

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

In the Matter of the Accusation Against:

GUSTAVO DELGADILLO, Respondent

Pharmacy Technician Registration No. TCH 119947

Agency Case No. 6630

OAH No. 2019070933

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 March 4, 2020.

It is so ORDERED on February 3, 2020.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

A handwritten signature in black ink, appearing to read "Greg Lippe", is written over the printed name and title.

By

Greg Lippe
Board President

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PROPOSED DECISION

Irina Tentser, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on October 15, 2019, in Los Angeles, California.

Stephanie J. Lee, Deputy Attorney General, represented Complainant.

Gustavo Delgadillo (Respondent) appeared and represented himself.

Oral and documentary evidence was received.

The record was closed and the matter was submitted for decision at the conclusion of hearing on October 15, 2019.

FACTUAL FINDINGS

Jurisdictional Matters

1. On July 19, 2019, Anne Sodergren (Complainant) filed the Accusation in her official capacity as the Interim Executive Officer of the Board of Pharmacy (Board), Department of Consumer Affairs, State of California.

2. Respondent filed a timely Notice of Defense requesting a hearing, which proceeded on October 15, 2019.

3. On February 24, 2012, the Board issued pharmacy technician registration number TCH 119947 (Registration) to Respondent. The Registration was in full force and effect at all relevant times and is scheduled to expire on November 30, 2019.

Respondent's August 8, 2017 Possession of Controlled Substance and Drug Paraphernalia

4. On August 8, 2017, during a routine traffic stop of Respondent's vehicle, Los Angeles County Department police officers smelled the strong odor of marijuana emitting from Respondent's vehicle. Respondent was the sole occupant of the vehicle. As a result, officers detained Respondent pending a vehicle marijuana investigation. While conducting a search of Respondent's vehicle, they recovered a white piece of paper containing a white crystal-like substance resembling methamphetamine, a glass pipe with a bulbed end and white residue inside, resembling a methamphetamine pipe. In addition, officers located a cigarette containing a green leafy substance resembling marijuana on the front passenger seat. Officers advised Respondent of his

"Miranda Rights."¹ Respondent waived his rights and agreed to speak to officers without an attorney present. Respondent identified the white crystal like substance as "Meth." (Exhibit 6.) In response to the officers' inquiry of whether he used "Meth," Respondent stated, "[Y]eah I just started a little while ago but I usually only smoke weed." (*Id.*)

5. Based on their observations and Respondent's admissions, officers arrested Respondent for being in possession of a controlled substance in violation of Health and Safety Code section 11377, subdivision (a), and being in possession of drug paraphernalia, in violation of Health and Safety Code section 11364, subdivision (a). Respondent's arrest resulted in a criminal complaint being filed against him charging him with one misdemeanor count of violating Health and Safety Code section 11377 (possession of a controlled substance); one misdemeanor count of violating Health and Safety Code section 11364 (possession of drug paraphernalia); and one misdemeanor count of violating Vehicle Code section 12500, subdivision (a) (driving a motor vehicle without a valid driver's license).

6. Respondent pleaded not guilty to the charges and entered into an informal diversion agreement wherein he agreed to complete 26 Narcotics

¹ The "Miranda Rights" is a notification customarily given by police to criminal suspects in police custody (or in a custodial interrogation) advising them of their rights, which include (1) the right to remain silent, (2) notification that anything the suspect says can and will be used against them in a court of law, (3) the right to an attorney, and (4) advisement that if the suspect cannot afford an attorney, one will be appointed for them.

Anonymous classes to receive a dismissal of the charges by the court. On April 5, 2018, Respondent filed his proof of completion of 26 Narcotics Anonymous/Alcoholic Anonymous meetings with the court. As a result, the court dismissed the charges against Respondent pursuant to Penal Code section 1385.²

² Penal Code section 1385 (dismissal of the action for want of prosecution or otherwise) states:

(a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal shall be stated orally on the record. The court shall also set forth the reasons in an order entered upon the minutes if requested by either party or in any case in which the proceedings are not being recorded electronically or reported by a court reporter. A dismissal shall not be made for any cause that would be ground of demurrer to the accusatory pleading.

(b) (1) If the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a).

7. At hearing, Respondent expressed frustration that he was being asked to discuss the details of his August 7, 2017 arrest, testifying that he had complied with the terms of the court-ordered diversion program and that his arrest should not, therefore, continue to "haunt him." Respondent admitted to possession of the pipe, but denied smoking methamphetamine at hearing. Based on Respondent's contemporaneous party admissions to officers that he smoked the methamphetamine officers discovered in his vehicle, Complainant established through a preponderance of the evidence that Respondent possessed the methamphetamine on August 8, 2017.

8. At the time of his arrest, Respondent was not employed as a pharmacy technician. Accordingly, the controlled substance methamphetamine found in Respondent's possession was not diverted as part of Respondent's duties and functions as a pharmacy technician. Nevertheless, Respondent's unlawful possession of methamphetamine is substantially related to the qualifications, functions, and duties of a registrant because pharmacy technicians have access to controlled substances and are required to handle those drugs in a lawful manner. In addition, Respondent's violation of the law is related to his registration because pharmacy technicians interact with the public and are expected to be trustworthy and law-abiding in the exercise of their duties, which involve the handling of drugs and sensitive consumer information.

(2) This subdivision does not authorize the court to strike the additional punishment for any enhancement that cannot be stricken or dismissed pursuant to subdivision (a).

