

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

In the Matter of the Statement of Issues Against:

Case No. 5088

DANEKA DENISE SMITH

OAH No. 2014061006

Pharmacy Technician Registration Applicant

Respondent.

DECISION AND ORDER

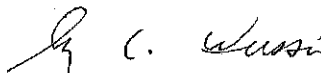
The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Pharmacy, Department of Consumer Affairs, as its Decision in this matter.

This decision shall become effective on October 20, 2014.

It is so ORDERED on September 18, 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 Statement of Issues
Against:

DANEKA DENISE SMITH,

Respondent.

Case No. 5088

OAH No. 2014061006

PROPOSED DECISION

Beth Faber Jacobs, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on July 18, 2014, in San Diego, California.

Loretta West, Deputy Attorney General, Department of Justice, State of California, appeared on behalf of complainant, Virginia Herold, Executive Officer of the Board of Pharmacy, Department of Consumer Affairs, State of California.

Daneka Denise Smith, respondent, represented herself.

The record remained open for the submission of a certified court record, and the matter was submitted on July 22, 2014.

FACTUAL FINDINGS

Procedural Background

1. On April 4, 2013, Daneka Denise Smith signed an application for registration¹ as a pharmacy technician. Smith is respondent's married name. Her maiden name was Daneka Denise Dancy.

2. Question 7 of the application asked if Mrs. Smith had "ever been convicted of any crime in any state, the USA and its territories, military court or foreign country." The instructions continued:

¹ The word "registration" includes references to a "license," a "certificate," or other means to engage in a regulated business or profession. (Bus. & Prof. Code, § 477.)

Check the box next to "Yes" if you have ever been convicted or plead guilty to any crime. "Conviction" includes a plea of no contest and any conviction that has been set aside or deferred pursuant to Sections 1000 or 1203.4 of the Penal Code, including infractions, misdemeanor [sic], and felonies. You do not need to report a conviction for an infraction with a fine of less than \$300 unless the infraction involved alcohol or controlled substances. You must, however, disclose any convictions in which you entered a plea on [sic] no contest and any convictions that were subsequently set aside pursuant to sections 1000 or 1203.4 of the Penal Code.

Check the box next to "No" if you have not been convicted of a crime.

You may wish to provide the following information in order to assist in the processing of your application: descriptive explanation of the circumstances surrounding the conviction

Failure to disclose a disciplinary action or conviction may result in the license being denied or revoked for falsifying the application

3. In response to Question 7, Mrs. Smith checked the box marked "No."
4. Mrs. Smith signed the application under penalty of perjury and submitted her application to the board. The board advised Mrs. Smith it was denying her application to become registered as a pharmacy technician. She requested a hearing.
5. On May 3, 2014, complainant signed the statement of issues to affirm the denial of respondent's application. The statement of issues alleged that Mrs. Smith had been dishonest in completing her application and that she incurred four substantially related convictions: that in 2002 and again in 2003 she was convicted of petty theft; that in 2004 she was convicted of receiving stolen property; and that in 2010 she was convicted of a wet reckless (reckless driving involving the use of alcohol.) It also alleged that Mrs. Smith's application should be denied because she used alcohol in a dangerous manner in 2010, when her driving resulted in the wet reckless conviction.
6. The statement of issues and other required jurisdictional documents were served on Mrs. Smith. She filed a timely notice of defense, and this hearing followed. The record remained open for the submission of a certified copy of Exhibit 5, a superior court record of conviction. The certified copy was received, marked, and admitted as Exhibit 12.

//

Mrs. Smith's Convictions

2004 RECEIVING STOLEN PROPERTY

7. On January 30, 2004, in *People v. Daneka Denise Dancy*, San Diego Superior Court, Case No. CS181894, Mrs. Smith pled guilty and was convicted of violating Penal Code section 496, subdivision (a), receiving stolen property.² The court sentenced her to serve 180 days in jail, with 61 days credit for time served, suspended the imposition of that sentence, and placed her on formal probation for three years with various terms and conditions of probation, including the payment of fines and fees.

Mrs. Smith did not make the required payments. On February 18, 2005, the court revoked probation. In March 2005 it reinstated probation, extended the probationary term to March 20, 2008, and ordered her to perform 25 days of public work service. It also ordered Mrs. Smith to remain in custody for 365 days with credit for 181 days of time served and stayed that order subject to her completing the public work service by October 1, 2005. Mrs. Smith did not complete the required service. On January 23, 2007, the court again revoked probation and ordered Mrs. Smith, who now had 236 days credit for time served, to complete the remaining custody period. She completed probation.

On October 17, 2007, the Superior Court granted Mrs. Smith's motion to dismiss the receiving stolen property conviction under Penal Code section 1203.4. Her plea of guilty was set aside; a plea of not guilty was entered; and the case was dismissed.

