



California State Board of Pharmacy
 1625 N. Market Blvd, N219, Sacramento, CA 95834
 Phone: (916) 574-7900
 Fax: (916) 574-8618
 www.pharmacy.ca.gov

BUSINESS, CONSUMER SERVICES AND HOUSING AGENCY
 DEPARTMENT OF CONSUMER AFFAIRS
 GOVERNOR EDMUND G. BROWN JR.

NOV 17 PM 12:33

APPLICATION FOR VOLUNTARY SURRENDER OF PHARMACY TECHNICIAN LICENSE

PLEASE PRINT IN BLACK OR BLUE INK OR TYPE YOUR RESPONSES

Name: <u>Marc VARGAS</u>	Case No. <u>AC 5392</u>
Address of Record: <u>140 E. SPRING ST. #1</u> <u>LONG BEACH CA. 90806</u>	

Pursuant to the terms and conditions of my probation with the California State Board of Pharmacy (Board) in Case No. AC 5392, I hereby request to surrender my pharmacy technician license, License No. TCH 96273. The Board or its designee shall have the discretion whether to grant the request for surrender or take any other action it deems appropriate and reasonable. Upon formal acceptance of the surrender of the license, I will no longer be subject to the terms and conditions of probation. I understand that this surrender constitutes a record of discipline and shall become a part of my license history with the Board.

Upon the acceptance of the surrender, I shall relinquish my pharmacy technician license to the Board within ten (10) days of notification by the Board that the surrender is accepted. I understand that I may not reapply for any license, permit, or registration from the board for three (3) years from the effective date of the surrender. I further understand that I shall meet all requirements applicable to the license sought as of the date the application for that license is submitted to the Board.

PLEASE BE ADVISED THAT YOU ARE NOT RELIEVED OF THE REQUIREMENTS OF YOUR PROBATION UNLESS THE BOARD NOTIFIES YOU THAT YOUR REQUEST TO SURRENDER YOUR LICENSE HAS BEEN ACCEPTED.

Marc Vargas
 Applicant's Signature

11/17/16
 Date

D. Heule
 Executive Officer's Approval

11/28/16
 Date

All items on this application are mandatory in accordance with your probationary order and the Board's Disciplinary Guidelines as authorized by Title 16, California Code of Regulations section 1760. Failure to provide any of the requested information or providing unreadable information will result in the application being rejected as incomplete. The information provided on this form will be used to determine eligibility for surrender. The official responsible for information maintenance is the Executive Officer, telephone (916) 574-7900, 1625 N. Market Blvd., Suite N-219, Sacramento, CA 95834. The information you provide may also be disclosed in the following circumstances: (1) in response to a Public Records Act request; (2) to another government agency as required by state or federal law; or, (3) in response to a court or administrative order, a subpoena, or a search warrant. Each individual has the right to review the files or records maintained on them by our agency, unless the records are identified as confidential information and exempted by Section 1798.40 of the Civil Code.

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

In the Matter of the Accusation Against:

MARC F. VARGAS

Pharmacy Technician Registration No.
TCH 96273

Respondent.

Case No. 5392

OAH No. 2015120414

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 November 2, 2016.

It is so ORDERED on October 3, 2016.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

Amy Gutierrez, Pharm.D.
Board President

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

In the Matter of the Accusation Against:

MARC F. VARGAS

Pharmacy Technician Registration No.
TCH 96273,

Respondent.

Case No. 5392

OAH No. 2015120414

CORRECTED PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on June 16, 2016, in Los Angeles.

Nancy A. Kaiser, Deputy Attorney General, represented Virginia Herold (complainant).

Marc F. Vargas (respondent) was present and represented himself.

The record was closed and the matter submitted for decision at the conclusion of the hearing on June 16, 2016. The ALJ issued a proposed decision on July 14, 2016.

By a letter dated August 19, 2016, Lisa Chullino, Enforcement Analyst, California State Board of Pharmacy (Board), noted two errors in the proposed decision and requested correction of the proposed decision pursuant to California Code of Regulations, title 1, section 1048. The two errors noted were that on page 10, term number 12, the ALJ erroneously stated 20 hours per calendar month was the minimum number of hours respondent must be employed as a pharmacy technician in California, whereas the rest of that term shows the ALJ intended the minimum number to be 80 hours per calendar month.

Respondent was timely served with the letter and did not object to the requested corrections.

The request to correct the two errors in the proposed decision is therefore granted. The two requested corrections are the only changes that have been made in this Corrected Proposed Decision.

FACTUAL FINDINGS

1. On December 10, 2009, the Board of Pharmacy (Board), which is within the California Department of Consumer Affairs, issued Pharmacy Technician Registration No. TCH 96273 to respondent. The registration will expire on September 30, 2017, unless renewed.

2. The Accusation was brought by complainant in her official capacity as the Executive Officer of the Board. The Accusation alleges cause exists to discipline respondent's license based on a positive drug test at work prompting his resignation.

3. Respondent timely submitted a Notice of Defense, which contained a request for a hearing to challenge the Accusation.

Respondent Resigns from His Pharmacy Technician Job

4. Respondent was employed as a full-time pharmacy technician at McGuff Compounding Pharmacy (McGuff) located in Santa Ana, California.

5. A compounding pharmacy prepares individual drugs to meet the prescriber's exact specifications and are dispensed directly to the patient or the prescriber, unlike pharmaceutical manufacturers, who mass produce various types of drugs for the general public. Compound pharmacies in California are licensed by the Board and the compounding is performed or supervised by a pharmacist licensed by the Board. The preparations offered by compounding pharmacies can be nonsterile (ointments, creams, liquids, or capsules that are used in areas of the body where absolute sterility is not necessary) or sterile (usually intended for injection into body tissues or the blood). The riskiest activity performed by a compounding pharmacy is converting nonsterile products into sterile ones that are internally consumed by patients, because it is vital that the items ingested or infused into the patients are in fact sterile. Because pharmacy technicians are intimately involved in the compounding process, under the supervision of licensed pharmacists, it is vital and a matter of public protection that pharmacy technicians not be impaired by drugs or alcohol while at the workplace involved in such high risk activity.

6. On July 21, 2014, respondent was asked to submit to a random urine drug test after his work-shift began by his supervisor at McGuff. Respondent complied and was personally escorted by his supervisor to the drug testing facility. After respondent was administered the drug test, he went on his lunch break. However, respondent failed to return to work from his lunch break. He later sent an email to McGuff, at approximately 1:22 p.m., in which he tendered his resignation. His resignation was accepted and respondent was immediately terminated.

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7. On July 24, 2014, McGuff received the report from respondent's urine drug test taken on July 21, 2014. The report showed respondent's urine was positive for marijuana, which is a Schedule I controlled substance, as defined by Health and Safety Code section 11054, subdivision (b)(48)(d)(13).

8. On July 24, 2014, McGuff's Pharmacist-in-Charge (PIC) sent an email informing the Board that respondent had tested positive for marijuana as part of its routine drug testing of employees.

The Board's Investigation and Respondent's Evidence

9. The Board assigned Inspector Katherine Sill to investigate the email received from McGuff. Inspector Sill visited the McGuff facility, interviewed respondent's former supervisor and several former pharmacy technician colleagues, reviewed documents and later interviewed respondent. One of the McGuff pharmacy technicians interviewed, Thang Pham, testified during the hearing.

10. During her investigation, Inspector Sill found no evidence indicating respondent had ever exhibited signs of being under the influence of alcohol or drugs at work.

11. However, several employees who worked with respondent at McGuff advised Inspector Sill that respondent had bragged to them that he smoked "weed" or "pot" almost daily. They also recounted how respondent had shown them a "piggy-back" intravenous device holding "fake urine," which respondent said he used to pass random drug tests. Respondent had been subjected to at least two prior drugs tests before the one in question, neither of which he failed. The employees told Inspector Sill they complained to management about respondent's marijuana use only after he began "calling in sick" an inordinate number of days, which irritated them. For this reason, these employees asked respondent's supervisor to personally take respondent to the drug testing facility when he was next drug tested in order to prevent respondent from using the "piggy-back" device he had developed. That is precisely what happened when respondent was tested on July 21, 2014. Respondent has no prescription or medical recommendation to use marijuana.

