

BEFORE THE IOWA BOARD OF PHARMACY

Re:)	
Pharmacy License of)	Case No. 2008-160
ECONOFOODS PHARMACY 471)	
License No. 849,)	STATEMENT OF CHARGES
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 (2009).
3. On December 22, 2008, the Board renewed general pharmacy license number 849 for Econofoods Pharmacy (hereinafter, "Respondent"), allowing Respondent to engage in the operation of a pharmacy subject to the laws of the State of Iowa and the rules of the Board.
4. General pharmacy license number 849 was cancelled by Respondent effective November 30, 2009.
5. At all times material to this statement of charges, Respondent was currently operating a general pharmacy at 3355 JFK circle, Dubuque, Iowa, with Diane M. Heiken as the pharmacist in charge.

A. CHARGES

COUNT I – FAILURE TO GIVE NOTICE OF CLOSURE TO BOARD

Respondent is charged under Iowa Code §§ 155A.15(2)(c) and 155A.19(1)(a) (2009), and 657 Iowa Administrative Code § 8.35(7), with failing to give two weeks prior notice to the Board of Respondent's intention to close a pharmacy.

COUNT II – FAILURE TO GIVE NOTICE OF CLOSURE TO PATIENTS

Respondent is charged under Iowa Code §§ 155A.15(2)(c) (2009), and 657 Iowa Administrative Code § 8.35(7)(b), with failing to give at least two weeks prior notice to patients of Respondent's intention to close a pharmacy.

COUNT III – UNETHICAL PRACTICE

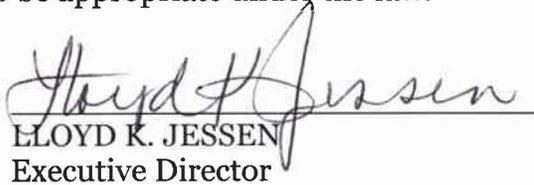
Respondent is charged under Iowa Code § 155A.15(2)(c) (2009), and 657 Iowa Administrative Code § 8.11(5) with engaging in an unethical practice by entering into an agreement with Hy-Vee which did not include provisions for notification to patients of their freedom to chose the pharmacy to which their patient and prescription records could be sent upon closure of Respondent's pharmacy.

B. CIRCUMSTANCES

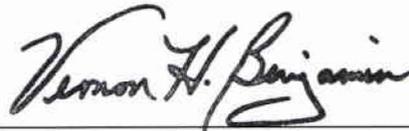
On December 4, 2009 an investigation commenced which revealed the following:

1. At all times material to this statement of charges, Respondent operated a general pharmacy located at 3355 JFK Circle, Dubuque, Iowa.
2. On November 30, 2009, Respondent closed, transferring all patient and prescription records to a Hy-Vee Pharmacy located at 3500 Dodge Street, Dubuque.
3. Notice was given to the Board five days prior to the closure.
4. No prior notice of the closure was given to pharmacy patients. The only notice given by Respondent to patients of the pharmacy was display of signs at the former pharmacy location which directed patients to the Hy-Vee Pharmacy. The signs were prepared and placed by Hy-Vee employees.
5. On the day of closure, Hy-Vee employees phoned some of Respondent's customers to inform them their prescription records had been transferred to Hy-Vee. Hy-Vee employees did not offer Respondent's patients the option of having prescription records transferred to a pharmacy other than Hy-Vee.
6. Respondent failed to inform its patients of their option to have their patient and prescription records transferred to a pharmacy other than Hy-Vee. Instead, all records were transferred to Hy-Vee without consulting pharmacy patients and prior to any notice to pharmacy patients.

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 24 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
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Des Moines, Iowa 50309-4688

cc: Scott M. Galenbeck
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BEFORE THE IOWA BOARD OF PHARMACY

IN THE MATTER OF THE)	CASE NO. 2009-160
STATEMENT OF CHARGES AGAINST)	DIA NO: 10PHB011
ECONOFOODS PHARMACY 471)	
)	FINDINGS OF FACT,
LICENSE NO. 849)	CONCLUSIONS OF LAW,
RESPONDENT)	DECISION AND ORDER

On March 24, 2010, the Iowa Board of Pharmacy (Board) found probable cause to file a Statement of Charges and Notice of Hearing against Econofoods Pharmacy 471 (Respondent), alleging the following violations:

Count I: Failing to give the Board two weeks prior notice of Respondent's intention to close a pharmacy, in violation of Iowa Code §§ 155A.15(2)(c) and 155A.19(1)(a)(2009) and 657 IAC 8.35(7).

