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

In the Matter of the First Amended Statement
of Issues Against:

MICHAEL DANIEL GUTIERREZ,

Respondent.

Case No. 4182
OAH No. 2012031050
DEFAULT DECISION AND ORDER
[Gov. Code, § 11520]

FINDINGS OF FACT

1. On or about October 17, 2012, Complainant Virginia Herold, in her official capacity as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs, filed a First Amended Statement of Issues No. 4182 against Michael Daniel Gutierrez (Respondent) before the Board of Pharmacy.
2. On or about February 11, 2011, Respondent filed an application dated February 8, 2011, with the Board of Pharmacy to obtain a Registration as a Pharmacy Technician.
3. On or about July 18, 2011, the Board issued a letter denying Respondent's application for a Registration as a Pharmacy Technician. On or about September 2, 2011, Respondent appealed the Board's denial of his application and requested a hearing.

1 4. On or about January 27, 2012, J. Mejia, an employee of the Department of Justice,
2 served by Certified and First Class Mail a copy of the Statement of Issues No. 4182, Statement to
3 Respondent, Respondent/Applicant's Notice of Designation of Counsel (2 copies),
4 Respondent/Applicant's Notice of Withdrawal of Request for Hearing (2 copies), Request for
5 Hearing (2 copies), Request for Discovery, and Discovery Statutes to Respondent to
6 Respondent's address on the application form, which was and is 1916 Minnesota Street Riverside,
7 CA 92507. On or about October 17, 2012, J. Mejia, an employee of the Department of Justice,
8 served by Certified and First Class Mail a copy of the First Amended Statement of Issues No.
9 4182, and Supplemental Statement to Respondent to Respondent's address on the application
10 form, which was and is 1916 Minnesota Street Riverside, CA 92507. A copy of the First
11 Amended Statement of Issues is attached as exhibit A, and is incorporated herein by reference.

12 5. Service of the First Amended Statement of Issues was effective as a matter of law
13 under the provisions of Government Code section 11505, subdivision (c)

14 6. On or about September 2, 2011, Respondent appealed the denial of his application
15 and requested a hearing in this action. On April 2, 2012, a Notice of Hearing was served by mail
16 at Respondent's address on the application and it informed him that an administrative hearing in
17 this matter was scheduled for January 8, 2013. Respondent failed to appear at that hearing.

18 7. Business and Professions Code section 118 states, in pertinent part:

19 (a) The withdrawal of an application for a license after it has been filed with a
20 board in the department shall not, unless the board has consented in writing to such
21 withdrawal, deprive the board of its authority to institute or continue a proceeding
22 against the applicant for the denial of the license upon any ground provided by law or
23 to enter an order denying the license upon any such ground.

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

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

26 9. California Government Code section 11520 states, in pertinent part:

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

1 respondent; and where the burden of proof is on the respondent to establish that the
2 respondent is entitled to the agency action sought, the agency may act without taking
3 evidence.

4 10. Pursuant to its authority under Government Code section 11520, the Board finds
5 Respondent is in default. The Board will take action without further hearing and, based on
6 evidence on file herein, finds that the allegations, in the First Amended Statement of Issues No.
7 4182 are true.

8 DETERMINATION OF ISSUES

9 1. Based on the foregoing findings of fact, Respondent Michael Daniel Gutierrez has
10 subjected his application for a Registration as a Pharmacy Technician to denial.

11 2. Service of the First Amended Statement of Issues No. 4182 and related documents
12 was proper and in accordance with the law.

13 3. The agency has jurisdiction to adjudicate this case by default.

14 4. The Board of Pharmacy is authorized to deny Respondent's application for licensure
15 based upon the following violations alleged in the First Amended Statement of Issues:

16 a. February 14, 2006, Criminal Conviction for Public Intoxication on May 21,
17 2005, and Failure to Appear on June 29, 2005;

18 b. October 23, 2008, Criminal Conviction for Driving Under the Influence of
19 Alcohol with a Blood Alcohol Content of 0.08% or More and for Driving Without a Valid
20 Driver's License on January 4, 2006;

21 c. January 6, 2012, Criminal Conviction for Petty Theft on October 5, 2011.

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ORDER

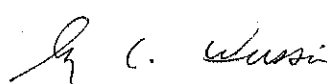
IT IS SO ORDERED that the application of Respondent Michael Daniel Gutierrez is hereby denied.

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

This Decision shall become effective on October 9, 2013.