12. During his interview with Inspector Sill and in his testimony at the hearing, respondent denied smoking marijuana or using the "piggy-back" device described by his former work colleagues. Respondent's testimony was not persuasive. Respondent admits he resigned from his job because he knew his drug test would turn out positive for marijuana. But he offered an uncorroborated and self-serving explanation: he ate a treat at a party laced with marijuana unbeknownst to him until after he ate it. Moreover, respondent failed to offer a satisfactory reason why he failed to disclose that situation to his supervisor at work after being told he would be drug tested, as opposed to mysteriously resigning after he submitted the urine sample. In addition, when respondent explained to Inspector Sill that he missed so many days of work on "sick leave" because he was caring for his father stricken with cancer, he was unable to tell her what kind of cancer he had. It is assumed a child caring for a parent stricken with cancer would know that detail. Respondent also did not establish a credible

reason why his former colleagues at work would falsely tell their supervisors at work about respondent's frequent marijuana use, only to have their complaints corroborated by his testing positive for marijuana. Overall, respondent's denials and explanations were not persuasive and were given no credit.

13. Respondent's brother-in-law, Edmundo Sumabat, Jr., testified on respondent's behalf. He testified that he did not believe his brother-in-law, respondent, was a frequent or chronic user of marijuana because he had not seen respondent "use pot" before. Mr. Sumabat's testimony was not persuasive for several reasons. First, his familial relationship would tend to bias him in favor of respondent. Second, respondent does not live with Mr. Sumabat and one would not immediately suspect a person using a controlled substance would do so in front of a relative. Third, when Mr. Sumabat explained he had been with respondent when he had spent time caring for his sick father, Mr. Sumabat was unable to specify the illness of respondent's father. One would expect he would know that detail.

14. Respondent has no prior history of discipline with the Board and no evidence presented suggests he has any criminal record.

15. Respondent worked for McGuff from June 2012 until he hastily resigned in July 2014. No evidence was presented indicating he had any problems at McGuff, other than as explained above. Respondent found a new job as a pharmacy technician at Care Meds Pharmacy sometime in 2015. Respondent presented several character reference letters from a supervisor and colleagues at Care Meds Pharmacy which corroborated his testimony that he has done well at that pharmacy and has no record of problems there. Respondent submitted several other positive character reference letters from friends and family members. However, those letters are of limited value because they are administrative hearsay. (Gov. Code, § 11513, subd. (d).) Moreover, all but one of the letters ignore the main allegation in this case, that respondent is a chronic marijuana user. The only letter mentioning that issue, written by respondent's sister-in-law Hazel Sumabat Ganay, contained no denial that respondent is a chronic user.

Costs

16. A. The Board incurred costs in the amount of \$1,834.25 based on Inspector Sill's investigation of the matter. Those costs are reasonable.

B. The Board also incurred costs in the amount of \$4,775 based on fees billed by attorneys and paralegals of the Department of Justice in prosecuting this matter. However, four different deputy attorneys general have been assigned to work on this case, as it has been assigned and reassigned. Without more clear and specific timesheets or other billing documents, it is impossible to differentiate the tasks the various attorneys completed. Based on the chronology of the time billed, it appears that much of the work was duplicated as different attorneys were assigned or reassigned to the case. Under these circumstances, a reasonable amount of attorney's fees would be those associated with the work performed by the attorney initially assigned to the case who prepared and filed the operative pleading

(Leslie A. Walden), the attorney who actually prepared for and prosecuted the hearing of this matter (Nancy A. Kaiser), and the paralegals who worked on the case. The amount of those individuals' fees billed to the Board is \$1,927.

C. Based on the above, the Board incurred reasonable costs in the investigation and prosecution of this matter in the amount of \$3,761.25.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The Board bears the burden of proving cause for discipline exists. (Evid. Code, § 115.) The standard of proof is preponderance of the evidence, because pharmacy technicians hold an occupational license, not a professional one. (See *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856; *Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-918; the Board's "Disciplinary Guidelines" [rev. 10/2007] (Guidelines), at p. 43.)

Cause for Discipline

2. First Cause for Discipline (Unlawful Possession of a Controlled Substance). Respondent is subject to disciplinary action pursuant to Business and Professions Code section 4060, in conjunction with section 4301, subdivision (j), and Health and Safety Code section 11170. It was established by a preponderance of the evidence that respondent was in possession of a controlled substance and/or administered or furnished a controlled substance for his own use without a prescription. Specifically, a drug test of a sample submitted by respondent on July 21, 2014, tested positive for marijuana. Respondent's explanation that he had inadvertently consumed marijuana was not persuasive and was outweighed by anecdotal evidence indicating he is a chronic user of marijuana. (Factual Findings 6-13.)

3A. Second Cause for Discipline (Unprofessional Conduct- Functioning Under the Influence of a Controlled Substance). Cause was not established to subject respondent to disciplinary action pursuant to Business and Professions Code section 4301, subdivision (h), for administering to himself a controlled substance to the extent the use impaired him from conducting himself with safety to the public in the practice authorized by his license. It was not established by a preponderance that respondent was ever impaired at work as a result of drug use. Although he submitted a sample on July 21, 2014, which later tested positive for marijuana, it was not established that the level of marijuana detected in his system that day would have impaired him. (Factual Findings 6-13.)

3B. For the same reason, it was not established respondent is subject to disciplinary action pursuant to Business and Professions Code section 4327, for selling, dispensing or compounding a drug while under the influence of any dangerous drug. (Factual Findings 6-13.)

Disposition

4A. Since cause for discipline was established, the level of warranted discipline must be determined. In reaching a decision on disciplining a license, the Guidelines must be considered. (Cal. Code Regs, tit. 16, § 1760.)

4B. The Guidelines list 15 different factors to be considered in determining the level of discipline to be imposed, most of which are in respondent's favor. For example, no actual harm was done to the public (factor 1) or to any consumer (factor 2). Respondent has no prior disciplinary record with the Board (factor 3) and he has received no prior warnings (factor 4). The discipline is based on one charge of unlawful possession and use of a drug (factor 5). The misconduct is deemed to be less than serious (factor 6). In mitigation, respondent has shown technical proficiency in two jobs as a pharmacy technician (factor 8). He presented character reference letters, which provided limited evidence of some rehabilitation (factor 9). No evidence suggests respondent has a criminal record (factors 10-12). He derived no financial benefit from his misconduct (factor 15). There are just a few factors not in respondent's favor. His elaborate attempts to manipulate drug tests and his denial of responsibility for his misconduct are aggravating facts (factor 7). His misconduct is fairly recent (factor 13), and was the result of intentional conduct (factor 14). (Factual Findings 1-15.)

4C. After considering the factual findings and legal conclusions above, and applying the Guideline factors discussed above, a minimum level of discipline is warranted in this case. While respondent's marijuana use is concerning, no evidence suggests his personal use has affected his work as a pharmacy technician. So far as can be discerned, respondent has a good track record at work. The public can be adequately protected by placing respondent's license on a minimum level of probation.

4D. The Guidelines recommend a five-year probation for minimum violations, under all standard terms and appropriate optional terms related to drug use. (Guidelines, at p. 44.) Given past concerns about respondent devising elaborate means to manipulate drug testing, he should be personally observed when submitting samples for drug tests. The Guidelines also state the Board expects licensees placed on probation to obtain certification pursuant to Business and Professions Code section 4202, subdivision (a)(4). However, the Guidelines also suggest a 90-day suspension. Given that respondent will be suspended while he obtains a certificate and that his misconduct was in the minimum range, an actual suspension is not warranted and should not be imposed.

5. Pursuant to Business and Professions Code section 125.3, the reasonable costs of investigating and prosecuting this disciplinary matter were \$3,761.25. Respondent should be required to reimburse the Board those costs. (Factual Finding 16.)

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ORDER

Pharmacy Technician Registration number TCH 96273, issued to respondent Marc F. Vargas, is revoked; however the revocation is stayed and respondent is placed on probation for five years upon the following terms and conditions:

1. Certification Prior to Resuming Work

Respondent shall be automatically suspended from working as a pharmacy technician until he is certified as defined by Business and Professions Code section 4202, subdivision (a)(4), and provides satisfactory proof of certification to the Board. Respondent shall not resume working as a pharmacy technician until notified by the Board. Failure to achieve certification within one year shall be considered a violation of probation. Respondent shall not resume working as a pharmacy technician until notified by the Board.

During the suspension, respondent shall not enter any pharmacy area or any portion of any other Board licensed premises (wholesaler, veterinary food-animal drug retailer or any other distributor of drugs) any drug manufacturer, or any other location where dangerous drugs and devices or controlled substances are maintained. Respondent shall not do any act involving drug selection, selection of stock, manufacturing, compounding or dispensing; nor shall respondent manage, administer, or assist any licensee of the Board. Respondent shall not have access to or control the ordering, manufacturing or dispensing of dangerous drugs and devices or controlled substances. Respondent shall not resume work until notified by the Board.

Failure to comply with this suspension shall be considered a violation of probation.

2. Obey All Laws

Respondent shall obey all state and federal laws and regulations.

Respondent shall report any of the following occurrences to the Board, in writing, within 72 hours of such occurrence:

- an arrest or issuance of a criminal complaint for violation of any provision of the Pharmacy Law, state and federal food and drug laws, or state and federal controlled substances laws;
- a plea of guilty or nolo contendere in any state or federal criminal proceeding to any criminal complaint, information or indictment;
- a conviction of any crime; or

- discipline, citation, or other administrative action filed by any state or federal agency which involves respondent's pharmacy technician registration license or which is related to the practice of pharmacy or the manufacturing, obtaining, handling, distributing, billing, or charging for any drug, device or controlled substance.

Failure to timely report any such occurrence shall be considered a violation of probation.

3. Report to the Board

Respondent shall report to the Board quarterly, on a schedule as directed by the Board or its designee. The report shall be made either in person or in writing, as directed. Among other requirements, respondent shall state in each report under penalty of perjury whether there has been compliance with all the terms and conditions of probation. Failure to submit timely reports in a form as directed shall be considered a violation of probation. Any period(s) of delinquency in submission of reports as directed may be added to the total period of probation. Moreover, if the final probation report is not made as directed, probation shall be automatically extended until such time as the final report is made and accepted by the Board.

4. Interview with the Board

Upon receipt of reasonable prior notice, respondent shall appear in person for interviews with the Board or its designee, at such intervals and locations as are determined by the Board or its designee. Failure to appear for any scheduled interview without prior notification to Board staff, or failure to appear at two or more scheduled interviews with the Board or its designee during the period of probation, shall be considered a violation of probation.

5. Cooperate with Board Staff

Respondent shall cooperate with the Board's inspection program and with the Board's monitoring and investigation of respondent's compliance with the terms and conditions of his probation. Failure to cooperate shall be considered a violation of probation.

6. Notice to Employers

During the period of probation, respondent shall notify all present and prospective employers of the decision in case number 5392 and the terms, conditions and restrictions imposed on respondent by the decision, as follows:

Within 30 days of the effective date of this decision, and within 15 days of respondent undertaking any new employment, respondent shall cause his direct supervisor, pharmacist-in-charge (including each new pharmacist-in-charge employed during respondent's tenure of employment) and owner to report to the Board in writing acknowledging that the listed individual(s) has/have read the decision in case number 5392 and the terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that his employer(s) and/or supervisor(s) submit timely acknowledgement(s) to the Board.

If respondent works for or is employed by or through a pharmacy employment service, respondent must notify his direct supervisor, pharmacist-in-charge and owner at every pharmacy of the terms and conditions of the decision in case number 5392 in advance of the respondent commencing work at each pharmacy. A record of this notification must be provided to the Board upon request.

Furthermore, within 30 days of the effective date of this decision, and within 15 days of respondent undertaking any new employment by or through a pharmacy employment service, respondent shall cause his direct supervisor with the pharmacy employment service to report to the Board in writing acknowledging that he or she has read the decision in case number 5392 and the terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that his employer(s) and/or supervisor(s) submit timely acknowledgment(s) to the Board.

Failure to timely notify present or prospective employer(s) or to cause that/those employer(s) to submit timely acknowledgements to the Board shall be considered a violation of probation.

"Employment" within the meaning of this provision shall include any full-time, part-time, temporary or relief service or pharmacy management service as a pharmacy technician or in any position for which a pharmacy technician license is a requirement or criterion for employment, whether the respondent is considered an employee, independent contractor or volunteer.

7. Reimbursement of Board Costs

As a condition precedent to successful completion of probation, respondent shall pay to the Board its costs of investigation and prosecution in the amount of \$3,761.25. Respondent may pay in even monthly installments pursuant to a payment plan approved by the Board. There shall be no deviation from this schedule absent prior written approval by the Board or its designee. Failure to pay costs by the deadline(s) as directed shall be considered a violation of probation.

A court of competent jurisdiction will determine whether the filing of bankruptcy by respondent shall relieve him of responsibility to reimburse the Board its costs of investigation and prosecution.

8. Probation Monitoring Costs

Respondent shall pay any costs associated with probation monitoring as determined by the Board each and every year of probation. Such costs shall be payable to the Board on a schedule as directed by the Board or its designee. Failure to pay such costs by the deadline(s) as directed shall be considered a violation of probation.

9. Status of License

Respondent shall, at all times while on probation, maintain an active, current pharmacy technician registration with the Board, including any period during which suspension or probation is tolled. Failure to maintain an active, current license shall be considered a violation of probation.

If respondent's pharmacy technician registration expires or is cancelled by operation of law or otherwise at any time during the period of probation, including any extensions thereof due to tolling or otherwise, upon renewal or reapplication respondent's registration shall be subject to all terms and conditions of this probation not previously satisfied.

10. License Surrender While on Probation/Suspension

Following the effective date of this decision, should respondent cease work due to retirement or health, or be otherwise unable to satisfy the terms and conditions of probation, respondent may tender his pharmacy technician registration to the Board for surrender. The Board or its designee shall have the discretion whether to grant the request for surrender or take any other action it deems appropriate and reasonable. Upon formal acceptance of the surrender of the registration, respondent will no longer be subject to the terms and conditions of probation. This surrender constitutes a record of discipline and shall become a part of the respondent's license history with the Board.

Upon acceptance of the surrender, respondent shall relinquish his pharmacy technician registration to the Board within 10 days of notification by the Board that the surrender is accepted. Respondent may not reapply for any license, permit, or registration from the Board for three years from the effective date of the surrender. Respondent shall meet all requirements applicable to the license sought as of the date the application for that license is submitted to the Board.

11. Notification of a Change in Name, Residence Address, Mailing Address or Employment

Respondent shall notify the Board in writing within 10 days of any change of employment. Said notification shall include the reasons for leaving, the address of the new

employer, the name of the supervisor and owner, and the work schedule if known. Respondent shall further notify the Board in writing within 10 days of a change in name, residence address and mailing address, or phone number.

Failure to timely notify the Board of any change in employer(s), name(s), address(es), or phone number(s) shall be considered a violation of probation.

