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

In the Matter of the Statement of Issues
Against:
JOSEPH JAMES BOITANO

Respondent.

Case No. 4373
OAH No. 2013031017
DEFAULT DECISION AND ORDER
[Gov. Code, § 11520]

FINDINGS OF FACT

1. On or about November 19, 2012, Complainant Virginia Herold, in her official capacity as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs, filed Statement of Issues No. 4373 against Joseph James Boitano (Respondent) before the Board of Pharmacy.
2. On or about November 29, 2011, Respondent filed an application dated November 21, 2011, with the Board of Pharmacy to obtain a Pharmacy Technician Registration.
3. On or about May 7, 2012, the Board issued a letter denying Respondent's application for a Pharmacy Technician Registration. On or about June 27, 2012, Respondent appealed the Board's denial of his application and requested a hearing.
4. On or about December 6, 2012, an employee of the Department of Justice, served by Certified and First Class Mail a copy of the Statement of Issues No. 4373, Statement to

1 Respondent, Notice of Defense, Request for Discovery, and Government Code sections 11507.5,
2 11507.6, and 11507.7 to Respondent's address on the application form. A copy of the Statement
3 of Issues is attached as exhibit A, and is incorporated herein by reference.

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

6 6. On or about June 27, 2012, Respondent appealed the denial of his application and
7 requested a hearing in this action. A Notice of Hearing was served by mail at Respondent's
8 address on the application and it informed him that an administrative hearing in this matter was
9 scheduled for November 18, 2013. Respondent failed to appear at that hearing.

10 7. California Government Code section 11520 states, in pertinent part:

11 (a) If the respondent either fails to file a notice of defense or to appear at the
12 hearing, the agency may take action based upon the respondent's express admissions
13 or upon other evidence and affidavits may be used as evidence without any notice to
14 respondent; and where the burden of proof is on the respondent to establish that the
15 respondent is entitled to the agency action sought, the agency may act without taking
16 evidence.

17 8. Pursuant to its authority under Government Code section 11520, the Board finds
18 Respondent is in default. The Board will take action without further hearing based upon the
19 allegation set forth in the Statement of Issues, excluding paragraph 8, subsection b, and
20 Respondent's failure to establish entitlement to issuance of a license.

21 DETERMINATION OF ISSUES

22 1. Based on the foregoing findings of fact, Respondent Joseph James Boitano has
23 subjected his application for a Pharmacy Technician Registration to denial.

24 2. Service of Statement of Issues No. 4373 and related documents was proper and in
25 accordance with the law.

26 3. The agency has jurisdiction to adjudicate this case by default.

27 4. The Board of Pharmacy is authorized to deny Respondent's application for licensure
28 based upon the following violations alleged in the Statement of Issues:

a. Business and Professions Code section 43041, subsection (1) and 480,
subsection (a)(1)- criminal conviction;

Exhibit A

Statement of Issues No. 4373

1 KAMALA D. HARRIS
Attorney General of California
2 JANICE K. LACHEMAN
Supervising Deputy Attorney General
3 ANAHITA S. CRAWFORD
Deputy Attorney General
4 State Bar No. 209545
1300 I Street, Suite 125
5 P.O. Box 944255
Sacramento, CA 94244-2550
6 Telephone: (916) 322-8311
Facsimile: (916) 327-8643
7 *Attorneys for Complainant*

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

12 In the Matter of the Statement of Issues Against: Case No. 4373

13 **JOSEPH JAMES BOITANO**

14 Respondent. **STATEMENT OF ISSUES**

15
16 Complainant alleges:

17 **PARTIES**

18 1. Virginia Herold (Complainant) brings this Statement of Issues solely in her official
19 capacity as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.

20 2. On or about November 29, 2011, the Board of Pharmacy, Department of Consumer
21 Affairs received an application for a Pharmacy Technician registration from Joseph James
22 Boitano (Respondent). On or about November 21, 2011, Joseph James Boitano certified under
23 penalty of perjury to the truthfulness of all statements, answers, and representations in the
24 application. The Board denied the application on May 7, 2012.

25 **JURISDICTION**

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

1 4. Section 4300 of the Code states:

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

3 ...

4 (c) The board may refuse a license to any applicant guilty of
5 unprofessional conduct. The board may, in its sole discretion, issue a probationary
6 license to any applicant for a license who is guilty of unprofessional conduct and who
7 has met all other requirements for licensure. . . .

