

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

In the Matter of the Statement of Issues
Against:

MARICELA MENDOZA

Pharmacy Technician Applicant

Respondent.

Case No. 4507

OAH No. 2013050726

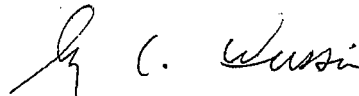
DECISION AND ORDER

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 November 22, 2013.

It is so ORDERED on October 23, 2013.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

STAN C. WEISSER
Board President

BEFORE THE
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Maricela Mendoza,

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PROPOSED DECISION

Administrative Law Judge Kirk E. Miller, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on July 18, 2013.

Susana Gonzales, Deputy Attorney General, represented Complainant Virginia Herold, Executive Officer of the Board of Pharmacy.

Respondent Maricela Mendoza represented herself.

The record closed on July 18, 2013.

FACTUAL FINDINGS

1. Complainant Virginia Herold filed the Statement of Issues in her official capacity as Executive Officer of the California Board of Pharmacy (Board).

2. On September 30, 2011, the Board received an application for registration as a Pharmacy Technician from Maricela Mendoza (Respondent). She disclosed on her application that she had incurred criminal convictions, and provided relevant court documents. On August 31, 2012, the Board denied the application because of Respondent's criminal conviction record. Respondent appealed the denial and this hearing followed.

Conduct and Conviction

3. On November 11, 2003, Respondent took items of clothing valued at \$140 from a Macy's Department Store in Modesto. Respondent's conduct was observed by a store loss prevention officer and she was detained until the Modesto Police arrived. Respondent was a juvenile at the time she committed the act. She was placed in a diversion program, fined \$45, ordered to perform community service, and to write an essay.

4. On January 13, 2009, while working at Macy's, Respondent was arrested for the unauthorized use of a customer's credit card. Respondent used the credit card to purchase two Macy's gift cards; the value of each card was \$500. Respondent was charged with a violation of Penal Code section 487, subdivision (a) (grand theft) and section 484, subdivision (g) (petty theft). Respondent was placed in a Pre-Trial Diversion program, ordered to perform community service and to pay a fine. Respondent's case was dismissed following her successful completion of Pre-Trial Diversion.

5. On March 19, 2010, in Superior Court of California, County of Alameda, Respondent was convicted, by her plea of nolo contendere, to a violation of Penal Code section 647, subdivision (b) (prostitution). Imposition of sentence was suspended and Respondent was placed on 36 months of unsupervised probation, ordered to complete an AIDS test and to pay various fines and fees.

This conviction resulted from Respondent placing an advertisement on an internet website offering erotic services. Two undercover police officers responded to the ad, and when Respondent came to a designated hotel and agreed to have sex with them, she was arrested.

Respondent's Evidence

6. Respondent took full responsibility for her convictions, while also offering explanations for her conduct. The shoplifting conviction occurred when she was 15 or 16 years old and she was spending time with the "wrong people." With respect to the unauthorized use of a credit card, she stated this occurred while she was under the influence of a boyfriend whom she loved, but who was not a person of integrity. Her mother ultimately persuaded her to stop seeing him. Her arrest for prostitution occurred during a time when she felt desperate. Respondent had totaled her car, did not have a job, and she was depressed. She ultimately placed an ad on an internet website. After her arrest, she spent two nights in the county jail and decided she did not want any further problems with the law. That was the last time she was arrested.

7. Respondent was completely forthright in advising the Board of her juvenile offense, which would otherwise have been confidential. On July 16, 2010, following completion of the Pre-Trial Diversion Program, the charges described in Factual Finding 4 were dismissed.¹ Respondent has completed the terms of probation for the conviction described in Factual Finding 5.

8. When Respondent graduated from high school in 2006, she started community college, but she was without a direction or with goals. It was during that time that Respondent's misconduct occurred. That has changed. In March 2010, she started the pharmacy technician program at Carrington College and received an Associate of Science Degree with honors in June 2011. She is now enrolled at Los Medanos College studying kinesiology.

9. As a result of her studies, Respondent has gained valuable work experience. She has worked at the Alameda County Juvenile Justice Center since March 2001, as both a discharge coordinator and as a pharmacy clerk. In the latter capacity, she uses MDG pharmacy software to order medication refills; dispense medication to minors; log medication deliveries; and stock the medication room. These responsibilities require her to handle medications directly. Since October 2011, Respondent has worked at Children's Hospital Oakland as a clerk specialist. There she works with patients and patient records. She also works with Contra Costa Auto Service.

