprive the board of its authority to
26 institute or continue a disciplinary proceeding against the licensee upon any ground provided by
27 law or to enter an order suspending or revoking the license or otherwise taking disciplinary action
28 against the licensee on any such ground”.

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B. Ordering Respondent to reimburse the Board of Pharmacy the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;

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

DATED: 6/9/10



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

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