



California State Board of Pharmacy
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BUSINESS, CONSUMER SERVICES AND HOUSING AGENCY
 DEPARTMENT OF CONSUMER AFFAIRS
 RECEIVED BY U.S. GOVERNOR EDMUND G. BROWN JR.
 BOARD OF PHARMACY

2016 JAN -6 AM 12:13

APPLICATION FOR VOLUNTARY SURRENDER OF PHARMACY TECHNICIAN LICENSE

PLEASE PRINT IN BLACK OR BLUE INK OR TYPE YOUR RESPONSES

| | |
|--|----------------------|
| Name: <u>Melissa Felardo</u> | Case No. <u>5148</u> |
| Address of Record: <u>1684 Decoto RD #313</u> <u>Union City CA 94587</u> | |

Pursuant to the terms and conditions of my probation with the California State Board of Pharmacy (Board) in Case No. 5148, I hereby request to surrender my pharmacy technician license, License No. Tec59902. The Board or its designee shall have the discretion whether to grant the request for surrender or take any other action it deems appropriate and reasonable. Upon formal acceptance of the surrender of the license, I will no longer be subject to the terms and conditions of probation. I understand that this surrender constitutes a record of discipline and shall become a part of my license history with the Board.

Upon the acceptance of the surrender, I shall relinquish my pharmacy technician license to the Board within ten (10) days of notification by the Board that the surrender is accepted. I understand that I may not reapply for any license, permit, or registration from the board for three (3) years from the effective date of the surrender. I further understand that I shall meet all requirements applicable to the license sought as of the date the application for that license is submitted to the Board.

PLEASE BE ADVISED THAT YOU ARE NOT RELIEVED OF THE REQUIREMENTS OF YOUR PROBATION UNLESS THE BOARD NOTIFIES YOU THAT YOUR REQUEST TO SURRENDER YOUR LICENSE HAS BEEN ACCEPTED.

[Signature]
 Applicant's Signature

1-5-16
 Date

[Signature]
 Executive Officer's Approval

1/5/16
 Date

All items on this application are mandatory in accordance with your probationary order and the Board's Disciplinary Guidelines as authorized by Title 16, California Code of Regulations section 1760. Failure to provide any of the requested information or providing unreadable information will result in the application being rejected as incomplete. The information provided on this form will be used to determine eligibility for surrender. The official responsible for information maintenance is the Executive Officer, telephone (916) 574-7900, 1625 N. Market Blvd., Suite N-219, Sacramento, CA 95834. The information you provide may also be disclosed in the following circumstances: (1) in response to a Public Records Act request; (2) to another government agency as required by state or federal law; or, (3) in response to a court or administrative order, a subpoena, or a search warrant. Each individual has the right to review the files or records maintained on them by our agency, unless the records are identified as confidential information and exempted by Section 1798.40 of the Civil Code.

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

In the Matter of the Accusation Against:

MELISSA M. FELARDO,
Also known as Melissa Felardo

Pharmacy Technician Registration
No. TCH 59902,

Respondent.

Case No. 5148

OAH No. 2015031287

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 December 4, 2015.

It is so ORDERED on November 4, 2015.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

Amy Gutierrez, Pharm.D.
Board President

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

In the Matter of the Accusation Against:

Case No. 5148

MELISSA M. FELARDO,
also known as Melissa Felardo,

OAH No. 2015031287

Pharmacy Technician Registration No.
TCH 59902,

ORDER CORRECTING PROPOSED
DECISION

Respondent.

On September 2, 2015, Administrative Law Judge Perry O. Johnson of the Office of Administrative Hearings issued a proposed decision in the above-captioned case. On September 23, 2015, Laura Freedman, attorney for the Board of Pharmacy, filed an application to correct the proposed decision. No opposition to the application was filed.

Probation Condition 16 on page 20 of the proposed decision states, "Respondent, at her own expense, shall participate in random testing, including but not limited to biological fluid testing (urine, blood), hair follicle testing, or other drug screening program as directed by the board or its designee. . . . At all times respondent shall fully cooperate with the board or its designee, and shall, when directed, submit to such tests and samples for the detection of narcotics, hypnotics, dangerous drugs or other controlled substances as the board or its designee may direct. . . ."

Probation Condition 16 should read, "Respondent, at her own expense, shall participate in random testing, including but not limited to biological fluid testing (urine, blood), breathalyzer, hair follicle testing, or other drug screening program as directed by the board or its designee. . . . At all times respondent shall fully cooperate with the board or its designee, and shall, when directed, submit to such tests and samples for the detection of alcoholic beverages, narcotics, hypnotics, dangerous drugs or other controlled substances as the board or its designee may direct. . . ." Correction of this error is authorized by law. (Cal. Code Regs., tit. 1, § 1048.)

GOOD CAUSE appearing, the following order is issued:

1. Probation Condition 16 on page 20 of the proposed decision is corrected to read "Respondent, at her own expense, shall participate in random testing, including but not

limited to biological fluid testing (urine, blood), breathalyzer, hair follicle testing, or other drug screening program as directed by the board or its designee. . . . At all times respondent shall fully cooperate with the board or its designee, and shall, when directed, submit to such tests and samples for the detection of alcoholic beverages, narcotics, hypnotics, dangerous drugs or other controlled substances as the board or its designee may direct. . . .”

2. A corrected proposed decision incorporating this change is attached to this order.

3. This order and the agency’s application (with attachments) are hereby made part of the record in this case.

DATED: September 30, 2015

DocuSigned by:
Cheryl R. Tompkin
0D1FF823682446D

CHERYL R. TOMPKIN
Presiding Administrative Law Judge
Office of Administrative Hearings

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

In the Matter of the Accusation Against:

MELISSA M. FELARDO,
also known as Melissa Felardo,

Pharmacy Technician Registration No.
TCH 59902,

Respondent.

Case No. 5148

OAH No. 2015031287

CORRECTED PROPOSED DECISION

Administrative Law Judge Perry O. Johnson, Office of Administrative Hearings, State of California (OAH), heard this matter on July 14, 2015, in Oakland, California.

Deputy Attorney General Gregory Tuss represented complainant Virginia Herold, Executive Officer, the Board of Pharmacy, Department of Consumer Affairs.

Attorney at Law Thomas Knutsen¹ represented respondent Melissa M. Felardo, who was present at the hearing

The record was held open in order to afford the parties the opportunity to file written closing arguments, and, if necessary, to file reply written arguments. On July 20, 2015, OAH received complainant's "Closing Argument," which was marked as exhibit "9," and received as argument. On August 15, 2015, OAH received respondent's "Closing Argument," which was marked as exhibit "B," and received as argument. Neither party filed a written reply brief.

On August 15, 2015, the parties were deemed to have submitted the matter for decision and the record was closed.

¹ Thomas Knutsen, Esq., is with the Knutsen Law Office, 39510 Paseo Padre Parkway, Suite 300, Fremont, CA 94538.

FACTUAL FINDINGS

1. On December 3, 2014, complainant Virginia Herold (complainant), in her official capacity as the Executive Officer of the Board of Pharmacy (the board), Department of Consumer Affairs, made and issued the Accusation against respondent Melissa F. Felardo, also known as Melissa Felardo (respondent).

At the hearing of this matter, the Accusation, at page 4, lines 25 to 26, was amended, under the authority of Government Code section 11507, to expunge from the pleading the phrase, "and completion of a driving under the influence program". The remaining sentence, therefore, reads: "The terms and conditions of probation included one day incarceration."

License Information

2. On December 15, 2004, the board issued Pharmacy Technician Registration No. TCH 59902 to respondent. The registration issued to respondent was in full force and effect at all times relevant to the matters raised in the Accusation. The registration will expire on August 31, 2016, unless renewed, surrendered, or revoked before that date.

Unprofessional Conduct – Record of A Criminal Conviction

3. On January 13, 2014, under Case No. 450439, in the Superior Court in and for the County of Alameda, on a plea of no contest, respondent was convicted of violating Vehicle Code sections 23103² (reckless driving-"dry reckless"), a misdemeanor.

4. The crime for which respondent was convicted on January 13, 2014, is an offense that is substantially related to the qualifications, functions, and duties of a pharmacy technician.

5. Respondent's conviction in January 2014 arose out of her arrest by a California Highway Patrol (CHP) officer on June 10, 2013, for drunk driving in violation of Vehicle Code section 23152, subdivision (b). (A plea bargain reduced, the severity of conviction of the offense for which respondent was arrested, and for which prosecution was commenced, to the lesser offense of reckless driving, under the single statutory provision that is referred to as "dry reckless.")

² Vehicle Code section 23103 is a reduced drunk driving charge. The conviction spares a person a DUI conviction record, and the conviction does not trigger an independent alcohol-related driver's license suspension. Unlike a "wet reckless" conviction under Vehicle Code sections 23103.5/23103, the dry reckless conviction is "not priorable," that is the conviction cannot be used to enhance a future DUI charge in a criminal proceeding.

Respondent's drunk driving arrest in June 2013 was preceded by a CHP officer stopping the vehicle driven by respondent because of the vehicle's nonfunctioning headlamp. But, upon interacting with respondent, the law enforcement officer detected the smell of alcoholic beverages coming from respondent. When respondent failed a field sobriety test, she was asked, nearly an hour after the traffic stop, to provide breath tests. The first test as administered by the CHP officer, at 12:49 a.m. on June 10, 2013, showed respondent to have a blood alcohol level of 0.10 percent. And, a second breath test given by respondent at 12:51 a.m. showed a BAC of 0.11 percent. Respondent was arrested for the offense of driving under the influence of alcoholic beverage with a blood alcohol content level of more than 0.08 percent. She was handcuffed, transported to a jail, and spent the night in confinement.

6. As a result of the January 2014 conviction, the superior court entered a conditional sentence and placed respondent on court (informal) probation for three years. The terms and conditions of probation included a one-day jail term; but, the court granted respondent credit for time served. The court commanded respondent not to refuse a chemical test if asked to do so by a law enforcement officer, and "not to drive with measurable alcohol in system." In addition to orders to obey all laws and to maintain regular employment, respondent was directed to pay court fines and fees of \$380. (At the superior court proceeding on January 13, 2014, respondent was represented by the lawyer appearing in this matter, Mr. Thomas Knutsen.)

Unprofessional Conduct – Self-Administration of Alcoholic Beverage to be Dangerous or Injurious or Injurious to Oneself or Others

7. On June 10, 2013, respondent operated a motor vehicle upon a public access road to a freeway when a law enforcement officer detected the smell of alcohol coming from respondent as the officer talked with respondent during a traffic stop. And as the CHP officer interacted with her, respondent exhibited red/glassy looking eyes, and she spoke with slurred speech. At the site of the arrest for her drunk driving, respondent could not pass a field sobriety test. Because of her intoxicated condition, the CHP officer was compelled to arrest respondent, place her in handcuffs, and transport her to jail, where she was confined for the night. And, before her arrest, respondent made an admission to the CHP officer that she had consumed one-half bottle of red wine over the hours before being stopped by the law enforcement officer.

