

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

In the Matter of the Statement of Issues
Against:

LAUREN J. TALLEY,

Respondent.

Case No. 4046

OAH No. 2012020671

DECISION

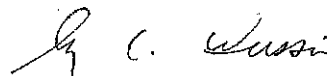
The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Pharmacy as the decision in the above-entitled matter, except that, pursuant to the provisions of Government Code section 11517, subdivision (c)(2)(C), paragraph 4 of the Legal Conclusions and Discussion, appearing on page 5, of the Proposed Decision, is hereby modified for technical reasons as follows:

4. Complainant established that Respondent's conviction and the underlying acts were substantially related to the qualifications, functions or duties of a pharmacy technician. However, it was not established that Respondent's failure to notify the police or Thomas M. that Van C.D. had a gun is also substantially related. While it may have been a good idea, Respondent was under no legal requirement to make any report and Ms. Knight's opinion to the contrary appears supported by her general belief that pharmacists and technicians should be "caring" people. This portion of Ms. Knight's opinion is not convincing. Respondent's failure to report was neither a substantially related act nor, as also alleged, was it an act of dishonesty, fraud or deceit, or one that would warrant denial of licensure.

The technical change made above does not affect the factual or legal basis of the Proposed Decision, which shall become effective on October 31, 2012.

IT IS SO ORDERED this 1st day of October, 2012.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

STANLEY C. WEISSER
Board President

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PROPOSED DECISION

This matter was heard on July 26, 2012, at Los Angeles, California, before David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California. Complainant Virginia Herold was represented by Deputy Attorney General Katherine M. Messana. Respondent Lauren J. Talley was present and was represented by Dennis P. O'Connell, Attorney at Law.

Oral and documentary evidence was presented and the matter was submitted for decision on July 26, 2012.

FACTUAL FINDINGS

The Administrative Law Judge finds the following facts:

1. The Statement of Issues was issued by Complainant Virginia Herold in her official capacity as Executive Officer of the Board of Pharmacy (Board). Respondent filed a Notice of Defense requesting a hearing.

2. On July 30, 2010, the Board received an application from Respondent for registration as a pharmacy technician. In the application Respondent answered "Yes" to a question of whether she had been convicted of a violation of law. For reasons not explained in the evidence, Respondent submitted further materials dated October 26, 2010, wherein, although she answered "No" to whether she had been convicted, she also submitted a letter of explanation of the conviction. Complainant denied the application by letter dated January 10, 2011.

3. On April 29, 2010, Respondent was convicted on her plea of nolo contendere to violating Penal Code section 148.9, making a false representation to a police officer, a misdemeanor. (*People v. Talley*, Super. Ct. San Bernardino County, 2010, case no. FCH08362.) Pronouncement of judgment was withheld and conditional and revocable release (probation) was granted for 36 months on terms and conditions including that she serve 56 days in county jail with 56 days credit and pay a restitution fine of \$268.

4. There was a delay between the underlying circumstances and the conviction based in part on Respondent's cooperation in the prosecution of another person. On October 25, 2006, an incident occurred related to two men that Respondent had dated. To protect privacy, full names will not be used. In that incident, Van C.D., who had dated Respondent, shot another man, in all likelihood thinking the other man was Thomas M., who had also dated Respondent. In fact, Van C.D. shot Daniel C., who was driving the same type of car owned by Thomas M. When initially questioned by police, Respondent denied any knowledge of the events and gave false information about her activities on the night of the shooting. Respondent subsequently admitted to knowing Van C.D. and Thomas M. and that she spoke to Van C.D. shortly before the shooting and saw that he had a gun.

5. More specifically, Respondent had known and dated Van C.D. for about two years before the incident, at times living with him. Van C.D. was abusive verbally and physically to Respondent, and had broken items in her apartment. He was a gang member. She was fearful of him. There was a time when she sought information about obtaining a restraining order against him, but she took no further action to do so. Although she testified that they had stopped seeing each other a few months before the incident, she also testified that the day of the incident they had been together and Van C.D. had driven her to attend a medical appointment.

6. Respondent had also dated Thomas M., and they lived in the same apartment complex. She had stopped dating Thomas M. by the time of the incident. However, Van C.D. and Thomas M. had exchanged text messages and phone calls prior to the incident in which there had been threats of physical confrontation. There had been such an exchange on the day of the incident, with an arrangement to fight each other at the apartment complex. Thomas M. was late in arriving and noticed police cars and ambulances. Thomas M. contacted police at the scene and was eventually asked to call Respondent on her cell phone to locate her. When he did, he spoke to her and could hear Van C.D. yelling in the background. He called again and Van C.D. answered. A sheriff's investigator recorded the call.

