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

11 In the Matter of the Accusation Against:

Case No. 4077

12 **BRIGETTE A. GUTIERREZ**
13 **5616 Grand Prix Court**
14 **Fontana, CA 92336**

A C C U S A T I O N

15 **Original Pharmacy Technician Registration**
16 **No. TCH 96774**

Respondent.

17
18 Complainant alleges:

19 **PARTIES**

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

22 2. On or about May 26, 2010, the Board of Pharmacy issued Original Pharmacy
23 Technician Registration Number TCH 96774 to Brigitte A. Gutierrez (Respondent). Said
24 Registration Number will expire on April 30, 2012.

25 **JURISDICTION**

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

1 4. Section 118, subdivision (b), of the Code provides that the
2 suspension/expiration/surrender/cancellation of a license shall not deprive the
3 Board/Registrar/Director of jurisdiction to proceed with a disciplinary action during the period
4 within which the license may be renewed, restored, reissued or reinstated.

5 5. Section 482 of the Code states:

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

8 "...

9 "(b) Considering suspension or revocation of a license under Section 490.

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

12 6. Section 490 of the Code provides, in pertinent part, that a board may suspend or
13 revoke a license on the ground that the licensee has been convicted of a crime substantially
14 related to the qualifications, functions, or duties of the business or profession for which the
15 license was issued.

16 7. Section 493 of the Code states:

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

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

28 8. Section 498 of the Code states:

1 "A board may revoke, suspend, or otherwise restrict a license on the ground that the
2 licensee secured the license by fraud, deceit, or knowing misrepresentation of a material fact or
3 by knowingly omitting to state a material fact."

4 9. Section 4202 of the Code states in pertinent part:

5 "(d) The board may suspend or revoke a license issued pursuant to this section on any
6 ground specified in Section 4301."

7 10. Section 4300 of the Code states:

8 "(a) Every license issued may be suspended or revoked."

9 STATUTORY PROVISIONS

10 11. Section 4301 of the Code states:

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

14 "...

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

17 "(h) The administering to oneself, of any controlled substance, or the use of any dangerous
18 drug or of alcoholic beverages to the extent or in a manner as to be dangerous or injurious to
19 oneself, to a person holding a license under this chapter, or to any other person or to the public, or
20 to the extent that the use impairs the ability of the person to conduct with safety to the public the
21 practice authorized by the license.

22 "...

23 "(j) The violation of any of the statutes of this state, or any other state, or of the United
24 States regulating controlled substances and dangerous drugs.

25 "...

26 "(l) The conviction of a crime substantially related to the qualifications, functions, and
27 duties of a licensee under this chapter. The record of conviction of a violation of Chapter 13
28 (commencing with Section 801) of Title 21 of the United States Code regulating controlled

1 substances or of a violation of the statutes of this state regulating controlled substances or
2 dangerous drugs shall be conclusive evidence of unprofessional conduct. In all other cases, the
3 record of conviction shall be conclusive evidence only of the fact that the conviction occurred.
4 The board may inquire into the circumstances surrounding the commission of the crime, in order
5 to fix the degree of discipline or, in the case of a conviction not involving controlled substances
6 or dangerous drugs, to determine if the conviction is of an offense substantially related to the
7 qualifications, functions, and duties of a licensee under this chapter. A plea or verdict of guilty or
8 a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning
9 of this provision. The board may take action when the time for appeal has elapsed, or the
10 judgment of conviction has been affirmed on appeal or when an order granting probation is made
11 suspending the imposition of sentence, irrespective of a subsequent order under Section 1203.4 of
12 the Penal Code allowing the person to withdraw his or her plea of guilty and to enter a plea of not
13 guilty, or setting aside the verdict of guilty, or dismissing the accusation, information, or
14 indictment.

15 **REGULATORY PROVISIONS**

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

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

23 14. California Code of Regulations, title 16, section 1769, states in pertinent part:

24 "...

