

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

In the Matter of the Statement of Issues
Against:

BENITA GHEI LEE,

Pharmacy Technician Registration Applicant

Respondent.

Case No. 6557

OAH No. 2018111011

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



By

Victor Law, R.Ph.
Board President

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

In the Matter of the Statement of Issues
Against:

BENITA GHEI LEE,

Pharmacy Technician Registration
Applicant

Respondent.

Case No. 6557

OAH No. 2018111011

PROPOSED DECISION

This matter was heard before Administrative Law Judge Sean Gavin, Office of Administrative Hearings, State of California, on February 21, 2019, in Sacramento, California.

Seth A. Curtis, Deputy Attorney General, represented Virginia Herold, Executive Officer of the Board of Pharmacy, Department of Consumer Affairs, State of California (complainant).

Benita Ghei Lee (respondent) appeared on her own behalf.

The record was closed and the case was submitted for decision on February 21, 2019.

FACTUAL FINDINGS

1. On November 30, 2017, the Board of Pharmacy (Board) received an application for a Pharmacy Technician Registration (application) from respondent.
2. On July 18, 2018, the Board denied respondent's application based on two convictions for driving under the influence of alcohol. Respondent timely filed a Notice of Defense.
3. On October 29, 2018, complainant signed and thereafter filed the Statement of Issues in her official capacity. The matter was set for an evidentiary hearing before an

Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency of the State of California, pursuant to Government Code section 11500, et seq.

Respondent's Convictions

4. On May 15, 2018, in the Butte County Superior Court, Case Nos. 17CM04979 (first conviction) and 17CM05702 (second conviction), respondent, on pleas of no contest, was convicted on two separate counts of violating Vehicle Code section 23152, subdivision (b), driving with a blood alcohol level of .08 percent or more (DUI), misdemeanors. Respondent was placed on three years of informal probation. She was ordered to serve 48 hours in jail per violation, for a total of 96 hours. She was also ordered to complete a Level 1 DUI course, and to pay fines and fees.

5. The incident underlying respondent's first conviction occurred on August 24, 2017. At approximately 11:00 p.m. that evening, a Butte County Sheriff Deputy was returning from an unrelated call and observed respondent's car parked across a marked space in a parking lot and respondent leaning against the steering wheel. When the officer stopped to conduct a welfare check, he noticed a puddle of vomit on the ground under the open driver's window and observed respondent slumped against the wheel. Upon waking respondent, the officer detected the odor of alcohol coming from her and her vehicle. As a result, the officer called California Highway Patrol (CHP) to conduct a DUI evaluation.

When the CHP officer arrived, he noticed that respondent appeared lethargic and disoriented. When asked, respondent admitted that she drank two tall mugs of beer, stating that her last drink was sometime between 10:00 and 10:30 p.m. The CHP officer conducted field sobriety tests and, based on respondent's performance, determined that she was under the influence of alcohol. Respondent provided a breath sample that measured her blood alcohol content at .141 and .136 percent. Respondent was arrested for DUI and transported to the Oroville CHP office, where she provided another breath sample that measured her blood alcohol content at .09 and .10 percent at 12:20 a.m. Respondent was advised of her right to have a blood or urine sample tested for alcohol content, but declined, stating, "I'd probably fail that anyways."

6. The incident underlying respondent's second conviction occurred on October 3, 2017. At approximately 11:15 p.m. that evening, a CHP officer observed respondent travelling eastbound on State Road 162 and conducted an enforcement stop because respondent was driving 62 miles per hour, 17 miles faster than the posted limit. Upon approaching respondent, the officer detected the odor of alcohol coming from her and her vehicle and observed her eyes to be watery. When asked, respondent admitted that she drank alcohol before driving, stating that her last drink was sometime between 10:30 and 11:00 p.m. The CHP officer conducted field sobriety tests and, based on respondent's performance, determined that she was under the influence of alcohol. Respondent provided a breath sample that measured her blood alcohol content at .126 and .127 percent. Respondent

was arrested for DUI and transported to the Butte County Jail, where she provided another breath sample that measured her blood alcohol content at .09 percent at 1:10 a.m.

Duties of a Pharmacy Technician

7. Louisa Tsoi, an Inspector for the Board, testified that as part of her duties, she conducts investigations and performs inspections. Inspector Tsoi is familiar with the duties of a pharmacy technician. She explained that pharmacy technicians assist pharmacists in the daily operation of the pharmacy, including removing drugs from stock; counting, pouring, and mixing pharmaceuticals; placing the products into containers; affixing labels to the containers; and packaging and repackaging prescribed products.

Respondent's Evidence

8. Respondent presently works at CVS as an employee in the pharmacy. She has completed 240 hours of pharmacy technician instruction that covered knowledge and understanding of different pharmacy practice settings and the duties, skills, and responsibilities of a pharmacy technician in relationship to other pharmacy personnel. Respondent wants to work as a pharmacy technician because she likes helping people and believes the job is stable and will help provide a comfortable retirement for her.

9. In June 2018, respondent enrolled in an 18-month DUI course, as mandated by the court, and is presently in compliance with the requirements of that course. The course is expected to continue until January, 2020. In addition, respondent attended Alcoholics Anonymous (AA) meetings following her criminal convictions, but has since ceased attending them. Respondent does not believe she is an alcoholic, and found the AA meetings more depressing than helpful. Respondent still drinks alcohol, but she no longer binges or drives after drinking. Respondent is on probation until May 2021, and she is still paying the court-imposed fines and fees.

10. Respondent submitted two statements that she previously wrote and sent to the Board as part of her application process. In those statements, respondent acknowledged the danger of her crimes and took responsibility for the choices she made. She also expressed regret and remorse, as well as gratitude that no one was harmed as a result of her actions.

11. Each of respondent's arrests was preceded by stressful days working at the CVS pharmacy followed by stressful phone calls with her husband, from whom she is separated, regarding an ongoing custody dispute. In each circumstance, she testified that she had only one or two drinks over the course of two to three hours. Regarding the night of her second DUI arrest, respondent testified that she intended to stop at a bar and drink after work and then leave her car at the bar overnight and take a cab home. Her home is approximately 30 miles from the bar. She said that she deviated from that plan and drove home because she lost track of time and her babysitter called after respondent was already an hour late getting home.

12. Respondent submitted a letter of support from Cecilia Nagel¹, her CVS pharmacy manager and immediate supervisor for the past two years. Dr. Nagel observed respondent's performance in the store's internal pharmacy technician training program and characterized respondent as empathic, tenacious, hard-working, and committed to helping her patients. She further indicated that she was aware of the circumstances leading to respondent's convictions, but believed respondent's past mistakes had not and would not affect her work performance.

13. Respondent also submitted a letter of support from Brian Hallen, her CVS store manager. Mr. Hallen described respondent as dependable and dedicated, and characterized her customer service and patient care skills as amazing. Mr. Hallen did not indicate whether he is aware of respondent's criminal convictions.

Discussion

14. The determination whether to deny a professional license should be made only after considering the applicant's conduct and any factors introduced in justification, mitigation, aggravation and rehabilitation. The applicant "should be permitted to introduce evidence of extenuating circumstances by way of mitigation or explanation, as well as any evidence of rehabilitation." (*Arneson v. Fox* (1980) 28 Cal.3d 440, 449, *Brandt v. Fox* (1979) 90 Cal.App.3d 737 at p. 747.) Pursuant to California Code of Regulations, title 16, section 1769, subdivision (b), the Board has set forth the following criteria for evaluating the rehabilitation of a license applicant who has been convicted of a crime:

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

15. Respondent's crimes were serious and jeopardized her own safety as well as that of the public. In addition, the closeness in time of the two incidents is concerning; respondent's second arrest was just six weeks after her first. Furthermore, respondent was convicted less than 10 months ago, and while she has complied with the terms of the court-

¹ The letter is not signed by Dr. Nagel because she emailed it directly to respondent.

ordered probation, little weight is given to evidence of rehabilitation while a person is on probation because it is expected that a person will act in an exemplary fashion. (See *In re Gossage* (2000) 23 Cal.4th 1080, 1099.)