12. Tolling of Probation

Except during periods of suspension, respondent shall, at all times while on probation, be employed as a pharmacy technician in California for a minimum of 80 hours per calendar month. Any month during which this minimum is not met shall toll the period of probation, i.e., the period of probation shall be extended by one month for each month during which this minimum is not met. During any such period of tolling of probation, respondent must nonetheless comply with all terms and conditions of probation.

Should respondent, regardless of residency, for any reason (including vacation) cease working as a pharmacy technician for a minimum of 80 hours per calendar month in California, respondent must notify the Board in writing within 10 days of cessation of work and must further notify the Board in writing within 10 days of the resumption of the work. Any failure to provide such notification(s) shall be considered a violation of probation.

It is a violation of probation for respondent's probation to remain tolled pursuant to the provisions of this condition for a total period, counting consecutive and non-consecutive months, exceeding 36 months.

“Cessation of work” means calendar month during which respondent is not working for at least 80 hours as a pharmacy technician, as defined in Business and Professions Code section 4115. “Resumption of work” means any calendar month during which respondent is working as a pharmacy technician for at least 80 hours as a pharmacy technician as defined by Business and Professions Code section 4115.

13. Violation of Probation

If respondent has not complied with any term or condition of probation, the Board shall have continuing jurisdiction over respondent, and probation shall automatically be extended, until all terms and conditions have been satisfied or the Board has taken other action as deemed appropriate to treat the failure to comply as a violation of probation, to terminate probation, and to impose the penalty that was stayed.

If respondent violates probation in any respect, the Board, after giving respondent notice and an opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. Notice and opportunity to be heard are not required for those

provisions stating that a violation thereof may lead to automatic termination of the stay and/or revocation of the license. If a petition to revoke probation or an accusation is filed against respondent during probation, the Board shall have continuing jurisdiction, and the period of probation shall be automatically extended until the petition to revoke probation or accusation is heard and decided.

14. Completion of Probation

Upon written notice by the Board indicating successful completion of probation, respondent's pharmacy technician registration will be fully restored.

15. No Ownership of Licensed Premises

Respondent shall not own, have any legal or beneficial interest in, or serve as a manager, administrator, member, officer, director, trustee, associate, or partner of any business, firm, partnership, or corporation currently or hereinafter licensed by the Board. Respondent shall sell or transfer any legal or beneficial interest in any entity licensed by the Board within 90 days following the effective date of this decision and shall immediately thereafter provide written proof thereof to the Board. Failure to timely divest any legal or beneficial interest(s) or provide documentation thereof shall be considered a violation of probation.

16. Attend Substance Abuse Recovery Relapse Prevention and Support Groups

Within 30 days of the effective date of this decision, respondent shall begin regular attendance at a recognized and established substance abuse recovery support group in California, (e.g., Alcoholics Anonymous, Narcotics Anonymous, etc.) which has been approved by the Board or its designee. Respondent must attend at least one group meeting per week unless otherwise directed by the Board or its designee. Respondent shall continue regular attendance and submit signed and dated documentation confirming attendance with each quarterly report for the duration of probation. Failure to attend or submit documentation thereof shall be considered a violation of probation.

17. Random Drug Screening

Respondent, at his own expense, shall participate in random testing, including but not limited to biological fluid testing (urine, blood), breathalyzer, hair follicle testing, or other drug screening program as directed by the Board or its designee. Respondent shall be personally observed by a third party when submitting the sample, including a urine sample.

Respondent may be required to participate in testing for the entire probation period and the frequency of testing will be determined by the Board or its designee. At all times respondent shall fully cooperate with the Board or its designee, and shall, when directed, submit to such tests and samples for the detection of alcohol, narcotics, hypnotics, dangerous drugs or other controlled substances as the Board or its designee may direct. Failure to timely submit to testing as directed shall be considered a violation of probation. Upon request of the Board or its designee, respondent shall provide documentation from a licensed practitioner that the prescription for a detected drug was legitimately issued and is a necessary part of the treatment of the respondent. Failure to timely provide such documentation shall be considered a violation of probation. Any confirmed positive test for alcohol or for any drug not lawfully prescribed by a licensed practitioner as part of a documented medical treatment shall be considered a violation of probation and shall result in the automatic suspension of work by respondent. Respondent may not resume work as a pharmacy technician until notified by the Board in writing.

During suspension, respondent shall not enter any pharmacy area or any portion of or any other Board licensed premises (wholesaler, veterinary food-animal drug retailer or any other distributor of drugs) any drug manufacturer, or any other location where dangerous drugs and devices or controlled substances are maintained. Respondent shall not do any act involving drug selection, selection of stock, manufacturing, compounding or dispensing; nor shall respondent manage, administer, or assist any licensee of the Board. Respondent shall not have access to or control the ordering, manufacturing or dispensing of dangerous drugs and devices or controlled substances. Respondent shall not resume work until notified by the Board.

Respondent shall not direct, control or perform any aspect of the practice of pharmacy. Subject to the above restrictions, respondent may continue to own or hold an interest in any licensed premises in which he holds an interest at the time this decision becomes effective unless otherwise specified in this order.

Failure to comply with this suspension shall be considered a violation of probation.

18. Notification of Departure

Prior to leaving the probationary geographic area designated by the Board or its designee for a period greater than 24 hours, respondent shall notify the Board verbally and in writing of the dates of departure and return. Failure to comply with this provision shall be considered a violation of probation.

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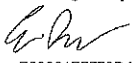
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19. Abstain from Drugs and Alcohol Use

Respondent shall completely abstain from the possession or use of alcohol, controlled substances, dangerous drugs and their associated paraphernalia except when the drugs are lawfully prescribed by a licensed practitioner as part of a documented medical treatment. Upon request of the Board or its designee, respondent shall provide documentation from the licensed practitioner that the prescription for the drug was legitimately issued and is a necessary part of the treatment of respondent. Failure to timely provide such documentation shall be considered a violation of probation. Respondent shall ensure that he is not in the same physical location as individuals who are using illicit substances even if respondent is not personally ingesting the drugs. Any possession or use of alcohol, controlled substances, or their associated paraphernalia not supported by the documentation timely provided, and/or any physical proximity to persons using illicit substances, shall be considered a violation of probation.

DATED: August 30, 2016

DocuSigned by:

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ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings

PROPOSED DECISION

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

In the Matter of the Accusation Against:

MARC F. VARGAS

Pharmacy Technician Registration No.
TCH 96273,

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Case No. 5392

OAH No. 2015120414

PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on June 16, 2016, in Los Angeles. The record was closed and the matter submitted for decision at the conclusion of the hearing.

Nancy A. Kaiser, Deputy Attorney General, represented Virginia Herold (complainant).

Marc F. Vargas (respondent) was present and represented himself.

FACTUAL FINDINGS

1. On December 10, 2009, the Board of Pharmacy (Board), which is within the California Department of Consumer Affairs, issued Pharmacy Technician Registration No. TCH 96273 to respondent. The registration will expire on September 30, 2017, unless renewed.

2. The Accusation was brought by complainant in her official capacity as the Executive Officer of the Board. The Accusation alleges cause exists to discipline respondent's license based on a positive drug test at work prompting his resignation.

3. Respondent timely submitted a Notice of Defense, which contained a request for a hearing to challenge the Accusation.

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Respondent Resigns from His Pharmacy Technician Job

4. Respondent was employed as a full-time pharmacy technician at McGuff Compounding Pharmacy (McGuff) located in Santa Ana, California.

5. A compounding pharmacy prepares individual drugs to meet the prescriber's exact specifications and are dispensed directly to the patient or the prescriber, unlike pharmaceutical manufacturers, who mass produce various types of drugs for the general public. Compound pharmacies in California are licensed by the Board and the compounding is performed or supervised by a pharmacist licensed by the Board. The preparations offered by compounding pharmacies can be nonsterile (ointments, creams, liquids, or capsules that are used in areas of the body where absolute sterility is not necessary) or sterile (usually intended for injection into body tissues or the blood). The riskiest activity performed by a compounding pharmacy is converting nonsterile products into sterile ones that are internally consumed by patients, because it is vital that the items ingested or infused into the patients are in fact sterile. Because pharmacy technicians are intimately involved in the compounding process, under the supervision of licensed pharmacists, it is vital and a matter of public protection that pharmacy technicians not be impaired by drugs or alcohol while at the workplace involved in such high risk activity.

