

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

In the Matter of the Accusation Against:

BRIGETTE GUTIERREZ

5616 Grand Prix Court
Fontana, CA 92336

Pharmacy Technician Registration No.
TCH 96774

Respondent.

Case No. 4077

OAH No. 201210646

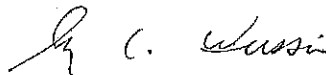
DECISION AND ORDER

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Pharmacy, Department of Consumer Affairs, as its Decision in this matter.

This decision shall become effective on February 7, 2013.

It is so ORDERED on January 8, 2013.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

STANLEY C. WEISSER
Board President

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PROPOSED DECISION

Beth Faber Jacobs, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on October 4, 2012, in San Diego, California.

William A. Buess, Deputy Attorney General, represented complainant Virginia Herold, Board of Pharmacy, Department of Consumer Affairs, State of California.

Brigette A. Gutierrez represented herself and was present throughout the administrative proceeding.

The matter was submitted on November 9, 2012.

SUMMARY

In February, 2009, respondent Brigitte Gutierrez was convicted of committing misdemeanor petty theft and placed on probation. Later that year she filed an application to become a pharmacy technician. The application asked if respondent had ever been convicted of a misdemeanor or felony, regardless of its age. Respondent falsely checked the box marked "no." Respondent was issued a pharmacy technician registration. In February, 2011, respondent pled guilty and was convicted of possession of a controlled substance.

Clear and convincing evidence established that respondent's drug-related conviction was substantially related to the qualifications, functions, and duties of a pharmacy technician and that she was dishonest in her application. Though respondent has demonstrated some elements of rehabilitation regarding her drug related conviction, no rehabilitation was shown regarding her dishonest application for licensure. It is not in the public interest to permit respondent to remain registered as a pharmacy technician at this time. Her registration is revoked.

FACTUAL FINDINGS

Jurisdictional Matters

1. Respondent Brigette A. Gutierrez became licensed as a pharmacy technician on May 26, 2010. Her license expires on April 30, 2014.

2. On October 28, 2011, Virginia Herold, complainant, signed the Accusation in her official capacity as Executive Officer of the Board of Pharmacy (board). The Accusation and other required documents were served on respondent. Respondent timely filed a Notice of Defense.

3. The record in the administrative hearing was opened on October 4, 2012. Jurisdictional documents were presented. Sworn testimony and documentary evidence was received. Closing arguments were given, but the record remained open for complainant to determine if respondent filed additional documents with the board as she testified, and if they were filed, to serve respondent with such documents and to give respondent an opportunity to respond. On October 9, 2012, complainant filed and served 13 pages including a cover letter from complainant's counsel, a certification of the attached documents, and a copy of documents dated April 23, 2010, filed by respondent with the board on April 27, 2010. Respondent did not file a response. The documents have been collectively marked as Exhibit 33, added to the administrative law judge's exhibit log, and received into evidence. Following a telephone status conference on November 9, 2012, both parties indicated that no additional proceedings were necessary to address the newly filed exhibit. The record was closed and the matter submitted on November 9, 2012.

Application for Licensure

4. On September 24, 2009, respondent signed an Application for Registration as a Pharmacy Technician (the application) with the Board of Pharmacy.

5. Question 6 of the application inquired about the applicant's criminal history. It read:

Have you ever been convicted or pled no contest to a violation of any law of a foreign country, the United States, or any state laws or local ordinances? You must disclose all misdemeanor and felony convictions, regardless of the age of the conviction, including those which have been set aside under Penal Code Section 1203.4. Traffic violations of \$500 or less need not be reported. If "yes," attach an explanation including the type of violation, the date, circumstances, location, and the complete penalty received. In addition to this written explanation, please provide the Board of Pharmacy with certified copies of all

pertinent court documents or arrest reports relating to this conviction.

6. In response to question, respondent filled in the box marked "no."

7. Following the background questions in the application, there was a section entitled "Applicant Affidavit," which respondent signed under penalty of perjury. It stated in part:

I understand that falsification of the information on this form may constitute grounds for denial or revocation of the license. I hereby certify under penalty of perjury under the laws of the State of California to the truth and accuracy of all statements, answers, and representations made in this application, including all supplementary statements. I also certify that I have read and understand the instructions attached to this application.

8. Respondent's statement was untrue. She was convicted of petty theft in 2009.

Respondent's 2009 Conviction for Petty Theft

9. On February 2, 2009, in *People v. Brigitte A. Gutierrez*, San Bernardino County Superior Court, Case No. MWV705250, respondent pled guilty and was convicted of violating Penal Code section 490.5(a), petty theft, a misdemeanor. Respondent was sentenced to two years conditional release, with various terms and conditions including that she violate no laws, pay restitution, fines and fees, serve one day in custody with credit for one day served, and stay away from Nordstrom Department Stores.

