

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

In the Matter of the Accusation Against:

**JAMIE PONCE,**

Pharmacy Technician Registration No.  
TCH 113874

Respondent.

Case No. 5993

OAH No. 2017030633

**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 September 27, 2017.

It is so ORDERED on August 28, 2017.

BOARD OF PHARMACY  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA



By

\_\_\_\_\_  
Amy Gutierrez, Pharm.D.  
Board President

BEFORE THE  
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TCH 113874,

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**PROPOSED DECISION**

Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on June 20, 2017, in San Diego, California.

Kevin W. Messer, Deputy Attorney General, Department of Justice, represented complainant.

Respondent Jaime Ponce represented himself.

The matter was submitted on June 20, 2017.

**FACTUAL FINDINGS**

*Background*

1. On December 5, 2016, complainant, Virginia Herold, Executive Officer, Board of Pharmacy, Department of Consumer Affairs, State of California (board), filed the Accusation in this matter in her official capacity. The accusation alleged that respondent's license is subject to discipline based upon two causes for discipline. The first cause for discipline alleged that respondent incurred a March 6, 2014, criminal conviction for driving under the influence of alcohol or drugs on June 12, 2012. The second cause for discipline alleged that respondent engaged in unprofessional conduct by his dangerous use of illegal substances on June 12, 2012. The accusation further asserted that as a disciplinary consideration, respondent incurred a May 9, 2000, criminal conviction for driving under the influence of alcohol or drugs.

2. On March 15, 2012, the board issued to respondent Jaime Ponce Original Pharmacy Technician Registration Number TCH 113874. The registration will expire on February 28, 2018, unless otherwise renewed, or revoked. At all relevant times respondent's license was in full force and effect.

### *Respondent's 2014 Conviction*

3. On March 6, 2014, in Imperial County Superior Court in case no. ECM-37741, respondent pled no contest and was convicted of violating Vehicle Code section 23152, subdivision (a), driving under the influence of alcohol or drugs, a misdemeanor. Respondent was placed on summary probation for three years with terms and conditions including paying fines and fees; enrolling in and successfully completing an alcohol safety class; enrolling in and successfully completing a SMART class program<sup>1</sup>; and submitting to a blood or breath test, and field sobriety test upon the request of a police officer. Respondent testified that as a result of this conviction, his driver's license was suspended.

4. The circumstances underlying respondent's March 6, 2014, conviction are as follows<sup>2</sup>: On June 12, 2012, at 10:05 p.m. patrol officers with the Imperial Police Department observed a vehicle driving at 48 miles per hour on a road with a posted speed limit of 35 miles per hour. The officers conducted an enforcement stop of the vehicle during which time they observed respondent in the driver's seat with an open container of alcohol in the cup holder of the vehicle. The officers asked respondent for his driver's license, and respondent stated that his driver's license was suspended. The officers conducted a record check of respondent's name and discovered that his driver's license was suspended. An officer conducted a field sobriety test of respondent and observed respondent had enlarged pupils with a slow reaction to light, a heart rate of 110 beats per minute, and fluttering eyelids. The officer informed respondent that he was showing signs of being under the influence of a controlled substance and asked respondent if he had used methamphetamine, and respondent stated "yes." Respondent was then arrested, and while at the police station, he provided a urine sample, which showed a positive result for methamphetamine. The police report further noted that the vehicle respondent was driving was registered to Ocotillo Pharmacy, Inc.

5. Respondent provided a letter to the board explaining the circumstances of his March 6, 2014, conviction. The letter stated as follows:

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<sup>1</sup> Court documents did not provide a meaning for the term "SMART class program"; however, respondent testified that he was required to attend an Alcoholics Anonymous (AA) program as a term of his summary probation.

<sup>2</sup> These factual findings are based, in part, on information included in a police report received under *Lake v. Reed* (1997) 16 Cal.4th 448. That case held that a law enforcement officer's report is admissible in an administrative proceeding, and that certain portions of the police report may be used to support a finding of fact in an administrative proceeding over a hearsay objection, including the officer's direct observations and the party's admissions. (*Id.* at pp. 461-462, 464.)

