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

11 In the Matter of the Statement of Issues Against:

Case No. 4182

12 **MICHAEL DANIEL GUTIERREZ**
13 **1916 Minnesota Street**
Riverside, CA 92507

FIRST AMENDED
STATEMENT OF ISSUES

14 Respondent.

15
16 Complainant alleges:

17 **PARTIES**

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

21 2. On or about February 11, 2011, the Board of Pharmacy, Department of Consumer
22 Affairs received an application for a Pharmacy Technician Registration from Michael Daniel
23 Gutierrez (Respondent). On or about February 8, 2011, Michael Daniel Gutierrez certified under
24 penalty of perjury to the truthfulness of all statements, answers, and representations in the
25 application. The Board denied the application on July 18, 2011.

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1 **JURISDICTION**

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

5 4. Section 4300, subdivision (c) of the Code states that the board may refuse a license to
6 any applicant guilty of unprofessional conduct.

7 **STATUTORY PROVISIONS**

8 5. Section 475 of the Code states:

9 (a) Notwithstanding any other provisions of this code, the provisions of this
10 division shall govern the denial of licenses on the grounds of:

11 (1) Knowingly making a false statement of material fact, or knowingly
12 omitting to state a material fact, in an application for a license.

13 (2) Conviction of a crime.

14 (3) Commission of any act involving dishonesty, fraud or deceit with the
15 intent to substantially benefit himself or another, or substantially injure another.

16 (4) Commission of any act which, if done by a licentiate of the business or
17 profession in question, would be grounds for suspension or revocation of license.

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19 6. Section 480 of the Code states:

20 (a) A board may deny a license regulated by this code on the grounds that the
21 applicant has one of the following:

22 (1) Been convicted of a crime. A conviction within the meaning of this section
23 means a plea or verdict of guilty or a conviction following a plea of nolo contendere.
24 Any action that a board is permitted to take following the establishment of a
25 conviction may be taken when the time for appeal has elapsed, or the judgment of
26 conviction has been affirmed on appeal, or when an order granting probation is made
27 suspending the imposition of sentence, irrespective of a subsequent order under the
28 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 licentiate 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.

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7. 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.

8. Section 493 of the Code states:

Notwithstanding any other provision of law, in a proceeding conducted by a board within the department pursuant to law to deny an application for a license or to suspend or revoke a license or otherwise take disciplinary action against a person who 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 to fix the degree of discipline or to determine if the conviction is substantially related to the qualifications, functions, and duties of the licensee in question.

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

9. 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:

....

(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.

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

....

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

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

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17 REGULATORY PROVISIONS

18 10. California Code of Regulations, title 16, section 1769 states:

19 (a) When considering the denial of a facility or personal license under Section
20 480 of the Business and Professions Code, the board, in evaluating the rehabilitation
21 of the applicant and his present eligibility for licensing or registration, will consider
22 the following criteria:

23 (1) The nature and severity of the act(s) or offense(s) under consideration as
24 grounds for denial.

25 (2) Evidence of any act(s) committed subsequent to the act(s) or crime(s) under
26 consideration as grounds for denial under Section 480 of the Business and Professions
27 Code.

28 (3) The time that has elapsed since commission of the act(s) or crime(s) referred
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.

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

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

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1 **FIRST CAUSE FOR DENIAL OF APPLICATION**

2 **(February 14, 2006 Criminal Conviction for Public Intoxication on May 21, 2005, and for**
3 **Failure to Appear on June 29, 2005)**

4 12. Respondent's application for registration as a pharmacy technician is subject to denial
5 under section 480, subdivision (a)(1) and 4301(l) of the Code in that Respondent was convicted
6 of a crime that is substantially related to the qualifications, duties, and functions of a pharmacy
7 technician. The circumstances are as follows:

8 13. On or about February 14, 2006, in a criminal proceeding entitled *State of California*
9 *v. Michael Daniel Gutierrez*, in the Riverside County Superior Court, Case Number
10 SWM038345, Respondent was convicted on his plea of guilty to violating Penal Code section
11 647(f) (public intoxication), and Failure to Appear, misdemeanors.

12 14. As a result of the convictions, the Court ordered that Respondent pay various fees and
13 fines due by February 15, 2006, and restricted Respondent's license for 12 months. The Court
14 ordered that during the restriction of his license, Respondent only drive to and from work and to
15 and from an alcohol program if one is ordered.

16 15. The facts and circumstances that led to the conviction are that on or about May 21,
17 2005, Respondent was arrested in Riverside County, California for public intoxication.
18 Respondent's arraignment was scheduled for June 29, 2005 and Respondent failed to appear. The
19 Court issued a bench warrant for Respondent's arrest. On February 14, 2006, Respondent was
20 arraigned and the bench warrant recalled.

21 **SECOND CAUSE FOR DENIAL OF APPLICATION**

22 **(October 23, 2008 Criminal Conviction for Driving Under the Influence of Alcohol With a**
23 **Blood Alcohol Content of 0.08% [Over 0.20%] or More and for Driving Without a Valid**
24 **Driver's License on January 4, 2006)**

25 16. Respondent's application for registration as a pharmacy technician is subject to denial
26 under section 480, subdivision (a)(1) and 4301(l) of the Code in that Respondent was convicted
27 of a crime that is substantially related to the qualifications, duties, and functions of a pharmacy
28 technician. The circumstances are as follows:

1 17. On or about October 23, 2008, in a criminal proceeding entitled *State of California v.*
2 *Michael Daniel Gutierrez*, in the Riverside County Superior Court, Case Number SWM048746,
3 Respondent was convicted on his plea of guilty of violating Vehicle Code sections 23152(a)
4 (driving under the influence of alcohol), 23152(b) (driving under the influence of alcohol with a
5 blood alcohol content of 0.08% or more), and 12500(A) (driving a motor vehicle without a valid
6 driver's license), misdemeanors.

7 18. As a result of the conviction, Respondent was placed on three years summary
8 probation and ordered to serve 15 days in the Riverside County Jail to be served in the Sheriff's
9 Labor Program, with one day credit for time served. The Court also ordered Respondent to obey
10 all laws, ordinances and court orders, pay various fees and fines, pay restitution in an amount to
11 be determined by the Court and payable to the Court, not drive with alcohol in his blood or within
12 six hours of consuming alcohol, not drive unless properly licensed nor without insurance or valid
13 registration, attend and satisfactorily complete a First Offender DUI Program for 9 months, and to
14 submit to chemical tests of blood, saliva, breath or urine or any reasonable physical test upon
15 request of any probation or law enforcement officer.

16 19. On May 21, 2009, the Court issued a bench warrant for Respondent's arrest for
17 failure to enroll in the First Offender DUI Program. On June 12, 2009, the warrant was recalled.
18 On August 11, 2009, a probation hearing took place regarding Respondent's enrollment in the
19 First Offender DUI Program. Probation was ordered revoked, however, the probation was
20 reinstated on the same terms and conditions. Respondent was ordered to file proof of enrollment
21 in the First Offender Program by October 20, 2009.

22 20. On or about October 22, 2009, the Court issued a bench warrant for Respondent's
23 arrest for failure to enroll in the First Offender DUI Program. On January 4, 2010, Respondent
24 was arraigned. Respondent admitted the violation of probation. Probation was reinstated to
25 continue on the same terms and conditions.

26 21. The facts and circumstances that gave rise to the January 4, 2006 conviction are that
27 Respondent drove a motor vehicle with a blood alcohol content above .08%.

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1 **THIRD CAUSE FOR DENIAL OF APPLICATION**

2 (January 6, 2012 Criminal Conviction for Petty Theft on October 5, 2011)

3 Respondent's application for registration as a pharmacy technician is subject to denial under
4 section 480, subdivision (a)(1) and 4301(l) of the Code in that Respondent was convicted of a
5 crime that is substantially related to the qualifications, duties, and functions of a pharmacy
6 technician. The circumstances are as follows:

7 22. On or about January 6, 2012, in a criminal proceeding entitled *People of the State of*
8 *California v. Michael Daniel Gutierrez*, in the Riverside County Superior Court, Case Number
9 RIM1117540, Respondent was convicted on his plea of guilty of violating Penal Code Section
10 490.5 (wilfully stole property from the premises of Stater Brothers of a value not exceeding
11 \$400.00), a misdemeanor.

12 23. As a result of the conviction, Respondent was placed on three years summary
13 probation and ordered to serve 8 days in the Riverside County Jail, with eight days credit for time
14 served. The Court also ordered Respondent to obey all laws, ordinances and court orders, pay
15 various fees and fines, pay restitution in an amount to be determined by the Probation Department
16 and payable to the Court, submit to immediate search of person, auto, home, premises, garage,
17 storage areas and personal or leased property with or without cause by the probation officer or
18 law enforcement, not to leave the state without obtaining written permission from the Probation
19 Department per the Interstate Compact Act, and not knowingly own, possess or have control of
20 any firearm, deadly weapon or ammunition.

21 24. The circumstances that led to the conviction are that on October 5, 2011, at
22 approximately 9:20 a.m. Respondent was observed shoplifting an \$11.99 bottle of Smirnoff
23 Vodka from Stater Brothers Market in Riverside, California. Respondent began running as he left
24 the store. Store employees chased him down the street. Respondent finally stopped running, and
25 with his back to the employees, he reached his hand into the front of his pants, pulled out the
26 bottle of vodka, held it over his head and then threw it to the ground, breaking the bottle in the
27 process. The store employees picked up the broken bottle pieces and walked Respondent back to
28 the store where they detained him until the police arrived. A store employee signed a private

1 person's arrest form placing Respondent under arrest for shoplifting. The Riverside Police
2 arrived, and cited and released Respondent.

3 **FOURTH CAUSE FOR DENIAL OF APPLICATION**

4 **(Act Involving Dishonesty, Fraud, or Deceit)**

5 25. Respondent's application is subject to denial under sections 480, subdivision (a)(2)
6 and (c) and 4301(f) and (g), of the Code in that he committed an act of dishonesty, fraud and/or
7 deceit when, in response to the question on his application for registration as a pharmacy
8 technician, "Have you ever been convicted of or pled no contest to a violation of any law of a
9 foreign country, the United States or any state laws or local ordinances? You must include all
10 misdemeanor and felony convictions, regardless of the age of the conviction, including those
11 which have been set aside under Penal Code section 1203.4. Traffic violations of \$500 or less
12 need not be reported. If "yes," attach an explanation including the type of violation, the date,
13 circumstances, location and the complete penalty received. In addition to this written
14 explanation, please provide the Board of Pharmacy with certified copies of all pertinent court
15 documents or arrest reports relating to this conviction." Respondent responded, "Yes," however,
16 he only disclosed the conviction that is the subject of the Second Cause for Discipline (the 2006
17 DUI), and failed to disclose the conviction that is the subject of the First Cause for Denial of
18 Application (2006 public intoxication).

19 **FIFTH CAUSE FOR DENIAL OF APPLICATION**

20 **(Commission of Acts Which if Done by a Licensee Would be**
21 **Grounds for Suspension or Revocation of License)**

22 26. Respondent's application is subject to denial under sections 480, subdivision (a)(3)(A)
23 of the Code in that he committed acts, that if done by a licensed pharmacy technician, would be
24 grounds for suspension or revocation of the license. The circumstances are as follows:

25 27. On or about February 14, 2006, October 23, 2008, and January 6, 2012, as detailed in
26 paragraphs 12 through 25, above, Respondent was convicted of crimes substantially related to the

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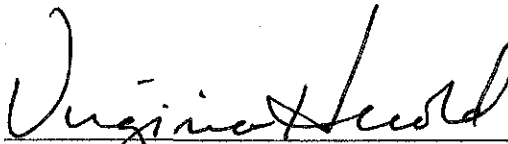
1 qualifications, functions, and duties of a licensed pharmacy technician, which would be grounds
2 for discipline under section 4301, subdivision (l) of the Code.

3 **PRAYER**

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

- 6 1. Denying the application of Michael Daniel Gutierrez for a Pharmacy Technician
7 Registration;
8 2. Taking such other and further action as deemed necessary and proper.

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11 DATED: 10/4/12


12 VIRGINIA HEROLD
13 Executive Officer
14 Board of Pharmacy
15 Department of Consumer Affairs
16 State of California
17 Complainant

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