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7
8 **BEFORE THE**
BOARD OF PHARMACY
9 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA

10 In the Matter of the Petition to Revoke Probation
11 Against:

Case No. 4250

12 **NICHOLAS PETER BAIN**
13 **35770 County Line Road**
Yucaipa, California 92399

PETITION TO REVOKE PROBATION

14 **Pharmacy Technician License No. TCH 80186**

15 Respondent.

16
17 Complainant alleges:

18 **PARTIES**

19 1. Virginia Herold (Complainant) brings this Petition to Revoke Probation solely in her
20 official capacity as Executive Officer, Board of Pharmacy, Department of Consumer Affairs.

21 2. On or about May 17, 2011, the Board of Pharmacy issued Original Pharmacy
22 Technician License Number TCH 80186 to Nicholas Bain (Respondent). The License was in
23 effect at all times relevant to the charges brought herein and will expire on October 31, 2012,
24 unless renewed.

25 3. In a disciplinary action entitled "In the Matter of the Statement of Issues Against
26 Nicholas Bain," Case No. 3451, the Board of Pharmacy issued a decision, effective May 16,
27 2011, whereby Respondent was to be issued a probationary license upon satisfaction of meeting
28 all statutory and regulatory requirements. Following the satisfaction of this condition, Respondent

1 was issued Pharmacy Technician License No. TCH 80186, and the license was immediately
2 revoked. Revocation was stayed, and the license was placed on probation for a period of two (2)
3 years with certain terms and conditions. A copy of that decision is attached as Exhibit A and is
4 incorporated by reference.

5 **JURISDICTION**

6 4. This Petition to Revoke Probation is brought before the Board of Pharmacy (Board),
7 Department of Consumer Affairs, under the authority of the following laws. All section
8 references are to the Business and Professions Code unless otherwise indicated.

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

12 6. Section 4300(a) of the Code provides that every license issued by the Board may be
13 suspended or revoked.

14 **FACTUAL BACKGROUND**

15 7. On or about February 27, 2009, the Board denied Nicholas Bain's Application for
16 Registration as a Pharmacy Technician due to multiple convictions for possession of a dangerous
17 drug, reckless driving and driving under the influence of alcohol.

18 8. Effective May 16, 2011, pursuant to a Decision adopted by the Board in Statement of
19 Issues No. 3451, Respondent was to be issued a probationary license upon satisfaction of meeting
20 all statutory and regulatory requirements. Following the satisfaction of this condition, Respondent
21 was issued Pharmacy Technician License No. TCH 80186, and the license was immediately
22 revoked. Revocation was stayed, and the license was placed on probation for a period of two (2)
23 years, subject to Terms and Conditions, including the requirements that Respondent report to the
24 board quarterly (T&C 3), participate in the Board's random drug screening program (T&C 13)
25 and abstain from drug and alcohol use (T&C 14).

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1 **FIRST CAUSE TO REVOKE PROBATION**

2 **(Failure to Report Quarterly to the Board)**

3 9. At all times after the effective date of the Decision and Order imposing probation on
4 Respondent's License, Term and Condition 3 of that Order required:

5 3. **Reporting to the Board.** Respondent shall report to the Board quarterly, on a
6 schedule as directed by the board or its designee. The report shall be made either
7 in person or in writing, as directed. Among other requirements, Respondent
8 shall state in each report under penalty of perjury whether there has been
9 compliance with all the terms and conditions of probation. Failure to submit
10 timely reports in a form as directed shall be considered a violation of probation.
11 Any period(s) of delinquency in submission of reports as directed may be added
12 to the total period of probation. Moreover, if the final probation report is not
13 made as directed, probation shall be automatically extended until such time as
14 the final report is made and accepted by the board.

11 10. Respondent's probation is subject to revocation as he failed to comply with Term
12 and Condition 3 of that probation, listed above. Respondent failed to submit timely quarterly
13 reports to the Board as required. The Board has received no reports since the start of probation.

14 **SECOND CAUSE TO REVOKE PROBATION**

15 **(Failure to Report and Submit to Random Drug Screening)**

16 11. At all times after the effective date of the Decision and Order imposing probation on
17 Respondent's License, Term and Condition 13 of that Order required in pertinent part:

18
19 13. **Random Drug Screening.** Respondent, at his own expense, shall participate in
20 random testing, including but not limited to biological fluid testing (urine, blood),
21 breathalyzer, hair follicle testing, or other drug screening program as directed by
22 the board or its designee. Respondent may be required to participate in testing for
23 the entire probation period and the frequency of testing will be determined by the
24 board or its designee. At all times respondent shall fully cooperate with the Board,
25 and shall, when directed, submit to such tests and samples for the detection of
26 alcohol, narcotics, hypnotics, dangerous drugs or other controlled substances as the
27 board or its designee may direct. Failure to timely submit to testing as directed shall
28 be considered a violation of probation.