Respondent's Failure to Respond to the Board August 22, 2018 Written Inquiry Regarding His Arrest

9. Registrants are responsible for maintaining a current address with the Board and are expected to cooperate in Board investigations. On August 22, 2018, the Board sent an inquiry letter to Respondent requesting an explanation of his August 8, 2017 arrest to his address of record with the Board. As of the date of the Board's investigative report, dated January 4, 2019, Respondent failed to respond to the Board or provide the requested information. Accordingly, Respondent subverted the investigation of the Board.

10. Respondent credibly testified at hearing that while his address of record with the Board was correct at the time the Board sent its August 2018 inquiry letter, he did not receive the Board's inquiry. According to Respondent, his Board address is his primary residence, but, at the time of the Board's inquiry, he was "going back and forth" between other addresses and his primary residence. Respondent's subversion of the Board's investigation is mitigated by the fact that he did not receive the Board's August 22, 2018 correspondence requesting an explanation of his arrest.

Matters in Aggravation

11. On February 26, 2016, the Board issued Citation Number CI 2015 67519 (2016 Citation) against Respondent with a fine of \$1,500, for violating Business and Professions Code section 4301, subdivisions (h) (alcohol abuse – driving under the influence of alcohol), (k) (two or more misdemeanor convictions involving dangerous use of alcohol), and (l) (criminal conviction). The fine has been paid and the 2016 Citation is final.

12. The basis for the 2016 Citation was that on January 21, 2016 in the Superior Court, County of Los Angeles, in Case Number 5IG05653, Respondent was convicted of violating Vehicle Code section 23152, subdivision (b) (driving with a blood alcohol content of 0.08 percent or greater), a misdemeanor. The court sentenced Respondent to three years' probation, ordered him to pay fines and restitution, and complete an 18-month alcohol abuse program. The circumstances underlying the conviction are that on October 4, 2015, Respondent drove under the influence of alcohol, with a blood' alcohol content of 0.14 percent.

13. On September 5, 2013, the Board issued Citation Number CI 2012 55199 (2013 Citation) against Respondent with a fine of \$900, for violating Business and Professions Code section 4301, subdivision (h) (dangerous use of alcohol) and (l) (criminal conviction). The fine was paid in full and the 2013 Citation is final.

14. The basis for the 2013 Citation was that on June 20, 2013, in the Superior Court, County of Los Angeles, in Case Number 3IG00681, Respondent was convicted of violating Vehicle Code section 23153, subdivision (b) (driving with a blood alcohol of 0.08 percent or greater, with great bodily injury), a misdemeanor. The court sentenced Respondent to three years of probation, ordered him to pay fines and restitution, and complete a nine-month First Offender Driving Under the Influence (DUI) Program. The circumstances underlying the conviction are that on January 1, 2013, Respondent drove under the influence of alcohol with a blood alcohol content of 0.20 percent and rear-ended another vehicle, injuring the other driver.

15. Neither of Respondent's two DUI convictions have been dismissed pursuant to Penal Code section 1203.4. At hearing, Respondent admitted to past substance abuse issues, but denied having a current alcohol abuse problem. He could not provide a sobriety date and continues to imbibe alcohol approximately twice a

month. Despite his assertion that he does not have ongoing issues with alcohol, Respondent voluntarily attends Alcoholic Anonymous (AA) meetings every other month. Respondent does not have an AA sponsor and does not follow the AA 12-Step Program, which is a set of guiding principles outlining a course of action for recovery.

Mitigation and Rehabilitation

16. Respondent testified that he has "issues in life," but not with alcohol or controlled substances. He was vague as to what those "issues" entailed. Respondent testified that he walks his dog and exercises for stress relief. Respondent's last employment as a pharmacy technician was approximately three years ago for CVS pharmacy. Since that job ended for unspecified reasons, he has not been employed as a pharmacy technician. For the past two years, Respondent has worked as a retail sales associate at Burlington.

17. Respondent testified that he had past substance abuse issues, but that he is trying to better himself and does not consider himself to have a current problem with the use of alcohol or controlled substances. He does not believe that an arrest warrants the discipline of his registration by the Board because he successfully completed the informal diversion program and the charges against him were dismissed.

Costs

18. The reasonable cost of the investigation and prosecution incurred by the Board in this case is \$4,820, consisting of \$4,795 of investigative costs and \$25 of prosecution costs. (Exhibit 3.)

LEGAL CONCLUSIONS

1. The standard of proof to be used in these proceedings is a preponderance of the evidence because pharmacy technicians hold an occupational license. (See Evid. Code, § 115.) This is supported by the Board's Disciplinary Guidelines (Guidelines), which provide: "Pharmacy technicians are issued a license 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." (Guidelines, p. 43.) To obtain a license, an applicant must complete 240 hours of instruction covering, among other things, "the duties and responsibilities of a pharmacy technician in relationship to other pharmacy personnel and knowledge of standards and ethics, laws and regulations governing the practice of pharmacy." (Cal. Code Regs., tit. 16, § 1793.6.)

2. Moreover, the law makes plain that a pharmacy technician performs nondiscretionary tasks that do not require the type of professional judgment exercised by a pharmacist. "A pharmacy technician may perform packaging, manipulative, repetitive, or other nondiscretionary tasks, only while assisting, and while under the direct supervision and control of, a pharmacist." (Bus. & Prof. Code, § 4115, subd. (a); Cal. Code Regs., tit. 16, § 1793.) A pharmacy technician's nondiscretionary tasks may include "(a) removing the drug or drugs from stock; (b) counting, pouring, or mixing pharmaceuticals; (c) placing the product into a container; (d) affixing the label or labels to the container; (e) packaging and repackaging." (Cal. Code Regs., tit. 16, § 1793.2.) A pharmacy technician is not authorized "to perform any act requiring the exercise of professional judgment by a pharmacist." (Bus. & Prof. Code, § 4115, subd. (c); Cal. Code Regs., tit. 16, § 1793.) Only a pharmacist may perform such tasks as receiving

new oral prescriptions, evaluating and interpreting prescriptions, interpreting a patient's medication records, and consulting with prescribing physicians. (Cal. Code Regs., tit. 16, § 1793.1.)

