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STATE OF WISCONSIN
BEFORE THE PHARMACY EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST	:	FINAL DECISION AND ORDER (Case No. LS 9504141 PHM)
RICHARD O. HEINZELMAN, R.Ph., RESPONDENT.	:	

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

Richard O. Heinzelman, R.Ph.
676 North Holden Street
Port Washington, WI 53074

State of Wisconsin Pharmacy Examining Board
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

State of Wisconsin Department of Regulation & Licensing
Division of Enforcement
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53709

This matter was commenced by the filing of a Complaint by the Division of Enforcement on April 14, 1995, and a hearing in the matter was conducted on September 21, 1995. Respondent appeared in person and by Attorneys Gerald P. Boyle and Bridget Boyle. Appearing for the Division of Enforcement was Attorney Arthur Thexton. The transcript of the proceedings was received on November 8, 1995.

The administrative law judge filed his Proposed Decision on December 18, 1995. Complainant filed his State's Objections on January 8, 1996, and Respondent filed his Respondent's Objections on January 29, 1996.

On the basis of the entire record, the Pharmacy Examining Board makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Richard O. Heinzelman, R.Ph., 676 North Holden Street, Port Washington, WI 53074 (respondent) is licensed as a pharmacist in Wisconsin by license #7673, granted on September 18, 1964. Respondent is also licensed as a dentist in Wisconsin.

2. Respondent has for a number of years believed that autogenous oral vaccination provides certain health benefits. Pursuant to that belief, respondent in 1994 and 1995 treated his mother by compounding a mixture of small amounts of her sterilized and filtered saliva, skin, urine and feces, which was then taken orally and applied topically. Respondent is a licensed dentist, and provided this treatment in part for conditions of his mother's oral cavity. The Dentistry Examining Board, by its Final Decision and Order dated July 6, 1988, ordered that respondent not engage in this form of treatment to patients. That order states in relevant part as follows:

> IT IS FURTHER ORDERED that Richard O. Heinzelman shall not advertise or engage in treatment of patients by immune therapy or oral vaccines unless he has obtained a written modification of this board order.

3. On November 4, 1994, respondent was employed as a pharmacist at The Pharmacy Station, Port Washington, Wisconsin. On or about that date, Terry Albinger, a coworker, consulted with respondent in his capacity as a pharmacist on recommendations for her acne condition. Respondent, a licensed dentist, prescribed nystatin, an antifungal prescription medication, for the treatment of her acne, and respondent dispensed that prescription. The oral consultation accompanying the prescription was to put a few drops of nystatin into boiling water, make a tent over the head, and permit the vapors to be absorbed into the skin. While the written prescription in evidence carries the notation "swirl and swallow," the prescription was not provided for treatment of a dental problem. Nystatin has no known effect on acne.

4. On March 31, 1995, while employed as a staff pharmacist at Good Valu/Elmwood Pharmacy in Elm Grove, Wisconsin, respondent permitted an unlicensed person to transfer three prescribed medications to patients without consultation by a licensed pharmacist.

CONCLUSIONS OF LAW

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

2. There is insufficient evidence to establish that respondent's treatment of his mother by immune therapy or oral vaccines at various times during 1994 and 1995, violated any provision of the Pharmacy Practice Act or of the board's administrative code.

3. In filling a prescription for nystatin, which was prepared by him in his capacity as a dentist, for the treatment of acne rather than for the treatment of a dental condition, respondent has dispensed a drug other than in the course of legitimate practice, in violation of sec. Phar 10.03(1), Code, and he has thereby violated a rule which substantially relates to the practice of pharmacy, in violation of sec. 450.10(1)(a)2., Stats.

4. Respondent's failure to personally provide a consultation to a patient or agent receiving a prescribed drug or device at the time of transfer to the patient or agent was unprofessional conduct pursuant to sec. Phar 7.01(1)(e), Code. Each and every patient, or patient's agent, must receive a face-to-face consultation from a licensed pharmacist, or supervised intern, at the time a prescribed drug or device is transferred to the patient in the pharmacy, whether the prescription is new or a refilled or renewed prescription. This duty is non-delegable and is not satisfied by having auxiliary staff ask if the patient has questions.

ORDER

NOW, THEREFORE, IT IS ORDERED that the license of Richard O. Heinzelman, R.Ph., to practice as a pharmacist in the State of Wisconsin be, and hereby is, SUSPENDED for a period of 30 days, commencing on the date of this Final Decision and Order.

IT IS FURTHER ORDERED that the license to practice pharmacy of Richard O. Heinzelman, R.Ph., is LIMITED in the following respect: upon completion of the suspension order herein respondent shall not practice pharmacy except under the direct and immediate supervision of another pharmacist, including on a temporary or acting basis, until respondent takes and passes the Wisconsin Practice of Pharmacy Examination, the Wisconsin Law Examination, and the Consultation portion of the Wisconsin Laboratory Practical Examination. Respondent may not take any examination more than twice without express permission of the board, which shall determine in its discretion under what terms and conditions the respondent may attempt an examination after two attempts. Upon proof of passing the examinations, the staff of the department shall notify respondent of such fact, and this limitation shall be removed without formal action by the board.

