

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

In the Matter of the Accusation Against:

JOSE MENDOZA

Pharmacy Technician License No.
TCH 70114

Respondent.

Case No. 3846

OAH No. 2011020856

PROPOSED DECISION

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter on June 27, 2011, in Oakland, California.

Deputy Attorney General Kim M. Settles represented complainant Virginia K. Herold, Executive Officer of the California State Board of Pharmacy.

Jose Mendoza (respondent) represented himself and was present telephonically throughout the administrative hearing.

The record was left open for receipt of additional evidence of rehabilitation from respondent. Respondent's evidence was received on July 5, 2011, and admitted as administrative hearsay. Complainant's timely response was received, marked and admitted on August 1, 2011. The matter was submitted on August 1, 2011.

PRELIMINARY MATTERS

Respondent did not appear on the date and time scheduled for the hearing. When contacted by telephone at his home, respondent stated that his attorney had recently advised him he would not be representing him, and respondent did not realize that the hearing would be going forward on this date. Respondent was advised that the hearing could proceed with him appearing by telephone or it could be continued until he could appear in person. Respondent elected to go forward, appearing by telephone.

FACTUAL FINDINGS

1. Complainant, Virginia K. Herold, made the accusation in her official capacity as Executive Officer of the California State Board of Pharmacy (Board).
2. On July 10, 2006, the Board issued Pharmacy Technician Registration Number TCH 70114 to respondent Jose Mendoza. The registration is scheduled to expire on May 31, 2012.
3. On January 5, 2010, while employed as a pharmacy technician at CVS Pharmacy, respondent reported to work intoxicated. Dan Golden, the pharmacist in charge, asked respondent to submit to a chemical test. Respondent accompanied Golden to the business office where they and the store manager attempted to obtain corporate approval for the chemical test. Before the approval was obtained, respondent began to leave the premises. Respondent was advised that if he left the premises without taking the chemical test, he would be terminated; he chose to leave the premises without taking the test. Respondent returned to CVS Pharmacy about an hour later and turned in his pharmacy jacket.
4. Agnes Hruska, a pharmacy technician who was working at CVS Pharmacy on January 5, 2010, testified at hearing. Hruska left work at approximately 8:05 p.m. on that date. She was walking to her car when she noticed respondent in his pickup truck in the parking lot. She felt sorry for him because of what had occurred earlier that day, and went over to speak with him. Respondent appeared sad and intoxicated. Respondent showed Hruska a yellow box and a gun, and said "That's for Dan," referring to Dan Golden, the pharmacist-in-charge. Hruska advised him to go home and get some rest, and not to hurt anyone. She noticed that Golden's car was no longer in his parking spot. After discussing what had occurred with her husband, Hruska contacted the police and reported the incident.
5. Dan Golden testified at hearing. He was contacted by the police on the evening of January 5, 2010, and advised that Hruska had made a report concerning respondent's conduct in the parking lot. The police came to his home and posted a restraining order against respondent on the front door. Golden advised the officers that he usually left work at 8:00 p.m., but he had worked a few minutes late that evening and when he left at 8:10 p.m. he noticed a pickup stopped in the parking lot, but did not think anything of it.
6. Officer Fletcher of the Windsor Police Department testified at hearing. Fletcher was on duty on the evening of January 5, 2010, and was involved in the investigation. Fletcher and other officers arrived at respondent's home that evening and found him asleep in his room with an unloaded revolver and a bullet on the bed next to him. The revolver was later identified by Hruska as similar to the one respondent showed her in the car. The officers found a yellow box containing ammunition in respondent's vehicle. Respondent admitted to the officers that he had gone to CVS Pharmacy earlier that evening and had the gun in the pickup, but denied intending to hurt anyone, or threatening to hurt anyone.

7. Respondent was charged with a violation of Penal Code section 422 (making terrorist threats). After the preliminary hearing, the complaint was amended to dismiss the that charge, and a violation of Penal Code section 664/422 (attempted threat) was added. There is no evidence that respondent was convicted of either offense.

8. On March 30, 2011, in the Superior Court of the County of Sonoma, respondent was convicted of violating Vehicle Code section 23152, subdivision (b) (driving with a blood alcohol content of .08 percent or higher). Imposition of sentence was suspended and respondent was placed on summary probation for a period of three years on conditions including completion of a nine-month first offender drinking driver program, use of an interlock device on respondent's vehicle, completion of 80 hours of community service and destruction of his weapon. The facts underlying the conviction are that on December 17, 2010, respondent was arrested after being observed driving unsafely and failing the field sobriety tests administered by the officer.