3. Business and Professions Code³ section 4301 authorizes the Board to take action against its licensees who engage in unprofessional conduct. Unprofessional conduct includes "The violation of any of the statutes of this state, or any other state, or of the United States regulating controlled substances and dangerous drugs." (§ 4301, subd. (j).) In addition, unprofessional conduct includes "Engaging in any conduct that subverts or attempts to subvert an investigation of the Board." (§ 4301, subd. (q).)

4. California Code of Regulations, title 16, section 1770, provides: "For the limited purpose of . . . revocation of a personal . . . license pursuant to Division 1.5 (commencing with Section 475) of the Business and Professions Code, [an] . . . act shall be considered substantially related to the qualifications, functions or duties of a . . . registrant if to a substantial degree it evidences present or potential unfitness of a . . . registrant to perform the functions authorized by his . . . registration in a manner consistent with the public health, safety, or welfare."

5. Section 4060 provides, in relevant part: "No person shall possess any controlled substance, except that furnished to a person upon the prescription . . . pursuant to Section 3640.7, or furnished pursuant to a drug order issued by a certified nurse-midwife pursuant to Section 2746.51, a nurse practitioner pursuant to Section

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

2836.1, or a physician assistant pursuant to Section 3502.1, or naturopathic doctor pursuant to Section 3640.5, or a pharmacist . . . Section 4052.”

6. “Methamphetamine” is a Schedule II controlled substance as designated by Health and Safety Code section 11055, subdivision (d)(2), and is categorized as a dangerous drug pursuant to section 4022.

Causes for Discipline

7. By unlawfully possessing a controlled substance and drug paraphernalia, as set forth in Factual Findings 4-8, Respondent committed acts which are substantially related to the qualifications, duties, and functions of a registrant. Therefore, grounds exist to discipline Respondent’s Registration for unprofessional conduct pursuant to section 4301, subdivision (j), in conjunction with California Code of Regulations, title 16, section 1770.

8. In failing to respond to the Board’s inquiry regarding his arrest, as set forth in Factual Finding 9, Respondent subverted the Board’s investigation. Therefore, grounds exist to discipline Respondent’s Registration for unprofessional conduct pursuant to section 4301, subdivision (q).

Disciplinary Guidelines

9. All evidence submitted in mitigation and rehabilitation, has been considered in light of the Board’s Disciplinary Guidelines (Cal. Code Regs., tit. 16, § 1760). In determining whether the minimum, maximum, or an intermediate penalty is to be imposed in a given case, the following factors are to be considered:

- a. Actual or potential harm to the public

- b. Actual or potential harm to any consumer
- c. Prior disciplinary record, including level of compliance with disciplinary order(s)
- d. Prior warning(s), including but not limited to citation(s) and fine(s), letter(s) of admonishment, and/or correction notice(s)
- e. Number and/or variety of current violations
- f. Nature and severity of the act(s), offense(s) or crime(s) under consideration
- g. Aggravating evidence
- h. Mitigating evidence
- i. Rehabilitation evidence
- j. Compliance with terms of any criminal sentence, parole, or probation
- k. Overall criminal record
- l. If applicable, evidence of proceedings for case being set aside and dismissed pursuant to Section 1203.4 of the Penal Code
- m. Time passed since the act(s) or offense(s)
- n. 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

- o. Financial benefit to the respondent from the misconduct.
- p. Other licenses held by the respondent and license history of those licenses.
- q. Uniform Standards Regarding Substance-Abusing Healing Arts Licensees (see Business and Professions Code Section 315)

10. For registrations issued to pharmacy technicians, the Board has identified four categories of violations and their associated recommended minimum and maximum penalties. These categories of violations are arranged in ascending order from the least serious (Category I) to the most serious (Category IV). According to the Board's disciplinary guidelines, any single violation in any category, or any combination of violation(s) in one or more categories, may merit revocation. For pharmacy technicians and designated representatives, the Board believes an order of revocation is typically the appropriate penalty when any grounds for discipline are established, and that if revocation is not imposed that a minimum Category III level of discipline should be imposed.

11. Applying the relevant foregoing factors to this matter, Respondent unlawfully possessed controlled substances and drug paraphernalia in August 2017, which is a Category II violation, and subverted the Board's investigation of his arrest in 2018. With regards to the relatively recent unlawful drug and paraphernalia possession, while his actions posed potential harm to both the public and consumers, it is significant that the drugs were not diverted while he was employed as a pharmacy technician. In mitigation, Respondent successfully completed the diversion program

that entailed substance abuse treatment. Further, he did not intentionally subvert the Board's investigation of his arrest because he did not receive the Board's August 2018 inquiry.

12. Respondent's reticence at hearing to discuss his past substance abuse issues in detail makes it impossible to meaningfully ascertain the status of his recovery. This is troubling because Respondent has a record of prior registration discipline and convictions, both for alcohol related issues. However, there is no evidence that he has participated in criminal activity since 2017, the time of his arrest. Respondent has accepted some responsibility for his errors in judgment and sporadically attends AA meetings. Based on Respondent's credible testimony that he is intent on bettering himself in the future and does not intend to repeat his past errors in judgment, revocation of Respondent's Registration is unduly punitive and not necessary for the protection of the public. Rather, a Category III level of probation, which contains terms and designed to address Respondent's past substance abuse issues and unlawful possession of controlled substances and drug paraphernalia, as described in the order that follows, is necessary and sufficient for the protection of the public.