...

Any confirmed positive test for alcohol or for any drug not lawfully prescribed by a
licensed practitioner as part of a documented medical treatment shall be considered
a violation of probation and shall result in automatic suspension of work by

1 Respondent. Respondent may not resume work as a pharmacy technician until
2 notified by the board in writing.

3 12. Respondent's probation is subject to revocation because he failed to comply with the
4 Term and Condition 13 of that probation, listed above. Respondent failed to report daily to the
5 contracted lab services vendor for random drug screening on several dates and failed to submit to
6 drug screening on several dates as scheduled.

7 **THIRD CAUSE TO REVOKE PROBATION**

8 **(Failure to Abstain from Drugs and Alcohol Use)**

9 13. At all times after the effective date of the Decision and Order imposing probation on
10 Respondent's License, the Term and Condition 14 of that Order required in pertinent part:

11 14. **Abstain from Drugs and Alcohol.** Respondent shall completely abstain from
12 the possession or use of alcohol, controlled substances, dangerous drugs and
13 their associated paraphernalia except when the drugs are lawfully prescribed by
14 a licensed practitioner as part of a documented medical treatment.

15 ...

16 Any possession or use of alcohol, controlled substances, or their associated
17 paraphernalia not supported by the documentation timely provided, and/or any
18 physical proximity to persons using illicit substances, shall be considered a
19 violation of probation.

20 14. Respondent's probation is subject to revocation as he failed to comply with Term
21 and Condition 14 of that probation, listed above. Respondent tested positive for ETG/ETS
22 (alcohol) on June 20, July 8, and July 13, 2011 through the Board's random drug screening
23 program.

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PRAYER

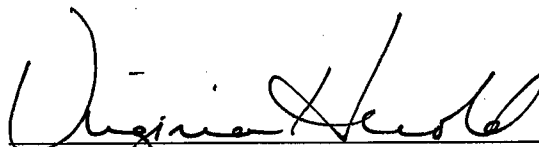
WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Board of Pharmacy issue a decision:

1. Revoking the probation that was granted by the Board of Pharmacy in Case No. 3451 and imposing the disciplinary order that was stayed, thereby revoking Pharmacy Technician License No. TCH 80186, issued to Nicholas Bain (Respondent);

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

DATED:

8/17/12



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

Exhibit A

Decision and Order

Board of Pharmacy Case No. 3451

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

In the Matter of the Statement of Issues
Against:

NICHOLAS PETER BAIN
1401 E. San Antonio #203
Colton, CA 92324

35770 County Line Road
Yucaipa, CA 92399

Respondent.

Case No. SI 2009 3451

OAH No. 2010040905

DECISION AFTER NONADOPTION

This matter was heard by Richard J. Lopez, Administrative Law Judge of the Office of Administrative Hearings on August 18, 2010, at Los Angeles, California.

Brian Walsh, Deputy Attorney General, represented the Complainant.

Respondent appeared in person and represented himself.

Oral and documentary evidence was received and argument was heard.

The record was held open until September 1, 2010 to allow Respondent to submit additional documentary evidence. Respondent timely filed same which was received as Exhibit F in evidence as administrative hearsay.

The case was deemed submitted on September 2, 2010.

The proposed decision of the Administrative Law Judge was submitted to the Board of Pharmacy on October 1, 2010. After due consideration thereof, the Board of Pharmacy declined to adopt said proposed decision and thereafter on December 8, 2010 issued an Order of Non-adoption and subsequently on February 22, 2011 issued an Order Fixing Date for Submission of Argument. Written argument having been received from Complainant and Respondent and the time for filing written argument in

this matter having expired, and the entire record, including the transcript of said hearing having been read and considered, the Board of Pharmacy pursuant to Section 11517 of the Government Code hereby makes the following decision:

FACTUAL FINDINGS

Parties and Procedure

1. Virginia Herold (Complainant) brought the Statement of Issues in her official capacity as Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.
2. On November 13, 2007, the Board of Pharmacy (Board) received an application for a Pharmacy Technician Registration from Nicholas Peter Bain, Respondent herein. On October 30, 2007, Respondent certified under penalty of perjury to the truthfulness of all statements, answers, and representations in the application.
3. The Board denied the application on February 27, 2009. Respondent timely appealed the Board's denial. All pre-hearing jurisdictional requirements have been met by the parties. Jurisdiction for this proceeding exists.

