

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

In the Matter of the Accusation Against:

JORGE ANTONIO ARIZMENDI
PENALOZA,

Pharmacy Technician Registration
No. TCH 117176,

Respondent.

Case No. 5053

OAH No. 2015020341

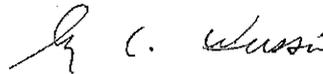
DECISION AND ORDER

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 June 19, 2015.

It is so ORDERED on May 20, 2015.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

STAN C. WEISSER
Board President

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PROPOSED DECISION

This matter was heard on April 1, 2015, before Susan J. Boyle, Administrative Law Judge, Office of Administrative Hearings, in San Diego, California.

Lauro A. Paredes, Deputy Attorney General, Department of Justice, represented complainant Virginia Herold, Executive Officer, Board of Pharmacy, Department of Consumer Affairs, State of California.

Respondent Jorge Antonio Arizmendi Penaloza represented himself.

The matter was submitted on April 1, 2015.

FACTUAL FINDINGS

1. On January 5, 2013, the Board of Pharmacy issued Pharmacy Technician License Number TCH 117176 to respondent. The license will expire on September 30, 2015, unless renewed.

2. On November 15, 2014, complainant signed the Accusation in Case No. 5053 in her official capacity as the board's Executive Officer. The Accusation sought to revoke or suspend respondent's pharmacy technician license based on allegations that respondent was convicted of a crime that is substantially related to the qualifications, duties, and functions of a pharmacy technician. The Accusation also sought the recovery of reasonable costs pursuant to Business and Professions Code section 125.3.

3. Respondent timely filed a Notice of Defense and requested a hearing.

July 18, 2014, Conviction for Harboring or Concealing a Felon

4. On September 15, 2012, a Riverside County Sheriff's Deputy was dispatched to a residence in Moreno Valley to investigate a claim of animal abuse.¹ A witness told the responding deputy that she observed a "white male . . . accompanied by a white female" shoot two dogs. The witness said she then saw the male and female go through a fence and head toward a group of homes. She directed the deputy to the home she believed the man and woman entered.

5. Additional Riverside County Sheriff's Deputies responded to the scene. They found two pit-bulls that had been shot and killed. The deputies saw a trail of blood leading to an opening in a fence and into the backyard of a residence on Ashwood Drive. The deputies followed the trail of blood and observed that it continued from the opening in the fence to a sliding door at the back of the residence. The deputies could see a bloody handprint on a water container inside the home and another trail of blood leading to the front door. They found a trail of blood going from the front door to the driveway. The sliding glass door was unlocked. The deputies opened the door, announced their presence, and entered the home. They searched throughout the home looking for anyone who might be injured and in need of help.

6. During their search, the deputies found four marijuana plants in an upstairs bedroom; a ten gallon plastic bin that appeared to contain marijuana in the bottom; ballast lights set up with plastic bins underneath; a large safe; a heat sealing machine; and scales.² The deputies concluded that the home was being used as a marijuana grow house.

7. The sheriff's deputies learned that a woman had been taken to Riverside County Regional Medical Center with serious injuries she received after being attacked by three dogs. When the deputies questioned the woman (S), she told them that the dogs attacked her when she was walking behind her house with her "boyfriend," whom she identified as respondent. She said respondent saw her being attacked, ran back into the house, grabbed a gun, and shot two of the dogs to get them off of her. S refused to say who had transported her to the hospital and refused to answer any questions about the marijuana

¹ Law enforcement reports were received under *Lake v. Reed* (1997) 16 Cal.4th 448. *Lake v. Reed* held that portions of a law enforcement officer's report that contain the officer's observations or a party's admissions are admissible in an administrative proceeding as exceptions to the hearsay rule and can support a finding of fact; however, the remaining hearsay statements cannot support a factual finding, even though they may be used to supplement or explain non-hearsay evidence.

² A later report stated that deputies also saw "30 hydroponic lights hanging from the ceilings with about 15 ten gallon buckets filled with water and suspected marijuana leaves."

in the home; however, she did say respondent had proper documentation to have the marijuana.

8. A deputy sheriff contacted respondent and obtained his statement. Respondent told the deputy that he was with S "behind their residence" when three dogs attacked S. Respondent ran into the house, grabbed a shotgun, and shot two of the dogs. He said he picked S up and that he and a friend, whom respondent refused to identify, transported S to the hospital. Respondent told the deputy that he was so frightened after the attack that he did not know what to do, so he left the hospital.

