

BOARD ORDER #T-11-079
SOAH DOCKET NO. 515-13-0731

RE: IN THE MATTER OF
JAMES ROBERT MITCHELL
(REGISTRATION #126695)

BEFORE THE TEXAS STATE
BOARD OF PHARMACY

On this day came on to be considered by the Texas State Board of Pharmacy the matter of registration number 126695, issued to James Robert Mitchell.

After proper and timely notice was given, the matter was heard in public hearing on December 10, 2012, before Steven M. Rivas, Administrative Law Judge (ALJ), State Office of Administrative Hearings (SOAH), who issued a Proposal for Decision, containing Findings of Fact and Conclusions of Law, which was properly served on all parties. All parties were given an opportunity to file exceptions and replies; however, no exceptions were filed. The Texas State Board of Pharmacy, after consideration of the Proposal for Decision and argument of the parties, makes and adopts the following Findings of Fact and Conclusions of Law of the Administrative Law Judge contained in the Proposal for Decision. A copy of the Proposal for Decision is attached as Exhibit "A" and incorporated by reference as though fully set forth herein. All proposed Findings of Fact and Conclusions of Law submitted by any party which are not specifically adopted herein are denied.

FINDINGS OF FACT

1. The Texas State Board of Pharmacy (Board) issued to James Mitchell (Respondent) a pharmacy technician registration, registration number 126695, on April 13, 2005. Respondent's Texas pharmacy technician registration has remained in full force and effect since that time.
2. On October 24, 2012, Board Staff (Staff) mailed by certified mail, return receipt requested, its notice of hearing and complaint to Respondent's last known address.
3. The notice of hearing and complaint contained a statement of the time, place, and nature of the hearing; a statement of the legal authority under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

4. The hearing was held on December 10, 2012, before SOAH ALJ Steven M. Rivas at the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Staff attorney Tyler Vance represented Staff. Respondent appeared and represented himself at the hearing. The record closed the same day.
5. On April 6, 2010, Respondent received deferred adjudication based on a plea of guilty to the misdemeanor offense of possession of marijuana.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter pursuant to Tex. Occ. Code (Code) § 568.003.
2. SOAH has jurisdiction over all matters related to conducting a contested case in this matter, including the preparation of a Proposal for Decision with Findings of Fact and Conclusions of Law, under Tex. Gov't Code ch. 2003.
3. Timely and proper notice of the hearing was sent to Respondent as required by Tex. Gov't Code ch. 2001; 1 Tex. Admin. Code § 155.401; and 22 Tex. Admin. Code § 281.30.
4. The Board may take disciplinary action against a pharmacy technician's registration if the registrant has been placed on deferred adjudication community supervision for a misdemeanor under chapter 481 of the Texas Health and Safety Code. Code § 568.003(a)(4)(A)(ii).
5. The sanction for a misdemeanor offense under Chapter 481 of the Health and Safety Code by a pharmacy technician is one-year probation under 22 Tex. Admin. Code § 281.64(c)(3)(A)(ii)(II)(-b-).
6. Based on the Findings of Fact and Conclusions of Law, the Board is authorized to impose one-year probation of Respondent's pharmacy technician registration under Code § 568.0035.

CONSTRUCTION

It is the intent of the Texas State Board of Pharmacy that any Findings of Fact that are properly construed as Conclusions of Law should be treated as Conclusions of Law and that any Conclusions of Law that are properly construed as Findings of Fact should be treated as Findings of Fact.

ORDER OF THE BOARD

THEREFORE, PREMISES CONSIDERED, the Texas State Board of Pharmacy ("hereinafter referred to as the "BOARD") does hereby ORDER that:

- (1) Effective thirty (30) days after the entry of this Order, Respondent's registration number 126695 shall be, and such registration is hereby suspended, until such time as written documentation is provided by a Board approved mental health professional (hereinafter referred to as "MHP") which states that Respondent is not physiologically or psychologically alcohol or drug dependent, does not have an incapacity of a nature that would prevent Respondent from performing pharmacy technician duties as authorized by Respondent's registration with reasonable skill, competence and safety to the public, and is able to return to the practice of pharmacy without posing a threat to Respondent or the public. During the period of suspension, Respondent shall:
 - (a) not practice as a pharmacy technician trainee or a pharmacy technician in this state or have access to prescription drugs; and
 - (b) authorize a Board approved MHP to furnish an initial written report, and any subsequent reports requested by the BOARD, to the BOARD. The initial written report shall include an evaluation of the current status of Respondent, Respondent's capacity to practice as a pharmacy technician trainee or a pharmacy technician, and a suggested schedule of future treatment and/or after-care if necessary. Failure to comply with all recommendations of the MHP shall constitute a violation of this Order.