Count II: Failing to give patients two weeks prior notice of Respondent's intention to close a pharmacy, in violation of Iowa Code §§ 155A.15(2)(c) and 657 IAC 8.35(7)(b).

Count III: Engaging in an unethical practice by entering into an agreement with Hy-Vee which did not include provisions for notification to patients of their freedom to choose the pharmacy to which their patient and prescription record could be sent upon closure of Respondent's pharmacy, in violation of Iowa Code § 155A.15(2)(c)(2009) and 657 IAC 8.11(5).

The hearing was held on June 2, 2010 at 11:00 a.m. The following members of the Board presided at the hearing: Vernon Benjamin, Chairperson; Susan Frey; Edward L. Maier; Mark Anliker; DeeAnn Wedemeyer Oleson; Margaret Whitworth; and Annabelle Diehl. Assistant Attorney General Scott Galenbeck represented the state. Respondent was represented by attorney Brendan T. Quann. The hearing was closed to the public, pursuant to Iowa Code § 272C.6(1)(2009) and was recorded by a certified court reporter. Administrative Law Judge Margaret LaMarche assisted the Board in conducting the hearing. After hearing the testimony and examining the exhibits, the Board convened in

closed executive session, pursuant to Iowa Code § 21.5(1)(f), to deliberate their decision. The administrative law judge was instructed to prepare the Findings of Fact, Conclusions of Law, Decision and Order, in conformance with the Board's deliberations.

THE RECORD

The record includes the testimony of the witnesses, State Exhibits 1-5 and Respondent Exhibits A-E.

FINDINGS OF FACT

1. On December 22, 2008, the Board renewed general pharmacy license number 849 for Econofoods Pharmacy #471 (Respondent), thereby allowing Respondent to engage in the operation of the pharmacy subject to the laws of the state of Iowa and the rules of the Board. At all times relevant to the statement of charges, Respondent was operating a general pharmacy at 3355 JFK Circle, Dubuque, Iowa, with Dione Miller, R.Ph. as the pharmacist in charge. (State Exhibits 2, 3)

2. Econofoods is owned by Nash Finch Company. On November 19, 2009, Nash Finch entered into a purchase agreement to sell Econofoods Pharmacy #471 (Respondent) to Hy-Vee, Inc. Negotiations for the purchase started in October 2009. The purchase agreement had some form and substance by November 5, 2009, but it was not signed by Hy-Vee until November 19, 2009. (Testimony of Kathy Mahoney; Respondent Exhibit A)

The purchase agreement included the following relevant provisions:

- Closing would take place on November 30, 2009, at the pharmacy and through the mail. (Ex. A, #16)
- At closing, Nash Finch would sell its existing pharmacy inventory to Hy-Vee. (Ex.A, #1)
- Respondent's pharmacy lists, files and records ("Miscellaneous Items") and pharmacy store telephone numbers would be maintained and preserved by Nash Finch Company and conveyed, transferred, assigned and delivered to Hy-Vee at the time of closing. Nash Finch would not offer, disclose or transfer all or any part of the Miscellaneous Items to any third party. (Ex. A, #2)

- From execution of the agreement (November 19, 2009) through closing (November 30, 2009) on dates mutually agreeable to the parties, Nash Finch would provide Hy-Vee with access to Nash Finch's pharmacy computer system for the purpose of seamless transfer of customer information, refill references, and other data which is material to the operation of the pharmacy. (Ex. A, #3)
- Hy-Vee agreed that Nash Finch would be relieved of its obligation to transfer a customer's prescription records to Hy-Vee (except to the extent such transfer is required by law) if, prior to closing, the customer objected to the transfer of the customer's prescription records to Hy-Vee or gave instructions to transfer the customer's prescriptions to a pharmacy other than Hy-Vee. (Ex. A, #26)

The signatures to the purchase agreement are not separately dated but the purchase agreement itself is dated November 19, 2009. Hy-Vee's President and Secretary apparently signed it on November 19, 2009. Nash Finch Vice-President and General Counsel Kathy Mahoney believed that she signed the purchase agreement on Friday, November 20, 2009 and then sent it by overnight delivery to Hy-Vee. (Testimony of Kathy Mahoney)

3. On November 23, 2009, Nash Finch's Director of Pharmacy sent a written notice to the Board by overnight delivery. The notice stated that the Nash Finch Company would close the Econofoods Pharmacy at 3344 JFK Circle in Dubuque on November 30, 2009. The notice further stated that the prescription files, prescription drugs, prescription records, family records, patient records and disbursement of controlled drugs would be kept at Hy-Vee Pharmacy #1159 at 3500 Dodge Street in Dubuque, Iowa. Nash Finch asked that the information remain confidential until closing. (Testimony of Kathy Mahoney; Respondent Exhibit D)