25 "(b) When considering the suspension or revocation of a facility or a personal license on
26 the ground that the licensee or the registrant has been convicted of a crime, the board, in
27 evaluating the rehabilitation of such person and his present eligibility for a license will consider
28 the following criteria:

- (1) Nature and severity of the act(s) or offense(s).
- (2) Total criminal record.
- (3) The time that has elapsed since commission of the act(s) or offense(s).
- (4) Whether the licensee has complied with all terms of parole, probation, restitution or any other sanctions lawfully imposed against the licensee.
- (5) Evidence, if any, of rehabilitation submitted by the licensee."

COST RECOVERY

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

CONTROLLED SUBSTANCES/DANGEROUS DRUGS

16. Section 4021 of the Code states:

"'Controlled substance' means any substance listed in Chapter 2 (commencing with Section 11053) of Division 10 of the Health and Safety Code."

17. Section 4022 of the Code states in pertinent part:

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

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

"...

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

18. Morphine is a Schedule II controlled substance as designated by Health and Safety Code section 11055(b)(1)(L) and designated a controlled substance by Business and Professions Code section 4021 and a dangerous drug by Business and Professions Code section 4022.

19. Oxycontin, generic name oxycodone, is a Schedule II controlled substance as designated by Health and Safety Code section 11055(b)(1)(M) and designated a controlled

1 substance by Business and Professions Code section 4021 and a dangerous drug by Business and
2 Professions Code section 4022.

3 20. Codeine is a Schedule II controlled substance as designated by Health and Safety
4 Code section 11055(b)(1)(G) and designated a controlled substance by Business and Professions
5 Code section 4021 and a dangerous drug by Business and Professions Code section 4022.

6 **FIRST CAUSE FOR DISCIPLINE**

7 (September 24, 2009 Failure to Disclose Criminal Conviction for Petty Theft on August 16, 2007)

8 21. Respondent is subject to disciplinary action under section 498 and section 4301(g) in
9 that Respondent failed to disclose on her 2009 application for registration as a pharmacy
10 technician, the September 24, 2009 criminal conviction for petty theft that occurred on August 16,
11 2007. The circumstances are as follows:

12 22. On or about August 16, 2007, Respondent was detained by the Loss Prevention Agent
13 at the Nordstrom store on Plaza Lane in Montclair, California. The Loss Prevention Agent
14 observed Respondent select thirteen clothing items from displays, proceed to a fitting room, exit
15 the room and leave eight of the items in the fitting room. Five items were unaccounted for. The
16 agent watched Respondent leave the store without paying for the five items. Upon confronting
17 Respondent outside of the store, the Loss Prevention Agents recovered five items from
18 Respondent's shopping bag and purse. The agents placed Respondent under citizen's arrest and
19 called Montclair Police. Respondent admitted to stealing the items to the police. The Montclair
20 Police Department issued Respondent a Misdemeanor Notice to Appear and she was released
21 from custody.

22 23. *People v. Brigitte Gutierrez*, San Bernardino Superior Court case number
23 MWV705250 was initiated based on the notice to appear. On October 11, 2007, Respondent
24 failed to appear at the arraignment. A warrant was ordered on October 15, 2007.

25 24. Respondent appeared for arraignment on February 2, 2009 in the Superior Court of
26 San Bernardino County. Respondent pled guilty to violation of Penal Code section 490.5(A),
27 Petty Theft and was sentenced to probation. (Sentencing details set forth in paragraph 31 below.)
28

25. On September 24, 2009, Respondent signed an Applicant Affidavit under the penalty of perjury as a part of her Application for Registration as a Pharmacy Technician. Respondent answered "No" to question 6 on page 3 of 4 when asked: "Have you ever been convicted of or pled no contest to a violation of any law of a foreign country, the United States or any state laws or local ordinances? You must include all misdemeanor and felony convictions, regardless of the age of the conviction, including those which have been set aside under Penal Code section 1203.4. Traffic violations of \$500 or less need not be reported. If "yes," attach an explanation including the type of violation, the date, circumstances, location and the complete penalty received. In addition to this written explanation, please provide the Board of Pharmacy with certified copies of all pertinent court documents or arrest reports relating to this conviction."

