

WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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STATE OF WISCONSIN
BEFORE THE PHARMACY EXAMINING BOARD

IN THE MATTER OF :
DISCIPLINARY PROCEEDINGS AGAINST :
WESTBY PHARMACY : FINAL DECISION AND ORDER
and :
GARY W. MILLER, R.Ph., : LS# 0701251 PHM
RESPONDENTS. : LS # 0702231 PHM

Division of Enforcement Case numbers
05 PHM 056, 05 PHM 075, 06 PHM 029, 06 PHM 035,
06 PHM 046, 06 PHM 062, 07 PHM 003

The parties to this action for the purposes of Wis. Stat. § 227.53 are:

Gary W. Miller, R.Ph.
104 W. State Street
Westby, WI 54667

Westby Pharmacy
c/o Gary W. Miller
104 W. State Street
Westby, WI 54667

Division of Enforcement
Department of Regulation and Licensing
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708-8935

Pharmacy Examining Board
Department of Regulation & Licensing
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708-8935

PROCEDURAL HISTORY

A disciplinary proceeding was commenced in this matter by the filing of a Notice of Hearing and Complaint with the Pharmacy Examining Board on January 25, 2007. A second Complaint was filed, along with a motion to consolidate the two complaints, on February 23, 2007. Prior to the hearing on the motion to consolidate and prior to the hearing or hearings on the Complaints, the parties in this matter agreed to the terms and conditions of the attached Stipulation as the final disposition of this matter, subject to the approval of the Board. The Board has reviewed this Stipulation and considers it acceptable.

Accordingly, the Board in this matter adopts the attached Stipulation and makes the following:

FINDINGS OF FACT

1. Gary W. Miller, R.Ph., (DOB 06/18/1941) is duly licensed as a pharmacist in the state of Wisconsin (license # 40-7383). This license was first granted on September 18, 1964.
2. Respondent Miller's most recent address on file with the Wisconsin Pharmacy Examining Board is 104 W. State Street, Westby, Wisconsin, 54667.
3. Respondent Westby Pharmacy is duly licensed as a pharmacy in the state of Wisconsin (license # 42-5674).
4. Respondent Westby Pharmacy is located at 104 W. State Street, Westby, Wisconsin, 54667.
5. Respondent owns Westby Pharmacy in Westby, Wisconsin. Respondent is the only pharmacist employed at that pharmacy on a regular basis.

Respondent Allowed Non-Pharmacists to Dispense Medications

6. Respondent Miller has, on many occasions, left the pharmacy in the hands of non-pharmacist staff, including under-aged store employees. Those employees have access to the pharmacy professional area and dispense medications to customers when no pharmacist is present in the pharmacy.
7. The only bathroom in Westby Pharmacy is located inside the professional area of the pharmacy. Non-pharmacist staff have access to a key to the professional area so that they can access the bathroom when the professional area is closed.
8. Respondent Miller has, on many occasions, employed relief pharmacists who did not have valid Wisconsin pharmacist licenses.

Respondent Dispensed Prescription Medications, Including Narcotics, Without Prescriptions

9. Respondent Miller has dispensed prescription medications, including narcotics, without prescriptions on many occasions. For example:
 - (a) Former employee E.D. alleged that Respondent supplied her with approximately 50-60 hydrocodone pills without a prescription. Respondent denies the quantity but admits that he gave E.D. one tablet of hydrocodone without a prescription, "to get her through her shift" when she had back pain. Medical and pharmacy records support E.D.'s assertion.
 - (b) Respondent admits that he gave customer M.C. six tablets of Flexeril without a prescription.
 - (c) Respondent admits that he gave another customer who was vacationing in Westby two to three tablets of a medication he cannot recall to get them through their vacation.
 - (d) Respondent admits that he continued to refill Depakote for customer D.W. from November 2004 to October 2005 without a prescription, in error. This error caused a life-threatening condition.

Medication Errors

10. Respondents have made multiple medication errors, including:
 - (a) Continuing to refill Depakote for customer D.W. from November 2004 to October 2005 without a prescription, causing a life-threatening condition;
 - (b) Shorting customer A.V. between 6-10 pills;

- (c) Ignoring customer L.S.'s prescribed requirement that her medication come from a certain manufacturer due to an allergic reaction to a second manufacturer's pills, on at least three occasions.
- (d) Shorting customer M.H.'s prescription by 2-3 pills on at least two occasions.

