

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

In the Matter of the Statement of Issues Against:

Case No. 5188

**DIA VUE
aka KATE VUE**

OAH No. 2014070657

Pharmacy Technician Registration Applicant

Respondent.

DECISION AND ORDER

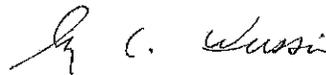
The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Pharmacy, Department of Consumer Affairs, as its Decision in this matter.

This decision shall become effective on May 15, 2015.

It is so ORDERED on April 15, 2015.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By



STAN C. WEISSER
Board President

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

In the Matter of the Statement of Issues
Against:

DIA VUE,
aka KATE VUE,

Respondent.

Case No. 5188

OAH No. 2014070657

PROPOSED DECISION

Administrative Law Judge Wilbert E. Bennett, State of California, Office of Administrative Hearings, heard this matter on February 24, 2015, in Sacramento, California.

Sterling A. Smith, Deputy Attorney General, represented Virginia Herold (complainant), Executive Officer of the Board of Pharmacy (Board), Department of Consumer Affairs.

Dia Vue, also known as Kate Vue (respondent), represented herself.

Evidence was received, the record was closed, and the matter was submitted for decision on February 24, 2015.

FACTUAL FINDINGS

1. On June 14, 2014, complainant filed the Statement of Issues in her official capacity. Complainant seeks to deny respondent's application for licensure based upon her 2004 conviction for grand theft by an employee, agent, or servant; and her 2011 conviction for theft by fraudulent possession of access card information, the commission of acts involving dishonesty, fraud, or deceit with the intent to substantially benefit herself, and the commission of acts which, if done by a licentiate, would be grounds for suspension or revocation of license.

2. On July 31, 2013, the Board received an application for a pharmacy technician license from respondent. The Board denied the application on February 19, 2014, and respondent timely requested a hearing on the denial.

Criminal Convictions

3. On January 21, 2004, in the Santa Clara County Superior Court, Case No. CC269682, respondent was convicted, by nolo contendere plea, of violating Penal Code section 487, subdivision (b)(3) (grand theft by an employee, agent, or servant), a felony. Pursuant to said conviction, respondent was placed on formal probation for a period of three years on certain terms and conditions, including service of 15 days in the county jail, performance of 200 hours of volunteer work, and payment of applicable fines and fees. Respondent successfully completed her three-year probation and, on July 19, 2007, was granted an order under Penal Code section 1203.4 dismissing the criminal complaint.

4. The facts and circumstances underlying this conviction involved conduct which occurred between December 1, 2000, and March 26, 2001, when respondent was employed as a marketing coordinator for Nortel Networks, and had the job responsibility of processing new membership payments. By her own admission, after being told that she would be laid off within a month, respondent altered a membership check made payable to her employer by making it payable to herself, and deposited it into her personal bank account. At that time, she had purchased a new car and was concerned about meeting her financial obligations.

5. On January 26, 2011, in the Sacramento County Superior Court, Case No. 10M07621, respondent was convicted, by nolo contendere plea, of violating Penal Code section 484e, subdivision (d) (theft by fraudulent possession of access card information), a misdemeanor. Pursuant to said conviction, respondent was placed on informal probation for a period of three years on certain terms and conditions, including service of 45 days in the county jail, with a credit for time served of five days, a prohibition against contact with the victim, payment of restitution to the victim in the amount of \$206, and payment of applicable fines and fees.

6. The facts and circumstances underlying this conviction, by respondent's own admission, involved her theft of a co-worker's purse on November 12, 2010, and her unauthorized use of the co-worker's credit card, located inside the purse, to purchase items from Barnes & Noble Bookstore by signing the card owner's name.