It is so ORDERED ON September 9, 2013.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By _____
STANLEY C. WEISSER
Board President

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Attachment:
Exhibit A: First Amended Statement of Issues No.4182

Exhibit A

First Amended Statement of Issues No. 4182

1 **JURISDICTION**

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

5 4. Section 4300, subdivision (c) of the Code states that the board may refuse a license to
6 any applicant guilty of unprofessional conduct.

7 **STATUTORY PROVISIONS**

8 5. Section 475 of the Code states:

9 (a) Notwithstanding any other provisions of this code, the provisions of this
10 division shall govern the denial of licenses on the grounds of:

11 (1) Knowingly making a false statement of material fact, or knowingly
12 omitting to state a material fact, in an application for a license.

13 (2) Conviction of a crime.

14 (3) Commission of any act involving dishonesty, fraud or deceit with the
15 intent to substantially benefit himself or another, or substantially injure another.

16 (4) Commission of any act which, if done by a licentiate of the business or
17 profession in question, would be grounds for suspension or revocation of license.

18

19 6. Section 480 of the Code states:

20 (a) A board may deny a license regulated by this code on the grounds that the
21 applicant has one of the following:

22 (1) Been convicted of a crime. A conviction within the meaning of this section
23 means a plea or verdict of guilty or a conviction following a plea of nolo contendere.
24 Any action that a board is permitted to take following the establishment of a
25 conviction may be taken when the time for appeal has elapsed, or the judgment of
26 conviction has been affirmed on appeal, or when an order granting probation is made
27 suspending the imposition of sentence, irrespective of a subsequent order under the
28 provisions of Section 1203.4 of the Penal Code.

(2) Done any act involving dishonesty, fraud, or deceit with the intent to
substantially benefit himself or herself or another, or substantially injure another.

(3) (A) Done any act that if done by a licentiate of the business or profession in
question, would be grounds for suspension or revocation of license.

(B) The board may deny a license pursuant to this subdivision only if the crime
or act is substantially related to the qualifications, functions, or duties of the business
or profession for which application is made.

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7. Section 482 of the Code states:

Each board under the provisions of this code shall develop criteria to evaluate the rehabilitation of a person when:

- (a) Considering the denial of a license by the board under Section 480; or
- (b) Considering suspension or revocation of a license under Section 490.

Each board shall take into account all competent evidence of rehabilitation furnished by the applicant or licensee.

8. 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."

9. 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:

....

(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.

(g) Knowingly making or signing any certificate or other document that falsely represents the existence or nonexistence of a state of facts.

....

(l) The conviction of a crime substantially related to the qualifications, functions, and duties of a licensee under this chapter. The record of conviction of a violation of Chapter 13 (commencing with Section 801) of Title 21 of the United States Code regulating controlled substances or of a violation of the statutes of this

1 state regulating controlled substances or dangerous drugs shall be conclusive
evidence of unprofessional conduct. In all other cases, the record of conviction shall
2 be conclusive evidence only of the fact that the conviction occurred. The board may
inquire into the circumstances surrounding the commission of the crime, in order to
3 fix the degree of discipline or, in the case of a conviction not involving controlled
substances or dangerous drugs, to determine if the conviction is of an offense
4 substantially related to the qualifications, functions, and duties of a licensee under this
chapter. A plea or verdict of guilty or a conviction following a plea of nolo
5 contendere is deemed to be a conviction within the meaning of this provision. The
board may take action when the time for appeal has elapsed, or the judgment of
6 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
7 Section 1203.4 of the Penal Code allowing the person to withdraw his or her plea of
guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or
8 dismissing the accusation, information, or indictment.

9

10 REGULATORY PROVISIONS

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

12 (a) When considering the denial of a facility or personal license under Section
480 of the Business and Professions Code, the board, in evaluating the rehabilitation
13 of the applicant and his present eligibility for licensing or registration, will consider
the following criteria:

14 (1) The nature and severity of the act(s) or offense(s) under consideration as
15 grounds for denial.

16 (2) Evidence of any act(s) committed subsequent to the act(s) or crime(s) under
17 consideration as grounds for denial under Section 480 of the Business and Professions
Code.

18 (3) The time that has elapsed since commission of the act(s) or crime(s) referred
to in subdivision (1) or (2).

19 (4) Whether the applicant has complied with any terms of parole, probation,
20 restitution or any other sanctions lawfully imposed against the applicant.

21 (5) Evidence, if any, of rehabilitation submitted by the applicant.

22

23 11. California Code of Regulations, title 16, section 1770 states:

24 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
25 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
26 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
27 public health, safety, or welfare.

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FIRST CAUSE FOR DENIAL OF APPLICATION

(February 14, 2006 Criminal Conviction for Public Intoxication on May 21, 2005, and for Failure to Appear on June 29, 2005)

12. Respondent's application for registration as a pharmacy technician is subject to denial under section 480, subdivision (a)(1) and 4301(l) of the Code in that Respondent was convicted of a crime that is substantially related to the qualifications, duties, and functions of a pharmacy technician. The circumstances are as follows:

13. On or about February 14, 2006, in a criminal proceeding entitled *State of California v. Michael Daniel Gutierrez*, in the Riverside County Superior Court, Case Number SWM038345, Respondent was convicted on his plea of guilty to violating Penal Code section 647(f) (public intoxication), and Failure to Appear, misdemeanors.

14. As a result of the convictions, the Court ordered that Respondent pay various fees and fines due by February 15, 2006, and restricted Respondent's license for 12 months. The Court ordered that during the restriction of his license, Respondent only drive to and from work and to and from an alcohol program if one is ordered.

15. The facts and circumstances that led to the conviction are that on or about May 21, 2005, Respondent was arrested in Riverside County, California for public intoxication. Respondent's arraignment was scheduled for June 29, 2005 and Respondent failed to appear. The Court issued a bench warrant for Respondent's arrest. On February 14, 2006, Respondent was arraigned and the bench warrant recalled.

SECOND CAUSE FOR DENIAL OF APPLICATION

(October 23, 2008 Criminal Conviction for Driving Under the Influence of Alcohol With a Blood Alcohol Content of 0.08% [Over 0.20%] or More and for Driving Without a Valid Driver's License on January 4, 2006)

16. Respondent's application for registration as a pharmacy technician is subject to denial under section 480, subdivision (a)(1) and 4301(l) of the Code in that Respondent was convicted of a crime that is substantially related to the qualifications, duties, and functions of a pharmacy technician. The circumstances are as follows:

1 17. On or about October 23, 2008, in a criminal proceeding entitled *State of California v.*
2 *Michael Daniel Gutierrez*, in the Riverside County Superior Court, Case Number SWM048746,
3 Respondent was convicted on his plea of guilty of violating Vehicle Code sections 23152(a)
4 (driving under the influence of alcohol), 23152(b) (driving under the influence of alcohol with a
5 blood alcohol content of 0.08% or more), and 12500(A) (driving a motor vehicle without a valid
6 driver's license), misdemeanors.

7 18. As a result of the conviction, Respondent was placed on three years summary
8 probation and ordered to serve 15 days in the Riverside County Jail to be served in the Sheriff's
9 Labor Program, with one day credit for time served. The Court also ordered Respondent to obey
10 all laws, ordinances and court orders, pay various fees and fines, pay restitution in an amount to
11 be determined by the Court and payable to the Court, not drive with alcohol in his blood or within
12 six hours of consuming alcohol, not drive unless properly licensed nor without insurance or valid
13 registration, attend and satisfactorily complete a First Offender DUI Program for 9 months, and to
14 submit to chemical tests of blood, saliva, breath or urine or any reasonable physical test upon
15 request of any probation or law enforcement officer.

16 19. On May 21, 2009, the Court issued a bench warrant for Respondent's arrest for
17 failure to enroll in the First Offender DUI Program. On June 12, 2009, the warrant was recalled.
18 On August 11, 2009, a probation hearing took place regarding Respondent's enrollment in the
19 First Offender DUI Program. Probation was ordered revoked, however, the probation was
20 reinstated on the same terms and conditions. Respondent was ordered to file proof of enrollment
21 in the First Offender Program by October 20, 2009.

22 20. On or about October 22, 2009, the Court issued a bench warrant for Respondent's
23 arrest for failure to enroll in the First Offender DUI Program. On January 4, 2010, Respondent
24 was arraigned. Respondent admitted the violation of probation. Probation was reinstated to
25 continue on the same terms and conditions.

26 21. The facts and circumstances that gave rise to the January 4, 2006 conviction are that
27 Respondent drove a motor vehicle with a blood alcohol content above .08%.

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1 **THIRD CAUSE FOR DENIAL OF APPLICATION**

2 (January 6, 2012 Criminal Conviction for Petty Theft on October 5, 2011)

3 Respondent's application for registration as a pharmacy technician is subject to denial under
4 section 480, subdivision (a)(1) and 4301(l) of the Code in that Respondent was convicted of a
5 crime that is substantially related to the qualifications, duties, and functions of a pharmacy
6 technician. The circumstances are as follows:

7 22. On or about January 6, 2012, in a criminal proceeding entitled *People of the State of*
8 *California v. Michael Daniel Gutierrez*, in the Riverside County Superior Court, Case Number
9 RIM1117540, Respondent was convicted on his plea of guilty of violating Penal Code Section
10 490.5 (wilfully stole property from the premises of Stater Brothers of a value not exceeding
11 \$400.00), a misdemeanor.

