

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

In the Matter of the Accusation Against:

VICTOR MANUEL VILLANUEVA
5830 Permentor Court
Orangevale, CA 95662

Pharmacy Technician Registration
No. TCH 8106

Respondent.

Case No. 4605

OAH No. 2013100192

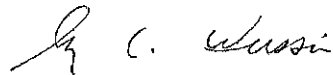
DECISION AND ORDER

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Pharmacy, Department of Consumer Affairs, as its Decision in this matter.

This decision shall become effective on May 5, 2014.

It is so ORDERED on April 4, 2014.

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:

VICTOR MANUEL VILLANUEVA,

Visalia, California 93291

Original Pharmacy Technician Registration
No. TCH 8106

Case No. 4605

OAH No. 2013100192

Respondent.

PROPOSED DECISION

This matter was heard by Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, on February 20, 2014, in Sacramento, California.

Karen R. Denvir, Deputy Attorney General, represented complainant Virginia K. Herold, Executive Officer, Board of Pharmacy (Board), Department of Consumer Affairs (Department), State of California.

Respondent Victor Manuel Villanueva represented himself.

Evidence was received, the record was closed, and the matter was submitted for decision on February 20, 2014.

SUMMARY

Complainant seeks to discipline respondent's license on the grounds that he was convicted of a crime that is substantially related to the qualifications, functions, and duties of a licensee and violated a California statute regulating controlled substances. Cause exists to discipline respondent's license on the latter ground only. Respondent did not present sufficient evidence of his continued fitness for licensure in light of his illegal possession of a controlled substance – methamphetamine – even on a restricted basis. Therefore, his license should be revoked outright.

FACTUAL FINDINGS

1. The Board issued Original Pharmacy Technician Registration Number TCH No. 8106 to respondent on June 28, 1993 (license). The license expires March 31, 2015, unless renewed or revoked. There is no history of prior discipline of the license.

2. On August 14, 2013, complainant issued the Accusation seeking to discipline respondent's license on the grounds that he was convicted of a crime that is substantially related to the qualifications, functions, and duties of a licensee and violated a California statute regulating controlled substances.

Pending Criminal Matter

3. On October 3, 2012, in the Superior Court of the State of California, in and for the County of Yolo, Case No. 12-3062, respondent pled guilty to a felony violation of Health and Safety Code section 11377, subdivision (a), possession of a controlled substance – methamphetamine. Pursuant to Penal Code section 1000, the court entered an Order for Deferred Entry of Judgment and suspended all further criminal proceedings pending receipt of a report on the progress of respondent's participation in the Yolo County Alcohol and Drug Program. The matter was continued to April 3, 2014, for the court's review of such report.

4. The factual basis for the criminal proceedings arose out of a traffic stop by the Yolo County Sheriff's Office on July 12, 2012. Respondent and his passenger were on their way to Eureka, California when they were stopped by a sheriff's deputy for a traffic violation. During a subsequent search of the car, the sheriff's deputy found respondent's wallet, which contained two small ziplock bags containing a crystal-clear substance. The sheriff's deputy also found the passenger's handbag, which contained paraphernalia commonly used for ingesting methamphetamine and a clear plastic bindle containing a crystal-clear substance. The contents of the two ziplock bags and clear plastic bindle were later determined to be methamphetamine. When asked what was in the bags found in his wallet, respondent said he did not know.

5. Respondent and his passenger were arrested and transported to the Yolo County Jail. After processing them into the jail, the sheriff's deputy reviewed video footage from a surveillance camera located in his patrol vehicle. In his arrest report, the sheriff's deputy provided the following summary of the conversation that occurred between respondent and his passenger in the back of his vehicle:

Gregory stated, "Well I better take the blame for it because you can't afford not to work. If we get caught with it" Villanueva says, "With what?" Gregory says the dope. Villanueva asked, "Where is it." Gregory response, "In my purse." Villanueva says, "Oh [expletive deleted]." Gregory Villanueva if he had anything in his wallet. Villanueva said, "Yes." He then says,

"We're screwed. We're just totally [explicative deleted] screwed." Villanueva continues to say, "I'm so [expletive deleted] screwed." Gregory says, "Let me just take the blame for it all." "Do you want me to take the blame for it all. I should cus otherwise" "Does he have my purse in his hand" Gregory says, "Did he find yours or just mine." Villanueva says, "Yup." "We are so [expletive deleted] screwed." Gregory says, "I'm going to tell him I put it in there cus it was in my pocket after you got out of the car. Was it a plastic baggie." Villanueva says, "Two of them."

6. At hearing, respondent admitted that the ziplock bags in his wallet contained methamphetamine and belonged to him. He explained that he had ingested methamphetamine earlier in the day prior to his arrest. Respondent also explained that the passenger in his car is now his wife.

Factors in Aggravation, Mitigation, or Rehabilitation

7. At hearing, respondent explained that he has worked in all the different types of pharmacies, except a retail pharmacy, during his 20 plus years as a licensed pharmacy technician. He also explained he has performed all the duties of a pharmacy technician, from checking in inventory as it arrives at the pharmacy to mixing the different drugs to fill prescriptions. According to respondent, he has never had issues at work with misappropriating drugs.

8. Respondent introduced a Certificate of Completion verifying his completion of the PC1000 Drug and Alcohol Diversion Class offered by the Humboldt Family Service Center on February 3, 2014. He explained that he was required to attend two Narcotics Anonymous meetings and two eight-hour classes on the use of narcotics in order to complete the Program and obtain the Certificate. He was not required to submit to any drug testing during the Program, and he has not participated in any other drug treatment programs.

9. Respondent provided vague testimony about his history of using methamphetamine, initially explaining that he did not know when he first began using. When pressed, he stated he began using approximately 10 years ago. Respondent also explained that he only used on weekends and at night. Again, when pressed for more specific details, he said he did not use every weekend, and estimated that he used once or twice each month or "something like that." He then stated that he "sometimes" used at night during the week. Finally, respondent estimated that he used methamphetamine four to five times during the week.

10. Respondent emphatically stated that he has not used methamphetamine since the date of his arrest, and explained that he has no concern that he will ever use again because he has not used since then and now recognizes that his previous use of

methamphetamine was something he should not have been doing. Respondent does not believe he had a substance abuse problem.

Evidence of the Duties of a Pharmacy Technician

11. Patricia Peterson is a licensed pharmacist, and has been employed by the Board as an inspector since October 2010. She was first licensed as a pharmacist by the State of Illinois in 1981. The Board issued her a license in 1984.

12. Prior to her employment with the Board, Ms. Peterson worked as a pharmacist. She was the pharmacist-in-charge for most of her years in private practice, which meant she was responsible for supervising other pharmacists as well as pharmacy technicians.

13. Ms. Peterson explained that a pharmacy technician's duties include pulling prescriptions that have been filled from the shelf, giving those prescriptions to patients, and collecting the patients' money. She also said many pharmacies place the responsibility for verifying the accuracy of drug orders from wholesalers in the pharmacy technicians. Additionally, pharmacy technicians are responsible for helping fill prescriptions by pulling the appropriate medication from the shelf, removing the appropriate amount of medication and placing it in the appropriate bottle, and labeling and preparing the bottles for review by a pharmacist. And while a pharmacist is ultimately responsible for all work performed by a pharmacy technician, Ms. Peterson explained that in reality many pharmacists rely on the pharmacy technicians to perform their duties with minimal to no supervision.

14. When asked what qualities are important for pharmacy technicians, Ms. Peterson stated, "My technicians needed to be trustworthy." She further stated that she needed to know that she could trust them. Ms. Peterson explained that a patient's first contact with a pharmacy is generally with a pharmacy technician. Therefore, she needs to be able to rely on the pharmacy technician to relay to her all information provided by the patient. Additionally, she explained that she needs to be able to rely on a pharmacy technician to be able to fill prescriptions accurately, and make sure prescriptions are stored in the correct places.

15. Respondent did not dispute Ms. Peterson's testimony, other than to explain that the duties described apply only to retail pharmacies. And while Ms. Peterson agreed, she explained that she would require many of the same qualities in a pharmacy technician regardless of the type of pharmacy. Additionally, a license issued by the Board allows the pharmacy technician to work in any type of pharmacy.

