

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

In the Matter of the Statement of Issues
Against:

DAVID VIRGEN

Pharmacy Technician Registration
Applicant

Respondent.

Case No. 6648

OAH No. 2019060349

STATEMENT OF ISSUES

DECISION AND ORDER

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Pharmacy, Department of Consumer Affairs, as its Decision in this matter.

This Decision shall become effective at 5:00 p.m. on November 27, 2019.

It is so ORDERED on October 28, 2019.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

Greg Lippe
Board Vice President (Acting President)

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

In the Matter of the Statement of Issues against:

DAVID VIRGEN, Respondent

Case No. 6648

OAH No. 2019060349

PROPOSED DECISION

This matter was heard before Administrative Law Judge Ed Washington, Office of Administrative Hearings, State of California, in Sacramento, California, on August 12, 2019.

Deputy Attorney General Joshua B. Eisenberg represented Anne Sodegren (complainant), Interim Executive Officer, Board of Pharmacy (Board), Department of Consumer Affairs.

David Virgen (respondent) represented himself.

Evidence was received, the record was closed, and the matter was submitted for decision on August 12, 2019.

FACTUAL FINDINGS

1. On July 30, 2018, the Board received an application for registration as a Pharmacy Technician from respondent. On December 19, 2018, the Board denied respondent's application based on disciplinary action taken against his out-of-state regulatory Pharmacy Technician license and the underlying conduct that led to that action, as described below. Respondent timely appealed the Board's denial. On May 3, 2019, complainant filed the Statement of Issues in her official capacity.

Disciplinary Action by the Division of Occupational and Professional Licensing of the Department of Commerce of the State of Utah

2. On December 3, 2015, in the disciplinary action titled *In the Matter of the license of David Virgen*, Case No. DOPL 2015-467, before the Division of Occupational and Professional Licensing of the Department of Commerce of the State of Utah, respondent voluntarily signed a Surrender Stipulation and Order (Stipulated Surrender), in which he agreed to the indefinite suspension of his Utah Pharmacy Technician License No. 9454017-1717 (Utah License). Pursuant to the Stipulated Settlement, respondent admitted to the following:

- That on or about June 30, 2015, he was first licensed to practice as a pharmacy technician in the State of Utah.
- Between July 2015 and August 2015, on multiple occasions, he forged prescriptions that were submitted to a Utah pharmacy to obtain quantities of the controlled substances Alprazolam and Adderall. Respondent obtained the Alprazolam and Adderall and used the controlled substances himself.

- He took a valid prescription he received from a Utah prescribing practitioner and used a computer image editing program to modify the prescription and create multiple forged prescriptions for himself and in the name of his girlfriend.
- That his conduct constituted unprofessional conduct and unlawful conduct, as defined in the Utah Annotated Code, and justifies taking disciplinary action against his Utah License.

3. Pursuant to the Stipulated Surrender, respondent agreed to the following:

- To surrender his Utah License and all rights related to that license.
- To not reapply for licensure to practice as a pharmacy technician in Utah until:
 - Five years have passed;
 - He has demonstrated that he has not used alcohol or drugs without a valid prescription for at least twelve months, by providing monthly drug test results for a minimum of twelve months prior to application;
 - He has successfully completed a substance use disorder evaluation completed by a preapproved evaluator within six months of application, and successfully completed any recommended treatment.

- That he forfeits all rights to practice as a pharmacy technician in Utah and that no guarantees are made that any future application for licensure by respondent will be granted.

Testimony of Louisa Tsoi

4. Louisa Tsoi testified at hearing. Ms. Tsoi has been a pharmacist for over 25 years. She has approximately 20 years of experience working in retail pharmacies, including approximately 10 years of experience working as a pharmacist-in-charge. For the last two years, Ms. Tsoi has worked as an inspector for the Board. As an inspector, Ms. Tsoi conducts routine inspections and case-related inspections of pharmacies to ensure compliance with pharmacy laws.

