

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

In the Matter of the Accusation Against:

EDGAR MONTES,

Pharmacy Technician Registration Number  
TCH 130390,

Case No. 5467

OAH No. 2015110895

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 at 5:00 p.m. on June 17, 2016.

It is so ORDERED on May 18, 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:

EDGAR MONTES,

Pharmacy Technician Registration Number  
TCH 130390,

Respondent.

Case No. 5467

OAH No. 2015110895

**PROPOSED DECISION**

Administrative Law Judge Gene K. Cheever, State of California, Office of Administrative Hearings, heard this matter in Sacramento, California on April 11, 2016.

Karen R. Denvir, Deputy Attorney General, Office of the Attorney General, represented Virginia Herold (complainant), Executive Officer, Board of Pharmacy (Board), Department of Consumer Affairs.

Edgar Montes (respondent) was present and was represented by Scott Tibbeaux, Esq.

Evidence was received, the record was closed, and the matter was submitted for decision on April 11, 2016.

**FACTUAL FINDINGS**

1. Complainant brought this Accusation in her official capacity as the Executive Officer of the Board. Complainant seeks to revoke respondent's pharmacy technician registration based upon respondent's convictions described below.

2. On February 11, 2013, the Board issued Pharmacy Technician Registration Number TCH 130390 (registration) to respondent. The registration was in full force and effect at all times relevant to this matter, and was due to expire on September 30, 2016. Respondent's registration has not been previously disciplined.

## *Respondent's Criminal Convictions*

### 2013 Hit and Run Conviction

3. On August 14, 2013, in the criminal proceeding entitled *People v. Edgar Montes*, in San Bernardino County Superior Court, Case Number TVA1301036, respondent was convicted on his plea of no contest of violating Vehicle Code section 20002, subdivision (a) (driver's duty where property damaged by vehicle), a misdemeanor.

4. The circumstances are as follows. On April 7, 2013, respondent while driving a vehicle ran into another vehicle that had a woman and two children in it causing damage to the woman's vehicle. Respondent left the scene of the accident without reporting the accident and without exchanging information with the driver of the other vehicle.

### 2015 Sexual Misconduct and Resisting Arrest Convictions

5. On March 10, 2015, in the criminal proceeding entitled *People v. Edgar Montes*, in San Joaquin County Superior Court, Case Number SF130580A, respondent was convicted on his plea of no contest of violating Penal Code section 148, subdivision (a) (willfully resisting arrest), a misdemeanor, and violating Penal Code section 288.4, subdivision (b) (arrange and appear at a meeting with a person believed to be a minor for the purpose of lewd and lascivious behavior), a felony.

6. The circumstances are as follows. Between December 15, 2014, and January 21, 2015, the Stockton Police Department ran an undercover operation during which an undercover officer exchanged numerous communications with respondent. During these communications, respondent was made to believe he was communicating with a 13-year-old girl that had not had sex before. Respondent exchanged numerous lewd messages with the undercover officer. For example, respondent instructed the undercover officer to practice sucking on a Popsicle without biting it so that she could suck a man's "dick" in the same manner. Respondent requested that the undercover agent send him a photograph of herself with and without clothes. Respondent asked the undercover agent if she were trying to lose her virginity. Respondent told the undercover agent that she needed to practice playing with her "pussy" to get it wet and moist. Respondent told the undercover agent that it was going to hurt her when he put his "dick inside her pussy." Respondent instructed the undercover agent on how to play with her "pussy." Respondent told the undercover agent that she could not say anything to anyone and that it would be "our little secret." Respondent told the undercover agent that he would put his "dick" into her mouth, he would ejaculate into her mouth, and she had to swallow it. Respondent told the undercover agent sex was the only thing that was going to happen when they met. Respondent eventually made arrangements with the undercover officer to meet during which meeting respondent believed he would be engaging in sexual acts, including intercourse, with a 13-year-old girl. When respondent arrived at the meeting place, the Stockton Police Department converged on respondent to make an arrest, and respondent resisted arrest. Respondent admitted he intended to have oral sex and sexual intercourse with a 13-year-old girl. He stated he thought it should be alright

to have sex with a 13-year-old girl if the girl wanted to have sex with him even though he knew it was illegal to do so.