On May 2013, I was pulled over and given a ticket for a DUI. The case was open and a ruling was not determined until March of 2014. I was charged for was [sic] DUI (driving under influence of alcohol). I attended and completed a Driving-Under-the Influence Program. I have attached a copy of the completion certificate. As I admitted to the judge, I made a bad judgement [sic] and/or decision. I understand the alcohol limit in California is .08 and thought that driving to my home, which was a few blocks away, would be okay. I understand the severity of the matter. Please consider my Pharmacy Technician Renewal.

In his letter, respondent made no mention of his consumption of methamphetamine or the positive urine test results showing he had used methamphetamine.

#### *Convictions for Disciplinary Consideration*

6. On May 9, 2000, in the Imperial County Superior Court in case no. CF-7447, respondent pled guilty and was convicted of violating Vehicle Code section 23152, subdivision (a), driving under the influence of alcohol or drugs (D.U.I.), a misdemeanor; and of violating Health and Safety Code section 11377, subdivision (a), possession of a controlled substance, a felony. As part of his guilty plea, respondent admitted that on October 27, 1999, he willfully and unlawfully, while under the influence of an alcoholic beverage and a drug and under the combined influence, drove a vehicle; and that on October 27, 1999, he was in possession of a controlled substance, namely methamphetamine. Respondent was sentenced to five years of probation with terms and conditions, including the completion of an Alcohol Safety Class.

7. Respondent wrote a letter to the board on March 12, 2011, regarding the circumstances underlying his May 9, 2000, conviction. Respondent's letter stated as follows:

I am writing to advise you of the fact that approximately ten years ago, September 1, 1999 I was arrested and charges were filed against me. On May 9, 2000 I was charged with violation [sic] code 11377(A). During this time I was placed on probation for 5 years and required to attend a Drug Diversion Program at Sober Roads along with other terms and conditions. I paid my dues and successfully completed the program and complied with all the other terms and conditions of my probation. During a brief time in my life, I took the wrong path and have regretted every moment of it. Fortunately, I immediately took full responsibility for my negative actions and got back on the right path. I can honestly say that I have been on the right path since this incident occurred and intend to stay on it.

8. On June 27, 2006, in the Imperial County Superior Court in case no. ECM21765, respondent pled guilty and was convicted of violating Vehicle Code section 14601.2, subdivision (a), driving while license suspended/revoked, a misdemeanor. Respondent's sentence from this conviction was unclear from the court documents provided, but included a fine and the requirement that he complete a ten-day Cal Trans program.

9. Respondent testified regarding the circumstances of his June 27, 2006, conviction. Respondent stated that this conviction resulted from his driving on a suspended license, which was suspended because of his May 9, 2000, D.U.I. conviction. Respondent stated that police officers stopped him for a broken taillight and asked for his license, which he did not have because it was suspended. Respondent had no recollection of going to court in June 2006 for this arrest and conviction. He explained that he had to go to work that day and as a result he drove without a license. Respondent further testified that after his 2012 conviction for D.U.I. his driver's license has been and remains suspended. However, he admitted that he does drive a car "but not that much" because his wife usually drives him.

#### *Testimony of Benedicto Rustia*

10. Benedicto Rustia is an inspector with the California State Board of Pharmacy, a position he has held for nine years. His responsibilities include conducting investigations of pharmacies, conducting audits of controlled substances, and drafting reports provided to the board. He conducts approximately 90 investigations per year for the board. Dr. Rustia has been a licensed pharmacist with the State of California since 1980. Prior to his employment with the board, Dr. Rustia worked as a pharmacist for 28 years.

11. Based on his career as a pharmacist and board inspector, Dr. Rustia is familiar with the laws and regulations that govern the work of pharmacists and pharmacy technicians, as well as the everyday functions of pharmacists and pharmacy technicians in practice. Dr. Rustia did not conduct the investigation of respondent's criminal convictions in this matter, because the criminal conviction unit of the board conducted the investigation and issued a report. However, Dr. Rustia reviewed the report created by the criminal conviction unit regarding respondent in this matter, which was kept with the board in its ordinary course of business.

Dr. Rustia stated his review of the board's report regarding respondent's history of convictions showed that respondent had multiple convictions involving his use of methamphetamine, with his most recent conviction involving methamphetamine in 2014.

