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

11
12 In the Matter of the Accusation Against:
13 **AMBER NICOLE MCKENZIE**
2606 Nida Place
14 Lemon Grove, CA 91945
15 Pharmacy Technician Reg. No. TCH 54104
16 Respondent.

Case No. 3257
DEFAULT DECISION AND ORDER
[Gov. Code, § 11520]

17
18 **FINDINGS OF FACT**

19 1. On or about April 14, 2009, Complainant Virginia Herold, in her official capacity as
20 the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs, filed
21 Accusation No. 3257 against Amber Nicole McKenzie (Respondent) before the Board of
22 Pharmacy.

23 2. On or about May 5, 2004, the Board of Pharmacy (Board) issued Pharmacy
24 Technician Registration No. TCH 54104 to Respondent. The Pharmacy Technician Registration
25 was in full force and effect at all times relevant to the charges brought herein and will expire on
26 November 30, 2009, unless renewed.

27 3. On or about April 16, 2009, Charlette Sheppard, an employee of the Department of
28 Justice, served by Certified and First Class Mail a copy of the Accusation No. 3257, Statement to

1 Respondent, Notice of Defense, Request for Discovery, and Government Code sections 11507.5,
2 11507.6, and 11507.7 to Respondent's address of record with the Board, which was and is:

3 2606 Nida Place

4 Lemon Grove, CA 91945.

5 A copy of the Accusation is attached as Exhibit A, and is incorporated herein by reference.

6 4. Service of the Accusation was effective as a matter of law under the provisions of
7 Government Code section 11505, subdivision (c).

8 5. On or about April 17, 2009, the aforementioned documents were accepted and signed
9 for by Respondent. On or about April 20, 2009, the DOJ received a U.S. Postal Service Domestic
10 Return Receipt with Respondent's signature indicating service was complete.

11 6. Government Code section 11506 states, in pertinent part:

12 (c) The respondent shall be entitled to a hearing on the merits if the respondent
13 files a notice of defense, and the notice shall be deemed a specific denial of all parts
14 of the accusation not expressly admitted. Failure to file a notice of defense shall
15 constitute a waiver of respondent's right to a hearing, but the agency in its discretion
16 may nevertheless grant a hearing.

17 7. Respondent failed to file a Notice of Defense within 15 days after service upon her of
18 the Accusation, and therefore waived her right to a hearing on the merits of Accusation No. 3257.

19 8. California Government Code section 11520 states, in pertinent part:

20 (a) If the respondent either fails to file a notice of defense or to appear at the
21 hearing, the agency may take action based upon the respondent's express admissions
22 or upon other evidence and affidavits may be used as evidence without any notice to
23 respondent.

24 9. Pursuant to its authority under Government Code section 11520, the Board finds
25 Respondent is in default. The Board will take action without further hearing and, based on the
26 evidence on file herein, finds that the allegations in Accusation No. 3257 are true.

27 10. The total cost for investigation and enforcement in connection with the Accusation
28 are \$4,013.50 as of May 22, 2009.

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DETERMINATION OF ISSUES

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2 1. Based on the foregoing findings of fact, Respondent Amber Nicole McKenzie has
3 subjected her Pharmacy Technician Registration No. TCH 54104 to discipline.

4 2. A copy of the Accusation is attached.

5 3. The agency has jurisdiction to adjudicate this case by default.

6 4. The Board of Pharmacy is authorized to revoke Respondent's Pharmacy Technician
7 Registration based upon the following violations alleged in the Accusation:

8 a. On or about September 28, 2007, in a criminal proceeding entitled *People*
9 *of the State of California v. Amber McKenzie*, in San Diego County Superior Court, case number
10 CD209278, Respondent was convicted on her plea of guilty for violating Health and Safety Code
11 section 11351, possession for sale of controlled substances, and Penal Code section 487,
12 subdivision (a), grand theft, in violation of sections 490 and 4301, subdivision (l) of the Code.

