

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

In the Matter of the Statement of Issues
Against:

MATTHEW JOHN SZALAY,

Respondent.

Case No. 5288

OAH No. 2015021030

ORDER DENYING RECONSIDERATION

The Board of Pharmacy having read and considered respondent's petition for reconsideration of the board's decision effective December 4, 2015 is denied. NOW THEREFORE IT IS ORDERED that the petition for reconsideration is denied. The Board of Pharmacy's Decision and Order effective December 4, 2015 is the Board of Pharmacy's final decision in this matter.

Date: December 3, 2015

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

Amy Gutierrez, Pharm.D.
Board President

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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

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Against:

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Respondent.

Case No. 5288

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PROPOSED DECISION

This matter was heard before Administrative Law Judge Erin R. Koch-Goodman, Office of Administrative Hearings, State of California, on August 25, 2015, in Fresno, California.

Elena L. Almanzo, Deputy Attorney General, appeared and represented Virginia Herold (complainant), Executive Officer, Board of Pharmacy (Board), Department of Consumer Affairs.

Eric H. Schweitzer, Attorney at Law, appeared and represented Matthew Szalay (respondent).

Evidence was received, the record closed, and the matter submitted for decision on August 25, 2015.

FACTUAL FINDINGS

1. On February 10, 2015, complainant filed the instant Statement of Issues in her official capacity.

2. On November 18, 2013, the Board received an Application for Registration (Application) as a Pharmacy Technician from respondent. On November 13, 2013, respondent certified under penalty of perjury to the truthfulness of all statements, answers and representations in the Application. On May 29, 2014, the Board denied the Application based on respondent's criminal convictions and unprofessional conduct. Respondent appealed.

Unprofessional Conduct

3. On August 21, 2013, a Fresno police officer responded to a call of domestic violence at a residential apartment. Respondent, his child, and A.H., the mother of his child, were inside the apartment. The police officer knocked and asked respondent to open the front door; respondent refused and blockaded the door from the inside with furniture. The officer kicked the door and gained entry into the apartment. The officer observed respondent to be extremely intoxicated. When questioned, respondent admitted to using marijuana earlier that evening.

4. On May 26, 2010, a Clovis police officer responded to a call of domestic violence at a residential home. The officers found respondent in a park nearby. When questioned, respondent admitted to pushing his girlfriend, M.M., during an argument between them. M.M. fell to the ground and hit her head. The officer observed that M.M.'s shirt was ripped and the back of her head had a laceration. Respondent was arrested. During booking, the officer had respondent submit to a Preliminary Alcohol Screening (PAS) test, with the result being a blood alcohol level of .186 percent. No criminal charges were filed.

Criminal Convictions

5. On March 1, 2010, in the criminal proceeding titled *People vs. Matthew John Szalay* (Fresno County Superior Court, Case No. M10000160), respondent was convicted, following his plea of nolo contendere, of a violation of Penal Code section 647, subdivision (f), public intoxication, an infraction.¹ The Court ordered respondent to pay fines, fees, and restitution.

The events giving rise to the March 1, 2010, criminal charges took place on December 16, 2009. Clovis police officers responded to a report of an individual breaking into a vehicle. The officer found respondent sitting on a curb near the vehicle. The officer could smell alcohol coming from respondent's person and observed respondent to have bloodshot eyes, slow and slurred speech, and an unsteady gate. When questioned, respondent appeared confused and did not know his whereabouts. Respondent was arrested.

6. On May 7, 2007, in a criminal proceeding entitled *People v. Matthew John Szalay* in Fresno County Superior Court (Case No. M07000802), respondent was convicted by plea of no contest of violating Health and Safety Code section 11357, subdivision (b), possession of marijuana, a misdemeanor. Respondent agreed to a deferred entry of judgment. Respondent performed all terms and conditions of the deferred entry of judgment; the plea was withdrawn, and the case dismissed on November 6, 2007.

The events giving rise to the May 7, 2007, criminal charges took place on March 7, 2007. Clovis police officers responded to a vehicle, which was parked on the premises of an

¹ The criminal complaint charged the violation of Penal Code section 647, subdivision (f), as a misdemeanor. The Court reduced the misdemeanor to an infraction.

elementary school that was in session. Officers approached the vehicle and found respondent, a glass pipe, a lighter, and a green leafy substance that tested positive for marijuana. Respondent admitted to the officers that the marijuana was his and he had smoked some marijuana the day before.

Mitigation/Aggravation/Rehabilitation

7. Respondent is 26 years old. He is single. He has one child. He offered no evidence of current employment or income. He attended Heald College for his pharmacy technician training, which he completed on October 4, 2013.