8. The circumstances giving rise to this conviction occurred on September 1, 2003, when Mrs. Smith was 19 years old. That day, she drove her 18 year-old girlfriend to a store knowing her friend intended to steal. Mrs. Smith waited in the car while her friend entered the store. Her friend stole \$12 from a woman's wallet, and returned to the car where Mrs. Smith was waiting.³ Both Mrs. Smith and her friend were arrested and charged with receiving stolen property as a felony.

2010 WET RECKLESS

9. On October 8, 2010, in *People v. Daneka Denise Dancy, aka Daneka Denise Smith*, San Diego Superior Court, Case No. C303429, Mrs. Smith pled guilty and was convicted of violating Vehicle Code section 23103, subdivision (a), per Vehicle Code section 23103.5, which is a plea to reckless driving in "substitution" for an original charge of

² The statement of issues alleges that this conviction was a misdemeanor; the superior court records establish that Mrs. Smith pled guilty to receiving stolen property as a felony.

³ These findings were based on respondent's letter to the board dated August 8, 2013, and her testimony during the hearing. No police report was offered, and no witness other than Mrs. Smith testified about the circumstances surrounding any of the alleged convictions listed in the statement of issues.

violating Vehicle Code section 23152, driving while under the influence of alcohol. This type of misdemeanor conviction is also referred to as a "wet reckless."

As a result of the conviction, the court placed Mrs. Smith on summary probation and imposed various terms and conditions of probation.⁴ These included the requirements that she comply with standard alcohol conditions and not drive with measurable alcohol in her system, complete a first alcohol-related conviction education program, attend a MADD victim impact program, and pay fines and fees.

10. The conviction arose from respondent's driving on January 21, 2010. That evening, Mrs. Smith had drinks with friends and got into her car to drive home. She did not think she was intoxicated. As she drove, she listened to music playing on her cell phone. She leaned down to change the song, and her car swerved slightly. A law enforcement officer saw her swerve and pulled her over. Mrs. Smith was honest with the officer and acknowledged she had been drinking earlier in the evening. She passed her field sobriety tests, but her breathalyzer test at the scene showed a blood alcohol level of .05% or .06%.

Complainant did not Establish that Mrs. Smith Incurred Petty Theft Convictions in 2002 and 2003

11. The statement of issues alleged that respondent was also convicted of petty theft on December 8, 2002, and on September 1, 2003. There was insufficient evidence to establish that Mrs. Smith was convicted of petty theft as alleged.

12. In support of these allegations, complainant relied on the charging documents from Mrs. Smith's 2004 conviction for receiving stolen property, referred to in paragraph 7, above. In that case, the District Attorney filed a complaint (the Information) against Mrs. Smith and her friend as co-defendants. Count 1 applied to both defendants and alleged a violation of Penal Code section 496, subdivision (a), receiving stolen property. Count 2 applied to Mrs. Smith only. It alleged that on January 21, 2004, she engaged in "petty theft with a prior." It "further alleged" that she engaged in petty theft on December 8, 2002, and was convicted of that offense on December 12, 2002; and that she engaged in petty theft on September 1, 2003, and that she was convicted of that offense on November 3, 2003. Count 3 pertained to Mrs. Smith's friend only.

13. As part of her plea deal related to the 2004 charges, Mrs. Smith pled guilty to Count 1, receiving stolen property, as a felony. Based on the certified superior court records admitted in evidence (Exhibit 12), the court dismissed Count 2 on the "People's motion" and "in the furtherance of justice."

14. The dismissed charges in the 2004 criminal complaint do not establish that Mrs. Smith was convicted of petty theft in 2002 and/or 2003.

⁴ The certified court records admitted into evidence did not specify the length of the probation imposed.

15. Complainant did not produce any superior court judgment or verified record of conviction to establish that Mrs. Smith was ever convicted of petty theft.

16. Complainant offered a copy of a Department of Justice document dated June 12, 2013, and titled: "DOJ Information Furnished Pursuant to an Applicant Fingerprint Submission." The document was admitted as administrative hearsay. It listed Mrs. Smith's two undisputed convictions – her 2004 conviction for receiving stolen property and her 2010 conviction for reckless driving. It also stated that she had been convicted of petty theft and petty theft with a prior, and that both of these convictions occurred on March 1, 2004, the date she was convicted of receiving stolen property. Following this entry, the document stated, in capital letters: "THIS ENTRY NOT SUBSTANTIATED BY VERIFIED FINGERPRINTS."

17. The DOJ document's hearsay statement that Mrs. Smith had two convictions for petty theft in 2004 was not reliable, did not corroborate or explain reliable direct or non-hearsay evidence, and did not support the allegations that she was convicted of petty theft in 2002 and 2003.

18. Mrs. Smith's correspondence and testimony shed some light on the issue, but still did not establish that she had been convicted of petty theft in 2002 or 2003. According to Mrs. Smith, she was arrested twice for petty theft when she was 14 years old (around 1998); at the time, she was homeless, without money, and hungry. As she explained, she stole food to eat, "just to be able to get by." She was under the impression that the arrests would not be translated into convictions unless she got in trouble with the law again. That occurred in 2004 when she was arrested and convicted of receiving stolen property.

