

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

In the Matter of the Statement of Issues Against:

SHANEE NICOLE BAUMGARTNER, also
known as SHANEE NICOLE BRANNIGAN,

Respondent.

Case No. 5346

OAH No. 2015060129

DECISION AND ORDER

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

This Decision shall become effective on September 4, 2015.

It is so ORDERED on August 5, 2015.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

Amy Gutierrez, Pharm.D.
Board President

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PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on June 22, 2015, in San Diego, California.

Nicole R. Trama, Deputy Attorney General, Department of Justice, State of California, represented complainant, Virginia Herold, the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs, State of California.

Respondent, Shanee Nicole Baumgartner, also known as Shanee Nicole Brannigan, appeared by telephone.

On June 22, 2015, the matter was submitted.

FACTUAL FINDINGS

The Application

1. On January 14, 2014, respondent, Shanee Nicole Baumgartner, also known as Shanee Nicole Brannigan, signed an application for registration as a pharmacy technician. On January 21, 2014, the Board of Pharmacy received that application.

In her application, Ms. Baumgartner represented that in May 2008, she was convicted in Oregon of misdemeanor tampering with drug records. Ms. Baumgartner attached a letter, dated January 9, 2014, that stated, in part, that she was guilty of two misdemeanor counts of fraudulently obtaining a prescription for an opioid medication and that she provided 80 hours of community service, paid a \$1,000 fine, and attended and completed a drug and alcohol

rehabilitation program following her conviction. She represented that she had been clean and sober since June 2007. She wrote, "I take full responsibility for a stupid mistake I made when I was in a deep depression and going through a divorce I would be open to having random drug tests if I was ever able to work in a Pharmacy again"

2. The Board advised Ms. Baumgartner that her application for registration was being denied. Ms. Baumgartner appealed and requested a hearing.

Jurisdictional Matters

3. On April 1, 2015, complainant signed Statement of Issues in Case No 5346. The statement of issues alleged that Ms. Baumgartner's conviction was substantially related to the qualifications, functions and duties of a pharmacy technician and provided grounds for the denial of Ms. Baumgartner's application. The statement of issues was served on Ms. Baumgartner.

4. Thereafter, Ms. Baumgartner was served with a notice of time and place of hearing. She contacted counsel for complainant and advised that she was unable to appear at the noticed hearing in person. She requested the opportunity to appear by telephone.

5. On June 22, 2015, the record was opened. Ms. Baumgartner did not appear in person. After Ms. Baumgartner was contacted by telephone, she requested a telephonic hearing. Counsel for complainant did not object. Her motion was granted and a telephonic hearing followed in which complainant introduced documentary evidence (previously served on Ms. Baumgartner) and sworn testimony. Ms. Baumgartner then provided her own sworn testimony. Counsel for complainant gave a closing argument. Ms. Baumgartner waived her closing argument. The record was closed and the matter was submitted.

Registration Information and History

6. Joshua Lee, Pharm. D., testified. Mr. Lee is a licensed pharmacist who is employed by the Board as an inspector. His testimony established that a pharmacy technician is an individual who, under the direct supervision and control of a licensed pharmacist, performs packaging, manipulative, repetitive, and other non-discretionary tasks related to the processing of prescriptions in a licensed pharmacy. Pharmacy technicians are not independent practitioners. They are supposed to work under direct supervision of a pharmacist, but much of their daily work is not closely scrutinized. A pharmacy technician has full access to all drugs in a pharmacy other than Schedule II drugs.

The Board issues pharmacy technician registrations based on an individual's attainment of a relatively minimal amount of education and/or training. No examination is required to hold a pharmacy technician registration.

A pharmacy technician has access to a great deal of personal and confidential patient information. A pharmacy technician's unlawful diversion of drugs, whether for personal use or other reasons, poses a substantial risk of harm to the employing pharmacy, the supervising pharmacist, and the general public. A pharmacy technician must be honest and trustworthy.