- (2) If within six (6) months after the entry of this Order, Respondent fails to provide written documentation from a Board approved MHP, as required by Paragraph (1), pharmacy technician registration number 126695 issued to Respondent shall be revoked and of no further force and effect, effective six (6) months after the entry of this Order. In the event that registration number 126695 issued to Respondent is revoked, Respondent shall:
 - (a) not practice as a pharmacy technician trainee or a pharmacy technician in this state or have access to prescription drugs during the period registration number 126695 is revoked; and
 - (b) surrender to the BOARD, registration number 126695 and any renewal certificate and personal identification card pertaining to registration number 126695.

- (3) Upon the completion of the initial suspension outlined in Paragraph (1) above, registration is hereby suspended for an additional period of one (1) year. Such suspension shall be probated under the conditions that Respondent abide by and obey the terms of this Order, all Federal laws and laws of the State of Texas with respect to pharmacy, controlled substances, dangerous drugs, and all rules and regulations adopted pursuant to the above-mentioned statutes, and that Respondent will comply with all terms of this Order.
- (4) Respondent shall pay a probation fee of four hundred dollars (\$400). This probation fee is due ninety (90) days after the probationary period outlined in Paragraph (3) above begins.

If Respondent fails to pay the probation fee within ninety (90) days after the probationary period begins, registration number 126695 issued to Respondent shall be suspended, effective ninety (90) days after the probationary period begins. In the event that registration number 126695 issued to Respondent is suspended Respondent shall not practice as a pharmacy technician trainee or a pharmacy technician in this state or have access to prescription drugs.

If within six (6) months after the probationary period begins, Respondent fails to pay the probation fee, registration number 126695 issued to Respondent shall be revoked and of no further force and effect, effective six (6) months after the probationary period begins. In the event that registration number 126695 issued to Respondent is revoked, Respondent shall:

- (a) not practice as a pharmacy technician trainee or a pharmacy technician in this state or have access to prescription drugs during the period registration number 126695 is revoked; and
 - (b) surrender to the BOARD, registration number 126695 and any renewal certificate and personal identification card pertaining to registration number 126695.
- (5) During the probationary period outlined in Paragraph (3) above, Respondent shall continue under the care of a MHP if the MHP determines further treatment and/or after care is needed and authorize the MHP and/or representative of the after-care program to furnish written quarterly reports to the BOARD concerning the conduct and status of Respondent;
 - (6) Respondent shall register with drug screening company as specified by Board staff (hereinafter referred to as the "DRUG SCREENING COMPANY") to participate in the drug and alcohol analysis program within ninety (90) days after the entry of this Order.

If Respondent fails to register with the DRUG SCREENING COMPANY within ninety (90) days after the entry of this Order, registration number 126695 issued to Respondent shall be suspended, effective ninety (90) days after the entry of this Order. In the event that registration number 126695 issued to Respondent is suspended Respondent shall not practice as a pharmacy technician trainee or a pharmacy technician in this state or have access to prescription drugs.

If within six (6) months after the entry of this Order, Respondent fails to register with the DRUG SCREENING COMPANY, registration number 126695 issued to Respondent shall be revoked and of no further force and effect, effective six (6) months after the entry of this Order. In the event that registration number 126695 issued to Respondent is revoked, Respondent shall:

- (a) not practice as a pharmacy technician trainee or a pharmacy technician in this state or have access to prescription drugs during the period registration number 126695 is revoked; and
- (b) surrender to the BOARD, registration number 126695 and any renewal certificate and personal identification card pertaining to registration number 126695.