19. The board sent Mrs. Smith correspondence in 2013 advising her that it learned she had convictions that had not been disclosed on her application. The letter was not produced by either party. However, on August 8, 2013, Mrs. Smith wrote the board in response to the board's letter. Her letter was received in evidence and conveyed a belief that she incurred two petty theft charges as a minor that became convictions on March 1, 2004, when she pled guilty to receiving stolen property. As she stated:

Due to the fact that I had a prior [arrest] record (that was also theft related) the courts then had the right to make [the receiving stolen property charge] into a felony, as well as convict me of the other two misdemeanor charges I received at the age of 14, and they did just that. This is the reason I was convicted of all three charges on the day of March 1, 2004.

20. During the hearing, Mrs. Smith did not recognize the dates that complainant alleged she had been arrested for petty theft (December 8, 2002, and September 1, 2003), or the dates that complainant alleged she had been convicted of petty theft (December 16, 2002, and November 3, 2003), all of which would have occurred when she was 18 years old. She denied having been arrested or convicted of petty theft when she was 18 years old, and

denied ever spending time in jail in 2003. According to her, other than her arrests for petty theft when she was 14 years old, she had no other arrests for petty theft.

21. Irrespective of Mrs. Smith's representations, certified superior court records established that on March 1, 2004, she was not convicted of three charges nor convicted of petty theft; that day, she was convicted of one crime only – receiving stolen property.⁵ Her representation that she was convicted of two counts of petty theft on March 1, 2004, was mistaken and appears to be an after-the-fact adoption of incorrect information in the Department of Justice hearsay document – a document the board sent to her after it received her application.

22. Insufficient evidence was submitted to establish that Mrs. Smith was convicted of petty theft on December 8, 2002, and/or on September 1, 2003, as alleged in the statement of issues, in the first and second causes for denial of her application.

Duties of a Pharmacy Technician

23. Christine Anne Acosta, Pharm.D, testified for complainant. She received her doctorate in pharmacy and has been a licensed pharmacist in California since 2006. She is employed by the board; she served for over two years as a general inspector for the board and is currently a supervising inspector. Previously, Dr. Acosta was employed as a pharmacist at various retail pharmacies. She gained extensive experience in working with licensed pharmacy technicians.

24. As Dr. Acosta explained, pharmacy technicians have important responsibilities in the dispensing of prescribed medications. They assist the pharmacist and are often a patient's first point of contact at a pharmacy. They have direct access to drugs and the DEA numbers of prescribing physicians. Pharmacy technicians hand drugs to patients and handle money. Ringing sales, they have full access to confidential patient information, including insurance and financial records, credit card numbers, bank and check numbers, and occasionally social security numbers. Pharmacy technicians are required to carefully read, follow instructions, and hand out medications correctly. Because dispensing medications can directly impact public safety, pharmacies are highly regulated. It is critical that a pharmacy technician be honest and trustworthy, have respect for the law, and exercise good judgment.

Mrs. Smith's Testimony

25. Mrs. Smith is 29 years old and has been married for six years. She grew up in the Skyline area of San Diego. As a child, her family life was difficult. Her mother was an

⁵ Complainant offered an uncertified copy of the superior court record regarding Mrs. Smith's conviction for receiving stolen property. (Exhibit 5.) Because of the disputed issues in this case, the administrative law judge requested that complainant produce a certified copy of the superior court record, serve Mrs. Smith, and make it part of the record. The record was kept open; complainant timely filed and served the certified copy. It was marked and admitted as Exhibit 12.

addict. For a period during her middle school years, she lived with relatives in Ohio. After returning to San Diego, she tried living with her stepfather, but that did not work out. For a while, she was a foster child.

26. Around 1998 when she was 14 years old and in the 8th grade, she became homeless. She was sometimes able to sleep at a friend's home but more often lived on the streets. She had no money. She was hungry. According to Mrs. Smith, she was twice arrested for petty theft that year, and both arrests were for stealing food to eat. On one of those occasions, she took cooked fried chicken from an Albertson's market without paying for it. She recalled being picked up from the juvenile detention center by her step-father and being told that her arrests would not result in a conviction unless she "got in trouble again."

27. Mrs. Smith lived in this fashion, which she called "from pillow-to-post," for over two years. When she was about age 16 or 17 years old, her mother and grandmother returned to San Diego, and she lived with her grandmother.

28. Mrs. Smith did not complete high school.

29. Mrs. Smith discussed her 2004 conviction for receiving stolen property. She fully acknowledged her participation in the crime (driving the car to a store with her friend, knowing her friend intended to steal when she entered the store, and waiting for her friend to return with something stolen⁶), and called her decision to do this "not-so-smart." She took responsibility for being convicted of receiving stolen property and for her initial violations of probation, which she said were the result of having insufficient funds to pay the fines. Today, Mrs. Smith recognizes that she exercised bad judgment. She conveyed remorse and apologized for her actions, which she felt were due to immaturity and an effort to "fit in" with a friend.

