

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

In the Matter of the Accusation Against:

Case No. 4283

KELLY JOANNE O'CONNOR
38745 3rd Street E
Palmdale, CA 93550

OAH No. 2013090489

Pharmacy Technician Registration
No. TCH 37039

Respondent.

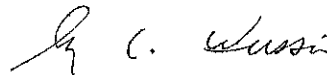
DECISION AND ORDER

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 26, 2014.

It is so ORDERED on April 24, 2014.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

STAN C. WEISSER
Board President

BEFORE THE
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In the Matter of the Accusation Against:

KELLY JOANNE O'CONNOR,

Respondent.

Case No. 4283

OAH No. 2013090489

PROPOSED DECISION

This matter was heard by Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings, State of California, on February 13, 2014, in Los Angeles.

Zachary T. Fanselow, Deputy Attorney General, represented Complainant.

Respondent Kelly Joanne O'Connor represented herself.

Testimonial and documentary evidence was received, and argument was heard. The matter was submitted and the record was closed on February 13, 2014.

FACTUAL FINDINGS

1. On July 22, 2013, Virginia Herold (Complainant) filed the Accusation in her official capacity as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs (Board).

2. On March 27, 2001, the Board issued pharmacy technician registration number TCH 37039 to Kelly Joanne O'Connor (Respondent).¹ The registration will expire on January 31, 2015, unless renewed.

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¹ The Accusation incorrectly states that the registration was issued in the year "2011" rather than "2001," as established by the License History Certification (Exh. 2).

October 13, 2011 Incident

3. Methamphetamine, is a Schedule II controlled substance under Health and Safety Code section 11055, subdivision (d)(2), and a dangerous drug under Business and Professions Code section 4022.

4. During a routine traffic stop on October 13, 2011, Respondent was found in possession of methamphetamine and arrested by Los Angeles County deputy sheriffs. The facts and circumstances surrounding the incident were established by the testimony of deputy sheriff Giovanni Lampignano, as supplemented by his written report of the incident. Lampignano has been a deputy sheriff for eight years. He has received training in drug recognition, and has been involved in over 200 drug-related arrests. Lampignano testified credibly regarding the circumstances of Respondent's arrest.

5. (A) On October 13, 2011, at 11 p.m., Lampignano and his partner were on patrol in the city of Palmdale when they saw a car (a white Saturn) driven by Respondent that was drifting across lanes, crossing double-yellow lane markings, and making improper turns, in violation of traffic laws. They followed the car and conducted a traffic stop as the car came to a stop in the driveway of Respondent's residence. Lampignano contacted Respondent as she sat in the driver's seat of the car. He saw that she was making "stuffing and retrieving movements," as if attempting to conceal or retrieve something from inside her purse. Lampignano immediately detained Respondent and removed her from the vehicle. As she got out of the car, Respondent told the deputy that she had her driver's license in her lap, but when he asked her what she was doing, Respondent said, "nothing." When Lampignano asked Respondent if there was anything illegal on her person or inside the car, she responded, "No, you're free to search anything you want." As Lampignano's partner started to search the car, Respondent spontaneously stated to Lampignano, "ok, ok, he might find some meth inside my purse." "Meth" is street slang for methamphetamine. Respondent stated that the meth was in a small pocket inside of her purse. Lampignano relayed the information to his partner, who found two small baggies of meth in a small pocket in Respondent's purse. Based on his experience and training, Lampignano estimated that each baggie contained \$10 to \$20 worth of meth. Respondent was placed under arrest and read her Miranda rights, which she waived.

(B) Respondent told Lampignano that she just bought the meth and needed it because she was going to a funeral that weekend. She stated she needed the meth to deal with the funeral. When Lampignano asked Respondent if she had any meth inside her house, Respondent stated that she had one more baggie of meth in the top drawer of the dresser in her bedroom. After Respondent consented to a search of her residence, Lampignano entered the residence and conducted a search of Respondent's bedroom. He found a plastic baggie of meth in Respondent's drawer as she had indicated. Based on his experience and training, Lampignano estimated that the baggie contained two to 3.5 grams of methamphetamine.

6. Respondent was arrested for possession of a controlled substance (methamphetamine) in violation of Health and Safety Code section 11377, subdivision (a).

