

# WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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STATE OF WISCONSIN  
BEFORE THE PHARMACY EXAMINING BOARD

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IN THE MATTER OF :  
DISCIPLINARY PROCEEDINGS AGAINST :  
NEIL T. NOESEN, RPH, : AMENDED FINAL  
RESPONDENT. : DECISION AND ORDER  
 : (Following Remand)  
 : Case No. LS0310091PHM

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Division of Enforcement Case File No. 01 PHM 080

**PARTIES**

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

Neil T. Noesen, R.Ph.,  
910 Juno Avenue  
Saint Paul, MN 55102

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

**PROCEDURAL HISTORY**

A hearing in the above-captioned matter was held on October 11 and 12, 2004, before Administrative Law Judge Colleen M. Baird. The Division of Enforcement appeared by Attorney John R. Zweig. The Respondent, Neil T. Noesen, R.Ph., appeared in person and by his attorney Krystal Williams-Obey. On April 13, 2005, the Wisconsin Pharmacy Examining Board, (“Board”) adopted a Final Decision and Order in this matter. (“Order”) On September 7, 2005, the Board denied the respondent’s Petition for Reconsideration of the Order. Following appeal by the respondent the case was remanded to the Board on June 25, 2008, by the Circuit Court for Barron County, Branch One, Case N. 05 CV 212, at the direction of the Court of Appeals, District III, for reconsideration of the imposition of costs.

**FOLLOWING REMAND TO THE BOARD:**

**The Wisconsin Pharmacy Examining Board adopts as its final decision and order in this matter, the following Findings of Fact, Conclusions of Law and Order.**

**FINDINGS OF FACT**

1. Neil T. Noesen, R.Ph., (D.O.B. 03/01/1974) is duly licensed and currently registered to practice pharmacy in the state of Wisconsin (license #13021). This license was first granted on 06/25/1999.
2. Respondent’s most recent address on file with the Pharmacy Examining Board is 910 Juno Avenue, Saint Paul, MN 55102.

3. At all times relevant to this action, Respondent was operating as a sole proprietor contracting his services through an employment agency, RPh On the Go USA, Inc., (hereinafter referred to as “On the Go”), a company which hires licensed registered pharmacists as independent contractors for temporary placements.

4. On June 5, 2002, the Respondent entered into a written independent contractor agreement with On the Go, which provided that Respondent shall therefore furnish to customers of the employment agency, “all services generally performed by a registered pharmacist in the customary manner and extent ordinarily performed at pharmacies, all of which shall be performed in a professionally competent manner.” The agreement stated that its’ terms constituted the entire understanding between the parties, which could not be altered or amended except by a writing signed by the parties.

5. Approximately one month after entering into the agreement, Respondent prepared a letter, dated July 2, 2002, addressed to On the Go and the K-Mart Pharmacy-Rhineland and K-Mart Pharmacy-Menomonie, which stated that he had a conscientious objection “to participating in the work of contraception.”

6. Respondent stated in his letter that he specifically wished to be excused from the following actions:

(1) Sale of or counsel for drug therapy or physical barriers, e.g.; condoms, spermicidal creams, etc., that render the act of sexual intercourse sterile, any drug therapy related to a sterilization procedure of the male or female sexual organs.

(2) A procedure involving a drug or device that may prevent the implantation of a fertilized human ovum, This includes, but is not limited to, drugs which are prescribed as contraceptives or “emergency contraceptives” or drugs which have post-fertilization effects, regardless of the primary indication, in menopausal patients.

(3) An abortion, as defined in Wisconsin State Statutes 253.10(2)(a).

(4) An experiment or medical procedure involving any of the following:

(a) The destruction of a human embryo;

(b) A human embryo or unborn child, at any stage of development, in which the experiment or procedure is not related to the beneficial treatment of the human embryo or unborn child.

(5) A procedure, including a transplant procedure that uses fetal tissue or organs other than fetal tissues or organs from a stillbirth, spontaneous abortion or miscarriage.

(6) The withholding or withdrawal of nutrition or hydration, unless the administration of nutrition or hydration is medically contraindicated.

(7) An act that causes or assists in causing the death of an individual, such as by assisted suicide.”

7. Following the list of specific activities, Respondent, wrote “participate in” means “to perform, assist in, recommend, counsel in favor of, make referrals for, dispense or administer drugs for, or otherwise promote, encourage, or aid.”

8. Respondent also stated in his letter that he would follow a certain protocol for informing the staff of his conscientious objection and for handling situations when he would exercise his objection:

“When confronted with an objectionable situation, which most likely will be a refill or new prescription for an oral contraceptive, I understand the necessity of responding in a professional manner with the patient(s), medical staff and pharmacy staff. I will *immediately* notify the patient of my conscientious objection and offer to call the prescriber or give the original prescription to the patient if it has not yet been filled. In the event that the prescriber is temporarily unavailable, I will contact a nurse or other staff that is working with the prescriber. If the nurse or other staff is unavailable, I will inform the patient that I was unable to contact the prescriber or the prescriber’s nurse. If the patient has not filled the prescription, I will offer to give the original unfilled prescription back to the patient.”

9. Respondent e-mailed his July 2, 2002, letter to John Scott, a representative of On the Go, but he did not send a copy of the letter to the K-Mart Pharmacies in Menomonie or Rhineland.

10. Respondent did not ask Mr. Scott to forward his letter to the pharmacies or the managing pharmacists where he would be assigned to work.

11. Respondent and Mr. Scott did not sign a writing amending the terms of Respondent’s independent contractor agreement.

12. Beginning on or about July 3, 2002, Respondent was assigned by On the Go to work at the K-Mart Pharmacy in Menomonie, Wisconsin.
13. Prior to his placement, Mr. Scott had communicated with Randall Smith, the K-Mart Pharmacy District Manager, and told him that Respondent would not dispense contraceptives. Mr. Smith was never given a copy of Respondent's letter dated July 2, 2002.
14. Respondent talked to Ken Jordanby, the managing pharmacist at the Menomonie pharmacy, and told him that he would not fill or dispense contraceptives on the basis of his conscientious objection. Mr. Jordanby was never given a copy of Respondent's letter dated July 2, 2002.
15. Respondent did not inform Mr. Jordanby or Mr. Smith that he would not transfer a prescription (e.g., for contraception) which he had declined to fill or dispense.
16. Based upon the information that Respondent disclosed about the extent of his conscientious objection, an arrangement was put in place by Mr. Jordanby for handling any contraceptive prescriptions that need to be filled and dispensed while Respondent was on duty.
17. The arrangement consisted of a working agreement that if a patient presented a prescription for contraceptives, a) the pharmacy technician would prepare the label, and b) Mr. Jordanby would be called to come in and perform the filling and dispensing of the medication.
18. Respondent did not inform the managing pharmacist or the employing pharmacist that he would not perform the transfer of a prescription based upon his conscientious objection.
19. The standard of care ordinarily exercised by a pharmacist is to inform the managing pharmacist or the employing pharmacy with specificity of those activities that the pharmacist will not perform at the pharmacy based upon his or her conscientious objection.
20. Because it was presumed that Respondent would transfer a prescription if requested to do so, the arrangement did not provide for handling a request for a transfer of a prescription which the Respondent declined to fill or dispense.
21. Respondent was the only pharmacist on duty at the K-Mart Pharmacy-Menomonie during the weekend of July 6 and 7, 2002. On Saturday, July 6, 2002, the patient, referred to hereinafter as "AR", went to the K-Mart Pharmacy and requested a refill of her Loestrin FE 1/20 prescription. AR's prescription had been previously filled at the pharmacy and was on file there.
22. Loestrin FE 1/20 is a medication used to prevent pregnancy or to regulate the menstrual cycle. It is a combination of an estrogen hormone (ethinyl estradiol) and a progestin hormone (norethindrone acetate), which prevents pregnancy by blocking ovulation, and thickens the cervical mucus and changes the endometrial lining, thereby reducing the likelihood of sperm entry and implantation. Loestrin FE 1/20 is also used to adjust hormone levels that may be contributing to irregular menstrual cycles or acne.
23. AR was using Loestrin FE 1/20 primarily for contraception purposes, as she did not want to become pregnant. She had been initially prescribed Ortho-Cyclen, a similar contraceptive medication, when she was 16 years old for the purpose of regulating her menstrual cycle.
24. AR had taken the last of the 28 doses of her previous prescription on July 6, 2002, and was to start the first dose of the refill the next day.
25. When AR appeared at the K-Mart Pharmacy on July 6, 2002, requesting the refill of her prescription, Respondent asked whether she intended to use the medication for contraception.
26. When AR indicated that she was using the prescription for contraception, Respondent stated that he would not refill her prescription because he had a conscientious religious objection to contraceptives.
27. After inquiring whether AR was using the medication for contraception, Respondent did not ask her any further questions and stopped providing any professional services to her.
28. When AR asked Respondent where she could go to have her prescription refilled, Respondent stated that he would not tell her because he did not want to be a part in her receiving the contraceptives.
29. After Respondent refused to dispense the patient's contraceptive prescription, she went to a nearby Wal-Mart pharmacy to see if they could refill it. The pharmacist at Wal-Mart informed AR that they were willing to dispense the refill of

