BEFORE THE DIRECTOR
DEPARTMENT OF CONSUMER AFFAIRS
BUREAU OF VOCATIONAL NURSING AND PSYCHIATRIC TECHNICIANS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: MICHELLE ANNE GARCIA 5722 N. Berkeley Street San Bernardino, CA 92407 Psychiatric Nurse License No. PT 32006 Respondent.	Case No. PT-2004-1135 OAH No. L2008020199

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Director of the Department of Consumer Affairs[1] as the final Decision in the above-entitled matter.

This Decision shall become effective on January 22, 2009.

IT IS SO ORDERED this 10th day of December 2008.

P. J. Harris
PATRICIA HARRIS
Deputy Director, Board/Bureau Support
Department of Consumer Affairs

[1]Pursuant to Business and Professions Code section 101.1(b), on July 1, 2008, the director became vested with the duties, powers, purposes, responsibilities, and jurisdiction of the Board of Vocational Nursing and Psychiatric Technicians.

BEFORE THE
DEPARTMENT OF CONSUMER AFFAIRS
BUREAU OF VOCATIONAL NURSING AND PSYCHIATRIC TECHNICIANS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	
MICHELLE ANNE GARCIA,	Case No. PT-2004-1135
Psychiatric Technician License No. PT 32006	OAH No. L2008020199
Respondent.	

PROPOSED DECISION

This matter was heard by Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Los Angeles, California, on July 25, 2008.

Christina Thomas, Deputy Attorney General, represented Teresa Bello-Jones, J.D., M.S., R.N. (Complainant).

Steven B. Bassoff, Attorney at Law, represented Michelle Anne Garcia (Respondent).

Complainant seeks to discipline Respondent's license based on allegations of inappropriate contact with a patient at Patton State Hospital (Patton). Respondent denied most of the allegations and presented evidence in support of continued licensure.

Oral and documentary evidence was received at the hearing. The record was left open for the parties to submit argument regarding Complainant's request for an award of costs of investigation and enforcement. On August 1, 2008, Respondent submitted her objections to the award of costs, which document has been marked as Exhibit C. Complainant filed a reply on August 28, 2008, which document has been marked as Exhibit 13. Respondent's objections have been considered in evaluating the reasonableness of Complainant's costs, and Exhibit 12, Complainant's evidence in support of such costs, is received in evidence. The matter was submitted for decision on August 28, 2008.

FACTUAL FINDINGS

1. Complainant filed the Accusation in her official capacity of Executive Officer, Bureau of Vocational Nursing and Psychiatric Technicians, Department of Consumer Affairs (Board).

2. On January 15, 2004, the Board issued Psychiatric Technician License number PT 32006 to Respondent. The license expires on June 30, 2009, unless renewed. The license has not been previously disciplined.

3. Respondent started working at Patton in January 2003, as a pre-licensing psychiatric technician. Patton houses mentally ill patients who have come in contact with the criminal justice system. During her employment at the facility, Respondent received training regarding the maintenance of appropriate boundaries with patients.

4. In mid-2004, Respondent was assigned to Unit 70, a unit housing adult male and female patients judicially found by the court unable to stand trial. Approximately 50 patients were typically in the unit. Each psychiatric technician was directly responsible for providing therapeutic assistance on a one-to-one basis to about seven patients. The technicians spent time with those under their supervision, assessing their needs and providing support. The specific tasks involved frequent conversation, counseling, escorting patients to meetings and activities, supervising activities, and engaging in recreational and therapeutic activities with the patients.

5. C.J.[1] was one of the patients in Unit 70, although not on Respondent's individual caseload. As part of Patton's reward system, C.J. was permitted to help staff with chores. He participated in some of the recreational activities Respondent led, such as playing ping pong and scrabble. Respondent listened to C.J.'s problems, in what she described as a counseling relationship.

