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**STATE OF WISCONSIN
BEFORE THE PHARMACY EXAMINING BOARD**

**IN THE MATTER OF THE APPLICATION
FOR PHARMACIST LICENSE**

**FINAL DECISION AND ORDER
WITH VARIANCE**

**DELORA PUFALL,
APPLICANT.**

DHA Case No. SPS-14-0041
DLSC Case No. 14 PHM 039

0004222

BACKGROUND

On June 22, 2015, Administrative Law Judge Jennifer Nashold (ALJ), Division of Hearings and Appeals, issued a Proposed Decision and Order (PDO) in the above referenced matter. The PDO was mailed to all parties. On July 10, 2015, the Division of Legal Services and Compliance (Division) filed an objection to the PDO as being contrary to the law and requested the Pharmacy Examining Board (Board) affirm the denial of the application for licensure. On July 21, 2015, the Respondent filed a response to the Division's objections and requested the Board adopt the PDO in its entirety. On July 22, 2015, the Board met to consider the merits of the PDO and the stated objections. The Board voted to approve the PDO with variance. The PDO is attached hereto and incorporated in its entirety into this Final Decision and Order with Variance (Order).

VARIANCE

Pursuant to Wis. Stat. §§ 440.035(1) and 450.05, the Board is the regulatory authority and final decision maker governing the licensure of pharmacy applicants. The matter at hand is characterized as a class 1 proceeding pursuant to Wis. Stat. § 227.01(3)(a). The Board may make modifications to a PDO, in a class 1 proceeding, pursuant to Wis. Stat. §§ 227.46(2) and (3), provided the Board's decision includes an explanation of the basis for each variance.

In the present case, the Board adopts the Procedural Summary and Findings of Fact, found in the PDO, with the following variances to correct minor typographical errors:

1. In the section titled, "FINDINGS OF FACT" found on page two (2), paragraph three (3) of the PDO, the Board makes the following amendment to reflect the correct language of Wis. Admin. Code §§ Phar 2.01 and 2.04 to read "[h]as been graduated from a school or college of pharmacy *approved* by the board, or has obtained certification by the foreign pharmacy graduate examination committee."
2. In the section titled, "FINDINGS OF FACT" found on page three (3), paragraph 13 of the PDO, the Board makes the following amendment to reflect the correct date of the memorandum from Division legal counsel to read "In a memorandum from Division legal counsel to the Executive Director of the Board and Department management issued

June 17, 2013, prior to Pufall's current application, legal counsel examined whether there was a legal basis for granting Pufall a license to practice Pharmacy in Wisconsin."

Further, the Board adopts the "DISCUSSION" in part beginning on page four (4) and ending after the recitation of Wis. Admin. Code § Phar 2.04 on page five (5), with the following variances to correct minor typographical errors as follows:

1. In the section titled, "DISCUSSION" under the subsection titled, "Requirements for Licensure," found on page four (4) the recitation of Wis. Stat. § 450.05 is amended to reflect the correct language of Wis. Stat. § 450.05 to read "The board may, upon application and payment of the fee specified in s. 440.05(2), license as a pharmacist any person who is licensed in another state if the person produces satisfactory evidence of having met requirements comparable to those that existed in this state at the time the person became *licensed* in the other state. . . ."
2. In the section titled, "DISCUSSION" under the subsection titled, "Requirements for Licensure," found on page five (5) the second sentence is amended to reflect the correct language of Wis. Admin. Code § Phar 2.04(2) to read "(2) Has passed the *required* examinations administered by the board."

Finally, the Board varies the remainder of the "DISCUSSION" section to uphold the legal requirements for licensure as a pharmacist in Wisconsin as follows:

The Applicant bore the burden to provide evidence satisfactory to the Board that she meets the requirements for licensure as a Pharmacist in Wisconsin. The Applicant failed to meet her burden. Wisconsin Stat. § 450.05 required the Applicant, a Pharmacist licensed in another state, do two things; 1) produce satisfactory evidence of having met the licensure requirements of Minnesota and, 2) establish that Minnesota's licensure requirements were comparable to those that existed in Wisconsin at the time Applicant became licensed. The record is devoid of the actual text of the relevant Minnesota statutes or rules. The record is also devoid of any information from the Minnesota Board of Pharmacy demonstrating Applicant met their licensing requirements.

