

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

In the Matter of the Accusation Against:

MILTON GABRIEL LUCERO,

Pharmacy Technician Registration,
No. TCH 108177

Respondent.

Case No. 5410

OAH No. 2015080748

DECISION AND ORDER

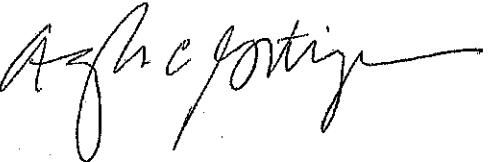
The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Pharmacy, Department of Consumer Affairs, as its Decision in this matter.

This Decision shall become effective at 5:00 p.m. on April 6, 2016.

It is so ORDERED on March 7, 2016

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By


Amy Gutierrez, Pharm.D.
Board President

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Board of Pharmacy No. 5410

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PROPOSED DECISION

Administrative Law Judge Juliet E. Cox, State of California, Office of Administrative Hearings, heard this matter on November 30, 2015, in Oakland, California.

Nicholas Tsukamaki, Deputy Attorney General, represented complainant Virginia Herold, in her official capacity as Executive Officer of the Board of Pharmacy (Board).

Respondent Milton Gabriel Lucero represented himself.

The matter was submitted on November 30, 2015.

FACTUAL FINDINGS

1. On November 12, 2010, the Board issued Pharmacy Technician Registration No. TCH 108177 to respondent. As of November 10, 2015, respondent's registration was in full force and effect, and was scheduled to expire April 30, 2016.

2. On June 13, 2015, complainant issued an accusation seeking revocation or suspension of respondent's pharmacy technician registration. Complainant alleges that respondent acted unprofessionally on August 14, 2014, by giving marijuana or concentrated cannabis to another person in violation of Health and Safety Code section 11360, subdivision (a). Respondent requested a hearing on the accusation.

Basis for Proposed Discipline

3. On August 14, 2014, in the early evening, respondent and a friend drove together to Berkeley in respondent's car. Respondent and his friend both were 24 years old, and had been friends since they were in middle school. They parked on Dwight Way, along the south side of People's Park.

4. While respondent and his friend stood in the park, an undercover City of Berkeley police officer conducting surveillance of the park watched respondent roll a cigarette and share it with his friend. The officer suspected that the cigarette contained marijuana, but no evidence established what the cigarette actually contained or who furnished the materials with which respondent made the cigarette.

5. After respondent and his friend had finished the cigarette, they returned to the car. As the undercover officer watched, respondent retrieved a small green zippered pouch from the car and gave it to his friend. Respondent's friend put the pouch in his left front pants pocket, and the two men re-locked the car and walked away. The undercover officer suspected that the green pouch contained drugs and that he had just observed a drug sale. He radioed his uniformed counterparts and asked them to detain the two young men.

6. Respondent and his friend browsed for several minutes in a nearby comic book store before walking north together on Telegraph Avenue toward the University of California campus. Uniformed police officers met respondent and his friend near the corner of Telegraph and Durant Avenues.

7. One police officer detained respondent and searched his person. Aside from respondent's car keys and respondent's facially valid California medical cannabis authorization card, the officer found nothing he deemed important. A second uniformed officer took respondent's car keys and conducted a warrantless search of respondent's car, approximately three blocks away.

8. A third uniformed officer detained and searched respondent's friend. That officer removed the green pouch from respondent's friend's pants pocket and opened it. The pouch held two small containers, one glass and one plastic, each holding approximately 5 grams of concentrated cannabis products. Although respondent's friend had held a valid California medical cannabis authorization card at some time in the past, he did not have such a card in his possession that evening.

9. The officers arrested respondent and his friend. Respondent spent the night in jail and posted \$20,000 bail the next day. The officers recommended prosecution of respondent's friend for unlawfully possessing marijuana or concentrated cannabis, and prosecution of respondent for unlawfully furnishing marijuana or concentrated cannabis to his friend.

Additional Evidence

10. That evening, respondent was wearing loose pants with front and back pockets. When respondent and his friend left the car for the comic book store, respondent's pockets contained his mobile phone, his wallet, a package of cigarettes, an electronic smoking "pen," and his car keys. The concentrated cannabis in the green pouch also belonged to respondent, but respondent had asked his friend to hold the pouch because respondent did not have room in his front pockets for it and was afraid of losing it if he put it in a back pocket.