8. Respondent testified at hearing; he was allusive, indifferent, and unconvincing. He never accepted responsibility for his conduct. He did not express remorse or contrition. He blamed his girlfriends for the fights. He never declared a desire to change his behavior. He claimed to have no knowledge as to whether marijuana was/is illegal to smoke in California, but admitted to having been trained on controlled substances at Heald and having a 2007 conviction for possession of marijuana. In addition, respondent claimed that he had only used marijuana to treat his anxiety, stress, and back pain; respondent presented no evidence to support his alleged diagnosis or a prescription from a physician for the legal use of marijuana.

9. Respondent did acknowledge that marijuana is harmful; in his Explanation of Convictions, filed with his Application on November 13, 2013, respondent stated: "I have learned that marijuana only brings harm and suffering and have changed my ways and no longer partake in behavior like this." But as recently as August 21, 2013, respondent admitted to a police officer that he had used marijuana earlier in the evening. At hearing, respondent reconciled the two statements by indicating that between 2007 and 2012, he had abstained from marijuana use, but that he began using marijuana again in 2013.

Discussion

10. In California Code of Regulations, title 16, section 1769, the Board has set forth the following criteria for rehabilitation when considering the denial of a license:

- (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 under Section 480 of the Business and Professions Code.
- (3) The time that has elapsed since commission of the act(s) or crime(s) referred to in subdivision (1) or (2).

- (4) Whether the applicant has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against the applicant.
- (5) Evidence, if any, of rehabilitation submitted by the applicant.

11. Respondent offered no rehabilitation evidence: no letters of support or witnesses to testify about a change in attitude since his last contact with law enforcement or his newly found respect for laws. In addition, respondent failed to introduce work experience or examples of his commitment to the pharmacy profession, compassion for the community through volunteering, or courses in drug or alcohol rehabilitation. Without rehabilitation evidence, the Board is left with only respondent's illegal and unprofessional behaviors, which resulted in personal injury to others (i.e. to A.H. and M.M.), personal injury to himself, property damage of others (i.e. breaking into a vehicle, forcing officers to kick the apartment door because respondent blockaded it with furniture), and risk of harm to others.

12. After respondent disclosed his 2007 marijuana conviction on his Application, at hearing, respondent argues that his 2007 marijuana conviction cannot be considered when evaluating his Application. (Health & Saf. Code, § 11361.7, subd. (b).) Respondent points to Health and Safety Code section 11361.5, subdivision (a), which states, in part, that records of any court of this state, pertaining to the arrest or conviction of any person for a violation of Section 11357, subdivision (b), shall not be kept beyond two years from the date of the conviction, or from the date of the arrest if there was no conviction. Health and Safety Code section 11361.7, subdivision (a), indicates that such records are "not [to] be considered to be accurate, relevant, timely, or complete for any purposes by any agency or person." Further still, Health and Safety Code section 11361.7, subdivision (b), states, in part, that no public agency shall deny, limit, revoke, or suspend any license of any person because of an arrest or conviction for an offense specified in Section 11361.5, subdivision (a) or (b), or because of the facts or events leading to such an arrest or conviction, on or after the date the records of such arrest or conviction are required to be destroyed by Section 11361.5., subdivision (a).

The statutes are quite clear. In this case, the statement of issues cites the 2007 conviction, but notes that the conviction was dismissed by the Court on November 6, 2007, following a deferred entry of judgment. In addition, complainant did not introduce a Court record regarding the 2007 conviction or a police report related to the underlying circumstances. However, given the applicable statutes, complainant cannot use the facts or events leading to the 2007 arrest or the 2007 conviction to deny a license to a person. As such, the Board cannot consider the facts, the arrest, or the conviction of respondent in 2007.

13. Ultimately, respondent has one conviction on March 1, 2010: an infraction for violating Penal Code section 647, subdivision (f), for public intoxication; at the time of his arrest (December 16, 2009), respondent was 20 years old. He had police contact again on May 26, 2010, following a fight with his girlfriend; respondent was intoxicated with a PAS tested blood alcohol level of .186 percent. Currently, respondent is the subject of criminal charges for his behavior on August 21, 2013, involving a fight with his girlfriend; at the

arrest, respondent admitted his use of marijuana earlier in the day. In six years, respondent has been arrested and/or detained by the police for his behavior three times. Given his history, respondent seems undeterred by contact with law enforcement; thereby showing an inability to comply with the law.

14. The Board is concerned any time an applicant for registration as a pharmacy technician has a history of marijuana possession or use and/or a pattern of failing to follow the law. Pharmacy technicians have access to an abundance of controlled substances. Because the field of pharmacy is highly regulated, a pharmacy technician must be a rule follower and utterly trustworthy; currently, respondent does not possess either quality. With no rehabilitation evidence, there is nothing to show that respondent is truly ready, willing to comport his behavior to the law, and/or able to conform to the requirements of a pharmacy technician position. As such, licensure at this time is not appropriate.

