

1 KAMALA D. HARRIS
 Attorney General of California
 2 LINDA K. SCHNEIDER
 Senior Assistant Attorney General
 3 GREGORY J. SALUTE
 Supervising Deputy Attorney General
 4 State Bar No. 164015
 600 West Broadway, Suite 1800
 5 San Diego, CA 92101
 P.O. Box 85266
 6 San Diego, CA 92186-5266
 Telephone: (619) 645-2617
 7 Facsimile: (619) 645-2061
Attorneys for Complainant

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 9 **BEFORE THE**
BOARD OF PHARMACY
 10 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA
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12 In the Matter of the Accusation Against: 13 GABRIEL MAGANA 14 19181 Bridlewood Perris, CA 92570 15 Pharmacy Technician Registration No. TCH 99110 16 Respondent.	Case No. 5594 A C C U S A T I O N
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 18 Complainant alleges:

19 **PARTIES**

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

22 2. On April 20, 2010, the Board of Pharmacy issued Pharmacy Technician
 23 Registration Number TCH 99110 to Gabriel Magana (Respondent). Respondent has also been
 24 known as Gabriel Jose Magana. The Pharmacy Technician Registration expired on July 31,
 25 2015, and has not been renewed.

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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, subdivision (a), of the Code provides that every license issued by the Board may be suspended or revoked.

5. Section 4300.1 of the Code states:

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

STATUTORY PROVISIONS

6. Section 482 of the Code states:

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

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

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

7. Section 4301 of the Code states:

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

....

(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.

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

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

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23 REGULATORY PROVISIONS

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

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26 (b) When considering the suspension or revocation of a facility or a
27 personal license on the ground that the licensee or the registrant has been
28 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:

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

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

37 For the purpose of denial, suspension, or revocation of a personal or
38 facility license pursuant to Division 1.5 (commencing with Section 475) of the

1 Business and Professions Code, a crime or act shall be considered substantially
2 related to the qualifications, functions or duties of a licensee or registrant if to a
3 substantial degree it evidences present or potential unfitness of a licensee or
4 registrant to perform the functions authorized by his license or registration in a
5 manner consistent with the public health, safety, or welfare.

6 **COST RECOVERY**

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

12 **FIRST CAUSE FOR DISCIPLINE**

13 **(September 12, 2013 Conviction for Driving with a BAC of .08% or More on July 20, 2013)**

14 11. Respondent has subjected his Pharmacy Technician Registration to discipline
15 under Code sections 490 and 4301, subdivision (i), in that he was convicted of a crime that is
16 substantially related to the qualifications, functions, and duties of a registered pharmacy
17 technician. The circumstances are as follows:

18 a. On September 12, 2013, in a criminal proceeding entitled *The People of*
19 *the State of California v. Gabriel Jose Magana*, in the Orange County Superior Court, West
20 Justice Center, Case Number 13WM08474, Respondent was convicted on his plea of guilty of
21 violating Vehicle Code (VC) section 23152, subdivision (b), driving with a blood alcohol
22 concentration (BAC) of 0.08 percent or more, a misdemeanor. Respondent admitted and the
23 court found true the allegation that at the time of violation of VC section 23152, subdivision (b),
24 his BAC was .15 percent or more, a sentencing enhancement under VC section 23578. A
25 misdemeanor charge for violation of VC section 23152, subdivision (a), driving while under the
26 influence of alcohol (DUI), with similar enhancement, and an infraction charge for violation of
27 Health and Safety Code (HSC) section 11357, subdivision (b), possession of marijuana weighing
28 28.5 grams or less, were dismissed under a plea bargain.

1 b. As a result of the conviction, on September 12, 2013, Respondent was
 2 sentenced to three years informal probation under standard alcohol conditions and ordered to pay
 3 fines, fees, restitution, penalties, and assessments. Respondent was also ordered to attend and
 4 satisfactorily complete a six-month First Offender Alcohol Program and a Mothers Against
 5 Drunk Driving (MADD) Victim Impact Panel. Respondent was further ordered to perform 60
 6 hours of community service.

7 c. On April 21, 2014, Respondent's probation was revoked for failure to
 8 complete 60 hours of community service. On May 7, 2014, Respondent was found to have failed
 9 to complete 60 hours of community service and his probation was reinstated and modified. On
 10 August 23, 2014, Respondent's probation was revoked for failure to complete 60 hours of
 11 community service. On September 4, 2014, Respondent was found in violation of probation for
 12 failure to complete 60 hours of community service. As a result of the violation, Respondent's
 13 probation was reinstated and modified. Respondent was sentenced to five days in the Orange
 14 County Jail, which was stayed pending completion of the 60 hours of community service. On
 15 January 26, 2015, Respondent was arrested for DUI of alcohol, as detailed in paragraph 12,
 16 below. On January 30, 2015, Respondent's probation was revoked for termination in the six-
 17 month First Offender Alcohol Program and failure to pay fines due. On June 22, 2015,
 18 Respondent was found in violation of his probation, which was reinstated and modified. On
 19 August 4, 2015, Respondent was found in violation of probation. As a result of the violation,
 20 Respondent's probation was terminated, reinstated, and modified to expire on March 1, 2017.

21 d. The facts that led to the conviction are that on July 20, 2013, while driving
 22 northbound on Magnolia Street in Fountain Valley, California, Respondent rear-ended a car that
 23 was slowing down in anticipation for a red light at the Slater Avenue intersection. An officer on
 24 routine patrol from the Fountain Valley Police Department (FVPD) happened to pass by the
 25 collision scene and initiated an investigation. Another officer interviewed Respondent. During
 26 the interview, the officer smelled alcohol coming from Respondent's mouth. Respondent's eyes
 27 were bloodshot red and watery and his eyelids sleepy. Respondent failed to perform a series of
 28 field sobriety tests as explained and demonstrated. During a search of Respondent's vehicle, the

1 officer found 4.3 grams of marijuana inside a prescription bottle. Respondent admitted to owning
2 the marijuana and to not having a prescription for it. Respondent was arrested for DUI and was
3 transported to the FVPD, where he consented to a blood draw. Respondent's subsequent
4 chemical test results indicated a BAC of .15 percent.

5 **SECOND CAUSE FOR DISCIPLINE**

6 **(June 9, 2015 Conviction for Driving with a BAC of .08% or More on January 26, 2015)**

7 12. Respondent has subjected his Pharmacy Technician Registration to discipline
8 under Code sections 490 and 4301, subdivision (l), in that he was convicted of a crime that is
9 substantially related to the qualifications, functions, and duties of a registered pharmacy
10 technician. The circumstances are as follows:

11 a. On June 9, 2015, in a criminal proceeding entitled *The People of the State*
12 *of California v. Gabriel Jose Magana*, in the San Bernardino County Superior Court, Rancho
13 Cucamonga District, Case Number TWV1500943, Respondent was convicted on his plea of
14 guilty of violating VC section 23152, subdivision (b), driving with a BAC of 0.08 percent or
15 more, a misdemeanor. Respondent admitted and the court found true the allegation that within
16 ten years of violating VC section 23152, subdivision (b), mentioned above, on July 17, 2005, he
17 committed a separate violation of VC section 23152, subdivision (a), DUI, resulting in a
18 misdemeanor conviction on December 14, 2005, in case number CN199287, detailed in
19 paragraph 15, below. Respondent also admitted and the court found true the allegation that on
20 July 20, 2013, Respondent also committed a separate violation of VC section 23152, subdivision
21 (b), resulting in a misdemeanor conviction on June 9, 2015, in case number TWV1500943,
22 detailed in paragraph 11, above. Both allegations are sentencing enhancements under VC section
23 23546, subdivision (a). Respondent further admitted and the court found true the allegation that
24 at the time of violation of VC section 23152, subdivision (b), his BAC was .15 percent or more, a
25 sentencing enhancement under VC section 23578. A misdemeanor charge for violation of VC
26 section 23152, subdivision (a), DUI of alcohol, with similar enhancements, was dismissed under
27 a plea bargain.

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1 b. As a result of the conviction, on June 9, 2015, Respondent was sentenced
2 to serve 240 days, with credit for two days served, and with the option to serve the balance in a
3 San Bernardino County Jail Facility under a weekender or work release program. Respondent
4 was granted 36 months probation under standard alcohol conditions and ordered to pay fines,
5 fees, restitution, and assessments. Respondent was also ordered to attend and satisfactorily
6 complete a Multiple Offender DUI Program.

7 c. The facts that led to the conviction are that on January 26, 2015,
8 Respondent overtook a patrol vehicle while driving eastbound at a high rate of speed on
9 interstate highway I-10, west of Euclid Avenue in Garden Grove, California. The California
10 Highway Patrol (CHP) officer driving the patrol vehicle followed Respondent at about 90 miles
11 per hour before initiating an enforcement stop. Upon contact with Respondent, the officer
12 immediately smelled alcohol coming from Respondent's breath. Respondent's eyes were red and
13 watery. Respondent admitted to drinking two Stella beers earlier. Respondent failed to perform a
14 series of field sobriety tests as explained and demonstrated. Respondent provided breath samples
15 for the preliminary alcohol screen, which indicated a BAC of .223 percent and .225 percent.
16 Respondent was subsequently arrested and transported to the West Valley Detention Center,
17 where he provided two breath samples, which indicated a BAC of .20 percent and .19 percent
18 after two minutes.

19 **THIRD CAUSE FOR DISCIPLINE**

20 **(Unprofessional Conduct - Dangerous Use of Alcohol)**

21 13. Respondent has subjected his Pharmacy Technician Registration to discipline
22 under Code section 4301, subdivision (h) in that on July 20, 2013 and January 26, 2015, he used
23 alcohol to the extent and in a manner that was dangerous and injurious to himself and to the
24 public, as described in the causes above, which are incorporated by reference.

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1 **FOURTH CAUSE FOR DISCIPLINE**

2 **(Unprofessional Conduct – Multiple Alcohol Related Misdemeanor Convictions)**

3 14. Respondent has subjected his Pharmacy Technician Registration to discipline
4 under Code section 4301, subdivision (k) in that on September 12, 2013 and June 9, 2015, he
5 was convicted of more than one misdemeanor involving the use or consumption of alcohol.

6 **DISCIPLINARY CONSIDERATIONS**

7 15. To determine the degree of discipline, if any, to be imposed on Respondent,
8 Complainant alleges:

9 a. On December 14, 2005, in a prior criminal proceeding entitled *The People*
10 *of the State of California v. Gabriel Jose Magana*, in the San Diego County Superior Court,
11 North County Division, Case Number CN199287, Respondent was convicted on his plea of
12 guilty of violating VC sections 23152, subdivision (a), DUI of alcohol, a misdemeanor, and
13 22348, subdivision (b), driving a vehicle upon a highway at a speed greater than 100 miles per
14 hour, an infraction. Misdemeanor charges for violation of VC sections 23152, subdivision (b),
15 driving with a BAC of 0.08 percent or more, and 23103, subdivision (a), reckless driving, and an
16 infraction charge for violation of VC section 23140, subdivision (a), person under 21 driving
17 with .05 percent BAC, were dismissed under a plea bargain.

18 b. As a result of the convictions, on December 14, 2005, Respondent was
19 sentenced to be committed to the custody of the San Diego County Sheriff for 180 days, which
20 was suspended for three years. Respondent was granted 36 months summary probation under
21 standard alcohol conditions and ordered to pay fines, restitution, and penalty assessments, with
22 credit for the equivalent of one day served. Respondent was also ordered to attend and
23 satisfactorily complete a First Conviction Program and a Survival Toward Adult Referral
24 Program. Respondent's privilege to drive was restricted for 365 days.

25 c. The facts that led to the convictions are that on July 17, 2005, Respondent
26 passed a patrol vehicle while driving northbound at a speed over 100 miles per hour on interstate
27 highway I-5 in Carlsbad, California. The Carlsbad Police Department officer driving the patrol
28 vehicle followed Respondent at about 120 miles per hour before initiating an enforcement stop.

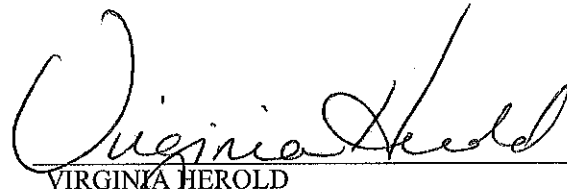
1 Upon contact with Respondent, the officer immediately smelled alcohol coming from
2 Respondent's breath. Respondent's speech was slow, soft, and slurred. Respondent admitted to
3 drinking four or five beers earlier. Respondent was subsequently arrested and taken to the
4 Carlsbad Police Station, where he provided two breath samples, which both indicated a BAC of
5 .09 percent. Respondent was thereafter transported and booked into the Vista Detention Facility.

6 **PRAYER**

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

- 9 1. Revoking or suspending Pharmacy Technician Registration Number TCH 99110,
10 issued to Gabriel Magana;
- 11 2. Ordering Gabriel Magana to pay the Board of Pharmacy the reasonable costs of
12 the investigation and enforcement of this case, pursuant to Business and Professions Code
13 section 125.3; and
- 14 3. Taking such other and further action as deemed necessary and proper.

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18 DATED: 11/20/15



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

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