11. The District Attorney charged respondent with violating Health and Safety Code section 11360, subdivision (a), by unlawfully furnishing marijuana or concentrated cannabis to his friend. Respondent entered into a deferred prosecution agreement, although no evidence established the agreement's terms. On November 4, 2015, after respondent successfully had completed his obligations under the deferred prosecution agreement, the charges against respondent arising from his August 14, 2014, arrest were dismissed.

12. Respondent presently works as a stagehand and event manager rather than as a pharmacy technician. He enjoyed working as a pharmacy technician and would like not only to return to such work but to become a licensed pharmacist. He testified credibly that he was careful and conscientious in his pharmacy work and that his supervisors had praised his job performance. Respondent has no history of professional discipline by the Board.

Costs

13. The California Department of Justice, Office of the Attorney General, has charged the Board \$2,250 for prosecution costs on this matter. The Board's claim for these costs is supported by a declaration that complies with California Code of Regulations, title 1, section 1042. The total cost amount is reasonable.

LEGAL CONCLUSIONS

1. The Board may discipline licensees for "unprofessional conduct," such as "violation of any of the statutes of this state . . . regulating controlled substances and dangerous drugs." (Bus. & Prof. Code, § 4301, subd. (j).)

2. Marijuana and concentrated cannabis are controlled substances. (Health & Saf. Code, §§ 11006.5, 11018; *id.*, § 11054, subd. (d)(13).) The Health and Safety Code generally prohibits possessing, selling, or giving away marijuana or concentrated cannabis, except in compliance with California's statewide system regulating possession and use of marijuana and related substances for medical purposes. (*Id.*, § 11357; *id.*, § 11360, subd. (a); *id.*, § 11362.5.)

3. The evidence did not establish that respondent sold or gave away any marijuana or concentrated cannabis. Instead, as set forth in findings 4 through 10, the evidence showed that respondent and his friend smoked a cigarette of unknown composition; that respondent lawfully possessed some concentrated cannabis; and that respondent asked his friend to hold a pouch containing that concentrated cannabis while the two men strolled and shopped together. No evidence showed that respondent's friend planned to use or had used any of the concentrated cannabis in the pouch that evening, or that respondent intended his friend to keep the cannabis even after they returned to respondent's car.

The undercover police officer who first noticed respondent and his friend suspected that they were sharing a marijuana cigarette. (Finding 4.) The officer asked his colleagues to detain respondent and his friend because the officer suspected a drug sale. (Finding 5.) After searching respondent and his friend, the officers understood that respondent had authority to possess the concentrated cannabis but that respondent's friend did not (Findings 7, 8); they arrested respondent and his friend because they suspected that respondent planned to share the concentrated cannabis with his friend (Finding 9). But suspicions are not evidence. Complainant failed to meet her burden of proof in this matter.

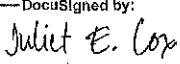
4. For pharmacists, license discipline must rest on clear and convincing evidence. (*Sternberg v. Board of Pharmacy* (2015) 239 Cal.App.4th 1159, 1171.) The same principle likely applies to pharmacy technicians, because registration as a pharmacy technician requires special training. (See *San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1893-94; *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856-57; see also Bus. & Prof. Code, § 4202.) In this case, however, not even a preponderance of evidence proves the facts on which complainant based her accusation against respondent.

5. Because the evidence did not establish respondent's unprofessional conduct, the Business and Professions Code does not authorize the Board to recover its prosecution costs from respondent. (Bus. & Prof. Code, § 125.3, subd. (a).)

ORDER

The accusation against respondent Milton Gabriel Lucero is dismissed.

