

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

In the Matter of the Statement of Issues
Against:

RICHARD ANTHONY ORTEGA

Respondent.

Case No. 5383

OAH No. 2015100282

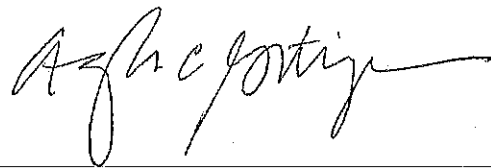
DECISION AND ORDER

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 June 6, 2016.

It is so ORDERED on May 6, 2016.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

Amy Gutierrez, Pharm.D.
Board President

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PROPOSED DECISION

This matter was heard by Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings, State of California, on December 7, 2015, in Los Angeles.

Shawn Cook, Deputy Attorney General, represented Complainant.

Respondent Richard Anthony Ortega represented himself.

Testimonial and documentary evidence was received, and argument was heard. The matter was submitted and the record was closed on December 7, 2015.¹

FACTUAL FINDINGS

1. On September 12, 2015, Virginia Herold (Complainant) filed the Statement of Issues in her official capacity as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs (Board).

2. On December 20, 2013, the Board received a Pharmacy Technician Application (Application) submitted by Richard Anthony Ortega (Respondent). The Board denied the Application on December 2, 2014, based on Respondent's criminal convictions, arrest history, and his failure to disclose all of his convictions on the Application.

¹ The issuance of this Proposed Decision was delayed due to the unexpected medical leave of the Administrative Law Judge. The parties agreed to wait for the issuance of the Proposed Decision until after the Administrative Law Judge returned from her medical leave in March 2016.

Respondent's Convictions

3. (A) On January 12, 2011, in the Superior Court, County of San Bernardino, Fontana District, case number MVA1003838, Respondent was convicted on his plea of guilty of one count of violating Penal Code section 148, subdivision (a)(1) (resist, obstruct, delay of peace officer), a misdemeanor. Pursuant to the plea agreement, the charge of violating Penal Code section 186.22, subdivision (d) (participation in criminal street gang) was dismissed. Respondent was placed on conditional and revocable release for a period of 18 months under terms and conditions including that he obey the law, pay fines and fees totaling \$215, and serve 14 days in county jail (credit given for time served of 14 days). On August 15, 2013, the court dismissed the case pursuant to Penal Code section 1203.4.

(B) The facts and circumstances underlying the conviction are: On December 28, 2010, at approximately 11:20 p.m., two officers of the Fontana Police Department, who were in uniform and driving a marked police car, were on patrol looking for possible suspects that had just attempted to steal a vehicle. The officers saw two Hispanic males walking on the street who matched the description of the suspects. The officers activated their overhead lights and made a U-turn. Both suspects began running toward the parking lot of a Circle-K store. One of the suspects stopped in the parking lot. The other suspect, later identified as Respondent, continued walking away from the police car. When one of the officers yelled for Respondent to come back to the police car, Respondent began running away. A passerby saw Respondent running from the officer and used his vehicle to block Respondent from going further. The pursuing officer took Respondent into custody and returned with him to the Circle-K parking lot.

(C) Respondent was searched and interviewed at the scene by the police officer. The officer found a cell phone in Respondent's pocket. The officer, who was a gang investigator, saw that Respondent's cell phone contained multiple pictures of Respondent and others displaying a "P" hand sign indicative of Pomona gang members as well as wearing caps and apparel bearing a "P" symbol associated with Pomona gang members. The wall paper of Respondent's cell phone was a picture of wall graffiti associated with a Pomona street gang. Respondent showed the officer the tattoos on his shoulders and chest which included a design of multiple "Ps" that the officer recognized as being indicative of Pomona gang members. During his interview with the police, Respondent stated he ran away because he panicked but admitted that he was stupid and should not have run away. Respondent told the officer that he lived the first 10 years of his life in Pomona but denied having any gang affiliation. Respondent told the officer that the pictures on his cell phone had been forwarded to him from others. He could not explain why he used the graffiti picture as his cell phone wall paper or why he was wearing a "P" hat and had multiple pictures relating him to Pomona street gangs. The officer concluded that Respondent was affiliated with the Pomona 12th Street Sharkies street gang, based on the amount of gang related pictures found on Respondent's cell phone, his tattoos, and his wearing a hat bearing the "P" logo associated with the gang.