6. On July 21, 2014, respondent was asked to submit to a random urine drug test after his work-shift began by his supervisor at McGuff. Respondent complied and was personally escorted by his supervisor to the drug testing facility. After respondent was administered the drug test, he went on his lunch break. However, respondent failed to return to work from his lunch break. He later sent an email to McGuff, at approximately 1:22 p.m., in which he tendered his resignation. His resignation was accepted and respondent was immediately terminated.

7. On July 24, 2014, McGuff received the report from respondent's urine drug test taken on July 21, 2014. The report showed respondent's urine was positive for marijuana, which is a Schedule I controlled substance, as defined by Health and Safety Code section 11054, subdivision (b)(48)(d)(13).

8. On July 24, 2014, McGuff's Pharmacist-in-Charge (PIC) sent an email informing the Board that respondent had tested positive for marijuana as part of its routine drug testing of employees.

The Board's Investigation and Respondent's Evidence

9. The Board assigned Inspector Katherine Sill to investigate the email received from McGuff. Inspector Sill visited the McGuff facility, interviewed respondent's former supervisor and several former pharmacy technician colleagues, reviewed documents and later interviewed respondent. One of the McGuff pharmacy technicians interviewed, Thang Pham, testified during the hearing.

10. During her investigation, Inspector Sill found no evidence indicating respondent had ever exhibited signs of being under the influence of alcohol or drugs at work.

11. However, several employees who worked with respondent at McGuff advised Inspector Sill that respondent had bragged to them that he smoked “weed” or “pot” almost daily. They also recounted how respondent had shown them a “piggy-back” intravenous device holding “fake urine,” which respondent said he used to pass random drug tests. Respondent had been subjected to at least two prior drugs tests before the one in question, neither of which he failed. The employees told Inspector Sill they complained to management about respondent’s marijuana use only after he began “calling in sick” an inordinate number of days, which irritated them. For this reason, these employees asked respondent’s supervisor to personally take respondent to the drug testing facility when he was next drug tested in order to prevent respondent from using the “piggy-back” device he had developed. That is precisely what happened when respondent was tested on July 21, 2014. Respondent has no prescription or medical recommendation to use marijuana.

12. During his interview with Inspector Sill and in his testimony at the hearing, respondent denied smoking marijuana or using the “piggy-back” device described by his former work colleagues. Respondent’s testimony was not persuasive. Respondent admits he resigned from his job because he knew his drug test would turn out positive for marijuana. But he offered an uncorroborated and self-serving explanation: he ate a treat at a party laced with marijuana unbeknownst to him until after he ate it. Moreover, respondent failed to offer a satisfactory reason why he failed to disclose that situation to his supervisor at work after being told he would be drug tested, as opposed to mysteriously resigning after he submitted the urine sample. In addition, when respondent explained to Inspector Sill that he missed so many days of work on “sick leave” because he was caring for his father stricken with cancer, he was unable to tell her what kind of cancer he had. It is assumed a child caring for a parent stricken with cancer would know that detail. Respondent also did not establish a credible reason why his former colleagues at work would falsely tell their supervisors at work about respondent’s frequent marijuana use, only to have their complaints corroborated by his testing positive for marijuana. Overall, respondent’s denials and explanations were not persuasive and were given no credit.

13. Respondent’s brother-in-law, Edmundo Sumabat, Jr., testified on respondent’s behalf. He testified that he did not believe his brother-in-law, respondent, was a frequent or chronic user of marijuana because he had not seen respondent “use pot” before. Mr. Sumabat’s testimony was not persuasive for several reasons. First, his familial relationship would tend to bias him in favor of respondent. Second, respondent does not live with Mr. Sumabat and one would not immediately suspect a person using a controlled substance would do so in front of a relative. Third, when Mr. Sumabat explained he had been with respondent when he had spent time caring for his sick father, Mr. Sumabat was unable to specify the illness of respondent’s father. One would expect he would know that detail.

14. Respondent has no prior history of discipline with the Board and no evidence presented suggests he has any criminal record.

15. Respondent worked for McGuff from June 2012 until he hastily resigned in July 2014. No evidence was presented indicating he had any problems at McGuff, other than as explained above. Respondent found a new job as a pharmacy technician at Care Meds Pharmacy sometime in 2015. Respondent presented several character reference letters from a supervisor and colleagues at Care Meds Pharmacy which corroborated his testimony that he has done well at that pharmacy and has no record of problems there. Respondent submitted several other positive character reference letters from friends and family members. However, those letters are of limited value because they are administrative hearsay. (Gov. Code, § 11513, subd. (d).) Moreover, all but one of the letters ignore the main allegation in this case, that respondent is a chronic marijuana user. The only letter mentioning that issue, written by respondent's sister-in-law Hazel Sumabat Ganay, contained no denial that respondent is a chronic user.

Costs

16. A. The Board incurred costs in the amount of \$1,834.25 based on Inspector Sill's investigation of the matter. Those costs are reasonable.

B. The Board also incurred costs in the amount of \$4,775 based on fees billed by attorneys and paralegals of the Department of Justice in prosecuting this matter. However, four different deputy attorneys general have been assigned to work on this case, as it has been assigned and reassigned. Without more clear and specific timesheets or other billing documents, it is impossible to differentiate the tasks the various attorneys completed. Based on the chronology of the time billed, it appears that much of the work was duplicated as different attorneys were assigned or reassigned to the case. Under these circumstances, a reasonable amount of attorney's fees would be those associated with the work performed by the attorney initially assigned to the case who prepared and filed the operative pleading (Leslie A. Walden), the attorney who actually prepared for and prosecuted the hearing of this matter (Nancy A. Kaiser), and the paralegals who worked on the case. The amount of those individuals' fees billed to the Board is \$1,927.

C. Based on the above, the Board incurred reasonable costs in the investigation and prosecution of this matter in the amount of \$3,761.25.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The Board bears the burden of proving cause for discipline exists. (Evid. Code, § 115.) The standard of proof is preponderance of the evidence, because pharmacy technicians hold an occupational license, not a professional one. (See *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856; *Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-918; the Board's "Disciplinary Guidelines" [rev. 10/2007] (Guidelines), at p. 43.)

Cause for Discipline

2. First Cause for Discipline (Unlawful Possession of a Controlled Substance). Respondent is subject to disciplinary action pursuant to Business and Professions Code section 4060, in conjunction with section 4301, subdivision (j), and Health and Safety Code section 11170. It was established by a preponderance of the evidence that respondent was in possession of a controlled substance and/or administered or furnished a controlled substance for his own use without a prescription. Specifically, a drug test of a sample submitted by respondent on July 21, 2014, tested positive for marijuana. Respondent's explanation that he had inadvertently consumed marijuana was not persuasive and was outweighed by anecdotal evidence indicating he is a chronic user of marijuana. (Factual Findings 6-13.)

3A. Second Cause for Discipline (Unprofessional Conduct- Functioning Under the Influence of a Controlled Substance). Cause was not established to subject respondent to disciplinary action pursuant to Business and Professions Code section 4301, subdivision (h), for administering to himself a controlled substance to the extent the use impaired him from conducting himself with safety to the public in the practice authorized by his license. It was not established by a preponderance that respondent was ever impaired at work as a result of drug use. Although he submitted a sample on July 21, 2014, which later tested positive for marijuana, it was not established that the level of marijuana detected in his system that day would have impaired him. (Factual Findings 6-13.)

3B. For the same reason, it was not established respondent is subject to disciplinary action pursuant to Business and Professions Code section 4327, for selling, dispensing or compounding a drug while under the influence of any dangerous drug. (Factual Findings 6-13.)