Ms. Baumgartner's Conviction

7. On March 5, 2008, in Case No. CF070460, *State of Oregon, Plaintiff, vs. Shanee Nicole Baumgartner, Defendant*, in the Circuit Court for Umatilla County, Oregon, Ms. Baumgartner was convicted, on her plea of guilty, of two counts of violating Oregon Revised Statutes, section 167.212 (tampering with drug records), each conviction being a class A misdemeanor. She was not convicted of a felony.

On March 5, 2008, the Umatilla County Circuit Court sentenced Ms. Baumgartner to serve 120 days in custody of the Umatilla County Sheriff; however, imposition of sentence was suspended and Ms. Baumgartner was placed on three years' probation with standard narcotic conditions. The court directed Ms. Baumgartner to complete two concurrent 80-hour community service programs through the Umatilla-Morrow County Community Corrections program and pay fines and fees.

Facts and Circumstances of the Offense

8. Ms. Baumgartner's conviction arose out of misconduct occurring in March, April, and May 2007. Ms. Baumgartner, who used different aliases, telephoned a Walmart Pharmacy and a Safeway Pharmacy in Pendleton, Oregon, and left messages authorizing the refill of prescriptions for Hydrocodone.¹ She pretended to be a staff member from the offices of her treating physicians. In doing so, she used the knowledge that she previously gained when working as a pharmacy technician. Questions arose concerning the prescription refill orders, and the pharmacies contacted law enforcement. After law enforcement officers arrested Ms. Baumgartner, she admitted that she made phone calls to the pharmacies and fraudulently identified herself as a staff member of a physician's office. The investigation revealed that Ms. Baumgartner fraudulently obtained about \$145 worth of prescription medications from the Walmart Pharmacy and about \$723 worth of prescription medications from the Safeway Pharmacy.

9. In her testimony in this matter, Ms. Baumgartner admitted that she had engaged in fraud in order to have prescriptions for Hydrocodone refilled. She testified she was going through a divorce, became addicted to Hydrocodone (which was originally prescribed for headaches), and was self-administering up to 15 Hydrocodone tablets a day. She admitted that her insider knowledge of pharmacy practices helped her in perpetrating the

¹ Hydrocodone, a semi-synthetic opioid pain medication used to treat moderate to severe pain, is a schedule II controlled substance as designated by the Health and Safety Code section 11055, subdivision (b)(1)(i), and is categorized as a dangerous drug pursuant to Business and Professions Code section 4022..

fraud. She said she used about 15 Hydrocodone tablets a day for approximately three months before she was apprehended.

10. Ms. Baumgartner testified, "I can't believe I did it" and "Getting caught was the best thing that ever happened to me."

Substantial Relationship

11. Ms. Baumgartner's conviction is substantially related to the qualifications, functions, and duties of a pharmacy technician.

Respondent's Background, Training, Experience, and Rehabilitation Evidence

12. Ms. Baumgartner was born in 1978. She grew up in the State of Washington. After obtaining her GED in 1995, she completed six months of practical training as a pharmacy technician through a program provided by a Rite Aid Pharmacy in Richland, Washington. She completed that program in 1998.

Ms. Baumgartner worked as a pharmacy technician for Rite Aid and several other retail pharmacies in Washington and Oregon for several years. She married, stopped working, and had two daughters. Her marriage failed, and she and her husband went through a divorce in 2006. Around that time, she became depressed, was being treated for headaches and other issues, and was prescribed Hydrocodone by at least one of her treating physicians. She became addicted. She admitted that she used an alias to place fraudulent refill orders for Hydrocodone. According to Ms. Baumgartner, "I can't believe I did it."

Ms. Baumgartner said she completed a two-week inpatient drug rehabilitation program in Portland, Oregon, after which she completed another 10-day inpatient drug rehabilitation program. She began attending Narcotics Anonymous meetings. She found that she preferred Alcoholics Anonymous meetings, even though she did not have a problem with alcohol.

