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

In the Matter of the Accusation Against:	Case No. 3036
ARNOLD AGUIRRE CASTRO,	OAH No. L2008050773
Pharmacist License No. RPH 41890	
Respondent	

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 April 10, 2009.

It is so ORDERED on March 11, 2009.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By Kenneth H. Schell
KENNETH H. SCHELL
Board President

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Respondent.	

PROPOSED DECISION

Ralph B. Dash, Administrative Law Judge, Office of Administrative Hearings, heard this matter on December 8, 9, 10, 11 and 12, 2008 at Los Angeles, California.

Susan M. Wilson, Deputy Attorney General, represented Complainant.

Russell Iungerich and Sunil Sundar, Attorneys at Law, represented Arnold Aguirre Castro (Respondent).

The record was left open until December 19, 2008, for Complainant to submit additional documentation in support of the claim for cost recovery, and for Respondent to file objections, if any, thereto. Complainant's documentation was timely received and marked Exhibit 52 for identification. Respondent's objections were timely received and marked Exhibit C for identification. As no costs are awarded to Complainant in this matter, the objections were not considered and the cost documentation was not admitted. The matter was deemed submitted on December 19, 2008.

Oral and documentary evidence having been received and the matter having been submitted, the Administrative Law Judge makes the following Proposed Decision.

FINDINGS OF FACT

1. Virginia Herold made the Accusation in her official capacity as the Executive Officer of the Board of Pharmacy (Board).

2. On August 3, 1988, the Board issued to Respondent Original Pharmacist License Number RPH 41890. At all times pertinent hereto, said license was, and now is, in full force and effect.

3. At all relevant times, Respondent was an employee of Cardinal Health Registry (Cardinal). This company provides pharmacists to work, on a temporary basis, to

pharmacies throughout California, including hospital pharmacies. Cardinal assigned Respondent to work at PaloVerde Hospital (the hospital) commencing April 13, 2005. The pharmacy fills only intra-hospital prescriptions and orders. It is not open to the public. The hospital is a small regional facility that is certified for 55 beds, but usually has only 25 in use. It also has an emergency room. The hospital is located in Blythe, California. At that time, Respondent lived in La Mirada, California, which is approximately 240 miles from the hospital. Respondent commuted to the hospital on a weekly basis. Cardinal arranged sleeping accommodations for Respondent at a motel in Blythe, located approximately one mile from the hospital. Respondent stayed at the motel during the week, returned to his home on Friday, then would return to Blythe the following Sunday, usually arriving late in the evening or in the early morning hours on Monday. During the entire period Respondent worked at the hospital, Dr. Alice Rogers-McAfee (Dr. McAfee) was the pharmacist in charge of the hospital pharmacy.[1] In addition to working the day shift, Dr. McAfee was on-call for nights and weekends. During her tenure, she was required to go to the pharmacy on most weekends to dispense medication, including narcotics not otherwise available.[2]

4. Dr. McAfee began her employment at the hospital on April 9, 2005, four days before Respondent started working there. When Dr. McAfee took over the pharmacy, she found the records, including the perpetual narcotics inventory log (the log), to be in disarray.[3] In addition, she found the doors to the narcotics cabinet were left open.[4] She also learned there may have been a number of keys to the pharmacy (the door always remained locked) not accounted for. The narcotics cabinet had two separate locks, and there may have been unaccounted for keys to that as well. Ultimately, Dr. McAfee was able to get the lock on the

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[1] In addition to the same dispensing duties Respondent had, Dr. McAfee also handled all administrative duties for the pharmacy.

[2] At the end of the week, the Pyxis machines in the hospital medical-surgical telemetry unit and the emergency room were supposed to be stocked with sufficient quantities of drugs so that it would not be necessary for Dr. McAfee to be called in to dispense drugs. According to the Pyxis manufacturer's website, "One of the initial reasons for developing the Pyxis system was narcotics control. Although barcode labels and readers have been used in a number of hospitals for controlled substances, some drugs were still being diverted from their intended use at an alarming rate. To remedy that, Medstation provides an electronic record of all drugs issued through the System 2000—and it cross-links caregivers, patients and drug usage, making inventory 'shrinkage' much easier to control."

[3] Dr. McAfee testified that she did not do an inventory audit when she first started employment because she "didn't know what was there before." Thus she had no idea whether the logs were accurate by the time Respondent started his employment there.

