

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

In the Matter of the Accusation Against:

SARAH JEAN IDE

Pharmacy Technician Registration
No. TCH 66657

Respondent.

Case No. 3692

OAH Case No. 2010070343

DECISION AFTER NONADOPTION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on March 7, 2011, in San Diego, California.

Desiree I. Kellogg, Deputy Attorney General, Office of the Attorney General, Department of Justice, State of California, represented Complainant, Virginia Herold, Executive Officer, Board of Pharmacy, Department of Consumer Affairs, State of California.

Respondent, Sarah Jean Ide, represented herself and was present throughout the administrative proceeding.

On March 7, 2011, the matter was submitted.

The proposed decision of the Administrative Law Judge was submitted to the Board of Pharmacy on March 10, 2011. After due consideration thereof, the Board of Pharmacy declined to adopt said proposed decision and thereafter on April 11, 2011 issued an Order of Non-adoption and subsequently on May 10, 2011 issued an Order Fixing Date for Submission of Argument. Written argument having been received from Complainant and the time for filing written argument in this matter having expired, and the entire record, including the transcript of said hearing having been read and considered, the Board of Pharmacy pursuant to Section 11517 of the Government Code hereby makes the following decision:

PRELIMINARY STATEMENT

In this disciplinary action, Complainant seeks to revoke Respondent's pharmacy technician registration as a result of Respondent being under the influence of a controlled substance on May 18, 2008. In mitigation and rehabilitation, Respondent provided that her use of Methamphetamine on that date was a singular event, that severe consequences were imposed, that Respondent now fully appreciates the dangers of unlawful drug use, and that it is very unlikely that similar misconduct will happen again.

Pharmacy technicians hold positions of trust and are expected to strictly adhere to rules involving controlled substances. Pharmacy technicians are also expected to exercise good judgment at all times for the protection of the public. However, Respondent's illegal use of methamphetamine at a gathering with known drug users, including her former boyfriend, shows a lack of good judgment and an inability to comply with standards. Under the circumstances, it would not be appropriate to grant an unrestricted license in this case. It is concluded that Respondent's registration should be revoked, that the order of revocation should be stayed, and that Respondent's registration should be placed on five years' probation on terms and conditions that will assure the protection of the public.

FACTUAL FINDINGS

Jurisdictional Matters

1. On June 9, 2010, Complainant Virginia Herold, Executive Officer, Board of Pharmacy, Department of Consumer Affairs, State of California, signed the Accusation in Case No. 3692. The accusation alleged that Respondent, Sarah Jean Ide, engaged in unprofessional conduct in that she was under the influence of a controlled substance and dangerous drug, Methamphetamine, on May 11, 2008 (first cause for discipline), that she possessed and furnished Methamphetamine on May 11, 2008 (second cause for discipline), and that she thereby violated the California Uniform Controlled Substances Act (third cause for discipline). The Accusation sought to revoke Respondent's pharmacy technician registration and sought an order directing Respondent to pay to the Board costs of investigation and enforcement.

The Accusation was served on Respondent, who timely filed a notice of defense. The matter was set for an administrative hearing.

On March 7, 2011, the record in the administrative hearing was opened. Respondent stipulated to the introduction of Complainant's documentary evidence. Jurisdictional documents were presented; Complainant gave an opening statement;

sworn testimony was received; closing arguments were given; the record was closed; and the matter was submitted.

Qualification/or Registration as a Pharmacy Technician

2. To qualify for registration as a pharmacy technician under Business and Professions Code section 4202, an individual must establish that he or she is a high school graduate or possesses a general educational development certificate equivalent and (1) holds an associate's degree in pharmacy technology; or (2) has completed a course of training specified by the Board¹; or (3) has graduated from a school of pharmacy recognized by the Board; or (4) holds certification from the Pharmacy Technician Certification Board (PTCB). In addition, the applicant must not have been convicted of any crime and must not have engaged in any misconduct substantially related to the qualifications, functions, or duties of a registered pharmacy technician. Passing a competency examination is not required to become registered as a pharmacy technician.

Pharmacy technicians are not independent practitioners, but work under the close supervision of registered pharmacists. Pharmacy technicians have access to controlled substances as a consequence of their employment.

Respondent's Registration History

3. On December 21, 2005, the Board issued Original Pharmacy Technician Registration No. TCH 66657 to Respondent, authorizing her to act as a pharmacy technician in California. Respondent's pharmacy technician's registration is renewed through March 31, 2013. There is no history of any previous administrative discipline having been imposed against Respondent's pharmacy technician's registration. (Ex. No. 2.)

Respondent's Background, Training, and Experience

4. Respondent was born in March 1981. She grew up in Murrieta, California. She took a break from high school after becoming pregnant in 1998. In 1999, Respondent gave birth to a daughter. Respondent returned to high school to obtain a high school diploma so she could begin the process to obtain registration as a pharmacy technician. Respondent obtained her high school diploma in 2001 from Creekside High School. Respondent became pregnant in 2003 and gave birth to a son.

¹ Title 16, California Code of Regulations, section 1793.6 provides that a course of training which meets the requirements of Business and Professions Code section 4202, subdivision (a)(2) includes: (a) a training program accredited by the American Society of Health-System Pharmacists; or (b) training provided by a branch of the federal armed services for which the applicant possesses a certificate of completion; or (c) any other training involving at least 240 hours of instruction in designated subject matters.

5. Respondent began working for Rite Aid in the Pharmacy Department. Pharmacist Anna Chung was her immediate supervisor. Rite Aid provided Respondent with the education, training, and practical experience required to obtain registration as a pharmacy technician. Respondent loved working as a pharmacy technician and her work met with her employer's approval after she obtained her registration.