10. The incident that gave rise to the conviction occurred on August 16, 2007, when respondent was 18 years old and shopping at a Nordstrom in Montclair, California. Respondent took several items of clothing into the dressing room. She left the dressing room with 5 items of clothing in her purse and a Nordstrom bag and proceeded to leave the store without paying for the items, which had a total value of under \$400. Respondent was detained by a Nordstrom loss prevention agent until the police arrived. Respondent admitted to the arresting officer that she had stolen the clothes for herself and a friend.

11. Respondent was given a citation and signed a promise to appear in superior court on October 11, 2007. She did not appear in court as promised. A warrant for her arrest was issued and bail was set at \$10,000. Respondent did not address the outstanding warrant until over a year later, on January 22, 2009, at which time the warrant was recalled.

12. As part of her sentencing, respondent was ordered to pay \$1,715, by making regular payments of at least \$30 a month. She did not do this and was repeatedly subject to warrants for her failure to timely pay the required fines. Her warrants were recalled and her

probation was modified on February 1, 2011.

13. On April 27, 2012, respondent filed a petition to have her probation end early under Penal Code section 1203.3 and to have the petty theft charges dismissed under Penal Code section 1203.4. Respondent produced documents showing that her probation was terminated early on May 2, 2012.

Respondent's Testimony Regarding Completion of the Application

14. Respondent attended Everest College to obtain her training to become a pharmacy technician. An administrator of the program, Mark, assisted respondent in completing her application to become a pharmacy technician. According to respondent, she told Mark about her petty theft conviction and he told her she did not need to report it to the board because it happened "so long ago." Consequently, she did not reference it and filled in the box marked "no" in response to whether she had any convictions. Mark completed the school's portion of the application the same day respondent signed it, and the school submitted respondent's application to the board.

15. Sometime thereafter, respondent received a letter from the board indicating it was aware of her petty theft conviction and that she needed to explain in detail the circumstances surrounding the conviction and why it was not disclosed in her application. Respondent testified that she wrote an essay and completed a second application where she acknowledged the conviction, and that after she signed the second application, Everest College submitted it and her essay to the board on her behalf. Thereafter, on May 26, 2010, respondent was issued a Pharmacy Technician Registration. She assumed the agency issued her the registration because it received and approved of her second application and essay explanation regarding the petty theft conviction and why it was not initially disclosed.

16. Respondent did not retain a copy of her second application or essay. She assumed the board had a copy of the documents and was surprised they were not included among the exhibits offered by complainant during the hearing.

17. The only application produced during the hearing was the one dated September 24, 2009, introduced as Exhibit 12.

18. At the end of the administrative hearing, the record was kept open for complainant's counsel to make an inquiry to the board to determine if a second application and an essay had been filed by respondent and if so, to produce any documents found in response to the inquiry.

The Newly Produced Documents

19. Following the hearing, complainant Virginia Herold filed a declaration dated October 8, 2012, indicating that the board had no record of a second application filed by respondent. The declaration further stated, however, that respondent did file with the board

additional information concerning her petty theft conviction. Attached to the declaration was a copy of the "essay" respondent testified about, which was dated April 23, 2010, and certain

court documents regarding the charges and conviction respondent submitted to the board with her written explanation.

20. The board received these documents on April 27, 2010. There was no explanation provided as to why the documents had not been included in the agency's investigation report, provided in discovery, or provided to complainant's counsel prior to the hearing.

21. In her letter essay submitted to the board in April, 2010, respondent stated:

In January of 2009 I joined the Pharmacy Technician program at Everest College. A routine background check was in effect, this was the first time I found there was something on my record. This was also my first and only offence. [sic] On June 6, 2009¹ I was arrested for shoplifting in a clothing store called Nordstrom. I was with my friend and peer pressured into taking clothes for her. I was young and juvenile furthermore soon realized that this would be the biggest mistake of my life. As this was my only offense, Nordstrom dropped the charges and the clothes were given back. I thought at that point this was the end of it, but the court charged me with a misdemeanor.

I didn't realize it until Everest College ran the background check. Currently everything is taken care of and I am paying my fine every month to the court.

The reason this offense was not disclosed on my application was because I thought it was off my record. Since it happened so long ago in the summer of 2007, and given that I have been paying the court fees every month on time.

In addition to another reason why I didn't put it on my application was because this was the only thing on my record and my advisors at school said it didn't need to be there because Nordstrom's dropped the charges.

I am now a very responsible and dependable person, I am ready to work as a pharmacy technician and put the past behind me. Everything should be there in the court documentation.

¹ This date was an error. Certified court documents showed respondent's citation was issued August 16, 2007 and that she was convicted of petty theft on February 2, 2009.

However, please feel free to contact me anytime. I hope this information was accommodating.

22. Respondent attached to her letter a copy of the Notice to Appear she signed on August 16, 2007, and copy of the superior court docket sheets showing her plea of guilty to and conviction of petty theft on February 2, 2009.

