

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

In the Matter of the Accusation Against:

JOHN H. REESE,

Pharmacy Technician Registration
No. TCH 79305

Respondent.

Case No. 4871

OAH No. 2015090611

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 at 5:00 p.m. on August 12, 2016.

It is so ORDERED on July 13, 2016.

BOARD OF PHARMACY.
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

Amy Gutierrez, Pharm.D.
Board President

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PROPOSED DECISION

Administrative Law Judge Mary-Margaret Anderson, Office of Administrative Hearings, State of California, heard this matter on December 16 and 17, 2015, and April 6, 2016, in Oakland, California.

Leslie E. Brast, Deputy Attorney General, represented Complainant Virginia Herold, Executive Officer, California State Board of Pharmacy (Board).

Robert F. Hahn, Attorney at Law, represented Respondent John H. Reese.

At the request of the parties, closing argument was provided by written briefs. The briefs were timely received and marked for identification as follows: Complainant's Closing Argument, Exhibit 16; Complainant's Closing in Rebuttal, Exhibit 17; Respondent's Closing Brief, Exhibit O; Respondent's Reply Brief, Exhibit P.

The record closed on May 6, 2016.

FACTUAL FINDINGS

1. Complainant Virginia Herold filed the Accusation in her official capacity as Executive Officer of the California Board of Pharmacy (Board).
2. On November 2, 2007, the Board issued Pharmacy Technician Registration NO. TCH 79305 to Respondent John H. Reese. As of November 25, 2015, the registration was renewed until September 30, 2017.

3. In an Accusation signed September 13, 2014, Complainant alleges that on four days in 2011, Respondent diverted Hydrocodone/APAP 5/325¹ (Norco) while employed by Kaiser Permanente as a pharmacy technician. It is alleged that he is therefore subject to license discipline for possession of a controlled substance without a prescription; obtaining a controlled substance by fraud, deceit or subterfuge; acts involving moral turpitude, dishonesty or fraud; furnishing a dangerous drug or controlled substance; and general unprofessional conduct. Respondent filed a Notice of Defense and this hearing followed.

4. The standard of proof applied in making the factual findings is clear and convincing evidence to a reasonable certainty. The Board of Pharmacy has not specified a particular standard of proof to be applied in its license discipline cases, whether the license is a pharmacist or a pharmacy technician. But clear and convincing evidence is the established standard for health professionals such as physicians, dentists, and nurses. Such licenses require a higher level of education than occupational licenses such as, for example, those required for employment as a security guard or smog technician, for which the preponderance of the evidence standard is applied. The higher standard is the fair and prudent choice where discipline is sought against a pharmacy technician license.

Kaiser investigation

5. On August 23, 2011, the Board received a Report of Theft or Loss of Controlled Substances form (DEA Form 106) from Vanessa Veyna, Pharmacist-in-Charge, Kaiser Permanente Pharmacy No. 634 in San Jose (the Pharmacy). The loss reported was of approximately 8800 dosage units of Norco between November 2010 and July 2011. Veyna reported that the loss was due to employee pilferage and that the investigation was ongoing.²

6. The loss report followed an audit of the Pharmacy that showed a discrepancy in the amount of Norco purchased versus the amount dispensed. In 2011, Kristen Sanchez, who is a licensed pharmacy technician, was working as a pharmacy internal auditor for Kaiser's Data Mining and Fraud Prevention unit. She discovered that there was over three months of positive data showing a continuous loss pattern at the Pharmacy, and began to investigate. By initiating daily counts conducted by management personnel who had been ruled-out-as-suspects, Sanchez was able to narrow down the shifts during which the losses occurred, and eventually identify the staff who were present.

¹ Hydrocodone/APAP (acetaminophen) is a narcotic and analgesic combination used to relieve moderate to moderately severe pain. Depending upon the formulation, it is sold under the brand names Norco and Vicodin. Hydrocodone is a controlled substance under Health and Safety Code section 11056, subdivision (e)(4), and a dangerous drug under Business and Professions Code section 4022.

² Over the course of the investigation in 2011, various amounts were represented to be missing, including 10,463 (as of September 2); 10,647; 9,200 (as of the end of June); and 7,000 to 8,000 tablets.

