

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

In the Matter of the Statement of Issues
Against:

KIMBERLY MICHELLE MACIAS

Respondent.

Case No. 5427

OAH No. 2015100741

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 November 16, 2016.

It is so ORDERED on October 17, 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 Laurie R. Pearlman, Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH), on August 11, 2016, in Los Angeles, California. Complainant was represented by Heather Vo, Deputy Attorney General. Kimberly Michelle Macias (Respondent) appeared and represented herself.

Oral and documentary evidence was received and argument was heard. The record was closed and the matter was submitted for decision on August 11, 2016.

FACTUAL FINDINGS

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

2a. On September 2, 2004, the Board issued a pharmacy technician license to Respondent. On November 30, 2009, her license expired and was ultimately cancelled.

2b. The Board received Respondent's application for registration as a pharmacy technician (application) on February 26, 2014. The Board denied the application on January 7, 2015. Respondent timely appealed the denial and this hearing ensued.

3a. On August 9, 2011, in the California Superior Court, County of Los Angeles, Case No. 1BF03821, after pleading nolo contendere, Respondent was convicted of violating Penal Code section 459 (burglary), a misdemeanor. The Court sentenced Respondent to serve 10 days in Los Angeles County jail and placed her on 36 months summary probation.

with terms and conditions which included paying \$100 in restitution, and staying away from all Money Marts.

3b. On November 18, 2013, Respondent was granted early termination of criminal probation. On February 5, 2014, the Court dismissed the conviction, pursuant to Penal Code section 1203.4.

4. The circumstances underlying the conviction are that on August 5, 2011, Respondent went to a Money Mart in Bellflower, California, where she attempted to cash a check, payable to Respondent in the amount of \$775, from Mishi's Strudel Bakery and Café (bakery). In conjunction with her attempt to cash the check, Respondent had filled out a Money Mart form indicating that she was an employee of the bakery, and the check's memo line stated that the check was for "cleaning." (Exhibit 9, p. AGO-57.) When the Money Mart cashier called the bakery to verify whether the check was valid, she was informed that the business had been burglarized on March 12, 2011, and its checkbook had been stolen. The teller notified the Los Angeles County Sheriff's Department and deputies detained Respondent and her roommate, Margie Velasquez, who was with Respondent at the Money Mart. They determined that Velasquez "had no involvement in the crime" and released her. (Exhibit 6, p. AGO-52.) Respondent was arrested, having admitted to deputies that she got the check from a female friend named "Angel" and that Respondent knew the check was "bad," but she needed the money to pay her rent to Velasquez.

5. In her February 2014 pharmacy technician licensing application, Respondent admitted that she had suffered a criminal conviction. She attached a written explanation, stating that, "I was cashing a check that I got paid with and it turned out to be a stolen check." (Exhibit 2, p. AGO 36.)

6a. At the administrative hearing, Respondent denied any culpability, providing a version of events which was inconsistent with both her statement on the application, and her admission to deputies at the time of her arrest. She testified that she does not recall telling deputies that the check was "bad."

6b. Respondent testified that at the time of the incident she, her then boyfriend, and their two young children were on welfare and had just moved in with Velasquez and her husband, a couple whom she did not know. Respondent testified that because she did not have rent money to pay the couple, Velasquez offered to have her aunt (whom Respondent did not know and had never met) lend the rent money to Respondent in the form of a check, which Velasquez provided, and which Velasquez's husband filled out. Velasquez accompanied Respondent to the Money Mart, where Respondent attempted to cash it. Respondent testified that she had believed the check to be legitimate and had been duped by Velasquez, who was the culpable party.

6c. Respondent was unable to explain why Velasquez's aunt, whom she did not know, would be willing to lend her money. Respondent admitted that she never told the deputies that Velasquez had provided the check to her or that Velasquez's husband had filled

it out. Respondent stated that she had claimed to be an employee of the bakery on the Money Mart form because she thought that would give her "a better chance to cash the check." She admitted that she had never worked at the bakery and had not provided any "cleaning" services.