6. After obtaining her pharmacy technician registration, Respondent worked for Rite Aid as a pharmacy technician for about a year. (RT 17:8-11.) Respondent left her employment with Rite Aid due to difficulties in obtaining child care. Respondent's immediate supervisor at Rite Aid told Respondent that she was welcome to return to work as a pharmacy technician when she was ready. Respondent admitted at the hearing that she had not told Rite Aid about her arrest or conviction. (RT 20:11-19.) Respondent has not returned to work.

7. The father of Respondent's son had a history of drug use and was an ex-felon when Respondent met him. While the father did not use drugs when he and Respondent lived together to the best of Respondent's knowledge, he was quite abusive. The father had several cousins who lived in south Riverside County who were known to law enforcement to be drug users. One of the cousins lived in a mobile home and was on parole with a 4th Amendment waiver.

8. Respondent testified that she did not illegally use any controlled substances before the evening of May 11, 2008. Respondent testified that she rarely consumed alcohol. This claim is often made in these kinds of disciplinary proceedings, but the claim is usually belied by the licensee's arrest record and record of convictions. Respondent, however, had no prior arrests or convictions. The Administrative Law Judge in this case found that Respondent's testimony that she did not use illegal drugs and rarely drank alcohol was credible and was corroborated by a relative who knew her well. However, while this finding may be somewhat helpful, it is not conclusive as to Respondent's use of controlled substances or alcohol prior to 2008. Further, it is undisputed that Respondent did illegally use a controlled substance on at least one occasion, notwithstanding Respondent's aunt's testimony.

Respondent's Arrest

9. Respondent and her (then) boyfriend went out the evening of May 11, 2008. Respondent left her daughter and son in the care of family members. When Respondent and the boyfriend were returning home, the boyfriend stopped by his cousin's mobile home in Homeland, about 15 miles north of Murrieta. When they were inside the mobile home, the boyfriend, his cousin, who was on parole, and another person inside the mobile home began smoking Methamphetamine from a glass pipe.

Respondent joined in. According to Respondent, it was the first and only time she had ever tried Methamphetamine.

Around 10:15 p.m., two Riverside County sheriff deputies conducted a parole search of the mobile home. The deputies contacted and detained the parolee and entered the mobile home. The deputies observed several empty white baggies on a table, a white plastic tube with a white residue, and a lighter. The deputies seized a case found outside the mobile home that contained several baggies of Methamphetamine and a scale. The deputies determined that several persons inside the mobile home, including Respondent, demonstrated objective signs of being under the influence of a stimulant.

Respondent was arrested and was taken into custody. Respondent provided a blood sample. That sample tested positive for the presence of amphetamine. Respondent remained in custody for approximately three hours, and was released on a misdemeanor promise to appear. The three other persons who were inside the mobile home and had been arrested, including the boyfriend, were charged with felonies.

Court Proceedings

10. On April 17, 2008, the Riverside County District Attorney's Office filed criminal charges against Respondent for violating Health and Safety Code section 11550, subdivision (a) (being under the influence of a controlled substance), a misdemeanor.

On May 28, 2008, Respondent failed to appear at her arraignment. The criminal complaint was amended to add Count 2, a violation of Penal Code section 853.6, subdivision (g) (failure to appear).

On September 11, 2009, the Superior Court set a Readiness Conference for October 15, 2009.

11. On October 15, 2009, Respondent entered a plea of guilty to a violation of Health and Safety Code section 11550, subdivision (a) (being under the influence of a controlled substance), a misdemeanor, in the Superior Court of California, County of Riverside, in Case No. SWM074961.

The Superior Court deferred entry of judgment under Penal Code section 1000 and placed Respondent in a diversion program on condition that she pay a \$100 administrative fee; participate in and complete the court-approved diversion program provided by Anderson & Associates at her own expense; and return for all future hearing dates as required. The failure to appear charge was dismissed.

On December 21, 2009, Respondent filed a proof of enrollment in the diversion program with the Superior Court. On May 12, 2010, Respondent filed a proof of completion of the diversion program with the Superior Court.

Following her completion of the diversion program, respondent's conviction for violating Health and Safety Code section 11550, subdivision (a), was dismissed. Respondent has not been convicted of any crime.²

Post-Arrest Matters

12. Following her arrest, Respondent broke up with her boyfriend. Respondent, her daughter, and her son moved back to live with family members. Respondent attended the diversion program classes, which she found extremely informative. She learned of the dangers associated with the use of Methamphetamine and other dangerous drugs. She observed, first hand in group meetings, the profoundly detrimental effect the illegal use of drugs had on others. During this period, Respondent attended two NA meetings and one AA meeting in support of a girlfriend who was an addict. Respondent did not attend these meetings because she believed that she did not have a substance abuse problem. Respondent was given a drug screening test upon entry into the diversion program and once again during that program. The testing was negative for controlled substances.

After her arrest, Respondent feared that her one-time use of Methamphetamine might result in her loss of custody of her son and daughter. She was concerned about her children becoming wards of the juvenile court. While her fears proved unfounded, and while no formal investigation was taken that was related to juvenile dependency proceedings, Respondent was very concerned and learned that her highest priority was her children.

As a result of her experiences, Respondent learned that she acted impulsively and in a stupid fashion, and that she had put her life, her family, and her career in jeopardy.

13. Respondent's aunt, Diana Laskowski, testified that Respondent was always law abiding and was abstinent of illegal drugs and alcohol as a teenager and when she was in her early 20s. Ms. Laskowski testified that Respondent's arrest came as a complete shock to the family and was totally out of character.

² Business and Professions Code section 492 authorizes a board regulating any of the healing arts to take disciplinary action against a licensee for professional misconduct even though the licensee has successfully completed a deferred entry of judgment diversion program. When a licensee completes such a program, there is no conviction; however, the agency may proceed with disciplinary action on the basis of the licensee's professional misconduct, and the existence of a conviction is not required.

14. Respondent testified that she rarely consumes alcoholic beverages. Respondent testified that she has not illegally consumed drugs on any occasion other than May 11, 2008. Respondent broke up with her boyfriend, she avoids persons who may be using drugs or may be under the influence of drugs, and she promised that she would never use illegal drugs again. The Administrative Law Judge found that Respondent's testimony was very credible.

