

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

In the Matter of the Accusation Against:

JENNEY MARIE GARRETT
PO Box 1844
Sutter Creek, CA 95685

Pharmacy Technician License No. TCH 96428

Respondent.

Case No. 3903

OAH No. 2011030698

DECISION

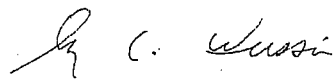
The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Pharmacy as its Decision in the above-entitled matter.

This decision shall become effective on January 11, 2012.

It is so ORDERED December 12, 2011.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By



STANLEY C. WEISSER
Board President

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PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California on October 3, 2011.

Anahita S. Crawford, Deputy Attorney General, represented Virginia K. Herold (complainant), Executive Officer of the Board of Pharmacy (Board), Department of Consumer Affairs (Department).

Respondent Jenney Marie Garrett represented herself.

Evidence was received, the record was closed, and the matter was submitted for decision on October 3, 2011.

SUMMARY

Complainant seeks to discipline respondent's pharmacy technician's license based on respondent's use of methamphetamine on April 9, 2010, to an extent or in a manner dangerous to herself or others or to an extent that she cannot safely perform her licensed duties. Discipline is also sought because respondent purportedly was under the influence of methamphetamine in violation of Health and Safety Code section 11550, subdivision (a), on April 9, 2010. Cause exists for discipline based on the former grounds only. Respondent did not establish that she has been sufficiently rehabilitated since her use of methamphetamine such that she can safely engage in her licensed duties, even on a probationary basis. Therefore, her pharmacy technician license is revoked.

5. On April 9, 2010, Detective Fiore and other members of the Special Investigations Bureau conducted a probation search of a house located in San Mateo, California. The subject of the search was respondent's boyfriend, with whom she lived at the house that was being searched. Detective Fiore identified herself to respondent, and the two of them began a conversation. While speaking with respondent, Detective Fiore noticed that respondent's pupils were dilated, she had sweat on her forehead, and her heart rate was elevated. Detective Fiore asked respondent whether she was taking any medications, and respondent admitted to having consumed the anti-depressant Wellbutrin and the diet medication Phentermine earlier that day.

Detective Fiore conducted a formal narcotics evaluation. She then told respondent that she (Detective Fiore) suspected that respondent had recently used methamphetamine or cocaine. Respondent admitted to having consumed methamphetamine approximately one and one-half hours before Detective Fiore's arrival. Detective Fiore formed the opinion that respondent was under the influence of methamphetamine, a controlled substance, and arrested her for violating Health and Safety Code section 11550 – using or being under the influence of a controlled substance. Respondent provided a urine sample, which Detective Fiore submitted to the San Mateo Forensic Laboratory for chemical analysis. Detective Fiore was never informed of the results of the analysis, and no evidence was introduced of those results.

Testimony of Anne Hunt

6. Anne Hunt has been a registered pharmacist in the State of California since 1986. She has been employed by the Department of Consumer Affairs as an inspector for the Board for the past six years. Her current duties include investigating the self-administration of controlled substances to licensees of the Board, monitoring licensees who are on probation, and inspecting licensed pharmacies.

7. Ms. Hunt opined that a licensee's use of a controlled substance in a manner that is dangerous to herself or others is grounds for discipline by the Board. Being under the influence of any controlled substance is grounds for discipline if the licensee does not have proper authorization to use such controlled substance, as is the violation of any law regulating the use of controlled substances. Finally, Ms. Hunt testified that the use of an illicit controlled substance, especially one that is as highly addictive as methamphetamine, is clearly dangerous to the licensee and is also potentially dangerous to others depending on what the licensee does while under the influence of the controlled substance. And if the licensee's use or addiction manifests while performing licensed duties, such use or addiction has the potential for being extremely dangerous.

11. Respondent testified candidly and credibly about her past use of methamphetamine. She admitted to three separate periods in her life during which she used methamphetamine. She initially began using in late 2000 or early 2001, shortly after her mother committed suicide. She also consumed alcohol excessively. Respondent used for approximately three or four years before quitting "cold turkey." During that three or four year period, she used methamphetamine about every six weeks until the last six to 12 months, during which she used once or twice a week.