12. Dr. Rustia testified that a pharmacist must directly supervise the actions of a pharmacy technician. Although a technician must be supervised, in reality, a pharmacist is only aware of what the pharmacy technician is doing generally. It is common for a pharmacy technician to perform tasks of which the pharmacist lacks direct knowledge. Additionally, pharmacy technicians have access to lots of dangerous drugs and controlled drugs. Dr. Rustia testified that pharmacy technicians must be trustworthy and exercise good judgment because of their direct access to dangerous drugs. A pharmacy technician with a

history of drug abuse poses a serious risk of danger without assurances that he has been rehabilitated.

### *Respondent's Testimony*

13. Respondent is 46 years old and has four children ages 30, 25, 15, and 13, and has two grandchildren ages 5 and 3. He is currently employed at AmeriMex Pharmacy as a pharmacy technician, a position he has held for the past two years. Respondent's duties include the inputting of prescriptions into a computer system so that the pharmacist can fill the prescriptions, assisting customers, and cleaning the pharmacy area. Respondent is the only pharmacy technician at AmeriMex Pharmacy, which has one pharmacist. Respondent stated that he has never been disciplined at his current job. Prior to his employment at AmeriMex Pharmacy, respondent worked as a pharmacy technician at Ocotillo Pharmacy until it closed. Respondent was working at Brawley Pharmacy at the time of his 2012 arrest.

14. Respondent testified about the events leading to his arrest on June 12, 2012, which resulted in his March 6, 2014, conviction. Respondent stated that at about 11:00 p.m. on June 12, 2012, he had already purchased a beer, had just opened the beer in his car and was driving back to his home. He was only a block away from his house and thought it was okay to open the beer so close to home. After respondent was pulled over by the police, the officer performed a field sobriety test on respondent, and he passed. However, the officer observed that respondent had a high heart rate. Respondent admitted to the officer that he had consumed methamphetamine. Respondent testified that, during that time period, he was using methamphetamine about two to three times per week. At the time of his arrest, respondent was driving a vehicle that belonged to Ocotillo Pharmacy, but he was not working during that time and simply "borrowed" the vehicle. Respondent also admitted that he was not authorized to use the vehicle at that time, and his employer never learned that he had done that.

15. Respondent stated that he first started using methamphetamine in 1999, when he was 20 or 22 years old. However according to respondent's birth date on court documents, he would have been 28 years old in 1999. Respondent stated that the only illegal drug he ever used was methamphetamine. He also drinks alcohol and continues to do so, but "not like before". Respondent stated that when he first began using methamphetamine, he did so "once in a while". He stated that at some point he stopped using methamphetamine, but started using it again about one-and-a-half years before his 2012 arrest. Respondent admitted that he has sometimes worked as a pharmacy technician while under the influence of methamphetamine but does not believe that it affected his work.

16. Respondent testified that the last time he consumed methamphetamine was the day of his arrest on June 12, 2012. During the time he used methamphetamine, he obtained the drugs from the streets. He stated that he is sorry for what he did and that he has taken all the required classes that the court ordered him to take. He stated that he now abides by all the rules, has been clean since his 2012 arrest and will remain clean because his mind is different now and he is focused, and because he is older now with grandchildren. Respondent stated that he still drinks alcohol on Fridays and Saturdays, typically about three

“tall boys,” but he does not drink until he is drunk and only drinks beer. Respondent denied ever using his position as a pharmacy technician to obtain controlled substances; denied ever obtaining pseudoephedrine to make methamphetamine or providing pseudoephedrine to someone else to make methamphetamine; and denied ever selling methamphetamine.

17. Respondent wrote a letter explaining his remorse for his actions. The letter, dated June 20, 2017, stated as follows:

Please accept my most sincere apologies for my conduct. There is however, no excuse for my behavior. The purpose of this is to convey to you the court my sincere apologies for any inconvenience, I have caused. I'm humbly asking the Board of Pharmacy (the court) not to revoke my Pharmacy Technician License. I understand that I made a terrible mistake when I decided to drive under the influence. I realize I put others life's [sic] in jeopardy as well as my own. I am extremely ashamed and remorseful about my actions. Especially because I have put my family in this predicament and I could lose my job and financial security because of my mistake. I truly regret my actions and have learned a lesson from this experience. I have successfully completed all classes required by the courts and complied with all the other terms and conditions of my probation. Also, I would like you to know that since that day I have stayed away from alcohol.