The Expert Testimony

15. Valerie Knight is a Registered Pharmacist and an experienced Board investigator. Investigator Knight testified that the side effects of Methamphetamine include euphoria, overstimulation, and possible disorientation. She testified that the use of Methamphetamine can be very dangerous.

Investigator Knight established that a pharmacy technician assists a registered pharmacist behind the counter, takes inventory, takes prescriptions and refill orders over the telephone, files documents, and enters data in pharmacy records. A pharmacy technician has access to controlled substances as a result of that employment. Good judgment is required to become and remain a pharmacy technician.

Investigator Knight testified that a pharmacy technician's illegal use of a controlled substance is adversely related to the qualifications, functions and duties of a pharmacy technician and makes that individual unfit for service. She further clarified that such use of a controlled substance would "impair judgment" and that Respondent would not be able to perform her job effectively. (CT 12:17-21.)

Disciplinary Guidelines

16. The Board enacted comprehensive regulatory guidelines to be followed in disciplinary actions.³ The Board recognizes that individual cases may necessitate a departure from its guidelines; in such cases, mitigating circumstances should be detailed.

With regard to a pharmacy technician, the guidelines state:

The board files cases against pharmacy technicians where the violation(s) involve significant misconduct on the part of the licensee. The board believes that revocation is the appropriate penalty when grounds for discipline are found to exist. Grounds for discipline include, but are not limited to the following violation(s) of law(s) involving:

³ California Code of Regulations, title 16, section 1760.

- Possession of dangerous drugs and/or controlled substances
- Use of dangerous drugs and/or controlled substances
- Possession for sale of dangerous drugs and/or controlled substances
- Personal misuse of drugs or alcohol.

If a revocation is not imposed, the Board recommends a minimum of a Category II level of discipline be imposed. This measure of discipline includes a suspension and a period of probation. In addition, a disciplined pharmacy technician must obtain certification from the Pharmacy Technician Certification Board (PTCB) before resuming work as a pharmacy technician on a probationary basis. The Board believes that certification before resuming work is always warranted in cases where a pharmacy technician's registration is disciplined but not revoked.

In determining whether the minimum, maximum, or an intermediate penalty should be imposed, factors such as the following should be considered: (1) actual or potential harm to the public; (2) actual or potential harm to any consumer; (3) prior record, including level of compliance with any disciplinary orders; (4) prior warnings of record, including citations and fines; (5) number and/or variety of current violations; (6) nature and severity of the acts, offenses, or crimes under consideration; (7) mitigating evidence; (8) rehabilitation evidence; (9) compliance with terms of any criminal sentence; (10) overall criminal record; (11) if applicable, evidence of proceedings for a case being set aside and dismissed pursuant to section 1203.4 of the Penal Code; (12) time passed since the acts or offenses; (13) whether the conduct was intentional or negligent, demonstrated incompetence, or, if the respondent is being held to account for conduct committed by another, the respondent had knowledge of or knowingly participated in such conduct; and (14) any financial benefit from the misconduct.

No single or combination of the above factors is required to justify the minimum and maximum penalty as opposed to an intermediate one. (Guidelines, p. 3.)

17. Respondent's misconduct involved a Category II violation. The guidelines for a Category II violation provide:

A minimum three-year probation period has been established by the board as appropriate in most cases where probation is imposed. A minimum five-year probation period has been established by the board as

appropriate where self-administration or diversion of controlled substances is involved. Terms and conditions are imposed to provide consumer protection and to allow the probationer to demonstrate rehabilitation. . . . The board prefers that any stayed order be for revocation rather than for some period of suspension. (Guidelines, p. 43.)

The Appropriate Measure of Discipline

18. Respondent used Methamphetamine once, on May 11, 2008. The clear and convincing evidence did not establish that Respondent was a drug dealer or that she possessed or offered Methamphetamine to others. Respondent's criminal history is wholly inconsistent with the history of persons addicted to Methamphetamine. Respondent's arrest and involvement in the criminal justice system made her far more appreciative of the dangers and pitfalls involved in using illegal drugs.

Respondent's use of Methamphetamine did not result in any actual harm to the public. It did not occur when she worked as a pharmacy technician. There is no evidence that Respondent used illegal drugs before or after May 11, 2008. There is no evidence that Respondent's promise to remain drug free is insincere. Respondent used Methamphetamine apparently as a result of peer pressure. Respondent's relative youth and her lack of a drug history are mitigating factors. Respondent completed the diversion program, accepted full responsibility for her misconduct, cooperated with law enforcement, cooperated in this disciplinary proceeding, expressed sincere remorse, and understands the Board's concerns, all of which demonstrate rehabilitation. Respondent learned a very difficult lesson. Nearly three years have passed since her misconduct. Respondent's regret and remorse make it appear highly unlikely that similar misconduct will reoccur.

The purpose of this proceeding is to protect the public. Respondent's illegal use of methamphetamine at a gathering with known drug users shows a lack of good judgment and an inability to comply with standards. Under the circumstances, it would not be appropriate to grant an unrestricted license in this case. The imposition of a revocation, stayed, with five years' probation on appropriate terms and conditions, will adequately protect the public.

Costs of Investigation and Enforcement

19. A certification of costs/declaration was signed by the deputy attorney general who prosecuted the action. The certification established that the Attorney General's Office billed approximately 34 hours of attorney services at the rate of \$170 per hour for total costs of enforcement of approximately \$5,825. The hourly rate was reasonable. The deputy attorney general who presented the case was well prepared and highly professional.

Notwithstanding the billing summary attached to the declaration which detailed the dates on which various legal services were billed by the Department of Justice, it is not clear why 34 hours of legal time was reasonably necessary to establish the facts in this disciplinary proceeding, which were essentially uncontested. The matter was not legally or factually complicated. The disciplinary hearing took just one hour to complete.