Costs

13. The reasonable costs of enforcement in this matter are \$4,820, as set forth in Factual Finding 18. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the Supreme Court rejected a constitutional challenge to a cost recovery provision similar to Business and Professions Code section 125.3. In so doing, however, the Court directed the administrative law judge and the agency to evaluate several factors to ensure that the cost recovery provision did not deter individuals from exercising their right to a hearing. Thus, the Board must not assess the full costs where it would unfairly penalize a respondent who has committed some misconduct,

but who has used the hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty. The Board must consider a respondent's subjective good faith belief in the merits of his or her position and whether he or she has raised a colorable challenge. The Board must also consider a respondent's ability to pay, and may not assess disproportionately large investigation and prosecution costs when it has conducted a disproportionately large investigation to prove that a respondent engaged in relatively innocuous misconduct. (*Zuckerman, supra* at 45.)

14. Here, Respondent used the hearing process to successfully obtain a reduction in the severity of the penalty, justifying the reduction of the Board's costs in half to \$2,410.

ORDER

Registration number TCH 119947 issued to Respondent is revoked; however, the revocation is stayed and Respondent's Registration is placed on probation for five years on the following terms and conditions:

Obey All Laws

1. Respondent shall obey all state and federal laws and regulations. Respondent shall report any of the following occurrences to the Board, in writing, within 72 hours of such occurrence:

- i) an arrest or issuance of a criminal complaint for violation of any provision of the Pharmacy Law, state and federal food and drug laws, or state and federal controlled substances laws

- ii) a plea of guilty, or nolo contendere, no contest, or similar, in any state or federal criminal proceeding to any criminal complaint, information or indictment
- iii) a conviction of any crime
- iv) the filing of a disciplinary pleading, issuance of a citation, or initiation of another administrative action filed by any state or federal agency which involves respondent's license or which is related to the practice of pharmacy or the manufacturing, obtaining, handling, distributing, billing, or charging for any drug, device or controlled substance.

Failure to timely report such occurrence shall be considered a violation of probation.

Report to the Board

2. Respondent shall report to the Board quarterly, on a schedule as directed by the Board or its designee. The report shall be made either in person or in writing, as directed. Among other requirements, respondent shall state in each report under penalty of perjury whether there has been compliance with all the terms and conditions of probation.

Failure to submit timely reports in a form as directed shall be considered a violation of probation. Any period of delinquency in submission of reports as directed may be added to the total period of probation. Moreover, if the final probation report is not made as directed, probation shall be automatically extended until such time as the final report is made and accepted by the Board.

Interview with the Board

3. Upon receipt of reasonable prior notice, respondent shall appear in person for interviews with the Board or its designee, at such intervals and locations as are determined by the Board or its designee. Failure to appear for any scheduled interview without prior notification to Board staff, or failure to appear for two or more scheduled interviews with the Board or its designee during the period of probation, shall be considered a violation of probation.

Cooperate with Board Staff

4. Respondent shall timely cooperate with the Board's inspection program and with the Board's monitoring and investigation of respondent's compliance with the terms and conditions of his probation, including but not limited to: timely responses to requests for information by Board staff; timely compliance with directives from Board staff regarding requirements of any term or condition of probation; and timely completion of documentation pertaining to a term or condition of probation. Failure to timely cooperate shall be considered a violation of probation.

Reporting of Employment and Notice to Employers

5. During the period of probation, respondent shall notify all present and prospective employers of the decision in case number and the terms, conditions and restrictions imposed on respondent by the decision, as follows:

Within 30 days of the effective date of this decision, and within 10 days of undertaking any new employment, respondent shall report to the Board in writing the name, physical address, and mailing address of each of his employer(s), and the name(s) and telephone number(s) of all of his direct supervisor(s), as well as any

pharmacist(s)-in-charge, designated representative(s)-in-charge, responsible manager, or other compliance supervisor(s) and the work schedule, if known. Respondent shall also include the reason(s) for leaving the prior employment. Respondent shall sign and return to the Board a written consent authorizing the Board or its designee to communicate with all of respondent's employer(s) and supervisor(s), and authorizing those employer(s) or supervisor(s) to communicate with the Board or its designee, concerning respondent's work status, performance, and monitoring. Failure to comply with the requirements or deadlines of this condition shall be considered a violation of probation.

Within 30 days of the effective date of this decision, and within 15 days of respondent undertaking any new employment, respondent shall cause (a) his direct supervisor, (b) his pharmacist-in-charge, designated representative-in-charge, responsible manager, or other compliance supervisor, and (c) the owner or owner representative of his employer, to report to the Board in writing acknowledging that the listed individual(s) has/have read the decision in case number 6630, and terms and conditions imposed thereby. If one person serves in more than one role described in (a), (b), or (c), the acknowledgment shall so state. It shall be respondent's responsibility to ensure that these acknowledgments are timely submitted to the Board. In the event of a change in the persons serving the roles described in (a), (b), or (c) during the term of probation, respondent shall cause the persons taking over the role to report to the Board in writing within 15 days of the change acknowledging that he or she has read the decision in case number 6630, and the terms and conditions imposed thereby.

If respondent works for or is employed by or through an employment service, respondent must notify each person described in (a), (b), and (c) above at every entity licensed by the Board of the decision in case number 6630, and the terms and

conditions imposed thereby in advance of respondent commencing work at such licensed entity. A record of this notification must be provided to the Board upon request.

Furthermore, within 30 days of the effective date of this decision, and within 15 days of respondent undertaking any new employment by or through an employment service, respondent shall cause each persons described in (a), (b), and (c) above at the employment service to report to the Board in writing acknowledging that he or she has read the decision in case number 6630, and the terms and conditions imposed thereby. It shall be respondent's responsibility to ensure that these acknowledgment(s) are timely submitted to the Board.