Respondent's 2011 Conviction for Possession of a Controlled Substance

23. On February 1, 2011, in *People v. Brigette A. Gutierrez*, San Bernardino County Superior Court, Case No. FMV1002531, respondent pled guilty and was convicted of violating Health and Safety Code section 11377, subdivision (a), possession of a controlled substance, a misdemeanor. Respondent was sentenced to serve three years summary probation, to violate no laws, serve 10 days in custody, report to a rehabilitation center, pay a fine, participate in a work release program, and comply with the other terms and conditions of probation.

24. The circumstances giving rise to the conviction stemmed from respondent's use of prescription medications to control her debilitating pain. The women in respondent's family have a history of breast cancer. Starting at age 16, respondent has had three breast surgeries, each medically indicated to remove suspicious lumps. She had pain before and after each surgery. She also had other medical conditions, which names she could not recall, that gave her significant and constant pain. Respondent was eventually prescribed Oxycontin² and morphine³ for her pain. Her prescriptions were refilled every 30 days.

25. Compounding her difficult health issues, respondent was not associating with responsible people. When she did not obtain good pain relief, her friends suggested she remove the time release coating from the Oxycontin and snort or smoke it; they told her she would get better and faster pain relief if she did this. She followed their suggestion.

26. At some point, however, respondent realized that she was being used by these "friends." She became concerned that they were only pretending to be her friends to get to the drugs she was lawfully prescribed and felt they were stealing her prescription drugs. Respondent distanced herself from these people.

27. On July 27, 2010, about two months after she stopped seeing her "friends," law enforcement served a search warrant on respondent at her residence. Respondent had

² Oxycontin is a Schedule II controlled substance. (Health & Saf. Code, § 11055, subd. (b)(1)(M); Bus. & Prof. Code, § 4021.) It is also designated as a dangerous drug. (Bus. & Prof. Code, § 4022.)

³ Morphine is a Schedule II controlled substance. (Health & Saf. Code, § 11055, subd. (b)(1)(L); Bus. & Prof. Code, § 4021.) It is also designated as a dangerous drug. (Bus. & Prof. Code, § 4022.)

several bottles of medication in her bedroom that had been prescribed for her. Included were her prescription bottles for 120 count bottle of 80 mg Oxycontin and for 100 count 100 mg morphine. The bottles contained ½ of an Oxycontin and 10 Morphine pills. Respondent believed her “friends” reported her to law enforcement because they were not happy that she would not supply them with drugs or retain a friendship where they would have access to steal from her.

28. Respondent felt she the officers pressured her into saying things that were just not true. Though respondent testified she never sold any of the drugs, the sheriff’s report stated that she told them she periodically sold Oxycontin to others.

29. On April 27, 2012, respondent filed a petition for early termination of probation related to her conviction for possession of controlled substances, pursuant to Penal Code section 1203.3, and to have it dismissed under Penal Code section 1203.4. Respondent produced documents showing that her probation was terminated early on May 2, 2012.

Respondent’s Background and Evidence of Rehabilitation

30. Respondent is 23 years old. She grew up in southern California. She graduated from Los Osos High School in 2007.

31. As indicated above, respondent has had health issues that caused physical pain and resulted in her being prescribed medications to address that pain. Over the years, what started as prescriptions for Vicodin and Norco to control her pain progressed to prescriptions for morphine and Oxycontin. Respondent decided, on her own, that she wanted to cut down on her use of and reliance on prescription medications. In April, 2012, respondent asked her physician for a referral to her health plan’s pain management program. She started and rigorously followed the program, meeting regularly with her physician, physical therapist, and therapist as she learned new skills to address her physical pain without reliance on narcotics. She no longer takes controlled substances and is managing her pain without them. She is taking medication, but continues to taper its use and to participate in the pain management program.

32. Through the pain management program, respondent learned about pain, addiction, and pain management. In retrospect, even though she told the arresting officer in her drug possession case that she was addicted to Oxycontin, she now realizes she was not addicted, but was taking the medication because she truly was in pain and the prescriptions were warranted. After successfully completing her pain management program, she is now managing her pain without taking Oxycontin, morphine, or any controlled substance. Respondent is deservedly proud of the work she has done through the pain management program that has enabled her to achieve pain control without the use of controlled substances.

33. Respondent’s three surgeries and health issues led respondent to explore the health care field and her decision to become a pharmacy technician. She completed the

program at Everest College and did an externship at the Target Pharmacy for a few months, which she enjoyed very much. Though she has tried, respondent has not been able to obtain a job in her chosen career as a pharmacy technician.

34. To support herself, respondent has been working seven days a week as a dance instructor at a dance studio in Orange County. She teaches tap, jazz, folklórico, and other dance styles, primarily to children. She lives in a condominium. She does not associate with any individual who uses illicit drugs or who abuses substances. She feels she has made positive changes in her life and that she has done everything requested of her to demonstrate she can be trusted to be a pharmacy technician.