7. Complainant presented expert testimony from Board inspector Chi Keung Joseph Wong, who has been employed in that capacity since October 2015. Prior to commencing that employment, he worked in the private sector as a licensed pharmacist and as a pharmacist in charge for five years. As a Board inspector, Mr. Wong has conducted over 200 investigations, including investigations involving drug diversions by pharmacy personnel for sale or for self-use. He noted that some prescription drugs, especially controlled substances, have a much higher street value when diverted and sold for

illegitimate non-medical use. Honesty and trustworthiness are, accordingly, important qualifications for a pharmacy technician because such a licensee has access to dangerous drugs and controlled substances, which represents a potentially lucrative source of income, as well as a public health and safety concern, if the drugs are illegally diverted. Mr. Wong further noted that the functions and duties of a pharmacy technician include assisting the pharmacist in drug inventory control, accurate counting, packaging, and labeling of drugs, making correct entries into the pharmacy computer system, and placing drugs on pharmacy shelves.

Factors in Aggravation, Mitigation, or Rehabilitation

8. Respondent was convicted of two theft offenses in 2004 and 2011 which involved, respectively, theft from an employer and theft from a co-worker. Although she successfully completed her first criminal probation in 2007 (and obtained an order of dismissal under Penal Code section 1203.4), she repeated her criminal behavior in 2010, thereby demonstrating a pattern of repeated and willful disregard of law with the intent to substantially benefit herself. No evidence was introduced regarding whether respondent successfully completed her second criminal probation.

9. Respondent did not testify in her own behalf, and presented no mitigation or rehabilitation evidence. She made no argument as to why the agency denial action should not be sustained. Respondent has not taken the first step towards rehabilitation: full acknowledgment of prior wrongdoing. (See, *Seide v. Committee of Bar Examiners of the State Bar of California* (1989) 49 Cal.3d 933, 940 [“Fully acknowledging the wrongfulness of his actions is an essential step towards rehabilitation.”].)

10. In California Code of Regulations, title 16, section 1769, subdivision (b), the Board has set forth the following criteria for evaluating the rehabilitation of an applicant and his or her present eligibility for licensure: (1) the nature and severity of the act(s) or offense(s) under consideration as grounds for denial; (2) evidence of any act(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for denial; (3) the time that has elapsed since commission of the act(s) or crime(s); (4) whether the applicant has complied with any terms of probation, and (5) evidence, if any, of rehabilitation submitted by the applicant.

11. The application of these criteria emphasizes the lack of any showing of rehabilitation by respondent. The mere passage of time since the occurrence of disqualifying acts or crimes does not equate to rehabilitation, which must be shown by attitudinal change reflective of a full acknowledgment of wrongdoing. In the absence of any mitigation or rehabilitation evidence, in view of respondent’s criminal history which demonstrates a propensity to commit acts of theft in response to perceived financial need, the only appropriate resolution of this matter consistent with public protection is license denial. Respondent may not be entrusted to perform the duties of a pharmacy technician in a manner that is consistent with the public health, safety, and welfare.

12. As discussed below, cause exists to deny respondent's application for a pharmacy technician license. Respondent has failed to establish the rehabilitation required for the issuance of a license at this time. Therefore, to assure public protection, respondent's application must be denied.

LEGAL CONCLUSIONS

1. The burden of proof is on the applicant for a license. (*Martin v. Alcoholic Beverage Control Appeals Bd.* (1959) 52 Cal.2d 238.) Rehabilitation is akin to an affirmative defense; therefore, the burden of proof of establishing an affirmative defense of rehabilitation is on the proponent of that defense. (*Whetstone v. Board of Dental Examiners* (1927) 87 Cal.App. 156, 164.) The term "burden of proof" means "the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (Evid. Code, § 115.)

2. Pursuant to Business and Professions Code section 480, subdivisions (a)(1), (a)(2), and (a)(3), the Board may deny a license on the grounds that the applicant has: (1) been convicted of a crime; or (2) done any act involving dishonesty, fraud, or deceit with the intent to substantially benefit himself or herself; or (3) "done any act that if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license."

3. Under Business and Professions Code section 480, subdivision (a), the Board may deny a license "only if the crime or act is substantially related to the qualifications, functions or duties of the business or profession for which application is made."

