

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

In the Matter of the Accusation Against:

FRANCINE JENNIE JOSEPHSON

Pharmacy Technician Registration
No. TCH 6056,

Respondent.

Case No. 5946

OAH No. 2017080049

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 May 31, 2018.

It is so ORDERED on May 1, 2018.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

Amy Gutierrez, Pharm.D.
Board President

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PROPOSED DECISION

Administrative Law Judge Perry O. Johnson, State of California, Office of Administrative Hearings, (OAH), heard this matter on January 22, 2018, in Oakland, California.

Deputy Attorney General Aspasia A. Papavassiliou represented complainant Virginia Herold, Executive Officer, the Board of Pharmacy, Department of Consumer Affairs.

Respondent Francine Jennie Josephson participated in the administrative adjudication proceeding as a self-represented litigant.

On January 22, 2018, the parties submitted the matter for decision and the record was closed.

FACTUAL FINDINGS

1. On July 1, 2017, complainant Virginia Herold (complainant), in her official capacity as the Executive Officer of the Board of Pharmacy (the board), Department of Consumer Affairs, made and issued the Accusation against respondent Francine Jennie Josephson (respondent).

License Information

2. On March 23, 1993, the board issued Pharmacy Technician Registration No. TCH 6056 to respondent. The registration issued to respondent was in full force and effect

at all times relevant to the matters raised in the Accusation. Respondent's registration will expire on September 30, 2018, unless renewed, surrendered, or revoked before that date.

Respondent's Employment – John Muir Medical Center's Pharmacy

3. In late December 1980, respondent began her employment with John Muir Medical Center Concord Campus Pharmacy (the JMCC Pharmacy). In 1986, after assuming the role of a pharmacy technician and being assigned to the JMCC Pharmacy's purchasing desk, respondent acquired the duties as the holder of the power of attorney for the subject pharmacy. That role vested respondent with the ability to sign for delivery of a range of pharmaceuticals including controlled substances and dangerous drugs. Respondent's most recent performance evaluation characterized her as being an expert in her job functions, duties, and responsibilities as a pharmacy technician, who performed the unique and sparingly performed work on the purchasing desk for JMCC Pharmacy. Before the Spring of 2015, respondent was never subject to any form of disciplinary action relating to her work as a pharmacy technician. But, due to her acts on and after March 31, 2015, and despite her 34-year tenure on the job, respondent's employment with the JMCC Pharmacy was terminated because of determinations by the pharmacy's senior management and the medical center's Human Resources Department, in consultation with both the medical center's ultimate management executives and lawyers, that respondent had diverted from the pharmacy to her herself a dangerous drug and controlled substances through dishonest, fraudulent, or deceitful means.

Causes for Discipline

4. In establishing cause for discipline as raised through the allegations in the Accusation, complainant called two percipient witnesses, namely Ms. Grace Ng and Ms. Julie Anderson, to offer compelling, persuasive, and credible testimonial evidence at the hearing of this matter.

MS. GRACE NG

5. Ms. Grace Ng (Ms. Ng or Operations Manager) holds the senior manager position within the JMMC Pharmacy as the Operations Manager. The JMMC Pharmacy has employed Ms. Ng since 1980. And, Ms. Ng has known respondent for more than 34 years.

By her demeanor while testifying, her attitude toward the proceeding, her clear and unhesitating presentation of evidence as well as her solemn, sincere and conscientious attitude toward the proposed action against respondent, Ms. Ng demonstrated herself to be a credible,¹ knowledgeable, and trustworthy witness at the hearing of this matter.

¹ Government Code section 11425.5, subdivision (b), third sentence.

6. In recent years, Ms. Ng created, implemented, and dutifully executed an extraordinary audit system, beyond the capabilities of the systems that had been used for years within the JMMC Pharmacy. The newly-created auditing system's ultimate objective was to definitively verify the integrity of supplies of dangerous drugs and controlled substances under the control, possession, or responsibility of the subject pharmacy. The extraordinary audit system's methods, which were crafted to provide another security measure to prevent thefts² or losses, were not disclosed to any pharmacy technician or to most of the medical center's staff pharmacists. The time for the extraordinary audit's periodic and regular execution was known only by the Operations Manager, and medical center's pharmacists-in-charge, and the designated assigned auditing pharmacist. The extraordinary audit entailed obtaining reports from the drug whole seller/distributor, that is McKesson Corporation³ (McKesson), which enabled the JMMC Pharmacy's management to reconcile in a precise and accurate manner all orders, invoices, and delivery documents for all dangerous drugs and controlled substances sent to the medical center's pharmacies.

7. On April 1, 2015, by way of the extraordinary audit, the assigned executive pharmacist, who was tasked with executing the extraordinary audit, detected that an invoice was missing from the records of the JMMC Pharmacy for an identified delivery as made by McKesson on March 31, 2015, of three bottles consisting of a total of 300 tablets of Adipex-P⁴ (37.5 mg).