6. By her own admission, Respondent became too close to C.J. On or about Thanksgiving Day 2004, Respondent gave C.J. her personal cellular and home phone numbers. Respondent did so out of concern for C.J., as he was distraught about family issues and wanted to be able to seek counsel from Respondent when she was not at Patton. Respondent and C.J. thereafter communicated by phone when she was not at work. On occasion, Respondent called C.J. on the semi-public phone shared by patients. They spoke by phone and in person about personal matters, including stressors in their respective lives. C.J. also wrote letters to Respondent.[2]

7. Respondent did not engage in a romantic or sexual relationship with C.J.

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[1] Initials have been used to protect the patient's privacy.

[2] This finding and factual finding number 7 are based on the uncontradicted testimony of Respondent, as supplemented by her statement to Patton Senior Special Investigator John R. Olive (Olive). C.J. did not testify. A statement purportedly given by him was not received in evidence because of authenticity, hearsay, and reliability concerns. In any event, the statement did not contain a different version of events than that provided by Respondent.

8. It was not established that C.J. became depressed over the relationship with Respondent or that he attempted to commit suicide. In support of the allegations, Olive testified that on January 1, 2005, he was called to a hospital where C.J. had been taken. The patient had purportedly appeared lethargic and hospital staff kept him for observation for an unspecified portion of the day as a precautionary measure. No competent evidence was presented about C.J.'s mental status on January 1, 2005, or the severity of his condition. Even if treated as direct evidence, the hearsay reports to Olive do not establish C.J.'s depression, the reason for any alleged depression, the ingestion of any drugs, or the ingestion of a potentially lethal dosage.

9. It was not established that Respondent and C.J. made plans to continue any kind of relationship after he was released. Although Respondent told Olive that she wanted to continue the relationship outside Patton, it was not established that any actual plan was made.

10. Respondent readily and credibly acknowledged that becoming too familiar with C.J. was inappropriate.

11. In the mid to latter part of December 2004, before the matter came to the attention of Patton managers or the Board, Respondent reported to her immediate supervisor, James Jordan (Jordan), that she had become over-familiar with C.J. and sought assistance. Jordan obtained enrollment materials for the employee assistance program and procured a transfer to another unit, effective after Respondent's time off at the end of December 2004.

12. Olive interviewed Respondent on January 2, 2005, which interview and investigation triggered Respondent's resignation from Patton. On January 3, 2005, Respondent left a note at work, stating that, "I Michelle Garcia resign for personal reasons my employment at [P]atton State Hospital effective today January 3, 2005." (Exhibit 5.)

13. At the time that she shared personal information with C.J., Respondent was under significant personal stress. She was in the midst of a contested divorce from an abusive spouse.

14. In engaging in the conduct set forth in factual finding number 6, respondent engaged in a personal relationship with a patient. The relationship was inconsistent with her duties and professional ethical obligations as a psychiatric technician. In becoming overly familiar with C.J., Respondent blurred the boundaries between patient and health care provider.

15. Respondent's conduct, however, does not constitute incompetence or gross negligence in the existing circumstances. The relationship started as a well-meaning effort to help C.J., the period of personal involvement was brief, and Respondent recognized her error before anyone called the matter to her attention.

16. The testimony of Deborah Lucas, an expert witness called by Complainant has been considered, but is insufficient to establish that Respondent's conduct constitutes incompetence or gross negligence. Her testimony was based on facts not established at the hearing, such as the existence of a sexual relationship and plans to continue a sexual relationship. In fact, she testified that a deviation from the standard of care or professional responsibilities may be simple or extreme, depending on the circumstances, and placed primary reliance on the existence of a sexual relationship to conclude that Respondent's deviation was extreme.

17. Respondent underwent psychotherapy for approximately three months to understand the reasons she became too close to C.J.

18. Respondent worked in a psychiatric practice in Redlands for two years before returning to a State of California facility. In July 2006, she started working as a psychiatric technician at the California Institute for Women in Chino, California. She provides care to female patients who have been sentenced to prison and who also have mental health issues. She is part of a team of mental health professionals that provides care to 25 to 50 patients in a segregated unit. Her three performance evaluations have met expectations and two resulted in above-average, or "outstanding," ratings.