7. Respondent was convicted and placed on probation pursuant to Penal Code section 1210.1. Under section 1210.1, any person convicted of a nonviolent drug possession offense shall receive probation, with the probation conditions requiring, among other things, "participation in and completion of an appropriate drug treatment program," and "appropriate drug testing." (Penal Code, § 1210.1, subd. (a).) Under section 1210.1, subdivision (e)(1), "the conviction on which the probation was based shall be set aside and the court shall dismiss the indictment, complaint, or information against the defendant," when the court determines that the defendant successfully completed drug treatment and substantially complied with the conditions of probation.

8. Respondent was ordered by the court to attend classes, AA or NA meetings, and pay fines. Respondent testified that she complied with the court's orders and conditions of probation.

Rehabilitation

9. Respondent is 50 years old. Her two adult daughters, one of whom recently gave birth to Respondent's grandson, live with Respondent. Respondent and her second husband are separated.

10. Respondent currently works in a doctor's office as a receptionist and medical records clerk. She has been in this job for eight and one-half years. Her duties do not require the use of her pharmacy technician registration. Respondent's current employer is not aware of her arrest.

11. Respondent has not worked as a registered pharmacy technician for nine years. Previously, she worked for Rite-Aid pharmacy for 15 years. The Board's records indicated that no prior disciplinary action has been taken against Respondent's registration.

12. Respondent testified she is committed to maintaining her sobriety because she has too much to lose. She does not want or need to get high on methamphetamine. She testified that her meth use cost her two marriages. She is embarrassed by her arrest. Respondent now has a grandson. Her family is what keeps her motivated to keep her life on the right track.

13. Respondent testified that she first started using methamphetamine in 1985 or 1986. She does not know why she started using the drug. The last time she used methamphetamine was in November 2012. Between 1986 and 2011, Respondent used methamphetamine off-and-on. She moved to the Lake Tahoe area in 1993 and lived there until 2001, when she moved to Palmdale, where she currently resides. Respondent testified she did not use meth when she lived in Lake Tahoe. She started using meth again when she

moved to Palmdale, where, according to Respondent, methamphetamine is "everywhere" and "readily available."

14. Respondent testified that she attended the classes and NA meetings that were ordered as part of her criminal probation. She does not currently attend NA meetings and is not currently participating in any drug counseling or treatment program. The last time she attended a drug treatment program was in December 2012. Respondent has recently begun attending church, which she says helps her maintain a positive outlook on life.

Duties of Pharmacy Technician

15. Suzy Patell has been an inspector for the Board since October 2012. Her duties as a Board inspector include inspecting licensees for regulatory compliance and investigating complaints. Patell has been licensed as a pharmacist in California since 1991 and in Nevada since 1992, and has worked as a pharmacist for over 20 years.

16. Patell's testimony established that a licensed pharmacy technician works under the direct supervision of the pharmacist on duty. A pharmacy technician has full access to medications. The technician's duties include taking prescription orders and refill authorizations from doctors over the phone, handing out medications, getting patient medical histories, taking drugs from the pharmacy's inventory and filling orders, and measuring out drugs and medications for prescriptions. The pharmacist on duty must review and verify that the technician's work is correct. Thus, a pharmacist must be able to trust the pharmacy technician because the pharmacist is signing off on the technician's work.

17. Methamphetamine is a controlled substance, but not a controlled substance sold in pharmacies. Meth is a street drug. There are drugs in a pharmacy that can be used to make meth, including over-the-counter drugs such as sudafedrin and ephedrine.

Cost Recovery

18. The reasonable cost of the investigation and prosecution incurred by the Board in this case is \$5,345.

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LEGAL CONCLUSIONS

1. Pursuant to Business and Professions Code section 4300, subdivision (a), any license issued by the Board may be suspended or revoked.

2. Business and Professions Code section 4301 provides, in pertinent part: "The board shall take action against any holder of a license who is guilty of unprofessional conduct." Unprofessional conduct shall include, but is not limited to, any of the following:

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

Subdivision (o): Violating or attempting to violate, directly or indirectly, . . . any provision or term of this chapter or of the applicable federal and state laws and regulations governing pharmacy, including regulations established by the board or by any other state or federal regulatory agency.

3. Health and Safety Code section 11377, subdivision (a), provides, in pertinent part: "[E]very person who possesses any controlled substance which is . . . specified in subdivision (d) . . . of Section 11055, unless upon the prescription of a physician, dentist, podiatrist, or veterinarian, licensed to practice in this state, shall be punished by imprisonment in a county jail for a period of not more than one year" Methamphetamine is a controlled substance specified in Health and Safety Code section 11055, subdivision (d)(2).

4. Business and Professions Code section 4060 provides, in part, that "[n]o person shall possess any controlled substance, except that furnished to a person upon the prescription of a physician."