4. (A) On December 14, 2011, in the Superior Court, County of San Bernardino, case number MVA 1102715, Respondent was convicted on his plea of guilty of one count of violating Penal Code section 647, subdivision (f) (disorderly conduct – under influence of alcohol), a misdemeanor. Respondent was placed on conditional and revocable release for a period of 24 months under terms and conditions including, but not limited to, that he obey the law, pay \$110 to the Victim Restitution Fund, and complete 32 hours in a work sentence program in lieu of paying a \$500 fine. On August 15, 2013, the the court dismissed the case pursuant to Penal Code section 1203.4.

(B) The facts and circumstances underlying the conviction are: On October 9, 2011, at approximately 5 a.m., an officer of the Fontana Police Department was dispatched to the location of a possibly intoxicated subject passed out in front of the location. Upon arriving at the scene, the officer saw Respondent sitting half way on the sidewalk and half way in the gutter. The officer contacted Respondent, who was staring blankly towards the ground. Initially, Respondent would not answer the officer's questions. The officer smelled a strong odor of an alcoholic beverage coming from Respondent's breath and person. Respondent told the officer that he drank "a few" but would not specify the type of alcohol he drank. Respondent denied taking any drugs. The officer noted that Respondent's speech was slurred and slow, and his eyes were red and watery. Based on his observations, the officer concluded that Respondent was too intoxicated to take care of himself. The officer arrested Respondent for public intoxication, in violation of Penal Code section 647, subdivision (f).

Respondent's Application

5. The Application is dated December 18, 2013, and signed by Respondent. By signing the Application, Respondent certified under penalty of perjury to the truth and accuracy of all statements, answers and representations made in the Application, including all supplementary statements.

6. Item 7 of the Application asks: "Have you ever been convicted of any crime in any state, the USA and its territories, military court or foreign country?" Two boxes are provided, one for the answer "Yes" and one for the answer "No." The instructions for Item 7 of the Application state, in part, that a conviction includes a plea of no contest and any conviction that has been set aside or deferred pursuant to Penal Code section 1203.4, including infractions, misdemeanors, and felonies. The instructions for Item 7 of the Application further state: "You do not need to report a conviction for an infraction with a fine of less than \$300 *unless the infraction involved alcohol or controlled substances.*" (Emphasis added.) Item 7 of the Application also includes space for the applicant to provide information for criminal convictions, and an instruction that the failure to disclose a conviction "may result in the license being denied . . . for falsifying the application."

7. In response to Item 7 of the Application, Respondent checked the box for the answer "Yes," and he disclosed his convictions on January 12, 2011, and December 14,

2011, discussed above.² Respondent, however, failed to disclose that he also had convictions on September 24, 2012, and September 17, 2013, for infractions involving alcohol, discussed in Findings 8 and 9 below.

8. (A) On September 24, 2012, in the Superior Court, County of San Bernardino, case number MVA1201535, Respondent was convicted on his plea of nolo contendere of one count of violating Penal Code section 415 (fighting, noise, offensive words), an infraction. The court ordered Respondent to pay a fine of \$300.

(B) The facts and circumstances underlying this conviction are: On June 22, 2012, around 11 p.m., an officer of the Fontana Police Department who was on patrol in uniform and driving a marked police car contacted Respondent, who was walking in the middle of the street. The officer smelled the odor of an alcoholic beverage on Respondent's breath. He saw that Respondent's eyes were bloodshot and watery, and that he was swaying. The officer noted that Respondent's speech was slurred and his attitude was insulting. Based on his observations, the officer concluded that Respondent was under the influence of alcohol to an extent that he was unable to exercise due care for his own safety or the safety of others. The officer arrested Respondent for violating Penal Code section 647, subdivision (f) (disorderly conduct – under influence of alcohol), a misdemeanor. Pursuant to his plea agreement, the criminal charge against Respondent was reduced to one infraction count of violating Penal Code section 415.

9. (A) On September 17, 2013, in the Superior Court, County of San Bernardino, case number 695786RO, Respondent was convicted on his plea of guilty of one count of violating Penal Code section 415 (fight, noise, offensive words), an infraction. The court ordered Respondent to pay a fine of \$100.