To begin, Applicant failed to demonstrate any evidence that she met the licensure requirements of Minnesota. Applicant simply argued that because she is licensed in Minnesota, she must have met Minnesota's licensing requirements. However, the inquiry at hand is not whether she was licensed in another state, rather the statute requires the Applicant demonstrate satisfactory evidence of "having met requirements" for licensure. The Applicant failed to produce Minnesota's requirements and failed to produce any evidence of meeting those requirements. The words the legislature chose to use in crafting the statute matter – "[w]e have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Garmain*, 503 US 249, 253-54 (1992). To further illustrate the point, a social worker applicant seeking reciprocal licensure in Wisconsin must show they "[h]old a similar certificate in another state or territory" and the Social Worker Section must determine "that the requirements for obtaining the certificate in the other state or territory are substantially equivalent" to Wisconsin's requirements. Wis. Stat.

§ 457.15. If the legislature wished, it could have written the Pharmacy statute as they did the social worker statute, but they did not. A social worker must show they “hold a similar license” whereas a Pharmacist must show they “met the requirements” for licensure. Therefore, simply providing evidence she holds a Minnesota Pharmacy license was legally insufficient.

Additionally, Applicant failed to demonstrate that Minnesota’s licensing requirements were comparable to Wisconsin’s licensing requirements. Applicant failed to produce the relevant statutes and rules for both Minnesota and Wisconsin licensure. By failing to produce the relevant Minnesota statutes or rules, the record does not allow for a comparison of Wisconsin Pharmacy licensure requirements with Minnesota Pharmacy licensure requirements. Thus Applicant failed to establish that the requirements were comparable. Instead, Applicant relied on a memorandum from a Division attorney, who did not testify at the hearing, to support a proposition that Minnesota and Wisconsin’s requirements were comparable. Because the Division attorney was not called to testify, the statements in the memorandum are uncorroborated hearsay and cannot form the basis for the decision of comparability. In an administrative review hearing in Wisconsin, Courts have long held that “[u]ncorroborated hearsay evidence, even if admissible, does not by itself constitute substantial evidence. . . Substantial evidence must include something ‘more than ‘a mere scintilla’ of evidence and more than ‘conjecture and speculation’.” *Williams v. Housing Authority Of Milwaukee*, 2010 WI App. 14, ¶ 14, 323 Wis. 2d 179, 187, 779 N.W.2e 185, 189 (citing *Gehin v. Wisconsin Group Insurance Board*, 2005 WI 16, 278 Wis. 2d 111, 692 N.W.2d 572). The Applicant failed to present anything more than this uncorroborated statement and therefore failed to carry her burden of proof.

Finally, the Applicant needed to show that she met the Wisconsin requirements for licensure via reciprocity in Wis. Admin. Code §§ Phar 2.04, 2.05 and 2.06. As outlined above, Wis. Admin. Code § Phar 2.04(1) gives the Board discretion to grant a license in Wisconsin to a licensee of another state if the applicant 1) has been graduated from a school or college of pharmacy approved by the board, or 2) has obtained certification by the Foreign Pharmacy Graduate Examination Committee (FPGEC). The Applicant has failed to demonstrate that she meets either requirement. Instead, the record clearly establishes that the Applicant does not meet either requirement. As to the first prong, the Pharmacy Board has not approved the University of Western Australia. For the second prong, the Applicant has conceded that her education does not meet FPGEC standards. In fact, Applicant asserted that she cannot gain certification as her Australian pharmacy education does not meet FPGEC standards for pharmacy education. Applicant attempts to leverage the fact that she does not meet FPGEC standards as a reason Wisconsin should ignore its licensure requirements. To the contrary, the fact that her foreign education does not meet the FPGEC standards for education further bolsters the Board’s decision to deny her licensure.

