

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

In the Matter of the Statement of Issues
Against:

CHONG HEE HWANG,

Pharmacy Technician Registration Applicant

Respondent.

Case No. 6488

OAH No. 2018090731

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 15, 2019.

It is so ORDERED on April 15, 2019.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

A handwritten signature in black ink, appearing to read 'Victor Law', is written over a horizontal line.

By

Victor Law, R.Ph.
Board President

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PROPOSED DECISION

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on February 12, 2019, in San Diego, California.

Daniel J. Cross, Deputy Attorney General, Department of Justice, State of California, represented complainant, Virginia Herold, Executive Officer, Board of Pharmacy (the board), Department of Consumer Affairs, State of California.

Chong Hee Hwang, respondent, represented herself.

On February 12, 2019, the matter was submitted.

FACTUAL FINDINGS

Jurisdictional Matters

1. On December 31, 2017, respondent signed an application for registration as a pharmacy technician. On January 5, 2018, the board received the application. On May 31, 2018, the board advised respondent that it was denying her application on the basis of her "criminal history." By letter dated June 12, 2018, respondent appealed the denial of her application.

2. On August 21, 2018, complainant signed the statement of issues in her official capacity. On August 29, 2018, the statement of issues and other jurisdictional documents

were served on respondent. On September 8, 2018, respondent signed and thereafter served on the Office of the Attorney General a request for hearing. On September 24, 2018, complainant served on respondent a notice of hearing. This hearing ensued.

The statement of issues alleges six causes for denial of the application. The first, third, and fifth causes for denial relate to convictions respondent sustained, in 1999, 2009, and 2012 respectively. These convictions have all been dismissed pursuant to Penal Code section 1203.4. The second, fourth, and sixth causes for denial relate to the acts underlying the three convictions.

Respondent's Convictions

3. On April 29, 1999, in the Superior Court of California, County of Orange, respondent was convicted on her plea of guilty on one count of violating Welfare and Institutions Code section 10980, subdivision (c), receiving public aid by misrepresentation, a misdemeanor.¹ Other counts were dismissed pursuant to the plea agreement. Respondent was placed on informal probation for three years. The terms of probation included that respondent pay restitution, complete 160 hours of Caltrans roadside service work, and pay a \$100 fine to the State Restitution Fund. On November 17, 2015, the court granted respondent's petition filed pursuant to Penal Code section 1203.4, and the case was dismissed.

4. On May 1, 2009, in the Superior Court of California, County of Orange, respondent was convicted on her plea of guilty on one count of violating Business and Professions Code section 7027.3, the fraudulent use of a contractor's license, a misdemeanor. Another count was dismissed pursuant to the plea agreement. Respondent provided the following factual basis in support of the plea agreement: "On 10-17-06, in O[range] C[ounty], I unlawfully used, with the intent to defraud, a contractor's license number that did not correspond to the number of a currently valid contractor's lic[ense] held by myself." Respondent was placed on informal probation for three years. The terms of probation included that respondent pay a \$100 fine to the State Restitution Fund and a \$20 security fee, make restitution in the amount of \$9,679, and complete 12 days of community service. On November 24, 2015, the court granted respondent's petition filed pursuant to Penal Code section 1203.4, and the case was dismissed.

5. On January 19, 2012, in the Superior Court of California, County of Orange, respondent was convicted on her plea of guilty on one count of violating Penal Code section 484b,² diversion of construction funds, and on one count of violating Business and Professions Code section 7028, subdivision (a), contracting without a license, both

¹ This count was initially charged as a felony, but it was reduced to a misdemeanor at the time of respondent's plea pursuant to Penal Code section 17, subdivision (b).

² This count was initially charged as a felony, but it was reduced to a misdemeanor pursuant to Penal Code section 17, subdivision (b) at the time of sentencing.

misdemeanors. Three other counts were dismissed pursuant to the plea agreement. Respondent was placed on informal probation for three years. The terms of probation included that respondent serve one day in jail (with credit for time served), pay fines and fees in the total amount of approximately \$200, pay restitution, and complete 320 hours of community service. On November 16, 2015, the court granted respondent's petition filed pursuant to Penal Code section 1203.4, and the case was dismissed.

6. Respondent fulfilled all terms of her probation in all three cases. She did not have any probation violations.

Respondent's Pre-hearing Statements³

7. With regard to her 1999 conviction, respondent provided the following prehearing written statement: "While I'm getting \$300 a month aid for me and two children and I was selling Herbalife products to make some extra that I didn't report to government when I was getting aid."

8. With regard to her 2009 conviction, respondent provided the following prehearing written statement: "I open a swimming pool contracting company with another person who had a swimming pool license and half way of the job the guy with the license left the company but company still continued the job without the license."

9. With regard to her 2012 conviction, respondent provided the following prehearing written statement: "The job I had referral by home owner case number 09WM00511⁴ asking extra free work without new job order they know my partner is left and don't have contracting license decided to sue me also."

