

BEFORE THE IOWA BOARD OF PHARMACY

Re:	)	Case No. 2007-30
Pharmacist License of)	
TOM DEAN	)	STATEMENT OF CHARGES
License No. 17619,)	
Respondent.)	

COMES NOW, the Complainant, Lloyd K. Jessen, and states:

1. He is the Executive Director for the Iowa Board of Pharmacy and files this Statement of Charges solely in his official capacity.
2. The Board has jurisdiction in this matter pursuant to Iowa Code Chapters 155A and 272C (2007).
3. On July 25, 1991, the Board issued Tom Dean (hereinafter, "Respondent"), after examination, a license to engage in the practice of pharmacy as evidenced by license number 17619, subject to the laws of the State of Iowa and the rules of the Board.
4. Respondent's pharmacist license is current and active until June 30, 2009.
5. Respondent's address of record is 7344 NW 86th Street, Johnston, Iowa 50131.
6. At all times material to this complaint, Respondent was employed by ValueMed Pharmacy, 224 4th Street, Suite 100, Sioux City, Iowa 51101.

A. CHARGES

COUNT I – LACK OF PROFESSIONAL COMPETENCY

Respondent is charged with a lack of professional competency, in violation of Iowa Code § 155A.12(1) (2007) and 657 Iowa Administrative Code § 36.1(4)(b), as demonstrated by willful and repeated departures from, and a failure to conform to, the minimal standard and acceptable and prevailing practice of pharmacy in the State of Iowa.

COUNT II – UNETHICAL CONDUCT

Respondent is charged pursuant to Iowa Code §§ 155A.12(1) and 155A.12(2) (2007), and 657 Iowa Administrative Code §§ 8.11 and 36.1(4)(u), with unethical conduct.

B. CIRCUMSTANCES

Circumstances supporting the above charges are set forth in Attachment A.

Wherefore, the Complainant prays that a hearing be held in this matter and that the Board take such action as it may deem to be appropriate under the law.


LLOYD K. JESSEN
Executive Director

On this 4th day of March 2008, the Iowa Board of Pharmacy found probable cause to file this Statement of Charges and to order a hearing in this case.


PAUL ABRAMOWITZ, Chairperson
Iowa Board of Pharmacy
400 SW Eighth Street, Suite E
Des Moines, Iowa 50309-4688

cc: Scott M. Galenbeck
Assistant Attorney General
Hoover State Office Building
Des Moines, Iowa

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BEFORE THE IOWA BOARD OF PHARMACY

IN THE MATTER OF:)	CASE NO: 2007-30
)	DIA NOS. 08PHB011,012,013
Pharmacist License of)	
KEVIN CHRISTIANS)	
License No. 18426	)	RULING ON RESPONDENTS'
	)	COMBINED MOTION TO DISMISS,
Pharmacist License of	)	MOTION TO STRIKE,
TOM DEAN	)	or in the alternative,
License No. 17619	)	MOTION TO RECAST
)	
Pharmacy License of)	
VALUMED PHARMACY)	
License No. 1311)	
Respondents)	

On March 4, 2008, the Iowa Board of Pharmacy (Board) found probable cause to file Statements of Charges against Kevin Christians, Tom Dean, and ValuMed Pharmacy (hereinafter "Respondents"). All three Respondents were charged with the following two counts:

COUNT I: Lack of professional competency, pursuant to Iowa Code section 155A.12(1)(2007)¹ and 657 IAC 36.1(4)(b), as demonstrated by willful and repeated departures from, and a failure to conform to, the minimal standard and acceptable and prevailing practice of pharmacy in the state of Iowa.

COUNT II: Unethical conduct, pursuant to Iowa Code section 155A.12(1) and 155A.12(2)(2007) and 657 IAC 8.11 and 36.1(4)(u).

Circumstances supporting the charges were set forth in Attachment A to the Statements of Charges. All three attachments contained substantially the same factual allegations.