In 2006, one of respondent's friends passed away. She attended the funeral and saw some friends with whom she used to use methamphetamine. Seeing those friends and dealing with the emotions caused by her friend's death led to respondent's relapse one time and use of methamphetamine. Some time afterwards, she enrolled herself in an outpatient treatment program. The program lasted a few months and consisted entirely of group meetings. She remained sober from methamphetamine during the program and for almost four years afterwards. She also greatly reduced her consumption of alcohol and drinks only on special occasions such as New Year's Eve, weddings, and other occasions on which it is "expected you drink."

12. April 9, 2010, was the day before respondent's boyfriend was supposed to enter a rehabilitation program for methamphetamine. While she did not want to, respondent testified that her boyfriend convinced her to use methamphetamine with him "one last time" before he was supposed to get "clean." She also took her prescription medication Wellburtin and Phentermine. She used methamphetamine only once that day, and she has not used since then.

13. The San Mateo County District Attorney's Office filed criminal charges against respondent for being under the influence of a controlled substance on April 9, 2010. She pled guilty, entry of a judgment of conviction was deferred pending her successful completion of a drug treatment program, and she was placed on probation for 18 months.³

³ Complainant did not introduce a certified copy of the court records for the criminal proceedings against respondent. However, respondent introduced a copy of her Deferred Entry of Judgment (PC 1000) Program Contract. The deferred entry of judgment program allows people charged with certain nonviolent drug offenses to plead guilty, have entry of judgment of conviction deferred, and participate in a drug treatment program as an alternative to being convicted and sentenced. (Pen. Code, §§ 1000; 1000.1.) Upon successful completion of the program, the guilty plea is withdrawn, and the criminal charges are dismissed. (Pen. Code, § 1000.3.) A guilty plea entered pursuant to the program does not constitute a conviction unless a judgment of guilty is entered after the participant fails the program pursuant to Penal Code section 1000.3.

Therefore, she said she decided early in the week before the hearing that she will no longer be in a relationship with him once he is released from jail. But she admitted that she went to visit him in jail later that same week and did not tell him about her decision. She explained that his mother, whom respondent described as being "like a surrogate mother" to her, asked respondent to visit her boyfriend to find out the status of his criminal case. Respondent said her boyfriend's mother asked respondent not to tell him that she (respondent) was leaving him out of fear about what might happen to him mentally. Respondent observed that she would have to terminate her relationship with her boyfriend's mother in order to effectively terminate her relationship with him. While respondent said she has made the decision to terminate her relationship with the mother, the manner in which she testified was unconvincing.

Evaluation of the Evidence

16. It is uncontroverted that respondent used methamphetamine, a controlled substance, on April 9, 2010. (Factual Findings 5 and 12.) However, establishing that she used methamphetamine does not in and of itself prove that she was under the influence of methamphetamine when she used. There must be some objective manifestation of her having been in the state of being under the influence of methamphetamine, however slight, to establish that she was in fact under the influence. (See, *People v. Canty* (2004) 32 Cal.4th 1266, 1278 [there must be some objective sign that the person was in fact in the state of being under the influence of a drug, however slight, to constitute a violation of Health and Safety Code section 11550, subdivision (a)].)

Here, there was no persuasive evidence that respondent was in fact under the influence of methamphetamine when she used that drug on April 9, 2009. As of that date, Detective Fiore had been a member of the Special Investigations Bureau for only three months. (Factual Finding 3.) The only formal training regarding the investigation of crimes related to controlled substances she had received as of that date was her participation in the 24-hour course sponsored by the California Narcotics Officers Association. (Factual Finding 4.) Therefore, complainant failed to lay the necessary evidentiary foundation for the admissibility of Detective Fiore's opinions that respondent was exhibiting objective signs of being under the influence of methamphetamine or that respondent was under the influence of methamphetamine on April 9, 2010. (See, Evid. Code, § 720 ["A person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates. . . ."]; see also, *Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 219 [the party calling the expert witness has the burden of laying a foundation for the witness' opinion].)