Testimony of Respondent

10. Respondent testified with regard to the 1999 conviction that she was a single mother at the time and had two children, six and eight years of age. She was collecting welfare and obtained a job selling vitamins door to door. She did not report the income from that job to the welfare department. The reason she did not report this income was that, even combined with the welfare payments she received, it was not enough to support herself and her children. She added that she was "young" at the time, i.e., in her 30s.

Respondent testified that she was a massage therapist at the time of the acts (which occurred in 2006) leading to her 2009 and 2012 convictions. One of her massage therapy clients, P.B., who had been a contractor for about 35 years but whose license at the time was suspended, had lymphoma. Respondent reached an agreement with P.B., pursuant to which

³ At hearing, respondent confirmed that all of the matters contained in her prehearing statements were true.

⁴ This is the case number relating to respondent's 2009 conviction.

she would open and own a pool construction company and P.B. would perform the company's construction work. However, respondent did not have a contractor's license and P.B.'s license was suspended. Accordingly, respondent and P.B. enlisted another individual, A.L., who had worked for P.B. and who did have a (Classification C-53, swimming pool) contractor's license, to help respondent obtain a business license. To that end, A.L. and respondent met at the Anaheim City Hall, where A.L.'s license apparently induced the clerk to issue the business license to respondent. Ultimately, A.L. had no on-going involvement in operating the business, and respondent never saw A.L. after the City Hall meeting. In essence, the arrangement was that respondent owned the company, P.B. built the pools, and A.L. helped respondent obtain the business license.

Respondent testified that she set up this company so that P.B. could perform construction work even though his contractor's license was suspended. In return P.B. made payments to respondent, which helped finance her course of study at an acupuncture school.

Respondent testified that she and P.B. went together to talk to prospective clients, i.e., homeowners who were contemplating the installation of a pool. Client funds were deposited in the business bank account controlled by respondent. P.B. failed to complete at least three of the swimming pool construction projects for homeowners, each of whom eventually sued respondent and filed complaints against her with the Contractors State License Board (CSLB). The 2009 and 2012 convictions arose in connection with these contracts and customers.

Respondent testified that she wishes to become a pharmacy technician because she would like to be in the healthcare field. She had hoped to become an acupuncturist, but lacked the funds to complete the required training and she had concerns about whether she could obtain a license, due to a prior conviction for prostitution.⁵

Respondent testified that she has been an Uber driver since 2012; she works nearly every day but only for an hour or two each day.

Respondent testified that she took a pharmacy technician class at the Huntington Beach adult school; she completed the program in January 2018. She is now taking Spanish-language classes to become more marketable as a pharmacy technician. She went to the Interior Designers Institute for about a year and received a certificate upon completion of her program in 2013.

Respondent testified that she and her two sisters help care for their mother, who has dementia. She visits her parents daily, soaks her mother's feet, performs light massage, and purchases groceries.

⁵ This prior conviction was not alleged as a basis for denying respondent a pharmacy technician registration since the court documents relating to the conviction were apparently destroyed.

Respondent testified she has owned several businesses, including a snack shop, a hamburger shop, a sushi bar, a jewelry shop, and a massage therapy facility. Respondent's involvement with these businesses came to an end in a variety of ways. She recalled having filed for bankruptcy at some point, but did not recall the outcome of that proceeding.

Respondent testified, "My record is so dirty and so shameful" and "I just want to be born again." She made these statements in the context of her prostitution conviction.

Respondent testified that she now realizes she should not have engaged in the conduct that led to her convictions in 2009 and 2012. In elaboration, she stated that knowing what she now knows about P.B., "I shouldn't do some stupid thing." She found out that he used her, but at the time she trusted him to help her out. During the course of the criminal proceedings, P.B. could have defended or protected respondent by stating that she was "just a victim," but he did not do so. She characterized P.B. as a "con man."

Testimony of Benedicto Rustia

11. Benedicto Rustia, a licensed pharmacist, has been a board inspector for the past 11 years. His duties include investigating complaints from consumers or insurance companies, inspecting pharmacies, and assisting and representing the board in disciplinary proceedings.

Mr. Rustia's uncontroverted testimony established that the duties of a pharmacy technician include aiding the pharmacist in filling out prescriptions, pouring and labeling prescriptions, receiving and stocking medication, taking inventory, typing new prescriptions into the system, assisting customers, and working at the cash register. Pharmacy technicians have access to controlled substances. A pharmacy technician also has access to a great deal of personal and confidential patient information. A pharmacy technician's unlawful diversion of drugs, whether for personal use or other reasons, poses a substantial risk of harm. Respondent's convictions cause a particular concern to the board because they involve fraud, misrepresentation, and/or deceit.