her prescription medication and they would call the K-Mart pharmacy to have the prescription order for refills transferred to their pharmacy.

30. The pharmacist at Wal-Mart telephoned Respondent and requested him to provide the necessary information to transfer AR's prescription. Respondent refused to provide the information necessary for the transfer.

31. A transfer of a prescription can only be made from pharmacist to pharmacist. (Wis. Admin. Code Phar 7.05(3)) The pharmacist receiving the transfer must be given the name of the pharmacist making the transfer, the phone number of the pharmacy, the name of the patient, the name of the physician, the original date of the prescription, the first refill, the first date of refill, the last refill, the original number of refills and the number of refills remaining.

32. Respondent objected to transferring the prescription for contraceptives to another pharmacist on the basis that it would induce another to do a morally wrong or sinful act pursuant to the doctrines of the Roman Catholic Church.

33. The Wal-Mart pharmacist told AR that Respondent had refused to provide the information necessary to transfer the refill and she could not refill the prescription.

34. AR went home and called the K-Mart store and spoke to Debi Wolter, the assistant store manager. Ms. Wolter told AR that K-Mart had been having problems the whole day because women could not get their prescriptions filled.

35. Ms. Wolter asked AR if she could wait until Monday when the regular pharmacist came in. AR told Ms. Wolter that she could not wait because she was supposed to start her new cycle of medication on Sunday.

36. Ms. Wolter called AR back later and told her that Mr. Jordanby would be coming in on Sunday and would refill her prescription then.

37. Mr. Jordanby was not in the Menomonie area on Sunday, because he had agreed to drive a float for his daughter in a Chamber of Commerce parade. He did not return until late Sunday night.

38. When AR called the store on Sunday morning, she spoke to Ms. Wolter who told her that the prescription still had not been refilled. While AR was on the line with Ms. Wolter, she overheard her say to Respondent that "Ken [Jordanby] had said he [Respondent] either needed to fill the prescription or release the information so it could be done."

39. After she hung up the phone, AR become very irritated and frustrated and decided to go to the police station for assistance. Two police officers accompanied the patient to the K-Mart pharmacy, although they were not sure that it was a matter that they could resolve.

40. While AR and the police officers were at the K-Mart pharmacy, Ms. Wolter again called Mr. Jordanby and this time gave the phone to the patient to talk directly with him. Mr. Jordanby apologized to AR and again asked her if she would wait until Monday for the refill because there was no one there who could handle the refill.

41. Mr. Jordanby then counseled AR concerning what she could do since she would be starting her medication cycle late. He recommended that she come in early Monday morning, take her Sunday night dose on Monday morning and then take her Monday dose as usual that evening.

42. Mr. Jordanby also suggested that AR use a back up form of contraception for the entire month. AR had received the same advice from her physician regarding what to do if she missed one dose of her contraceptive medication.

43. On Monday, July 8, AR went to the K-Mart pharmacy and Mr. Jordanby dispensed the medication to her. She took the first two doses that day.

44. The effectiveness of AR's oral contraceptive medication was decreased as result of her inability to take the first tablet of her next cycle until the second day of the cycle.

45. The risk of pregnancy to AR was increased based on the number of doses of the contraceptive which she missed due to her inability to obtain her medication.

46. Respondent did not ask AR any questions about her medical condition and did not know whether she had a medical condition that would cause harm to her if she became pregnant.

47. Respondent did not ask AR when she had taken the last dose of her previous prescription or when she was to take the first dose of the refill prescription. He had no knowledge of how many doses she would have missed because of his refusal to transfer her prescription.

48. Respondent did not follow the protocol that he proposed in his July 2, 2002 letter, such as contacting AR's

prescriber, the prescriber's nurse, or other staff working with the prescriber.

49. Respondent did not assess the risk of harm to AR as a result of his refusal to transfer her refill prescription or of his refusal to provide her information about her options to obtain her prescribed medication.
50. The fear of unwanted pregnancy could harm AR, or another woman, physically or emotionally.
51. An unwanted pregnancy could harm AR, or another woman, physically or emotionally.
52. The standard of care ordinarily exercised by a pharmacist requires a pharmacist to dispense medication to a patient when presented with a valid prescription order, unless the pharmacist in his professional opinion believes that the prescription has the potential for causing harm to the patient.
53. There was no evidence adduced at hearing that refilling the prescription would harm AR.
54. The standard of care ordinarily exercised by a pharmacist requires that a pharmacist who exercises a conscientious objection to the dispensing of a prescription must ensure that there is an alternative mechanism for the patient to receive his or her medication, including informing the patient of their options to obtain their prescription.
55. Respondent did not ensure that there was an alternative mechanism in place so that AR could receive her medication.

### **CONCLUSIONS OF LAW**

1. The Pharmacy Examining Board has jurisdiction over this matter pursuant to Wis. Stat. § 450.10.
2. As set forth in the Findings of Fact above, by failing to clearly inform the managing pharmacist that based upon his conscientious objection Respondent would not transfer a prescription for oral contraceptives, Respondent has engaged in practice which constitutes a danger to the health, welfare, or safety of a patient and has practiced in a manner which substantially departs from the standard of care ordinarily exercised by a pharmacist and which harmed or could have harmed a patient, in violation of Wis. Adm. Code § Phar 10.03(2).
3. As set forth in the Findings of Fact above, by failing to provide information to the patient AR regarding her options for obtaining a refill of her prescription which he refused to dispense or transfer, Respondent has engaged in practice which constitutes a danger to the health, welfare, or safety of a patient and has practiced in a manner which substantially departs from the standard of care ordinarily exercised by a pharmacist and which harmed or could have harmed a patient, in violation of Wis. Adm. Code § Phar 10.03(2).

