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STATE OF WISCONSIN
BEFORE THE PHARMACY EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST

STEVEN W. TUMILTY, R.PH.,
RESPONDENT

PROPOSED DECISION
LS 921291 PHM

The parties to this proceeding for purposes of s. 227.53, Stats., are:

Steven W. Tumilty
6107 Spring Pond Court
McFarland WI 53558

Pharmacy Examining Board
Department of Regulation and Licensing
P.O. Box 8935
Madison WI 53708

Division of Enforcement
Department of Regulation and Licensing
P.O. Box 8935
Madison WI 53708

A hearing was held on this matter on January 29, 1993. Complainant Division of Enforcement appeared by Attorney Arthur Thexton. Respondent appeared in person and with counsel, Attorney Richard D. Schepp, Corporate Counsel for Shopko Stores, Inc., 700 Pilgrim Way, Green Bay, Wisconsin 54307-9060.

Based on the entire record of the proceeding, the Administrative Law Judge recommends that the Pharmacy Examining Board adopt the following Findings of Fact, Conclusions of Law, Order and Opinion as its Final Decision and Order in the matter.

FINDINGS OF FACT

1. Steven W. Tumilty, R.Ph., holds license #10811 to practice pharmacy in the state of Wisconsin. He resides in McFarland, Wisconsin, and has been employed as chief pharmacist at the Shopko Store pharmacy located at 7401 Mineral Point Road, Madison, Wisconsin, since March 1991, continuing through the date of the hearing in this matter.

2. On November 21, 1991, Ms. Joy Gander-Rozzelle went to the Shopko Store pharmacy where Mr. Tumilty is the managing pharmacist to have a prescription filled. The prescription had been written that day by Ms. Gander-Rozzelle's physician for a medication which is available only by prescription.

3. Ms. Gander-Rozzelle left the scrip at the drop-off counter of the Shopko Store pharmacy, and was informed by an employee of the pharmacy that it would be several minutes before the prescription would be ready. Ms. Gander-Rozzelle left the store, and returned to pick up the prescription several hours later, at the end of her working day.

4. When Ms. Gander-Rozzelle returned to pick up the prescription, it was delivered to her by a clerk who was not a pharmacist. The clerk completed the financial portion of the transaction, and Ms. Gander-Rozzelle left the store with the prepared prescription. There was no consultation by a pharmacist with Ms. Gander-Rozzelle.

5. Mr. Tumilty was not present in the store or the pharmacy at the time the prescription was delivered to Ms. Gander-Rozzelle. The pharmacist on duty at the time later reported to Mr. Tumilty that there had been no consultation, and Mr. Tumilty spoke with the subordinate pharmacist about the necessity for a consultation.

6. As a result of the Gander-Rozzelle transaction on November 21, 1991, the subordinate pharmacist on duty at the time of the transaction was disciplined by the Pharmacy Examining Board for failing to comply with the regulation requiring a pharmacist to transfer prescription medications to patients or agents of the patient, and requiring a consultation with the patient about the medication.

7. On August 24, 1992, Steve Rohland, a regulation compliance investigator employed by the Division of Enforcement, Department of Regulation and Licensing, went to the Shopko Store pharmacy for which Mr. Tumilty is the managing pharmacist. Mr. Rohland went to the pharmacy for the purpose of observing the method in which the pharmacy was operated.

8. While Mr. Rohland was moving about the pharmacy, perusing the displays of over-the-counter merchandise, he observed two separate transactions.

9. From a spot several feet distant from the prescription drop-off window, just around the corner of the nearest display gondola, Mr. Rohland observed a woman deliver a piece of paper to an employee of the pharmacy behind the counter. The employee was wearing a blue colored smock. Mr. Rohland heard the employee tell the customer that it would be about ten minutes before the order would be ready. The customer indicated that she would return to pick up the order, and left the pharmacy.

10. Mr. Rohland does not know what was written on the piece of paper the customer handed to the employee.

11. While Mr. Rohland was in the pharmacy, at approximately the same vantage point around the corner of the display rack several feet from the prescription drop-off window, he observed a second customer repeat the same process with the same employee.

