

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

In the Matter of the Statement of Issues
Against:

MELISSA ARLENE HERNANDEZ

Pharmacy Technician Registration Applicant

Respondent.

Case No. 4204

OAH No. 2012040697

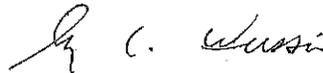
DECISION AND ORDER

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 February 7, 2013.

It is so ORDERED on January 8, 2013.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

STANLEY C. WEISSER
Board President

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

In the Matter of the Statement of Issues
Against:

Melissa Arlene Hernandez,

Respondent

Case No. 4204

OAH No. 2012040697

PROPOSED DECISION

Administrative Law Judge Howard Posner, Office of Administrative Hearings, State of California, heard this matter in Los Angeles, California on October 26, 2012.

Katherine Messana, Deputy Attorney General, represented Complainant Virginia Herold, Executive Officer of the Board of Pharmacy, Department of Consumer Affairs (the Board).

Respondent Melissa Hernandez represented herself.

This matter was heard on October 26, 2012. On the Board's motion, the First Amended Statement of Issues ("Statement of Issues") was amended to delete paragraph 18; references to March 30, 2010, in lines 6 and 13 on page 6; and the entire Third Cause for Denial of Application (paragraph 21). Oral and documentary evidence was received. The record was held open until November 5, 2012, so Complainant could, at the administrative law judge's request, submit documentary evidence of the discipline sought or imposed on respondent's employers. The evidence was submitted and admitted without objection as Exhibit 17, and the matter was submitted November 5, 2012.

The Executive Office of the Board of Pharmacy brings this Statement of Issues to deny Respondent's pharmacy technician registration. For the reasons set out below, respondent's applicant is granted, but she is placed on probation for two years.

FACTUAL FINDINGS

Jurisdiction and Background

1. Complainant issued this Statement of Issues in her official capacity.

2. Respondent was registered as a Pharmacy Technician from March 8, 2004 to April 4, 2010, when the Board cancelled her registration under Business and Professions Code section 4402, after it expired December 31, 2009.¹ On December 20, 2010, respondent applied for registration as a pharmacy technician. The Board denied the application on August 22, 2011, and respondent timely requested a hearing.

3. Respondent worked at the Olympia Plaza Pharmacy, which is in the Olympia Medical Plaza at 5901 Olympic Boulevard in West Los Angeles,² between May 2008 and April 2010. While employed there, respondent received and transcribed orally-transmitted prescriptions from prescribers, violating California Code of Regulations, title 16, section section 1793.1, subdivision (a),³ which provides that only a pharmacist may “[r]eceive a new prescription order orally from a prescriber or other person authorized by law.” The Statement of Issues alleges three discrete incidents of respondent’s taking prescriptions over the phone. Respondent, in her testimony at hearing, described the practice as being more widespread: Tatiana Brokhovich, the pharmacist in charge at Olympia Plaza Pharmacy (and the pharmacy’s owner, with her husband Emil Borokhovich) was often absent (because she worked at another pharmacy), knew respondent often took prescriptions over the phone, and instructed her to do so. The pharmacy was in the Olympia Medical Plaza building, and got its business from practitioners in the building. Respondent testified at hearing that patients and doctors might not even know who Tatiana was; doctors and nurses would ask for respondent by name when they contacted the pharmacy. Tatiana instructed respondent to take calls from doctors and nurses in the building and help them immediately because they did not like to put on hold.

4. The Statement of Issues alleges that respondent falsified records to procure prescription drugs for herself. There was no reliable evidence that she did so. Board investigator Valerie Knight, suspecting that respondent had faked prescriptions for patients and for herself, sent inquiries and form declarations to five doctors. Only one doctor, Brad Penenberg, unequivocally stated, “Patient not found in our records,” but the last name of the patient the Board asked about (“Devlin”) was not the name on the prescription slip (“Devin”); Dr. Penenberg’s not finding the wrong name in his records did not prove that there was no prescription under the correct name. Other doctors affirmed that they had indeed ordered the prescriptions in question. The last doctor, Eric Roberts, said that one of the prescriptions for respondent herself (for albuterol, a bronchodilator) appeared in his records. Dr. Roberts declared that respondent “worked in the pharmacy in our building and I may have authorized the [other prescriptions, for the anti-reflux medicine omeprazole, the antibiotic azithromycin, and the cough suppressant promethazine codeine syrup] by phone,”

¹ Business and Professions Code section 4402, subdivision (e), provides that the Board may cancel a registration if it is not renewed within 60 days after it expires. The canceled license cannot be reissued. “Instead, a new license will be required.”

