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

12 In the Matter of the Accusation Against:

Case No. 4764

13 **FRANCISCO RUBIO**
14 **508 South C Street**
Imperial, CA 91951

A C C U S A T I O N

15 **Pharmacy Technician Registration**
16 **No. TCH 90579**

17 Respondent.

18
19 Complainant alleges:

20 **PARTIES**

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

23 2. On or about April 27, 2009, the Board of Pharmacy issued Pharmacy Technician
24 Registration Number TCH 90579 to Francisco Rubio, who is also known as Frank Rubio, and
25 Francisco Garcia Rubio (Respondent). The Pharmacy Technician Registration was in full force
26 and effect at all times relevant to the charges brought herein and will expire on July 31, 2014,
27 unless renewed.

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1 **JURISDICTION**

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

5 4. Section 4300, subdivision (a) of the Code states "Every license issued may be
6 suspended or revoked."

7 5. Section 4300.1 of the Code states:

8 The expiration, cancellation, forfeiture, or suspension of a board-issued license
9 by operation of law or by order or decision of the board or a court of law, the
10 placement of a license on a retired status, or the voluntary surrender of a license by a
11 licensee shall not deprive the board of jurisdiction to commence or proceed with any
12 investigation of, or action or disciplinary proceeding against, the licensee or to render
13 a decision suspending or revoking the license.

12 **STATUTORY PROVISIONS**

13 6. Section 482 of the Code states:

14 Each board under the provisions of this code shall develop criteria to evaluate
15 the rehabilitation of a person when:

- 16 (a) Considering the denial of a license by the board under Section 480; or
- 17 (b) Considering suspension or revocation of a license under Section 490.

18 Each board shall take into account all competent evidence of rehabilitation
19 furnished by the applicant or licensee.

20 7. Section 490 of the Code provides, in pertinent part, that a board may suspend or
21 revoke a license on the ground that the licensee has been convicted of a crime substantially
22 related to the qualifications, functions, or duties of the business or profession for which the
23 license was issued.

24 8. Section 493 of the Code states:

25 Notwithstanding any other provision of law, in a proceeding conducted by a
26 board within the department pursuant to law to deny an application for a license or to
27 suspend or revoke a license or otherwise take disciplinary action against a person who
28 holds a license, upon the ground that the applicant or the licensee has been convicted
of a crime substantially related to the qualifications, functions, and duties of the
licensee in question, the record of conviction of the crime shall be conclusive
evidence of the fact that the conviction occurred, but only of that fact, and the board
may inquire into the circumstances surrounding the commission of the crime in order

1 to fix the degree of discipline or to determine if the conviction is substantially related
2 to the qualifications, functions, and duties of the licensee in question.

3 As used in this section, 'license' includes 'certificate,' 'permit,' 'authority,' and
4 'registration.'

5 9. Section 4022 of the Code states

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

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

10 (b) Any device that bears the statement: "Caution: federal law restricts this
11 device to sale by or on the order of a _____," "Rx only," or words of similar
12 import, the blank to be filled in with the designation of the practitioner licensed to use
13 or order use of the device.

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

16 10. Section 4059 of the Code states, in pertinent part, that a person may not furnish any
17 dangerous drug except upon the prescription of a physician, dentist, podiatrist, optometrist,
18 veterinarian, or naturopathic doctor pursuant to Section 3640.7. A person may not furnish any
19 dangerous device, except upon the prescription of a physician, dentist, podiatrist, optometrist,
20 veterinarian, or naturopathic doctor pursuant to Section 3640.7.

21 11. Section 4060 of the Code provides, in pertinent part, that no person shall possess any
22 controlled substance, except that furnished to a person upon the prescription of a physician,
23 dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor.

24 12. Section 4301 of the Code states:

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

....

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

....

(h) The administering to oneself, of any controlled substance, or the use of any
dangerous drug or of alcoholic beverages to the extent or in a manner as to be

1 dangerous or injurious to oneself, to a person holding a license under this chapter, or
2 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.

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

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

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27 REGULATORY PROVISIONS

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

. . . .

(b) When considering the suspension or revocation of a facility or a personal
License on the ground that the licensee or the registrant 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.

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

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

6 **COSTS**

7 15. Section 125.3 of the Code provides, in pertinent part, that the Board may request the
8 administrative law judge to direct a licentiate found to have committed a violation or violations of
9 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
10 enforcement of the case, with failure of the licentiate to comply subjecting the license to not being
11 renewed or reinstated. If a case settles, recovery of investigation and enforcement costs may be
12 included in a stipulated settlement.

13 **DRUGS**

14 16. Alprazolam, sold commercially as Xanax, is a Schedule IV controlled substance
15 under California Health and Safety Code section 11057, subdivision (d)(1), and is classified as a
16 dangerous drug pursuant to Business and Professions Code section 4022.

17 17. Hydrocodone bitartate/acetaminophen, sold commercially as Vicodin, Norco, etc., is
18 a Schedule III controlled substance as designated by Health and Safety Code section 11056,
19 subdivision (e)(4), and is a dangerous drug pursuant to Business and Professions Code section
20 4022.

21 18. Hydrocodone is a Schedule II controlled substance as designated by Health and
22 Safety Code section 11055, subdivision (b)(1)(I), and is a dangerous drug pursuant to Business
23 and Professions Code section 4022.

24 19. Marijuana is a Schedule I controlled substance as designated by Health and Safety
25 Code section 11054, subdivision (d)(13), and is a dangerous drug pursuant to Business &
26 Professions Code section 4022.

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1 **SECOND CAUSE FOR DISCIPLINE**

2 **(November 28, 2012 Criminal Conviction for Disorderly Conduct on April 27, 2012)**

3 23. Respondent has subjected his registration to discipline under sections 490 and 4301,
4 subdivision (l) of the Code in that he was convicted of a crime that is substantially related to the
5 qualifications, duties, and functions of a pharmacy technician. The circumstances are as follows:

6 a. On or about November 28, 2012, in a criminal proceeding entitled *People of the*
7 *State of California v. Francisco Rubio*, in Imperial County Superior Court, case number
8 JCF29804, Respondent was convicted on his plea of no contest violating Penal Code section 647,
9 disorderly conduct, a misdemeanor. The court granted the defense's motion to suppress evidence,
10 under Penal Code section 1538.5, and dismissed the original counts of possession of a controlled
11 substance (Health & Saf. Code, § 11377(a)), under the influence of a controlled substance (Health
12 & Saf. Code, § 11550(a)), and possession of an opium pipe (Health & Saf. Code, § 11364.1(a)).

13 b. As a result of the conviction, on or about November 28, 2012, Respondent was
14 sentenced to 38 days in jail, with credit for 38 days, and payment of fees.

15 c. The facts that led to the conviction are that on or about the evening of April 27,
16 2012, a patrol officer with the Imperial Police Department observed Respondent sitting in the
17 driver's seat of a vehicle parked in front of a residence with past drug-related arrests and police
18 contacts. There was another male in the passenger seat. The officer made contact with
19 Respondent who told the officer he was dropping off his friend at the residence. The officer
20 detected a strong odor of marijuana emitting from the interior of the vehicle. He also observed
21 that Respondent appeared nervous and shifted from side to side in his seat, his speech was rapid,
22 slurred, and choppy, his eyes were red, watery, glassy, and appeared enlarged, his mouth was dry
23 and he constantly licked his lips. Under questioning, Respondent admitted that he had smoked
24 marijuana earlier. The officer conducted field sobriety tests on Respondent. Respondent's
25 eyelids exhibited fluttering, his pupils were dilated, and his pulse was 120 bpm. Respondent
26 admitted to the officer that he had last used methamphetamine the day before. Respondent's
27 vehicle was searched. A glass pipe used to smoke methamphetamine was found between the
28 center console and the passenger seat, and a baggie containing marijuana was on the right rear

1 passenger floorboard in plain view. Inside the center console, officers found two tablets of
2 Alprazolam, one tablet of acetaminophen with hydrocodone, and a plastic container with
3 marijuana residue. Additionally, the officers found a prescription bottle containing 15
4 hydrocodone tablets prescribed to a female patient; and a medicine bottle containing
5 promethazine, prescribed to a second female patient. Both prescriptions were filled at the
6 pharmacy where Respondent was employed. In the trunk of the vehicle, the officer found another
7 tablet of acetaminophen with hydrocodone in the pocket of a pair of jeans. The officer contacted
8 one of the prescribed patients; she told the officer that she did not know Respondent and did not
9 give him permission to possess the prescription medication. The promethazine was prescribed to
10 her, but she never filled the prescription because her insurance did not cover the cost and she
11 could not afford to pay for it out of pocket. The officer contacted the pharmacy's prescription
12 manager who came to the police station to identify the substances. She stated that Respondent
13 delivered prescriptions for the pharmacy, and there was no reason for him to possess the
14 controlled substances. The manager stated that the bottle of promethazine was specifically
15 marked for destruction after the patient did not purchase the prescription. The only way
16 Respondent would be in possession of the medication was if he stole it from the pharmacy. The
17 manager stated she would report the theft to the Drug Enforcement Administration. Respondent
18 admitted during questioning that he was in possession of prescriptions from the pharmacy that
19 he forgot to deliver. During booking, Respondent provided a urine sample which subsequently
20 tested positive for benzodiazepines, marijuana, methamphetamine, and opiates. Respondent did
21 not have a valid prescription for these substances at the time of his arrest.

THIRD CAUSE FOR DISCIPLINE

(Illegal Use of Controlled Substances)

24 24. Respondent has subjected his registration to discipline under section 4301,
25 subdivision (h) of the Code in that he used controlled substances, and was under the influence of
26 controlled substances without a prescription on April 27, 2012, as described in paragraph 23,
27 above. Such conduct was dangerous or injurious to himself, and it impaired Respondent's ability
28 to safely conduct practice as a pharmacy technician.

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FOURTH CAUSE FOR DISCIPLINE

(Commission of Acts Involving Dishonesty, Fraud, Deceit & Corruption)

25. Respondent has subjected his registration to discipline under section 4301, subdivision (f) of the Code for unprofessional conduct in that Respondent obtained controlled substances from his employer/pharmacy using fraud, deceit, and dishonesty, as described in paragraph 23, above.

FIFTH CAUSE FOR DISCIPLINE

(Violation of California Statutes Regulating Controlled Substances)

26. Respondent is subject to disciplinary action under section 4301, subdivision (j) of the Code for unprofessional conduct in that on or about April 27, 2012, Respondent knowingly violated Business and Professions Code sections 4022, 4059, and 4060, as described in paragraph 23, above.

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 or suspending Pharmacy Technician Registration Number TCH 90579, issued to Francisco Rubio;
2. Ordering Francisco Rubio 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: 9/6/13 - Virginia Herold

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

SD2013705497