In her testimony, Ms. Baumgartner claimed a sobriety date of September 19, 2007. When asked why she used this date in her testimony, but claimed that she had been clean and sober since June 2007 in her January 9, 2014, letter to the Board, Ms. Baumgartner explained that she had a "slip" and consumed alcohol; this was the reason her sobriety date was inconsistent with the sobriety date she previously claimed. She said she had worked the 12-steps of recovery, had a 12-step sponsor, and attended approximately three 12-step meetings a week. She claimed she was "serious about sobriety." She represented that she currently does not consume non-prescribed medications or alcohol.

Ms. Baumgartner has been diagnosed with depression and other psychiatric issues, and she suffers from some physical problems that prevent her from full time employment. Since her last employment as a pharmacy technician, she has worked as an administrative

assistant with a workers' compensation program and at an art gallery. She has been unemployed for the past year. She receives social security disability benefits.

Ms. Baumgartner testified that she originally wanted to be a pharmacist, loved working as a pharmacy technician, and very much wants a chance to return to work in the pharmacy field. She claimed she was an excellent pharmacist technician. She believed that her Oregon pharmacy tech registration was revoked, although she was not certain about that. She testified that working in a pharmacy in close proximity to narcotics and other addictive controlled substances would not pose a temptation and that she would never use non-prescribed controlled substances again. She testified that she would undergo random drug testing at her own expense if she were granted a probationary license.

Rehabilitation Criteria/Evaluation

13. The Board adopted California Code of Regulations, title 16, section 1769, which sets forth various criteria that should be considered in evaluating the rehabilitation of an applicant and his or her present eligibility for registration.

Using the Board's rehabilitation criteria, it was established that Ms. Baumgartner suffered a misdemeanor conviction arising out of unlawfully obtaining Hydrocodone in 2007, about eight years ago. She complied with terms and conditions of her Oregon criminal probation. No evidence was presented that established she has engaged in any misconduct since then. She disclosed her conviction in her application for registration. No sworn testimony or documentary evidence corroborated Ms. Baumgartner's evidence in explanation, mitigation, or rehabilitation.

14. Ms. Baumgartner had the burden of establishing by a preponderance of the evidence that she is currently fit to hold a pharmacy technician registration. Given the serious and substantially related nature of the Oregon conviction, the dishonesty related to that conviction, and the absence of independent evidence to corroborate her testimony concerning her rehabilitation, it cannot be concluded that Ms. Baumgartner provided sufficient evidence of her rehabilitation to hold a pharmacy technician registration at this time, even on a probationary basis. The public interest requires that her application for licensure be denied.

The denial of Ms. Baumgartner's application is without prejudice to her reapplying for a pharmacy technician registration in the future. If she reappplies, she should be prepared to present independent evidence that corroborates her account of her successful rehabilitative efforts.

If her reapplication is successful, the Board's disciplinary guidelines will require her to obtain certification, as defined by Business and Professions Code section 4202, subdivision (a)(4), before resuming work as a pharmacy technician.²

² Business and Professions Code section 4202 provides in part:

LEGAL CONCLUSIONS

Registration and Responsibilities of a Pharmacy Technician

1. As observed in *Golden Drugs Co., Inc. v. Maxwell-Jolly* (2009) 179 Cal.App.4th 1455, 1458-1459:

The practice of pharmacy is a profession subject to the Pharmacy Law (Bus. & Prof. Code, §§ 4000 4426, 4050). Pharmacies must be licensed by the California State Board of Pharmacy (the Board), which has as its “highest priority” the “[p]rotection of the public. (Bus. & Prof. Code, §§ 4001.1, 4110.)

Every pharmacy must have a “pharmacist-in-charge” who is licensed by the Board and “responsible for the pharmacy’s compliance with all state and federal laws and regulations pertaining to the practice of pharmacy.” (Bus. & Prof. Code, §§ 4036, 4113.)