Total enforcement costs of \$2,500 are reasonable under the circumstances, but the Administrative Law Judge determined that these costs must be reduced in accordance with *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Ca1.4th 32.

20. Complainant initially sought a revocation, which was not unreasonable given the nature of Respondent's misconduct. Respondent always admitted wrongdoing, and she requested a hearing because she wanted to retain her registration. In that regard, Respondent had a subjective good faith belief in the merits of her claim that she was rehabilitated and she ultimately was successful in retaining her license on terms and conditions.

Respondent is a single mother who lives with her two children in the home of another family member. She is unemployed, but she wants to return to her employment as a registered pharmacy technician when her son begins Kindergarten next year.

The Administrative Law Judge found that requiring Respondent to pay all full costs would, under the circumstances, involve a financial hardship and would have a chilling effect on the right of an accused to challenge the measure of discipline initially sought by the Board. Under the circumstances, the Administrative Law Judge found that cause exists to direct Respondent to pay \$1,250 in costs. Pursuant to Business and Professions Code section 125.3(d), this finding is not reviewable by the Board to increase the cost award.

LEGAL CONCLUSIONS

Standard of Proof

1. Business and Professions Code section 4038 defines a "pharmacy technician" as "an individual who assists a pharmacist in a pharmacy in the performance of his or her pharmacy related duties as specified in section 4115."

Business and Professions Code section 4115 sets forth various tasks a pharmacy technician may perform. For example, subdivision (a) provides "a pharmacy technician may perform packaging, manipulative, repetitive, or other nondiscretionary tasks, only while assisting, and while under the direct supervision and control of, a

pharmacist." The duties a pharmacy technician may perform are further subject to regulation.⁴

Business and Professions Code section 4115, subdivision (e) provides:

No person shall act as a pharmacy technician without first being registered with the board as a pharmacy technician as set forth in Section 4202.

The pharmacy technician license may be issued upon a relatively minimal showing of formal education, training, and experience.

2. A nonprofessional license typically is issued without the need to demonstrate any specific education or skill and upon the mere showing of good character. In contrast, an applicant for a professional license must ordinarily satisfy extensive educational and training requirements, and then pass a rigorous state-administered competency examination. The sharp distinction between professional licenses and nonprofessional licenses supports a distinction in the standards of proof needed to revoke these two different types of licenses. (*Mann v. Department of Motor Vehicles* (1999) 76 Cal.App.4th 312, 319.)

An administrative disciplinary action seeking to suspend or revoke a professional license requires proof by "clear and convincing evidence." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) An administrative disciplinary action seeking to suspend or revoke an occupational license requires proof by a preponderance of the evidence.

3. The standard of proof required to suspend or revoke the registration issued to a pharmacy technician is a preponderance of the evidence (see Factual Finding 2). Thus, the preponderance of the evidence standard applies. (*Mann v. Department of Motor Vehicles* (1999) 76 Cal.App.4th 312, 320-321.)

⁴ California Code of Regulations, title 16, section 1793.2 provides:

"'Nondiscretionary tasks' as used in Business and Professions Code section 4115, include:

- (a) Removing the drug or drugs from stock;
- (b) counting, pouring, or mixing pharmaceuticals;
- (c) placing the product into a container;
- (d) affixing the label or labels to the container;
- (e) packaging and repackaging."

Disciplinary Authority

4. Business and Professions Code section 4060 provides in part:

No person shall possess any controlled substance, except that furnished to a person upon the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor ... or furnished pursuant to a drug order issued by a certified nurse-midwife ... , a nurse practitioner ... a physician assistant ... a naturopathic doctor ... or a pharmacist. . . This section shall not apply to the possession of any controlled substance by a manufacturer, wholesaler, pharmacy, pharmacist, physician, podiatrist, dentist, optometrist, veterinarian, naturopathic doctor, certified nurse-midwife, nurse practitioner, or physician assistant, when in stock in containers correctly labeled with the name and address of the supplier or producer....

5. Business and Professions Code section 4301 provides in part:

The board shall take action against any holder of a license who is guilty of unprofessional conduct ... 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 ... in a manner as to be dangerous or injurious to oneself ... or to any other person or to the public ...

...

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

...

(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. ...

Substantial Relationship

6. A professional license may be suspended or revoked only if the conduct upon which the discipline is based relates to the practice of the particular profession and thereby demonstrates a present unfitness to practice such profession. There must be a logical connection between the licensees' conduct to their present fitness or competence to practice the profession or to the qualifications, functions, or duties of the profession in question. Despite the omission of an explicit requirement that there be a "substantial relationship" in a disciplinary statute, courts have concluded that the Legislature intend such a requirement. (*Clare v. California State Board of Accountancy* (1992) 10 Ca1.App.4th 294,301-303.)

7. The substantial relationship between holding a pharmacy technician registration and the unlawful use of controlled substances or dangerous drugs is obvious - persons who illegally use such substances should not be permitted to hold employment that provides virtually unlimited access to controlled substances because of the risk of diversion and abuse, and the harm inevitably caused to the public as a consequence thereof. This substantial relationship is amply demonstrated in the Board's Disciplinary Guidelines.

Cause Exists to Impose Administrative Discipline

8. Cause exists to impose discipline against Respondent's registration. A preponderance of the evidence established that Respondent unlawfully used Methamphetamine on May 11, 2008, which involved conduct dangerous to herself, violated state drug laws and the Pharmacy Law, all of which established Respondent's unprofessional conduct under Business and Professions Code section 4301.

The Appropriate Measure of Discipline

9. Title 16, California Code of Regulations, section 1769, subdivision (b), is not directly on point because it relates to the conviction of a crime, but it nevertheless provides some guidance. Subdivision (b) provides in part:

(b) When considering the suspension or revocation of a ... a personal license on the ground that ... the registrant has been convicted of a crime, the board, in evaluating the rehabilitation of such person and his present eligibility for a license will consider the following criteria:

- (1) Nature and severity of the act(s) or offense(s).
- (2) Total criminal record.

