

IN THE MATTER OF
LINDA SPENCER, P.D.
LICENSE NO. 10863

* BEFORE THE
* MARYLAND STATE
* BOARD OF PHARMACY

Respondent

*

* * * * *

FINAL DECISION AND ORDER

Background

This case arose out of allegations that Linda Spencer, P.D. (the "Respondent"), practiced pharmacy for a period of six weeks after her pharmacist's license expired and that she failed to provide evidence to the Board that she obtained the requisite amount of continuing education credits to renew her license for the two-year period beginning on July 1, 1999. Based upon its investigation, on February, 16, 2000, the Board of Pharmacy (the "Board") issued charges against the Respondent for violating the Maryland Pharmacy Act, Md. Code Ann., Health Occ. ("H.O.") §12-101 *et seq.*, specifically § 12-313(b)(24) (violates any rule or regulation adopted by the Board), *to wit* Code of Maryland Regulations ("COMAR") 10.34.18.02 (completion of continuing education required for renewal), §12-301 (an individual shall be licensed before practicing pharmacy), and §12-701 (an individual may not practice pharmacy unless licensed by the Board). A violation of §12-701 subjects an individual to a civil fine imposed by the Board in accordance with H.O. §12-707(e).

On May 18, 2000, a case resolution conference was held. In attendance were Stanton Ades, P.D., Board President, Laura Schneider, Board member, LaVerne Naesea, Executive Director for the Board, Paul Ballard, Assistant Attorney General and Board

Counsel, Roberta Gill, Assistant Attorney General and Administrative Prosecutor on behalf of the State, Joseph S. Kaufman, Esquire, Counsel for Respondent, and the Respondent. Although the Respondent agreed to a proposal at the conference, she later rejected it.

A contested case hearing was held under the Administrative Procedure Act, Md. Code Ann., State Gov't §10-201 *et seq.* before a quorum of the Board on September 20, 2000 and was continued on January 8, 2001. On the same date, this same quorum of the Board convened to deliberate and voted to uphold the charges against the Respondent and to impose the sanctions contained in this Final Decision and Order. On February 21, 2001, this quorum of the Board unanimously approved this Final Decision and Order.

SUMMARY OF THE EVIDENCE

A. Documents.

The following documents were admitted into evidence.

- State's Exhibit No. 1 - Charges of February 16, 2000.
- State's Exhibit No. 2 - 7/7/97 "Dear Pharmacist" Letter
- State's Exhibit No. 3 - COMAR 10.34.18.08
- State's Exhibit No. 4 - Andoll Investigative Report, dated 10/28 99
- State's Exhibit No. 5 - Andoll Letter to Gill, dated 1/11/00
- State's Exhibit No. 6 - Investigative Memo, dated 1/28/00, redacted, with Karpe Affidavit
- State's Exhibit No. 7 - Respondent's personnel application
- State's Exhibit No. 8 - Alco Daily Logs
- State's Exhibit No. 9 - Alco Pharmaceuticals, Inc.'s pharmacy permit renewal, dated 12/7/97

- State's Exhibit No. 10 - Respondent's renewal application, received by the Board on 8/30/99
- State's Exhibit No. 11 - License(s) issued by the Board to Respondent
- State's Exhibit No. 13 - 8/7/96 Letter to Respondent and 9/17/96 Letter of Agreement
- State's Exhibit No. 14 - 8/16/00 Memo from Andoll to Gill, with attachment
- Respondent's Exhibit No. 1 - 9/26/96 Letter from Dorothy Levi to Respondent
- Respondent's Exhibit No. 2 - Curriculum Vitae for Francis B. Palumbo
- Respondent's Exhibit No. 3 - 2/24/00 Letter from Joseph S. Kaufman to LaVerne Naesea
- Respondent's Exhibit No. 4 - 3/31/00 Letter from LaVerne Naesea to Joseph S. Kaufman
- Respondent's Exhibit No. 5 - Preliminary Evaluation of the State Board of Pharmacy (Excerpts)

B. Summary of Pertinent Witness Testimony.

Michelle Andoll, Pharmacist Compliance Officer for the Board, testified she first learned of a problem with the Respondent's license renewal when she received a phone call from Allen Karpe, the Respondent's supervisor at Alco Pharmaceuticals, Inc, on August 16, 1999, inquiring about the status of the Respondent's renewal. She stated that Mr. Karpe informed her that the Respondent had told him that her license had expired in June of 1999, that she had submitted her renewal application to the Board, but that it was being held up by the Board. (Transcript of Proceedings ("T"), p. 53). The Board's licensing unit then informed Ms. Andoll that the Board had not received the Respondent's application. (T. 54).