7. Respondent did not express any remorse for her wrongful conduct, which resulted in a criminal conviction. Her inconsistent testimony was neither credible nor persuasive. Of the three conflicting explanations she offered at various times, Respondent's admission to the deputies that she knew the check was "bad" but needed the money to pay her rent is the only credible version of events.

8. Respondent is 31 years old. She has three children who are three, eight, and 10 years-old, and she is pregnant with her third child. The father of her two oldest children had suffered criminal convictions, and she left him in 2012. Respondent worked in a pharmacy setting in 2014 and considers herself to be a good employee and an honest and kind person. She is unemployed and in need of income, and would like to become a pharmacy technician in order to provide a better life and future for her family.

9. Respondent has never been in trouble with the law aside from the check-cashing incident. She explained that she entered into a plea deal in August 2011 because it enabled her to return home to her children as quickly as possible. Nonetheless, she has suffered a criminal conviction. "Regardless of the motive which may have impelled the plea, the conviction which was based thereon stands as conclusive evidence of [Respondent's] guilt of the offense charged. To hold otherwise would impose upon administrative boards extensive, time-consuming hearings aimed at relitigating criminal charges which had culminated in final judgments of conviction." (*Arneson v. Fox* (1980) 28 Cal.3d 440, 449.) Respondent's conviction is conclusive evidence of her guilt upon which the Administrative Law Judge must rely in these proceedings.

10. Pharmacy technicians have ready access to customers' medical information, personal identification information, and credit card information. They routinely dispense controlled substances under the general supervision of a pharmacist, accept cash and credit cards from customers, and have a significant amount of public contact. The work done by pharmacy technicians involves trust and honesty.

11. Respondent's conviction is for a crime which is substantially related to the duties, functions, and qualifications of a pharmacy technician. The conduct underlying the conviction involves dishonesty and deceit, and she acted with the intent to substantially benefit herself, or substantially injure another. Respondent demonstrated poor judgment, and her conduct evidences her present or potential unfitness to perform the functions authorized by the license in a manner consistent with the public health, safety, or welfare.

LEGAL CONCLUSIONS

1. In the absence of a statute to the contrary, the burden of proof is on the applicant for a license or permit. (See *Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1224–1225; *Southern California Jockey Club, Inc. v. California Horse Racing Board* (1950) 36 Cal.2d 167, 177.) Absent legal authority to the contrary, the standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

2. Grounds exist to deny Respondent's application pursuant to Business and Professions Code section 480, subdivision (a)(1), and California Code of Regulations, title 16, section 1770, in that she suffered a criminal conviction substantially related to the qualifications, functions and duties of a pharmacy technician which to a substantial degree evidences her present or potential unfitness to perform the functions authorized by the license in a manner consistent with the public health, safety, or welfare, by reason of factual findings 3 through 11.

3. Grounds exist to deny Respondent's application pursuant to Business and Professions Code section 480, subdivision (a)(2), in that Respondent committed acts involving dishonesty, fraud, or deceit with the intent to substantially benefit herself, or substantially injure another, as set forth in factual findings 3 through 11.

4. Grounds exist to deny Respondent's application pursuant to Business and Professions Code section 480, subdivisions (a)(3)(A) and (a)(3)(B), Business and Professions Code section 4301, subdivisions (f) and (l), and California Code of Regulations, title 16, section 1770, in that she engaged in conduct that, if done by a registered pharmacy technician, would be grounds to suspend or revoke a license, by reason of factual findings 3 through 11.

5. All evidence submitted in support and against licensure has been considered. Over five years have passed since Respondent was arrested for her crime and in 2014 her conviction was dismissed. However, Respondent has suffered a criminal conviction involving dishonesty and deceit. At the administrative hearing, she minimized her involvement in the events which led to her conviction and failed to take responsibility for her actions. Respondent's inconsistent versions of events and lack of candor and veracity demonstrates her continued lack of integrity and prevents a finding of rehabilitation.

