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

In the Matter of the Statement of Issues Against: EVERETT ALEXANDER RINCAN, Respondent.	Case No. 6033 OAH No. 2017040042

DECISION AND ORDER

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

This decision shall become effective at 5:00 p.m. on November 8, 2017.

It is so ORDERED on October 9, 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 Statement of Issues Against:	Case No. 6033
EVERETT ALEXANDER RINCAN,	OAH No. 2017040042
Respondent.	

PROPOSED DECISION

The hearing in the above-captioned matter took place on June 7, 2017, before Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings.

Complainant Virginia Herold was represented by William Gardner, Deputy Attorney General. Respondent Everett Alexander Rincan appeared and represented himself.

At the outset of the hearing, Complainant moved to amend the Statement of Issues by striking the First and Second Causes for Denial of Application in their entirety, i.e., paragraphs 9 and 10 of the pleading. Further, Complainant moved to strike the Fourth Cause for Denial, paragraph 12. The motion was granted. The case proceeded on the Third Cause for Denial of Application, that Respondent knowingly made a false statement of material fact in his license application.

Evidence was received, the case was argued, and the matter was submitted for decision on the hearing date. The ALJ hereby makes his factual findings, legal conclusions, and order.

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues against Respondent while acting in her official capacity as Executive Officer of the Board of Pharmacy (Board), Department of Consumer Affairs.

2. On April 18, 2016, the Board received Respondent's Application for a Pharmacy Technician Registration (Application). Respondent had signed the Application under penalty of perjury on April 14, 2016. The Board denied the application on October 13,

2016. Respondent sought a hearing on the denial and this proceeding ensued. All jurisdictional requirements have been met.

3. (A) The Application form asks the applicant, in this case Respondent, a number of questions regarding the applicant's background. Question number 8 asks:

> Have you ever been convicted of, or pleaded guilty or nolo contendere/no contest to any crime, in any state, the United States or its territories, a military court, or any foreign country? Include any felony or misdemeanor offense, and any infraction involving drugs or alcohol with a fine of $500 or more. You must disclose a conviction even if it was: (1) later dismissed or expunged pursuant to Penal Code section 1203.4 . . . . Failure to answer truthfully and completely may result in the denial of your license.

(Ex. 2, p.AG-0033.)

(B) The balance of question 8 provides a handful of exceptions to the rule set forth above. None of those exceptions apply in this case.

4. In responding to question 8, Respondent answered "no," indicating that he had not been convicted of any crimes. However, that statement was false because Respondent had suffered two misdemeanor convictions prior to the time he submitted his Application.

5. Respondent was convicted on January 11, 2010 of violating Vehicle Code section 23152, subdivision (b), driving with blood alcohol level of .08 percent or more. On June 27, 2013, Respondent was convicted of violating Penal Code section 484, subdivision (a), petty theft. Both convictions were for misdemeanors.

6. Each conviction was dismissed or "expunged" pursuant to Penal Code section 1203.4, prior to the time that Respondent filed his application.[1]

7. During the hearing, Respondent testified that he filled out his application the way he did—answering "no" to question 8—because his counselor at his school said that because of the expungements, Respondent did not have to answer yes to question 8. The counselor advised him to send copies of the two orders in with his application. Respondent testified that he did so.

8. Respondent wrote to the Board on August 14, 2016 regarding his convictions. Complainant offered one of the letters as exhibit 3; it pertained to the petty theft case. When

[1] Documentation of the dismissals was not provided by either party at the hearing, but Complainant's attorney did not dispute the dismissals, as the fact of the dismissals required him to strike the three Causes for Denial of Application. That was because the Business and Professions Code now provides that a conviction that has been expunged is not grounds for license denial. (Bus. & Prof. Code, § 480, subd. (c).)

Respondent raised the issue of other letters, Complainant's counsel was able to locate them in his file and they were received as exhibits 3A and 3B.

9. (A) At the end of the two letters that spoke directly to the circumstances of the convictions—exhibits 3 and 3A—Respondent stated:

> My reasoning for not disclosing the arrest and conviction of this incident; the school counselor that helped me complete the application for the licensure for Pharmacy Tech stated that I did not have to disclose it, because I had the conviction expunged and dismissed from my record. Upon submission of my application, I included the dismissal letter of the offense in question.

(B) The "dismissal letter" was not produced in evidence by either party.

10. Respondent has obtained a degree in childhood development and recently began working at a facility with children. He is licensed as a security guard as well.

11. (A) When Respondent wrote to the Board about the circumstances surrounding his arrest for petty theft, he asserted that he had gone to a Macy's store with a friend and that Respondent bought an item. He claimed his friend asked him to hold his satchel because he was going to the bathroom. Respondent's friend did not return, and when Respondent eventually left the store, there were items of clothing in the satchel that had not been paid for. He told a similar story during the hearing. The police report indicates that the incident occurred on June 6, 2013.

(B) According to the police report, Respondent did not mention his friend to the Macy's store security, or to the officers from the Los Angeles Police Department. He was observed taking several items of clothing into a dressing room, and he left the dressing room with the clothing hidden in the satchel he was carrying; a search of the dressing room showed he did not leave the material behind. Further, he took a pan from the houseware section. Those items were in his possession when he was taken into custody by store security.

(C) When apprehended by store security, Respondent told them that he had been hit in the head with a baseball bat the previous October and his actions and thoughts had not been normal since. He told the police that he did not have the intent to steal when he went into the Macy's and that he had suffered a head injury the previous October and "has not been able to remember events or his actions." (Ex. 3, p. AG-0039.) He also told the police officers that he did not remember what had happened inside the store and did not remember taking the unpaid-for merchandise. Respondent was searched, found to have $1, and no credit cards or checks.

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12. Respondent's claims to the Board about the circumstances of the petty theft, and the repetition of that story at the hearing, do not reconcile with his statements at the time of the event. This is damaging to his credibility as a witness in this case.

LEGAL CONCLUSIONS

1. The Board has jurisdiction to proceed in this matter, pursuant to Business and Professions Code section 4300, subdivision (c),[2] based on Factual Findings 1 and 2.

2. Cause exists to deny Respondent's application pursuant to section 480, subdivision (c), by his knowingly making a false statement of facts in the Application, when he denied having any criminal convictions, when he had two. This Conclusion is based on Factual Findings 2 through 5, 7, 11, and 12.

3. The purpose of proceedings of this type is to protect the public, not to punish an errant licensee. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 784-786; *Bryce v. Board of Medical Quality Assurance* (1986) 184 Cal.App.3d 1471, 1476.) It is obvious that a pharmacy technician must have honesty and integrity because they have access to dangerous drugs, other pharmacy property, as well as patient medical and financial records. Respondent made a material misstatement of fact in his application, and his excuse is not credited. Thus, public protection, the Board's paramount purpose under section 4001.1, requires denial of Respondent's Application.

ORDER

The application of Everett Alexander Rincan for registration as a pharmacy technician is denied.

DATED: July 5, 2017

DocuSigned by:
Joseph D. Montoya
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JOSEPH D. MONTOYA
Administrative Law Judge
Office of Administrative Hearings

[2] All further statutory references are to the Business and Professions Code unless otherwise stated.

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

In the Matter of the Statement of Issues Against: **EVERETT ALEXANDER RINCAN** Pharmacy Technician Registration Applicant Respondent.	Case No. 6033 **STATEMENT OF ISSUES**

Complainant alleges:

PARTIES

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

2. On or about April 18, 2016, the Board received an application for a Pharmacy Technician Registration from Everett Alexander Rincan (Respondent). On or about April 14, 2016, Everett Alexander Rincan certified under penalty of perjury to the truthfulness of all statements, answers, and representations in the application. The Board denied the application on October 13, 2016.

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JURISDICTION

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

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

5. Section 4300.1 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 480 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, 1203.4a, or 1203.41 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, a person shall not be denied a license solely on the basis that he or she has been convicted of a felony if he or she has obtained a certificate of rehabilitation under Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code or 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.

"(c) Notwithstanding any other provisions of this code, a person shall not be denied a license solely on the basis of a conviction that has been dismissed pursuant to Section 1203.4, 1203.4a, or 1203.41 of the Penal Code. An applicant who has a conviction that has been dismissed pursuant to Section 1203.4, 1203.4a, or 1203.41 of the Penal Code shall provide proof of the dismissal.

"(d) A board may deny a license regulated by this code on the ground that the applicant knowingly made a false statement of fact that is required to be revealed in the application for the license."

7. Section 4301 states, in pertinent part:

"The board shall take action against any holder of a license who is guilty of unprofessional conduct or whose license has been 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.

. . .

"(h) The administering to oneself, of any controlled substance, or the use of any dangerous drug or of alcoholic beverages to the extent or in a manner as to be dangerous or injurious to oneself, to a person holding a license under this chapter, or to any other person or to

the public, or to the extent that the use impairs the ability of the person to conduct with safety to the public the practice authorized by the license.

. . . .

"(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."

"(p) Actions or conduct that would have warranted denial of a license."

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REGULATORY PROVISIONS

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

"For the purpose of denial, suspension, or revocation of a personal or facility license pursuant to Division 1.5 (commencing with Section 475) of the Business and Professions Code, 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."