Failure to timely notify present or prospective employer(s) or failure to cause the identified person(s) with that/those employer(s) to submit timely written acknowledgments to the Board shall be considered a violation of probation.

"Employment" within the meaning of this provision includes any full-time, part-time, temporary, relief, or employment/management service position as a pharmacy technician registrant, or any position for which a pharmacy technician registration is a requirement or criterion for employment, whether the respondent is an employee, independent contractor or volunteer.

Notification of Change(s) in Name, Address(es), or Phone Number(s)

6. Respondent shall further notify the Board in writing within 10 days of any change in name, residence address, mailing address, e-mail address or phone number.

Failure to timely notify the Board of any change in employer, name, address, or phone number shall be considered a violation of probation.

Reimbursement of Board Costs

7. As a condition precedent to successful completion of probation, respondent shall pay to the Board its costs of investigation and prosecution in the amount of \$2,410. Respondent shall make payments based on a payment plan approved by the Board.

There shall be no deviation from this schedule absent prior written approval by the Board or its designee. Failure to pay costs by the deadline(s) as directed by the Board shall be considered a violation of probation.

Respondent shall be permitted to pay these costs in a payment plan approved by the Board or its designee, so long as full payment is completed no later than one year prior to the end date of probation.

Probation Monitoring Costs

8. Respondent shall pay any costs associated with probation monitoring as determined by the Board each and every year of probation. Such costs shall be payable to the Board on a schedule as directed by the Board or its designee. Failure to pay such costs by the deadline(s) as directed shall be considered a violation of probation.

Status of License

9. Respondent shall, at all times while on probation, maintain an active, current pharmacy technician registration with the Board, including any period during which suspension or probation is tolled. Failure to maintain an active, current pharmacy technician registration shall be considered a violation of probation.

If respondent's pharmacy technician registration expires or is cancelled by operation of law or otherwise at any time during the period of probation, including any extensions thereof due to tolling or otherwise, upon renewal or reapplication respondent's license shall be subject to all terms and conditions of this probation not previously satisfied.

Registration Surrender While on Probation

10. Following the effective date of this decision, should respondent cease practice due to retirement or health, or be otherwise unable to satisfy the terms and conditions of probation, respondent may relinquish his registration, including any indicia of registration issued by the Board, along with a request to surrender the registration. The Board or its designee shall have the discretion whether to accept the surrender or take any other action it deems appropriate and reasonable. Upon formal acceptance of the surrender of the registration, respondent will no longer be subject to the terms and conditions of probation. This surrender constitutes a record of discipline and shall become a part of the respondent's registration history with the Board.

Upon acceptance of the surrender, respondent shall relinquish his pocket and/or wall registration, including any indicia of registration not previously provided to the Board within 10 days of notification by the Board that the surrender is accepted if not already provided.

Respondent may not reapply for any license or registration from the Board for three years from the effective date of the surrender. Respondent shall meet all requirements applicable to the license or registration sought as of the date the

application for that license or registration is submitted to the Board, including any outstanding costs.

Certification

11. Respondent shall maintain an active, current certification as defined by Business and Professions Code section 4202, subdivision (a)(4), for the entire period of probation, and shall submit proof of re-certification or renewal of certification to the Board within 10 days of receipt. Failure to maintain active, current certification or to timely submit proof of same shall be considered a violation of probation.

Practice Requirement – Extension of Probation

12. Except during periods of suspension, respondent shall, at all times while on probation, be employed as a pharmacy technician in California for a minimum of 80 hours per calendar month. Any month during which this minimum is not met shall extend the period of probation by one month. During any such period of insufficient employment, respondent must nonetheless comply with all terms and conditions of probation, unless respondent receives a waiver in writing from the Board or its designee.

If respondent does not practice as a pharmacy technician in California for the minimum number of hours in any calendar month, for any reason (including vacation), respondent shall notify the Board in writing within 10 days of the conclusion of that calendar month. This notification shall include at least: the date(s), location(s), and hours of last practice; the reason(s) for the interruption or reduction in practice; and the anticipated date(s) on which respondent will resume practice at the required level. Respondent shall further notify the Board in writing within 10 days following the next calendar month during which respondent practices as a pharmacy technician in

California for the minimum of hours. Any failure to timely provide such notification(s) shall be considered a violation of probation.

It is a violation of probation for respondent's probation to be extended pursuant to the provisions of this condition for a total period, counting consecutive and non-consecutive months, exceeding 36 months. The Board or its designee may post a notice of the extended probation period on its website.

Violation of Probation

13. If respondent has not complied with any term or condition of probation, the Board shall have continuing jurisdiction over respondent, and the Board shall provide notice to respondent that probation shall automatically be extended, until all terms and conditions have been satisfied or the Board has taken other action as deemed appropriate to treat the failure to comply as a violation of probation, to terminate probation, and to impose the penalty that was stayed. The Board or its designee may post a notice of the extended probation period on its website.

If respondent violates probation in any respect, the Board, after giving respondent notice and an opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If a petition to revoke probation or an accusation is filed against respondent during probation, or the preparation of an accusation or petition to revoke probation is requested from the Office of the Attorney General, the Board shall have continuing jurisdiction and the period of probation shall be automatically extended until the petition to revoke probation or accusation is heard and decided.

Completion of Probation

14. Upon written notice by the Board or its designee indicating successful completion of probation, respondent's registration will be fully restored.