30. Mrs. Smith spoke about her efforts to change her life, which efforts began in 2006 when she met her husband. She said she got "tired of not having stability" and "not knowing" where her life was going. She stopped partying. She focused on turning her life around and finding a good job. She began working for ACE Parking and was told she needed to expunge her criminal record in order to continue employment. In 2007, she obtained a dismissal of her 2004 conviction for receiving stolen property. She felt her employment at ACE showed she was trustworthy; she collected money from parking booths and made the bank deposits. She was elevated to supervisor.

31. By 2010, Mrs. Smith had been married a few years, and her husband had a job that took him out of town four days a week. On one of the days he was away, Mrs. Smith went out with friends and had a few drinks. She did not think she was inebriated, but her driving resulted in her 2010 wet reckless conviction. Except for the payment of about \$300, she has complied with all the terms and conditions of probation. She believes her probation

⁶ Mrs. Smith's testimony was the sole evidence produced concerning the circumstances of this crime.

term was three years; although she thinks probation has ended, she is not sure because she still owes money on the fine.

32. Following her 2010 conviction, Mrs. Smith and her husband had a talk about what she was going to do with her life. She decided she wanted to become a pharmacy technician. They discussed the importance of making sure she could obtain the license because the path would take a lot of time and money. Her husband asked her to make sure that "the past doesn't bite you." According to Mrs. Smith, she met with staff at American College of Healthcare, the school she planned to attend. She told them she had convictions. The school seemed more concerned about her lack of a high school diploma, and required that she obtain a GED. She took the necessary classes, passed the test on her first try, and received her GED. Mrs. Smith started the pharmacy technician classes and earned a 4.0 grade point average in her courses. She was asked to be valedictorian, but declined because she was too shy.

33. Mrs. Smith testified about her application process and why she answered "No" to Question 7, which asked if she had ever been convicted of a criminal offense. According to her, she brought the application to her school and discussed it with Susan Kirtland, the school's Director of Compliance. Mrs. Smith did not understand Question 7. She told Mrs. Kirtland about her conviction for receiving stolen property and that it had been dismissed in 2007. Mrs. Smith was under the mistaken impression that once her 2004 receiving-stolen-property conviction had been dismissed, she did not need to mention it in subsequent job applications. As to the wet reckless, she "forgot about the entire case" and did not mention it to Mrs. Kirtland. Mrs. Kirtland told her to go ahead and answer "No" to Question 7.

34. Mrs. Smith and her husband discussed how she should answer Question 7. He told her to disclose her conviction history.⁷ She decided to rely on what Mrs. Kirtland told her because she felt the school had more experience with the board and in filling out pharmacy technician applications. In retrospect, she realizes her decision was "wrong" and that she made a "mistake" by relying on Mrs. Kirtland and by answering "No" when she completed her initial application in April 2013.

35. Mrs. Smith also testified that she did not read the entire application before signing it, but relied on Mrs. Kirtland's summaries and her pointing where to sign. Mrs. Smith attributed her failure to read the application's full page "affidavit" portion to "laziness."

36. Mrs. Smith apologized for not carefully reading the application and not disclosing the convictions she knew about. She said she had no intent to hide her past; when she started at the school, she told the school about her history and would have chosen a different program if she had known it would be a problem. She worked and studied hard, did well in her internship, and wants to become a pharmacy technician. When the board initially told her its concern because she had not disclosed any conviction on her April 2013

⁷ It was not clear from the evidence whether respondent thought she had ever been convicted of petty theft when she completed her first application in April 2013.

application, respondent wrote her letter dated August 8, 2013, and followed it with the submission of a new application she signed on August 23, 2013. This time, she answered "Yes" to Question 7. She stated that she had incurred four convictions: three on March 1, 2004 (two counts of petty theft and one count of receiving stolen property) and one on October 8, 2010, the wet reckless.⁸

37. Mrs. Smith has done some volunteer work at a hospital. She has successfully held several jobs since being married. She is currently employed in the quality control division of a company that produces shampoos. She seldom drinks alcohol, and she wishes she had not driven home that night in 2010 after drinking with friends while her husband was out of town. Her husband no longer works in a different city. She has not driven after drinking since her arrest in 2010.

Additional Evidence

38. Mrs. Smith's husband, Douglas Wayne Smith, testified on her behalf. Mr. Smith is a commercial plumbing supervisor. He has over 18 years of sobriety and been clean and sober since March 22, 1997. Mr. Smith no longer works in a different city, and he and his wife have a strong family life together. He praised his wife and called her "intelligent and bright" and a "good woman," who has overcome obstacles of her youth and is "trying hard to live in society." He shared about her efforts to study hard and "ace" her coursework. He bragged about his wife's accomplishments that she did not mention during her initial testimony (such as her having been asked to be valedictorian, and having been made a supervisor at her job.) He asked that she be given an opportunity to show she can be trusted, as he believes she is entirely trustworthy. His love and support for his wife were sincere and heartfelt.