Again I am truly sorry for my actions and the cost and time incurred by my offense. I would like to plead for your leniency and the Board to reconsider revoking my license. I realize how wrong I was and my actions were unacceptable. I can promise the court that this will never happen again.

I can understand that it may be difficult for the court to accept my apology, but I hope you will provide me with an opportunity to prove my behavior. Thank you.

18. Respondent testified that his current income is \$946 biweekly after taxes, and he has financial responsibilities including a car payment, rent and other costs so that, along with his wife's income, his family is living paycheck to paycheck. He stated that, without his current pharmacy technician job, he would not be able to pay the board its costs. He stated that, with his current job, he would be able to pay the board's costs at the rate of \$100 per month.

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### *Rehabilitation*

19. Respondent has a long history of methamphetamine and alcohol abuse. Respondent has completed court ordered treatment programs, but has taken no further steps to ensure he will no longer consume methamphetamine and provided no evidence other than his own unsupported statements that he no longer uses methamphetamine. He admitted that he continues to consume alcohol, despite his statement in his June 20, 2017, letter that he no longer consumes alcohol. Respondent has previously incurred convictions related to methamphetamine and wrote letters to the board promising that he would never use methamphetamine again, when in fact he did so in 2012 when he was arrested. Not only did respondent fail to comply with his prior statement that he would never use methamphetamine again, he presented inconsistent testimony in these proceedings, and failed to present any evidence, other than his own unsubstantiated statements, that he has not consumed methamphetamine since 2012. Respondent submitted no other evidence of rehabilitation.

### *Cost Recovery*

20. Complainant submitted a certification of prosecution costs and declaration of Kevin W. Messer pursuant to Business and Professions Code section 125.3. The certification is for work performed by the Office of the Attorney General and shows costs of prosecution in the amount of \$2,445, with a break-down of the costs on an hourly basis showing each task performed and the hourly rate. The evidence shows that those costs were incurred and that they are reasonable. The certification complies with the requirements of California Code of Regulations, title 1, section 1042, subdivision (b) (3).

### *Respondent's Ability to Pay Costs*

21. Respondent has financial responsibilities and his present income is barely sufficient to support his financial obligations. Respondent would be able to pay the prosecution costs only on a payment plan if he kept his license and his job.

## LEGAL CONCLUSIONS

### *Burden and Standard of Proof*

1. Pharmacy technicians are issued a license<sup>3</sup> based on minimal education, training requirements, or certification. No examination is required for issuance of the registration. Pharmacy technicians are not independent practitioners and must work under the supervision of a pharmacist.

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<sup>3</sup> The term "license" includes "certificate, registration, or any other means to engage in a business or profession" regulated by the Business and Professions Code. (Bus. & Prof. Code, § 477, subd. (b).)



2. In proceedings to revoke professional licenses, the clear and convincing evidence standard of proof applies; the preponderance of the evidence standard of proof applies in proceedings to revoke nonprofessional or occupational licenses. The sharp distinction between professional licenses and nonprofessional licenses supports the distinction in the standards of proof. Because a professional license represents the fulfillment of extensive educational, training and testing requirements, a licensee has an extremely strong interest in retaining the license that he or she has expended so much effort to obtain. The same cannot be said for a licensee's interest in retaining a nonprofessional license even though an applicant for an occupational (as opposed to a professional) license is required to complete certain coursework and pass an examination. (*Lone Star Sec. & Video, Inc. v. Bureau of Security and Investigative Services* (2012) 209 Cal.App.4th 445, 453-454.)

3. The complainant has the burden of proving the charging allegations by a preponderance of the evidence. The preponderance of the evidence standard applies in this proceeding because a pharmacy technician registration is a nonprofessional/occupational license.

#### *Applicable Statutes and Regulations*

4. Business and Professions Code section 4301 provides in part:

The board shall take action against any holder of a license who is guilty of unprofessional conduct. . . . Unprofessional conduct shall include, but is not limited to, any of 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.