It is further ORDERED that upon the entry of this Order and during the entire duration of the Order, Respondent shall:

- (7) submit, within twenty-four (24) hours, to the performance of unscheduled urinalysis or other types of drug or alcohol analysis as specified by BOARD staff or others authorized by BOARD staff, such as a mental health professional or supervising pharmacist;
- (8) provide copies of chain-of-custody document(s) from the collection site for any urinalysis or other type of drug or alcohol analysis, as required by Paragraph (7), for which Respondent has submitted a sample. Such document(s) shall be provided within three (3) days of the submission to the analysis;
- (9) provide copies of any and all current prescriptions taken by or in possession of Respondent to BOARD staff. Within ten (10) days of any and all new prescriptions prescribed by a treating physician (or other health-care practitioner with prescriptive authority) who has reviewed this Order, Respondent shall provide copies of any and all new prescriptions to BOARD staff;
- (10) provide a written statement from a treating physician (or other health-care practitioner with prescriptive authority), who has reviewed this Order, for all current sample medication taken by or in possession of Respondent to BOARD staff. The statement

- shall include the patient's name, drug name, quantity provided, date provided, directions for use, and physician's name. Within ten (10) days of any and all new sample medication provided by a treating physician (or other health-care practitioner with prescriptive authority), who has reviewed this Order, Respondent shall provide copies of such a statement to BOARD staff;
- (11) inform any and all physicians (or other health-care practitioners with prescriptive authority) who treat Respondent for any reason or condition that Respondent has a history of substance abuse, and that Respondent is the subject of this Order. Unless a medical emergency exists, Respondent shall also provide a copy of this Order to any treating physician for review prior to the physician's authorization of prescription medication for Respondent;
 - (12) cause any treating physician (or other health-care practitioner with prescriptive authority) to provide BOARD staff, upon request, with information and patient records, including information about any and all prescriptions authorized for Respondent. By Respondent's signature on this Order, Respondent does hereby authorize any and all physicians (or other health-care practitioners with prescriptive authority) treating Respondent for any reason or condition to provide BOARD staff with information, including patient records, regarding prescriptions authorized for Respondent;
 - (13) be in violation of this Order, and shall surrender registration number 126695 pending formal disciplinary action in said matter, in the event that:
 - (a) the results of any alcohol or drug analysis indicate the presence of alcohol or drugs (unless the dangerous drug was prescribed within one (1) year or the controlled substance was prescribed within six (6) months from the date of the analysis for a legitimate and documented therapeutic purpose by a practitioner who reviewed the terms of this Order before authorizing the prescription; and/or
 - (b) any health-care practitioner submits written documentation that Respondent has developed an incapacity to practice as a pharmacy technician;
 - (14) participate in the activities and programs of Alcoholics Anonymous, or any other substantially similar program that has been approved in writing by BOARD staff, on a regular basis as directed by BOARD staff. Respondent shall maintain documentation as to the number and location of meetings attended and make such documentation available to BOARD staff upon request;
 - (15) abstain from the consumption of alcohol, any products containing alcohol (including over-the-counter products and prescription drugs), dangerous drugs, and/or controlled

- substances in any form unless prescribed, within one (1) year if a dangerous drug, or within six (6) months if a controlled substance, by a practitioner with prescriptive authority for a legitimate and documented therapeutic purpose and unless ingested for the same therapeutic purpose as originally prescribed;
- (16) not be convicted of or received deferred adjudication for an alcohol-related or drug-related offense;
- (17) abide by and not violate Federal laws and laws of the State of Texas or any other state with respect to pharmacy, controlled substances, dangerous drugs and rules and regulations promulgated pursuant to the above-mentioned statutes;
- (18) not hold any of the individuals providing reports to the BOARD liable in any manner for the contents of such reports;
- (19) authorize the persons listed below to discuss and/or disclose the terms of this Order, the nature of the complaint(s) resulting in the entry of the Order, the status and conduct of Respondent, and any other relevant matter, with each other:
- staff of the BOARD;
 - intervenors and staff of the Professional Recovery Network of the Texas Pharmacy Association;
 - MHP and/or any physician (or other health-care practitioner with prescriptive authority) who is evaluating or treating (or who has evaluated or treated) Respondent;
 - representative(s) of any after-care program evaluating or treating (or that has evaluated or treated) Respondent;
 - supervising pharmacist and any potential or current employer of pharmacy technician; and
 - any other person who Respondent, by oral or written notification to the BOARD, has authorized to discuss this information.
- (20) provide written information to Board staff with the name and telephone number of an individual or individuals to contact in case of a medical emergency, and authorize the Board staff to disclose to such individual(s) any relevant information regarding this Order or the medical emergency;

