

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

In the Matter of the Accusation Against:

PETER J. SULLENGER,

Pharmacy Technician Registration
No. TCH 26660

Respondent.

Case No. 4581

OAH No. 2014090382

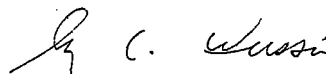
DECISION AND ORDER

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 April 6, 2015.

It is so ORDERED on March 6, 2015.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

STAN C. WEISSER
Board President

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

In the Matter of the Accusation Against:

PETER J. SULLENGER,

Pharmacy Technician Registration
No. TCH 26660

Respondent.

Case No. 4581

OAH No. 2014090382

PROPOSED DECISION

Administrative Law Judge Nancy L. Rasmussen, State of California, Office of Administrative Hearings, heard this matter on January 15, 2015, in Oakland, California.

Deputy Attorney General Aspasia A. Papavassiliou represented complainant Virginia Herold, Executive Officer, Board of Pharmacy, Department of Consumer Affairs.

Respondent Peter J. Sullenger was self-represented.

The matter was submitted for decision on January 15, 2015.

FACTUAL FINDINGS

1. On August 3, 1998, the Board of Pharmacy issued Pharmacy Technician Registration Number TCH 26660 to respondent Peter J. Sullenger. The registration expired on March 31, 2014, and was cancelled on July 29, 2014, under Business and Professions Code section 4402, subdivision (e).¹

¹ Business and Professions Code section 4402, subdivision (e), authorizes the board to cancel a registration that is not renewed within 60 days of its expiration. Respondent asserts that he sent in his renewal application on March 26, 2014, but the board did not receive it before his registration expired. He received a bill for a late fee, which he paid, but his registration was not renewed. The board later cancelled respondent's registration and refunded his renewal fee and late fee. Respondent called the board and was told that his registration was not renewed because of the pending administrative action against him.

2. On December 16, 2013, in the Alameda County Superior Court, respondent was convicted on a plea of no contest of violating Health and Safety Code section 11357, subdivision (c) (possession of marijuana), a misdemeanor. Imposition of sentence was suspended and respondent was placed on a conditional sentence for three years. Terms of the conditional sentence include serving two days in county jail, with credit for time served of two days, and a prohibition on possessing more than one ounce of marijuana.

3. The incident that led to respondent's conviction occurred on April 24, 2012, when California Highway Patrol Officer Michael Novosel pulled respondent's car over for several Vehicle Code violations. Novosel detected an odor of marijuana coming from within the vehicle, but when he asked respondent if there was any marijuana in the vehicle, respondent said "No." Novosel later searched the trunk and found a plastic bag containing approximately 3.4 pounds of marijuana. Novosel's opinion, based on his training and experience, is that this amount exceeds what one would expect for personal use. Respondent was arrested and charged with felony violations of Health and Safety Code section 11359 (possession of marijuana for sale) and section 11360, subdivision (a) (transportation of marijuana).

4. Respondent claims the marijuana in his car was for his personal use and he thought it was legal for him to have this drug because he had obtained a medical marijuana recommendation. On February 12, 2009, respondent was issued a medical marijuana recommendation by a physician, but this recommendation expired on February 12, 2010. Respondent did not realize the recommendation was no longer valid until he showed it to his attorney after his arrest. On April 27, 2012, three days after his arrest, respondent obtained a new medical marijuana recommendation by a physician, with an expiration date of April 26, 2013.²

At the time of his arrest, respondent resided in Fresno but was in the process of relocating to the Bay Area. He did not want to leave the marijuana at his Fresno apartment when he came to the Bay Area for several days, so he had it with him in his car.

The original felony drug charges against respondent were dismissed as part of the plea bargain in which he pled no contest to misdemeanor possession of marijuana.

5. Respondent is 39 years old and lives in Vallejo. After the board issued his registration in 1998, he worked as a pharmacy technician for Longs Drugs in Mill Valley until 2001. From November 2001 to July 2012, respondent worked as a pharmacy technician for Kaiser in Fresno. When he moved back to the Bay Area, he took a job in schedule maintenance at Kaiser in Novato because there were no openings for pharmacy technicians at the local Kaiser facilities. Respondent continues to work in this non-pharmacy job.

² Also on April 27, 2012, respondent obtained a "Grower's Certificate" stating in part: "**Officer** – This crop of medical cannabis is being grown entirely for my personal medical use . . ." At the hearing, respondent was not questioned about this certificate, and he did not explain why he obtained it.