Disposition

4A. Since cause for discipline was established, the level of warranted discipline must be determined. In reaching a decision on disciplining a license, the Guidelines must be considered. (Cal. Code Regs, tit. 16, § 1760.)

4B. The Guidelines list 15 different factors to be considered in determining the level of discipline to be imposed, most of which are in respondent's favor. For example, no actual harm was done to the public (factor 1) or to any consumer (factor 2). Respondent has no prior disciplinary record with the Board (factor 3) and he has received no prior warnings (factor 4). The discipline is based on one charge of unlawful possession and use of a drug (factor 5). The misconduct is deemed to be less than serious (factor 6). In mitigation, respondent has shown technical proficiency in two jobs as a pharmacy technician (factor 8). He presented character reference letters, which provided limited evidence of some rehabilitation (factor 9). No evidence suggests respondent has a criminal record (factors 10-12). He derived no financial benefit from his misconduct (factor 15). There are just a few factors not in respondent's favor. His elaborate attempts to manipulate drug tests and his denial of responsibility for his misconduct are aggravating facts (factor 7). His misconduct is fairly recent (factor 13), and was the result of intentional conduct (factor 14). (Factual Findings 1-15.)

4C. After considering the factual findings and legal conclusions above, and applying the Guideline factors discussed above, a minimum level of discipline is warranted in this case. While respondent's marijuana use is concerning, no evidence suggests his personal use has affected his work as a pharmacy technician. So far as can be discerned, respondent has a good track record at work. The public can be adequately protected by placing respondent's license on a minimum level of probation.

4D. The Guidelines recommend a five-year probation for minimum violations, under all standard terms and appropriate optional terms related to drug use. (Guidelines, at p. 44.) Given past concerns about respondent devising elaborate means to manipulate drug testing, he should be personally observed when submitting samples for drug tests. The Guidelines also state the Board expects licensees placed on probation to obtain certification pursuant to Business and Professions Code section 4202, subdivision (a)(4). However, the Guidelines also suggest a 90-day suspension. Given that respondent will be suspended while he obtains a certificate and that his misconduct was in the minimum range, an actual suspension is not warranted and should not be imposed.

5. Pursuant to Business and Professions Code section 125.3, the reasonable costs of investigating and prosecuting this disciplinary matter were \$3,761.25. Respondent should be required to reimburse the Board those costs. (Factual Finding 16.)

ORDER

Pharmacy Technician Registration number TCH 96273, issued to respondent Marc F. Vargas, is revoked; however the revocation is stayed and respondent is placed on probation for five years upon the following terms and conditions:

1. Certification Prior to Resuming Work

Respondent shall be automatically suspended from working as a pharmacy technician until he is certified as defined by Business and Professions Code section 4202, subdivision (a)(4), and provides satisfactory proof of certification to the Board. Respondent shall not resume working as a pharmacy technician until notified by the Board. Failure to achieve certification within one year shall be considered a violation of probation. Respondent shall not resume working as a pharmacy technician until notified by the Board.

During the suspension, respondent shall not enter any pharmacy area or any portion of any other Board licensed premises (wholesaler, veterinary food-animal drug retailer or any other distributor of drugs) any drug manufacturer, or any other location where dangerous drugs and devices or controlled substances are maintained. Respondent shall not do any act involving drug selection, selection of stock, manufacturing, compounding or dispensing; nor shall respondent manage, administer, or assist any licensee of the Board. Respondent shall not have access to or control the ordering, manufacturing or dispensing of dangerous drugs

and devices or controlled substances. Respondent shall not resume work until notified by the Board.

Failure to comply with this suspension shall be considered a violation of probation.

2. Obey All Laws

Respondent shall obey all state and federal laws and regulations.

Respondent shall report any of the following occurrences to the Board, in writing, within 72 hours of such occurrence:

- an arrest or issuance of a criminal complaint for violation of any provision of the Pharmacy Law, state and federal food and drug laws, or state and federal controlled substances laws;
- a plea of guilty or nolo contendere in any state or federal criminal proceeding to any criminal complaint, information or indictment;
- a conviction of any crime; or
- discipline, citation, or other administrative action filed by any state or federal agency which involves respondent's pharmacy technician registration license or which is related to the practice of pharmacy or the manufacturing, obtaining, handling, distributing, billing, or charging for any drug, device or controlled substance.

Failure to timely report any such occurrence shall be considered a violation of probation.

3. Report to the Board

Respondent shall report to the Board quarterly, on a schedule as directed by the Board or its designee. The report shall be made either in person or in writing, as directed. Among other requirements, respondent shall state in each report under penalty of perjury whether there has been compliance with all the terms and conditions of probation. Failure to submit timely reports in a form as directed shall be considered a violation of probation. Any period(s) of delinquency in submission of reports as directed may be added to the total period of probation. Moreover, if the final probation report is not made as directed, probation shall be automatically extended until such time as the final report is made and accepted by the Board.

4. Interview with the Board

Upon receipt of reasonable prior notice, respondent shall appear in person for interviews with the Board or its designee, at such intervals and locations as are determined by the Board or its designee. Failure to appear for any scheduled interview without prior

notification to Board staff, or failure to appear at two or more scheduled interviews with the Board or its designee during the period of probation, shall be considered a violation of probation.

5. Cooperate with Board Staff

Respondent shall cooperate with the Board's inspection program and with the Board's monitoring and investigation of respondent's compliance with the terms and conditions of his probation. Failure to cooperate shall be considered a violation of probation.

6. Notice to Employers

During the period of probation, respondent shall notify all present and prospective employers of the decision in case number 5392 and the terms, conditions and restrictions imposed on respondent by the decision, as follows:

Within 30 days of the effective date of this decision, and within 15 days of respondent undertaking any new employment, respondent shall cause his direct supervisor, pharmacist-in-charge (including each new pharmacist-in-charge employed during respondent's tenure of employment) and owner to report to the Board in writing acknowledging that the listed individual(s) has/have read the decision in case number 5392 and the terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that his employer(s) and/or supervisor(s) submit timely acknowledgement(s) to the Board.

If respondent works for or is employed by or through a pharmacy employment service, respondent must notify his direct supervisor, pharmacist-in-charge and owner at every pharmacy of the terms and conditions of the decision in case number 5392 in advance of the respondent commencing work at each pharmacy. A record of this notification must be provided to the Board upon request.

Furthermore, within 30 days of the effective date of this decision, and within 15 days of respondent undertaking any new employment by or through a pharmacy employment service, respondent shall cause his direct supervisor with the pharmacy employment service to report to the Board in writing acknowledging that he or she has read the decision in case number 5392 and the terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that his employer(s) and/or supervisor(s) submit timely acknowledgment(s) to the Board.

Failure to timely notify present or prospective employer(s) or to cause that/those employer(s) to submit timely acknowledgements to the Board shall be considered a violation of probation.

"Employment" within the meaning of this provision shall include any full-time, part-time, temporary or relief service or pharmacy management service as a pharmacy technician or in any position for which a pharmacy technician license is a requirement or criterion for

employment, whether the respondent is considered an employee, independent contractor or volunteer.

7. Reimbursement of Board Costs

As a condition precedent to successful completion of probation, respondent shall pay to the Board its costs of investigation and prosecution in the amount of \$3,761.25. Respondent may pay in even monthly installments pursuant to a payment plan approved by the Board. There shall be no deviation from this schedule absent prior written approval by the Board or its designee. Failure to pay costs by the deadline(s) as directed shall be considered a violation of probation.

A court of competent jurisdiction will determine whether the filing of bankruptcy by respondent shall relieve him of responsibility to reimburse the Board its costs of investigation and prosecution.