Criminal Conviction

4. On March 22, 2006, after pleading nolo contendere, Respondent was convicted of one misdemeanor count of violating Vehicle Code section 23152, subdivision (b) (driving while having 0.08% and more, by weight, of alcohol in his blood) in the criminal proceeding entitled *the People of the State of California v. Nicholas Peter Bain* (Super. Ct. San Bernardino County, 2006, No. TVA93812). The circumstances surrounding the conviction are that on November 12, 2005, Respondent drove a vehicle while having 0.08% and more, by weight, of alcohol in his blood.
5. On October 11, 2001, after pleading guilty, Respondent was convicted of one misdemeanor count of violating Vehicle Code section 23103, subdivision (a) (reckless driving) in the criminal proceeding entitled *the People of the State of California v. Nicholas Peter Bain* (Super. Ct. San Bernardino County, 2001, No. 188753NB). The circumstances surrounding the conviction are that on September 7, 2001, Respondent engaged in reckless driving on the highway.
6. On May 15, 2001, after pleading nolo contendere, Respondent was convicted of one felony count of violating Health and Safety Code section 11357, subdivision (a) (possession of concentrated cannabis) in the criminal proceeding entitled *The People of the State of California v. Nicholas Peter Bain* (Super. Ct. San Bernardino County, 2001, No. FBV3293). The court sentenced Respondent to 90 days in San Bernardino County Jail and placed him on supervised probation for a period of 36 months, with terms and conditions. On September 12, 2002, the Court ordered

Respondent's probation revoked, but reinstated, and sentenced him to 14 days in San Bernardino County Jail for violating a condition of probation. The circumstances surrounding the conviction are that on January 17, 2001, Respondent was found to be in possession of concentrated cannabis.

7. Findings 4, 5, and 6, taken together, are substantially related¹ to the qualifications, functions or duties of a person holding the applied-for-license in that said conduct, to a substantial degree, evidences present or potential unfitness of a person holding a license as a pharmacy technician to perform the functions authorized by the license in a manner consistent with the public health, safety or welfare.

8. Respondent committed acts – the convictions set forth in Findings 4, 5, and 6 – which if done by a licentiate would be grounds for suspension or revocation of his license.

Mitigation

9. The conduct leading to the convictions set forth in Findings 5 and 6 occurred when Respondent was 18 years of age and a high school senior. Those circumstances do not excuse his youthful but wrongful conduct but do mitigate same.

Disclosure

10. Respondent disclosed the convictions set forth in Findings 4 and 6 in the application but failed to disclose the reckless driving conviction (Finding 5). The failure to do so was the result of inadvertence in that Respondent thought his reckless conduct resulted in a Vehicle Code infraction and not in a misdemeanor. There was no intent by Respondent to deceive or otherwise mislead the Board.

11. Respondent did not commit a dishonest act with the intent to substantially benefit himself or substantially injure another, by reason of Finding 10.

12. Respondent did not knowingly make a false statement of fact in his application, by reason of Finding 10.

Rehabilitation and Character

13. Respondent has completed all court ordered sanctions with regard to all convictions and has successfully completed probation in all cases. Respondent has suffered no other conviction and he is, presently, in conformity to society's norms and rules. Respondent, at present, is not chemically dependent on alcohol or drugs.

14. Respondent was previously employed by Foothill Pharmacy from time to time over a period of four years as an assistant with duties including typing and delivery of prescriptions. While so employed he worked with diligence, honesty, and

¹ California Code of Regulations, title 16, section 1770.

trustworthiness. His work at the pharmacy led to the instant application in that he developed an affinity for pharmacy work.

15. Respondent is now in pursuit of higher education to improve the chances of economic success during this period of the Great Recession.² He is presently enrolled in a number of courses including courses in pharmacology at San Bernardino Valley College and maintains an approximate 3.0 grade point average. Joel Lamore, Associate Professor of English proffered the following:

Mr. Bain is a good student, and I recommend him without reservation. His performance in the class was always solid. He turned in work on time and in good condition, maintained good attendance, earned an A and B on the two exams, participated in workshop discussion well, and turned in a final portfolio that earned a B. His writing was solid, well-composed and formatted, though his work lacked creativity (which is not uncommon for students in the class where work is often very derivative). As his grade demonstrates, however, he both understood the techniques of creative writing and was able to use them in his work competently. That he did well in a course that did not particularly suit his talents indicates academic determination. In workshops (an important part of the course), he interacted well with the other students, contributed comments, and was on task (something quite a few students have trouble with at times).