### **ORDER**

NOW, THEREFORE, IT IS HEREBY ORDERED that

1. Respondent, Neil T. Noesen, R.Ph., is hereby REPRIMANDED.
2. Respondent's license is hereby LIMITED as follows:
  - a. Prior to providing pharmacy services at any pharmacy, Respondent shall prepare a written notification *specifying in detail*
    - i. The pharmacy practices he will decline to perform as a result of his conscience; and
    - ii. The steps he will take to ensure that a patient's access to medication is not impeded by his declination(s).
  - b. The written notification referred to in ¶2(a) above shall be provided to a potential pharmacy employer at least five (5) business days prior to Respondent commencing practice at the pharmacy.
  - c. Respondent shall provide a copy of this Final Decision and Order together with and at the same time of any provision of written notification pursuant to ¶2(a) above.
  - d. Respondent shall immediately notify the Department Monitor if he fails to comply with any provisions of this Order.

e. Respondent shall take a minimum of six (6) credit hours of continuing education in Ethics for pharmacy practice, which shall be pre-approved by the Board. The continuing education shall be completed within six (6) months of the date of this order.

f. Respondent shall pay the full costs of these proceedings.

3. Respondent may petition the Board for modification of limitations upon his license no earlier than two (2) years from the date of this order.

4. All petitions, requests, notifications and payments shall be mailed, faxed or delivered to: Department Monitor, Department of Regulation and Licensing, Division of Enforcement, 1400 East Washington Ave., P.O. Box 8935, Madison, WI 53708-8935, Fax (608) 266-2264, Telephone (608) 267-3817.

### OPINION

The central issue in this case is whether by refusing to transfer the patient's prescription on the basis of his conscientious objection, Respondent departed from a standard of care ordinarily exercised by a pharmacist and which harmed or could have harmed the patient.

The applicable laws are as follows:

Wis. Stat. § 450.10: Disciplinary proceedings; immunity; orders.

(1)(a) In this subsection, "unprofessional conduct" includes, but is not limited to: . . . .

(2) Violating this chapter or, subject to s. 961.38(4r), ch. 961 or any federal or state statute or rule which substantially relates to the practice of the licensee.

. . . .

(6) Engaging in conduct the practice of the licensee which evidences a lack of knowledge or ability to apply professional principles or skills.

Wis. Admin. Code § Phar 10.03(2): Unprofessional conduct. The following, without limitation because of enumeration, are violations of standards of professional conduct and constitute unprofessional conduct in addition to those grounds specified under s. 450.10 (1), Stats.:

. . . .

(3) Engaging in any pharmacy practice which constitutes a danger to the health, welfare, or safety of a patient or public, including but not limited to, practicing in a manner which substantially departs from the standard of care ordinarily exercised by a pharmacist which harmed or could have harmed a patient.

The allegations set forth in the complaint are that on July 6 and 7, 2002, Respondent, was working as a relief pharmacist at a K-Mart Pharmacy in Menomonie, Wisconsin, and was asked by a patient to dispense an oral contraceptive prescribed by her physician. The prescription had been originally filled at the pharmacy and was on file there. Respondent refused to dispense the medication on the basis of his conscientious objection to contraceptives and when asked to transfer the physician's order for refills to another pharmacy so the medication could be dispensed, Respondent refused to provide the information necessary to transfer the prescription.

The Respondent's conduct in refusing to transfer the patient's prescription was alleged to be a violation of Wis. Adm. Code §Phar 10.03(2). It was further alleged that Respondent was required to ensure under the standards of professional conduct that, in exercising his conscience, he did not deprive the patient of her right to receive health care. Finally, it was alleged that because Respondent took no steps to ensure there was a way for the patient to receive her medication once he knew that she was using it for contraception, his conduct departed substantially from the standard of care exercised by a pharmacist, in that the conduct harmed or could have harmed a patient, contrary to Wis. Admin. Code Phar §10.03(2).

Respondent maintains that Wis. Admin. Code Phar §10.03(2) cannot be constitutionally applied to force him to engage in an act that his religious faith considers an "intrinsic evil." Specifically, Respondent contends that he was not required to transfer the patient's prescription to another pharmacy or to provide the patient with information regarding how she could get her prescription refilled. Respondent also maintains that he was not required to provide a written memorandum detailing his conscientious objections or to ensure that an alternative mechanism was in place for the patient to obtain her contraceptives. He further contends that his acts did not harm the patient and, therefore, the Department's interest in protecting the public must

yield to Respondent's right of conscience.

## ANALYSIS OF THE EVIDENCE

### A) Respondent's Employment Contract

There is no dispute that Respondent was an independent contractor whose placement at the K-Mart Pharmacy in Menomonie during the weekend of July 6-7, 2002 was arranged by RPh On the Go USA, Inc., ("On The Go"), a company that specialized in providing temporary relief pharmacists for pharmacies. The professional pharmacy services which Respondent contractually agreed to perform, pursuant to his agreement with On the Go were described as follows:

[C]ontractor shall therefore furnish to customers of [On the Go] *all services generally performed by a registered pharmacist in the customary manner and extent ordinarily performed at pharmacies*, all of which shall be performed in a professionally competent manner. (Emphasis added) [Ex. 3, page 2]

The term of the agreement was for one (1) year. The agreement further provided in paragraph 10 as follows:

This agreement constitutes the entire understanding between the parties hereto with respect to the subject matter hereof and may not be altered or amended except by Agreement in writing signed by the parties. [Ex. 3, page 2]

Paul Rosowski, the complainant's expert witness who examined the On the Go Agreement, testified that in his opinion, a minimally competent pharmacist who entered into such an agreement would be agreeing to fill and transfer prescriptions. [TR. at 263] Mr. Rosowski based his opinion on the fact that the agreement requires that he perform *all services* generally performed by a registered pharmacy in a customary manner and transfer would be something customarily done by a pharmacist. (Emphasis added) [TR. at 263] Respondent was under a contractual obligation, therefore, at the time of his placement at the K-Mart Pharmacy, to provide those services generally performed by a pharmacist in a pharmacy, which includes not only filling, but transferring prescriptions upon request.

Respondent knew or should have known that it was very likely that he would be asked to refill or transfer a prescription for oral contraceptives when he accepted employment for a weekend duty at K-Mart Pharmacy. Mr. Rosowski has worked as a pharmacist for many years, including as relief pharmacist, and confirmed that most prescriptions for oral contraceptives are refilled on weekends. He testified as follows:

I'd say from my professional experience the weekends tend to be times when women usually come into the pharmacy to get their oral contraceptives either filled or refilled, one for convenience purposes but probably more importantly that's usually the time - Sunday is when the first pill out of the cycle is started. [TR. at 265]

Mr. Rosowski also testified that most prescriptions for oral contraceptives provide for an original and 11 monthly refills, therefore, one would expect almost 11 out of 12 requests for oral contraceptives would be refills. [TR. at 265-7] It is reasonable to conclude that Respondent should have known that when he accepted placement at the K-Mart Pharmacy he would be required to perform pharmacy duties which included the refills and transfers of prescriptions if he would not refill them.