9. A few days later, respondent contacted the Moreno Valley Police Department and said he wanted to speak with a police officer about the marijuana found inside his house. Respondent went to the police station and gave a statement. According to the police report, respondent admitted that all of the marijuana inside of the house was his and that he had been selling marijuana from that house for the past year and a half. Respondent told the police that he went on-line to learn how to cultivate marijuana; he usually grew 30 plants at a time; he harvested marijuana every two to three months; he made between \$3,000 and \$4,000 the prior year by selling marijuana to individuals with or without medical marijuana cards; he gave marijuana to S and another friend; he knew S and the friend did not possess medical marijuana cards; and S and the friend helped him sell marijuana. Respondent also told the police that there should be about two pounds of marijuana and around \$1,000 to \$1,500 inside "his safe" in the house.

Respondent said that he "shot the pit bulls with [my] shotgun and put the shotgun back inside [my] safe." He told the police that S was his girlfriend and that she had been living with him at the Ashwood Drive home for the past seven or eight months.

10. Respondent permitted the police to search "his residence" and remove items related to marijuana growing, packaging and selling. Police confiscated 28 pounds of marijuana from the house. Inside the safe, which was unlocked, police found a shotgun, two pounds of marijuana, and cash. When he learned that 28 pounds of marijuana had been found in the house, respondent modified his statement and told police that, other than the two pounds of marijuana in the safe, the marijuana seized from inside the house did not belong to him, and he did not know why the marijuana was inside his house.

The police who conducted the search of the home also found evidence that respondent was manufacturing hashish from marijuana. When confronted, respondent told police that he manufactured hashish every four to five months and had done so approximately four times. Respondent said S was aware of his marijuana processing and sales operation, but she did not participate in it.

11. After he was charged with several drug offenses and was being readied for transport to a detention center, respondent recanted and told the police that none of the marijuana inside of the Ashwood Drive house was his and that he did not live there.

12. On July 18, 2014, in the Riverside County Superior Court, in case number RIF1206985, as part of a plea bargain, respondent pled guilty to, and was convicted of, one misdemeanor count of being an accessory to a felony by harboring, concealing or aiding a person who had committed a felony with the intent that the individual avoid or escape from arrest, conviction or punishment, and having knowledge that the person had committed, or been charge with, or convicted of, a felony, in violation of Penal Code section 32. In exchange for his plea of guilty, the court placed respondent on three years' summary probation on terms and conditions that required respondent to pay fines and fees in the amount of \$734 and serve 90 days in custody, with respondent being eligible to serve 87 days in the work release program with three days credit for time served.

Evidence in Mitigation and of Rehabilitation

RESPONDENT'S TESTIMONY

13. Respondent is 48 years old. He has a bachelor's degree in communications and, at one time, was on general assignment for a newspaper. In 2012, respondent was employed as a security guard. After he was charged with cultivating, processing and possessing marijuana, respondent was placed on administrative leave. He did not work for two years after that; instead, he attended community college classes with the goal of becoming a nurse. He currently holds a massage therapist certification. Although he obtained his pharmacy technician's license in January 2012, respondent was never employed in a pharmacy. He requested a hearing in this matter so he would have a clear record when he applied for licensure as a nurse.

Respondent is currently employed as a security guard. He has a security guard registration, a baton permit and a chemical spray permit. He does not have a firearm permit.

14. Respondent stated that, when he was 13 years old, his friend got into a fight after using drugs and alcohol and died in respondent's presence. Respondent professed that, as a result of this experience, he does not use drugs and is afraid to take them.

15. Respondent's testimony concerning the "facts" underlying his conviction was irreconcilable with the statements he gave the police following the pit bull attack. At the hearing, respondent testified that he did not participate in the marijuana growing, packaging and selling activities that were conducted in the Ashwood Drive house. He denied that he processed hashish from marijuana. He claimed that he did not live at the Ashwood Drive house when the marijuana operation was being conducted. He denied S was his girlfriend, that he shot the pit bulls, and that he took S to the hospital. Respondent argued that the police had no proof that he violated any law relating to the cultivation or sale of marijuana. Respondent's testimony in this regard is completely at odds with the detailed statements he provided to the police about his involvement in the marijuana operation.

16. Respondent testified that he lived at the Ashwood Drive house for just two weeks in 2010 even though the lease and utilities for the property remained in his name. He

said he left the home after two weeks because he had unresolvable personal conflicts with his roommate, who had been his friend before they began living together. Respondent stated that his roommate directed frequent racial insults towards him, told him he should be living in Mexico, and said he hated respondent's accent. Respondent testified that, because of his roommate's harassment, "It was hell to live in that place." Despite having left the house in 2010, respondent never changed the lease or took the utilities out of his name. He claimed he made one telephone call to his former roommate in the summer of 2012, a month or two before the pit bull attack, to ask the roommate to change the lease into the roommate's name.