### *Responsibilities of a Pharmacy Technician*

7. Steven Kyle testified on behalf of complainant. For the past 18 months, Mr. Kyle has worked as an inspector for the Board to investigate cases involving violations of pharmacy laws. He is also a registered pharmacist and has been for approximately 20 years. The duties and responsibilities of a pharmacy technician include assisting a pharmacist with his or her duties, filling prescriptions under the supervision of a pharmacist, handling controlled substances, interacting with patients, and reviewing patients' sensitive personal information, including patients who are minors. It is very important that a pharmacy technician be trustworthy and accurate. Mr. Kyle reviewed the police reports regarding respondent's convictions. Based upon these reports, Mr. Kyle is concerned about respondent being a trustworthy pharmacy technician.

8. Respondent testified and admitted to the facts of his hit and run misdemeanor offense and conviction. He stated he left the scene because he "panicked" and was distressed about how he was going to pay for the damage.

9. Respondent testified and admitted to the facts of his intent to have sex with a 13-year-old girl felony offense and conviction. Respondent took issue at the hearing with the extent to which he resisted arrest and the statements made in the police report concerning his resistance. He admitted, however, when the police arrested him in January 2015, he did not respond to police requests as quickly as he should have. Respondent also admitted he "panicked" when the police were arresting him.

10. Respondent did not offer into evidence any exhibits or testimony from third party witnesses. The only evidence offered by respondent was his own testimony. His testimony provided little evidence of rehabilitation and/or mitigation. He stated he had "learned from his mistakes" and believed he "deserved a second chance." He has attended 11 of 26 sex offender sessions ordered by the court. He has not sought any other forms of counseling or education to address the issues that led to his 2015 conviction.

11. As a result of respondent's 2015 conviction, respondent spent 20 days in jail and registered as a sex offender pursuant to Penal Code section 290. He is serving a five-year formal probation which does not expire until March 10, 2020. The terms of his sentence restrict his contact and communication with minors.

12. Pursuant to California Code of Regulations, title 16, section 1760, the Board adopted disciplinary guidelines (Guidelines) that are to be followed in Board disciplinary actions.<sup>1</sup>

---

<sup>1</sup> The Guidelines list fifteen examples of factors that should be considered in determining whether the minimum, maximum, or an intermediate penalty should be imposed in a particular case, which are: (1) actual or potential harm to the public; (2) actual or

13. When the disciplinary criteria set forth in the Guidelines are considered, in order to protect the public health, safety and welfare, respondent's registration should be revoked. Respondent's 2015 convictions were serious. The potential harm to the public and consumers based on the type of conduct respondent sought to engage in is very real and significant. Respondent intentionally exchanged lewd communications and sought to have sex with a person he believed to be a 13-year-old girl knowing it was illegal. He then resisted arrest by failing to cooperate with the police. Very little time has passed since the 2015 convictions. Respondent was also convicted in 2013 for a misdemeanor hit and run when he fled the scene of the accident. The Board is reasonably concerned about respondent's trustworthiness. While respondent has apparently complied with the sentencing terms of the 2015 conviction and probation to date, respondent will remain on probation for another approximate four years. (*In re Gossage* (2000) 23 Cal.4th 1080, 1099 [when a person is on criminal probation, rehabilitation efforts are accorded less weight, "[s]ince persons under the direct supervision of correctional authorities are required to behave in exemplary fashion..."].) Respondent presented no evidence that he has participated in any type of rehabilitation other than attending the sexual offender sessions that he is required to attend. He demonstrated little insight into his wrongdoing. When all the evidence is considered, in order to protect the public, respondent's registration must be revoked.

#### *Costs*

14. Complainant has requested costs of investigation and enforcement pursuant to Business and Professions Code section 125.3 in the total amount of \$3,336. In support of this request, complainant submitted a Declaration from the Deputy Attorney General and a computer printout of the tasks performed by the Office of the Attorney General. From the information presented, the time spent was reasonable, and the activities conducted were necessary and appropriate to the development and presentation of the case. Respondent did not object to any of these costs. Respondent testified that he was currently employed. Respondent did not offer any evidence that he was not able to pay these costs.

### LEGAL CONCLUSIONS

1. The main purpose of administrative disciplinary proceedings is to protect the public through the prevention of future harm and the improvement and rehabilitation of the licensee. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.

---

potential harm to any consumer; (3) prior disciplinary record; (4) prior warnings; (5) number and/or variety of current violations; (6) nature and severity of the act(s), offense(s) or crime(s) under consideration; (7) aggravating evidence; (8) mitigation evidence; (9) rehabilitation evidence; (10) compliance with terms of any criminal sentence, parole, or probation; (11) overall criminal record; (12) if applicable, evidence of proceedings for case being set aside and dismissed pursuant to Penal Code section 1203.4; (13) time passed since the act(s) or offense(s); (14) whether the conduct was intentional or negligent; and (15) financial benefit to the respondent from the misconduct.

2. Pursuant to Business and Professions Code section 4301, the Board may take action against the holder of any license who has engaged in unprofessional conduct, which includes, but is not limited to:

(a) Gross immorality.

[¶] ... [¶]

(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.

[¶] ... [¶]

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

[¶] ... [¶]

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

3. Under section 4301, subdivision (a), a pharmacy technician commits unprofessional conduct if he has shown "gross immorality." The statute does not define gross immorality and complainant cited no cases that have applied this phrase to specific factual circumstances. "Immoral" has been defined as "morally evil; impure; obscene; unprincipled; vicious; or dissolute," and "gross" as "out of all measure; beyond allowance; flagrant; shameful; as a gross dereliction of duty, a gross injustice, gross carelessness or negligence." (Black's Law Dict. (Rev. 6th ed. 1990) pp. 751 and 702, respectively.) For respondent's conduct to reflect gross immorality complainant would have to prove that his actions were flagrantly unprincipled, or vicious and dissolute beyond allowance.

4. Over a 30-day period of time, respondent exchanged many lewd communications with and then made arrangements to have sex with a person he believed to be a 13-year-old girl, knowing that such conduct was illegal. Respondent was convicted of a felony for having engaged in these acts. Under the facts established in this case, respondent's behavior and related criminal conviction constitute unprofessional conduct reflecting gross immorality. Complainant therefore established cause to discipline respondent's registration pursuant to Business and Professions Code section 4301, subdivision (a).

5. Under section 4301, subdivision (f), a pharmacy technician commits unprofessional conduct if he has engaged in acts involving "moral turpitude" whether those acts are committed in the course of his relations as a licensee or otherwise, and whether the act is a felony or misdemeanor. A criminal act involves moral turpitude if it involves a serious breach of a duty owed to another or to society. (*In re Stuart K. Lesansky* (2001) 25 Cal.4th 11, 16.) Acts of moral turpitude involve "bad character" and "readiness to do evil." (*People v. Zaturay* (1985) 173 Cal.app.3d 390, 400.) Moral turpitude has also been described as "any crime or misconduct committed without excuse, or any 'dishonest or immoral' act not necessarily a crime." (*Clerici v. Department of Motor Vehicles* (1990) 224 Cal.App.3d 1016, 1027.) A crime of moral turpitude is "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." (*In re Craig* (1938) 12 Cal.2d 93, 97.)

6. Respondent's 2013 and 2015 convictions involved moral turpitude. Respondent's hit-and-run conviction involved moral turpitude because it involved a dishonest act by which respondent tried to evade his responsibility to another. Respondent's 2015 conviction involved moral turpitude for the reasons explained in Legal Conclusion 4. Complainant therefore established cause to discipline respondent's registration pursuant to Business and Professions Code section 4301, subdivision (f).

7. Pursuant to California Code of Regulations, title 16, section 1770, "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." Respondent's 2013 and 2015 convictions are substantially related to the qualifications, duties and functions of a pharmacy technician under those criteria. Complainant therefore established cause to discipline respondent's registration pursuant to Business and Professions Code section 4301, subdivision (l).

8. Complainant did not establish that respondent is subject to disciplinary action under Business and Professions Code section 4301, subdivision (o), for unprofessional conduct for violating laws governing pharmacy since the only such laws that complainant argued respondent violated are those set forth in Business and Professions Code section 4301, subdivisions (a), (f) and (l). Complainant cannot bootstrap an additional cause for discipline based solely upon the prior three causes for discipline.