Respondent's act of drunk driving on June 10, 2013, involved the self-administration of alcoholic beverage to a point that her condition was potentially injurious to herself or other drivers and passengers traveling in vehicles that night.

Matters in Aggravation

8. On April 4, 2011, the board issued respondent Citation No. CI 2008 40222 for unprofessional conduct due to her use of alcoholic beverages to an extent, or in a manner, as to be dangerous or injurious to herself or the public.

The citation was issued under the authority of Business and Professions Code section 4301, subdivision (h). The underlying facts, which resulted in the citation, pertain to respondent's acts on June 13, 2010, when she was arrested for violation of Penal Code section 594, subdivision (a)(3) (vandalism - destroying property), and Penal Code section 148, subdivision (a)(1) (resisting, delaying or obstructing a peace officer in the discharge of any duty of his office or employment). The underlying facts for respondent's conduct in June 2010 involved her consumption of alcoholic beverages and entailed her fighting with family members so that police officers were summoned, and then respondent, after being apprehended, caused the breaking of a windshield of a police patrol vehicle.

Respondent paid the \$500 citation fine for Citation No. CI 2008 40222, and the board closed the matter on May 9, 2011.

Matters in Mitigation and Respondent's Background

9. Respondent is approximately 30 years old and she appears to be a mature individual.

10. Respondent has been married for 13 years.

11. Respondent has been a board registered pharmacy technician for approximately 11 years. Other than the citation described above in Factual Finding 8, respondent has no record of disciplinary action or any allegation against her for substantiated unprofessional conduct on her part.

Matters in Rehabilitation

12. After her January 2014 conviction, respondent enrolled in a women's facility that had been recommended to her by Kaiser Permanente Medical Center (Kaiser). She participated in the women's facility for a 90-day in-patient treatment program. Also, she then was enrolled for four months in an "after-care" program as administrated by Kaiser. And, for an unknown period of time, she received one-to-one therapy with a psychiatrist. Further, respondent has been involved with "self-help groups" in the context of attending religious activities at her church.

For a short period of time, respondent participated in Alcoholics Anonymous (AA) counseling while she was involved in the Kaiser after-care program. (But, the record for the hearing is devoid of documents establishing the actual month(s) of her engagement with AA.)

13. Respondent poignantly proclaimed at the hearing of this matter that at this point in time she has no impairment by reason of excessive use of alcoholic beverages. (However, she provided no competent, corroborating proof of her claim of absolute sobriety.)

14. Respondent asserted at the hearing that in recent years she has received a diagnosis of Post Traumatic Stress Disorder. Respondent poignantly claimed that she is receiving on-going therapy for the PTSD condition. (But, respondent offered no documentary evidence regarding the ongoing psychiatric treatment.)

15. Currently, Seton Medical Center employs respondent. Although she holds the title of pharmacy technician, she actually performs duties and functions in the medical center's Information Technology Department. Respondent's work entails inputting into the medical center's database various medication prescriptions, which are written by physicians, for processing and dispensing by pharmacists. As of the date of the hearing, respondent had worked at Seton Medical Center "a little over a year."

16. Previous to working at Seton Medical Center, respondent had been employed for ten years at the Alameda County Health System's Medical Center that was once known as Highland Hospital, which is located in Oakland.

17. Respondent has the respect of responsible persons in the pharmacy profession and other health care professionals. At the hearing of this matter, she offered three letters³ from health care professionals. The respective messages indicate that the letter writers have worked with respondent over periods of time. The letters proclaim respondent to be a good practitioner who has worked ethically and compassionately and as a worker who has been "providing excellent customer care" as a pharmacy technician. Each of letters depicts respondent as being very professional in her work.

Factual Weakness in Respondent's Presentation of Efforts Toward Rehabilitation

18. Despite respondent's poignant testimony regarding the organized counseling and therapy programs as received by her for an alcoholic beverage abuse disposition (that is, a 90-day residential program, a several-month-long outpatient set of behavior modification programs, and on-going psychiatric therapy for post-traumatic stress disorder and other emotional ailment), respondent presented no competent documentary evidence to corroborate her claims.

19. Respondent compellingly asserted that she has paid all costs associated with the criminal conviction's probation order. But, she provided no documentary proof to support her assertion.

³ A letter, dated January 28, 2015, by Yvonne Vierra, Patient Assistant Coordinator, Alameda Health System; a letter, dated February 5, 2015, by Theresa Ivory; and, a letter, dated February 6, 2015, by Thao Nguyen.

Other Matters

20. Respondent called no witness to the hearing of this matter. No person appeared on respondent's behalf to offer evidence pertaining to respondent's reputation in her community for sobriety and integrity. No person came to the hearing of this matter to describe respondent's attitude towards her past criminal action that led to the criminal court proceeding mentioned above.

21. Respondent presented no competent evidence that she has been involved or participated in significant or conscientious community, religious or privately-sponsored programs designed for social benefit or to ameliorate social problems.

Matters that Suggest Respondent Is Not Fully Rehabilitated.

22. Respondent has been on criminal probation for only one and one-half years. The period of the superior court-imposed probation will not expire before January 2017, unless respondent files a petition for early termination of probation.

23. Respondent presented no documentary proof establishing that she has an ongoing commitment to counseling or behavior modification treatment in the way of services through Alcoholics Anonymous.

24. During the hearing of this matter, respondent refused to accept responsibility for her conduct that led to her recent arrest for the crime of being under the influence of alcoholic beverages. Respondent was not believable that on the night of her recent arrest for drunk driving that she was not at all under the influence of alcoholic beverages. (Notwithstanding the accuracy of a breath test, the arresting CHP officer smelled alcohol coming from respondent, noticed her "red, watery" eyes, observed her lack of coordination, and recorded her inability to pass the field sobriety test.)

Further, as to the 2006 arrests, respondent was evasive and unclear as to the precise nature of her unlawful conduct in 2006 when she was arrested for vandalism and resisting police officers. At the hearing of this matter, respondent sought to blame a strong-willed sister, who was an active duty military service member, as the person who was at the heart of the 2006 disturbance for which respondent "took the fall" to accept arrest so that her sister would not be exposed to an adverse military action.

Complainant's Expert Witness

25. Ms. Hilda Nip (Inspector Nip) offered reliable and persuasive evidence at the hearing of this matter. By her demeanor while testifying, her attitude toward the proceeding, her clear and unhesitating presentation of evidence as well as her solemn, sincere and conscientious attitude toward the proposed action against respondent, Inspector

Nip established herself to be a credible,⁴ exceedingly knowledgeable, and trustworthy witness at the hearing of this matter.

26. Inspector Nip is a licensed pharmacist. Over a period of several years, she gained experience in the operations and management of pharmacies. She knows about the duties and functions of a pharmacy technician.

Inspector Nip persuasively demonstrated that respondent's history of arrests for being under the influence of alcoholic beverages reflect very poorly on respondent's capacity to act as a faithful and dutiful pharmacy technician.

Inspector Nip established that respondent's records of having a drunk driving conviction as well as her past arrests for violation of vandalism and resisting police officer that arose from her excessive use of alcoholic beverages, operate in underscoring respondent's unprofessional conduct. Inspector Nip stated the board policy that a registered pharmacy technician must exhibit sound judgment. The evidence showed that respondent lacked good, sound judgment.

Cost Recovery

27. Complainant incurred costs of investigation and prosecution of the accusation against respondent as follows:

| | |
|--------------------------------------|------------|
| Attorney General's Costs | |
| By Deputy Attorney General | |
| Regarding Prosecution 2013/2014/2015 | |
| 21.25 hours at \$170 per hour | \$3,612.00 |
| Paralegals' Costs | |
| 5.25 hours at \$120 per hour | \$630.00 |
| Cost of Prosecution | \$4,242.50 |
| Complainant's Investigative Costs | |
| Inspector Hilda Kip | |
| 31 hours at \$102 per hour | \$3,162.00 |
| TOTAL COSTS INCURRED: | \$7,404.50 |

28. Respondent did not advance a meritorious defense in the exercise of her right to a hearing in this matter. And, respondent cannot be seen, under the facts set out above, to

⁴ Government Code section 11425.5, subdivision (b), third sentence.

have committed slight or inconsequential misconduct in the context of the Accusation. And, respondent did not raise a "colorable challenge" to complainant's Accusation.

The declaration by the deputy attorney general, regarding the extent of the prosecution and the scope of the investigation, appears to be commensurate with respondent's misconduct. And, Inspector Nip's cost declaration regarding the investigation efforts, which included the preparation of a detailed written report, were reasonable.

A basis does not exist to warrant a reduction of the assessment against respondent for the costs of investigation and prosecution incurred by complainant. The imposition upon respondent of the full costs of prosecution will not unfairly penalize respondent, especially when the payments may be made over time under a schedule of payment, which is acceptable to the board. All factors considered, the reasonable and appropriate cost to be borne by respondent is \$7,404.50

29. The reasonable and appropriate cost, as owed by respondent to the board, is \$7,404.50

Ultimate Findings

30. Respondent engaged in unprofessional conduct by her self-administration of an intoxicating amount of an alcoholic beverage on June 10, 2013.

31. An insufficient amount of time has passed for the board to determine that respondent has attained sufficient rehabilitation, from her past conduct in violating the law regarding her arrest for drunk driving, so as to enable her to hold an unrestricted registration as a pharmacy technician.

LEGAL CONCLUSIONS

The Burden and Standard of Proof

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

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

Applicable Statutes and Regulations

FIRST CAUSE FOR DISCIPLINE

UNPROFESSIONAL CONDUCT: CONVICTION OF SUBSTANTIALLY RELATED CRIMES

2. Business and Professions Code section 490, subdivision (a), provides, in pertinent part: "a board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued."

3. Cause exists for discipline against respondent's registration pursuant to Business and Professions Code section 490, subdivision (a), by reason of the matters set forth in Factual Findings 3 and 4, along with Legal Conclusion 2.

SECOND CAUSE FOR DISCIPLINE-

UNPROFESSIONAL CONDUCT: CONVICTION OF A CRIME

4. Business and Professions Code 4301, subdivision (l), sets forth, in part, that the board shall take action against any holder of a license who is guilty of unprofessional conduct that includes,

[t]he conviction of a crime substantially related to the qualifications, functions, and duties of a licensee under [the Pharmacy Law] 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 [the Pharmacy Law]

California Code of Regulations, title 16, section 1770, provides, "[f]or the purpose of . . . revocation of a personal . . . license . . . 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."

5. Cause exists for discipline against respondent's registration pursuant to Business and Professions Code section 4301, subdivision (l), in conjunction with California Code of Regulations, title 16, section 1770, by reason of the matters set forth in Factual Findings 3 through 6, along with Legal Conclusion 4.

THIRD CAUSE FOR DISCIPLINE-

UNPROFESSIONAL CONDUCT: SELF-ADMINISTRATION OF ALCOHOLIC BEVERAGES

6. Business and Professions Code 4301, subdivision (h), provides that the board shall take action against any holder of a license who is guilty of unprofessional conduct that includes, "the administering to oneself . . . of alcoholic beverages to the extent or in a manner as to be dangerous or injurious to oneself . . . or to the public"

7. Cause exists for discipline against respondent's registration pursuant to Business and Professions Code section 4301, subdivision (h), by reason of the matters set forth in Factual Findings 5 and 7, along with Legal Conclusion 6.