(B) The facts and circumstances underlying this conviction are: On July 14, 2013, at approximately 1:18 a.m., an officer of the Fontana Police Department, who was on patrol in uniform and driving a marked police car, was dispatched to the location of a report of a woman screaming and a possible fight in the area. Upon arriving at the scene, the officer saw Respondent and two other males standing in the middle of the street. The officer saw that Respondent and one of the males each had red marks and what appeared to be dried blood on their hands. Both men denied any sort of physical altercation and declined medical attention. When the officer spoke to Respondent, he could immediately smell the odor of an alcoholic beverage on Respondent's breath and on his person. The officer also noticed that Respondent had red, watery, bloodshot eyes and that his gait was unsteady. Respondent appeared to the officer to be angry and seemed as if he wanted to fight. Based on his observations, the officer concluded that Respondent was under the influence of an alcoholic beverage and was unable to care for his own safety. The officer arrested Respondent for violating Penal Code section 647, subdivision (f) (disorderly conduct, drunk in public), a

² The Application incorrectly states the date of the disorderly conduct conviction as "11/22/2011." Court records established that the date of conviction was December 14, 2011, and that "11/22/2011" was the date Respondent was arraigned. (Exh. 9.)

misdemeanor. Pursuant to his plea agreement, the criminal charge against Respondent was reduced to one infraction count of violating Penal Code section 415.

10. By failing to disclose his two infraction convictions as required by the Application, and the infraction convictions having occurred prior to Respondent signing and dating the Application on December 18, 2013, Respondent knowingly made a false statement of fact required to be disclosed on the Application.

Possession of Marijuana

11. Marijuana is a Schedule I controlled substance under Health and Safety Code section 11054, subdivision (d)(13), and a dangerous drug as defined in Business and Professions Code 4022.

12. On June 3, 2010, Respondent smoked marijuana and consumed alcohol (vodka) to an extent and in a manner as to be dangerous or injurious to himself and others. The circumstances are as follows. On June 3, 2010, an officer of the Riverside Police Department was dispatched to an apartment complex to investigate a report by the tenant of apartment 23 of a person making threats and pounding on his front door and windows. Upon arriving at the scene, the officer saw a person, later identified as Respondent, pulling on the door handle of apartment 23 and attempting to force open a window. The officer contacted Respondent and found Respondent to be in possession of 5.7 grams of marijuana. The officer found the marijuana in a purple bottle that was in the front pocket of Respondent's shorts. Based on his contact with Respondent, the officer concluded that Respondent was intoxicated. The officer saw that Respondent's eyes were bloodshot and watery, he was speaking loudly, and he was having difficulty standing up straight. The officer also smelled the odor of an alcoholic beverage coming from Respondent's mouth. During his interview with the officer, Respondent denied pulling on the door handle or trying to open a window to apartment 23. He told the officer he had been at the apartment complex all day to help his aunt move out of her apartment. Respondent claimed all of the apartments looked the same, and he thought he was pounding on the door of his aunt's apartment and his friend was "messing with him" by not opening the door. Respondent denied making any verbal threats but admitted to the officer that he was not in the right state of mind because he had been smoking marijuana and had drunk two cups of vodka. On several occasions, Respondent told the officer he was "pretty high" and "pretty drunk." Respondent denied that the marijuana in the purple container was his. The officer contacted Respondent's aunt in apartment 21, who confirmed that Respondent and several other males had been helping her move all day. Based on his investigation, the officer arrested Respondent for possession of marijuana, in violation of Health and Safety Code section 11357, subdivision (b).

13. At this hearing, Respondent testified he does not dispute that, on June 3, 2010, he was publicly intoxicated from drinking vodka and smoking marijuana. His testimony regarding the circumstances of the June 3, 2010 incident was consistent with his statements documented in the arrest report. The Statement of Issues alleges that a criminal charge was filed against Respondent in the Riverside County Superior Court, case number RIM

10009000, and the case was dismissed due to Respondent's completion of a deferred entry of judgment. No court records for that case were offered at the hearing. However, Respondent testified that he completed all required classes and community service for this charge.

Rehabilitation

14. Respondent is 24 years old. He and his girlfriend have a two-year-old daughter. The family currently lives at the home of the girlfriend's father. Respondent is employed through a temporary agency doing seasonal, minimum wage warehouse jobs. Respondent is a high school graduate. He completed the 9-month pharmacy technician program at American Career College, as well as an externship at a Walgreen's pharmacy through that program.

