

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

In the Matter of the Automatic Suspension of License
of:

NICHOLAS JOSHUA FRANCO
17350 Temple Ave. #26
La Puente, CA 91744

Pharmacy Technician License No. TCH 122550

and _____

In the Matter of the Accusation Against:

NICHOLAS JOSHUA FRANCO
17350 Temple Ave. #26
La Puente, CA 91744

Pharmacy Technician License No. TCH 122550

Respondent.

Consolidated Case No. 4853

OAH Nos. 2014020252 and
2014030454

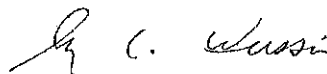
DECISION AND ORDER

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 September 12, 2014.

It is so ORDERED on August 13, 2014.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By _____

STAN C. WEISSER
Board President

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

In the Matter of the Automatic Suspension of License
of:

NICHOLAS FRANCO,
Pharmacy Technician License No. TCH 122550,

and

In the Matter of the Accusation Against:
NICHOLAS FRANCO,
Pharmacy Technician License No. TCH 122550,

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OAH Nos. 2014020252 and
2014030454

PROPOSED DECISION

These consolidated matters were heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on July 9, 2014, in Los Angeles, California. Complainant was represented by M. Travis Peery, Deputy Attorney General. Nicholas Franco (Respondent) appeared telephonically.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on July 9, 2014.

FACTUAL FINDINGS

1. On January 17, 2014, Complainant Virginia K. Herold (Complainant) issued to Respondent a Notice of Automatic Suspension of License while acting in her official capacity as Executive Officer of the California State Board of Pharmacy (Board), Department of Consumer Affairs. The Notice of Automatic Suspension informed Respondent that his pharmacy technician license had been automatically suspended, due to his felony incarceration beginning April 13, 2013.
2. On January 24, 2014, Respondent requested a hearing to contest the automatic suspension.
3. On February 12, 2014, Complainant filed the Accusation while acting in her official capacity.

4. Respondent filed a Notice of Defense requesting a hearing.

5. On April 26, 2012, the Board issued Pharmacy Technician License Number TCH 122550 to Respondent. The Pharmacy Technician License expired on April 30, 2014, and has not been renewed. However, the Board retains the jurisdiction to proceed with this disciplinary action pursuant to Business and Professions Code section 118, subdivision (b).

6(a). On July 17, 2012, in the Superior Court of the State of California, County of Los Angeles, Case Number 2JB05709, Respondent was convicted of violating Vehicle Code section 23152, subdivision (b) (driving with a blood alcohol content of .08 percent or higher) and Penal Code section 25400, subdivision (a) (1) (having a concealed firearm in vehicle), misdemeanors.

6(b). Respondent was placed on probation for three years and ordered to serve 103 days in jail, with credit for six days in custody. He was also ordered to complete a three-month First Offender Alcohol Counseling Program and to refrain from committing any further violation of law.

6(c). The circumstances underlying the July 17, 2012 conviction are as follows: On July 15, 2012, Respondent left a friend's home and drove his vehicle with a blood alcohol content exceeding .08 percent. When Respondent was stopped by police for speeding, the officer smelled a strong odor of alcohol on Respondent's breath, and Respondent failed field sobriety tests. After arresting Respondent for driving under the influence of alcohol, the officers searched Respondent's vehicle and found a loaded Smith & Wesson 38 special revolver, wrapped in a McDonald's wrapper, under the driver's seat. The officers also found a polished metal dagger, in a hard plastic sheath with dried blood on the tip, under the driver's seat. After Respondent was transported to the police station for booking, the officers found a 100 dollar bill in his wallet which was determined to be counterfeit.

6(d). On November 27, 2012, Respondent was found in violation of his probation for failure to obey all laws based on his felony case, Number KA099761 (see Factual Finding 7). He was ordered to serve 85 days in jail, with credit for 85 days in custody.

7(a). On November 27, 2012, in the Superior Court for the State of California, County of Los Angeles, Case Number KA099761, Respondent was convicted of violating Penal Code section 25400, subdivision (a)(2) (having a concealed firearm on his person), a felony.

7(b). Respondent was sentenced to serve three years in state prison. The sentence was suspended, and he was placed on probation for three years and ordered to serve 180 days in jail, with credit for 85 days in custody.