Respondent's Ill-Placed Reliance on Adams v. People and the Foundational Requirement for Admissibility into Evidence at a Civil Proceeding of Test Results from Blood Alcohol Test

8. Respondent strenuously argues that the board is precluded from reaching a determination of respondent's unprofessional conduct by reason of her excessive consumption of alcoholic beverages before operating a motor vehicle which led to her drunk driving arrest. Respondent is unduly fixated on the directive of *People v. Adams* (1976) 59 Cal.App.3d 559, as a means to prompt the dismissal of the Accusation. In particular, respondent argues that the board must exclude from evidence: the CHP Probable Cause Declaration in Support of Arrest (complainant's exhibit 4A); the CHP Driving Under the Influence Arrest - Investigation Report, dated June 10, 2013 (complainant's exhibit 4B); and, the Alameda County Sheriff's Office Crime Laboratory, DRAEGER ALCOTEST 7110 MKIII-C, Precautionary Checklist (complainant's exhibit 4C). First, respondent argues that under Evidence Code section 1280, exhibit 4A cannot be deemed a record of a government employee. Under respondent's argument, the exhibits are impermissible as hearsay that must be excluded from evidence in this matter. Second, respondent contends that the decision in *People v. Adams*, establishes rigid foundational requirements demanding the evidence for this matter must demonstrate the reliable aspects of the breath testing equipment, as well as the proficiency of the law enforcement officer administering the test, that resulted in recording respondent's excessive consumption of alcoholic beverages before the time she drove a vehicle upon public streets on June 10, 2013. Respondent is in error.

First, Government Code section 11513, subdivision (c), provides:

The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or

statutory rule which might make improper the admission of the evidence over objection in civil actions.

(Emphasis added.)

The CHP Probable Cause Declaration in Support of Arrest (complainant's exhibit 4A) was prepared by "Officer A. Carnahan (Badge No. 19880)." And, the CHP Arrest- Investigative Report (exhibit 4B) from June 11, 2013, was written by "A. Carnahan/Officer." The documents show that the CHP officer's observations and analysis of respondent's behaviors, which suggested her being intoxicated, were recorded close in time to the traffic stop that led to respondent's arrest. Hence, exhibits 4A and 4B are the sort of evidence on which responsible person may "rely in the conduct of serious affairs."

Second, *People v. Adams* does not stand for the proposition advanced by respondent's arguments, namely that unless complainant brings into the hearing, based on the Accusation in this matter, an expert witness to establish the proper calibration of the breath-testing equipment used by the CHP officer on June 11, 2013, as well as the proper training of the officer who used the testing device, then the results from the breath testing equipment as set out in exhibits 4B and 4C, cannot not be admitted into the record for the preparation of a decision that may proposed occupational license suspension or revocation. *People v. Adams* established that in criminal prosecution actions, and DMV actions, where breath testing equipment is at that heart of a controversy, whether or not compliance with regulations pertaining to the accuracy of the testing equipment or the proficiency of the law enforcement officer, only pertains to the weight to be given questioned test results. *People v. Adams* does not demand the complete exclusion of the evidence of the alcohol testing results. The court in *People v. Adams* stated:

In *People v. Rawlings*, 42 Cal.App.3d 952; the court dealt, in dicta, with the very problem presented herein. . . . [T]he court stated that: 'Where a statute, such as this, does not specifically provide that evidence shall be excluded for failure to comply with said statute and there are no constitutional issues involved (and none are involved here) such evidence is not inadmissible. Statutory compliance or noncompliance merely goes to the weight of the evidence'

We agree with *Rawlings* that noncompliance goes merely to the weight of the evidence. The regulations are an expressed standard for competency of the test results; in effect, they are a simplified method of admitting the results into evidence. Were the rule to provide that the evidence of the test results would be inadmissible if the regulation were not followed there would be the incentive to turn the drunk driving case into a contest to find a technical defect in the test procedure so as to have the evidence excluded.

Under the present rule, if the test procedure does not comply with the regulations, a defendant is protected, as the prosecution then must qualify the personnel involved in the test, the accuracy of the equipment used and the reliability of the method followed before the results can be admitted. In the present case, as the regulations were not followed, appellants were entitled to attempt to discredit the results by showing that noncompliance affected their validity; indeed, the court instructed that any such noncompliance could be considered by the jury in evaluating the test evidence.

However, [the *People v. Adams* court did] not agree with appellants' contention that such noncompliance inherently and automatically rendered the machine unreliable and the test results worthless Appellants do not contend, nor could they on the record presented, that an inadequate foundation was presented as to the reliability of the machine used, despite the technical violation. Nor did they attempt any showing that the noncompliance affected the test results in any way, let alone rendered the results inaccurate.

Noncompliance with the Administrative Code regulations goes only to the weight of the blood alcohol concentration evidence. (*People v. Adams, supra* 59 Cal. App. 3d 559, 566-67.)

Based on the foregoing, complainant's exhibits 4A, 4B, and 4C are relied upon in making the Legal Conclusions and Order in this matter.

Determinations

9. In January 2014, respondent entered a plea of nolo contendere to the crime of reckless driving—"dry reckless." But, the fact of her past admission to a law enforcement officer about having consumed a half-bottle of wine before driving her car, and the entirety of the superior court's record of the prosecution and conviction, remain facts, which respondent cannot now deny occurred. Moreover, the investigating and arresting police officer's statements reflecting what respondent told him must be considered as direct evidence under *Lake v. Reed* (1997) 16 Cal.4th 448, 561-562.

A plea of nolo contendere admits all matters essential to the conviction. (*People v. Arwood* (1985) 165 Cal.App.3d 167.) In an administrative proceeding, a respondent cannot challenge the validity of a prior conviction. (*Thomas v. Dept. of Motor Vehicles* (1970) 3 Cal.3d 335; *Matanky v. Board of Medical Examiners* (1979) 79 Cal.App.3d 293.)

In this matter, respondent engaged in an impermissible attack upon the facts upon which she engaged a no contest plea in the superior court. Respondent's strategy at the hearing of this matter shows a lack on her part for the acceptance of responsibility for her past misconduct.

10. California Code of Regulations, title 16, section 1769, subdivision (b), provides in part:

When considering the suspension or revocation of . . . a personal license on the ground that . . . 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.

Under the Disciplinary Guidelines of the California State Board of Pharmacy, 14 factors are set out for consideration in determining the penalty that may result from an administrative adjudication proceeding. Those factors have been weighed in this matter. In particular, matters that pertain to respondent's background as well as matters in mitigation and matters in rehabilitation as described in Factual Findings 9 through 17 were considered in making the following order. And, the matters as set out in Factual Findings 6 through 8, and 18 through 26, which indicate that respondent has not been fully rehabilitated and that such matters detract from her good qualities, have been considered in making the following order.

Costs of Investigation and Prosecution

11. Business and Professions Code section 125.3 prescribes that a "licentiate found to have committed a violation or violations of the licensing act" may be directed "to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case."

The California Supreme Court's reasoning on the obligation of a licensing agency to fairly and conscientiously impose costs in administrative adjudication in *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45-46, is persuasive and should be considered in this matter. Scrutiny of certain factors, which pertain to the board's exercise of discretion to analyze or examine factors that might mitigate or reduce costs of

investigation and prosecution upon a licensee found to have engaged in unprofessional conduct, are set forth in Factual Finding 28. And, measured against the concrete presentation by complainant, respondent offered insufficient evidence in her defense. Respondent's professed matters in mitigation are insubstantial when compared to the board's burden in prosecuting this matter and safeguarding the public from unprofessional licensees in the way of absolving all the costs incurred by complainant. Due to respondent's strategy to deny the seriousness of her alcohol beverage related criminal conduct, complainant was compelled to thoroughly investigate respondent's activities and to instruct its legal counsel to prepare a comprehensive prosecution of the disciplinary action. And, respondent's employment status, coupled with lack of proof that she is impacted by extant, significant financial commitments, do not warrant a reduction of the overall costs that required respondent to address and eliminate.

With all factors considered, the costs of prosecution as set forth in Factual Findings 27 and 29, are reasonable in a total amount of \$7,404.50

ORDER

Pharmacy technician registration number TCH 59902, as issued to respondent Melissa M. Felardo, is revoked; however, the revocation is stayed and respondent's registration is placed on probation for four years upon the following terms and conditions:

1. Obey All Laws

Respondent shall obey all state and federal laws and regulations.

Respondent shall report any of the following occurrences to the board, in writing, within seventy-two (72) hours of such occurrence:

- an arrest or issuance of a criminal complaint for violation of any provision of the Pharmacy Law, state and federal food and drug laws, or state and federal controlled substances laws;
- a plea of guilty or nolo contendere in any state or federal criminal proceeding to any criminal complaint, information or indictment;
- a conviction of any crime; or,
- discipline, citation, or other administrative action filed by any state or federal agency which involves respondent's Pharmacy Technician Registration or which is related to the practice of pharmacy or the manufacturing, obtaining, handling, distributing, billing, or charging for any drug, device or controlled substance.

Failure to timely report any such occurrence shall be considered a violation of probation.

2. Report to the Board

Respondent shall report to the board quarterly, on a schedule as directed by the board or its designee. The report shall be made either in person or in writing, as directed. Among other requirements, respondent shall state in each report under penalty of perjury whether there has been compliance with all the terms and conditions of probation. Failure to submit timely reports in a form as directed shall be considered a violation of probation. Any period(s) of delinquency in submission of reports as directed may be added to the total period of probation. Moreover, if the final probation report is not made as directed, probation shall be automatically extended until such time as the final report is made and accepted by the board.

3. Interview with the Board

Upon receipt of reasonable prior notice, respondent shall appear in person for interviews with the board or its designee, at such intervals and locations as are determined by the board or its designee. Failure to appear for any scheduled interview without prior notification to board staff, or failure to appear at two (2) or more scheduled interviews with the board or its designee during the period of probation, shall be considered a violation of probation.

4. Cooperate with Board Staff

Respondent shall cooperate with the board's inspection program and with the board's monitoring and investigation of respondent's compliance with the terms and conditions of her probation. Failure to cooperate shall be considered a violation of probation.

5. Notice to Employers

During the period of probation, respondent shall notify all present and prospective employers of the decision in case number 5148 and the terms, conditions and restrictions imposed on respondent by the decision, as follows:

Within thirty (30) days of the effective date of this decision, and within fifteen (15) days of respondent undertaking any new employment, respondent shall cause her direct supervisor, pharmacist-in-charge (including each new pharmacist-in-charge employed during respondent's tenure of employment) and owner to report to the board in writing acknowledging that the listed individual(s) has/have read the decision in case

number 4631 and the terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that her employer(s) and/or supervisor(s) submit timely acknowledgement(s) to the board.