Discussion

16. For the reasons explained below, no cause exists to discipline respondent's license based on the criminal proceedings pending against him. Cause does exist, however, to discipline his license based on his violation of Health and Safety Code section 11377,

subdivision (a), a California statute that regulates controlled substances. He admitted at hearing that the methamphetamine found in his wallet was his.

While respondent is to be commended for his sobriety from methamphetamine, he provided no assurance that he will not relapse in the future, other than his word. His participation in two Narcotics Anonymous meetings and two eight-hour classes is insufficient in light of his having used methamphetamine for 10 years. (See, *Seide v. Committee of Bar Examiners of the State Bar of California* (1989) 49 Cal.3d 933, 940-941[while evidence of sustained counseling or an admission of a prior drug addiction is not required in order to show rehabilitation, such evidence would be helpful since respondent admitted to habitually using an illicit drug without acknowledging having a substance abuse problem].) Respondent demonstrated little insight into his misuse of methamphetamine. Therefore, he introduced insufficient evidence of his continued fitness for licensure, even on a restricted basis.

Costs of Investigation and Enforcement

17. Pursuant to Business and Professions Code section 125.3, complainant requested reimbursement in the amount of \$1,742.50 for costs incurred by the Office of the Attorney General and billed to the Board. At hearing, complainant introduced, without objection, a Certification of Prosecution Costs; Declaration of Karen R. Denvir, which requests costs in the amount of \$1,742.50. Attached to the Certification is a printout of a Matter Time Activity by Professional Type, which describes the tasks performed by the Office of the Attorney General.

While respondent did not object to complainant's evidence at hearing, he claimed that having to pay costs would cause a financial hardship for him and his family because he has not worked since August 2013 due to an injury. However, he is currently receiving disability benefits, and his wife works "occasionally." Respondent estimated their combined gross monthly income to be \$3,400. He estimated their monthly expenses, which include supporting a school-age daughter, to be \$2,550.

The costs incurred by the Board for work performed by the Office of the Attorney General in the amount of \$1,742.50 are reasonable in light of the issues involved in this matter as discussed in Legal Conclusion 5 below.

LEGAL CONCLUSIONS

Cause for Discipline

1. A pharmacy technician license may be disciplined if the licensee has been convicted of a crime that is substantially related to the qualifications, functions, and duties of a licensee. (Bus. & Prof. Code, § 4301, subd. (l).) Respondent pled guilty to a felony violation of Health and Safety Code section 11377, subdivision (a), on October 3, 2012, and

Business and Professions Code section 4301, subdivision (l), provides that “a plea or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning of this provision.” However, he entered his plea pursuant to Penal Code section 1000.1, subdivision (b), and the criminal court deferred entering a judgment of conviction and suspended further criminal proceedings pending receipt of a report on respondent’s participation in a drug treatment program. Penal Code section 1000.1, subdivision (d), specifies that “a defendant’s plea of guilty pursuant to this chapter shall not constitute a conviction for any purpose unless a judgment of guilty is entered pursuant to Section 1000.3.” Business and Professions Code section 4301, subdivision (l), being a statute of general application and Penal Code section 1000.1, subdivision (d), one of specific application, the latter controls. (Code Civ. Proc., § 1859; *City of Clovis v. County of Fresno* (2014) 222 Cal.App.4th 1469, 1481.) Therefore, no cause exists to discipline respondent’s pharmacy technician license pursuant to Business and Professions Code section 4301, subdivision (l).

2. A pharmacy technician license may also be disciplined if the licensee has violated “any of the statutes of this state ... regulating controlled substances and dangerous drugs.” (Bus. & Prof. Code, § 4301, subd. (j).) Methamphetamine is a Schedule II controlled substance pursuant to Health and Safety Code section 11055, subdivision (d)(2), and a dangerous drug in accordance with Business and Professions Code section 4022. Health and Safety Code section 11377, subdivision (a), prohibits anyone from possessing methamphetamine.¹ At hearing, respondent admitted he possessed methamphetamine on July 12, 2012. Therefore, cause exists to discipline his license pursuant to Business and Professions Code section 4301, subdivision (j).

3. Cause exists to discipline respondent’s pharmacy technician license pursuant to Business and Professions Code section 4301, subdivision (j), only. For the reasons discussed in Factual Finding 16, he did not produce sufficient evidence of his continued fitness for licensure, even on a restricted basis, in light of his misuse of methamphetamine. Therefore, respondent’s license should be revoked.

Award of Costs

4. Business and Professions Code section 125.3 states, in pertinent part:

(a) Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before any board within the department or before the Osteopathic Medical Board, upon request of the entity bringing the proceeding, the administrative law judge may direct a licentiate found to have committed a

¹ Having a lawful prescription for methamphetamine is a defense to a charge for violating Health and Safety Code section 11377, subdivision (a). But respondent has the burden of proving that defense, and he introduced no evidence that he had any such prescription. (See, *People v. Mower* (2002) 28 Cal.4th 457, 479.)

violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

[¶]...[¶]

(c) A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the entity bringing the proceeding or its designated representative shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.

In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and Professions Code section 125.3. These factors include: 1) the licentiate's success in getting the charges dismissed or reduced; 2) the licentiate's subjective good faith belief in the merits of his or her position; 3) whether the licentiate raised a colorable challenge to the proposed discipline; 4) the licentiate's financial ability to pay; and 5) whether the scope of the investigation was appropriate in light of the alleged misconduct. (*Id.* at p. 45.)

5. Ms. Denvir's declaration constitutes prima facie evidence of the reasonableness of the costs incurred by the Office of the Attorney General and billed to the Board (\$1,742.50). (Bus. & Prof., § 125.3, subd. (c).) Respondent failed to rebut such evidence. His claim that requiring him to pay the Board's costs would cause his family a financial hardship was not persuasive. And while he was successful in getting one of the charges for discipline against him dismissed, the costs incurred by the Board are minimal and his limited success does not warrant a reduction. Therefore, after considering the relevant evidence and the pertinent *Zuckerman* factors, costs in the amount of \$1,742.50 are reasonable and are awarded as set forth in the Order below.

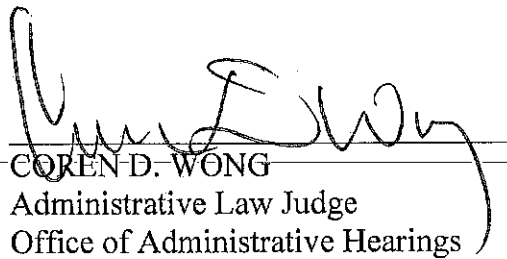
ORDER

1. Original Pharmacy Technician Registration No. TCH 8106 issued to respondent Victor Manuel Villanueva is REVOKED. Respondent shall relinquish his technician license to the Board within ten (10) days of the effective date of this Decision. Pursuant to Business and Professions Code section 4309, subdivision (a)(1), respondent may not reapply or petition the Board for reinstatement of his revoked license for three (3) years from the effective date of this Decision.

2. A condition of any reinstatement of respondent's revoked license shall be that he is certified as defined in Business and Professions Code section 4202, subdivision (a)(4), and provide satisfactory proof of certification to the Board.

3. As a condition precedent to reinstatement of his revoked technician license, respondent shall reimburse the Board for its costs of investigation and prosecution in the amount of \$1,742.50. Said amount shall be paid in full prior to the reapplication or reinstatement of his revoked technician license, unless otherwise ordered by the Board.

DATED: March 7, 2014


COREN D. WONG
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 Accusation Against:

Case No. 4605

12 **VICTOR MANUEL VILLANUEVA**
108 S. Elm Street
13 Visalia, CA 93291

A C C U S A T I O N

14 **Original Pharmacy Technician Registration**
15 **No. TCH 8106**

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 June 28, 1993, the Board of Pharmacy issued Original Pharmacy
22 Technician Registration Number TCH 8106 to Victor Manuel Villanueva (Respondent). The
23 Original Pharmacy Technician Registration was in full force and effect at all times relevant to the
24 charges brought herein and will expire on March 31, 2015, 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.