15. Respondent testified that, on a voluntary basis, he completed a 12-week anger management program and received individual therapy. Respondent also testified that he and his girlfriend/daughter's mother have taken parenting classes. No documentary evidence, such as completion certificates, progress reports or attendance records, was presented to corroborate this testimony.

16. Respondent complied with the probation terms for his January 12, 2011 conviction and December 14, 2011 conviction, as both of those convictions have been expunged pursuant to Penal Code section 1203.4. The court records for the September 17, 2013 infraction conviction includes an entry that payment of the \$130 fine was received on January 16, 2014. The court records for the September 24, 2012 infraction conviction indicate the \$300 fine was suspended.

17. (A) At this hearing, Respondent denied having any involvement or association with Pomona street gangs. Respondent testified that his father is a member of a street gang and has repeatedly been in and out of prison. Respondent feels he gets incorrectly identified as a gang member because he and his father share the same name. Respondent testified he wants to make his own life and be proud of himself. He is determined to prove that he is "not my dad."

(B) As a rebuttal witness, Complainant presented the testimony of Adam Davis, who is a police officer with the Fontana Police Department. Officer Davis is trained and experienced as a gang investigator. Officer Davis reviewed the Arrest Report for Respondent's December 28, 2010 arrest (Exh. 7A), including the pictures found on Respondent's cell phone. Officer Davis' testimony explained and supplemented the opinion contained in the Arrest Report that Respondent was affiliated with the Pomona 12th Street Sharkies gang. Based on his review of the Arrest Report, and based on his training and experience, Officer Davis opined that it is "more likely than not" that Respondent is a Pomona street gang "affiliate," but not an active gang member. Officer Davis testified credibly that the pictures found on Respondent's cell phone showed Respondent and others displaying hand signs associated with Pomona street gangs by holding their fingers in the shape of the letter "P." The pictures also showed Respondent and others wearing baseball

caps and/or shirts with the "P" logo of the Pittsburgh Pirates major league baseball team, which Officer Davis testified is used by a Pomona street gang. The wall graffiti Respondent used as his cell phone wall paper was identified by Officer Davis as used by street gangs to mark their territory. Officer Davis also recognized Respondent's tattoos as using a design associated with a Pomona street gang. All of these circumstances, in Officer Davis' opinion, support the conclusion that Respondent is more likely than not an affiliate of a Pomona street gang. Respondent's testimony denying his affiliation with a street gang was not persuasive and, thus, insufficient to rebut Officer Davis' opinion.

18. Respondent testified that he has made mistakes and wrong decisions. He does not dispute that he was publicly intoxicated on June 3, 2010, from smoking marijuana and drinking vodka. His testimony at hearing, however, did not demonstrate he has fully accepted responsibility for his other offenses involving public intoxication. He stated several times during his testimony that he asked the police for breath tests and blood tests for measuring his level of intoxication, but the police would not give him those tests.

19. Respondent's convictions at issue in this case occurred between June 2010 and September 2013. On cross-examination, Respondent testified that he had no interaction with the police during 2014. This was not true. On February 9, 2014, Respondent was arrested for domestic violence and burglary arising from a domestic dispute between Respondent and his girlfriend. The police who responded to the scene found that both Respondent and the girlfriend were intoxicated. They admitted to the police that they had been drinking. They both had red, watery, and bloodshot eyes, their speech was slurred, and a strong odor of alcohol was emitted from both persons. Although the police saw visible injuries on both Respondent and the girlfriend, they both denied having any type of physical altercation.

20. Respondent wishes to pursue a career as a pharmacy technician so that he can support and care for his family. Respondent's two-year-old daughter motivates him in pursuing his career goal.

LEGAL CONCLUSIONS

1. Business and Professions Code section 480, subdivision (a)(1), provides that a board may deny a license to an applicant who has "[b]een convicted of a crime that is substantially related to the qualifications, functions, or duties of the licensed profession."³

2. Cause exists to deny Respondent's application, pursuant to section 480, subdivision (a)(1), in that Respondent was convicted of crimes substantially related to the qualifications, functions and duties of a pharmacy technician, based on Factual Findings 3 and 4.

