

BEFORE THE BOARD OF PHARMACY EXAMINERS
OF THE STATE OF IOWA

Re: Pharmacy License of :
 :
 MEDICAP PHARMACY : **COMPLAINT**
 License No. 746 : **AND**
 David W. Sloman, : **STATEMENT OF CHARGES**
 Pharmacist in charge :
 and Owner, :
 Respondent :

COMES NOW, Norman C. Johnson, Executive Secretary of the Iowa Board of Pharmacy Examiners, on the 20th day of April, 1989, and files this Complaint and Statement of Charges against Medicap Pharmacy, a pharmacy licensed pursuant to Iowa Code Chapter 155A, and alleges that:

1. Rollin C. Bridge, Chairman; Melba L. Scaglione, Vice Chairperson; Donna J. Flower; Marian L. Roberts; John F. Rode; Alan M. Shepley; and Gale W. Stapp are duly appointed, qualified members of the Iowa Board of Pharmacy Examiners.

2. Respondent is licensed to operate a pharmacy at 2030 Sixth Street S.W. in Cedar Rapids, Iowa 52404, and holds license number 746.

3. General pharmacy license number 746, issued in the name of Medicap Pharmacy, with David W. Sloman as pharmacist in charge and owner, was renewed on February 3, 1989, and is current until December 31, 1989.

4. The Board has received a copy of an Indictment in the United States District Court for the Northern District of Iowa, titled United States of America v. David W. Sloman, in which a federal grand jury has charged Respondent with the following:

COUNT 1: On or about July 25, 1988, in the Northern District of Iowa, DAVID SLOMAN did knowingly, intentionally and unlawfully distribute and dispense morphine, a Schedule II controlled substance. This in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT 2: On or about March 11, 1989, in the Northern District of Iowa, DAVID SLOMAN did knowingly, intentionally, and unlawfully distribute and dispense oxycodone, a Schedule II controlled substance. This in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT 3: On or about March 31, 1989, in the Northern District of Iowa, DAVID SLOMAN did knowingly, intentionally, and unlawfully distribute and dispense oxycodone, a Schedule II controlled substance. This in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT 4: On or about April 1, 1989, in the Northern District of Iowa, DAVID SLOMAN did knowingly, intentionally, and unlawfully distribute and dispense oxycodone, a Schedule II controlled substance. This in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT 5: Between about early 1988 and April 1989, in the Northern District of Iowa, DAVID SLOMAN did wilfully, knowingly, and unlawfully combine, conspire, confederate and agree with other persons whose names are known and unknown to the Grand Jury to distribute, dispense, and possess with the intent to distribute or dispense controlled substances, to wit: morphine, oxycodone, hydromorphone, and codeine, Schedule II controlled substances, in violation of Title 21, United States Code, Section 841(a)(1). This in violation of Title 21, United States Code, Section 846.

COUNT 6: (1) The Grand Jury realleges Counts 1 through 5 of this Indictment as fully set forth herein. (2) The following property was used and intended to be used to commit and to facilitate the commission of the above offenses which are felonies in violation of Title 21, United States Code, and are forfeitable under Title 21, United States Code, Section 853(a)(2): The business known as the Medicap Pharmacy located at 2030 Sixth Street S.W., Cedar Rapids, Iowa, including all inventory, tangible and intangible property, but excluding the real property and building in which the business is located.

5. The Board has also received an investigative report dated December 23, 1988, from Pharmacy Investigator E. Ray Shelden. That report indicates the following:

a. On December 19, 1988, Board Investigator E. Ray Shelden conducted an audit of Schedule II controlled substances at the Medicap Pharmacy located at 2030 Sixth Street S.W. in Cedar Rapids for the time period beginning May 1, 1987, and ending December 19, 1988. That audit produced evidence of the following:

- i. a shortage of 316 tablets of Dilaudid 4mg
- ii. a shortage of 38 tablets of Methylphenidate 5mg
- iii. a shortage of 98 tablets of Methylphenidate 20mg
- iv. a shortage of 176 tablets of Oxycodone with Acetaminophen

b. On December 19, 1988, Board Investigator E. Ray Shelden conducted an audit of Schedule III controlled substances at the Medicap Pharmacy located at 2030 Sixth Street S.W. in Cedar Rapids for the time period beginning May 1, 1987, and ending December 19, 1988. That audit produced evidence of a shortage of 277 tablets of Acetaminophen with Codeine 60mg.