A pharmacist may be assisted by a “pharmacy technician,” who must be licensed as such and is “an individual who assists a pharmacist in a pharmacy in the performance of his or her pharmacy related duties, as specified in Section 4115.” (Bus. & Prof. Code, §§ 4038, 4115, subd. (e).)

Business and Professions Code section 4115 states in part:

“(a) A pharmacy technician may perform packaging, manipulative, repetitive, or other nondiscretionary tasks, only while assisting, and while under the direct supervision and control of a pharmacist.

“(b) This section does not authorize the performance of any tasks specified in subdivision (a) by a pharmacy technician without a pharmacist on duty.

(a) The board may issue a pharmacy technician license to an individual if he or she is a high school graduate or possesses a general educational development certificate equivalent, and meets any one of the following requirements:

[¶] . . . [¶]

(4) Is certified by the Pharmacy Technician Certification Board.

“(c) This section does not authorize a pharmacy technician to perform any act requiring the exercise of professional judgment by a pharmacist.

“(d) The board shall adopt regulations to specify tasks pursuant to subdivision (a) that a pharmacy technician may perform under the supervision of a pharmacist.”

The Board adopted a regulation (Cal. Code Regs., tit. 16, § 1793.2 (regulation 1793.2)), stating, “Nondiscretionary tasks’ as used in Business and Professions Code section 4115, include:

- [()] (a) removing the drug or drugs from stock;
- [()] (b) counting, pouring, or mixing pharmaceuticals;
- [()] (c) placing the product into a container;
- [()] (d) affixing the label or labels to the container; [and]
- [()] (e) packaging and repackaging.”

Another regulation states that “[o]nly a pharmacist” (or an intern pharmacist acting under the pharmacist’s supervision) may interpret a prescription; “[s]upervise the packaging of drugs and check the packaging procedures and product upon completion”; and “[p]erform all functions which require professional judgment.” (Cal. Code Regs., tit. 16, § 1793.1 (regulation 1793.1).)

Burden and Standard of Proof

2. In a proceeding involving the issuance of a license, the burden of proof is on the applicant to show that he or she is qualified to hold the license. The standard of proof is a preponderance of the evidence. (*California Administrative Hearing Practice* (Cont. Ed. Bar 2nd ed. 2010), *The Hearing Process*, §§ 7.51-7.53 at 376-378.)

Disciplinary Statutes and Regulations

3. Business and Professions Code section 475 provides in part:

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

[()] . . . [()]

(2) Conviction of a crime.

[()] . . . [()]

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

4. Business and Professions Code section 480 provides in part:

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

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

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

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

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

(b) Notwithstanding any other provision of this code, no person shall be denied a license solely on the basis . . . that he or she has been convicted of a misdemeanor if he or she has met all applicable requirements of the criteria of rehabilitation developed by the board to evaluate the rehabilitation of a person when considering the denial of a license under subdivision (a) of Section 482

5. Business and Professions Code section 482 provides in part:

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

(a) Considering the denial of a license by the board under Section 480 . . .

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

6. Business and Professions Code section 493 provides in part:

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

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

7. Business and Professions Code section 4060 prohibits the possession of any controlled substance by any person except as authorized by law.

8. Business and Professions Code section 4301 provides in part:

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

[¶] . . . [¶]

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

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

[¶] . . . [¶]

(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.

[¶] . . . [¶]

(l) 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 . . . 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

[¶] . . . [¶]

(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

Substantial Relationship

9. In *Harrington v. Department of Real Estate* (1989) 214 Cal.App.3d 394, 402, the appellate court noted:

Conviction alone will not support a denial of a license unless the crime substantially relates to the qualifications, functions, or duties of the business or profession in question.

Licensing authorities do not enjoy unfettered discretion to determine on a case-by-case basis whether a given conviction is substantially related to the relevant professional qualifications. Business and Professions Code section 481 requires each licensing agency to develop criteria to aid it to determine whether a crime or act is substantially related to the qualifications, functions, or duties of the business or profession it regulates. (*Donaldson v. Department of Real Estate* (2005) 134 Cal.App.4th 948, 955-956.)