Respondent testified that he had no other contact with his roommate after he left the home, with the exception that the roommate telephoned respondent in February 2013 after the roommate was arrested for an unrelated matter and was confined to a detention center. Respondent went to the detention center to ask his former roommate why he was arrested and about the condition of the Ashwood Drive house.³

17. On August 31, 2012, less than one month before the pit bull attack, respondent obtained two letters from William S. Eidelman, M.D., confirming that respondent was under Dr. Eidelman's medical care; that respondent told Dr. Eidelman that "cannabis relieves his medical symptoms;" and that Dr. Eidelman recommended and approved of respondent's use of marijuana under the Compassionate Use Act. Dr. Eidelman further wrote that respondent "chooses to use cannabis/marijuana therapeutically" and that he would continue to monitor respondent's condition. One of the letters authorized respondent to "grow up to 99 plants and possess up to 6 pounds of dried cannabis flowers for his own personal medical use." Each of the letters was valid for one year. Each letter received in evidence contained an original signature and was printed on the reverse side of excerpts from the Riverside Municipal Code.

18. In 2012, respondent was employed in Temecula Town Center as a security guard. On September 17, 2012, two days after the pit bull attack, a Moreno Valley police officer telephoned respondent at work and told him that marijuana had been found at the Ashwood Drive residence. Respondent testified that he had no idea what was going on, but he agreed to meet with the police.

When respondent met with the police, he admitted to them that he was involved in all of the activities that were going on in the house, and he explained why he shot the two pit bulls. Respondent's admissions, as summarized above, were described in detail in the police report.

³ This testimony is all the more inconsistent as his visit to the detention center occurred five months after the police had searched the house and after respondent was charged with being a participant in the marijuana operation that he implied was being conducted by his former roommate.

At the administrative hearing, respondent admitted that he told the police each fact they attributed to him in the police report. Nonetheless, and despite those admissions, at the hearing he adamantly denied that he had any involvement in, or knowledge of,⁴ the marijuana cultivation and hashish manufacture going on in the Ashwood Drive house. He also denied any involvement in the pit bull incident. Specifically, he denied that he shot the pit bulls, claiming that he had never used a gun in his life.⁵ He denied that S was his girlfriend and stated that he does not have, and did not have, a girlfriend. He asserted, instead, that it was his "friend's girlfriend who was bitten by three pit bulls." He denied taking S to the hospital. He stated that nothing inside the Ashwood Drive house belonged to him, including the safe, and that he did not know what was inside the safe. He denied that he made hashish from marijuana.

Respondent testified that he told the police that he was involved in the marijuana operation because Dr. Eidelman's letters authorized him to have 99 plants and six pounds of marijuana. He felt Dr. Eidelman's authorization permitted him to engage in whatever activities were taking place in the house and to possess at least six pounds of marijuana. Therefore, respondent reasoned, he could admit to everything the police asked about without any criminal repercussions.

Respondent's explanation and his conduct were inconsistent with the actions of an innocent person and with many other parts of his testimony. Additionally his testimony ignored the factual detail he provided to the police and did not explain why he was able to tell the police about certain facts that could be known only by an individual who was involved in the marijuana operation.⁶ Respondent's testimony was not logical, credible, or trustworthy.

Possibly the most implausible part of respondent's testimony was his explanation for the reason he obtained the medical marijuana recommendation letters from Dr. Eidelman. Respondent testified that the only reason he obtained the recommendation letters from Dr. Eidelman was to enable him to purchase marijuana so he could study it. Respondent steadfastly claimed that he "never used (cannabis/marijuana) in his life." He admitted that he falsely told Dr. Eidelman that "cannabis relieves his medical symptoms" only to obtain the recommendation letters. He cavalierly claimed that Dr. Eidelman included this statement in all his letters, even if the statement was not true, because it is the only way his "patients" could obtain a medical marijuana card. Respondent stated that he was interested in studying

⁴ Respondent later stated that he "heard" that his former roommate was growing marijuana, but he never went to the house to confirm what he heard.

⁵ Respondent later testified that he had used a gun at a shooting range in connection with his attempt to obtain a firearm permit.

⁶ Respondent's assertion that the police put the words in his mouth does not negate that he freely admitted to each fact allegedly suggested by the police. Respondent alluded to evidence that would prove this assertion, but he did not offer such proof.

the use of marijuana to help cancer and AIDS patients feel hungry. Respondent stated that he never actually obtained marijuana to study, but he applied to medical marijuana dispensaries to have them hire him as a grower. He testified that no dispensary hired him.