5. Ms. Tsoi is familiar with the duties of a Pharmacy Technician. She testified that a Pharmacy Technician's primary duties are to assist the pharmacist by counting and recording medication, pulling medication from stock, and labeling medication. A Pharmacy Technician must also interact with patients daily by engaging in cashiering, taking prescriptions at the drop-off counter, and speaking with patients by telephone. She emphasized that it is extremely important that pharmacy technicians exercise good judgment while working, because they have access to patient records and controlled substances.

6. Ms. Tsoi reviewed the circumstances that led to respondent's surrender of his Utah License. She noted that Alprazolam is a Schedule IV controlled substance and that Adderall is a Schedule II controlled substance, pursuant to Business and Professions Code section 4022. Mr. Tsoi testified that combining the two controlled substances in the manner responded did is commonly referred to as "speedballing." She testified that speedballing is very dangerous because it frequently results in

individuals experiencing excessive highs and lows causing them to then take more of Alprazolam or Adderall to minimize excessive highs or excessive lows. Laypersons often unknowingly place themselves at significant risk of overdose when attempting to counteract the effects of speedballing, because they are administering these substances without the supervision of a physician and may overcompensate.

7. Ms. Tsoi testified that issuing a pharmacy technician license to respondent would present an unacceptable public safety risk, if respondent has not fully addressed the circumstances that caused him to illegally acquire controlled substances for his own use. She opined that respondent's prior diversion and unlawful use of controlled substances, if not addressed, could result in patients potentially receiving improper consultation, taking the wrong medication, or taking the correct medication improperly. She testified that drug diversion also leads to more controlled substances on the street available for illicit use, which increases the risk of harm to the public.

Respondent's Testimony

8. Respondent is 28 years old. He was previously licensed as a Pharmacy Technician in California from March 6, 2014 to April 30, 2017, when his license was cancelled. He moved to Salt Lake City in April 2015 to become a Pharmacy Technician. He was in an automobile accident in June 2015. He was prescribed Norco for pain, and soon became addicted to the substance. He was then prescribed Xanax, a brand name for Alprazolam, for unspecified reasons, and became addicted to that substance. He then "photoshopped" his prescriptions by altering them in a fashion that allowed him to receive more Norco and Xanax than his physician prescribed. He also forged his girlfriend's name on his photoshopped prescriptions to allow him to obtain more controlled substances under his girlfriend's name.

9. Respondent was criminally charged in the Third District Court for the State of Utah with making a false prescription. He entered into a plea in abeyance agreement, the terms of which required him to obtain a mental health evaluation, refrain from using controlled substances without a valid prescription, complete 48 hours of community service, and pay court costs. Respondent completed the terms of his plea in abeyance agreement in February 2019.

10. Respondent testified that he was an addict in 2015 but is now rehabilitated. He has been prescribed Adderall for Attention Deficit Hyperactivity Disorder since he was 15 years old. He increased his use of Adderall beyond what he was prescribed to counteract the effects of his addiction to Xanax.

11. Respondent testified that he has not used Adderall or Xanax, without a valid prescription, since August 2015. He has recently joined a church and is a youth group leader at the church. He testified that he became rehabilitated from his addiction by "just talking to people . . . and being open about [his] addition," rather than trying to deal with it on his own. He has not completed a formal drug rehabilitation program. On an unspecified date prior to February 5, 2019, respondent reported to the Tulare County Mental Health Alcohol and Other Drugs program as a condition of his plea in abeyance. After evaluation, he was given a "no treatment recommendation." In March 2018, respondent traveled to the Ibogaine Institute in Rosarito, Mexico, where he took an Ibogaine sacrament. Respondent described Ibogaine as "a very powerful and natural psychedelic . . . that helps [one] face things [he] wouldn't normally face by [eliminating] the ego" . . . "and allowing [one] to face the cause of [his] addiction." The program lasted for two weeks and involved an initial self-assessment, three days of increasing Ibogaine use, and then a reassessment prior to being reintegrated into society. Although respondent had not used illegal drugs for

over two years when he entered the program, he identifies the program as integral to his rehabilitation.