4. Pursuant to California Code of Regulations, title 16, section 1770, a crime or act, as defined in section 480, shall be considered to be substantially related to the qualifications, functions, or duties of a licensee "if to a substantial degree it evidences present or potential unfitness ... to perform the functions authorized by [the] license in a manner consistent with the public health, safety, and welfare."

5. Pursuant to newly amended Business and Professions Code section 480, subdivision (c), which became effective on January 1, 2015, "a person shall not be denied a license solely on the basis of a conviction that has been dismissed pursuant to Section 1203.4 of the Penal Code."

6. Business and Professions Code section 4301, subdivisions (f) and (1), provides that the Board may take disciplinary action when a licensee is guilty of unprofessional conduct, which includes, but is not limited to, "the commission of any act involving moral turpitude, dishonesty, fraud, deceit or corruption," and "the conviction of a crime substantially related to the qualifications, functions, and duties of a licensee."

Legal Causes for Denial of License

7. Respondent was convicted of grand theft by an employee and theft by fraudulent possession of access card information. (Findings 3 and 5.) Such crimes evidence respondent's present or potential unfitness to perform the functions authorized by a pharmacy technician license in a manner consistent with the public health, safety, and welfare and, accordingly, are determined to be substantially related to the qualifications, functions or duties of such a license. The testimony of Board inspector Wong regarding the qualifications, functions, and duties of a pharmacy technician was considered in making this determination. (Finding 7.)

8. Cause for denial of respondent's application for licensure was established pursuant to Business and Professions Code section 480, subdivision (a)(1), by reason of respondent's conviction of theft by fraudulent possession of access card information, a crime which is substantially related to the qualifications, functions, or duties of a pharmacy technician license.

9. No cause for denial of respondent's application for licensure was established pursuant to Business and Professions Code section 480, subdivision (a)(1), by reason of the restrictive provisions of Business and Professions Code section 480, subdivision (c), although respondent's criminal offense of grand theft by an employee is substantially related to the qualifications, functions, or duties of a pharmacy technician license.

10. Respondent, by her own admission, committed acts involving dishonesty and deceit with the intent to substantially benefit herself, which resulted in her conviction for grand theft by an employee. (Finding 4.) Cause for denial of respondent's application for licensure was established pursuant to Business and Professions Code section 480, subdivision (a)(2), by reason of such conduct. Cause for denial of respondent's application for licensure was also established pursuant to Business and Professions Code section 480, subdivision (a)(3), by reason of such conduct which would constitute grounds for license discipline under Business and Professions Code section 4301, subdivision (f).

11. Respondent, by her own admission, committed acts involving dishonesty and deceit with the intent to substantially benefit herself, which resulted in her conviction for theft by fraudulent possession of access card information. (Finding 6.) Cause for denial of respondent's application for licensure was established pursuant to Business and Professions Code section 480, subdivision (a)(2), by reason of such conduct. Cause for denial of respondent's application for licensure was also established pursuant to Business and Professions Code section 480, subdivision (a)(3), by reason of such conduct which would constitute grounds for license discipline under Business and Professions Code section 4301, subdivision (f).

12. As set forth in Findings 8 through 12, respondent failed to establish that she has been sufficiently rehabilitated to permit the issuance of a license at this time.

ORDER

The application of Dia Vue, also known as Kate Vue, for the issuance of a pharmacy technician license is DENIED.

DATED: March 24, 2015

Wilbert E. Bennett

WILBERT E. BENNETT
Administrative Law Judge
Office of Administrative Hearings

1 KAMALA D. HARRIS
Attorney General of California
2 KENT D. HARRIS
Supervising Deputy Attorney General
3 STERLING A. SMITH
Deputy Attorney General
4 State Bar No. 84287
1300 I Street, Suite 125.
5 P.O. Box 944255
Sacramento, CA 94244-2550
6 Telephone: (916) 445-0378
Facsimile: (916) 327-8643
7 *Attorneys for Complainant*

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

12 In the Matter of the Statement of Issues Against:

Case No. 5188

13 **DIA VUE**
14 **aka KATE VUE**

STATEMENT OF ISSUES

15 **Applicant for Pharmacy Technician**
16 **Registration**

17 Respondent.

18
19 Virginia Herold ("Complainant") alleges:

20 **PARTIES**

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

23 2. On or about July 31, 2013, the Board received a Pharmacy Technician Application
24 from Dia Vue, also known as Kate Vue ("Respondent"). On or about July 30, 2013, Respondent
25 certified under penalty of perjury to the truthfulness of all statements, answers, and
26 representations in the application. The Board denied the application on February 19, 2014.