Clinical Diagnostic Evaluation

15. Within 30 days of the effective date of this decision, and on a periodic basis thereafter if required by the Board or its designee, respondent shall undergo, at his own expense, clinical diagnostic evaluation(s) by a practitioner selected or approved prior to the evaluation by the Board or its designee. The approved evaluator shall be provided with a copy of the Board's Accusation and decision. Respondent shall sign a release authorizing the evaluator to furnish the Board with a current diagnosis and a written report regarding the respondent's judgment and ability to function independently as a pharmacy technician with safety to the public. If the evaluator recommends restrictions or conditions on respondent's practice, including but not limited to other terms and conditions listed in these guidelines (e.g., required psychotherapy, inpatient treatment, prescription coordination and monitoring, restricted practice), the Board or its designee may by written notice to respondent adopt any such restrictions or conditions as additional probation terms and conditions, violation of which shall be considered a violation of probation. Failure to comply with any requirement or deadline stated by this paragraph shall be considered a violation of probation.

If at any time the approved evaluator or therapist determines that respondent is unable to practice safely or independently, the licensed mental health practitioner shall notify the Board immediately by telephone and follow up by written letter within three working days. Upon notification from the Board or its designee of this determination,

respondent shall be automatically suspended and shall not resume practice until notified by the Board or its designee that practice may resume.

Failure to comply with any requirement or deadline stated by this term shall be considered a violation of probation.

Psychotherapy

16. Within 30 days of the effective date of this decision, respondent shall submit to the Board or its designee, for prior approval, the name and qualifications of a licensed mental health practitioner of respondent's choice. Within 30 days of approval thereof, respondent shall submit documentation to the Board demonstrating the commencement of psychotherapy with the approved licensed mental health practitioner. Should respondent, for any reason, cease treatment with the approved licensed mental health practitioner, respondent shall notify the Board immediately and, within 30 days of ceasing treatment, submit the name of a replacement psychotherapist or licensed mental health practitioner of respondent's choice to the Board for its prior approval. Within 30 days of approval thereof, respondent shall submit documentation to the Board demonstrating the commencement of psychotherapy with the approved replacement. Failure to comply with any requirement or deadline stated by this paragraph shall be considered a violation of probation.

Upon approval of the initial or any subsequent licensed mental health practitioner, respondent shall undergo and continue treatment with that therapist, at respondent's own expense, until the therapist recommends in writing to the Board, and the Board or its designee agrees by way of a written notification to respondent, that no further psychotherapy is necessary. Upon receipt of such recommendation

from the treating therapist, and before determining whether to accept or reject said recommendation, the Board or its designee may require respondent to undergo, at respondent's own expense, a mental health evaluation by a Board-appointed or Board-approved psychiatrist or psychologist. If the approved evaluator recommends that respondent continue psychotherapy, the Board or its designee may require respondent to continue psychotherapy.

Psychotherapy shall be at least once a week unless otherwise approved by the Board. Respondent shall provide the therapist with a copy of the Board's accusation and decision no later than the first therapy session. Respondent shall take all necessary steps to ensure that the treating therapist submits written quarterly reports to the Board concerning respondent's fitness to practice, progress in treatment, and such other information required by the Board or its designee.

If at any time the treating therapist determines that respondent cannot practice safely or independently, the therapist shall notify the Board immediately by telephone and follow up by written letter within three working days. Upon notification from the Board or its designee of this determination, respondent shall be automatically suspended and shall not resume practice until notified by the Board that practice may be resumed.

During any suspension, respondent shall not enter any pharmacy area or any portion of the licensed premises of a wholesaler, third-party logistics provider, veterinary food-animal drug retailer, or any other distributor of drugs which is licensed by the Board, or any manufacturer, or any area where dangerous drugs and/or dangerous devices or controlled substances are maintained.

Respondent shall not practice pharmacy nor do any act involving drug selection, selection of stock, manufacturing, compounding, dispensing or patient consultation; nor shall respondent manage, administer, or be a consultant to any licensee of the Board, or have access to or control the ordering, distributing, manufacturing or dispensing of dangerous drugs and/or dangerous devices or controlled substances. Respondent shall not resume practice until notified by the Board.

During any suspension, respondent shall not engage in any activity that requires the professional judgment of and/or licensure as a pharmacy technician. Respondent shall not direct or control any aspect of the practice of pharmacy, or of the manufacturing, distributing, wholesaling, or retailing of dangerous drugs and/or dangerous devices or controlled substances.

Failure to comply with any requirement or deadline stated by this term shall be considered a violation of probation.

Drug and Alcohol Testing

17. Respondent, at his own expense, shall participate in testing as directed by the Board or its designee for the detection of alcohol, controlled substances, and dangerous drugs and/or dangerous devices. Testing protocols may include biological fluid testing (urine, blood), breathalyzer, hair follicle testing, or other testing protocols as directed by the Board or its designee. All testing must be pursuant to an observed testing protocol, unless respondent is informed otherwise in writing by the Board or its designee. Respondent may be required to participate in testing for the entire probation period and frequency of testing will be determined by the Board or its designee.

By no later than 30 days after the effective date of this decision, respondent shall have completed all of the following tasks: enrolled and registered with an approved drug and alcohol testing vendor; provided that vendor with any documentation, and any information necessary for payment by respondent; commenced testing protocols, including all required contacts with the testing vendor to determine testing date(s); and begun testing. At all times, respondent shall fully cooperate with the testing vendor, and with the Board or its designee, with regard to enrollment, registration, and payment for, and compliance with, testing. Any failure to cooperate timely shall be considered a violation of probation.

Respondent may be required to test on any day, including weekends and holidays. Respondent is required to make daily contact with the testing vendor to determine if a test is required, and if a test is required must submit to testing on the same day.