IT IS FURTHER ORDERED that pursuant to sec. 450.10(2), Stats., Richard O. Heinzelman, R.Ph., is assessed a forfeiture of $250.00.

IT IS FURTHER ORDERED that pursuant to sec. 440.22, Stats., the costs of this proceeding shall be assessed against Richard O. Heinzelman, R.Ph.

EXPLANATION OF VARIANCE

The Pharmacy Examining Board has made two modifications to the ALJ's Proposed Decision. An additional Conclusion of Law has been added to correct an inadvertent omission of the legal conclusion flowing from the ALJ's Finding of Fact #4 that the respondent failed to provide patient consultation. That the ALJ in fact drew such a conclusion is substantiated by the Finding of Fact, itself; the statement in the Opinion that a consultation violation had occurred; and the acknowledgment that the recommended forfeiture was assessed in recognition of it being the standard discipline imposed by the board for a failure to consult. The added Conclusion of Law reads as follows:

> 4. Respondent's failure to personally provide a consultation to a patient or agent receiving a prescribed drug or device at the time of transfer to the patient or agent was unprofessional conduct pursuant to sec. Phar 7.01(1)(e), Code. Each and every patient, or patient's agent, must receive a face-to-face consultation from a licensed pharmacist, or supervised intern, at the time a prescribed drug or device is transferred to the patient in the pharmacy, whether the prescription is new or a refilled or renewed prescription. This duty is non-delegable and is not satisfied by having auxiliary staff ask if the patient has questions.

The board's second modification to the Proposed Decision is to provide an additional requirement that respondent successfully pass the state law, practice of pharmacy and consultation examinations prior to being permitted to practice pharmacy outside the direct supervision and presence of another pharmacist.

The board has accepted the recommendation that the respondent be suspended for a period of thirty days and pay a forfeiture of $250.00, as well as be required to pay the costs of the proceeding. These recommended sanctions clearly serve the disciplinary goals of rehabilitating the respondent and deterring other licensees from engaging in similar misconduct. However, it is the board's opinion that the disciplinary function of public protection also requires that respondent's pharmacy practice be supervised and monitored by another pharmacist upon completion of his suspension, until such time as he demonstrates minimal competence, through examination, to practice pharmacy consistent with the public's health, safety and welfare.

The record in this case indicates that respondent has spent some years away from the practice of pharmacy. It also raises serious questions regarding his knowledge of drug utilization and efficacy, as demonstrated by the prescribing and dispensing of nystatin as well as the testimony of his supervisor. He also failed to provide consultation to patients. Re-examination of respondent prior to permitting him to return to unsupervised pharmacy practice serves the public interest. It will assure that he has the minimal knowledge base and technical proficiency necessary for the public's protection prior to being permitted to practice in unsupervised settings.

Dated this 19th day of February, 1996.

STATE OF WISCONSIN
PHARMACY EXAMINING BOARD

George F. Christiansen, R.Ph.
Chairman

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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.

Serve Petition for Rehearing or Judicial Review on:

STATE OF WISCONSIN PHARMACY EXAMINING BOARD

1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708.

The Date of Mailing this Decision is:

February 22, 1996

1. REHEARING

Any person aggrieved by this order may file a written petition for rehearing within 20 days after service of this order, as provided in sec. 227.49 of the *Wisconsin Statutes*, a copy of which is reprinted on side two of this sheet. The 20 day period commences the day of personal service or mailing of this decision. (The date of mailing this decision is shown above.)

A petition for rehearing should name as respondent and be filed with the party identified in the box above.

A petition for rehearing is not a prerequisite for appeal or review.

2. JUDICIAL REVIEW.

Any person aggrieved by this decision may petition for judicial review as specified in sec. 227.53, *Wisconsin Statutes* a copy of which is reprinted on side two of this sheet. By law, a petition for review must be filed in circuit court and should name as the respondent the party listed in the box above. A copy of the petition for judicial review should be served upon the party listed in the box above.

A petition must be filed within 30 days after service of this decision if there is no petition for rehearing, or within 30 days after service of the order finally disposing of a petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30-day period for serving and filing a petition commences on the day after personal service or mailing of the decision by the agency, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing this decision is shown above.)

STATE OF WISCONSIN
BEFORE THE PHARMACY EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST	:	NOTICE OF FILING PROPOSED DECISION LS9504141PHM
RICHARD O. HEINZELMAN, R.Ph., RESPONDENT.	:	

TO: Gerald P. Boyle, Attorney
1124 W. Wells Street
Suite 2600
Milwaukee, WI 53233
Certified Z 091 396 852

Arthur Thexton, Attorney
Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708

PLEASE TAKE NOTICE that a Proposed Decision in the above-captioned matter has been filed with the Pharmacy Examining Board by the Administrative Law Judge, Wayne R. Austin. A copy of the Proposed Decision is attached hereto.

