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

Case No. 4147

OAH No. 2012070707

In the Matter of the Accusation Against:

JENEL BACUAL, a.k.a. JENEL SUGABON BACUAL 10840 #2 Hortense North Hollywood, CA 91602

Pharmacy Technician Registration No. TCH 58548

Respondent.

DECISION AND ORDER

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Pharmacy, Department of Consumer Affairs, as its Decision in this matter.

This decision shall become effective on May 2, 2013.

It is so ORDERED on April 2, 2013.

BOARD OF PHARMACY DEPARTMENT OF CONSUMER AFFAIRS STATE OF CALIFORNIA

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By

STANLEY C. WEISSER Board President

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

In the Matter of the Accusation Against:

JENEL BACUAL, a.k.a., JENEL SUGANOB BACUAL,

Agency Case No. 4147

OAH Case No. 2012070707

Pharmacy Technician Registration No. TCH 58548,

Respondent.

PROPOSED DECISION

Daniel Juárez, Administrative Law Judge (ALJ), Office of Administrative Hearings, heard this matter on February 14, 2013, in Los Angeles, California.

Michelle M. McCarron, Deputy Attorney General, represented Virginia Herold (Complainant), Executive Officer of the Board of Pharmacy (Board).

Jenel Bacual (Respondent) represented himself.

The parties submitted the matter for decision on February 14, 2013.

STATEMENT OF THE CASE

Complainant seeks to discipline Respondent's pharmacy technician registration for suffering a felony conviction.

Respondent conceded the conviction.

FACTUAL FINDINGS

1. Complainant, in her official capacity, filed the Accusation on or around June 22, 2012. Respondent filed a Notice of Defense on July 2, 2012.

2. The Board issued pharmacy technician registration to Respondent on September 21, 2004; it expired on February 29, 2012. Respondent has not renewed his registration. The Board retains jurisdiction over Respondent's registration, pursuant to Business and Professions Code section 118.

3. On February 22, 2011, following Respondent's nolo contendere plea, the Los Angeles County Superior Court, in case number GA082118, convicted Respondent of violating Penal Code section 487, subdivision (a) (grand theft of personal property), a felony. The court suspended imposition of sentence and placed Respondent on formal probation for three years under various terms and conditions.

4. The terms and conditions of probation included, among other things, serving two days in jail, paying \$270 in fines and fees, paying \$1,094.76 in restitution to the victim retail store, and obeying all laws.

5. The facts underlying the conviction were that between approximately September and December 2010, while working as a clerk/cashier at a Rite Aid store in Burbank, California, Respondent processed numerous fraudulent merchandise returns and retained the value of each item in cash. On numerous occasions, while alone at the cash register, having taken an item from the store inventory, Respondent would process a false return transaction and in this way, create a cash overage in the amount of the return and then take the extra cash to reconcile the cash register. He admitted to the Burbank Police Department that he stole more than \$1,000, but less than \$10,000. He further explained to the police that his mother, who lived in the Philippines, was very ill and he was stealing money to pay for her medical bills. Respondent repeated this reasoning at hearing.

6. At hearing, Respondent asserted that his conviction was expunged, but he provided no evidence to support that assertion.

7. Respondent only worked as a pharmacy technician for a brief period soon after receiving his registration. He has not worked as a pharmacy technician since 2005. His training was in compounding. He has no retail experience. Before his employment as a cashier at Rite Aid (from 2008 until his arrest in December 2010), Respondent worked as a restaurant manager. He currently works as a caregiver to a cancer patient.

8. Respondent asserted that his mother died approximately two years ago. He asserted that he would not steal again. He described his crime as a "poor decision" and stated that he regrets it every day. Respondent stated that jail was a bad experience and he never wants to repeat it. Respondent further asserted that he has no plans to seek employment as a pharmacy technician.