16. Respondent, now 27 years of age, remains close to his parents and close to extended family members who live in other areas. When his parents or other family member are in town, Respondent attends church services with them at Loma Linda University. His mother proffered a credible character letter on Respondent's behalf attesting to his present good character and to his maturation.

17. Respondent was open and transparent in the application process with exception of the oversight in Finding 10 and has been cooperative, thorough and professional during the process. He was open and candid in his testimony and has a change in attitude since 2006, the time of his last conviction. That change was brought about by a number of factors including Respondent's continuing maturation, his fealty to friends and family, his school works, and his desire to be a productive member of society. That change was demonstrated by his credible testimony.

² The financial crisis of year 2007 to the present triggered by a liquidity shortfall in the United States banking system caused by the overvaluation of assets. Some economists claim it has ended. Other economists claim it persists and will continue to persist given the number of citizens unemployed or underemployed.

LEGAL CONCLUSIONS

Violations

1. Respondent's application is subject to denial under sections 4301, subdivision (l), and 480, subdivision (a)(1), in that Respondent was convicted of crimes, as is set forth in Findings 4, 5, and 6.

2. Respondent's application is not subject to denial under sections 4301, subdivision (f), and 480, subdivision (a)(2), in that Respondent did not commit dishonest act with the intent to substantially benefit himself, or substantially injure another, by reason of Findings 10 and 11.

3. Respondent's application is not subject to denial under sections 4301, subdivision (g), and 480, subdivision (c), in that Respondent did not knowingly make a false statement of fact in his application by reason of Findings 10 and 12.

4. Respondent's application is subject to denial under sections 4301, subdivision (p), and 480, subdivision (a)(3), in that Respondent committed acts which if done by a licensee would be grounds for suspension or revocation of his license. In particular, 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 490 and 4301, subdivision (l), by reasons of Findings 4, 5, 6, and 7.

Licensing Considerations

5. Due to the applicant's history of convictions and the fact that the Respondent has no "track record" of a licensing history with the Board, it would not be appropriate to grant an unrestricted license in this case. The Board's Disciplinary Guidelines (Guidelines) dated and revised October, 2007, were reviewed and considered by the Board to determine if issuance of a restricted license was warranted and, if appropriate, the appropriate level of restriction. Additionally, the objective of a proceeding to determine fitness for licensure is to protect the public, the licensed profession, maintain integrity, high standards, and preserve public confidence in licensees of the Board.³ The purpose of proceedings of this type is not to punish Respondent. In particular, the statutes relating to Board licensees are designed to protect the public from any potential risk of harm. The law looks with favor upon those who have been properly rehabilitated.

6. California Code of Regulations, title 16, section 1769, subdivision (a), a regulation of the Board entitled Criteria of Rehabilitation, states in pertinent part:

³*Camacho v. Youde* (1975) 95 Cal.App.3d, 165; *Clerical v. Department of Motor Vehicles* (1990) 224 Cal.App.3d 1016, 1030-1031; *Fahmy v. Medical Board of California* (1995) 38 Cal.App.4th 810, 816.

- (a) When considering the denial . . . of a license . . . the board in evaluating the rehabilitation of the applicant and his present eligibility for a licensing or registration will consider the following criteria:
- (1) The nature of severity of the act(s) or offenses 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 suspension or 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) referenced 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.

7. In the same sequential order:

- (1) The misdemeanors are serious in that the underlying conduct – driving while drunk – presents a risk of harm or death.
- (2) None.
- (3) The last conviction is four years remote.
- (4) Respondent has complied with probation in all cases.
- (5) Respondent has established the significant rehabilitation set forth in Finding 13 through 17 together with mitigation (Finding 9).

8. Pages 43 through 54 of the 91 page Guidelines relate to Pharmacy Technicians. By reason of Respondent's rehabilitation to date, set forth in Findings 13 through 17, and the significant amount of time that has elapsed since the convictions occurred, a two-year probationary license with the applicable standard conditions set forth in the Guidelines together with the optional conditions listed below is consistent with the public interest.

ORDER

Upon satisfaction of all statutory and regulatory requirements for issuance of a license, a pharmacy technician license shall be issued to Respondent and immediately revoked; the order of revocation is stayed and Respondent is placed on probation for two years upon the following terms and conditions:

1. Certification Prior to Resuming Work

Respondent shall be automatically suspended from working as a pharmacy technician until he is certified as defined by Business and Professions Code section 4202(a)(4) and provides satisfactory proof of certification to the Board. Respondent shall not resume working as a pharmacy technician until notified by the Board. Failure to achieve certification within one (1) year shall be considered a violation of probation. Respondent shall not resume working as a pharmacy technician until notified by the Board.