Other Evidence

12. In a report submitted at hearing by complainant concerning a June 5, 2012, Contractors State License Board meeting, an "Enforcement Program Update" contained an entry involving respondent, which in part⁶ stated the following:

A homeowner entered into written contract with an unlicensed woman, Chong Hee Hwang, for a swimming pool remodel, landscaping, and irrigation for \$32,500. Hwang abandoned the project after receiving \$28,586, leaving behind incomplete and

⁶ Omitted portions of this entry involved other matters that are outside the scope of the pleadings in this proceeding.

defective work. In an effort to avoid paying restitution to the homeowner and others, Hwang filed for bankruptcy. The homeowner protested the bankruptcy filing and presented the Bankruptcy Trustee with evidence that Hwang owned four businesses Hwang's petition for bankruptcy was dismissed because she failed to accurately disclose her business ownership. A Norwalk Investigative Center investigator issued Hwang an administrative citation for contracting without a license and coordinated her investigation with the Orange County Sheriff to achieve a criminal filing.⁷

13 Respondent submitted at hearing a certificate of completion issued to her on December 8, 2013, by the Interior Designers Institute.

LEGAL CONCLUSIONS

Registration and Responsibilities of a Pharmacy Technician

1. As the court observed in *Golden Drugs Co., Inc. v. Maxwell-Jolly* (2009) 179 Cal.App.4th 1455, 1458-1459:

The practice of pharmacy is a profession subject to the Pharmacy Law (Bus. & Prof. Code, §§ 4000 4426, 4050). Pharmacies must be licensed by the California State Board of Pharmacy (the Board), which has as its "highest priority" the "[p]rotection of the public. (Bus. & Prof. Code, §§ 4001.1, 4110.)

Every pharmacy must have a "pharmacist-in-charge" who is licensed by the Board and "responsible for the pharmacy's compliance with all state and federal laws and regulations pertaining to the practice of pharmacy." (Bus. & Prof. Code, §§ 4036, 4113.)

A pharmacist may be assisted by a "pharmacy technician," who must be licensed as such and is "an individual who assists a pharmacist in a pharmacy in the performance of his or

⁷ This entry was received as administrative hearsay pursuant to Government Code section 11513, subdivision (d), to the extent that it explains or supplements other evidence, in particular the testimony of respondent. However, how this document was prepared and what other information or documents were relied on in its preparation are not known, and it is given little weight.

her pharmacy related duties, as specified in Section 4115.”
(Bus. & Prof. Code, §§ 4038, 4115, subd. (e).)

Business and Professions Code section 4115 states in part:

“(a) 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.

“(b) This section does not authorize the performance of any tasks specified in subdivision (a) by a pharmacy technician without a pharmacist on duty.

“(c) This section does not authorize a pharmacy technician to perform any act requiring the exercise of professional judgment by a pharmacist.

“(d) The board shall adopt regulations to specify tasks pursuant to subdivision (a) that a pharmacy technician may perform under the supervision of a pharmacist.”

The Board adopted a regulation (Cal. Code Regs., tit. 16, § 1793.2 (regulation 1793.2)), stating, “‘Nondiscretionary tasks’ as used in Business and Professions Code section 4115, 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; [and]
- (e) packaging and repackaging.”

Another regulation states that “[o]nly a pharmacist” (or an intern pharmacist acting under the pharmacist’s supervision) may interpret a prescription; “[s]upervise the packaging of drugs and check the packaging procedures and product upon completion”; and “[p]erform all functions which require professional judgment.” (Cal. Code Regs., tit. 16, § 1793.1 (regulation 1793.1).)

Burden and Standard of Proof

2. In a proceeding involving the issuance of a license, the burden of proof is on the applicant to show that he or she is qualified to hold the license. The standard of proof is a preponderance of the evidence. (Evid. Code, §§ 115, 500.)

3. “‘Preponderance of the evidence’ means evidence that has more convincing force than that opposed to it. [Citations.]” (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) “The sole focus of the legal definition of ‘preponderance’ in the phrase ‘preponderance of the evidence’ is on the *quality* of the evidence. The *quantity* of the evidence presented by each side is irrelevant.” (*Ibid.*) “If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it. [Citation].” (*People v. Mabini* (2001) 92 Cal.App.4th 654, 663.)

Statutory, Regulatory, and Judicial Authority for Denial of License

4. Business and Professions Code section 475 states in part:

(a) Notwithstanding any other provisions of this code, the provisions of this division shall govern the denial of licenses on the grounds of:

[¶] . . . [¶]

(2) Conviction of a crime.

(3) Commission of any act involving dishonesty, fraud or deceit with the intent to substantially benefit himself or another, or substantially injure another.

(c) A license shall not be denied, suspended, or revoked on the grounds of a lack of good moral character or any similar ground relating to an applicant's character, reputation, personality, or habits.

5. Business and Professions Code section 480 states in part:

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

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

(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.

(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.

(b) Notwithstanding any other provision of this code, no person shall be denied a license solely on the basis . . . that he or she has been convicted of a misdemeanor if he or she has met all applicable requirements of the criteria of rehabilitation developed by the board to evaluate the rehabilitation of a person when considering the denial of a license under subdivision (a) of Section 482.

