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

Case No. 3730

In the Matter of the Accusation Against:

**CLARA DIANE DOWNEY
3046 Oceanside Blvd.
Oceanside, CA 92054**

DEFAULT DECISION AND ORDER

**Pharmacy Technician Registration No. TCH
3748**

[Gov. Code, §11520]

Respondent.

FINDINGS OF FACT

1. On or about July 1, 2010, Complainant Virginia Herold, in her official capacity as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs, filed Accusation No. 3730 against Clara Diane Downey (Respondent) before the Board of Pharmacy. (Accusation No. 3764 attached as Exhibit A)

2. On or about January 27, 1993, the Board of Pharmacy (Board) issued Pharmacy Technician Registration No. TCH 3748 to Respondent. The Pharmacy Technician Registration was in full force and effect at all times relevant to the charges brought herein and will expire on September 30, 2010, unless renewed.

3. On or about July 15, 2010, Respondent was served by Certified and First Class Mail with copies of the Accusation No. 3730, Statement to Respondent, Notice of Defense, Request for Discovery, and Government Code sections 11507.5, 11507.6, and 11507.7 at Respondent's

1 address of record with the Board, pursuant to Business and Professions Code sections 136 and
2 4100, and title 16 California Code of Regulations section 1704, as is required to be reported and
3 maintained with the Board, and which was and is: 3046 Oceanside Blvd., Oceanside, CA 92054.

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

6 5. The Return Receipt confirming delivery of the Certified Mail was signed for and
7 returned by the U.S. Postal Service. The aforementioned documents were not returned by the
8 U.S. Postal Service as undeliverable.

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

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

13 7. Respondent failed to file a Notice of Defense within 15 days after service upon her of
14 the Accusation, and therefore waived her right to a hearing on the merits of Accusation No. 3730.

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

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

19 9. Pursuant to its authority under Government Code section 11520, the Board finds
20 Respondent is in default. The Board will take action without further hearing and, based on the
21 evidence before it in the Default Decision Evidence Packet in this matter, as well as taking
22 official notice of all the investigatory reports, exhibits and statements contained therein, on file at
23 the Board's offices regarding the allegations contained in Accusation No. 3730, finds that the
24 charges and allegations in Accusation No. 3730, are separately and severally, found to be true and
25 correct by clear and convincing evidence.

26 10. Taking official notice of its own internal records, pursuant to Business and
27 Professions Code Section 125.3, it is hereby determined that the reasonable cost for Investigation
28 and Enforcement is \$3,723.50 as of August 12, 2010.

1 **DETERMINATION OF ISSUES**

2 1. Based on the foregoing findings of fact, Respondent Clara Diane Downey has
3 subjected her Pharmacy Technician Registration No. TCH 3748 to discipline.

4 2. The agency has jurisdiction to adjudicate this case by default.

5 3. The Board of Pharmacy is authorized to revoke Respondent's Pharmacy Technician
6 Registration based upon the following violations as alleged in the Accusation which are supported
7 by the evidence contained in the Default Decision Evidence Packet maintained by the Board in
8 this case:

9 a. Respondent is subject to disciplinary action under Business and Professions
10 Code sections 490 and 4301(l), in that she was convicted of a crime that is substantially related to
11 the qualifications, functions and duties of a pharmacy technician in that on or about April 20,
12 2009, in a criminal proceeding entitled *People of the State of California v. Clara Diane Downey*,
13 in the San Diego Superior Court case number CN259062, Respondent was convicted of violation
14 of Health and Safety Code section 11350(a), possession of a controlled substance, hydrocodone.

15 b. Respondent is subject to disciplinary action under Business and Professions
16 Code section 4301(f) for exhibiting unprofessional conduct in that her theft from CVS Pharmacy
17 constitutes dishonesty and deceit.

18 c. Respondent is subject to disciplinary action under Business and Professions
19 Code section 4301(h) for exhibiting unprofessional conduct in that she illegally administered a
20 controlled substance to herself.

21 d. Respondent is subject to disciplinary action under Business and Professions
22 Code section 4301(j) for exhibiting unprofessional conduct in that she violated California Health
23 and Safety Code sections 11173(a), 11170, and 11350(a).

24 e. Respondent is subject to disciplinary action under Business and Professions
25 Code section 4301(o) for exhibiting unprofessional conduct in that she violated the Pharmacy Act
26 by furnishing a dangerous drug to herself in violation of Code section 4059 and she illegally
27 possessed a controlled substance in violation of Code section 4060.
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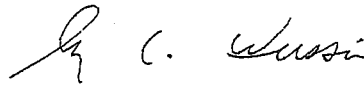
ORDER

IT IS SO ORDERED that Pharmacy Technician Registration No. TCH 3748, heretofore issued to Respondent Clara Diane Downey, is revoked.

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

This Decision shall become effective on November 18, 2010.

It is so ORDERED October 19, 2010.