13 b. Respondent is subject to disciplinary action under section 4301,
14 subdivision (f) of the Code in that on or between September 24 and September 27, 2007, while
15 working as a pharmacy technician, Respondent stole controlled substances from her employer,
16 CVS Pharmacy, using fraud, deceit, and dishonesty.

17 c. Respondent is subject to disciplinary action under section 4301,
18 subdivision (j) of the Code in that on or between September 24 and September 27, 2007, while
19 working as a pharmacy technician, Respondent furnished to herself and was in possession of
20 controlled substances without a prescription in violation of sections 4059 and 4060 of the Code.

21 d. Respondent is subject to disciplinary action under section 4301,
22 subdivision (o) of the Code in that on or between September 24 and September 27, 2007, while
23 working as a pharmacy technician, Respondent violated Title 21 United States Code section 843,
24 subdivision (a)(3), Board of Pharmacy Regulations (California Code of Regulations, Title 16,
25 Section 1700, et seq.), and the California Uniform Controlled Substances Act (Health and Safety
26 Code 11000, et seq.).

27 e. Respondent is subject to disciplinary action under section 4301,
28 subdivision (p) of the Code in that on or between September 24 and September 27, 2007, while

1 working as a pharmacy technician, Respondent stole controlled substances from her employer,
2 and was subsequently convicted for grand theft and possession of controlled substances for sale.
3 Such egregious conduct would have warranted the denial a pharmacy technician registration
4 under section 480, subdivisions (a)(1) and (a)(2) of the Code.

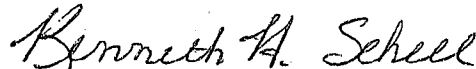
5 **ORDER**

6 IT IS SO ORDERED that Pharmacy Technician Registration No. TCH 54104, heretofore
7 issued to Respondent Amber Nicole McKenzie, is revoked.

8 Pursuant to Government Code section 11520, subdivision (c), Respondent may serve a
9 written motion requesting that the Decision be vacated and stating the grounds relied on within
10 seven (7) days after service of the Decision on Respondent. The agency in its discretion may
11 vacate the Decision and grant a hearing on a showing of good cause, as defined in the statute.

12 This Decision shall become effective on October 15, 2009.

13 It is so ORDERED September 15, 2009.

14 

15 _____
16 KENNETH H. SCHELL, BOARD PRESIDENT
17 FOR THE BOARD OF PHARMACY
18 DEPARTMENT OF CONSUMER AFFAIRS
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23 DOJ docket number:SD2009803470

24 Attachment: Exhibit A: Accusation No.3257
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Exhibit A
Accusation No. 3257

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of the State of California
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12 In the Matter of the Accusation Against:
13 AMBER NICOLE MCKENZIE
2606 Nida Place
14 Lemon Grove, CA 91945
15 Pharmacy Technician Reg. No. TCH 54104
16 Respondent.

Case No. 3257

A C C U S A T I O N

17
18 Complainant alleges:

19 PARTIES

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

23 2. On or about May 5, 2004, the Board of Pharmacy issued Pharmacy
24 Technician Registration Number TCH 54104 to Amber Nicole McKenzie (Respondent). The
25 Pharmacy Technician Registration was in full force and effect at all times relevant to the charges
26 brought herein and will expire on November 30, 2009, unless renewed.

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7. 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."

8. Section 4300, subdivision (a) of the Code states that "every license issued may be suspended or revoked."

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.

....

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

....

(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 state regulating controlled substances or dangerous drugs shall be conclusive evidence of unprofessional conduct. In all other cases, the record of conviction shall be conclusive evidence only of the fact that the conviction occurred. The board may inquire into the circumstances surrounding the commission of the crime, in order to fix the degree of discipline or, in the case of a conviction not involving controlled substances or dangerous drugs, to determine if the conviction is of an offense substantially related to the qualifications, functions, and duties of a licensee under this chapter. A plea or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a conviction

1 within the meaning of this provision. The board may take action when the time
2 for appeal has elapsed, or the judgment of conviction has been affirmed on appeal
3 or when an order granting probation is made suspending the imposition of
4 sentence, irrespective of a subsequent order under Section 1203.4 of the Penal
Code allowing the person to withdraw his or her plea of guilty and to enter a plea
of not guilty, or setting aside the verdict of guilty, or dismissing the accusation,
information, or indictment.

5

6 (o) Violating or attempting to violate, directly or indirectly, or assisting in
7 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
8 pharmacy, including regulations established by the board or by any other state or
federal regulatory agency.

9 (p) Actions or conduct that would have warranted denial of a license.

10

11 10. Section 4022 of the Code states

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

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

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

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

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

24 12. Section 4060 of the Code states:

25 No person shall possess any controlled substance, except that furnished to
26 a person upon the prescription of a physician, dentist, podiatrist, optometrist,
veterinarian, or naturopathic doctor pursuant to Section 3640.7, or furnished
27 pursuant to a drug order issued by a certified nurse-midwife pursuant to Section
2746.51, a nurse practitioner pursuant to Section 2836.1, or a physician assistant
28 pursuant to Section 3502.1, or naturopathic doctor pursuant to Section 3640.5, or
a pharmacist pursuant to either subparagraph (D) of paragraph (4) of, or clause

1 (iv) of subparagraph (A) of paragraph (5) of, subdivision (a) of Section 4052.
2 This section shall not apply to the possession of any controlled substance by a
3 manufacturer, wholesaler, pharmacy, pharmacist, physician, podiatrist, dentist,
4 optometrist, veterinarian, naturopathic doctor, certified nurse-midwife, nurse
5 practitioner, or physician assistant, when in stock in containers correctly labeled
6 with the name and address of the supplier or producer.

7 Nothing in this section authorizes a certified nurse-midwife, a nurse
8 practitioner, a physician assistant, or a naturopathic doctor, to order his or her
9 own stock of dangerous drugs and devices.

10 13. United States Code, title 21, section 843 states, in pertinent part:

11 (a) It shall be unlawful for any person knowingly or intentionally --

12

13 (3) to acquire or obtain possession of a controlled substance by
14 misrepresentation, fraud, forgery, deception, or subterfuge;

15

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

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

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

25

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:

(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 c. The facts that led to the conviction were that on or about
2 September 22, 2007, a pharmacy technician at a San Diego CVS Pharmacy conducted the
3 weekly cycle count, or inventory, of the pharmacy's controlled substances. In the previous two
4 weeks, the technician noticed that there was a shortage of hydrocodone/acetaminophen and that
5 the pharmacy's computerized system was frequently reordering the drug. The technician
6 decided to investigate the matter and found two baggies of what was later identified as
7 hydrocodone/ acetaminophen tablets secreted in a paper towel dispenser in the store's restroom.
8 The technician notified the store's manager, who then notified the CVS Regional Loss
9 Prevention Manager. A cursory audit was conducted and it was discovered that there were 24
10 bottles of hydrocodone/ acetaminophen unaccounted for based on receipts versus distribution.
11 Two empty bottles for 500 tablets of hydrocodone/acetaminophen were found in a trashcan
12 outside of the pharmacy bathroom.

13 d. On or about September 23, 2007, the Loss Prevention Manager
14 installed surveillance cameras in and around the pharmacy and the area leading to the restrooms.
15 The video surveillance for September 24, 2007, recorded Respondent beginning her shift at
16 approximately 9 a.m. At approximately 9:30 a.m., Respondent took two bottles of
17 hydrocodone/acetaminophen and threw them into a trash can underneath the filling counter.
18 Respondent then placed some sandwich-sized plastic baggies into the trashcan. Just prior to her
19 lunch break, Respondent was videotaped removing the trashbag from underneath the filling
20 counter and taking it into the restroom. A few minutes later, Respondent exited the restroom and
21 placed the trashbag in the hallway. Respondent was then videotaped retrieving her purse from
22 behind the fill station and returning to the bathroom. After a minute or two, Respondent left the
23 restroom with her purse and exited the store. Respondent was also videotaped on September 25,
24 2007 removing two bottles of hydrocodone/acetaminophen from the shelf and throwing them
25 into the trash can.

26 e. On or about September 26, 2007, the Loss Prevention Manager
27 reported the incident to California Department of Justice, Bureau of Narcotics Enforcement
28 (BNE). At approximately 9 a.m., agents from the BNE, RxNet Task Force, and the Drug

1 Enforcement Administration went to the CVS Pharmacy and conducted an investigation. At
2 approximately 12:00 noon, Respondent was detained as she was leaving the pharmacy with her
3 boyfriend. A search of the pharmacy restroom revealed two baggies containing hydrocodone/
4 acetaminophen. One baggie had 675 tablets, and the second baggie contained 171 tablets.

5 f. Respondent's vehicle was searched and over 1,000 doses of
6 hydrocodone/acetaminophen were located, along with quantities of other controlled and non-
7 controlled drugs, including 106 phentermine pills. There was also a piece of paper with 21
8 names and various dollar amounts next to each name, indicating Respondent was keeping track
9 of sales and payments owed, as well a sheet indicating her drug inventory. A search of
10 Respondent's residence revealed an additional 212 Valium tablets.

11 **SECOND CAUSE FOR DISCIPLINE**

12 **(Unprofessional Conduct - Commission of Acts Involving Moral Turpitude,**
13 **Dishonesty, Fraud, Deceit & Corruption)**

14 19. Respondent is subject to disciplinary action under section 4301,
15 subdivision (f) of the Code in that on or between September 24 and September 27, 2007, while
16 working as a pharmacy technician, Respondent stole controlled substances from her employer,
17 CVS Pharmacy, using fraud, deceit, and dishonesty, as detailed in paragraph 16, above.

18 **THIRD CAUSE FOR DISCIPLINE**

19 **(Unprofessional Conduct - Possession of Controlled Substances)**

20 20. Respondent is subject to disciplinary action under section 4301,
21 subdivision (j) of the Code in that on or between September 24 and September 27, 2007, while
22 working as a pharmacy technician, Respondent furnished to herself and was in possession of
23 controlled substances without a prescription in violation of sections 4059 and 4060
24 of the Code, as detailed in paragraph 16, above.

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FOURTH CAUSE FOR DISCIPLINE

**(Unprofessional Conduct - Violating Federal & State Laws
& Regulations Governing Pharmacy)**

21. Respondent is subject to disciplinary action under section 4301, subdivision (o) of the Code in that on or between September 24 and September 27, 2007, while working as a pharmacy technician, Respondent violated Title 21 United States Code section 843, subdivision (a)(3), Board of Pharmacy Regulations (California Code of Regulations, Title 16, Section 1700, et seq.), and the California Uniform Controlled Substances Act (Health and Safety Code 11000, et seq.), as detailed in paragraph 16, above.

FIFTH CAUSE FOR DISCIPLINE

(Conduct That Would Have Warranted Denial of a License)

22. Respondent is subject to disciplinary action under section 4301, subdivision (p) of the Code in that on or between September 24 and September 27, 2007, while working as a pharmacy technician, Respondent stole controlled substances from her employer, and was subsequently convicted for grand theft and possession of controlled substances for sale. Such egregious conduct would have warranted the denial a pharmacy technician registration under section 480, subdivisions (a)(1) and (a)(2) of the Code.

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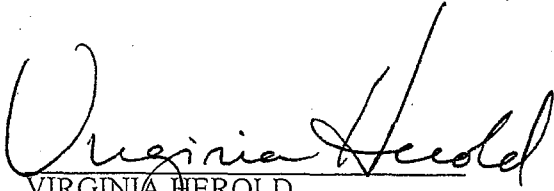
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PRAYER

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 54104, issued to Amber Nicole McKenzie;
2. Ordering Amber Nicole McKenzie 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: 4/14/09


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

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