California State Board of Pharmacy
1625 N. Market Blvd, N219, Sacramento, CA 95834
Phone: (916) 574-7900
Fax: (916) 574-8618
www.pharmacy.ca.gov

BUSINESS, CONSUMER SERVICES AND HOUSING AGENCY
DEPARTMENT OF CONSUMER AFFAIRS
GOVERNOR EDMUND G. BROWN JR.

September 25, 2017

CERTIFIED MAIL

Bryce A. Davis
6792 Marilyn Drive
Huntington Beach, CA 92647

RE: Statement of Issues Case No. 6077

Dear Mr. Davis:

Attached is the Decision and Order of the Board of Pharmacy (Board) regarding the Proposed Decision signed by Administrative Law Judge Theresa M. Brehl. Your attention is directed to page 17 of the Decision.

Effective at 5:00 p.m. on October 25, 2017, the application of Bryce A. Davis for a Pharmacy Technician Registration is denied.

If you wish to file a petition for reconsideration pursuant to Government Code section 11521, the petition must be received prior to the effective date of the decision. However, please be aware the Board needs approximately five (5) days to process a petition for reconsideration. Attached is a copy of the Government Code section for your review. **Please note that reconsideration is NOT available if you entered into a stipulated decision with the Board.**

If you have any questions concerning this matter, you may contact Lisa Chullino, Enforcement Analyst, at (916) 574-7921.

Sincerely,

VIRGINIA K. HEROLD
Executive Officer

By Susan Cappello

Susan Cappello
Enforcement Manager

Enclosure(s)

cc: Nicole R. Trama, DAG (electronic mail only)

DECLARATION OF SERVICE BY CERTIFIED MAIL

RE: Bryce A. Davis, Pharmacy Technician Applicant Case No. 6077

I am over 18 years of age, and not a party to the within cause; my business address is 1625 N. Market Blvd, Suite N 219, Sacramento, California 95834. I served a copy of the:

LETTER AND DECISION

on each of the following, by placing same in an envelope(s) addressed to as follows:

NAME	CERTIFIED NO.
Bryce A. Davis 6792 Marilyn Drive Huntington Beach, CA 92647	7016 0750 0000 4651 4200

and that said envelope was then sealed and deposited and certified in the United States Post Office at Sacramento, California, on September 25, 2017, as certified mail with postage fully prepaid thereon and return receipt service by United States mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 25, 2017 at Sacramento, California.

Susan Cappello

Susan Cappello, Enforcement Manager

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

In the Matter of the First Amended Statement of Issues Against:	Case No. 6077
BRYCE A. DAVIS,	OAH No. 2017060577
Respondent.	

DECISION AND ORDER

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

This decision shall become effective at 5:00 p.m. on October 25, 2017.

It is so ORDERED on September 25, 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 First Amended Statement of Issues Against:	Case No. 6077
BRYCE A. DAVIS,	OAH No. 2017060577
Respondent.	

PROPOSED DECISION

Theresa M. Brehl, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on July 25, 2017, in San Diego, California.

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

Bryce A. Davis, respondent, represented himself.

The matter was submitted on July 25, 2017.

SUMMARY

Complainant contended that the board's denial of Mr. Davis's pharmacy technician application should be affirmed, based on allegations that he was convicted of a crime substantially related to the qualifications, functions, and duties of a pharmacy technician; he violated state and federal statutes regulating controlled substances; and he engaged in unprofessional conduct by cultivating marijuana with the intent to sell it for a profit. Mr. Davis asserted that his license application should be granted because the superior court set aside the criminal conviction and dismissed the criminal charges pursuant to Penal Code section 1203.4 and he has been trying to turn his life around. Complainant established that cause exists to deny Mr. Davis's license application, and Mr. Davis did not present sufficient evidence of rehabilitation to warrant granting him a license, even on a probationary basis. Therefore, the denial of Mr. Davis's application is affirmed.

FACTUAL FINDINGS

Background and Jurisdiction

1. Mr. Davis submitted his pharmacy technician application to the board in August 2016.

2. On February 10, 2017, the board sent a letter to Mr. Davis, notifying him that his application was denied based on his arrest and the resulting conviction for cultivating marijuana. The letter explained Mr. Davis's right to appeal the denial. On February 16, 2017, Mr. Davis submitted a letter appealing the board's denial of his application.

3. Complainant signed the Statement of Issues on May 8, 2017, and signed the First Amended Statement of Issues on July 10, 2017. The First Amended Statement of Issues included three causes for denial of the application, which alleged: Mr. Davis was convicted of a crime substantially related to the qualifications, functions, and duties of a registered pharmacy technician; Mr. Davis violated state and federal statutes regulating controlled substances (citing Health and Safety Code section 11358 and Title 22 United States Code section 841); and Mr. Davis engaged in general unprofessional conduct when he cultivated marijuana for sale for profit.

Although Mr. Davis's notice of defense was not included in the exhibits submitted during the hearing, complainant did not dispute that Mr. Davis timely submitted a notice of defense.

The Criminal Conviction

4. On December 13, 2016, Mr. Davis was convicted in Riverside County Superior Court, on his plea of guilty, of violating Health and Safety Code section 11358, cultivating marijuana, a misdemeanor. Although Mr. Davis was initially charged with felony violation of Health and Safety Code section 11358, the court granted the prosecution's motion to reduce the charge to a misdemeanor pursuant to Proposition 64.[1] According to the Riverside Superior Court's "Case Print," the court "denied" probation; sentenced Mr. Davis to serve two days in Riverside County Jail, with credit for the two days he served presentence; and ordered Mr. Davis to pay fees and fines.