Where the Legislature delegates to an administrative agency the responsibility to implement a statutory scheme through rules and regulations, the courts will interfere only when the agency has clearly overstepped its statutory authority or violated a constitutional mandate (*Ford Dealers Association v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 356), and deference should be given to an administrative agency's interpretation of a statute or regulation involving its area of expertise. (*Communities for a Better Environment v. State Water Resources Control Board* (2005) 132 Cal.App.4th 1313, 1330.)

10. California Code of Regulations, title 16, section 1770, provides in part:

For the purpose of denial . . . of a personal . . . license . . . 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.

11. The relationship between holding a pharmacy technician registration and respondent's conviction is obvious – a person who obtains controlled substances by false pretenses and fraud should not be permitted to hold a position of employment that provides virtually unlimited access to controlled substances due to the high risk of diversion and the dangers posed to pharmacies, supervising pharmacists, and the general public. In addition, a person who engages in fraud should not have access to the confidential personal, financial, and medical information of others due to the risk of identity theft. A person with a history of such a conviction must establish his or her rehabilitation to overcome the negative inferences that must be drawn as a result of his or her past misconduct.

Rehabilitation Criteria

12. The Board's rehabilitation criteria were applied in Factual Finding 13.

13. The more serious the misconduct and the bad character evidence, the stronger the applicant's showing of rehabilitation must be. Rehabilitation commonly involves a substantial period of exemplary conduct following the applicant's misdeeds. Truly exemplary conduct ordinarily includes service to the community. (*In re Glass* (2014) 58 Cal.4th 500, 520.)

14. Respondent failed to establish sufficient rehabilitation to establish her present fitness to hold a pharmacy technician registration, even on a probationary basis.

Cause Exists to Deny the Application

15. First Cause for Denial: Cause exists to deny respondent's application for registration as a pharmacy technician under Business and Professions Code section 480,

subdivisions (a)(1) and (a)(3)(A). On March 5, 2008, respondent was convicted of tampering with drug records, a conviction that is substantially related to the qualifications, functions, and duties of a registered pharmacy technician, which would be a ground for discipline of a pharmacy technician registration under Business and Professions Code section 4301, subdivision (f).

16. Second Cause for Denial: Cause exists to deny respondent's application for registration as a pharmacy technician under Business and Professions Code section 480, subdivisions (a)(2) and (a)(3)(A). Respondent's misconduct relating to her possession and attempted possession of Hydrocodone in 2007 involved dishonesty, fraud and deceit, which would be grounds for discipline for a registered pharmacy technician under Business and Professions Code section 4301, subdivision (f).

17. Third Cause for Denial: Cause exists to deny respondent's application for registration as a pharmacy technician under Business and Professions Code section 480, subdivisions (a)(2) and (a)(3)(A). Respondent falsely represented the existence of a state of facts when she made telephone calls to the Safeway Pharmacy and the Walmart Pharmacy, which would be grounds for discipline of a registered pharmacy technician under Business and Professions Code section 4301, subdivision (g).

18. Fourth Cause for Denial: Cause exists to deny respondent's application for registration as a pharmacy technician under Business and Professions Code section 480, subdivision (a)(3)(A). Respondent violated Oregon Revised Statutes, section 167.212, which regulated the possession and distribution of controlled substances, which would be a ground for discipline of a licensed pharmacy technician under Business and Professions Code section 4301, subdivision (j).

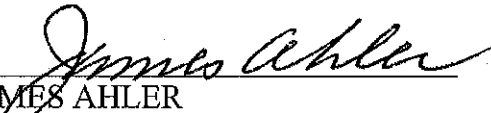
19. Fifth Cause for Denial: Cause exists to deny respondent's application for registration as a pharmacy technician under Business and Professions Code section 480, subdivision (a)(3)(A). Respondent's misconduct resulting in her violations of Oregon Revised Statutes, section 167.212, which regulated the possession and distribution of controlled substances, would be a ground for discipline of a licensed pharmacy technician under Business and Professions Code section 4301, subdivision (o).