7(c). The circumstances underlying the November 27, 2012 conviction are as follows: On October 16, 2012, police officers found Respondent sleeping in a slumped-over

seated position on a residential street curb, with a Smith & Wesson .357 revolver (loaded with six rounds of ammunition and scratched-off serial numbers) tucked in his waistband. Officers searched Respondent following his arrest and found a glass smoking pipe containing a white crystalline residue resembling methamphetamine. Respondent told officers that he was too intoxicated to recall anything that happened that night and that he did not know where the gun had come from.

7(d). On March 18, 2013, Respondent was found in violation of his probation, and his probation was revoked. He was ordered to serve his sentence of three years in state prison, with credit for 221 days served.

8. Respondent is currently serving his prison sentence for his felony conviction.

9(a). At the administrative hearing, Respondent testified that the gun found in his vehicle on July 17, 2012 was not registered to him and he did not know why it was in his vehicle. He maintained that the dagger was in his vehicle because he had just returned from a camping trip and that he was not aware the 100 dollar bill was counterfeit.

9(b). Respondent further testified that he did not know how the firearm came to be tucked into his waistband on October 16, 2012. He denied scratching off the serial numbers on the gun, and stated that he did not know to whom the gun was registered. When asked about the glass smoking pipe found by police, Respondent replied that he had "no idea what they are talking about," and that he did not use drugs.

9(c). Respondent does not consider himself an alcoholic. Despite driving with a blood alcohol content over .08 percent on one occasion and his losing consciousness due to alcohol consumption on another occasion, he denied having any problem with alcohol consumption.

9(d). Despite his failure to comply with his criminal probations, he maintained that he would comply with any Board-ordered probation.

9(e). Respondent's testimony was self-serving and lacked credibility.

10. Complainant submitted evidence establishing that the Board had incurred costs of \$5,750 for the prosecution of this matter, all of which are deemed reasonable.

LEGAL CONCLUSIONS

1. Cause exists to affirm the automatic suspension of Respondent's pharmacy technician license, pursuant to Business and Professions Code section 4311, subdivision (a), on the grounds that Respondent is currently incarcerated for a felony conviction, as set forth in Factual Findings 7 and 8.

2(a). Cause exists to discipline Respondent's pharmacy technician license, pursuant to Business and Professions Code sections 490 and 4301, subdivision (1), and California Code of Regulations, title 16, section 1770, on the grounds that Respondent has been convicted of crimes which are substantially related to the qualifications, functions and duties of a pharmacy technician, as set forth in Factual Findings 5 through 8, and Legal Conclusion 2(b).

2(b). Respondent's convictions individually and collectively are substantially related to the qualifications, functions and duties of a pharmacy technician. Respect for human life and compliance with the law are all paramount in pharmacy technicians, who have access to dangerous drugs and controlled substance, are privy to sensitive personal information of pharmacy clients, and have been placed in a position of trust with respect to that access and that information. Respondent's crimes of driving while intoxicated and twice being illegally in the possession of a loaded weapon demonstrate a lack of respect for human welfare and a propensity to flout the law. These characteristics, to a substantial degree, evidence a potential unfitness to perform the functions of a pharmacy technician in a manner consistent with the public health, safety and welfare. (Cal.Code Regs., tit.16, § 1770.)

3. Cause exists to discipline Respondent's pharmacy technician license, pursuant to Business and Professions Code section 4301, subdivision (h), on the grounds that Respondent used alcoholic beverages to the extent or in a manner as to be dangerous to himself or others, as set forth in Factual Findings 5 through 8.

4. Pursuant to Business and Professions Code section 125.3, Complainant is entitled to the recover reasonable costs of prosecution of this matter in the amount of \$5,750, as set forth in Factual Finding 10.

5(a). Pursuant to California Code of Regulations, title 16, section 1769, subdivision (c):

When considering the suspension or revocation of a facility or a 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:

(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.

5(b). Respondent sustained two convictions in the span of four months, and his second crime was committed while on criminal probation for his first. His crimes demonstrate a lack of respect for human welfare and a propensity to flout the law. This causes serious concern about continuing to allow Respondent to act in a position of trust as a pharmacy technician. Additionally, Respondent's crimes and convictions are only two years old, and Respondent is currently serving a three year prison sentence for his felony conviction. Consequently, there has been no passage of time to assess Respondent's rehabilitation while released from the command of the criminal justice system. (See, *In re Gossage* (2000) 23 Cal.4th 1080.) Moreover, Respondent refused to take responsibility for his actions, expressed no remorse, and provided no evidence of rehabilitation. Respondent gave insufficient assurance of future compliance with any Board-ordered probationary terms. Consequently, probation in this matter would not be appropriate and would not ensure adequate public protection.

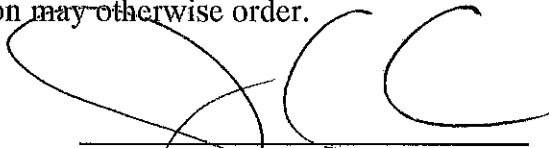
5(c). Given the foregoing, revocation of Respondent's pharmacy technician license is warranted in order to protect the public health, safety and welfare.

ORDER

WHEREFORE, THE FOLLOWING ORDERS are hereby made:

1. The automatic suspension of Respondent Nicholas Franco's Pharmacy Technician License Number TCH 122550 is affirmed.
2. Pharmacy Technician License Number TCH 122550, issued to Respondent Nicholas Franco, is hereby revoked.
3. If Respondent later applies for a new pharmacy technician license or reinstatement of his revoked license, Respondent shall reimburse the Board \$5,750 for its prosecutorial costs in this case, prior to reinstatement or issuance of any pharmacy technician license or as the Board in its discretion may otherwise order.

DATED: July 18, 2014



JULIE CABOS-OWEN
Administrative Law Judge
Office of Administrative Hearings

1 KAMALA D. HARRIS
Attorney General of California
2 GREGORY J. SALUTE
Supervising Deputy Attorney General
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Attorneys for Complainant
7

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

10 In the Matter of the Accusation Against:

Case No. 4853

11 **NICHOLAS JOSHUA FRANCO**
12 17350 Temple Ave. #26
La Puente, CA 91744
13 and
Nicholas Joshua Franco CDCR # AN9026
14 Tehachapi Prison
24900 California 202
15 Tehachapi, CA 93561

ACCUSATION

16 Pharmacy Technician Registration No. TCH 122550

17 Respondent.

18
19
20 Complainant alleges:

21 **PARTIES**

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

24 2. On or about April 26, 2012, the Board issued Pharmacy Technician Registration No.
25 TCH 122550 to Nicholas Joshua Franco (Respondent). The Pharmacy Technician Registration
26 was in full force and effect at all times relevant to the charges brought herein and will expire on
27 April 30, 2014, unless renewed.

28 ///

1 JURISDICTION

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

4 4. Section 4300.1 states:

5 "The expiration, cancellation, forfeiture, or suspension of a board-issued license by
6 operation of law or by order or decision of the board or a court of law, the placement of a license
7 on a retired status, or the voluntary surrender of a license by a licensee shall not deprive the board
8 of jurisdiction to commence or proceed with any investigation of, or action or disciplinary
9 proceeding against, the licensee or to render a decision suspending or revoking the license."

10 STATUTORY PROVISIONS

11 5. Section 118, subdivision (b), provides that the suspension, expiration, surrender or
12 cancellation of a license shall not deprive the Board of jurisdiction to proceed with a disciplinary
13 action during the period within which the license may be renewed, restored, reissued or reinstated.

14 6. Section 490 states, in pertinent part:

15 "(a) In addition to any other action that a board is permitted to take against a licensee, a
16 board may suspend or revoke a license on the ground that the licensee has been convicted of a
17 crime, if the crime is substantially related to the qualifications, functions, or duties of the business
18 or profession for which the license was issued.

19 "(b) Notwithstanding any other provision of law, a board may exercise any authority to
20 discipline a licensee for conviction of a crime that is independent of the authority granted under
21 subdivision (a) only if the crime is substantially related to the qualifications, functions, or duties
22 of the business or profession for which the licensee's license was issued.

23 "(c) A conviction within the meaning of this section means a plea or verdict of guilty or a
24 conviction following a plea of nolo contendere. Any action that a board is permitted to take
25 following the establishment of a conviction may be taken when the time for appeal has elapsed, or
26 the judgment of conviction has been affirmed on appeal, or when an order granting probation is
27 made suspending the imposition of sentence, irrespective of a subsequent order under the
28 provisions of Section 1203.4 of the Penal Code. . . ."

1 7. Section 4300, subdivision (a), states that "[e]very license issued may be suspended or
2 revoked."

3 8. Section 4301 states, in pertinent part:

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

7

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

13

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

1 guilty, or setting aside the verdict of guilty, or dismissing the accusation, information, or
2 indictment. . . ."

3 **REGULATORY PROVISION**

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

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

11 **COST RECOVERY**

12 10. Section 125.3 provides that the Board may request the administrative law judge to
13 direct a licensee found to have committed a violation or violations of the licensing act to pay a
14 sum not to exceed the reasonable costs of the investigation and enforcement of the case.

15 **CONTROLLED SUBSTANCE / DANGEROUS DRUG**

16 11. Methamphetamine is a Schedule II controlled substance as designated by Health and
17 Safety Code section 11055, subdivision (d)(2), and is categorized as a dangerous drug pursuant to
18 section 4022

19 **FIRST CAUSE FOR DISCIPLINE**

20 **(Convictions of Substantially Related Crimes)**

21 12. Respondent is subject to disciplinary action under sections 490 and 4301,
22 subdivision (l), in conjunction with California Code of Regulations, title 16, section 1770, in that
23 Respondent was convicted of crimes substantially related to the qualifications, functions or duties
24 of a licensee or registrant which to a substantial degree evidence his present or potential unfitness
25 to perform the functions authorized by his license or registration in a manner consistent with the
26 public health, safety, or welfare, as follows:

27 a. On or about July 17, 2012, after pleading nolo contendere, Respondent was convicted
28 of two (2) misdemeanor counts, Count 2, violating Vehicle Code section 23152(b) [drive with an

1 equal to or greater than 0.08% blood alcohol content (BAC)], and Count 3, violating Vehicle
2 Code section 25400(a)(1) [having a concealed firearm in vehicle] in the criminal proceeding
3 entitled *The People of the State of California v. Nicholas Joshua Franco* (Super. Ct. Los Angeles
4 County, 2012, No. 2JB05709). The Court sentenced Respondent to 85 days in jail, placed him on
5 three (3) years probation, and ordered him to complete a Three-Month First Offender Alcohol
6 Program.

7 b. The circumstances underlying the conviction are that on or about July 15, 2012,
8 Respondent drove a vehicle while under tested blood alcohol contents of 0.114/0.176/0.129. In
9 addition, Respondent was in possession of a Smith & Wesson, 38 Special, loaded with five (5)
10 rounds of ammunition, a polished metal dagger, and a counterfeit 100 dollar bill.

11 c. On or about November 27, 2012, after pleading nolo contendere, Respondent was
12 convicted of one felony count of violating Penal Code section 25400(a)(2) [having a concealed
13 firearm on his person] in the criminal proceeding entitled *The People of the State of California v.*
14 *Nicholas Joshua Franco* (Super. Ct. Los Angeles County, 2012, No. KA099761). The Court
15 sentenced Respondent to three (3) years in state prison. The sentence was suspended and
16 Respondent was placed on three (3) years probation and ordered to serve 180 days in jail.

17 d. The circumstances underlying the conviction are that on or about October 16, 2012,
18 Respondent was found sleeping in a seated position on a residential street curb, while in
19 possession of a Smith & Wesson .357 revolver loaded with six (6) rounds of ammunition and
20 scratched-off serial numbers, and a methamphetamine glass smoking pipe. Respondent admitted
21 to officers that he was too drunk to remember anything that happened that night.

22 SECOND CAUSE FOR DISCIPLINE

23 (Dangerous Use of Alcohol)

24 13. Respondent is subject to disciplinary action under section 4301, subdivision (h), on
25 the grounds of unprofessional conduct, in that Respondent used alcoholic beverages to the extent
26 or in a manner as to be dangerous or injurious to himself or others. Complainant refers to and by
27 this reference incorporates the allegations set forth above in paragraph 11, subparagraphs a
28 through d, inclusive, as though set forth fully.

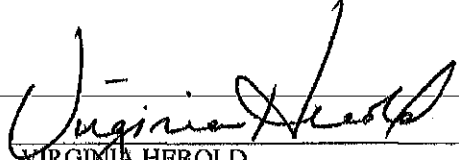
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PRAYER

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

1. Revoking or suspending Pharmacy Technician Registration No. TCH 122550 , issued to Nicholas Joshua Franco;
2. Ordering Nicholas Joshua Franco to pay the Board the reasonable costs of the investigation and enforcement of this case, pursuant to section 125.3; and
3. Taking such other and further action as deemed necessary and proper.