If respondent works for or is employed by or through a pharmacy employment service, respondent must notify her direct supervisor, pharmacist-in-charge and owner at every pharmacy of the terms and conditions of the decision in case number 5148 in advance of the respondent commencing work at each pharmacy. A record of this notification must be provided to the board upon request.

Furthermore, within thirty (30) days of the effective date of this decision, and within fifteen (15) days of respondent undertaking any new employment by or through a pharmacy employment service, respondent shall cause her direct supervisor with the pharmacy employment service to report to the board in writing acknowledging that he or she has read the decision in case number 5148 and the terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that her employer(s) and/or supervisor(s) submit timely acknowledgment(s) to the board.

Failure to timely notify present or prospective employer(s) or to cause that/those employer(s) to submit timely acknowledgements to the board shall be considered a violation of probation.

"Employment" within the meaning of this provision shall include any full-time, part-time, temporary or relief service or pharmacy management service as a pharmacy technician or in any position for which a pharmacy technician license is a requirement or criterion for employment, whether the respondent is considered an employee, independent contractor or volunteer.

6. Reimbursement of Board Costs

As a condition precedent to successful completion of probation, respondent shall pay to the board its costs of prosecution in the amount of \$7,404.50, before the third year anniversary of commencement date for the probation of the pharmacy technician's registration. There shall be no deviation from this schedule absent prior written approval by the board or its designee. Failure to pay costs by the deadline as directed shall be considered a violation of probation.

The filing of bankruptcy by respondent shall not relieve respondent of her responsibility to reimburse the board its costs of prosecution.

7. Probation Monitoring Costs

Respondent shall pay any costs associated with probation monitoring as determined by the board each and every year of probation. Such costs shall be payable to the board on a schedule as directed by the board or its designee. Failure to pay such costs by the deadline as directed shall be considered a violation of probation.

8. Status of License

Respondent shall, at all times while on probation, maintain an active, current pharmacy technician license with the board, including any period during which suspension or probation is tolled. Failure to maintain an active, current license shall be considered a violation of probation.

If respondent's pharmacy technician license expires or is cancelled by operation of law or otherwise at any time during the period of probation, including any extensions thereof due to tolling or otherwise, upon renewal or reapplication respondent's license shall be subject to all terms and conditions of this probation not previously satisfied.

9. License Surrender While on Probation/Suspension

Following the effective date of this decision, should respondent cease work due to retirement or health, or be otherwise unable to satisfy the terms and conditions of probation, respondent may tender her pharmacy technician registration to the board for surrender. The board or its designee shall have the discretion whether to grant the request for surrender or take any other action it deems appropriate and reasonable. Upon formal acceptance of the surrender of the license, respondent will no longer be subject to the terms and conditions of probation. This surrender constitutes a record of discipline and shall become a part of the respondent's license history with the board.

Upon acceptance of the surrender, respondent shall relinquish her pharmacy technician registration to the board within ten (10) days of notification by the board that the surrender is accepted. Respondent may not reapply for any license, permit, or registration from the board for three (3) years from the effective date of the surrender. Respondent shall meet all requirements applicable to the license sought as of the date the application for that license is submitted to the board.

10. Notification of a Change in Name, Residence Address, Mailing Address or Employment

Respondent shall notify the board in writing within ten (10) days of any change of employment. Said notification shall include the reasons for leaving, the address of the new employer, the name of the supervisor and owner, and the work schedule if known. Respondent shall further notify the board in writing within ten (10) days of a change in name, residence address and mailing address, or phone number.

Failure to timely notify the board of any change in employer(s), name(s), address(es), or phone number(s) shall be considered a violation of probation.

11. Tolling of Probation

Except during periods of suspension, respondent shall, at all times while on probation, be employed as a pharmacy technician in California for a minimum of 20 hours per calendar month. Any month during which this minimum is not met shall toll the period of probation, i.e., the period of probation shall be extended by one month for each month during which this minimum is not met. During any such period of tolling of probation, respondent must nonetheless comply with all terms and conditions of probation.

Should respondent, regardless of residency, for any reason (including vacation) cease working as a pharmacy technician for a minimum of 20 hours per calendar month in California, respondent must notify the board in writing within ten (10) days of cessation of work and must further notify the board in writing within ten (10) days of the resumption of the work. Any failure to provide such notification(s) shall be considered a violation of probation.

It is a violation of probation for respondent's probation to remain tolled pursuant to the provisions of this condition for a total period, counting consecutive and non-consecutive months, exceeding thirty-six (36) months.

"Cessation of work" means calendar month during which respondent is not working for at least 20 hours as a pharmacy technician, as defined in Business and Professions Code section 4115. "Resumption of work" means any calendar month during which respondent is working as a pharmacy technician for at

least 20 hours as a pharmacy technician as defined by Business and Professions Code section 4115.

12. Violation of Probation

If respondent has not complied with any term or condition of probation, the board shall have continuing jurisdiction over respondent, and probation shall automatically be extended, until all terms and conditions have been satisfied or the board has taken other action as deemed appropriate to treat the failure to comply as a violation of probation, to terminate probation, and to impose the penalty that was stayed.

If respondent violates probation in any respect, the board, after giving respondent notice and an opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. Notice and opportunity to be heard are not required for those provisions stating that a violation thereof may lead to automatic termination of the stay and/or revocation of the license. If a petition to revoke probation or an accusation is filed against respondent during probation, the board shall have continuing jurisdiction, and the period of probation shall be automatically extended until the petition to revoke probation or accusation is heard and decided.

13. Completion of Probation

Upon written notice by the board indicating successful completion of probation, respondent's pharmacy technician registration will be fully restored.

14. No Ownership of Licensed Premises

Respondent shall not own, have any legal or beneficial interest in, or serve as a manager, administrator, member, officer, director, trustee, associate, or partner of any business, firm, partnership, or corporation currently or hereinafter licensed by the board. Respondent shall sell or transfer any legal or beneficial interest in any entity licensed by the board within ninety (90) days following the effective date of this decision and shall immediately thereafter provide written proof thereof to the board. Failure to timely divest any legal or beneficial interest(s) or provide documentation thereof shall be considered a violation of probation.

15. Attend Substance Abuse Recovery Relapse Prevention and Support Groups

Within thirty (30) days of the effective date of this decision, respondent shall begin regular attendance at a recognized and established substance abuse recovery support group or behavior modification program in California, (e.g., Narcotics Anonymous, Alcoholics Anonymous, etc.) which has been approved by the board or its designee. Respondent must attend at least one group meeting per week unless otherwise directed by the board or its designee. Respondent shall continue regular attendance and submit signed and dated documentation confirming attendance with each

quarterly report for the duration of probation. Failure to attend or submit documentation thereof shall be considered a violation of probation.

16. Random Drug Screening

Respondent, at her own expense, shall participate in random testing, including but not limited to biological fluid testing (urine, blood), breathalyzer, hair follicle testing, or other drug screening program as directed by the board or its designee. Respondent may be required to participate in testing for the entire probation period and the frequency of testing will be determined by the board or its designee. At all times respondent shall fully cooperate with the board or its designee, and shall, when directed, submit to such tests and samples for the detection of alcoholic beverages, narcotics, hypnotics, dangerous drugs or other controlled substances as the board or its designee may direct. Failure to timely submit to testing as directed shall be considered a violation of probation. Upon request of the board or its designee, respondent shall provide documentation from a licensed practitioner that the prescription for a detected drug was legitimately issued and is a necessary part of the treatment of the respondent. Failure to timely provide such documentation shall be considered a violation of probation. Any confirmed positive test for any drug not lawfully prescribed by a licensed practitioner as part of a documented medical treatment shall be considered a violation of probation and shall result in the automatic suspension of work by respondent. Respondent may not resume work as a pharmacy technician until notified by the board in writing.

17. Work Site Monitor

Within ten (10) days of the effective date of this decision, respondent shall identify a work site monitor, for prior approval by the board, who shall be responsible for supervising respondent during working hours. Respondent shall be responsible for ensuring that the work site monitor reports in writing to the board quarterly. Should the designated work site monitor determine at any time during the probationary period that respondent has not maintained sobriety, she shall notify the board immediately, either orally or in writing as directed. Should respondent change employment, a new work site monitor must be designated, for prior approval by the board, within ten (10) days of commencing new employment. Failure to identify an acceptable initial or replacement work site monitor, or to ensure quarterly reports are submitted to the board, shall be considered a violation of probation.

18. Notification of Departure

Prior to leaving the probationary geographic area designated by the board or its designee for a period greater than twenty-four (24) hours, respondent shall notify the board verbally and in writing of the dates of departure and return. Failure to comply with this provision shall be considered a violation of probation.

19. Abstain from Alcoholic Beverage Use

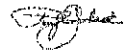
Respondent shall completely abstain from the possession or use of alcoholic beverages, controlled substances, dangerous drugs and their associated paraphernalia except when the drugs are lawfully prescribed by a licensed practitioner as part of a documented medical treatment. Upon request of the board or its designee, respondent shall provide documentation from the licensed practitioner that the prescription for the drug was legitimately issued and is a necessary part of the treatment of the respondent. Failure to timely provide such documentation shall be considered a violation of probation. Respondent shall ensure that she is not in the same physical location as individuals who are using illicit substances even if respondent is not personally ingesting the drugs. Any possession or use of alcoholic beverages, controlled substances, or their associated paraphernalia not supported by the documentation timely provided, and/or any physical proximity to persons using illicit substances, shall be considered a violation of probation.

20. Tolling of Probation

During the period of probation, respondent shall not leave the State of California for any period exceeding ten (10) days, regardless of purpose (including vacation). Any such absence in excess of ten (10) days during probation shall be considered a violation of probation. Moreover, any absence from California during the period of probation exceeding ten (10) days shall toll the probation, i.e., the probation shall be extended by one day for each day over ten (10) days respondent is absent from California. During any such period of tolling of probation, respondent must nonetheless comply with all terms and conditions of probation.

Respondent must notify the board in writing within ten (10) days of departure, and must further notify the board in writing within ten (10) days of return. The failure to provide such notification(s) shall constitute a violation of probation. Upon such departure and return, respondent shall not return to work until notified by the board that the period of probation has been satisfactorily completed.

DATED: September 29, 2015.

DocuSigned by:

28085AC98FE7453

PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings

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

In the Matter of the Accusation Against:

MELISSA M. FELARDO,
also known as Melissa Felardo,

Pharmacy Technician Registration No.
TCH 59902,

Respondent.

Case No. 5148

OAH No. 2015031287

PROPOSED DECISION

Administrative Law Judge Perry O. Johnson, Office of Administrative Hearings, State of California (OAH), heard this matter on July 14, 2015, in Oakland, California.

Deputy Attorney General Gregory Tuss represented complainant Virginia Herold, Executive Officer, the Board of Pharmacy, Department of Consumer Affairs.

Attorney at Law Thomas Knutsen¹ represented respondent Melissa M. Felardo, who was present at the hearing

The record was held open in order to afford the parties the opportunity to file written closing arguments, and, if necessary, to file reply written arguments. On July 20, 2015, OAH received complainant's "Closing Argument," which was marked as exhibit "9," and received as argument. On August 15, 2015, OAH received respondent's "Closing Argument," which was marked as exhibit "B," and received as argument. Neither party filed a written reply brief.