c. On December 19, 1988, Board Investigator E. Ray Shelden conducted an audit of Schedule IV controlled substances at the Medicap Pharmacy located at 2030 Sixth Street S.W. in Cedar Rapids for the time period beginning May 1, 1987, and ending December 19, 1988. That audit produced evidence of the following:

- i. a shortage of 302 capsules of Propoxyphene 65mg
- ii. a shortage of 247 tablets of Xanax 0.5mg

d. On December 19, 1988, Board Investigator E. Ray Shelden conducted an audit of Schedule V controlled substances at the Medicap Pharmacy located at 2030 Sixth Street S.W. in Cedar Rapids for the time period beginning May 1, 1987, and ending December 19, 1988. That audit produced evidence of the following:

- i. a shortage of 900 milliliters of Novahistine Expectorant
- ii. a shortage of 320 milliliters of Guiatuss-AC Syrup

6. Respondent is guilty of violations of 1989 Iowa Code sections 155A.15(2)(c), 155A.15(2)(d), 155A.15(2)(h), 155A.23(1)(a), 155A.23(1)(c), 204.308(1), 204.308(3), 204.401(1)(a), 204.401(1)(b), 204.401(1)(c), 204.401(1)(d), 204.402(1)(a), and 204.403(1)(c) by virtue of the allegations in paragraphs 4 and 5.

Iowa Code section 155A.15 provides, in part, the following:

2. ...The board may refuse to issue or renew a license or may impose a fine, issue a reprimand, or revoke, restrict, cancel, or suspend a license, and may place a licensee on probation, if the board finds that the applicant or licensee has done any of the following:...

c. Violated any provision of this chapter or any rule adopted under this chapter or that any owner or employee of the pharmacy has violated any provision of this chapter or any rule adopted under this chapter.

d. Delivered without legal authorization prescription drugs or devices to a person...

....

h. Failed to keep and maintain records as required by this chapter, the controlled substances Act, or rules adopted under the controlled substances Act.

Iowa Code section 155A.23 provides, in part, the following:

A person shall not:

1. Obtain or attempt to obtain a prescription drug or procure or attempt to procure the administration of a prescription drug by:

- a. Fraud, deceit, misrepresentation, or subterfuge....
- ...
- c. Concealment of a material fact.

Iowa Code section 204.308 provides, in part, the following:

1. ...[N]o controlled substance in schedule II may be dispensed without the written prescription of a practitioner.

...

3. ...[A] controlled substance included in schedule III or IV, which is a prescription drug ... shall not be dispensed without a written or oral prescription of a practitioner.

Iowa Code section 204.401(1) provides, in part, the following:

Except as authorized by this chapter, it is unlawful for any person to ... deliver ... a controlled substance, or to act with, enter into a common scheme or design with, or conspire with one or more other persons to ... deliver ... a controlled substance.

Any person who violates this subsection with respect to:

a. A substance classified in schedule I or II which is a narcotic drug, is guilty of a class "C" felony.

b. Any other controlled substance in schedules I, II, or III, is guilty of a class "D" felony.

c. A substance classified in schedule IV, is guilty of a serious misdemeanor.

d. A substance classified in schedule V, is guilty of a simple misdemeanor.

Iowa Code section 204.402(1) provides, in part, the following:

It is unlawful for any person:

a. Who is subject to division III to distribute or dispense a controlled substance in violation of section 204.308;...

Iowa Code section 204.403(1) provides, in part, the following:

It is unlawful for any person knowingly or intentionally:...

c. To acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge;...

7. Respondent is guilty of violations of 657 Iowa Administrative Code sections 9.1(4)(c) and 9.1(4)(h) by virtue of the allegations in paragraphs 4 and 5.

657 Iowa Administrative Code section 9.1(4) provides, in part, the following:

The board may impose any of the disciplinary sanctions set out in subrule 9.1(2) ... when the board determines that the licensee or registrant is guilty of the following acts or offenses:...

c. Knowingly making misleading, deceptive, untrue or fraudulent representations in the practice of pharmacy or engaging in unethical conduct or practice harmful to the public. Proof of actual injury need not be established.

