

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

In the Matter of the Accusation Against:

**MELISSA ORTEGA**

Pharmacy Technician License  
No. TCH 142714,

Respondent.

Case No. 5715

OAH No. 201660443

**DECISION AND ORDER**

The Proposed Decision of the administrative law judge, dated December 2, 2016, in this matter was submitted to the California State Board of Pharmacy (Board). After considering the Proposed Decision, it is hereby rejected. The Accusation in this matter is hereby dismissed.

This Decision shall become effective at 5:00 p.m. on March 9, 2017.

It is so ORDERED on February 7, 2017.

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:

MELISSA ANN ORTEGA,

Respondent.

Case No. 5715

OAH No. 2016060443

**PROPOSED DECISION**

This matter was heard by Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Los Angeles, California, on November 28, 2016.

Brittany Jones, Certified Law Student, under the supervision of Zachary T. Fanselow, Deputy Attorney General, represented Virginia Herold (Complainant), Executive Officer, Board of Pharmacy (Board).

Melissa Ann Ortega (Respondent) represented herself.

Complainant seeks to discipline Respondent's license on the basis of allegations that on June 14, 2015, Respondent engaged in unprofessional conduct by permitting the smoking of marijuana in the presence of her infant daughter and by unlawfully possessing a controlled substance, marijuana. Respondent disputed some of the allegations, and provided evidence in mitigation and rehabilitation in support of continued licensure.

Oral and documentary evidence was received at the hearing, and the matter was submitted for decision on November 28, 2016.

**FACTUAL FINDINGS**

1. Complainant filed the Accusation in her official capacity.
2. a. On September 14, 2014, the Board issued Pharmacy Technician License number TCH 142714 to Respondent. The license has not been previously disciplined. The license expired on June 30, 2016, and was cancelled on October 2, 2016.

b. Respondent explained at the hearing that she had not renewed her license because she thought the matter would have to be resolved through the pending proceeding.

3. On the evening of June 14, 2015, Respondent and Armando Naja (Naja), the father of Respondent's five-month-old daughter, were outside the home of Naja's mother, waiting to give her some bottles for recycling. The bottles were in Respondent's vehicle. While there, Naja received a text from a friend who needed a ride. Naja drove the vehicle, with Respondent and her daughter as passengers, to pick up his friend. They met the friend, drove him to a 7-Eleven to get food, and returned to Naja's mother's home. She had not arrived, and Respondent and Naja continued to wait for her.

4. While they waited for his mother to arrive, Naja and his friend stepped out of the car to smoke marijuana.<sup>1</sup> Respondent did not smoke, and remained inside the car, with the windows partially open. She sat in the front passenger seat, and her baby was in the back seat. The two men were smoking near the vehicle, and Respondent was able to smell the smoke. Some of the smoke entered the vehicle through the partially open windows. After finishing their smoke, Naja and his friend returned to the car. Naja sat in the front seat, although Respondent testified she planned to drive once they left the bottles with Naja's mother. Naja's and his friend's clothes smelled of marijuana.

5. At approximately 9:43 p.m., Port Huaneme Police Department Officer Harbin (Harbin), who was investigating a complaint about the use of fireworks, approached the parked vehicle and asked about the fireworks. Once at the vehicle, Harbin noticed smoke in the vehicle and smelled the odor of marijuana emanating from the driver's side. During the exchange that ensued, Naja reported that he had stored marijuana under the driver's seat. Harbin thereafter retrieved a bag containing approximately .47 grams of marijuana. As established by Respondent's testimony, which is consistent with Naja's statements and actions, the marijuana was Naja's.

6. Harbin also found several bottles in the vehicle, one of which had a small quantity of beer inside. The bottles were the ones for Naja's mother to recycle. None of the occupants of the vehicle were drinking alcoholic beverages on the night in question.

7. Harbin arrested Respondent for alleged violation of Penal Code section 273a, subdivision (b) (child endangerment) and Vehicle Code section 23223, subdivision (b) (possession of an open container). Criminal charges were never filed against Respondent.

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<sup>1</sup> The fact that Naja and his friend smoked outside the vehicle is based on Respondent's credible testimony. According to the officer, Naja told him he had smoked in the car, but this hearsay statement is insufficient to support a finding given Respondent's contrary testimony.

8. After the arrest, Ventura County Child Protective Services investigated the matter, and recommended that Respondent and Naja take parenting classes and attend alcohol counseling meetings. Respondent attended two parenting classes, but was unable to afford to continue paying for the remaining eight. She attended two alcohol counseling meetings, but did not complete the eight-week program because she felt uncomfortable with the people at the meetings, as they had engaged in conduct that made her fearful. She does not consume alcohol or use marijuana. Her daughter was never removed from her care.

9. Respondent resides with her parents and her two daughters, aged 22 months and five years. She works two part-time jobs to provide for herself and her daughters.

10. Respondent submitted a letter from a friend of ten years, Mirlyne Ceja (Ceja). Ceja writes: “[Respondent] has always been an outstanding person, with a good head on her shoulders. She lives a clean, drug free life and puts her kids above everything. She is such a hard worker, and I was so happy when she finished school. She has always been that person that you could count on for anything, she always puts others before herself. . . .” (Exh. B, at p. 2.)

11. The Board incurred \$3,215 in the form of Attorney General charges in its investigation and enforcement of this matter. In light of the complexity of the case, the causes for discipline established at the hearing, and Respondent’s inability to pay the costs, the reasonable costs are \$500.

### LEGAL CONCLUSIONS

1. Expiration or cancellation of Respondent’s pharmacy technician license does not deprive the Board of jurisdiction to discipline the license. (Bus. & Prof. Code, § 4300.1.)

2. Grounds exist to discipline Respondent’s license for unprofessional conduct pursuant to Business and Professions Code section 4301 in that she allowed her five-month old baby to remain in the proximity of an area where marijuana was being smoked, by reason of factual finding numbers 4 and 5.

3. Grounds do not exist to discipline Respondent’s license pursuant to Business and Professions Code section 4060 because she was not in possession of a controlled substance on June 14, 2015, by reason of factual finding numbers 4 and 5.

4. Cause exists, pursuant to Business and Professions Code section 125.3, to order Respondent to pay the Board’s reasonable costs of investigation and enforcement in this matter, in the sum of \$500, by reason of factual finding number 11 and legal conclusion numbers 1 and 2.

In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the Supreme Court rejected a constitutional challenge to a cost regulation similar to Business and Professions Code section 125.3. In so doing, however, the Court directed the administrative law judge and the agency to evaluate several factors to ensure that the cost provision did not deter individuals from exercising their right to a hearing. Thus, an agency must not assess the full costs where it would unfairly penalize the respondent who has committed some misconduct, but who has used the hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty; the agency must consider a respondent's subjective good faith belief in the merits of his or her position and whether the respondent has raised a colorable challenge; the agency must consider a respondent's ability to pay; and the agency may not assess disproportionately large investigation and prosecution costs when it has conducted a disproportionately large investigation to prove that a respondent engaged in relatively innocuous misconduct. (*Id.*, at p. 45.)

In this case, Respondent has demonstrated that she is unable to pay the Board's full costs of investigation and enforcement and that she is unable to presently pay any of the costs. Respondent will be required to make monthly installment payments of at least \$50 once she obtains full-time employment as a pharmacy technician.

5. All evidence submitted in mitigation and rehabilitation, as well as that submitted in aggravation, has been considered in light of the Board's Disciplinary Guidelines (Cal. Code Regs., tit. 16, § 1760) and criteria for rehabilitation (Cal. Code of Regs., tit. 16, § 1769). In brief, Respondent suffered a single, relatively minor, lapse in judgment. She is dedicated to protecting and providing for her daughters, and is not likely to engage in similar conduct in the future. Accordingly, the order that follows is sufficient for the protection of the public.

6. Business and Professions Code section 4402, subdivision (e), provides: "Any other license issued by the board may be canceled by the board if the license is not renewed within 60 days after its expiration. Any license canceled under this subdivision may not be reissued. Instead, a new application will be required." Respondent will therefore have to file a new application for licensure in order to remain licensed.

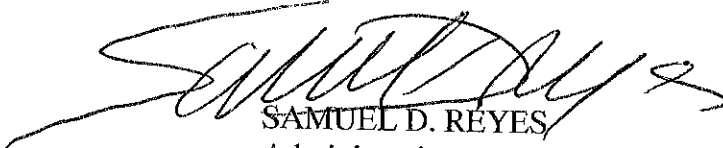
#### ORDER

1. Pharmacy Technician Registration No. TCH 142714 issued to Melissa Ann Ortega is hereby publicly reprovved pursuant to Business and Professions Code section 495.

2. If Respondent applies for renewal of her license, such application will be treated as an application for a new license pursuant to Business and Professions Code section 4402, subdivision (e), and, if she otherwise meets all requirements for licensure, the license shall be granted.

3. Within six months of obtaining full-time employment as a pharmacy technician, Respondent shall make payments of at least \$50 per month to reimburse the Board for its \$500 in reasonable costs of investigation and enforcement.

DATED: 12/2/16



SAMUEL D. REYES  
Administrative Law Judge  
Office of Administrative Hearings

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

10 In the Matter of the Accusation Against:

Case No. 5715

11 **MELISSA ANN ORTEGA**  
12 827 Paseo Tosamar  
13 Camarillo, CA 93012

**A C C U S A T I O N**

14 Original Pharmacy Technician Registration No.  
TCH 142714

15 Respondent.  
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21 Complainant alleges:

22 **PARTIES**

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

25 2. On or about September 17, 2014, the Board of Pharmacy issued Original Pharmacy  
26 Technician Registration Number TCH 142714 to Melissa Ann Ortega ("Respondent"). The  
27 Pharmacy Technician License was in full force and effect at all times relevant to the charges  
28 brought herein and will expire on June 30, 2016, unless renewed.