8. Upon making the detection of the loss of the drugs, the assigned auditing pharmacist contacted respondent, who was the JMMC Pharmacy purchasing desk pharmacy technician on duty at the times of both the ordering and the delivery of the Adipex-P. When she was confronted, by email, with a query regarding the absence of both the invoice for the purchase of Adipex as well as the matter of the apparent loss or theft of the drug, respondent only responded that an error must have occurred.

(Ms. Ng, who has known respondent to be a very detailed oriented, careful, and conscientious pharmacy technician when serving on the purchasing desk, was amazed with respondent's attitude towards the problem, and respondent's disinterested attitude to help

² On one occasion within 24 months prior to March 2015, the JMMC Pharmacy had experienced one instance of either a theft or a loss of a dangerous drug/controlled substance. That loss was never solved.

³ McKesson is a corporation that distributes pharmaceuticals and provides health management information. In 2017 it employed more than 68,000 persons, and had revenue of more than \$198 billion. (www.mckesson.com) McKesson is a large business entities having detailed systems for the inventory control of drugs.

⁴ Adipex-P is the brand name for phentermine, and it is an appetite suppressant. Business and Professions Code section 4022 designates phentermine as a dangerous drug. And, Health and Safety Code section 10057, subdivision (f)(4), deems phentermine to be a controlled substance.

solve the problem. On April 3, 2017, when confronted with the inquiry by the auditing pharmacist on the matter of the missing invoice and three bottles of drugs, respondent did not exert any effort to join in an investigation of the loss. Of importance, is that over several decades of knowing respondent, the Operations Manager had a distinct impression that when a question of misplaced drugs was brought to respondent's attention, she had immediately joined in the efforts of pharmacy personnel to investigate the problem. Moreover, Ms. Ng noted that on April 3, 2015, respondent had been tasked with the "End-of-the-Month Report Shift" desk so that she had the time and the opportunity to contribute to the investigation of the missing invoice and seemingly lost drugs.)

After April 3, 2015, the auditing pharmacist along with the JMMC Operations Manager engaged in an exhaustive and thorough investigation of the missing invoice for the three lost bottles, with 100 tablets in each bottle, of Adipex P. The investigation detected the following:

- On the morning of March 31, 2015, a total of 10 employees were signed in through the Kronos System, that is the computerized attendance recording program for the JMMC Pharmacy personnel. Of the ten persons present for duty that morning, only Ms. Ng and respondent possessed passwords and User ID numbers to make computerized purchase orders with McKesson.
- On March 31, 2015, respondent was the only assigned purchasing deck pharmacy technician for the JMMC Pharmacy. In making purchase requests, respondent possessed a unique, confidential user identification code of ACFJNV6 (respondent's User ID) with McKesson, the JMMC Pharmacy's lead source for controlled substances and dangerous drugs. Respondent's User ID with McKesson⁵ was encrypted in both the entry of the digital numerals as well as the transmission of any purchase order.
- At 8:12:40 a.m., on March 31, 2015, from her assigned computer terminal on the premises of the JMMC pharmacy, respondent's User ID was entered with McKesson for a purchase order for two four-ounce bottles of APAP/codeine elixir. Respondent entered the order in the usual course of business by use of not only her encrypted, unique User ID, but also of the additional identifying information of "fj OT." The letter "fj" denoted initials for respondent's name. (In accordance with written policy set by Ms. Ng, pharmacy technicians

⁵ McKesson has created "McKesson Connect," which is the corporation's online pharmaceutical ordering portal. It is easily accessible from any desktop computer system, as well as mobile devices. By using McKesson Connect, with the input of an encrypted identifying number a purchasing agent has an up-to-date product list and pricing information and the assurance of a simple, intuitive ordering functionality.

assigned to the purchasing desk were required to type the initials for their respective names onto computer-driven purchase orders for drugs.)

- Approximately three minutes after executing the routine purchase order, on March 31, 2015, for APAP/codeine elixir, respondent's User ID was entered, at 8:15:43 a.m., in McKesson computer portal by use of a "Quick Order"⁶ key function for the above stated quantity of Adipex-P. The order, which showed a particular number of QOO3312015 was entered and received by McKesson at 8:15:45 a.m. with respondent's unique User ID (ACFJNV6). The McKesson computerized site generated invoice number 769616388 for the order pertaining to a supply of 300 tablets of the Adipex-P as made through respondent's User ID. The Quick Order function assured that the drug order would be delivered on the date of the order so long as the order was made by 10:00 a.m. And, an order made by the Quick Order function was to be delivered in a separate "tote," having a particular marking on the exterior of the tote, that is transport box.
- Adipex-P was not an item in the hospital pharmacy's formulary, that is the drug was not routinely stocked at that JMMC Pharmacy. And, on March 31, 2015, there was neither a patient record nor a physician's prescription indicating a request for requested Adipex-P from the JMMC Pharmacy.
- The procedure within the JMMC Pharmacy for the receipt and acceptance of medications from McKesson involved the designated pharmacy technician validating the arriving order, and then using the pharmacy's loud speaker to call the Operations Manager or the pharmacist-in-charge to sign a receipt for the delivery. A pharmacy technician then would be tasked with placing the medications in the proper storage area.
- McKesson's records established that on March 31, 2015, at 11:59 a.m., a container (tote) transporting three bottles, consisting of 300 tablets, of Adipex-P was delivered to the JMMC Pharmacy. Other totes, which transported APAP/codeine elixir as well as 20 additional totes (containers) of drugs, which had been ordered on dates prior to March 31, 2015, were delivered at the same time as the delivery for the Adipex-P. Although the