There was no indication that Respondent would refuse to perform all of the services customarily and ordinarily performed by a registered pharmacist at a pharmacy. There was no reference whatsoever in Respondent's Independent Contractor Agreement to Respondent's conscientious objection to filling, dispensing or transferring prescriptions for oral contraceptives. On cross-examination, Respondent admitted that the Independent Contractor Agreement had never been amended by the parties to excuse him from providing those services required under the agreement. [TR. at 206-7]

It is clear from the record that Respondent failed to inform On the Go of his conscientious objection before he entered into the agreement and that he failed to inform his potential employer of the pharmacy services that he would not perform in advance of agreeing to placement as a weekend relief pharmacist. Thus, it is reasonable to conclude that Respondent failed to perform the pharmacy services which he had contractually agreed to perform.

### (B) Respondent's July 2, 2002 Letter

On July 2, 2002, shortly before beginning his employment at the K-Mart Pharmacy in Menomonie, Respondent e-mailed a letter to John Scott, an agent for On the Go. In that letter, Respondent stated that he had a conscientious objection to contraceptives. While Respondent addressed his letter to Mr. Scott and the K-Mart Pharmacy in Menomonie and



Rhineland, he only sent it to Mr. Scott. When Respondent was asked why this critical information was sent to Mr. Scott, he responded as follows:

The intention of that letter was to inform my agent of my conscientious objection. I had no contact with K-Mart Pharmacy, with Ken Jordanby. I didn't know his name, I didn't know who – you know, who he was or I didn't feel that I had – it was professional of me to contact him before I started to work there since the contract is a confidential contract between On the Go and K-Mart, they do all their dealing, and I just gave John what I had, cut and paste from my Children's Hospital objection, and with Bill AB 63 in there and e-mailed it and that is what he got. [TR. at 120]

When asked whether he had an obligation to make certain that the pharmacies knew the extent of his conscientious objections and the acts which he would not perform, Respondent's answered, "That's a good question. Is that a good answer or not?" [TR. at 158] [\[1\]](#)

At another point in the hearing, Respondent was asked to explain how an employer could accommodate a pharmacist's refusal to transfer a prescription if they did not know that the pharmacist would refuse to do so. Respondent again replied, "That's a good question. That's my answer." [TR. at 209] Respondent's July 2, 2002 letter said nothing about his refusal to transfer a prescription. [TR. at 119-20] When asked on cross-examination whether he intended to include transferring a prescription within his letter, Respondent replied that he did not recall. [TR. at 125] Respondent testified that while he did not explicitly refer to transferring a prescription, he thought that it *may* have been implied when he used the terms "participate in" in his letter. When Respondent was asked whether anyone reading his letter should have understood that his letter, which did not use the word "transfer," was meant to include transfer, his response was again, "I don't recall." [TR. at 125] Regardless of whether Respondent intended to include transfer of prescription within the scope of his letter, the fact remains that he did not give either Mr. Jordanby or Mr. Smith, the managing pharmacists, a copy of the letter. Nor did Respondent indicate in any other manner, including his discussion with Mr. Jordanby that he objected to transferring a prescription.

Respondent's letter, and his disclosure and delivery of it, are critical components to his ability to properly exercise his conscientious objection while at the same time fulfilling his professional duties as a pharmacist. The evidence shows that Respondent failed to inform either the employing pharmacy or its managing pharmacist of the full extent of his conscientious objection (including the pharmacy duties that Respondent would not perform.) Randall Smith, the K-Mart District Managing Pharmacist, testified that he never received a copy of Respondent's letter. [TR at 65-6] This is why Mr. Smith did not have an alternative process for transfer of prescriptions in place when Respondent was working. Mr. Smith testified "I just assumed that he would transfer a prescription and it never occurred to me that he wouldn't transfer." [TR. at 69.] Mr. Smith employs approximately 44 pharmacists in 21 pharmacies and has had only one situation where a pharmacist told him that she would not dispense a particular medication (the morning-after pill) and he found a way to accommodate her limitations by not carrying that medication in that pharmacy. [TR. at 66]

The local managing pharmacist, Ken Jordanby, also testified that Respondent never informed him of the extent of his conscientious objections. Respondent did not give Mr. Jordanby a copy of his July 2, 2002 letter. [TR. at 80] When Respondent spoke to Mr. Jordanby on the first day that he worked as a relief pharmacist, he only told him that he would not fill or dispense contraceptives because of his religious beliefs. [TR at 82] Respondent admitted that he did not specify to Mr. Jordanby whether or not he would transfer a prescription based on his moral objection. [TR. at 156] Mr. Jordanby had no idea, therefore, that Respondent would refuse to transfer a prescription to another pharmacy when requested to do so. Mr. Jordanby further testified that, "he had never worked with a relief pharmacist who would not transfer a prescription order for contraceptives." [TR. at 82] As a result of Respondent's failure to disclose the extent of his conscientious objection, Mr. Jordanby did not think it necessary to develop a contingency plan for the transfer of prescriptions.

An employer's ability to reasonably accommodate a practitioner's conscientious objection is logically dependent upon the disclosure and communication of the objection to the employer. Respondent sent a letter the day before he was to start work at the pharmacy; he did not even address or deliver the letter to either the employing pharmacy or its managing pharmacist. The letter he sent did not specifically address the services customarily and ordinarily provided by a pharmacist that would be declined. These actions fall far short of what is required to constitute effective disclosure and communication of a conscientious objection.

Furthermore, it should be noted that Respondent failed to follow the protocol that he proposed in his July 2, 2002 letter:

I will *immediately* notify the patient of this objection and offer to call the prescriber or give the original prescription to the patient if it has not yet been filled. In the event that the prescriber is temporarily unavailable, I will contact a nurse or other staff that is working with the prescriber. If a nurse or other staff is unavailable I will inform the patient that I

was unable to contact the prescriber or the prescriber's nurse. [Ex. 3 at page 2]

When he asked why he did not follow his own protocol, Respondent was unable to offer any explanation. [TR. at 128] Instead, he admitted that he did not offer to call the prescriber and he did not do what he wrote to Mr. Scott in his e-mail that he would do. [TR. at 128]

(C) Professional Standards of Conduct

Both the Respondent and the Complainant acknowledged that Wisconsin does not have a statute or rule which deals specifically with the issue of conscientious objection. This acknowledgement, however, is by no means dispositive. The Wisconsin Supreme Court addressed this issue in *Strigenz v. Department of Regulation*, 103 Wis. 2d 281, 307 N.W. 2d 664 (1981), in which a dentist contended that because the Dentistry Examining Board had not promulgated rules specifying what conduct was prohibited, he lacked notice and could not be disciplined for his conduct. The court, at page 286, stated:

It is not necessary that a written rule declare that a professional person must practice his or her profession in a minimally competent manner. It is not necessary to adopt a standard to declare that a licensed person must apply his or her professional skills in a minimally competent manner for that professional person to be on notice of such requirement.

The court also stated at page 287:

Neither Dr. Strigenz nor any other licensed professional can convincingly argue that he was not on notice that he had to perform professionally in a minimally competent manner . . . .

Similarly, in *Gilbert v. Medical Examining Board*, 119 Wis. 2d 168, 349 N.W. 2d 68, 78 (1984), the Wisconsin Supreme Court reviewed the constitutionality of Wis. Admin. Code Med. §16.02, which then stated as follows:

(1) The terms 'practice that are inimical to the public health,' 'conduct unbecoming a person licensed to practice' or 'detrimental to the best interest of the public,' 'unprofessional conduct' and 'unprofessional acts' are defined to mean and include but not be limited to the following, or aiding and abetting the same: . . .

(g) Any practice or conduct under license or certificate granted by the examining board which tends to constitute a danger to the health, welfare, or safety of the patient or public.