6. Respondent's misdemeanor burglary conviction was serious in that it demonstrated a willingness to deceive and a penchant for dishonesty when an opportunity to advance her personal interests by dishonest means presented itself. Respondent's crime was one of opportunity. Similar opportunities can arise at any time. The public health, safety, welfare and interest cannot be adequately protected if Respondent is permitted to obtain a pharmacy technician registration. Respondent has failed to demonstrate sufficient rehabilitation to warrant licensure at this time. Accordingly, the order that follows is necessary for the protection of the public.

ORDER

The application of Kimberly Michelle Macias for registration as a pharmacy technician is hereby denied.

DATED: September 9, 2016

DocuSigned by:

Laurie Pearlman

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LAURIE R. PEARLMAN

Administrative Law Judge

Office of Administrative Hearings

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7 *Attorneys for Complainant*

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
Against:

Case No. 5427

12 **KIMBERLY MICHELLE MACIAS**

STATEMENT OF ISSUES

13 Pharmacy Technician Registration Applicant

14 Respondent.

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17 Complainant alleges:

18 **PARTIES**

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

22 2. On or about February 26, 2014, the Board received an application for a Pharmacy
23 Technician Registration from Kimberly Michelle Macias (Respondent). On or about February 20,
24 2014, Respondent certified under penalty of perjury to the truthfulness of all statements, answers,
25 and representations in the application. The Board denied the application on January 7, 2015.

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JURISDICTION

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2 3. This Statement of Issues is brought before the Board under the authority of the
3 following laws. All section references are to the Business and Professions Code unless otherwise
4 indicated.

5 4. Section 4300, subdivision (c), states, in pertinent part:

6 "The board may refuse a license to any applicant guilty of unprofessional conduct. The
7 board may, in its sole discretion, issue a probationary license to any applicant for a license who is
8 guilty of unprofessional conduct and who has met all other requirements for licensure. . . ."

STATUTORY AND REGULATORY PROVISIONS

9
10 5. Section 480 states, in pertinent part:

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

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

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

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

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

26 "(b) Notwithstanding any other provision of this code, a person shall not be denied a
27 license solely on the basis that he or she has been convicted of a felony if he or she has obtained a
28 certificate of rehabilitation under Chapter 3.5 (commencing with Section 4852.01) of Title 6 of

1 Part 3 of the Penal Code or that he or she has been convicted of a misdemeanor if he or she has
2 met all applicable requirements of the criteria of rehabilitation developed by the board to evaluate
3 the rehabilitation of a person when considering the denial of a license under subdivision (a) of
4 Section 482.

5 "(c) Notwithstanding any other provisions of this code, a person shall not be denied a
6 license solely on the basis of a conviction that has been dismissed pursuant to Section 1203.4,
7 1203.4a, or 1203.41 of the Penal Code. An applicant who has a conviction that has been
8 dismissed pursuant to Section 1203.4, 1203.4a, or 1203.41 of the Penal Code shall provide proof
9 of the dismissal."

10 6. Section 4300 provides in pertinent part, that every license issued by the Boards is
11 subject to discipline, including suspension or revocation.

12 7. Section 4301 states, in pertinent part:

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

16

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

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21 "(l) The conviction of a crime substantially related to the qualifications, functions, and
22 duties of a licensee under this chapter. The record of conviction of a violation of Chapter 13
23 (commencing with Section 801) of Title 21 of the United States Code regulating controlled
24 substances or of a violation of the statutes of this state regulating controlled substances or
25 dangerous drugs shall be conclusive evidence of unprofessional conduct. In all other cases, the
26 record of conviction shall be conclusive evidence only of the fact that the conviction occurred.
27 The board may inquire into the circumstances surrounding the commission of the crime, in order to
28 fix the degree of discipline or, in the case of a conviction not involving controlled substances or