STANLEY C. WEISSER, BOARD PRESIDENT
FOR THE BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS

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EXHIBIT A
ACCUSATION

1 EDMUND G. BROWN JR.
Attorney General of California
2 LINDA K. SCHNEIDER
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3 NICOLE R. COOK
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Attorneys for Complainant
8

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

11 Case No: 3730

12 In the Matter of the Accusation Against:

13 CLARA DIANE DOWNEY
3046 Oceanside Blvd.
14 Oceanside, CA 92054

A C C U S A T I O N

15 Pharmacy Technician Registration No. TCH
3748

16 Respondent.
17

18
19 Complainant alleges:

20 **PARTIES**

- 21 1. Virginia Herold (Complainant) brings this Accusation solely in her official capacity
22 as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.
23 2. On or about January 27, 1993, the Board of Pharmacy issued Pharmacy Technician
24 Registration Number TCH 3748 to Clara Diane Downey (Respondent). The Pharmacy
25 Technician Registration was in full force and effect at all times relevant to the charges brought
26 herein and will expire on September 30, 2010, unless renewed.
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1 and the board may inquire into the circumstances surrounding the commission of
2 the crime in order to fix the degree of discipline or to determine if the conviction is
3 substantially related to the qualifications, functions, and duties of the licensee in
4 question.

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

7 9. Section 4059 of the Code provides in part that a person may not furnish any
8 dangerous drug, except upon the prescription of a physician, dentist, podiatrist, optometrist,
9 veterinarian, or naturopathic doctor pursuant to Section 3640.7. A person may not furnish any
10 dangerous device, except upon the prescription of a physician, dentist, podiatrist, optometrist,
11 veterinarian, or naturopathic doctor pursuant to Section 3640.7.

12 10. Section 4060 of the Code states:

13 No person shall possess any controlled substance, except that furnished to a
14 person upon the prescription of a physician, dentist, podiatrist, optometrist,
15 veterinarian, or naturopathic doctor pursuant to Section 3640.7, or furnished
16 pursuant to a drug order issued by a certified nurse-midwife pursuant to Section
17 2746.51, a nurse practitioner pursuant to Section 2836.1, or a physician assistant
18 pursuant to Section 3502.1, or naturopathic doctor pursuant to Section 3640.5, or a
19 pharmacist pursuant to either subparagraph (D) of paragraph (4) of, or clause (iv)
20 of subparagraph (A) of paragraph (5) of, subdivision (a) of Section 4052. This
21 section shall not apply to the possession of any controlled substance by a
22 manufacturer, wholesaler, pharmacy, pharmacist, physician, podiatrist, dentist,
23 optometrist, veterinarian, naturopathic doctor, certified nurse-midwife, nurse
24 practitioner, or physician assistant, when in stock in containers correctly labeled
25 with the name and address of the supplier or producer.

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

11. Section 4301 of the Code states:

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

16 (f) The commission of any act involving moral turpitude, dishonesty, fraud,
17 deceit, or corruption, whether the act is committed in the course of relations as a
18 licensee or otherwise, and whether the act is a felony or misdemeanor or not.

19

1 (h) The administering to oneself, of any controlled substance, or the use of
2 any dangerous drug or of alcoholic beverages to the extent or in a manner as to be
3 dangerous or injurious to oneself, to a person holding a license under this chapter,
4 or to any other person or to the public, or to the extent that the use impairs the
5 ability of the person to conduct with safety to the public the practice authorized by
6 the license.

7

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

10

11 (l) The conviction of a crime substantially related to the qualifications,
12 functions, and duties of a licensee under this chapter. The record of conviction of
13 a violation of Chapter 13 (commencing with Section 801) of Title 21 of the United
14 States Code regulating controlled substances or of a violation of the statutes of this
15 state regulating controlled substances or dangerous drugs shall be conclusive
16 evidence of unprofessional conduct. In all other cases, the record of conviction
17 shall be conclusive evidence only of the fact that the conviction occurred. The
18 board may inquire into the circumstances surrounding the commission of the
19 crime, in order to fix the degree of discipline or, in the case of a conviction not
20 involving controlled substances or dangerous drugs, to determine if the conviction
21 is of an offense substantially related to the qualifications, functions, and duties of a
22 licensee under this chapter. A plea or verdict of guilty or a conviction following a
23 plea of nolo contendere is deemed to be a conviction within the meaning of this
24 provision. The board may take action when the time for appeal has elapsed, or the
25 judgment of conviction has been affirmed on appeal or when an order granting
26 probation is made suspending the imposition of sentence, irrespective of a
27 subsequent order under Section 1203.4 of the Penal Code allowing the person to
28 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.

. . . .

(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 or by any other state or
federal regulatory agency.

. . . .

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

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

5 14. Health and Safety Code section 11350 provides that every person who possesses a
6 controlled substance, unless upon the prescription of a physician, dentist, podiatrist, or
7 veterinarian, licensed to practice in this state, shall be punished by imprisonment in the state
8 prison.