Ms. Andoll then offered to accommodate the Respondent by faxing another application to her. However, Mr. Karpe informed Ms. Andoll that the Respondent did not have the information necessary to document the completion of the required continuing education credits for the previous renewal period. He told Ms. Andoll that the Respondent had recently moved and could not provide documentation of the continuing education credits. Ms. Andoll then informed Mr. Karpe that the Respondent was not licensed to practice pharmacy at that point, had not been licensed since July 1, 1999, and needed to stop working as a pharmacist immediately. Mr. Karpe then relieved the Respondent of her duties as a pharmacist. (T. 54-57). Ms. Andoll testified that Alco's daily logs showed that the Respondent had been dispensing medications on many occasions after July 1, 1999 while her pharmacist's license had expired (T. 102-104; State's Exhibit No. 8), which fact was acknowledged by Respondent's counsel. (T. 102, 104).

Ms. Andoll testified that when she had asked the Respondent to produce a cancelled check to show that the Board had received her application and fee, the Respondent replied that she would look for the cancelled check. However she failed to produce it. Ms. Andoll testified that the Respondent did not tell her that she had sent a money order to the Board rather than a check. (T. 237).

Ms. Andoll further testified that the Respondent could only produce evidence of having earned 6 of the 26.25 credits required to be completed by June 30, 1999. (T. 116; State's Exhibit No. 2; State's Exhibit No. 10). After Respondent earned the remaining credits, the Board issued a renewal license to her on September 14, 1999. (T. 247-248).

Sharon Demory-Cornish, the Board's Administrative Specialist and Licensing Supervisor during the time in question, testified regarding the Board's renewal process in general and with regard to the Respondent's renewal application in particular. Ms. Demory-Cornish explained that she typically sends a data processing work request form to the Department of Health and Mental Hygiene headquarters approximately two-and-one-half to three months before a license is due to expire. The data processing unit then inputs the information and prints the renewal applications. When Ms. Demory-Cornish receives the information back from the data processing unit several days later, she then adds to the application form that amount of continuing education credits that are due and the month when the license is due to expire. (T. 258-259). The application form is then sent to the pharmacist two or three months prior to the license's expiration date. (T. 261). Despite the renewal application's warning to the pharmacist that "this is your only notice," Ms. Demory-Cornish took it upon herself to institute a practice of sending reminder notices to pharmacists. (T. 281).

Ms. Demory-Cornish testified that when the Board receives an application, the applicant's name, the type of application, and the money received are all noted in the Board's database. (T. 263). There are two separate databases, one for mail received and one for checks received. Before checks are taken to the cash office, the Board staff always reconciles the mail and the cash. All of these procedures are done on a daily basis. (T. 265).

With regard to the Respondent, Ms. Demory-Cornish testified that the Board sent the renewal application to her within a week after March 26, 1999. (T. 279). She did not testify regarding whether the Respondent had been sent a reminder notice. (T. 283).

However, she testified that neither the mail database nor the cash database indicated that an application had been received from the Respondent. (T. 267). Ms. Demory-Cornish further testified that when she asked the Respondent for a check number, the Respondent replied she did not have her checkbook with her, and she provided neither a check number nor a money order number to the Board. (T. 268; 282- 283). If the Respondent had provided a check number or a money order number, the Board could have checked the cash database to see if any checks or money orders with that number had been received. (T. 267). The Board does not accept cash. (T. 264).

Francis Palumbo, expert witness on behalf of the Respondent, testified that in his opinion it was permissible for the Respondent to practice pharmacy after her license had expired, even if she had not filed a timely application. (T. 157-158). He based this opinion on the provision contained in Md. Code Ann. State Gov't Art., §12-226(b), which states that once a sufficient application is made at least two weeks in advance of a license's expiration date, the license does not expire until the licensing agency takes final action on the application and the time for judicial review expires. (T. 138; 167). However, he acknowledged that "the law does not specifically state that the board must send out a notice or anything like that" before a pharmacist would have to stop practicing pharmacy upon expiration of the pharmacist's license. (T. 178-180).