⁶ The "Quick Order" function key permits an expedited ordering and delivery of a small supply of pharmaceuticals. Although the Quick Order function permits McKesson to capture the encrypted User ID of the individual making the order and created a precise record of the order through a nine-character, the Quick Order function did not permit the JMMC pharmacy to retain ordering details comparable to use of the routine order function keys. But, McKesson's computer record would secure and preserve information regarding the order and the purchasing agent's User ID. (Since this incident, the JMMC Pharmacy has disallowed all use by all pharmacy personnel of the Quick Order function key.)

APAP/codeine elixir and other drugs were accounted for, the Adipex-P disappeared after McKesson's official delivery of the drug. McKesson's records show that the delivery of the Adipex-P was made through a particular container (tote) having a number of 6897874, which related to the company's invoice 7679616388.

- At or about 11:59 a.m., Respondent signed for the totes that carried the two four-ounce bottles of APAP/codeine elixir as well as the other drugs. And, she used the pharmacy's loud speaker to summon Ms. Ng, who also affixed her signature to the McKesson invoice and the pharmacy's confirmation of delivery form for the drugs delivered by the wholesaler. Although the respective signatures of Ms. Ng and respondent appeared on the McKesson invoice form as retained by the wholeseller's delivery agent regarding the tote carrying the Adipex-P, no signature by any pharmacy employee was displayed on that pharmacy's retained invoice, which purportedly confirmed delivery of the tote transporting to the JMMC Pharmacy the three bottles of Adipex-P.

9. Between April 1, 2015, and April 24, 2015, JMMC Pharmacy personnel carried out a detailed search for the missing invoice and the Adipex-P. During the search the pharmacy's Operations Manager contacted the JMMC Human Resources office. On April 24, 2015, respondent was summoned to a meeting, which was attended by Ms. Ng as well as the general manager for all JMMC pharmacy sites. The meeting, was led by the JMMC Human Resources Director, resulted in respondent being placed on administrative leave pending resolution of further inquiries and determinations. On May 1, 2015, a letter of termination of employment was sent to respondent by the JMMC Human Resources Director. Also, on May 1, 2015, the JMMC Pharmacy Director, Martin Iyoya, filed with the DEA (the Drug Enforcement Agency of the federal government) Form 106, which is the Report of Theft or Loss of Controlled Substances form. The particular Form 106 noted the loss on March 31, 2015, of "Adipex-P 37.5 mg tablet(s), 300" to have been attributed to "employee pilferage." The Form 106 specified the value of the missing controlled substance to be \$591.

Ms. JULIE ANDERSON

10. Ms. Julie Anderson was employed as the JMMC Human Resources Director over a period of 25 years. (Since July 27, 2016, she has held the designation as a "Human Resources Business Partner" for John Muir Health.)

Ms. Anderson offered credible, knowledgeable, and trustworthy testimonial evidence at the hearing of this matter.

11. Approximately two weeks after the detection of the missing invoice for an order of three bottles of Adipex-P, constituting 300 tablets, Ms. Anderson learned on April

15, 2015, of the exhaustive record search and subsequent audit by the JMMC Pharmacy and a suspicion that respondent was responsible for the loss or misappropriation.

After mid-April 2015, Ms. Anderson concluded her analysis as to whether respondent was culpable for misconduct regarding the diversion of a controlled substance/ dangerous drug from the JMMC Pharmacy on March 31, 2016. In addition to the findings made by the pharmacy's Operations Manager, the independent investigation and analysis by Ms. Anderson found the following:

- On March 31, 2015, McKesson's records established that the delivery of the order of three bottles, which contained 100 tablets, of phentermine, that is Adipex-P, was made at 11:59 a.m.
- The workstation used by respondent on March 31, 2015, was not a "heavily populated area." All indications supported an inference that it was unlikely, or even highly improbable, that some other person would have had been present at respondent's workstation at 8:15 a.m. on March 31, 2015.
- Respondent was present at the time of the order. Although respondent's usual lunch break was taken by her at 1:30 p.m. each day, on March 31, 2015, she left for lunch at 12:46 p.m., as shown by the computerized attendance report of pharmacy personnel.
- The McKesson "vault count" was correct, which established that the distributor supply of Adipex-P was reduced by its delivery of the subject drug to the JMMC Pharmacy.
- During the meeting in the Human Resources Department on April 24, 2015, respondent made false or misleading statements, to support her denial of guilt for the loss of the drugs and the missing invoice for the delivery on March 31, 2015. First, respondent falsely stated that on April 3, 2015, when the auditing executive pharmacist had asked her about the missing drug and related invoice, she was "too busy" to sort out the ordering and delivery discrepancies or to otherwise assist in the investigation regarding the missing items. On April 3, 2015, respondent had been assigned to an assignment whereby she was to prepare an end-of-the-month report, which did not require the expenditure to a full-day's attention to that task.