1 **JURISDICTION**

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

4 4. Section 4300 provides, in pertinent part, that every license issued by the Board is  
5 subject to discipline, including suspension or revocation.

6 5. Section 4300.1 states:

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

12 **STATUTORY PROVISIONS**

13 6. Section 4022 states

14 "Dangerous drug" or "dangerous device" means any drug or device unsafe for self-use in  
15 humans or animals, and includes the following:

16 "(a) Any drug that bears the legend: "Caution: federal law prohibits dispensing without  
17 prescription," "Rx only," or words of similar import.

18 "(b) Any device that bears the statement: "Caution: federal law restricts this device to sale by  
19 or on the order of a \_\_\_\_\_," "Rx only," or words of similar import, the blank to be filled in  
20 with the designation of the practitioner licensed to use or order use of the device.

21 "(c) Any other drug or device that by federal or state law can be lawfully dispensed only on  
22 prescription or furnished pursuant to Section 4006."

23 7. Section 4060 states, in pertinent part:

24 "No person shall possess any controlled substance, except that furnished to a person upon  
25 the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor  
26 pursuant to Section 3640.7, or furnished pursuant to a drug order issued by a certified  
27 nurse-midwife pursuant to Section 2746.51, a nurse practitioner pursuant to Section 2836.1, or a  
28 physician assistant pursuant to Section 3502.1, or naturopathic doctor pursuant to Section 3640.5,



1 or a pharmacist pursuant to either subparagraph (D) of paragraph (4) of, or clause (iv) of  
2 subparagraph (A) of paragraph (5) of, subdivision (a) of Section 4052. This section shall not apply  
3 to the possession of any controlled substance by a manufacturer, wholesaler, pharmacy,  
4 pharmacist, physician, podiatrist, dentist, optometrist, veterinarian, naturopathic doctor, certified  
5 nurse-midwife, nurse practitioner, or physician assistant, when in stock in containers correctly  
6 labeled with the name and address of the supplier or producer.

7 8. Section 4301 states:

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

11 **REGULATORY PROVISION**

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

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

19 **COST RECOVERY**

20 10. Section 125.3 states, in pertinent part, that the Board may request the administrative  
21 law judge to direct a licentiate found to have committed a violation or violations of the licensing  
22 act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the  
23 case.

24 **CONTROLLED SUBSTANCES AND DANGEROUS DRUGS**

25 11. Marijuana is a hallucinogenic Schedule I controlled substance as defined in Health and  
26 Safety Code section 11054, subdivision (d)(13), and a dangerous drug pursuant to Business and  
27 Professions Code section 4022.

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1 **FIRST CAUSE FOR DISCIPLINE**

2 **(Unprofessional Conduct)**

3 12. Respondent is subject to discipline under section 4301, on the grounds of general  
4 unprofessional conduct, as follows:

5 a. On or about June 14, 2015, an officer from the Port Hueneme Police Department  
6 approached a parked vehicle, smelling a strong odor of burnt marijuana. The officer noticed that  
7 the vehicle's driver window was open approximately four inches and the interior of the vehicle was  
8 filled with smoke. The officer illuminated the vehicle with his flashlight and observed a male, A.N.  
9 in the driver's seat, Respondent in the rear driver's side seat and an infant in the rear passenger  
10 side of the vehicle. The officer asked whose child the infant was, and Respondent stated it was her  
11 daughter with A.N. The officer asked if they regularly smoked marijuana in the presence of their  
12 child and Respondent replied that she was doing nothing wrong. A.N. stated that he was not  
13 blowing marijuana in the child's face, so everything was ok, and he had the window open a few  
14 inches so he was not "hot boxing." During the investigation, the child was evaluated by the  
15 paramedics, who found that the child was very lethargic and took quite a while to wake up. Also  
16 on the floorboard directly in front of the child was a six pack of beer bottles which were almost  
17 empty but cold to the touch.

18 **SECOND CAUSE FOR DISCIPLINE**

19 **(Possession of a Controlled Substance)**

20 13. Respondent is subject to disciplinary action under section 4060 for possessing  
21 marijuana, a schedule I controlled substance, without a prescription. The circumstances are that  
22 on or about June 14, 2015, Respondent was found smoking marijuana in her car while her child  
23 was present. Complainant refers to, and by this reference incorporates, the allegations set forth  
24 above in paragraph 12, subparagraph (a) inclusive, as though set forth fully.

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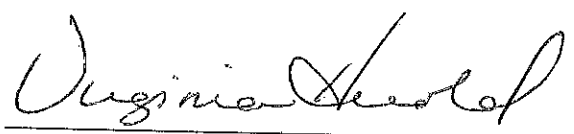
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PRAYER

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

1. Revoking or suspending Original Pharmacy Technician Registration Number TCH 142714, issued to Melissa Ann Ortega;
2. Ordering Melissa Ann Ortega to pay the Board of Pharmacy the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3; and,
3. Taking such other and further action as deemed necessary and proper.

DATED: 4/6/16



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

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