

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

In the Matter of the Accusation Against:

LAURA MARTINEZ
Lakewood, CA 90715

Pharmacy Technician Registration No. TCH 2516

Respondent.

Case No. 3851

OAH No. 2011020030

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter in Los Angeles, California on June 30, 2011.

Nancy A. Kaiser, Deputy Attorney General, and Patricia Ford, Certified Legal Intern, represented Virginia K. Herold (complainant), Executive Officer of the Board of Pharmacy (Board), Department of Consumer Affairs (Department).

Laura Martinez (respondent) represented herself.

Evidence was received, the record was closed, and the matter was submitted for decision on June 30, 2011.

SUMMARY

Complainant seeks to discipline respondent's license because respondent stole medication and gift cards from the pharmacy where she worked. Cause exists for discipline. Respondent did not show sufficient rehabilitation to establish that she can engage in the duties of a licensed pharmacy technician in a manner that is consistent with the health, safety, and welfare of the public, even on a restricted basis. Therefore, it is appropriate and necessary to revoke her license.

FACTUAL FINDINGS

1. On December 14, 1992, the Board issued Pharmacy Technician Registration Number TCH 2516 (license) to respondent. The license was in full force and effect at all times relevant herein and will expire on January 31, 2012, unless renewed or revoked. There is no prior history of discipline for respondent's license.

2. On or about December 2, 2010, complainant, acting solely in her official capacity as the Executive Officer of the Board, filed an accusation seeking to discipline respondent's license based on her having stolen medication and gift cards from the pharmacy where she worked.

Criminal Conviction

3. On August 5, 2010, in the Superior Court of the State of California, in and for the County of Los Angeles, Case No. 0BF02215, respondent pled guilty to, and was convicted of, violating Penal Code section 490.1, petty theft of property with a value not greater than \$50, an infraction.¹ Probation was denied. Respondent was ordered to pay fines, penalties, and assessments in the total sum of \$98.

4. The factual basis for the conviction arose out of respondent's arrest for stealing medication and gift cards from her employer, CVS Pharmacy. She was initially detained by Loss Prevention for CVS Pharmacy on February 10, 2010, and then turned over to the Los Angeles County Sheriff's Department. While in the custody of the Sheriff's Department, respondent wrote a statement admitting that she had given away to customers, without permission or payment, one bottle each of the prescription medications Diovan and Levothyroxine. She also confessed to consuming, without permission or paying for, the prescription medications Lisinopril

¹ At the administrative hearing, respondent denied having pled guilty to, and been convicted of, petty theft. The certified court records conclusively establish her guilty plea and conviction. (See, *Arneson v. Fox* (1980) 28 Cal.3d 440, 449; see also, Evid. Code, § 452.5, subd. (b); *People v. Duran* (2002) 97 Cal.App.4th 1448, 1460-1461 [Evid. Code, § 452.5, subd. (b), creates a hearsay exception which allows for admission of qualified court record to not only prove fact of conviction but also that the offense reflected in record actually occurred].) However, no negative inferences about her credibility are drawn from her denial. She stated that she never went to court because her attorney told her she did not need to because the charges were dropped. The court records corroborate her testimony that she never appeared in court. Instead, she appeared through private counsel pursuant to Penal Code section 977, subdivision (a). There is no evidence to support or contradict her testimony about what her attorney allegedly told her.

and Omeprazole on days when she forgot to take her own. She also admitted that she fraudulently "loaded" CVS gift cards for herself on about 30 occasions.²

Factors in Aggravation, Mitigation, and Rehabilitation

5. Respondent is 51 years old and is currently not employed outside her home. She is paid \$200 a week to babysit her grandchildren during the day. A discussion of her testimony is unnecessary because it consisted largely of her improper attempt to impeach her conviction, irrelevant testimony about her manager's purported dislike for her, and respondent's attempt to impeach her written confession on the day of her arrest.

6. The Department has adopted criteria for consideration when determining whether a licensee has been rehabilitated since committing the acts for which discipline is sought. Once such criterion which is relevant here is the amount of time that has elapsed since the acts were committed. (Cal. Code Regs., tit. 16, § 1769, subd (a)(3); see, *In re Andreani* (1939) 14 Cal.2d 736, 749 [the existence of rehabilitation is difficult to establish affirmatively, "but its nonexistence may be 'proved' by a single act."])