12. During the period November 1991 through August 1992, Shopko pharmacy employees wore smocks of different colors depending on the employees' job. Clerks wore blue smocks, pharmacy technicians wore white smocks, and pharmacists either did not wear smocks or wore white smocks.

13. Mr. Rohland roamed the pharmacy for a short period of time until both of the customers he had previously observed returned. Mr. Rohland stationed himself at the end of an aisle approximately thirty feet from the prescription pick-up window, and from there observed each of the two customers pay for merchandise delivered to them, in bags, by the same employee who had received their orders previously. The employee completed the financial portion of both transactions, and the customers left the store.

14. Mr. Rohland did not make any contact with either customer. He does not know what was in the bags delivered to the customer by the employee.

15. Mr. Rohland does not know the name of the employee he observed, and does not know whether the employee was a pharmacist.

16. Mr. Rohland testified that he did not hear the complete conversation between either customer and the employee at the time the merchandise was delivered to the customers, but did hear that the conversation included the employee telling the customer the price of the merchandise delivered to each.

17. Mr. Tumilty was not present in the store or the pharmacy at the time Mr. Rohland was observing the operation of the pharmacy.

18. The Shopko Store pharmacy of which Mr. Tumilty is managing pharmacist filled 83,633 prescriptions between November 1991 and August 1992. During that time, there have been four female pharmacists working at the pharmacy.

19. Shopko Stores, Inc., has a pharmacy policy manual with which each pharmacist is required to be familiar. The new employee training conducted by Shopko Stores, Inc., for its pharmacist employees includes being tested on the contents of the policy manual. The policy manual includes several directives directly and indirectly requiring compliance with state regulations which require a pharmacist to transfer prescription medications to patient-customers, and to consult with the customer about the medication.

20. The employment evaluation of each pharmacist, and the compensation of each pharmacist, is based in part on compliance with the policies of Shopko Stores, Inc., and state regulations governing the practice of pharmacy.

CONCLUSIONS OF LAW

1. The Pharmacy Examining Board has jurisdiction in this matter pursuant to s. 450.10, Stats.

2. Steven W. Tumilty did, on and between November 1991 and August 1992, have in place policies and procedures which effectively required his subordinate pharmacists to transfer prescriptions to the customer for whom they were intended and to consult with the patients who received prescription medications, in compliance with ss. Phar 7.01(1)(e) and 10.03(2), Wis. Admin. Code.

ORDER

Now, therefore, this disciplinary proceeding against Steven W. Tumilty, R.Ph., is **DISMISSED**.

OPINION

It is the Complainant's burden to prove its case. In order to prove a case, it is necessary to prove the existence of facts which are sufficient to show that a particular person has failed to comply with a particular law.

The central allegation in this matter is that Mr. Tumilty failed to require his subordinates to comply with s. Phar 7.01(1)(e), Wis. Admin. Code. That section reads:

Phar 7.01 Minimum procedures for compounding and dispensing. (1) Except as provided in sub. (4), a pharmacist or pharmacist-intern who compounds or dispenses according to a prescription order shall follow the procedures described in this rule and other applicable procedures. The pharmacist or pharmacist-intern as directed and supervised by a pharmacist shall:

(e) *Transfer the prescription to the patient or agent of the patient and give the patient or agent appropriate consultation relative to the prescription except that prescriptions may be delivered by an agent of the pharmacist to a patient's residence if the delivery is accompanied by appropriate directions and an indication that consultation is available by contacting the pharmacist.*

The Complainant in this proceeding has chosen to charge Mr. Tumilty with failing to comply with the law which holds him responsible for the professional operations of the Shopko Stores pharmacy on Mineral Point Road in Madison, Wisconsin. Specifically, the Complainant charges that Mr. Tumilty did not manage the pharmacy in such a way that his subordinate pharmacists delivered prescription medications to the patients who ordered them, giving appropriate consultation to the patients about the prescription medications at the time. The Complainant has proven by a preponderance of the evidence that on one occasion when Mr. Tumilty was not present one patient received one prescription medication from the hand of a pharmacy employee who was not a pharmacist, and that on that occasion there was no consultation about the prescription medication between a pharmacist and the patient.