10. This work experience has given Respondent more self-insight than she ever had before, and she has learned what being a professional in the work environment requires. Respondent understands the need to follow rules and regulations, act properly with others; have open and good communication skills; and, to conduct her affairs with honesty.

11. In addition to working while continuing her education, Respondent now follows a regular and rigorous physical conditioning program. Six days each week, Respondent attends an hour long exercise class starting at 5:30 a.m., and a second hour long evening class. Adherence to this demanding regimen demonstrates a high level of discipline and maturity.

12. Respondent's dream is to put her past behind her and to have a regular, full-time job with benefits. She testified on all issues in a forthcoming and straightforward manner.

¹ The legal effect of the dismissal is the arrest is deemed to have never occurred. (Pen. Code § 1101.9)

13. Respondent provided recent character letters from her employers:

(a) Bill Beller, owner of Contra Costa Auto Service states: “[Respondent] is a great employee. . . [and] has been able to stand up to the challenge of each task given and has been diligent in completing [them] correctly and timely.”

(b) Lomesh Singh, Respondent’s colleague at Alameda County Juvenile Justice Center states: “I have been blown away by the determination and dedication [Respondent] as exhibited. . . [Respondent] has shown me that she has everything to be an exceptional pharmacy technician.”

LEGAL CONCLUSIONS

Unprofessional Conduct

1. Business and Professions Code section 480, subdivision (a)(3), and Business and Professions Code section 4300, subdivision (c), as that section interacts with section 4301, subdivision (f), provides that the Board may deny a license if the Respondent has committed an act of unprofessional conduct.

The conduct described in Factual Finding 3 occurred 10 years ago, occurred when Respondent was a minor, and the underlying conduct was petty theft. The conduct described in Factual Finding 3 does not constitute unprofessional conduct.

The conduct described in Factual Findings 4 and 5 constitutes unprofessional conduct.

Criminal Conviction

2. Business and Professions Code section 480, subdivision (a)(1), and Business and Professions Code section 4300, subdivision (c), as that section interacts with section 4301, subdivision (l), provides the Board may deny a license if the Respondent has been convicted of a crime substantially related to the qualifications, functions or duties of a pharmacy technician.

California Code of Regulations, title 16, section 1770, provides:

For the purpose of denial, suspension, or revocation of a personal or facility license pursuant to Division 1.5 (commencing with Section 475) of the Business and Professions Code, a crime or act shall be considered substantially related to the qualifications, functions or duties of a licensee or registrant if to a substantial degree it evidences present or potential

unfitness for a licensee or registrant to perform the functions authorized by his license or registration in a manner consistent with the public health, safety, or welfare.

By reason of Factual Finding 5, Respondent's conviction is substantially related to the qualifications, functions or duties of a pharmacy technician.

3. Since cause to deny Respondent's registration exists, it must next be determined whether she has demonstrated rehabilitation. In California Code of Regulations, title 16, section 1769, the Board has set forth the following criteria for rehabilitation when considering the denial of registration as a pharmacy technician:

- (1) The nature and severity of the acts or offenses under consideration as grounds for denial.
- (2) Evidence of any acts committed subsequent to the acts or crimes under consideration as grounds for denial under Section 480 of the Business and Professions Code.
- (3) The time that has elapsed since commission of the acts or crimes referred to in subdivision (1) or (2).
- (4) Whether the Respondent has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against the Respondent.
- (5) Evidence, if any, of rehabilitation submitted by the Respondent.

4. Respondent is seeking a registration that will routinely give her access to sensitive and highly regulated pharmaceuticals, and in this context, her prior conduct and criminal conviction must be carefully considered against the above criteria.

Respondent's 2009 offense was as an adult and it is evidence of very poor judgment at the time of the act. Even when a Respondent has participated in a pre-trial diversion program, as here, Business and Professions code section 492 permits the Board to consider the information contained in Respondent's arrest record when considering the issuance of a registration. On the other hand, Penal Code section 1101.9 provides:

- (a) . . . Upon successful completion of a diversion program, the arrest upon which the diversion was based shall be deemed to have never occurred. The divertee may indicate in response to any question concerning his or her prior criminal record that he or she was not arrested or diverted for the offense, except as specified in subdivision (b). A record pertaining to an arrest resulting in successful completion of a diversion program shall

not, without the divertee's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate.

Respondent's conduct will be considered. It is mitigated, however, by her forthright disclosure of her participation in the Diversion Program and the ultimate dismissal of the underlying charges.

It is unfortunate that Respondent's difficult personal situation in 2010, led her to make the very poor choice that ultimately resulted in a conviction. This is, however, her only conviction, and it is not a crime involving dishonesty.