[4] All narcotics in the pharmacy were required to be under separate lock and key within the pharmacy, and only a pharmacist (as opposed to a pharmacy technician) was permitted to have access to them. The narcotics cabinet had two storage units, each with separate locks.

pharmacy door changed;[5] the locks to the narcotics cabinet were never changed during the entire period Dr. McAfee worked at the hospital.[6]

5. During his tenure at the hospital, one of Respondent's duties was maintaining the log. He shared this Responsibility with Dr. McAfee. The purpose of the log is to keep a running count of all narcotics used in the hospital, including such items as morphine, Fentanyl and Percocet.[7] The log is a relatively informal document. It has a separate sheet for each narcotic in the pharmacy. When a narcotic is dispensed from the pharmacy, entries are made on the appropriate log sheet to show the date it was dispensed, the department receiving the drug, the name of the dispensing pharmacist, the amount dispensed and the amount that remains in inventory (a simple matter of subtracting the amount dispensed from the prior log total). When drugs are received from a supplier, entries are made showing the date of delivery, the invoice number and the amount received. The amount received is then added to the last balance on the log for that drug. If a drug is returned to the pharmacy as being unused, the date and amount returned will be noted and added to the running total. All entries on the log must be initialed by the pharmacist who either dispenses or receives the drug.

6. The only way to confirm the accuracy of the logs (i.e. the amount of drug physically in the pharmacy as compared to the amount that should be there according to the log) is to make a physical count of the inventory. If there is a discrepancy between the amount referenced in the log and the actual count (either over or under), the log is checked to make sure there are no simple addition or subtraction errors.[8] If there are, the errors are corrected. If there are no errors found, the physical count of the amount of that drug will be placed in the log directly below the last running total, along with the date of entry and the name of the pharmacist who conducted the physical count.

7. From time to time, Respondent and Dr. McAfee each conducted physical counts of one or more of the narcotics on hand, usually when some discrepancy was noted regarding that particular drug. Copies of the log (Exhibits 21 through 33) were admitted in evidence.

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[5] Dr. McAfee testified the lock was changed only after it appeared someone had tried to "jimmy" the pharmacy door during the summer of 2005.

[6] Dr. McAfee was terminated from employment at the hospital in the Spring of 2006, approximately six months after Respondent ceased working there, because she was unable to maintain accurate pharmacy records, and because she "was unable to discover" the reason narcotics continued to be missing from the pharmacy with no accounting therefore.

[7] Morphine is a Schedule II (highly addictive) pure opioid analgesic used for moderate to severe pain. Fentanyl is a Schedule II opioid agonist used for analgesia and sedation. Percocet is a Schedule II narcotic analgesic, used to treat moderate to moderately severe pain. It contains two drugs--acetaminophen and oxycodone.

[8] In this regard, the evidence showed that in one instance (an entry made on Exhibit 22), out of the numerous entries he made in the logs, Respondent made one math error. On June 6, 2006, Respondent entered an RTS (return to stock) of five tablets of alprazolam, a Schedule IV benzodiazepine/anxiolytic. However, rather than adding the five to the running total for this drug, Respondent subtracted five. This mistake was inadvertent, easily discoverable, and did not lead to the loss of any drug inventory.

For most of the narcotics kept in the pharmacy, the log showed that on various dates, either Respondent or Dr. McAfee found discrepancies between the log total and the physically counted total. For example, on June 27, 2005, Respondent made a physical count of Percocet, 5mg. and found there to be five tablets missing. He duly noted the discrepancy and initialed the log. On August 29, 2005, Respondent made another count of Percocet and found the amount on hand was zero when there should have been 22 tablets in inventory. Respondent duly noted this discrepancy on the log. In addition to Percocet, the records show that, from time to time, Respondent found and logged discrepancies for acetaminophen with codeine (he actually twice found discrepancies for this drug), carisoprodol,[9] Fentanyl, and OxyContin.[10] On her physical counts, Dr. McAfee found and logged similar discrepancies. Respondent informed Dr. McAfee each time he found a discrepancy. There was no evidence presented as to the cause of any of the discrepancies that either by Respondent or Dr. McAfee found. In fact, the evidence showed that the pharmacy had log discrepancies of the type referred to herein long before Respondent was employed there and long after he left.

8. In the fall of 2005, pharmacy employees noticed a change in Respondent's manner and demeanor. He did not appear as alert or as communicative as he had been. He was often drowsy or sleepy. On one occasion, he seemed not to hear one of the pharmacy technicians ask him to move, even though she repeated her request. In fact, this technician thought Respondent was literally "asleep on his feet." Dr. McAfee also noticed this behavior and suggested to the hospital management that all four pharmacy employees be drug-tested.

9. On November 14, 2005, Respondent, Dr. McAfee, and two pharmacy technicians all supplied urine samples for testing. They all went to the hospital laboratory at 11:30 a.m. and, one by one, used the lab restroom to supply the sample. Each gave the sample to a laboratory technician, then left. The urine was tested and on November 17, 2005, the test results of Respondent's sample came back positive for morphine and hydrocodone. Based on this test result, Respondent was summarily dismissed from employment at the hospital (discussed more fully below).

10. Scant evidence was presented to show that the positive urine sample actually came from Respondent, or even whether the test itself was accurate.[11] No chain of custody of the samples was established. The four samples were given to an unnamed laboratory technician at approximately 11:30 a.m. On the Forensic Drug Testing and Control Form (control form) (part of Exhibit 47),[12] whoever "collected" the specimens at the hospital

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[9] Carisoprodol is a centrally-acting skeletal muscle relaxant whose active metabolite is meprobamate. Although several case reports have shown that carisoprodol has abuse potential both by itself and as a potentiator of hydrocodone, dihydrocodeine, codeine and similar drugs, it is not a scheduled narcotic.

[10] OxyContin (brand name for oxycodone) is an analgesic opioid agonist and a Schedule II controlled substance with an abuse liability similar to morphine.

[11] In this regard, it should be noted that none of the hospital employees tested was given a "split sample" (a portion of the same specimen that is being tested) to have his or her own test conducted.

laboratory indicated the same were collected at 2:30 p.m. No evidence was presented as to what became of the samples in the three hours after they were given at 11:30 a.m. and "collected" at 2:30 p.m. Furthermore, no evidence was presented as to how the samples were labeled, stored or shipped to the testing facility, which was located in Nashville, Tennessee. None of this information was on the control form.

The hospital utilized the services of a company named OccuPatient, whose medical review officer is Renata Bluhm, M.D., Ph.D. For reasons not disclosed by the evidence, Dr. Bluhm refused to testify at the trial of this matter.[13] However, OccuPatient was not the entity which tested the sample; it only reported the results. The testing laboratory was Aegis Sciences Laboratory, also located in Nashville, but at a different address from OccuPatient. It was not clear if the samples were sent by the hospital to OccuPatient, which then delivered them to Aegis, or whether they were sent directly to Aegis by the hospital. The form must be filled out by both the collector of the specimens and the receiving laboratory. The control form was not completed by the "receiving laboratory." Thus, the control form contained no information regarding the date of receipt of the sample or that the "primary specimen bottle" was received with its seal intact. The control form requires that this information be placed on it. In fact, the "receiving laboratory" entered no information at all on the control form. That portion of the form was completely blank. While Dr. Bluhm, in her declaration (Exhibit 51), purported to describe how the testing was done, she had no direct knowledge of those facts; there was no indication she was present when the samples were tested. Furthermore, she had no direct knowledge of the chain of custody either, nor did her declaration even purport to establish the chain of custody.

11. Dr. Bluhm spoke with Respondent on November 17, 2005 (before the report was made to the hospital), told him his sample tested positive for narcotics, and asked him if he was taking any prescribed drugs. Respondent answered "no."[14] There was no further conversation. Later that day, Respondent was asked to join a conference call with Dr. Bluhm, Dr. McAfee, and two hospital administrators. The call was brief. Respondent asked Dr. Bluhm if his sample could have been contaminated by his having narcotics on his hand. Dr. Bluhm stated that was not possible, and the call ended shortly thereafter.[15] At no time

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[12] This form is a vital part of the "chain of custody" evidence which is needed to prove that any given sample came from a particular person. Each of the four persons giving samples that day signed such a form, and the form had that person's name and social security number on it. However, there was no evidence that linked the form to the actual specimen sample.

[13] Complainant offered a declaration by Dr. Bluhm that was prepared during the trial. It could not be admitted as direct evidence under the Administrative Procedure Act, but was admitted as administrative hearsay. It did not support any direct evidence regarding the chain of custody. In fact, the Administrative Law Judge reviewed the Declaration, marked as Exhibit 51, and found that even if admitted as direct evidence, the declaration did nothing to establish the chain of custody of the tested samples.

[14] Interestingly, the logs show no morphine, the drug Respondent allegedly ingested, to have been missing from the pharmacy.

[15] Apparently, there was no discussion during this call regarding the difference between someone having a narcotic "on his hand" and someone absorbing a narcotic through his skin. The latter, if it occurred, would then enter the

did Respondent admit or deny that he had used narcotics. Apparently, no one ever asked him. Respondent and Dr. McAfee then returned to the pharmacy. Later that day, Respondent was notified that his employment was terminated effective immediately.

12. Dr. McAfee told Respondent to gather his belongings and escorted him to the hospital exit. At the exit, a hospital administrator asked Respondent for permission to search his belongings. Respondent agreed. The administrator looked through Respondent's backpack and, in a side pocket, found two blister packs, one containing a single dose of docusate sodium[16] and one containing a single dose of tramadol hydrochloride.[17] Respondent readily admitted these two items were hospital-owned drugs. At the hearing of this matter, Respondent explained that he had not attempted to steal either of these two items. Rather, they were in his possession through inadvertence. It was Respondent's duty to collect from the nursing floor those drugs which had been dispensed from the pharmacy but not used. He did this on a daily basis. As the drugs were to be returned to pharmacy inventory, it was Respondent's practice to make his round of the hospital to collect the drugs his first order of business. Accordingly, he made the collection every morning before going to the pharmacy. He would either carry the drugs back to the pharmacy in his hands, or put the drugs in his backpack, then empty the backpack once he got to the pharmacy. Respondent testified that he must have overlooked these two small items and failed to return them to inventory. Respondent's explanation was reasonable and is credited as being the cause for these drugs having been in his backpack.

13. Respondent denied he ever used any narcotic or other controlled substance while he was employed at the hospital. He did admit that, during the fall of 2005, his manner and demeanor changed. He was often distracted and tired. This was the result of several factors. During that time period, Respondent had difficult family issues with which he had to contend. His mother was in the end stages of Alzheimer's disease, and his mother-in-law had been diagnosed with Stage IV (inoperable) lung cancer. Respondent, living at the Motel 8, was unable to sleep well. In addition, he was making his return trips to Blythe in the early hours of Monday morning, and got even less sleep than he had been getting. Respondent informed Dr. McAfee that he wanted to leave his employment at the hospital so he could be closer to home. He told her his last day at work would be October 31, 2005. However, because Cardinal was unable to find a suitable position for him, Respondent asked, and was given permission, to extend his date of departure to November 19, 2005.

14. The hospital informed Respondent's supervisor at Cardinal, Rondi Lund-Zeiger, of Respondent's positive drug test. When Respondent returned from Blythe, Ms. Zeiger asked Respondent why he had not immediately told her had been tested by the hospital (she

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system and the metabolites thereof would be revealed in a drug screen, just as though the drug had been injected. Merely having a narcotic on one's hand and then somehow contaminating the sample therewith, would not produce the metabolites found on a drug screen.

[16] Docusate sodium is a stool softener

[17] Tramadol hydrochloride is a non-scheduled synthetic analgesic used in the treatment of chronic pain.

testified she would have had him tested as well) and his reply was that he had nothing to worry regarding the not as yet received results, so he didn't want to bother her. Upon Respondent's return, Ms. Zeiger sent him for a drug test, which came back negative. Ms. Zeiger testified that before she hires any pharmacist for the Cardinal registry, she requires that he or she undergo a drug screen. Ms. Zeiger found Respondent to be a reliable employee, always punctual and easy to work with. After Respondent's negative screen was returned, Ms. Zeiger placed Respondent at Centinela Hospital in Inglewood, California, which is less than 25 miles from La Mirada, California.

15. Centinela hospital is a 350-bed facility. It has 20 pharmacists and technicians working in its pharmacy on any given shift. Dr. Howard Darvey, Respondent's supervisor at Centinela, testified on his behalf. Dr. Darvey found Respondent to be competent, easy to get along with, and honest. One of Respondent's duties at Centinela was to keep the perpetual log for narcotics. Dr. Darvey found no problem with Respondent's record-keeping. He saw no evidence that Respondent used or abused narcotics. Respondent currently works for Cardinal in an administrative capacity.

16. In light of the below Conclusions of Law, and the below Order, no Findings are made with respect to the costs incurred by the Board in connection with the investigation and prosecution of this matter.

* * * * *

CONCLUSIONS OF LAW

1. In making this Proposed Decision, the Administrative Law Judge is guided by the following:

a. With respect to standard of proof: The standard of proof which must be met to establish the charging allegations herein is "clear and convincing" evidence. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853.) This means the burden rests with Complainant to offer proof that is clear, explicit and unequivocal -- so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478.)

Witkin explained the rationale for requiring such a high and often difficult standard of proof to meet as follows:

> In a few situations, for reasons of policy of the substantive law, the ordinary 'preponderance of the evidence' is not considered sufficient to establish the fact in issue, and instead the party must prove it by 'clear and convincing evidence.' In such cases, of course, the jury or trial judge should not be satisfied with a slight preponderance in favor of the plaintiff. [Citations] The phrase has been defined as 'clear, explicit and unequivocal,' 'so clear as to leave no substantial doubt,' and 'sufficiently strong to command the unhesitating assent of every reasonable mind.'

[Citation] Otherwise stated, a preponderance calls for probability, while clear and convincing proof demands a high probability. [Citation.] 1 Witkin, Cal. Evidence (4th ed., 2000) Vol. III, Burden of Proof and Presumptions.

b. With respect to determination of witness credibility: On the cold record a witness may be clear, concise, direct, unimpeached, uncontradicted -- but on a face-to-face evaluation, so exude insincerity as to render his credibility factor nil. Another witness may fumble, bumble, be unsure, uncertain, contradict himself, and on the basis of a written transcript be hardly worthy of belief. But one who sees, hears and observes him may be convinced of his honesty, his integrity, his reliability. (*Meiner* v. *Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140.)

The trier of fact may "accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (*Stevens v. Parke Davis & Co.* (1973) 9 Cal.3d 51, 67.) The trier of fact may also "reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material." (*Id.*, at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal.App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.)

The rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. Disbelief does not create affirmative evidence to the contrary of that which is discarded. The fact that the trier of fact may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative. (See, *Hutchinson v. Contractors' State License Bd* (1956) 143 Cal.App.2d 628, 632-633, citing *Marovich v. Central California Traction Co.* (1923) 191 Cal. 295, 304.)

2. Complainant has not established, by clear and convincing evidence, that Respondent ever used narcotics nor that he ever dispensed medicine while he was under the influence of a narcotic. In order for a Finding of drug use to be made, among other things it must be determined whether the sample that tested positive actually came from the individual accused of the drug use.

When establishing a chain of custody, the burden is on the party offering the evidence to establish that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. While a perfect chain of custody is desirable, gaps will not result in the exclusion of the evidence, so

long as the links offered connect the evidence with the case and raise no serious questions of tampering. (*People v. Catlin* (2001) 26 Cal.4th 81, 134.)

3. In *People v. Diaz* (1992) 3 Cal.4th 495, 559, the California Supreme Court upheld its determination in *People v. Riser* (1956) 47 Cal.2d 566, which sets forth the rules for establishing chain of custody:

> The burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration.
>
> The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight. [Citations.]

4. The strict chain of custody requirements are not limited to criminal proceedings. In *Perrin v. State Personnel Board* (2000) 83 Cal.App.4th 1350, the appellate court upheld the trial court when it set aside the State Personnel Board's decision to terminate employment of a CalTrans employee based on an alleged positive drug test. Commencing at page 1356, the *Perrin* court stated:[18]

> In order to prove that Edgerton failed a drug test, Caltrans was required to show that a medical review officer (MRO) reviewed the positive test result for "possible alternative medical explanations" and reviewed "the chain of custody to ensure that it is complete and sufficient on its face." (49 C.F.R. § 40.33(a)(1) (1999).)
>
> Under the federal regulations, the chain of custody is defined as "[p]rocedures to account for the integrity of each urine or blood specimen by tracking its handling and storage from point of specimen collection to final disposition of the specimen. With respect to drug testing, these procedures shall require that an appropriate drug testing custody form (see § 40.23(a)) be used from time of collection to receipt by the laboratory and that upon receipt by the laboratory an appropriate laboratory chain of custody form(s) account(s) for the sample or sample aliquots within the laboratory." (49 C.F.R. § 40.3 (1999).) In documenting the chain of custody, the testing laboratory is required to complete a chain of custody form documenting "each time a specimen is

[18] While it is true the Code of Federal Regulations cited in quotation is not applicable here, those regulations are highly instructive regarding the procedure that should be followed to establish properly a chain of custody.

handled or transferred and [identifying] every individual in the chain of custody...." (49 C.F.R. § 40.25(k) (1999).)

Here, the trial court found that "although the MRO certified chain of custody as 'properly completed,' he reviewed no chain of custody documentation (as prescribed by 49 C.F.R. §§ 40.25(k) & 40.29(a) & (b) (1999)) for the internal handling of these urine specimens by either lab, nor did he review external (i.e., shipping & receiving) chain of custody documentation from the first lab to the second lab." The court thus found that the MRO's certification that the chain of custody was complete was incorrect, and that Caltrans's failure to prove that the MRO reviewed the external chain of custody from Centinela to PoisonLab rendered PoisonLab's positive test result inadmissible.

Caltrans disputes the trial court's finding, contending that the testimony of Dr. James Lemus, the MRO responsible for reviewing Edgerton's test results, provides substantial evidence that Edgerton tested positive for methamphetamines and that Caltrans was not required to document the shipping of Edgerton's specimen from Centinela to PoisonLab. That testimony and the chain of custody forms that were admitted at the hearing, however, showed only that the Centinela laboratory received Edgerton's urine samples. No evidence was admitted at the hearing documenting the internal chain of custody at either of the testing laboratories.

[¶] . . . [¶]

It is well settled that chain of custody documentation is required at the collection site and at the testing laboratory where specimens are vulnerable to tampering. (Interstate Brands v. Local 441 Retail, Wholesale (11th Cir. 1994) 39 F.3d 1159, 1162.) As the trial court found, Caltrans failed to sustain its burden of proving that Edgerton suffered a positive drug test because its documentation of the chain of custody for Edgerton's samples was lacking. Although a violation of chain of custody procedures does not per se invalidate a drug test (see Frank v. Department of Transp., F.A.A., supra, 35 F.3d at p. 1556), based on the documentation before him, the MRO did not have enough information to certify that the chain of custody was "complete and sufficient." (49 C.F.R. § 40.33(a) (1999).) Indeed, he had no information before him documenting the chain of custody for Edgerton's samples after they were received by the Centinela laboratory. The positive test results were thus obtained in violation of the federal regulations and failed to support the Board's decision to terminate Edgerton. (49 C.F.R. § 40.33(b)(3) ["The MRO shall not ... consider the results or urine samples that are not obtained or processed in accordance with this part"].)

Although Caltrans is correct that it was not required to document the use of couriers in the shipment of the samples between laboratories (see 49 C.F.R. §

40.25(k) (1999) ["the chain of custody is not broken, and a test shall not be canceled, because couriers, express carriers, postal service personnel, or similar persons involved solely with the transportation of a specimen to a laboratory, have not documented their participation in the chain of custody documentation"]), the problem presented by the evidence here is that there is no documentation of the internal chain of custody of the samples once they arrived in the custody of the Centinela laboratory. Given this record, the MRO erroneously certified the chain of custody as complete.

5. In this matter, there is no documentation whatsoever regarding how the samples were packed by the hospital, or when, how, and in what condition they were received at Aegis. In fact, the evidence was not clear whether Aegis was the initial receiving laboratory, or whether OccuPatient received the samples and forwarded them to Aegis (Findings 9 and 10). Thus, no chain of custody was established between Respondent's urine sample and the positive test results. Those results cannot then be attributed to Respondent. The change in Respondent's manner and demeanor at or about the time of the drug test is not sufficient to establish that he ingested narcotics (Findings 8 and 13). Accordingly, it has not been established by clear and convincing evidence that Respondent, while in the employ of the hospital pharmacy, used narcotics of any kind.

6. No evidence was presented establishing that any of the shortages of controlled substances, as indicated in the perpetual narcotics logs, were in any way attributable to Respondent (Findings 5, 6 and 7).

7. Except for the single instance that Respondent made a mathematical error on one of the logs, no evidence was presented that Respondent failed to keep accurate records (Finding 6, footnote 8). Discipline of Respondent's license under Business and Professions Code section 4301, subdivision (a), and California Code of Regulations, title 16, section 1714, subdivision (d), is not warranted.

8. No evidence was presented that Respondent committed any acts involving dishonesty, fraud or deceit. In addition to a failure of proof regarding Respondent's alleged use of narcotics and/or responsibility for inventory missing from the pharmacy, there was a failure of proof that Respondent possessed any drugs without an appropriate prescription. The single instance of Respondent's having any drugs (the single doses of docusate sodium and tramadol hydrochloride described in Finding 12) does not equate to "possession" of those drugs for license disciplinary purposes. Respondent had no intent to steal the drugs nor was there any evidence he intended to use them, sell them or give them away. As described in Finding 12, Respondent's "possession" of those drugs was temporary, unintentional and his explanation therefore was both reasonable and understandable.

9. Except as noted in Finding 6, footnote 8, and Conclusion 7, there was a failure of proof on each of the Causes for Discipline alleged in the Accusation. Thus, Complainant failed to prove, by clear and convincing evidence, that license discipline should be imposed for Respondent's alleged violations of the provisions of any of the following code sections:

Business and Professions Code sections 4060, 4301, subdivisions (h), (f), (j) and (o), and 4327; Health and Safety Code sections 11170, 11171, 11173, subdivision (a), and 11350, subdivision (a); and, California Code of Regulations, title 16, section 1714, subdivision (d).

10. The Board is not entitled to recover its cost of investigation and prosecution of this matter under the provisions of Business and Professions Code section 125.3 (Finding 16 and Conclusions of Law 2 through 9.)

* * * * *

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The Accusation is dismissed.

Date: 1-27-09

RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings

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

In the Matter of the Accusation Against: ARNOLD AGUIRRE CASTRO 14744 Florita Rd. La Mirada, CA 90638 Pharmacist License No. RPH 41890 Respondent.	Case No. 3036 **ACCUSATION**

Complainant alleges:

PARTIES

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

2. On or about August 3, 1988, the Board issued Pharmacist License Number RPH 41890 to Arnold Aguirre Castro (Respondent). The Pharmacist License was in full force and effect at all times relevant to the charges brought herein and will expire on February 29, 2008, unless renewed.

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JURISDICTION

3. This Accusation is brought before the Board under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 4300 states:

"(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.

5. Section 4301 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:
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> . . . .
>
> (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.
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> . . . .
>
> (j) The violation of any of the statutes of this state or of the United States regulating controlled substances and dangerous drugs.
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> . . . .
>
> (o) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of or conspiring to violate any provision or term of this chapter or of the applicable federal and state laws and regulations governing pharmacy, including regulations established by the board.

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6. Section 4059, subdivision (a), states that a person may not furnish any dangerous drug except upon the prescription of a physician, dentist, podiatrist, optometrist, or veterinarian.

7. Section 4060 states that a person may not possess any controlled substance except upon the prescription of a physician, dentist, podiatrist, optometrist, or veterinarian.

8. California Code of Regulations, title 16, section 1714, subdivision (d), which requires that each pharmacist, while on duty, shall be responsible for the security of the prescription department, including provisions for effective control against theft or diversion of dangerous drugs and devices, and records for such drugs and devices.

9. Section 4327 states that any person who, while on duty, sells, dispenses or compounds any drug while under the influence of any dangerous drug or alcoholic beverages shall be guilty of a misdemeanor.

10. Health and Safety Code section 11170 states that no person shall prescribe, administer, or furnish a controlled substance for himself.

11. Health and Safety Code section 11171 states that no person shall prescribe, administer, or furnish a controlled substance except under the conditions and in the manner provided by this division.

12. Health and Safety Code section 11173, subdivision (a), states that no person shall obtain or attempt to obtain controlled substances, or procure or attempt to procure the administration of or prescription for controlled substances, (1) by fraud, deceit, misrepresentation, or subterfuge; or (2) by the concealment of a material fact.

13. Health and Safety Code section 11350, subdivision (a), states that every person who possesses any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the state prison.

14. Section 125.3 of the Code states that the Board may request the administrative law judge to direct a licentiate found to have committed a violation of the

licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

15. **DRUG CLASSIFICATIONS**

	BRAND NAME	GENERIC NAME	SCHEDULED DRUG	INDICATIONS FOR USE
1.	Dilaudid	Hydromorphone	Schedule II H&S 11055(b)(1)(k)	Severe Pain
2.	Duragesic	Fentanyl	Schedule II H&S 11055(c)(8)	Severe Pain
3.	Oramorph	Morphine	Schedule II H&S 11055(b)(1)(m)	Severe Pain
4.	Oxycontin	Oxycodone	Schedule II H&S 11055(b)(1)(n)	Severe Pain
5.	Phenobarbital	Phenobarbital	Schedule III H&S 11057(d)(26)	Seizures, sedative
6.	Percocet 5	Oxycodone/ APAP 5-325	Schedule II H&S 11055(b)(1)(n)	Severe Pain
7.	Soma	Carisoprodol	Not scheduled B&P § 4022	Muscle Relaxant
8.	Tylenol w/ codeine 30 mg	APAP/Codeine #3	Schedule III H&S 11056(e)(2)	Pain
9.	Vicodin Vicodin ES	Hydrocodone/ APAP 7.5-750mg	Schedule III H&S 11056(e)(4)	Pain
10.	Xanax	Alprazolam	Schedule III H&S 11057(d)(1)	Anxiety
11.	Ultram	Tramadol	Not scheduled B&P § 4022	Pain

FACTUAL SUMMARY

16. During a period including April to November 2005, Respondent was employed as a pharmacist at Palo Verde Hospital in Blythe, California. Respondent's duties included responsibility for ordering and maintaining the drug inventory. Respondent was also responsible for maintaining the controlled substance perpetual inventory. During this time there were repeated discrepancies in the controlled substance perpetual inventory, including:

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	DATE	DRUG	DESCRIPTION
1.	03/23/2005 to 08/31/2005	Fentanyl 250mg/5ml	5 units not accounted for
2.	04/20/2005 to 06/06/2005	Alprazolam 0.5mg	5 units not accounted for
3.	06/21/2005 to 06/27/2005	APAP/Codeine #3	16 units not accounted for
4.	06/24/2005 to 06/27/2005	Percocet 5	5 units not accounted for
5.	06/27/2005	Oxycontin 20mg	1 unit not accounted for
6.	06/27/2005 to 06/28/2005	APAP/Codeine #3	27 units not accounted for
7.	07/05/2005 to 07/14/2005	APAP/Codeine #3	30 units not accounted for
8.	07/06/2005 to 08/18/2005	Duragesic patch 100mcg/hr	1 unit not accounted for
9.	07/06/2005 to 08/06/2005	Phenobaribital 30mg	12 units not accounted for
10.	07/21/2005 to 08/08/2005	Carisoprodol 350mg	66 units not accounted for
11.	08/07/2005 to 08/08/2005	Carisoprodol 350 mg	41 units not accounted for
12.	08/25/2005	Percocet 5	22 units not accounted for
13.	10/03/2005 to 10/17/2005	APAP/Codeine #3	6 units not accounted for
14.	10/03/2005 to 10/25/2005	Oxycontin 20mg	12 units not accounted for
15.	10/06/2005 to 10/25/2005	Percocet 5	11 units not accounted for
16.	10/04/2005 to 10/17/2005	Carisoprodol 350mg	26 units not accounted for
17.	10/19/2005 to 10/25/2005	Carisoprodol 350mg	51 units not accounted for
18.	10/21/2005	Morphine 2mg	no inventory count recorded
19.	10/25/2005	Phenobarbital 30mg tab	20 units not accounted for
20.	11/17/2005	Oramporph 30mg	11 units not accounted for

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17. During a period including April to November 2005, Respondent self-administered controlled substances, while employed as a pharmacist at Palo Verde Hospital. Respondent was also under the influence of controlled substances while on duty.

18. On or about November 14, 2005, Respondent submitted to a drug test and tested positive for morphine and hydrocodone. Respondent did not have a prescription or legitimate medical reason to take morphine, hydrocodone or any other controlled substance during this time.

19. On or about November 17, 2005, the hospital conducted a search of Respondent and his possessions. Respondent was in possession of one tablet of Tramadol and one tablet of Docusate Sodium which belonged to the hospital. Respondent did not have a prescription to take Tramadol or Docusate Sodium at this time. Respondent admitted the drugs belonged to the hospital.

FIRST CAUSE FOR DISCIPLINE

(Using Controlled Substances)

20. Respondent's pharmacist license is subject to discipline for unprofessional conduct pursuant to Section 4301, subdivision (h), in that he administered to himself a controlled substance, or used a dangerous drug, to the extent or in a manner as to be dangerous or injurious to himself, to a person holding a license under the Pharmacy Act, 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 of pharmacy, for the reasons stated in Paragraphs 15 - 19.

SECOND CAUSE FOR DISCIPLINE

(Violation of Laws Relating to Controlled Substances and Dangerous Drugs)

21. Respondent's pharmacist license is subject to discipline for unprofessional conduct pursuant to Section 4301, subdivision (j), based on the facts stated in Paragraphs 15 - 20, in that he violated statutes of this state, of any other state, or of the United States regulating controlled substances and dangerous drugs, as follows:

a. Respondent possessed a controlled substance for reasons unrelated to the practice of pharmacy, without a prescription, in violation of Section 4060 and

Health and Safety Code section 11350, subdivision (a).

b. Respondent, while on duty, sold, dispensed or compounded drugs while under the influence of a dangerous drug, in violation of Section 4327.

c. Respondent administered or furnished a controlled substance without a prescription, for himself, in violation of Health and Safety Code sections 11170 and 11171.

d. Respondent obtained or attempted to obtain controlled substances, or procured or attempted to procure the administration of or prescription for controlled substances, by fraud, deceit, misrepresentation, or subterfuge; or by the concealment of a material fact, in violation of Health and Safety Code section 11173, subdivision (a).

22. Respondent's pharmacist license is subject to discipline for unprofessional conduct pursuant to Section 4301, subdivision (o), in that he violated or attempted to violate, directly or indirectly, or assisted in or abetted the violation of or conspired to violate any provision or term of the Pharmacy Act or of the applicable federal and state laws and regulations governing pharmacy, including regulations established by the board or by any other state or federal regulatory agency, for the reasons stated in Paragraphs 15 - 21.

THIRD CAUSE FOR DISCIPLINE

(Acts Involving Dishonesty, Fraud or Deceipt)

23. Respondent's pharmacist license is subject to discipline for unprofessional conduct pursuant to Section 4301, subdivision (f), in that he committed acts involving moral turpitude, dishonesty, fraud, deceit, or corruption, for the reasons stated in Paragraphs 15 - 19.

FOURTH CAUSE FOR DISCIPLINE

(Failure to Ensure Security and Maintain Accurate Records)

24. Respondent's pharmacist license is subject to discipline for unprofessional conduct pursuant to Section 4301, subdivision (o), in that he violated or attempted to violate, directly or indirectly, or assisted in or abetted the violation of or conspired to violate any provision or term of the Pharmacy Act or of the applicable federal and state laws and regulations governing pharmacy, including regulations established by the board, as follows:

a. Respondent violated California Code of Regulations, title 16, section 1714, subdivision (d), in that Respondent, while on duty as a pharmacist, failed to be responsible for the security of the prescription department, including provisions for effective control against theft or diversion of dangerous drugs and devices, and records for such drugs and devices, for the reasons stated in Paragraphs 15 - 19.

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:

A. Revoking or suspending Pharmacist License Number RPH 41890, issued to Respondent Arnold Aguirre Castro.

B. Ordering Respondent Arnold Aguirre Castro 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;

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

DATED: 10/22/07

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

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