5. Cause exists to suspend or revoke Respondent's pharmacy technician registration, pursuant to Business and Professions Code sections 4300 and 4301, subdivision (j), for unprofessional conduct, in that, on October 13, 2011, Respondent unlawfully possessed a controlled substance (methamphetamine) in violation of Business and Professions Code section 4060, based on the matters in Factual Findings 3-7.

6. Cause exists to suspend or revoke Respondent's pharmacy technician registration, pursuant to Business and Professions Code sections 4300 and 4301, subdivision (j), for unprofessional conduct, in that, on October 13, 2011, Respondent violated Health and Safety Code section 11377, subdivision (a), by possessing the controlled substance, methamphetamine, based on the matters in Factual Findings 3-7.

7. Cause exists to suspend or revoke Respondent's pharmacy technician registration, pursuant to Business and Professions Code sections 4300 and 4301, subdivision (o), for unprofessional conduct, in that, on October 13, 2011, Respondent violated provisions of the Pharmacy Law (Bus. & Prof. Code, § 4000 et seq.) by her unlawful possession of a controlled substance, methamphetamine, based on the matters in Factual Findings 3-7.

8. Administrative proceedings to revoke, suspend or impose discipline on a professional license are non-criminal and non-penal; they are not intended to punish the licensee, but rather to protect the public. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 785-786.)

9. The Board has developed Disciplinary Guidelines (Rev. 10/2007) (Guidelines), which are incorporated by reference in the Board's regulations at California Code of Regulations, title 16, section 1760.

10. The Guidelines classify categories of violations and recommended penalties as Category I, II or III. In this case, Respondent's violations under Business and Professions Code section 4301 are classified as Category II, which are for violations with a serious potential for harm, involve greater disregard for pharmacy law and public safety, or reflect on ethics or care exercised or competence. The maximum penalty for Category II violations is revocation, and the minimum penalty is revocation stayed, three years probation. (Guidelines, pp. 11 and 13.)

11. The Guidelines set forth factors to be considered in determining the penalty to be imposed in a given case. The factors include: actual or potential harm to the public or any consumer; prior disciplinary record; prior warning(s); number and/or variety of current violations; nature and severity of the acts or offenses under consideration; aggravating evidence; mitigating evidence; rehabilitation evidence; time passed since the act(s) or offense(s); whether the conduct was intentional or negligent, demonstrated incompetence, or, if the respondent is being held to account for conduct committed by another, the respondent had knowledge of or knowingly participated in such conduct; and financial benefit to the respondent from the misconduct. (Guidelines, p. 3.)

12. The Guidelines provide that a respondent is permitted to present mitigating circumstances at a hearing, and has the burden of demonstrating any rehabilitative or corrective measures he or she has taken. (Guidelines, p. 4.) The respondent must produce "admissible evidence in the form required by law." (*Id.*)

13. In this case, the revocation of Respondent's pharmacy technician registration is warranted. Respondent has no history of prior discipline by the Board against her registration. She appears motivated by her family and new grandson to keep her life on the right track. However, Respondent's criminal act -- possession of an illegal street drug (meth) -- is antithetical to the functions and duties of a registered pharmacy technician. Respondent, as a pharmacy technician, can reasonably be expected to know that possession and use of methamphetamine is illegal. Although the sheriff deputies recovered a small amount of meth

from Respondent at the time of her arrest, Respondent's testimony established that she has used meth, off-and-on, for a significant period of time (1986 through 2012). Only three years have passed since Respondent's arrest in October 2011. She last used meth just over one year ago, in November 2012. She is not presently participating in any drug counseling or rehabilitation program. Other than her own testimony, Respondent presented no other evidence to establish she is rehabilitated from her criminal act. Given her history with illegal drug use, her own testimony, standing alone, is insufficient to establish rehabilitation at this time. More time is need for Respondent to establish she is rehabilitated. Respondent is encouraged to continue her efforts to remain law-abiding and maintain her sobriety. Respondent may, if she wishes and meets the requirements, apply for reinstatement of her pharmacy technician registration in three years. (Bus. & Prof. Code, § 4309.) However, nothing in this Proposed Decision is intended to indicate whether such an application should or would be successful.

14. Cause exists to direct Respondent to pay the reasonable cost of investigation and enforcement of this matter pursuant to Business and Professions Code section 125.3. The reasonable cost of the investigation and enforcement of this matter is \$5,345. (Factual Finding 17.) However, inasmuch as Respondent's pharmacy technician registration is being revoked, she will not be required to pay the costs at this time. She will be required to pay the costs as a condition for issuance of a new license, or reinstatement of her revoked license, by the Board.