7. After the medical appointment, Van C.D. dropped off Respondent by her car and she drove home. When she left later to walk her dog, she noticed Van C.D. in his car outside the apartment complex and spoke with him, during which time he called Thomas M. and challenged him to a fight. He then grabbed a handgun from the center console. She tried to talk and reason with him; he drove off. Respondent gave two versions of subsequent events. She heard shots either after she returned to her apartment or as she returned home

from the walk. Respondent then left her apartment to meet with Van C.D. and they had dinner in a restaurant.

8. When Respondent later returned to her apartment, police asked her for an interview and she agreed. She said she was aware a shooting occurred, but left shortly after to meet a girl friend for dinner. Respondent said she had been in contact with Van C.D. in the afternoon but had not seen or heard from him after. A different officer wrote that Respondent denied seeing Van C.D. either that day or for a few months before the incident. Respondent was confronted with the tape of the phone conversation when Thomas M. spoke to Van C.D. who was using Respondent's phone. Respondent was arrested, after which she eventually gave correct information to police about the incident.

9. Respondent testified that she did not call police after she saw Van C.D. with a gun because she was in fear for her life. She knew that Respondent was a gang member and was afraid that if Respondent was arrested he might arrange for his friends to threaten and hurt her. There was ample evidence to support Respondent's concerns about Van C.D.'s nature of being threatening and violent. He had threatened or harassed members of her family. She moved and changed her phone number.

10. When Respondent was dating Van C.D. and had lived with him, she saw guns in his home. She was not threatened by them, as she had grown up with guns around and felt it was "normal."

11. Respondent was attending school in a pharmacy technician program when the incident occurred. She missed two months of school while in jail. She waited to apply for a technician certificate until the criminal proceedings against Van C.D. were over, and there were many delays in that case before he entered into a plea bargain. She assisted the District Attorney in that prosecution, and as a result charges against her were reduced. The Deputy District Attorney believed that Respondent was remorseful, and had been in fear of Van C.D. (See letter, Exhibit A, received as "administrative hearsay"¹.) Respondent testified that she had stopped dating Van C.D. about two months before the incident but wanted him to go with her to the medical appointment she had that day. She was anxious after seeing Van C.D. with the gun, but thought it was "unbelievable" and she did not know what would happen. She was also anxious about studying for a test she had the next day. After the incident she could not recall if she had called Van C.D. or if he had called her. She met with him, but did not explain why. Respondent testified that she presently works as a dancer, however her counsel objected that a follow up question for more details was irrelevant,

¹ The term "administrative hearsay" is a shorthand reference to the provisions of Government Code section 11513, subdivision (d), to the effect that hearsay evidence that is objected to, and is not otherwise admissible, may be used to supplement or explain other evidence but may not, by itself, support a finding. It may be combined with other evidence to provide substantial evidence sufficient to support a finding. (*Komizu v. Gourley* (2002) 103 Cal.App.4th 1001.)

which objection was sustained. No further evidence was submitted regarding Respondent's activities after the incident other than what is summarized above.

12. Complainant elicited testimony from Valerie Knight, a pharmacist registered in California since 1981 and an inspector for the Board since 1989. Based on her education, training and experience Ms. Knight was qualified to offer the expert opinions noted herein. In reviewing the qualifications, functions and duties of a pharmacy technician, it was Ms. Knight's opinion that the position is one involving trust, integrity and good judgment. A pharmacy technician not only has access to dangerous drugs and sensitive medical information but also insurance information and, often, credit card information. It was also her opinion that the acts underlying Respondent's conviction involving false representations were substantially related to the qualifications, functions and duties of a pharmacy technician. Ms. Knight was also of the opinion that Respondent's act of not reporting to either the police or to Thomas M. that she had seen Van C.D. with a gun was indicative of a lack of caring that was substantially related to the qualifications, functions and duties of a pharmacy technician, because "pharmacy is all about caring for people." She acknowledged, however, that she was not aware of any legal requirement for Respondent to report the gun to police or Thomas M.

LEGAL CONCLUSIONS AND DISCUSSION

Based upon the foregoing factual findings, the Administrative Law Judges makes the following legal conclusions:

1. In this proceeding based on a Statement of Issues, the burden of proof is on the Respondent, by a preponderance of the evidence, to establish she is entitled to the license. (*Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205; *Southern Cal. Jockey Club v. California Horse Racing Bd.* (1950) 36 Cal.2d 167.)

2. Under Business and Professions Code section 480, subdivision (a)(1), the Board may deny a license application if the applicant has been convicted of a crime, including a plea of guilty or nolo contendere. Under subdivision (a)(3)(B), the conviction must be of a crime "substantially related to the qualifications, functions or duties" of the profession for which the license is sought. Denial of an application may also occur under Business and Profession Code section 4301, subdivision (p), which characterizes such a conviction as unprofessional conduct.

3. Under California Code of Regulations (CCR), title 16, section 1770, relating to licenses or registrations issued by the Board, "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."

4. Claimant established that Respondent's conviction and the underlying acts were substantially related to the qualifications, functions or duties of a pharmacy technician. However, it was not established that Respondent's failure to notify the police or Thomas M. Van C.D. had a gun is also substantially related. While it may have been a good idea, Respondent was under no legal requirement to make any report and Ms. Knight's opinion to the contrary appears supported by her general belief that pharmacists and technicians should be "caring" people. This portion of Ms. Knight's opinion is not convincing. Respondent's failure to report was neither a substantially related act nor, as also alleged, was it an act of dishonesty, fraud or deceit, or one that would warrant denial of licensure.

5. Cause exists to deny the application of Respondent for registration as a pharmacy technician for violating Business and Professions Code sections 480, subdivision (a)(1), and 4301, subdivision (p), for conviction of a crime, for the reasons set forth in Factual Finding 3 and Legal Conclusions 2 through 4.

6. Under Business and Professions Code section 480, subdivision (a)(2), the Board may deny a license application if the applicant has done "any act involving dishonesty, fraud or deceit with the intent to substantially benefit himself or herself or another, or substantially injure another."

7. Cause exists to deny the application of Respondent for registration as a pharmacy technician for violating Business and Professions Code section 480, subdivision (a)(2), for performing acts involving dishonesty, fraud or deceit, for the reasons set forth in Factual Findings 3 through 8 and Legal Conclusions 4 and 6.

8. Under CCR, title 16, section 1769, the Board is to consider the following criteria in evaluating the rehabilitation of the applicant and her present eligibility for registration: (1) the nature and severity of the act or offense; (2) subsequent acts; (3) the time that has elapsed since commission of the act or crime; (4) whether the applicant has complied with any terms of probation; and (5) "Evidence, if any, of rehabilitation submitted by the applicant."

9. CCR, title 16, section 1760 refers to Disciplinary Guidelines (Guidelines) adopted by the Board in October 2007, which serve as guidance in this matter. To determine the proper penalty to be imposed, the Guidelines list various factors to be considered, including aggravating evidence, mitigation evidence and rehabilitation evidence. Mitigation evidence may include work performance evaluations, documents relating to a rehabilitation program or counseling, or letters from probation officers. For Respondent, these factors present a mixed picture. It was clear that Respondent was fearful and anxious, and with good cause, to report Van C.D.'s activities before the incident. However, once the incident occurred and she was questioned by police, there was no sufficient cause for her to withhold information and provide knowingly false information, several times, in response to their questions. That false information impeded a police investigation into a shooting. And it appears that Respondent decided to provide correct information only after being directly confronted with evidence that she was lying. Further, that Respondent would meet with Van

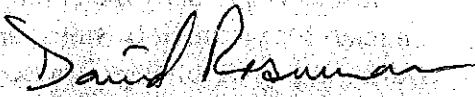
C.D. soon after an incident in which she had every reason to believe that he had shot someone after arranging to fight a former boyfriend severely undercuts her testimony trying to depict the level of fear she was experiencing. Completely lacking in the record is any evidence of actions by Respondent after these events were over to show rehabilitation, other than her agreement to testify in the prosecution against Van C.D. Even that agreement had, as some motivation, the reduction of charges against her. Respondent's application must be denied. She was convicted of a crime that had an underlying fact pattern showing dishonesty. She is still on probation and her conviction has not been expunged. Respondent failed to establish that she has sufficiently rehabilitated herself to ensure the Board that issuance of the applied-for registration would be consistent with the Board's duty to protect the public health, safety, and welfare.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The application for registration as a pharmacy technician of Respondent Lauren J. Talley is denied.

DATED: August 8, 2012:


DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings