

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

In the Matter of the Accusation Against:

IAN WADE LIVINGSTON

Pharmacy Technician Registration No.
TCH 77213,

Respondent.

Case No. 4726

OAH No. 2014110887

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 September 4, 2015.

It is so ORDERED on August 5, 2015.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

Amy Gutierrez, Pharm.D.
Board President

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PROPOSED DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on June 1, 2015, in San Bernardino, California.

Kevin J. Rigley, Deputy Attorney General, Department of Justice, represented complainant, Virginia Herold, Executive Officer, Board of Pharmacy, Department of Consumer Affairs, State of California.

Ian Wade Livingston, respondent, represented himself.

The matter was submitted on June 1, 2015.

FACTUAL FINDINGS

Background

1. On July 14, 2007, the board issued to respondent Pharmacy Technician Registration Number TCH 77213. The registration expires on November 30, 2016.
2. On June 16, 2014, complainant filed the Accusation in this matter in her official capacity. The Accusation alleged that between January and November 2010, while working as a pharmacy technician, respondent stole approximately 40 hydrocodone/APAP 10/325¹ tablets from his employer, CVS Pharmacy. The Accusation alleged four causes for

¹ Hydrocodone/APAP, is a combination of hydrocodone and acetaminophen. Hydrocodone is a schedule II controlled substance as designated by the Health and Safety

discipline: unlawful possession of a controlled substance, furnishing a controlled substance without a prescription, dishonest acts, and unprofessional conduct. Complainant sought to revoke or suspend respondent's registration.

Respondent's Statement Admitting Theft of Hydrocodone

3. Complainant submitted a signed statement, dated November 30, 2010, that respondent had submitted to CVS Pharmacy's loss prevention officer. Respondent was a pharmacy technician employed by CVS Pharmacy. On November 10, 2010, respondent was arrested for unlawful possession of a controlled substance. Respondent had three tablets on his person. In the statement, respondent admitted taking hydrocodone/APAP tablets from his employer three to four times over a 12 month period. According to the statement, respondent took 40 tablets from CVS during this period.

Respondent's Testimony

4. Respondent is 29 years old. He was born with cystic fibrosis and has had chronic health problems his entire life. At age 14 he received a liver transplant. In 2005 he received a lung transplant. In 2009 his brother passed away from complications associated with cystic fibrosis. Respondent explained that around the same time, his wife left him. From January to November 2010, respondent fell into a deep depression. Because of this depression, respondent began to self-medicate with hydrocodone.

5. Respondent testified that he only took drugs from the pharmacy on three or four occasions. Although he admitted in the statement to CVS that he took 40 tablets, he testified that the number of tablets he actually took was eight tablets at most. Respondent explained that hydrocodone was a schedule III controlled substance in 2010, and a pharmacy technician was permitted to fill the prescription. Respondent explained that the tablets found on him when he was arrested were not from the CVS pharmacy, but from a friend from whom he also obtained hydrocodone. Respondent denied ever having been under the influence while he was at work. Respondent testified that the court dismissed the criminal charge against him.² Respondent has not illegally used controlled substance since 2010, although he admitted to having a marijuana brownie several months ago.

6. Respondent expressed great remorse over his actions. He said that going to jail was a terrifying experience for him and he has learned greatly from the experience. Respondent testified about his goals for the future. He has been accepted to California Baptist University and plans to study biomedical engineering. He also received a scholarship from the Cystic Fibrosis Scholarship Foundation. He wishes to become a nurse or physician assistant so that he can work with children who have cystic fibrosis.

Code section 11055, subdivision (b)(1)(i), and is categorized as a dangerous drug pursuant to Business and Professions Code section 4022.

² No information relating to the criminal charge was received as evidence.

7. Respondent has not worked as a pharmacy technician since he was terminated from CVS in 2010. Instead, he has been taking courses at community college. Respondent does not have plans to work as a pharmacy technician while in school. Instead, he wishes to maintain his pharmacy technician registration because he is concerned about the effect license discipline would have on his ability to obtain a professional license in the future.

Testimony of Michael Livingston

8. Mr. Livingston is respondent's father. He testified that the circumstances surrounding respondent's use of hydrocodone were unique and precipitated by respondent's illness, the death of his brother, and his failed marriage. He believes that respondent has learned his lesson.

Reference Letters

9. Respondent submitted seven emails in support of respondent. All of the writers have known respondent since he was a child. They described his health problems and failed marriage. They described him as resilient and able to learn from his mistakes. All of the writers highly recommended him. They were all aware of his past troubles, and they believe that he has learned from his mistakes and will make an excellent health-care provider in the future.