9. Joan Coyne, a supervising inspector with the Board since 2006, testified at hearing. On January 12, 2010, the Board received a telephonic complaint from Golden regarding respondent's actions on January 5, 2010. Coyne investigated the complaint. As a result of her investigation, Coyne concluded that respondent had acted unprofessionally when he appeared for work intoxicated, in his use of alcohol outside of work, and in returning to CVS Pharmacy with a weapon after being terminated. Coyne also found respondent's conviction for driving under the influence to be cause for discipline.

10. The Board has incurred \$4,047.50 in legal costs. There is no challenge to the reasonableness of these costs.

Respondent's Evidence

11. Respondent admits that he has a problem with alcohol use. He had been drinking on January 5, 2010, and decided not to wait for the chemical test at CVS Pharmacy because he felt he was going to be terminated. Respondent returned to CVS Pharmacy that evening, after going to the liquor store nearby. He intended to stop by to pick up a prescription, but it was too late and the pharmacy was closing. He spoke to Hruska in the parking lot, and admits having a gun in the car, but claims he did not show her anything and did not threaten anyone. He saw Golden leave, and after speaking with Hruska went home and went to bed. He had the gun with him in bed because he had lost his job and was contemplating suicide. Respondent reports that the criminal charges stemming from this incident were dismissed for lack of evidence.

12. Respondent believes that he was the victim of discrimination by Golden and the general manager at CVS Pharmacy. He believes that Hruska claimed that he threatened Golden because she was jealous of him and wanted his job.

13. Respondent is not currently working. He is completing the community service hours ordered in his driving under the influence conviction at the Redwood Gospel Mission Thrift Store.

14. Respondent has been sober since January 1, 2011. He is attending Alcoholics Anonymous meetings five days each week and began attending the Sonoma County drinking driver program on April 6, 2011. He is scheduled to complete the program on February 2, 2012. Respondent undergoes chemical testing and had a SCRAM device on his leg to detect alcohol in his system for 60 days beginning in January 2011.

15. Respondent became depressed and started drinking heavily after his mother passed away and his wife was killed in a traffic accident. Respondent is now taking medication for his depression. He is trying to re-claim his life and recognizes that he has a lot to live for, including his son and grandson. Respondent believes he is a different person today from the person he was when he was drinking.

LEGAL CONCLUSIONS

1. Business and Professions Code section 4301 authorizes the suspension or revocation of a license¹ for any of the following reasons: unprofessional conduct which includes the commission of any act involving moral turpitude, whether the act is committed in the course of relations as a licensee or otherwise (subd. (f)); and the use of any controlled substance or alcoholic beverage to the extent or in a manner as to be dangerous or injurious to oneself, or any other person, or to the public, or to the extent that the use impairs his ability to conduct with safety to the public the practice authorized by his license (subd. (h)).

2. Business and Professions Code section 490, subdivision (a), authorizes the suspension or revocation of a license if the licensee has been convicted of a crime that is substantially related to the qualifications, functions or duties of the licensed business or profession. Section 1770 of title 16 of the California Code of Regulations (Regulation) provides that a crime 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.

3. By reason of the matters set forth in Findings 3 through 9, respondent's conduct constitutes cause for discipline pursuant to Business and Professions Code section 4301, subdivisions (f) and (h), section 490, subdivision (a), and Regulation 1770.

4. Respondent's misconduct appears to be related to his depression and alcoholism. He has begun the process of addressing these issues and has taken some important steps in that regard. However, respondent is at the beginning of the process and

¹ Under Business and Professions Code section 477, "license" includes certificate, registration or other means to engage in a business or profession regulated by this code.

more time is needed to demonstrate rehabilitation. (Findings 11 through 15.) At this time, protection of the public warrants revocation of respondent's license.

5. Complainant has requested that respondent be ordered to pay the Board the costs of investigating and enforcing this case. Business and Professions Code section 125.3 provides that respondent may be ordered to pay the Board "a sum not to exceed the reasonable costs of the investigation and enforcement of the case." The actual costs of investigation and enforcement have been found to be \$4,047.50. (Factual Finding 10.) The case of *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 sets forth the factors to be considered in determining the reasonableness of costs. Those factors include whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of his or her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate to the alleged misconduct. The only factor that might militate in respondent's favor is his financial ability to pay a cost recovery award, and there was no evidence offered on this. Consequently, the actual costs of \$4,047.50 are determined to be reasonable. However, the Board does not require a revoked licensee to reimburse it for costs unless the license is reinstated in the future. At that time, the Board may reduce the amount of costs and allow payment in installments.