[¶] . . . [¶]

(l) The conviction of a crime substantially related to the qualifications, functions, and duties of a licensee under this chapter. The record of conviction of a violation of Chapter 13 (commencing with Section 801) of Title 21 of the United States Code regulating controlled substances of dangerous drugs shall be conclusive evidence of unprofessional conduct. In all other cases, the record of conviction shall be conclusive evidence only of the fact that the conviction occurred. The board may inquire into the circumstances surrounding the commission of the crime,

in order to fix the degree of discipline or, in the case of a conviction not involving controlled substances or dangerous drugs, to determine if the conviction is of an offense substantially related to the qualifications, functions, and duties of a licensee under this chapter. A plea or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning of this provision. The board may take action 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 Section 1203.4 of the Penal Code allowing the person to withdraw his or her plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, information, or indictment. . . .

5. California Code of Regulations, title 16, section 1770, addresses the issue of substantial relationship. It states in part that:

[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.

#### *Substantially Related Criminal Conviction*

6. Respondent's 2014 criminal conviction is substantially related to the qualifications, functions, and duties of a pharmacy technician registrant within the meaning of California Code of Regulations, title 16, section 1770. The crime of driving under the influence of methamphetamine and alcohol, committed by respondent, shows, to a substantial degree, his present or potential unfitness to perform the functions authorized by his registration in a manner consistent with the public health, safety, or welfare. In this case, respondent intentionally consumed methamphetamine and alcohol and drove a vehicle placing the public and himself at risk.

7. Licensees in the health care industry are required to abide by numerous laws and regulations established to protect the health and safety of the public. This includes abiding by laws that govern the licensee's activities that may not be directly related to his professional license, but could impact the public's health and safety outside the work environment. Respondent has repeatedly demonstrated a terrible lapse of judgment by consuming methamphetamine and alcohol and driving, and by consuming methamphetamine while working as a pharmacy technician. A person who intentionally consumes a dangerous drug or alcohol and drives a vehicle poses a serious risk to the health, safety and welfare of the public. A pharmacy technician's work involves intimate access to controlled substances

and dangerous drugs. The act of consuming methamphetamine and alcohol and driving demonstrated a dangerous, conscious and selfish disregard for the law and the rights of others. (*In re Gossage* (2000) 23 Cal.4th 1080, 1098, citing *In re Nevill* (1985) 39 Cal.3rd 729, 735 and *In re Strick* (1987) 43 Cal3rd 644, 653.)

### *Cause to Discipline*

8. Cause exists to discipline respondent's pharmacy technician registration pursuant to Business and Professions Code section 4301, subdivisions (h) and (l), in that respondent administered to himself a dangerous controlled substance placing the public and himself in danger; and was convicted of crimes that are substantially related to the qualifications, functions, and duties of a pharmacy technician registrant.

### *Evaluation of Appropriate Discipline*

9. California Code of Regulations, title 16, section 1769, subdivision (b), states:

(b) When considering the suspension or revocation of a facility or a personal license on the ground that the licensee or the registrant has been convicted of a crime, the board, in evaluating the rehabilitation of such person and his present eligibility for a license will consider the following criteria:

- (1) Nature and severity of the act(s) or offense(s).
- (2) Total criminal record.
- (3) The time that has elapsed since commission of the act(s) or offense(s).
- (4) Whether the licensee has complied with all terms of parole, probation, restitution or any other sanctions lawfully imposed against the licensee.
- (5) Evidence, if any, of rehabilitation submitted by the licensee.

10. California Code of Regulations, title 16, section 1760, states:

In reaching a decision on a disciplinary action under the Administrative Procedure Act (Government Code section 11400 et seq.) the board shall consider the disciplinary guidelines entitled "Disciplinary Guidelines" (Rev. 10/2007), which are hereby incorporated by reference.

Deviation from these guidelines and orders, including the standard terms of probation, is appropriate where the board, in

its sole discretion, determines that the facts of the particular case warrant such a deviation-the presence of mitigating factors; the age of the case; evidentiary problems.

11. The board's Disciplinary Guidelines state that the board files cases against pharmacy technicians when the violations involve significant misconduct on the part of the licensee, including possession or use of dangerous drugs or controlled substances. The board believes that revocation is typically the appropriate penalty when such grounds for discipline are found to exist.