³ All further statutory references are to the Business and Professions Code unless otherwise indicated.

3. Respondent's convictions for resisting, obstructing, and delaying a peace officer, and for disorderly conduct while under the influence of alcohol, were for "substantially related" crimes because those crimes, to a substantial degree, evidence a present or potential unfitness of Respondent to perform the functions authorized by a pharmacy technician registration in a manner consistent with the public health, safety, or welfare. (Cal. Code Regs., tit. 16, § 1770.)

4. Section 480, subdivision (d), provides that a board may deny a license "on the ground that the applicant knowingly made a false statement of fact that is required to be revealed in the application for the license." A "false statement of fact" means more than verbal misstatements or positive assertions. "A representation may be either expressed or implied . . . and may arise from silence . . . or nondisclosure." (*Halé v. Wolfsen* (1969) 276 Cal.App.2d 285, 291.)

5. Cause exists to deny Respondent's application, pursuant to section 480, subdivision (d), in that Respondent knowingly made a false statement of fact that was required to be revealed in the Application when he failed to disclose his two infraction convictions in the Application, based on Factual Findings 5-10.

6. Section 4300, subdivision (c), provides, in part: "The board may refuse a license to any applicant guilty of unprofessional conduct." Unprofessional conduct is defined in section 4301 as including, but not limited to, the acts or conduct enumerated in subdivisions (h), (j), and (l).

7. Section 480, subdivision (a)(3)(A), provides that a board may deny a license on the grounds that the applicant has "[d]one any act that if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license." Section 4301 provides that the Board "shall take action against any holder of a license who is guilty of unprofessional conduct."

8. Cause exists to deny Respondent's application, pursuant to sections 4300, subdivision (c), and 480, subdivision (a)(3)(A), in that Respondent engaged in acts constituting unprofessional conduct and which, if done by a Board licensee, would be grounds for license suspension or revocation, as follows:

A. Respondent was convicted of "substantially related" crimes on January 12, 2011, and December 14, 2011, which constitutes unprofessional conduct under section 4301, subdivision (l), and California Code of Regulations, title 16, section 1770, and would be grounds for suspension or revocation of a license under sections 490 and 4301. (Factual Findings 3 and 4.)

B. Respondent possessed a controlled substance and dangerous drug (marijuana) in violation of section 4060, which constitutes unprofessional conduct under section 4301, subdivision (j), and would be grounds for suspension or revocation of a license

under section 4301. Under section 4060, a person shall not possess any controlled substance except that furnished upon a valid prescription. (Factual Findings 11-13.)

C. Respondent administered to himself a dangerous drug (marijuana) and alcohol (vodka) to an extent and in a manner as to be dangerous or injurious to himself or others, which constitutes unprofessional conduct under section 4301, subdivision (h), and would be grounds for suspension or revocation of a license under section 4301. (Factual Findings 11-13.)

9. Under California Code of Regulations, title 16, section 1769, subdivision (b), when the Board is considering the denial of a license or registration under section 480, the Board, in evaluating the rehabilitation of an applicant and the applicant's present eligibility for licensing or registration, shall consider the following criteria: (1) the nature and severity of the acts or offenses under consideration as grounds for denial; (2) evidence of any acts committed subsequent to the acts or crimes under consideration as grounds for denial under section 480; (3) the time that has elapsed since the commission of the acts or crimes; (4) whether the applicant has complied any terms of parole, probation, restitution or any other lawfully imposed sanction; and (5) evidence, if any, of rehabilitation submitted by the applicant.