FIRST CAUSE FOR DENIAL OF APPLICATION

(Convictions of Substantially Related Crimes)

9. Respondent's application is subject to denial under section 480, subdivision (a)(1), in that Respondent was convicted of substantially related crimes, as follows:

a. On or about June 27, 2013, after pleading nolo contendere, Respondent was convicted of one misdemeanor count of violating Penal Code section 484, subdivision (a) [petty theft] in the criminal proceeding entitled *The People of the State of California v. Everett Alexander Rincan* (Super. Ct. L.A. County, 2013, No. 3CA15775). The Court placed Respondent on 12 months probation, with terms and conditions. The circumstances surrounding the conviction are that on or about June 6, 2013, Respondent entered a Macy's Department store and was observed by Loss Prevention Agents to select multiple items, enter a fitting room, and then exit with one item. The Loss Prevention Agents entered the fitting room formally occupied by Respondent and observed no clothing inside the fitting stall. Respondent was then observed to select a kitchenware item, remove the wrapping, and exit the store with the kitchen item in his hand with a small duffle bag. Respondent was detained outside of the store and subsequently arrested by Los Angeles Police Department officers.

b. On or about January 11, 2010, after pleading nolo contendere, Respondent was convicted of one misdemeanor count of violating Vehicle Code section 23152, subdivision (b) [driving while having 0.08% or more, by weight, of alcohol in his blood] in the criminal proceeding entitled *The People of the State of California v. Ever Castillo* (Super. Ct. L.A. County,

2010, No. 9BV01423). The Court ordered Respondent to attend a 6-month first offender DUI program and placed him on 36 months probation, with terms and conditions. The circumstances surrounding the conviction are that on or about July 11, 2009, Beverly Hills Police Department officers initiated an enforcement stop after observing Respondent drive a vehicle without headlights activated during hours of darkness. While speaking to Respondent, the officers smelled a strong odor of alcohol emitting from his breath and he was observed to have slurred speech and bloodshot watery eyes. Respondent admitted to having two drinks. Respondent submitted to a series of field sobriety tests which he was unable to perform as indicated. During the booking procedure, Respondent provided a breath sample that revealed a breath alcohol content level of 0.17% on the first and second readings.

SECOND CAUSE FOR DENIAL OF APPLICATION

(Acts Involving Dishonesty, Fraud, or Deceit)

10. Respondent's application is subject to denial under section 480, subdivision (a)(2), in that on or about June 6, 2013, Respondent committed acts involving dishonesty, fraud, or deceit with the intent to substantially benefit himself, or substantially injure another. Complainant refers to, and by this reference incorporates, the allegations set forth above in paragraph 9, subparagraph (a), as though set forth fully

THIRD CAUSE FOR DENIAL OF APPLICATION

(Knowingly Made a False Statement of Fact)

11. Respondent application is subject to denial under section 480, subdivision (c), in that on or about April 14, 2016, Respondent knowingly made a false statement of fact by failing to disclose his two convictions, on his application for licensure when he checked no, to question No. 8, in the application which asked if he had ever been convicted of a criminal offense. Complainant refers to, and by this reference incorporates, the allegations set forth in paragraph 9, as though set forth fully.

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FOURTH CAUSE FOR DENIAL OF APPLICATION

(Acts Warranting Denial of Licensure)

12. Respondent's application is subject to denial under sections 4301, subdivision (p) and / or (o), and 480, subdivisions (a)(3)A) and (a)(3)(B), in that Respondent committed acts which if done by a licentiate of the business and profession in question, would be grounds for suspension or revocation of his license as follows:

a. Respondent was convicted of crimes substantially related to the qualifications, functions, or duties of a pharmacy technician which to a substantial degree evidence his present or potential unfitness to perform the functions authorized by his license in a manner consistent with the public health, safety, or welfare, in violation of sections 4301, subdivision (l), and 490, in conjunction with California Code of Regulations, title 16, section 1770. Complainant refers to, and by this reference incorporates, the allegations set forth above in paragraph 9, as though set forth fully.

b. Respondent committed acts involving dishonesty, fraud, or deceit, in violation of section 4301, subdivision (f). Complainant refers to, and by this reference incorporates, the allegations set forth above in paragraph 9, subparagraph (a), as though set forth fully.

c. Respondent used alcoholic beverages to an extent or in a manner dangerous or injurious to himself, any person, or the public, in violation of section 4301, subdivision (h). Complainant refers to, and by this reference incorporates, the allegations set forth above in paragraph 9, subparagraph (b), as though set forth fully.

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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. Denying the application of Everett Alexander Rincan for a Pharmacy Technician Registration; and

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

DATED: 3/4/17

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

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