If you have objections to the Proposed Decision, you may file your objections in writing, briefly stating the reasons, authorities, and supporting arguments for each objection. If your objections or argument relate to evidence in the record, please cite the specific exhibit and page number in the record. Your objections and argument must be received at the office of the Pharmacy Examining Board, Room 178, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708, on or before January 8, 1996. You must also provide a copy of your objections and argument to all other parties by the same date.

You may also file a written response to any objections to the Proposed Decision. Your response must be received at the office of the Pharmacy Examining Board no later than seven (7) days after receipt of the objections. You must also provide a copy of your response to all other parties by the same date.

The attached Proposed Decision is the Administrative Law Judge's recommendation in this case and the Order included in the Proposed Decision is not binding upon you. After reviewing the Proposed Decision, the Pharmacy Examining Board will issue a binding Final Decision and Order.

Dated at Madison, Wisconsin this 18th day of December, 1995.

Wayne R. Austin
Administrative Law Judge

STATE OF WISCONSIN
BEFORE THE PHARMACY EXAMINING BOARD

IN THE MATTER OF
DISCIPLINARY PROCEEDINGS AGAINST

RICHARD O. HEINZELMAN, R.Ph. LS9504141PHM

Respondent

PROPOSED DECISION

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

Richard O. Heinzelman, R.Ph.
676 North Holden Street
Port Washington, WI

State of Wisconsin Pharmacy Examining Board
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

State of Wisconsin Department of Regulation & Licensing
Division of Enforcement
1400 East Washington Avenue
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This matter was commenced by the filing of a Complaint by the Division of Enforcement on April 14, 1995, and a hearing in the matter was conducted on September 21, 1995. Respondent appeared in person and by Attorneys Gerald P. Boyle and Bridget Boyle. Appearing for the Division of Enforcement was Attorney Arthur Thexton. The transcript of the proceedings was received on November 8, 1995.

Based upon the entire record in this case, the administrative law judge recommends that the Pharmacy Examining Board adopt as its final decision in the matter the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Richard O. Heinzelman, R.Ph., 676 North Holden Street, Port Washington, WI 53074 (respondent) is licensed as a pharmacist in Wisconsin by license #7673, granted on September 18, 1964. Respondent is also licensed as a dentist in Wisconsin.

2. Respondent has for a number of years believed that autogenous oral vaccination provides certain health benefits. Pursuant to that belief, respondent in 1994 and 1995 treated his mother by compounding a mixture of small amounts of her sterilized and filtered saliva, skin, urine and feces, which was then taken orally and applied topically. Respondent is a licensed dentist, and provided this treatment in part for conditions of his mother's oral cavity. The Dentistry Examining Board, by its Final Decision and Order dated July 6, 1988, ordered that respondent not engage in this form of treatment to patients. That order states in relevant part as follows:

> IT IS FURTHER ORDERED that Richard O. Heinzelman shall not advertise or engage in treatment of patients by immune therapy or oral vaccines unless he has obtained a written modification of this board order.

3. On November 4, 1994, respondent was employed as a pharmacist at The Pharmacy Station, Port Washington, Wisconsin. On or about that date, Terry Albinger, a coworker, consulted with respondent in his capacity as a pharmacist on recommendations for her acne condition. Respondent, a licensed dentist, prescribed nystatin, an antifungal prescription medication, for the treatment of her acne, and respondent dispensed that prescription. The oral consultation accompanying the prescription was to put a few drops of nystatin into boiling water, make a tent over the head, and permit the vapors to be absorbed into the skin. While the written prescription in evidence carries the notation "swirl and swallow," the prescription was not provided for treatment of a dental problem. Nystatin has no known effect on acne.

4. On March 31, 1995, while employed as a staff pharmacist at Good Valu/Elmwood Pharmacy in Elm Grove, Wisconsin, respondent permitted an unlicensed person to transfer three prescribed medications to patients without consultation by a licensed pharmacist.

CONCLUSIONS OF LAW

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

2. There is insufficient evidence to establish that respondent's treatment of his mother by immune therapy or oral vaccines at various times during 1994 and 1995, violated any provision of the Pharmacy Practice Act or of the board's administrative code.

3. In filling a prescription for nystatin, which was prepared by him in his capacity as a dentist, for the treatment of acne rather than for the treatment of a dental condition, respondent has dispensed a drug other than in the course of legitimate practice, in violation of sec. Phar

10.03(1), Code, and he has thereby violated a rule which substantially relates to the practice of pharmacy, in violation of sec. 450.10(1)(a)2., Stats.