LEGAL CONCLUSIONS

The Burden and Standard of Proof

1. In a proceeding involving the issuance of a license, the burden of proof is on the applicant to show that he or she is qualified to hold the license. In order to prevail,

⁸ Respondent completed the chart at the end of Question 7. Except for the information in brackets that has been added for reader's convenience, respondent charted her arrests and convictions as follows:

<u>Arrest date</u>	<u>Conviction Date</u>	<u>Violation(s)</u>
03-01-04	03-01-04	PC 484 [Petty Theft]
03-01-04	03-01-04	PC 484/666 [Petty Theft with a prior]
03-01-04	03-01-04	PC 496(a) [Receiving stolen property]
10-08-10	10-08-04	VC 23103(a) [Wet reckless]

As noted above, in Finding of Fact, paragraph 21, Mrs. Smith's representation that she was arrested and convicted of two counts of petty theft on March 1, 2004, was incorrect.

respondent must demonstrate by a preponderance of the evidence that she should become a registered pharmacy technician. (Evid. Code, § 115.)

Applicable Statutes and Regulations

2. The board may deny a license application under Business and Professions Code section 480, subdivision (a)(1), when an applicant has been convicted of a crime that is substantially related to the qualifications, functions, or duties of a pharmacy technician.

3. The board may deny a license application under Business and Professions Code section 480, subdivision (a)(2), when an applicant has engaged in any act involving dishonesty, fraud, or deceit with the intent to substantially benefit oneself or another, or substantially injure another.

4. Grounds for denial of a license also include doing any act that if done by a licensee would be grounds for suspension or revocation of the license, as long as the act or crime is substantially related to the qualifications, functions or duties of a pharmacy technician. (Bus. & Prof. Code, § 480, subs. (a)(3)(A) and (B).)

5. Business and Professions Code section 4301 lists numerous grounds for imposing discipline on a licensee. Included are the commission of any act involving dishonesty, fraud, deceit or corruption, regardless of whether it is a felony or misdemeanor (subdivision (f)); knowingly making or signing any document with a false representation about the facts (subdivision (g)); using alcohol in a manner that is dangerous or injurious to herself or others (subdivision (h)); and the conviction of a crime substantially related to the qualifications, functions, or duties of a pharmacy technician, irrespective of whether the conviction has been dismissed under Penal Code section 1203.4 (subdivision (l)).

6. California Code of Regulations, title 16, section 1770, addresses the issue of substantial relationship. It states in part that:

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 of 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

Cause Exists to Deny Mrs. Smith's Application for a Registration

7. Cause was established to deny Mrs. Smith's application to become a pharmacy technician based on her 2004 conviction for receiving stolen property and her 2010 conviction for reckless driving in connection with alcohol use. Each of these convictions was substantially related to the qualifications, functions, or duties of a pharmacy technician, and each was cause for denial of an application under Business and Professions Code section 480, subdivision (1)(a). Had she been licensed at the time of her convictions, each would

have constituted grounds for discipline, as a conviction of a substantially related crime under Business and Professions Code, section 4301, subdivision (f).

8. Cause also exists to deny Mrs. Smith's application under Business and Professions Code sections 480, subdivision(a)(3)(a), and 4302, subdivision (h), based on her use of alcohol on January 21, 2010, which ultimately resulted in her wet reckless conviction. On January 21, 2010, she used alcohol in a manner that was dangerous to herself or others, and had she been licensed at the time, this would have been grounds for discipline.

9. Cause exists to deny Mrs. Smith's application because she dishonestly answered "No" on her April 4, 2013, application in response to Question 7, which inquired whether she had ever been convicted of a crime. A preponderance of the evidence established that when she completed her initial application in April 2013, she knew she had been convicted of at least two crimes – receiving stolen property in 2004 and reckless driving in 2010, and that she was still on probation for the reckless driving. Her failure to disclose these convictions constitutes grounds for denial of her application under Business and Professions Code sections 480, subdivisions (a)(2) and (c), and 4301, subdivisions (f) and (g).

The Charges That Mrs. Smith was Convicted of Petty Theft Were Not Established and Are not Cause to Deny her a Registration

10. Although the statement of issues alleged that Mrs. Smith was convicted of petty theft on December 16, 2002, and again on September 1, 2003, these allegations were not established. (See Findings of Fact, paragraphs 11 through 22.) The only evidence offered to support these allegations were charges in the Information filed by the district attorney in the 2004 receiving-stolen-property case, which charges were dismissed by the court as part of a plea bargain. Under Business and Professions Code section 493, "the record of conviction of the crime shall be conclusive evidence of that the conviction occurred." Dismissed charges in a criminal complaint do not constitute a "record of conviction;" Mrs. Smith denied she was convicted of petty theft in either 2002 or 2003; and complainant did not offer any record of conviction for petty theft charges. These unsubstantiated charges cannot be used as grounds to deny her application.