6. On August 22, 2013, respondent obtained a medical marijuana recommendation by a physician, with an expiration date of August 22, 2014. His current recommendation, issued on September 3, 2014, is valid until September 3, 2015.

7. Respondent asserts that in his 14 years as a pharmacy technician he was never disciplined and had no problems with his work performance. He also has no other criminal convictions. Respondent would like to get his registration back so he can transfer into a pharmacy technician position at Kaiser.

8. As of December 30, 2014, the board had incurred the following costs for the investigation and enforcement of this case:

Attorney General's costs for legal services:

Paralegal

2012/2013: 2.00 hrs. @ \$120/hr. - \$ 240.00

Deputy Attorney General

2012/2013: 6.00 hrs. @ \$170/hr. - \$1,020.00

2013/2014: 8.25 hrs. @ \$170/hr. - \$1,402.50

2014/2015: 14.25 hrs. @ \$170/hr. - \$2,422.50

Total \$5,085.00

LEGAL CONCLUSIONS

1. Under Business and Professions Code section 4300.1, the board has continuing jurisdiction in this matter despite the cancellation of respondent's pharmacy technician registration.

2. Business and Professions Code section 4301 authorizes the board to take disciplinary action against a licensee for unprofessional conduct. Under subdivision (j) of that section, unprofessional conduct includes: "The violation of any of the statutes of this state . . . regulating controlled substances and dangerous drugs." Under subdivision (l), unprofessional conduct includes: "The conviction of a crime substantially related to the qualifications, functions, and duties of a licensee under this chapter." Subdivision (l) further provides: "The record of conviction . . . of a violation of the statutes of this state regulating controlled substances or dangerous drugs shall be conclusive evidence of unprofessional conduct."

3. Health and Safety Code section 11357, subdivision (c) (possession of marijuana), is a statute regulating a controlled substance, and respondent's violation of this statute therefore constitutes unprofessional conduct under Business and Professions Code section 4301, subdivision (j). Respondent's criminal offense is substantially related to the

qualifications, functions and duties of a pharmacy technician because it involved a large quantity of illegal drugs, and his conviction therefore constitutes unprofessional conduct under Business and Professions Code section 4301, subdivision (l). Respondent's dishonesty with Officer Novosel and his possession of a large quantity of marijuana constitutes unprofessional conduct under Business and Professions Code section 4301, and respondent's conviction of the drug offense is conclusive evidence of unprofessional conduct under subdivision (l) of that section.

Respondent's unprofessional conduct under Business and Professions Code section 4301 and subdivisions (j) and (l) of that section constitutes cause for discipline of respondent's pharmacy technician registration.

4. Respondent's claim that the marijuana in his car was for personal use is not entirely credible given the large amount, but there is otherwise no evidence that he intended to sell the marijuana. There is also no evidence that respondent ever diverted drugs during his 14 years of work as a pharmacy technician or that he was dishonest or untrustworthy in the performance of his duties. Almost three years have elapsed since respondent's offense, although he is still on a conditional sentence following his December 2013 conviction for possession of marijuana. Considering all the facts of this case, protection of the public does not require that respondent's pharmacy technician registration be revoked. His registration was cancelled last year, but if respondent reapplies for registration and there is no other cause for denial, he should be allowed to obtain a pharmacy technician registration subject to appropriate terms and conditions of probation.

5. Complainant has requested that respondent be ordered to pay the board the costs of investigation and enforcement of the case. Business and Professions Code section 125.3 provides that respondent may be ordered to pay the board "a sum not to exceed the reasonable costs of the investigation and enforcement of the case." The actual costs of investigation and enforcement are \$5,085. The case of *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 sets forth the factors to be considered in determining the reasonableness of costs. Those factors include whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of his or her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate to the alleged misconduct. None of these factors militate in respondent's favor (it is presumed that he has the financial ability to pay a cost recovery award, since he is gainfully employed). Under these circumstances, the actual costs of investigation and enforcement of \$5,085 are determined to be reasonable. Payment of costs shall be a condition of probation if respondent reapplies for and is issued a pharmacy technician registration.