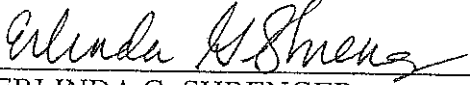
Discussion

10. Respondent has not established sufficient rehabilitation to warrant the issuance of a pharmacy technician registration at this time. Applying the rehabilitation criteria, Respondent was convicted of minor crimes that were charged as misdemeanors and infractions. He complied with the probation terms for his two misdemeanor convictions and both of those convictions were dismissed pursuant to Penal Code section 1203.4. Respondent's oldest conviction occurred about six years ago, but his most recent conviction occurred less than three years ago. Respondent's repeated instances of public intoxication raise concerns that he is susceptible or prone to abusing drugs or alcohol. On several occasions, Respondent was found by the police to be publicly intoxicated to an extent that he posed a danger to his own safety and the safety of others. Subsequent to his most recent conviction, Respondent was again involved with the police in February 2014 during a domestic dispute with his girlfriend where both parties were intoxicated. Despite his history of public intoxication, Respondent, at this hearing, presented no evidence of recent or current participation in any alcohol or drug counseling or rehabilitation program. Respondent appeared sincere when expressing that his two-year-old daughter motivates him to pursue his career goals and better himself. Respondent's testimony, without more, is not sufficient to establish that he is rehabilitated from his history of criminal offenses and alcohol abuse. Respondent did not present any supporting evidence from sources other than himself. He did not present any witnesses to testify or provide letters of support to lend credibility or substance to his own testimony of rehabilitation. More time is needed for Respondent to establish his rehabilitation and demonstrate his fitness to perform the duties of a registered pharmacy technician in a manner consistent with the public health, safety, or welfare. Based on the record of this case, the Application must be denied.

ORDER

The Application for Pharmacy Technician Registration of Respondent Richard Anthony Ortega is denied.

DATED: March 22, 2016



ERLINDA G. SHRENGER
Administrative Law Judge
Office of Administrative Hearings

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

11 In the Matter of the Statement of Issues
Against:

Case No. 5383

12 **RICHARD ANTHONY ORTEGA**

STATEMENT OF ISSUES

13 Pharmacy Technician Registration Applicant

14 Respondent,
15

16 Complainant alleges:

17 **PARTIES**

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

20 2. On or about December 20, 2013, the Board of Pharmacy, Department of Consumer
21 Affairs received an application for a Pharmacy Technician Registration from Richard Anthony

22 Ortega (Respondent). On or about December 18, 2013, Richard Anthony Ortega certified under
23 penalty of perjury to the truthfulness of all statements, answers, and representations in the
24 application. The Board denied the application on December 2, 2014.

25 **JURISDICTION**

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

STATUTORY PROVISIONS

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4. Section 480 of the Code states, in pertinent part:

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

"(1) Been convicted of a crime. A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action that a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4, 1203.4a, or 1203.41 of the Penal Code.

....

"(3) (A) 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.

(B) The board may deny a license pursuant to this subdivision 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.

....

"(d) A board may deny a license regulated by this code on the ground that the applicant knowingly made a false statement of fact that is required to be revealed in the application for the license."

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

6. Section 492 of the Code states, in pertinent part:

"Notwithstanding any other provision of law, successful completion of any diversion program under the Penal Code, or successful completion of an alcohol and drug problem assessment program under Article 5 (commencing with Section 23249.50) of Chapter 12 of

1 Division 11 of the Vehicle Code, shall not prohibit any agency established under Division 2
2 (commencing with Section 500) of this code, or any initiative act referred to in that division, from
3 taking disciplinary action against a licensee or from denying a license for professional
4 misconduct, notwithstanding that evidence of that misconduct may be recorded in a record
5 pertaining to an arrest.

6 This section shall not be construed to apply to any drug diversion program operated by any
7 agency established under Division 2 (commencing with Section 500) of this code, or any
8 initiative act referred to in that division.

9 7. Section 4060 of the Code states, in pertinent part:

10 "No person shall possess any controlled substance, except that furnished to a person upon
11 the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic
12 doctor pursuant to Section 3640.7, or furnished pursuant to a drug order issued by a certified
13 nurse-midwife pursuant to Section 2746.51, a nurse practitioner pursuant to Section 2836.1, or a
14 physician assistant pursuant to Section 3502.1, or naturopathic doctor pursuant to Section 3640.5,
15 or a pharmacist pursuant to either subparagraph (D) of paragraph (4) of, or clause (iv) of
16 subparagraph (A) of paragraph (5) of, subdivision (a) of Section 4052. This section shall not
17 apply to the possession of any controlled substance by a manufacturer, wholesaler, pharmacy,
18 pharmacist, physician, podiatrist, dentist, optometrist, veterinarian, naturopathic doctor, certified
19 nurse-midwife, nurse practitioner, or physician assistant, when in stock in containers correctly
20 labeled with the name and address of the supplier or producer. . . ."