Prior to any vacation or other period of absence from the area where the approved testing vendor provides services, respondent shall seek and receive approval from the Board or its designee to use an alternate testing vendor to ensure testing can occur. Upon approval, Respondent shall enroll and register with the approved alternate drug testing vendor, provide to that alternate vendor any documentation required by the vendor, including any necessary payment by respondent. During the period of absence of the area, respondent shall commence testing protocols with the alternate vendor, including required daily contacts with the testing vendor to determine if testing is required, and required testing. Any failure to timely seek or receive approval from the Board or its designee, or to timely enroll and register with, timely commence testing protocols with, or timely undergo testing with, the alternate testing vendor, shall be considered a violation of probation.

Upon detection of an illicit drug, controlled substance or dangerous drug, the Board or its designee may require respondent to timely provide documentation from a licensed practitioner authorized to prescribe the detected substance demonstrating that the substance was administered or ingested pursuant to a legitimate prescription issued as a necessary part of treatment. All such documentation shall be provided by respondent within 10 days of being requested.

Any of the following shall be considered a violation of probation and shall result in respondent being immediately suspended from practice as a pharmacy technician until notified by the Board in writing that he may resume practice: failure to timely complete all of the steps required for enrollment/registration with the drug testing vendor, including making arrangements for payment; failure to timely commence drug testing protocols; failure to contact the drug testing vendor as required to determine testing date(s); failure to test as required; failure to timely supply documentation demonstrating that a detected substance was taken pursuant to a legitimate prescription issued as a necessary part of treatment; and/or detection through testing of alcohol, or of an illicit drug, or of a controlled substance or dangerous drug absent documentation that the detected substance was taken pursuant to a legitimate prescription and a necessary treatment. In the event of a suspension ordered after detection through testing of alcohol, an illicit drug, or of a controlled substance or dangerous drug absent documentation that the detected substance was taken pursuant to a legitimate prescription and a necessary treatment, the Board or its designee shall inform respondent of the suspension and inform him to immediately leave work, and shall notify respondent's employer(s) and work site monitor(s) of the suspension.

During any such suspension, respondent shall not enter any pharmacy area or any portion of the licensed premises of a wholesaler, third-party-logistics provider, veterinary food-animal drug retailer, or any other distributor of drugs which is licensed by the Board, or any manufacturer, or any area where dangerous drugs and/or dangerous devices or controlled substances are maintained. Respondent shall not practice pharmacy nor do any act involving drug selection, selection of stock, manufacturing, compounding, dispensing or patient consultation; nor shall respondent manage, administer, or be a consultant to any licensee of the Board, or have access to or control the ordering, distributing, manufacturing or dispensing of dangerous drugs and/or dangerous devices and controlled substances.

During any such suspension, respondent shall not engage in any activity that requires the professional judgment of and/or licensure as a pharmacy technician. Respondent shall not direct or control any aspect of the practice of pharmacy, or of the manufacturing, distributing, wholesaling, or retailing of dangerous drugs and/or dangerous devices. Failure to comply with any such suspension shall be considered a violation of probation. Failure to comply with any requirement or deadline stated by this term shall be considered a violation of probation.

Abstain from Drugs and Alcohol

18. Respondent shall completely abstain from the possession or use of alcohol, controlled substances, illicit drugs, dangerous drugs and/or dangerous devices, or their associated paraphernalia, except when possessed or used pursuant to a legitimate prescription issued as a necessary part of treatment. Respondent shall ensure that he is not in the same physical location as individuals who are using illicit substances even if respondent is not personally ingesting the drugs. Any possession or use of alcohol, dangerous drugs and/or dangerous devices or controlled substances,

or their associated paraphernalia for which a legitimate prescription has not been issued as a necessary part of treatment, or any physical proximity to persons using illicit substances, shall be considered a violation of probation.

Attend Substance Abuse Recovery Relapse Prevention and Support Groups

19. Within 30 days of the effective date of this decision, respondent shall begin regular attendance at a recognized and established substance abuse recovery support group in California (e.g., Alcoholics Anonymous, Narcotics Anonymous, etc.) which has been approved by the Board or its designee. Respondent must attend the number of group meetings per week or month directed by the Board or its designee, which shall typically be at least one per week. Respondent shall continue regular attendance and submit signed and dated documentation confirming attendance with each quarterly report for the duration of probation. Failure to attend or submit documentation thereof shall be considered a violation of probation.

Supervised Practice

20. Within 30 days of the effective date of this decision, Respondent shall submit to the Board or its designee, for prior approval, the name of a pharmacist licensed by and not on probation with the Board, to serve as respondent's practice supervisor. As part of the documentation submitted, respondent shall cause the proposed practice supervisor to report to the Board in writing acknowledging that her or she has read the decision in case number 6630, and is familiar with the terms and conditions imposed thereby, including the level of supervision required by the Board or its designee. Respondent may have multiple supervisors approved by the Board if necessary to meet respondent's work requirements.

Any of the following shall be considered a violation of probation: failure to timely nominate either an initial or a replacement practice supervisor; failure to cause the practice supervisor to timely report to the Board in writing acknowledging the decision, terms and conditions, and supervision level; practicing in the absence of an approved practice supervisor after lapse of the nomination period; and/or failure to adhere to the level of supervision required by the Board or its designee. If any of these obligations or prohibitions is not met, respondent shall be prohibited from practice as a pharmacy technician and may not resume such practice until notified by the Board or its designee in writing.