Here, is has been only 17 months since respondent stole medication and gift cards from her employer. Furthermore, she attempted to impeach her conviction by explaining that she had permission from her former manager to take the gift cards and the medication she consumed herself. (See, *Seide v. Committee of Bar Examiners of the State Bar of California* (1989) 49 Cal.3d 933, 940 ["Fully acknowledging the wrongfulness of his actions is an essential step towards rehabilitation."])

7. As discussed below, legal cause exists to discipline respondent's license. Respondent has not shown sufficient rehabilitation to establish that she can engage in the duties of a licensed pharmacy technician in a manner that is consistent with the health, safety, and welfare of the public, even on a restricted basis, as discussed in Factual Finding 6. Therefore, it is appropriate and necessary to revoke her license.

Costs of Enforcement

8. Complainant requested costs of enforcement in the total amount of \$2,852.50 pursuant to Business and Professions Code section 125.3. A Certification of Prosecution Costs: Declaration of Nancy A. Kaiser was introduced at the hearing. Attached as Exhibit A to that Certification is a document entitled Matter Time Activity by Professional Type, which shows that the Board has incurred costs in the

² Gift cards are commonly mass produced without any actual dollar amount. A store employee "loads" the gift card with the desired dollar amount using a cash register at the time of sale to the customer.

amount of \$2,852.50 for work performed by the Attorney General's Office in this matter.

Respondent did not object to the requested costs as being unreasonable. She testified that she currently does not work outside her home, but is paid to watch her grandchildren during the day. (Factual Finding 5.) She receives \$200 each week for babysitting. Her husband is self-employed as a garage door installer, but business has been slow lately due to the poor economy. Respondent stated that her monthly expenses exceed her monthly income. However, she agreed to reimburse CVS Pharmacy the sum of \$1,928.35 for the items she stole, thereby raising an inference that she does have the ability to pay complainant's costs.

The costs that complainant seeks are reasonable in light of the issues involved in this matter as discussed in Legal Conclusion 5 below.

LEGAL CONCLUSIONS

1. The Board may discipline a license if the holder has engaged in unprofessional conduct. "Unprofessional conduct" includes the commission of any act which involves dishonesty, fraud, or deceit. (Bus. & Prof. Code, § 4301, subd. (f).) The act of unprofessional conduct must be substantially related to the qualifications, functions, or duties of a licensed pharmacy technician. (See, *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 769 ["Thus the state can impose discipline on a professional license only if the conduct upon which the discipline is based relates to the practice of the particular profession and thereby demonstrates an unfitness to practice such profession."])

2. Respondent engaged in acts of unprofessional conduct when she stole medication and gift cards from her employer. (Factual Finding 4.) The Legislature has determined that "any act involving moral turpitude, dishonesty, fraud, deceit, or corruption . . ." is substantially related to the qualifications, functions, or duties of a licensed pharmacy technician. (Bus. & Prof. Code, § 4301, subd. (f); see, *Harrington v. Department of Real Estate* 1989) 214 Cal.App.3d 394, 402-403 [the codification of certain behavior as constituting grounds for discipline indicates that a determination was made that such behavior is substantially related to the qualifications, functions, or duties of the licensed profession].) Therefore, legal cause exists to discipline respondent's license pursuant to Business and Professions Code section 4301, subdivision (f), based on her having stolen medication and gift cards from her employer.

3. Legal cause exists to discipline respondent's license pursuant to Business and Professions Code section 4301, subdivision (f), for the reasons explained in Legal Conclusion 2. When all of the evidence is considered, the appropriate discipline is to revoke her license.

Cost Recovery

4. Business and Professions Code section 125.3, subdivision (a), states:

Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before any board within the department or before the Osteopathic Medical Board, upon request of the entity bringing the proceeding, the administrative law judge may 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.

5. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and Professions Code section 125.3. These factors include: 1) the licentiate's success in getting the charges dismissed or reduced; 2) the licentiate's subjective good faith belief in the merits of his or her position; 3) whether the licentiate raised a colorable challenge to the proposed discipline; 4) the licentiate's financial ability to pay; and 5) whether the scope of the investigation was appropriate in light of the alleged misconduct. (*Id.*, at p. 45.)

Here, complainant sought to discipline respondent's license on the grounds that respondent stole medication and gift cards from her employer. (Factual Finding 2.) Respondent admitted to having committed those acts after she was arrested. (Factual Finding 4.) There is no evidence that the scope of the Board's investigation was inappropriate in light of the misconduct alleged. When weighing each of the *Zuckerman* factors, the requested costs of \$2,852.50 are reasonable in light of the issues involved in this matter and are awarded as set forth in the Order below.

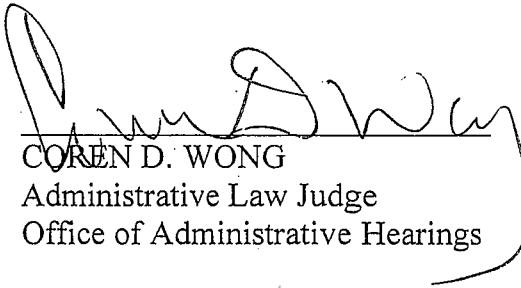
ORDER

1. Pharmacy technician license number TCH 2516 issued to respondent Laura Martinez is REVOKED. Respondent shall relinquish her technician license 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 license for three (3) years from the effective date of this decision.

2. A condition of any reinstatement of respondent's revoked technician license shall be that she 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 any reinstatement of respondent's revoked technician license, respondent shall reimburse the Board for its costs of investigation and prosecution in the amount of \$2,852.50. Said amount shall be paid in full prior to the reinstatement of her revoked technician license, unless otherwise ordered by the Board.

DATED: July 20, 2011



COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings

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

13 In the Matter of the Accusation Against:

Case No. 3851

14 **LAURA MARTINEZ**
20416 Arline Ave.
15 Lakewood, CA 90715
16 **Pharmacy Technician Registration No. TCH**
2516

A C C U S A T I O N

17 Respondent.

18
19 Complainant alleges:

20 **PARTIES**

21 1. Virginia K. Herold (Complainant) brings this Accusation solely in her official
22 capacity as the Executive Officer of the California State Board of Pharmacy.

23 2. On or about December 14, 1992, the Board of Pharmacy issued Pharmacy Technician
24 Registration Number TCH 2516 to Laura Martinez (Respondent). The Pharmacy Technician
25 Registration was in full force and effect at all times relevant to the charges brought herein and
26 will expire on January 31, 2012, unless renewed.

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28 ///

JURISDICTION

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

5 4. Section 4300 permits the Board to take disciplinary action to suspend or revoke a
6 license issued by the Board.

7 5. Section 4301 states, in part:

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

11 ...
12 "(f) The commission of any act involving moral turpitude, dishonesty, fraud, deceit, or
13 corruption, whether the act is committed in the course of relations as a licensee or otherwise, and
14 whether the act is a felony or misdemeanor or not."

15 6. Section 118, subdivision (b), provides that the expiration of a license shall not deprive
16 the Board of jurisdiction to proceed with a disciplinary action during the period within which the
17 license may be renewed, restored, reissued or reinstated.

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

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

COST RECOVERY

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26 8. Section 125.3 states, in part, that the Board may request the administrative law judge
27 to direct a licentiate found to have committed a violation or violations of the licensing act to pay a
28 sum not to exceed the reasonable costs of the investigation and enforcement of the case.

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CAUSE FOR DISCIPLINE

(Committed Acts of Dishonesty)

9. Respondent has subjected her license to disciplinary action under section 4301, subdivision (f), in conjunction with California Code of Regulations, title 16, section 1770, on the grounds of unprofessional conduct, in that Respondent committed acts of dishonesty, as follows:

10. On or about August 5, 2010, after pleading guilty, Respondent was convicted of violating Penal Code section 490.1 (Petty Theft under \$50), an infraction, in the criminal proceeding entitled *The People of the State of California v. Laura Martinez* (Super. Ct. Los Angeles County, 2010, No. 0BF02215). The Court ordered Respondent to pay a fine.

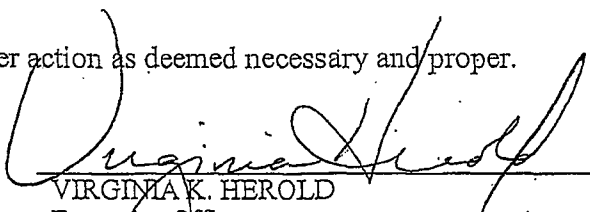
11. The circumstances surrounding the conviction are between on or about August 1, 2009, and February 10, 2010, while Respondent was employed at CVS drug store, located in Hawaiian Gardens, California, she took prescription medication (Diovan, Levothyroxine, Lisinopril; Omeprazole), valued at \$408.08, and approximately 30 CVS gift cards, valued at \$1,520, from her employer without her employer's permission. Respondent used the gift cards to make purchases at the CVS drug store.

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 2516, issued to Laura Martinez;
2. Ordering Laura Martinez to pay the Board of Pharmacy the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3; and
3. Taking such other and further action as deemed necessary and proper.

DATED: 12/2/10


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