² The Statement of Issues erroneously calls it “Olympic Plaza Pharmacy.”

³ “CCR” will denote further citations to title 16 of the California Code of Regulations.

though he did not remember them specifically and “did not not put it in her chart.” The thrust of his declaration appears to be that he was not careful about documenting his prescriptions for respondent because she worked in the building pharmacy and he knew her professionally. His declaration is not evidence that respondent fabricated prescriptions.

5. The Statement of Issues alleges, in paragraphs 12 through 15 and 16(d) and (e), a number of acts of misconduct, including theft of drugs, all based entirely on hearsay statements by Tatiana Borokhovich, which were made in response to a Board investigation of Borokhovich and Olympia Plaza Pharmacy, and are included in investigator Valerie Knight’s report of that investigation. It is not clear whether the Board intended to abandon any of these allegations: it amended the Statement of Issues to eliminate paragraphs paragraphs 18 and 21, which based causes for denial on the acts alleged in in paragraphs 12 through 15 and 16(d) and (e), but did not delete the allegations themselves, and some later paragraphs in the Statement of Issues confuse the issue further by referring to conduct alleged in those paragraphs or in paragraph 10, which alleges no conduct, but consists entirely of a citation to CCR section 1793.1.⁴ But assuming for the sake of clarity that the Board intends to continue asserting the allegations in paragraphs 12 through 15 and 16(d) and (e), those allegations are unsupported by evidence. Tatiana Borokhovich’s hearsay statements would be unpersuasive even if they were admissible. Knight testified that the credibility of both Borokhoviches was questionable, a conclusion supported by her report, which noted that Emil Borokhovich, a nurse practitioner, had been disciplined by the Board of Registered Nursing for several incidents, including stealing drugs from a patient’s medicine cabinet, forging prescriptions for Vicodin and getting them filled under false names, and being convicted of possession of Vicodin.

Mitigation and Rehabilitation

6. Respondent testified at hearing that she was never asked to take oral prescriptions when she was employed in other pharmacies as a clerk (in 2003) and then as a pharmacy technician (from 2004 to 2008) before being employed at Olympia Plaza Pharmacy. Respondent knew it was wrong for her to take prescriptions over the phone, and sometimes complained to the Borokhoviches about having to do it. She testified that when a relief pharmacist objected to respondent’s taking prescriptions over the phone, both Borokhoviches explained to him that it was done to keep the doctors happy. The relief pharmacist quit because of this. Respondent also threatened to quit because her job required

⁴ Paragraph 17, which alleges that improperly receiving prescriptions (Factual Findings 3 through 5) is a cause for denial, says those acts are “described in more particularity in paragraph 10 through 16, subdivisions (a) through (c).” Paragraphs 19 and 20 both refer to conduct “described in more particularity in paragraph 17, subdivisions (b) and (d) above,” while paragraph 22 refers to “described in more particularity in paragraph 17, subdivisions (a) and (c) above[.]” Paragraph 17 has no subdivisions and describes no conduct with more particularity; the intended references may be to paragraph 16. Paragraph 23 refers to unspecified conduct that is more particularly described “in paragraphs 18 through 23, above” and paragraph 24 similarly refers to conduct more particularly described “in paragraphs 18 through 24, above.”

her to take prescriptions over the phone, but the Borokhoviches placated her by raising her salary.

7. Respondent's testimony that her employers instructed her to take oral prescriptions, and made it part of her job, was credible. Indeed, even the Board's investigator, Valerie Knight, testified at hearing that she believed respondent's testimony was credible on this point.

8. Respondent is 29 years old. She was 25 when she started at Olympia Plaza Pharmacy Respondent and 27 when she left. She was forthcoming in admitting that she received and transcribed oral prescriptions, acknowledging that her conduct was wrong and that she exercised bad judgment. She had no record of discipline or complaints during the six years she was a registered pharmacy technician. Respondent got married in March of 2012, and recently has been helping her mother care for respondent's sister's two children, who have been adopted by respondent's mother.

9. The Board has not requested reimbursement of costs it has incurred for this Statement of Issues, and has presented no evidence of any such costs.