ORDER

NOW, THEREFORE, IT IS ORDERED that the license of Richard O. Heinzelman, R.Ph., to practice as a pharmacist in the State of Wisconsin be, and hereby is, suspended for a period of 30 days, commencing on the date of the board's Final Decision and Order adopting the terms of this Proposed Decision.

IT IS FURTHER ORDERED that pursuant to sec. 450.10(2), Stats., Richard O. Heinzelman, R.Ph., is assessed a forfeiture of $250.00.

IT IS FURTHER ORDERED that pursuant to sec. 440.22, Stats., the costs of this proceeding shall be assessed against Richard O. Heinzelman, R.Ph.

OPINION

Treatment of Norma Heinzelman by the Respondent

The Complaint filed by the Dentistry Examining Board alleges that the treatment provided by respondent to his mother constituted use of immune therapy or oral vaccines, in violation of that board's previous order dated July 6, 1988. Respondent denies that what he refers to as his homeopathic treatment of his mother is the same as that which the dentistry board previously prohibited. Whether it was or was not is largely irrelevant to the pharmacy board's consideration of the practice. What is relevant is whether that treatment constitutes "conduct in the practice of pharmacy which evidences a lack of knowledge or ability to apply professional principles and skills," in violation of sec. 450.10(1)(a)6., Stats., or "engaging in any pharmacy practice which constitutes a danger to the health, welfare or safety of patient or public," in violation of sec. Phar 10.03(2), Code.

Respondent's testimony to the contrary at hearing notwithstanding, there doesn't appear to be much question that the therapy administered to respondent's mother was intended to benefit more than her mouth and therefore went beyond the practice of dentistry. See, *inter alia*, respondent's comments in his letter of August 12, 1994, admitted as Exhibit 6, that the treatment "reduce[s] foreign microbes from the body thereby improving the oral health, and possibly the general health of the patient." But that respondent's treatment of his mother may have exceeded the scope of the practice of dentistry does not lead to the conclusion that he was practicing pharmacy. Rather, the more likely conclusion is that he was engaged in the practice of medicine. If so, then he provided treatment pursuant to a specific exception to the requirement for a medical license at sec. 448.03(2)(h) of the Medical Practices Act for "the gratuitous domestic administration of family remedies."

It could be argued, though it wasn't, that the nexus between respondent's treatment of his mother and the practice of pharmacy was that respondent created the oral vaccine administered to her. It

seems somewhat questionable that the process respondent describes, as set forth in Finding of Fact #2, above, fits the definition of "compound" at sec. 450.01(3), Stats. To the extent it does, there is no evidence in this record that he compounded the various ingredients of his autovaccine incompetently, or that the manner in which those ingredients were compounded constituted a danger to the health, safety or welfare of his mother. There is probably a question as to the efficacy of that treatment modality. But the treatment's efficacy is not an issue raised by the Complaint in this matter and, in any event, it would be a stretch to conclude that the efficacy of the treatment bears on respondent's practice of pharmacy.

Treatment of Acne with Nystatin.

In his deposition on September 8, 1995, and in his testimony at hearing, respondent claims that he prescribed nystatin for Terry Albinger, a clerk at The Pharmacy Station, the pharmacy where they were both employed, for a dental condition rather than for acne. That testimony is not credited. At deposition, respondent testified that Ms. Albinger had complained to him of a sore mouth, and that he examined her mouth, finding a white film about the size of a dime or smaller inside the cheek on the left side, indicating a "fungal lesion." Following the testimony of the state's expert, Kathleen Kelly, D.D.S., that nystatin is indicated for the treatment of thrush (tr., p.63), respondent testified at hearing as follows:

> Q. (by Mr. Thexton) And what was the dental purpose for which you suggested that she put a pinch of nystatin in the water and breathe the vapors?
>
> A. I -- It was certainly secondary. And I believe that I did read somewhere in a paper at some point that it was beneficial.
>
> Q. Beneficial to what?
>
> A. To combat thrush fungal infection.
>
> Q. Did you in fact diagnose her as having thrush or some other fungal infection in her mouth?
>
> A. It was -- it was thrush.
>
> Q. You diagnosed her as having thrush?
>
> A. Yes. (Tr., p. 115)

Dr. Kelly described the symptoms of thrush as follows:

> Q. (by Mr. Thexton) Dr. Kelly, I wonder if you would describe for us the symptoms of thrush?
>
> A. Generally, you suspect that diagnosis when you see a white coating on the tongue or inside the mouth.

Q. Would round lesions, one or more, indicate thrush at all?

A. Not that I'm aware of.

Respondent did, of course, have considerable motivation to testify that he was providing services for a dental condition suffered by Ms. Albinger. If he wasn't, then his preparation of a prescription for nystatin, and his dispensing of that medication pursuant to that prescription, would constitute unprofessional conduct under both licenses. Ms. Albinger, on the other hand, had no discernible motive for misrepresenting her interactions with the respondent. Excerpts from her testimony include the following:

> Dick [Heinzelman] and I had been talking about health foods. Previously, in his -- one of his other jobs, he had worked in a pharmacy where they had a lot of health foods, a lot of vitamins and things like that. He believed in that. He thought that would be a good concept for our store, for our drug store, to get more of that in because people were more -- becoming more aware of health foods. And natural vitamins and taking better care of themselves. In our conversation I had mentioned to him, gee, I'm in my 40's, I still break out, you know. Why should a person in their 40's still have acne like this. And he mentioned there was nothing really over-the-counter to use, except a prescription that he said would be nystatin. I trusted him as a pharmacist and as a co-worker. He told me he would give me a prescription for it, that I was to boil a kettle of water and put a few drops of this in, to make a tent over it and steam my face. And that would help me. And so I believed him. (tr., pp. 9-10)

> After our conversation, Dick made a prescription up for me. He gave it to me and said to put it in the refrigerator . . . . Dick left his shift. Laura White, the manager pharmacist of the store, had come in to relieve him from his shift. After a while I mentioned it to her that Dick gave me this. And our conversation. And I said to her I felt a little uneasy about it. (tr., p. 11)

Ms. Albinger also testified that respondent did not conduct any examination of any kind, including any examination of her oral cavity, and that he did not discuss her health or dental history with her prior to providing the prescription to her.

Laura White was the managing pharmacist at The Pharmacy Station on the day in question. Her testimony at hearing supported that of Ms. Albinger:

> I came into work and Terry asked me about some nystatin powder that she was told to use. At the time I didn't agree with the use. Thought it was just one person giving advice to another person, and told her to forget about it, and just throw it away, whatever it was. (tr., p. 27)

> When I came in she brought up the nystatin powder and said that she was told to put some in boiling water and let the steam soak into her pores. I didn't think it made any sense to me as far as what the nystatin powder would do for adult acne is what she told me she was questioning. And that's why I told her forget the thing. (tr., pp. 27-28)

Respondent did admit in his testimony that he may have mentioned to Ms. Albinger the possibility that nystatin might help her acne condition.

> Q. (by Ms. Boyle) Did you mention anything to Terry Albinger -- or did she mention anything about the acne problem at that time?
>
> A. We discussed it, yes.
>
> Q. And what did she say?
>
> A. We discussed it a number of times. And I remember her talking about it. And I said I had heard that that was a possibility it might help it, but that was not the primary motive for my treating her with nystatin because it's just not a legitimate form of treatment for acne.
>
> Q. You just heard that it might?
>
> A. I heard that at one time. (tr., pp. 102-103)

In fact, respondent had not merely "heard" that nystatin might help acne, he was a proponent of its use for that purpose. In a paper he wrote in 1986 and updated in 1987 on the subject of "Immune Therapy" (Exh. 5), he presented the following anecdotal testimony:

> I had another patient, a young boy, place nystatin powder in water, boil it, and breathe in the vapors. My rationale was to eliminate the yeast of fungi over as large an area as possible, including the lungs, to attempt to decrease the total stress on the immune organs. An interesting situation occurred. After breathing the vapors, his rather severe acne problem cleared up.
>
> * * * *
>
> I, myself, tried breathing in nystatin vapors right after I developed a severe chest pain. This problem never reoccurred.
>
> After doing this, breathing in nystatin vapors, I noticed the blemishes on my skin disappeared, and the dry areas cleared up. It also improved my dandruff problem. These conditions returned after I discontinued the nystatin vapors.

Based first upon the credible testimony of Terry Albinger and of Laura White as to the circumstances of and purpose for respondent's preparing the prescription for nystatin; second, upon respondent's previous claims as to the benefits of nystatin vapor in treating acne and other skin problems; and third, upon respondent's inconsistent testimony as to the nature of Ms. Albinger's problem and his diagnosis thereof; it is concluded that Ms. Albinger sought assistance from respondent exclusively for her acne condition and that respondent's recommended treatment was directed exclusively to that condition. If so, then his attempt to treat Ms. Albinger's acne exceeded the scope of both dentistry and pharmacy, the prescription for nystatin

prepared by him was not a valid prescription, and he improperly dispensed the medication pursuant to that invalid prescription.[1]

The Consulting Issue

Department investigator Steven Rohland testified that on March 31, 1995, he went to the Elmwood Pharmacy in Milwaukee, where respondent was then employed. He further testified that he observed three transactions whereby customers requested their prescriptions, that medications were dispensed from the pharmacy area by a person other than respondent, and that respondent did not provide any consultation. In his testimony, respondent conceded that he was the only pharmacist on the premises at that time. While Mr. Rohland did not actually see either the prescriptions, the preparation of the medications, or the labels on the medication containers, he testified that he heard each of the three customers ask for their "prescriptions," and that they were dispensed from the pharmacy area. There is thus a preponderance of evidence that the medications were in fact prescription drugs.