19. In an attempt to rehabilitate himself after he testified that he lied to Dr. Eidelman, respondent stated:

The way that I lied saying that I was using the marijuana, it helped me not to be convicted with those charges because I had to say that I was basically smoking the marijuana in order to use this recommendation. . . . In order not to be convicted of the charges for growing, selling and manufacturing marijuana, I had to admit to the court that I was using the marijuana, that I was smoking it and using it like edibles and stuff like that.

Upon examination on this issue, the following exchange occurred:

DEPUTY ATTORNEY GENERAL: You had serious charges against you that could potentially put you in jail for a long time, the cultivation, growing and manufacturing. Right?

RESPONDENT: Correct.

DEPUTY ATTORNEY GENERAL: And as part of your deal you admitted to the judge that you used marijuana. So far so true?

RESPONDENT: Yes, it is true.

DEPUTY ATTORNEY GENERAL: And you're saying now that what you told the judge was not true, but you needed to tell him that to not get more serious charges.

RESPONDENT: Correct.

DEPUTY ATTORNEY GENERAL: So the conviction, where . . . part of the condition is that you use marijuana, that's not true. You just said that to avoid the more serious charges.

RESPONDENT: Correct.

20. As relates to firearms allegations, respondent testified that he was aware that there was a shotgun and rifle in the Ashwood Drive house because he allowed them to be purchased in his name. He stated that, during the two weeks in "hell" that he lived in the house, his former roommate suggested that they "go and buy some guns and let's put them in

your name.” Respondent said he agreed to this request without asking why the roommate wanted the guns to be in respondent’s name. He said his roommate paid for the firearms. Respondent testified that he agreed to put the firearms in his name on the condition that the guns not be “used against anyone or to hurt anyone.” Respondent left the guns at the house when he moved out.

21. Respondent suggested that he could not be punished in any court because he is protected AB215 and AB420⁷ and the Compassionate Use Act. Proposition 215 was passed by California voters in 1996. It was codified by Health and Safety Code section 11362.5.

It is noted that section 11362.5, subdivision (b)(1)(A), specifically states that the purpose of the Compassionate Use Act of 1996 is to “ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes when that medical use is deemed appropriate” Subdivision (b)(2) states, “Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.”

RENE BARRAGAN

22. Rene Barragan has known respondent for four years. During that time, he has known respondent to live in Riverside, not in Moreno Valley. He has never seen respondent use marijuana and was “shocked” when he learned of the charges against respondent. He believes respondent is a dependable, hard-working person who accomplishes whatever he puts his mind to. He was aware that respondent has gone to school and has professional certificates.

Motion to Amend the Accusation

23. Following respondent’s testimony, complainant moved to amend the Accusation to add three causes for discipline.

Complainant sought to add a second cause for discipline on the grounds that respondent engaged in unprofessional conduct in violation of Business and Professions code section 4301, subdivisions (f) and (g). Subdivision (f) provides that it is unprofessional conduct for a licensee to commit acts of moral turpitude, dishonesty, fraud, deceit or corruption. Subdivision (g) provides that it is unprofessional conduct for a licensee to knowingly make or sign a document “that falsely represents the existence or nonexistence of a state of facts.” The basis for the requested amendment was respondent’s testimony that he permitted his name to be used as the legal owner of weapons that were purchased by his former roommate.

⁷ It is assumed respondent intended to reference Proposition 215 and Senate Bill 420, the California Medical Marijuana Program.

Complainant sought to add a third cause for discipline on the grounds that respondent violated Penal Code section 26500, which provides that “[n]o person shall sell, lease, or transfer firearms unless the person has been issued a license”

Complaint sought to add a fourth cause for discipline on the grounds that respondent engaged in unprofessional conduct in violation of Business and Professions Code section 4301, subdivision (g), when he presented Dr. Eidelman’s letters, which contained false statements, to the court.

Respondent opposed complainant’s motion to amend the Accusation. Based upon the late notice of the proposed additional charges and because the proposed additional charges were unrelated to the original cause for discipline, complainant’s motion to amend the Accusation was denied in the interests of justice.

Rebuttal Witness – Benedicto Rustia

24. Benedicto Rustia is an inspector who has been employed by the board for seven years. He has been a licensed pharmacist for 28 years. Prior to his employment with the board, Mr. Rustia worked in hospitals, worked for direct retail pharmacies, and owned his own pharmacy. Mr. Rustia has experience as a Pharmacist-in-Charge. He has worked with pharmacy technicians as a co-worker, manager, director and supervisor.