DATED: 2/12/14


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

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2
3 **BEFORE THE**
4 **BOARD OF PHARMACY**
5 **DEPARTMENT OF CONSUMER AFFAIRS**
6 **STATE OF CALIFORNIA**

7 **NICHOLAS JOSHUA FRANCO**
8 17350 Temple Ave #26
9 La Puente, California 91744

10 c/o California Correctional Institution
11 Inmate Registration #AN9026
12 P O BOX 1031
13 Tehachapi, California 93581

14 Pharmacy Technician License No. TCH 122550

15 Respondent

Case No. 4853

**NOTICE OF AUTOMATIC
SUSPENSION OF LICENSE
(Bus. & Prof. Code, § 4311 subd. (a).)**

16 TO: NICHOLAS JOSHUA FRANCO

17 **YOUR PHARMACY TECHNICIAN LICENSE HAS BEEN SUSPENDED.**

18 **NOTICE IS HEREBY GIVEN THAT YOUR LICENSE TO WORK AS A PHARMACY**
19 **TECHNICIAN IN THE STATE OF CALIFORNIA HAS BEEN AUTOMATICALLY SUSPENDED,**
20 **PURSUANT TO CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 4311,**
21 **SUBDIVISION (A), DUE TO YOUR INCARCERATION ON OR ABOUT APRIL 4, 2013, FOR**
22 **YOUR CONVICTION IN VIOLATION OF PENAL CODE SECTION 25400, SUBDIVISION (A)(2),**
23 **(HAVING A CONCEALED FIREARM ON HIS PERSON), A FELONY, IN CASE NUMBER**
24 **KA099761, IN LOS ANGELES COUNTY SUPERIOR COURT.**

25 The suspension will remain in effect for the duration of your incarceration. The information
26 received by the Board indicates a period of incarceration of three years. Accordingly, in the absence of
27 further information, your license will be suspended until at least April 4, 2016. If the period of
28

1 incarceration is longer or shorter than three years, or has a different start or end date than stated in this
2 Notice, it is your responsibility to provide that information to the Board along with any and all
3 supporting documentation. Where appropriate, certified copies of court documents may be required.
4 The suspension will remain in effect until a final decision on the accusation is rendered thereon.

5 **UNLESS OR UNTIL THIS SUSPENSION IS LIFTED YOU MAY**
6 **NOT WORK UNDER YOUR PHARMACY TECHNICIAN LICENSE.**

7 You have a right at this time to request a hearing under California Business and Professions
8 Code section 4311, subdivision (a) to contest the automatic suspension. The hearing on the automatic
9 suspension shall be limited to whether you are presently incarcerated pursuant to a felony conviction.

10 The request for hearing may be made by delivering, mailing or transmitting by facsimile one of
11 the enclosed forms entitled, "Request for Hearing" to:

12 Virginia K. Herold, Executive Officer
13 State Board of Pharmacy
14 1625 N. Market Blvd, Suite N219
15 Sacramento, CA 95834
16 FAX: (916) 574-8618

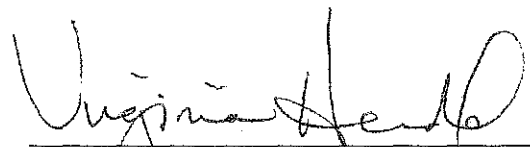
17 **ANY REQUEST FOR A HEARING MUST BE RECEIVED BY THE BOARD WITHIN**
18 **FIFTEEN (15) DAYS FOLLOWING RECEIPT OF THIS NOTICE**

19 If the Board receives a request for hearing within fifteen (15) days following receipt of this
20 Notice, a hearing will be held pursuant to the provisions of California Business and Professions Code
21 section 4311 and the California Administrative Procedure Act [Government Code section 11500 et seq.].

22 A copy of California Business and Professions Code section 4311 is enclosed.

23 You may, but need not, be represented by counsel (at your own expense) at any or all stages of
24 any proceeding brought against your license by the State Board of Pharmacy.

25 Dated: January 17, 2014

26 

27 VIRGINIA K. HEROLD, Executive Officer
28 State Board of Pharmacy
Department of Consumer Affairs
State of California