Applicant further argues that her education is “equivalent” and therefore should be accepted by Wisconsin. However, the question at hand is not one of educational “equivalence,” rather it is a question of whether the Applicant met the specified requirements for FPGEC certification (which she did not), or whether her school was approved by the Board (which it was not). Simply put, all applicants must meet the credentialing requirements and the Applicant failed to do so here.

Applicant failed to meet her burden of demonstrating she met the licensing requirements of Wis. Stat. § 450.05 and Wis. Admin. Code § Phar 2.04. Applicant also failed to demonstrate that the Board made a mistake in fact or law in denying her application as a Pharmacist in Wisconsin. Therefore the Pharmacy Board's decision to Deny Applicant licensure in Wisconsin must stand.

CONCLUSIONS OF LAW

1. The Board has jurisdiction in this matter pursuant to Wis. Stat. § 450.05.
2. An applicant has the burden of showing that the applicant meets the eligibility requirements set by law for the credential and the Board made a mistake of fact or law in denying the application. Wis. Admin. Code §§ SPS 1.07(3) and 1.08(4).
3. Applicant failed to establish that she meets the requirements of Wis. Stat. § 450.05 because she did not establish that she met the licensing requirements of Minnesota and because she failed to demonstrate that Minnesota's licensing requirements were comparable to Wisconsin's licensing requirements at the time of licensure.
4. Applicant failed to establish that she meets the requirements of Wis. Admin. Code § Phar 2.04(1) because she did not graduate from a school or college of pharmacy approved by the Board, nor did she obtain certification by the Foreign Pharmacy Graduate Examination Committee.
5. Applicant failed to establish the Board made a mistake of fact or law.

ORDER

For the reasons set forth above, it is hereby ORDERED:

1. Applicant Delora Pufall's application (# 476001) for licensure as a Wisconsin pharmacist is DENIED.
2. The terms of this Order are effective the date the Final Decision and Order is signed by the Board.

Dated at Madison, Wisconsin this 31 day of August, 2015.

By: Th. Schumacher (initials)
A Member of the Board



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Application for Pharmacist
License of Delora Pufall, Applicant

DHA Case No. SPS-14-0041
DLSC Case No. 14 PHM 039

PROPOSED DECISION AND ORDER

0004222

The parties to this proceeding for purposes of Wis. Stat §§ 227.47(1) and 227.53 are:

Delora Pufall, by

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Department of Safety and Professional Services, Division of Legal Services and
Compliance, by

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PROCEDURAL SUMMARY

This proceeding was commenced on May 14, 2014, when the Department of Safety and Professional Services, Division of Legal Services and Compliance (Division) issued a Notice of Denial and Notice of Hearing, which denied Applicant Delora Pufall's application for pharmacy licensure. A hearing was held on February 24, 2015, at which Pufall testified on her own behalf. Post-hearing briefs were submitted, with the last brief received on May 21, 2015.

FINDINGS OF FACT

1. On September 19, 2007, Delora Pufall was awarded a Master of Pharmacy degree from the University of Western Australia, Crawley, Western Australia. Prior to receiving her Master of Pharmacy degree, Pufall had completed a Bachelor's degree in chemistry at Northland College in Ashland, Wisconsin. (Div. Ex. 1, p. 13; Hrg. Tr., p. 19)

2. After receiving her Master of Pharmacy degree, Pufall completed a required 2,000-hour internship under the auspices of the Pharmaceutical Society or Council of Western Australia. While completing the 2,000 hours of internship and training, Pufall was under supervision and had periodic examinations, and was considered a student of Australia's Board of Pharmacy rather than of the university. (Hrg. Tr., pp. 20-21, 52-53)

3. To be a licensed pharmacist in Wisconsin, Wis. Admin. Code §§ Phar 2.01(1) and 2.04(1)¹ require that an applicant "[h]as been graduated from a school or college of pharmacy by the board or has obtained certification by the foreign pharmacy graduate examination committee" (FPGEC), a subcommittee of the National Association of Boards of Pharmacy. (App. Ex. 101)

4. There is no evidence in the record that the University of Western Australia, Crawley, Western Australia, is a school or college of pharmacy approved by the Wisconsin Pharmacy Examining Board (Board).