19. Respondent's immediate supervisor since March 2007, Senior Psychiatric Technician Josette Manning (Manning), testified that Respondent is very professional, concerned, thorough, and "enlightened in mental health." Respondent has performed well in crisis situations. Respondent told Manning about becoming overly familiar with C.J., and the supervisor nevertheless supports Respondent's continued licensure and employment.

20. Respondent's second-level supervisor, Patricia Brockmeyer, also testified in support of continued licensure. She has personally observed Respondent discharge her duties and is confident about Respondent's abilities. She is also aware of the circumstances surrounding Respondent's relationship with C.J., and wishes Respondent to remain licensed.

21. The Board has incurred $6,765.25 in the form of Attorney General charges in connection with its investigation and enforcement of this matter.

22. Respondent's take-home pay is approximately $4,600 per month. Her monthly mortgage obligations are $1,404.

23. Except for those previously addressed in this Proposed Decision, all other allegations in the Accusation are found to be unproved or surplusage.

LEGAL CONCLUSIONS

1. Grounds exist to suspend or revoke Respondent's license pursuant to Business and Professions Code section 4521, subdivision (a), and California Code of Regulations, title 16, section 2576.6, subdivisions (b)(3) and (c), in that she failed to maintain professional boundaries by having a personal relationship with a patient, by reason of factual finding numbers 6 and 14.

2. Grounds do not exist to suspend or revoke Respondent's license pursuant to Business and Professions Code section 4521, subdivision (a)(1), because she did not demonstrate incompetence or engage in gross negligence, by reason of factual finding numbers 6 through 16.

3. Grounds do not exist to suspend or revoke Respondent's license pursuant to Business and Professions Code sections 726 or 4521, subdivision (1), because she did not engage in sexual relations with a patient, by reason of factual finding numbers 6 and 7.

4. All evidence submitted in mitigation or rehabilitation has been considered. Despite this evidence, Respondent's misconduct was serious and had the potential to cause serious harm to a patient. On the other hand, Respondent is remorseful about her conduct and has sought insight into what led to the personal relationship, factors that make recurrence unlikely. Respondent has been working competently and without incident for two years, in a place where her contributions are valued. On balance, the order that follows is necessary and sufficient for the protection of the public.

5. Cause exists to order Respondent to pay the Board's reasonable costs of investigation and enforcement pursuant to Business and Professions Code section 125.3, by reason of factual finding number 21 and legal conclusion number 1.

In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the Supreme Court rejected a constitutional challenge to a cost recovery provision similar to Business and Professions Code section 125.3. In so doing, however, the Court directed the administrative law judge and the agency to evaluate several factors to ensure that the cost recovery provision did not deter individuals from exercising their right to a hearing. Thus, the board must not assess the full costs where it would unfairly penalize the respondent who has committed some misconduct, but who has used the hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty; the board must consider a respondent's subjective good faith belief in the merits of his or her position and whether the respondent has raised a colorable challenge; the board must consider a respondent's ability to pay; and the board may not assess disproportionately large investigation and prosecution costs when it has conducted a disproportionately large investigation to prove that a respondent engaged in relatively innocuous misconduct. (*Zuckerman*, supra at 45.)

In this case, the actual costs of investigation and enforcement of this matter are $6,765.25, as set forth in factual finding number 21. However, taking into account Respondent's ability to pay and the allegations that were actually established at the hearing, a 50 percent reduction from the actual costs is appropriate. Therefore, the reasonable costs of investigation and enforcement are $3,382.62.

ORDER

A. Psychiatric Technician License No. PT 32006 issued to Respondent Michelle Anne Garcia is revoked; provided, the revocation is stayed for three years on the following terms and conditions.