35. Respondent testified that both her convictions were dismissed by the San Bernardino Superior Court on May 2, 2012. There is no question but that respondent believes this occurred. Respondent submitted documents with general information from the superior court regarding filing petitions under Penal Code section 1203.3 (for early termination of probation) and under Penal Code section 1203.4 (for dismissal of a conviction). Her case specific documents, however, indicated only that both probationary orders arising from her two convictions were terminated early by the superior court on May 2, 2012, under Penal Code section 1203.3. Whether her convictions were actually dismissed does not determine the outcome of this administrative matter.

36. Respondent was the only person who testified on her behalf or who provided evidence on the issues of mitigation or rehabilitation.

Evaluation

37. Respondent was not truthful with the board when she submitted her application in September, 2009, and thereby denied having any conviction on her record.

Respondent's testimony at the hearing conflicted with her April 2010 letter to the board. She testified that she did not initially realize she had criminal charges pending. She thought that because she gave the clothes back, Nordstrom dropped the charges. While her belief may have been unreasonable, the court records support the notion that she may not have known about the outstanding criminal charge until Everest College advised her of it when they performed the background check in January, 2009. The criminal docket shows that the petty theft citation was issued on August 23, 2007, that she did not appear for the October 2007 hearing on the citation, and that she pled guilty on February 2, 2009, a month after Everest College completed its background check. The timing of her guilty plea supports respondent's testimony that she did not realize the petty theft charges were outstanding until she saw the results of the background check. She then took care of the charges.

But this does not explain why respondent did not disclose her February 2, 2009 petty theft conviction on the application she completed on September 24, 2009 and filed with the board.

Respondent testified that Mark, at Everest College, told her she did not need to include it on the application because the conviction was "so old." Mark did not testify and there was no corroboration of respondent's testimony in that regard.

Contrary to her testimony, respondent's April 2010 letter to the board gave three conflicting reasons for not disclosing the petty theft conviction on her application: (1) she thought it had been off her record; (2) she felt she did not need to disclose it because it "happened so long ago in the summer of 2007" and because she had "been paying the court fees every month on time;" and, (3) that her "advisors at school said it didn't need to be on there because Nordstrom's dropped the charges." These inherently inconsistent explanations do not excuse respondent's dishonesty in the application or show mitigation. Once Everest College shared its background check results with her in January 2009, respondent knew the charges had not been dropped and that she had been charged with a misdemeanor. She pled guilty the following month and was criminally sentenced to two years probation, with numerous terms and conditions. It strains belief to suggest, just eight months after she pled guilty and while still early in serving her criminal probation, that respondent did not know she had been convicted of a crime in February 2009.

None of respondent's explanations justify her failure to disclose the conviction. The charges were not dropped, she knew she was convicted, and there is nothing "old" about a conviction occurring less than eight months before. The application stated that all convictions - "regardless of the age of the conviction" - needed to be disclosed. No one from the school testified that they told respondent she did not need to disclose the conviction. But even if someone had, it would not have excused respondent's failure to follow the application's instructions and disclose all convictions. Respondent's selection of "no" when asked if she had ever been convicted of a crime was dishonest.

38. When respondent entered a plea bargain and pled guilty on February 1, 2011 to a violation of Health and Safety Code section 11377, subdivision (a), unauthorized possession of a controlled substance, she was convicted of that crime. Though the underlying circumstances reflect that the controlled substances in her possession had been lawfully prescribed, her conviction cannot be collaterally attacked and is conclusive proof that she unlawfully possessed controlled substances. (*Arneson v. Fox* (1980) 27 Cal.3d 440, 452.) The crime of possession of controlled substances is substantially related to the qualifications, duties and functions of a pharmacy technician and is grounds for disciplinary action.

39. Complainant also alleged that respondent violated Business and Professions Code section 4301, subdivision (h), which prohibits a licensee from administering a controlled substance to herself in an unsafe manner that is dangerous to herself or others, or using a controlled substance in such a manner that it impairs her ability to safely practice as a pharmacy technician. The evidence did not support this charge. Respondent was prescribed the medications that were in her possession. She admitted to having used the Oxycontin, on occasion, in a manner not prescribed, such as by smoking the drug or taking off the time-release coating. Respondent denied ever selling her prescription medications and denied

telling the arresting officer that she ever sold them to others. Respondent was convicted of unlawful possession – not possession for sale, not unlawful use, and not being under the influence of a controlled substance. No law enforcement officer testified at the hearing. Respondent’s testimony about how she came to believe her “friends” were stealing her pills and how she distanced herself from them prior to her arrest on this point was at least as credible as the conflicting statements in the sheriff’s report.⁴ There was no clear and convincing evidence to establish that respondent sold her prescribed drugs to others. And there was no expert testimony provided to establish that her periodic use of her Oxycontin prescription in a manner not prescribed was “dangerous or injurious” to herself or others. Absent such testimony, there is not clear and convincing evidence to establish that respondent used a dangerous drug in a manner dangerous to herself or to the public, or that her use of her prescribed medication impaired her ability to safely practice as a pharmacy technician.