LEGAL CONCLUSIONS

Applicable Statutes and Regulations

1. Business and Professions Code section 480 allows the Board to deny a license on the grounds that the applicant has “[d]one any act which if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license.” (Bus. & Prof. Code, § 480, subd. (a)(3)(A).) That said, “[t]he Board may deny a license pursuant to this subdivision only if the crime is substantially related to the qualifications, functions or duties of the business or profession for which application is made.” (Bus. & Prof. Code, § 480, subd. (a)(3)(B).)

2. Business and Professions Code section 4301 provides that the Board shall take action against any holder of a license who is guilty of unprofessional conduct, including, but not limited to the following:

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

[¶] ... [¶]

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

[¶] ... [¶]

(o) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of or conspiring to violate any provision or term of this chapter or of the applicable federal and state laws and regulations governing pharmacy, including regulations established by the board or by any other state or federal regulatory agency.

3. Business and Professions Code section 4060 provides: “No person shall possess any controlled substance, except that furnished to a person upon the prescription of a physician, dentist, podiatrist, optometrist, ...” (See also Health & Saf. Code, § 11357; Veh. Code, § 23222.) Marijuana is a Schedule I controlled substance. (Health & Saf. Code § 11054, subd. (d)(13).)

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

[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.

Cause for Discipline

5. Respondent’s use of a controlled substance without a valid prescription is substantially related to the qualifications, functions and duties of a licensed pharmacy technician; in that it evidences a present and/or potential unfitness of respondent to perform the functions authorized by said license in a manner consistent with the public health, safety, or welfare.

6. Cause exists to deny respondent’s Application pursuant to Business and Professions Code sections 480, subdivision (a)(3)(A), and 4301, subdivisions (j) and (o), by reason of the matters set forth in Factual Findings 3 and 6; in that respondent self-administered marijuana, a controlled substance, without a valid prescription from a physician on August 21, 2013, and May 7, 2007.

7. Respondent’s use of alcohol is substantially related to the qualifications, functions and duties of a licensed pharmacy technician; in that it evidences a present and/or potential unfitness of respondent to perform the functions authorized by said license in a manner consistent with the public health, safety, or welfare.

8. Cause exists to deny respondent’s Application pursuant to Business and Professions Code sections 480, subdivision (a)(3)(A), and 4301, subdivision (h), by reason of

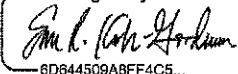
the matters set forth in Factual Findings 4 and 5; in that respondent used alcohol to an extent or in a manner as to be dangerous or injurious to himself, to any other person, or to the public on May 26, 2010, and December 16, 2009.

9. The matters set forth in Factual Findings 3 through 14 were considered in making the following order. It would be contrary to the public interest, health or safety to issue respondent a license at this time.

ORDER

The application of Matthew John Szalay for Registration as a Pharmacy Technician is DENIED.

DATED: September 21, 2015

DocuSigned by:

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ERIN R. KOCH-GOODMAN
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 Statement of Issues
12 Against:
13 **MATTHEW JOHN SZALAY**
14 **Pharmacy Technician Registration**
Applicant
15 **Respondent.**

Case No. 5288

STATEMENT OF ISSUES

17 Virginia Herold ("Complainant") alleges:

18 **PARTIES**

- 19 1. Complainant brings this Statement of Issues solely in her official capacity as the
20 Executive Officer of the Board of Pharmacy (the "Board"), Department of Consumer Affairs.
- 21 2. On or about November 18, 2013, the Board received an application for a Pharmacy
22 Technician registration from Matthew John Szalay ("Respondent"). On or about November 13,
23 2013, Respondent certified under penalty of perjury to the truthfulness of all statements, answers,
24 and representations in the application. The Board denied the application on May 29, 2014.
- 25 ///
26 ///
27 ///
28 ///

1 including regulations established by the board or by any other state or federal
2 regulatory agency . . .

3 7. Code section 4022 states, in pertinent part:

4 "Dangerous drug" . . . means any drug or device unsafe for self-use in humans
5 or animals, and includes the following:

6 (a) Any drug that bears the legend: "Caution: federal law prohibits dispensing
7 without prescription," "Rx only," or words of similar import.

8 (c) Any other drug or device that by federal or state law can be lawfully
9 dispensed only on prescription or furnished pursuant to Section 4006.

10 8. Code section 4060 states, in pertinent part:

11 No person shall possess any controlled substance, except that furnished to a
12 person upon the prescription of a physician, dentist, podiatrist, optometrist,
13 veterinarian, or naturopathic doctor pursuant to Section 3640.7, or furnished pursuant
14 to a drug order issued by a certified nurse-midwife pursuant to Section 2746.51, a
nurse practitioner pursuant to Section 2836.1, or a physician assistant pursuant to
Section 3502.1, or naturopathic doctor pursuant to Section 3640.5, or a pharmacist
pursuant to either subparagraph (D) of paragraph (4) of, or clause (iv) of
subparagraph (A) of paragraph (5) of, subdivision (a) of Section 4052 . . .