21 8. Section 4300 of the Code states, in pertinent part:

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23 "(c) The board may refuse a license to any applicant guilty of unprofessional conduct.
24 The board may, in its sole discretion, issue a probationary license to any applicant for a license
25 who is guilty of unprofessional conduct and who has met all other requirements for licensure.
26 The board may issue the license subject to any terms or conditions not contrary to public policy. .
27 . . ."

28 9. Section 4301 of the Code states, in pertinent part:

1 "The board shall take action against any holder of a license who is guilty of unprofessional
2 conduct or whose license has been procured by fraud or misrepresentation or issued by mistake.

3 Unprofessional conduct shall include, but is not limited to, any of the following:

4

5 "(f) The commission of any act involving moral turpitude, dishonesty, fraud, deceit, or
6 corruption, whether the act is committed in the course of relations as a licensee or otherwise, and
7 whether the act is a felony or misdemeanor or not.

8

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

14

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

1 the Penal Code allowing the person to withdraw his or her plea of guilty and to enter a plea of not
2 guilty, or setting aside the verdict of guilty, or dismissing the accusation, information, or
3 indictment.

4

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

9 "(p) Actions or conduct that would have warranted denial of a license. . . ."

10 **REGULATORY PROVISION**

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

12 "For the purpose of denial, suspension, or revocation of a personal or facility license
13 pursuant to Division 1.5 (commencing with Section 475) of the Business and Professions Code, a
14 crime or act shall be considered substantially related to the qualifications, functions or duties of a
15 licensee or registrant if to a substantial degree it evidences present or potential unfitness of a
16 licensee or registrant to perform the functions authorized by his license or registration in a
17 manner consistent with the public health, safety, or welfare."

18 **CONTROLLED SUBSTANCE / DANGEROUS DRUGS**

19 11. Marijuana is a hallucinogenic Schedule I controlled substances under State and
20 federal law. (Health & Safe. Code, §11054, subs. (d)(13) and (20); 21 U.S.C. § 812.)
21 Marijuana is also a dangerous drug as defined in section 4022 of the Code.

22 **FIRST CAUSE FOR DENIAL OF APPLICATION**

23 **(Convictions of Substantially Related Crimes)**

24 12. Respondent's application is subject to denial under section 480, subdivision (a)(1), in
25 that Respondent was convicted of substantially related crimes, as follows:

26 a. On or about January 12, 2011, after pleading guilty, Respondent was convicted of one
27 misdemeanor count of violating Penal Code section 148, subdivision (a)(1) [resist, obstruct, delay
28 of peace officer or EMT], in the criminal proceeding entitled *The People of the State of*

1 *California v. Richard Anthony Ortega* (Super. Ct. San Bernardino County, 2011, No.
2 MVA1003838). The Court sentenced Respondent to 14 days in jail, placed him on 18 months
3 summary probation with terms and conditions, and ordered him to pay fines. On or about August
4 15, 2013, the Court dismissed the case pursuant to Penal Code section 1203.4.

5 b. The circumstances surrounding the conviction are that on or about December 28,
6 2010, Respondent ran away from law enforcement officers who were attempting to detain him.
7 Subsequently, Respondent ignored the officers' commands for him to stop.

8 c. On or about December 14, 2011, after pleading guilty, Respondent was convicted of
9 one misdemeanor count of violating Penal Code section 647, subdivision (f) [disorderly conduct;
10 person under the influence of alcohol or drugs], in the criminal proceeding entitled *The People of*
11 *the State of California v. Richard Anthony Ortega* (Super. Ct. San Bernardino County, 2011, No.
12 MVA1102715). The Court placed Respondent on 24 months summary probation with terms and
13 conditions, ordered him to complete 32 hours in a work sentence program, and ordered him to
14 pay into a Victim Restitution Fund. On or about August 15, 2013, the Court dismissed the case
15 pursuant to Penal Code section 1203.4.

16 d. The circumstances surrounding the conviction are that on or about October 9, 2011,
17 Respondent was observed passed out on a sidewalk due to intoxication. Upon contact, a law
18 enforcement officer detected a strong odor of an alcoholic beverage emitting from Respondent.
19 Respondent informed the officer that he had a few alcoholic drinks.