Also, respondent falsely stated to the medical center's Human Resources Department that she was barely familiar with the "Quick Order" function key for entry into the McKesson internet portal. To the contrary, during the month of March 2015 alone, respondent had used the Quick Order function key on March 9, March 24, and March 31.

- Prior to March 31, 2015, respondent had exhibited discontent and anger towards the circumstances of her employment with the JMMC Pharmacy. Of particular note, she had been dissatisfied with a management decision to not vest her with a promotion involving the pharmacy purchase/order desk.
- Respondent's assertion was determined implausible on the topic that someone other than her may have been responsible for the absent invoice and the missing Adipex-P.
- Based upon the weight of the findings, a letter of termination was dispatched on May 1, 2015, to respondent.

Complainant's Expert Witness

12. Ms. Anne Hunt (Inspector Hunt) offered reliable and persuasive evidence at the hearing of this matter. By her demeanor while testifying, her attitude toward the proceeding, her clear and unhesitating presentation of evidence as well as her solemn, sincere and conscientious attitude toward the proposed action against respondent, Inspector Hunt established herself to be a credible, exceedingly knowledgeable, and trustworthy witness at the hearing of this matter.

Inspector Hunt is a licensed pharmacist. Over a period of several years, she has gained experience in the operations and management of pharmacies. She is aware of the duties and functions of a pharmacy technician. And, in her capacity as a board supervising investigator, Inspector Hunt is familiar with the procedures, parameters and methods used by board investigators who are assigned to ascertain whether violations of the law or board regulations have occurred

13. Inspector Hunt persuasively demonstrated that the 21-page report prepared by Inspector Catherine Hodnett, who is now retired from state service, was exhaustive, reasonable and very reliable. In formulating the findings and conclusions recorded in the Investigative Report, dated December 14, 2005, for the file number, which pertained to respondent's unlawful acts, Inspector Hodnett, in the capacity as the board's lead investigator into this matter, amassed sound, corroborating documentary evidence to verify the conclusions made by Ms. Ng and Ms. Anderson that respondent used artifice and deceptive measures to misappropriate three bottles, having 100 tablets, of Adipex-P, otherwise known as phentermine. The misappropriation of the controlled substance/ dangerous drug could be reasonably inferred to establish that only respondent's acts could be determined to have caused the diversion of the drug for her personal use or the use of someone associated with respondent.

Of critical importance, Inspector Hunt established that respondent's single serious act of the diversion of drugs from her former employing pharmacy, along with her false and misleading statements, which unpersuasively voiced a denial of wrongdoing, reflected very poorly on respondent's capacity to act as a faithful and dutiful pharmacy technician.

Inspector Hunt emphasized that respondent's act of having diverted a controlled substances/dangerous drug operates in underscoring respondent's unprofessional conduct in the diversion of a dangerous drug and controlled substance. Inspector Hunt stated the board policy that a registered pharmacy technician must exhibit sound judgment and utmost honesty. Respondent's misconduct that led to the termination of her employment was based upon a thorough investigation. And respondent's employment termination was due to her acts of dishonesty, which had a very strong substantial relationship to the duties, functions, and responsibilities of a pharmacy technician. The evidence of respondent's unprofessional act, which involved an embezzlement-like offense, showed that respondent lacked good, sound judgment and integrity. Moreover, respondent's workplace misconduct indicated a defect in trustworthiness on her part.

14. Through the investigative report by Investigator Hodnett and the further investigative analysis by Supervising Investigator Hunt, complainant reasonably determined that on March 31, 2015, respondent, without possessing a valid prescription or other authorization, ordered the purchase and effected receipt of delivery of 300 tablets of 37.5 mg Adipex-P (three bottles containing 100 tablets each). The records of both respondent's employing pharmacy as well as the drug distributor/whole seller, verified the delivery of the Adipex-P to the JMMC Pharmacy; but, the medical center's pharmacy personnel could not locate the medication in the pharmacy's inventory.

Matters in Mitigation and Respondent's Background

15. Respondent is approximately 57 years old and she appears to be a mature and intelligent individual.

16. Respondent held a position of employment with JMMC Pharmacy for more than 34 years. Over the more than three decades of her employment, she was never the subject of disciplinary action nor was she ever "written up" by any supervisor. Moreover, not "even one tab, vial, amp, or cap" of medication was ever deemed missing due to respondent's acts or omissions, before March 31, 2015.

17. After the JMMC terminated her employment on May 1, 2015, respondent appealed the termination action and denial of unemployment compensation payments to her to the California Unemployment Insurance Appeals Board. An administrative law judge with that state agency granted respondent's appeal to award her unemployment compensation on a determination that the employer presented "insufficient evidence" to deny her unemployment income claim.

18. Other than the instant Accusation, respondent has no record of the board's disciplinary action or any allegation against her pharmacy technician registration for substantiated unprofessional conduct on her part.

19. The board has no record of having issued respondent a prior warning, a citation, a letter of admonishment, or a correction notice due to any act or omission related to the work of a pharmacy technician.

Other Matters

20. Except for her husband, respondent called no witness to the hearing of this matter. No person appeared on respondent's behalf to offer evidence pertaining to her reputation in her community for honesty and integrity. No person came to the hearing of this matter to describe respondent's attitude towards her past action that led to the termination of her employment.

21. Respondent presented no competent evidence that she has been involved or participated in significant or conscientious community, religious, or privately-sponsored programs designed for social benefit or to ameliorate social problems.

22. Respondent's unprofessional acts of diverting a controlled substances and dangerous drug as an agent or employee of pharmacy operate as a potential harm to the public.

23. Respondent's misconduct in diverting the subject dangerous drug and controlled substances was intentional and she had knowledge of or knowingly participated in the conduct that led to the termination of her employment.

Unprofessional Conduct – Violation of Laws Pertaining to Dangerous Drugs or Controlled Substances

24. On March 31, 2015, in her capacity as a holder of a pharmacy technician registration, respondent violated the laws pertaining to dangerous drugs or controlled substances in that she furnished, to herself or others, a dangerous drug (Adipex –P) without possessing a prescription in violation of Business and Professions Code sections 4059 and 4060. And, by her acts on March 31, 2016, respondent unlawfully possessed a controlled substance in violation of Business and Professions Code section 4301, subdivision (j).

Unprofessional Conduct – Commission of an Act Involving Dishonesty, or Fraud

25. On March 31, 2015, in her capacity as a holder of a pharmacy technician registration, respondent committed acts of dishonesty, fraud, or deceit, when she ordered and attended to oversight of the delivery of 300 tablets of 37.5 mg. of Adipex-P, having a value of \$591.

Complainant's Cost Recovery Petition

26. Complainant incurred costs of investigation and prosecution of the Accusation against respondent as follows:

Attorney General's Costs	
By Deputy Attorney General	
Regarding Prosecution Fiscal Years 2016 and 2017	
38.25 hours at \$170 per hour	\$6,502.50
<u>By Paralegal Staff 2.25 hours at \$120 per hour</u>	<u>\$ 270.00</u>
Total Costs of Prosecution	\$6,772.50

Complainant's Investigative Costs	
By one inspector for 3.75 hours at an hourly rate of \$102	\$382.50
<u>By another inspector for 21.75 hours at an hourly rate of \$121 . .</u>	<u>\$2,631.75</u>
Total Investigative Costs	\$3,014.25

GRAND TOTAL COSTS INCURRED: \$9,786.75

27. Respondent did not advance a meritorious defense in the exercise of her right to a hearing in this matter. Also, respondent cannot be seen, under the facts set out above, to have committed slight or inconsequential misconduct in the context of the Accusation. And, respondent did not raise a "colorable challenge" to complainant's Accusation.

The declaration by the deputy attorney general as to prosecution costs, as well as the supervising inspector's cost declaration regarding the investigation efforts by two inspectors that included a responsible and clear recitation of the time for preparation of a detailed written report, established that the prosecution costs and investigative costs were reasonable.

28. At the current time, respondent has limited financial means. Since the termination of her position with the JMMC Pharmacy, respondent has not held any form of gainful employment. She claims that her husband, who has a physical impairment affecting his back, can only take on part time work on a sporadic basis. Other than her husband and her, the family household consists of respondent's elderly 95-year-old father, who has respondent as his principal caregiver. Respondent proclaimed at the hearing of this matter that the annual household income is at approximately \$20,000. Respondent, however, did not present any documentary evidence, such as income tax returns, bank statements, or bill collection reports, in support of her assertions⁷ that she has limited income.

29. A basis, however, does not exist to warrant a reduction of the assessment against respondent for the combined costs of investigation and prosecution incurred by complainant. The imposition of cost recovery upon respondent of the full costs of prosecution will not unfairly penalize respondent, especially when the Order below contemplates that she may pay the costs over an extended period of time so that by a

⁷ Under Government Code section 11522, respondent has the ability to file with the department a Petition for Reconsideration on the issue of the costs recovery award to the board.

prospective date approximately six months before she files an application with the board for re-licensure the costs may be paid by her. All factors considered, the reasonable and appropriate cost amount to be borne by respondent is established by the evidence offered by complainant .

30. The reasonable and appropriate cost, as owed by respondent to the board, is \$9,786.75.

Ultimate Findings

31. Respondent engaged in unprofessional conduct through the diversion of a dangerous drug and a controlled substance that involved the use of dishonesty, fraud and deceit.

32. An insufficient amount of time has passed for the board to determine that respondent has attained rehabilitation from her past unprofessional conduct in violating the law pertaining to dangerous drugs and controlled substances, so as to enable her to hold even a restricted registration as a pharmacy technician.

33. Respondent is obligated to reimburse to the board the full measure of the costs of investigation and the costs of prosecution as necessarily incurred before the date of the hearing in this matter.

LEGAL CONCLUSIONS

The Burden and Standard of Proof

1. The Accusation alleged that respondent engaged in misconduct that warrants license discipline. Where an agency representative has filed charges against the holder of a license, as was done in this case, the party filing the charges has the burden of proof. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789.)

Two different standards of proof apply in license discipline proceedings: the clear and convincing to a reasonable certainty standard, and the preponderance of the evidence standard. And the courts make “a distinction between professional licenses, such as those held by doctors [citation], lawyers [citation], and real estate brokers [citation] on the one hand, and nonprofessional or occupational licenses, such as those held by food processors [citation] and vehicle salespersons [citation], on the other hand,” in determining which standard applies. (*Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916.) The clear and convincing standard applies when disciplining the former types of licenses, whereas the preponderance of the evidence standard applies when disciplining an occupational license held by a person who is not characterized as a “professional,” such as a pharmacy technician registration. Rationalizing the basis for applying a different standard depending on the type of license

subject to discipline, the appellate court in *San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, explained:

Because a professional license represents the licensee's fulfillment of extensive educational, training and testing requirements, the licensee has an extremely strong interest in retaining the license that he or she has expended so much effort in obtaining. It makes sense to require that a higher standard of proof be met in a proceeding to revoke or suspend such a license. The same cannot be said for a licensee's interest in retaining a [nonprofessional] license.

(*Id.*, at p. 1894.)

Resolution of the allegations raised by the Accusation in this matter against respondent is affected by applying the preponderance of the evidence standard. Under the law of the State of California for more than a century the concept of the preponderance of the evidence" standard has been said to mean, "[t]hat the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed." (*People v. Miller* (1916) 171 Cal. 649, 652.) And, going back further in time, the California Supreme Court found a definition from the State of Michigan to be instructive as, " 'by a preponderance of evidence' is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests." (*Hoffman v. Loud* (1896) 111 Mich. 156, 158.)

Complainant established by a preponderance of the evidence the allegations against respondent as set out in the Accusation in this matter.

Causes for Discipline

FIRST CAUSE FOR DISCIPLINE:
VIOLATION OF LAWS PERTAINING TO DANGEROUS DRUGS OR CONTROLLED
SUBSTANCES

2. Business and Professions Code section 4059 prohibits a person from furnishing a dangerous drug, except pursuant to a valid prescription.

Business and Professions Code section 4060 prohibits a person from possessing any controlled substance, except pursuant to a valid prescription.

Business and Professions Code section 4301, subdivision (j), sets forth, in part, that the board shall take action against any holder of a license who is guilty of unprofessional

conduct that includes, “[t]he violation of any of the statutes of this state, of any other state, or of the United States regulating controlled substances and dangerous drugs.”

3. Cause exists for discipline against respondent’s pharmacy technician registration pursuant to Business and Professions Code sections 4059, 4060, and 4301, subdivision (j), by reason of the matters set forth in Factual Findings 7 through 9, 11 through 14, 24, and 31, along with Legal Conclusion 2.

SECOND CAUSE FOR DISCIPLINE-
COMMISSION OF AN ACT INVOLVING DISHONESTY, FRAUD, OR DECEIT

4. Business and Professions Code section 4301, subdivision (f), provides that the board shall take action against any holder of a license who is guilty of unprofessional conduct that includes, “[t]he commission of any act involving . . . 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.”

5. Respondent’s acts on March 31, 2015, falls into the particularized category of embezzlement as proscribed by Penal Code section 508. The statutory section defines respondent’s unlawful act as occurring as, “[e]very clerk, agent, or servant of any person who fraudulently appropriates to [her] own use, or *secretes with a fraudulent intent to appropriate to [her] own use*, any property of another which has come into [her] control or care by virtue of [her] employment as such clerk, agent, or servant, is guilty of embezzlement.” (Emphasis added.) A pharmacy technician is generally a “clerk, agent” or employee of a business or enterprising pharmacist. A pharmacy technician is placed in a position where it may be easy to “appropriate to [one’s] use,” property (controlled substances, other drugs, credit card information, or cash in a cash register) that can come into the control or care of the licensee by virtue of the employment as a “clerk, agent” or employee of a pharmacist or pharmacy business operation.

Respondent’s acts on March 31, 2015, constitute dishonesty, fraud, and deceit. The essence of her bad acts underscore a cause for license revocation.

6. Cause exists for discipline against respondent’s pharmacy technician registration pursuant to Business and Professions Code section 4301, subdivision (f), by reason of the matters set forth in Factual Findings 9, 11 through 14, 25, and 31, along with Legal Conclusions 3, 4 and 5.

Other Determinations

7. California Code of Regulations, title 16, section 1760 provides in part:

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.

Under the Disciplinary Guidelines of the California State Board of Pharmacy, the agency proclaims that it "files cases against pharmacy technicians where the violation(s) involve significant misconduct on the part of the licensee. The board believes that revocation is typically the appropriate penalty when grounds for discipline are found to exist. Grounds for discipline include, but are not limited to the following violation(s) of law(s) involving: [p]ossession of dangerous drugs and/or controlled substances . . ." ("A Manual of Disciplinary Guidelines and Model Disciplinary Orders, Cal. State Board of Pharmacy, Dept. of Consumer Affairs (Rev. 10/2007)," p. 43.)

The evidence at hearing established that respondent engaged in a very serious set of offenses when she diverted a controlled substance and dangerous drug from the pharmacy of her employing medical center by dishonesty, fraud and deceit. After the execution of her initial scheme, respondent refused to acknowledge her misconduct and gave false and misleading statements to personnel of the medical center as well as the board's investigator.

The board's Manual of Disciplinary Guidelines declares that, "[p]harmacy technicians are not independent practitioners and must work under the supervision of a pharmacist. To place a pharmacy technician on probation places an additional burden on the pharmacist . . . to ensure that the respondent pharmacy technician complies with the terms and conditions of . . . her probation." (*Ibid.*) Although respondent's background and other factors pertinent to her lengthy history as a board licensee were considered in making the following Order, respondent did not present sufficient evidence as to warrant deviation from the board's guidelines.

Ultimate Legal Conclusion

8. Cause exists to discipline respondent's original pharmacy technician registration for the reasons discussed in Legal Conclusions 3, 6, and 7, individually and collectively. When all the evidence is considered, respondent did not introduce sufficient evidence to establish it would be in the interests of public health, safety, or welfare to allow her to continue performing the licensed duties of a registered pharmacy technician, even on a probationary basis, for the reasons explained in factual findings, above. Therefore, respondent's pharmacy technician registration must be revoked.

Costs of Investigation and Prosecution

9. Business and Professions Code section 125.3 prescribes that a “licentiate found to have committed a violation or violations of the licensing act” may be directed “to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.”

The California Supreme Court’s reasoning on the obligation of a licensing agency to fairly and conscientiously impose costs in administrative adjudication in *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45-46, is persuasive and should be considered in this matter. Scrutiny of certain factors, which pertain to the board’s exercise of discretion to analyze or examine factors that might mitigate or reduce costs of investigation and prosecution upon a licensee found to have engaged in unprofessional conduct, are set forth in Factual Finding 28. But, measured against the concrete presentation by complainant regarding the agency’s incurred costs of prosecution and investigation, respondent offered insufficient evidence in her request for reduction of the total amount of the costs. Respondent’s professed matters in mitigation and extenuation are insubstantial when compared to the complainant’s burden in prosecuting this matter and safeguarding the public from unprofessional licensees in the way of absolving the costs incurred by complainant. And, respondent’s work skills and ability to gain some form of employment, coupled with the amount of time that she may take to pay complainant’s full costs, do not warrant a reduction of the overall costs that required respondent to address and eliminate before the date that she may apply for licensure reinstatement.

With all factors considered, the costs of prosecution as set forth in Factual Findings 26 through 27, 29, 30 and 33, are reasonable and appropriate in a total amount of \$9,786.75.

ORDER

1. Pharmacy technician registration number TCH 6056, as issued to respondent Francine Jennie Josephson, is revoked.

2. Respondent shall pay to the board its costs of prosecution and investigation costs in the total amount of \$9,786.75. She must make full payment of the costs by a date not later than six months before the date of any prospective application for reinstatement of a registration as a pharmacy technician.

DATED: February 15, 2018

DocuSigned by:



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PERRY O. JOHNSON

Administrative Law Judge

Office of Administrative Hearings

1 KAMALA D. HARRIS
Attorney General of California
2 DIANN SOKOLOFF
Supervising Deputy Attorney General
3 ASPASIA A. PAPAVALASSILOU
Deputy Attorney General
4 State Bar No. 196360
1515 Clay Street, 20th Floor
5 P.O. Box 70550
Oakland, CA 94612-0550
6 Telephone: (510) 879-0818
Facsimile: (510) 622-2270
7 E-mail: Aspasia.Papavassiliou@doj.ca.gov
Attorneys for Complainant

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

11 In the Matter of the Accusation Against:
12 **FRANCINE JENNIE JOSEPHSON**
13 **901 Via Pajaro**
14 **Fairfield, CA 94534-1525**
15 **Pharmacy Technician Registration No. TCH**
6056
16 Respondent.

Case No. 5946

A C C U S A T I O N

17
18 Complainant alleges:

19 **PARTIES**

- 20 1. Virginia Herold (Complainant) brings this Accusation solely in her official capacity as
21 the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.
22 2. On or about March 23, 1993, the Board of Pharmacy issued Pharmacy Technician
23 Registration Number TCH 6056 to Francine Jennie Josephson (Respondent). The Pharmacy
24 Technician Registration was in full force and effect at all times relevant to the charges brought in
25 this Accusation and will expire on September 30, 2018, unless renewed.

26 **JURISDICTION**

- 27 3. This Accusation is brought before the Board of Pharmacy (Board), Department of
28 Consumer Affairs, under the authority of the following laws. All section references are to the

1 Business and Professions Code unless otherwise indicated.

2 4. Section 4300 of the Code states, in pertinent part:

3 "(a) Every license issued may be suspended or revoked.

4 "(b) The board shall discipline the holder of any license issued by the board, whose default
5 has been entered or whose case has been heard by the board and found guilty, by any of the
6 following methods:

7 "(1) Suspending judgment.

8 "(2) Placing him or her upon probation.

9 "(3) Suspending his or her right to practice for a period not exceeding one year.

10 "(4) Revoking his or her license.

11 "(5) Taking any other action in relation to disciplining him or her as the board in its
12 discretion may deem proper.

13 ...

14 "(e) The proceedings under this article shall be conducted in accordance with Chapter 5
15 (commencing with Section 11500) of Part 1 of Division 3 of the Government Code, and the board
16 shall have all the powers granted therein. The action shall be final, except that the propriety of the
17 action is subject to review by the superior court pursuant to Section 1094.5 of the Code of Civil
18 Procedure."

19 5. Section 4300.1 of the Code states:

20 "The expiration, cancellation, forfeiture, or suspension of a board-issued license by operation
21 of law or by order or decision of the board or a court of law, the placement of a license on a
22 retired status, or the voluntary surrender of a license by a licensee shall not deprive the board of
23 jurisdiction to commence or proceed with any investigation of, or action or disciplinary proceeding
24 against, the licensee or to render a decision suspending or revoking the license."

25 STATUTORY PROVISIONS

26 6. Section 4059 of the Code states, in pertinent part:

27 "(a) A person may not furnish any dangerous drug, except upon the prescription of a
28 physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor pursuant to Section

1 3640.7. A person may not furnish any dangerous device, except upon the prescription of a
2 physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor pursuant to Section
3 3640.7."

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

5 "No person shall possess any controlled substance, except that furnished to a person upon
6 the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor
7 pursuant to Section 3640.7, or furnished pursuant to a drug order issued by a certified
8 nurse-midwife pursuant to Section 2746.51, a nurse practitioner pursuant to Section 2836.1, or a
9 physician assistant pursuant to Section 3502.1, or naturopathic doctor pursuant to Section 3640.5,
10 or a pharmacist pursuant to either subparagraph (D) of paragraph (4) of, or clause (iv) of
11 subparagraph (A) of paragraph (5) of, subdivision (a) of Section 4052."

12 8. Section 4301 of the Code states, in pertinent part:

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

16 ...

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

20 ...

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

23 COST RECOVERY PROVISION

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

28

1 DRUGS

2 10. Adipex-P, a brand name for phentermine, is a dangerous drug under Code section
3 4022 and a Schedule IV controlled substance under Health and Safety Code section 10057(f)(4).
4 It is used as an appetite suppressant.

5
6 FACTUAL BACKGROUND

7 11. On or about March 31, 2015, while working as a pharmacy technician at John Muir
8 Medical Center in Concord, Respondent, without a valid prescription or other authorization,
9 ordered the purchase and delivery of 300 tablets of 37.5 mg Adipex-P (three bottles containing
10 100 tablets each). Records showed the Adipex-P was delivered to the hospital, but hospital staff
11 could not locate the medication in their inventory.

12 FIRST CAUSE FOR DISCIPLINE
13 (Violation of Laws Pertaining to Dangerous Drugs or Controlled Substances)
(Bus. & Prof. Code, §§ 4059, 4060, and 4301, subd. (j))

14 12. Respondent has subjected her pharmacy technician registration to discipline because
15 she violated laws pertaining to dangerous drugs or controlled substances (Bus. & Prof. Code, §
16 4301, subd. (j)) in that she furnished a dangerous drug without a prescription (Bus. & Prof. Code,
17 § 4059) and unlawfully possessed a controlled substance (Bus. & Prof. Code, § 4060). The
18 circumstances are described in paragraph 11, above.

19 SECOND CAUSE FOR DISCIPLINE
20 (Dishonesty, Fraud, or Deceit)
(Bus. & Prof. Code, § 4301, subd. (f))

21 13. Respondent has subjected her pharmacy technician registration to discipline because
22 she committed an act involving dishonesty, fraud, or deceit (Bus. & Prof. Code, § 4301, subd. (f)).
23 The circumstances are described in paragraph 11, above.

24 PRAYER

25 WHEREFORE, Complainant requests that a hearing be held on the matters alleged in this
26 Accusation, and that following the hearing, the Board of Pharmacy issue a decision:

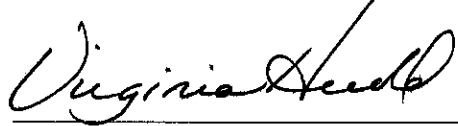
27 1. Revoking or suspending Pharmacy Technician Registration Number TCH 6056, issued
28 to Francine Jennie Josephson;

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2. Ordering Francine Jennie Josephson 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: 7/1/17



VIRGINIA HEROLD
Executive Officer
Board of Pharmacy
Department of Consumer Affairs
State of California
Complainant

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