5. Pufall has not obtained certification of her Australian pharmacy education from the FPGEC. (Div. Ex. 1, pp. 2, 6, 16; App. Exs. 101, 103, 104)

6. Pufall cannot obtain certification from FPGEC because Pufall's Australian pharmacy education does not meet FPGEC standards for pharmacy education. Specifically, the FPGEC standard for certification of a foreign pharmacy degree requires that the foreign program leading to a degree was at least a four or five-year program, depending on when the degree was issued. In Pufall's case, the FPGEC determined that in order to give consideration to advanced degrees in determining eligibility for FPGEC certification, the first degree must be a pharmacy degree. Because Pufall's first degree was in chemistry, the FPGEC was unable to calculate the required minimum curriculum length based on the chemistry degree obtained in the United States plus the Master of Pharmacy obtained in Australia. Also, the FPGEC would not credit Pufall's post-graduate internship to her degree program because it was not part of her degree program and was not required for her Master of Pharmacy degree. The FPGEC expressed "sympathy" for Pufall and encouraged her to work with the Wisconsin Board. (App. Exs. 101, 102, pp. 8, 24, 103, 104; Hrg. Tr., pp. 53-54)

7. Pufall left Australia in 2009 to return to Ashland, where she grew up and still has family. (Hrg. Tr., pp. 19, 25)

8. On June 15, 2012, Pufall obtained a license to practice pharmacy in Minnesota. As part of the licensing process, she passed the North American Pharmacist Licensure Examination (NAPLEX) administered by the National Association of Boards of Pharmacy, which is the licensing examination that every student graduating from a U.S. school must pass to obtain

¹ The relevant language from these provisions is the same now as it was in 2012, when Pufall became licensed in Minnesota.

licensure. She also completed an internship of 1,600 hours, as required by Minnesota. (Div. Ex. 1, p. 23; Hrg. Tr., pp. 22-24)

9. Since becoming licensed in Minnesota, Pufall has been practicing as a pharmacist there and has had no disciplinary problems with her license. She travels 2 ½ hours to and from work each day and would prefer to work in Wisconsin, near or in Ashland, where she lives. (Hrg. Tr., pp. 24- 25)

10. Pufall also took a Canadian equivalency examination in order to practice in Canada, which test she passed. (Hrg., Tr., pp. 21-22)

11. On June 27, 2013, Pufall applied for a license to practice pharmacy in Wisconsin, by endorsement of her Minnesota license. (Div. Ex. 1, pp. 13-14, 19)

12. On March 14, 2015, the Board denied Pufall's application, stating the following as grounds for denial: "Applicant has not met the requirements found in Wis. Admin. Code § Phar 2.04 relative to having an approved degree or certification by the foreign pharmacy graduate examination committee." (Div. Ex. 1, p. 2)

13. Prior to Pufall's current application, Pufall had previously applied for licensure in Wisconsin. In a memorandum from Division legal counsel² to the Executive Director of the Board and Department management issued June 17, 2014, prior to Pufall's current application, legal counsel examined whether there was a legal basis for granting Pufall a license to practice pharmacy in Wisconsin. With respect to original licensure, counsel stated that the answer was no because Pufall did not meet the requirements. Specifically, she did not have a professional degree from a pharmacy program approved by the Board, nor had she obtained certification from the FPGEC. (Div. Ex. 1, pp. 5-7)

14. With respect to licensure by endorsement (*i.e.*, reliance on Pufall's Minnesota licensure), legal counsel's answer was "possibly." Counsel noted that pursuant to Wis. Stat. § 450.05, the requirements for licensure in the other jurisdiction must be comparable to those in Wisconsin at the time of licensure. Counsel determined that the requirements were comparable, with both states requiring a pharmacy degree from an approved school, or a FPGEC certification where the applicant has a degree from a foreign pharmacy school; passage of the NAPLEX and the MPJE; and comparable internship requirements. The memorandum noted that Minnesota appeared to have determined that "Pufall met Minnesota's degree requirements by passing an exam which was substantially equivalent to the FPGEC exam that would be certified by the FPGEC." The memorandum concluded:

Both the Wisconsin statutes and the rules require an applicant for pharmacist licensure to have an approved degree. As has already been established, Ms. Pufall does not. However, what she does have is a license from another jurisdiction whose requirements were comparable to Wisconsin's requirements at the time her license was issued. And, although she did not meet the stated requirements for Minnesota licensure, the PEB can elect to give credence to Minnesota's grant of a license (footnote omitted), and on that basis, reasonably find that Ms. Pufall has met the statutory requirements for licensure by endorsement pursuant to s. 450.05, Stats.