20. Sixth Cause for Denial: Cause does not exist to deny respondent's application for registration as a pharmacy technician under Business and Professions Code section 480, subdivision (a)(3)(A), as that statute interacts with Business and Professions Code section 4301, subdivision (o) and Code of Federal Regulations, title 21, section 1301.71, subdivision (f). It was not established that respondent was convicted of a felony offense relating to controlled substances.

ORDER

Shanee Nicole Baumgartner's application for the issuance of a pharmacy technician registration is denied.

DATED: July 1, 2015



JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings

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

12 In the Matter of the Statement of Issues Against:

Case No. 5346

13 **SHANEE NICOLE BAUMGARTNER,**
14 **AKA SHANEE NICOLE BRANNIGAN**

STATEMENT OF ISSUES

15 **Pharmacy Technician Registration Applicant**
16 **Respondent.**

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18 Complainant alleges:

19 **PARTIES**

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

23 2. On January 21, 2014, the Board of Pharmacy, Department of Consumer Affairs
24 received an application for a Pharmacy Technician Registration from Shanee Nicole
25 Baumgartner, also known as Shanee Nicole Brannigan (Respondent). On January 14, 2014,
26 Shanee Nicole Baumgartner certified under penalty of perjury to the truthfulness of all
27 statements, answers, and representations in the application. The Board denied the application on
28 September 3, 2014.

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JURISDICTION

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

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

STATUTORY PROVISIONS

5. Section 475 of the Code states:

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

- (1) Knowingly making a false statement of material fact, or knowingly omitting to state a material fact, in an application for a license.
- (2) Conviction of a crime.
- (3) Commission of any act involving dishonesty, fraud or deceit with the intent to substantially benefit himself or another, or substantially injure another.
- (4) Commission of any act which, if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license.

....

6. Section 480 of the Code states:

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

- (1) Been convicted of a crime. A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of *nolo contendere*. Any action that a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of section 1203.4 of the Penal Code.
- (2) Done any act involving dishonesty, fraud, or deceit with the intent to substantially benefit himself or herself or another, or substantially injure another.
- (3) (A) Done any act that if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license.

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7. Section 482 of the Code states:

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

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

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

8. Section 493 of the Code states:

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

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

9. Section 4060 of the Code states:

A person shall not 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, a physician assistant pursuant to Section 3502.1, a naturopathic doctor pursuant to Section 3640.5, or a pharmacist pursuant to Section 4052.1, 4052.2, or 4052.6. This section does not apply to the possession of any controlled substance by a manufacturer, wholesaler, third-party logistics provider, pharmacy, pharmacist, physician, podiatrist, dentist, optometrist, veterinarian, naturopathic doctor, certified nurse-midwife, nurse practitioner, or physician assistant, if in stock in containers correctly labeled with the name and address of the supplier or producer.

This section does not authorize 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.

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10. Section 4301 of the Code states:

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

....

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

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

....

(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.

....

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

....

(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.

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1 **REGULATORY PROVISIONS**

2 11. California Code of Regulations, title 16, section 1769 states:

3 (a) When considering the denial of a facility or personal license under
4 section 480 of the Business and Professions Code, the board, in evaluating the
5 rehabilitation of the applicant and his present eligibility for licensing or
6 registration, will consider the following criteria:

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

9 (2) Evidence of any act(s) committed subsequent to the act(s) or
10 crime(s) under consideration as grounds for denial under section 480 of the
11 Business and Professions Code.