During suspension, Respondent shall not enter any pharmacy areas or any portion of any other board licensed premises (wholesaler, veterinary food-animal drug retailer or any other distributor of drugs) any drug manufacturer, or any other location where dangerous drugs and devices or controlled substances are maintained. Respondent shall not do any act involving drug selection, selection of stock, manufacturing, compounding or dispensing; nor shall Respondent manage, administer, or assist any licensee of the board. Respondent shall not have access to or control the ordering, manufacturing or dispensing of dangerous drugs and devices or controlled substances. Respondent shall not resume work until notified by the board.

Subject to the above restrictions, Respondent may continue to own or hold an interest in any licensed premises by the board in which he holds an interest at the time this decision becomes effective unless otherwise specified in this order.

Failure to comply with this suspension shall be considered a violation of probation.

2. Obey All Laws

Respondent shall obey all state and federal laws and regulations.

Respondent shall report any of the following occurrences to the board, in writing, within seventy-two (72) hours of such occurrence:

- an arrest or issuance of a criminal complaint for violation of any provision of the Pharmacy Law, state and federal food and drug laws, or state and federal controlled substances laws

- a plea of guilty or nolo contendere in any state or federal criminal proceeding to any criminal complaint, information or indictment
- a conviction of any crime
- discipline, citation, or other administrative action filed by any state or federal agency which involves Respondent's license or which is related to the practice of pharmacy or the manufacturing, obtaining, handling, distributing, billing, or charging for any drug, device or controlled substance.

Failure to timely report such occurrence shall be considered a violation of probation.

3. Report to the Board

Respondent shall report to the board quarterly, on a schedule as directed by the board or its designee. The report shall be made either in person or in writing, as directed. Among other requirements, Respondent shall state in each report under penalty of perjury whether there has been compliance with all the terms and conditions of probation. Failure to submit timely reports in a form as directed shall be considered a violation of probation. Any period(s) of delinquency in submission of reports as directed may be added to the total period of probation. Moreover, if the final probation report is not made as directed, probation shall be automatically extended until such time as the final report is made and accepted by the board.

4. Interview with the Board

Upon receipt of reasonable prior notice, Respondent shall appear in person for interviews with the board or its designee, at such intervals and locations as are determined by the board or its designee. Failure to appear for any scheduled interview without prior notification to board staff, or failure to appear for two (2) or more scheduled interviews with the board or its designee during the period of probation, shall be considered a violation of probation.

5. Cooperate with Board Staff

Respondent shall cooperate with the board's inspection program and with the board's monitoring and investigation of Respondent's compliance with the terms and conditions of his or her probation. Failure to cooperate shall be considered a violation of probation.

6. Notice to Employers

During the period of probation, respondent shall notify all present and prospective employers of the decision in OAH case number 2010040905 and the terms, conditions and restrictions imposed on respondent by the decision, as follows:

Within thirty (30) days of the effective date of this decision, and within fifteen (15) days of Respondent undertaking any new employment, Respondent shall cause his direct supervisor, pharmacist-in-charge (including each new pharmacist-in-charge employed during respondent's tenure of employment) and owner to report to the board in writing acknowledging that the listed individual(s) has/have read the decision in OAH case number 2010040905, and terms and conditions imposed thereby. It shall be Respondent's responsibility to ensure that his or her employer(s) and/or supervisor(s) submit timely acknowledgment(s) to the board.

If Respondent works for or is employed by or through a pharmacy employment service, respondent must notify his or her direct supervisor, pharmacist-in-charge, and owner at every entity licensed by the board of the terms and conditions of the decision in OAH case number 2010040905 in advance of the respondent commencing work at each pharmacy. A record of this notification must be provided to the board upon request.

Furthermore, within thirty (30) days of the effective date of this decision, and within fifteen (15) days of Respondent undertaking any new employment by or through a pharmacy employment service, Respondent shall cause his or her direct supervisor with the pharmacy employment service to report to the board in writing acknowledging that he or she has read the decision in OAH case number 2010040905 and the terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that his or her employer(s) and/or supervisor(s) submit timely acknowledgment(s) to the board. Failure to timely notify present or prospective employer(s) or to cause that/those employer(s) to submit timely acknowledgments to the board shall be considered a violation of probation.

"Employment" within the meaning of this provision shall include any full-time, part-time, temporary, relief or pharmacy management service as a pharmacy technician or any position for which a pharmacy technician license is a requirement or criterion for employment, whether the respondent is considered an employee, independent contractor or volunteer.