12 23. As a result of the conviction, Respondent was placed on three years summary
13 probation and ordered to serve 8 days in the Riverside County Jail, with eight days credit for time
14 served. The Court also ordered Respondent to obey all laws, ordinances and court orders, pay
15 various fees and fines, pay restitution in an amount to be determined by the Probation Department
16 and payable to the Court, submit to immediate search of person, auto, home, premises, garage,
17 storage areas and personal or leased property with or without cause by the probation officer or
18 law enforcement, not to leave the state without obtaining written permission from the Probation
19 Department per the Interstate Compact Act, and not knowingly own, possess or have control of
20 any firearm, deadly weapon or annumition,.

21 24. The circumstances that led to the conviction are that on October 5, 2011, at
22 approximately 9:20 a.m. Respondent was observed shoplifting an \$11.99 bottle of Smirnoff
23 Vodka from Stater Brothers Market in Riverside, California. Respondent began running as he left
24 the store. Store employees chased him down the street. Respondent finally stopped running, and
25 with his back to the employees, he reached his hand into the front of his pants, pulled out the
26 bottle of vodka, held it over his head and then threw it to the ground, breaking the bottle in the
27 process. The store employees picked up the broken bottle pieces and walked Respondent back to
28 the store where they detained him until the police arrived. A store employee signed a private

1 person's arrest form placing Respondent under arrest for shoplifting. The Riverside Police
2 arrived, and cited and released Respondent.

3 **FOURTH CAUSE FOR DENIAL OF APPLICATION**

4 **(Act Involving Dishonesty, Fraud, or Deceit)**

5 25. Respondent's application is subject to denial under sections 480, subdivision (a)(2)
6 and (c) and 4301(f) and (g), of the Code in that he committed an act of dishonesty, fraud and/or
7 deceit when, in response to the question on his application for registration as a pharmacy
8 technician, "Have you ever been convicted of or pled no contest to a violation of any law of a
9 foreign country, the United States or any state laws or local ordinances? You must include all
10 misdemeanor and felony convictions, regardless of the age of the conviction, including those
11 which have been set aside under Penal Code section 1203.4. Traffic violations of \$500 or less
12 need not be reported. If "yes," attach an explanation including the type of violation, the date,
13 circumstances, location and the complete penalty received. In addition to this written
14 explanation, please provide the Board of Pharmacy with certified copies of all pertinent court
15 documents or arrest reports relating to this conviction." Respondent responded, "Yes," however,
16 he only disclosed the conviction that is the subject of the Second Cause for Discipline (the 2006
17 DUI), and failed to disclose the conviction that is the subject of the First Cause for Denial of
18 Application (2006 public intoxication).

19 **FIFTH CAUSE FOR DENIAL OF APPLICATION**

20 **(Commission of Acts Which if Done by a Licensee Would be**
21 **Grounds for Suspension or Revocation of License)**

22 26. Respondent's application is subject to denial under sections 480, subdivision (a)(3)(A)
23 of the Code in that he committed acts, that if done by a licensed pharmacy technician, would be
24 grounds for suspension or revocation of the license. The circumstances are as follows:

25 27. On or about February 14, 2006, October 23, 2008, and January 6, 2012, as detailed in
26 paragraphs 12 through 25, above, Respondent was convicted of crimes substantially related to the

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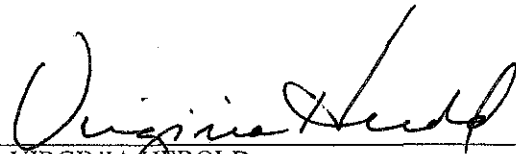
1 qualifications, functions, and duties of a licensed pharmacy technician, which would be grounds
2 for discipline under section 4301, subdivision (l) of the Code.

3 **PRAYER**

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

- 6 1. Denying the application of Michael Daniel Gutierrez for a Pharmacy Technician
7 Registration;
8 2. Taking such other and further action as deemed necessary and proper.

9
10 DATED: 10/4/12



11 VIRGINIA HEROLD
12 Executive Officer
13 Board of Pharmacy
14 Department of Consumer Affairs
15 State of California
16 *Complainant*

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