- (21) If Respondent chooses to practice as a pharmacy technician trainee or a pharmacy technician in Texas, Respondent shall:
- (a) notify the BOARD of Respondent's initial place of employment in Texas and of any subsequent change of employment and the reasons for such change. Such notifications shall be submitted in writing to the BOARD's office within ten (10) days after the entry of this Order, and within ten (10) days of any subsequent employment; and
 - (b) inform any and all employers that Respondent is the subject of this Order.
- (22) If Respondent submits a written request to surrender Respondent's registration, this Order shall be terminated, and registration number 126695 shall be, and such registration is hereby revoked effective immediately. Respondent shall surrender registration number 126695 and any renewal certificate and personal identification card pertaining to registration number 126695 within thirty (30) days after the request. Respondent shall not request to reinstate registration number 126695 within one year after registration number 126695 is revoked. In the event that registration number 126695 issued to Respondent is revoked, Respondent shall not practice as a pharmacy technician trainee or a pharmacy technician in this state or have access to prescription drugs during the period registration number 126695 is revoked.
- (23) The terms and conditions described above in paragraph (1) through paragraph (22) apply to Respondent's registration when designated either as a pharmacy technician trainee or a pharmacy technician.

It is further ORDERED that any cost associated with compliance with the terms of this Order shall be the responsibility of the Respondent.

It is further ORDERED that Respondent shall allow Board staff to directly contact the Respondent on any matter regarding the enforcement of this Order.

It is finally ORDERED that failure to comply with any of the requirements in this Order constitutes a violation and shall be grounds for further disciplinary action. The requirements of this Order are subject to the Texas Pharmacy Act, TEX. OCC. CODE ANN., Title 3, Subtitle J (2011), and Texas Pharmacy Board Rules, 22 TEX. ADMIN. CODE (2013).

Passed and approved at the regular meeting of the Texas State Board of Pharmacy on the 7th day of May, 2013.

THIS ORDER IS A PUBLIC RECORD.

SIGNED AND ENTERED ON THIS 7th day of May, 2013.

MEMBER, TEXAS STATE BOARD OF PHARMACY

ATTEST:

Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy

Kerstin E. Arnold
General Counsel
Texas State Board of Pharmacy

**SOAH DOCKET NO. 515-13-0731
(TSBP NO. 2011-2095)**

TEXAS STATE BOARD OF PHARMACY, Petitioner	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	OF
	§	
JAMES MITCHELL, REGISTRATION NO. 126695, Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Staff of the Texas State Board of Pharmacy (Staff/Board) seeks one-year probation of the pharmacy technician registration held by James Mitchell (Respondent) on the basis that Respondent received deferred adjudication for possession of marijuana. The Administrative Law Judge (ALJ) recommends that Respondent’s registration be placed on probation for one year.

I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY

The hearing convened December 10, 2012, before State Office of Administrative Hearings (SOAH) ALJ Steven M. Rivas at the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Tyler Vance appeared and represented Staff. Respondent appeared and represented himself. The record closed at the conclusion of the hearing the same day. Notice and jurisdiction were undisputed, and those matters are set out in the Findings of Fact and Conclusions of Law without further discussion here.

II. DISCUSSION

A. Applicable Law

III. The Board has the responsibility for implementing and enforcing the Texas Pharmacy Act (Act), found in title 3, subtitle J of the Texas Occupations Code (Code). Under the

Act, a person must register with the Board to be a pharmacy technician in Texas.¹ The Board is authorized to discipline a registrant for certain acts or violations and to impose disciplinary sanctions that range from reprimand to revocation of a technician's registration.² If the Board proposes to take disciplinary action, the responding registrant is entitled to a contested case hearing at SOAH.³ When a hearing is held, Staff has the burden to prove by a preponderance of the evidence that grounds for discipline exist.⁴

The Board, pursuant to § 568.003(a)(4)(A)(ii) of the Act, may take disciplinary action against a pharmacy technician's registration if the registrant has been placed on deferred adjudication community supervision for a misdemeanor under chapter 481 of the Texas Health and Safety Code. Possession of marijuana, two ounces or less, is considered a Class B misdemeanor under the Health and Safety Code § 481.121(b)(1).