7. Because theft was found, Sanchez notified Daniel Falzon, a senior investigations manager for Kaiser, who joined in the investigation. Falzon has an extensive background in law enforcement. There were already overt cameras installed in various locations in the Pharmacy, and Sanchez and Falzon viewed portions of the tapes. They also arranged to have a covert camera installed over the location where Norco is kept. Following review of the tape footage, Falzon decided there was enough evidence to show that Respondent was diverting Norco. On the footage, Respondent is seen taking Norco from various locations where it was stored and placing it in baskets or bins used to restock unused or overstocked amounts.

8. On September 2, 2011, Falzon interviewed Respondent. Three other Kaiser management personnel were present, along with a representative from Respondent's union. The video clips were shown while Falzon stated what he believed they showed, and asked Respondent questions. Respondent did not acknowledge any wrongdoing. When asked why he took the Norco from the shelf and put it in the Go-Back Bin, Respondent answered, "I'm putting the drugs away. It's part of my job duty, I don't know if it's protocol or not." He also said that he could not tell if the drugs Falzon was asking about were Norco or something else. Through his union rep, Respondent stated that he did not take the drugs and would not be resigning. Respondent was placed on administrative leave and escorted from the facility.

9. Law enforcement was not advised of the loss or theft of the drugs, and Respondent was not criminally charged. Falzon explained that it is Kaiser's policy to only report cases that involve diverting drugs for sale, not where it is determined that the diversion is for personal use. Falzon opined that Respondent was stealing for personal use because of his addiction. No basis for this opinion was otherwise stated. And Falzon did not change his opinion when he learned that Respondent had a prescription for Norco, because in his experience addicts develop a tolerance to drugs.

10. Ian Lei was Kaiser's Outpatient Pharmacy Director and she oversaw six pharmacies. She told Sanchez that Respondent might be the thief because she had seen changes in his performance, had received complaints about his behavior and felt he was not as courteous as he had previously been. Lei viewed the video clips and concluded that Respondent was diverting Norco. She terminated Respondent for gross misconduct. She wrote that Kaiser's investigation concluded that he removed Norco "from its designated location in the Discharge pharmacy" while "performing the return-to-stock function on August 19, 22, 23, and September 1, 2011," without having "a legitimate or work related reason" for doing so.

Board investigation

11. Joseph Wong, Pharm. D., is a Board inspector.³ He reviewed the Kaiser investigation and included its findings in his report. In addition, Wong obtained

³ Wong's investigation included the Pharmacy itself and Pharmacist-in-Charge Vanessa Veyna, and both were found in violation of California pharmacy laws. Both were

Respondent's prescription records and interviewed him. Wong's findings are contained in two reports, the latter submitted after he interviewed Respondent.

12. Wong and Board inspector Catherine Hodnett interviewed Respondent on July 28, 2013. Respondent's attorney was present. Wong's report contains his summary of the interview, including what Respondent told him, and Hodnett's summary as well. Respondent denied any wrongdoing. He said that his duties included filling, ordering, and putting away orders. The video clips show him returning items to their correct locations after the items were misfiled. He said that he was performing "normal procedures" that he did every day.

13. Respondent's prescription profile shows that he was prescribed Norco from approximately September 2010 to September 2011. During that time, Respondent was suffering from plantar fasciitis, a very painful foot condition. The amount prescribed was sufficient to provide four tablets per day during the time the drug was prescribed. At his Board interview, Respondent stated that he would take four tablets per day or one tablet every six hours. Respondent testified that he took two pills twice daily during that time.

By the time of the Board interview, Respondent was no longer taking Norco. He was "put off" taking it because of being accused of stealing it. In addition, he had received cortisone shots, was no longer on his feet as much, and the condition had resolved.

The video clips

14. The video clips submitted in evidence are from two cameras, one overt and one covert, taken on August 19, 22, 23 and September 1, 2011. They were created by Sanchez, who watched tapes of entire shifts, to see which employees reached into the bin containing Norco. The video clips show that Respondent removed Norco from where it was stored, and he acknowledges that they show him doing so.

15. There are no video clips in evidence, and none were obtained by the Board, showing what Respondent did or where he went afterwards, other than occasionally walking down the hall. It was established that there were many cameras in the facility, including in the back hallways and other locations, but no footage from these other locations is in evidence.

16. Restocking unused portions of bottles of drugs or moving overstocked medications to other locations in the pharmacy is called "go-back duty." A bin or basket is used to carry the drugs. Respondent acknowledges that the video clips show him taking bottles of Norco from the shelf and putting them in the basket, but he denies this was theft; rather, it was normal go-back duty. When there was too much stock on shelves, it was put into an overstock area until it was needed. When he found stock in the wrong location, he

cited for failing to maintain effective control of security of the prescription department and failing to maintain an accurate inventory of Norco.

would remove it and put it where it belonged. He would sometimes arrange and organize the basket so that it would be easier to put items away in the various locations. Respondent has consistently denied that he stole Norco and disputes that the video clips show him doing anything incorrect or illegal.