9. The matters set forth in Findings 2 through 13 have been considered. When the Guidelines and all the evidence are considered, to protect the public, respondent's registration should be revoked. Respondent did not offer sufficient evidence of rehabilitation to demonstrate that it would be consistent with public protection to allow him to retain his registration.

10. Pursuant to Business and Professions Code section 125.3, a licensee found to have violated a licensing act may be ordered to pay the reasonable costs of investigation and

prosecution of a case. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and Professions Code section 125.3. These factors include whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of his or her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate in light of the alleged misconduct.

11. As set forth in Finding 14, complainant has requested costs of investigation and enforcement pursuant to Business and Professions Code section 125.3 in the total amount of \$3,336. These costs are reasonable. Respondent did not contest the reasonableness of these costs and did not submit evidence that he is not able to pay these costs. Under these circumstances respondent should pay the costs associated with the investigation and enforcement of this case.

#### ORDER

1. Pharmacy Technician Registration Number TCH 130390 issued to respondent Edgar Montes is revoked.

2. Respondent Edgar Montes shall pay to the Board its costs of investigation and prosecution in the amount of \$3,336.

DATED: April 15, 2016

DocuSigned by:

*Gene Cheever*

882CCD3F93894F...

GENE K. CHEEVER

Administrative Law Judge

Office of Administrative Hearings



1 KAMALA D. HARRIS  
Attorney General of California  
2 KENT D. HARRIS  
Supervising Deputy Attorney General  
3 STERLING A. SMITH  
Deputy Attorney General  
4 State Bar No. 84287  
1300 I Street, Suite 125  
5 P.O. Box 944255  
Sacramento, CA 94244-2550  
6 Telephone: (916) 445-0378  
Facsimile: (916) 327-8643  
7 *Attorneys for Complainant*

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

11 In the Matter of the Accusation Against:

Case No. 5467

12 **EDGAR MONTES**  
9851 Gentle Ben Ct.  
13 Stockton, California 95209

**ACCUSATION**

14 Pharmacy Technician Registration Number  
15 No. TCH 130390

16 Respondent number.

17 Virginia Herold ("Complainant") alleges:

18 **PARTIES**

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

21 2. On or about February 11, 2013, the Board of Pharmacy issued Pharmacy Technician  
22 Registration Number TCH 130390 to Edgar Montes ("Respondent"). The pharmacy technician  
23 registration number was in full force and effect at all times relevant to the charges brought herein  
24 and will expire on September 30, 2016, unless renewed.

25 ///

26 ///

27 ///

28 ///

1 JURISDICTION

2 3. Business and Professions Code ("Code") section 4300 states, in pertinent part:

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

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

7 (1) Suspending judgment.

8 (2) Placing him or her upon probation.

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

10 (4) Revoking his or her license.

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

13 4. Code section 4300.1 states:

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

20 STATUTORY AND REGULATORY PROVISIONS

21 5. Code section 4301 states, in pertinent part:

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

26 (a) Gross immorality.

27 (f) The commission of any act involving moral turpitude, dishonesty, fraud,  
28 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.

(1) The conviction of a crime substantially related to the qualifications,  
functions, and duties of a licensee under this chapter. The record of conviction of a  
violation of Chapter 13 (commencing with Section 801) of Title 21 of the United  
States Code regulating controlled substances or of a violation of the statutes of this  
state regulating controlled substances or dangerous drugs shall be conclusive  
evidence of unprofessional conduct. In all other cases, the record of conviction shall  
be conclusive evidence only of the fact that the conviction occurred. The board may  
inquire into the circumstances surrounding the commission of the crime, in order to

1 fix the degree of discipline or, in the case of a conviction not involving controlled  
2 substances or dangerous drugs, to determine if the conviction is of an offense  
3 substantially related to the qualifications, functions, and duties of a licensee under this  
4 chapter. A plea or verdict of guilty or a conviction following a plea of nolo  
5 contendere is deemed to be a conviction within the meaning of this provision. The  
6 board may take action when the time for appeal has elapsed, or the judgment of  
7 conviction has been affirmed on appeal or when an order granting probation is made  
8 suspending the imposition of sentence, irrespective of a subsequent order under  
9 Section 1203.4 of the Penal Code allowing the person to withdraw his or her plea of  
10 guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or  
11 dismissing the accusation, information, or indictment.