25. A pharmacy technician has access to controlled substances, narcotics and psychotropic medications that can be used for improper purposes, including use as recreational drugs. Pharmacy technicians help pharmacists fill prescriptions by inputting patient information, including insurance information; counting pills; affixing labels to medications; and pulling patient prescriptions. A pharmacy technician can order medications, pull medications from the shelves to fill prescriptions, or dispose of expired medications. A pharmacy technician may assist a pharmacist in conducting inventories, and a pharmacy technician could, by entering an erroneous count, divert medications for personal use or sale.

26. Although pharmacy technicians are supervised by a licensed pharmacist, the pharmacist cannot monitor every action taken by a pharmacy technician. The pharmacist and the board must have the highest confidence in the pharmacy technician’s honesty, trustworthiness and professional ethics.

27. Medications are categorized by schedules based on their potential for abuse. Marijuana is a Schedule I controlled substance, which signifies that it has a high potential for abuse.

28. Mr. Rustia was present during respondent’s testimony. He expressed great concern that respondent misled Dr. Eidelman by providing false statements in the course of a supposed medical consultation. Mr. Rustia was also concerned that respondent was involved

in a scheme to purchase firearms in his name when he was not the true owner of the weapons and relinquished control of them to another.

Costs

29. The board filed a Certification of Prosecution Costs seeking to recover costs of investigation and prosecution pursuant to Business and Professions Code section 125.3. The certification sought recovery of costs in the amount of \$4,990. The request for an award of \$4,990 for costs incurred in this matter is supported by the evidence and is reasonable.

LEGAL CONCLUSIONS

Burden of Proof

1. In a proceeding to revoke the license of a Pharmacy Technician, the clear and convincing evidence standard of proof applies. "Clear and convincing evidence" requires a high probability of the existence of the disputed fact, greater than proof by a preponderance of the evidence. Evidence of a charge is clear and convincing as long as there is a high probability that the charge is true. (*People v. Mabini* (2001) 92 Cal.App.4th 654, 662.)

Applicable Statutory and Regulatory Provisions

2. Business and Professions Code section 4300 provides, in part, that every license issued by the board may be disciplined by suspension, revocation and/or placing the license on probation.

3. Business and Professions Code section 4301 provides, in part, that the "board shall take action against any holder of a license who is guilty of unprofessional conduct"

Unprofessional conduct includes, but is not limited to:

[¶] . . . [¶]

((1) 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 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. . . .

4. California Code of Regulations, title 16, section 1769, subdivision (c), provides:

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. California Code of Regulations, title 16, section 1770 provides in part:

For the purpose of . . . suspension, or revocation of a personal . . . license pursuant to Division 1.5 (commencing with Section 475) of the Business and Professions Code, 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.

Respondent is not Permitted to Collaterally Attack His Conviction

6. In an administrative disciplinary proceeding, a licensee may not seek to impeach a prior criminal conviction by means of an inquiry into the circumstances

surrounding the offense. The conviction stands as conclusive evidence of guilt of the offense charged. A licensee is permitted to explain the circumstances surrounding the commission of a crime and to introduce evidence of extenuating circumstances by way of mitigation or explanation. (*Arneson v. Fox* (1980) 28 Cal.3d 440, 449.)

7. The circumstances surrounding the commission of a crime may be relevant to determining whether the crime is substantially related to the qualifications, functions, or duties of a licensee and the measure of discipline that should be imposed. A determination that a licensee's conviction justifies discipline requires a reasoned determination that the conduct was in fact substantially related to the licensee's fitness to engage in a profession. Licensing authorities do not have unfettered discretion to determine whether a given conviction is substantially related to the relevant professional qualifications. Licensing authorities are required to develop criteria to aid in making that determination. (*Robbins v. Davi* (2009) 175 Cal.App.4th 118, 124.)

8. Being an accessory to a felony is an offense that, to a substantial degree, evidences both a present and potential unfitness of an individual to hold employment as a licensed pharmacy technician. The elements of the offense involve knowledge of another's wrongdoing and an attempt to assist the other in avoiding arrest or conviction. In this matter, respondent not only admitted to the elements of that offense, he told the police he was actually involved in the offense at issue – the cultivation and sale of marijuana and the manufacture of hashish, and he told the police that he had shot the two pit bulls. The police officers' observations, coupled with respondent's admissions of guilt, provided all the facts necessary to convict him of several very serious penal code violations. His denial of any involvement in the marijuana operation came only when he was on his way to a detention center. The underlying circumstances surrounding respondent's conviction establish that respondent is unfit to hold a license as a pharmacy technician and that it would not be in the interest of public health, safety, or welfare to permit him to retain his license absent a showing of rehabilitation.