Rehabilitation

11. California Code of Regulations, title 16, section 1769, lists the criteria for evaluating an applicant's rehabilitation and his or her present eligibility for a license. These include:

- (1) The nature and severity of the act(s) or crime(s) under consideration as grounds for denial.
- (2) Evidence of any act(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for denial which also

could be considered as grounds for denial under Section 480 of the Code.

(3) The time that has elapsed since commission of the act(s) or crime(s) referred to in subdivision (1) or (2).

(4) The extent to which the applicant has complied with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against the applicant.

(5) Evidence, if any, of rehabilitation submitted by the applicant.

12. Rehabilitation 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.)

Evaluation

13. Mrs. Smith conveyed sincerity and showed real effort to change her life from the difficulties she had as a young woman. Her 2004 conviction for receiving stolen property occurred ten years ago, was the result of youthful immaturity, and was dismissed in 2007 under Penal Code section 1203.4. She went to school to better herself and to obtain a trade. She has incurred no other driving or alcohol-related convictions since her 2010 wet reckless conviction, and appears to have been law-abiding since then. She is in a stable and supportive marriage.

14. Despite showing some rehabilitation, respondent's more recent misconduct – her dishonesty in April 2013, when she falsely denied having any criminal convictions – showed that respondent has not demonstrated the level of rehabilitation necessary to warrant the public's trust. Pharmacy technicians have important responsibilities in the dispensing of prescribed medications. They must be trustworthy, have respect for the law, and exercise good judgment. Respondent did not. When respondent initially applied to become licensed as a pharmacy technician, she knew she had incurred at least two convictions. She exercised poor judgment when she relied on someone else who suggested it was acceptable to lie on an application, and showed even poorer judgment when she submitted the application, knowing she falsely answered "No" in response to the question of whether she had incurred any convictions.⁹

⁹ Although the weight of the evidence did not establish respondent was previously convicted of petty theft, it was unclear whether respondent thought she had been convicted of the crime on any date or dates before April 2013, when she signed her first application. If respondent thought she had been convicted of petty theft prior to April 4, 2013, she was obliged to state that in the application.

15. Public protection is the key element in determining if an applicant should be licensed. As a result, agencies are permitted to inquire into any substantially related conviction and to rely upon it to deny a license, even if the conviction has been dismissed under Penal Code section 1203.4. (*Krain v. Medical Board of California* (1999) 71 Cal.App. 4th 1416, 1420-1421.) Respondent's application specifically instructed her to include any dismissed conviction. Her testimony that she did not understand that she needed to report her dismissed conviction for receiving stolen property flies in the face of the instructions and was not a defense. But even if it had been, there was no excuse for respondent's failure to disclose her 2010 wet reckless conviction – a conviction for which she was still on criminal probation when she signed the application. Her testimony that she had “forgotten” about it was troubling. It does not demonstrate the kind of rehabilitation required for licensure.

16. Mrs. Smith also acknowledged that she did not read the affidavit portion of the application before submitting it but merely signed where her school representative told her to sign. Even she characterized this as “laziness.”

17. Public safety requires pharmacy technicians to pay close attention to what they read and what they do. A patient's health and safety can depend on it. Mrs. Smith's 2013 application-related actions were so lacking in judgment that they overshadowed the rehabilitation she otherwise showed with respect to her convictions and alcohol-related dangerous driving. Had she candidly and honestly answered Question 7, disclosed her 2004 and 2010 convictions and the circumstances giving rise to them, it is likely her 2004 conviction, which occurred when she was 18 or 19 years old might have been deemed remote in time and the result of youthful indiscretion. Probation might have been warranted.

18. Mrs. Smith's August 8, 2013, letter, and her August 23, 2013, corrected application, show better judgment. However, they were submitted months after her first application and only after the board advised her it planned to deny her application because she had failed to disclose her convictions. The letter and revised application are first steps toward rehabilitation from her dishonesty but are insufficient to overcome the totality of her actions surrounding her initial application process and misrepresentation to the board.

19. If Mrs. Smith remains interested in obtaining a pharmacy technician registration, she is encouraged to review the board's rehabilitation criteria, work towards rehabilitation, and demonstrate that she is honest, attentive to detail, and can be trusted. At this time, however, granting her a pharmacy technician registration, even on a probationary basis, would not be in the public interest.

//


//

//

ORDER

The application of Daneka Denise Smith to become a registered pharmacy technician is denied.

DATED: August 19, 2014


BETH FABER JACOBS
Administrative Law Judge
Office of Administrative Hearings

1 KAMALA D. HARRIS
Attorney General of California
2 ALFREDO TERRAZAS
Senior Assistant Attorney General
3 LINDA K. SCHNEIDER
Supervising Deputy Attorney General
4 State Bar No. 101336
110 West "A" Street, Suite 1100
5 San Diego, CA 92101
P.O. Box 85266
6 San Diego, CA 92186-5266
Telephone: (619) 645-3037
7 Facsimile: (619) 645-2061
Attorneys for Complainant

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

11 In the Matter of the Statement of Issues Against:

Case No. 5088

12 **DANEKA DENISE SMITH**

13 **Applicant for a Pharmacy Technician Registration**

STATEMENT OF ISSUES

14 Respondent.
15

16
17 Complainant alleges:

18 **PARTIES**

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

21 2. On or about May 22, 2013, the Board of Pharmacy, Department of Consumer Affairs
22 received an application for a pharmacy technician registration from Daneka Denise Smith
23 (Respondent). On or about April 4, 2013, Daneka Denise Smith certified under penalty of perjury
24 to the truthfulness of all statements, answers, and representations in the application. The Board
25 denied the application on November 4, 2013.