4. Also on November 23, 2009, Nash Finch's Director of Pharmacy sent a written notice to the Drug Enforcement Administration (DEA) notifying it that the Econofoods Pharmacy on JFK Circle in Dubuque would be sold effective the close of business on November 29, 2009 and that Hy-Vee pharmacy #1159 would be acquiring its inventory. Nash Finch asked that the information remain confidential until closing. (Testimony of Kathy Mahoney; Respondent Exhibit E)

5. Hy-Vee Pharmacy #1159 is located approximately $\frac{3}{4}$ -1 mile from Econofoods Pharmacy #471. The two stores are separated by a four lane divided

highway (Highway 20). It could be difficult for some of Respondent's customers (e.g. those who are disabled or who do not have a car) to travel the extra distance to Hy-Vee Pharmacy #1159. (Testimony of Diane Heiken; RF)

6. Respondent did not notify any of its pharmacy employees, including its pharmacist in charge, of the plan to close the pharmacy until the day of the closing. Diane Heiken is a pharmacist who had been employed by Econofoods #471 for a number of years. Ms. Heiken recalled that on November 23, 2009, the Econofoods Pharmacy Director called down to the pharmacy to notify the employees that he was dialing into the main terminal. Ms. Heiken later saw that the Pharmacy Director was copying data from the pharmacy's computer.

Diane Heiken was not scheduled to work on November 30, 2009. On November 30, 2009 at about 9:20 a.m., the pharmacist in charge called Ms. Heiken at home and told her that she had just been informed by the store manager that Hy-Vee was purchasing the pharmacy, and the pharmacy would be closing that day. The pharmacist in charge asked Ms. Heiken to come to the pharmacy to remove her pharmacist license and her personal effects.

When word spread among the employees that the pharmacy was closing they rushed to obtain a 90 day supply of their prescriptions, as permitted by their insurance plan. Diane Heiken agreed to stay and work in the pharmacy for a few hours to help with the rush. No signs were posted to notify customers of the impending pharmacy closing. Diane Heiken verbally informed the customers who came to the pharmacy that day about the closing, but she was unable to tell them which Hy-Vee would be receiving their records.

Respondent did not tell employees which Hy-Vee pharmacy would be receiving its pharmacy files and records until 4:30 p.m. on November 30, 2009. After the pharmacy closed at 6:00 p.m., representatives from Hy-Vee came in and removed all drugs from Respondent's pharmacy. They posted signs informing customers of the closing and the transfer of their prescription files to the Hy-Vee Store on Dodge Street. (Testimony of Diane Heiken; State Exhibit 3)

7. Respondent cancelled general pharmacy license number 849 effective November 30, 2009. (State Exhibits 1, 3)

8. On December 1, 2009, a Hy-Vee employee went to the closed Econofoods pharmacy and used the pharmacy's phone to contact patients and inform them

of the transfer of their prescription files to Hy-Vee. This was done because the Econofoods phone number did not transfer as planned. Patients were invited to an open house at Hy-Vee but were not told that they had a right to transfer their active prescriptions to a pharmacy of their own choosing. (Testimony of Diane Heiken; State Exhibit 3 Attachment D)

On December 1, 2009, Hy-Vee sent Respondent's customers a letter notifying them that the Econofoods Pharmacy in Dubuque would move to the Dodge Street Hy-Vee on December 1, 2009. The letter told the customers that their prescription information would be available to Hy-Vee staff immediately and that all of their pharmaceutical and health needs would continue to be met without interruption in service. The letter did not inform customers that they had a right to transfer their active prescriptions to a pharmacy of their own choosing. (State Exhibit 3, Attachment E)

9. RF was an employee of the Econofoods store on JFK Boulevard and also a customer of Respondent's pharmacy. RF had formerly been employed by the Hy-Vee store on Dodge Street. Respondent did not give RF any prior notice of its plan to close the pharmacy on November 30, 2009. On November 30, 2009 at 11:00 a.m, RF heard about the closing from other employees but did not know where her prescription files would be sent. RF went to the pharmacy and filled any prescriptions that could be filled at that time, consistent with her health insurance plan. RF was extremely upset that her prescriptions were transferred to the Dodge Street Hy-Vee without her knowledge or permission. RF decided to transfer her prescriptions from Hy-Vee to another pharmacy. (Testimony of RF)

10. Although the purchase agreement provided that the parties would keep the terms confidential, Nash Finch and Hy-Vee both deny that there were any written or verbal agreements between them that prohibited Respondent from notifying its existing customers of the plans to close the pharmacy. (Testimony of Kathy Mahoney; State Exhibit 3, Attachment G)

According to Nash Finch Vice-President and General Counsel Kathy Mahoney, Nash Finch was simply unaware of the two week notice requirements pertaining to pharmacy closings. Ms. Murphy reports that one of their lawyers checked the Board's website for provisions relating to the sale of the pharmacy but did not find the rules pertaining to notice. After the complaint was filed, Ms. Murphy consulted the Board's published rules and found the two week notice provisions.

Ms. Mahoney questioned whether the rule pertaining to notice to customers were applicable because the rule refers to "permanent closing." However, she admitted that Nash Finch has no intention of reopening a pharmacy at the Econofoods location and that their purchase agreement with Hy-Vee included a Covenant Not to Compete. (Testimony of Kathy Mahoney; Exhibit A, #5)

CONCLUSIONS OF LAW

Counts I and II

Iowa Code section 155A.15(2)(c)(2009) provides that the Board may impose a fine, issue a reprimand, or revoke, restrict, cancel, or suspend a license, and may place a license on probation, if the Board finds that the licensee has violated any provision of Iowa Code chapter 155A or any rule adopted under Iowa Code chapter 155A.

Iowa Code section 155A.19(1)(a)(2009) provides that a pharmacy shall report a permanent closing in writing to the board, pursuant to its rules.

657 IAC 8.35(7) provides, in relevant part:

8.35(7) Pharmacy closing. At least two weeks prior to the closing of a pharmacy, a written notice shall be sent to the board and to the Drug Enforcement Administration (DEA) notifying those agencies of the intent to discontinue business or sell the pharmacy including the anticipated date of sale or closing.

a. Prior notification shall include the name, address, DEA registration number, Iowa pharmacy license number, and Iowa controlled substances Act (CSA) registration number of the closing pharmacy and of the pharmacy to which prescription drugs will be transferred. Notification shall also include the name, address, DEA registration number, Iowa pharmacy license number, and Iowa controlled substances Act (CSA) registration number of the location at which prescription files, patient profiles, and controlled substance receipt and disbursement records will be maintained.

b. Pharmacy patients with active prescriptions on file with a pharmacy that intends to close permanently shall be notified by that pharmacy, via direct mail or public notice at least two weeks

prior to the closure of the pharmacy, that each patient has the right to transfer the patient's active prescriptions to a pharmacy of the patient's choosing. This paragraph shall not apply in the case of an emergency or unforeseeable closure including, but not limited to, emergency board action, foreclosure, fire, or natural disaster.

Count I charged Respondent with failing to give the Board two weeks' prior notice of its intention to close its pharmacy. The preponderance of the evidence established that Respondent gave the Board notice approximately six days prior to its November 30, 2009 closure, which is less than half the notice required by Board rule. Respondent suggested that full compliance with the rule was impossible because the purchase agreement was not signed by Hy-Vee until November 19, 2009, which was only 11 days prior to the closure. However, the parties determined what date the pharmacy would close. They could have easily set a closing date that permitted the proper notice to be provided to the Board. Respondent has violated Iowa Code § 155A.15(2)(c)(2009) and 657 IAC 8.35(7).

Count II charged Respondent with failing to give pharmacy patients notice of their right to transfer their active prescriptions to a pharmacy of the patient's choosing, at least two weeks prior to the pharmacy closing. The notice could have been given either by direct mail or by public notice. In this case, Respondent failed to give its pharmacy patients any prior notice of the pharmacy closing and failed to inform its patients of the right to transfer active prescriptions to a pharmacy of the patient's choosing. Respondent clearly violated Iowa Code § 155A.15(2)(c)(2009) and 657 IAC 8.35(7)(b).

Respondent suggests that the application of this rule to its closing is ambiguous because the rule refers to "permanent closing." However, there was no evidence to suggest that this was anything but a permanent closure of the Econofoods #471 pharmacy. All drugs and prescription records were removed from the pharmacy and the pharmacy license was cancelled.

Count III

Count III charged Respondent with engaging in an unethical practice by entering into an agreement with Hy-Vee that did not include provisions for notification to patients of their freedom to choose the pharmacy to which their patient and prescription records could be sent upon closure of Respondent's pharmacy.