LEGAL CONCLUSIONS

The Burden and Standard of Proof

1. The accusation alleged that respondent engaged in misconduct that warrants license discipline. Where an agency representative has filed charges against the holder of a license, as was done in this case, the party filing the charges has the burden of proof. (*Hughes v. Board of Architectural Exam’rs* (1998) 17 Cal.4th 763, 789.)

2. A pharmacy technician registration is a professional license that is granted only upon a showing of the licensee’s training. The standard of proof in an administrative disciplinary action seeking the suspension or revocation of a professional license is “clear and convincing evidence.” (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) Evidence of a charge is clear and convincing so long as there is a “high probability” that the charge is true. *People v. Mabini* (2001) 92 Cal.App.4th 654, 662.

Applicable Statutes and Regulations

3. Business and Professions Code section 498 provides that a board may revoke or otherwise impose discipline on the ground a licensee⁵ “secured the license by fraud, deceit, or a knowing misrepresentation of a material fact or by knowingly omitting to state a material fact.”

4. Business and Professions Code section 4301 provides in part that the board

⁴ The arresting officer’s statements reflecting what respondent told him or her were considered as direct evidence under *Lake v. Reed* (1997) 16 Cal.4th 448, 561-562.

⁵ Under the Business and Professions Code, references to a “licensee” include the holder of a certificate or registration. (Bus. & Prof. Code, § 493.)

shall take action against any licensee who is guilty of unprofessional conduct or whose license has been procured by fraud or misrepresentation or issued by mistake. Under section 4301, unprofessional conduct includes, but is not limited to, the following:

.....

(g) Knowingly making or signing any certificate or other document that falsely represents the existence or nonexistence of a state of facts.

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

.....

(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.

.....

(l) The conviction of a crime substantially related to the qualifications, functions, and duties of a licensee under this chapter. The record of conviction of a violation of Chapter 13 (commencing with Section 801) of Title 21 of the United States Code regulating controlled substances or of a violation of the statutes of this state regulating controlled substances or dangerous drugs shall be conclusive evidence of unprofessional conduct. In all other cases, the record of conviction shall be conclusive evidence only of the fact that the conviction occurred. The board may inquire into the circumstances surrounding the commission of the crime, in order to fix the degree of discipline or, in the case of a conviction not involving controlled substances or dangerous drugs, to determine if the conviction is of an offense substantially related to the qualifications, functions, and duties of a licensee under this chapter. A plea or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning of this provision. . . .

5. The board's regulation, California Code of Regulations, title 16, section 1770, also addresses the issue of substantial relationship. It states in part that:

a crime or act shall be considered substantially related to the 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 functions authorized by his license or registration in a manner consistent with the public health, safety, or welfare.

Cause Exists to Revoke or Suspend Respondent's Registration

6. As set forth in Findings 4 through 22, and 37, and Legal Conclusions 1 through 4, respondent misrepresented a material fact in her application for registration when she signed the application under penalty of perjury on September 24, 2009, and falsely affirmed she had incurred no convictions despite having been convicted of petty theft less than eight months before. Thus, grounds exist to revoke or suspend respondent's registration as a pharmacy technician, pursuant to Business and Professions Code sections 498 and 4301, subdivision (g).

7. As set forth in Findings 23 through 36 and 38, and Legal Conclusions 1 through 5, respondent's 2011 conviction for possession of a controlled substance demonstrates she violated a state statute regulating controlled substances and dangerous drugs. Her conviction is substantially related to the qualifications, functions and duties of a pharmacy technician. Thus, grounds exist to revoke or suspend respondent's registration as a pharmacy technician, pursuant to Business and Professions Code sections 490 and 4301, subdivisions (j) and (l).

8. As set forth in Findings 23 through 36 and 38 and 39, and Legal Conclusions 1 through 5, there was insufficient evidence to establish that respondent administered a controlled substance to herself in a manner or to the extent that is dangerous or injurious to herself or others, or to the extent that it impairs her ability to safely serve as a pharmacy technician, in violation of Business and Professions Code section 4301, subdivision (h).