12. The board's Disciplinary Guidelines list the following factors to be considered in determining penalties:

In determining whether the minimum, maximum, or an intermediate penalty is to be imposed in a given case, factors such as the following should be considered:

1. actual or potential harm to the public
2. actual or potential harm to any consumer
3. prior disciplinary record, including level of compliance with disciplinary order(s)
4. prior warning(s), including but not limited to citation(s) and fine(s), letter(s) of admonishment, and/or correction notice(s)
5. number and/or variety of current violations
6. nature and severity of the act(s), offense(s) or crime(s) under consideration
7. aggravating evidence
8. mitigating evidence
9. rehabilitation evidence
10. compliance with terms of any criminal sentence, parole, or probation
11. overall criminal record

12. if applicable, evidence of proceedings for case being set aside and dismissed pursuant to Section 1203.4 of the Penal Code
13. time passed since the act(s) or offense(s)
14. whether the conduct was intentional or negligent, demonstrated incompetence, or, if the respondent is being held to account for conduct committed by another, the respondent had knowledge of or knowingly participated in such conduct
15. financial benefit to the respondent from the misconduct.

No single one or combination of the above factors is required to justify the minimum and/or maximum penalty in a given case, as opposed to an intermediate one.

13. Applying the board's criteria in this matter, respondent's crime did not occur during the course of his job as a registered pharmacy technician. However, his consumption of methamphetamine and alcohol while driving is very serious in nature, and his long-term addiction to methamphetamine is of grave concern. Respondent has a criminal history dating back to 2000. Respondent has not been the subject of any prior disciplinary actions by the board, and his most recent conviction resulted from misconduct that took place five years ago. The record was devoid of information regarding whether or not respondent completed his probation for his 2014 conviction. While there is no evidence respondent has had disciplinary problems at his places of employment as a pharmacy technician, he admitted to taking methamphetamine while working as a pharmacy technician.

14. The weight of the evidence did not establish that respondent has been rehabilitated. Rehabilitation is a state of mind. The law looks with favor on one who has achieved reformation and regeneration. (*Hightower v. State Bar* (1983) 34 Cal.3d 150, 157.) The evidentiary significance of an individual's misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct. (*In Re Gossage* (2000) 23 Cal.4th 1080, 1098; *Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1070.) Respondent failed to provide convincing evidence that he is no longer consuming methamphetamine or alcohol, and failed to establish that he has developed mechanisms to ensure he will no longer consume methamphetamine in the future. Respondent admitted that he continues to consume alcohol. He provided inconsistent evidence in these proceedings regarding his consumption of alcohol. Respondent expressed concern about his financial situation and the possibility he will lose his source of income as a result of his actions.

15. Due to the present lack of evidence of rehabilitation, and the nature and seriousness of the offenses for which he was convicted, public health and safety require the revocation of respondent's registration at this time. After an appropriate length of time

leading a law-abiding life and compiling evidence of his rehabilitation, respondent may consider filing a petition for reinstatement of his pharmacy technician registration.

### *Cost Recovery*

16. Complainant is seeking recovery of the reasonable costs of prosecution in the amount of \$2,445. The California Supreme Court in *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 held that a regulation imposing costs for investigation and enforcement under California Code of Regulations, title 16, section 317.5, which is similar to Business and Professions Code section 125.3, did not violate due process. But it was incumbent on the board in that case to exercise discretion to reduce or eliminate cost awards in a manner such that costs imposed did not “deter [licensees] with potentially meritorious claims or defenses from exercising their right to a hearing.” The Supreme Court set forth four factors to consider in deciding whether to reduce or eliminate costs: (1) whether the licensee used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed; (2) whether the licensee had a “subjective” good faith belief in the merits of his or her position; (3) whether the licensee raised a “colorable challenge” to the proposed discipline; and (4) whether the licensee had the financial ability to make payments. The reasoning of *Zuckerman* must be applied to Business and Professions Code section 125.3 since the language in the cost recovery regulation at issue in *Zuckerman* and section 125.3 are substantially the same.

17. The costs claimed totaling \$2,445 are reasonable. However, respondent had a subjective good faith belief of his defense and a “colorable” challenge to the proposed discipline. Finally, as established by his multiple financial obligations, respondent has limited ability to pay the costs of prosecution but can do so on a payment plan if he is employed. Accordingly, respondent shall be ordered to pay costs in this matter if he reapplies or petitions the board for reinstatement of his revoked registration.

### ORDER

1. Pharmacy technician registration number TCH 113874 issued to respondent Jaime Ponce is revoked. Respondent may not reapply or petition the board for reinstatement of his revoked registration for three years from the effective date of this decision.

