

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

In the Matter of the Accusation
Against:

JENNIFER LYNNE MARTINEZ,

Pharmacy Technician Registration
No. TCH 70267

Respondent.

Case No. 5828

OAH No. 2016080103

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 March 15, 2017.

It is so ORDERED on February 13, 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:

JENNIFER LYNNE MARTINEZ,

Pharmacy Technician Registration
No. TCH 70267

Respondent.

Case No. 5828

OAH No. 2016080103

PROPOSED DECISION

Administrative Law Judge Kirk E. Miller, State of California, Office of Administrative Hearings, heard this matter on November 16, 2016, in Oakland, California.

Nicholas P. Tsukamaki, Deputy Attorney General, represented complainant Virginia Herold, Executive Officer of the Board of Pharmacy.

Respondent Jennifer Lynne Martinez represented herself.

The record was left open until December 15, 2016, to permit respondent to submit a character reference letter. The letter was received, marked for identification as Exhibit "B," and admitted as administrative hearsay.

The matter was submitted on December 15, 2016.

SUMMARY OF THE CASE

Respondent was employed at a Walgreens retail pharmacy as a pharmacy technician. She suffered from severe back pain, which caused her to become dependent on controlled pain relievers, and she used her access to physician prescribed customer medications to divert them from the pharmacy for her own use. Her theft of the medications was identified by her employer and she was terminated in September 2015. During the time since her

termination, respondent has successfully participated in a drug treatment program, and she no longer uses any medication for which she does not have a physician's prescription.

FACTUAL FINDINGS

1. Complainant Virginia Herold filed the Accusation in her official capacity as Executive Officer of the Board of Pharmacy (Board).

2. On August 2, 2006, the Board issued Pharmacy Technician Registration Number TCH 70267 to Jennifer Lynne Martinez (respondent). The registration is in full force and effect until February 28, 2017.

Complainant's Evidence

3. Respondent was initially hired by Walgreens as a pharmacy technician in 2007. In September 2015, while she was working as a pharmacy technician at a Walgreens store in Vallejo, the store's pharmacist determined that two prescriptions for controlled substances were missing from the prescriptions drawer: on April 2, 2015, 60 tablets of OxyContin 20 MG, and on April 29, 2015, 150 tablets of Hydrocodone 10/325 MG, were unaccounted for. The pharmacist requested an investigation into the missing, filled prescriptions.

4. Destry Prescott, a Walgreens asset protection manager, conducted the investigation and testified at the hearing. On September 24, 2015, a third prescription was reported missing from the control drawer. Prescott had previously installed a video camera in a position to monitor this drawer, and it showed that on the same date respondent had removed and had not returned a filled prescription from the drawer for no clear reason.

5. Prescott interviewed respondent at the Vallejo store on September 29, 2015, at which time she provided him with a statement stating that she had taken 800 tablets of Hydrocodone, 10/325 MG, and 40 tablets of Cephalexin CAP 500 MG.¹ The value of the tablets was \$678.57. She told Prescott that she was addicted to the medications and that she had passed them to a friend. She was forthcoming with Prescott and she apologized for her conduct. Respondent repaid Walgreens the full amount of the loss.

6. Respondent was terminated on September 29, 2015. No criminal charges were filed.

7. Hilda Nip is a pharmacist and a Board investigator, and testified at the hearing regarding a pharmacy technician's responsibilities. Technicians dispense prescriptions, handle controlled substances, and must have an associate degree in pharmacy technology in order to be certified by the Board. Pharmacy technicians impact patient health and safety:

¹ Cephalexin is not listed as a controlled substance; it is an antibiotic.

they must handle medications appropriately and protect patient confidentiality. Nip did not believe respondent could properly handle this responsibility.

Respondent's Evidence

8. Respondent acknowledged she had taken Hydrocodone and Cephalexin, but testified that she overstated the number of Hydrocodone tablets taken when she met with Prescott, because Prescott had asked for a "believable" number, and she was concerned she might be arrested if she was not viewed as being honest in the interview. She was grateful that no criminal charges followed.