Disciplinary Guidelines

9. The Board of Pharmacy Disciplinary Guidelines, October 2007, provide that the board "serves the public by: protecting the health, safety, and welfare of the people of California with integrity and honesty"

10. The Guidelines provide that the following factors should be considered when determining the level of discipline to be imposed in a disciplinary case:

1. Actual or potential harm to the public.
2. Actual or potential harm to any consumer.
3. Prior disciplinary record, including level of compliance with disciplinary order(s).

4. Prior warning(s), including but not limited to citation(s) and fine(s), letter(s) of admonishment, and/or correction notice(s).
5. Number and/or variety of current violations.
6. Nature and severity of the act(s), offense(s) or crime(s) under consideration.
7. Aggravating evidence.
8. Mitigating evidence.
9. Rehabilitation evidence.
10. Compliance with terms of any criminal sentence, parole, or probation.
11. Overall criminal record.
12. If applicable, evidence of proceedings for case being set aside and dismissed pursuant to Section 1203.4 of the Penal Code.
13. Time passed since the act(s) or offense(s).
14. Whether the conduct was intentional or negligent, demonstrated incompetence, or, if the respondent is being held to account for conduct committed by another, the respondent had knowledge of or knowingly participated in such conduct.
15. Financial benefit to the respondent from the misconduct.

Evaluation

11. Cause exists to discipline respondent's pharmacy technician license because he was convicted of being an accessory to a felony, a crime that is substantially related to the qualifications, functions and duties of a pharmacy technician. Pharmacy technicians occupy positions that require trustworthiness, honesty, clear-headedness, and the exercise of impeccable judgment, particularly because they have access to confidential personal and financial information as well as highly regulated medications and devices.

To establish a nexus between misconduct and fitness to practice a profession, it is not necessary for the misconduct to have occurred in the actual practice of the profession; and,

patient harm is not required. The laws are designed to protect the public before a licensee harms any patient rather than after harm has occurred. (*Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 771-772.)

A preponderance of the evidence established that respondent's conviction was substantially related to the qualifications, functions and duties of a licensed technician.

Discipline Determination

12. The purpose of an administrative proceeding seeking the revocation or suspension of an occupational license or registration is not to punish the individual; the purpose is to protect the public from dishonest, immoral, disreputable or incompetent practitioners. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.)

The determination of whether respondent's license should be revoked or suspended includes an evaluation of the criteria set forth in the board's disciplinary Guidelines. The Guidelines may be applied as follows. The facts and circumstances surrounding respondent's July 18, 2014, conviction were intentional and serious, and they involved actual and potential harm to the public. He remains on probation and his conviction has not been expunged. He has never practiced as a licensed pharmacy technician and has no prior disciplinary record. He presented the testimony of one character witness who was shocked to hear of respondent's conviction. He denied any wrongdoing and presented little evidence in rehabilitation.

Rehabilitation is a state of mind, and the law looks with favor on rewarding with the opportunity to serve, one who has achieved reformation and regeneration. (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) The amount of evidence of rehabilitation required varies according to the seriousness of the misconduct. The mere expression of remorse does not demonstrate rehabilitation. A truer indication of rehabilitation will be presented if a petitioner can demonstrate by sustained conduct over an extended period that he or she is rehabilitated and fit to practice. (*In re Menna* (1995) 11 Cal.4th 975, 987, 991.)

An administrative agency may take into account a respondent's attitude and character as evidenced by the respondent's behavior and demeanor at a disciplinary hearing. A finding that a respondent was untruthful demonstrates neither understanding of wrongdoing nor remorse, and it provides solid support for an agency's decision to revoke a license. (*Landau v. Superior Court* (1988) 81 Cal.App.4th 191, 223.)

13. Respondent spun a tale that bore no indicia of truthfulness. He made it abundantly clear that he would tell, and has told, falsehoods, including those under oath, to escape punishment and benefit himself. Further, he proved that he either could not distinguish between the truth and a falsehood, or that he simply did not care which was which. He did not accept any responsibility for his conduct; he admitted he lied to obtain a

medical marijuana recommendation letter; and he admitted he lied to a criminal court judge when he entered his plea.

Respondent admitted in two interviews with the police that he shot the pit bulls that attacked S. He admitted having a romantic relationship with S. He admitted that he lived in the Ashwood Drive home. What respondent told the police they would find in the safe was precisely what they found there. Respondent provided detailed information about the marijuana cultivation, packaging, sale and processing of hashish operation that was being conducted out of the Ashwood Drive home. He described how much marijuana he cultivated and sold. He told the police that he manufactured hashish from marijuana. He then recanted these admissions to obtain a favorable plea bargain. He admitted that he did not tell the truth when he entered his plea, and the reason he lied to the criminal court was to gain the advantage of the plea bargain.

Respondent admitted he lied to Dr. Eidelman about having a medical condition that warranted obtaining a medical marijuana card. His far-fetched tale about wanting to obtain marijuana to conduct his own research was unbelievable.

Respondent testified that he moved from Ashwood Drive after only two weeks because his roommate was repugnant and a racist. Nonetheless, respondent failed for at least two years to take any action to remove his name from the lease or transfer the utility bills to someone else, even after he heard rumors that a marijuana operation was being conducted there. He allowed the loathsome roommate to purchase guns and put them in respondent's name. Further, respondent did not see fit to take those weapons when he left the premises, instead leaving them in the hands of his roommate.

Respondent proved that he was and is willing to ignore the truth and say anything to avoid the consequences of his misconduct. There was nothing in respondent's testimony that was credible. The possibility that respondent could obtain employment as a licensed pharmacy technician, with access to confidential patient information and controlled substances, is unacceptable. Only the outright revocation of respondent's license will protect the public.

Cost Recovery

14. Complainant is seeking recovery of the reasonable costs of investigation and prosecution in the amount of \$4,990. *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 held that a regulation imposing costs for investigation and enforcement under California Code of Regulations, title 16, section 317.5, which is similar to Business and Professions Code section 125.3, did not violate due process. But it was incumbent on the board in that case to exercise discretion to reduce or eliminate cost awards in a manner such that costs imposed did not "deter [licensees] with potentially meritorious claims or defenses from exercising their right to a hearing." The Supreme Court set forth four factors to consider in deciding whether to reduce or eliminate costs: (1) whether the licensee used the hearing process to obtain dismissal of other charges or a reduction in the severity of the

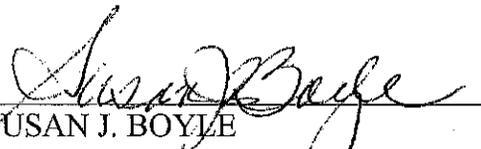
discipline imposed; (2) whether the licensee had a "subjective" good faith belief in the merits of his or her position; (3) whether the licensee raised a "colorable challenge" to the proposed discipline; and (4) whether the licensee had the financial ability to make payments. The reasoning of *Zuckerman* must be applied to Business and Professions Code section 125.3 since the language in the cost recovery regulation at issue in *Zuckerman* and section 125.3 is substantially the same.

Respondent failed to achieve a reduction in the severity of the discipline sought to be imposed and did not raise a colorable challenge to the proposed discipline. Respondent provided no evidence of inability to pay costs; he said only that it was not fair to seek costs from him. One of the bases upon which respondent claimed unfairness was that he was protected under the Compassionate Use Act. As discussed above, respondent is not protected under that Act. Respondent's assertion is without merit and represents yet another example of his attempt to avoid responsibility for his conduct. It is reasonable to require respondent to pay \$4,990 in costs. These costs shall be paid prior to respondent filing an application for reinstatement of his license.

ORDER

1. Pharmacy Technician Registration TCH 117176 issued to Jorge Antonio Arizmendi Penaloza is revoked.
2. Jorge Antonio Arizmendi Penaloza is ordered to pay costs to the board in the amount of \$4,990.00.

DATED: April 29, 2015


SUSAN J. BOYLE
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
12 In the Matter of the Accusation Against:
13 **JORGE ANTONIO ARIZMENDI**
PENALOZA
14 **P.O. Box 1295**
Riverside, CA 92502
15
16 **Pharmacy Technician Registration No. TCH**
117176
17 Respondent.

Case No. 5053
A C C U S A T I O N

18
19 Complainant alleges:

20 **PARTIES**

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

23 2. On or about January 5, 2012, the Board of Pharmacy issued Pharmacy Technician
24 Registration Number TCH 117176 to Jorge Antonio Arizmendi Penaloza (Respondent). The
25 Pharmacy Technician Registration was in full force and effect at all times relevant to the charges
26 brought herein and will expire on September 30, 2015, unless renewed.

27 ///
28 ///

1 **JURISDICTION**

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

5 4. Section 4300 of the Code states:

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

7 ...