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

6. Business and Professions Code section 493 states in part that:

Notwithstanding any other provision of law, in a proceeding conducted by a board within the department pursuant to law to deny an application for a license⁸ . . . upon the ground that the applicant . . . has been convicted of a crime substantially related to the qualifications, functions, and duties of the licensee in question, the record of conviction of the crime shall be conclusive evidence of the fact that the conviction occurred, but only of that fact, and the board may inquire into the circumstances surrounding the commission of the crime in order to fix the degree of discipline or to determine if the conviction is substantially related to the qualifications, functions, and duties of the licensee in question.

⁸ The section elaborates that the term "license" includes the term "registration."

7. Business and Professions Code section 4301 states in part:

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

[¶] . . . [¶]

(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.

[¶] . . . [¶]

(l) The conviction of a crime substantially related to the qualifications, functions, and duties of a licensee under this chapter. The record of conviction of a violation of Chapter 13 (commencing with Section 801) of Title 21 of the United States Code regulating controlled substances or of a violation of the statutes of this state regulating controlled substances or dangerous drugs shall be conclusive evidence of unprofessional conduct. In all other cases, the record of conviction shall be conclusive evidence only of the fact that the conviction occurred. The board may inquire into the circumstances surrounding the commission of the crime, in order to fix the degree of discipline or, in the case of a conviction not involving controlled substances or dangerous drugs, to determine if the conviction is of an offense substantially related to the qualifications, functions, and duties of a licensee under this chapter. A plea or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning of this provision. The board may take action when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under Section 1203.4 of the Penal Code allowing the person to withdraw his or her plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, information, or indictment.

8. The denial of a license cannot be based on a conviction that has been dismissed pursuant to Penal Code section 1203.4. However, a licensing agency *may* deny or restrict a license based on the conduct underlying a dismissed conviction, as long as the conduct independently qualifies as a basis for denial or restriction. (*Moustafa v. Board of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1125.)

9. To summarize the foregoing authority in the context of the present matter:

a. The board may not deny a pharmacy technician registration to an applicant on the basis of any criminal conviction that has been dismissed pursuant to Penal Code section 1203.4. (Bus. & Prof. Code, § 480, subd. (a)(3); *Moustafa v. Board of Registered Nursing*, *supra*, 29 Cal.App.5th 1119, 1125.)

b. The board may, however, deny a pharmacy technician registration to an applicant who has committed an act involving dishonesty, fraud, or deceit with an intent to substantially benefit oneself or another person. (Bus. & Prof. Code, § 480, subd. (a)(2).)

The facts found above establish by a preponderance of the evidence that respondent has committed acts involving dishonesty, fraud, or deceit with an intent to substantially benefit oneself or another person. In 1999, respondent knowingly received public assistance to which she was not entitled. In 2006, she sought to circumvent the California Contractors License Law to enable her to engage in the business of a contractor without having a license to do so and to enable P.M., whose license was suspended, to do likewise.

c. The board may also deny a pharmacy technician registration to an applicant who has committed an act that if committed by a licensee would be grounds for suspension or revocation of a license. (Bus. & Prof. Code, § 480, subd. (a)(3)(A).)

More specifically, the board may, under subdivision (a)(3)(A), deny a registration to an applicant who has committed any act involving dishonesty, fraud or deceit or who has knowingly made or signed a certificate or other document that falsely represents the existence or nonexistence of a state of facts. (Bus. & Prof. Code, §4301, subds. (f) and (g).) The board may not, however, deny a registration to an applicant on the basis of a dismissed criminal conviction. (Bus. & Prof. Code, § 480, subd. (a)(3); *Moustafa v. Board of Registered Nursing*, *supra*, 29 Cal.App.5th 1119, 1125.) Accordingly, the board may not, in the present case, deny a registration to an applicant under subdivision (a)(3)(A) as that provision interacts with section 4301, subdivision (l).

The facts found above establish by a preponderance of the evidence that respondent committed acts involving moral turpitude, dishonesty, fraud, deceit or corruption. In 1999, respondent knowingly received public assistance to which she was not entitled. In 2006, she sought to circumvent the California Contractors License Law to enable her to engage in the business of a contractor without having a license to do so and to enable P.M., whose license was suspended, to do likewise.

The facts found above do not establish by a preponderance of the evidence, however, that respondent knowingly made or signed a certificate or other document that falsely represented the existence or nonexistence of a state of facts. While the acts she committed in 1999 and 2006 may well have involved her making or signing of a document that falsely represented the existence of a state of facts, the evidence of record is insufficient to establish that this actually occurred.

Substantial Relationship and Fitness to Practice

10. It is typical in cases involving the denial of a license on the basis of criminal convictions and/or the acts underlying those convictions to consider and apply to a determination of the matter the concepts of substantial relationship and fitness to practice. Otherwise stated, inquiry is made with regard to whether the conviction or underlying act is substantially related to the qualifications, functions or duties of the profession or occupation in question and renders the applicant unfit to practice the licensed profession or occupation. In the present case, however, such an inquiry need not (and in fact should not) be made. This is because the substantial relationship and fitness concepts do not apply to any of the causes for discipline alleged in the present case apart from those based on the dismissed convictions.