Cost Recovery

10. Complainant submitted a certification of costs and requested cost recovery pursuant to Business and Professions Code section 125.3. The certification contained information related to services provided by the Office of the Attorney General and included costs of prosecution that totaled \$2,620.00. The evidence established that those costs were reasonably incurred. The certification complied with the requirements of California Code of Regulations, title 1, section 1042, subdivision (b)(1).

11. Respondent receives social security disability, is not employed, and is attending school full-time. Due to the costs associated with his schooling, he would not be able to pay prosecution costs.

LEGAL CONCLUSIONS

Purpose of License Discipline

1. The main purpose of license discipline is protection of the public through the prevention of future harm and the improvement and rehabilitation of the licensee. It is far more desirable to impose discipline before a licensee harms any patient than after harm has occurred. (*Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 772.)

Burden and Standard of Proof

2. The standard of proof in an administrative action seeking to suspend or revoke a professional license is "clear and convincing evidence." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) Clear and convincing evidence requires a finding of high probability, or evidence so clear as to leave no substantial doubt; it requires sufficiently strong evidence to command the unhesitating assent of every reasonable mind. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594.)

Applicable Statutes

3. Business and Professions Code section 4301 provides in part:

The board shall take action against any holder of a license who is guilty of unprofessional conduct Unprofessional conduct shall include, but is not limited to, any of the following:

[¶] . . . [¶]

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

[¶] . . . [¶]

(h) The administering to oneself, of any controlled substance, or the use of any dangerous drug or of alcoholic beverages to the extent or in a manner as to be dangerous or injurious to oneself, to a person holding a license under this chapter, or to any other person or to the public, or to the extent that the use impairs the ability of the person to conduct with safety to the public the practice authorized by the license.

(i) Except as otherwise authorized by law, knowingly selling, furnishing, giving away, or administering, or offering to sell, furnish, give away, or administer, any controlled substance to an addict.

(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.

[¶] . . . [¶]

(o) Violating or attempting to violate, directly or indirectly, or

assisting in or abetting the violation of or conspiring to violate any provision or term of this chapter or of the applicable federal and state laws and regulations governing pharmacy, including regulations established by the board or by any other state or federal regulatory agency.

4. Business and Professions Code section 4060 provides that a person shall not possess any controlled substance except furnished by a prescription.

Evaluation

5. Licensees in the health care industry are required to abide by numerous laws and regulations established to protect the health and safety of the public. This includes abiding by laws that govern the licensee's activities that may not be directly related to the professional license but that could impact the public's health and safety outside the work environment. Respondent does not dispute that he stole from his employer and self-administered a controlled substance on several occasions. However, there was no evidence presented that respondent unlawfully furnished a controlled substance.

Cause Exists to Discipline Respondent's Registration

6. Clear and convincing evidence established cause under Business and Professions Code section 4301, subdivision (j), to impose discipline against respondent's registration for unlawful possession of a controlled substance as defined in Business and Professions Code section 4060.

7. Clear and convincing evidence established cause under Business and Professions Code section 4301, subdivision (h), to impose discipline against respondent's registration for self-administration of a controlled substance. Evidence did not establish that respondent furnished a controlled substance in violation of Business and Professions Code section 4301, subdivision (i).

8. Clear and convincing evidence established cause under Business and Professions Code section 4301, subdivision (f), to impose discipline against respondent's registration for the commission of a dishonest act by stealing narcotics from his employer.

9. Clear and convincing evidence established cause under Business and Professions Code section 4301, subdivision (o), to impose discipline against respondent's registration for committing unprofessional acts and violating provisions of the licensing chapter.

Evaluation of Appropriate Discipline

10. California Code of Regulations, title 16, section 1769, subdivision (b), states:

(b) When considering the suspension or revocation of a facility or a personal license on the ground that the licensee or the registrant has been convicted of a crime, the board, in evaluating the rehabilitation of such person and his present eligibility for a license will consider the following criteria:

- (1) Nature and severity of the act(s) or offense(s).
- (2) Total criminal record.
- (3) The time that has elapsed since commission of the act(s) or offense(s).
- (4) Whether the licensee has complied with all terms of parole, probation, restitution or any other sanctions lawfully imposed against the licensee.
- (5) Evidence, if any, of rehabilitation submitted by the licensee.

11. California Code of Regulations, title 16, section 1760, states:

In reaching a decision on a disciplinary action under the Administrative Procedure Act (Government Code section 11400 et seq.) the board shall consider the disciplinary guidelines entitled "Disciplinary Guidelines" (Rev. 10/2007), which are hereby incorporated by reference.

Deviation from these guidelines and orders, including the standard terms of probation, is appropriate where the board, in its sole discretion, determines that the facts of the particular case warrant such a deviation-the presence of mitigating factors; the age of the case; evidentiary problems.