DATED: December 4, 2015

DocuSigned by:

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JULIET E. COX
Administrative Law Judge
Office of Administrative Hearings

1 KAMALA D. HARRIS
2 Attorney General of California
3 JOSHUA A. ROOM
4 Supervising Deputy Attorney General
5 NICHOLAS TSUKAMAKI
6 Deputy Attorney General
7 State Bar No. 253959
8 455 Golden Gate Avenue, Suite 11000
9 San Francisco, CA 94102-7004
10 Telephone: (415) 703-1188
11 Facsimile: (415) 703-5480
12 E-mail: Nicholas.Tsukamaki@doj.ca.gov
13 *Attorneys for Complainant*

Attorneys for Complainant

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

In the Matter of the Accusation Against: Case No. 5410

12 MILTON GABRIEL LUCERO
3824 Rockford Drive
13 Antioch, CA 94509

ACCUSATION

14 | Pharmacy Technician Registration No. TCH
108177

ACCUSATION

Respondent.

18 Complainant alleges:

PARTIES

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

22 2. On or about November 12, 2010, the Board of Pharmacy issued Pharmacy Technician
23 Registration Number TCH 108177 to Milton Gabriel Lucero (Respondent). The Pharmacy
24 Technician Registration was in full force and effect at all times relevant to the charges brought
25 herein and will expire on April 30, 2016, unless renewed.

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JURISDICTION

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

4. Section 4011 of the Code provides that the Board shall administer and enforce both the Pharmacy Law [Bus. & Prof. Code, § 4000 et seq.] and the Uniform Controlled Substances Act [Health & Safety Code, § 11000 et seq.].

5. Section 4300, subdivision (a) of the Code provides that every license issued by the Board may be suspended or revoked.

6. Section 4300.1 of the Code provides that the expiration, cancellation, forfeiture, or suspension of a Board-issued license, the placement of a license on a retired status, or the voluntary surrender of a license by a licensee, shall not deprive the Board of jurisdiction to commence or proceed with any investigation of, or action or disciplinary proceeding against, the licensee or to render a decision suspending or revoking the license.

STATUTORY PROVISIONS

7. Section 4301 of the Code provides, in pertinent part:

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

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

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8. Health and Safety Code section 11360, subdivision (a) states:

"Except as otherwise provided by this section or as authorized by law, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into

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1 this state or transport any marijuana shall be punished by imprisonment pursuant to subdivision
2 (h) of Section 1170 of the Penal Code for a period of two, three or four years."

3 9. Marijuana is a Schedule I controlled substance as designated by Health and Safety
4 Code section 11054, subdivision (d)(13), and a dangerous drug as designated by Business and
5 Professions Code section 4022. It is a hallucinogenic drug.

COSTS

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

FACTUAL BACKGROUND

14 11. On or about August 14, 2014, a police officer observed Respondent and another
15 individual smoking a suspected marijuana joint near a park in Berkeley, California. The park is
16 located in a known drug trafficking area. The officer observed Respondent enter a parked vehicle
17 while the other individual stood next to the vehicle looking up and down the street nervously.
18 Respondent then handed the individual a sunglass case, which the individual placed in his jeans
19 pocket. Respondent and the other individual were then detained by other police officers. One of
20 the officers found a receipt in Respondent's wallet from a marijuana dispensary dated August 14,
21 2014 for "Animal Cookie Oil." Another officer detained the other individual and located the
22 sunglass case in that individual's jeans pocket. Inside the sunglass case the officer found a small
23 plastic container labeled "Animal Cookie Oil" and a small glass container, both containing
24 suspected cannabis concentrate. The suspected cannabis concentrate in both containers tested
25 presumptive positive. Respondent was then arrested for furnishing concentrated cannabis to the
26 other individual.

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CAUSE FOR DISCIPLINE

(Unprofessional Conduct)

3 12. Respondent is subject to disciplinary action under section 4301, subdivision (j) of the
4 Code for unprofessional conduct in that he violated Health and Safety Code section 11360,
5 subdivision (a) when he furnished and/or gave away, and/or offered to furnish and/or give away
6 marijuana. The circumstances of Respondent's conduct are set forth above in paragraph 11.

PRAYER

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

- 10 1. Revoking or suspending Pharmacy Technician Registration Number TCH 108177
11 issued to Milton Gabriel Lucero;

12 2. Ordering Milton Gabriel Lucero to pay the Board of Pharmacy the reasonable costs of
13 the investigation and enforcement of this case pursuant to Business and Professions Code section
14 125.3;

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

17 | DATED:

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

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