12 6. California Code of Regulations, title 16, section 1770, states:

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

#### 20 COST RECOVERY

21 7. Code section 125.3 provides, in pertinent part, that the Board may request the  
22 administrative law judge to direct a licentiate found to have committed a violation or violations of  
23 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and  
24 enforcement of the case, with failure of the licentiate to comply subjecting the license to not being  
25 renewed or reinstated. If a case settles, recovery of investigation and enforcement costs may be  
26 included in a stipulated settlement.

#### 27 FIRST CAUSE FOR DISCIPLINE

28 (Criminal Conviction)

8. Respondent is subject to disciplinary action pursuant to Code section 4301(l), on the  
grounds of unprofessional conduct, in that Respondent committed crimes that are substantially  
related to the qualifications, functions, and duties of a licensed pharmacy technician, as follows:

a. On or about August 14, 2013, in a criminal proceeding entitled *People v. Edgar  
Montes*, Superior Court of California, County of San Bernardino, Case No. TVA1301036,  
Respondent was convicted by the court on his plea of no contest to violating Vehicle Code  
section 20002(a) (driver's duty where property damaged by vehicle), a misdemeanor. The  
circumstances of the crime are that on or about April 7, 2013, an officer with the Fontana Police

1 Department responded to report of a hit and run traffic collision. The victim, who had two  
2 children in her vehicle, gave the officer the license plate number of the driver who hit her. The  
3 officer located Respondent, who admitted that he collided with the victim's vehicle. Respondent  
4 stated that he panicked and left the scene of the accident.

5 b. On or about March 10, 2015, in a criminal proceeding entitled *People v. Edgar*  
6 *Montes*, Superior Court of California, County of San Joaquin, Case No. SF130580A, Respondent  
7 was convicted by the court on his plea of no contest to violating Penal Code section 148(a)  
8 (willfully resisting, delaying, or obstructing a peace officer), a misdemeanor; and, guilty to  
9 violating Penal Code section 288.4(b) (arrange and appear at a meeting with a person believed to  
10 be a minor for the purpose of lewd and lascivious behavior), a felony. The circumstances of the  
11 crime are that between on or about December 15, 2014, and January 21, 2015, Respondent made  
12 arrangements to meet a female for the purpose of committing a sexual offense, in that it was  
13 represented to him that she was a minor. Specifically, in an effort to deter child sexual predators,  
14 on or about December 15, 2014, a detective with the Stockton Police Department posted an  
15 advertisement on Craigslist.org using the photograph of an female undercover officer (a "decoy")  
16 posing as an 18 year old female. In or around the month of January 2015, Respondent exchanged  
17 text messages with the detective/decoy. Respondent was informed in a text message that he was  
18 texting a 13 year old girl who hadn't had sex before. Among other things, Respondent suggested  
19 that the decoy practice oral copulation and "play with herself". On or about January 21, 2015,  
20 Respondent texted the detective/decoy to meet that night to have sex. When Respondent arrived  
21 at the arranged meeting place, the decoy approached his passenger-side window and started  
22 conversing. Officers with the Stockton Police Department converged on Respondent to make an  
23 arrest. Respondent refused to open the driver's side door as ordered. Officers grabbed him,  
24 dragged him out of the vehicle, and placed him on the ground. Respondent refused to show his  
25 hands and appeared to struggle to stand up. In a subsequent interview with Stockton Police  
26 Department detectives, Respondent explained that he intended to have sexual intercourse and oral  
27 sex with a 13 year old girl and stated that it should be alright to have sex with a 13 year old girl if  
28 she wants to, even though it is illegal.

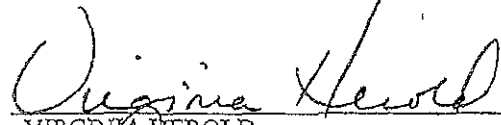


1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

3. Taking such other and further action as deemed necessary and proper.

DATED:

9/4/15



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

SA2015103670  
11920869.doc