12. The board's Disciplinary Guidelines list the following factors to be considered in determining the degree of discipline:

In determining whether the minimum, maximum, or an intermediate penalty is to be imposed in a given case, factors such as the following should be considered:

1. actual or potential harm to the public
2. actual or potential harm to any consumer
3. prior disciplinary record, including level of compliance with disciplinary order(s)

4. prior warning(s), including but not limited to citation(s) and fine(s), letter(s) of admonishment, and/or correction notice(s)
5. number and/or variety of current violations
6. nature and severity of the act(s), offense(s) or crime(s) under consideration
7. aggravating evidence
8. mitigating evidence
9. rehabilitation evidence
10. compliance with terms of any criminal sentence, parole, or probation
11. overall criminal record
12. if applicable, evidence of proceedings for case being set aside and dismissed pursuant to Section 1203.4 of the Penal Code
13. time passed since the act(s) or offense(s)
14. whether the conduct was intentional or negligent, demonstrated incompetence, or, if the respondent is being held to account for conduct committed by another, the respondent had knowledge of or knowingly participated in such conduct
15. financial benefit to the respondent from the misconduct.

No single one or combination of the above factors is required to justify the minimum and/or maximum penalty in a given case, as opposed to an intermediate one.

13. Applying the board's criteria in this matter: The conduct occurred in the course of respondent's job as a registered pharmacy technician; no consumer or member of the public was harmed; respondent has no prior discipline or criminal record; the conduct took place five years ago; the criminal charges against respondent were dismissed; respondent's conduct was intentional; and respondent did not furnish drugs for monetary gain. As for rehabilitation, it is a state of mind. The law looks with favor on one who has achieved reformation and regeneration. (*Hightower v. State Bar* (1983) 34 Cal.3d 150, 157.) The evidentiary significance of an individual's misconduct is greatly diminished by the passage

of time and by the absence of similar, more recent misconduct. (*In Re Gossage* (2000) 23 Cal.4th 1080, 1098; *Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1070.) Respondent has accepted full responsibility for his actions. Respondent is to be commended for learning from his mistakes and pursuing his education. There is little doubt that respondent has overcome extreme adversity and is headed in the right direction.

14. Pharmacy technicians occupy positions that require trustworthiness, honesty, clear-headedness, and the exercise of impeccable judgment, particularly because pharmacy technicians have access to confidential personal and financial information of consumers and to highly regulated medications and devices. The board's Disciplinary Guidelines state that the board files cases against pharmacy technicians where the violations involve significant misconduct on the part of the licensee. The board believes that revocation is typically the appropriate penalty when grounds for discipline involving significant misconduct are found to exist.

15. Respondent will be enrolled in school full-time to pursue his bachelor's degree. Respondent does not wish to work as a pharmacy technician; rather, he wishes to retain his registration to avoid any difficulties in obtaining a professional license in the future. Even if respondent's registration were placed on probation, because of the nature of his conduct, public protection requires probationary terms that would include, certification by the Pharmacy Technician Certification Board, minimum work requirements, stringent monitoring, and daily reporting for drug testing. It is determined that respondent would be unable to satisfy these requirements if his registration were placed on probation. Moreover, the seriousness of his misconduct, in consideration of the board's guidelines, compel the conclusion that public health and safety require the revocation of respondent's registration.

Cost Recovery

16. Complainant is seeking recovery of the reasonable costs of prosecution in the amount of \$2620.00. The California Supreme Court in *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 held that a regulation imposing costs for investigation and enforcement under California Code of Regulations, title 16, section 317.5, which is similar to Business and Professions Code section 125.3, did not violate due process. But it was incumbent on the board in that case to exercise discretion to reduce or eliminate cost awards in a manner such that costs imposed did not "deter [licensees] with potentially meritorious claims or defenses from exercising their right to a hearing." The Supreme Court set forth four factors to consider in deciding whether to reduce or eliminate costs: (1) whether the licensee used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed; (2) whether the licensee had a "subjective" good faith belief in the merits of his or her position; (3) whether the licensee raised a "colorable challenge" to the proposed discipline; and (4) whether the licensee had the financial ability to make payments. The reasoning of *Zuckerman* must be applied to Business and Professions Code section 125.3 since the language in the cost recovery regulation at issue in *Zuckerman* and section 125.3 are substantially the same.

17. The costs claimed totaling \$2620.00 are reasonable. However, respondent had

a "colorable" challenge to the proposed discipline, and he established that his financial obligations deprive him of the ability pay the costs of prosecution. Therefore, respondent shall not be ordered to pay costs in this matter.

ORDER

Pharmacy technician license number TCH 77213, issued to respondent, Ian Wade Livingston, is revoked. Respondent shall relinquish his technician license to the board within 10 days of the effective date of this decision. Respondent may not reapply or petition the board for reinstatement of his revoked technician license for three years from the effective date of this decision.