LEGAL CONCLUSIONS

1. Respondent's receiving and transcribing oral prescriptions without being a registered pharmacist (Factual Finding 3) constitutes cause to deny her application because it violated CCR sections 1717 and 1793.1, both of which provide that an orally transmitted prescription must be taken and transcribed by a registered pharmacist, as alleged in paragraph 22 of the Statement of Issues. Cause also exists under Business and Professions Code section 4301, subdivision (o), which provides that violating "regulations governing pharmacy" is unprofessional conduct, which is grounds for revoking a license. As Paragraph 23 alleges, respondent's license application may be denied (under §480, subd. (a)(3)(A) for any act that would be grounds to revoke a license. And as paragraph 24 of the Statement of Issues alleges, unprofessional conduct is also grounds (under §4300, subd. (c)) for denying her application.

2. Cause does not exist to deny respondent's application under section 4300, subdivision (e) and section 4301, subdivision (j), as alleged in the Statement of Issues' paragraphs 19 and 20. Those paragraphs are based on allegations that respondent obtained controlled substances without a prescription, and those allegations lack evidentiary support. (Factual Findings 4 and 5.)

3. There is also no cause to deny the application stated in paragraph 17, which alleges that respondent committed "acts involving dishonesty fraud or deceit with the intent to substantially benefit herself or substantially injure another," amounting to unprofessional conduct under section 4301, subdivision (f).⁵ Respondent's conduct in receiving oral

⁵ Section 4301, subdivision (f) does not include "with the intent to substantially benefit herself or another or substantially injure another" or words to the same effect.

prescription did not involve deceit or concealment, which is the thrust of "dishonesty" in the statute. Respondent's actions did not mislead anyone.

4. While respondent is an applicant, she was a licensed pharmacy technician for six years (Factual Findings 2 and 8) and her conduct as a technician is what provides cause for denying her application. In essence, she faces discipline because she followed her employers' instructions, and was willing to be bought off by raises when she complained about doing it. (Factual Findings 3 and 6.) She was a young technician who accepted breaking the rules because it was the way things were done where she worked. It is significant that the conduct at issue occurred only at Olympia Plaza Pharmacy, and not any of the pharmacies at which respondent was previously employed, (Factual Finding 6) an indication that respondent's misconduct was occasioned as much by the environment as by her own bad judgment.

5. The Board's Disciplinary Guidelines sets out four categories of offenses for which the Board may take disciplinary action. In each category, the Board has listed statutes and regulations, violations of which typically merit the recommended range of penalties for that category. Improperly receiving and transcribing oral prescriptions falls into two categories because it violates two regulations. A violation of CCR section 1717 falls into Category I, for which the minimum recommended discipline is one year of probation and the maximum penalty is revocation. A violation of CCR section 1793.1 falls into category II, for which the minimum recommended discipline is three years' probation. The guidelines state that greater discipline may be in order when repeated violations are involved, but in view of the mitigating factors discussed in Legal Conclusion 4 and Factual Findings 6 through 8, probation for two years—a mid-level Category I discipline—is warranted.

ORDER

Upon satisfaction of all statutory and regulatory requirements for issuance of a license, a license shall be issued to respondent and immediately revoked; the order of revocation is stayed and respondent is placed on probation for two years on these terms and conditions:

1. Certification Prior to Resuming Work

Respondent shall be automatically suspended from working as a pharmacy technician until she is certified as defined by Business and Professions Code section 4202(a)(4) and provides satisfactory proof of certification to the board. Respondent shall not resume working as a pharmacy technician until notified by the board. Failure to achieve certification within one year shall be considered a violation of probation. Respondent shall not resume working as a pharmacy technician until notified by the board.

During suspension, respondent shall not enter any pharmacy area or any portion of any other board licensed premises (wholesaler, veterinary food-animal drug retailer or any other distributor of drugs) any drug manufacturer, or any other location where dangerous drugs and devices or controlled substances are maintained. Respondent shall not do any act

involving drug selection, selection of stock, manufacturing, compounding or dispensing; nor shall respondent manage, administer, or assist any licensee of the board. Respondent shall not have access to or control the ordering, manufacturing or dispensing of dangerous drugs and devices or controlled substances. Respondent shall not resume work until notified by the board.

Subject to the above restrictions, respondent may continue to own or hold an interest in any licensed premises by the board in which she holds an interest at the time this decision becomes effective unless otherwise specified in this order.

Failure to comply with this suspension shall be considered a violation of probation.