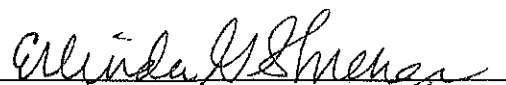
ORDER

Pharmacy technician registration number TCH 37039, issued to Respondent Kelly Joanne O'Connor, is revoked. Respondent shall relinquish her pharmacy technician registration 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 registration for three (3) 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.

As a condition precedent to reinstatement of her revoked pharmacy technician registration, Respondent shall reimburse the Board for its costs of investigation and prosecution in the amount of \$5,345. Said amount shall be paid in full prior to the reapplication or reinstatement of her revoked pharmacy technician registration, unless otherwise ordered by the Board.

DATED: March 27, 2014


ERLINDA G. SHRENGER
Administrative Law Judge
Office of Administrative Hearings

1 KAMALA D. HARRIS
Attorney General of California
2 MARC D. GREENBAUM
Supervising Deputy Attorney General
3 ZACHARY T. FANSELOW
Deputy Attorney General
4 State Bar No. 274129
300 So. Spring Street, Suite 1702
5 Los Angeles, CA 90013
Telephone: (213) 897-2562
6 Facsimile: (213) 897-2804
Attorneys for Complainant

7
8 **BEFORE THE**
BOARD OF PHARMACY
9 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA

10 In the Matter of the Accusation Against:
11
12 **KELLY JOANNE O'CONNOR**
38745 3rd Street E.
13 Palmdale, CA 93550
14 Pharmacy Technician Registration No. TCH
37039
15 Respondent.

Case No. 4283

ACCUSATION

16
17
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 ("Board").
22 2. On or about March 27, 2011, the Board issued Pharmacy Technician Registration No.
23 TCH 37039 to Kelly Joanne O'Connor ("Respondent"). The Pharmacy Technician Registration
24 was in full force and effect at all times relevant to the charges brought herein and will expire on
25 January 31, 2015, unless renewed.

26 **JURISDICTION**

- 27 3. This Accusation is brought before the Board, under the authority of the following
28 laws. All section references are to the Business and Professions Code unless otherwise indicated.

1 STATUTORY PROVISIONS

2 4. Section 492 states:

3 "Notwithstanding any other provision of law, successful completion of any diversion
4 program under the Penal Code, or successful completion of an alcohol and drug problem
5 assessment program under Article 5 (commencing with section 23249.50) of Chapter 12 of
6 Division 11 of the Vehicle Code, shall not prohibit any agency established under Division 2
7 ([Healing Arts] commencing with Section 500) of this code, or any initiative act referred to in that
8 division, from taking disciplinary action against a licensee or from denying a license for
9 professional misconduct, notwithstanding that evidence of that misconduct may be recorded in a
10 record pertaining to an arrest.

11 "This section shall not be construed to apply to any drug diversion program operated by any
12 agency established under Division 2 (commencing with Section 500) of this code, or any
13 initiative act referred to in that division."

14 5. Section 4060 states:

15 "No person shall possess any controlled substance, except that furnished to a person upon
16 the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor
17 pursuant to Section 3640.7, or furnished pursuant to a drug order issued by a certified
18 nurse-midwife pursuant to Section 2746.51, a nurse practitioner pursuant to Section 2836.1, or a
19 physician assistant pursuant to Section 3502.1, or naturopathic doctor pursuant to Section 3640.5,
20 or a pharmacist pursuant to either subparagraph (D) of paragraph (4) of, or clause (iv) of
21 subparagraph (A) of paragraph (5) of, subdivision (a) of Section 4052. This section shall not
22 apply to the possession of any controlled substance by a manufacturer, wholesaler, pharmacy,
23 pharmacist, physician, podiatrist, dentist, optometrist, veterinarian, naturopathic doctor, certified
24 nurse-midwife, nurse practitioner, or physician assistant, when in stock in containers correctly
25 labeled with the name and address of the supplier or producer.

26 "Nothing in this section authorizes a certified nurse-midwife, a nurse practitioner, a
27 physician assistant, or a naturopathic doctor, to order his or her own stock of dangerous drugs and
28 devices."

1 6. Section 4300, subdivision (a), states that "[e]very license issued may be suspended or
2 revoked."