9. Respondent first began taking medications from the pharmacy six to eight weeks before the September 29, 2015 interview, and acknowledged there were three or four such thefts. On one occasion she "passed" a Hydrocodone prescription to a friend through the pharmacy pickup window. Respondent diverted the tablets for her own use; her friend returned the tablets to her.

10. Respondent testified that she removed all patient identifying information from the bottle and any information contained in the bag containing the bottle, before she released it to her friend. She did this because of her HIPAA training regarding the need to protect patient confidentiality.

11. Respondent attributed her conduct to two factors: first, she was experiencing great pain from her life-long struggle with a collapsed disc and degenerative disc disease, causing back pain; and second, there was substantial pressure from the pharmacy manager to work extra hours, which she testified prevented her from going to the doctor for this pain. She did not feel she could take time off without risking termination.

12. Respondent was forthright in acknowledging her dependence on pain medication, and after being terminated she took Prescott's advice to seek treatment. After investigating treatment options, respondent started regular outpatient treatment for drug dependence at MedMark, which specializes in opiate addiction care, and she has found the treatment invaluable.

13. Methadone maintenance is one part of the treatment MedMark provides, in addition to counseling and coordinating all of respondent's medical needs. She is presently tapering off of methadone altogether. She has also had physical therapy for her back pain and has successfully worked with a physician to address a sleep disorder. Respondent states that getting regular sleep has been an important part of finding pain relief for her back. In addition, she sees a counselor on a weekly basis, which she plans to continue doing. Her counselor confirmed respondent's participation in such counseling since she enrolled in the program.

14. Since starting treatment at MedMark respondent has undergone and passed random drug screening tests each month.

15. Respondent's pharmacy technician registration was not suspended when she was terminated in September 2015, and she believes she could have found another pharmacy technician position at that time, but she did not feel she should do so without first seeking treatment for her opiate dependence. She believes that the year-long treatment has been successful, and with the medical and counseling help she has received and will continue receiving, that she can now practice safely in the pharmacy setting.

16. Respondent testified that she takes her job seriously -- that being a pharmacy technician is "who she is" -- and that losing her registration would be devastating.

17. Respondent has a stable home life and is raising two young daughters.

Costs

18. Business and Professions Code section 125.3 provides that respondent may be ordered to pay the Board "a sum not to exceed the reasonable costs of the investigation and enforcement of the case." The Board's investigation costs are \$2,541. The Board has also incurred legal fees from the Attorney General's Office in the amount of \$2,752.50. These charges are supported by declarations that comply with California Code of Regulations, title 1, section 1042. In the absence of any evidence or argument to the contrary, these costs are found to be reasonable.

LEGAL CONCLUSIONS

First Cause for Discipline: Acts Involving Moral Turpitude, Dishonesty, Fraud, Deceit or Corruption

1. Business and Professions Code section 4301, subdivision (f)², provides that the Board may discipline a licensee who has committed acts involving moral turpitude, dishonesty, fraud, or deceit. Respondent committed acts of dishonesty when she diverted medications from the pharmacy. By reason of the matters set forth in Findings 3 through 5, cause exists to discipline respondent's registration, because respondent's theft of controlled medications constituted an act of dishonesty.

Second Cause for Discipline: Illegal Possession of Controlled Substances

2. Section 4060, and section 4301, subdivisions (j) and (o), together with Health and Safety Code section 11350, provide that the Board may discipline a licensee who has possessed controlled substances without a prescription. By reason of the matters set forth in Findings 3 through 5, cause exists to discipline respondent's registration, because respondent possessed one or more controlled substances without authorization to do so.

² All statutory references are to the Business and Professions Code unless otherwise indicated.

Third Cause for Discipline: Illegal Furnishing of Dangerous Drugs

3. Section 4301, subdivisions (j) and/or (o), together with section 4059, subdivision (a), provide that the Board may discipline a licensee who furnished controlled substances to others, without a prescription from a physician or dentist. By reason of the matters set forth in Findings 3 through 5, cause exists to discipline respondent's registration, because respondent provided, without proper authorization, controlled substances to another.

Fourth Cause for Discipline: Obtaining Controlled Substance by Fraud, Deceit, or Subterfuge

4. Section 4301, subdivisions (j) and/or (o), together with Health and Safety Code section 11173, subdivision (a), provide that the Board may discipline a licensee who has obtained controlled substances by fraud, deceit, subterfuge, or concealment of a material fact. By reason of the matters set forth in Findings 3 through 5, cause exists to discipline respondent's registration, because respondent obtained controlled substances by fraud, deceit, subterfuge, or concealment of a material fact.

Fifth Cause for Discipline: Unprofessional Conduct

5. Section 4301 provides that the Board may discipline a licensee who has engaged in unprofessional conduct. Respondent engaged in unprofessional conduct when she obtained controlled substances from the pharmacy where she was employed. By reason of the matters set forth in Findings 3 through 5, and Legal Conclusions 1 through 4, cause exists to discipline respondent's pharmacy technician registration, because she obtained controlled substances without authorization to do so. This conduct constitutes unprofessional conduct.

Analysis

6. As a result of her back pain, respondent became dependent on opioids, and this dependence in turn led to workplace misconduct that resulted in her termination from Walgreens, and called into question her safety to practice. Even though this was serious misconduct, this is a difficult case because respondent practiced successfully for nearly 10 years prior to this event, and since her termination respondent has demonstrated significant evidence of rehabilitation. She has recognized her opiate dependence, sought regular and ongoing treatment, stopped the use of any controlled substance except as prescribed by a physician, and voluntarily refrained from seeking employment as a pharmacy technician. Throughout her months of treatment at MedMark, she has been subject to random drug testing and has passed the tests, and has taken other steps to improve her overall health. Respondent is highly motivated to demonstrate her commitment to sobriety, and her registration is very important to her. This work is significant and puts respondent on the right track to healthy life. However, in light of the fact that respondent's misconduct occurred in the workplace, that her sobriety date is relatively recent, and she is still tapering

off of methadone, it is too early to determine that she can safely practice as a pharmacy technician, and for this reason, the public's safety requires termination of her registration.

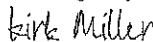
7. Complainant requests reimbursement of costs in the amount of \$5,293.50, pursuant to Business and Profession Code section 125.3. The case of *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 432, sets forth certain standards by which a licensing Board must exercise its discretion to reduce or eliminate cost awards to ensure that licensees with potentially meritorious claims are not deterred from exercising their right to an administrative hearing. Those standards include whether the licensee has been successful at hearing in getting the charges dismissed or reduced, the licensee's good faith belief in the merits of her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability the licensee to pay, and whether the scope of the investigation was appropriate to the alleged misconduct. Here, respondent was been substantially unemployed during more than a year while in treatment, and she presented substantial, good faith testimony regarding her rehabilitation and its relationship to her ability to practice. In light of the *Zuckerman* factors, a reduction of \$2,500 of the Board's costs is appropriate.

ORDER

1. Pharmacy technician registration number TCH 70267, issued to Jennifer Lynne Martinez, is revoked.

2. Respondent Jennifer Lynne Martinez shall reimburse the Board of Pharmacy for its costs of investigation and enforcement in the amount \$2,793.50. These costs may be paid pursuant to a payment plan approved by the Board.

DATED: January 17, 2017

DocuSigned by:

7F0E8978ADA4447...