Respondent's Supportive Documents

12. To support his application for licensure, respondent submitted a letter, dated February 5, 2019, from James Rouse, an addiction specialist with Family Intervention Office in Visalia, California. The letter specifies that although respondent was referred by the court, he "does not meet the medical necessity for treatment and there is no evidence indicating any current substance abuse/use." Respondent also submitted a letter from David Kline, Facility Manager at Radiant Church, which states that respondent completed 48 hours of community service at the church, between February 7, 2019 and July 14, 2019. These letters were admitted into evidence as administrative hearsay and have been considered to the extent permitted pursuant to Government Code section 11513, subdivision (d).¹

Discussion

13. Government Code section 11504 provides that a "statement of issues shall be a written statement specifying the statutes and rules with which the respondent must show compliance by producing proof at the hearing." Thus, the

¹ Government Code section 11513, subdivision (d), provides, in pertinent part, that "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions"

burden is on respondent to establish his fitness for registration as a Pharmacy Technician.

14. When reviewing whether to deny a license, the Board considers the following criteria: (1) the nature and severity of the act(s) or offense(s) under consideration as grounds for denial; (2) evidence of any act(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for denial; (3) the time that has elapsed since commission of the act(s) or crime(s); (4) whether the applicant has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against the applicant; and (5) evidence, if any, of rehabilitation submitted by the applicant. (Cal. Code Regs., tit. 16, § 1769.)²

15. In July and August 2015, respondent created fraudulent prescriptions for controlled substances on multiple occasions for his own use. This conduct was corrupt and reprehensible. That respondent was both licensed and employed as a Pharmacy Technician in Utah when this conduct occurred makes his unlawful acts even more serious. His acts are substantially related to the qualifications, duties and functions of a Board licensee, as they demonstrate respondent's present or potential unfitness to perform the functions authorized by the license he seeks in a manner consistent with the public health, safety, or welfare.

² Business and Professions Code section 477, subdivision (b), states, "'License' includes certificate, registration or other means to engage in a business or profession regulated by this code." Business and Professions Code section 4032 states, "'License' means and includes any license, permit, registration, certificate, or exemption issued by the board and includes the process of applying for and renewing the same."

16. Respondent presented a modicum of rehabilitation. He testified that he has not used controlled substances without a valid prescription since August 2015. He completed his plea in abeyance period in February 2019. However, respondent produced little evidence to demonstrate that he is sufficiently rehabilitated to be currently fit for licensure. Only seven months have passed since he completed the terms of his plea in abeyance. He has not completed a formal rehabilitation program and does not currently participate in Narcotics Anonymous or similar ongoing drug rehabilitation program. He produced no evidence of changes he has made to prevent his unlawful acts from reoccurring. He remains ineligible to apply for reinstatement of his Utah License, until no earlier than December 2020. Although respondent testified in an open and straightforward fashion, his testimony and documentary evidence simply fell short of demonstrating that he is presently fit for licensure.

17. Protecting the public is the Board's highest priority and the paramount concern when exercising its licensing, regulatory, and disciplinary functions. (Bus. & Prof. Code, § 4001.1.) It was respondent's burden to demonstrate that he can be relied upon to obey all Board laws and regulations, and act in a manner that is upright, honest, and consistent with professional standards of conduct. When all the evidence is considered, respondent failed to submit sufficient evidence to meet this burden. Consequently, respondent's application must be denied.

LEGAL CONCLUSIONS

1. The burden of proof is on the applicant for a license. (*Martin v. Alcoholic Beverage Control Appeals Bd.* (1959) 52 Cal.2d 238.) Rehabilitation is akin to an affirmative defense; therefore, the burden of proof of establishing an affirmative defense of rehabilitation is on the proponent of that defense. (*Whetstone v. Board of*

Dental Examiners (1927) 87 Cal.App. 156, 164.) The term "burden of proof" means "the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (Evid. Code, § 115.)

2. Business and Professions Code section 480 provides, in relevant part:

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

[1] . . . [1]

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

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

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

3. Business and Professions Code section 4300, subdivision (c), provides that the Board may refuse a license to any applicant guilty of unprofessional conduct.