SECOND CAUSE FOR DISCIPLINE

(February 1, 2011 Criminal Conviction for Possession of a Controlled Substance on July 27, 2010)

26. Respondent is subject to disciplinary action under section 490 and 4301(j) and 4301(l) in that on or about February 1, 2011, in the County of San Bernardino, Rancho Cucamonga District case, *People of the State of California v. Brigitte Anne Gutierrez*, number FMV1002531, Respondent was convicted by a plea of guilty to a substantially related crime of violation of Health and Safety Code section 11377(a), possession of a controlled substance. The circumstances are as follows:

27. On or about July 27, 2010, Sheriff's Department personnel of the Multi Enforcement Team executed a search warrant at Respondent's residence in Fontana. The officers found and seized a number of items including 1/2 Oxycontin pill, 10 Morphine pills, 2 Acetaminophen with Codeine pills, and 5 Cephalexin (not a controlled substance) pills. The officers interviewed Respondent who admitted to having prescriptions for Oxycontin and Morphine for personal use. She also admitted to taking Oxycontin and Morphine daily for pain and occasionally selling Oxycontin when she needed money. Respondent reported feeling addicted to Oxycontin. Respondent was arrested and charged with violations of Health and Safety Code section 11351 Possession of Narcotics for Sale.

1 28. Felony Complaint in case FWV1002531 was filed on October 12, 2010, and alleged
2 the violation of section 11351 in Count 1.

3 29. On February 1, 2011, on the People's motion, the Complaint was amended to dismiss
4 Count 1 and allege Count 2, violation of Health and Safety Code section 11377(a) Unauthorized
5 Possession of a controlled substance. Respondent pled guilty to Count 2 and was sentenced to
6 probation for 36 months with the following conditions: Violate no law other than minor traffic;
7 pay fines; served 10 days in custody; report to a rehabilitation center; and complete a work
8 release program.

9 **THIRD CAUSE FOR DISCIPLINE**

10 (Administer a Controlled Substance to Self so as to be Dangerous or Injurious)

11 30. Respondent is subject to disciplinary action under section 490 and 4301(h) in that
12 Respondent was convicted of a substantially related crime for violation of Health and Safety
13 Code section 11377(a), Possession of a Controlled Substance for self administration as described
14 more fully in paragraphs 26-29 and incorporated herein by this reference.

15 **DISCIPLINE CONSIDERATIONS**

16 31. To determine the degree of discipline, if any, to be imposed on Respondent,
17 Complainant alleges that on or about February 2, 2009, in a prior criminal proceeding entitled
18 *People of the State of California v. Brigitte Gutierrez* in San Bernardino Superior Court, Case
19 Number MWV705250. Respondent was convicted by a plea of guilty for violating PC490.5(A)
20 Petty Theft, a misdemeanor, and was ordered to Conditional and Revocable Release for 24
21 months. Probation conditions: Violate no law other than minor traffic; pay a fine of \$1680.00; pay
22 a fee of \$35.00 for a total of \$1715.00; stay away from Nordstrom stores; serve 1 day in San
23 Bernardino County Jail Facility.

24 **PRAYER**

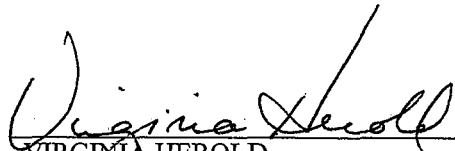
25 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
26 and that following the hearing, the Board of Pharmacy issue a decision:

27 1. Revoking or suspending Original Pharmacy Technician Registration Number TCH
28 96774, issued to Brigitte A. Gutierrez ;

1 2. Ordering Brigette A. Gutierrez to pay the Board of Pharmacy the reasonable costs of
2 the investigation and enforcement of this case, pursuant to Business and Professions Code section
3 125.3;

4 3. Taking such other and further action as deemed necessary and proper.
5
6

7
8 DATED: 10/28/11


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

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