2. A condition of reinstatement shall be that the respondent is certified as defined in Business and Professions Code section 4202(a)(4) and provides satisfactory proof of certification to the board.

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3. As a condition precedent to reinstatement of his revoked pharmacy technician registration respondent shall reimburse the board for its costs of prosecution in the amount of \$2,445. Said amount shall be paid in full prior to the reapplication or reinstatement of his revoked pharmacy technician registration, unless otherwise ordered by the board.

Dated: July 19, 2017.

DocuSigned by:  
*Debra Nye-Perkins*  
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DEBRA D. NYE-PERKINS  
Administrative Law Judge  
Office of Administrative Hearings

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

11  
12 In the Matter of the Accusation Against:

Case No. 5993

13 **JAIME PONCE**  
14 **623 Bina Street**  
**Brawley, CA 92227**

**ACCUSATION**

15 **Pharmacy Technician Registration**  
16 **No. TCH 113874**

17 Respondent.

18  
19 Complainant alleges:

20 **PARTIES**

- 21 1. Virginia Herold (Complainant) brings this Accusation solely in her official capacity  
22 as the Executive Officer of the Board of Pharmacy (Board), Department of Consumer Affairs.  
23 2. On or about March 15, 2012, the Board issued Pharmacy Technician Registration  
24 Number TCH 113874 to Jaime Ponce (Respondent). The Pharmacy Technician Registration was  
25 in full force and effect at all times relevant to the charges brought herein and will expire on  
26 February 28, 2018, unless renewed.

27 ///

28 ///



1 **JURISDICTION**

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

5 4. Section 4300, subdivision (a) of the Code states, "Every license issued may be  
6 suspended or revoked."

7 5. Section 4300.1 of the Code states:

8 The expiration, cancellation, forfeiture, or suspension of a board-issued license by  
9 operation of law or by order or decision of the board or a court of law, the placement of a  
10 license on a retired status, or the voluntary surrender of a license by a licensee shall not  
11 deprive the board of jurisdiction to commence or proceed with any investigation of, or  
12 action or disciplinary proceeding against, the licensee or to render a decision suspending  
13 or revoking the license.

12 **STATUTORY PROVISIONS**

13 6. Section 482 of the Code states:

14 Each board under the provisions of this code shall develop criteria to evaluate  
15 the rehabilitation of a person when:

16 (a) Considering the denial of a license by the board under Section 480; or

17 (b) Considering suspension or revocation of a license under Section 490.

18 Each board shall take into account all competent evidence of rehabilitation  
19 furnished by the applicant or licensee.

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

24 8. Section 493 of the Code states:

25 Notwithstanding any other provision of law, in a proceeding conducted by a board  
26 within the department pursuant to law to deny an application for a license or to suspend  
27 or revoke a license or otherwise take disciplinary action against a person who holds a  
28 license, upon the ground that the applicant or the licensee has been convicted of a crime  
substantially related to the qualifications, functions, and duties of the licensee in  
question, the record of conviction of the crime shall be conclusive evidence of the fact  
that the conviction occurred, but only of that fact, and the board may inquire into the  
circumstances surrounding the commission of the crime in order to fix the degree of  
discipline or to determine if the conviction is substantially related to the qualifications,

1 functions, and duties of the licensee in question.

2 As used in this section, "license" includes "certificate," "permit," "authority," and  
3 "registration."

4 9. Section 4301 of the Code states:

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

9 . . . .

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

15 . . . .

16 (i) The conviction of a crime substantially related to the qualifications, functions,  
17 and duties of a licensee under this chapter. The record of conviction of a violation of  
18 Chapter 13 (commencing with Section 801) of Title 21 of the United States Code  
19 regulating controlled substances or of a violation of the statutes of this state regulating  
20 controlled substances or dangerous drugs shall be conclusive evidence of unprofessional  
21 conduct. In all other cases, the record of conviction shall be conclusive evidence only of  
22 the fact that the conviction occurred. The board may inquire into the circumstances  
23 surrounding the commission of the crime, in order to fix the degree of discipline or, in  
24 the case of a conviction not involving controlled substances or dangerous drugs, to  
25 determine if the conviction is of an offense substantially related to the qualifications,  
26 functions, and duties of a licensee under this chapter. A plea or verdict of guilty or a  
27 conviction following a plea of nolo contendere is deemed to be a conviction within the  
28 meaning of this provision. The board may take action 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 Section 1203.4 of the Penal Code allowing the person to  
withdraw his or her plea of guilty and to enter a plea of not guilty, or setting aside the  
verdict of guilty, or dismissing the accusation, information, or indictment. . . .