ORDER

Upon the reapplication of respondent Peter J. Sullenger for a pharmacy technician registration and the satisfaction of all statutory and regulatory requirements for issuance of registration, provided that there is no cause for denial other than the matters set forth in Legal Conclusion 3, a pharmacy technician registration shall be issued to respondent. The registration shall immediately be revoked, but the order of revocation shall be stayed and respondent shall be placed on probation for a period of three (3) years upon the following terms and conditions:

1. Certification Prior to Resuming Work

Respondent shall be automatically suspended from working as a pharmacy technician until he is certified as defined by Business and Professions Code section 4202, subdivision (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 (1) year shall be considered a violation of probation.

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 board-licensed premises in which he 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 such 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 registration 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 for two (2) 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 his 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 4581 and the terms, conditions and restrictions imposed on respondent by the decision, as follows:

Within 30 days of the date of issuance of his pharmacy technician registration, and within 15 days of respondent undertaking any new employment, respondent shall cause his 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 the listed individual(s) has/have read the decision in case number 4581 and the terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that his employer(s) and/or supervisor(s) submit timely acknowledgment(s) to the board.

If respondent works for or is employed by or through a pharmacy employment service, respondent must notify his direct supervisor, pharmacist-in-charge and owner at every pharmacy of the terms and conditions of the decision in case number 4581 in advance of respondent commencing work at each pharmacy. A record of this notification must be provided to the board upon request.

Furthermore, within 30 days of the date of issuance of his pharmacy technician registration, and within 15 days of respondent undertaking any new employment by or through a pharmacy employment service, respondent shall cause his direct supervisor with the pharmacy employment service to report to the board in writing acknowledging that he or she has read the decision in case number 4581 and the terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that his or her employer(s) and/or supervisor(s) submit timely acknowledgment(s) to the board.

Failure to timely notify present or prospective employer(s) or to cause that/those employer(s) to submit timely acknowledgments 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 registration is a requirement or criterion for employment, whether respondent is considered an employee, independent contractor or volunteer.

7. Reimbursement of Board Costs

As a condition precedent to successful completion of probation, respondent shall pay to the board its costs of investigation and enforcement in the amount of \$5,085. Respondent shall make said payments as follows:

Commencing 30 days from the date of issuance of his pharmacy technician registration, respondent shall make monthly payments to the board in the amount of \$200, until the total amount of \$5,085 has been paid in full. Each installment payment is due on or before the 10th day of the month.

There shall be no deviation from this schedule absent prior written approval by the board or its designee, except that respondent may pay more than \$200 per month if he wishes to pay off the total amount sooner. Failure to make timely payments as directed shall be considered a violation of probation.

The filing of bankruptcy by respondent shall not relieve respondent of his responsibility to reimburse the board for its costs of investigation and enforcement.

8. Probation Monitoring Costs

Respondent shall pay any costs associated with probation monitoring as determined by the board each and 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.

9. Status of Registration

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

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

10. Surrender of Registration While on Probation/Suspension

Following the issuance of his pharmacy technician registration, should respondent cease work due to retirement or health, or be otherwise unable to satisfy the terms and conditions of probation, respondent may tender his registration 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. This surrender constitutes a record of discipline and shall become a part of respondent's registration history with the board.

Upon acceptance of the surrender, respondent shall relinquish his pharmacy technician registration to the board within 10 days of notification by the board that the surrender is accepted. Respondent may not reapply for any registration or license from the board for three (3) years from the effective date of the surrender. Respondent shall meet all requirements applicable to the registration or license sought as of the date the application is submitted to the board, including any outstanding costs.

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

Respondent shall notify the board in writing within 10 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 10 days of a change in name, residence address, mailing address, or phone number.

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

12. 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 50 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 50 hours

per calendar month in California, respondent must notify the board in writing within 10 days of the cessation of work, and must further notify the board in writing within 10 days of the resumption of work. Any failure to provide such notification(s) 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 any calendar month during which respondent is not working for at least 50 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 for at least 50 hours as a pharmacy technician, as defined in Business and Professions Code section 4115.

13. Violation of Probation

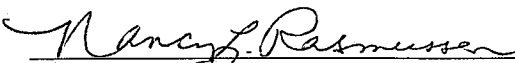
If respondent has not complied with any term or condition of probation, the board shall have continuing jurisdiction over respondent, and probation shall automatically be extended, until all terms and conditions have been satisfied or the board has taken other action as deemed appropriate to treat the 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 thereof may lead to automatic termination of the stay and/or revocation of the registration. 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