As a condition of reinstatement, respondent shall be certified as defined in Business and Professions Code section 4202(a)(4) and provide satisfactory proof of certification to the board.

Dated: June 25, 2015.

DocuSigned by:



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ADAM L. BERG
Administrative Law Judge
Office of Administrative Hearings

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

12 In the Matter of the Accusation Against:

Case No. 4726

13 **IAN WADE LIVINGSTON**
1640 Cordova Avenue
Redlands, CA 92737

ACCUSATION

14 **Pharmacy Technician Registration No. TCH 77213**

15 Respondent.

16
17 Complainant alleges:

18 **PARTIES**

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

21 2. On or about July 14, 2007, the Board of Pharmacy issued Pharmacy Technician
22 Registration Number TCH 77213 to Ian Wade Livingston (Respondent). The Pharmacy
23 Technician Registration was in full force and effect at all times relevant to the charges brought
24 herein and will expire on November 30, 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 STATUTORY PROVISIONS

2 4. Section 4059, subdivision (a) states, in pertinent part:

3 "A person may not furnish any dangerous drug, except upon the prescription of a physician,
4 dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor pursuant to Section
5 3640.7. A person may not furnish any dangerous device, except upon the prescription of a
6 physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor pursuant to
7 Section 3640.7."

8 5. Section 4060 provides in pertinent part, that no person shall possess any controlled
9 substance, except that furnished to a person upon the prescription of a physician, dentist,
10 podiatrist, optometrist, veterinarian, or other authorized prescriber.

11 6. Section 4300 provides in pertinent part, that every license issued by the Boards is
12 subject to discipline, including suspension or revocation.

13 7. Section 4300.1 states:

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

19 8. Section 4301 states, in pertinent part:

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

23

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

27

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 **CONTROLLED SUBSTANCE/DANGEROUS DRUG**

4 11. "Hydrocodone" is a Schedule II controlled substance as designated by the Health and
5 Safety Code section 11055, subdivision (b)(1)(i), and is categorized as a dangerous drug pursuant
6 to section 4022.

7 **FIRST CAUSE FOR DISCIPLINE**

8 **(Obtained or Possessed a Controlled Substance)**

9 12. Respondent is subject to disciplinary action under section 4301, subdivision (j), as
10 defined in section 4060, in that between January 2010 and November 2010, while working as a
11 pharmacy technician at CVS, Respondent, by his own written admission, stole controlled
12 substances from his employer on numerous occasions (to wit: approximately 40
13 hydrocodone/APAP 10-325 tablets), for his own personal consumption.

14 **SECOND CAUSE FOR DISCIPLINE**

15 **(Furnishing Controlled Substances Without a Prescription)**

16 13. Respondent is subject to disciplinary action under section 4301, subdivisions (h) and
17 (i), as defined in section 4059, subdivision (a), in that between January 2010 and November 2010,
18 while working as a pharmacy technician at CVS, Respondent, by his own written admission, stole
19 controlled substances from his employer on numerous occasions (to wit: a total of 40
20 hydrocodone/APAP 10-325 tablets), for his own personal consumption.

21 **THIRD CAUSE FOR DISCIPLINE**

22 **(Dishonest Acts)**

23 14. Respondent is subject to disciplinary action under section 4301, subdivision (f), in that
24 between January 2010 and November 2010, while working as a pharmacy technician at CVS,
25 Respondent, by his own written admission, stole controlled substances from his employer on
26 numerous occasions (to wit: a total of 40 hydrocodone/APAP 10-325 tablets), for his own
27 personal consumption.

28 ///

1 **FOURTH CAUSE FOR DISCIPLINE**

2 **(Unprofessional Conduct/ Violation of Licensing Chapter)**

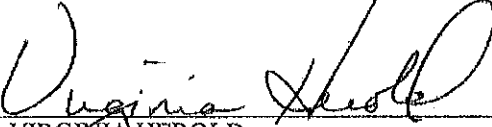
3 15. Respondent is subject to disciplinary action under section 4301, subdivision (o), in that
4 Respondent committed acts of unprofessional conduct and/or violated provisions of the licensing
5 chapter. Complainant refers to, and by this reference incorporates, the allegations set forth above
6 in paragraphs 12-14, as though set forth fully.

7 **PRAYER**

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

- 10 1. Revoking or suspending Pharmacy Technician Registration Number TCH 77213,
11 issued to Ian Wade Livingston;
- 12 2. Ordering Ian Wade Livingston to pay the Board of Pharmacy the reasonable costs of
13 the investigation and enforcement of this case, pursuant to Business and Professions Code section
14 125.3; and
- 15 3. Taking such other and further action as deemed necessary and proper.

16
17 DATED: 6/16/14


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

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