1. OBEY ALL LAWS. Respondent shall obey all federal, state and local laws, including all statutes and regulations governing the license. Respondent shall submit, in writing, a full and detailed account of any and all violations of the law to the Board within five days of occurrence. To ensure compliance with this term, Respondent shall submit two completed fingerprint cards and the applicable fingerprint processing fees to the Board within 30 days of the effective date of the decision, unless the Board determines that fingerprint cards were already submitted by the Respondent as part of her licensure application process effective July 1, 1996. Respondent shall also submit a recent 2" x 2" photograph of herself within 30 days of the effective date of the decision.

2. COMPLIANCE WITH PROBATION PROGRAM AND QUARTERLY REPORT REQUIREMENTS. Respondent shall fully comply with terms and conditions of the probation established by the Board and shall cooperate with the representatives of the Board in its monitoring and investigation of the Respondent's compliance with the Probation Program.

Respondent shall submit quarterly reports, under penalty of perjury, in a form required by the Board. The reports shall certify and document compliance with all the conditions of probation.

3. NOTIFICATION OF ADDRESS AND TELEPHONE NUMBER CHANGE(S). Respondent shall notify the Board, in writing, within five days of a change of residence or mailing address, of her new address and any change in her work and/or home telephone numbers.

4. NOTIFICATION OF RESIDENCY OR PRACTICE OUTSIDE OF STATE. Respondent shall notify the Board, in writing, within five days, if she leaves California to reside or practice in another state. Respondent shall notify the Board, in writing, within five days, upon her return to California. The period of probation shall not run during the time Respondent is residing or practicing outside California.

5. NOTIFICATION TO EMPLOYER(S). When currently employed or applying for employment in any capacity in any health care profession, Respondent shall notify her employer of the probationary status of Respondent's license. This notification to Respondent's current health care employer shall occur no later than the effective date of the Decision. Respondent shall notify any prospective health care employer of her probationary status with the Board prior to accepting such employment. This notification shall be by providing the employer or prospective employer with a copy of the Board's Decision.

Health Care Profession includes, but is not limited to: Licensed Vocational Nurse, Psychiatric Technician, Registered Nurse, Medical Assistant, Paramedic, Emergency Medical Technician, Certified Nursing Assistant, Home Health Aide, and all other ancillary technical health care positions.

Respondent shall cause each health care employer to submit quarterly reports to the Board. The reports shall be on a form provided by the Board, shall include a performance evaluation and such other information as may be required by the Board.

Respondent shall notify the Board, in writing, within five days of any change in employment status. Respondent shall notify the Board, in writing, if she is terminated from any nursing or health care related employment with a full explanation of the circumstances surrounding the termination.

6. INTERVIEWS/MEETINGS WITH BOARD REPRESENTATIVE(S). Respondent, during the period of probation, shall appear in person at interviews/meetings as directed by the Board, or its designated representatives.

7. EMPLOYMENT REQUIREMENTS AND LIMITATIONS. During probation, respondent shall work in her licensed capacity in the State of California. This practice shall consist of no less than six continuous months and of no less than 20 hours per week.

While on probation, Respondent shall not work for a nurses' registry or in any private duty position, a temporary nurse placement agency, as a faculty member in an accredited or approved school of nursing, or as an instructor in a Board approved continuing education course except as approved, in writing, by the Board. Respondent shall work only on a regularly assigned, identified and predetermined work site(s) and shall not work in a float capacity except as approved, in writing, by the Board.

The period of probation shall not run during the time Respondent is not working in a licensed capacity in the State of California.

8. SUPERVISION REQUIREMENTS. Respondent shall obtain prior approval from the Board, before commencing any employment, regarding the level of supervision provided to Respondent while employed as a licensed vocational nurse or psychiatric technician.

Respondent shall not function as a charge nurse (i.e., work in any healthcare setting as the person who oversees or directs licensed vocational nurses, psychiatric technicians, certified nursing assistants or unlicensed assistive personnel) or supervising psychiatric technician during the period of probation except as approved, in writing, by the Board.

9. COMPLETION OF EDUCATIONAL COURSE(S). Respondent, at her own expense, shall enroll and successfully complete a course substantially related to the violations no later than the end of the first year of probation; or the Respondent shall be suspended from practice until she has enrolled in and has successfully completed the specified coursework.