8 **STATUTORY PROVISIONS**

9 5. Section 4301 of the Code states:

10 The board shall take action against any holder of a license who is guilty
11 of 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 ...

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

17 ...

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

6. Section 480 of the Code states:

(a) A board may deny a license regulated by this code on the grounds that
the applicant has one of the following:

(1) Been convicted of a crime. A conviction within the meaning of this
section means a plea or verdict of guilty or a conviction following a plea of nolo
contendere. Any action that a board is permitted to take following the establishment

1 of a conviction may be taken when the time for appeal has elapsed, or the judgment
2 of conviction has been affirmed on appeal, or when an order granting probation is
3 made suspending the imposition of sentence, irrespective of a subsequent order under
4 the provisions of Section 1203.4 of the Penal Code.

5 (3) (A) Done any act that if done by a licentiate of the business or
6 profession in question, would be grounds for suspension or revocation of license.

7 (B) The board may deny a license pursuant to this subdivision only if the
8 crime or act is substantially related to the qualifications, functions, or duties of the
9 business or profession for which application is made.

10 (b) Notwithstanding any other provision of this code, no person shall be
11 denied a license solely on the basis that he or she has been convicted of a felony if he
12 or she has obtained a certificate of rehabilitation under Chapter 3.5 (commencing
13 with Section 4852.01) of Title 6 of Part 3 of the Penal Code or that he or she has been
14 convicted of a misdemeanor if he or she has met all applicable requirements of the
15 criteria of rehabilitation developed by the board to evaluate the rehabilitation of a
16 person when considering the denial of a license under subdivision (a) of Section 482.

17 7. Section 4060 of the Code states:

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

FIRST CAUSE FOR DENIAL OF APPLICATION

(Criminal Conviction)

8. Respondent's application is subject to denial for unprofessional conduct under section
4300, subsection (c) as defined in section 4301, subsection (l) and 480, subsection (a)(1) in that
Respondent has the following convictions:

a. On or about March 10, 2010, in a criminal proceeding entitled *People of the State of
California vs. Joseph J. Bottano* in Amador County Superior Court, Case Number 08CR14098,
Respondent was convicted by his plea of guilty for violating Vehicle Code Section 23222(b)

1 (driving while in possession of marijuana), a misdemeanor. On July 10, 2008, Respondent was
2 granted Deferred Entry of Judgment for a period of 18 months. On or about March 10, 2010,
3 Respondent was sentenced due to non-compliance with his Deferred Entry of Judgment program,
4 including failing to pay fines and fees and failing to complete a drug counseling program.
5 Respondent's driver's license was suspended for 12 months and he was ordered to pay fines and
6 fees. The circumstances of the crime were as follows: On or about April 11, 2008, Respondent
7 was pulled over by Jackson Police Department for lack of registration tabs on his license plate.
8 The officer smelled an odor of marijuana and discovered approximately 4 grams of marijuana in
9 the front seat. Respondent was cited and released.

10 b. On July 26, 2010, in a criminal proceeding entitled *People of the State of California*
11 *vs. Joseph J. Boltano* in Alpine County Superior Court, Case Number A100538, Respondent
12 plead Guilty¹ to violating Health and Safety Code section 11377(a), possession of a controlled
13 substance, to wit: ecstasy, a substance containing methamphetamine, a felony. The circumstances
14 of the crime are as follows: On or about March 24, 2010, a confidential informant with the
15 Alpine County Sheriff's Office purchased ecstasy pills from Respondent.

16 **SECOND CAUSE FOR DENIAL OF APPLICATION**

17 **(Acts Done by Licentiate)**

18 9. Respondent's application is subject to denial under section 480, subsection (a)(3)(A)
19 for violation of section 4301, subsection (j) in that Respondent violated Health and Safety Code
20 section 11377(a), and Business and Professions Code section 4060, statutes regulating controlled
21 substances, as more fully set forth in paragraph 8, above.

22 **PRAYER**

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

25 1. Denying the application of Joseph James Boitano for a Pharmacy Technician
26 registration;

27 _____
28 ¹ Respondent's court conviction was subsequently dismissed pursuant to Proposition 36.

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2. Taking such other and further action as deemed necessary and proper.

DATED: 11/19/12



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

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