---

[1] Proposition 64, also referred to as the "Adult Use of Marijuana Act," made it legal for adults, 21 years or older, to grow marijuana for personal use beginning November 9, 2016. Subdivision (G) of Proposition 64 provides: "Currently, the courts are clogged with cases of non-violent drug offenses. By legalizing marijuana, the Adult Use of Marijuana Act will alleviate pressure on the courts, but continue to allow prosecutors to charge the most serious marijuana-related offenses as felonies, while reducing the penalties for minor marijuana-related offenses as set forth in the act." (See also, Health & Saf. Code, § 11361.8, subds. (a) and (b), concerning reduction and dismissal of charges as a result of Proposition 64.)

On February 21, 2017, Mr. Davis petitioned the court for dismissal of the criminal case under Penal Code section 1203.4, subdivision (a). In his petition, he wrote:

> I was arrested on 5/18/15, offense § code: HS11358 – Plant/cultivation/marijuana/hash. This was a one-time incident and as you can see I haven't been in trouble before or after this incident. This was a one-time incident and [*sic*] would like to move forward with my life. I have attended and completed the Pharmacy Tech Program at American Career College in Anaheim, CA. However the Board of Pharmacy is denying me my state license due to this incident. I look forward to getting my license and beginning my new career.

On March 8, 2017, the court granted Mr. Davis's petition. His guilty plea was then set aside, a plea of not guilty was entered, and the case was ordered dismissed.

5. The circumstances that led to Mr. Davis's December 13, 2016, conviction were described in the Riverside County Sheriff's Incident Report[2] regarding Mr. Davis's May 18, 2015, arrest and in a December 23, 2016, letter Mr. Davis sent to the board. Mr. Davis also testified about his conduct at the hearing.

6. According to the incident report, on May 18, 2015, sheriff's deputies executed a search warrant at a residence in Hemet, California, where Mr. Davis was living. During their search of the premises, the deputies located 85 live marijuana plants inside a bedroom that had been converted into a "grow room" and 510 marijuana plants in large green houses on the property. The deputies found the following items in Mr. Davis's bedroom: "approximately 33 grams of honey oil, three plastic baggies containing marijuana weighing approximately 7.2 pounds, honey oil on top of the nightstand and a digital scale." The deputies also found approximately six pounds of "shake" in the house.

The incident report described Mr. Davis's May 18, 2015, statement to the reporting deputy as follows:

---

[2] The incident report was received in evidence under *Lake v. Reed* (1997) 16 Cal.4th 448, which considered the admissibility of police reports in administrative proceedings. In *Lake*, the California Supreme Court concluded an officer's direct observations memorialized in the police report were admissible under Evidence Code section 1280, the public employee records exception to the hearsay rule, and admissions by a party memorialized in the police report were admissible under Evidence Code section 1220. (*Id.* at pp. 461-462.) The *Lake* court noted that other witness statements in the police report, which were not otherwise admissible under any hearsay exception, could not be used alone to support a factual finding but could be used to supplement or explain other admissible evidence, citing Government Code section 11513. (*Id.* at p. 461.)

> Davis told me he has been renting the above property from an unknown male nicknamed "Old Man" for three months. Davis said he and the "Old Man" came to an agreement that Davis would live at the above property and grow marijuana plants for the "Old Man." At the end of the season and after marijuana is processed, the "Old Man" would give 15 percent of the total weight of the marijuana to Davis. Davis estimated he would have received approximately 15 pounds of processed marijuana as payment from the "Old Man." Davis told me he would sell the 15 pounds of processed marijuana to a dispensary in the San Diego area and get paid approximately $1,500 dollars per pound totaling $22,500 dollars for 15 pounds. Davis does not have a job. Davis was unable to provide any further information.

7. In his letter to the board, dated December 23, 2016, Mr. Davis wrote:

> Type of offense and code: HS 11358-Plant/Cultivate/Marijuana/Hash. Inside the above residence deputies located live marijuana plants in a bedroom that was converted into a grow room and there were several large greenhouses on the property. I was working for a chain of medical marijuana dispensaries during that time. I was arrested on 5/18/2015 . . . .
>
> [¶] . . . [¶]
>
> This was a one-time incident and would like to move forward with my life.

Mr. Davis's Testimony

8. During his testimony, Mr. Davis explained that he became employed in the medical marijuana industry because he suffered from health issues that made it difficult for him to finish high school and hold down a job. A medical marijuana dispensary was the only place where the employer was willing to tolerate him taking time off work to be in and out of the hospital for treatment. Beginning in 2007, during his senior year in high school, when he was 18 years old, Mr. Davis suffered from a hernia and gastroesophageal reflux disease (GERD). He obtained a doctor's recommendation to use marijuana to manage the pain.[3] Mr. Davis was not able to graduate from high school until 2011 due to his medical conditions. Mr. Davis is now 28 years old. He had surgery during 2014 that resolved his health issues, and he no longer needs marijuana for pain management. During the time he worked in the medical marijuana industry, he was working "to get by." He "was lost in life and with health

[3] Mr. Davis did not submit any documentation to substantiate his testimony that a doctor recommended he use marijuana.

issues." He said medical marijuana "is for people who are hurting," and the medical marijuana laws were made for people like him.