Rehabilitation

9. The board maintains regulations that assist in evaluating the rehabilitation of an individual convicted of a substantially related crime. Under California Code of Regulations, title 16, section 1769, subdivision (b), when considering the suspension or revocation of a personal license based on a criminal conviction, the board considers the following criteria in evaluating rehabilitation and the person's present eligibility for a license:

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

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

10. Taking these factors into consideration, the nature of respondent's conviction is significant.⁶ Respondent was convicted of unlawful possession of controlled substances, which, as a drug-related conviction, is so inherently related to the qualifications, functions and duties of a pharmacy licensee that it is statutorily deemed to be unprofessional conduct. (Bus. & Prof. Code, §§ 4301, subd. (j) and (l).) Respondent's conviction date of February 1, 2011 is relatively recent. Coupled with the petty theft conviction, this was respondent's second conviction of a misdemeanor crime.

11. Respondent provided evidence of her successful participation in the pain management program, completion of her criminal probations, distancing herself from those who abuse substances, being self supporting and desiring to retain her pharmacy technician registration. No other witnesses testified on her behalf.

12. The core responsibilities of a pharmacy technician involve working with and around regulated drugs, including controlled substances and dangerous drugs, and often in a retail setting. The board has reasonable concerns that respondent's recent controlled substance conviction, which arose from her misuse of prescription drugs, is inconsistent with public protection, particularly when coupled with the petty theft conviction. While the evidentiary significance of an individual's misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct, (*Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1070), respondent's last conviction occurred less than two years ago. She completed her probationary periods in both convictions in May of this year. More telling evidence of rehabilitation from her drug related conviction will be respondent's conduct when she is not under the scrutiny envisioned by criminal probation. Very little time has passed.

13. Of greater concern is respondent's dishonesty in the application process. Respondent demonstrated no insight about her misrepresentation in the application and failed to provide any evidence of mitigation or rehabilitation on this issue. "[T]here is more to being a licensed professional than mere knowledge and ability. Honesty and integrity are

⁶ Complainant did not allege the petty theft conviction as an independent basis for discipline, but referenced it solely in connection with the allegations of filing a false application and with respect to the degree of discipline, if any, to be imposed.

deeply and daily involved in various aspects of the practice.” (*Golde v. Fox* (1979) 98 Cal.App.3d 167, 176.) The public welfare requires that pharmacy technicians be honest. Respondent’s blatant misrepresentation to the board and absence of rehabilitation on the issue demonstrates that it would not be in the public interest to permit respondent to continue holding a pharmacy technician registration, even on a probationary basis, at this time.

Costs

14. Complainant requested costs of investigation and enforcement pursuant to Business and Professions Code section 125.3. The statute provides in part:

(a) 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 may request the 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.

.....

(c) A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the entity bringing the proceeding or its designated representative shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.

(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). The finding of the administrative law judge with regard to costs shall not be reviewable by the board to increase the cost award. The board may reduce or eliminate the cost award, or remand to the administrative law judge where the proposed decision fails to make a finding on costs requested pursuant to subdivision (a).

.....

15. The Office of Administrative Hearings has enacted regulations for use when evaluating an agency’s cost request. California Code of Regulations, title 1, section 1042,

provides in part:

(a) An agency shall allege in its pleading any request for costs, citing the applicable cost recovery statute or regulation.

(b) 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:

(1)

(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.

. . . .

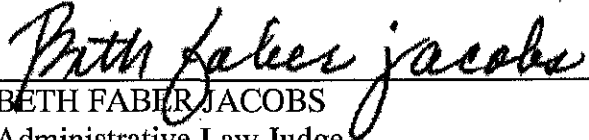
16. In this case, the deputy attorney general representing complainant submitted a declaration indicating that he, a supervising deputy attorney general, and a paralegal all worked on the case. The deputy's declaration indicated that an attachment to his declaration included the billing costs incurred by the deputy, "as well as other professionals of the DOJ who worked on the matter; and sets forth the tasks undertaken, the amount of time billed for the activity, and the billing rate by professional type." The attachment, however, did not include any of this information except the billing rate; there was no break down by the person providing the service, no description of the general tasks performed, and no description of the time spent on each task. Nor was the attached document a copy of the Department of Justice's time and billing records submitted by the service provider. The declaration and its attachment did not provide specific and sufficient facts to support a finding of the actual costs incurred and did not comply with the requirements of the California Code of Regulations, title 1, section 1042, subsections (b) (2) or (b) (3). As a result, complainant's cost request is hereby denied.

//

ORDER

Pharmacy Technician Registration Number TCH 96774 issued to respondent Brigitte A. Gutierrez is hereby revoked.

DATED: November 30, 2012


BETH FABER JACOBS
Administrative Law Judge
Office of Administrative Hearings

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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. 4077

12 **BRIGETTE A. GUTIERREZ**
13 **5616 Grand Prix Court**
14 **Fontana, CA 92336**

A C C U S A T I O N

15 **Original Pharmacy Technician Registration**
16 **No. TCH 96774**

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 May 26, 2010, the Board of Pharmacy issued Original Pharmacy
23 Technician Registration Number TCH 96774 to Brigette A. Gutierrez (Respondent). Said
24 Registration Number will expire on April 30, 2012.