Mr. Palumbo also testified that in his opinion the failure of a pharmacist to keep evidence that continuing education credits were completed could not form the basis for discipline. (T. 143-144). However, when asked whether discipline was appropriate for a pharmacist who failed to locate evidence of completed continuing education credits even after being given notice and a "reasonable period of time to produce the evidence," he

had no answer for the question. (T. 170). He acknowledged that the renewal applicant "certainly has a burden to demonstrate to the board that they have met the requirements of the law." (T. 171).

Howard Schiff, Executive Director of the Maryland Pharmacists Association, testified that he had recommended to the Board that it send out reminder notices to pharmacists whose licenses were about to expire. (T. 308). Mr. Schiff acknowledged that a pharmacist has the responsibility to know whether the pharmacist's licenses has expired or not. (T. 323). He also stated that if a pharmacist has only 15 out of the required 30 continuing education credits at the time she files her renewal application, that "there would have to be some sort of explanation; they were in the deep forest of the Amazon or something to that effect." (T. 325).

Allen Karpe, the Respondent's supervisor at Alco Pharmaceuticals, Inc., testified that his partner had told him that she noticed that the Respondent's license had expired. He then asked the Respondent for an explanation, to which she replied she had sent in her application but had not received anything back from the Board. Mr. Karpe asked the Respondent to call the Board and resolve the situation because he needed to keep the pharmacy's operations legal and he needed to make sure that insurance would cover her practice as a pharmacist. The Respondent failed to call the Board, and consequently Mr. Karpe resorted to call the Board himself to ascertain the status of her renewal application. (T. 340-341).

Mr. Karpe testified that Ms. Andoll told him that the Respondent could not practice because her license was no longer good and it was past the renewal date. (T. 341). Mr. Karpe then immediately prohibited the Respondent from working as a

pharmacist. When he asked the Respondent to explain why she continued to work after her license expired, she told him that the Board had sent out licenses late in past years. (T. 342). The Respondent also told him that she did not have copies of her continuing education credits because she had moved. (T. 357). The Respondent told Mr. Karpe that she had sent a check to the Board with her renewal application but that she did not have a copy of her application or a copy of her check. (T. 350). Mr. Karpe testified that the Respondent had worked as pharmacist for the period of July 1, 1999 until mid-August, 1999, when he contacted the Board. (T. 349). He also related one past instance in which he had received his pharmacist's license late and had then called the Board. He was told that he could continue to practice because the Board had received his application in a timely manner. (T. 360).

The Respondent testified she had mailed the renewal application to the Board in the first week of June, 1999, that she never makes a copy of her renewal application, that she used a money order to pay the renewal fee, and that she continued to work without calling the Board because she has received her license late in past years. (T. 373). The Respondent also testified that she never makes a copy of her continuing education documentation. (T. 374). Despite working on an expired license and failing to keep evidence of her completion of continuing education credits, the Respondent believes she did nothing wrong. (T. 377).

The Respondent testified that she had the continuing education documentation in her possession when she completed the renewal application in June of 1999. (T. 413). However, she could not reproduce this documentation because she had "moved earlier in the year. I didn't reproduce the CE because I moved then." (T. 414). But she then

denied telling Mr. Karpe and Ms. Andoll that the reason she could not locate her documentation of continuing education credits was because she had moved. (T. 414-415).

The Respondent acknowledged that she had signed a 1996 Letter of Agreement with the Board to obtain missing documentation of continuing education credits. She later obtained the missing documentation in accordance with the Letter of Agreement. (T. 397-400; State's Exhibit No. 13; Respondent's Exhibit No. 1).