26 ///

27 ///

28 ///

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 references
4 are to the Business and Professions Code (Code) unless otherwise indicated.

5 4. Section 4300, subdivision (c) of the Code states "The board may refuse a license to
6 any applicant guilty of unprofessional conduct."

7 **STATUTORY PROVISIONS**

8 5. Section 475 of the Code states:

9 (a) Notwithstanding any other provisions of this code, the provisions of this
10 division shall govern the denial of licenses on the grounds of:

11 (1) Knowingly making a false statement of material fact, or knowingly omitting
12 to state a material fact, in an application for a license.

13 (2) Conviction of a crime.

14 (3) Commission of any act involving dishonesty, fraud or deceit with the intent
15 to substantially benefit himself or another, or substantially injure another.

16 (4) Commission of any act which, if done by a licentiate of the business or
17 profession in question, would be grounds for suspension or revocation of license.

18

19 6. Section 480 of the Code states:

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

22 (1) Been convicted of a crime. A conviction within the meaning of this section
23 means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any
24 action that a board is permitted to take following the establishment of a conviction may be
25 taken when the time for appeal has elapsed, or the judgment of conviction has been
26 affirmed on appeal, or when an order granting probation is made suspending the
27 imposition of sentence, irrespective of a subsequent order under the provisions of Section
28 1203.4 of the Penal Code.

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

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

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

.....

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

7. Section 482 of the Code states:

Each board under the provisions of this code shall develop criteria to evaluate the rehabilitation of a person when:

- (a) Considering the denial of a license by the board under Section 480; or
- (b) Considering suspension or revocation of a license under Section 490.

Each board shall take into account all competent evidence of rehabilitation furnished by the applicant or licensee.

8. Section 493 of the Code states:

Notwithstanding any other provision of law, in a proceeding conducted by a board within the department pursuant to law to deny an application for a license or to suspend or revoke a license or otherwise take disciplinary action against a person who holds a license, upon the ground that the applicant or the licensee has been convicted of a crime substantially related to the qualifications, functions, and duties of the licensee in question, the record of conviction of the crime shall be conclusive evidence of the fact that the conviction occurred, but only of that fact, and the board may inquire into the circumstances surrounding the commission of the crime in order to fix the degree of discipline or to determine if the conviction is substantially related to the qualifications, functions, and duties of the licensee in question.

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

9. Section 4301 of the Code states:

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:

.....

(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.

(g) Knowingly making or signing any certificate or other document that falsely represents the existence or nonexistence of a state of facts.

(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.

.....

1
2 (1) The conviction of a crime substantially related to the qualifications, functions,
3 and duties of a licensee under this chapter. The record of conviction of a
4 violation of Chapter 13 (commencing with Section 801) of Title 21 of the United States
5 Code regulating controlled substances or of a violation of the statutes of this state
6 regulating controlled substances or dangerous drugs shall be conclusive evidence of
7 unprofessional conduct. In all other cases, the record of conviction shall
8 be conclusive evidence only of the fact that the conviction occurred. The board may
9 inquire into the circumstances surrounding the commission of the crime, in order to
10 fix the degree of discipline or, in the case of a conviction not involving controlled
11 substances or dangerous drugs, to determine if the conviction is of an offense substantially
12 related to the qualifications, functions, and duties of a licensee under this chapter. A plea
13 or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a
14 conviction within the meaning of this provision. The board may take action when the time
15 for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when
16 an order granting probation is made
17 suspending the imposition of sentence, irrespective of a subsequent order under Section
18 1203.4 of the Penal Code allowing the person to withdraw his or her plea of
19 guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing
20 the accusation, information, or indictment.
21
22

23 REGULATORY PROVISIONS

24 10. California Code of Regulations, title 16, section 1769 states:

25 (a) When considering the denial of a facility or personal license under Section 480
26 of the Business and Professions Code, the board, in evaluating the rehabilitation of the
27 applicant and his present eligibility for licensing or registration, will consider the following
28 criteria:

(1) The nature and severity of the act(s) or offense(s) under consideration as
grounds for denial.

(2) Evidence of any act(s) committed subsequent to the act(s) or crime(s) 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 act(s) or crime(s) referred
to in subdivision (1) or (2).

(4) Whether the applicant has complied with any terms of parole, probation,
restitution or any other sanctions lawfully imposed against the applicant.

(5) Evidence, if any, of rehabilitation submitted by the applicant.
.....