17. Angela Curtis is a pharmacy technician. She worked with Respondent at the Kaiser Gilroy facility where he first worked. Curtis was accused of diverting drugs in April 2015, and resigned in July 2015. Kaiser “was not able to account for about 55 pills a day over eight months” during the time she was investigated. She denies diverting drugs, but decided to resign because she “couldn’t take it anymore.”

Curtis watched all nine video clips. She is familiar with re-arranging the baskets, and described it as a very common practice while performing go-back duty. Also, people will “overstuff the bins,” so that items need to be rearranged or moved elsewhere. Curtis saw nothing on the video clips that looked unusual or suspicious.

Respondent’s additional evidence

18. Respondent lives in Morgan Hill with his wife, who retired from Kaiser in 2014, and his 45-year-old stepson, who is severely disabled. Respondent has not been employed outside the home since he was terminated from the Kaiser position. Considerable time is spent in attending to the daily needs of his stepson, who requires 24-hour care.

Respondent and his family are active members of the Church of Jesus Christ of Latter-day Saints, and it guides his daily life. He has never consumed alcohol. He denies being “hooked on Norco,” or possessing it without a prescription. Respondent denies being dishonest or committing fraud in any context.

19. As stated above, Respondent’s plantar fasciitis condition has resolved, but he continues to be challenged by other medical conditions, including diabetes. Respondent had major abdominal surgery in 1994. He discovered at that time that he is allergic to morphine. Respondent suffers from abdominal hernias that are exacerbated by opioids because of their effects on the intestines. He is therefore not able to tolerate more than the amount of Norco he took for relief of the plantar fasciitis pain. At the time of the hearing, Respondent was pending surgery for an abdominal hernia.

20. Prior to becoming a pharmacy technician, Respondent worked for a private security company that contracted with Kaiser. He became a supervisor, and worked at Kaiser for about six years. Respondent became interested in pharmacy and attended Western Career College in South San Jose. He completed an 18-month accelerated program and worked at a Kaiser facility in Gilroy until he transferred to the Pharmacy in San Jose.

21. Respondent was involved with his union while employed at Kaiser. He was elected shop steward for two years. As a union representative, Respondent worked on grievance issues with Ian Lei, the Pharmacy supervisor. The issues included job

performance and attendance. Respondent estimates that he would be pulled away for union related duties approximately five or six days per month.

22. Respondent filed a grievance following his termination by Kaiser, but for reasons not clearly explained, it appears that the process was never formally concluded. The matter was pending an arbitration hearing, but the process was delayed because of the Board's investigation.

23. Reference letters were received from three members of Respondent's church: Ronald J. Howard, Jeff Piper, and Soren Koldewyn. The authors have known Respondent and his family for many years, and describe him as devoted to his wife and stepson, patient, kind, and honest, diligent, and faithful in his church assignments.

Costs

24. Deputy Attorney Leslie E. Brast submitted a declaration certifying that the Department of Justice has billed the Board \$7,405 for work performed in the investigation and enforcement of this matter. Complainant submitted a certification of costs certifying that the Board has incurred the following additional costs of investigation: Division of Investigation \$6,156.50. The total costs are therefore \$13,561.50, and in the absence of contrary evidence, are found reasonable.

LEGAL CONCLUSIONS

Evidentiary analysis

1. The Pharmacy was missing large amounts of Norco in 2011 and Kaiser investigators concluded that this was because Respondent was stealing it. They reached this conclusion by viewing his actions on video clips taken from certain security cameras, after they had narrowed the pool of possible suspects. But the tapes do not show theft standing alone, and the investigators opinions that they show Respondent stealing were not persuasive. Wong continued the investigation by obtaining prescription records and interviewing Respondent, but the resulting information sheds no new light on the situation. Respondent has continuously denied wrongdoing, and his explanations for his conduct and Sanchez's conclusions are both credible.