Mr. Davis began working for a chain of medical marijuana dispensaries when he was 19 or 20 years old. His job duties included dispensing marijuana to customers and working as the district manager of 10 dispensaries, which involved picking money up from the dispensaries.

In March 2015, Mr. Davis moved to the house in Hemet to cultivate marijuana for the "Old Man." He referred to the house as the "grow house" during his testimony. He had not worked for the "Old Man" before, and he never knew the "Old Man's" real name. Mr. Davis explained that it is common in the marijuana industry for people to use nicknames so no one knows their real names. The "Old Man" was the person who invested the money, and they were growing marijuana for a "collective." Mr. Davis learned how to cultivate the marijuana by reading about it. He believed he would "turn" the marijuana "into" the dispensary's owner, "Bob." Mr. Davis believed he would be paid in cash from the profit margin, and he expected to receive 15 percent of the profits after expenses.[4] As part of the arrangement, Mr. Davis was not required to pay rent or bills to live at the grow house. He lived at the grow house for three months.

Although Mr. Davis did not dispute there were 85 live marijuana plants inside the residence, he stated there were really only 200 to 300 live plants in the green houses. According to Mr. Davis, a big part of the crop died and the deputies counted dead plants to come up with the 500 or so figure found in the green houses. Mr. Davis pointed out that, at the time of his arrest, the deputies seemed to be relieved because there were no guns involved. He also noted that he was not in a gang.

Mr. Davis explained that honey oil was a concentrated form of cannabis that is smoked. He understood that it was the "strongest form." Mr. Davis did not manufacture honey oil, and he acknowledged that it can be dangerous to make. He obtained the honey oil from Bob as part of the trade for his work in the growing operation, and Mr. Davis smoked the honey oil for his pain. Mr. Davis also explained that "shake" consisted of the trimmings or "all the extra leaves" and is used to make food. According to Mr. Davis, it takes a lot of shake to make a little bit of food.

Mr. Davis used marijuana for pain beginning when he was 19 years old until he was 26 years old. He used it so often every day that he could not count the number of times per day. After he started using honey oil, he only needed one hit for the pain, and he used it only four to five times per day (one hit at a time) for pain. According to Mr. Davis, after he turned 26, he stopped using marijuana and/or honey oil. He had surgery in 2014, and his pain subsided over the year after the surgery. The pain stopped "right after the raid," which

[4] Mr. Davis noted that when he told the sheriff's deputy that he would receive 15 pounds of the marijuana to sell as compensation for his work (as opposed to his testimony that he would receive cash based on the profit margin), he was terrified and crying.

he said was sometime around June or July 2015. Now, he may take Tylenol 3 from time to time, if needed for pain.

Mr. Davis said he also stopped using marijuana because he wanted to change. He did not believe he was addicted, and it was easy for him to stop using it after the surgery because the pain went away. He did not participate in any drug rehabilitation program, and he did not attend Alcoholics Anonymous or Narcotics Anonymous meetings. According to Mr. Davis, such programs are not necessary to stop using marijuana because marijuana is "not addictive." Marijuana was the only drug, other than prescription medication, he ever took.

Mr. Davis attended American Career College's pharmacy technician program, and he completed the requisite externship hours at a Walgreen's store and a packaging pharmacy. When Mr. Davis signed up for the program, he told the school about his history with marijuana. Someone at the school told him that "because this is California," it would not be a problem. He wanted to work in the health care field to help people, and he liked the pharmacy program the best. At the time of the hearing, Mr. Davis was unemployed.

When Mr. Davis was asked whether there was anything he would have done differently, he stated that the he would "try not to help out as many people," and he "might not have grown as many" plants, "because maybe it looked bigger to helicopters." When he was asked about any assurances he could give the board that he would not divert drugs if he were licensed, he stated that he would not want to risk his career by stealing and selling drugs. He also pointed out that he did "not see how you could get away with it."

When he worked at the dispensaries, Mr. Davis thought he had all the "proper paperwork." He thought he was "in compliance with the state" and was "doing it all right." However, he did not supply any of the paperwork he referenced, and it was unclear whether he believed that paperwork might have somehow applied to his work at the grow house. He acknowledged that he knew his participation at the grow house violated federal law. He also stated out that he thought the federal government was "not supposed to interfere" with the state.

Mr. Davis testified that he was trying to turn his life around. He did not provide any evidence of his rehabilitation other than his own testimony.

Dr. Brandon Mutrux's Testimony

9. Brandon Mutrux, Pharm.D., obtained his Bachelor of Science Degree in Biology in 2002 and his Doctorate of Pharmacy in 2008. He has been a licensed pharmacist since 2008. Dr. Mutrux worked from 2008 until 2012 as a pharmacist in charge of a retail pharmacy. His duties in that position included supervising pharmacy technicians. Since June 2012, Dr. Mutrux has been working as a pharmacy inspector for the board. His duties include inspecting pharmacies and conducting investigations to ensure compliance with the law. He has investigated cases involving diversion. Dr. Mutrux is familiar with the statutes and regulations that govern pharmacists and pharmacy technicians. Dr. Mutrux testified

regarding the duties and responsibilities of pharmacy technicians. He also explained the importance of the character traits of honesty and sound judgment in a pharmacy technician.

Pharmacy technicians work with and are supervised by pharmacists. Pharmacy technicians may perform nondiscretionary duties, including assisting the pharmacist with counting and labeling medications. They do not work independently. However, the level of supervision may be impacted by how busy it is at a retail or hospital pharmacy, such that the pharmacist may not always have "eyes on" the technicians being supervised.

Pharmacy technicians have access to drugs, including controlled substances; confidential medical histories; and pharmacy records. Additionally, they may encounter patients who are inappropriately seeking access to drugs or who are diverting, or attempting to divert, drugs. It is therefore important that pharmacy technicians are honest and truthful, follow the law, and exercise good judgment.

Dr. Mutrux reviewed the records in this case and stated that Mr. Davis's conduct raised several concerns. If Mr. Davis had a problem abusing drugs, Dr. Mutrux was concerned about allowing Mr. Davis to have access to controlled substances. If Mr. Davis were to work under the influence of a controlled substance, that could endanger the public if mistakes were made. Dr. Mutrux stated that it can also be difficult to trust someone with a prior drug abuse problem because the person could fall back into old habits. Theft of controlled substances for sale on the street could also be a concern.

In response to Mr. Davis's questions, Dr. Mutrux acknowledged that "legally" the supervising pharmacist was responsible for mistakes that might be made, and that he has seen drug testing as a term of a probationary license. However, he pointed out that a pharmacy technician who is on probation requires more supervision than a pharmacy technician whose registration is unrestricted.

LEGAL CONCLUSIONS

1. The main purpose of administrative disciplinary proceedings is to protect the public through the prevention of future harm and the improvement and rehabilitation of the licensee. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) It is far more desirable to impose discipline before a licensee harms any patient than after harm has occurred. (*Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 772.)

The Standard and Burden of Proof

2. The burden of proof is on respondent to prove by a preponderance of the evidence that his license application should be granted. (*Martin v. Alcoholic Beverage Control Appeals Board* (1950) 52 Cal.2d 259, 264-265.)

3. "'Preponderance of the evidence means evidence that has more convincing force than that opposed to it.' [Citations.]" (*Glage v. Hawes Firearms* Company (1990) 226 Cal.App.3d 314, 324.) "The sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the *quality* of the evidence. The *quantity* of the evidence presented by each side is irrelevant." (*Ibid.* at pp. 324-325, italics in original.) "If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it. [Citation]." (*People v. Mabini* (2001) 92 Cal.App.4th 654, 663.)

Applicable Disciplinary Statutes

4. Business and Professions Code section 480, subdivisions (a)(1), (a)(3), and (c), provide:

> (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.
>
> [¶] . . . [¶]
>
> (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.
>
> [¶] . . . [¶]
>
> (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.

5. Business and Professions Code section 4038 defines a "pharmacy technician" as "an individual who assists a pharmacist in a pharmacy in the performance of his or her pharmacy related duties as specified in section 4115." Business and Professions Code section 4115 sets forth various tasks a pharmacy technician may perform. For example, subdivision (a) provides "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."

6. Under Business and Professions Code section 4300, subdivision (c), "[t]he board may refuse a license to any applicant guilty of unprofessional conduct. The board may, in its sole discretion, issue a probationary license to any applicant for a license who is guilty of unprofessional conduct and who has met all other requirements for licensure."

7. Business and Professions Code section 4301, subdivisions (j) and (l), provide:

> 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:
>
> [¶] . . . [¶]
>
> (j) The violation of any of the statutes of this state, of 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. . . .

8. Business and Professions Code section 480 governs denial of a license based on conviction of a crime, regardless of requirements inconsistent with that section contained in other Business and Professions Code sections tailored to specific professions. (Bus. & Prof. Code, § 475, subd. (a)(2); *Pieri v. Fox* (1979) 96 Cal.App.3d 802, 805-808.) In *Pieri,* the attorney general's office argued that Pieri's application for a real estate sales license should be denied based solely on a misdemeanor conviction that had been dismissed under Penal Code section 1203.4. Notwithstanding language in Business and Professions Code section 480, subdivision (b),[5] that denial could not be based "solely" on an expunged conviction, Business and Professions Code section 10177, subdivision (b), authorized the denial of a real estate license based on a conviction "[i]rrespective . . . of a subsequent order under the provisions of Section 1203.4 of the Penal Code allowing such licensee to withdraw his plea of guilty and to enter a plea of not guilty, or dismissing the accusation or information." The *Pieri* court concluded (*Pieri, supra,* 96 Cal.App.3d at p. 808):

> We conclude the provisions of division 1.5 of the Business and Professions Code, of which section 480 is a part, supersede all other statutes regulating each individual profession with regard to denial of a license; the Department of Real Estate is not authorized to deny a real estate broker's license solely on the basis that the applicant plead guilty to a misdemeanor involving moral turpitude where such applicant has thereafter complied with the provision of subdivision (b) of section 480 of the Business and Professions Code. The Legislative Counsel of California has on two occasions (June 21, 1978 July 21, 1978) announced a similar conclusion, to wit: the all-encompassing language evidences a legislative intent that section 480, subdivision (b), prevail over section 10177 of the Business and Professions Code.

---

[5] The language regarding denial based solely on a conviction that was dismissed under Penal Code section 1203.4 now appears in subdivision (c) of Business and Professions Code section 480, instead of subdivision (b).

9. Even if a licensee's misconduct does not result in a criminal conviction, he may still suffer discipline for unprofessional conduct as defined by statute. (*Watson v. Superior Court* (2009) 176 Cal.App.4th 1407, 1424, physician arrested for driving under the influence of alcohol disciplined although he was not convicted of a crime.)

10. Business and Professions Code section 481 requires "[e]ach board under the provisions of this code" to "develop criteria to aid it, when considering the denial, suspension or revocation of a license, to determine whether a crime or act is substantially related to the qualifications, functions, or duties of the business or profession it regulates."

11. California Code of Regulation, title 16, section 1770, provides:

> 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.

State and Federal Statutes Regarding the Cultivation of Marijuana for Sale

12. Health and Safety Code section 11538, subdivision (c), as amended effective June 27, 2017, states:

> Each person who plants, cultivates, harvests, dries, or processes cannabis plants, or any part thereof, except as otherwise provided by law, shall be punished as follows:
>
> [¶] . . . [¶]
>
> (c) Each person 18 years of age or over who plants, cultivates, harvests, dries, or processes more than six living cannabis plants shall be punished by imprisonment in a county jail for a period of not more than six months or by a fine of not more than five hundred dollars ($500), or by both that fine and imprisonment.

13. Title 21 United States Code section 841, subdivision (a), provides (emphasis in original):

//

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

14. Marijuana[6] is listed as a Schedule I controlled substance in 21 United States Code section 812, subdivision (c), under Schedule I, subdivision (c)(10). According to 21 United States Code section 812, subdivision (b)(1), drugs designated under Schedule I are generally described as follows:

(1) Schedule I-

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

Evaluation of the Existence of Cause to Deny Mr. Davis's Application

15. Pharmacy technicians, who necessarily have access to controlled substances, are expected to comply with the laws related to the distribution of controlled substances. Mr. Davis's admitted unlawful cultivation of marijuana for sale, a Schedule I controlled substance, constitutes conduct substantially related to the qualifications, functions, and duties of a pharmacy technician because, to a substantial degree, it evidences present or potential unfitness to perform the functions authorized by a pharmacy technician in a manner consistent with the public health, safety, or welfare.

16. Cause does not exist to deny Mr. Davis's application for registration as a pharmacy technician under the first cause for denial pursuant to Business and Professions Code sections 480, subdivisions (a)(1) and (a)(3)(A), and 4301, subdivision (l), based solely on Mr. Davis's dismissed criminal conviction. Mr. Davis proved by a preponderance of the evidence that his December 13, 2016, conviction for violating Health and Safety Code section 11358, cultivating marijuana, a misdemeanor, was dismissed under Penal Code

[6] It is spelled "marihuana" in the United States Code.

section 1203.4. Business and Professions Code section 480, subdivision (c), is clear that "[n]otwithstanding 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." As was explained in the *Pieri* case, *supra*, 96 Cal.App.3d at p.808, section 480, subdivision (c), supersedes section 4301, subdivision (l), to the extent section 4301, subdivision (l), states that a conviction may be the basis for discipline "[i]rrespective of a subsequent order under Section 1203.4 of the Penal Code."

17. Cause exists to deny Mr. Davis's application for registration as a pharmacy technician under the second cause for denial pursuant to Business and Professions Code sections 480, subdivision (a)(3)(A), and 4301, subdivision (j). Sheriff's deputies counted 595 marijuana plants at the grow house, and Mr. Davis admitted that he cultivated somewhere between 285 and 385 marijuana plants at the grow house for sale with knowledge that his conduct was in violation of federal law (21 United States Code section 841, subdivision (a)). His conduct also violated state law (Health and Safety Code section 11358). The fact the Mr. Davis's conviction was expunged does not preclude a finding that he engaged in conduct that violated Health and Safety Code section 11358 based on his admissions during the hearing of this matter. (See *Watson v. Superior Court* (2009) 176 Cal.App.4th 1407, 1424.) Mr. Davis's conduct constitutes unprofessional conduct as defined by Business and Professions Code section 4301, subdivision (j), because he violated laws of California and the United States "regulating controlled substances and dangerous drugs." Because such unprofessional conduct, if done by a licentiate, would be grounds for suspension or revocation, cause exists to deny Mr. Davis's application under Business and Professions Code section 480, subdivision (a)(3)(A).

18. Cause exists to deny Mr. Davis's application for registration as a pharmacy technician under the third cause for denial pursuant to Business and Professions Code sections 480, subdivision (a)(3)(A), and 4300, subdivision (c), because Mr. Davis engaged in general unprofessional conduct. By virtue of Mr. Davis's admitted cultivation of marijuana for sale, he engaged in general unprofessional conduct as defined by Business and Professions Code section 4301, subdivision (j), because he violated laws of the State of California and the United States "regulating controlled substances and dangerous drugs." Because such unprofessional conduct, if done by a licentiate, would be grounds for suspension or revocation, cause exists to deny Mr. Davis's application under Business and Professions Code sections 480, subdivision (a)(3)(A).

Applicable Law Regarding Rehabilitation and Appropriate Level of Discipline

19. When determining whether to grant an application or discipline a licensee, the board "shall give consideration to evidence of rehabilitation. However, public protection shall take priority over rehabilitation and, where evidence of rehabilitation and public protection are in conflict, public protection shall take precedence." (Bus. & Prof. Code, § 4313.)