20 **SECOND CAUSE FOR DENIAL OF APPLICATION**

21 **(Knowingly Made a False Statement of Fact)**

22 13. Respondent's application is subject to denial under section 480, subdivision (c), in
23 that on or about December 18, 2013, Respondent knowingly made a false statement of fact by
24 failing to disclose his two convictions on his application for licensure to the Board, as follows:

25 a. On or about September 24, 2012, after pleading nolo contendere, Respondent was
26 convicted of one interlineated infraction count of violating Penal Code section 415 [fighting;
27 noise; offensive words in a public place], in the criminal proceeding entitled *The People of the*
28 *State of California v. Richard Anthony Ortega* (Super. Ct. San Bernardino County, 2012, No.

1 MVA1201535). The circumstances surrounding the conviction are that on or about June 22,
2 2012, Respondent was showing signs and symptoms of intoxication in the middle of a street.
3 Subsequently, Respondent was arrested and charged with violating Penal Code section 647,
4 subdivision (f) [disorderly conduct; person under the influence of alcohol or drugs]. The Court
5 ordered Respondent to pay a fine.

6 b. On or about September 17, 2013, after pleading guilty, Respondent was convicted of
7 one lesser infraction count of violating Penal Code section 415 [fighting; noise; offensive words
8 in a public place], in the criminal proceeding entitled *The People of the State of California v.*
9 *Richard Anthony Ortega* (Super. Ct. San Bernardino County, 2013, No. 695786RO). The
10 circumstances surrounding the conviction are that on or about July 14, 2013, Respondent got into
11 an altercation with another person in the middle of a street. Upon contact, a law enforcement
12 office smelled the odor of an alcoholic beverage on Respondent, and observed that he was
13 showing signs and symptoms of intoxication. Subsequently, Respondent was arrested and
14 charged with violating Penal Code section 647, subdivision (f) [disorderly conduct; person under
15 the influence of alcohol or drugs]. The Court ordered Respondent to pay a fine.

16 THIRD CAUSE FOR DENIAL OF APPLICATION

17 (Acts Warranting Denial of Licensure)

18 14. Respondent's application is subject to denial under sections 4301, subdivision (o) and
19 / or (p), and 480, subdivisions (a)(3), on the grounds of unprofessional conduct, in that
20 Respondent committed acts which if done by a licentiate of the business and profession in
21 question, would be grounds for suspension or revocation of his license, as follows:

22 a. Sections 490, and 4301, subdivision (l), in conjunction with California Code of
23 Regulations, title 16, section 1770, in that on or about January 12, 2011 and December 14, 2011
24 Respondent was convicted of crimes substantially related to the qualifications, functions, or
25 duties of a pharmacy technician which to a substantial degree evidence his present or potential
26 unfitness to perform the functions authorized by his license in a manner consistent with the public
27 health, safety, or welfare. Complainant refers to and by this reference incorporates the allegations
28 set forth above in paragraph 11, subparagraphs a and c, inclusive, as though set forth fully.

1 b. Section 4301, subdivision (j), on the grounds of unprofessional conduct, for violating
 2 Code section 4060, in that on or about June 3, 2010, Respondent was in possession of 5.7 grams
 3 of Marijuana, a controlled substance and a dangerous drug, without a valid prescription.

4 c. Section 4301, subdivision (h), on the grounds of unprofessional conduct, in that
 5 Respondent administered to himself Marijuana, a dangerous drug, and alcohol to the extent or in
 6 a manner as to be dangerous or injurious to himself or others. Specifically, Respondent admitted
 7 to smoking Marijuana and drinking two cups of Vodka. Subsequently, on or about August 16,
 8 2010, after pleading guilty, Respondent was granted a Deferred Entry of Judgment for violating
 9 Penal Code section 647, subdivision (f) [public intoxication], in the criminal proceeding entitled
 10 *The People of the State of California v. Richard Anthony Ortega* (Super. Ct. Riverside County,
 11 2010, RIM10009000). On or about August 13, 2013, the Court dismissed the case due to
 12 completion of the Deferred Entry of Judgment.

13 **PRAYER**

14 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
 15 and that following the hearing, the Board issue a decision:

- 16 1. Denying the application of Richard Anthony Ortega for a Pharmacy Technician
 17 Registration; and
 18 2. Taking such other and further action as deemed necessary and proper.

19
 20
 21 DATED: 9/12/15 Virginia Herold
 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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