4. Business and Professions Code section 4301 provides, in relevant part, that the Board "shall take action against the holder of a license who is guilty of unprofessional conduct." Unprofessional conduct includes:

[¶] . . . [¶]

(f) The commission of any act involving moral turpitude, dishonesty, fraud, deceit, or corruption.

(g) Knowingly making or signing any certificate or other document that falsely represents the existence or nonexistence of a state of facts.

[¶] . . . [¶]

(n) The revocation, suspension, or other discipline by another state of a license to practice pharmacy, operate a pharmacy, or do any other act for which a license is required by this chapter that would be grounds for revocation, suspension, or other discipline under [Pharmacy Law].

5. Pursuant to California Code of Regulations, title 16, section 1770, a crime or act is considered to be substantially related to the qualifications, functions or duties of a Board licensee "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."

6. As specified in Factual Finding 15, the conduct respondent engaged in that led to the surrender of his Utah License is substantially related to the qualifications, functions, and duties of the business or profession for which the application was made pursuant to California Code of Regulations, title 16, section 1770.

7. As specified in Factual Finding 2, respondent's Utah License was surrendered pursuant to his execution of a Stipulated Surrender with Division of Occupational and Professional Licensing of the Department of Commerce of the State of Utah. The Stipulated Surrender establishes that he was subjected to the revocation, suspension, or other discipline by another state of a license to practice pharmacy. Consequently, respondent's application is subject to denial pursuant to Business and Professions Code section 4301, subdivision (n), by and through Business and Professions Code section 480, subdivision (a)(3).

8. As specified in Factual Finding 2, respondent falsified prescriptions to obtain controlled substances for his own use, conduct which establishes that he committed acts involving moral turpitude, dishonesty, fraud, deceit, or corruption. Consequently, respondent's application is subject to denial pursuant to Business and Professions Code section 4301, subdivision (f), by and through Business and Professions Code section 480, subdivisions (a)(2) and (a)(3). These facts further establish that respondent knowingly made or signed a certificate or other document that falsely represented the existence or nonexistence of a state of facts. Accordingly, respondent's application is subject to denial pursuant to Business and Professions Code section 4301, subdivision (g), by and through Business and Professions Code section 480, subdivisions (a)(2) and (a)(3).

9. As specified in Factual Findings 13 through 17, respondent failed to submit sufficient evidence at the hearing to establish that it would be consistent with the public health, safety and welfare to issue respondent the license he seeks. Consequently, respondent's application must be denied.

ORDER

The application for registration as a Pharmacy Technician submitted by respondent David Virgen is DENIED.

DATE: September 11, 2019

DocuSigned by:
Ed Washington
D1857747BA4F405...

ED WASHINGTON
Administrative Law Judge
Office of Administrative Hearings

1 XAVIER BECERRA
Attorney General of California
2 KENT D. HARRIS
Supervising Deputy Attorney General
3 JOSHUA B. EISENBERG
Deputy Attorney General
4 State Bar No. 279323
1300 I Street, Suite 125
5 P.O. Box 944255
Sacramento, CA 94244-2550
6 Telephone: (916) 210-6115
Facsimile: (916) 327-8643
7 *Attorneys for Complainant*

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

12 In the Matter of the Statement of Issues
13 Against:

14 **DAVID VIRGEN**

15 **Pharmacy Technician Registration**
16 **Applicant**

17 Respondent.

Case No. 6648

STATEMENT OF ISSUES

18
19 Complainant alleges:

20 **PARTIES**

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

24 2. On or about July 30, 2018, the Board received an application for a Pharmacy
25 Technician Registration from David Virgen (“Respondent”). On or about July 27, 2018,
26 Respondent certified under penalty of perjury to the truthfulness of all statements, answers, and
27 representations in the application. The Board denied the application on December 19, 2018.

28 ///

JURISDICTION

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

4. Code section 480 states, in pertinent part:

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

...

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

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

5. Code section 4300 states, in pertinent part:

...

(c) The board may refuse a license to any applicant guilty of unprofessional conduct . . .

6. Code section 4301 states, in pertinent part:

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

...

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

(g) Knowingly making or signing any certificate or other document that falsely represents the existence or nonexistence of a state of facts.

...

(n) The revocation, suspension, or other discipline by another state of a license to practice pharmacy, operate a pharmacy, or do any other act for which a license is required by this chapter that would be grounds for revocation, suspension, or other discipline under this chapter. Any disciplinary action taken by the board pursuant to this section shall be coterminous with action taken by another state, except that the term of any discipline taken by the board may exceed that of another state, consistent with the board's

enforcement guidelines. The evidence of discipline by another state is conclusive proof of unprofessional conduct.

REGULATORY PROVISIONS

7. Title 16, California Code of Regulations, (CCR), section 1770, states:

For the purpose of denial, suspension, or revocation of a personal or facility license pursuant to Division 1.5 (commencing with Section 475) of the Business and Professions Code, 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.

CONTROLLED SUBSTANCES

8. *Alprazolam* is a Schedule IV controlled substance as defined by Health and Safety Code section 11057(d)(1), and a dangerous drug pursuant to Code section 4022.

9. *Adderall* is a Schedule II controlled substance as defined by Health and Safety Code section 11055(d)(1), and a dangerous drug pursuant to Code section 4022.

FIRST CAUSE FOR DENIAL OF APPLICATION

(Out of State Discipline)

10. Respondent's application is subject to denial under Code section 4300(c) as defined by Code section 4301(n), in that effective December 4, 2015, in the disciplinary action entitled *In the Matter of the License of David Virgen*, Case No. DOPL 2015-467, the Utah Department of Commerce, Division of Occupational and Professional Licensing adopted a Surrender Stipulation and Order accepting the voluntary surrender of Respondent's Utah Pharmacy Technician License No. 9454017-1717. The circumstances of Respondent's discipline with the State of Utah Department of Commerce are as follows:

a. On or about June 30, 2015, Respondent was issued a license to practice as a pharmacy technician in the State of Utah.

b. Between July 2015 and August 2015, on multiple occasions, Respondent forged prescriptions that were submitted to a Utah pharmacy to obtain quantities of the controlled substances Alprazolam and Adderall. Respondent obtained the Alprazolam and Adderall and used the controlled substances himself.

///

1 c. Respondent admitted to a Utah Division of Occupational and Professional Licensing
2 investigator that he took a valid prescription that he had received from a Utah prescribing
3 practitioner and photoshopped the prescription to create multiple forged prescriptions for himself
4 and in the name of his girlfriend.

5 **SECOND CAUSE FOR DENIAL OF APPLICATION**

6 **(Dishonesty, Fraud or Deceit)**

7 11. Respondent's application is subject to denial under Code section 480(a)(2), in that
8 Respondent committed acts involving dishonesty, fraud, or deceit with the intent to substantially
9 benefit himself or another, or substantially injure another, as more particularly set forth above in
10 paragraph 10.

11 **THIRD CAUSE FOR DENIAL OF APPLICATION**

12 **(Committed Acts Which If Done By A Licentiate Constitute Cause for Discipline)**

13 12. Respondent's application is subject to denial under Code section 480(a)(3)(A), in that
14 he committed acts which if done by a licentiate of the profession would constitute grounds for
15 discipline under Code section 4301, subdivision (f) (commission of any act involving moral
16 turpitude, dishonesty, fraud, deceit, or corruption), subdivision (g) (knowingly making or signing
17 any certificate or other document that falsely represents the existence or nonexistence of a state of
18 facts), and subdivision (j) (the violation of any of the statutes of this state or any other state, or of
19 the United States regulating controlled substances and dangerous drugs), as more particularly set
20 forth above in paragraph 10.

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

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. Denying the application of David Virgen for a Pharmacy Technician License;
2. Taking such other and further action as deemed necessary and proper.

DATED: May 3, 2019



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

SA2019100852
13510848.docx