9. The Board incurred \$1,920 in enforcement costs through the California Department of Justice, Office of the Attorney General. Those costs were reasonable. Complainant's counsel declared in her declaration of prosecution costs that it was her good faith estimate that the Board would incur an additional \$340 (two additional hours) in

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preparation of the case up to the commencement of the hearing. However, there was no evidence of the additional actual costs incurred nor was there evidence that the actual costs were unavailable at hearing. Therefore, the additional \$340 was not allowed.

10. A licensed pharmacy technician must be honest and trustworthy, as he or she can work alone within a pharmacy, have access to controlled substances, fill prescriptions, have access to patient medical records, and work without constant supervision.

LEGAL CONCLUSIONS

1. Business and Professions Code section 4301, subdivisions (f) and (l) provide that the Board may take action against a licentiate or registrant who is guilty of unprofessional conduct. Subdivision (f) defines unprofessional conduct, in part, as the commission of any act involving dishonesty, fraud, or deceit. Subdivision (l) defines unprofessional conduct as the conviction of a crime substantially related to the qualifications, functions, and duties of a Board licentiate or registrant.

2. Business and Professions Code section 490 provides that the Board may discipline a licentiate or registrant for the conviction of a crime substantially related to a licensee's qualifications, functions, or duties.

3. California Code of Regulations, title 16, section 1770 provides that a crime or act is substantially related to a Board licensee's (or registrant's) qualifications, functions, or duties if the crime or act evidences, to a substantial degree, the present or potential unfitness of a Board licensee or registrant to perform the functions authorized by his or her license or registration in a manner consistent with the public health, safety, or welfare.

4. Complainant must prove her case by clear and convincing evidence to a reasonable certainty. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853.) Clear and convincing evidence means the evidence is "so clear as to leave no substantial doubt" and is "sufficiently strong to command the unhesitating assent of every reasonable mind." (*Mathieu v. Norrell Corporation* (2004) 115 Cal.App.4th 1174, 1190 [citing *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 332-333].)

5. Respondent's felony evidences his present and potential unfitness to perform the duties of a pharmacy technician in a manner consistent with the public health, safety, and welfare. (Cal. Code Regs., tit. 16, § 1770.) Respondent's crime is substantially related to a pharmacy technician's qualifications, functions, and duties. (*Ibid.*)

6. Cause exists to discipline Respondent's pharmacy technician registration, pursuant to Business and Professions Code, sections 4301, subdivision (1), and 490, for his felony conviction, as set forth in Factual Findings 1-3, and Legal Conclusions 1-5.

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7. Respondent's actions that led to his felony grand theft conviction involved dishonesty, fraud, and deceit.

8. Cause exists to discipline Respondent's pharmacy technician registration, pursuant to Business and Professions Code, section 4301, subdivision (f), for acts involving dishonesty, fraud, and deceit, as set forth in Factual Findings 1-3, 5, and Legal Conclusions 1, 3-5, and 7.

9. California Code of Regulations, title 16, section 1769, subdivision (b), provides that when considering the suspension or revocation of a registration on the ground that the registrant has been convicted of a crime, rehabilitation is to be evaluated considering: the nature and severity of the offense (subdivision (1)); the total criminal record (subdivision (2)); the time that has elapsed since commission of the offense (subdivision (3)); whether the registrant has complied with all terms of parole, probation, restitution or any other sanctions lawfully imposed against the registrant (subdivision (4)); and evidence, if any, of rehabilitation submitted by the registrant (subdivision (5)).

10. Respondent is currently on probation. Since the criminal court requires him to obey all laws, his current lawful behavior is of limited value in assessing his rehabilitation. (*In re Gossage* (2000) 23 Cal.4th 1080, 1099.) Respondent's crime is recent. (Cal. Code Regs., tit. 16, § 1769, subd. (3).) The nature and severity of his felony crime is severe in that it evidences dishonesty and deceit. (Cal. Code Regs., tit. 16, § 1769, subd. (1).) His reason for engaging in such conduct was unpersuasive, as many persons experience having an ill relative and do not engage in grand theft to pay for medical costs. Respondent provided little evidence of rehabilitation. His demeanor at hearing was contrite and respectful (Cal. Code Regs., tit. 16, § 1769, subd. (5)), but he did not provide evidence of expungement, or of doing anything beyond complying with his court-ordered probation. In light of his conviction, it cannot be concluded that the public would be safe if the Board were to allow Respondent to retain his pharmacy technician registration, even if probationary. Revocation is therefore required.