A notice was issued on March 6, 2008 setting the matter for a disciplinary contested case hearing for June 3, 2008 at

¹ Christians and Dean were charged under Iowa Code section 155A.12, which relates to discipline of pharmacists, while ValuMed Pharmacy was charged under Iowa Code section 155A.15, which relates to discipline of pharmacies. The substance of the two statutes is the same.

1:00 p.m. On May 16, 2008, Respondents filed a Combined Motion To Dismiss, Motion to Strike, and Motion to Recast and Request for Immediate Hearing. The state filed a Resistance on June 2, 2008, and the parties agreed to present oral arguments on the motion at the time originally scheduled for hearing. The following members of the Board² heard and considered the pending motion and resistance: Lemar Olson, Chairperson; Susan Frey; DeeAnn Wedemeyer Oleson; Edward L. Maier; Margaret Whitworth; and Ann Diehl. Attorney Tammy Westhoff Gentry represented Respondents. Assistant Attorney General Scott Galenbeck represented the state. The motion hearing was closed to the public at Respondent's election, in accordance with Iowa Code section 272C.6(1). Administrative Law Judge Margaret LaMarche assisted the Board with procedure and drafted this ruling, in accordance with the Board's deliberations, for its review.

Respondents' raise a number of constitutional arguments in their motion, including that the cited statutes and rules are unconstitutionally vague and overbroad, both on their face and as applied to these Respondents, and that the Statements of Charges violate Respondents' due process rights because they fail to provide sufficient notice of the state's claims.

Although administrative agencies lack authority to decide constitutional issues, parties to contested cases must raise the constitutional issues at the agency level in order to preserve them for judicial review. Soo Line R.R. v. Iowa Dep't of Transportation, 521 N.W.2d 685, 688 (Iowa 1994). The Iowa Supreme Court has explained the rationale for the exhaustion requirement. Permitting the administrative process to first run its course may eliminate the need for reaching potential constitutional claims. In addition, even facial constitutional issues are more effectively presented for adjudication based upon a

² Board member Susan Frey voluntarily recused herself from participating in this contested case proceeding. In addition, Respondents made a verbal request for Board Chairman Lemar Olson to recuse himself but did not file a written motion or affidavits as required by Iowa Code section 17A.11(3). See Kholeif v. Board of Medical Examiners, et.al., 497 N.W.2d 804, 806 (Iowa 1993) (holding that 17A's affidavit requirement is not a mere formality and an oral objection is statutorily insufficient). Nevertheless, Mr. Olson declined to recuse himself and stated on the record that his past contact with Respondent Kevin Christians did not prevent him from serving as an impartial decision maker in this contested case.

specific factual record, and facial constitutional challenges are frequently coupled with claims that the legislation is unconstitutional as applied to the litigant. Shell Oil Co. v. Bair, 417 N.W.2d 425, 430 (Iowa 1987).

Statutes are presumed constitutional and the party asserting vagueness must negate every reasonable basis on which the statute can be sustained. Eaves v. Board of Medical Examiners, 467 N.W.2d 234, 236 (Iowa 1991). The Iowa Supreme Court has rejected vagueness challenges to professional licensing statutes and rules that are similar to the statutes and rules cited in the Statements of Charges. See Wettach v. Iowa Board of Dental Examiners, 534 N.W.2d 168 (Iowa 1994) (upholding statute allowing discipline for "dishonorable or unprofessional conduct in the practice of dentistry"); Fisher v. Iowa Board of Optometry Examiners, 510 N.W.2d 873 (Iowa 1994) (upholding statute prohibiting "engaging in unethical conduct or practice harmful or detrimental to the public"); Eaves v. Board of Medical Examiners, 467 N.W.2d 234 (Iowa 1991) (upholding statutes prohibiting "practice harmful or detrimental to the public" and "departure from, or the failure to conform to, the minimal standard of acceptable and prevailing practice of medicine"). The Court has recognized that regulation of the medical profession requires flexibility because the limits between good and bad professional conduct can never be clearly marked. It would simply be impossible to catalog all the types of professional misconduct. Id. In this case, the Board was not persuaded by Respondents' arguments that the Statements of Charges should be dismissed because the cited statutes and rules are unconstitutionally vague.

Respondents further argue that the cited statutes and rules are overbroad and invade Respondents' protected First Amendment rights. This argument addresses the application of the statutes and rules in this contested case. Since this constitutional argument must necessarily be analyzed as applied to the Respondents, the objection is premature because the Board has not made any findings or taken any disciplinary action against Respondents. Moreover, although professionally appropriate speech is protected by the First Amendment, inappropriate and/or inaccurate speech made in a professional context is not protected. Wettach, 534 N.W.2d at 172. Whether or not Respondents engaged in unprotected inappropriate speech subject to discipline

under the cited statutes and rules must be determined following a contested case hearing.

Finally, Respondents assert that the charges fail to provide them sufficient notice of the legal claims against them and the factual basis for the charges. The Iowa Administrative Procedure Act requires that notice of a contested case hearing contain a "short and plain statement of the matters asserted." Iowa Code § 17A.12(2007). When the administrative proceeding involves the revocation or suspension of a license, the licensee must be given notice of "facts or conduct and the provisions of law which warrants the intended action..." Iowa Code § 17A.18(3). A person must have a reasonable opportunity to know of the claims which affect the person. Alfredo v. Iowa Racing and Gaming Comm'n, 555 N.W.2d 827, 833 (Iowa 1996).

Upon review of Respondents' arguments and the Statements of Charges, the Board was persuaded that the three Statements of Charges should have specified which of the eight subsection(s) of subrule 8.11 are at issue. The Board was further persuaded that it should review the information in the investigative file relating to the counts and determine whether additional detail concerning the factual allegations should be provided and/or whether some of the factual circumstances previously included should be omitted, as asserted by Respondents.

Since the Board's investigative file was not included in the record, the Board determined that it would be appropriate to grant Respondents' Motion to Strike the three pending Statements of Charges, while reserving the right to re-file charges following further review of the investigative file. At a future meeting, the Board will reconsider both the investigative information and what charges should be filed against each Respondent.

ORDER

IT IS THEREFORE ORDERED that the March 4, 2008, Statements of Charges filed against Respondents Kevin Christians, Tom Dean, and ValuMed Pharmacy, Case NO. 2007-30, are hereby stricken without prejudice. The Board will review the investigative file for the purpose of determining any future charges to be filed.

Dated this 10th day of June, 2008.



Leman E. Olson, Chairperson
Iowa Board of Pharmacy Examiners

cc: Scott Galenbeck, Assistant Attorney General
Tammy Westhoff Gentry, Respondents' Attorney

BEFORE THE IOWA BOARD OF PHARMACY

Re:	)	Case No. 2007-30
Pharmacist License of)	
TOM DEAN	)	STATEMENT OF CHARGES
License No. 17619,)	
Respondent.)	

COMES NOW, the Complainant, Lloyd K. Jessen, and states:

1. He is the Executive Director for the Iowa Board of Pharmacy and files this Statement of Charges solely in his official capacity.
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3. On July 25, 1991, the Board issued Tom Dean (hereinafter, "Respondent"), after examination, a license to engage in the practice of pharmacy as evidenced by license number 17619, subject to the laws of the State of Iowa and the rules of the Board.
4. Respondent's pharmacist license is current and active until June 30, 2011.
5. Respondent's address of record is 7344 NW 86th Street, Johnston, Iowa 50131.
6. At all times material to this complaint, Respondent was employed by ValueMed Pharmacy, 224 4th Street, Suite 100, Sioux City, Iowa 51101.

A. CHARGES

COUNT I – LACK OF PROFESSIONAL COMPETENCY

Respondent is charged with a lack of professional competency, in violation of Iowa Code § 155A.12(1) (2009) and 657 Iowa Administrative Code § 36.1(4)(b), as demonstrated by willful and repeated departures from, and a failure to conform to, the minimal standard and acceptable and prevailing practice of pharmacy in the State of Iowa.

COUNT II – UNETHICAL CONDUCT

Respondent is charged pursuant to Iowa Code §§ 155A.12(1) and 155A.12(2) (2009), and 657 Iowa Administrative Code §§ 8.11(1), 8.11(5), 8.11(8), and 36.1(4)(u), with unethical conduct.

B. CIRCUMSTANCES

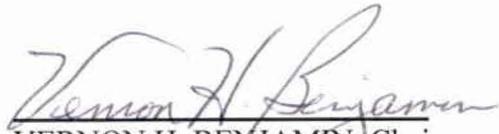
On or about April 12, 2007, an investigation was commenced, revealing the following:

1. Respondent is an employee of ValueMed Pharmacy (hereinafter, "ValueMed"), located in Sioux City, Iowa. ValuMed, provides pharmacy services to long-term care facilities. ValueMed is owned by KST Group, LLC, which also owns Signature Care Centers, LLC, an operator of long-term care facilities. One of the long-term care facilities owned by Signature Care Centers is Rosewood Manor in Estherville, Iowa (hereinafter, "Rosewood"), 110 miles from Sioux City.
2. In March of 2007, residents of Rosewood received a letter that Rosewood had "entered into a new contract with ValuMed Pharmacy, effective April 25, 2007." The letter does nothing to indicate that residents have a choice of providers of pharmacy services.
3. The March 2007 letter states that "ValuMed Pharmacy is an independent, pharmacist owned provider. . . ."
4. Estherville Drug received a letter from Rosewood dated March 13, 2007 advising that Rosewood would no longer be needing the services of Estherville Drug.
5. In response to the letter, Alan Robinson, on behalf of Estherville Drug, ran an ad in the Estherville newspaper advising readers that the residents of Rosewood were not required to "switch your prescriptions to Valley Vue Pharmacy in Sioux City, IA." Robinson, on behalf of Estherville Drug, also sent letters to Rosewood resident family members.
6. On April 5, 2007, Respondent and pharmacist Kevin Christian, employees of ValueMed, arrived at Estherville Drug, apparently to speak with Alan Robinson. Respondent confronted Robinson over Robinson's providing Rosewood residents the phone number of the Iowa Department of Inspections and Appeals, and Robinson's newspaper advertisement regarding Rosewood residents' freedom to chose Estherville Drug. Respondent also indicated to Robinson that his visit was intended to threaten Robinson.

Wherefore, the Complainant prays that a hearing be held in this matter and that the Board take such action as it may deem to be appropriate under the law.


LLOYD K. JESSEN
Executive Director

On this 10th day of March 2010, the Iowa Board of Pharmacy found probable cause to file this Statement of Charges and to order a hearing in this case.


VERNON H. BENJAMIN, Chairperson
Iowa Board of Pharmacy
400 SW Eighth Street, Suite E
Des Moines, Iowa 50309-4688

cc: Scott M. Galenbeck
Assistant Attorney General
Hoover State Office Building
Des Moines, Iowa

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IOWA BOARD OF PHARMACY

BEFORE THE IOWA BOARD OF PHARMACY

Re:)	Case No. 2007-30
Pharmacist License of)	
TOM DEAN	)	STIPULATION
License No. 17619	)	AND
Respondent	)	CONSENT ORDER

Pursuant to Iowa Code §§ 17A.10 and 272C.3(4) (2009), the Iowa Board of Pharmacy (hereinafter, "Board") and Tom Dean (hereinafter, "Respondent"), enter into the following Stipulation and Consent Order settling a licensee disciplinary proceeding currently pending before the Board.

Allegations contained in a Statement of Charges against Respondent shall be resolved without proceeding to hearing, as the Board and Respondent stipulate as follows:

1. Respondent was issued a license to practice pharmacy in Iowa on July 25, 1991, following examination, as evidenced by Pharmacist License Number 17619 which is recorded in the permanent records of the Board.
2. The Iowa pharmacist license issued to and held by Respondent is active and current until June 30, 2011.
3. The Board has jurisdiction over Respondent and jurisdiction over the subject matter of these proceedings.
4. A Statement of Charges was filed against Respondent by the Board on March 10, 2010.
5. Respondent was, at all times material to the Statement of Charges, affiliated with ValuMed Pharmacy, 224 4th Street, Suite 100, Sioux City, Iowa 51101.

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6. Respondent does not admit the allegations contained in the Notice of Hearing and Statement of Charges and enters into this Stipulation and Consent Order for the sole purpose of resolving this matter to avoid the burden, expense, delay and uncertainties of a contested case hearing. Respondent acknowledges that the allegations, if proven in a contested case proceeding, would constitute grounds for the discipline described herein.

7. Upon the Board's approval of this Stipulation and Consent Order, Respondent's Iowa pharmacist license shall be placed on probation for a term of two (2) years.

Probation is granted under the following conditions, which Respondent agrees to follow:

- a. Within three (3) months after the date of the Board's approval of this Stipulation and Consent Order, Respondent shall complete not less than four (4) hours of formal, structured continuing pharmacy education ("CPE") which shall be pre-approved by the Board. The CPE shall be focused on pharmacist ethics (2 hours) and pharmacy law (2 hours). Upon completion of the 4 hours of CPE, documentation of satisfactory completion shall be promptly submitted to the Board. This CPE shall be in addition to – not in lieu of – the thirty (30) hours of continuing pharmacy education required every two years for license renewal.
- b. Respondent shall inform the Board, in writing, of any change of home address, place of employment, home telephone number, or work telephone number, within ten (10) days of such a change.
- c. Within thirty (30) days after approval of this Stipulation and Consent Order by the Board, and within fifteen (15) days of undertaking new employment

as a pharmacist, Respondent shall cause his pharmacy employer, and any pharmacist-in-charge he works under, to report to the Board in writing acknowledging that the employer and the pharmacist-in-charge have read this document and understand it. It shall be Respondent's responsibility to assure that these reports are provided to the Board.

d. Respondent shall appear informally before the Board, upon the request of the Board, for the purpose of reviewing his performance as a pharmacist during Respondent's probationary period. Respondent shall be given reasonable notice of the date, time, and place for the appearances.

e. Respondent shall obey all federal and state laws, rules, and regulations related to the practice of pharmacy.

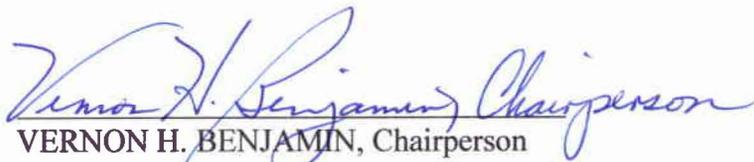
f. Respondent shall comply with such other reasonable terms as the Board may wish to impose.

8. Upon the Board's approval of this Stipulation and Consent Order, Respondent shall be assessed a civil penalty in the amount of \$1500. This civil penalty shall be paid promptly after the Board's approval of this Stipulation and Consent Order, by check made payable to the Treasurer of Iowa and mailed to the executive director of the Board. All civil penalty payments shall be deposited into the State of Iowa general fund.

9. Should Respondent violate or fail to comply with any of the terms and conditions of this Stipulation and Consent Order, the Board may initiate action to revoke or suspend Respondent's Iowa pharmacist license or impose other licensee discipline as authorized

THE STATE OF IOWA

This Stipulation and Consent Order is accepted by the Iowa Board of Pharmacy on the 3rd day of November 2010.


VERNON H. BENJAMIN, Chairperson
Iowa Board of Pharmacy
400 SW Eighth Street, Suite E
Des Moines, Iowa 50309-4688

cc: Scott M. Galenbeck
Assistant Attorney General
Office of the Attorney General
Hoover State Office Building
Des Moines, Iowa 50319

Tammy Westhoff Gentry
2910 Grand Avenue
Des Moines, IA 50312

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