8. Probation Monitoring Costs

Respondent shall pay any costs associated with probation monitoring as determined by the Board each and every year of probation. Such costs shall be payable to the Board on a schedule as directed by the Board or its designee. Failure to pay such costs by the deadline(s) as directed shall be considered a violation of probation.

9. Status of License

Respondent shall, at all times while on probation, maintain an active, current pharmacy technician registration with the Board, including any period during which suspension or probation is tolled. Failure to maintain an active, current license shall be considered a violation of probation.

If respondent's pharmacy technician registration expires or is cancelled by operation of law or otherwise at any time during the period of probation, including any extensions thereof due to tolling or otherwise, upon renewal or reapplication respondent's registration shall be subject to all terms and conditions of this probation not previously satisfied.

10. License Surrender While on Probation/Suspension

Following the effective date of this decision, should respondent cease work due to retirement or health, or be otherwise unable to satisfy the terms and conditions of probation, respondent may tender his pharmacy technician registration to the Board for surrender. The Board or its designee shall have the discretion whether to grant the request for surrender or take any other action it deems appropriate and reasonable. Upon formal acceptance of the surrender of the registration, respondent will no longer be subject to the terms and conditions of probation. This surrender constitutes a record of discipline and shall become a part of the respondent's license history with the Board.

Upon acceptance of the surrender, respondent shall relinquish his pharmacy technician registration to the Board within 10 days of notification by the Board that the surrender is accepted. Respondent may not reapply for any license, permit, or registration from the Board for three years from the effective date of the surrender. Respondent shall meet all requirements applicable to the license sought as of the date the application for that license is submitted to the Board.

11. Notification of a Change in Name, Residence Address, Mailing Address or Employment

Respondent shall notify the Board in writing within 10 days of any change of employment. Said notification shall include the reasons for leaving, the address of the new employer, the name of the supervisor and owner, and the work schedule if known. Respondent shall further notify the Board in writing within 10 days of a change in name, residence address and mailing address, or phone number.

Failure to timely notify the Board of any change in employer(s), name(s), address(es), or phone number(s) shall be considered a violation of probation.

12. Tolling of Probation

Except during periods of suspension, respondent shall, at all times while on probation, be employed as a pharmacy technician in California for a minimum of 20 hours per calendar month. Any month during which this minimum is not met shall toll the period of probation, i.e., the period of probation shall be extended by one month for each month during which this minimum is not met. During any such period of tolling of probation, respondent must nonetheless comply with all terms and conditions of probation.

Should respondent, regardless of residency, for any reason (including vacation) cease working as a pharmacy technician for a minimum of 20 hours per calendar month in California, respondent must notify the Board in writing within 10 days of cessation of work and must further notify the Board in writing within 10 days of the resumption of the work. Any failure to provide such notification(s) shall be considered a violation of probation.

It is a violation of probation for respondent's probation to remain tolled pursuant to the provisions of this condition for a total period, counting consecutive and non-consecutive months, exceeding 36 months.

"Cessation of work" means calendar month during which respondent is not working for at least 80 hours as a pharmacy technician, as defined in Business and Professions Code section 4115. "Resumption of work" means any calendar month during which respondent is working as a pharmacy technician for at least 80 hours as a pharmacy technician as defined by Business and Professions Code section 4115.

13. Violation of Probation

If respondent has not complied with any term or condition of probation, the Board shall have continuing jurisdiction over respondent, and probation shall automatically be extended, until all terms and conditions have been satisfied or the Board has taken other action as deemed appropriate to treat the failure to comply as a violation of probation, to terminate probation, and to impose the penalty that was stayed.

If respondent violates probation in any respect, the Board, after giving respondent notice and an opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. Notice and opportunity to be heard are not required for those provisions stating that a violation thereof may lead to automatic termination of the stay and/or revocation of the license. If a petition to revoke probation or an accusation is filed against respondent during probation, the Board shall have continuing jurisdiction, and the period of probation shall be automatically extended until the petition to revoke probation or accusation is heard and decided.

14. Completion of Probation

Upon written notice by the Board indicating successful completion of probation, respondent's pharmacy technician registration will be fully restored.

15. No Ownership of Licensed Premises

Respondent shall not own, have any legal or beneficial interest in, or serve as a manager, administrator, member, officer, director, trustee, associate, or partner of any business, firm, partnership, or corporation currently or hereinafter licensed by the Board. Respondent shall sell or transfer any legal or beneficial interest in any entity licensed by the Board within 90 days following the effective date of this decision and shall immediately thereafter provide written proof thereof to the Board. Failure to timely divest any legal or beneficial interest(s) or provide documentation thereof shall be considered a violation of probation.

16. Attend Substance Abuse Recovery Relapse Prevention and Support Groups

Within 30 days of the effective date of this decision, respondent shall begin regular attendance at a recognized and established substance abuse recovery support group in California, (e.g., Alcoholics Anonymous, Narcotics Anonymous, etc.) which has been approved by the Board or its designee. Respondent must attend at least one group meeting per week unless otherwise directed by the Board or its designee. Respondent shall continue regular attendance and submit signed and dated documentation confirming attendance with each quarterly report for the duration of probation. Failure to attend or submit documentation thereof shall be considered a violation of probation.

17. Random Drug Screening

Respondent, at his own expense, shall participate in random testing, including but not limited to biological fluid testing (urine, blood), breathalyzer, hair follicle testing, or other drug screening program as directed by the Board or its designee. Respondent shall be personally observed by a third party when submitting the sample, including a urine sample.

Respondent may be required to participate in testing for the entire probation period and the frequency of testing will be determined by the Board or its designee. At all times respondent shall fully cooperate with the Board or its designee, and shall, when directed, submit to such tests and samples for the detection of alcohol, narcotics, hypnotics, dangerous drugs or other controlled substances as the Board or its designee may direct. Failure to timely submit to testing as directed shall be considered a violation of probation. Upon request of the Board or its designee, respondent shall provide documentation from a licensed practitioner that the prescription for a detected drug was legitimately issued and is a necessary part of the treatment of the respondent. Failure to timely provide such documentation shall be considered a violation of probation. Any confirmed positive test for alcohol or for any drug not lawfully prescribed by a licensed practitioner as part of a documented medical treatment shall be considered a violation of probation and shall result in the automatic suspension of work by respondent. Respondent may not resume work as a pharmacy technician until notified by the Board in writing.

During suspension, respondent shall not enter any pharmacy area or any portion of or any other Board licensed premises (wholesaler, veterinary food-animal drug retailer or any other distributor of drugs) any drug manufacturer, or any other location where dangerous drugs and devices or controlled substances are maintained. Respondent shall not do any act involving drug selection, selection of stock, manufacturing, compounding or dispensing; nor shall respondent manage, administer, or assist any licensee of the Board. Respondent shall not have access to or control the ordering, manufacturing or dispensing of dangerous drugs and devices or controlled substances. Respondent shall not resume work until notified by the Board.

Respondent shall not direct, control or perform any aspect of the practice of pharmacy. Subject to the above restrictions, respondent may continue to own or hold an interest in any licensed premises in which he holds an interest at the time this decision becomes effective unless otherwise specified in this order.

Failure to comply with this suspension shall be considered a violation of probation.

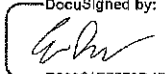
18. Notification of Departure

Prior to leaving the probationary geographic area designated by the Board or its designee for a period greater than 24 hours, respondent shall notify the Board verbally and in writing of the dates of departure and return. Failure to comply with this provision shall be considered a violation of probation.

19. Abstain from Drugs and Alcohol Use

Respondent shall completely abstain from the possession or use of alcohol, controlled substances, dangerous drugs and their associated paraphernalia except when the drugs are lawfully prescribed by a licensed practitioner as part of a documented medical treatment. Upon request of the Board or its designee, respondent shall provide documentation from the licensed practitioner that the prescription for the drug was legitimately issued and is a necessary part of the treatment of respondent. Failure to timely provide such documentation shall be considered a violation of probation. Respondent shall ensure that he is not in the same physical location as individuals who are using illicit substances even if respondent is not personally ingesting the drugs. Any possession or use of alcohol, controlled substances, or their associated paraphernalia not supported by the documentation timely provided, and/or any physical proximity to persons using illicit substances, shall be considered a violation of probation.