- (3) The time that has elapsed since commission of the act(s) or offense(s).
- (4) Whether the licensee has complied with all terms of ... probation ... lawfully imposed against the licensee.
- (5) Evidence, if any, of rehabilitation submitted by the licensee.

10. The Board's disciplinary guidelines were applied in this matter. Those guidelines do not mandate a straight revocation given the kinds of evidence Respondent presented in explanation, mitigation, and rehabilitation, but do require the imposition of a Category II sanction. Respondent's misconduct was serious, but she appears to have learned a very difficult lesson. The imposition of revocation, stayed, with five years' probation on appropriate terms and conditions of probation will adequately protect the public.

Recovery of Costs of Investigation and Prosecution

11. Business and Professions Code section 125.3 provides in part:

(a) Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding ... the board may request the administrative law judge to direct a licensee 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 ...

...

(d) The administrative law judge shall make a proposed finding of the amount of reasonable costs of investigation and prosecution of the case when requested pursuant to subdivision (a)

....

12. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Ca1.4th 32, the California Supreme Court held that the imposition of costs for investigation and enforcement under California Code of Regulations, title 16, section 317.5 did not violate due process. However, it was incumbent upon the Board to exercise its discretion to reduce or eliminate cost awards to ensure that the claims recovery regulation did not "deter chiropractors with potentially meritorious claims or defenses from exercising their right to a hearing." The Court set forth four factors to be considered in deciding whether to reduce or eliminate costs (1) whether the chiropractor used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed; (2) whether the chiropractor had a "subjective" good faith belief in the merits of his position; (3) whether the chiropractor

raised a "colorable challenge" to the proposed discipline; and (4) whether the chiropractor had the financial ability to make payments.

Since California Code of Regulation, title 16, section 317.5 and Business and Professions Code section 125.3 contains substantially the same language, it is reasonable to extend the reasoning in *Zuckerman* to Business and Professions Code section 125.3.

13. Under all the circumstances, causes exists under Business and Professions Code section 125.3 to direct Respondent to pay \$1,250 in costs.

ORDER

Pharmacy technician registration number TCH 6657 issued to Respondent, Sarah Jean Ide, is revoked; however, the order of revocation is stayed and Respondent is placed on probation for five (5) years upon the following terms and conditions:

1. *Obey All Laws*

Respondent shall obey all state and federal laws and regulations.

Respondent shall report any of the following occurrences to the Board, in writing, within seventy-two (72) hours of such occurrence:

- an arrest or issuance of a criminal complaint for violation of any provision of the Pharmacy Law, state and federal food and drug laws, or state and federal controlled substances laws;
- a plea of guilty or nolo contendere in any state or federal criminal proceeding to any criminal complaint, information or indictment;
- a conviction of any crime; or,
- discipline, citation, or other administrative action filed by any state or federal agency which involves respondent's pharmacy technician license or which is related to the practice of pharmacy or the manufacturing, obtaining, handling, distributing, billing, or charging for any drug, device or controlled substance.

Failure to timely report any such occurrence shall be considered a violation of probation.

2. *Certification Prior to Resuming Work*

Respondent shall be automatically suspended from working as a pharmacy technician until she is certified as defined by Business and Professions Code section 4202(a)(4) and provides satisfactory proof of certification to the Board. Respondent shall not

resume working as a pharmacy technician until notified by the Board. Failure to achieve certification within one (1) year shall be considered a violation of probation. Respondent shall not resume working as a pharmacy technician until notified by the Board.

During suspension, respondent shall not enter any pharmacy area or any portion of any other Board licensed premises (wholesaler, veterinary food-animal drug retailer or any other distributor of drugs) any drug manufacturer, or any other location where dangerous drugs and devices or controlled substances are maintained. Respondent shall not do any act involving drug selection, selection of stock, manufacturing, compounding or dispensing; nor shall respondent manage, administer, or assist any licensee of the Board. Respondent shall not have access to or control the ordering, manufacturing or dispensing of dangerous drugs and devices or controlled substances. Respondent shall not resume work until notified by the Board.

Subject to the above restrictions, respondent may continue to own or hold an interest in any licensed premises by the Board in which she holds an interest at the time this decision becomes effective unless otherwise specified in this order.

Failure to comply with this suspension shall be considered a violation of probation.

3. *Reporting to the Board*

Respondent shall report to the Board quarterly, on a schedule as directed by the Board or its designee. The report shall be made either in person or in writing, as directed. Among other requirements, respondent shall state in each report under penalty of perjury whether there has been compliance with all the terms and conditions of probation. Failure to submit timely reports in a form as directed shall be considered a violation of probation. Any period(s) of delinquency in submission of reports as directed may be added to the total period of probation. Moreover, if the final probation report is not made as directed, probation shall be automatically extended until such time as the final report is made and accepted by the Board.

4. *Interview with the Board*

Upon receipt of reasonable prior notice, respondent shall appear in person for interviews with the Board or its designee, at such intervals and locations as are determined by the Board or its designee. Failure to appear for any scheduled interview without prior notification to Board staff, or failure to appear at two (2) or more scheduled interviews with the Board or its designee during the period of probation, shall be considered a violation of probation.

5. *Cooperation with Board Staff*

Respondent shall cooperate with the Board's inspection program and with the Board's monitoring and investigation of Respondent's compliance with the terms and conditions of her probation. Failure to cooperate shall be considered a violation of probation.

6. *Notice to Employers*

During the period of probation, respondent shall notify all present and prospective employers of the decision in case number 3692 and the terms, conditions and restrictions imposed on respondent by the decision, as follows:

Within thirty (30) days of the effective date of this decision, and within fifteen (15) days of respondent undertaking any new employment, respondent shall cause her direct supervisor, pharmacist-in-charge (including each new pharmacist-in-charge employed during respondent's tenure of employment) and owner to report to the Board in writing acknowledging that the listed individual(s) has/have read the decision in case number 3692 and the terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that her employer(s) and/or supervisor(s) submit timely acknowledgement(s) to the Board.

If respondent works for or is employed by or through a pharmacy employment service, respondent must notify her direct supervisor, pharmacist-in-charge and owner at every pharmacy of the terms and conditions of the decision in case number 3692 in advance of the respondent commencing work at each pharmacy. A record of this notification must be provided to the Board upon request.

Furthermore, within thirty (30) days of the effective date of this decision, and within fifteen (15) days of respondent undertaking any new employment by or through a pharmacy employment service, respondent shall cause her direct supervisor with the pharmacy employment service to report to the Board in writing acknowledging that he or she has read the decision in case number 3692 and the terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that her employer(s) and/or supervisor(s) submit timely acknowledgment(s) to the Board.

Failure to timely notify present or prospective employer(s) or to cause that/those employer(s) to submit timely acknowledgements to the Board shall be considered a violation of probation.

"Employment" within the meaning of this provision shall include any full-time, part-time, temporary or relief service or pharmacy management service as a pharmacy technician or in any position for which a pharmacy technician license

is a requirement or criterion for employment, whether the respondent is considered an employee, independent contractor or volunteer.

7. *Random Drug Screening*

Respondent, at her own expense, shall participate in random testing, including but not limited to biological fluid testing (urine, blood), breathalyzer, hair follicle testing, or other drug screening program as directed by the Board or its designee. Respondent may be required to participate in testing for the entire probation period and the frequency of testing will be determined by the Board or its designee. At all times respondent shall fully cooperate with the Board or its designee, and shall, when directed, submit to such tests and samples for the detection of alcohol, narcotics, hypnotics, dangerous drugs or other controlled substances as the Board or its designee may direct. Failure to timely submit to testing as directed shall be considered a violation of probation. Upon request of the Board or its designee, respondent shall provide documentation from a licensed practitioner that the prescription for a detected drug was legitimately issued and is a necessary part of the treatment of the respondent. Failure to timely provide such documentation shall be considered a violation of probation. Any confirmed positive test for alcohol or for any drug not lawfully prescribed by a licensed practitioner as part of a documented medical treatment shall be considered a violation of probation and shall result in the automatic suspension of work by respondent. Respondent may not resume work as a pharmacy technician until notified by the Board in writing.

During suspension, respondent shall not enter any pharmacy area or any portion of or any other Board licensed premises (wholesaler, veterinary food-animal drug retailer or any other distributor of drugs) any drug manufacturer, or any other location where dangerous drugs and devices or controlled substances are maintained. Respondent shall not do any act involving drug selection, selection of stock, manufacturing, compounding or dispensing; nor shall respondent manage, administer, or assist any licensee of the Board. Respondent shall not have access to or control the ordering, manufacturing or dispensing of dangerous drugs and devices or controlled substances. Respondent shall not resume work until notified by the Board.

Respondent shall not direct, control or perform any aspect of the practice of pharmacy. Subject to the above restrictions, respondent may continue to own or hold an interest in any licensed premises in which she holds an interest at the time this decision becomes effective unless otherwise specified in this order.

Failure to comply with this suspension shall be considered a violation of probation.

8. *Abstain from Drugs and Alcohol Use*

Respondent shall completely abstain from the possession or use of alcohol, controlled substances, dangerous drugs and their associated paraphernalia except when the drugs are lawfully prescribed by a licensed practitioner as part of a documented medical treatment. Upon request of the Board or its designee, respondent shall provide documentation from the licensed practitioner that the prescription for the drug was legitimately issued and is a necessary part of the treatment of the respondent. Failure to timely provide such documentation shall be considered a violation of probation. Respondent shall ensure that she is not in the same physical location as individuals who are using illicit substances even if respondent is not personally ingesting the drugs. Any possession or use of alcohol, controlled substances, or their associated paraphernalia not supported by the documentation timely provided, and/or any physical proximity to persons using illicit substances, shall be considered a violation of probation.

9. *Reimbursement of Board Costs*

Respondent shall pay to the Board its costs of investigation and prosecution in the amount of \$1,250.00. Such costs shall be payable to the Board on a schedule as directed by the Board or its designee. There shall be no deviation from this schedule absent prior written approval by the Board or its designee.

Failure to pay costs by the deadline(s) as directed shall be considered a violation of probation. The filing of bankruptcy by Respondent shall not relieve Respondent of her responsibility to reimburse the Board its costs.

10. *Probation Monitoring Costs*

Respondent shall pay any costs associated with probation monitoring as determined by the Board each and every year of probation. Such costs shall be payable to the Board on a schedule as directed by the Board or its designee. Failure to pay such costs by the deadline(s) as directed shall be considered a violation of probation.

11. *Status of License*

Respondent shall, at all times while on probation, maintain an active, current pharmacy technician registration/license with the Board, including any period during which suspension or probation is tolled. Failure to maintain an active, current license shall be considered a violation of probation. If Respondent's pharmacy technician registration expires or is cancelled by operation of law or otherwise, upon renewal or reapplication, Respondent's license shall be subject to all terms and conditions of this probation not previously satisfied.

12. *License Surrender While on Probation/Suspension*

Following the effective date of this decision, should respondent cease work due to retirement or health, or be otherwise unable to satisfy the terms and conditions of probation, respondent may tender her pharmacy technician license to the Board for surrender. The Board or its designee shall have the discretion whether to grant the request for surrender or take any other action it deems appropriate and reasonable. Upon formal acceptance of the surrender of the license, respondent will no longer be subject to the terms and conditions of probation. This surrender constitutes a record of discipline and shall become a part of the respondent's license history with the Board.

Upon acceptance of the surrender, respondent shall relinquish her pharmacy technician license to the Board within ten (10) days of notification by the Board that the surrender is accepted. Respondent may not reapply for any license, permit, or registration from the Board for three (3) years from the effective date of the surrender. Respondent shall meet all requirements applicable to the license sought as of the date the application for that license is submitted to the Board.

13. *Notification of Employment/Mailing Address Change*

Respondent shall notify the Board in writing within ten (10) days of any change of employment. Said notification shall include the reasons for leaving, the address of the new employer, the name of the supervisor and owner, and the work schedule if known. Respondent shall further notify the Board in writing within ten (10) days of a change in name, residence address and mailing address, or phone number.

Failure to timely notify the Board of any change in employer(s), name(s), address(es), or phone number(s) shall be considered a violation of probation.

14. *Tolling of Probation*

Except during periods of suspension, respondent shall, at all times while on probation, be employed as a pharmacy technician in California for a minimum of 80 hours per calendar month. Any month during which this minimum is not met shall toll the period of probation, i.e., the period of probation shall be extended by one month for each month during which this minimum is not met. During any such period of tolling of probation, respondent must nonetheless comply with all terms and conditions of probation.

Should respondent, regardless of residency, for any reason (including vacation) cease working as a pharmacy technician for a minimum of 80 hours per calendar month in California, respondent must notify the Board in writing within ten (10) days of cessation of work and must further notify the Board in writing within ten (10) days of the

resumption of the work. Any failure to provide such notification(s) shall be considered a violation of probation.

It is a violation of probation for respondent's probation to remain tolled pursuant to the provisions of this condition for a total period, counting consecutive and non-consecutive months, exceeding thirty-six (36) months.

"Cessation of work" means calendar month during which respondent is not working for at least 80 hours as a pharmacy technician, as defined in Business and Professions Code section 4115. "Resumption of work" means any calendar month during which respondent is working as a pharmacy technician for at least 80 hours as a pharmacy technician as defined by Business and Professions Code section 4115.

15. *Tolling of Suspension*

During the period of suspension, respondent shall not leave California for any period exceeding ten (10) days, regardless of purpose (including vacation). Any such absence in excess of ten (10) days during suspension shall be considered a violation of probation. Moreover, any absence from California during the period of suspension exceeding ten (10) days shall toll the suspension, i.e., the suspension shall be extended by one day for each day over ten (10) days respondent is absent from California. During any such period of tolling of suspension, respondent must nonetheless comply with all terms and conditions of probation.

Respondent must notify the Board in writing within ten (10) days of departure, and must further notify the Board in writing within ten (10) days of return. The failure to provide such notification(s) shall constitute a violation of probation. Upon such departure and return, respondent shall not return to work until notified by the Board that the period of suspension has been satisfactorily completed.

16. *Violation of Probation*

If respondent has not complied with any term or condition of probation, the Board shall have continuing jurisdiction over respondent, and probation shall automatically be extended, until all terms and conditions have been satisfied or the Board has taken other action as deemed appropriate to treat the failure to comply as a violation of probation, to terminate probation, and to impose the penalty that was stayed.

If respondent violates probation in any respect, the Board, after giving respondent notice and an opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. Notice and opportunity to be heard are not required for those provisions stating that a violation thereof may lead to automatic termination of the stay and/or revocation of the license. If a petition to revoke probation or an

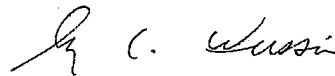
accusation is filed against respondent during probation, the Board shall have continuing jurisdiction, and the period of probation shall be automatically extended until the petition to revoke probation or accusation is heard and decided.

17. *Successful Completion of Probation*

Upon written notice by the Board indicating the successful completion or early termination of probation, Respondent's pharmacy technician registration will be fully restored.

This Decision shall become effective on September 7, 2011.

IT IS SO ORDERED this 8th day of August, 2011.



STANLEY C. WEISSER
Board President

1 EDMUND G. BROWN JR.
Attorney General of California
2 LINDA K. SCHNEIDER
Supervising Deputy Attorney General
3 DESIREE I. KELLOGG
Deputy Attorney General
4 State Bar No. 126461
110 West "A" Street, Suite 1100
5 San Diego, CA 92101
P.O. Box 85266
6 San Diego, CA 92186-5266
Telephone: (619) 645-2996
7 Facsimile: (619) 645-2061
Attorneys for Complainant

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

11 In the Matter of the Accusation Against:

Case No. 3692

12 **SARAH JEAN IDE**
13 **412 West Minster Drive**
14 **San Jacinto, CA 92583**

ACCUSATION

15 **Pharmacy Technician Registration No. TCH**
16 **66657**

17 Respondent.

18
19
20 Complainant alleges:

21 **PARTIES**

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

24 2. On or about December 21, 2005, the Board of Pharmacy issued Pharmacy Technician
25 Registration Number TCH 66657 to Sarah Jean Ide (Respondent). The Pharmacy Technician
26 Registration was in full force and effect at all times relevant to the charges brought herein and
27 will expire on March 31, 2011, unless renewed.
28

[illegible]

2
3
4

5
6

7
8
9
0

1

2

3

- 5

17

3

19
20
21
22
23

24
2520
21
22

1 dangerous device, except upon the prescription of a physician, dentist, podiatrist, optometrist,
2 veterinarian, or naturopathic doctor pursuant to Section 3640.7.

3 9. Section 4060 of the Code states:

4 No person shall possess any controlled substance, except that furnished to a
5 person upon the prescription of a physician, dentist, podiatrist, optometrist,
6 veterinarian, or naturopathic doctor pursuant to Section 3640.7, or furnished pursuant
7 to a drug order issued by a certified nurse-midwife pursuant to Section 2746.51, a
8 nurse practitioner pursuant to Section 2836.1, or a physician assistant pursuant to
9 Section 3502.1, or naturopathic doctor pursuant to Section 3640.5, or a pharmacist
10 pursuant to either subparagraph (D) of paragraph (4) of, or clause (iv) of
11 subparagraph (A) of paragraph (5) of, subdivision (a) of Section 4052. This section
12 shall not apply to the possession of any controlled substance by a manufacturer,
13 wholesaler, pharmacy, pharmacist, physician, podiatrist, dentist, optometrist,
14 veterinarian, naturopathic doctor, certified nurse-midwife, nurse practitioner, or
15 physician assistant, when in stock in containers correctly labeled with the name and
16 address of the supplier or producer.

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

20 10. Section 4301 of the Code states:

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

25
26 (h) The administering to oneself, of any controlled substance, or the use of any
27 dangerous drug or of alcoholic beverages to the extent or in a manner as to be
28 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.

29
30 (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.

31
32 (o) Violating or attempting to violate, directly or indirectly, or assisting in or
33 abetting the violation of or conspiring to violate any provision or term of this chapter
34 or of the applicable federal and state laws and regulations governing pharmacy,
35 including regulations established by the board or by any other state or federal
36 regulatory agency.

1 11. Title 16, California Code of Regulations, section 1769, states:

2

3 (b) When considering the suspension or revocation of a facility or a personal
4 license on the ground that the licensee or the registrant has been convicted of a crime,
the board, in evaluating the rehabilitation of such person and his present eligibility for
5 a license will consider the following criteria:

6 (1) Nature and severity of the act(s) or offense(s).

7 (2) Total criminal record.

8 (3) The time that has elapsed since commission of the act(s) or offense(s).

9 (4) Whether the licensee has complied with all terms of parole, probation,
restitution or any other sanctions lawfully imposed against the licensee.

10 (5) Evidence, if any, of rehabilitation submitted by the licensee.

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

12 For the purpose of denial, suspension, or revocation of a personal or facility
13 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
14 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
15 functions authorized by his license or registration in a manner consistent with the
public health, safety, or welfare.

16
17 COST RECOVERY

18 13. Section 125.3 of the Code states, in pertinent part, that the Board may request the
19 administrative law judge to direct a licentiate found to have committed a violation or violations of
20 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
21 enforcement of the case.

22 DRUG

23 14. Methamphetamine is a schedule II controlled substance as designated by Health and
24 Safety Code section 11055(d)(2), and is a dangerous drug pursuant to Business and Professions
25 Code section 4022.
26
27
28

1 CAUSE FOR DISCIPLINE

2 (Unprofessional Conduct-Use of a Controlled Substance)

3 15. Respondent is subject to disciplinary action under section 4301(h) of the Code in that
4 she used a controlled substance, Methamphetamine. The circumstances are as follows:

5 a. On or about April 11, 2008, police officers investigated the travel trailer of a
6 parolee. As the police officers approached the travel trailer, the police officers heard what
7 sounded like someone "snorting" from a straw or a small pipe and then saw several people,
8 including Respondent exit the trailer. The police then searched the trailer and found empty white
9 baggies and a white plastic tube with a white crystalline substance inside the trailer. The
10 substance inside the straw, field tested positive for methamphetamine. Next to the trailer, the
11 police found a case containing baggies with a crystalline substance inside, a blue digital scale,
12 three lighters, several cotton swabs and a small metal measuring spoon. A police officer
13 evaluated Respondent and found that she displayed the objective signs of being under the
14 influence of a central nervous system stimulant, Methamphetamine.

15 b. On or about October 15, 2009, in a criminal proceeding entitled *People of the State*
16 *of California v. Sarah Jean Ide*, in Riverside County Superior Court, case number SWM074961,
17 Respondent plead guilty to a charge of violating Health and Safety code section 11550(a), under
18 the influence of a controlled substance, a misdemeanor and was granted deferred entry of
19 judgment. A misdemeanor violation of Penal Code section 853.7, fail to appear after written
20 promise was dismissed. On December 15 and 21, 2009, Respondent filed proof of enrollment in
21 a drug diversion program pursuant to Penal Code section 1000 with the court.

22 SECOND CAUSE FOR DISCIPLINE

23 (Unprofessional Conduct-Violations of the Chapter)

24 16. Respondent is subject to disciplinary action under Code section 4301(o) for violation
25 of the Pharmacy Act in that on or about April 11, 2008, Respondent furnished to herself and
26 possessed a controlled substance, Methamphetamine, in violation of Code sections 4059 and 4060
27 as is more fully described in Paragraph 15 above.

1 THIRD CAUSE FOR DISCIPLINE

2 (Unprofessional Conduct-Violating Laws Regulating Controlled Substances)

3 17. Respondent is subject to disciplinary action under section 4301(j) of the Code in that
4 on or about April 11, 2008, Respondent violated the California Uniform Controlled Substances
5 Act (Health and Safety Code 11000, et seq.) as is more fully described in Paragraph 15 above.

6 PRAYER

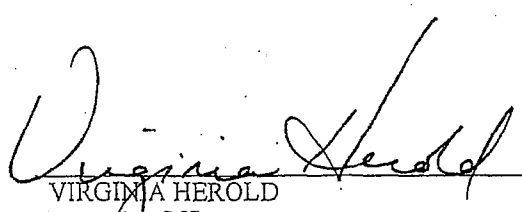
7 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
8 and that following the hearing, the Board of Pharmacy issue a decision:

9 1. Revoking or suspending Pharmacy Technician Registration Number TCH 66657,
10 issued to Sarah Jean Ide;

11 2. Ordering Sarah Jean Ide to pay the Board of Pharmacy the reasonable costs of the
12 investigation and enforcement of this case, pursuant to Business and Professions Code section
13 125.3;

14 3. Taking such other and further action as deemed necessary and proper.

15
16
17 DATED: 6/9/10


18 VIRGINIA HEROLD
19 Executive Officer
20 Board of Pharmacy
21 Department of Consumer Affairs
22 State of California
23 Complainant

24
25
26
27
28
SD2010800577
80459332.doc