On August 15, 2015, the parties were deemed to have submitted the matter for decision and the record was closed.

¹ Thomas Knutsen, Esq., is with the Knutsen Law Office, 39510 Paseo Padre Parkway, Suite 300, Fremont, CA 94538.

FACTUAL FINDINGS

1. On December 3, 2014, complainant Virginia Herold (complainant), in her official capacity as the Executive Officer of the Board of Pharmacy (the board), Department of Consumer Affairs, made and issued the Accusation against respondent Melissa F. Felardo, also known as Melissa Felardo (respondent).

At the hearing of this matter, the Accusation, at page 4, lines 25 to 26, was amended, under the authority of Government Code section 11507, to expunge from the pleading the phrase, "and completion of a driving under the influence program". The remaining sentence, therefore, reads: "The terms and conditions of probation included one day incarceration."

License Information

2. On December 15, 2004, the board issued Pharmacy Technician Registration No. TCH 59902 to respondent. The registration issued to respondent was in full force and effect at all times relevant to the matters raised in the Accusation. The registration will expire on August 31, 2016, unless renewed, surrendered, or revoked before that date.

Unprofessional Conduct – Record of A Criminal Conviction

3. On January 13, 2014, under Case No. 450439, in the Superior Court in and for the County of Alameda, on a plea of no contest, respondent was convicted of violating Vehicle Code sections 23103² (reckless driving-"dry reckless"), a misdemeanor.

4. The crime for which respondent was convicted on January 13, 2014, is an offense that is substantially related to the qualifications, functions, and duties of a pharmacy technician.

5. Respondent's conviction in January 2014 arose out of her arrest by a California Highway Patrol (CHP) officer on June 10, 2013, for drunk driving in violation of Vehicle Code section 23152, subdivision (b). (A plea bargain reduced, the severity of conviction of the offense for which respondent was arrested, and for which prosecution was commenced, to the lesser offense of reckless driving, under the single statutory provision that is referred to as "dry reckless.")

² Vehicle Code section 23103 is a reduced drunk driving charge. The conviction spares a person a DUI conviction record, and the conviction does not trigger an independent alcohol-related driver's license suspension. Unlike a "wet reckless" conviction under Vehicle Code sections 23103.5/23103, the dry reckless conviction is "not priorable," that is the conviction cannot be used to enhance a future DUI charge in a criminal proceeding.

Respondent's drunk driving arrest in June 2013 was preceded by a CHP officer stopping the vehicle driven by respondent because of the vehicle's nonfunctioning headlamp. But, upon interacting with respondent, the law enforcement officer detected the smell of alcoholic beverages coming from respondent. When respondent failed a field sobriety test, she was asked, nearly an hour after the traffic stop, to provide breath tests. The first test as administered by the CHP officer, at 12:49 a.m. on June 10, 2013, showed respondent to have a blood alcohol level of 0.10 percent. And, a second breath test given by respondent at 12:51 a.m. showed a BAC of 0.11 percent. Respondent was arrested for the offense of driving under the influence of alcoholic beverage with a blood alcohol content level of more than 0.08 percent. She was handcuffed, transported to a jail, and spent the night in confinement.

6. As a result of the January 2014 conviction, the superior court entered a conditional sentence and placed respondent on court (informal) probation for three years. The terms and conditions of probation included a one-day jail term; but, the court granted respondent credit for time served. The court commanded respondent not to refuse a chemical test if asked to do so by a law enforcement officer, and "not to drive with measurable alcohol in system." In addition to orders to obey all laws and to maintain regular employment, respondent was directed to pay court fines and fees of \$380. (At the superior court proceeding on January 13, 2014, respondent was represented by the lawyer appearing in this matter, Mr. Thomas Knutsen.)

Unprofessional Conduct – Self-Administration of Alcoholic Beverage to be Dangerous or Injurious or Injurious to Oneself or Others

7. On June 10, 2013, respondent operated a motor vehicle upon a public access road to a freeway when a law enforcement officer detected the smell of alcohol coming from respondent as the officer talked with respondent during a traffic stop. And as the CHP officer interacted with her, respondent exhibited red/glassy looking eyes, and she spoke with slurred speech. At the site of the arrest for her drunk driving, respondent could not pass a field sobriety test. Because of her intoxicated condition, the CHP officer was compelled to arrest respondent, place her in handcuffs, and transport her to jail, where she was confined for the night. And, before her arrest, respondent made an admission to the CHP officer that she had consumed one-half bottle of red wine over the hours before being stopped by the law enforcement officer.

Respondent's act of drunk driving on June 10, 2013, involved the self-administration of alcoholic beverage to a point that her condition was potentially injurious to herself or other drivers and passengers traveling in vehicles that night.

Matters in Aggravation

8. On April 4, 2011, the board issued respondent Citation No. CI 2008 40222 for unprofessional conduct due to her use of alcoholic beverages to an extent, or in a manner, as to be dangerous or injurious to herself or the public.

The citation was issued under the authority of Business and Professions Code section 4301, subdivision (h). The underlying facts, which resulted in the citation, pertain to respondent's acts on June 13, 2010, when she was arrested for violation of Penal Code section 594, subdivision (a)(3) (vandalism - destroying property), and Penal Code section 148, subdivision (a)(1) (resisting, delaying or obstructing a peace officer in the discharge of any duty of his office or employment). The underlying facts for respondent's conduct in June 2010 involved her consumption of alcoholic beverages entailed her fighting with family members so that police officers were summoned, and then respondent, after being apprehended, caused the breaking of a wind shield of a police patrol vehicle.

Respondent paid the \$500 citation fine for Citation No. CI 2008 40222, and the board closed the matter on May 9, 2011.

Matters in Mitigation and Respondent's Background

9. Respondent is approximately 30 years old and she appears to be a mature individual.

10. Respondent has been married for 13 years.

11. Respondent has been a board registered pharmacy technician for approximately 11 years. Other than the citation described above in Factual Finding 8, respondent has no record of disciplinary action or any allegation against her for substantiated unprofessional conduct on her part.

Matters in Rehabilitation

12. After her January 2014 conviction, respondent enrolled in a women's facility that had been recommended to her by Kaiser Permanente Medical Center (Kaiser). She participated in the women's facility for a 90-day in-patient treatment program. Also, she then was enrolled for four months in an "after-care" program as administrated by Kaiser. And, for an unknown period of time, she received one-to-one therapy with a psychiatrist. Further, respondent has been involved with "self-help groups" in the context of attending religious activities at her church.

For a short period of time, respondent participated in Alcoholics Anonymous (AA) counseling while she was involved in the Kaiser after-care program. (But, the record for the hearing is devoid of documents establishing the actual month(s) of her engagement with AA.)

13. Respondent poignantly proclaimed at the hearing of this matter that at this point in time she has no impairment by reason of excessive use of alcoholic beverages. (However, she provided no competent, corroborating proof of her claim of absolute sobriety.)

14. Respondent asserted at the hearing that in recent years she has received a diagnosis of Post Traumatic Stress Disorder. Respondent poignantly claimed that she is receiving on-going therapy for the PTSD condition. (But, respondent offered no documentary evidence regarding the ongoing psychiatric treatment.)

15. Currently, Seton Medical Center employs respondent. Although she holds the title of pharmacy technician, she actually performs duties and functions in the medical center's Information Technology Department. Respondent's work entails inputting into the medical center's database various medication prescriptions, which are written by physicians, for processing and dispensing by pharmacists. As of the date of the hearing, respondent had worked at Seton Medical Center "a little over a year."

16. Previous to working at Seton Medical Center, respondent had been employed for ten years at the Alameda County Health System's Medical Center that was once known as Highland Hospital, which is located in Oakland.

17. Respondent has the respect of responsible persons in the pharmacy profession and other health care professionals. At the hearing of this matter, she offered three letters³ from health care professionals. The respective messages indicate that the letter writers have worked with respondent over periods of time. The letters proclaim respondent to be a good practitioner who has worked ethically and compassionately and as a worker who has been "providing excellent customer care" as a pharmacy technician. Each of letters depicts respondent as being very professional in her work.

Factual Weakness in Respondent's Presentation of Efforts Toward Rehabilitation

18. Despite respondent's poignant testimony regarding the organized counseling and therapy programs as received by her for an alcoholic beverage abuse disposition (that is, a 90-day residential program, a several-month-long outpatient set of behavior modification programs, and on-going psychiatric therapy for post-traumatic stress disorder and other emotional ailment), respondent presented no competent documentary evidence to corroborate her claims.

19. Respondent compellingly asserted that she has paid all costs associated with the criminal conviction's probation order. But, she provided no documentary proof to support her assertion.

³ A letter, dated January 28, 2015, by Yvonne Vierra, Patient Assistant Coordinator, Alameda Health System; a letter, dated February 5, 2015, by Theresa Ivory; and, a letter, dated February 6, 2015, by Thao Nguyen.

Other Matters

20. Respondent called no witness to the hearing of this matter. No person appeared on respondent's behalf to offer evidence pertaining to respondent's reputation in her community for sobriety and integrity. No person came to the hearing of this matter to describe respondent's attitude towards her past criminal action that led to the criminal court proceeding mentioned above.

21. Respondent presented no competent evidence that she has been involved or participated in significant or conscientious community, religious or privately-sponsored programs designed for social benefit or to ameliorate social problems.

Matters that Suggest Respondent Is Not Fully Rehabilitated.

22. Respondent has been on criminal probation for only one and one-half years. The period of the superior court-imposed probation will not expire before January 2017, unless respondent files a petition for early termination of probation.

23. Respondent presented no documentary proof establishing that she has an ongoing commitment to counseling or behavior modification treatment in the way of services through Alcoholics Anonymous.

24. During the hearing of this matter, respondent refused to accept responsibility for her conduct that led to her recent arrest for the crime of being under the influence of alcoholic beverages. Respondent was not believable that on the night of her recent arrest for drunk driving that she was not at all under the influence of alcoholic beverages. (Notwithstanding the accuracy of a breath test, the arresting CHP officer smelled alcohol coming from respondent, noticed her "red, watery" eyes, observed her lack of coordination, and recorded her inability to pass the field sobriety test.)

Further, as to the 2006 arrests, respondent was evasive and unclear as to the precise nature of her unlawful conduct in 2006 when she was arrested for vandalism and resisting police officers. At the hearing of this matter, respondent sought to blame a strong-willed sister, who was an active duty military service member, as the person who was at the heart of the 2006 disturbance for which respondent "took the fall" to accept arrest so that her sister would not be exposed to an adverse military action.

Complainant's Expert Witness

25. Ms. Hilda Nip (Inspector Nip) offered reliable and persuasive evidence at the hearing of this matter. By her demeanor while testifying, her attitude toward the proceeding, her clear and unhesitating presentation of evidence as well as her solemn, sincere and conscientious attitude toward the proposed action against respondent, Inspector

Nip established herself to be a credible,⁴ exceedingly knowledgeable, and trustworthy witness at the hearing of this matter.