The coursework shall be in addition to that required for license renewal. The Board shall notify Respondent of the course content and number of contact hours required. Within 30 days of the Board's written notification of assigned coursework, Respondent shall submit a written plan to comply with this requirement. The Board shall approve such plan prior to enrollment in any course of study. Upon successful completion of the course, Respondent shall cause the instructor to furnish proof to the Board within 30 days of course completion.

10. MAINTENANCE OF VALID LICENSE. Respondent shall, at all times while on probation, maintain an active current license with the Board, including any period during which suspension or probation is tolled. Should Respondent's license, by operation of law or otherwise, expire, upon renewal or reinstatement Respondent's license shall be subject to any and all terms of this probation not previously satisfied.

11. COST RECOVERY REQUIREMENTS. Respondent shall reimburse the Board for its reasonable costs of investigation and enforcement, $3,382.62, pursuant to Business and Professions Code Section 125.3. She shall make timely payments in equal quarterly payments during the period of probation. Failure to make payments in accordance with this condition or any formal agreement entered into with the Board or pursuant to any Decision by the Board shall be considered a violation of probation.

The Board may conditionally renew or reinstate, for a maximum of one year, the license of any Respondent who demonstrates financial hardship. Respondent shall enter into a formal agreement with the Board to reimburse the unpaid costs within that one year period. Except as provided above, the Board shall not renew or reinstate Respondent's license if she has failed to pay all the costs as directed in a Decision.

If probation is tolled while Respondent is not employed, this cost repayment obligation shall also be tolled.

12. VIOLATION OF PROBATION. If Respondent violates the conditions of her probation, the Board, after giving Respondent notice and an opportunity to be heard, may set aside the stay order and impose the stayed revocation of Respondent's license. If during the period of probation, an accusation or petition to revoke has been filed against Respondent's license or the Attorney General's Office has been requested to prepare an accusation or petition to revoke probation against the Respondent's license, the probationary period shall automatically be extended and shall not expire until the accusation or petition has been acted upon by the Board. Upon successful completion of probation, Respondent's license will be fully restored.

B. Respondent Michelle Anne Garcia is ordered to reimburse the Board the sum of $3,382.62 for its costs of investigation and prosecution, in equal quarterly payments during the period of probation. If probation is tolled while respondent is not employed, this cost repayment obligation shall also be tolled.

DATED: 9/16/08

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings

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BEFORE THE
BOARD OF VOCATIONAL NURSING AND PSYCHIATRIC TECHNICIANS
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: MICHELLE ANNE GARCIA 5722 N. Berkeley Street San Bernardino, CA 92407 Psychiatric Technician License No. PT 32006 Respondent.	Case No. PT-2004-1135 **ACCUSATION**

Complainant alleges:

PARTIES

1. Teresa Bello-Jones, J.D., M.S.N., R.N. (Complainant) brings this Accusation solely in her official capacity as the Executive Officer of the Board of Vocational Nursing and Psychiatric Technicians (Board), Department of Consumer Affairs.

2. On or about January 15, 2004, the Board issued Psychiatric Technician License No. PT 32006 to Michelle Anne Garcia (Respondent). The Psychiatric Technician License was in full force and effect at all times relevant to the charges brought herein and will expire on June 30, 2007, unless renewed.

JURISDICTION

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

STATUTORY PROVISIONS

4. Section 4520 of the Business and Professions Code (Code) provides, in pertinent part, that the Board may discipline any licensed psychiatric technician for any reason provided in Article 3 (commencing with section 4520) of the Psychiatric Technicians Law (Code § 4500, et. seq.)

5. Section 118(b) of the Code provides, in pertinent part, that the expiration of a license shall not deprive the Board jurisdiction to proceed with a disciplinary action during the period within which the license may be renewed, restored, reissued or reinstated. Under section 4545 of the Code, the Board may renew an expired license at any time within four years after the expiration.