In his testimony, respondent conceded that he does not consult with each and every person to whom a prescription is dispensed. His further testimony included the following:

> Q. (by Mr. Boyle) Is it impossible for a pharmacist to consult with every person that comes in?
>
> A. Yes.
>
> Q. Why is that?
>
> A. It's not always convenient. It's not always necessary. Some people become very angry when you consult with them. . . . I mean I believe it's helpful. And I do the best I can. And I know I do as well if not better than the other pharmacists that I've met. And -- I guess what else can I say. (tr., pp. 104-105)

Dr. Heinzelman is not the first respondent in either this or other disciplinary proceedings to testify as to the difficulty of consulting in each and every instance, and he will undoubtedly not be the last. The testimony of Laura White, managing pharmacist at the Pharmacy Station, is interesting in that regard.

> Q. (by Ms. Boyle) Do you consult?
>
> A. I try my best.
>
> Q. So you don't consult every single time you deliver a prescription?

[1] As stated in the Findings of Fact, the actual prescription document admitted at hearing carries the hand-written notation "swirl & swallow" accross one corner of the prescription form. There is no satisfactory evidence in this record as to when that notation was added.

A. on new prescriptions, yes. On the refills, I am not perfect. I have been fined myself for that -- for that practice. And I know probably every other pharmacist in the state does not counsel on all their refills. (tr., p. 30)

It may be worth noting that the Dentistry board's complaint in this matter was filed on March 20, 1995, and the pharmacy board's Complaint was filed on April 14, 1995. The investigation of respondent's consulting practices occurred on March 31, 1995. The only allegation in the pharmacy Complaint which does not appear in the dentistry Complaint is the consulting allegation, and the timing of these events is thus interesting in light of the testimony cited above. But whether or not the purpose of the investigation and resulting charge of failure to consult was undertaken merely to create a makeweight issue does not alter the fact that there is satisfactory evidence that the violation occurred.

Discipline

It is well established that the purposes of licensee discipline in Wisconsin are to protect the public, to deter other licensees from engaging in similar conduct, and to promote the rehabilitation of the licensee. *State v. Aldrich,* 71 Wis. 2d 206 (1976). Punishment of the licensee is not an appropriate consideration. *State v. McIntyre*, 41 Wis. 2d 481 (1969). The prosecutor indicated in his closing argument that the standard discipline imposed by the board for failure to consult is a forfeiture of $250. The board has apparently decided that this forfeiture satisfactorily meets the disciplinary objectives, and the undersigned would certainly not argue with that proposition.

As to the other violation found, the prosecutor urges a whole series of limitations, including supervision of respondent's practice and successful completion of the various pharmacy examinations. The basis for this recommendation was said in closing arguments to be the testimony of Laura White, the managing pharmacist at The Pharmacy Station, who described one incident which made her uncomfortable about respondent's current knowledge base in terms of newer medications. Ms. White's testimony as to a single event is hardly sufficient to support a finding of incompetent practice of pharmacy, even if that event had been alleged in the Complaint.

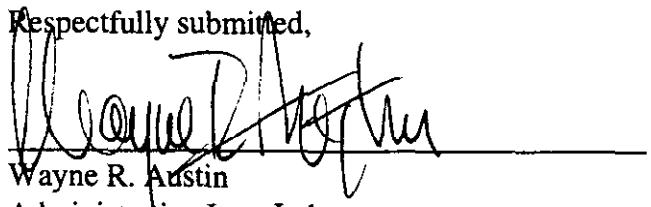
Running throughout this case, however, is the suggestion that respondent's conduct involving Terry Albinger demonstrates, in and of itself, incompetence in the practice pharmacy. The efficacy of the use of nystatin vapor as a treatment modality for Ms. Albinger's acne is certainly in question, but there is no expert testimony in this record establishing that it is not. Complainant's expert testified that treatment of acne does not fall within the scope of dentistry and that nystatin is used in dentistry for treatment of thrush; she did not testify as to its possible uses outside the field of dentistry. Ms. White testified that nystatin is "used quite frequently for things like diaper rash, other topical fungal rashes. Things like that. Most commonly. There could be other uses, but that's the -- its real common use." Finally, respondent conceded in his answer that nystatin vapor "has no known effect on acne," and conceded in his testimony that treatment of acne by the use nystatin vapors "is not a legitimate form of treatment for acne." One is tempted to put all that together and conclude that as a licensed pharmacist, respondent should have known that he was prescribing an ineffective treatment. Again, however, the expert

testimony establishing that Ms. Albinger did in fact suffer from adult acne, and that the use of nystatin vapors is not and could not be effective for that skin condition, is missing from this record.

Respondent's conduct in recommending and prescribing nystatin for treatment of acne was improper because it exceeded the scope of practice of both pharmacy and dentistry. But based on this record, it was no more improper than if he had correctly diagnosed and treated the condition. Accordingly, in subserving the disciplinary goals of rehabilitating the respondent and deterring other licensees from engaging in similar improper conduct, a 30 day suspension of the license seems appropriate.