26. Inspector Nip is a licensed pharmacist. Over a period of several years, she gained experience in the operations and management of pharmacies. She knows about the duties and functions of a pharmacy technician.

Inspector Nip persuasively demonstrated that respondent's history of arrests for being under the influence of alcoholic beverages reflect very poorly on respondent's capacity to act as a faithful and dutiful pharmacy technician.

Inspector Nip established that respondent's records of having a drunk driving conviction as well as her past arrests for violation of vandalism and resisting police officer that arose from her excessive use of alcoholic beverages, operate in underscoring respondent's unprofessional conduct. Inspector Nip stated the board policy that a registered pharmacy technician must exhibit sound judgment. The evidence showed that respondent lacked good, sound judgment.

Cost Recovery

27. Complainant incurred costs of investigation and prosecution of the accusation against respondent as follows:

| | |
|--------------------------------------|------------|
| Attorney General's Costs | |
| By Deputy Attorney General | |
| Regarding Prosecution 2013/2014/2015 | |
| 21.25 hours at \$170 per hour | \$3,612.00 |
| Paralegals' Costs | |
| 5.25 hours at \$120 per hour | \$630.00 |
| Cost of Prosecution | \$4,242.50 |
| Complainant's Investigative Costs | |
| Inspector Hilda Kip | |
| 31 hours at \$102 per hour | \$3,162.00 |
| TOTAL COSTS INCURRED: | \$7,404.50 |

28. Respondent did not advance a meritorious defense in the exercise of her right to a hearing in this matter. And, respondent cannot be seen, under the facts set out above, to

⁴ Government Code section 11425.5, subdivision (b), third sentence.

have committed slight or inconsequential misconduct in the context of the Accusation. And, respondent did not raise a “colorable challenge” to complainant’s Accusation.

The declaration by the deputy attorney general, regarding the extent of the prosecution and the scope of the investigation, appears to be commensurate with respondent’s misconduct. And, Inspector Nip’s cost declaration regarding the investigation efforts, which included the preparation of a detailed written report, were reasonable.

A basis does not exist to warrant a reduction of the assessment against respondent for the costs of investigation and prosecution incurred by complainant. The imposition upon respondent of the full costs of prosecution will not unfairly penalize respondent, especially when the payments may be made over time under a schedule of payment, which is acceptable to the board. All factors considered, the reasonable and appropriate cost to be borne by respondent is \$7,404.50

29. The reasonable and appropriate cost, as owed by respondent to the board, is \$7,404.50

Ultimate Findings

30. Respondent engaged in unprofessional conduct by her self-administration of an intoxicating amount of an alcoholic beverage on June 10, 2013.

31. An insufficient amount of time has passed for the board to determine that respondent has attained sufficient rehabilitation, from her past conduct in violating the law regarding her arrest for drunk driving, so as to enable her to hold an unrestricted registration as a pharmacy technician.

LEGAL CONCLUSIONS

The Burden and Standard of Proof

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

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

Applicable Statutes and Regulations

FIRST CAUSE FOR DISCIPLINE

UNPROFESSIONAL CONDUCT: CONVICTION OF SUBSTANTIALLY RELATED CRIMES

2. Business and Professions Code section 490, subdivision (a), provides, in pertinent part: "a board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued."

3. Cause exists for discipline against respondent's registration pursuant to Business and Professions Code section 490, subdivision (a), by reason of the matters set forth in Factual Findings 3 and 4, along with Legal Conclusion 2.

SECOND CAUSE FOR DISCIPLINE-

UNPROFESSIONAL CONDUCT: CONVICTION OF A CRIME

4. Business and Professions Code 4301, subdivision (l), sets forth, in part, that the board shall take action against any holder of a license who is guilty of unprofessional conduct that includes,

[t]he conviction of a crime substantially related to the qualifications, functions, and duties of a licensee under [the Pharmacy Law] 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 [the Pharmacy Law]

California Code of Regulations, title 16, section 1770, provides, "[f]or the purpose of . . . revocation of a personal . . . license . . . 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."

5. Cause exists for discipline against respondent's registration pursuant to Business and Professions Code section 4301, subdivision (l), in conjunction with California Code of Regulations, title 16, section 1770, by reason of the matters set forth in Factual Findings 3 through 6, along with Legal Conclusion 4.

THIRD CAUSE FOR DISCIPLINE-
UNPROFESSIONAL CONDUCT: SELF-ADMINISTRATION OF ALCOHOLIC BEVERAGES

6. Business and Professions Code 4301, subdivision (h), provides that the board shall take action against any holder of a license who is guilty of unprofessional conduct that includes, "the administering to oneself . . . of alcoholic beverages to the extent or in a manner as to be dangerous or injurious to oneself . . . or to the public"

7. Cause exists for discipline against respondent's registration pursuant to Business and Professions Code section 4301, subdivision (h), by reason of the matters set forth in Factual Findings 5 and 7, along with Legal Conclusion 6.

Respondent's Ill-Placed Reliance on Adams v. People and the Foundational Requirement for Admissibility into Evidence at a Civil Proceeding of Test Results from Blood Alcohol Test

8. Respondent strenuously argues that the board is precluded from reaching a determination of respondent's unprofessional conduct by reason of her excessive consumption of alcoholic beverages before operating a motor vehicle which led to her drunk driving arrest. Respondent is unduly fixated on the directive of *People v. Adams* (1976) 59 Cal.App.3d 559, as a means to prompt the dismissal of the Accusation. In particular, respondent argues that the board must exclude from evidence: the CHP Probable Cause Declaration in Support of Arrest (complainant's exhibit 4A); the CHP Driving Under the Influence Arrest - Investigation Report, dated June 10, 2013 (complainant's exhibit 4B); and, the Alameda County Sheriff's Office Crime Laboratory, DRAEGER ALCOTEST 7110 MKIII-C, Precautionary Checklist (complainant's exhibit 4C). First, respondent argues that under Evidence Code section 1280, exhibit 4A cannot be deemed a record of a government employee. Under respondent's argument, the exhibits are impermissible as hearsay that must be excluded from evidence in this matter. Second, respondent contends that the decision in *People v. Adams*, establishes rigid foundational requirements demanding the evidence for this matter must demonstrate the reliable aspects of the breath testing equipment, as well as the proficiency of the law enforcement officer administering the test, that resulted in recording respondent's excessive consumption of alcoholic beverages before the time she drove a vehicle upon public streets on June 10, 2013. Respondent is in error.

First, Government Code section 11513, subdivision (c), provides:

The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or

statutory rule which might make improper the admission of the evidence over objection in civil actions.

(Emphasis added.)

The CHP Probable Cause Declaration in Support of Arrest (complainant's exhibit 4A) was prepared by "Officer A. Carnahan (Badge No. 19880)." And, the CHP Arrest-Investigative Report (exhibit 4B) from June 11, 2013, was written by "A. Carnahan/Officer." The documents show that the CHP officer's observations and analysis of respondent's behaviors, which suggested her being intoxicated, were recorded close in time to the traffic stop that led to respondent's arrest. Hence, exhibits 4A and 4B are the sort of evidence on which responsible person may "rely in the conduct of serious affairs."

Second, *People v. Adams* does not stand for the proposition advanced by respondent's arguments, namely that unless complainant brings into the hearing, based on the Accusation in this matter, an expert witness to establish the proper calibration of the breath-testing equipment used by the CHP officer on June 11, 2013, as well as the proper training of the officer who used the testing device, then the results from the breath testing equipment as set out in exhibits 4B and 4C, cannot not be admitted into the record for the preparation of a decision that may proposed occupational license suspension or revocation. *People v. Adams* established that in criminal prosecution actions, and DMV actions, where breath testing equipment is at that heart of a controversy, whether or not compliance with regulations pertaining to the accuracy of the testing equipment or the proficiency of the law enforcement officer, only pertains to the weight to be given questioned test results. *People v. Adams* does not demand the complete exclusion of the evidence of the alcohol testing results. The court in *People v. Adams* stated:

In *People v. Rawlings*, 42 Cal.App.3d 952; the court dealt, in dicta, with the very problem presented herein. . . . [T]he court stated that: 'Where a statute, such as this, does not specifically provide that evidence shall be excluded for failure to comply with said statute and there are no constitutional issues involved (and none are involved here) such evidence is not inadmissible. Statutory compliance or noncompliance merely goes to the weight of the evidence'

We agree with *Rawlings* that noncompliance goes merely to the weight of the evidence. The regulations are an expressed standard for competency of the test results; in effect, they are a simplified method of admitting the results into evidence. Were the rule to provide that the evidence of the test results would be inadmissible if the regulation were not followed there would be the incentive to turn the drunk driving case into a contest to find a technical defect in the test procedure so as to have the evidence excluded.

Under the present rule, if the test procedure does not comply with the regulations, a defendant is protected, as the prosecution then must qualify the personnel involved in the test, the accuracy of the equipment used and the reliability of the method followed before the results can be admitted. In the present case, as the regulations were not followed, appellants were entitled to attempt to discredit the results by showing that noncompliance affected their validity; indeed, the court instructed that any such noncompliance could be considered by the jury in evaluating the test evidence.

However, [the *People v. Adams* court did] not agree with appellants' contention that such noncompliance inherently and automatically rendered the machine unreliable and the test results worthless Appellants do not contend, nor could they on the record presented, that an inadequate foundation was presented as to the reliability of the machine used, despite the technical violation. Nor did they attempt any showing that the noncompliance affected the test results in any way, let alone rendered the results inaccurate.

Noncompliance with the Administrative Code regulations goes only to the weight of the blood alcohol concentration evidence. (*People v. Adams*, *supra* 59 Cal. App. 3d 559, 566-67.)

Based on the foregoing, complainant's exhibits 4A, 4B, and 4C are relied upon in making the Legal Conclusions and Order in this matter.

Determinations

9. In January 2014, respondent entered a plea of nolo contendere to the crime of reckless driving—"dry reckless." But, the fact of her past admission to a law enforcement officer about having consumed a half-bottle of wine before driving her car, and the entirety of the superior court's record of the prosecution and conviction, remain facts, which respondent cannot now deny occurred. Moreover, the investigating and arresting police officer's statements reflecting what respondent told him must be considered as direct evidence under *Lake v. Reed* (1997) 16 Cal.4th 448, 561-562.

A plea of nolo contendere admits all matters essential to the conviction. (*People v. Arwood* (1985) 165 Cal.App.3d 167.) In an administrative proceeding, a respondent cannot challenge the validity of a prior conviction. (*Thomas v. Dept. of Motor Vehicles* (1970) 3 Cal.3d 335; *Matanky v. Board of Medical Examiners* (1979) 79 Cal.App.3d 293.)

In this matter, respondent engaged in an impermissible attack upon the facts upon which she engaged a no contest plea in the superior court. Respondent's strategy at the hearing of this matter shows a lack on her part for the acceptance of responsibility for her past misconduct.