The Complainant has not proven that any other person has ever received a prescription medication from the hand of a person who was not a pharmacist, or that any other patient has ever failed to receive an appropriate consultation from a pharmacist when receiving prescription medications at the Shopko Store pharmacy at which Mr. Tumilty is the managing pharmacist. The Complainant apparently assumes that the law requires that all prescription medications be handed to patient-customers by a pharmacist, and prohibits a pharmacist from delegating to a pharmacy technician the task of moving a prescription from behind the counter to the hand of the patient. The regulation is not clear on the point, and I specifically do not reach the question.

The evidence in this proceeding is uncontroverted that the subordinate pharmacist who was responsible for the single proven failure of a pharmacist to deliver a prescription medication, and patient consultation, reported the failure to Mr. Tumilty, and that Mr. Tumilty reminded him of the expected standard. The evidence also shows that the subordinate pharmacist responsible for the failure had never before and has never since done or failed to do anything which Mr. Tumilty knows about which would require supervisory correction.

The evidence which Complainant offers as proof of a pattern of violations of the pharmacist transfer and patient consultation requirement consists entirely of the single proven failure in November 1991, and two transactions partially observed by Mr. Rohland in August 1992. Complainant founds its case on the premise that a pattern of repeated violations compels the inference that Mr. Tumilty has failed to manage the pharmacy in accordance with his duty to comply with the law, and to protect the public safety.

There is no pattern of violations. There is a single, isolated, previously discovered violation which resulted in the discipline of the pharmacist who was on duty, actually present in the pharmacy, at the time the violation took place.

Mr. Rohland's testimony does not prove any violation. At best, it provides a reason to investigate whether there has been a violation, but it does no more than suggest the possibility that there may have been a violation. Mr. Rohland does not know, and therefore cannot say, whether either of the two transactions he observed involved a prescription medication. He observed two unidentified customers each hand a piece of paper to an unidentified employee at the Shopko pharmacy. Nobody knows what was written on either piece of paper. Complainant surmises that each was a scrip for a prescription medication, and implicitly offers as proof of that supposition that the transfer of the pieces of paper took place in a pharmacy in a manner consistent with the delivery of an order for a prescription medication.

Mr. Rohland does not know the identity of the pharmacy employee he observed accept the pieces of paper from the customers. He does not know whether the employee was a pharmacist. He does know that the employee was female, and that she was wearing a blue smock. Mr. Rohland testified that he assumed that the employee was merely a clerk because she was wearing a blue smock. He testified that the basis for his assumption is that he has himself been a customer at a different Shopko pharmacy in another city, and at that other Shopko pharmacy he has been served by a clerk wearing a blue smock.

Mr. Rohland testified that he watched each of the two customers receive and pay for bagged merchandise, and that the customers were again served by the female employee in the blue smock. He heard, from his station about thirty feet away, the statement of the price due. At the time, Mr. Rohland was standing in an open area just inside the pharmacy display from the rest of the Shopko store. His testimony was, "I can't say I listened to every word" spoken by the customer and the employee as the transactions were completed. It is fairly clear that he could not reasonably be expected to have heard the conversation even if he had been straining to listen over the ambient noise of a discount department store just behind him, unless the customer and the employee were fairly yelling at one another across the counter separating them. There is no reason to believe they spoke to each other in unusually loud voices.

Nobody knows what was in the bag that each customer received. Mr. Rohland did not ask. Nobody knows what was said by the employee, whoever it was, to the customers, because Mr. Rohland did not listen to the entire conversation in either event.

The Complainant in this case supposes that the customers ordered and received prescription medications. There is absolutely no basis on which to reject the possibility that the customers in this case were not, instead, ordering a non-prescription item they could not pronounce, or were embarrassed to ask for out loud in a public area, or had been unable to find in the open display, or knew was kept refrigerated, or had been sent to pick up by someone else who had written down for them what to get. The Complainant assumes that the employee who dealt

with the customers Mr. Rohland observed was not a pharmacist. The only basis for the assumption is the color of the smock she was wearing. There is absolutely no basis on which to reject the possibility that the employee was a pharmacist who put on the first smock to hand when taking up a messy task, or to ward off the chill of the air conditioning on that late August day. The testimony on which the Complainant relies for proof of Mr. Tumilty's unprofessional conduct did not even include the name of the person committing the act upon which Complainant would have him convicted.