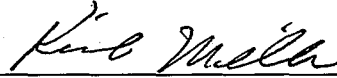
While Respondent stumbled badly during and immediately following high school, in the three years since her only conviction, she has demonstrated a level of focus, purpose, responsibility and maturity that is leagues apart from her younger self. She has learned to set and achieve goals, she obtained her associate of science degree, she has been a responsible and trusted employee, and she has demonstrated the discipline to make a very demanding fitness program a central part of her life. Respondent has successfully completed the terms of her probation and has not reoffended. She is continuing her college studies and she has already worked in an institutional pharmacy, and has done so without incident. While three years is not generally considered a long period of time for purposes of rehabilitation, her use of the time is at least as important as its length. Respondent has used all of the time in an unusually committed and constructive manner.

5. The statutes relating to licensing are designed to protect the public from dishonest, untruthful and disreputable licensees. (*Arneson v. Fox* (1980) 28 Cal.3d 440, 451.) These statutes typically authorize disciplinary proceedings as a means of accomplishing this objective. Such proceedings are not for the primary purpose of punishing an individual. (*Camacho v. Youde* (1979) 95 Cal.App.3d 161, 165.) Rather, in issuing and disciplining licenses the Commissioner is primarily concerned with protection of the public, maintaining the integrity and high standards of the profession, and preserving public confidence in licensure. (*Ibid.*) While legal cause exists to deny this application, when rehabilitation is considered, that result is not warranted. After considering all of the evidence, it is determined that Respondent has rehabilitated herself to the extent it would not be against the public interest to permit her to hold a pharmacy registration. While a probationary period is often required following any conviction, in this case, given Respondent's candor and her changed circumstances and attitude, a probationary period would not serve any purpose.

ORDER

The application of Respondent Maricela Mendoza for the issuance of a pharmacy technician registration is granted.

DATED: August 9, 2013



KIRK E. MILLER
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**

11 In the Matter of the Statement of Issues
Against:

Case No. 4507

12 **MARICELA MENDOZA**

STATEMENT OF ISSUES

13
14 **Pharmacy Technician Registration**
15 **Applicant**

16 Respondent.

17
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 September 30, 2011, the Board of Pharmacy, Department of Consumer
23 Affairs received an application for a Pharmacy Technician Registration from Maricela Mendoza
24 (Respondent). On or about August 1, 2011, Maricela Mendoza certified under penalty of perjury
25 to the truthfulness of all statements, answers, and representations in the application. The Board
26 denied the application on August 31, 2012.

1 JURISDICTION

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

5 4. Section 118 of the Code states, in pertinent part:

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

11 STATUTORY AND REGULATORY PROVISIONS

12 5. Section 4300, subdivision (c), of the Code states:

13 “(c) The board may refuse a license to any applicant guilty of unprofessional conduct. The
14 board may, in its sole discretion, issue a probationary license to any applicant for a license who is
15 guilty of unprofessional conduct and who has met all other requirements for licensure. The board
16 may issue the license subject to any terms or conditions not contrary to public policy”

17 6. Section 4301 of the Code provides, in pertinent part, that “unprofessional conduct” is
18 defined to include, but not be limited to, any of the following:

19 . . .

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

23 . . .

24 “(l) The conviction of a crime substantially related to the qualifications, functions, and
25 duties of a licensee under this chapter.”

26 7. Section 480 of the Code states:

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

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

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

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

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

14 8. Section 492 of the Code states:

15 “Notwithstanding any other provision of law, successful completion of any diversion
16 program under the Penal Code, or successful completion of an alcohol and drug problem
17 assessment program under Article 5 (commencing with section 23249.50) of Chapter 12 of
18 Division 11 of the Vehicle Code, shall not prohibit any agency established under Division 2
19 ([Healing Arts] commencing with Section 500) of this code, or any initiative act referred to in that
20 division, from taking disciplinary action against a licensee or from denying a license for
21 professional misconduct, notwithstanding that evidence of that misconduct may be recorded in a
22 record pertaining to an arrest.”

23 9. Section 493 of the Code states:

24 “Notwithstanding any other provision of law, in a proceeding conducted by a board within
25 the department pursuant to law to deny an application for a license or to suspend or revoke a
26 license or otherwise take disciplinary action against a person who holds a license, upon the
27 ground that the applicant or the licensee has been convicted of a crime substantially related to the
28 qualifications, functions, and duties of the licensee in question, the record of conviction of the

1 crime shall be conclusive evidence of the fact that the conviction occurred, but only of that fact,
2 and the board may inquire into the circumstances surrounding the commission of the crime in
3 order to fix the degree of discipline or to determine if the conviction is substantially related to the
4 qualifications, functions, and duties of the licensee in question.