15 **DRUG**

16 9. *Marijuana* is a Schedule I controlled substance as designated by Health and Safety
17 Code section 11054(d)(13), and is known to impair motor skills.

18 **CAUSE FOR DENIAL**

19 (Committed Acts Which If Done By a Licentiate Would Be Grounds For Discipline)

20 10. Respondent's application is subject to denial pursuant to Code section 480(a)(3)(A),
21 in that Respondent committed acts that if done by a licentiate would be grounds for discipline, as
22 follows:

23 a. **Code section 4301(j)&(o)**: Respondent self-administered marijuana, a controlled
24 substance, without a valid prescription from a physician, dentist, podiatrist, optometrist,
25 veterinarian, or naturopathic doctor, in violation of Health and Safety Code section 11357 and
26 Code section 4060, as follows:

27 i. On or about March 7, 2007, a glass pipe, a lighter, and a green leafy substance that
28 tested positive for marijuana, were found inside Respondent's vehicle, which was parked on the

1 premises of a K-12 school that was in session. Respondent admitted to the investigating officer
2 with the Clovis Police Department that the marijuana was his and that he had smoked marijuana
3 the day before. On or about May 7, 2007, in the case entitled *People v. Matthew John Szalay*,
4 Fresno County Superior Court, Clovis Division, Case No. M07000802, Respondent entered a plea
5 of no contest to violating Health and Safety Code section 11357(b) (possession of marijuana)
6 subject to conditional settlement terms. Respondent complied with the terms of settlement and the
7 plea was withdrawn and the case dismissed on or about November 6, 2007.

8 ii. On or about August 21, 2013, a police officer with the Fresno Police Department
9 attempted to contact Respondent regarding domestic disturbance reported by "V1", the mother of
10 his child. Respondent entered V1's apartment and refused entry to a police officer. After advising
11 Respondent that the door would be opened by force, the police officer started kicking the door.
12 The officer eventually gained entry and observed that Respondent appeared to have blocked the
13 door with furniture and appeared to be extremely intoxicated. When questioned, Respondent
14 stated that he had used marijuana earlier that evening.

15 b. **Code section 4301(h)**: Respondent used a dangerous drug and/or alcoholic beverage
16 to an extent or in a manner as to be dangerous or injurious to himself, to any other person, or to
17 the public, as follows:

18 i. On or about March 1, 2010, in the case entitled *People v. Matthew John Szalay*,
19 Fresno County Superior Court, Clovis Division, Case No. M10000160, Respondent pled nolo
20 contendere to Count 2, for violating Penal Code section 647(f) (public intoxication), which was
21 reduced from a misdemeanor to an infraction. Count 2 stated that on or about December 16,
22 2009, Respondent was under the influence of intoxicating liquor and toluene¹ to an extent that he
23 was unable to exercise care for his own safety or the safety of others. The circumstances of the
24 violation are that on or about December 16, 2009, a police officer with the Clovis Police

25 _____
26 ¹ Toluene is an organic solvent used as an inhalant drug for its intoxicating properties. It has
27 the potential to cause severe neurological harm.
28

1 Department responded to a report of an individual breaking into a vehicle. The officer found
2 Respondent on a curb near the vehicle. His speech was slow and slurred, the strong odor of an
3 alcoholic beverage emitted from his breath and person; his eyes were bloodshot, red, and watery;
4 he was unsteady on his feet; did not know his whereabouts; and, appeared confused.

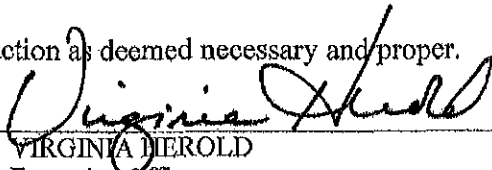
5 ii. On or about May 26, 2010, in response to report of a domestic disturbance, a
6 police officer with the Clovis Police Department interviewed Respondent, who admitted to
7 pushing "M.M." during an altercation between them. The investigating officer observed that
8 M.M.'s shirt was ripped and the back of her head had a laceration. Respondent's blood alcohol
9 level was .186%.

10 **PRAYER**

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

- 13 1. Denying the application of Matthew John Szalay for a pharmacy technician license;
14 and,
15 2. Taking such other and further action as deemed necessary and proper.

16 DATED: 2/10/15


17 VIRGINIA DEROLD
18 Executive Officer
19 Board of Pharmacy
20 Department of Consumer Affairs
21 State of California
22 Complainant

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