3 7. Section 4300.1 states:

4 "The expiration, cancellation, forfeiture, or suspension of a board-issued license by
5 operation of law or by order or decision of the board or a court of law, the placement of a license
6 on a retired status, or the voluntary surrender of a license by a licensee shall not deprive the board
7 of jurisdiction to commence or proceed with any investigation of, or action or disciplinary
8 proceeding against, the licensee or to render a decision suspending or revoking the license."

9 8. Section 4301 states, in pertinent part:

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

13

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

16

17 "(o) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the
18 violation of or conspiring to violate any provision or term of this chapter or of the applicable
19 federal and state laws and regulations governing pharmacy, including regulations established by
20 the board or by any other state or federal regulatory agency."

21 DRUG STATUTES

22 9. "**Methamphetamine**," is a Schedule II controlled substance, as designated in Health
23 and Safety Code section 11055, subdivision (d)(2), and is categorized as a dangerous drug
24 pursuant to Business and Professions Code section 4022.

25 10. Health and Safety Code section 11377, subdivision (a), states:

26 "Except as authorized by law and as otherwise provided in subdivision (b) or Section
27 11375, or in Article 7 (commencing with Section 4211) of Chapter 9 of Division 2 of the
28 Business and Professions Code, every person who possess any controlled substance which is (1)

1 classified in Schedule III, IV, or V, and which is not a narcotic drug, (2) specified in subdivision
2 (d) of Section 11054, except paragraphs (13), (14), (15), and (20) of subdivision (d), (3) specified
3 in paragraph (11) of subdivision (c) of Section 11056, (4) specified in paragraph (2) or (3) of
4 subdivision (f) of Section 11054, or (5) specified in subdivision (d), (e), or (f) of Section 11055,
5 unless upon the prescription of a physician, dentist, podiatrist, or veterinarian, licensed to practice
6 in this state, shall be punished by imprisonment in a county jail for a period of not more than one
7 year or in the state prison.”

8 COST RECOVERY

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

13 FIRST CAUSE FOR DISCIPLINE

14 (Possession of a Controlled Substance)

15 12. Respondent's license is subject to disciplinary action under section 4300 and section
16 4301, subdivision (j), in conjunction with section 4060, on the grounds of unprofessional conduct,
17 in that on or about October 13, 2011, Respondent was found to be in possession of the controlled
18 substance and dangerous drug methamphetamine, without a valid prescription. On or about
19 October 13, 2011, a Los Angeles Sheriff's Officer conducted a routine traffic stop of
20 Respondent's vehicle. During the traffic stop Respondent admitted that there was
21 methamphetamine inside her purse, she also admitted there was more methamphetamine in her
22 bedroom. Officers found two small bags of methamphetamine inside Respondent's purse and
23 during a later search of Respondent's bedroom found an additional small bag of
24 methamphetamine inside Respondent's dresser.

25 SECOND CAUSE FOR DISCIPLINE

26 (Violating Drug Statutes)

27 13. Respondent's license is subject to disciplinary action under section 4300 and section
28 4301, subdivision (j), for violating Health and Safety Code section 11377, subdivision (a), for

1 possessing the controlled substance methamphetamine. Complainant refers to, and by this
2 reference incorporates, the allegations set forth above in paragraph 12 as though set forth fully.

3 **THIRD CAUSE FOR DISCIPLINE**

4 **(Violating Provisions of the Pharmacy Law)**

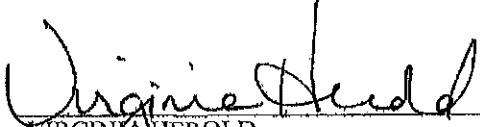
5 14. Respondent's license is subject to disciplinary action under sections 4300 and 4301,
6 subdivision (o), for violating provisions of the Pharmacy Law [§ 4000, et seq.]. Complainant
7 refers to, and by this reference incorporates, the allegations set forth above in paragraph 12 as
8 though set forth fully.

9 **PRAYER**

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

- 12 1. Revoking or suspending Pharmacy Technician Registration No. TCH 37039, issued
13 to Kelly J. O'Connor;
- 14 2. Ordering Kelly J. O'Connor to pay the Board the reasonable costs of the investigation
15 and enforcement of this case, pursuant to Business and Professions Code section 125.3; and
- 16 3. Taking such other and further action as deemed necessary and proper.

17
18 DATED: 7/22/13


19 VIRGINIA HEROLD
Executive Officer
20 Board of Pharmacy
Department of Consumer Affairs
21 State of California
Complainant

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