8 5. Section 4300.1 of the Code states:

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

13 **STATUTORY PROVISIONS**

14 6. Section 477 of the Code states:

15 As used in this division:

16 (a) 'Board' includes 'bureau,' 'commission,' 'committee,' 'department,'
17 'division,' 'examining committee,' 'program,' and 'agency.'

18 (b) 'License' includes certificate, registration or other means to engage in
19 a business or profession regulated by this code.

20 7. Section 482 of the Code states:

21 Each board under the provisions of this code shall develop criteria to
22 evaluate the rehabilitation of a person when:

23 (a) Considering the denial of a license by the board under Section 480; or

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

25 8. Section 490 of the Code provides, in pertinent part, that a board may suspend or
26 revoke a license on the ground that the licensee has been convicted of a crime substantially
27 related to the qualifications, functions, or duties of the business or profession for which the
28 license was issued.

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9. Section 493 of the Code states:

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

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

10. Section 4301 of the Code states:

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

...

(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. 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.

REGULATORY PROVISIONS

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

....

1 (b) When considering the suspension or revocation of a facility or a personal
2 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:

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

4 (2) Total criminal record.

5 (3) The time that has elapsed since commission of the act(s) or offense(s).

6 (4) Whether the licensee has complied with all terms of parole, probation,
7 restitution or any other sanctions lawfully imposed against the licensee.

8 (5) Evidence, if any, of rehabilitation submitted by the licensee.

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

11 For the purpose of denial, suspension, or revocation of a personal or
12 facility license pursuant to Division 1.5 (commencing with Section 475) of the
13 Business and Professions Code, a crime or act shall be considered substantially
14 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.

15 **COST RECOVERY**

16 13. Section 125.3 of the Code provides, in pertinent part, that the Board may request the
17 administrative law judge to direct a licentiate found to have committed a violation or violations of
18 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
19 enforcement of the case, with failure of the licentiate to comply subjecting the license to not
20 being renewed or reinstated. If a case settles, recovery of investigation and enforcement costs
21 may be included in a stipulated settlement.

22 **FIRST CAUSE FOR DISCIPLINE**

23 **(July 18, 2014 Conviction for Concealing
24 and Aiding a Principal in a Felony)**

25 14. Respondent's Pharmacy Technician Registration is subject to discipline under Code
26 sections 490 and 4301 subdivisions (l) in that he was convicted of a crime that is substantially
27 related to the qualifications, duties, and functions of a Pharmacy Technician. The circumstances
28 are as follows:

1 a. On or about July 18, 2014, in a criminal proceeding entitled *People of the State*
2 *of California v. Jorge Antonio Arizmendi Penaloza*, in Riverside County Superior Court, Case
3 Number RIF1206985, Respondent entered a plea of guilty of violating Penal Code Section 32,
4 harboring or concealing a principal after the commission of a felony, a misdemeanor.
5 Respondent was also initially charged with violation of Health and Safety Code section 11358,
6 planting cultivating, harvesting, drying and processing marijuana along with violation of Health
7 and Safety Code section 11359, possession of marijuana for sale, however those charges were
8 dismissed as part of a plea agreement.

9 b. As a result of his conviction, Respondent was sentenced to 90 days in custody,
10 ordered to pay fines and placed on probation for three-years.

11 c. The facts that led to the conviction are that on or about September 15, 2012,
12 police entered Respondent's residence and found that it was set up as a "marijuana grow house."
13 A search of Respondent's home found 28 pounds of marijuana, grow lights, scales and other
14 marijuana paraphernalia. In addition to growing and selling marijuana, Respondent admitted to
15 police that he had been manufacturing marijuana into hashish¹.

16 **PRAYER**

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

19 1. Revoking or suspending Pharmacy Technician Registration Number TCH 117176,
20 issued to Jorge Antonio Arizmendi Penaloza;

21 2. Ordering Jorge Antonio Arizmendi Penaloza to pay the Board of Pharmacy the
22 reasonable costs of the investigation and enforcement of this case, pursuant to Business and
23 Professions Code section 125.3;

24 ///

25 ///

26 ///

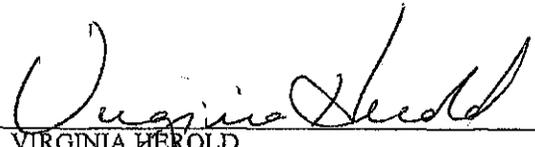
27 ¹ Hashish is a potent form of cannabis (marijuana) produced by collecting and
28 compressing trichomes, the most potent material from cannabis plants.

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

DATED:

11/15/14



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

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