KIRK E. MILLER
Administrative Law Judge
Office of Administrative Hearings

1 KAMALA D. HARRIS
Attorney General of California
2 JOSHUA A. ROOM
Supervising Deputy Attorney General
3 NICHOLAS TSUKAMAKI
Deputy Attorney General
4 State Bar No. 253959
455 Golden Gate Avenue, Suite 11000
5 San Francisco, CA 94102-7004
Telephone: (415) 703-1188
6 Facsimile: (415) 703-5480
E-mail: Nicholas.Tsukamaki@doj.ca.gov
7 *Attorneys for Complainant*

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

11 In the Matter of the Accusation Against:
12 **JENNIFER LYNNE MARTINEZ**
13 **709 Maryland Street**
Fairfield, CA 94533
14 **Pharmacy Technician Registration No. TCH**
15 **70267**
16 Respondent.

Case No. 5828

A C C U S A T I O N

17
18 Complainant alleges:

19 **PARTIES**

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

22 2. On or about August 2, 2006, the Board of Pharmacy issued Pharmacy Technician
23 Registration Number TCH 70267 to Jennifer Lynne Martinez (Respondent). The Pharmacy
24 Technician Registration was in full force and effect at all times relevant to the charges brought
25 herein and will expire on February 28, 2017, unless renewed.

26 ///
27 ///
28 ///

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

JURISDICTION

3. This Accusation 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 4011 of the Code provides that the Board shall administer and enforce both the Pharmacy Law [Bus. & Prof. Code, § 4000 et seq.] and the Uniform Controlled Substances Act [Health & Safety Code, § 11000 et seq.].

5. Section 4300.1 of the Code states:

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

STATUTORY PROVISIONS

6. Section 4059, subdivision (a) of the Code states: “A person may not furnish any dangerous drug, except upon the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor pursuant to Section 3640.7. A person may not furnish any dangerous device, except upon the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor pursuant to Section 3640.7.”

7. Section 4060 of the Code states:

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

1 pharmacist, physician, podiatrist, dentist, optometrist, veterinarian, naturopathic doctor, certified
2 nurse-midwife, nurse practitioner, or physician assistant, when in stock in containers correctly
3 labeled with the name and address of the supplier or producer.

4 ...”

5 8. Section 4301 of the Code provides, in relevant part:

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

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

9 ...

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

13 ...

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

16 ...

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

21 ...”

22 9. Health and Safety Code section 11173, subdivision (a) provides that no person shall
23 obtain or attempt to obtain controlled substances, or procure or attempt to procure the
24 administration of or prescription for controlled substances (1) by fraud, deceit, misrepresentation,
25 or subterfuge; or (2) by the concealment of a material fact.

26 10. Health and Safety Code section 11350, in pertinent part, makes it unlawful to possess
27 any controlled substance listed in Schedule II (Health and Safety Code section 11055),
28 subdivision (b) or (c), or any narcotic drug in Schedules III-V, absent a valid prescription.

1 11. Norco, Vicodin, Vicodin ES, Lortab, and Lorcet are among the brand names for
2 compounds of varying dosages of acetaminophen (aka APAP) and hydrocodone, a Schedule III
3 controlled substance as designated by Health and Safety Code section 11056, subdivision (e)(4)
4 and dangerous drug as designated by Business and Professions Code section 4022. The varying
5 compounds are also known generically as Hydrocodone with APAP. These are all narcotic
6 drugs. Products like these that combine hydrocodone with non-controlled substances are also
7 called hydrocodone combination products. Effective October 6, 2014, hydrocodone combination
8 productions were switched at the federal level from Schedule III (21 C.F.R. § 1308.13(e)(1)(iii)
9 and (iv)) to Schedule II (21 C.F.R. § 1308.12(b)(1)). This includes Hydrocodone with APAP
10 drugs.

11 12. Cephalexin is a dangerous drug as designated by Business and Professions Code
12 section 4022.

13 COSTS

14 13. Section 125.3 of the Code provides, in pertinent part, that the Board may request the
15 administrative law judge to direct a licentiate found to have committed a violation or violations of
16 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
17 enforcement of the case, with failure of the licentiate to comply subjecting the license to not being
18 renewed or reinstated. If a case settles, recovery of investigation and enforcement costs may be
19 included in a stipulated settlement.