FINDINGS OF FACT

Based upon the testimony and documentary evidence presented at the evidentiary hearing, the Board finds that the following facts are true:

1. The Respondent was licensed to practice pharmacy in the State of Maryland. On July 1, 1999, the Respondent's pharmacist's license expired.
2. Despite the expiration of her license, the Respondent continued to practice pharmacy until August 16, 1999, when she was instructed by her supervisor, Allen Karpe, to cease practicing pharmacy. (T. 349; 373; 102, 104; State's Exhibit No. 8).
3. In either late March or early April, 1999, the Board mailed a renewal application to the Respondent. (T. 279). It is unknown whether the Board sent the Respondent an informational letter reminding her to renew her license.
4. The Board never received a renewal application from the Respondent prior to July 1, 1999, the date her pharmacist's license was due to expire. (T. 54; 267).
5. When the Respondent did not receive her pharmacist's license by July 1, 1999, she failed to contact the Board to verify receipt of her application and to

- obtain permission to continue practicing pharmacy beyond the expiration date on her license. (T. 373).
6. To qualify for renewal of her pharmacist's license, the Respondent was required to produce evidence that she had completed 26.25 continuing education credits by June 30, 1999. Instead, the Respondent could only produce 6 credits earned by that date. (T. 116; State's Exhibit No. 2; State's Exhibit No. 10). After the Respondent earned the remaining credits, the Board issued a renewal license to her on September 14, 1999. (T. 247-248).
 7. The Respondent failed to keep documentation showing she had earned the continuing education credits required to be earned by June 30, 1999 to obtain renewal of her license. (T. 374; 414-415).
 8. On August 7, 1996, the Board sent a letter to the Respondent indicating that an audit of her continuing education credits earned for the previous license renewal period revealed that documentation of 3 credits was missing. On September 17, 1996, the Respondent entered into a Letter of Agreement with the Board in which she agreed to obtain this documentation. She then obtained the documentation and the matter was closed. (T. 399-400; State's Exhibit No. 13; Respondent's Exhibit No. 1).

OPINION

It is a fundamental principle of law that a license is "permission to do something which without the license would not be allowable." *Black's Law Dictionary* (Fifth Ed.). Under H.O. §12-301(a), "an individual shall be licensed by the Board before the individual may practice pharmacy in this State." H.O. §12-701(a) further states that "a

person may not practice, attempt to practice, or offer to practice pharmacy in this State unless licensed by the Board.” H.O. §12-707 provides for both criminal and civil penalties for practicing pharmacy without first obtaining a license from the Board. Indeed, the Board is authorized under that section to impose a fine of up to \$50,000 for the unlicensed practice of pharmacy.

The Respondent has admitted she practiced pharmacy for a period of six weeks after her license to practice pharmacy expired, which fact provides sufficient basis for the Board to impose discipline for her behavior. In her defense, she contends the provisions contained in State Gov’t Article, §10-226(b) insulate her from Board discipline. State Gov’t Article, §10-226(b) provides that “if, at least 2 weeks before a license expires, the licensee makes sufficient application for renewal of the license, the license does not expire until: (1) the unit takes final action on the application; and (2) either: (i) the time for seeking judicial review of the action expires; or (ii) any judicial stay of the unit’s final action expires.” The fatal flaw with this defense is that the Respondent cannot show she mailed an application to the Board at least two weeks before the license expired on July 1, 1999. Therefore, there was no “sufficient application for renewal” filed “at least 2 weeks before a license expires” as required by SG §10-226(b).

The Board’s records do not contain any application, check, or money order from the Respondent. The Board routinely logs in all applications and checks into its database. (T. 263). Once a review of the Board’s records showed there was no application, it was incumbent upon the Respondent to provide evidence that she sent the application. However, she made no copies of the application or the money order that she allegedly sent to the Board. (T. 373).

The Respondent's testimony was inconsistent and therefore of insufficient probative value to rebut the contrary evidence that the Board possessed no documentation showing she had submitted her renewal application to the Board. She testified she had lost her continuing education documents because she had moved but then denied that she told either Allen Karpe or Michelle Andoll this was the reason she could not find this documentation. (T. 413-415). She testified she had all the continuing education documentation in place when she completed the application in early June of 1999, but she also claimed she had previously lost the documentation when she moved in January of 1999, prior to submitting her application. (411-414).

The Respondent claimed she kept all her continuing education documentation in one place, but then was able to locate documentation for only 6 of the 26.25 credits required for renewal, all 6 of which were earned within 10 days of the renewal deadline. (T. 410-412). Her testimony that these 6 credits were intended to be applied to the next renewal period is not persuasive since these credits could not be counted towards the next renewal period under COMAR 10.34.18.07 A. (T. 411-412). Rather, the fact that the Respondent earned these 6 credits on June 21 and June 22, 1999, within 10 days of the renewal deadline of June 30, 1999, shows it is more likely that the Respondent made a last-minute effort to earn the required 26.25 credits, which behavior is not consistent with her claim that she mailed the renewal application in early June of 1999.