In addition, the appropriate sanction for a pharmacy technician who commits a misdemeanor offense under Chapter 481 of the Health and Safety Code is a one-year registration probation under the Board's rule at 22 Tex. Admin. Code § 281.64(c)(3)(A)(ii)(II)(-b-).

B. Evidence

At the hearing, Staff offered one exhibit and Respondent testified briefly on his own behalf. Staff's exhibit was a copy of an Order Deferring Adjudication of Guilt and Granting Adult Probation (Non-Jury) issued after Respondent pleaded guilty on April 1, 2010, to the offense of possession of marijuana 0-2 ounces in Cause No. 222299, *State of Texas v. James R. Mitchell*, in the County Court at Law No. 2, of Bexar County, Texas. The Order indicates

¹ Tex. Occ. Code § 568.002.

² *Id.* § 568.0035.

³ *Id.* § 565.061; Tex. Gov't Code ch. 2001.

⁴ 22 Tex. Admin. Code § 281.31(a).

Respondent was sentenced to six months' probation and was ordered to pay \$394.00 in court costs, perform twenty-four hours of community service, and complete a drug education program.

Respondent acknowledged he pleaded guilty to marijuana possession. He further contended that the hearing in this matter was not necessary because he believed the Board had already taken action against his registration.

C. Analysis

The ALJ finds the Board has authority to place Respondent's registration on probation for one year. Respondent pleaded guilty to the misdemeanor offense of possession of marijuana, which constitutes a violation of the Health and Safety Code § 481.121(b)(1). Therefore, the Board may discipline Respondent under § 568.0035 of the Act, and the prescribed sanction for Respondent's violation is one-year probation of Respondent's pharmacy technician registration under the Board's rule at 22 Tex. Admin. Code § 281.64(c)(3)(A)(ii)(II)(-b-). Respondent presented no evidence to refute Staff's allegation.

III. FINDINGS OF FACT

1. The Texas State Board of Pharmacy (Board) issued to James Mitchell (Respondent) a pharmacy technician registration, registration number 126695, on April 13, 2005. Respondent's Texas pharmacy technician registration has remained in full force and effect since that time.
2. On October 24, 2012, Board Staff (Staff) mailed by certified mail, return receipt requested, its notice of hearing and complaint to Respondent's last known address.
3. The notice of hearing and complaint contained a statement of the time, place, and nature of the hearing; a statement of the legal authority under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
4. The hearing was held on December 10, 2012, before State Office of Administrative Hearings (SOAH) ALJ Steven M. Rivas at the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Staff attorney Tyler Vance represented Staff. Respondent appeared and represented himself at the hearing. The record closed the same day.

5. On April 6, 2010, Respondent received deferred adjudication based on a plea of guilty to the misdemeanor offense of possession of marijuana.

IV. CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter pursuant to Tex. Occ. Code (Code) § 568.003.
2. SOAH has jurisdiction over all matters related to conducting a contested case in this matter, including the preparation of a Proposal for Decision with Findings of Fact and Conclusions of Law, under Tex. Gov't Code ch. 2003.
3. Timely and proper notice of the hearing was sent to Respondent as required by Tex. Gov't Code ch. 2001; 1 Tex. Admin. Code § 155.401; and 22 Tex. Admin. Code § 281.30.
4. The Board may take disciplinary action against a pharmacy technician's registration if the registrant has been placed on deferred adjudication community supervision for a misdemeanor under chapter 481 of the Texas Health and Safety Code. Code § 568.003(a)(4)(A)(ii).
5. The sanction for a misdemeanor offense under Chapter 481 of the Health and Safety Code by a pharmacy technician is one-year probation under 22 Tex. Admin. Code § 281.64(c)(3)(A)(ii)(II)(-b-).
6. Based on the Findings of Fact and Conclusions of Law, the Board is authorized to impose one-year probation of Respondent's pharmacy technician registration under Code § 568.0035.

V. RECOMMENDATION

The ALJ recommends that the Board impose one-year probation of Respondent's pharmacy technician registration for the violation noted above.

SIGNED January 28, 2013.



STEVEN M. RIVAS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS