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

11 In the Matter of the Petition to Revoke Probation Case No. 4544
Against:

12
13 **FRANK ANTHONY GUTIERREZ**
700 South Granda Dr #145
14 Madera, California 93637

PETITION TO REVOKE PROBATION

15 Pharmacy Technician License No. TCH 64204

16 Respondent.

17
18 Complainant alleges:

19 **PARTIES**

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

22 2. On or about August 24, 2005, the Board of Pharmacy issued Original Pharmacy
23 Technician License Number TCH 64204 to Frank Anthony Gutierrez (Respondent). The license
24 was in effect at all times relevant to the charges brought herein and expired on November 30,
25 2012.

26 3. In a disciplinary action entitled "In the Matter of the Accusation Against Frank
27 Anthony Gutierrez," Case No. 3579, the Board of Pharmacy issued a Decision effective May 11,
28 2011, revoking Respondent's pharmacy technician license. Revocation was stayed and

1 Respondent was placed on probation for a period of three (3) years with certain terms and
2 conditions. A copy of that decision is attached as Exhibit A and is incorporated by reference.

3 JURISDICTION

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

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

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

12 7. Section 4300.1 of the Code provides that the expiration, cancellation, forfeiture, or
13 suspension of a board-issued license by operation of law or by order or decision of the board or a
14 court of law, the placement of a license on a retired status, or the voluntary surrender of a license
15 by a licensee shall not deprive the board of jurisdiction to commence or proceed with any
16 investigation of, or action or disciplinary proceeding against, the licensee or to render a decision
17 suspending or revoking the license.

18 FACTUAL BACKGROUND

19 8. In a disciplinary action entitled "In the Matter of the Accusation Against Frank
20 Anthony Gutierrez," Case No. 3579, the Board issued a Decision effective May 11, 2011, in
21 which Respondent's pharmacy technician license was revoked. However, the revocation was
22 stayed and Respondent's pharmacy technician license was placed on probation for three (3) years
23 subject to terms and conditions as set forth in the Decision and Order, including the requirements
24 that Respondent shall attend a board-approved substance abuse recovery relapse prevention and
25 support group, shall obtain certification from the Pharmacy Technician Certification Board
26 (PTCB), shall report to the Board or its designee quarterly, shall reimburse the Board its costs of
27 investigation and prosecution and shall submit payment for the costs associated with probation
28 monitoring.

1 **FIRST CAUSE TO REVOKE PROBATION**

2 **(Failure to Submit Proof of Attendance of Substance Abuse Program)**

3 9. At all times after the effective date of the Decision and Order imposing probation on
4 Respondent's license, Term and Condition 1 of that Order required in pertinent part:

5 **1. Attend Substance Abuse Recovery Relapse Prevention and Support**
6 **Groups.** Within 30 days of the effective date of this Decision, Respondent shall
begin regular attendance at a recognized and established substance abuse

7 recovery support group in California (e.g. Alcoholics Anonymous, Narcotics
8 Anonymous, etc.) which has been approved by the board or its designee.
Respondent must attend at least one group meeting per week unless otherwise
9 directed by the Board or its designee. Respondent shall continue regular
attendance and submit signed and dated documentation confirming attendance
with each quarterly report for the duration of probation.

10 ...

11 Failure to attend or submit documentation thereof shall be considered a violation
12 of probation.

13 10. Respondent's probation is subject to revocation as he failed to comply with Term and
14 Condition 1 of that probation, listed above. Respondent has failed to submit timely proof of
15 continued attendance at a Board-approved recognized and established substance abuse recovery
16 support group in California. The last report of attendance was received by the Board on
17 February 12, 2012.

18 **SECOND CAUSE TO REVOKE PROBATION**

19 **(Failure to Obtain Certification by the Pharmacy Technician Certification Board)**

20 11. At all times after the effective date of the Decision and Order imposing probation on
21 Respondent's License, Term and Condition 2 of that Order required in pertinent part:

22 **2. Certification Prior to Resuming Work.** Respondent shall be
23 automatically suspended from working as a pharmacy technician until he is
certified as defined by Business and Professions Code section (4202(a)(4) and
24 provides satisfactory proof of certification to the Board.

25 ...

26 Failure to achieve certification within one (1) year shall be considered a
violation of probation.

27 12. Respondent's probation is subject to revocation as he failed to comply with Term 2 of
28 that probation, listed above. Respondent failed to provide proof of certification by the PTCB

1 within one year of the effective date of the decision. To date, no documentation has been
2 provided to the Board.

3 **THIRD CAUSE TO REVOKE PROBATION**

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

5 13. At all times after the effective date of the Decision and Order imposing probation on
6 Respondent's license, Term and Condition 4 of that Order required in pertinent part:

7
8 4. **Report to the Board.** Respondent shall report to the Board quarterly,
9 on a schedule as directed by the board or its designee. The report shall be made
10 either in person or in writing, as directed. Among other requirements, respondent
11 shall state under penalty of perjury whether there has been compliance with all
12 the terms and conditions of probation. Failure to submit timely reports in a form
13 as directed shall be considered a violation of probation.

14 14. Respondent's probation is subject to revocation as he failed to comply with Term
15 and Condition 4 of that probation, listed above. Respondent failed to submit timely quarterly
16 reports to the Board. To date, the Board has not received a quarterly report since February 12,
17 2012.

18 **FOURTH CAUSE TO REVOKE PROBATION**

19 **(Failure to Submit Cost Recovery Payments)**

20 15. At all times after the effective date of the Decision and Order imposing probation
21 on Respondent's license, Term and Condition 8 of that Order required in pertinent part:

22 8. **Reimbursement of Board Costs.** As a condition precedent to
23 successful completion of probation, respondent shall pay to the Board its costs of
24 investigation and prosecution in the amount of \$1,360.00. Respondent shall
25 make said payments pursuant to a payment schedule to be arranged with the
26 board. Once the board has arranged a payment schedule, there shall be no
27 deviation from this schedule absent prior written approval by the board or its
28 designee. Failure to pay costs by the deadline(s) as directed shall be considered
a violation of probation.

16. Respondent's probation is subject to revocation as he failed to comply with Term
and Condition 8 of that probation, listed above. To date, no payments have been received by the
Board since February 12, 2012.

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FIFTH CAUSE TO REVOKE PROBATION

(Failure to Submit Payment for Costs Associated with Probation Monitoring)

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

9. 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.

18. Respondent's probation is subject to revocation as he failed to comply with Term and Condition 9 of that probation, listed above. Respondent failed to submit payment for costs associated with probation monitoring as required. To date, the Board has not received payment for costs submitted to Respondent on October 22, 2012.

SIXTH CAUSE TO REVOKE PROBATION

(Failure to Maintain an Active and Current License)

19. At all times after the effective date of the Decision and Order imposing probation on Respondent's License, Term and Condition 10 of that Order required:

10. Status of License. Respondent shall, at all times while on probation, maintain an active, current pharmacy technician 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.

20. Respondent's probation is subject to revocation as he failed to comply with Term and Condition 10 of that probation, listed above. Respondent's pharmacy technician license expired on November 30, 2012 and was not renewed.

PRAYER

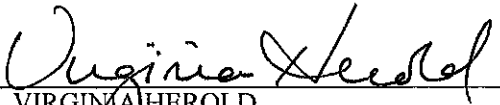
WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Board of Pharmacy issue a decision:

1. Revoking the probation that was granted by the Board of Pharmacy in Case No. 3579 and imposing the disciplinary order that was stayed, thereby revoking Pharmacy Technician License No. TCH 64204, issued to Frank Anthony Gutierrez (Respondent);

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

DATED: 7/11/13



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. 3579

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

In the Matter of the Accusation Against:

FRANK ANTHONY GUTIERREZ
40713 Hwy. 41, #2
Oakhurst, CA 93644

Pharmacy Technician No. TCH 64204

Respondent.

Case No. 3579

OAH No. 2010070681

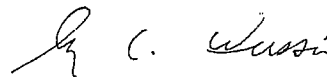
DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Pharmacy as its Decision in the above-entitled matter.

This decision shall become effective on May 11, 2011.

It is so ORDERED April 11, 2011.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

STANLEY C. WEISSER
Board President

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

In the Matter of the Accusation Against:

FRANK ANTHONY GUTIERREZ,

Respondent.

Case No. 3579

OAH Case No. 2010070681

PROPOSED DECISION

This matter was heard before Marilyn A. Woollard, Administrative Law Judge for the Office of Administrative Hearings (OAH), State of California, on December 28, 2010, in Sacramento, California.

Deputy Attorney General Kent D. Harris represented complainant Virginia Herold in her official capacity as the Executive Officer of the Board of Pharmacy (Board), Department of Consumer Affairs. Also present on the Board's behalf was Rick Iknoian.

Frank Anthony Gutierrez (respondent) appeared and represented himself.

Evidence was received, the record was closed, and the matter was submitted on December 28, 2010.

SUMMARY STATEMENT

Complainant met its burden of establishing that respondent's pharmacy technician license should be revoked, based upon his alcohol related convictions. It is not contrary to the public interest to allow respondent to retain his license on a probationary basis, subject to terms and conditions.

FACTUAL FINDINGS

1. On August 24, 2005, the Board issued Pharmacy Technician Registration Number TCH 64204 to respondent. This license is in full force and effect and will expire November 30, 2012.

2. On May 6, 2010, complainant made and filed the original Accusation against respondent in her official capacity only. Complainant requested that respondent's license be revoked or suspended for unprofessional conduct under Business and Professions Code section 4301, subdivisions (l), (k) and (h).¹ Respondent's alleged unprofessional conduct was based upon: his criminal convictions described in Factual Findings 4 through 8, his multiple convictions involving the use of alcohol, and his use of alcoholic beverages to an extent or in a manner dangerous or injurious to others. Complainant requested an order that respondent pay the Board the reasonable costs of its investigation and enforcement of this matter pursuant to section 125.3.

3. On May 25, 2010, respondent filed his Notice of Defense and request for a hearing. The matter was then set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500, et seq.

Respondent's Convictions

4. *August 2, 2006 Conviction:* On August 2, 2006, in Case Number C014586, the Madera Superior Court (Chowchilla Branch) convicted respondent of a violation of Vehicle Code section 23152, subdivision (a) (driving under the influence of alcohol [DUI]). The conviction was based upon respondent's conduct on January 27, 2006.

Sentencing documents for this conviction were not provided. Respondent testified that he completed a 6 month "wet reckless" program following this conviction.

5. *March 7, 2007 Conviction:* On March 7, 2007, in Case Number M07912875, the Fresno County Superior Court convicted respondent of a misdemeanor violation of Vehicle Code section 23152, subdivision (b) (DUI with a blood alcohol content (BAC) of .08 percent or higher), with one prior DUI conviction, based upon his guilty plea. The Court found that respondent's BAC at the time of his arrest was .09 percent.

Imposition of sentence was suspended and respondent was placed on a three year conditional probation. Respondent was ordered: to serve 18 days in county jail with referral to the Adult Offender Work Program (AOWP); to pay of a total fine of \$1,574 and fees of \$145 in monthly installments; to obey all laws; to complete an 18-month Multiple Offender Alcohol Program (Multiple Offender Program); to refrain from driving with a measurable amount of alcohol or drugs in his blood and submit to

¹ Unless otherwise indicated, all undesignated statutory references are to the California Business and Professions Code.

testing on demand; to refrain from driving without a valid driver's license or proof of automobile liability insurance or financial responsibility. This probation was set to end on March 7, 2010.

On April 7, 2007, respondent enrolled in the mandated Multiple Offender Alcohol Program. On October 15, 2007, respondent failed to appear at jail or AOWP. On December 11, 2007, a bench warrant was issued and respondent was to serve 12 days in jail. On March 24, 2008, respondent was arrested and served time on this warrant. On September 11, 2008, respondent was re-referred to the Multiple Offender Alcohol Program.

6. Respondent's conduct which led to this conviction occurred on October 20, 2006, shortly before midnight, as he was driving from Fresno to his home in Madera. The arresting patrol officers observed respondent pull out of a private driveway directly into the path of an approaching car that had to act swiftly to avoid hitting him. Police detected alcohol on respondent's breath; on observation, respondent's speech was slightly slurred and his eyes appeared red and watery. Respondent was unable to perform requested field sobriety tests and provided a breath sample.

7. *April 30, 2007 Conviction:* On April 30, 2007, in Case Number M07912875, the Fresno County Superior Court convicted respondent of a misdemeanor violation of Vehicle Code section 14601.2, subdivision (a), (driving when privilege suspended for prior DUI conviction), based upon his plea of no contest. The conduct underlying this conviction occurred on February 11, 2007 at approximately 12:30 a.m., when respondent was observed to run a red turn arrow. When he was stopped, the police officer determined that respondent's driver's license had been suspended effective November 19, 2006. Respondent's car was impounded.

Imposition of sentence was suspended and respondent was placed on three year conditional probation. Respondent was ordered: to serve 10 days in county jail with referral to the AOWP; to pay of a total fine of \$1,100 and fees of \$195 in monthly installments; to obey all laws; to install an Ignition Interlock Device, with this requirement to remain on his driving record for 3 years; and to refrain from driving without a valid driver's license or proof of automobile liability insurance or financial responsibility. This probation was set to end on April 30, 2010.

Following conviction, the Superior Court Docket noted that: on June 15, 2007, respondent failed to pay; on December 18, 2007, respondent failed to appear at jail or AOWP; on December 28, 2007, a bench warrant was issued with an order for respondent to serve 7 days in county jail; and on March 24, 2008, respondent was arrested and served time on the warrant.

8. *December 6, 2007 Conviction:* On December 6, 2007, in Case Number SCR007641, in the Madera County Superior Court, respondent was convicted of misdemeanor violations of Vehicle Code sections 23152, subdivision (b) (DUI with BAC of .08 or higher) and 14601.2, subdivision (a) (driving when privilege suspended for prior DUI conviction), based upon his guilty plea, and admitted his prior August 2, 2006 DUI conviction.

Imposition of sentence was suspended and respondent was placed on three year conditional probation. Respondent was ordered: to serve 10 days in county jail; to install an Ignition Interlock Device (condition to be reviewed on March 25, 2008); to enroll in the 18-month second offender program and "complete the Kings View Program to the satisfaction of the program director"; to pay of a total fine of \$1,365 (with a suspended fine of \$1050) and an additional restitution fine of \$300 (\$150 each count) payable by a date certain; and to refrain from driving with a measurable amount of alcohol or drugs in his blood and submit to chemical testing on demand.

Respondent's conduct which led to this conviction occurred in the late evening on May 18, 2007. Respondent was stopped for failing to dim his high beams. The arresting officer noted signs of intoxication. Respondent's BAC was .10 percent.

On June 23, 2009, a hearing convened in this matter regarding respondent's compliance with the Ignition Interlock Device probation condition. The court revoked respondent's probation and reinstated it for three years from the original date of December 6, 2007. The Court ordered respondent to serve 10 days in county jail, which could be served a day at a time consistent with his work schedule. The Court deleted the Ignition Interlock Device probation condition, and ordered respondent to re-enroll in the Kings View 18-month DUI Program (KV Program) by August 1, 2009. Respondent's probation was set to end on December 6, 2010.

9. The convictions described in Factual Findings 4 through 8 are substantially related to the qualifications, functions and duties of a pharmacy technician.

Respondent's Testimony

10. Respondent is now 27 years old. Respondent is unmarried and has no children. His closest family member is his father, who lives in Madera. Respondent acknowledged that he had made a series of bad decision in his early 20s which resulted in his convictions. He admitted that, after his initial conviction, he was aware he was on probation at the time of the new offenses. In 2006 and 2007 when he engaged in the conduct that resulted in his convictions, respondent was going through some personal problems. At that time, respondent thought drinking would help. He knows better now. Respondent believes that he has matured since this time.

To better himself, respondent moved from Madera to Oakhurst, to be close to his job at Rite Aid. Respondent has worked at the Rite Aid in Oakhurst for almost ten years. Respondent began working with Rite Aid as a stock clerk when he was a teenager. Respondent is bilingual (English-Spanish) and considers himself to be "good with numbers". He was always a straight 'A' student and avoided gangs. When respondent was 18 years old, the pharmacy manager asked if he was interested in working in the pharmacy. Respondent became a pharmacy clerk. He then completed a pharmacy technician program in Fresno and obtained his license. Respondent also completed a year of community college classes. Respondent hopes to continue his career as a pharmacy technician at Rite Aid and does not want to lose his license. Respondent believes his move to Oakhurst provided him with a "fresh start" apart from old friends. His experience in jail scared him and made him realize that he does not wish to return there and that his career is the most important thing in his life.

Respondent has been involved in the KV Program, which includes random alcohol testing, since January 2010. After a brief interruption in attendance, respondent re-enrolled. He anticipates completing the KV Program in April 2011. As part of the KV Program, respondent has become involved with Mothers Against Drunk Driving. Respondent expressed remorse for his conduct and great relief that he never hurt or killed anyone while he was drinking and driving.

As part of his recovery, respondent attends meetings with Alcoholic Anonymous (AA) in Oakhurst. Respondent enjoys the AA fellowship and recognizes that his use of alcohol resulted in his convictions. Respondent's previous drinking pattern involved situations where he was attending events (dinners at a restaurant, concerts) rather than drinking alone at home. While respondent agrees that he has had a drinking problem, he does not think he is an "alcoholic." Respondent has abstained from drinking for over a year and considers November 29, 2009 as his "sobriety date." He does not currently have an AA "sponsor," but he has a personal group of friends in the program. He is working the steps to recovery. Respondent notes that, in addition to testing through the DV Program, he is subject to random drug testing at his job. He does not take any prescription medications. Respondent provided a copy of an AA meeting sign-in sheet covering his attendance during the period from July 2009 through December 2010.

Respondent believes that he is now off of probation, but was not sure of the exact date. Respondent has completed all jail time and paid all fines. Specifically, respondent served approximately 65 to 90 days of jail time in Madera and Fresno Counties. He provided receipts from the Madera Superior Court which showed: (a) his December 12, 2007 payments of \$1,515 and of \$150, with a balance due of zero, in Case Number CR SCR007641; and (b) a December 12, 2007 payment of \$1,200 with a balance due of zero in Case Number CCR014586. There were no receipts for fines and fees ordered in connection with the Fresno conviction. It is unclear if respondent served jail time in lieu of fines for this matter.

Respondent currently uses public transportation as needed. Respondent anticipates that he will get his driver's license back in April of 2011. Respondent's truck is not completely paid off, but he had to insure it as part of his probation. Respondent provided copies of his Unitrin "California Proof of Insurance Card" showing insurance on his 2005 GMC Canyon for the period from January 15, 2011 through January 15, 2012.

11. *Costs:* In its Certification of Prosecution Costs: Declaration of Kent D. Harris, the Board provided billing summaries in support of its request for cost under section 125.3. Specifically, Deputy Attorney General Harris declared that legal costs billed to the Board by the Department of Justice (DOJ) for the prosecution of this matter totaled \$1,360. The Declaration was supported by the DOJ's "Matter Time Activity by Professional Type" billing report as of December 20, 2010, which reflected a total of 7 attorney hours on this matter over the 2009 and 2010 fiscal years. In addition, Mr. Harris's Declaration reported an additional hour spent in case preparation incurred before his December 20, 2010 signature on the Declaration.

Eight (8) hours of legal preparation with total costs of \$1,360 is reasonable in light of the allegations in the Accusation.

12. Respondent did not object to paying costs. He has worked diligently to pay off previous fines and fees. Respondent typically works full time and earns approximately \$2,200 a month after taxes. He is willing to pay costs on a payment plan.

13. *Discussion:* Respondent testified credibly about the changes he has made in his life since his most recent conviction and he has made significant beginning strides toward rehabilitation. While he has not yet completed the KV Program, respondent has developed an active support structure that will enable him to continue and maintain his recovery. Under these circumstances, it would not be contrary to the public interest to allow him to continue working as a pharmacy technician under a probationary license.