5 "As used in this section, 'license' includes 'certificate,' 'permit,' 'authority,' and
6 'registration.'"

7 10. California Code of Regulations, title 16, section 1770, states:

8 "For the purpose of denial, suspension, or revocation of a personal or facility license
9 pursuant to Division 1.5 (commencing with Section 475) of the Business and Professions Code, a
10 crime or act shall be considered substantially related to the qualifications, functions or duties of a
11 licensee or registrant if to a substantial degree it evidences present or potential unfitness of a
12 licensee or registrant to perform the functions authorized by his license or registration in a manner
13 consistent with the public health, safety, or welfare."

14 FIRST CAUSE FOR DENIAL OF APPLICATION

15 (Unprofessional Conduct)

16 (Bus. & Prof. Code §§ 480, subd. (a)(2), 4301, subd. (f))

17 11. Respondent's application is subject to denial under Code sections 480, subdivision
18 (a)(2), and 4301, subdivision (f), in that Respondent engaged in unprofessional conduct involving
19 dishonesty, fraud, or deceit when Respondent was arrested for violating Penal Code section 484,
20 subdivision (a) (petty theft). The circumstances are that on or about November 11, 2003,
21 Respondent was at the Macy's store in Modesto, California. A Macy's loss prevention officer
22 observed Respondent select two items of merchandise from one department and walk over to the
23 children's department. After selecting a black shirt, Respondent met up with three other
24 unidentified female juveniles. Respondent then went into the children's fitting room with one of
25 the unidentified juveniles. The unidentified juvenile handed Respondent a gray, plastic Anchor
26 Blue shopping bag. The Macy's loss prevention officer observed Respondent conceal the
27 merchandise in the Anchor Blue shopping bag. Respondent then walked out of the store with the
28 bag. Once outside, Respondent was approached by the Macy's loss prevention officer and

1 escorted back into the store. Respondent had \$140.98 worth of Macy's merchandise in her
2 possession. The loss prevention officer called the Modesto Police Department. A Modesto
3 police officer arrived and interviewed Respondent regarding the incident. Respondent admitted
4 that she took the items from Macy's and that she intended to take them without paying.

5 SECOND CAUSE FOR DENIAL OF APPLICATION

6 (Unprofessional Conduct)

7 (Bus. & Prof. Code §§ 480, subd. (a)(2), 4301, subd. (f))

8 12. Respondent's application is subject to denial under Code sections 480, subdivision
9 (a)(2), and 4301, subdivision (f), in that Respondent engaged in unprofessional conduct involving
10 dishonesty, fraud, or deceit when Respondent was arrested by an officer from the Antioch Police
11 Department and charged with violating Penal Code sections 484e(a) (theft of access card or
12 account information), 470(a) (forgery), 460(b) (burglary), 484g (fraudulent use of access cards or
13 account information), and 503 (embezzlement). The circumstances are as follows:

14 13. On or about January 13, 2009, a Loss Prevention Supervisor at Macy's in Antioch,
15 California called the Antioch Police Department (APD) to report that she had taken Respondent
16 into custody for suspected theft. Respondent was also a Macy's employee at the time. An APD
17 officer responded to the scene and met separately with the Loss Prevention Supervisor and
18 Respondent. The officer learned that on or about January 11, 2009, a Macy's customer used their
19 credit card to make a purchase at Macy's. The customer inadvertently left his credit card at the
20 store and Respondent subsequently used the card to purchase two \$500 Macy's gift cards. When
21 the Macy's Loss Prevention office contacted Wells Fargo regarding the credit card that
22 Respondent had used, they learned that the credit card had been reported as lost or stolen. Macy's
23 Loss Prevention then contacted the owner of the card, and he confirmed that he did not make the
24 gift card purchases, and he had not given anyone authorization to use his card. Respondent
25 admitted that she used the credit card to purchase the two \$500 gift cards and to make a purchase
26 at another store. Respondent stated that she gave one of the two \$500 gift cards to her boyfriend,
27 and she used the other \$500 gift card to purchase a purse and a pair of pants.
28

1 in prostitution), a misdemeanor. Respondent was sentenced to two days in jail and three years of
2 probation, and was ordered to take an AIDS test.

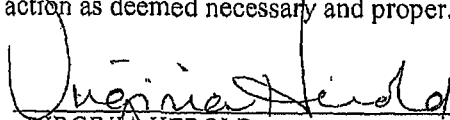
3 PRAYER

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

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

9 DATED: _____

2/2/13



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

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