25 **JURISDICTION**

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

1 4. Section 118, subdivision (b), of the Code provides that the
2 suspension/expiration/surrender/cancellation of a license shall not deprive the
3 Board/Registrar/Director of jurisdiction to proceed with a disciplinary action during the period
4 within which the license may be renewed, restored, reissued or reinstated.

5 5. Section 482 of the Code states:

6 "Each board under the provisions of this code shall develop criteria to evaluate the
7 rehabilitation of a person when:

8 "...

9 "(b) Considering suspension or revocation of a license under Section 490.

10 "Each board shall take into account all competent evidence of rehabilitation furnished by
11 the applicant or licensee."

12 6. Section 490 of the Code provides, in pertinent part, that a board may suspend or
13 revoke a license on the ground that the licensee has been convicted of a crime substantially
14 related to the qualifications, functions, or duties of the business or profession for which the
15 license was issued.

16 7. Section 493 of the Code states:

17 "Notwithstanding any other provision of law, in a proceeding conducted by a board within
18 the department pursuant to law to deny an application for a license or to suspend or revoke a
19 license or otherwise take disciplinary action against a person who holds a license, upon the
20 ground that the applicant or the licensee has been convicted of a crime substantially related to the
21 qualifications, functions, and duties of the licensee in question, the record of conviction of the
22 crime shall be conclusive evidence of the fact that the conviction occurred, but only of that fact,
23 and the board may inquire into the circumstances surrounding the commission of the crime in
24 order to fix the degree of discipline or to determine if the conviction is substantially related to the
25 qualifications, functions, and duties of the licensee in question.

26 "As used in this section, 'license' includes 'certificate,' 'permit,' 'authority,' and
27 'registration.'"

28 8. Section 498 of the Code states:

1 "A board may revoke, suspend, or otherwise restrict a license on the ground that the
2 licensee secured the license by fraud, deceit, or knowing misrepresentation of a material fact or
3 by knowingly omitting to state a material fact."

4 9. Section 4202 of the Code states in pertinent part:

5 "(d) The board may suspend or revoke a license issued pursuant to this section on any
6 ground specified in Section 4301."

7 10. Section 4300 of the Code states:-

8 "(a) Every license issued may be suspended or revoked."

9 **STATUTORY PROVISIONS**

10 11. Section 4301 of the Code states:

11 "The board shall take action against any holder of a license who is guilty of unprofessional
12 conduct or whose license has been procured by fraud or misrepresentation or issued by mistake.

13 Unprofessional conduct shall include, but is not limited to, any of the following:

14 "...

15 "(g) Knowingly making or signing any certificate of other document that falsely represents
16 the existence of nonexistence of a state of facts.

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

22 "...

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

25 "...

26 "(l) The conviction of a crime substantially related to the qualifications, functions, and
27 duties of a licensee under this chapter. The record of conviction of a violation of Chapter 13
28 (commencing with Section 801) of Title 21 of the United States Code regulating controlled

1 substances or of a violation of the statutes of this state regulating controlled substances or
2 dangerous drugs shall be conclusive evidence of unprofessional conduct. In all other cases, the
3 record of conviction shall be conclusive evidence only of the fact that the conviction occurred.
4 The board may inquire into the circumstances surrounding the commission of the crime, in order
5 to fix the degree of discipline or, in the case of a conviction not involving controlled substances
6 or dangerous drugs, to determine if the conviction is of an offense substantially related to the
7 qualifications, functions, and duties of a licensee under this chapter. A plea or verdict of guilty or
8 a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning
9 of this provision. The board may take action when the time for appeal has elapsed, or the
10 judgment of conviction has been affirmed on appeal or when an order granting probation is made
11 suspending the imposition of sentence, irrespective of a subsequent order under Section 1203.4 of
12 the Penal Code allowing the person to withdraw his or her plea of guilty and to enter a plea of not
13 guilty, or setting aside the verdict of guilty, or dismissing the accusation, information, or
14 indictment.

15 REGULATORY PROVISIONS

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

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

23 14. California Code of Regulations, title 16, section 1769, states in pertinent part:

24 "...

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

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

7 **COST RECOVERY**

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

12 **CONTROLLED SUBSTANCES/DANGEROUS DRUGS**

13 16. Section 4021 of the Code states:

14 “‘Controlled substance’ means any substance listed in Chapter 2 (commencing with Section
15 11053) of Division 10 of the Health and Safety Code.”

16 17. Section 4022 of the Code states in pertinent part:

17 “‘Dangerous drug’ or ‘dangerous device’ means any drug or device unsafe for self-use in
18 humans or animals, and includes the following:

19 “(a) Any drug that bears the legend: ‘Caution: federal law prohibits dispensing without a
20 prescription,’ ‘Rx only,’ or words of similar import.

21 “...