18. As discussed below, cause exists to discipline respondent's license. She did not establish that she has been sufficiently rehabilitated since her arrest such that she can safely engage in the duties of a licensed pharmacy technician as discussed in Factual Finding 17. Therefore, her license should be revoked.

Costs of Enforcement

19. Complainant requested costs of enforcement in the total amount of \$3,102.50 pursuant to Business and Professions Code section 125.3. A Certification of Prosecution Costs: Declaration of Anahita S. Crawford was introduced at the hearing. Attached as Exhibit A to the Certification is a document entitled Matter Time Activity by Professional Type. Ms. Crawford explained the following about Exhibit A in her Declaration: "The billing summary is comprehensive of the charges by the Office to the Board of Pharmacy through September 29, 2011. It does not include billing for tasks performed after September 29, 2011, up to the date of hearing, including the estimated costs that will be charged to the Board of Pharmacy as more fully discussed in paragraph 7 below." But, included on Exhibit A are charges for two hours of work Ms. Crawford performed on September 30, 2011, the day after her Certification was signed and the billing summary was prepared. Furthermore, the estimated costs referenced in paragraph 7 of the Certification were Ms. Crawford's estimated additional hours that would be "billed to the Board of Pharmacy for the further preparation of the case up to the commencement of the hearing." But her estimated additional hours are identical to those listed for the September 30, 2011, entry on Exhibit A, thereby creating the appearance of double billing. No attempt to amend the Certification or Exhibit A was made at the hearing.

Respondent did not object to the requested costs as being unreasonable.

The costs identified in the Certification of Costs: Declaration of Anahita S. Crawford are not reasonable for the reasons discussed in Legal Conclusion 4. However, the costs incurred for "pleading preparation" (\$212.50) by Ms. Crawford and "case management" (\$42.50) by Arthur D. Taggart are reasonable in light of the issues involved in this matter as discussed in Legal Conclusion 5.

LEGAL CONCLUSIONS

1. The Board may discipline a license if the holder has engaged in unprofessional conduct. "Unprofessional conduct" includes the licensee's use of a controlled substance to the extent or in a manner which is dangerous or injurious to her or others or to the extent that the use impairs the licensee's ability to perform her licensed duties in a manner that is consistent with public safety. (Bus. & Prof. Code, § 4301, subd. (h).) The act of unprofessional conduct must be substantially related to the qualifications, functions, or duties of a licensed pharmacy technician in order for discipline to be imposed. (See, *Griffiths v. Superior Court* (2002) 96 Cal.App.4th

3. Legal cause exists to discipline respondent's license pursuant to Business and Professions Code section 4301, subdivision (h), for the reasons explained in Legal Conclusion 1. No cause exists to discipline her license pursuant to Business and Professions Code section 4301, subdivision (j), for the reasons discussed in Legal Conclusion 2. When all of the evidence is considered, the appropriate discipline is to revoke respondent's license for the reasons discussed in Factual Findings 17 and 18.

Cost Recovery

4. Business and Professions Code section 125.3, subdivision (a), states:

Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before any board within the department or before the Osteopathic Medical Board, upon request of the entity bringing the proceeding, the administrative law judge may direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

California Code of Regulations, title 1, section 1042, subdivision (b), states the following about cost recovery:

Except as otherwise provided by law, proof of costs at the Hearing may be made by Declarations that contain specific and sufficient facts to support findings regarding actual costs incurred and the reasonableness of the costs, which shall be presented as follows:

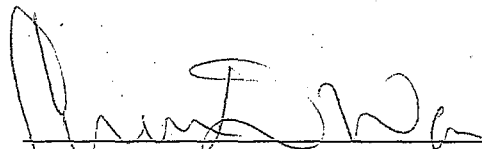
[¶] ... [¶]

(2) For services provided by persons who are not agency employees, the Declaration shall be executed by the person providing the service and describe the general tasks performed, the time spent on each task and the hourly rate or other compensation for the service. In lieu of this Declaration, the agency may attach to its Declaration copies of the time and billing records submitted by the service provider.