26 ///

27 ///

28 ////

1 11. California Code of Regulations, title 16, section 1770 states:

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

8 **FIRST CAUSE FOR DENIAL OF APPLICATION**

9 **(December 16, 2002 Criminal Conviction for Petty Theft on December 8, 2002)**

10 12. Respondent's application for registration as a pharmacy technician is subject to denial
11 under section 480, subdivisions (a)(1) and (a)(3)(A) of the Code in that she was convicted of a
12 crime that is substantially related to the qualifications, duties, and functions of a pharmacy
13 technician, and would be a ground for discipline under section 4301(l) of the Code for a registered
14 pharmacy technician. The circumstances are as follows:

15 a. On or about December 16, 2002, in a criminal proceeding entitled *State of*
16 *California v. Daneka Denise Dancy*, in the Superior Court of California, County of San Diego,
17 Case No. S172869, Respondent was convicted of violating Penal Code section 484 (petty theft), a
18 misdemeanor.

19 **SECOND CAUSE FOR DENIAL OF APPLICATION**

20 **(November 3, 2003 Criminal Conviction for Petty Theft With a Prior**
21 **on September 1, 2003)**

22 13. Respondent's application for registration as a pharmacy technician is subject to denial
23 under section 480, subdivisions (a)(1) and (a)(3)(A) of the Code in that she was convicted of a
24 crime that is substantially related to the qualifications, duties, and functions of a pharmacy
25 technician, and would be a ground for discipline under section 4301(l) of the Code for a registered
26 pharmacy technician. The circumstances are as follows:

27 a. On or about November 3, 2003, in a criminal proceeding entitled *State of*
28 *California v. Daneka Denise Dancy*, in the Superior Court of California, County of San Diego,
Case No. S179000, Respondent was convicted of violating Penal Code section 484/666 (petty
theft with a prior), a misdemeanor.

1 THIRD CAUSE FOR DENIAL OF APPLICATION

2 (January 30, 2004 Criminal Conviction for Receiving Stolen Property
3 on January 21, 2004)

4 14. Respondent's application for registration as a pharmacy technician is subject to denial
5 under section 480, subdivisions (a)(1) and (a)(3)(A) of the Code in that she was convicted of a
6 crime that is substantially related to the qualifications, duties, and functions of a pharmacy
7 technician, and would be a ground for discipline under section 4301(I) of the Code for a registered
8 pharmacy technician. The circumstances are as follows:

9 a. On or about January 30, 2004, in a criminal proceeding entitled *State of California v.*
10 *Daneka Denise Dancy*, in the Superior Court of California, County of San Diego, Case
11 No. CS181894, Respondent was convicted on her plea of guilty of violating Penal Code section
12 496 (receiving stolen property), a misdemeanor.

13 b. As a result of the conviction, the Court placed Respondent on three years formal
14 probation, ordered her to serve 180 days in the county jail, with 61 days credit for time served, and
15 ordered her to pay various fines and fees. Respondent's probation was revoked on
16 February 18, 2005 and March 21, 2005, and the Court ordered her to serve 365 days in the county
17 jail, stayed pending completion of Public Work Service, with 181 days credit for time served, and
18 ordered her to enroll in and complete Public Service Work. On January 23, 2007, Respondent's
19 probation was revoked and she was remanded to the custody of the Sheriff without bail. On
20 February 22, 2007, the Public Work Service was deleted and the Court imposed the 365 days
21 custody. On October 17, 2007, Respondent filed a Petition for Relief under Penal Code section
22 1203.4 and the Court granted Respondent's Petition.

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **SIXTH CAUSE FOR DENIAL OF APPLICATION**

2 **(Act Involving Dishonesty, Fraud, or Deceit)**

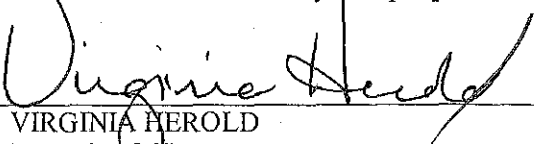
3 17. Respondent's application is subject to denial under sections 480, subdivision (a)(2) and
4 (e) of the Code in that on or about April 4, 2013, she committed an act of dishonesty, fraud and/or
5 deceit when, in response to the question on his application for registration as a pharmacy
6 technician, "Have you ever been convicted of any crime in any state, the USA and its territories,
7 military court or foreign country," Respondent responded, "No," and failed to disclosed the
8 convictions that are detailed at paragraphs 12-15, above, which would be a ground for discipline
9 under section 4301(f) and (g) of the Code for a registered pharmacy technician.

10 **PRAYER**

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

- 13 1. Denying the application of Daneka Denise Smith for a Pharmacy Technician
14 Registration;
- 15 2. Taking such other and further action as deemed necessary and proper.

16 DATED: 5/3/14

17 
18 VIRGINIA HEROLD
19 Executive Officer
20 Board of Pharmacy
21 Department of Consumer Affairs
22 State of California
23 Complainant

21 SD2014706591
22 70843691.doc