1 dangerous drugs, to determine if the conviction is of an offense substantially related to the
2 qualifications, functions, and duties of a licensee under this chapter. A plea or verdict of guilty or
3 a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning
4 of this provision. The board may take action when the time for appeal has elapsed, or the
5 judgment of conviction has been affirmed on appeal or when an order granting probation is made
6 suspending the imposition of sentence, irrespective of a subsequent order under Section 1203.4 of
7 the Penal Code allowing the person to withdraw his or her plea of guilty and to enter a plea of not
8 guilty, or setting aside the verdict of guilty, or dismissing the accusation, information, or
9 indictment.

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

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

17 **FIRST CAUSE FOR DENIAL OF APPLICATION**

18 **(Conviction of a Substantially Related Crime)**

19 9. Respondent's application is subject to denial under section 480, subdivision (a)(1), in
20 that Respondent has been convicted of a crime substantially related to the qualifications, functions
21 or duties of a pharmacy technician, as follows:

22 a. On or about August 9, 2011, after pleading nolo contendere, Respondent was
23 convicted of one misdemeanor count of violating Penal code section 459 [burglary] in the criminal
24 proceeding entitled *The People of the State of California v. Kimberly Ellis* (Super. Ct. L.A.
25 County, 2011, No. 1BF03821). The Court sentenced Respondent to serve 10 days in Los Angeles
26 County jail and placed her on 36 months probation, with terms and conditions. On or about
27 February 5, 2014, the Court dismissed the matter pursuant to Penal Code section 1203.4.

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1 b. The circumstances surrounding the conviction are that on or about August 5, 2011,
2 Respondent attempted to cash a business check in the amount of \$775.00 at a Money Mart. When
3 the cashier called to verify if the check was good, she was informed that the business had been
4 burglarized and their checkbook had been stolen. The teller notified police who detained
5 Respondent. Respondent admitted to deputies that she knew the check was bad but she needed
6 the money to pay her rent.

7 **SECOND CAUSE FOR DENIAL OF APPLICATION**

8 **(Acts Involving Dishonesty, Fraud, or Deceit)**

9 10. Respondent's application is subject to denial under section 480, subdivision (a)(2), in
10 that Respondent committed acts involving dishonesty, fraud, or deceit with the intent to
11 substantially benefit herself, or substantially injure another. Complainant refers to, and by this
12 reference incorporates, the allegations set forth above in paragraph 9, subparagraph (b), as though
13 set forth fully

14 **THIRD CAUSE FOR DENIAL OF APPLICATION**

15 **(Acts Warranting Denial of Licensure)**

16 11. Respondent's application is subject to denial under section 480, subdivisions (a)(3)A)
17 and (a)(3)(B), in that Respondent committed acts which if done by a registered pharmacy
18 technician would be grounds for suspension or revocation of the license as follows:

19 a. Respondent was convicted of a crime substantially related to the qualifications,
20 functions, or duties of a pharmacy technician which to a substantial degree evidence her present or
21 potential unfitness to perform the functions authorized by the license in a manner consistent with
22 the public health, safety, or welfare, in violation of sections 4031, subdivision (I), in conjunction
23 with California Code of Regulations, title 16, section 1770. Complainant refers to, and by this
24 reference incorporates, the allegations set forth above in paragraph 9, subparagraph (a), as though
25 set forth fully.

26 b. Respondent committed acts involving dishonesty, fraud, or deceit, in violation of
27 section 4301, subdivision (f). Complainant refers to, and by this reference incorporates, the
28 allegations set forth above in paragraph 9, subparagraph (b), as though set forth fully.

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PRAYER

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

1. Denying the application of Kimberly Michelle Macias for a Pharmacy Technician Registration;
2. Taking such other and further action as deemed necessary and proper.

DATED: 9/12/15 Virginia Herold
VIRGINIA HEROLD
Executive Officer
Board of Pharmacy
Department of Consumer Affairs
State of California
Complainant

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