20 FACTUAL BACKGROUND

21 14. In or around 2015, Respondent was employed as a pharmacy technician at a
22 Walgreens pharmacy in Vallejo, California. On or about September 29, 2015, Respondent
23 admitted to removing a container of hydrocodone/acetaminophen 10/325mg from a pharmacy
24 drawer and passing the container to one of Respondent's friends through the pharmacy's drive-
25 thru window. Respondent's friend did not have a prescription for the medication and did not pay
26 for it. Respondent admitted that she had engaged in that conduct several times in the previous
27 few months. Respondent further admitted to stealing forty (40) tablets of cephalexin 500mg and
28 eight-hundred (800) tablets of hydrocodone/acetaminophen 10/325mg. Respondent stated that

1 she was addicted to those medications.

2 **FIRST CAUSE FOR DISCIPLINE**

3 **(Act Involving Moral Turpitude, Dishonesty, Fraud, Deceit, and/or Corruption)**

4 15. Respondent is subject to disciplinary action under section 4301, subdivision (f) of the
5 Code in that Respondent committed acts involving moral turpitude, dishonesty, fraud, deceit,
6 and/or corruption when she stole drugs from the pharmacy where she was employed. The
7 circumstances of Respondent's conduct are set forth above in Paragraph 14.

8 **SECOND CAUSE FOR DISCIPLINE**

9 **(Illegal Possession of Controlled Substances)**

10 16. Respondent is subject to disciplinary action under section 4301, subdivisions (j)
11 and/or (o) and section 4060 of the Code, and/or Health and Safety Code section 11350, in that
12 Respondent possessed controlled substances without a prescription. The circumstances of
13 Respondent's conduct are set forth above in Paragraph 14.

14 **THIRD CAUSE FOR DISCIPLINE**

15 **(Illegal Furnishing of Dangerous Drugs)**

16 17. Respondent is subject to disciplinary action under section 4301, subdivisions (j)
17 and/or (o) and section 4059, subdivision (a) of the Code in that Respondent illegally furnished
18 dangerous drugs to another person. The circumstances of Respondent's conduct are set forth
19 above in Paragraph 14.

20 **FOURTH CAUSE FOR DISCIPLINE**

21 **(Obtaining Controlled Substance by Fraud, Deceit, or Subterfuge)**

22 18. Respondent is subject to disciplinary action under section 4301, subdivisions (j)
23 and/or (o) of the Code and Health and Safety Code section 11173, subdivision (a), in that
24 Respondent obtained controlled substances by fraud, deceit, subterfuge, and/or the concealment
25 of a material fact. The circumstances of Respondent's conduct are set forth above in Paragraph
26 14.

27 ///

28 ///

1 **FIFTH CAUSE FOR DISCIPLINE**

2 **(Unprofessional Conduct)**

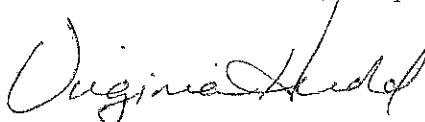
3 19. Respondent is subject to disciplinary action under section 4301 of the Code in that
4 Respondent engaged in unprofessional conduct when she stole drugs from the pharmacy where
5 she was employed. The circumstances of Respondent's conduct are set forth above in Paragraph
6 14.

7 **PRAYER**

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

- 10 1. Revoking or suspending Pharmacy Technician Registration Number TCH 70267
11 issued to Jennifer Lynne Martinez;
- 12 2. Ordering Jennifer Lynne Martinez to pay the Board of Pharmacy the reasonable costs
13 of the investigation and enforcement of this case pursuant to Business and Professions Code
14 section 125.3;
- 15 3. Taking such other and further action as deemed necessary and proper.

16
17 DATED: 6/13/16



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

24 SF2016200797
25 41536084.doc