20. California Code of Regulations, title 16, section 1769, subdivision (b), sets forth the criteria to be considered by the board when evaluating the rehabilitation of a person and his present eligibility for licensure:

> (1) The nature and severity of the act(s) or offense(s) under consideration as grounds for denial.
> (2) Evidence of any act(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for denial under Section 480 of the Business and Professions Code.
>
> (3) The time that has elapsed since commission of the act(s) or crime(s) referred to in subdivision (1) or (2).
>
> (4) Whether the applicant has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against the applicant.
>
> (5) Evidence, if any, of rehabilitation submitted by the applicant.

21. Rehabilitation is a state of mind, and a person who has reformed should be rewarded with the opportunity to serve. (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) "While a candid admission of misconduct and a full acknowledgement of wrongdoing may be a necessary step in the process, it is only a first step. In our view, a truer indication of rehabilitation will be presented if petitioner can demonstrate by his sustained conduct over an extended period of time that he is once again fit to practice. . . ." (*In re Conflenti* (1981) 29 Cal.3d 120, 124-125.)

22. When considering an individual's rehabilitation from substance abuse, consideration must be given to the nature and extent of that abuse and its impact upon the individual. Through continued abstinence, a substance abuser may arrest the deleterious manifestations of the disease. The requisite length of time required to show meaningful and sustained rehabilitation varies from case to case. (*In re Billings* (1990) 50 Cal.3d 358, 367.)

23. In considering disciplinary action, the board is required to consider its disciplinary guidelines, effective October 2007. (Cal. Code Regs., tit. 16, §1760.) "Deviation from these guidelines and orders, including the standard terms of probation, is appropriate where the board, in its sole discretion, determines that the facts of the particular case warrant such a deviation-the presence of mitigating factors; the age of the case; evidentiary problems." (Cal. Code Regs., tit. 16, §1760.)

//

24. The board's disciplinary guidelines provide that:

In determining whether the minimum, maximum, or an intermediate penalty is to be imposed in a given case, factors such as the following should be considered:

1. actual or potential harm to the public
2. actual or potential harm to any consumer
3. prior disciplinary record, including level of compliance with disciplinary order(s)
4. prior warning(s), including but not limited to citation(s) and fine(s), letter(s) of admonishment, and/or correction notice(s)
5. number and/or variety of current violations
6. nature and severity of the act(s), offense(s) or crime(s) under consideration
7. aggravating evidence
8. mitigating evidence
9. rehabilitation evidence
10. compliance with terms of any criminal sentence, parole, or probation
11. overall criminal record
12. if applicable, evidence of proceedings for case being set aside and dismissed pursuant to Section 1203.4 of the Penal Code
13. time passed since the act(s) or offense(s)
14. whether the conduct was intentional or negligent, demonstrated incompetence, or, if the respondent is being held to account for conduct committed by another, the respondent had knowledge of or knowingly participated in such conduct

15. financial benefit to the respondent from the misconduct.

No single one or combination of the above factors is required to justify the minimum and/or maximum penalty in a given case, as opposed to an intermediate one.

25. The guidelines also list examples of evidence a respondent may submit regarding rehabilitation, including "[r]ecent, dated" performance evaluations, references, or statements from employers; letters regarding participation in recovery programs or support groups; laboratory or drug screening reports, showing abstention from drugs and/or alcohol; physical examination or assessment reports; and/or letters from probation or parole officers.

26. The guidelines place violations in categories and recommend discipline based on the category of the specific violation. Unprofessional conduct under Business and Professions Code section 4301 falls under Category II. The maximum recommended discipline under Category II is revocation, and the minimum is revocation, stayed, with three years' probation and standard probationary terms. However, if self-administration or diversion of controlled substances is involved, five years of probation is the minimum recommendation.

Evaluation

27. Pharmacy technicians occupy positions that require trustworthiness, honesty, clear-headedness, and the exercise of impeccable judgment because pharmacy technicians have access to confidential personal and financial information of consumers and highly regulated medications and devices.

28. In this case, Mr. Davis admitted that he cultivated anywhere between 285 and 385 marijuana plants for sale. For several years, he consumed large amounts of marijuana and honey oil, although he claimed to have a doctor's recommendation for medical use to control pain. Even though he stopped using marijuana in 2015, he did not seek any form of treatment because he did not believe he was addicted, based on his belief that marijuana is not addictive.

Respondent's misconduct was very serious, and while he may not have fully understood until his conviction that he was violating state law, he admitted he knew he was violating federal law. Although he acknowledged that what he did was wrong, some of his testimony was particularly troublesome. When he was asked what he would have done differently, he volunteered that he would not have planted as many marijuana plants so it would not look as big to helicopters. He also stated that one of the reasons the board should not be concerned that he might divert controlled substances was that he "did not see how you could get away with it." Those responses raise dire concerns about whether Mr. Davis truly understands the serious nature of his conduct and whether he could be trusted around controlled substances if he believed he could get away with diversion. His reference to what might be detectible from a helicopter indicates that he may be sorry he got caught (as

opposed to regretting his conduct) and he might do it again but on a smaller scale. It was also disconcerting that when he was given the opportunity to cross-examine Dr. Mutrux, he asked Dr. Mutrux to confirm that if a pharmacy technician made a mistake, that it was really the supervising pharmacist's legal responsibility. That question displayed a misunderstanding of the potential harmful consequences to a patient in the event of a mistake.

Mr. Davis did not present any rehabilitation evidence other than his own testimony. While it is unfortunate that he relied upon American Career College's assurances that his issues with marijuana would not be a problem when he decided to pursue a career as a pharmacy technician, that information does not show rehabilitation. Because Mr. Davis failed to present sufficient evidence of rehabilitation, the board's decision to deny his application must be affirmed.

ORDER

The Board of Pharmacy's denial of respondent Bryce A. Davis's application for a pharmacy technician application is AFFIRMED.

DATED: August 16, 2017

DocuSigned by:
Theresa Brehl
A6B0D1C95F194AE...

THERESA M. BREHL
Administrative Law Judge
Office of Administrative Hearings

XAVIER BECERRA
Attorney General of California
JAMES M. LEDAKIS
Supervising Deputy Attorney General
NICOLE R. TRAMA
Deputy Attorney General
State Bar No. 263607
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 738-9441
Facsimile: (619) 645-2061
Attorneys for Complainant

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

In the Matter of the Statement of Issues Against: **BRYCE A. DAVIS** **Pharmacy Technician Registration Applicant** Respondent.	Case No. 6077 **FIRST AMENDED STATEMENT OF ISSUES**

Complainant alleges:

PARTIES

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

2. On or about August 23, 2016, the Board received an application for a Pharmacy Technician Registration from Bryce A. Davis (Respondent). On or about August 15, 2016, Bryce A. Davis certified under penalty of perjury to the truthfulness of all statements, answers, and representations in the application. The Board denied the application on February 10, 2017.

///

///

JURISDICTION

3. This First Amended 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 (Code) unless otherwise indicated.

4. Section 4300, subdivision (c) of the Code provides, in pertinent part, that the Board may refuse a license to any applicant guilty of unprofessional conduct. The board may, in its sole discretion, issue a probationary license to any applicant for a license who is guilty of unprofessional conduct and who has met all other requirements for licensure.

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.

(b) Notwithstanding any other provisions of this code, the provisions of this division shall govern the suspension and revocation of licenses on grounds specified in paragraphs (1) and (2) of subdivision (a).

(c) A license shall not be denied, suspended, or revoked on the grounds of a lack of good moral character or any similar ground relating to an applicant's character, reputation, personality, or habits.

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, 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 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."

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

. . .

(j) The violation of any of the statutes of this state, of 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. . .

REGULATORY PROVISIONS

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

. . .

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

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

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

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

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

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

10. 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

(December 13, 2016 Criminal Conviction for Cultivating Marijuana on May 18, 2015)

11. Respondent's application for licensure is subject to denial under section 480, subdivisions (a)(1) and (a)(3)(A) of the Code in that he was convicted of a crime that is substantially related to the qualifications, duties, and functions of a registered pharmacy technician. Said conviction would be grounds for discipline under section 4301, subdivision (l) of the Code for a registered pharmacy technician. The circumstances are as follows:

a. On December 13, 2016, in a criminal proceeding entitled, *People of the State of California v. Bryce Anthony Davis*, in Riverside County Superior Court, case number BAF1500799, Respondent was convicted on his plea of guilty of violating Health and Safety Code section 11358, cultivating marijuana, a felony which the court agreed to reduce to a misdemeanor pursuant to Proposition 64.[1]

b. As a result of the conviction, Respondent was ordered to serve two days in county jail with pre-custody credit for two days for time served, and to pay fines and fees in the amount of $220.

c. The facts that led to the conviction are that on May 18, 2015, deputies with the Riverside County Sheriff's Department (RCSD), Southwest Corridor Narcotics Task Force, served a narcotics related search warrant in Hemet, California. During the search warrant, RCSD deputies made contact with Respondent and a co-defendant inside the target residence. RCSD deputies located 85 live marijuana plants in a bedroom that was converted into a grow room, and several large green houses on the property containing live marijuana plants. During a search of Respondent's bedroom, the RCSD deputies located approximately 33 grams of honey oil, three

///

[1] California Proposition 64, also referred to as "the Adult Use of Marijuana Act," was on the November 8, 2016 ballot in California as an initiated state statute. Proposition 64 made it legal for adults aged 21 years or older to use and grow marijuana for personal use beginning November 9, 2016.

plastic baggies containing marijuana weighing approximately 7.2 pounds, honey oil on top of the nightstand, and a digital scale. During the investigation, Respondent claimed to be living at that residence with the agreement that he would grow marijuana plants for an unknown male nicknamed "Old Man," and in return he would receive approximately 15 percent of the total weight of the marijuana as payment. Respondent estimated that he would have received 15 pounds of processed marijuana as payment, which he would then sell to a local marijuana dispensary and get paid approximately $1,500 per pound, totaling $22,500. Respondent was arrested for cultivating marijuana.

SECOND CAUSE FOR DENIAL OF APPLICATION

(Violation of State & Federal Statutes Regulating Controlled Substances)

12. Respondent's application for licensure is subject to denial under section 480, subdivision (a)(3)(A) of the Code in that he violated state (Health and Safety Code section 11358) and federal (Title 21, U.S.C., section 841) statutes regulating controlled substances, when he cultivated/manufactured marijuana, as described in paragraph 11 above, and incorporated herein by reference. Said violation would be grounds for discipline under section 4301, subdivision (j) of the Code for a registered pharmacy technician.