7. Probation Monitoring Costs

Respondent shall pay any costs associated with probation monitoring as determined by the board each and every year of probation. Such costs shall be payable to the board on a schedule as directed by the board or its designee. Failure to pay such costs by the deadline(s) as directed shall be considered a violation of probation.

8. Status of License

Respondent shall, at all times while on probation, maintain an active, current license with the board, including any period during which suspension or probation is tolled. Failure to maintain an active, current license shall be considered a violation of probation.

If Respondent's license expires or is cancelled by operation of law or otherwise at any time during the period of probation, including any extensions thereof due to tolling or otherwise, upon renewal or reapplication respondent's license shall be subject to all terms and conditions of this probation not previously satisfied.

9. License Surrender While on Probation/Suspension

Following the effective date of this decision, should Respondent cease practice due to retirement or health, or be otherwise unable to satisfy the terms and conditions of probation, Respondent may tender his pharmacy technician license to the board for surrender. The board or its designee shall have the discretion whether to grant the request for surrender or take any other action it deems appropriate and reasonable. Upon formal acceptance of the surrender of the license, Respondent will no longer be subject to the terms and conditions of probation. This surrender constitutes a record of discipline and shall become a part of the respondent's license history with the board.

Upon acceptance of the surrender, Respondent shall relinquish his pharmacy technician license to the board within ten (10) days of notification by the board that the surrender is accepted. Respondent may not reapply for any license from the board for three (3) years from the effective date of the surrender. Respondent shall meet all requirements applicable to the license sought as of the date the application for that license is submitted to the board.

10. Notification of a Change in Name, Residence Address, Mailing Address or Employment

Respondent shall notify the board in writing within ten (10) days of any change of employment. Said notification shall include the reasons for leaving, the address of the new employer, the name of the supervisor and owner, and the work schedule if known. Respondent shall further notify the board in writing within ten (10) days of a change in name, residence address, mailing address, or phone number.

Failure to timely notify the board of any change in employer(s), name(s), address(es), or phone number(s) shall be considered a violation of probation.

11. Tolling of Probation

Except during periods of suspension, respondent shall, at all times while on probation, be employed as a pharmacy technician in California for a minimum of 80 hours per calendar month. Any month during which this minimum is not met shall toll the period of probation, i.e., the period of probation shall be extended by one month for each month during which this minimum is not met. During any such period of tolling of probation, respondent must nonetheless comply with all terms and conditions of probation.

Should Respondent, regardless of residency, for any reason (including vacation) cease practicing as a pharmacy technician for a minimum of 80 hours per calendar month in California, respondent must notify the board in writing within ten (10) days of the cessation of work, and must further notify the board in writing within ten (10) days of the resumption of the work. Any failure to provide such notification(s) shall be considered a violation of probation.

It is a violation of probation for respondent's probation to remain tolled pursuant to the provisions of this condition for a total period, counting consecutive and non-consecutive months, exceeding thirty-six (36) months.

"Cessation of work" means calendar month during which respondent is not working for at least 80 hours as a pharmacy technician, as defined in Business and Professions Code section 4115. "Resumption of work" means any calendar month during which respondent is practicing as a pharmacy technician for at least 80 hours as a pharmacy technician as defined by Business and Professions Code section 4115.

12. Violation of Probation

If a Respondent has not complied with any term or condition of probation, the board shall have continuing jurisdiction over respondent, and probation shall automatically be extended, until all terms and conditions have been satisfied or the board has taken other action as deemed appropriate to treat the failure to comply as a violation of probation, to terminate probation, and to impose the penalty that was stayed.

If Respondent violates probation in any respect, the board, after giving respondent notice and an opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. Notice and opportunity to be heard are not required for those provisions stating that a violation thereof may lead to automatic termination of the stay and/or revocation of the license. If a petition to revoke probation or an accusation is filed against respondent during probation, the board shall have continuing jurisdiction and the period of probation shall be automatically extended until the petition to revoke probation or accusation is heard and decided.

13. Random Drug Screening

Respondent, at his or her own expense, shall participate in random testing, including but not limited to biological fluid testing (urine, blood), breathalyzer, hair follicle testing, or other drug screening program as directed by the board or its designee. Respondent may be required to participate in testing for the entire probation period and the frequency of the testing will be determined by the board or its designee. At all times respondent shall fully cooperate with the board or its designee, and shall, when directed, submit to such tests and samples for the detection of alcohol, narcotics, hypnotics, dangerous drugs or other controlled substances as the board or its designee may direct. Failure to timely submit to testing as directed shall be considered a violation of probation. Upon request of the board or its designee, respondent shall provide documentation from a licensed practitioner that the prescription for a detected drug was legitimately issued and is a necessary part of the treatment of the respondent. Failure to timely provide such documentation shall be considered a violation of probation. Any confirmed positive test for alcohol or for any drug not lawfully prescribed by a licensed practitioner as part of a documented medical treatment shall be considered a violation of probation and shall result in the automatic suspension of work by respondent. Respondent may not resume work as a pharmacy technician until notified by the board in writing.

