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

In the Matter of the Accusation Against:

GABRIEL J. TAMAYO
1204 East El Norte Parkway
Escondido, CA 92027

Pharmacy Technician Registration
No. TCH 61215

Respondent.

Case No. 4200

DEFAULT DECISION AND ORDER

[Gov. Code, §11520]

FINDINGS OF FACT

1. On or about January 25, 2012, Complainant Virginia Herold, in her official capacity as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs, filed Accusation No. 4200 against Gabriel J. Tamayo (Respondent) before the Board of Pharmacy. (The Accusation attached as Exhibit A.)
2. On or about February 24, 2005, the Board of Pharmacy (Board) issued Pharmacy Technician Registration No. TCH 61215 to Respondent. The Pharmacy Technician Registration was in full force and effect at all times relevant to the charges brought in Accusation No. 4200 and will expire on January 31, 2013, unless renewed.
3. On or about February 1, 2012, Respondent was served by Certified and First Class Mail copies of the Accusation No. 4200, Statement to Respondent, Notice of Defense, Request for Discovery, and Discovery Statutes (Government Code sections 11507.5, 11507.6, and 11507.7) at Respondent's address of record which, pursuant to Business and Professions Code

1 section 4100 and California Code of Regulations, title 16, section 1704, is required to be reported
2 and maintained with the Board, which was and is:

3 1204 East El Norte Parkway
4 Escondido, CA 92027

5 4. Service of the Accusation was effective as a matter of law under the provisions of
6 Government Code section 11505, subdivision (c) and/or Business & Professions Code section
7 124.

8 5. Government Code section 11506 states, in pertinent part:

9 (c) The respondent shall be entitled to a hearing on the merits if the respondent
10 files a notice of defense, and the notice shall be deemed a specific denial of all parts
11 of the accusation not expressly admitted. Failure to file a notice of defense shall
12 constitute a waiver of respondent's right to a hearing, but the agency in its discretion
13 may nevertheless grant a hearing.

14 6. Respondent failed to file a Notice of Defense within 15 days after service upon him
15 of the Accusation, and therefore waived his right to a hearing on the merits of Accusation No.
16 4200.

17 7. California Government Code section 11520 states, in pertinent part:

18 (a) If the respondent either fails to file a notice of defense or to appear at the
19 hearing, the agency may take action based upon the respondent's express admissions
20 or upon other evidence and affidavits may be used as evidence without any notice to
21 respondent.

22 8. Pursuant to its authority under Government Code section 11520, the Board finds
23 Respondent is in default. The Board will take action without further hearing and, based on the
24 relevant evidence contained in the Default Decision Evidence Packet in this matter, as well as
25 taking official notice of all the investigatory reports, exhibits and statements contained therein on
26 file at the Board's offices regarding the allegations contained in Accusation No. 4200, finds that
27 the charges and allegations in Accusation No. 4200, are separately and severally, found to be true
28 and correct by clear and convincing evidence.

9. Taking official notice of its own internal records, pursuant to Business and
Professions Code section 125.3, it is hereby determined that the reasonable costs for Investigation
and Enforcement is \$702.50 as of March 12, 2012.

1 **DETERMINATION OF ISSUES**

2 1. Based on the foregoing findings of fact, Respondent Gabriel J. Tamayo has subjected
3 his Pharmacy Technician Registration No. TCH 61215 to discipline.

4 2. The agency has jurisdiction to adjudicate this case by default.

5 3. The Board of Pharmacy is authorized to revoke Respondent's Pharmacy Technician
6 Registration based upon the following violations alleged in the Accusation which are supported
7 by the Default Decision Investigatory Evidence Packet in this case:

8 a. Respondent has subjected his registration to discipline under sections 490 and
9 4301, subdivision (l) of the Code in that on or about May 5, 2011, in a criminal proceeding
10 entitled *People of the State of California v. Gabriel Jaime Tamayo*, San Diego County Superior
11 Court, case number CN289305, Respondent was convicted on his plea of guilty to violating
12 Vehicle Code section 23152, subdivision (a), driving under the influence of a controlled
13 substance, a misdemeanor, and Health and Safety Code section 11377, subdivision (a), possession
14 of a controlled substance, a felony. The court found true the enhancements that Respondent was
15 previously convicted of violating Vehicle Code section 23152, subdivision (b) within 10 years.
16 Said crimes are substantially related to the qualifications, duties, and functions of a pharmacy
17 technician.

18 b. Respondent has subjected his registration to disciplinary action under section
19 4301, subdivision (h) of the Code for unprofessional conduct in that on or about March 11, 2011,
20 Respondent was impaired by controlled substances while operating a motor vehicle.

21 c. Respondent has subjected his registration to disciplinary action under section
22 4301, subdivision (j) of the Code for unprofessional conduct in that on or about March 11, 2011,
23 Respondent violated the following state laws regulating controlled substances: Health and Safety
24 Code section 11377, subdivision (a), Health & Safety Code section § 11350, subdivision (a),
25 Health and Safety Code section 11375, subdivision (b)(2), Health and Safety Code section 11357,
26 subdivision (c), and Business and Professions Code section 4060.

27 d. Respondent has subjected his registration to disciplinary action under sections
28 4301, subdivision (k) of the Code in that on or about May 5, 2011, Respondent was convicted of

1 violating Health and Safety Code section 11377, subdivision (a), possession of a controlled
2 substance, a felony.

3 **ORDER**

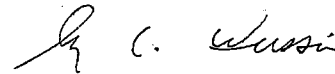
4 IT IS SO ORDERED that Pharmacy Technician Registration No. TCH 61215, heretofore
5 issued to Respondent Gabriel J. Tamayo, is revoked.

6 Pursuant to Government Code section 11520, subdivision (c), Respondent may serve a
7 written motion requesting that the Decision be vacated and stating the grounds relied on within
8 seven (7) days after service of the Decision on Respondent. The agency in its discretion may
9 vacate the Decision and grant a hearing on a showing of good cause, as defined in the statute.

10 This decision shall become effective on May 25, 2012.

11 It is so ORDERED on April 25, 2012.

12 BOARD OF PHARMACY
13 DEPARTMENT OF CONSUMER AFFAIRS
14 STATE OF CALIFORNIA



15 By

16 STANLEY C. WEISSER

17 Board President

18
19
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21
22
23 DOJ Matter ID: SD2011801473

24 Attachment:
25 Exhibit A: Accusation

Exhibit A

Accusation

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2 LINDA K. SCHNEIDER
Supervising Deputy Attorney General
3 State Bar No. 101336
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7 Facsimile: (619) 645-2061
Attorneys for Complainant
8

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

12 In the Matter of the Accusation Against:

Case No. 4200.

13 **GABRIEL J. TAMAYO**
1204 East El Norte Parkway
14 Escondido, CA 92027

A C C U S A T I O N

15 **Pharmacy Technician Registration**
16 **No. TCH 61215**

17 Respondent.

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 February 24, 2005, the Board of Pharmacy issued Pharmacy Technician
23 Registration Number TCH 61215 to Gabriel J. Tamayo (Respondent). The Pharmacy Technician
24 Registration was in full force and effect at all times relevant to the charges brought herein and
25 will expire on January 31, 2013, unless renewed.

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JURISDICTION

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

4. Section 4300, subdivision (a) of the Code states "Every license issued may be suspended or revoked."

STATUTORY PROVISIONS

5. Section 490 of the Code provides, in pertinent part, that a board may suspend or revoke a license on the ground that the licensee has been convicted of a crime substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued.

6. Section 493 of the Code states:

Notwithstanding any other provision of law, in a proceeding conducted by a board within the department pursuant to law to deny an application for a license or to suspend or revoke a license or otherwise take disciplinary action against a person who holds a license, upon the ground that the applicant or the licensee has been convicted of a crime substantially related to the qualifications, functions, and duties of the licensee in question, the record of conviction of the crime shall be conclusive evidence of the fact that the conviction occurred, but only of that fact, and the board may inquire into the circumstances surrounding the commission of the crime in order to fix the degree of discipline or to determine if the conviction is substantially related to the qualifications, functions, and duties of the licensee in question.

As used in this section, "license" includes "certificate," "permit," "authority," and "registration."

7. Section 4301 of the Code states:

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

....

(h) The administering to oneself, of any controlled substance, or the use of any dangerous drug or of 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 to the public, or to the extent that the use impairs the ability of the person to conduct with safety to the public the practice authorized by the license.

....

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

3 (k) The conviction of more than one misdemeanor or any felony involving the
4 use, consumption, or self-administration of any dangerous drug or alcoholic beverage,
5 or any combination of those substances.

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

25

26 8. Section 4022 of the Code states

27 "Dangerous drug" or "dangerous device" means any drug or device unsafe for
28 self-use in humans or animals, and includes the following:

(a) Any drug that bears the legend: "Caution: federal law prohibits dispensing
without prescription," "Rx only," or words of similar import.

(b) Any device that bears the statement: "Caution: federal law restricts this
device to sale by or on the order of a _____," "Rx only," or words of similar
import, the blank to be filled in with the designation of the practitioner licensed to use
or order use of the device.

(c) Any other drug or device that by federal or state law can be lawfully
dispensed only on prescription or furnished pursuant to Section 4006.

9. Section 4059 of the Code states, in pertinent part, that a person may not furnish any
dangerous drug except upon the prescription of a physician, dentist, podiatrist, optometrist,
veterinarian, or naturopathic doctor pursuant to Section 3640.7. A person may not furnish any
dangerous device, except upon the prescription of a physician, dentist, podiatrist, optometrist,
veterinarian, or naturopathic doctor pursuant to Section 3640.7.

1 10. Section 4060 of the Code states, in pertinent part, that no person shall possess any
2 controlled substance, except that furnished to a person upon the prescription of a physician,
3 dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor.

4 **REGULATORY PROVISIONS**

5 11. California Code of Regulations, title 16, section 1769, states:

6

7 (b) When considering the suspension or revocation of a facility or a personal
8 license on the ground that the licensee or the registrant has been convicted of a crime,
9 the board, in evaluating the rehabilitation of such person and his present eligibility for
a license will consider the following criteria:

10 (1) Nature and severity of the act(s) or offense(s).

11 (2) Total criminal record.

12 (3) The time that has elapsed since commission of the act(s) or offense(s).

13 (4) Whether the licensee has complied with all terms of parole, probation,
restitution or any other sanctions lawfully imposed against the licensee.

14 (5) Evidence, if any, of rehabilitation submitted by the licensee.

15 12. California Code of Regulations, title 16, section 1770, states:

16 For the purpose of denial, suspension, or revocation of a personal or facility
17 license pursuant to Division 1.5 (commencing with Section 475) of the Business and
18 Professions Code, a crime or act shall be considered substantially related to the
19 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.

20 **COSTS**

21 13. Section 125.3 of the Code states, in pertinent part, that the Board may request the
22 administrative law judge to direct a licentiate found to have committed a violation or violations of
23 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
24 enforcement of the case.

25 **DRUGS**

26 14. Marijuana is a Schedule I controlled substance as designated by Health and Safety
27 Code section 11054, subdivision (d)(13), and is a dangerous drug pursuant to Business &
28 Professions Code section 4022.

1 15. Vicodin and Norco, brand names for acetaminophen and hydrocodone, are Schedule
2 III controlled substances as designated by Health and Safety Code Section 11056, subdivision
3 (e)(4), and are dangerous drugs pursuant to Business and Professions Code section 4022.

4 16. Hydrocodone is a Schedule II controlled substance as designated by Health and
5 Safety Code section 11055, subdivision (b)(1)(I), and is a dangerous drug pursuant to Business
6 and Professions Code section 4022.

7 17. Clonazepam, the generic for Klonopin, is a Schedule IV controlled substance under
8 California Health and Safety Code section 11057, subdivision (d)(7), and is a dangerous drug
9 pursuant to Business and Professions Code section 4022.

10 18. Alprazolam, the generic for Xanax, is a Schedule IV controlled substance under
11 California Health and Safety Code section 11057, subdivision (d)(1), and is classified as a
12 dangerous drug pursuant to Business and Professions Code section 4022.

13 **FIRST CAUSE FOR DISCIPLINE**

14 **(May 5, 2011 Criminal Conviction for DUI/Drugs &**

15 **Possession of a Controlled Substance on March 11, 2011)**

16 19. Respondent has subjected his registration to discipline under sections 490 and 4301,
17 subdivision (I) of the Code in that he was convicted of crimes that are substantially related to the
18 qualifications, duties, and functions of a pharmacy technician. The circumstances are as follows:

19 a. On or about May 5, 2011, in a criminal proceeding entitled *People of the State*
20 *of California v. Gabriel Jaime Tamayo*, San Diego County Superior Court, case number
21 CN289305, Respondent was convicted on his plea of guilty to violating Vehicle Code section
22 23152, subdivision (a), driving under the influence of a controlled substance, a misdemeanor, and
23 Health and Safety Code section 11377, subdivision (a), possession of a controlled substance, a
24 felony. The court found true the enhancements that Respondent was previously convicted of
25 violating Vehicle Code section 23152, subdivision (b) within 10 years, as detailed in paragraph
26 23, below, within the meaning of Vehicle Code sections 23626 and 23540. Two additional
27 counts of possession of a controlled substance (Health & Saf. Code, § 11350(a)), possession of a
28 designated controlled substance (Health & Saf. Code, § 11375(b)(2)), and possession of more

1 than one ounce of marijuana (Health & Saf. Code, § 11357(c)), were dismissed as part of the plea
2 agreement.

3 b. As a result of the conviction, on or about July 7, 2011, Respondent was granted
4 five years formal probation, and ordered to serve 180 days in jail, stayed pending successful
5 completion of probation. Respondent was further ordered to complete 15 days of Public Work
6 Service, with credit for one day, pay fines, fees, and restitution in the amount of \$2,709, and
7 comply with felony probation terms.

8 c. The facts that led to the conviction are that on or about the evening of March
9 11, 2011, a patrol officer with the Escondido Police Department observed Respondent driving in
10 an unsafe manner and conducted a traffic stop. As the officer approached Respondent's vehicle,
11 the officer noted that there was a strong odor of marijuana emanating from the vehicle.
12 Respondent told the officer he was coming from work at a local pharmacy. Respondent admitted
13 to the officer that he had approximately one ounce of marijuana in the vehicle and said that he
14 had a medical authorization for it due to back pain and anxiety. Respondent said he had not used
15 marijuana in the previous two weeks. The officer found the marijuana in an unmarked black
16 canister on the rear passenger floorboard. Respondent exhibited the symptoms of drug use:
17 bloodshot and watery eyes, slurred and mumbled speech, a lax face and jaw, and a dry mouth.
18 Respondent was asked to exit his vehicle and sit on the curb; he walked with an unsteady gait.
19 Inside a backpack on the back seat was an additional baggie containing marijuana, numerous
20 empty Ziploc baggies and packaging materials, and separate baggies containing eight tablets of
21 Vicodin, 20 tablets of Clonazepam, 3.5 tablets of Norco, and 16 tablets of Alprazolam.
22 Respondent confirmed that the backpack and medications belonged to him. Respondent admitted
23 he had consumed Norco and Alprazolam that morning. Respondent stated he did not have
24 prescriptions for the medications and that he gets them from a friend who gets them in Mexico.
25 Respondent acknowledged that he should have a prescription for the medications. Inside the
26 center console the officer found a small digital scale, \$127 in various denominations of U.S.
27 currency, and \$120 in currency wrapped with a rubber band, additional baggies of marijuana, and
28 a baggie containing four Norco tablets, three Clonazepam tablets, two Vicodin tablets, and five

1 Alprazolam tablets. Respondent denied he was selling the medications. Respondent was
2 administered a series of field sobriety tests which he was unable to complete as explained and
3 demonstrated by the officer. Respondent was arrested for driving under the influence, possession
4 of controlled substances, and possession of controlled substances without a prescription.

5 **SECOND CAUSE FOR DISCIPLINE**

6 **(Unprofessional Conduct – Dangerous Use of Controlled Substances)**

7 20. Respondent has subjected his registration to disciplinary action under section 4301,
8 subdivision (h) of the Code for unprofessional conduct in that on or about March 11, 2011,
9 Respondent was impaired by controlled substances while operating a motor vehicle, as detailed in
10 paragraph 19, above.

11 **THIRD CAUSE FOR DISCIPLINE**

12 **(Unprofessional Conduct – Violation of State Laws Regulating Controlled Substances)**

13 21. Respondent has subjected his registration to disciplinary action under section 4301,
14 subdivision (j) of the Code for unprofessional conduct in that on or about March 11, 2011, as
15 detailed in paragraph 19, above, Respondent violated the following state laws regulating
16 controlled substances: Health and Safety Code section 11377, subdivision (a), Health & Safety
17 Code section § 11350, subdivision (a), Health and Safety Code section 11375, subdivision (b)(2),
18 Health and Safety Code section 11357, subdivision (c), and Business and Professions Code
19 section 4060.

20 **FOURTH CAUSE FOR DISCIPLINE**

21 **(Conviction of a Drug-Related Felony)**

22 22. Respondent has subjected his registration to disciplinary action under sections 4301,
23 subdivision (k) of the Code in that on or about May 5, 2011, as detailed in paragraph 19, above,
24 Respondent was convicted of violating Health and Safety Code section 11377, subdivision (a),
25 possession of a controlled substance, a felony.

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1 **DISCIPLINARY CONSIDERATIONS**

2 23. To determine the degree of discipline, if any, to be imposed on Respondent, pursuant
3 to California Code of Regulations, title 16, section 1769, Complainant alleges:

4 a. On or about January 7, 2010, in a prior administrative proceeding, Respondent
5 was issued Citation and Fine number CI 2008 37307. The citation was based on Respondent's
6 December 24, 2005 arrest, and March 20, 2006 conviction, for driving with a blood alcohol
7 concentration of .08 percent or more (in violation of section 4301, subdivisions (h) and (l) of the
8 Code); and Respondent's April 3, 2008 arrest, and June 16, 2008 conviction for petty theft (in
9 violation of section 4301, subdivisions (f) and (l) of the Code). The citation ordered a fine of
10 \$600.

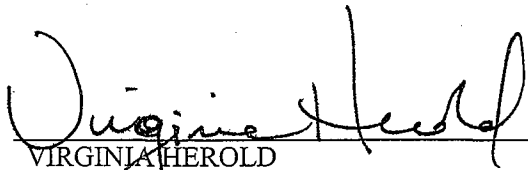
11 b. On September 21, 2010, Respondent was issued a modified Citation and Fine
12 reducing the fine to \$400. Respondent complied with the citation on November 9, 2010.

13 **PRAYER**

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

- 16 1. Revoking or suspending Pharmacy Technician Registration Number TCH 61215,
17 issued to Gabriel J. Tamayo;
- 18 2. Ordering Gabriel J. Tamayo to pay the Board of Pharmacy the reasonable costs of the
19 investigation and enforcement of this case, pursuant to Business and Professions Code section
20 125.3;
- 21 3. Taking such other and further action as deemed necessary and proper.

22
23
24 DATED: 1/25/12


25 VIRGINIA HEROLD
26 Executive Officer
27 Board of Pharmacy
28 Department of Consumer Affairs
State of California
Complainant

SD2011801473