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

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

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

18

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

20 For the purpose of denial, suspension, or revocation of a personal or
21 facility license pursuant to Division 1.5 (commencing with section 475) of the
22 Business and Professions Code, a crime or act shall be considered substantially
23 related to the qualifications, functions or duties of a licensee or registrant if to a
24 substantial degree it evidences present or potential unfitness of a licensee or
25 registrant to perform the functions authorized by his license or registration in a
26 manner consistent with the public health, safety, or welfare.

27 13. Code of Federal Regulations, title 21, section 1301.71, subdivision (f) states:

28 A collector shall not employ, as an agent or employee who has access to
or influence over controlled substances acquired by collection, any person who
has been convicted of any felony offense relating to controlled substances or who,
at any time, had an application for registration with DEA denied, had a DEA
registration revoked or suspended, or has surrendered a DEA registration for
cause. For purposes of this subsection, "for cause" means in lieu of, or as a
consequence of, any Federal or State administrative, civil, or criminal action
resulting from an investigation of the individual's handling of controlled
substances.

1 DRUG AT ISSUE

2 14. Hydrocodone is a Schedule II controlled substance as designated by Health and
3 Safety Code section 11055, subdivision (b)(1)(I) and is a dangerous drug pursuant to Code
4 section 4022.

5 FIRST CAUSE FOR DENIAL OF APPLICATION

6 (March 5, 2008 Conviction for Tampering with Drug Records on May 7 and 14, 2007)

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

12 a. On March 5, 2008, in a criminal proceeding entitled *The State of Oregon,*
13 *Plaintiff, vs. Shanee Nicole Baumgartner, Defendant,* in Umatilla County Circuit Court, Umatilla
14 County Courthouse Case Number CF070460, Respondent was convicted on her plea of guilty to
15 two counts of violation of Oregon Revised Statutes (ORS) section 167.212, tampering with drug
16 records, class C felonies reduced to class A misdemeanors. Three felony charges for separate
17 violations of ORS section 167.212, were dismissed pursuant to a plea bargain.

18 b. As a result of the convictions, on March 5, 2008, Respondent was
19 sentenced to be committed to the custody of the Umatilla County Sheriff for 120 days. However,
20 the 120 days of incarceration was suspended and Respondent was granted three years bench
21 probation subject to standard narcotics conditions. Respondent was ordered to complete two 80-
22 hour community services with the Umatilla-Morrow County Community Corrections program,
23 to be served concurrently. Respondent was also ordered to pay fees, assessments, fines, and
24 restitution.

25 c. The facts that led to the convictions are that on March 21, April 12 and 16,
26 and May 7 and 14, 2007, Respondent, using different aliases, called-in and left messages for
27 prescription refills at a Walmart Pharmacy and a Safeway Pharmacy in Pendleton, Oregon. On
28 May 14, 2007, the pharmacist reviewing prescription refill messages at the Walmart Pharmacy

1 called the office of Respondent's alleged prescribing physician to confirm authority. A member
2 of the staff at the office informed the pharmacist that nobody worked there by the name that
3 Respondent used as an alias and that Respondent was not a patient. Walmart Pharmacy records
4 also indicated that Respondent successfully obtained prescription refills using a different alias
5 through another prescribing physician. The pharmacist also called the other physician's office
6 and was told that there was no employee working in that office using Respondent's second alias.
7 Respondent was a patient at the second physician's office but had not been prescribed
8 Hydrocodone. On May 14, 2007, a responding officer from the Pendleton City Police
9 Department (PCPD) initiated contact with Respondent as she was about to pick-up her fraudulent
10 prescription refill. Thereafter, Respondent was transported to the PCPD, where she admitted to
11 fraudulently obtaining Hydrocodone. Investigation showed that Respondent fraudulently
12 received \$144.76 worth of prescription medication from the Walmart Pharmacy branch and
13 \$723.11 worth of prescription medication from the Safeway Pharmacy branch during the period
14 January to May 2007.