The Respondent also denied writing a check and telling people she had submitted a check with her renewal application, instead claiming she sent a money order to the Board. (T. 373; 408-409). But the fact that several witnesses testified that the Respondent referred to sending the Board a "check" suggests that it is more likely than

not that she referred to a check at the times she spoke with these witnesses. Michelle Andoll (T. 237), Sharon Demory-Cornish (T. 282-283), and Allen Karpe (T. 350) all remembered the term "check" being used when they spoke with the Respondent in August of 1999.¹ Of course, a cancelled check could have been retrieved from the Respondent's bank.

For all of these reasons, the Respondent's credibility is suspect and her testimony is insufficient to rebut the contrary evidence showing that no application was received by the Board.

It is clear that the Respondent failed to present any credible evidence that she in fact submitted a timely and sufficient application that could have afforded her the protections of State Gov't Art., §10-226(b). Instead, the Board will rely on its own records, which do not support the Respondent's claim that she mailed a renewal application to the Board. Because the Respondent practiced pharmacy without a valid pharmacist's license for a period of six weeks, she violated H.O. §§12-301 and 12-701, subjecting her to a civil fine to be imposed by the Board in accordance with H.O. §12-707.

Although Francis Palumbo testified that in his opinion the Board was required to send a reminder notice to the Respondent, he acknowledged "the law does not specifically state that the board must send out a notice or anything like that" before a pharmacist would have to stop practicing pharmacy. (T. 178-180). His opinion that the Board is required to allow a pharmacist to work on an expired license, even if the

¹ On redirect examination, Mr. Karpe acknowledged that the Respondent could have referred to sending in a money order rather than a check, but stated that "for some reason I thought she said check." (T. 353).

pharmacist fails to meet the criteria under SG §10-226(b), has no rational basis. Why should the Board bother to issue licenses with expiration dates as required by H.O. §12-308, if these expiration dates may simply be ignored by pharmacists with no consequences? His opinion makes no sense and is therefore rejected by the Board.

Although Sharon Demory-Cornish had testified that sometime after she became the Board's licensing supervisor in April of 1998, she had on her own initiated a practice of sending reminder notices to pharmacists at least 15 days prior to the license's expiration date (T. 257; 281), the Board had not voted to approve this practice as a Board policy until the year 2000. (T. 281; 299). Thus, there would have been no justification for the Respondent to rely on such a reminder notice because it had never been given to her in previous renewal years, especially in light of the fact that the renewal application states that "this is your final notice." (T. 281). In any event, the Respondent claimed that she sent the renewal application to the Board in early June of 1999, meaning that a reminder notice received after that date would have been irrelevant since what she needed instead was verification of the receipt of her application. Once her pharmacist's license expired, the Respondent could not practice pharmacy until she first verified that the Board had received her application at least two weeks before the date of license expiration as required by SG §10-226(b).

It is also self-evident that the Respondent violated COMAR 10.34.18.02 when she failed to obtain and maintain evidence of the completion of continuing education credits. That section provides in pertinent part that the pharmacist "shall retain supporting documents for inspection by the Board for 4 years after the date of renewal for

which the continuing education credits were used." The Respondent violated this section when she could not produce documentation for 20.25 of the required 26.25 credits.²

CONCLUSIONS OF LAW

Based upon the foregoing summary of evidence, findings of fact, and opinion, the Board concludes that the Respondent violated H.O. §§12-301 and 12-701 by practicing pharmacy without a valid license for the period between July 1, 1999 and August 16, 1999, subjecting her to the imposition of a civil fine by the Board in accordance with H.O. §12-707(e).

The Board also concludes that the Respondent failed to obtain and maintain documentation for 20.25 of the required 26.25 continuing education credits required for the renewal period that ended on June 30, 1999, and thus the Respondent violated H.O. 12-313(24), *to wit*, COMAR 10.34.18.02 B.