2. A condition of any reinstatement of respondent's revoked technician license shall be that she is certified as defined in Business and Professions Code section 4202, subdivision (a)(4), and provides satisfactory proof of certification to the Board.

3. Respondent shall pay to the Board its costs of investigation and prosecution in the amount of \$255 within fifteen (15) days of the effective date of this Decision.

DATED: October 18, 2011



COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings

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

12 In the Matter of the Accusation Against:

Case No. 3903

13 **JENNEY MARIE GARRETT**

14 PO Box 1844
Sutter Creek, CA 95685

ACCUSATION

15 Pharmacy Technician Registration Number
TCH 96428

16 Respondent.

17
18 Complainant alleges:

19 **PARTIES**

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

22 2. On or about January 14, 2010, the Board of Pharmacy issued Pharmacy Technician
23 License Number TCH 96428 to Jenney Marie Garrett (Respondent). The Pharmacy Technician
24 License was in full force and effect at all times relevant to the charges brought herein and will
25 expire on December 31, 2011, unless renewed.

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JURISDICTION

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

5 4. Section 118, subdivision (b), of the Code provides that the expiration of a license
6 shall not deprive the Board of jurisdiction to proceed with a disciplinary action during the period
7 within which the license may be renewed, restored, reissued or reinstated.

STATUTORY PROVISIONS

8
9 5. Section 4301 of the Code states, in part:

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

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

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

21 6. Health and Safety Code section 11550, subsection (a) states, in part:

22 No person shall use, or be under the influence of any controlled substance
23 which is (1) . . . specified in paragraph (1) or (2) of subdivision (d) or in paragraph (3)
24 of subdivision (e) of Section 11055, . . . except when administered by or under the
25 direction of a person licensed by the state to dispense, prescribe, or administer
26 controlled substances. . . .

COST RECOVERY

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

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CONTROLLED SUBSTANCE AT ISSUE

8. "Methamphetamine" is a Schedule II controlled substance as designated by Health and Safety Code section 11055, subdivision (d)(2).

FIRST CAUSE FOR DISCIPLINE

(Use of Controlled Substances)

9. Respondent is subject to disciplinary action under section 4301, subsection (h) in that on or about April 9, 2010, Respondent admitted to using the controlled substance methamphetamine. The circumstances are that on or about April 9, 2010 at approximately 9:30 p.m., officers from San Mateo Police Department conducted a probation search of the residence of a known drug user located in San Mateo, California. Respondent was the girlfriend of the probationer whose home was being searched. Respondent displayed objective signs of being under the influence (dilated pupils, rapid heart rate, sweating, thick speech, etc.) When questioned by officers, Respondent admitted that she had used Methamphetamine at 8:00 p.m. that evening with her boyfriend by snorting the controlled substance. Respondent did not have a lawful purpose for using the controlled substance. Respondent also admitted to being a drug user in the past.

SECOND CAUSE FOR DISCIPLINE

(Violation of Statute Regulating Controlled Substances)

10. Respondent is subject to disciplinary action under section 4301, subsection (j) in that Respondent violated Health and Safety Code section 11550 subsection (a) which regulates the use of controlled substances. The circumstances are that on or about April 9, 2010, Respondent admitted to using methamphetamine 1.5 hours prior to the officers' arrival and was found to be under the influence of methamphetamine by San Mateo Police officers, as further set forth in paragraph 9, above.

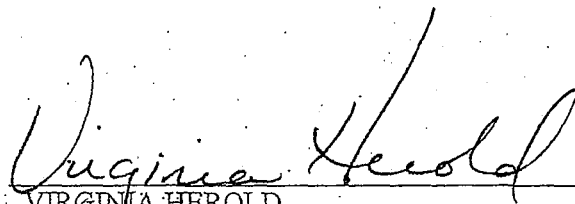
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PRAYER

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 License Number TCH 96428, issued to Jenney Marie Garrett;
2. Ordering Jenney Marie Garrett 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: 12/30/10


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

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