657 IAC 8.11(5) provides, in relevant part:

8.11(5) *Freedom of choice/solicitation/kickbacks/fee-splitting and imprinted prescription blanks or forms.* A pharmacist or pharmacy shall not enter into any agreement which negates a patient's freedom of choice of pharmacy services. A pharmacist or pharmacy shall not participate in prohibited agreements with any person in exchange for recommending, promoting, accepting, or promising to accept the professional pharmaceutical services of any pharmacist or pharmacy. "Person" includes an individual, corporation, partnership, association, firm, or other entity. "Prohibited agreements" includes an agreement or arrangement that provides premiums, "kickbacks", fee-splitting, or special charges as compensation or inducement for placement of business or solicitation of any patronage with any pharmacist or pharmacy

The state failed to establish, by a preponderance of the evidence, that Respondent entered into a verbal or written agreement to negate a patient's freedom of choice of pharmacy services, in violation of Iowa Code § 155A.15(2)(c)(2009) and 657 IAC 8.11(5). The purchase agreement included a provision incorporating the customer's freedom of choice (Ex. A, #26) Nevertheless, customer freedom of choice was completely thwarted by Respondent's failure to provide appropriate notice of the closing to its customers. This failure was addressed under Count II.

Under the terms of the purchase agreement, the purchase price was based on prescription volume. Therefore, Respondent realized an economic advantage by not giving advance notice to its customers of their right to transfer their active prescriptions to a pharmacy of their own choosing. However, there was insufficient evidence to establish that Respondent entered into an agreement with Hy-Vee to negate a patient's freedom of choice.

Sanction

The Board's mission is to promote, preserve, and protect the public health, safety, and welfare by fostering the provision of pharmaceutical care to all Iowans through the effective regulation of the practice of pharmacy, the operation of pharmacies, the appropriate utilization of pharmacy technicians, the

distribution of prescription medications and devices, and the education and training of pharmacists.¹

Respondent's corporate management made a series of poor decisions leading up to the closure of the pharmacy on November 30, 2009. Under the Board's rules, the pharmacist in charge was responsible for ensuring the pharmacy's legal operation, including compliance with all requirements of state and federal laws, rules, and regulations.² Corporate management should have timely notified its pharmacist in charge concerning the plans to close the pharmacy. If this had been done, the Board is convinced that the pharmacist in charge would have informed management of the notice requirements. This entire situation would have been avoided if the pharmacist in charge had not been excluded from the discussions leading to the closing of the pharmacy. It is clear that Respondent's management failed to take appropriate steps to discover and identify its legal obligations with respect to the closure. As a result, its customers were never given the opportunity to exercise their right to choose another pharmacy for their active prescriptions³ before those prescriptions were transferred to Hy-Vee. The violations under Counts I and II merit a substantial civil penalty.

DECISION AND ORDER

IT IS THEREFORE ORDERED that Respondent Econofoods Pharmacy #471 is hereby CITED for failing to timely provide the notices required by 657 IAC 8.35(7) when it closed its pharmacy on November 30, 2009. Respondent is hereby WARNED that further violations of these provisions may result in more severe sanctions than those imposed by this Decision and Order.

IT IS FURTHER ORDERED that Econofoods Pharmacy #471 shall pay a civil penalty of twenty-five thousand dollars (\$25,000) within thirty (30) days of the issuance of this Decision and Order.

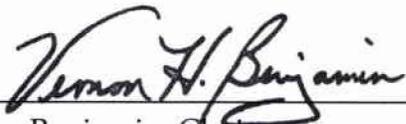
¹ See www.state.ia.us/ibpe/board/mission.html and Iowa Code § 155A.2(1)(2009).

² 657 IAC 6.2(15).

³ It is important to note that Board rules require Respondent to retain a patient record for a period of not less than two years from the date of the last entry in the patient record. See 657 IAC 6.13(2). When Respondent's pharmacy operation was sold to Hy-Vee, Hy-Vee became responsible for retaining Respondent's historical patient records. Therefore, while patients had the right to transfer their active prescriptions to the pharmacy of their own choosing, Hy-Vee would still be required to maintain Respondent's records as required by law.

IT IS FURTHER ORDERED, pursuant to Iowa Code section 272C.6 and 657 IAC 36.18(2), that Respondent shall pay \$75.00 for fees associated with conducting the disciplinary hearing. In addition, the executive secretary/director of the Board may bill Respondent for any witness fees and expenses or transcript costs associated with this disciplinary hearing. Respondent shall remit for these expenses within thirty (30) days of receipt of the bill.

Dated this 20th day of July , 2010.



Vernon Benjamin, Chairperson
Iowa Board of Pharmacy

cc: Scott Galenbeck, Assistant Attorney General
Brendan T. Quann, Respondent's Attorney

Any aggrieved or adversely affected party may seek judicial review of this decision and order of the board, pursuant to Iowa Code section 17A.19.