10. California Code of Regulations, title 16, section 1769, subdivision (b), provides in part:

When considering the suspension or revocation of . . . a personal license on the ground that . . . 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.

Under the Disciplinary Guidelines of the California State Board of Pharmacy, 14 factors are set out for consideration in determining the penalty that may result from an administrative adjudication proceeding. Those factors have been weighed in this matter. In particular, matters that pertain to respondent's background as well as matters in mitigation and matters in rehabilitation as described in Factual Findings 9 through 17 were considered in making the following order. And, the matters as set out in Factual Findings 6 through 8, and 18 through 26, which indicate that respondent has not been fully rehabilitated and that such matters detract from her good qualities, have been considered in making the following order.

Costs of Investigation and Prosecution

11. Business and Professions Code section 125.3 prescribes that a "licentiate found to have committed a violation or violations of the licensing act" may be directed "to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case."

The California Supreme Court's reasoning on the obligation of a licensing agency to fairly and conscientiously impose costs in administrative adjudication in *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45-46, is persuasive and should be considered in this matter. Scrutiny of certain factors, which pertain to the board's exercise of discretion to analyze or examine factors that might mitigate or reduce costs of

investigation and prosecution upon a licensee found to have engaged in unprofessional conduct, are set forth in Factual Finding 28. And, measured against the concrete presentation by complainant, respondent offered insufficient evidence in her defense. Respondent's professed matters in mitigation are insubstantial when compared to the board's burden in prosecuting this matter and safeguarding the public from unprofessional licensees in the way of absolving all the costs incurred by complainant. Due to respondent's strategy to deny the seriousness of her alcohol beverage related criminal conduct, complainant was compelled to thoroughly investigate respondent's activities and to instruct its legal counsel to prepare a comprehensive prosecution of the disciplinary action. And, respondent's employment status, coupled with lack of proof that she is impacted by extant, significant financial commitments, do not warrant a reduction of the overall costs that required respondent to address and eliminate.

With all factors considered, the costs of prosecution as set forth in Factual Findings 27 and 29, are reasonable in a total amount of \$7,404.50

ORDER

Pharmacy technician registration number TCH 59902, as issued to respondent Melissa M. Felardo, is revoked; however, the revocation is stayed and respondent's registration is placed on probation for four years upon the following terms and conditions:

1. Obey All Laws

Respondent shall obey all state and federal laws and regulations.

Respondent shall report any of the following occurrences to the board, in writing, within seventy-two (72) hours of such occurrence:

- an arrest or issuance of a criminal complaint for violation of any provision of the Pharmacy Law, state and federal food and drug laws, or state and federal controlled substances laws;
- a plea of guilty or nolo contendere in any state or federal criminal proceeding to any criminal complaint, information or indictment;
- a conviction of any crime; or,
- discipline, citation, or other administrative action filed by any state or federal agency which involves respondent's Pharmacy Technician Registration or which is related to the practice of pharmacy or the manufacturing, obtaining, handling, distributing, billing, or charging for any drug, device or controlled substance.

Failure to timely report any such occurrence shall be considered a violation of probation.

2. Report to the Board

Respondent shall report to the board quarterly, on a schedule as directed by the board or its designee. The report shall be made either in person or in writing, as directed. Among other requirements, respondent shall state in each report under penalty of perjury whether there has been compliance with all the terms and conditions of probation. Failure to submit timely reports in a form as directed shall be considered a violation of probation. Any period(s) of delinquency in submission of reports as directed may be added to the total period of probation. Moreover, if the final probation report is not made as directed, probation shall be automatically extended until such time as the final report is made and accepted by the board.

3. Interview with the Board

Upon receipt of reasonable prior notice, respondent shall appear in person for interviews with the board or its designee, at such intervals and locations as are determined by the board or its designee. Failure to appear for any scheduled interview without prior notification to board staff, or failure to appear at two (2) or more scheduled interviews with the board or its designee during the period of probation, shall be considered a violation of probation.

4. Cooperate with Board Staff

Respondent shall cooperate with the board's inspection program and with the board's monitoring and investigation of respondent's compliance with the terms and conditions of her probation. Failure to cooperate shall be considered a violation of probation.

5. Notice to Employers

During the period of probation, respondent shall notify all present and prospective employers of the decision in case number 5148 and the terms, conditions and restrictions imposed on respondent by the decision, as follows:

Within thirty (30) days of the effective date of this decision, and within fifteen (15) days of respondent undertaking any new employment, respondent shall cause her direct supervisor, pharmacist-in-charge (including each new pharmacist-in-charge employed during respondent's tenure of employment) and owner to report to the board in writing acknowledging that the listed individual(s) has/have read the decision in case

number 4631 and the terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that her employer(s) and/or supervisor(s) submit timely acknowledgement(s) to the board.

If respondent works for or is employed by or through a pharmacy employment service, respondent must notify her direct supervisor, pharmacist-in-charge and owner at every pharmacy of the terms and conditions of the decision in case number 5148 in advance of the respondent commencing work at each pharmacy. A record of this notification must be provided to the board upon request.

Furthermore, within thirty (30) days of the effective date of this decision, and within fifteen (15) days of respondent undertaking any new employment by or through a pharmacy employment service, respondent shall cause her direct supervisor with the pharmacy employment service to report to the board in writing acknowledging that he or she has read the decision in case number 5148 and the terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that her employer(s) and/or supervisor(s) submit timely acknowledgment(s) to the board.

Failure to timely notify present or prospective employer(s) or to cause that/those employer(s) to submit timely acknowledgements to the board shall be considered a violation of probation.

"Employment" within the meaning of this provision shall include any full-time, part-time, temporary or relief service or pharmacy management service as a pharmacy technician or in any position for which a pharmacy technician license is a requirement or criterion for employment, whether the respondent is considered an employee, independent contractor or volunteer.

6. Reimbursement of Board Costs

As a condition precedent to successful completion of probation, respondent shall pay to the board its costs of prosecution in the amount of \$7,404.50, before the third year anniversary of commencement date for the probation of the pharmacy technician's registration. There shall be no deviation from this schedule absent prior written approval by the board or its designee. Failure to pay costs by the deadline as directed shall be considered a violation of probation.

The filing of bankruptcy by respondent shall not relieve respondent of her responsibility to reimburse the board its costs of prosecution.

7. Probation Monitoring Costs

Respondent shall pay any costs associated with probation monitoring as determined by the board each and every year of probation. Such costs shall be payable to the board on a schedule as directed by the board or its designee. Failure to pay such costs by the deadline as directed shall be considered a violation of probation.

8. Status of License

Respondent shall, at all times while on probation, maintain an active, current pharmacy technician license with the board, including any period during which suspension or probation is tolled. Failure to maintain an active, current license shall be considered a violation of probation.

If respondent's pharmacy technician license expires or is cancelled by operation of law or otherwise at any time during the period of probation, including any extensions thereof due to tolling or otherwise, upon renewal or reapplication respondent's license shall be subject to all terms and conditions of this probation not previously satisfied.

9. License Surrender While on Probation/Suspension

Following the effective date of this decision, should respondent cease work due to retirement or health, or be otherwise unable to satisfy the terms and conditions of probation, respondent may tender her pharmacy technician registration to the board for surrender. The board or its designee shall have the discretion whether to grant the request for surrender or take any other action it deems appropriate and reasonable. Upon formal acceptance of the surrender of the license, respondent will no longer be subject to the terms and conditions of probation. This surrender constitutes a record of discipline and shall become a part of the respondent's license history with the board.

Upon acceptance of the surrender, respondent shall relinquish her pharmacy technician registration to the board within ten (10) days of notification by the board that the surrender is accepted. Respondent may not reapply for any license, permit, or registration from the board for three (3) years from the effective date of the surrender. Respondent shall meet all requirements applicable to the license sought as of the date the application for that license is submitted to the board.

10. Notification of a Change in Name, Residence Address, Mailing Address or Employment

Respondent shall notify the board in writing within ten (10) days of any change of employment. Said notification shall include the reasons for leaving, the address of the new employer, the name of the supervisor and owner, and the work schedule if known. Respondent shall further notify the board in writing within ten (10) days of a change in name, residence address and mailing address, or phone number.

Failure to timely notify the board of any change in employer(s), name(s), address(es), or phone number(s) shall be considered a violation of probation.

11. Tolling of Probation

Except during periods of suspension, respondent shall, at all times while on probation, be employed as a pharmacy technician in California for a minimum of 20 hours per calendar month. Any month during which this minimum is not met shall toll the period of probation, i.e., the period of probation shall be extended by one month for each month during which this minimum is not met. During any such period of tolling of probation, respondent must nonetheless comply with all terms and conditions of probation.

Should respondent, regardless of residency, for any reason (including vacation) cease working as a pharmacy technician for a minimum of 20 hours per calendar month in California, respondent must notify the board in writing within ten (10) days of cessation of work and must further notify the board in writing within ten (10) days of the resumption of the work. Any failure to provide such notification(s) shall be considered a violation of probation.

It is a violation of probation for respondent's probation to remain tolled pursuant to the provisions of this condition for a total period, counting consecutive and non-consecutive months, exceeding thirty-six (36) months.

“Cessation of work” means calendar month during which respondent is not working for at least 20 hours as a pharmacy technician, as defined in Business and Professions Code section 4115. “Resumption of work” means any calendar month during which respondent is working as a pharmacy technician for at

least 20 hours as a pharmacy technician as defined by Business and Professions Code section 4115.

12. Violation of Probation

If respondent has not complied with any term or condition of probation, the board shall have continuing jurisdiction over respondent, and probation shall automatically be extended, until all terms and conditions have been satisfied or the board has taken other action as deemed appropriate to treat the failure to comply as a violation of probation, to terminate probation, and to impose the penalty that was stayed.

If respondent violates probation in any respect, the board, after giving respondent notice and an opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. Notice and opportunity to be heard are not required for those provisions stating that a violation thereof may lead to automatic termination of the stay and/or revocation of the license. If a petition to revoke probation or an accusation is filed against respondent during probation, the board shall have continuing jurisdiction, and the period of probation shall be automatically extended until the petition to revoke probation or accusation is heard and decided.

13. Completion of Probation

Upon written notice by the board indicating successful completion of probation, respondent's pharmacy technician registration will be fully restored.

14. No Ownership of Licensed Premises

Respondent shall not own, have any legal or beneficial interest in, or serve as a manager, administrator, member, officer, director, trustee, associate, or partner of any business, firm, partnership, or corporation currently or hereinafter licensed by the board. Respondent shall sell or transfer any legal or beneficial interest in any entity licensed by the board within ninety (90) days following the effective date of this decision and shall immediately thereafter provide written proof thereof to the board. Failure to timely divest any legal or beneficial interest(s) or provide documentation thereof shall be considered a violation of probation.

15. Attend Substance Abuse Recovery Relapse Prevention and Support Groups

Within thirty (30) days of the effective date of this decision, respondent shall begin regular attendance at a recognized and established substance abuse recovery support group or behavior modification program in California, (e.g., Narcotics Anonymous, Alcoholics Anonymous, etc.) which has been approved by the board or its designee. Respondent must attend at least one group meeting per week unless otherwise directed by the board or its designee. Respondent shall continue regular attendance and submit signed and dated documentation confirming attendance with each

quarterly report for the duration of probation. Failure to attend or submit documentation thereof shall be considered a violation of probation.