6. Section 4521 of the Code states:

"The board may suspend or revoke a license issued under this chapter [the Psychiatric Technicians Law] for any of the following reasons:

"(a) Unprofessional conduct, which includes but is not limited to any of the following:

"(1) Incompetence or gross negligence in carrying out usual psychiatric technician functions.

. . . .

"(d) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provision or terms of this chapter [the Psychiatric Technicians Law].

. . . .

"(l) The commission of any act punishable as a sexually related crime, if that act is substantially related to the duties and functions of the licensee."

7. Section 726 of the Code states:

"The commission of any act of sexual abuse, misconduct, or relations with a patient, client, or customer constitutes unprofessional conduct and grounds for disciplinary action for any person licensed under this division, under any initiative act referred to in this division and

under Chapter 17 (commencing with Section 9000) of Division 3.

"This section shall not apply to sexual contact between a physician and surgeon and his or her spouse or person in an equivalent domestic relationship when that physician and surgeon provides medical treatment, other than psychotherapeutic treatment, to his or her spouse or person in an equivalent domestic relationship."

8. California Code of Regulations, title 16, section 2576.6 states:

. . . .

"(b) A licensed psychiatric technician shall adhere to standards of the profession and shall incorporate ethical and behavioral standards of professional practice which include but are not limited to the following:

. . . .

"(3) Maintaining professional boundaries with the patient/client; and

. . . .

"(c) A violation of this section constitutes unprofessional conduct for purposes of initiating disciplinary action."

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

FIRST CAUSE FOR DISCIPLINE

(Incompetence or Gross Negligence)

10. Respondent is subject to disciplinary action under section 4521, subdivision (a)(1), for unprofessional conduct, in that from on or about December 1, 2004 to January 3, 2005, while working as a psychiatric technician, at Patton State Hospital (PSH), Respondent demonstrated incompetence or gross negligence, as follows:

a. Respondent willfully engaged in a personal relationship with Patient C.J.(C.J.), a dependent adult compromised by mental illness.

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b. On or about January 1, 2005, C.J. attempted suicide, by overdosing on prescription drugs, as a result of becoming depressed over the relationship.

c. Respondent gave C.J. her home and cell phone numbers and accepted love letters from C.J.

d. Respondent made numerous phone calls to C.J. and would have other patients locate C.J. when he was not near the communal patient's telephone.

e. Respondent made plans with C.J. to get together when C.J. was discharged.

f. Respondent was witnessed by two patients that saw her having sex with C.J.

g. Respondent, by her own admission, admitted to having a personal relationship with C.J.

SECOND CAUSE FOR DISCIPLINE

(Sexual Relations with a Patient)

11. Respondent is subject to disciplinary action under section 4521, subdivision (1) and 726 of the Code, on the grounds of unprofessional conduct, in that from on or about December 1, 2004 to January 3, 2005, while working as a psychiatric technician, at PSH, Respondent had a sexual relationship with C.J., as more fully set forth above in paragraph 10.

THIRD CAUSE FOR DISCIPLINE

(Failure to Maintain Professional Boundaries)

12. Respondent is subject to disciplinary action under section 4521, subdivisions (a) and (d) of the Code, on the grounds of unprofessional conduct, for violating California Code of Regulations, title 16, section 2576.6, subdivisions (b)(3) and (c), in that from on or about December 1, 2004 to January 3, 2005, while working as a psychiatric technician, at PSH, Respondent failed to maintain professional boundaries, by having a personal relationship with C.J., as more fully set forth above in paragraphs 10 and 11.

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PRAYER

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

1. Revoking or suspending Psychiatric Technician License No. PT 32006, issued to Michelle Anne Garcia.

2. Ordering Michelle Anne Garcia to pay the Board the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3.

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

DATED: March 5, 2007

TERESA BELLO-JONES, J.D., M.S.N., R.N.
Executive Officer
Board of Vocational Nursing and Psychiatric Technicians
State of California
Complainant

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