To elaborate, the first, third, and fifth causes for discipline are based on respondent's dismissed convictions. Pursuant to Business and Professions Code section 480, subdivision (c), and *Moustafa*, respondent cannot be denied a license on the basis of these causes for discipline, and an inquiry into substantial relationship and fitness is beside the point. On the other hand, the second, fourth, and sixth causes for discipline are based on provisions (i.e., Business and Professions Code sections 480, subdivisions (a)(2) and (a)(3)(A) and 4301, subdivisions (f) and (g)) that do *not* implicate a substantial relationship or fitness analysis. As the court stated in *Moustafa*:

another statutory ground for denying a license to a professional applicant is that the applicant has "[d]one any act involving dishonesty, fraud, or deceit with the intent to substantially benefit himself or herself or another, or substantially injure another," which does not require a separate determination that the act is substantially related to the practice of the profession. (§ 480, subd. (a)(2).) (*Moustafa v. Board of Registered Nursing, supra*, 29 Cal.App.5th at 1140.)

Accordingly, a substantial relationship/fitness analysis has no bearing on the present matter.⁹

⁹ While certain statutory and regulatory provisions (e.g., Business and Professions Code section 481 and California Code of Regulations, title 16, section 1770) suggest that a substantial relationship/fitness analysis could still apply to an *act* committed – as opposed to a *conviction* suffered – by an applicant, none of the six causes for denial set forth in the statement of issues in this case identifies any act of respondent as a basis for denial on the ground that the act in question is substantially related or demonstrates unfitness.

Disciplinary Guidelines, Mitigation and Rehabilitation

11. Business and Professions Code section 482 states in part that each board under the provisions of this code shall develop criteria to evaluate the rehabilitation of a person when considering the denial of a license by the board under Section 480. Each board shall take into account all competent evidence of rehabilitation furnished by the applicant or licensee.

12. In considering disciplinary action, the board is required to consider its disciplinary guidelines, effective October 2007. (Cal. Code Regs., tit. 16, §1760.) “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.” (Cal. Code Regs., tit. 16, §1760.)

13. California Code of Regulations, title 16, section 1769 states in part:

(b) When considering the denial of a facility or personal license under Section 480 of the Business and Professions Code, the board, in evaluating the rehabilitation of the applicant and his present eligibility for licensing or registration, will consider 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 under Section 480 of the Business and Professions Code.

(3) The time that has elapsed since commission of the act(s) or crime(s) referred to in subdivision (1) or (2).

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

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

14. The more serious the misconduct and the bad character evidence, the stronger the applicant’s showing of rehabilitation must be. Rehabilitation commonly involves a substantial period of exemplary conduct following the applicant’s misdeeds. Truly exemplary conduct ordinarily includes service to the community. (*In re Glass* (2014) 58 Cal.4th 500, 520.)

15. The amount of evidence required to establish rehabilitation varies according to the seriousness of the misconduct at issue. (*In re Menna* (1995) 11 Cal.4th 975, 987.) Mere remorse does not demonstrate rehabilitation. A truer indication of rehabilitation is presented by sustained conduct over an extended period of time. (*Id.* at p.991.)

16. The evidentiary significance of misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct. (*Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1070.)

17. Rehabilitation is a state of mind and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved “reformation and regeneration.” (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.)

18. Since persons under the direct supervision of judicial or correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that such an individual did not commit additional crimes or continue inappropriate behavior while under supervision. (*In re Gossage* (2000) 23 Cal.4th 1080, 1099.)

19. An individual’s candor, cooperation and remorse, and a willingness to accept punishment and good faith efforts to rehabilitate himself, may be significant mitigating factors. (*Hipolito v. State Bar* (1989) 48 Cal.3d 621, 626.)

Evaluation

20. Respondent failed to establish by a preponderance of the evidence her rehabilitation and present eligibility to be licensed as a pharmacy technician, even on a probationary basis. In this regard, the acts underlying all three of her convictions involved dishonesty and deceit. While these acts are quite remote in time (1999 and 2006), respondent’s probation imposed in connection with the 2012 conviction did not terminate until 2015. Further, respondent did not at hearing seem fully to recognize the seriousness of her actions. With regard to the 1999 incident, respondent stated that she was a single mother and she needed the combined income of her public benefits and income to support her children and herself. With regard to the 2006 incidents, respondent acknowledged she should not have engaged in the conduct in question, but she also characterized what she did as “some stupid thing” and also suggested that she considered herself to be a victim of P.B. more than a perpetrator herself. In addition, she submitted no letters of recommendation and presented no witnesses on her behalf. Under all the circumstances, respondent failed to establish by a preponderance of the evidence that issuance to her of a pharmacy technician license would be consistent with the protection of the public.

Cause Exists to Deny the Application

21. First Cause for Denial: Cause does not exist to deny respondent’s application for registration as a pharmacy technician under Business and Professions Code section 480, subdivisions (a)(1) and (a)(3)(A). Though on April 29, 1999, respondent was convicted of

violating Welfare and Institutions Code section 10980, receiving public aid by misrepresentation, a crime substantially related to the qualifications, functions, and duties of pharmacy technician, this conviction has been dismissed pursuant to Penal Code section 1203.4 and thus pursuant to Business and Professions Code section 480, subdivision (c), it does not provide a legal basis on which to deny respondent a license.