² The attorney who drafted the memorandum is not the same attorney handling the instant matter.

However, the memorandum further concluded that the Board could not make a decision regarding Pufall's licensure at that time because it was without jurisdiction due to the fact that Pufall did not then have an application pending and the appeal and rehearing deadlines had passed with respect to previous denials of her license. (Div. Ex. 1, pp. 5-7)

DISCUSSION

Burden of Proof

Wisconsin Admin. Code § 1.08(4) provides:

(4) BURDEN OF PROOF. The applicant has the burden of proof to show by evidence satisfactory to the credentialing authority that the applicant meets the eligibility requirements set by law for the credential. The office of examinations has the burden of proof to show by a preponderance of the evidence that the applicant cheated on an examination or breached examination security.

Wisconsin Admin. Code § SPS 1.07(3) states that an applicant requesting a hearing must indicate "a description of the mistake in fact or law which constitutes reasonable grounds for reversing the decision to deny the application for a credential. . . ." Pursuant to these provisions, an applicant's burden is to show that she meets the eligibility requirements set by law for the credential and that the Board made a mistake of fact or law in denying the application.³

Requirements for Licensure

Wisconsin Stat. § 450.05 and Wis. Admin. Code § Phar 2.04 provide the standards for licensure for those applicants licensed in another state. Wisconsin Stat. § 450.05 states:

The board may, upon application and payment of the fee specified in s. 440.05(2), license as a pharmacist any person who is licensed in another state if the person produces satisfactory evidence of having met requirements comparable to those that existed in this state at the time the person became license in the other state. . . . If the board requires an equivalency examination, any person licensed as a pharmacist in another state who is engaged in the active practice of pharmacy may only be required to pass an examination on state and federal laws, rules, and regulations.

Wisconsin Admin. Code § Phar 2.04 provides:

Qualifications for persons licensed in another state. A pharmacist holding a license to practice pharmacy in another state may become licensed in Wisconsin if the applicant:

³ The Division cites Wis. Stat. § 227.57 for the burden of proof. I conclude that that provision is only applicable to judicial review of an agency's decision, including the administrative law judge's decision, and does not apply to the administrative law judge's decision.

(1) Has been graduated from a school or college of pharmacy approved by the board, or has obtained certification by the foreign pharmacy graduate examination committee.

(2) Has passed the require examinations administered by the board.

Pufall argues that she meets these requirements. She contends that pursuant to Wis. Stat. § 450.05, she is licensed in Minnesota and that Minnesota's requirements are comparable to those that existed in Wisconsin at the time she became licensed in Minnesota.

Although neither party has provided the actual text of the relevant Minnesota statute or rule in effect at the time Pufall became licensed in Minnesota, the provision is explained in detail in the June 17, 2013 legal memorandum by Division legal counsel and is characterized therein as comparable to Wisconsin requirements. Most relevant is that both states' provisions require applicants to have graduated from a school or college of pharmacy approved by the board, or to have obtained certification by the FPGEC. In Wisconsin, this requirement is necessary for applicants applying for an original license, *see* Wis. Admin. Code § Phar 2.01(1), and for those who are applying for a license on the basis of a license from another state. *See* Wis. Admin. Code § Phar 2.04(1).

The dispute in this case appears to center on what is meant by the phrase, "requirements comparable," in Wis. Stat. § 450.05. Pufall argues that as long as she is licensed in Minnesota and the governing provisions of Minnesota and Wisconsin are comparable, she has met the eligibility requirements, whereas the Division suggests that because Minnesota did not require a FPGCE certification, the states' requirements are not comparable.