9 REGULATORY PROVISIONS

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

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

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

17
18 (b) When considering the suspension or revocation of a facility or a
19 personal 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 a license will consider the following criteria:

- 20 (1) Nature and severity of the act(s) or offense(s).
21 (2) Total criminal record.
22 (3) The time that has elapsed since commission of the act(s) or offense(s).
23 (4) Whether the licensee has complied with all terms of parole, probation,
24 restitution or any other sanctions lawfully imposed against the licensee.
25 (5) Evidence, if any, of rehabilitation submitted by the licensee.

1 COST RECOVERY

2 17. Section 125.3 of the Code provides, in pertinent part, that the Board may request the
3 administrative law judge to direct a licentiate found to have committed a violation or violations of
4 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
5 enforcement of the case.

6 DRUGS

7 18. Zolpidem tartarate, sold under the brand names Ambien, Edluar, and Zolpimist, is a
8 Schedule IV controlled substance as designated by Health and Safety Code section 11507(d)(32),
9 and is a dangerous drug pursuant to Business & Professions Code section 4022.

10 19. Hydrocodone bitartate/acetaminophen, also known by the brand names Vicodin,
11 Norco, Zydone, Maxidone, Lortab, Lorcet, Hydrocet, Co-Gesic, and Anexsia, is a narcotic
12 Schedule III controlled substance as designated by Health and Safety Code section 11056(e)(4),
13 and is a dangerous drug pursuant to Business and Professions Code section 4022. Hydrocodone
14 is used as a narcotic analgesic in the relief of pain.

15 FIRST CAUSE FOR DISCIPLINE

16 (April 20, 2009 Conviction for Possession of Hydrocodone)

17 20. Respondent is subject to disciplinary action under sections 490 and 4301(l) in that she
18 was convicted of a crime that is substantially related to the qualifications, functions, and duties of
19 a pharmacy technician. The circumstances are as follows:

20 a. On or about April 20, 2009 in a criminal proceeding entitled *People of the*
21 *State of California v. Clara Diane Downey*, in the San Diego Superior Court case number
22 CN259062, Respondent was convicted of violation of Health and Safety Code section 11350(a),
23 possession of a controlled substance, hydrocodone.

24 b. The facts that led to the conviction are that Respondent was employed as a
25 pharmacy technician at CVS Pharmacy in Oceanside, California from October 1987 to March
26 2009. On March 9, 2009, the store manager at CVS witnessed Respondent take a prescription
27 stock bottle off a shelf, open it, and pour some pills into her smock. The store manager then
28 performed a "smock check" and discovered numerous pills in Respondent's smock pocket. The

1 store manager then requested that Respondent empty her purse, which was located in a locker in
2 the breakroom. When Respondent's purse was emptied, more pills were found. Both pill
3 discoveries were witnessed by the pharmacist and another pharmacy technician.

4 c The CVS loss prevention manager interviewed Respondent in the presence
5 of the store manager. During the interview, Respondent admitted to taking Ambien pills from the
6 pharmacy without payment. Respondent stated that she had been taking the pills for "around one
7 year." Respondent admitted that she took an average of about 10 pills each time and that the
8 thefts occurred about 50 times in the past year. Respondent also admitted that she took 450
9 tablets of Ambien 10 mg and 50 tablets of Ambien 5 mg. However, Respondent stated that the 22
10 Vicodin ES tablets (hydrocodone/APAP) found in her purse were provided to her by her dentist.

11 d. Respondent signed a statement wherein she admitted to taking "Ambien
12 CR, Zolpidem 10 mg and Ambien 5 mg" for insomnia. Respondent stated that the last time she
13 had taken the drugs was "about 1 month ago and today," and about 50 times in the past year.
14 Respondent also admitted in her written statement that she took about 500 pills from CVS
15 without payment by placing the stock bottles in her purse. Respondent also signed a promissory
16 note and notice of civil demand for \$826.58. The loss prevention manager then called the
17 Department of Justice, Bureau of Narcotic Enforcement. A Special Agent with the Bureau
18 identified and booked into evidence the 22 tablets of Vicodin 7.5/500 mg, 8 tablets of Ambien 5
19 mg, 61 tablets of zolpidem tartrate 5 mg, and 49 tablets of Ambien 10 mg. Respondent was
20 subsequently arrested and charged with violation of Penal Code section 460(b), second degree
21 burglary and violation of Health and Safety Code section 11350(a), possession of a controlled
22 substance.

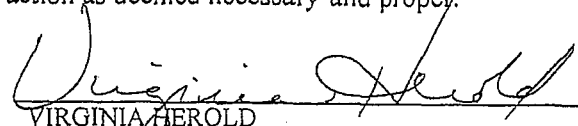
23 e. As a result of her conviction, Respondent was sentenced to 3 days in
24 custody, ordered to pay all fines, fees and restitution, required to participate and complete a drug
25 treatment program pursuant to Penal Code section 1210, with the imposition of the sentence
26 suspended for 3 years.

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2. Ordering Clara Diane Downey 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: 7/1/10



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

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