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

24 18. Morphine is a Schedule II controlled substance as designated by Health and Safety
25 Code section 11055(b)(1)(L) and designated a controlled substance by Business and Professions
26 Code section 4021 and a dangerous drug by Business and Professions Code section 4022.

27 19. Oxycontin, generic name oxycodone, is a Schedule II controlled substance as
28 designated by Health and Safety Code section 11055(b)(1)(M) and designated a controlled

1 substance by Business and Professions Code section 4021 and a dangerous drug by Business and
2 Professions Code section 4022.

3 20. Codeine is a Schedule II controlled substance as designated by Health and Safety
4 Code section 11055(b)(1)(G) and designated a controlled substance by Business and Professions
5 Code section 4021 and a dangerous drug by Business and Professions Code section 4022.

6 **FIRST CAUSE FOR DISCIPLINE**

7 (September 24, 2009 Failure to Disclose Criminal Conviction for Petty Theft on August 16, 2007)

8 21. Respondent is subject to disciplinary action under section 498 and section 4301(g) in
9 that Respondent failed to disclose on her 2009 application for registration as a pharmacy
10 technician, the September 24, 2009 criminal conviction for petty theft that occurred on August 16,
11 2007. The circumstances are as follows:

12 22. On or about August 16, 2007, Respondent was detained by the Loss Prevention Agent
13 at the Nordstrom store on Plaza Lane in Montclair, California. The Loss Prevention Agent
14 observed Respondent select thirteen clothing items from displays, proceed to a fitting room, exit
15 the room and leave eight of the items in the fitting room. Five items were unaccounted for. The
16 agent watched Respondent leave the store without paying for the five items. Upon confronting
17 Respondent outside of the store, the Loss Prevention Agents recovered five items from
18 Respondent's shopping bag and purse. The agents placed Respondent under citizen's arrest and
19 called Montclair Police. Respondent admitted to stealing the items to the police. The Montclair
20 Police Department issued Respondent a Misdemeanor Notice to Appear and she was released
21 from custody.

22 23. *People v. Brigitte Gutierrez*, San Bernardino Superior Court case number
23 MWV705250 was initiated based on the notice to appear. On October 11, 2007, Respondent
24 failed to appear at the arraignment. A warrant was ordered on October 15, 2007.

25 24. Respondent appeared for arraignment on February 2, 2009 in the Superior Court of
26 San Bernardino County. Respondent pled guilty to violation of Penal Code section 490.5(A),
27 Petty Theft and was sentenced to probation. (Sentencing details set forth in paragraph 31 below.)
28

1 28. Felony Complaint in case FWV1002531 was filed on October 12, 2010, and alleged
2 the violation of section 11351 in Count 1.

3 29. On February 1, 2011, on the People's motion, the Complaint was amended to dismiss
4 Count 1 and allege Count 2, violation of Health and Safety Code section 11377(a) Unauthorized
5 Possession of a controlled substance. Respondent pled guilty to Count 2 and was sentenced to
6 probation for 36 months with the following conditions: Violate no law other than minor traffic;
7 pay fines; served 10 days in custody; report to a rehabilitation center; and complete a work
8 release program.

9 **THIRD CAUSE FOR DISCIPLINE**

10 (Administer a Controlled Substance to Self so as to be Dangerous or Injurious)

11 30. Respondent is subject to disciplinary action under section 490 and 4301(h) in that
12 Respondent was convicted of a substantially related crime for violation of Health and Safety
13 Code section 11377(a), Possession of a Controlled Substance for self administration as described
14 more fully in paragraphs 26-29 and incorporated herein by this reference.

15 **DISCIPLINE CONSIDERATIONS**

16 31. To determine the degree of discipline, if any, to be imposed on Respondent,
17 Complainant alleges that on or about February 2, 2009, in a prior criminal proceeding entitled
18 *People of the State of California v. Brigitte Gutierrez* in San Bernardino Superior Court, Case
19 Number MWV705250. Respondent was convicted by a plea of guilty for violating PC490.5(A)
20 Petty Theft, a misdemeanor, and was ordered to Conditional and Revocable Release for 24
21 months. Probation conditions: Violate no law other than minor traffic; pay a fine of \$1680.00; pay
22 a fee of \$35.00 for a total of \$1715.00; stay away from Nordstrom stores; serve 1 day in San
23 Bernardino County Jail Facility.

24 **PRAYER**

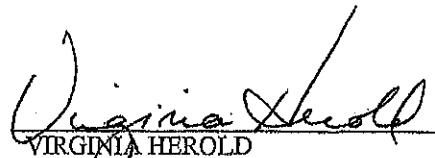
25 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
26 and that following the hearing, the Board of Pharmacy issue a decision:

27 1. Revoking or suspending Original Pharmacy Technician Registration Number TCH
28 96774, issued to Brigitte A. Gutierrez ;

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2. Ordering Brigette A. Gutierrez 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: 10/28/11



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

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