The court stated this language "provides a standard for revocation sufficiently definite so that physicians should have no difficulty providing a standard of care which meets the requirement of professional conduct." 119 Wis. 2d. 168, at 194.

The pharmacy rule in Wis. Adm. Code § Phar 10.03(2) is analogous to the Medical Board rule cited in *Gilbert* as it refers in general terms to pharmacy practices which constitute a danger to the health, welfare, or safety of a patient or public, including practicing in a manner which substantially departs from the standard of care ordinarily exercised by a pharmacist. The Pharmacy Board is not, therefore, required to have promulgated specific rules on a practitioner's exercise of conscientious objection in order to discipline the Respondent for violating professional standards of care.

Testimony of Mr. Rosowski

Mr. Rosowski, the Complainant's expert witness, testified that in his opinion, Respondent did not satisfy the standard of care as reflected by a consensus of opinion in the field. Mr. Rosowski testified that he has been a registered pharmacist in Wisconsin from 1988 to the present and has a Master of Science in Pharmacy Administration. From 1996 to 2001, Mr. Rosowski was the Director of Pharmacy Internship for the State of Wisconsin and a clinical associate professor at the University of Wisconsin-Madison School of Pharmacy. [TR. at 11] As the Director of Pharmacy Internship for the UW School of Pharmacy, Mr. Rosowski co-authored the standards of professional conduct, which were included in the clinical clerkship manual. [TR. at 259] Mr. Rosowski has also authored a number of formal peer-reviewed and informal papers, made numerous presentations on pharmacy topics and is highly active in professional service functions in the field of pharmacy. [Ex. 11] Finally, Mr. Rosowski has actually worked as a pharmacist in Wisconsin, including as a relief pharmacist in community pharmacies, i.e., same role Respondent was performing at the K-Mart pharmacy in Menomonie. [TR. at 256]

Mr. Rosowski testified that a minimally competent pharmacist who intends to exercise their conscience has a professional obligation to make certain that the activities in which they would not engage are communicated to the managing pharmacist. Mr. Rosowski indicated that Respondent should not have assumed that a third party had made those communications on his behalf. [TR. at 272-3] Mr. Rosowski referred to the American Pharmacist Association (hereinafter referred to as "APhA") report on the subject of conscientious objection to buttress this opinion. He noted that while the APhA recognizes that a pharmacist has a right to exercise their conscience, they also have a duty to the patient to meet their health care needs and desires. [TR. at 261] When Mr. Rosowski was asked to give his opinion on how a pharmacist, practicing to their minimal

levels of competence, can exercise their conscience while at the same time fulfill the needs of their patients, he stated as follows:

By setting forth clearly in writing what they would object to with their employer, the managing pharmacist that they are working with, so that they know specifically what activities that they would not engage in at that pharmacy [TR. at 261]

Mr. Rosowski testified that unless a pharmacist has indicated what his conscience prevents him from doing, a managing pharmacist cannot put a mechanism in place to ensure that the interests of the patients and the objecting pharmacist are accommodated. According to Mr. Rosowski, the failure to effectively disclose and communicate the extent of a conscientious objection to an employer substantially departs from the standard of care ordinarily exercised by a pharmacist.

Mr. Rosowski also testified that a minimally competent pharmacist would have followed the plan he outlined and that failing to do so violated professional standards of care. [TR. at 276] In this regard as well, Respondent's conduct substantially departed from the standard of care ordinarily exercised by a pharmacist.

#### 1997-98 APhA Policy Committee Report- Pharmacist Conscience Clause

Mr. Rosowski testified that the APhA Policy Committee Report is the best summary of the standard of care for a pharmacist, in terms of their professional duties and obligations, when a pharmacist asserts a conscientious objection. [TR. at 260] Mr. Rosowski explained that the APhA's report reflects the consensus of professional opinion on this subject. The APhA's report recognizes the need to balance the rights of the pharmacists as individuals with their responsibility to serve patients as health care professionals. The APhA report recommends that pharmacists be allowed to excuse themselves from dispensing situations which they find morally objectionable, but that removal from participation must be accompanied by responsibility to the patient and performance of certain professional duties which accompany that refusal:

Pharmacists choosing to excuse themselves from such a situation continue to have a responsibility to the patient—ensuring that the patient will be referred to another pharmacist or be channeled into another available health system. Exercising the authority to excuse themselves from the dispensing process, and thus avoiding having personal, moral decisions of others placed upon them, requires the same consideration of the patient—the patient should not be required to abide by the pharmacist's personal, moral decision. Providing alternative mechanisms for patients in this situation ensures patient access to drug products, without requiring the pharmacist or the patient to abide by personal decisions other than their own. Such policy is necessary to establish professional processes that support both patients receiving what they are seeking—as determined by the personal decision of the patient and the professional judgment of his or her physician, and that pharmacists are not required to participate in activities which they find morally objectionable. [Ex. 6, pg. 1]

As to the question of conscience, the report states:

Conscientiousness does not permit one to merely excuse oneself from a difficult situation. It is defining a specific situation, and acting in a manner that accommodates one's personal beliefs without grossly overstepping the rights of others. (Emphasis added) [Ex. 6 at pg. 5]

Mr. Rosowski explained that the pharmacist should set out in writing to his or her employer or managing pharmacist specifically what activities the pharmacist would not engage in at that pharmacy as a result of his conscientious objection. [TR. at 261]

#### Code of Ethics for Pharmacists

The Code of Ethics for Pharmacists is also informative as to the standard of practice to be considered in this case and to contextually review the Respondent's conduct. The Preamble to the Code of Ethics for Pharmacists states that the principles set forth in the code are intended to publicly state the role and responsibilities of pharmacists and to guide pharmacists in their relationships with patients, health professionals and society. The first article of the code describes the relationship between the patient and the pharmacist as a covenant, which requires that a pharmacist has moral obligations to help individuals achieve optimum benefit from their medications, to be committed to their welfare, and to maintain their trust.

The second article states that a pharmacist must promote the good of the patient in a caring, compassionate and confidential manner. The first sentence of that article states that a pharmacist must place the concern for the well-being of his patients at the center of professional practice. The code also states other principles such as the patient's self-determination, respecting personal and cultural differences among patients, and avoiding practices, behavior or work conditions that compromise dedication to the best interests of patients.

The predominant theme in the ethical code is that of a patient-centered professional practice. Mr. Rosowski as well referred to the principle that a pharmacist must always keep in mind the patient's desires first. The patient has to come first. [TR. at 285] Respondent's conduct in refusing to transfer AR's prescription or to provide her with information about how she could obtain her prescription, is inconsistent with the principles of a patient-focused practice set forth in the Code of Ethics for Pharmacists.

#### Testimony of Dr. Wernow

Dr. Jerome Wernow, Executive Director, Northwest Center for Bioethics in Portland, Oregon, testified on behalf of Respondent. Dr. Wernow has a Bachelor of Science in Pharmacy and advanced degrees in religious studies and philosophy. He also served as adjunct faculty at Western Seminary, a Senior Pastor in the state of Washington and a foreign missionary. In the field of pharmacy, Dr. Wernow held various positions over the years, beginning in 1979, as a director of pharmacy (1 year), a staff pharmacist (5 years) and a part-time pharmacy consultant and advisor on pharmacy policy (1 year).

Dr. Wernow testified that in his opinion, Respondent practiced due diligence in good faith within the criteria of the APhA standards of practice. Dr. Wernow stated the basis for his opinion as follows:

A: ... that [Respondent] followed when he crafted his letter and he articulated the contents of his letter that he submitted to Mr. John Scott, to Mr. Jordanby, and that there was an arrangement made that would be within the contours of the APhA's suggested standard of practice for conscientious objection, where it said that the pharmacist did indeed oppose or conscientiously object, they had a professional responsibility that is tied to that refusal and under Section E there's a statement that says he needs to ensure that the patient will be referred to another pharmacist. By arranging with Mr. Jordanby referrals in areas where he objected in dispensing he set up an appropriate standard that would permit that referral, so there is an alternative in place. [TR. at 330]

The difficulty with reconciling Dr. Wernow's opinion with the evidence in this case is that it assumes that Respondent gave proper notice of his conscientious objection to the managing pharmacist and employing pharmacy. As cited above, Dr. Wernow testified that Respondent "articulated the contents of his letter that he submitted to Mr. John Scott, to Mr. Jordanby, and that there was an arrangement made that would be within the contours of the APhA." However, the evidence shows that Respondent did not provide a copy of his July 2, 2002 letter to Mr. Jordanby, the managing pharmacist. Nor did Respondent provide a copy of his letter to Mr. Smith, the district managing pharmacist, or to the pharmacies in Menomonie or Rhinelander. He did not even ask Mr. Scott to forward the letter to anyone. Similarly, the evidence of record shows that when Respondent began working at the pharmacy, Respondent did *not* inform the managing pharmacist that he would not transfer a prescription on the basis of his conscientious objection. Respondent never articulated the contents of his letter or the extent of his conscientious objection to his employers; therefore, Dr. Wernow's opinion is not supported by the evidence adduced at the hearing.

Dr. Wernow also based his opinion on a rulemaking responsibility for the Pharmacy Examining Board that is inconsistent with the standard set forth in *Strigenz*.

Q: Are you referring to the State Board of Pharmacy's responsibility right now?

A: If they're –if the State Board of Pharmacy is going to sanction penalties, the pharmacist needs to know or needs to be at least notified and warned that if indeed they're going to express a conscientious objection here, the criteria or the things, the criteria that they must follow, and so there needs to be some type of specific criteria laid down that they'd be holding the pharmacy up against – the pharmacist up against as well as the managing pharmacist. [TR. at 336]

Dr. Wernow's opinion was based on factual and legal assumptions not supported by the evidence; he contends that proper notice of his conscientious objection was given by Respondent and that the Board is required to detail with specificity all examples of unprofessional conduct as a prerequisite to imposing discipline. For these reasons, his testimony was unpersuasive.

The evidence in this case shows that Respondent fell far short of satisfying the standard of care as articulated by Mr. Rosowski and as reflected in the APhA report and Pharmacist Code of Ethics. Respondent failed to balance his covenantal duties to his patients with the exercise of his conscience. He did not adequately and timely disclose and communicate to the managing pharmacist or pharmacy, the activities which he would not perform as a result of his conscience. He did not even follow the protocol or steps that he proposed in July 2, 2002 letter, which he said that he would do when confronted with a situation where he would exercise his conscience. Respondent did none of the professional duties which must accompany his refusal to participate in the dispensing of medication which is lawfully prescribed by a physician for his or her patient.

Respondent admitted that once he was informed that the patient was seeking to refill a prescription for contraceptives, he completely disregarded her as a patient and did nothing more for her.

A pharmacist is a professional health care provider who has ethical duties to their patients. A pharmacist in exercising their conscientious objection must seek to avoid results that cause harm or potential harm to their patients, such as the denial of access to their prescribed medications and disruptions in the patient's continuity of care. For all he knew, Respondent could have suffered severe life-threatening complications or even possibly died from the consequences of his actions in denying access to her prescribed medication. Respondent has engaged in a pharmacy practice that constitutes a danger to the health, safety and welfare of the patient.

(D) Respondent's Failure to Provide Information to the Patient

In addition to failing to inform the managing pharmacist or pharmacy that he would not transfer a prescription for contraceptives, Respondent violated the professional standard of care by failing to advise the patient AR of her options to get her prescription filled elsewhere. According to Mr. Rosowski, a pharmacist is required to inform the patient of her options as to what she can do to get her prescription filled if he refuses to dispense the medication. [TR. at 273-4] Mr. Rosowski testified that upon receiving the call from the Wal-Mart pharmacy requesting the refill transfer information, Respondent should have transferred the prescription to the other pharmacy and allowed the patient to get the medication she needed. In the alternative, Respondent could have routed the patient to an emergency room so that a physician there could have written a new prescription which could have been filled at another pharmacy. [TR. at 275]

AR testified that Respondent did not give her any information or assistance when she asked how she might get her prescription filled. Respondent does not deny this. He testified that he did not tell her anything because he did not want to facilitate her receiving birth control. [TR. at 36] Respondent admitted that the first thing that he did when AR requested a refill of her prescription was determine whether she was using the medication as a contraceptive. [TR. at 141] As a result, Respondent did not ask AR when she had taken the last dose of her previous prescription or what day she was to begin taking the first dose of the refill prescription she was seeking. [TR. at 35-6]. Respondent also failed to ask AR whether she had a medical condition, for which a pregnancy –especially an unintended pregnancy – could adversely affect her physical or emotional health. In short, Respondent failed to take any steps whatsoever to assess the risk of harm to AR caused by his refusal to transfer her prescription or to provide her with information as to how to get her prescription filled. Once Respondent knew that the patient was using the medication for contraception, he refused to do anything further to assist her in any way. By his refusal, he substantially departed from the standard of care ordinarily exercised by pharmacists.

(E) Harm or Potential Harm to a Patient

Respondent argues that this disciplinary action should be dismissed because there was no actual harm or potential harm to the patient. However, the applicable law in this case does not require a finding of actual harm. The definition of unprofessional conduct as set forth in Wis. Adm. Code § Phar 10.03(2), states “any pharmacy practice which constitutes a danger to the health, welfare, or safety of a patient or public, including but not limited to, practicing in a manner which substantially departs from the standard of care ordinarily exercised by a pharmacist *which harmed or could have harmed a patient.*” The prohibition of conduct which has a potential to cause harm is consistent with the purpose of professional licensing and the disciplining of licensed professionals to protect the public. See *Krahenbuhl v. Wisconsin Dentistry Examining Bd.*, 2004 WI App. 147, 30, 681 N.W. 2d 891:

... [A] state action against a licensee is not principally about damages, penalties or forfeitures but rather is about the protection of the public. See also *Doersching v. Funeral Dirs. & Embalmers Examining Bd.*, 138 Wis. 2d 312, 328, 405 N.W. 2d 781 (Ct. App. 1987) (“The state's purpose in licensing professionals is to protect its citizens. *Strigenz*, 103 Wis. 2d at 286, 307 N.W. 2d at 667.

Evidence was presented that the increased risk of a pregnancy to AR resulting from her inability to obtain her contraceptive medication harmed or could have harmed her. Women still die during childbirth. Every pregnancy has the potential for morbidity or mortality. [TR. at 304] There is a risk of pregnancy even while taking oral contraceptives exactly as directed, and an increased risk when it is not taken as directed. [Exhibit 2, page 3]

Respondent also argues that any temporary frustration or anxiety experienced by the patient as a result of her inability to obtain her contraceptive medication cannot be the basis for a finding of harm. Respondent relies on the opinion of Dr. Ralph Miech, a retired professor of pharmacology and emergency medicine. Dr. Miech's testimony was focused on the pharmacodynamics of oral contraceptives; how the drug acts in the body. [TR. at 311-312] In Dr. Miech's opinion, Respondent's refusal to transfer AR's prescription, which resulted in her missing the first dose of Loestrin, was not a danger to AR's health. Dr.

Miech based his opinion on the fact that AR had no difficulty taking a double dose to make up for the missed dose and she was able to take the remaining doses in the cycle. [TR. at 313-314]. Dr. Miech's opinion was, therefore, based upon the outcome in this case; that because AR did not experience any side effects from the double dose and did not become pregnant. [TR. at 316].

The flaw in Dr. Miech's opinion is that the risk of harm, for purposes of the applicable pharmacy rule, Wis. Adm. Code Phar §10.03(2), is not determined by whether the patient was *actually* harmed, but whether there was a *potential* that a patient could have been harmed. In addition, the rule does not limit the potential harm to a specific patient; it could include *any* patient that could have been harmed. Nor does the rule distinguish between physical and emotional harm. Dr. Miech admitted that he did not take into consideration the potential emotional harm to a patient from an unintended pregnancy. [TR. at 319] The fact that there was no actual physical harm to AR does not mean that Respondent's conduct was acceptable under the pharmacy rule and, therefore, Dr. Miech's opinion has little relevance to the violation in this case.

Whether or not AR actually became pregnant as a result of missing the first dose of her prescribed medication does not settle the issue of harm or potential for harm. Pregnancy itself can create health risks to the mother. The possibility of ovulation and pregnancy increases with each missed dose of the medication in question. [Ex. 2] Mr. Jordanby advised AR to use a back-up method of contraception for the rest of her menstrual cycle. [TR. at 90] At the time of the hearing, AR testified that she was pregnant and that her pregnancy had resulted from missing just one dose of her contraceptive medication. [TR. at 58] From the prospective of a patient desiring contraceptive protection, the Respondent's conduct created harm or the risk of harm.

#### (F) Respondent's Motion to Dismiss

Prior to the hearing of this matter, Respondent requested that the Complaint be dismissed on the basis that the rules of professional conduct, as applied to the facts of this case, unconstitutionally interfere with Respondent's right to the Free Exercise of Religion protected by the First Amendment to the United States Constitution and Article 1, Sec. 18 of the Wisconsin Constitution. While constitutional issues in general cannot be litigated in this forum (*Omernick v. Department of Natural Resources*, 100 Wis. 2d 234, 248, 301 N.W. 2d 437 (1981)), this tribunal has determined for the reasons set forth below that Respondent's contentions do not reach a constitutional level. Based upon a review of the record, including the arguments filed by the parties subsequent to the hearing, Respondent's motion to dismiss is without merit and is denied. Respondent's arguments on this issue are nonetheless of record for the purposes of appeal.

The Wisconsin Pharmacy Examining Board has never held that a pharmacist is not entitled to exercise his or her conscience in the practice of his or her profession, nor is Respondent's exercise of conscience the basis for prosecution of this case. Rather, this case is about following professional standards in the exercise of one's conscience. This, Respondent failed to do. The discipline recommended in this Order is a consequence of Respondent's failure to act as a professional. The Respondent is not being sanctioned for exercising his conscience. Rather, he is being held accountable, as would any other registered pharmacist, for engaging in a practice that departed from the standards of care that govern his profession. The United States Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872; 110 S.Ct. 1595, 108 L.Ed. 2d 876, has held that the free exercise of religion clause would not relieve an individual of the obligation to comply with a law which incidentally forbids the performance of act that the individual's religious belief required, so long as the law was not specifically directed to religious practice and was otherwise constitutional.

The Court said:

We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.

See also, *Peace Lutheran Church v. Village of Sussex*, 2001 WI App 139, 246 Wis. 2d 502, 517, 631 N.W. 2d 229:

The United States Supreme Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."

Nor has the United States Supreme Court held "that when otherwise prohibited conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation." *Lange v. Lange*, 175 Wis. 2d 373, 383-84, 502 N.W. 2d 143 (Ct. App. 1993) (citations omitted).

It has not been shown by the evidence presented in this case that Respondent's ability to freely exercise his religious beliefs will be unduly burdened if he is required to follow generally recognized professional standards of care in exercising his conscientious objection to birth control.

Nor has Respondent successfully demonstrated that he is entitled to a claim under the Wisconsin Constitution. Respondent has failed to show that application of Wis. Admin. Code § Phar 10.03(2) unduly "burdens" him and, thus, his arguments fail. See e.g., *State v. Miller*, 202 Wis. 2d 56, 549 N.W. 235 (1996).

The state's compelling interest in making certain that health care professionals practice in a competent manner is well established:

This court has acknowledged that the purpose of licensing statutes is not to benefit those persons licensed to practice under the statutes, but rather to protect the public by the requirement of a license as a condition precedent to practicing in a given profession. The granting of a license pursuant to such a statute has been characterized as a privilege. *Strigenz v. Department of Regulation*, 103 Wis. 2d 281, 286, 307 N.W. 2d 664 (1981). Such statutes are grounded in the state's police power to protect the public welfare through safeguarding the life, health, and property of its citizens, quoting *State ex rel. Wis. Registration Bd. of Architects & Professional Engineers v. T.V. Engineers*, 30 Wis. 2d 434, 438-39, 141 N.W. 2d 235 (1966). Occupational licensing requirements follow a legislative determination that the public's health and safety require protection from "incompetent practitioners" *Laufenberg v. Cosmetology Examining Board*, 87 Wis. 2d 175, 184, 274 N.W. 2d 618 (1979), citing *Watchmaking Examining Bd. v. Husar*, 49 Wis. 2d at 533. See also, *State ex. rel. Green v. Clark*, 235 Wis. 628, 631, 294 N.W. 25 (1940).

*Gilbert v. Medical Examining Board*, 119 Wis. 2d 168, 188-9, 349 N.W. 2d 68 (1984):

#### (G) Objectives of Professional Discipline

The recommendation for discipline in this Order is based upon the objectives of professional discipline, which include (1) to promote the rehabilitation of the licensee; (2) to protect the public; and (3) to deter other licensees from engaging in similar conduct. *State v. Aldrich*, 71 Wis. 2d 206, 209 (1976). Punishment of the licensee is not an appropriate consideration. *State v. McIntyre*. 41 Wis. 2d 481, 485 (1969).

Respondent testified at hearing that he no longer puts any disclosure of his conscientious objection in writing to anyone.

Q: So does that mean, Mr. Noesen that you still use the same definition of participate?

A: I don't use any written stuff anymore. I just – I was on the phone for an hour with Lance Moran. I was on the phone for an hour with Steve Mouskou, he's my agent through Lance Moran's company, and we just talk it out. It's just a matter of communication. That was more of a business decision that I put in writing. That wasn't—I wasn't obligated by any means to put anything in writing and so – to be consistent I'm going through Pharmstaff ....

Q: And you communicated to your agent that you will not transfer a prescription, is that correct?

A: I can't remember for sure.

Q: So, you may be sitting in the same spot later?

A: You know, I can't remember. I can't remember if I— [TR. at 204]

When asked why he did not assess the risk to the patient by asking AR about her medical condition or when she took her last dose of medication, Respondent testified as follows:

Q: And what the patient wanted wasn't important to you, was it?

A: If the patient is desiring something that's contrary to the moral code, to the natural law, to the philosophy of pharmacy practice going way back to the old pharmacy guys like Galen, Plano the Elder, and all these guys that established pharmacy practice a long time ago, like Hippocrates said, you know, don't give a poison to your patient,

so we have to follow these laws of our profession because they don't change.

Q: But, the point is this, the moral code that you say you must follow in making determinations for this patient is the moral code that you choose to believe?

A: I believe there is a God. There's objective truth. There's good. There's evil. There's lies. There's truth. [TR. at 149-150]

Respondent's testimony gave the distinct impression that satisfying his own personal moral code was his only concern. Respondent did not even acknowledge that he had caused or could have caused harm to a patient. In fact, Respondent argued that others were to blame for the problem – the patient, Ken Jordanby, the Wal-Mart Pharmacist and the Pharmacy Examining Board. Rather than accepting and acknowledging his responsibility as a professional pharmacist, Respondent would have the Board conclude that it was the obligation of others to interpret the extent of his conscientious objections and to ensure that an alternate arrangement was in place so that patients would receive their health care.

Respondent clearly needs training in the ethics of his profession. This Order recommends a minimum of six hours of continuing education in ethics in the profession of pharmacy. In addition, the Order imposes limitations that will guide Respondent in the responsible exercise of his conscience in accord with the standard of care reflected in the APhA report and Pharmacist Code of Ethics. Respondent is allowed to work as a pharmacist and to exercise his beliefs about contraception; he is merely prevented from doing so in a manner where he deprives patients of their legal health care rights by failing to inform his practice setting of the acts he will not perform. The imposition of the proposed discipline, training and practice guidelines strike the appropriate balance between the interests of an objecting pharmacist and the need for protection of the public in this action.

The goal of deterrence is likewise met by the terms of this Order. Respondent as a condition of his licensure is ordered to follow accepted guidelines for the professional exercise of his conscience, and he will be required to obtain additional training. These measures should be sufficient to deter him from confusion of his professional responsibilities in future. Nor is it unreasonable to hope that the Board's recognition of guidelines in its Order will be sufficient for the deterrence of others in similar situations.

#### (H) Costs of the Proceeding

Wis. Stat. § 440.22(2) provides in relevant part:

In any disciplinary proceeding against a holder of a credential in which the department or an examining board, affiliated credentialing board or board in the department orders suspension, limitation or revocation of the credential or reprimands the holder, the department, examining board, affiliated credentialing board or board may, in addition to imposing discipline, assess all or part of the costs of the proceeding against the holder. Costs assessed under this subsection are payable to the department.

The presence of the word "may" in the statute is a clear indication that the decision whether to assess the costs of this disciplinary proceeding against Mr. Noesen is a discretionary decision on the part of the Board and that the Board's discretion extends to the decision whether to assess the full costs or only a portion of the costs.

The ALJ's recommendation and the Board's decision as to whether the full costs of the proceeding should be assessed against the credential holder, like the supreme court's decision whether to assess the full costs of disciplinary proceedings against disciplined attorneys, *see* Supreme Court Rule 22.24(1m), is based on the consideration of several factors, including:

- 1) The number of counts charged, contested, and proven;
- 2) The nature and seriousness of the misconduct;
- 3) The level of discipline sought by the parties;
- 4) The respondent's cooperation with the disciplinary process;
- 5) Prior discipline, if any;
- 6) The fact that the Department of Regulation and Licensing is a "program revenue" agency, whose operating



- costs are funded by the revenue received from licensees, and the fairness of imposing the costs of disciplining a few members of the profession on the vast majority of the licensees who have not engaged in misconduct; and
- 7) Any other relevant circumstances.

Mr. Noesen has not presented any evidence regarding any of the above factors that would mitigate the imposition of the full costs of this proceeding. To the contrary, the conduct was of a serious nature, denying patient care, and serious administrative sanctions were sought. The factual allegations were all proven and there is no argument to apportion any counts that were unproven, (being none), or that certain factual findings were investigated and litigated that were unnecessary. Given the fact that the Department of Regulation and Licensing is a “program revenue” agency, whose operating costs are funded by the revenue received from licensees, fairness here dictates of imposing the costs of disciplining Mr. Noesen upon him and not fellow members of the pharmacy profession who have not engaged in such conduct.

### EXPLANATION OF VARIANCE

Following remand, the Board has reconsidered the imposition of costs and the reasons therefore. The modified portion of this opinion reflecting the Board’s exercise of discretion to impose costs is inserted into this opinion at subpart “(H)” of the ALJ’s analysis of the evidence.

The ALJ’s analysis formerly proposed the following, which is now stricken:

*The assessment of costs against a disciplined professional is authorized by sec. 440.22(2), Wis. Stats. and sec. RL 2.18, Wis. Admin. Code. The Pharmacy Examining Board has the discretion to impose all, some, or none of the costs of the proceeding. Wis. Stats. § 440.22 (2). The recommendation that the full costs of the proceeding be assessed is based on two factors. First, the Department of Regulation and Licensing is a "program revenue" agency, which means that the costs of its operations are funded by the revenue received from its licensees. Second, licensing fees are calculated based upon costs attributable to the regulation of each of the licensed professions and are proportionate to those costs. This budget structure means that the costs of prosecuting cases for a particular licensed profession will be borne by the licensed members of that profession. It is fundamentally unfair to impose the costs of prosecuting a few members of the profession on the vast majority of the licensees who have not engaged in misconduct. The cost of this proceeding should not be borne by or passed along to the other members of the profession who abide by the rules of practice and follow the law. Since the Respondent is found to have engaged in unprofessional conduct, he should be held responsible for the full costs of this proceeding.*

It is so ordered by the Board

Dated October 29, 2008

Gregory C. Weber, R.Ph.  
Board Chair

[\[1\]](#) Unfortunately, this rhetorical response was typical of Respondent’s demeanor when questioned as to critical points during the hearing. The following excerpt of Respondent’s testimony is illustrative:

Q: All right. So Mr. Scott, your agent, got this letter. Exhibit 4, and how was he supposed to know from reading this letter that you wouldn’t transfer a prescription?

A: Well, perhaps, Mr. Zweig, you could tell me what you would think if I read you a piece of this?

A: Well, Mr. Noesen, we’ve already established that you didn’t put anywhere in the letter that you wouldn’t transfer a prescription, correct?

A: If you’d allow me to read a part of this.

Q: Well, please, answer that. Then I’ll allow you.

A: I think that I have already answered that question.

Q: And the answer is you did not, correct?

A: I did answer that question.

Q: Your answer to the question was that you did not include specifically in this letter that you would not transfer a prescription.

A: I believe that I've answered that question already.

Q: And what was your answer?

A: You can ask the court reporter.

Q: You could save us a lot of time if you'd tell us, sir. Is there a reason you don't want to tell us what your answer is?

A: I think this is harassment if you keep asking me the same question over and over.

Q: Is that an objection, Mr. Noesen?

Q: Rather than waste time, let's ---I'll ask you a different question. What language in Exhibit 4 do you believe makes it clear to someone reading Exhibit 4 that you will not transfer a prescription?

A: Mr. Zweig, you tell me what you think when I read this.

Q: No, you don't get to ask me the questions, Mr. Noesen.

A: Okay.

Q: Please read from that letter the portion of the letter that you believe informs a reader that you will not transfer a prescription.

A: Let me ask Attorney Baird what she thinks. [TR. at 120-122]