ORDER


1. Pharmacy technician license number TCH 70114, issued to Respondent Jose Mendoza is revoked. Respondent shall relinquish his technician license to the Board within 10 days of the effective date of this decision. Respondent may not reapply or petition the Board for reinstatement of his revoked technician license for three years from the effective date of this decision.

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

3. As a condition precedent to reinstatement of his revoked technician license respondent shall reimburse the Board for its costs of investigation and prosecution in the amount of \$ 4,047.50. Said amount shall be paid in full prior to the reapplication or reinstatement of his technician license, unless otherwise ordered by the Board.

DATED: _____

8/8/11


JILL SCHLICHTMANN
Administrative Law Judge
Office of Administrative Hearings

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

13 In the Matter of the Accusation Against:

Case No. 3846

14 **JOSE MENDOZA**
15 **Post Office Box 2616**
16 **Santa Rosa, CA 95405**
Pharmacy Technician No. TCH 70114

FIRST SUPPLEMENTAL ACCUSATION

17 Respondent.

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19 Complainant alleges:

20 **PARTIES**

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

24 2. On or about July 10, 2006, the Board of Pharmacy issued Pharmacy Technician
25 Number TCH 70114 to Jose Mendoza (Respondent). The Pharmacy Technician was in full force
26 and effect at all times relevant to the charges brought in this First Supplemental Accusation and
27 will expire on May 31, 2012, unless renewed.

28 //

1 7. California Code of Regulations, title 16, section 1770, states:

2 "For the purpose of denial, suspension, or revocation of a personal or facility license
3 pursuant to Division 1.5 (commencing with Section 475) of the Business and Professions Code, a
4 crime or act shall be considered substantially related to the qualifications, functions or duties of a
5 licensee or registrant if to a substantial degree it evidences present or potential unfitness of a
6 licensee or registrant to perform the functions authorized by his license or registration in a manner
7 consistent with the public health, safety, or welfare."

8 **COST RECOVERY**

9 8. Section 125.3 of the Code provides, in pertinent part, that the Board may request the
10 administrative law judge to direct a licentiate found to have committed a violation or violations of
11 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
12 enforcement of the case.

13 **FIRST CAUSE FOR DISCIPLINE**

14 **(Conviction of a Crime)**

15 9. Respondent has subjected his license to discipline under sections 4301, subdivision (l)
16 and 490, in that he was convicted of the following crime that is substantially related to the
17 qualifications, functions, and duties of a registered pharmacy technician. On or about March 30,
18 2011, in Sonoma County Superior Court, Case No. SCR-595988, entitled *People of the State of*
19 *California v. Jose Mendoza Mendoza*, Respondent was convicted of violating Vehicle Code
20 section 23152, subdivision (b)(driving while having .08% or higher blood alcohol).

21 The circumstances of the crime were that on or about December 17, 2010, Respondent
22 willfully and unlawfully drove a vehicle, while having .20% of alcohol in his blood.

23 **SECOND CAUSE FOR DISCIPLINE**

24 **(Unprofessional Conduct: Use of Alcohol)**

25 10. Paragraph 9, above, is incorporated by reference as if fully set forth.

26 11. Respondent has subjected his license to disciplinary action under section 4301,
27 subdivision (h), in that on December 17, 2010, Respondent consumed alcohol and unlawfully
28 drove a vehicle in an intoxicated condition as set forth in paragraph 9, above.

1 PRAYER

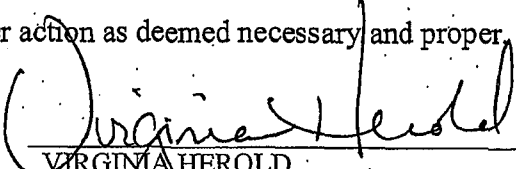
2 WHEREFORE, Complainant requests that a hearing be held on the matters alleged in this
3 First Supplemental Accusation, and that following the hearing, the Board of Pharmacy issue a
4 decision:

5 1. Revoking or suspending Pharmacy Technician Number TCH 70114, issued to Jose
6 Mendoza;

7 2. Ordering Jose Mendoza to pay the Board of Pharmacy the reasonable costs of the
8 investigation and enforcement of this case, pursuant to Business and Professions Code section
9 125.3;

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

11 DATED: 6/2/11

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13 VIRGINIA HEROLD
14 Executive Officer
15 Board of Pharmacy
16 Department of Consumer Affairs
17 State of California
18 Complainant

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