DATED: July 14, 2016

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ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings

1 KAMALA D. HARRIS
Attorney General of California
2 MARC D. GREENBAUM
Supervising Deputy Attorney General
3 LESLIE A. WALDEN
Deputy Attorney General
4 State Bar No. 196882
300 So. Spring Street, Suite 1702
5 Los Angeles, CA 90013
Telephone: (213) 897-3465
6 Facsimile: (213) 897-2804
Attorneys for Complainant

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

10 In the Matter of the Accusation Against:

Case No. 5392

11 **MARC F. VARGAS**
12 **140 E. Spring St., #1**
13 **Long Beach, CA 90806**

ACCUSATION

14 **Pharmacy Technician Registration No. TCH**
15 **96273**

Respondent.

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18 Complainant alleges:

19 **PARTIES**

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

22 2. On or about December 10, 2009, the Board of Pharmacy issued Pharmacy Technician
23 Registration Number TCH 96273 to Marc F. Vargas (Respondent). The Pharmacy Technician
24 Registration was in full force and effect at all times relevant to the charges brought herein and
25 will expire on September 30, 2015, unless renewed.

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1 JURISDICTION

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

5 4. California Code of Regulations, title 16, section 1770, states:

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

12 5. Section 4300 of the Code states:

13 "(a) Every license issued may be suspended or revoked.

14 "(b) The board shall discipline the holder of any license issued by the board, whose default
15 has been entered or whose case has been heard by the board and found guilty, by any of the
16 following methods:

17 "(1) Suspending judgment.

18 "(2) Placing him or her upon probation.

19 "(3) Suspending his or her right to practice for a period not exceeding one year.

20 "(4) Revoking his or her license.

21 "(5) Taking any other action in relation to disciplining him or her as the board in its
22 discretion may deem proper.

23 "(c) The board may refuse a license to any applicant guilty of unprofessional conduct. The
24 board may, in its sole discretion, issue a probationary license to any applicant for a license who is
25 guilty of unprofessional conduct and who has met all other requirements for licensure. The board
26 may issue the license subject to any terms or conditions not contrary to public policy, including,
27 but not limited to, the following:

28 "(1) Medical or psychiatric evaluation.

1 "(2) Continuing medical or psychiatric treatment.

2 "(3) Restriction of type or circumstances of practice.

3 "(4) Continuing participation in a board-approved rehabilitation program.

4 "(5) Abstention from the use of alcohol or drugs.

5 "(6) Random fluid testing for alcohol or drugs.

6 "(7) Compliance with laws and regulations governing the practice of pharmacy.

7 "(d) The board may initiate disciplinary proceedings to revoke or suspend any probationary
8 certificate of licensure for any violation of the terms and conditions of probation. Upon
9 satisfactory completion of probation, the board shall convert the probationary certificate to a
10 regular certificate, free of conditions.

11 "(e) The proceedings under this article shall be conducted in accordance with Chapter 5
12 (commencing with Section 11500) of Part 1 of Division 3 of the Government Code, and the board
13 shall have all the powers granted therein. The action shall be final, except that the propriety of the
14 action is subject to review by the superior court pursuant to Section 1094.5 of the Code of Civil
15 Procedure."

16 6. Section 4300.1 of the Code states:

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

22 7. Section 4301 of the Code states:

23 "The board shall take action against any holder of a license who is guilty of unprofessional
24 conduct or whose license has been procured by fraud or misrepresentation or issued by mistake.

25 Unprofessional conduct shall include, but is not limited to, any of the following:

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

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...

"(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.

...

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

"..."

8. Section 4060 of the Code states:

"No person shall possess any controlled substance, except that furnished to a person upon the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor pursuant to Section 3640.7, or furnished pursuant to a drug order issued by a certified nurse-midwife pursuant to Section 2746.51, a nurse practitioner pursuant to Section 2836.1, or a physician assistant pursuant to Section 3502.1, or naturopathic doctor pursuant to Section 3640.5, or a pharmacist pursuant to either subparagraph (D) of paragraph (4) of, or clause (iv) of subparagraph (A) of paragraph (5) of, subdivision (a) of Section 4052. This section shall not apply to the possession of any controlled substance by a manufacturer, wholesaler, pharmacy, pharmacist, physician, podiatrist, dentist, optometrist, veterinarian, naturopathic doctor, certified nurse-midwife, nurse practitioner, or physician assistant, when in stock in containers correctly labeled with the name and address of the supplier or producer.

"Nothing in this section authorizes a certified nurse-midwife, a nurse practitioner, a physician assistant, or a naturopathic doctor, to order his or her own stock of dangerous drugs and devices."

9. Section 4327 of the Code states:

"Any person who, while on duty, sells, dispenses or compounds any drug while under the influence of any dangerous drug or alcoholic beverages shall be guilty of a misdemeanor."

1 10. Section 11170 of the California Health & Safety Code states:

2 "No person shall prescribe, administer, or furnish a controlled substance for himself."

3 **COST RECOVERY**

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

8 **DRUG CLASSIFICATION**

9 12. Marijuana is a Schedule I controlled substance as defined by Health and Safety Code
10 section 11054 subdivision (b)(48)(d)(13).

11 **FIRST CAUSE FOR DISCIPLINE**

12 (Unlawful Possession of a Controlled Substance)

13 13. Respondent is subject to disciplinary action under section 4060 in conjunction with
14 section 4301 subdivision (j), and Health and Safety code section 11170 in that Respondent was in
15 possession of a controlled substance and/or administered or furnished a controlled substance for
16 his own use without a prescription. The circumstances are as follows:

17 14. On or about July 21, 2014, Respondent, while working at McGruff Compounding
18 Pharmacy located at 2921 W. Macarther Boulevard, suite 142, Santa Ana, California, was asked
19 to submit to a random urine drug test after his work-shift began. The result of this test showed
20 that Respondent's urine tested positive for marijuana.

21 **SECOND CAUSE FOR DISCIPLINE**

22 (Unprofessional Conduct - Functioning Under the Influence of a Controlled Substance)

23 15. Respondent is subject to disciplinary action under section 4301, subdivision (h) in
24 that the Board may take action against any licensee who is guilty of administering to himself any
25 controlled substance to the extent that the use impairs that person to conduct himself with safety
26 to the public in the practice authorized by his license. Respondent is further subject to disciplinary
27 action under section 4327, in that any person who sells dispenses or compounds any drug while
28

1 under the influence of any dangerous drug shall be guilty of a misdemeanor. The circumstances
2 are as follows:

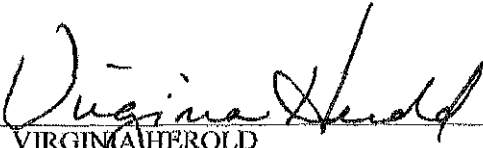
3 16. On or about July 21, 2014, Respondent, while working at McGruff Compounding
4 Pharmacy located at 2921 W. Macarther Boulevard, suite 142, Santa Ana, California, was asked
5 to submit to a random urine drug test after his work-shift began. The result of this test showed
6 that Respondent's urine tested positive for marijuana, which is a Schedule I controlled substance
7 as defined by Health and Safety Code section 11054 subdivision (b)(48)(d)(13). After said test,
8 Respondent failed to return from his lunch break, and later sent an email the same day at 1:22
9 p.m. tendering his resignation from McGruff Compounding Pharmacy.

10
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 96273,
15 issued to Marc F. Vargas;
- 16 2. Ordering Marc F. Vargas 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; and
- 19 3. Taking such other and further action as deemed necessary and proper.

20
21 DATED: 9/4/15


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

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