2. Obey All Laws

Respondent shall obey all state and federal laws and regulations.

Respondent shall report any of the following occurrences to the board, in writing, within 72 hours of occurrence:

- an arrest or issuance of a criminal complaint for violation of any provision of the Pharmacy Law, state and federal food and drug laws, or state and federal controlled substances laws
- a plea of guilty or nolo contendere in any state or federal criminal proceeding to any criminal complaint, information or indictment
- a conviction of any crime
- discipline, citation, or other administrative action filed by any state or federal agency which involves respondent's pharmacy technician license or which is related to the practice of pharmacy or the manufacturing, obtaining, handling, distributing, billing, or charging for any drug, device or controlled substance. Failure to timely report any such occurrence shall be considered a violation of probation.

3. Report to the Board

Respondent shall report to the board quarterly, on a schedule as directed by the board or its designee. The report shall be made either in person or in writing, as directed. Among other requirements, respondent shall state in each report under penalty of perjury whether there has been compliance with all the terms and conditions of probation. Failure to submit timely reports in a form as directed shall be considered a violation of probation. Any period(s) of delinquency in submission of reports as directed may be added to the total period of probation. Moreover, if the final probation report is not made as directed, probation shall be automatically extended until such time as the final report is made and accepted by the board.

4. Interview with the Board

Upon receipt of reasonable prior notice, respondent shall appear in person for interviews with the board or its designee, at such intervals and locations as are determined by the board or its designee. Failure to appear for any scheduled interview without prior notification to board staff, or failure to appear at two or more scheduled interviews with the board or its designee during the period of probation, shall be considered a violation of probation.

5. Cooperate with Board Staff

Respondent shall cooperate with the board's inspection program and with the board's monitoring and investigation of respondent's compliance with the terms and conditions of her probation. Failure to cooperate shall be considered a violation of probation.

6. Notice to Employers

During the period of probation, respondent shall notify all present and prospective employers of the decision in case number 4204 and the terms, conditions and restrictions imposed on respondent by the decision, as follows:

Within thirty 30 days of the effective date of this decision, and within fifteen 15 days of respondent undertaking any new employment, respondent shall cause her direct supervisor, pharmacist-in-charge (including each new pharmacist-in-charge employed during respondent's tenure of employment) and owner to report to the board in writing acknowledging that they have read the decision in case number 4204 and the terms and conditions imposed it imposes. It shall be respondent's responsibility to ensure that each employer and supervisor submits a timely acknowledgement to the board.

If respondent works for or is employed by or through a pharmacy employment service, respondent must notify her direct supervisor, pharmacist-in-charge and owner at every pharmacy of the terms and conditions of the decision in case number 4204 in advance of the respondent commencing work at each pharmacy. A record of this notification must be provided to the board upon request.

Furthermore, within thirty 30 days of the effective date of this decision, and within 15 days of respondent undertaking any new employment by or through a pharmacy employment service, respondent shall cause her direct supervisor with the pharmacy employment service to report to the board in writing acknowledging that the supervisor has read the decision in case number 4204 and the terms and conditions it imposes. I It shall be respondent's responsibility to ensure that each employer and supervisor submits a timely acknowledgement to the board.

Failure to timely notify present or prospective employers or to cause them to submit timely acknowledgements to the board shall be considered a violation of probation.

"Employment," within the meaning of this provision, shall include any full-time, part-time, temporary or relief service or pharmacy management service as a pharmacy technician or in any position for which a pharmacy technician license is a requirement or criterion for employment, whether the respondent is considered an employee, independent contractor or volunteer.

7. Probation Monitoring Costs

Respondent shall pay any costs associated with probation monitoring as determined by the board every year of probation. Such costs shall be payable to the board on a schedule as directed by the board or its designee. Failure to pay such costs by the deadline(s) as directed shall be considered a violation of probation.

8. Status of License

At all times while on probation, Respondent shall maintain an active, current pharmacy technician license with the board, including any period during which suspension or probation is tolled. Failure to maintain an active, current license shall be considered a violation of probation.

If respondent's pharmacy technician license expires or is cancelled by operation of law or otherwise at any time during the probation period, including any extensions due to tolling or otherwise, upon renewal or reapplication respondent's license shall be subject to all terms and conditions of this probation not previously satisfied.