Dated this 18th day of December 1995.

Respectfully submitted,



Wayne R. Austin
Administrative Law Judge

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STATE OF WISCONSIN
BEFORE THE PHARMACY EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST

LS9504141PHM

RICHARD O. HEINZELMAN, R.Ph.,

Respondent

AFFIDAVIT OF COSTS
OFFICE OF BOARD LEGAL SERVICES
(SEC. 440.22, STATS.)

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Wayne R. Austin, being first duly sworn on oath, deposes and states as follows:

1. Your affiant is an attorney licensed to practice law in the State of Wisconsin, and is employed by the Wisconsin Department of Regulation & Licensing, Office of Board Legal Services.

2. In the course of his employment, your affiant was assigned as administrative law judge in the above-captioned matter.

3. Set out below are the actual costs of the proceeding for the Office of Board Legal Services in this matter. Unless otherwise noted, all times commence at the start of the first five minute period following actual start of the activity, and terminate at the start of the first five minute period prior to the actual end of the activity. Because the matter before the Dentistry Examining Board and the Pharmacy Examining Board were consolidated for the purposes of hearing, various activities were not and could not be separately documented. The times set forth below are therefore the total time expended for both matters, and the final total cost for each matter represents one-half the total expenditure for both matters.

ADMINISTRATIVE LAW JUDGE EXPENSE

DATE & TIME SPENT	ACTIVITY
4/13/95 10 minutes	Draft Notice of Prehearing Conference
5/10/95 15 minutes	Conduct prehearing conference

5/10/95 15 minutes	Draft Prehearing Memorandum
9/21/95 5 hours, 50 minutes	Conduct Hearing
12/7/95-12/18/95 3 hours, 36 minutes	Prepare Proposed Decision
Total Time Spent	10 hours 6 minutes

Total administrative law judge expense for Wayne R. Austin:
10 hours, 6 minutes @ $43.45, salary and benefits $438.84

REPORTER EXPENSE
Magne-Script

DATE & TIME SPENT	ACTIVITY
9/29/95	Record hearing; prepare transcript

Total billing from Magne-Script reporting service (Invoice #9333, dated 11/12/95) $689.30

TOTAL ASSESSABLE COSTS FOR THE OFFICE OF BOARD LEGAL SERVICES: $1128.14

TOTAL ASSESSABLE COSTS FOR THE OFFICE OF BOARD LEGAL SERVICES ATTRIBUTABLE TO PROCEEDINGS BEFORE THE PHARMACY EXAMINING BOARD **$564.07**

Wayne R. Austin, Administrative Law Judge

Sworn to and subscribed before me this 1ST day of APRIL, 1996.

Notary Public, State of Wisconsin
My commission is permanent

WRA:9603293.doc

STATE OF WISCONSIN
BEFORE THE PHARMACY EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST RICHARD O. HEINZELMAN, R.PH., RESPONDENT.	: : : : :	**AFFIDAVIT OF COSTS** 94 PHM 83

STATE OF WISCONSIN)
COUNTY OF DANE)

I, Arthur Thexton, being on affirmation, say:

1 That I am an attorney licensed in the state of Wisconsin and am employed by the Wisconsin Department of Regulation and Licensing, Division of Enforcement;

2. That in the course of those duties I was assigned as a prosecutor in the above-captioned matter; and

3. That set out on the attached record are the costs of the proceeding accrued to the Division of Enforcement in this matter, based upon Division of Enforcement records compiled in the regular course of agency business in the above-captioned matter, and based on attorney fees of $41 per hour, an investigator time rate of $20 per hour, and a mileage rate of $.25 per mile.

Arthur Thexton, Prosecuting Attorney

Subscribed to and affirmed before me this ~~12th~~ 26 day of ~~January~~ February, 1996.

Notary Public
My Commission is permanent.

akt
75

STATE OF WISCONSIN
Department of Regulation & Licensing
Division of Enforcement
1400 East Washington Avenue
Madison, WI 53708-8935

Richard O. Heinzelman
676 N. Holden Street
Port Washington, WI 53074

94 PHM 83 (LS 9504141 PHM)

		HOURS
07/05/94		
	AKT Receive and review informal complaint; screen.	.50
07/14/94		
	INV Receive and review file.	.25
07/19/94		
	INV Review file with Board Advisor.	.50
07/22/94		
	INV Telephone conference with complainant.	.50
07/29/94		
	INV Traveled to Port Washington, contacted respondent. Return, discuss case with Prosecuting Attorney, prepare Request for Subpoena.	3.50
	AKT Conference with Inv. Johnson re: Investigative Subpoena. Prepare and issue same.	.60
08/01/94		
	INV Traveled to Port Washington, met and interviewed respondent's mother.	3.50
08/08/94		
	INV Traveled to Port Washington, serve subpoena on respondent.	6.00
08/12/94		
	INV Conference with Prosecuting Attorney and respondent.	1.00
	AKT Conference with Inv. Johnson and respondent: review materials provided.	2.00
09/06/94		
	INV Review entire file. Prepare PIC memo.	3.00
11/22/94		
	AKT Received and reviewed correspondence from respondent, review file.	.30

Richard O. Heinzelman

94 PHM 83 (LS 9504141 PHM)

			HOURS
02/09/95			
	AKT	Letter to respondent with proposed stipulation drafted for conference.	1.30
02/16/95			
	AKT	Conference with respondent. Deliver letter with proposed stipulation.	.60
	INV	Conference with respondent and Prosecuting Attorney. Travel to Milwaukee, search for witnesses.	6.00
02/23/95			
	INV	Traveled to Milwaukee, interview F. Boris R.Ph., R. Fons R.Ph., and N. Acker.	4.00
02/24/95			
	INV	Traveled to Milwaukee, interview S. Ziebell R.Ph. and obtain prescription and profile records.	4.00
03/09/95			
	INV	Telephone conference with T. Albinger, memo of same.	.50
03/10/95			
	INV	Traveled to Milwaukee, meet with T. Albinger, obtain written statement.	4.00
03/24/95			
	AKT	Review file. Send materials to Board Advisor.	.50
03/29/95			
	AKT	Telephone conference with Board Advisor. Letter to Atty Boyle with new proposed stipulation.	2.00
03/31/95			
	INV	Traveled to Milwaukee to observe consultations at Elmwood Pharmacy. Return and dictate memo.	4.00
04/07/95			
	AKT	Received and reviewed correspondence from Atty Boyle.	.30
04/10/95			
	AKT	Draft Complaint and Notice of Hearing, prepare for service.	1.50
05/08/95			
	AKT	Received and reviewed correspondence from Atty Boyle (Answer).	.30

Richard O. Heinzelman

94 PHM 83 (LS 9504141 PHM)

			HOURS
05/10/95			
	AKT	Prehearing conference with Atty Boyle and ALJ. Telephone conference with Atty Boyle.	.40
05/18/95			
	AKT	Received and reviewed correspondence from Atty Boyle (witness list). Ltr to Atty Boyle (State's Witness List).	.50
08/16/95			
	AKT	Received and reviewed correspondence from Atty Boyle (final witness list).	.30
09/05/95			
	AKT	Deposition and trial preparation.	2.50
09/08/95			
	AKT	Traveled to Milwaukee, depose respondent, return.	4.50
	AKT	Telephone conference with T. Albinger.	.40
09/12/95			
	AKT	Received and reviewed correspondence from court reporter (depo transcript). Review file. Trial preparation.	1.00
09/19/95			
	AKT	Telephone conference with Atty B. Boyle. Trial preparation.	4.00
09/20/95			
	AKT	Trial preparation.	6.50
09/21/95			
	AKT	Conduct trial.	8.50
12/19/95			
	AKT	Received and reviewed correspondence from ALJ (proposed decision). Letter to BA, draft objections.	2.50
12/21/95			
	AKT	Telephone conference with Board Advisor, work on draft objections.	.50
01/08/96			
	AKT	Finalize and file Objections.	1.00
01/30/96			
	AKT	Received and reviewed correspondence from Atty Boyle (respondent's objections).	.30

Richard O. Heinzelman

94 PHM 83 (LS 9504141 PHM)

		HOURS	
02/22/96			
AKT	Received and reviewed correspondence from Board (Final Decision and Order).	.30	
02/26/96			
AKT	Prepare affidavit of costs.	2.00	
	FOR CURRENT SERVICES RENDERED	85.85	2664.10
07/29/94	Mileage for Inv. Johnson for trip to Port Washington.		40.00
08/01/94	Mileage for Inv. Johnson for trip to Port Washington.		40.00
08/08/94	Mileage for Inv. Johnson for trip to Port Washington area.		40.00
02/10/95	Mileage for Inv. Johnson trip to Port Washington (interview T. Albinger).		40.00
02/16/95	Mileage for Inv. Johnson trip to Milwaukee and area.		50.00
02/23/95	Mileage for Inv. Johnson for trip to Milwaukee.		40.00
02/24/95	Mileage for Inv. Johnson for trip to Milwaukee.		40.00
03/31/95	Mileage for Inv. Rohland trip to Elmwood Phmcy.		40.00
09/08/95	Mileage to Milwaukee for Atty Thexton for respondent's deposition.		40.00
09/12/95	Deposition of respondent on 9/8/95.		339.50
09/21/95	Witness fees and mileage (L. Andersen-White R.Ph.)		43.00
09/21/95	Witness fees and mileage (T. Albinger).		42.20
	TOTAL COSTS		794.70
	BALANCE DUE		$3,458.80

The above records are kept in the ordinary course of business by the Division and are assessable under s.440.22, Wis. Stats. Hourly rates of $41/attorney and