As a preliminary matter, I note that under both Wisconsin law and Minnesota law, FPGCE certification is not an absolute requirement. Rather, such certification is required in the absence of the applicant having graduated from a pharmacy program approved by the Board. Thus, to the extent that the Division is suggesting that FPGEC certification is an absolute requirement, that is incorrect. Moreover, although somewhat ambiguous, it appears from the June 17, 2013 memorandum that the Minnesota Board's rationale for licensing Pufall may have been on grounds that she met the pharmacy degree requirement. (The memorandum states that Minnesota appeared to have determined that "Pufall met Minnesota's degree requirements by passing an exam which was substantially equivalent to the FPGEC exam that would be certified by the FPGEC."⁴) The parties in this case do not elaborate on what is meant by the language in Wis. Admin. Code §§ Phar 2.01(1) and 2.04(1) requiring graduation from a school or college of pharmacy "approved by the Board." The Division notes only that there is no evidence in the record that the University of Western Australia, Crawley, Western Australia, is a pharmacy school or college approved by the Board. Obviously, the Wisconsin Board did not "approve" Pufall's school or college of pharmacy in the instant case or it presumably would have granted her a license (subject to passing the required examination). It is also clear that the Wisconsin Board did not choose to interpret the licensure requirements in a manner similar to that of the Minnesota Board.

⁴ Unfortunately, the parties have not provided any relevant documentation from the Minnesota Board with respect to its licensure of Pufall.

Be that as it may, the more important question in this case is whether Pufall meets the requirements of licensure under Wis. Stat. § 450.05 by virtue of having been licensed in Minnesota under provisions that are comparable to those in effect at the time she was licensed. I conclude that Pufall meets the requirements of Wis. Stat. § 450.05. I agree with Pufall that the focus of the inquiry under Wis. Stat. § 450.05 is on the actual licensing provisions in effect at the time of licensure rather than on how the Minnesota Board interpreted its comparable provision. The only evidence in the record is that the states' licensing provisions were comparable. I therefore conclude that under Wis. Stat. § 450.05, Pufall "met requirements comparable to those that existed in this state" at the time she became licensed in Minnesota and is therefore eligible to sit for the pharmacy examination.

Although not necessary to the legal analysis, I also note the seemingly unreasonable outcome of adopting the position advanced by the Division. It is undisputed that based on her unique educational circumstances, Pufall is unable to obtain FPGEC certification, despite being licensed to practice pharmacy in Minnesota, Canada and Australia and despite her unblemished record in practicing pharmacy. Assuming therefore that Pufall's pharmacy program is not one "approved by the board" under Wis. Admin. Code § Phar 2.04(1), there would evidently be nothing she could do to ever obtain a license to practice in Wisconsin, short of repeating her post-high school education. As Pufall states, she could be credentialed in 49 other states, obtain all manner of training and awards, yet her inability to get FPGEC certification would deny her a Wisconsin license in perpetuity. Such a result does not appear to promote the objectives of licensing requirements.

CONCLUSIONS OF LAW

1. The Board has jurisdiction in this matter pursuant to Wis. Stat. § 450.05.
2. An applicant has the burden of showing that the applicant meets the eligibility requirements set by law for the credential and that the Board made a mistake of fact or law in denying the application. Wis. Admin. Code §§ SPS 1.07(3) and 1.08(4).
3. Pufall has established that she meets the requirements of Wis. Stat. § 450.05 because she received a license to practice pharmacy in Minnesota, and Minnesota's requirements were comparable to the requirements in Wisconsin at the time of Pufall's licensure in Minnesota.

ORDER

For the reasons set forth above, it is hereby ORDERED:

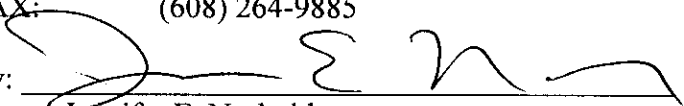
1. The Board shall allow Applicant Delora Pufall to take the required pharmacy examination.

2. The terms of this Order are effective the date the Final Decision and Order is signed by the Board.

Dated at Madison, Wisconsin on June 22, 2015.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____


Jennifer E. Nashold
Administrative Law Judge