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

DATED: January 20, 2015


NANCY L. RASMUSSEN
Administrative Law Judge
Office of Administrative Hearings

1 KAMALA D. HARRIS
Attorney General of California
2 DIANN SOKOLOFF
Supervising Deputy Attorney General
3 ASPASIA A. PAPAVALASSILIOU
Deputy Attorney General
4 State Bar No. 196360
1515 Clay Street, 20th Floor
5 P.O. Box 70550
Oakland, CA 94612-0550
6 Telephone: (510) 622-2199
Facsimile: (510) 622-2270
7 E-mail: Aspasia.Papavassiliou@doj.ca.gov
Attorneys for Complainant

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

11 In the Matter of the Accusation Against:

Case No. 4581

12 **PETER J. SULLENGER**
13 **7797 N. First Street # 66**
14 **Fresno, CA 93720**

ACCUSATION

15 **Pharmacy Technician Registration No. TCH 26660**

16 Respondent.

17 Complainant alleges:

18 **PARTIES**

19 1. Virginia Herold (Complainant) brings this Accusation solely in her official capacity
20 as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.

21 2. On or about August 3, 1998, the Board of Pharmacy issued Pharmacy Technician
22 Registration Number TCH 26660 to Peter J. Sullenger (Respondent). The Pharmacy Technician
23 Registration was in full force and effect at all times relevant to the charges brought in this
24 Accusation and will expire on March 31, 2014, unless renewed.

25 **JURISDICTION**

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

1 4. Section 4300 of the Code states, in part:

2 "(a) Every license issued may be suspended or revoked.

3 "(b) The board shall discipline the holder of any license issued by the board, whose default
4 has been entered or whose case has been heard by the board and found guilty, by any of the
5 following methods:

6 "(1) Suspending judgment.

7 "(2) Placing him or her upon probation.

8 "(3) Suspending his or her right to practice for a period not exceeding one year.

9 "(4) Revoking his or her license.

10 ...

11 "(e) The proceedings under this article shall be conducted in accordance with Chapter 5
12 (commencing with Section 11500) of Part 1 of Division 3 of the Government Code, and the board
13 shall have all the powers granted therein. The action shall be final, except that the propriety of
14 the action is subject to review by the superior court pursuant to Section 1094.5 of the Code of
15 Civil Procedure."

16 5. Section 4300.1 of the Code states:

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

22 STATUTORY PROVISION

23 6. Section 4301 provides that the board shall take action against any holder of a license
24 guilty of unprofessional conduct.

25 COST RECOVERY

26 7. Section 125.3 of the Code states, in pertinent part, that the Board may request the
27 administrative law judge to direct a licentiate found to have committed a violation or violations of
28

1 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
2 enforcement of the case.

3 CAUSE FOR DISCIPLINE

4 (Unprofessional Conduct)

5 8. Respondent has subjected his pharmacy technician registration to discipline for
6 violation of Code section 4301 (Unprofessional Conduct). The circumstances are described
7 below.

8 9. On or about April 24, 2012, California Highway Patrol arrested Respondent for
9 violation of Health and Safety Code sections 11359 (Possession of Marijuana for Sale) and
10 11360, subdivision (a) (Transportation of Marijuana). The arrest occurred off westbound
11 Interstate 580, just west of the Alameda County line, where an officer stopped Respondent's car
12 after noticing that it lacked a front license plate, had tinted front windows, and had a clear license
13 plate cover over the rear license plate. While Respondent was gathering his license and
14 registration, the officer noticed an odor of marijuana coming from inside the car. The officer
15 asked Respondent if there was any marijuana in the car and Respondent said no. After another
16 officer arrived to assist in a search of the car, the officers found a plastic bag in the trunk that
17 contained what turned out to be 1.546 kilograms (3.4 pounds) of marijuana. Officers also found
18 marijuana residue in the storage drawer under the driver's seat. Respondent did not have a
19 medical marijuana card; moreover, the amount of marijuana Respondent was transporting was
20 greater than the amount a typical user would possess for personal use.

21 PRAYER

22 THEREFORE, Complainant requests that a hearing be held on the matters alleged in this
23 Accusation, and that following the hearing, the Board of Pharmacy issue a decision:

24 1. Revoking or suspending Pharmacy Technician Registration Number TCH 26660,
25 issued to Peter J. Sullenger;

26 2. Ordering Peter J. Sullenger to pay the Board of Pharmacy the reasonable costs of the
27 investigation and enforcement of this case, pursuant to Business and Professions Code section
28 125.3;

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

3. Taking such other and further action as deemed necessary and proper.

DATED: 9/6/13



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

SF2013901521