16. Furthermore, respondent lacked insight and awareness regarding how to avoid repeating her past criminal conduct. While respondent cannot be blamed for the stressful professional and personal circumstances with which she was confronted, her reaction to those stressors has been to drink and drive. She did not offer any evidence to suggest that she has learned alternative methods of dealing with stress that is highly likely to reappear in her life.

17. In addition, respondent's explanations for her DUIs were not persuasive. Though she testified that she had only one or two drinks over the course of two to three hours, her blood alcohol content was sufficiently elevated, even hours after she had stopped drinking, as to call into question the accuracy and veracity of her testimony in that regard. Regarding the night of her second DUI arrest, her testimony that she planned to take a 30-mile cab ride home, but lost track of time, was not credible.

18. When the rehabilitation factors are considered as a whole, respondent did not establish that she has engaged in sufficient rehabilitation to receive a pharmacy technician registration. She had two alcohol-related convictions, involving high blood-alcohol levels, in proximity to one another and less than 10 months ago. She has not yet fully complied with the terms and conditions of her probation, and she continues to use alcohol despite her previous alcohol-related crimes. Other than the support letter from Dr. Nagel², she did not offer any evidence from family, friends, or counselors familiar with her convictions and the circumstances underlying them to substantiate that she is sufficiently rehabilitated and ready to be a pharmacy technician.

19. Pharmacy technicians are expected to act with good judgment, responsibility, and maturity. Respondent's two alcohol-related convictions, and her failure to submit sufficient evidence to substantiate her rehabilitation, establish that it would be inconsistent with the public health, safety and welfare to grant respondent a pharmacy technician registration at this time. Respondent's application should therefore be denied.

LEGAL CONCLUSIONS

1. An applicant for a license bears the burden of proving that she should be granted a license. (*Martin v. Alcohol Beverage Control Appeals Board* (1959) 52 Cal.2d

² Mr. Hallen's letter does not indicate that he is aware of respondent's convictions and is therefore afforded little weight. (*Seide v. Committee of Bar Examiners of the State Bar of California* (1989) 49 Cal.3d 933, 940 ["If the character witnesses were not aware of the extent and seriousness of petitioner's criminal activities, their evaluations of his character carry less weight."])

238.) At a hearing regarding the denial of an application, the respondent must produce proof at the hearing to “show compliance” with the statutes and regulations outlined in the Statement of Issues. (Gov. Code, § 11504.) Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. (Evid. Code, § 115.)

2. Pursuant to Business and Professions Code section 480, subdivision (a)(1), a license application may be denied when the applicant has been “convicted of a crime” that is substantially related to the qualifications, functions or duties of the business or profession for which application was made.³ “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.” (Bus. & Prof. Code, § 480, subd. (a)(3)(B).)

3. Pursuant to Business and Professions Code section 493:

“in a proceeding ... to deny an application for a license ... 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 ... to determine if the conviction is substantially related to the qualifications, functions, and duties of the licensee in question.”

4. In California Code of Regulations, title 16, section 1770, the Board has stated that a crime will be “considered substantially related to the qualifications, functions or duties of a licensee or registrant if to a substantial degree it evidences present or potential unfitness of a licensee or registrant to perform the functions authorized by his license or registration in a manner consistent with the public health, safety, or welfare.”

5. Respondent’s two alcohol-related convictions are substantially related to the qualifications, functions and duties of a pharmacy technician in that they evidence respondent’s present or potential unfitness to perform the functions of a pharmacy technician in a manner consistent with the public health, safety, or welfare. Convictions involving alcohol consumption reflect a lack of sound professional and personal judgment. (See *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 770.) As articulated in Factual Findings 4 through 6, respondent’s convictions establish cause to deny her application under Business and Professions Code sections 480, subdivision (a)(1), in conjunction with California Code of Regulations, title 16, section 1770.

³ Business and Professions Code section 477, subdivision (b), states that the term “license” includes “certificate, registration or other means to engage in a business or profession regulated by this code.”

6. Pursuant to Business and Professions Code section 4300, subdivision (c), which applies to license applicants under Business and Professions Code section 480, subdivision (a)(3)(A), a license application may be denied when the applicant is guilty of unprofessional conduct. Unprofessional conduct includes “the use of ... alcoholic beverages to the extent or in a manner as to be dangerous or injurious to oneself, to a person holding a license under this chapter, or to any other person or to the public.” (Bus. & Prof. Code, § 4301, subd. (h).)

7. Respondent’s convictions demonstrate unprofessional conduct insofar as they both involved the use of alcoholic beverages to the extent or in a manner that was dangerous to respondent and the public. As articulated in Factual Findings 4 through 6, respondent’s alcohol-related convictions therefore establish cause to deny her application under Business and Professions Code sections 4300, subdivision (c) and 4301(h).

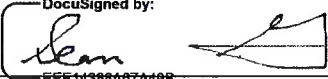
8. Pursuant to Business and Professions Code section 4301, subdivision (k), unprofessional conduct also includes “[t]he conviction of more than one misdemeanor ... involving the use, consumption, or self-administration of any ... alcoholic beverage.” As articulated in Factual Findings 4 through 6, respondent was convicted of two misdemeanors involving the use, consumption, or self-administration of alcoholic beverages. Cause therefore exists to deny respondent’s license application under Business and Professions Code sections 4300, subdivision (c) and 4301(k).

9. As articulated in Factual Findings 8 through 19, while respondent’s efforts toward rehabilitation thus far are encouraging, respondent did not establish that she has been sufficiently rehabilitated. Therefore, it would be inconsistent with the public health, safety, and welfare to issue her a pharmacy technician registration at this time.

ORDER

The Pharmacy Technician Application submitted by respondent Benita Ghei Lee is DENIED.

DATED: March 6, 2019

DocuSigned by:

EEF14388A67A19B
SEAN GAVIN
Administrative Law Judge
Office of Administrative Hearings

1 XAVIER BECERRA
Attorney General of California
2 KENT D. HARRIS
Supervising Deputy Attorney General
3 SETH A. CURTIS
Deputy Attorney General
4 State Bar No. 236263
1300 I Street, Suite 125
5 P.O. Box 944255
Sacramento, CA 94244-2550
6 Telephone: (916) 210-6121
Facsimile: (916) 324-5567
7 *Attorneys for Complainant*

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

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

Case No. 6557

14 **BENITA GHEI LEE**

STATEMENT OF ISSUES

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

17 Respondent.

18
19 Complainant alleges:

20 **PARTIES**

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

24 2. On or about November 30, 2017, the Board received a Pharmacy Technician
25 Registration Application from Benita Ghei Lee (Respondent). On or about October 11, 2017,
26 Respondent certified under penalty of perjury to the truthfulness of all statements, answers, and
27 representations in the application. The Board denied the application on July 18, 2018.

28 ///

1 **JURISDICTION**

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

5 **STATUTORY PROVISIONS**

6 4. Code section 480 states, in pertinent part:

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

9 (1) Been convicted of a crime. A conviction within the meaning of this section means
10 a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action
11 that a board is permitted to take following the establishment of a conviction may be taken
12 when the time for appeal has elapsed, or the judgment of conviction has been affirmed on
13 appeal, or when an order granting probation is made suspending the imposition of sentence,
14 irrespective of a subsequent order under the provisions of Section 1203.4, 1203.4a, or
15 1203.41 of the Penal Code.

13

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

16 5. Code section 4300(c) states, in pertinent part:

17 The board may refuse a license to any applicant guilty of unprofessional
18 conduct. . . .

19 6. Code section 4301 states, in pertinent part:

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

22

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

26

27 (k) The conviction of more than one misdemeanor or any felony involving the use,
28 consumption, or self-administration of any dangerous drug or alcoholic beverage, or any
combination of those substances.

1 (l) The conviction of a crime substantially related to the qualifications, functions, and
2 duties of a licensee under this chapter...

3 **FACTUAL ALLEGATIONS**

4 **Case No. 17CM04979**

5 7. On or about May 15, 2018, in the criminal proceeding *People v. Benita Ghei Lee*,
6 Butte County Superior Court Case Number 17CM04979, Respondent was convicted upon her
7 pleas of nolo contendere of violating Penal Code section 23152(b), driving with a blood alcohol
8 level of .08% or higher, a misdemeanor. Respondent was placed on three years' probation,
9 ordered to serve 96 hours in jail, pay a fine of \$4,030.00, and complete the level 1 DUI school.

10 8. The circumstances of the conviction are as follows: On or about August 24, 2017,
11 Respondent was observed by an officer of the California Highway Patrol slumped over the
12 steering wheel of her vehicle in a parking lot with vomit on the ground under the open driver's
13 side window of the vehicle. Upon contacting Respondent, the officer noticed that she appeared
14 lethargic and disoriented. Respondent admitted consuming two tall mugs of beer earlier.
15 Respondent performed poorly on field sobriety tests and the preliminary alcohol test showed her
16 to have a blood alcohol level of .14% and .13%. Respondent was arrested and transported to the
17 Oroville station where she submitted to a chemical breath test that identified her blood alcohol
18 level as .09% and .10%.

19 **Case No. 17CM05702**

20 9. On or about May 15, 2018, in the criminal proceeding *People v. Benita Ghei Lee*,
21 Butte County Superior Court Case Number 17CM05702, Respondent was convicted upon her
22 pleas of nolo contendere of violating Penal Code section 23152(b), driving with a blood alcohol
23 level of .08% or higher, a misdemeanor. Respondent was placed on three years' probation,
24 ordered to serve 96 hours in jail, pay a fine of \$4,030.00, and complete the level 1 DUI school.
25 Respondent's sentence was ordered to run concurrent with the sentence imposed in Butte County
26 Superior Court Case No. 17CM04979.

27 10. The circumstances of the conviction are as follows: On or about October 4, 2017,
28 Respondent was observed by an officer of the California Highway Patrol, driving 62 miles per

1 hour in a 45 mile per hour construction zone. Upon conducting an enforcement stop, the officer
2 could smell alcohol emitting from Respondent's vehicle. Respondent admitted consuming one
3 beer a short time earlier. Respondent performed poorly on the field sobriety tests and the
4 preliminary alcohol test showed her to have a blood alcohol level of .12% and .12%. Respondent
5 was taken to Oroville Medical Center for a chemical blood draw before being transported to the
6 Butte County Jail where she provided breath samples which identified her blood alcohol level as
7 .09%.

8 **FIRST CAUSE FOR DISCIPLINE**

9 **(Conviction of Substantially Related Crime)**

10 11. Respondent's application is subject to denial under Code sections 480(a)(1),
11 480(a)(3)(A), 4300(c), and 4301 (l) for unprofessional conduct, in that on or about May 15, 2018,
12 Respondent was convicted in two separate matters of violating Penal Code section 23152(b),
13 driving with a blood alcohol level of .08% or higher, as set forth in paragraphs 7-10 above.

14 **SECOND CAUSE FOR DENIAL OF APPLICATION**

15 **(Dangerous Use of Alcohol)**

16 12. Respondent's application is subject to denial under Code sections 480 (a)(3)(A),
17 4300(c), 4301 subdivision (h) for unprofessional conduct, in that she used alcohol in a dangerous
18 manner, as set forth in paragraphs 7-10 above.

19 **THIRD CAUSE FOR DISCIPLINE**

20 **(Conviction of More Than One Misdemeanor Involving Alcohol)**

21 13. Respondent's application is subject to denial under Code sections 480, subdivision
22 (a)(3)(A) and 4301, subdivision (k) for unprofessional conduct, in that, as described in paragraphs
23 7-10 above, she was convicted ore more than one misdemeanor involving the use, consumption or
24 self-administration of alcohol.

25 ///

26 ///

27 ///

28 ///

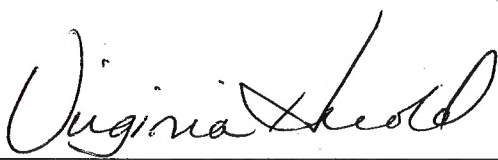
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PRAYER

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

1. Denying the application of Respondent Benita Ghei Lee to be registered as a Pharmacy Technician;
2. Taking such other and further action as deemed necessary and proper.

DATED: 10/29/18



VIRGINIA K. HEROLD
Executive Officer
California State Board of Pharmacy
State of California
Complainant

SA2018103033
13300423.docx