LEGAL CONCLUSIONS

1. *Burden of Proof:* In this matter, the Board bears the burden to prove by clear and convincing evidence that the allegations contained in its Accusation are true, and that the relief it seeks should be granted. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal. App. 3d 853, 856.) Respondent bears the burden of establishing affirmative defenses, including rehabilitation, by a preponderance of the evidence. (*Whetstone v. Board of Dental Examiners* (1927) 87 Cal.App. 156, 164.)

2. *Unprofessional Conduct:* Section 4301 of the Pharmacy Law (section 4300, et seq.) authorizes the Board to take disciplinary action against any licensee “who is guilty of unprofessional conduct.” In relevant part, section 4301 provides that “unprofessional conduct” includes, but is not limited to:

[¶] . . . [¶]

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

[¶] . . . [¶]

(k) The conviction of more than one misdemeanor or any felony involving the use, consumption, or self-administration of any dangerous drug or alcoholic beverage, or any combination of those substances.

(l) The conviction of a crime substantially related to the qualifications, functions, and duties of a licensee under this chapter. . . .

3. In determining whether to discipline an existing license, “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.” (§ 4313.)

4. Legal Cause is established to revoke respondent’s license within the meaning of section for 4301, subdivisions (h), (k) and (l), for unprofessional conduct based upon his use of alcohol to an extent to be dangerous to himself or others and for the resulting multiple misdemeanor convictions involving the use of alcohol while driving a car. A pharmacy technician has access to dangerous drugs and controlled substances. To protect the public, a pharmacy technician must be able to maintain sobriety and comply with laws and regulations. As set forth in Factual Findings 4 through 9, respondent’s convictions are substantially related to the qualifications, functions, and duties of a pharmacy technician because they evidence a “potential unfitness of a licensee. . .to perform the functions authorized by his license. . .in a manner consistent with the public health, safety, or welfare.” (Cal. Code Regs., tit. 16, § 1770.)

5. *Rehabilitation:* California Code of Regulations, title 16, section 1769, subdivision (b), provides that, when considering the revocation of a license on the ground that the licensee has been convicted of a crime, the Board, in evaluating the

rehabilitation of such person and his present eligibility for a license will consider 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.

Further, in reaching a decision on a disciplinary action, the Board "shall consider the disciplinary guidelines entitled "Disciplinary Guidelines" (Rev. 10/2007)," which are incorporated into the regulations. (Cal. Code Regs., tit. 16, § 1760.) Those Guidelines have been considered.

As set forth in Factual Findings 10 through 13, respondent has made substantial beginning steps toward rehabilitation. While the offenses for which he was convicted are serious, the underlying conduct occurred almost four years ago. Throughout the intervening time, respondent has continued working as a pharmacy technician without any complaints or license discipline. When not working, respondent has dedicated himself to completing his jail/work program time, paying off his substantial fines, and attending recovery programs. Respondent's testimony reflected a change in understanding and an increased maturity than that he exhibited at the time of his convictions. As a consequence, it is appropriate to stay the revocation of respondent's license and to authorize a probationary license for a three (3) year period subject to the conditions set forth below.

6. *Costs:* Pursuant to Business and Professions Code section 125.3, respondent may be directed to pay the reasonable costs of investigation and enforcement of the action against him. As set forth in Factual Finding 11, the Board established by a preponderance of the evidence that the reasonable cost of its investigation and prosecution of the allegations against respondent is \$1,360.00.

ORDER

Pharmacy technician license number TCH 64204 is revoked; however, the revocation is stayed and respondent is placed on probation for three (3) years upon the following terms and conditions:

1. *Attend Substance Abuse Recovery Relapse Prevention and Support Groups* (Optional Condition 16): Respondent shall continue attending and shall complete the Kings View Multiple Offender Program.

Within thirty (30) days of the effective date of this decision, respondent shall begin regular attendance at a recognized and established substance abuse recovery support group in California, (e.g., Alcoholics Anonymous, Narcotics Anonymous, etc.) which has been approved by the board or its designee. Respondent must attend at least one group meeting per week unless otherwise directed by the board or its designee. Respondent shall continue regular attendance and submit signed and dated documentation confirming attendance with each quarterly report for the duration of probation. Respondent shall also submit documentation to the board establishing his successful completion of the Kings View Program. Failure to attend or submit documentation thereof shall be considered a violation of probation.

2. *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.

During suspension, respondent shall not enter any pharmacy area 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 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.

3. *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 pharmacy technician 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 any such occurrence shall be considered a violation of probation.

4. *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.

5. *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 at two (2) or more scheduled interviews with the board or its designee during the period of probation, shall be considered a violation of probation.

6. *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 probation. Failure to cooperate shall be considered a violation of probation.

7. *Notice to Employers:* During the period of probation, respondent shall notify all present and prospective employers of the decision in OAH case number 2010070681 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 or her 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 2010070681 and the terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that his 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 direct supervisor, pharmacist-in-charge and owner at every pharmacy of the terms and conditions of the decision in OAH case number 2010070681 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 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 2010070681 and the terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that his 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 acknowledgements 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 or relief service or pharmacy management service as a pharmacy technician or in 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.

8. *Reimbursement of Board Costs:* As a condition precedent to successful completion of probation, respondent shall pay to the board its costs of investigation and prosecution in the amount of \$1,360. Respondent shall make said payments pursuant to a payment schedule to be arranged with the board. Once the board has arranged a payment schedule, there shall be no deviation from this schedule absent prior written approval by the board or its designee. Failure to pay costs by the deadline(s) as directed shall be considered a violation of probation.

The filing of bankruptcy by respondent shall not relieve respondent of his responsibility to reimburse the board its costs of investigation and prosecution.

9. *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.

10. *Status of License:* Respondent shall, at all times while on probation, maintain an active, current pharmacy technician 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 pharmacy technician 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.

11. *License Surrender While on Probation/Suspension:* Following the effective date of this decision, should respondent cease work 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 or her 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, permit, or registration 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.

12. *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 and 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.

13. *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 _____ 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 working as a pharmacy technician for a minimum of ___ hours per calendar month in California, respondent must notify the board in writing within ten (10) days of 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.

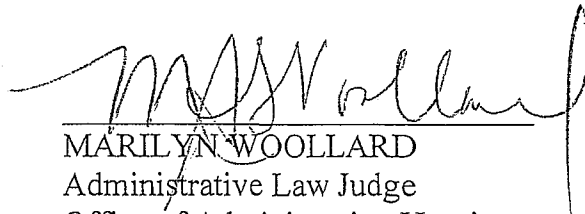
"Cessation of work" means calendar month during which respondent is not working for at least ___ hours as a pharmacy technician, as defined in Business and Professions Code section 4115. "Resumption of work" means any calendar month during which respondent is working as a pharmacy technician for at least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

14. *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.

15. *Completion of Probation:* Upon written notice by the board indicating successful completion of probation, respondent's pharmacy technician license will be fully restored.

DATED: January 28, 2011



MARILYN WOOLLARD
Administrative Law Judge
Office of Administrative Hearings

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

12 In the Matter of the Accusation Against:

Case No. 3579

13 **FRANK ANTHONY GUTIERREZ**
931 Cutting street
Madera, CA 93637

ACCUSATION

14 **Pharmacy Technician Registration No.**
15 **TCH 64204**

16 Respondent.

17 Complainant alleges:

18 **PARTIES**

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

21 2. On or about August 24, 2005, the Board of Pharmacy issued Pharmacy Technician
22 Registration Number TCH 64204 to Frank Anthony Gutierrez (Respondent). The Pharmacy
23 Technician Registration was in full force and effect at all times relevant to the charges brought
24 herein and will expire on November 30, 2010, unless renewed.

JURISDICTION

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

4. Section 4300 of the Code states in pertinent part:

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

"(b) The board shall discipline the holder of any license issued by the board, whose default has been entered or whose case has been heard by the board and found guilty, by any of the following methods:

"(1) Suspending judgment.

"(2) Placing him or her upon probation.

"(3) Suspending his or her right to practice for a period not exceeding one year.

"(4) Revoking his or her license.

"(5) Taking any other action in relation to disciplining him or her as the board in its discretion may deem proper.

...

"(e) The proceedings under this article shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of the Government Code, and the board shall have all the powers granted therein. The action shall be final, except that the propriety of the action is subject to review by the superior court pursuant to Section 1094.5 of the Code of Civil Procedure."

5. Section 4301 of the Code states in pertinent part:

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

...

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

6 ...

7 "(k) The conviction of more than one misdemeanor or any felony involving the use,
8 consumption, or self-administration of any dangerous drug or alcoholic beverage, or any
9 combination of those substances.

10 "(l) The conviction of a crime substantially related to the qualifications, functions, and
11 duties of a licensee under this chapter. The record of conviction of a violation of Chapter 13
12 (commencing with Section 801) of Title 21 of the United States Code regulating controlled
13 substances or of a violation of the statutes of this state regulating controlled substances or
14 dangerous drugs shall be conclusive evidence of unprofessional conduct. In all other cases, the
15 record of conviction shall be conclusive evidence only of the fact that the conviction occurred.
16 The board may inquire into the circumstances surrounding the commission of the crime, in order
17 to fix the degree of discipline or, in the case of a conviction not involving controlled substances
18 or dangerous drugs, to determine if the conviction is of an offense substantially related to the
19 qualifications, functions, and duties of a licensee under this chapter. A plea or verdict of guilty or
20 a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning
21 of this provision. The board may take action when the time for appeal has elapsed, or the
22 judgment of conviction has been affirmed on appeal or when an order granting probation is made
23 suspending the imposition of sentence, irrespective of a subsequent order under Section 1203.4 of
24 the Penal Code allowing the person to withdraw his or her plea of guilty and to enter a plea of not
25 guilty, or setting aside the verdict of guilty, or dismissing the accusation, information, or
26 indictment.

27 ...

1 over for running a right red arrow at a traffic signal. At that time respondent's license was
2 suspended as a result of his prior DUI conviction, and his arrest on October 20, 2006 set forth
3 above in paragraph 7(a) and(b).

4 d. On December 6, 2007 in the Superior Court, Madera County, California in the case
5 entitled *People of the State of California v. Frank Anthony Gutierrez*, Case No. R007641,
6 Respondent was convicted by the court of a violations of Vehicle Code section 23152(b) (driving
7 with a blood alcohol level of .08 or higher.) a misdemeanor, and Vehicle Code section 14601.2(a)
8 (driving when privilege suspended for prior DUI conviction) a misdemeanor. The circumstances
9 are as follows: On May 18, 2007, respondent drove a motor vehicle in Madera County while
10 under the influence of alcohol or drugs and while his license was suspended for prior DUI arrests
11 and convictions.

12 SECOND CAUSE FOR DISCIPLINE

13 (Multiple Convictions involving the use of Alcohol)

14 8. Respondent is subject to disciplinary action for unprofessional conduct under section
15 4301(k) in that he has suffered multiple convictions for crimes involving the use of alcohol as set
16 forth above in paragraphs 7 (a), (b), and (d).

17 THIRD CAUSE FOR DISCIPLINE

18 (Use of Alcoholic Beverage to the Extent or in a Manner Dangerous or Injurious to Others)

19 9. Respondent is subject to disciplinary action for unprofessional conduct under section
20 4301(h) in that he consumed alcoholic beverages to an extent or in a manner that was dangerous
21 or injurious to himself and others as set forth in paragraphs 7(a), (b), and (d) above.

22 PRAYER

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

25 1. Revoking or suspending Pharmacy Technician Registration Number TCH 64204,
26 issued to Frank Anthony Gutierrez Frank Anthony Gutierrez.

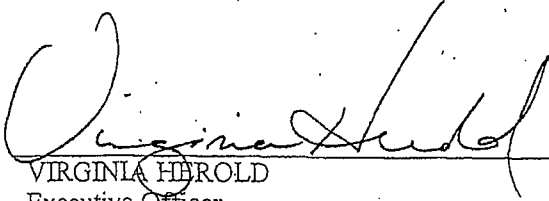
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2. Ordering Frank Anthony Gutierrez to pay the Board of Pharmacy the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;

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

DATED: 5/6/10



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

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