THIRD CAUSE FOR DENIAL OF APPLICATION

(General Unprofessional Conduct)

13. Respondent's application for licensure is subject to denial under section 480, subdivision (a)(3)(A) of the Code for committing acts constituting unprofessional conduct when he illegally cultivated/manufactured marijuana with the intent to sell a percentage of that marijuana for profit, acts that if done by a licensee would be grounds for suspension or revocation of license under section 4301 of the Code.

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 Bryce A. Davis for a Pharmacy Technician Registration;

///

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

DATED: 7/10/17

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

SD2017704194
81743564.docx

XAVIER BECERRA
Attorney General of California
LINDA K. SCHNEIDER
Senior Assistant Attorney General
JAMES M. LEDAKIS
Supervising Deputy Attorney General
State Bar No. 132645
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 738-9409
Facsimile: (619) 645-2061
Attorneys for Complainant

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

In the Matter of the Statement of Issues Against: **BRYCE A. DAVIS** **Pharmacy Technician Registration Applicant** Respondent.	Case No. 6077 **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 (Board), Department of Consumer Affairs.

2. On or about August 23, 2016, the Board received an application for a Pharmacy Technician Registration from Bryce A. Davis (Respondent). On or about August 15, 2016, Bryce A. Davis certified under penalty of perjury to the truthfulness of all statements, answers, and representations in the application. The Board denied the application on February 10, 2017.

///

///

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 (Code) unless otherwise indicated.

4. Section 4300, subdivision (c) of the Code provides, in pertinent part, that the Board may refuse a license to any applicant guilty of unprofessional conduct. The board may, in its sole discretion, issue a probationary license to any applicant for a license who is guilty of unprofessional conduct and who has met all other requirements for licensure.

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.

(b) Notwithstanding any other provisions of this code, the provisions of this division shall govern the suspension and revocation of licenses on grounds specified in paragraphs (1) and (2) of subdivision (a).

(c) A license shall not be denied, suspended, or revoked on the grounds of a lack of good moral character or any similar ground relating to an applicant's character, reputation, personality, or habits.

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, 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 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."

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

. . .

(j) The violation of any of the statutes of this state, of 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. . .

REGULATORY PROVISIONS

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

. . .

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

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

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

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

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

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

10. 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

(December 13, 2016 Criminal Conviction for Cultivating Marijuana on May 18, 2015)

11. Respondent's application for licensure is subject to denial under section 480, subdivisions (a)(1) and (a)(3)(A) of the Code in that he was convicted of a crime that is substantially related to the qualifications, duties, and functions of a registered pharmacy technician. Said conviction would be grounds for discipline under section 4301, subdivision (l) of the Code for a registered pharmacy technician. The circumstances are as follows:

a. On December 13, 2016, in a criminal proceeding entitled, *People of the State of California v. Bryce Anthony Davis*, in Riverside County Superior Court, case number BAF1500799, Respondent was convicted on his plea of guilty of violating Health and Safety Code section 11358, cultivating marijuana, a felony which the court agreed to reduce to a misdemeanor pursuant to Proposition 64.[1]

b. As a result of the conviction, Respondent was ordered to serve two days in county jail with pre-custody credit for two days for time served, and to pay fines and fees in the amount of $220.

c. The facts that led to the conviction are that on May 18, 2015, deputies with the Riverside County Sheriff's Department (RCSD), Southwest Corridor Narcotics Task Force, served a narcotics related search warrant in Hemet, California. During the search warrant, RCSD deputies made contact with Respondent and a co-defendant inside the target residence. RCSD deputies located 85 live marijuana plants in a bedroom that was converted into a grow room, and several large green houses on the property containing live marijuana plants. During a search of Respondent's bedroom, the RCSD deputies located approximately 33 grams of honey oil, three

///

[1] California Proposition 64, also referred to as "the Adult Use of Marijuana Act," was on the November 8, 2016 ballot in California as an initiated state statute. Proposition 64 made it legal for adults aged 21 years or older to use and grow marijuana for personal use beginning November 9, 2016.

plastic baggies containing marijuana weighing approximately 7.2 pounds, honey oil on top of the nightstand, and a digital scale. During the investigation, Respondent claimed to be living at that residence with the agreement that he would grow marijuana plants for an unknown male nicknamed "Old Man," and in return he would receive approximately 15 percent of the total weight of the marijuana as payment, which he would then sell to a local marijuana dispensary. Respondent was arrested for cultivating marijuana.

SECOND CAUSE FOR DENIAL OF APPLICATION

(Violation of State Statute Regulating Controlled Substances)

12. Respondent's application for licensure is subject to denial under section 480, subdivision (a)(3)(A) of the Code in that he violated a state statute regulating controlled substances. On May 18, 2015, Respondent was arrested for cultivating marijuana, a violation of Health and Safety Code, section 11358, as described in paragraph 11 above, and incorporated herein by reference. Said violation would be grounds for discipline under section 4301, subdivision (j) of the Code for a registered pharmacy technician.

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 Bryce A. Davis for a Pharmacy Technician Registration;
2. Taking such other and further action as deemed necessary and proper.

DATED: 5/8/17

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

SD2017704194
81673683.doc