15 **SECOND CAUSE FOR DENIAL OF APPLICATION**

16 **(Act If Done By Licentiate – Commission of Acts Involving Moral Turpitude, Dishonesty,
17 Fraud, Deceit, or Corruption)**

18 16. Respondent's application for registration as a pharmacy technician is subject to
19 denial under Code section 480, subdivisions (a)(2) and (a)(3)(A) in that she committed acts
20 which involve moral turpitude, dishonesty, fraud, deceit, and corruption, which would be
21 grounds for discipline for a registered pharmacy technician under Code section 4301, subdivision
22 (f). Respondent committed theft of controlled substances by deception on March 21, April 12
23 and 16, and May 7 and 14, 2007, as described in paragraph 15, above, which is incorporated by
24 reference.

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THIRD CAUSE FOR DENIAL OF APPLICATION

**(Act If Done By Licentiate - Knowingly Making Utterances of Prescriptions that
Falsely Represent the Existence of a State of Facts)**

17. Respondent's application for registration as a pharmacy technician is subject to denial under Code section 480, subdivisions (a)(2) and (a)(3)(A) in that she committed acts involving fraudulent prescriptions that falsely represented the existence of a state of facts when she made calls and left voice messages on March 21, April 12 and 16, and May 7 and 14, 2007, as described in paragraph 15, above, and incorporated herein by this reference. Respondent's false representations would also be grounds for discipline for a registered pharmacy technician under Code section 4301, subdivision (g).

FOURTH CAUSE FOR DENIAL OF APPLICATION

(Act If Done By Licentiate - Violation of Drug Regulation Laws)

18. Respondent's application for registration as a pharmacy technician is subject to denial under Code section 480, subdivision (a)(3)(A) in that on March 21, April 12 and 16, and May 7 and 14, 2007, she violated ORS section 167.212, tampering with drug records, class C felonies, a statute of the State of Oregon regulating controlled substances and dangerous drugs, which would be a ground for discipline for a licensed pharmacy technician under Code section 4301, subdivision (j).

FIFTH CAUSE FOR DENIAL OF APPLICATION

(Act If Done By Licentiate - Violation of Pharmacy Laws)

19. Respondent's application for registration as a pharmacy technician is subject to denial under Code section 480, subdivision (a)(3)(A) in that on March 21, April 12 and 16, and May 7 and 14, 2007, she violated ORS section 167.212, tampering with drug records, class C felonies, a pharmacy law of the State of Oregon regulating controlled substances and dangerous drugs, which would be a ground for discipline for a licensed pharmacy technician under Code section 4301, subdivision (o).

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1 **SIXTH CAUSE FOR DENIAL OF APPLICATION**

2 **(Act If Done By Licentiate – Violation of Federal Regulation)**

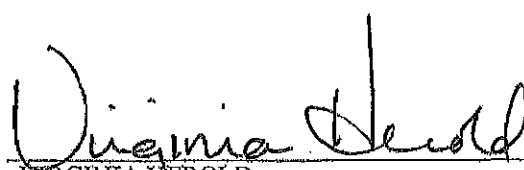
3 20. Respondent's application for registration as a pharmacy technician is subject to
4 denial under Code section 480, subdivision (a)(3)(A) in that on March 21, April 12 and 16, and
5 May 7 and 14, 2007, she violated ORS section 167.212, tampering with drug records, class C
6 felonies, a pharmacy law of the State of Oregon regulating controlled substances and dangerous
7 drugs. Such violation would also be a ground for discipline for a licensed pharmacy technician
8 under Code section 4301, subdivision (o), in conjunction with Code of Federal Regulations, title
9 21, section 1301.71, subdivision (f), a collector shall not employ, as an agent or employee who
10 has access to or influence over controlled substances acquired by collection if the person has
11 been convicted of any felony offense relating to controlled substances.

12 **PRAYER**

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

- 15 1. Denying the application of Shanee Nicole Baumgartner, also known as Shanee
16 Nicole Brannigan for a Pharmacy Technician Registration; and
17 2. Taking such other and further action as deemed necessary and proper.

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19
20 DATED: 4/1/15



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

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