9. License Surrender While on Probation

Following the effective date of this decision, should respondent cease work due to retirement or health, or be otherwise unable to satisfy the terms and conditions of probation, respondent may tender her pharmacy technician license to the board for surrender. The board or its designee shall have the discretion whether to grant the request for surrender or take any other action it deems appropriate and reasonable. Upon formal acceptance of the surrender, respondent will no longer be subject to the terms and conditions of probation. Surrender constitutes a record of discipline and shall become a part of the respondent's license history with the board.

On acceptance of surrender, respondent shall relinquish her pharmacy technician license to the board within ten days after the board notifies her that the surrender is accepted. Respondent may not reapply for any license, permit, or registration from the board for three years from the effective date of the surrender. Respondent shall meet all requirements applicable to the license sought as of the date the application for that license is submitted to the board.

10. Notification of a Change in Name, Residence Address, Mailing Address or Employment

Respondent shall notify the board in writing within ten days of any change of employment. Said notification shall include the reasons for leaving, the address of the new employer, the name of the supervisor and owner, and the work schedule if known. Respondent shall further notify the board in writing within ten days of a change in name, residence address and mailing address, or phone number.

Failure to timely notify the board of any change in employer, name, address, or phone number shall be considered a violation of probation.

11. Tolling of Probation

Except during periods of suspension, respondent shall, at all times while on probation, be employed as a pharmacy technician in California for a minimum of 20 hours per calendar month. Any month during which this minimum is not met shall toll the period of probation, i.e., the period of probation shall be extended by one month for each month during which this minimum is not met. During any such period of tolling of probation, respondent must nonetheless comply with all terms and conditions of probation.

Should respondent, regardless of residency, for any reason (including vacation) cease working as a pharmacy technician for a minimum of 20 hours per calendar month in California, respondent must notify the board in writing within ten days of cessation of work and must further notify the board in writing within ten days of the resumption of the work. Any failure to provide notifications shall be considered a violation of probation.

It is a violation of probation for respondent's probation to remain tolled pursuant to the provisions of this condition for a total period, counting consecutive and non-consecutive months, exceeding 36 months.

"Cessation of work" means a calendar month during which respondent is not working for at least 20 hours as a pharmacy technician, as defined in Business and Professions Code section 4115. "Resumption of work" means any calendar month during which respondent is working as a pharmacy technician for at least 20 hours as a pharmacy technician as defined by Business and Professions Code section 4115.

13. Violation of Probation

If a respondent has not complied with any term or condition of probation, the board shall have continuing jurisdiction over respondent, and probation shall automatically be extended, until all terms and conditions have been satisfied or the board has taken other action deemed appropriate to treat the failure to comply as a violation of probation, to terminate probation, and to impose the penalty that was stayed.

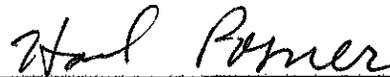
If respondent violates probation in any respect, the board, after giving respondent

notice and an opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. Notice and opportunity to be heard are not required for those provisions stating that a violation of probation may lead to automatic termination of the stay and or revocation of the license. If a petition to revoke probation or an accusation is filed against respondent during probation, the board shall have continuing jurisdiction, and the period of probation shall be automatically extended until the petition to revoke probation or accusation is heard and decided.

14. Completion of Probation

On written notice by the board indicating successful completion of probation, respondent's pharmacy technician license will be fully restored.

DATED: November 5, 2012



HOWARD POSNER
Administrative Law Judge
Office of Administrative Hearings

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

11 In the Matter of the Statement of Issues
Against:
12 **MELISSA ARLENE HERNANDEZ**
13 860 S. Berendo St., #1
14 Los Angeles, CA 90005
15 Applicant for Pharmacy Technician
Registration
16 Respondent.
17

Case No. 4204

**FIRST AMENDED STATEMENT OF
ISSUES**

18 Complainant alleges:

19 **PARTIES**

- 20 1. Virginia Herold ("Complainant") brings this Statement of Issues solely in her official
21 capacity as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.
22 2. On or about March 8, 2004, the Board issued pharmacy technician license TCH
23 55447 to Respondent. The license expired on December 31, 2009, and was not renewed. The
24 license was subsequently cancelled on April 4, 2010, pursuant to section 4402, subdivision (e) of
25 the Code. On or about December 20, 2010, the Board of Pharmacy, Department of Consumer
26 Affairs received an Application for Registration as a Pharmacy Technician from Melissa Arlene
27 Hernandez ("Respondent"). On or about December 8, 2010, Melissa Arlene Hernandez certified
28

1 under penalty of perjury to the truthfulness of all statements, answers, and representations in the
2 application. The Board denied the application on August 22, 2011.