In addition, questions of motive remain unanswered. The fact that Respondent had a prescription for Norco could mean that he had no need to steal it or that he did need to steal because he had become addicted or dependent such that he needed more than he was prescribed. Falzon concluded that it was the latter, because addicts develop a tolerance, but there was no evidence at all that Respondent is an addict; he testified that he was not even dependent upon the drug, and experienced no ill effects when he quit taking it. There is no other evidence that points towards addiction or even dependence. As many as 10,000 plus

tablets went missing, and all of this missing inventory was blamed on Respondent. The record does not support this conclusion.

The evidence does not support proof by even the preponderance standard that Respondent stole Norco from the Pharmacy. Accordingly, the Accusation will be dismissed.

2. The evidence does not establish cause for license discipline for unprofessional conduct pursuant to Business and Professions Code sections 4301, subdivisions (j), and (o); 4060; and Health and Safety Code section 11350.

3. The evidence does not establish cause for license discipline for unprofessional conduct pursuant to Business and Professions Code section 4301, subdivisions (j), and (o), and Health and Safety Code section 11173, subdivision (a).

4. The evidence does not establish cause for license discipline for unprofessional conduct pursuant to Business and Professions Code section 4301, subdivision (f).

5. The evidence does not establish cause for license discipline for unprofessional conduct pursuant to Business and Professions Code sections 4301, subdivisions (j), and (o); 4059; and Health and Safety Code section 11170.

6. The evidence does not establish cause for license discipline for general unprofessional conduct pursuant to Business and Professions Code section 4301.

7. Business and Professions Code section 125.3 provides:

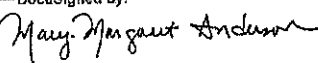
... the board may request an administrative law judge to direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

By reason of the matters set forth in Finding 24, the reasonable costs in this matter were established to be \$13,561.50. However, no costs can be ordered because no violations were found.

ORDER

The Accusation against John H. Reese is dismissed.

DATED: June 3, 2016

DocuSigned by:

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MARY-MARGARET ANDERSON
Administrative Law Judge
Office of Administrative Hearings

1 KAMALA D. HARRIS
Attorney General of California
2 FRANK H. PACOE
Supervising Deputy Attorney General
3 LESLIE E. BRAST
Deputy Attorney General
4 State Bar No. 203296
455 Golden Gate Avenue, Suite 11000
5 San Francisco, CA 94102-7004
Telephone: (415) 703-5548
6 Facsimile: (415) 703-5480
Attorneys for Complainant

7
8 **BEFORE THE**
BOARD OF PHARMACY
9 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA

10
11 In the Matter of the Accusation Against:

Case No. 4871

12 **JOHN H. REESE**
17990 Hillwood Lane
13 Morgan Hill, CA 95037

ACCUSATION

14 **Pharmacy Technician Registration No. TCH 79305**

15 Respondent.

16
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 (Board), Department of Consumer Affairs.

21 2. On or about November 2, 2007, the Board issued Pharmacy Technician Registration
22 Number TCH 79305 to John H. Reese (Respondent). The Pharmacy Technician Registration was
23 in full force and effect at all times relevant to the charges brought herein and will expire on
24 September 30, 2015, unless renewed.

25 JURISDICTION

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

1 **FOURTH CAUSE FOR DISCIPLINE**

2 **(Furnishing a Dangerous Drug/Controlled Substance)**

3 21. Respondent is subject to discipline under Code sections 4301(j), 4301(o), 4059,
4 and/or Health and Safety Code section 11170, in that Respondent furnished to himself or another
5 without a valid prescription, and/or conspired to furnish, and/or assisted or abetted furnishing of,
6 a dangerous drug and/or a controlled substance, as described in paragraph 17, above.

7 **FIFTH CAUSE FOR DISCIPLINE**

8 **(Unprofessional Conduct)**

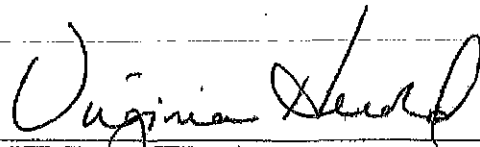
9 22. Respondent is subject to discipline under section 4301 for unprofessional conduct as
10 described in paragraph 17, above.

11 **PRAYER**

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

- 14 1. Revoking or suspending Pharmacy Technician Registration Number TCH 79305,
15 issued to John H. Reese;
- 16 2. Ordering John H. Reese to pay the Board of Pharmacy the reasonable costs of the
17 investigation and enforcement of this case, pursuant to Business and Professions Code section
18 125.3;
- 19 3. Taking such other and further action as deemed necessary and proper.
- 20

21
22 DATED: 9/13/14



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

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