During suspension, respondent shall not enter any pharmacy area or any portion of or any other board licensed premises (wholesaler, veterinary food-animal drug retailer or any other distributor of drugs) any drug manufacturer, or any other location where dangerous drugs and devices or controlled substances are maintained. Respondent shall not do any act involving drug selection, selection of stock, manufacturing, compounding or dispensing; nor shall respondent manage, administer, or assist any licensee of the board. Respondent shall not have access to or control the ordering, manufacturing or dispensing of dangerous drugs and devices or controlled substances. Respondent shall not resume work until notified by the board.

Respondent shall not direct, control or perform any aspect of the practice of pharmacy. Subject to the above restrictions, respondent may continue to own or hold an interest in any licensed premises in which he or she holds an interest at the time this decision becomes effective unless otherwise specified in this order.

Failure to comply with this suspension shall be considered a violation of probation.

14. Abstain from Drugs and Alcohol Use

Respondent shall completely abstain from the possession or use of alcohol, controlled substances, dangerous drugs and their associated paraphernalia except when the drugs are lawfully prescribed by a licensed practitioner as part of a documented medical treatment. Upon request of the board or its designee, Respondent shall provide documentation from the licensed practitioner that the prescription for the drug was legitimately issued and is a necessary part of the treatment of the respondent.

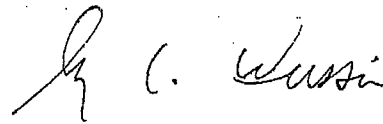
Respondent shall ensure that he is not in the same physical location as individuals who are using illicit substances even if Respondent is not personally ingesting the drugs. Any possession or use of alcohol, controlled substances, or their associated paraphernalia not supported by the documentation timely provided, and/or any physical proximity to persons using illicit substances, shall be considered a violation of probation.

15. Completion of Probation

Upon written notice by the board or its designee indicating successful completion of probation, Respondent shall be granted an unrestricted license.

This Decision shall become effective on May 16, 2011.

IT IS SO ORDERED this 15th day of April, 2011.



STANLEY C. WEISSER
Board President

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2 MARC D. GREENBAUM
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7 *Attorneys for Complainant*

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

11 In the Matter of the Statement of Issues
Against:

Case No. SI 2009 3451

STATEMENT OF ISSUES

12 **NICHOLAS PETER BAIN**
13 1401 E. San Antonio #203
Colton, CA 92324

14 35770 County Line Road
15 Yucaipa, CA 92399

16 Respondent.

17
18 Complainant alleges:

19 **PARTIES**

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

22 2. On or about November 13, 2007, the Board of Pharmacy (Board) received an
23 application for a Pharmacy Technician Registration from Nicholas Peter Bain (Respondent). On
24 or about October 30, 2007, Respondent certified under penalty of perjury to the truthfulness of all
25 statements, answers, and representations in the application. The Board denied the application on
26 February 27, 2009.

27 ///

28 ///

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.

STATUTORY PROVISIONS

4. Section 480 states, in pertinent part:

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

5. Section 490 states:

"(a) In addition to any other action that a board is permitted to take against a licensee, a board may suspend or revoke a license on the ground that the licensee has been convicted of a

1 crime, if the crime is substantially related to the qualifications, functions, or duties of the business
2 or profession for which the license was issued.

3 "(b) Notwithstanding any other provision of law, a board may exercise any authority to
4 discipline a licensee for conviction of a crime that is independent of the authority granted under
5 subdivision (a) only if the crime is substantially related to the qualifications, functions, or duties
6 of the business or profession for which the licensee's license was issued.

7 "(c) A conviction within the meaning of this section means a plea or verdict of guilty or a
8 conviction following a plea of nolo contendere. Any action that a board is permitted to take
9 following the establishment of a conviction may be taken when the time for appeal has elapsed, or
10 the judgment of conviction has been affirmed on appeal, or when an order granting probation is
11 made suspending the imposition of sentence, irrespective of a subsequent order under the
12 provisions of Section 1203.4 of the Penal Code."

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

15 7. Section 4301 states, in pertinent part:

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

19

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

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

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

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

17 REGULATORY PROVISIONS

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

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

25 FIRST CAUSE FOR DENIAL OF APPLICATION

26 (Conviction of Crimes)

27 9. Respondent's application is subject to denial under sections 4301, subdivision (l)
28 and 480, subdivision (a)(1), in that Respondent was convicted of crimes, as follows:

1 a. On or about March 22, 2006, after pleading nolo contendere, Respondent was
2 convicted of one misdemeanor count of violating Vehicle Code section 23152, subdivision (b)
3 (driving while having 0.08% and more, by weight, of alcohol in his blood) in the criminal
4 proceeding entitled *The People of the State of California v. Nicholas Peter Bain* (Super. Ct. San
5 Bernardino County, 2006, No. TVA93812). The circumstances surrounding the conviction are
6 that on or about November 12, 2005, Respondent drove a vehicle while having 0.08% and more,
7 by weight, of alcohol in his blood.

8 b. On or about October 11, 2001, after pleading guilty, Respondent was convicted of
9 one misdemeanor count of violating Vehicle Code section 23103, subdivision (a) (reckless
10 driving) in the criminal proceeding entitled *The People of the State of California v. Nicholas*
11 *Peter Bain* (Super. Ct. San Bernardino County, 2001, No. 188753NB). The circumstances
12 surrounding the conviction are that on or about September 7, 2001, Respondent engaged in
13 reckless driving on the highway.

14 c. On or about May 15, 2001, after pleading nolo contendere, Respondent was
15 convicted of one felony count of violating Health and Safety Code section 11357, subdivision (a)
16 (possession of concentrated cannabis) in the criminal proceeding entitled *The People of the State*
17 *of California v. Nicholas Peter Bain* (Super. Ct. San Bernardino County, 2001, No. FBV3293).
18 The Court sentenced Respondent to 90 days in San Bernardino County Jail and placed him on
19 supervised probation for a period of 36 months, with terms and conditions. On or about
20 September 12, 2002, the Court ordered Respondent's probation revoked, but reinstated, and
21 sentenced him to 14 days in San Bernardino County Jail for violating term no. 2 of the terms and
22 conditions of probation. The circumstances surrounding the conviction are that on or about
23 January 17, 2001, Respondent was found to be in possession of concentrated cannabis.

24 **SECOND CAUSE FOR DENIAL OF APPLICATION**

25 **(Dishonest Acts)**

26 10. Respondent's application is subject to denial under sections 4301, subdivision (f)
27 and 480, subdivision (a)(2), in that Respondent committed dishonest acts with the intent to
28 substantially benefit himself, or substantially injure another, by failing to reveal his complete

1 criminal history on his application for licensure. Specifically, Respondent failed to disclose the
2 conviction identified in paragraph 10, subparagraph (b), set forth above.

3 **THIRD CAUSE FOR DENIAL OF APPLICATION**

4 **(Knowingly Made a False Statement of Fact)**

5 11. Respondent's application is subject to denial under sections 4301, subdivision (g) and
6 480, subdivision (c), in that Respondent knowingly made a false statement of fact in his
7 application, that he certified under penalty of perjury, where he failed to disclose his complete
8 criminal history on his application for licensure. Specifically, Respondent failed to disclose the
9 conviction identified in paragraph 10, subparagraph (b), set forth above.

10 **FOURTH CAUSE FOR DENIAL OF APPLICATION**

11 **(Acts Warranting Denial of Licensure)**

12 12. Respondent's application is subject to denial under sections 4301, subdivision (p)
13 and 480, subdivision (a)(3), in that Respondent committed acts which if done by a licentiate
14 would be grounds for suspension or revocation of his license. Respondent was convicted of
15 crimes substantially related to the qualifications, functions, or duties of a pharmacy technician
16 which to a substantial degree evidence her present or potential unfitness to perform the functions
17 authorized by his license in a manner consistent with the public health, safety, or welfare, in
18 violation of sections 490 and 4301, subdivision (l), in conjunction with California Code of
19 Regulations, title 16, section 1770. Complainant refers to, and by this reference incorporates, the
20 allegations set forth above in paragraph 10, subparagraphs (a) through (c), inclusive, as though set
21 forth fully.

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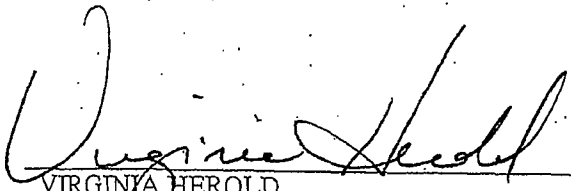
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PRAYER

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

1. Denying the application of Respondent for a Pharmacy Technician Registration; and
2. Taking such other and further action as deemed necessary and proper.

DATED: 3/16/10



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

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