11. Business and Professions Code section 125.3 provides that the administrative law judge may direct a licentiate found to have committed a violation of the applicable licensing act to pay the reasonable costs of enforcement of the case.

12. Respondent provided no evidence of financial hardship with regard to Complainant's costs. His current employment does not require his pharmacy technician registration; he continues to have gainful employment despite the Order *post*.

13. Cause exists to impose the reasonable costs of enforcement (\$1,920) against Respondent, pursuant to Business and Professions Code section 125.3, as set forth in Factual Findings 1-10, and Legal Conclusions 1-12.

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ORDER

Pharmacy technician license number TCH 58548, issued to Respondent Jenel Bacual 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.

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

Respondent shall pay to the board its costs of investigation and prosecution in the amount of \$1,920 within 15 days of the effective date of this Decision, or as otherwise directed by the Board. The Board may allow a longer period to satisfy the costs payment and may further allow monthly payments, as it deems appropriate.

Dated: March 7, 2013

DANIEL JUAREZ Administrative Law Judge Office of Administrative Hearings

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	Attorneys for Complainant	•
	7 BEFORE THE	
	8 BOARD OF PHARMACY DEPARTMENT OF CONSUMER AI	FFAIRS
	9 STATE OF CALIFORNIA	
	10 In the Matter of the Accusation Against:	
	11 JENEL BACUAL Case No. 4147	
	a.k.a., JENEL SUGANOB BACUALA C C U S A 11210840 #2 Hortense	LION
	North Hollywood, CA 91602	
	Pharmacy Technician Registration 14 No. TCH 58548	
	16 Complainant alleges:	
:	17 PARTIES	
	18 1. Virginia Herold ("Complainant") brings this Accusat	ion solely in her official capacity
	19 as the Executive Officer of the Board of Pharmacy, Department of	
	20 2. On or about September 21, 2004, the Board of Pharm	· ·
	21 Technician Registration No. TCH 58548 to Jenel Bacual, also kn	
•	22	•
	23 ("Respondent"). The Pharmacy Technician Registration was in f	
	relevant to the charges brought herein and will expire on Februar	y 29, 2012, unless renewed.
	25 JURISDICTION	
	3. This Accusation is brought before the Board under th	e authority of the following
	laws. All section references are to the Business and Professions (Code ("Code") unless otherwise
	27 indicated.	· · · · · ·
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STATUTORY PROVISIONS

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

5. Section 490 states, in pertinent part:

6 "(a) In addition to any other action that a board is permitted to take against a licensee, a
7 board may suspend or revoke a license on the ground that the licensee has been convicted of a
8 crime, if the crime is substantially related to the qualifications, functions, or duties of the business
9 or profession for which the license was issued.

"(b) Notwithstanding any other provision of law, a board may exercise any authority to
discipline a licensee for conviction a crime that is independent of the authority granted under
subdivision (a) only if the crime is substantially related to the qualifications, functions, or duties
of the business or profession for which the licensee's license was issued.

14 "(c) A conviction within the meaning of this section means a plea or verdict of guilty or a 15 conviction following a plea of nolo contendere. Any action that a board is permitted to take 16 following the establishment of a conviction may be taken when the time for appeal has elapsed, or 17 the judgment of conviction has been affirmed on appeal, or when an order granting probation is 18 made suspending the imposition of sentence, irrespective of a subsequent order under the 19 provisions of Section 1203.4 of the Penal Code."

20 6. Section 4300 provides, in pertinent part, that every license issued by the Board is
21 subject to discipline, including suspension or revocation.