SANCTIONS

The Board is disturbed by the Respondent's cavalier attitude towards her legal responsibility to renew her license prior to continuing to practice pharmacy. A pharmacist's license is only effective until it expires. The Board never received a renewal application from the Respondent and it is quite troubling that the Respondent never bothered to contact the Board about the status of her renewal application even six weeks after her license had expired, and even after that fact had been pointed out to her by her supervisor. Instead, her supervisor had to take the initiative to contact the Board to ascertain whether the Board had received her renewal application.

² Mr. Palumbo's opinion to the contrary has no support in law. COMAR 10.34.18.02 B clearly requires that a pharmacist maintain such supporting documentation for 4 years.

The fact that Respondent failed to maintain documentation of her continuing education credits is also disturbing, especially since she had failed to keep all her documentation once before, resulting in a Letter of Agreement with the Board. Therefore, the Respondent was quite aware that she was required to keep this documentation and that the Board took these matters seriously. Despite this previous experience with the Board, she still failed to maintain this documentation.

The Board has a history of disciplining pharmacists for continuing education violations. Within the past four years alone, the Board has entered into Consent Orders with several pharmacists for their violations of continuing education requirements.³ However, the Board was only granted authority to issue fines for the unlicensed practice of pharmacy by the General Assembly as recently as 1997, so there are no previously adjudicated cases to guide the Board's decision in this case regarding that charge.⁴

To deter further instances of the unlicensed practice of pharmacy, the Board will impose a fine of \$500.00.

To deter further violations of the Board's continuing education requirements, the Board will issue a reprimand, place the Respondent's license on probation, and as conditions of her probation the Board shall require that (1) the Respondent earn three continuing education credits prior to the end of the current license renewal period in

³ These pharmacists include David Olson, Jeffrey Lewis, David Becker, Steven Klebrowski, and Rosemary Thompson.

⁴ The Board is cognizant of the Preliminary Evaluation of the Board (Respondent's Exhibit No. 5). Contrary to the Respondent's claim, this preliminary report does not conclude that the Board's disciplinary actions are in fact inconsistent, but rather that the lack of a standardized approach "means that the board's actions could potentially be inconsistent." Indeed, the report states that "most cases are resolved by adding extra continuing education requirements and levying a fine." which sanctions are consistent with those imposed in this case.

addition to the thirty credits required for renewal; and (2) the Respondent's continuing education credits shall be subject to mandatory audits over the next three renewal periods.

ORDER

Based on the foregoing Findings of Fact, Opinion, and Conclusions of Law, by a unanimous decision of a quorum of the Board it is hereby

ORDERED that the Respondent pay a **FINE OF \$500.00** to the Board by June 30, 2001. And be it further

ORDERED that the Respondent is **REPRIMANDED** for failing to maintain records of continuing education. And be it further

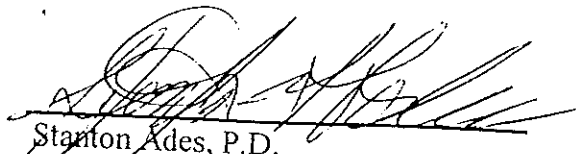
ORDERED that the Respondent shall be placed on **PROBATION** until June 30, 2001, during which time the Respondent shall earn 3 credits of continuing education in addition to the 30 credits required for renewal on June 30, 2001. And be it further

ORDERED that the Respondent's continuing education credits shall be audited for the next three renewal periods. And be it further

ORDERED that if the Respondent violates any of the foregoing conditions of probation, the Board may, after affording the Respondent an opportunity for a hearing, take action to suspend, revoke, or take any other disciplinary action. And be it further

ORDERED that this is a final order of the State Board of Pharmacy and as such is a **PUBLIC DOCUMENT** pursuant to Md. Code Ann., State Gov't Art., §§10-611, *et seq.*

2/21/01
Date


Stanton Ades, P.D.
President, Board of Pharmacy

NOTICE OF RIGHT TO APPEAL

Pursuant to Md. Code Ann., Health Occ. Art., §12-316, you have the right to take a direct judicial appeal. A petition for appeal shall be filed within thirty days of your receipt of this Final Decision and Order and shall be made as provided for judicial review of a final decision in the Maryland Administrative Act, Md. Code Ann., State Gov't Art., §§10-201, *et seq.*, and Title 7, Chapter 200 of the Maryland Rules.