3 **JURISDICTION AND STATUTORY PROVISIONS**

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

7 4. Section 4402 of the Code states:

8 "...

9 (e) Any other license issued by the board may be canceled by the board if
10 the license is not renewed within 60 days after its expiration. Any license canceled
11 under this subdivision may not be reissued. Instead, a new application will be
12 required."

13 5. Section 480 of the Code states, in pertinent part:

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

16 ...

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

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

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

24 6. Section 4300 of the Code states, in pertinent part:

25 "(c) The board may refuse a license to any applicant guilty of
26 unprofessional conduct. The board may, in its sole discretion, issue a probationary
27 license to any applicant for a license who is guilty of unprofessional conduct and who
28 has met all other requirements for licensure. The board may issue the license subject
to any terms or conditions not contrary to public policy, including, but not limited
to..."

7. Section 4301 of the Code states in pertinent part:

"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:

...

1 (f) The commission of any act involving moral turpitude, dishonesty,
2 fraud, deceit, or corruption, whether the act is committed in the course of relations as
3 a licensee or otherwise, and whether the act is a felony or misdemeanor or not.

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

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

8 (o) Violating or attempting to violate, directly or indirectly, or assisting in
9 or abetting the violation of or conspiring to violate any provision or term of this
10 chapter or of the applicable federal and state laws and regulations governing
11 pharmacy, including regulations established by the board or by any other state or
12 federal regulatory agency.”

13 REGULATIONS

14 8. California Code of Regulations, title 16, section 1770 states:

15 “For the purpose of denial, suspension, or revocation of a personal or
16 facility license pursuant to Division 1.5 (commencing with Section 475) of the
17 Business and Professions Code, a crime or act shall be considered substantially
18 related to the qualifications, functions or duties of a licensee or registrant if to a
19 substantial degree it evidences present or potential unfitness of a licensee or registrant
20 to perform the functions authorized by his license or registration in a manner
21 consistent with the public health, safety, or welfare.”

22 9. California Code of Regulations, title 16, section 1717 states, in pertinent part:

23 “(c) Promptly upon receipt of an orally transmitted prescription, the
24 pharmacist shall reduce it to writing, and initial it, and identify it as an orally
25 transmitted prescription. If the prescription is then dispensed by another pharmacist,
26 the dispensing pharmacist shall also initial the prescription to identify him or herself.
27 All orally transmitted prescriptions shall be received and transcribed by a pharmacist
28 prior to compounding, filling, dispensing, or furnishing. Chart orders as defined in
section 4019 of the Business and Professions Code are not subject to the provisions of
this subsection.”

10. California Code of Regulations, title 16, section 1793.1(a) states, in pertinent part:

“Only a pharmacist, or an intern pharmacist acting under the supervision
of a pharmacist, may:

(a) Receive a new prescription order orally from a prescriber or other
person authorized by law.”

OLYMPIC PLAZA PHARMACY

11. On or about May 7, 2008, Respondent was hired by Olympic Plaza Pharmacy
 (“Olympic”). Respondent worked at Olympic until approximately April 9, 2010.

1 12. On or about April 7, 2010, during a physical CII inventory count, pharmacy
2 technician D.R. discovered a loss/shortage of 50 tablets Hydromorphone 4mg. A security access
3 report indicated that Respondent was the only person who accessed the patient's file.

4 13. On or about April 9, 2010, when confronted with the allegations, Respondent
5 resigned from Olympic.

6 14. On or about May 18, 2010, T.B., the Pharmacist-in-Charge at Olympic notified the
7 Board via E-mail that Olympic Plaza Pharmacy, Inc. discovered a "theft / shortage of controlled
8 substance on or about April 7, 2010 of Hydromorphone 4mg tabs, NDC # 00054-0264-25,
9 missing quantity #50. Our internal investigation, although could not determine definetly (sic)
10 seriously implicated one of our employees, clerk/tech, which led to her resignation. Please see
11 attached copy of the DEA 106 form that has recently been filed with DOJ..." Attached to the E-
12 mail was a copy of a DEA-106 Loss Report, indicating that 50 Hydromorphone 4mg was missing
13 from the pharmacy.

14 15. On or about May 25, 2010, the Board contacted Olympic Plaza Pharmacy, Inc. and
15 was informed the employee implicated in the thefts was Pharmacy Technician, Melissa
16 Hernandez.

17 16. The Board conducted an investigation. Interviews and a review of relevant
18 documents revealed the following:

19 a. On or about February 29, 2008, Respondent received and transcribed a "Z-Pak"
20 (azithromycin) prescription for herself without legal or prescriber authorization.

21 b. On March 3, 2008, transcribed a prescription for 40 Hydrocodone/APAP 5-500
22 ("Vicodin") tablets for herself without legal or prescriber authorization under the name of patient
23 G.D. and Dr. B.P.

24 c. On or about May 27, 2009, Respondent received and transcribed a prescription
25 for Robaxin (Methocarbamol) 750mg #30 for herself.

26 d. On or about March 30, 2010, Respondent manipulated prescription records to
27 conceal a theft of 50 tablets of Hydromorphone by decreasing this prescription's authorized
28 amount of #250 tablets to #200.

1 e. As the theft was about to be revealed, Respondent manipulated the prescription
2 record of a second Hydromorphone 4mg prescription on April 7, 2010, increasing the quantity
3 from 150 to 200 to balance the pharmacy records and conceal the original theft on March 30,
4 2010.

5 **FIRST CAUSE FOR DENIAL OF APPLICATION**

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

7 17. Respondent's application is subject to denial under section 480, subdivision (a)(2) of
8 the Code and section 4300, subdivision (c) of the Code in conjunction with section 4301,
9 subdivision (f) of the Code in that Respondent committed acts involving dishonesty, fraud or
10 deceit with the intent to substantially benefit herself or another or substantially injure another. On
11 or about February 29, 2008, March 3, 2008 and May 27, 2009, Respondent received and
12 transcribed an orally transmitted prescription from a prescriber without being a registered
13 pharmacist, in violation of California Code of Regulations, title 16, section 1717, subdivision (c)
14 and section 1793.1, subdivision (a). The conduct is described in more particularity in paragraph
15 10 through paragraph 16, subdivisions (a) through (c), above, inclusive and herein incorporated
16 by reference.

17 18. Respondent's application is subject to denial under section 480, subdivision (a)(2) of
18 the Code and section 4300, subdivision (c) of the Code in conjunction with section 4301,
19 subdivision (f) of the Code in that Respondent committed acts involving dishonesty, fraud or
20 deceit with the intent to substantially benefit himself or another or substantially injure another.
21 On or about March 30, 2010, Respondent manipulated prescription records to obtain 50
22 Hydromorphone 4mg tablets. Furthermore, on or about April 7, 2010, Respondent further
23 manipulated records to balance the pharmacy records and conceal the original theft on March 30,
24 2010. The conduct is described in more particularity in paragraph 17, subdivisions (d) and (e)
25 above, inclusive and herein incorporated by reference.

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1 or about February 28, 2008, March 3, 2008 and May 27, 2009, Respondent received and
2 transcribed prescriptions for herself and was not a Registered Pharmacist. The conduct is
3 described in more particularity in paragraph 17, subdivisions (a) through (c) above, inclusive and
4 herein incorporated by reference.

5 **FIFTH CAUSE FOR DENIAL OF APPLICATION**

6 **(Acts Which if Done by Licentiate Would be Grounds for Discipline)**

7 23. Respondent's application is subject to denial under section 480, subdivision (a)(3)(A)
8 of the Code in that Respondent committed acts which if done by a licentiate would be grounds for
9 discipline. The conduct is described in more particularity in paragraphs 18 through 23, above,
10 inclusive and herein incorporated by reference.

11 **SIXTH CAUSE FOR DENIAL OF APPLICATION**

12 **(Unprofessional Conduct: Violation of Pharmacy Law)**

13 24. Respondent's application is subject to denial pursuant to section 4300, subdivision (c)
14 of the Code in conjunction with section 4301, subdivision (o) of the Code on the grounds of
15 unprofessional conduct in that Respondent's actions while working at Olympic Plaza Pharmacy
16 violated Pharmacy Law. The conduct is described in more particularity in paragraphs 18 through
17 24, above, inclusive and herein incorporated by reference.

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PRAYER

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

1. Denying the application of Melissa Arlene Hernandez for Registration as a Pharmacy Technician;
2. Taking such other and further action as deemed necessary and proper.

DATED: 8/9/12 Virginia Herold

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

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