Unsanitary Conditions

11. Respondent Miller allowed his dog to have free run of the pharmacy on a regular basis. Customers witnessed the dog urinating on the pharmacy floor numerous times.

Practice Without A Valid License

12. Respondent Miller's license expired on June 13, 2006. He renewed his license on July 13, 2006. Respondent Miller continued to practice during the month that his license was expired.

Invalid and Illegal Dispensing of Narcotics

13. Beginning in or about December of 1996, Respondents began filling prescriptions for narcotics for patient C.W., most of which were written by Dr. W.C. Respondents continued filling narcotics prescriptions for C.W. until June 21, 2005.

14. The prescription profile for patient C.W., the original prescriptions written for C.W. by Dr. W.C., and C.W.'s medical records from Dr. W.C., show that Respondent Miller:

- (a) refilled prescriptions for narcotics when no refills were permitted or when the number of allowable refills had already occurred;
- (b) refilled a narcotic prescription more times than allowed by law;
- (c) refilled narcotic prescriptions early;
- (d) dispensed narcotics in different concentrations than were prescribed;
- (e) dispensed narcotics in larger amounts than prescribed;
- (f) dispensed narcotics on refills in larger amounts than originally prescribed;
- (g) dispensed a different medication than was written on the referenced prescription number, and refilling that same medication on that same prescription number;
- (h) dispensed narcotics under one physician's name but with another physician's DEA number on them;
- (i) dispensed narcotics pursuant to alleged telephone prescriptions when those prescriptions have no corresponding entry in the medical records and when the physician denies issuing the prescription;
- (j) failed to read and interpret a prescriber's direction for use and accurately transferring those instructions to the prescription label;
- (k) refilled a label prescription with reference to an original prescription that does not exist;
- (l) failed to recognize that his dispensing of Hydrocodone 7.5 mg/APAP 750 when Hydrocodone 7.5mg/APAP 325 was prescribed, when taken according to directions, resulted in the patient taking well over the maximum threshold of 4 grams of acetaminophen allowable per day for patient safety.

CONCLUSIONS OF LAW

1. The Wisconsin Pharmacy Examining Board has jurisdiction to act in this matter, pursuant to Wis. Stat. §450.10, and is authorized to enter into the attached Stipulation and Order, pursuant to Wis. Stat. § 227.44(5).

2. The conduct described in paragraph 6 above constitutes a violation of Wisconsin Administrative Code §§ Phar 7.01(1)(e) and (em), Phar 10.03(1), Phar 10.03(2), Phar 10.03(10) and Wis. Stat. §§ 450.09(2), 450.10(1)(a)2 and 450.10(1)(a)6 and subjects respondent to discipline pursuant to Wis. Stat. § 450.10(1)(b)1.

3. The conduct described in paragraph 7 above constitutes a violation of Wisconsin Administrative Code §§ Phar 6.04 and Phar 10.03(2) and Wis. Stat. §§ 450.10(1)(a)2 and 450.10(1)(a)6, and subjects respondent to discipline pursuant to Wis. Stat. § 450.10(1)(b)1.

4. The conduct described in paragraph 8 above constitutes a violation of Wisconsin Administrative Code §§ Phar 10.03(2) and 10.03(10) and Wis. Stat. §§ 450.10(1)(a)2 and 450.10(1)(a)6, and subjects respondent to discipline pursuant to Wis. Stat. § 450.10(1)(b)1.

5. The conduct described in paragraph 9 above constitutes a violation of Wisconsin Administrative Code §§ Phar 7.01(1), Phar 8.05(2), Phar 10.03(1), Phar 10.03(2) and Wis. Stat. § 450.10(1)(a)2 and 6 and subjects respondent to discipline pursuant to Wis. Stat. § 450.10(1)(b)1.

6. The conduct described in paragraph 10 above constitutes a violation of Wisconsin Administrative Code §§ Phar 10.03(1), Phar 10.03(2), Phar 10.03(7), Phar 10.03(7m) and Wis. Stat. § 450.10(1)(a)6 and subjects respondent to discipline pursuant to Wis. Stat. § 450.10(1)(b)1.

7. The conduct described in paragraph 11 above constitutes a violation of Wisconsin Administrative Code §§ Phar 10.03(2), and Wis. Stat. §§ 450.09(4), 450.10(1)(a)2 and 450.10(1)(a)6 and subjects respondent to discipline pursuant to Wis. Stat. § 450.10(1)(b)1.