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

- (a) Every license issued may be suspended or revoked.
- (b) The board shall discipline the holder of any license issued by the board, whose default has been entered or whose case has been heard by the board and found guilty, by any of the following methods:
 - (1) Suspending judgment.
 - (2) Placing him or her upon probation.
 - (3) Suspending his or her right to practice for a period not exceeding one year.
 - (4) Revoking his or her license.
 - (5) Taking any other action in relation to disciplining him or her as the board in its discretion may deem proper.

...

5. 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:

...

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

...

(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 state regulating controlled substances or dangerous drugs shall be conclusive evidence of unprofessional conduct. In all other cases, the record of conviction shall 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 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 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 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 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 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

1 guilty, or setting aside the verdict of guilty, or dismissing the accusation, information,
or indictment.

2 ...

3 6. Section 4300.1 of the Code provides that the expiration, cancellation, forfeiture, or
4 suspension of a board-issued license by operation of law or by order or decision of the board or a
5 court of law, the placement of a license on a retired status, or the voluntary surrender of a license
6 by a licensee shall not deprive the board of jurisdiction to commence or proceed with any
7 investigation of, or action or disciplinary proceeding against, the licensee or to render a decision
8 suspending or revoking the license.

9 **COST RECOVERY**

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

14 **DRUGS**

15 8. Methamphetamine is a Schedule II controlled substance as designated by Health and
16 Safety Code section 11055(d)(2) and a dangerous drug as designated by Business and Professions
17 Code section 4022. It is a stimulant drug.

18 **FIRST CAUSE FOR DISCIPLINE**

19 **(Criminal Conviction)**

20 9. Respondent is subject to disciplinary action under section 4301, subdivision (l) in that
21 he was convicted of a crime substantially related to the qualifications, functions, and duties of a
22 licensee. The circumstances are as follows:

23 10. On or about October 3, 2012, in the case of *People v. Victor Manuel Villanueva* (Yolo
24 County Superior Court Case No. 12-3062), Respondent was convicted on his plea of guilty to a
25 felony violation of Health and Safety Code section 11377, subdivision (a) (possession of a
26 controlled substance). The circumstances are as follows:

27 11. On or about July 12, 2012, Yolo County Deputy Sheriff Pineda initiated a traffic stop
28 and contacted Respondent, who was driving, and a female passenger. Respondent consented to a

1 search of his vehicle, and Deputy Pineda found two small zip lock bags with .03 grams of
2 methamphetamine inside Respondent's wallet. In addition, Deputy Pineda also located a purse
3 that contained a plastic bindle containing 4.60 grams of methamphetamine, as well as drug
4 paraphernalia. Respondent and the passenger were transported in the patrol vehicle to the Yolo
5 County Jail. Surveillance video inside the patrol vehicle recorded a conversation between
6 Respondent and the passenger in which Respondent admitted ownership of the two baggies of
7 methamphetamine in his wallet.

8 **SECOND CAUSE FOR DISCIPLINE**

9 **(Violation of Statutes Regulating Controlled Substances)**

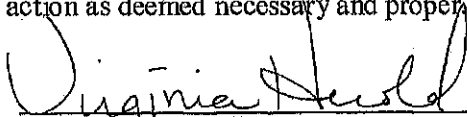
10 12. Respondent is subject to disciplinary action under section 4301, subdivision (j), in
11 that Respondent violated California statutes regulating controlled substances, in that he violated
12 Health and Safety Code section 11377, subdivision (a) (possession of a controlled substance), as
13 set forth above in paragraphs 10-11.

14 **PRAYER**

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

- 17 1. Revoking or suspending Original Pharmacy Technician Registration Number TCH
18 8106, issued to Victor Manuel Villanueva;
- 19 2. Ordering Victor Manuel Villanueva to pay the Board of Pharmacy the reasonable
20 costs of the investigation and enforcement of this case, pursuant to Business and Professions
21 Code section 125.3;
- 22 3. Taking such other and further action as deemed necessary and proper

23 DATED: 8/14/13

24 
25 VIRGINIA HEROLD
26 Executive Officer
27 Board of Pharmacy
28 Department of Consumer Affairs
State of California
Complainant