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7. Section 4301 states, in pertinent part:

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

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Accusation

"(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.

"(l) The conviction of a crime substantially related to the qualifications, functions, and 5 duties of a licensee under this chapter. The record of conviction of a violation of Chapter 13 6 (commencing with Section 801) of Title 21 of the United States Code regulating controlled 7 substances or of a violation of the statutes of this state regulating controlled substances or 8 dangerous drugs shall be conclusive evidence of unprofessional conduct. In all other cases, the 9 record of conviction shall be conclusive evidence only of the fact that the conviction occurred. 10 The board may inquire into the circumstances surrounding the commission of the crime, in order 11 to fix the degree of discipline or, in the case of a conviction not involving controlled substances 12 or dangerous drugs, to determine if the conviction is of an offense substantially related to the 13 qualifications, functions, and duties of a licensee under this chapter. A plea or verdict of guilty or 14 a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning 15 of this provision. The board may take action when the time for appeal has elapsed, or the 16 17 judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under Section 1203.4 of 18 the Penal Code allowing the person to withdraw his or her plea of guilty and to enter a plea of not 19 guilty, or setting aside the verdict of guilty, or dismissing the accusation, information, or 20 indictment." 21

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REGULATORY PROVISIONS

8. California Code of Regulations, title 16, section 1770 states, in pertinent part;
"For the purpose of denial, suspension, or revocation of a personal or facility license
pursuant to Division 1.5 (commencing with Section 475) of the Business and Professions Code, 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
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Accusation

licensee or registrant to perform the functions authorized by his license or registration in a manner consistent with the public health, safety, or welfare."

COST RECOVERY

9. Section 125.3 states, in pertinent part, that the Board 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.

FIRST CAUSE FOR DISCIPLINE

(Conviction of a Substantially Related Crime)

10 10. Respondent is subject to disciplinary action under sections 4301, subdivision (1) and
11 490, in conjunction with California Code of Regulations, title 16, section 1770, in that
12 Respondent has been convicted of crimes substantially related to the qualifications, functions, or
13 duties of a pharmacy technician as follows:

11. On or about February 22, 2011, after pleading nolo contendere, Respondent was 14 convicted of one felony count of violating Penal Code section 487, subdivision (a) [grand theft of 15 personal property] in the criminal proceeding entitled The People of the State of California v. 16 Jenel Bacual (Super. Ct. Los Angeles County, 2011, No. GA082118). The Court sentenced 17 Respondent to serve 2 days in Los Angeles County Jail and placed her on 3 years formal 18 19 probation, with terms and conditions. The circumstances surrounding the conviction are that on or between October and December of 2010, while working as a store manager for Rite-Aid, in 20 21 Burbank, California, Respondent processed fraudulent returns and pocketed the cash. When confronted by the Burbank Police Department Officer, Respondent admitted that he began 22 processing fraudulent returns in September or October 2010. In addition, he estimated that he 23 24 stole about twenty different times from Rite Aid, admitted that he stole over one thousand dollars, but less than ten thousand dollars. 25

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Accusation

SECOND CAUSE FOR DISCIPLINE

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(Acts Involving Dishonesty, Fraud, or Deceit)

12. Respondent is subject to disciplinary action under sections 4301, subdivision (f), in that Respondent committed acts involving dishonesty, fraud, or deceit. Complainant refers to, and by this reference incorporates, the allegations set forth above in paragraph 11, as though set forth fully.

PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Board issue a decision:

Revoking or suspending Pharmacy Technician Registration No. TCH 58548, issued
 to Respondent;

Ordering Respondent to pay the Board the reasonable costs of the investigation and
 enforcement of this case, pursuant to section 125.3; and

14	3. Taking such other and further action as deemed necessary and proper.	
15	DATED: BBI/2 Juginie Devold	
16	VIRGINIAHEROLD Executive Officer	
17	Board of Pharmacy Department of Consumer Affairs	
18	State of California Complainant	• •
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