8. The conduct described in paragraph 12 above constitutes a violation of Wisconsin Administrative Code §§ Phar 10.03(19), and subjects respondent to discipline pursuant to Wis. Stat. § 450.10(1)(b)1.

9. The conduct described in paragraph 7 above constitutes a violation of Wisconsin Administrative Code §§ Phar 7.01, 7.07(2), 7.07(4), Phar 8.04, Phar 8.05, Phar 8.06, Phar 10.03(1), Phar 10.03(2), Phar 10.03(3) and Wis. Stat. § 961.38(3), and subjects respondents to discipline pursuant to Wis. Stat. § 450.10(1)(b)1, § 450.10(1)(a)6 and § 450.10(1)(a)2.

ORDER

IT IS ORDERED:

1. The stipulation of the parties is approved.
2. The Pharmacy Examining Board accepts the surrender of Gary W. Miller's license to practice as a pharmacist in the state of Wisconsin (license # 40-7383).
3. In the event that Respondent Miller applies for Wisconsin licensure as a pharmacist in the future, or applies to own a Wisconsin pharmacy in the future, the Board will enter an order denying any such application without further notice or hearing.
4. Respondent Miller must sell Westby Pharmacy. Respondent Miller must have a signed offer for the sale of the pharmacy by April 11, 2007. If Respondent Miller provides proof to the Board Monitor by April 12, 2007 that he has a signed offer for the sale of the pharmacy, the Board or its designee may extend the license for Westby Pharmacy pending the closing of the sale at its or its designee's discretion. If Respondent Miller does not provide proof by April 12, 2007 that he has a signed offer for the sale of the pharmacy, the license of Westby Pharmacy may be suspended, without further notice or hearing, by the board or its designee in its discretion. Prior to the sale of the pharmacy, Respondent Miller may continue to own Westby Pharmacy, but must hire other pharmacists to manage and run the pharmacy and may not be present in the professional area of the pharmacy for any reason after March 8, 2007.
5. In the event that Respondent Miller applies to own or operate a pharmacy in Wisconsin at any time in the future, the Board will enter an order denying such application without further notice or hearing.
6. Violation of any of the terms of this Order may be construed as conduct imperiling public health, safety and welfare and may result in a summary suspension of Respondent Westby Pharmacy's license. The Board in its discretion may in the alternative impose additional conditions and limitations or other additional discipline for a violation of any of the terms of this Order.

7. Respondent shall pay costs of Six Thousand Dollars (\$6,000.00) to the Department of Regulation and Licensing within ninety (90) days of this Order. In the event Respondent fails to pay costs as ordered, the license of Westby Pharmacy, Inc. active, will be suspended, without further notice or hearing, until Respondents have complied with the terms of this Order.

8. All further notice, payments or correspondence shall be forwarded to:

Department Monitor
Division of Enforcement
Department of Regulation and Licensing
P.O. Box 8935
Madison, WI 53708-8935
Telephone (608) 267-3817
Fax (608) 266-2264

9. This Order shall become effective upon the date of its signing.

Dated at Madison, Wisconsin this 15th day of March, 2007.

Pharmacy Examining Board

By: Michael Bettiga R.Ph.

A Member of the Board

STATE OF WISCONSIN
BEFORE THE PHARMACY EXAMINING BOARD

IN THE MATTER OF	:	
DISCIPLINARY PROCEEDINGS AGAINST	:	
	:	STIPULATION
WESTBY PHARMACY	:	
	:	
and	:	LS# 0701251 PHM
	:	
GARY W. MILLER, R.Ph.,	:	LS # 0702231 PHM
RESPONDENTS.	:	

Division of Enforcement Case numbers
05 PHM 056, 05 PHM 075, 06 PHM 029, 06 PHM 035,
06 PHM 046, 06 PHM 062, 07 PHM 003

Respondent Gary W. Miller, R.Ph., personally and on behalf of Respondent Westby Pharmacy; Respondents' Attorney Ellen Thorn, and Jeanette Lytle, attorney for the Department of Regulation and Licensing, Division of Enforcement, stipulate:

1. This Stipulation is entered into as a result of pending investigations of Respondents' licensure by the Division of Enforcement (case Nos. 05 PHM 056, 05 PHM75, 06 PHM 029, 06 PHM 035, 06 PHM 046, 06 PHM 062, 07 PHM 003). Respondents consent to the resolution of this investigation by stipulation.