The only thing the Complainant has proven is that once, out of 83,633 events, a pharmacist under Mr. Tumilty's supervision failed to complete the delivery of a prescription medication to a patient in accordance with the state law and the policies of Shopko Stores, Inc.; and that on that one occasion, Mr. Tumilty did not take strong disciplinary action against his subordinate, but the Pharmacy Examining Board issued a reprimand to the offending pharmacist.

From this single proven failure and the incomplete observation of parts of two other transactions, Complainant extrapolates a continuous pattern of reckless violation of a requirement that only a pharmacist deliver prescription medications to patients, and consult with them about the medication delivered. Complainant argues that Mr. Tumilty's failure to take swift and stinging discipline of the pharmacist who reported to him the pharmacists' own error on the one instance it is proven an error was committed is clear evidence that Mr. Tumilty runs his pharmacy with a loose attitude, and that Mr. Tumilty has thus created an environment where all his subordinates know that reckless disregard of the law is tolerated, if not encouraged.

A more dispassionate view of the evidence is that Mr. Tumilty cannot possibly be physically present at all times the pharmacy is open, and that even if he were, it would be objectively impossible for him to watch every action of every employee under his supervision. It is obvious to me that no supervisor can ever catch or prevent every error of his subordinates, and that the supervisor must depend, to some degree, on the assistance of his subordinates in performing their own supervision. The pharmacist who made the one proven error reported it to his supervisor, who noted it and reminded his subordinate of what they both already knew - it was an error to release a prescription that way. Complainant surmises that Mr. Tumilty created an environment of disrespect for law and public duty by not imposing some notable discipline on the errant pharmacist. I surmise that Mr. Tumilty could readily foresee that none of his subordinates would ever again admit an error to him if he punished the person who reported his own isolated error. The Complainant surmises that Mr. Tumilty did not care enough to correct the error; I surmise that Mr. Tumilty wanted to prevent future errors more than he wanted his subordinates to live in fear of disproportionate reaction to human imperfection.

Complainant recognizes that there is an aspect of a test case about this proceeding, and that aspect has to do with setting the standard of the managing pharmacist's responsibility for the acts of his subordinates when he is absent. Complainant argues that the statute is clear; the managing pharmacist is responsible for the professional operations of the pharmacy, and Mr. Tumilty is therefore responsible for what occurs there while he is gone. The standard Complainant proposes is whether the managing pharmacist has policies and procedures in place which effectively require that all transfers of prescription medications to patients be done by pharmacists, with a consultation. Counsel for the Complainant denies that this is a requirement of strict liability on the part of the managing pharmacist for any imperfect performance by his subordinates, saying that all that is required is a reasonable effort. This very proceeding refutes Complainant's claim by requiring perfection of Mr. Tumilty and his subordinates.

Dated this 1st day of February, 1993.



James E. Polewski
Administrative Law Judge

BDLS2:2793

NOTICE OF APPEAL INFORMATION

(Notice of Rights for Rehearing or Judicial Review,
the times allowed for each, and the identification
of the party to be named as respondent)

The following notice is served on you as part of the final decision:

1. Rehearing.

Any person aggrieved by this order may petition for a rehearing within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes, a copy of which is attached. The 20 day period commences the day after personal service or mailing of this decision. (The date of mailing of this decision is shown below.) The petition for rehearing should be filed with the state of Wisconsin Pharmacy Examining Board.

A petition for rehearing is not a prerequisite for appeal directly to circuit court through a petition for judicial review.

2. Judicial Review.

Any person aggrieved by this decision has a right to petition for judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes, a copy of which is attached. The petition should be filed in circuit court and served upon the State of Wisconsin Pharmacy Examining Board

within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing of this decision is shown below.) A petition for judicial review should be served upon, and name as the respondent, the following: the State of Wisconsin Pharmacy Examining Board.

The date of mailing of this decision is April 22, 1993.