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1 7. Code section 480 states, in pertinent part:

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

4 (1) Been convicted of a crime. A conviction within the meaning of this section
5 means a plea or verdict of guilty or a conviction following a plea of nolo contendere.
6 Any action that a board is permitted to take following the establishment of a
7 conviction may be taken when the time for appeal has elapsed, or the judgment of
8 conviction has been affirmed on appeal, or when an order granting probation is made
9 suspending the imposition of sentence, irrespective of a subsequent order under the
10 provisions of Section 1203.4 of the Penal Code.

11 (2) Done any act involving dishonesty, fraud, or deceit with the intent to
12 substantially benefit himself or herself or another, or substantially injure another.

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

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

18 FIRST CAUSE FOR DENIAL OF APPLICATION

19 (Conviction of Crimes)

20 8. Respondent's application is subject to denial under Code section 480(a)(1), in that she
21 was convicted of the following crimes that are substantially related to the qualifications, functions
22 or duties of a pharmacy technician:

23 a. On or about January 21, 2004, in the case of *People v. Dia Vue, aka Katie Vue*,
24 (Super. Ct. Santa Clara County, 2004, Case No. CC269682), Respondent was convicted by the
25 Court on her plea of nolo contendere of violating Penal Code section 487(b)(3) (grant theft by
26 employee, agent or servant), a felony. The circumstances of the crime were that between
27 December 1, 2000, and March 26, 2001, Respondent took a check made payable to her employer
28 in the amount of \$15,000, altered the check by making it payable to herself, and deposited it into
her personal bank account.

b. On or about January 26, 2011, in the case of *People v. Dia Vue, aka Katie Vue*,
(Super. Ct. Sacramento County, 2010, Case No. 10M07621), Respondent was convicted by the
Court on her plea of nolo contendere of violating Penal Code section 484e(d) (used account data
without consent), a misdemeanor. The circumstances of the crime were that on or about

1 November 12, 2010, Respondent stole a co-worker's purse and used the co-worker's credit card
2 located inside the purse to purchase items by signing the card owner's name.

3 **SECOND CAUSE FOR DENIAL OF APPLICATION**

4 **(Dishonesty, Fraud or Deceit)**

5 9. Respondent's application is subject to denial under Code section 480(a)(2), in that
6 Respondent committed acts involving dishonesty, fraud or deceit with the intent to substantially
7 benefit herself, as more particularly set forth above in paragraph 8.

8 **THIRD CAUSE FOR DENIAL OF APPLICATION**

9 **(Committed Acts Which If Done By A Licentiate)**

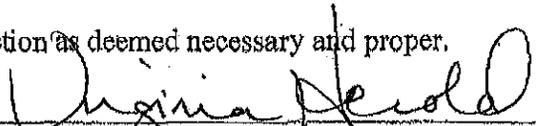
10 10. Respondent's application is subject to denial under Code section 480(a)(3)(A), in that
11 she committed acts which if done by a licentiate of the profession would constitute grounds for
12 discipline under Code section 4301(1) (conviction of a crime). The conduct described above in
13 paragraph 8 would also constitute grounds for discipline under Code section 4301(f) (commission
14 of any act involving moral turpitude, dishonesty, fraud, deceit, or corruption).

15 **PRAYER**

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

- 18 1. Denying the application of Dia Vue, also known as Kate Vue for a Pharmacy
19 Technician Registration; and,
20 2. Taking such other and further action as deemed necessary and proper.

21 DATED: 6/14/14


22 VIRGINIA HEROLD
23 Executive Officer
24 Board of Pharmacy
25 Department of Consumer Affairs
26 State of California
27 Complainant

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