2. Respondent Miller understands that by signing this Stipulation he voluntarily and knowingly waives his rights and the rights of Respondent Westby Pharmacy, including: the right to a hearing on the allegations at which time the state has the burden of proving those allegations by a preponderance of the evidence; the right to confront and cross-examine the witnesses; the right to call witnesses on Respondents' behalf and to compel their attendance by subpoena; the right to testify; the right to file objections to any proposed decision and to present briefs or oral arguments to the officials who are to render the final decision; the right to petition for rehearing; and all other applicable rights afforded to Respondents under the United States Constitution, the Wisconsin Constitution, the Wisconsin Statutes, the Wisconsin Administrative Code, and any other provisions of state or federal law.

3. Respondent has consulted with legal counsel prior to signing this stipulation.

4. Respondent Miller agrees to voluntarily surrender his license to practice as a pharmacist in the state of Wisconsin. Respondent Miller agrees that he will not apply for Wisconsin licensure as a pharmacist, or to operate a pharmacy, at any time in the future. In the event that Respondent does in fact apply for Wisconsin licensure as a pharmacist or to operate a pharmacy, the Board may deny that application based upon this stipulation, without further notice or hearing, and Respondent Miller hereby expressly waives all rights to a hearing on any such denial.

5. Respondent Miller agrees to sell Westby Pharmacy. Respondent Miller must have a signed offer to purchase the pharmacy by April 11, 2007. If Respondent Miller provides proof no later than April 12, 2007 of a signed offer to purchase the pharmacy, then the license for Westby Pharmacy may be extended at the discretion of the Board or its designee pending the closing of the sale. Respondent Miller agrees that if he does not provide proof by April 12, 2007 of a signed offer to purchase the pharmacy, the license of Westby Pharmacy may be suspended by the board or its designee, in its discretion, without further notice or hearing. Prior to the sale of the pharmacy, Respondent Miller may continue to own Westby Pharmacy, but must hire other pharmacists to manage and run the pharmacy and may not be present in the professional area of the pharmacy for any reason after March 8, 2007. Respondent Miller agrees that he will not apply to own or operate a pharmacy in Wisconsin at any time in the future. In the event that Respondent does in fact apply to own or operate a pharmacy in Wisconsin in the future, the Board may deny that application based upon this stipulation, without further notice or

hearing, and Respondent Miller hereby expressly waives all rights to a hearing on any such denial.

6. Respondent agrees to the adoption of the attached Final Decision and Order by the Pharmacy Examining Board. The parties to the Stipulation consent to the entry of the attached Final Decision and Order without further notice, pleading, appearance or consent of the parties. Respondent waives all rights to any appeal of the Board's order, if adopted in the form as attached.

7. If the terms of this Stipulation are not acceptable to the Board, the parties shall not be bound by the contents of this Stipulation, and the matter shall be returned to the Division of Enforcement for further proceedings. In the event that this Stipulation is not accepted by the Board, the parties agree not to contend that the Board has been prejudiced or biased in any manner by consideration of this attempted resolution.

8. The parties to this Stipulation agree that the attorney or other agent for the Division of Enforcement and any member of the Pharmacy Examining Board ever assigned as an advisor in this investigation may appear before the Board in open or closed session, without the presence of the Respondents or their attorney, for purposes of speaking in support of this agreement and answering questions that any member of the Board may have in connection with the Board's deliberations on the Stipulation. Additionally, any such Board advisor may vote on whether the Board should accept this Stipulation and issue the attached Final Decision and Order.

9. Respondents are informed that should the Board adopt this Stipulation, the Board's final decision and order is a public record and will be published in accordance with standard Department procedure.

10. The Division of Enforcement joins Respondents in recommending the Board adopt this Stipulation and issue the attached Final Decision and Order.

Gary W. Miller, R.Ph.
104 W. State Street
Westby, WI 54667

Date

Westby Pharmacy
by Gary W. Miller
104 W. State Street
Westby, WI 54667

Date

Ellen Thorn
Arndt Buswell & Thorn, S.C.
Attorneys for Gary Miller and Westby Pharmacy
101 West Oak Street
P.O. box 349
Sparta, WI 54656

Date

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

Date