22. Second Cause for Denial: Cause exists to deny respondent's application for registration as a pharmacy technician under Business and Professions Code section 480, subdivisions (a)(2) and (a)(3)(A) as the latter provision interacts with section 4301, subdivision (f). Respondent admitted that she received public assistance benefits while she also received earned income and that she did not report her earned income. Respondent's actions involved dishonesty, fraud, or deceit, with the intent to substantially benefit herself. Cause does not exist to deny respondent's application pursuant to Business and Professions Code section 480, subdivision (a)(3)(A) as this provision interacts with section 4301, subdivision (g), because the evidence did not establish that respondent knowingly made or signed a document that falsely represented the existence or non-existence of a state of facts.

23. Third Cause for Denial: Cause does not exist to deny respondent's application for registration as a pharmacy technician under Business and Professions Code section 480, subdivisions (a)(1) and (a)(3)(A). Though on May 1, 2009, respondent was convicted of violating Business and Professions Code section 7027.3, the fraudulent use of a contractor's license, a crime substantially related to the qualifications, functions, and duties of pharmacy technician, this conviction has been dismissed pursuant to Penal Code section 1203.4 and thus pursuant to Business and Professions Code section 480, subdivision (c), does not provide a legal basis on which to deny respondent a license.

24. Fourth Cause for Denial: Cause exists to deny respondent's application for registration as a pharmacy technician under Business and Professions Code section 480, subdivisions (a)(2) and subdivision (a)(3)(A). Respondent set up her construction company so that P.B. could perform construction work even though his contractor's license was suspended and she herself did not possess a contractor's license. In so doing, she circumvented the construction licensing laws. Respondent's actions involved dishonesty, fraud, or deceit, with the intent to substantially benefit herself, and they would also constitute grounds for discipline of a licensee pursuant to Business and Professions Code section 4301, subdivision (f).

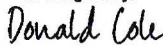
25. Fifth Cause for Denial: Cause does not exist to deny respondent's application for registration as a pharmacy technician under Business and Professions Code section 480, subdivisions (a)(1) and (a)(3)(A). Though on January 19, 2012, respondent was convicted of violating Business and Professions Code section 484d, diversion of construction funds, and Business and Professions Code section 7028, subdivision (a), contracting without a license, these convictions have been dismissed pursuant to Penal Code section 1203.4 and thus pursuant to Business and Professions Code section 480, subdivision (c), do not provide a legal basis on which to deny respondent a license.

26. Sixth Cause for Denial: Cause exists to deny respondent's application for registration as a pharmacy technician under Business and Professions Code section 480, subdivisions (a)(2) and (a)(3)(A). Respondent set up her construction company so that P.B. could perform construction work even though his contractor's license was suspended and she herself did not possess a contractor's license. In so doing, she circumvented the construction licensing laws. Respondent's actions involved dishonesty, fraud, or deceit, with the intent to substantially benefit herself, and they would also constitute grounds for discipline of a licensee pursuant to Business and Professions Code section 4301, subdivision (f).

ORDER

The application of Chong Hee Hwang for the issuance of a pharmacy technician registration is denied.

DATED: March 5, 2019

DocuSigned by:

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DONALD P. COLE
Administrative Law Judge
Office of Administrative Hearings

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

11
12 In the Matter of the Statement of Issues Against:

Case No. 6488

13 **CHONG HEE HWANG**

STATEMENT OF ISSUES

14 **Pharmacy Technician Registration Applicant**

15 Respondent.

16
17
18 Complainant alleges:

19 **PARTIES**

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

23 2. On or about January 5, 2018, the Board of Pharmacy received an application for a
24 Pharmacy Technician Registration from Chong Hee Hwang (Respondent). On or about
25 December 31, 2017, Respondent certified under penalty of perjury to the truthfulness of all
26 statements, answers, and representations in the application. The Board denied the application on
27 May 31, 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 (Code) unless otherwise indicated.

4. Section 4300, subdivision (c) of the Code states, in pertinent part, that "the board may refuse a license to any applicant guilty of unprofessional conduct. . . ."

STATUTORY PROVISIONS

5. Section 475 of the Code states:

(a) Notwithstanding any other provisions of this code, the provisions of this division shall govern the denial of licenses on the grounds of:

(1) Knowingly making a false statement of material fact, or knowingly omitting to state a material fact, in an application for a license.

(2) Conviction of a crime.

(3) Commission of any act involving dishonesty, fraud or deceit with the intent to substantially benefit himself or another, or substantially injure another.

(4) Commission of any act which, if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license.

(b) Notwithstanding any other provisions of this code, the provisions of this division shall govern the suspension and revocation of licenses on grounds specified in paragraphs (1) and (2) of subdivision (a) .

(c) A license shall not be denied, suspended, or revoked on the grounds of a lack of good moral character or any similar ground relating to an applicant's character, reputation, personality, or habits.