## 22 REGULATORY PROVISIONS

23 10. California Code of Regulations, title 16, section 1769, subdivision (b) states:

24 When considering the suspension or revocation of a facility or a personal license on  
25 the ground that the licensee or the registrant has been convicted of a crime, the board, in  
26 evaluating the rehabilitation of such person and his present eligibility for a license will  
27 consider the following criteria:

28 (1) Nature and severity of the act(s) or offense(s).

(2) Total criminal record.

1 (3) The time that has elapsed since commission of the act(s) or offense(s).

2 (4) Whether the licensee has complied with all terms of parole, probation,  
3 restitution or any other sanctions lawfully imposed against the licensee.

4 (5) Evidence, if any, of rehabilitation submitted by the licensee.

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

6 For the purpose of denial, suspension, or revocation of a personal or facility license  
7 pursuant to Division 1.5 (commencing with Section 475) of the Business and Professions  
8 Code, a crime or act shall be considered substantially related to the qualifications,  
9 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.

10 **COSTS**

11 12. Section 125.3 of the Code states, in pertinent part, that the Board may request the  
12 administrative law judge to direct a licensee found to have committed a violation or violations of  
13 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and  
14 enforcement of the case.

15 **FIRST CAUSE FOR DISCIPLINE**

16 **(March 6, 2014 Criminal Conviction for DUI on June 12, 2012)**

17 13. Respondent has subjected his registration to disciplinary action under sections 490  
18 and 4301, subdivision (l) of the Code in that he was convicted of a crime that is substantially  
19 related to the qualifications, duties, and functions of a pharmacy technician. The circumstances  
20 are as follows:

21 a. On or about March 6, 2014, in a criminal proceeding entitled *People of the*  
22 *State of California v. Jaime Galvan Ponce*, in Imperial County Superior Court, case number  
23 ECM37741, Respondent was convicted on his plea of no contest of violating Vehicle Code  
24 23152, subdivision (a), driving under the influence of alcohol, a misdemeanor. Additional counts  
25 of violating Health and Safety Code section 11550, subdivision (a), under the influence of a  
26 controlled substance, to wit, methamphetamine; Vehicle Code section 14601.1, subdivision (a),  
27 driving when privilege suspended or revoked; and Vehicle Code section 23222, subdivision (a),  
28 possession of open container when driving, were dismissed pursuant to the plea agreement.



1 pled guilty to violating Vehicle Code section 23152, subdivision (a), driving under the influence  
2 of alcohol or drugs, a misdemeanor, and was granted five years probation. Respondent also pled  
3 guilty to violating Health and Safety Code section 11377, subdivision (a), possession of a  
4 controlled substance, a felony, and was granted deferred entry of judgment for 18 months.  
5 Additional counts of violating Health and Safety Code section 11550, subdivision (a), under the  
6 influence of a controlled substance; Penal Code section 148, subdivision (a)(1), resist, obstruct,  
7 delay of peace officer or EMT; and Health and Safety Code section 11364, possession of a  
8 smoking device, were dismissed pursuant to the plea agreement.

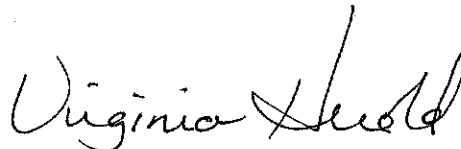
9 **PRAYER**

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

- 12 1. Revoking or suspending Pharmacy Technician Registration Number TCH 113874,  
13 issued to Jaime Ponce;
- 14 2. Ordering Jaime Ponce to pay the Board of Pharmacy the reasonable costs of the  
15 investigation and enforcement of this case, pursuant to Business and Professions Code  
16 section 125.3;
- 17 3. Taking such other and further action as deemed necessary and proper.

18  
19  
20 DATED: \_\_\_\_\_

12/5/16



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

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