16. Random Drug Screening

Respondent, at her own expense, shall participate in random testing, including but not limited to biological fluid testing (urine, blood), hair follicle testing, or other drug screening program as directed by the board or its designee. Respondent may be required to participate in testing for the entire probation period and the frequency of testing will be determined by the board or its designee. At all times respondent shall fully cooperate with the board or its designee, and shall, when directed, submit to such tests and samples for the detection of narcotics, hypnotics, dangerous drugs or other controlled substances as the board or its designee may direct. Failure to timely submit to testing as directed shall be considered a violation of probation. Upon request of the board or its designee, respondent shall provide documentation from a licensed practitioner that the prescription for a detected drug was legitimately issued and is a necessary part of the treatment of the respondent. Failure to timely provide such documentation shall be considered a violation of probation. Any confirmed positive test for any drug not lawfully prescribed by a licensed practitioner as part of a documented medical treatment shall be considered a violation of probation and shall result in the automatic suspension of work by respondent. Respondent may not resume work as a pharmacy technician until notified by the board in writing.

17. Work Site Monitor

Within ten (10) days of the effective date of this decision, respondent shall identify a work site monitor, for prior approval by the board, who shall be responsible for supervising respondent during working hours. Respondent shall be responsible for ensuring that the work site monitor reports in writing to the board quarterly. Should the designated work site monitor determine at any time during the probationary period that respondent has not maintained sobriety, she shall notify the board immediately, either orally or in writing as directed. Should respondent change employment, a new work site monitor must be designated, for prior approval by the board, within ten (10) days of commencing new employment. Failure to identify an acceptable initial or replacement work site monitor, or to ensure quarterly reports are submitted to the board, shall be considered a violation of probation.

18. Notification of Departure

Prior to leaving the probationary geographic area designated by the board or its designee for a period greater than twenty-four (24) hours, respondent shall notify the board verbally and in writing of the dates of departure and return. Failure to comply with this provision shall be considered a violation of probation.

19. Abstain from Alcoholic Beverage Use

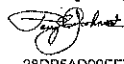
Respondent shall completely abstain from the possession or use of alcoholic beverages, controlled substances, dangerous drugs and their associated paraphernalia except when the drugs are lawfully prescribed by a licensed practitioner as part of a documented medical treatment. Upon request of the board or its designee, respondent shall provide documentation from the licensed practitioner that the prescription for the drug was legitimately issued and is a necessary part of the treatment of the respondent. Failure to timely provide such documentation shall be considered a violation of probation. Respondent shall ensure that she is not in the same physical location as individuals who are using illicit substances even if respondent is not personally ingesting the drugs. Any possession or use of alcoholic beverages, controlled substances, or their associated paraphernalia not supported by the documentation timely provided, and/or any physical proximity to persons using illicit substances, shall be considered a violation of probation.

20. Tolling of Probation

During the period of probation, respondent shall not leave the State of California for any period exceeding ten (10) days, regardless of purpose (including vacation). Any such absence in excess of ten (10) days during probation shall be considered a violation of probation. Moreover, any absence from California during the period of probation exceeding ten (10) days shall toll the probation, i.e., the probation shall be extended by one day for each day over ten (10) days respondent is absent from California. During any such period of tolling of probation, respondent must nonetheless comply with all terms and conditions of probation.

Respondent must notify the board in writing within ten (10) days of departure, and must further notify the board in writing within ten (10) days of return. The failure to provide such notification(s) shall constitute a violation of probation. Upon such departure and return, respondent shall not return to work until notified by the board that the period of probation has been satisfactorily completed.

DATED: September 2, 2015

DocuSigned by:

28DBSAD99FE7453
PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings

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

11 In the Matter of the Accusation Against:

Case Number 5148

12 **MELISSA M. FELARDO**
13 **a.k.a. Melissa Felardo**
14 **1684 Decoto Road, #313**
15 **Union City, California 94587**

A C C U S A T I O N

16 **Pharmacy Technician Registration Number**
17 **TCH 59902,**

Respondent.

18 Complainant Virginia Herold alleges:

19 **PARTIES**

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

22 2. On or about December 15, 2004, the Board issued Pharmacy Technician
23 Registration Number TCH 59902 to respondent Melissa M. Felardo, a.k.a. Melissa Felardo. This
24 pharmacy technician registration was in full force and effect at all times relevant to the charges
25 brought in this accusation and will expire on August 31, 2016, unless renewed.

26 **JURISDICTION**

27 3. This accusation is brought before the Board under the authority of the following
28

1 laws. All section references are to the Business and Professions Code unless otherwise indicated.

2 4. Section 4300 states in part:

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

4 "(b) The board shall discipline the holder of any license issued by the board, whose
5 default has been entered or whose case has been heard by the board and found guilty, by any of
6 the following methods:

7 "(1) Suspending judgment.

8 "(2) Placing him or her upon probation.

9 "(3) Suspending his or her right to practice for a period not exceeding one year.

10 "(4) Revoking his or her license.

11 "(5) Taking any other action in relation to disciplining him or her as the board in its
12 discretion may deem proper."

13 5. Section 4300.1 states:

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

19 **STATUTORY AND REGULATORY AUTHORITY**

20 6. Section 490 states in part:

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

25 7. Section 4301 states in part:

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

1 following:

2 . . .

3 “(h) The administering to oneself, of any controlled substance, or the use of any
4 dangerous drug or of alcoholic beverages to the extent or in a manner as to be dangerous or
5 injurious to oneself, to a person holding a license under this chapter, or to any other person or to
6 the public, or to the extent that the use impairs the ability of the person to conduct with safety to
7 the public the practice authorized by the license,

8 . . .

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

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

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

1 crime or act shall be considered substantially related to the qualifications, functions or duties of a
2 licensee or registrant if to a substantial degree it evidences present or potential unfitness of a
3 licensee or registrant to perform the functions authorized by his license or registration in a manner
4 consistent with the public health, safety, or welfare.”

5 **COST RECOVERY**

6 9. Section 125.3 states in part:

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

12 **FACTUAL BACKGROUND**

13 10. On June 10, 2013, at about 11:40 p.m., a California Highway Patrol stopped
14 respondent in Hayward, California, for driving a vehicle with a headlight not working. The
15 officer smelled the odor of an alcoholic beverage coming from respondent. Respondent said that
16 she had stopped at the liquor store and was going home. She admitted to splitting a bottle of wine
17 with a friend.

18 11. Respondent failed to properly perform a series of field sobriety tests.
19 Respondent’s blood alcohol concentrations were measured at the jail at 0.10 percent and 0.11
20 percent.

21 12. On or about January 13, 2014, in *People of the State of California v. Melissa*
22 *Felardo*, Alameda County Superior Court Case Number 450439, respondent pled no contest to
23 reckless driving (Veh. Code, § 23103), a misdemeanor. Execution of sentence was suspended,
24 and respondent was placed on three years’ unsupervised probation. The terms and conditions of
25 probation included one day incarceration and completion of a driving under the influence
26 program.

27 ///

28

1 **CAUSES FOR DISCIPLINE**

2 **FIRST CAUSE FOR DISCIPLINE**

3 **Conviction**

4 **Business and Professions Code section 490, subdivision (a)**

5 13. The allegations of paragraphs 10-12 are realleged and incorporated by reference as
6 if fully set forth.

7 14. Respondent has subjected her pharmacy technician registration to discipline for
8 being convicted of a crime substantially related to the qualifications, functions, or duties of a
9 pharmacy technician (Bus. & Prof. Code, § 490, subd. (a)). On or about January 13, 2014,
10 respondent pled no contest to reckless driving (Veh. Code, § 23103), a misdemeanor.

11 **SECOND CAUSE FOR DISCIPLINE**

12 **Unprofessional Conduct – Conviction**

13 **Business and Professions Code section 4301, subdivision (I)**

14 15. The allegations of paragraphs 10-12 are realleged and incorporated by reference as
15 if fully set forth.

16 16. Respondent has subjected her pharmacy technician registration to discipline for the
17 unprofessional conduct of being convicted of a crime substantially related to the qualifications,
18 functions, or duties of a pharmacy technician (Bus. & Prof. Code, § 4301, subd. (I)). On or about
19 January 13, 2014, respondent pled no contest to reckless driving (Veh. Code, § 23103), a
20 misdemeanor.

21 **THIRD CAUSE FOR DISCIPLINE**

22 **Unprofessional Conduct – Self Administration of Alcoholic Beverages**
23 **to be Dangerous or Injurious to Oneself or Others**

24 **Business and Professions Code section 4301, subdivision (h)**

25 17. The allegations of paragraphs 10-12 are realleged and incorporated by reference as
26 if fully set forth.

27 18. Respondent has subjected her pharmacy technician registration to discipline for the
28 unprofessional conduct of using alcoholic beverages to the extent or in a manner as to be
dangerous or injurious to oneself or others (Bus. & Prof. Code, § 4301, subd. (h)). On June 10,
2013, respondent drove a vehicle with a blood alcohol concentration of approximately 0.10
percent. On or about January 13, 2014, respondent pled no contest to reckless driving (Veh.

1 Code, § 23103), a misdemeanor.

2 **OTHER DISCIPLINARY CONSIDERATIONS**

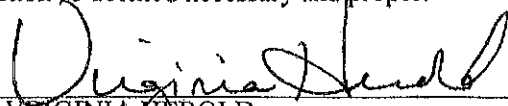
3 19. On June 13, 2010, respondent was arrested while under the influence of alcohol for
4 vandalism (Pen. Code, § 594, subd. (a)(3)) and resisting/obstructing a public officer (Pen. Code, §
5 148, subd. (a)(1)). On April 4, 2011, the Board issued Citation Number CI 2008 40222 to
6 respondent for the unprofessional conduct of using an alcoholic beverage to the extent or in a
7 manner as to be dangerous or injurious to oneself or others (Bus. & Prof. Code, § 4301, subd.
8 (h)). Respondent paid the \$500.00 citation and the Board closed the case on May 9, 2011.

9 **PRAYER**

10 WHEREFORE, complainant requests that a hearing be held on the matters alleged in this
11 accusation, and that following the hearing, the Board of Pharmacy issues a decision:

- 12 1. Revoking or suspending Pharmacy Technician Registration Number TCH 59902
13 issued to Melissa M. Felardo, a.k.a. Melissa Felardo;
- 14 2. Ordering Melissa M. Felardo, a.k.a. Melissa Felardo, to pay the Board of Pharmacy
15 the reasonable costs of the investigation and enforcement of this case under Business and
16 Professions Code section 125.3; and
- 17 3. Taking such other and further action as deemed necessary and proper.

18 DATED: 12/3/14


19 VIRGINIA HEROLD
20 Executive Officer
21 Board of Pharmacy
22 Department of Consumer Affairs
23 State of California
24 Complainant

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