6. Section 480 of the Code states:

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

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

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

///

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

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

6 (b) Notwithstanding any other provision of this code, a person shall not be denied
7 a license solely on the basis that he or she has been convicted of a felony if he or she has
8 obtained a certificate of rehabilitation under Chapter 3.5 (commencing with Section
9 4852.01) of Title 6 of Part 3 of the Penal Code or that he or she has been convicted of a
10 misdemeanor if he or she has met all applicable requirements of the criteria of
11 rehabilitation developed by the board to evaluate the rehabilitation of a person when
12 considering the denial of a license under subdivision (a) of Section 482.

13 (c) Notwithstanding any other provisions of this code, a person shall not be denied
14 a license solely on the basis of a conviction that has been dismissed pursuant to Section
15 1203.4, 1203.4a, or 1203.41 of the Penal Code. An applicant who has a conviction that
16 has been dismissed pursuant to Section 1203.4, 1203.4a, or 1203.41 of the Penal Code
17 shall provide proof of the dismissal.

18 (d) A board may deny a license regulated by this code on the ground that the
19 applicant knowingly made a false statement of fact that is required to be revealed in the
20 application for the license.

21 7. Section 482 of the Code states:

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

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

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

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

28 8. Section 493 of the Code states:

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

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

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1 9. Section 4301 of the Code states:

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

5 ...

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

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

11 ...

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

29 REGULATORY PROVISIONS

30 10. California Code of Regulations, title 16, section 1769, states:

31 ...

32 (b) When considering the denial of a facility or personal license under Section 480
33 of the Business and Professions Code, the board, in evaluating the rehabilitation of the
34 applicant and his present eligibility for licensing or registration, will consider the
35 following criteria:

36 (1) The nature and severity of the act(s) or offense(s) under consideration as
37 grounds for denial.

38 (2) Evidence of any act(s) committed subsequent to the act(s) or crime(s)
 under consideration as grounds for denial under Section 480 of the Business and
 Professions Code.

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1 (3) The time that has elapsed since commission of the act(s) or crime(s)
2 referred to in subdivision (1) or (2).

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

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

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

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

14 **FIRST CAUSE FOR DENIAL OF APPLICATION**

15 **(April 29, 1999 Criminal Conviction for Welfare Fraud)**

16 12. Respondent's application for registration as a pharmacy technician is subject to denial
17 under section 480, subdivisions (a)(1) and (a)(3)(A), of the Code, in that she was convicted of a
18 crime that is substantially related to the qualifications, functions, and duties of a pharmacy
19 technician. Said conduct would be grounds for discipline under section 4301, subdivision (l), of
20 the Code, for a registered pharmacy technician. The circumstances are as follows:

21 a. On or about April 29, 1999, in a criminal proceeding entitled *People of the*
22 *State of California vs. Chong Hee Hwang aka Chong Hee Giegoldt, Chong Hee Mwang, Chung*
23 *Hee Hwang*, in Orange County Superior Court, case number 98NF3238, Respondent was
24 convicted on her plea of guilty of violating Welfare and Institutions Code section 10980,
25 subdivision (c)(2), obtaining aid by misrepresentation over \$400, a felony which was later
26 reduced to a misdemeanor pursuant to Penal Code section 17B, subdivision (5). Two additional
27 counts of committing perjury (Pen. Code, § 118) were dismissed pursuant to the plea agreement.

28 b. The facts that led to the conviction are that between January 1, 1996, and July
31, 1997, Respondent obtained aid, which she was not entitled to, from Orange County in the
amount of \$7,895.00, by means of false statements and representations.

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1 c. As a result of the conviction, Respondent was granted informal probation for
2 three years, and ordered to complete 160 hours of Cal Trans community service and pay
3 restitution. While on probation, Respondent was subject to immediate search and seizure
4 requirements.

5 d. On November 17, 2015, the case was dismissed pursuant to Penal Code section
6 1203.4.

7 **SECOND CAUSE FOR DENIAL OF APPLICATION**

8 **(Commission of Acts Involving Dishonesty, Fraud, Deceit & Corruption)**

9 13. Respondent's application for registration as a pharmacy technician is subject to denial
10 under section 480, subdivisions (a)(2) and (a)(3)(A), of the Code, in that she committed acts
11 involving dishonesty, fraud, deceit, and corruption when she obtained public assistance funds by
12 means of false statements and representations, as described in paragraph 12, above. Said conduct
13 would be grounds for discipline under section 4301, subdivisions (f) and (g), of the Code, for a
14 registered pharmacy technician.

15 **THIRD CAUSE FOR DENIAL OF APPLICATION**

16 **(May 1, 2009 Criminal Conviction for Fraudulent Use of a Contractor's License Number)**

17 14. Respondent's application for registration as a pharmacy technician is subject to denial
18 under section 480, subdivisions (a)(1) and (a)(3)(A), of the Code, in that she was convicted of a
19 crime that is substantially related to the qualifications, functions, and duties of a pharmacy
20 technician. Said conduct would be grounds for discipline under section 4301, subdivision (l), of
21 the Code, for a registered pharmacy technician. The circumstances are as follows:

22 a. On or about May 1, 2009, in a criminal proceeding entitled *People of the State*
23 *of California vs. Chong Hee Hwang aka Chong Hee Giegoldt, Chong Hee Mwang, Chung Hee*
24 *Hwang*, in Orange County Superior Court, case number 09WM00511, Respondent was convicted
25 on her plea of guilty of violating Business and Professions Code section 7027.3, fraudulent use of
26 contractor's license number, a misdemeanor. An additional count of contracting without a license
27 (Bus. & Prof. Code, § 7028(a)) was dismissed pursuant to the plea agreement.

28 ///

1 b. The facts that led to the conviction, as admitted by Respondent in the
2 Misdemeanor Guilty Plea Form filed May 1, 2009, are that "On 10-17-06, in [Orange County], I
3 unlawfully used, [with] the intent to defraud, a contractor's license number that did not correspond
4 to the number on a currently valid contractor's [license] held by myself."

5 c. As a result of the conviction, Respondent was granted informal probation for
6 three years, and ordered to pay fines, fees and restitution, and to complete 12 days of community
7 service.

8 d. On November 24, 2015, the case was dismissed pursuant to Penal Code section
9 1203.4.

10 **FOURTH CAUSE FOR DENIAL OF APPLICATION**

11 **(Commission of Acts Involving Dishonesty, Fraud, Deceit & Corruption)**

12 15. Respondent's application for registration as a pharmacy technician is subject to denial
13 under section 480, subdivisions (a)(2) and (a)(3)(A), of the Code, in that she committed an act
14 involving fraud, dishonesty, deceit, and corruption when she used a contractor's license number,
15 with the intent to defraud, that did not correspond to the number on a valid contractor's license
16 that she held, as described in paragraph 14, above. Said conduct would be grounds for discipline
17 under section 4301, subdivision (f), of the Code, for a registered pharmacy technician.

18 **FIFTH CAUSE FOR DENIAL OF APPLICATION**

19 **(January 19, 2012 Criminal Convictions for Diversion of Construction Funds and**
20 **Contracting Without a License)**

21 16. Respondent's application for registration as a pharmacy technician is subject to denial
22 under section 480, subdivisions (a)(1) and (a)(3)(A), of the Code, in that she was convicted of
23 crimes that are substantially related to the qualifications, functions, and duties of a pharmacy
24 technician. Said conduct would be grounds for discipline under section 4301, subdivision (l), of
25 the Code, for a registered pharmacy technician. The circumstances are as follows:

26 a. On or about January 19, 2012, in a criminal proceeding entitled *People of the*
27 *State of California vs. Chong Hee Hwang aka Chong Hee Giegoldt, Chong Hee Mwang, Chong*
28 *(Annie) Hee Hwang*, in Orange County Superior Court, case number 11CF0743, Respondent was

1 convicted on her plea of guilty of violating Penal Code section 484b, diversion of construction
2 funds, a felony which was later reduced to a misdemeanor pursuant to Penal Code 17, subdivision
3 (b); and Business and Professions Code section 7028, subdivision (a), contracting without a
4 license, a misdemeanor. Additional counts of grand theft by embezzlement (Pen. Code, § 487(a)),
5 fraudulent use of a contractor's license (Bus. & Prof. Code, § 7027.3), and conspiracy to defraud
6 another of property (Pen. Code, § 182(a)(4)), were dismissed pursuant to the plea agreement.

7 b. As a result of the convictions, Respondent was granted informal probation for
8 three years, and ordered to serve one day in Orange County Jail, with a credit of one day for time
9 served. Respondent was further ordered to complete 320 hours of community service, to pay
10 fines, fees, and restitution, and to comply with all other terms of criminal probation.

11 c. On November 16, 2015, the case was dismissed pursuant to Penal Code section
12 1203.4.

13 **SIXTH CAUSE FOR DENIAL OF APPLICATION**

14 **(Commission of Acts Involving Dishonesty, Fraud, Deceit & Corruption)**

15 17. Respondent's application for registration as a pharmacy technician is subject to denial
16 under section 480, subdivisions (a)(2) and (a)(3)(A), of the Code, in that she committed acts
17 involving dishonesty, fraud, deceit, and corruption which is evidenced by her convictions for
18 diverting construction funds and contracting without a license, as described in paragraph 16,
19 above. Said conduct would be grounds for discipline under section 4301, subdivision (f), of the
20 Code, for a registered pharmacy technician.

21 **PRAYER**

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

24 1. Denying the application of Chong Hee Hwang for a Pharmacy Technician
25 Registration;

26 ///

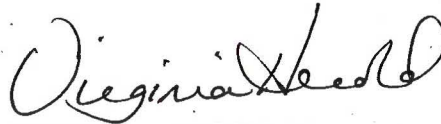
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2. Taking such other and further action as deemed necessary and proper.

DATED: 8/21/18



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

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