DATE: November 13, 2019

DocuSigned by:
Irina Tentser
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IRINA TENTSER

Administrative Law Judge

Office of Administrative Hearings

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7

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

12 In the Matter of the Accusation Against:

Case No. 6630

13 **GUSTAVO DELGADILLO**

ACCUSATION

14 3205 W. 113th St.
Inglewood, CA 90303

15 **Pharmacy Technician Registration No.**
16 **TCH 119947**

17 Respondent.

18
19 **PARTIES**

20 1. Anne Sodergren (Complainant) brings this Accusation solely in her official capacity
21 as the Interim Executive Officer of the Board of Pharmacy (Board), Department of Consumer
22 Affairs.

23 2. On or about February 24, 2012, the Board Pharmacy Technician Registration Number
24 TCH 119947 to Gustavo Delgadillo (Respondent). The Pharmacy Technician Registration was in
25 full force and effect at all times relevant to the charges brought herein and will expire on
26 November 30, 2019, unless renewed.

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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(a) of the Code, provides in pertinent part, that every license 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
9 license by operation of law or by order or decision of the board or a court of law, the
10 placement of a license on a retired status, or the voluntary surrender of a license by a
11 licensee shall not deprive the board of jurisdiction to commence or proceed with any
investigation of, or action or disciplinary proceeding against, the licensee or to render
a decision suspending or revoking the license.

12 **STATUTORY PROVISIONS**

13 6. Section 4301 of the Code states, in pertinent part:

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

16 . . .

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

19 . . .

20 (q) Engaging in any conduct that subverts or attempts to subvert an
investigation of the board.

21 **REGULATORY PROVISIONS**

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

23 For the purpose of denial, suspension, or revocation of a personal or
24 facility license pursuant to Division 1.5 (commencing with Section 475) of the
25 Business and Professions Code, a crime or act shall be considered substantially
26 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.

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1 **COST RECOVERY**

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

6 **FIRST CAUSE FOR DISCIPLINE**

7 **(Unprofessional Conduct – Violation of State Statute Regulating Controlled Substances)**

8 9. Respondent is subject to disciplinary action under Code section 4301(j), in
9 conjunction with California Code of Regulations, title 16, section 1770, in that on or about
10 August 8, 2017, he violated Health and Safety Code sections 11377 (Possession of a Controlled
11 Substance, Methamphetamine) and 11364 (Possession of Drug Paraphernalia). Specifically, on
12 or about August 8, 2017, during a traffic stop, Los Angeles County Sheriff's Department deputies
13 found Respondent in possession of methamphetamine, a glass methamphetamine pipe with
14 residue, and marijuana. Respondent admitted that he used methamphetamine and marijuana.

15 **SECOND CAUSE FOR DISCIPLINE**

16 **(Unprofessional Conduct – Failure to Respond to the Board)**

17 10. Respondent is subject to disciplinary action under Code section 4301(q), in that
18 Respondent subverted an investigation of the Board. On or about August 22, 2018, the Board
19 sent an inquiry letter to Respondent requesting an explanation for his arrest, which occurred on or
20 about August 8, 2017. As of the date of the Board's investigation report, dated January 4, 2019,
21 Respondent failed to respond to the Board or provide the requested information. Complainant
22 refers to, and by this reference incorporates, the allegations set forth above in paragraph 9, as
23 though set forth fully.

24 **DISCIPLINE CONSIDERATIONS**

25 11. To determine the degree of discipline, if any, to be imposed on Respondent,
26 Complainant alleges the following:

27 a. On or about February 26, 2016, in a prior action, the Board issued Citation Number
28 CI 2015 67519 against Respondent with a fine of \$1,500, for violating Code sections 4301(h)

1 (alcohol abuse - driving under the influence of alcohol), 4301 (k) (two or more misdemeanor
2 convictions involving dangerous use of alcohol), and 4301(l) (criminal conviction). The fine has
3 been paid in full and the citation is now final. The basis for the citation was that on or about
4 January 21, 2016, in a criminal proceeding entitled *People v. Gustavo Delgadillo* (Super. Ct. L.A.
5 County, 2016, Case No. 5IG05653), Respondent was convicted of violating Vehicle Code section
6 23152(b) (driving with a blood alcohol content of 0.08% or greater), a misdemeanor. The court
7 sentenced Respondent to three years probation, ordered him to pay fines and restitution, and
8 complete an 18-month alcohol abuse program. The circumstances underlying the conviction are
9 that on or about October 4, 2015, Respondent drove under the influence of alcohol. Respondent's
10 breath alcohol content was 0.14%.

11 b. On or about September 5, 2013, in a prior action, the Board issued Citation Number
12 CI 2012 55199 against Respondent with a fine of \$900, for violating Code sections 4301(h)
13 (dangerous use of alcohol) and 4301(l) (criminal conviction). The fine has been paid in full and
14 the citation is now final. The basis for the citation was that on or about June 20, 2013, in a
15 criminal proceeding entitled *People v. Gustavo Delgadillo* (Super. Ct. L.A. County, 2013, Case
16 No. 3IG00681), Respondent was convicted of violating Vehicle Code section 23153(b) (driving
17 with a blood alcohol content of 0.08% or greater, with bodily injury), a misdemeanor. The court
18 sentenced Respondent to three years of probation, ordered him to pay fines and restitution, and
19 complete a nine-month First Offender DUI Program. The circumstances underlying the
20 conviction are that on or about January 1, 2013, Respondent drove under the influence of alcohol
21 and rear-ended another vehicle, injuring the other driver. Respondent's breath alcohol content
22 was 0.20%.

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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 of Pharmacy issue a decision:

1. Revoking or suspending Pharmacy Technician Registration Number TCH 119947, issued to Gustavo Delgadillo;

2. Ordering Gustavo Delgadillo to pay the Board of Pharmacy the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3; and,

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

DATED: May 30, 2019



ANNE SODERGREN
Interim Executive Officer
Board of Pharmacy
Department of Consumer Affairs
State of California
Complainant

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