...

h. Distribution of ... drugs for other than lawful purposes.

The Iowa Board of Pharmacy Examiners finds that paragraphs 6 and 7 constitute grounds for which Respondent's license to operate a pharmacy in Iowa can be suspended or revoked.

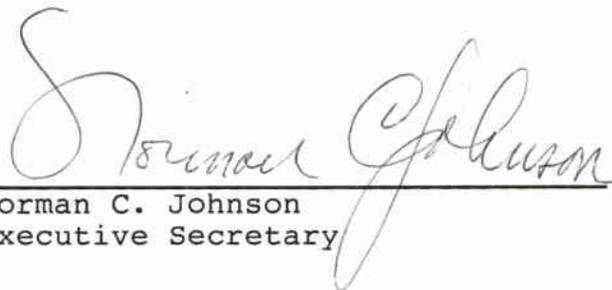
WHEREFORE, the undersigned charges that Respondent Medicap Pharmacy has violated 1989 Iowa Code sections 155A.15(2)(c), 155A.15(2)(d), 155A.15(2)(h), 155A.23(1)(a), 155A.23(1)(c), 204.308(1), 204.308(3), 204.401(1)(a), 204.401(1)(b), 204.401(1)(c), 204.401(1)(d), 204.402(1)(a), and 204.403(1)(c), and 657 Iowa Administrative Code sections 9.1(4)(c) and 9.1(4)(h).

IT IS HEREBY ORDERED that David W. Sloman appear on behalf of Medicap Pharmacy before the Iowa Board of Pharmacy Examiners on May 23 , 1989, at 10:00 a.m., in the second floor conference room, 1209 East Court Avenue, Executive Hills West, Capitol Complex, Des Moines, Iowa.

The undersigned further asks that upon final hearing the Board enter its findings of fact and decision to suspend, revoke, or not renew the license to operate a pharmacy issued to Medicap Pharmacy on February 3, 1989, and take whatever additional action that they deem necessary and appropriate.

Respondent may bring counsel to the hearing, may cross-examine any witnesses, and may call witnesses of its own. The failure of Respondent to appear could result in the permanent suspension or revocation of its license. Information regarding the hearing may be obtained from Thomas D. McGrane, Assistant Attorney General, Hoover Building, Capitol Complex, Des Moines, Iowa 50319.

IOWA BOARD OF PHARMACY EXAMINERS



Norman C. Johnson
Executive Secretary

BEFORE THE BOARD OF PHARMACY EXAMINERS
OF THE STATE OF IOWA

Re: Pharmacy License of MEDICAP PHARMACY License No. 746 David W. Sloman, Pharmacist in charge and Owner, Respondent	} } } } } } }	AMENDMENT TO COMPLAINT AND STATEMENT OF CHARGES
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COMES NOW, Norman C. Johnson, Executive Secretary of the Iowa Board of Pharmacy Examiners, on the 27th day of November, 1989, and files this Amendment to the Complaint and Statement of Charges issued on April 20, 1989, to Medicap Pharmacy, a pharmacy licensed pursuant to Iowa Code chapter 155A, and alleges that:

1. Rollin C. Bridge, Chairperson; Melba L. Scaglione, Vice Chairperson; Donna J. Flower; Marian L. Roberts; John F. Rode; Alan M. Shepley; and Gale W. Stapp are duly appointed, qualified members of the Iowa Board of Pharmacy Examiners.

2. On June 23, 1989, Respondent David W. Sloman and the United States of America agreed to and entered into a plea agreement whereby Respondent David W. Sloman pled guilty to Count 5 of the Indictment filed against him in United States District Court for the Northern District of Iowa, Cedar Rapids Division, on April 18, 1989.

3. On July 7, 1989, Respondent David W. Sloman entered a plea of guilty in United States District Court for the Northern District of Iowa, Cedar Rapids Division, to one count of conspiracy to distribute, dispense, and possess with the intent to distribute or dispense Schedule II controlled substances, in violation of Title 21, United States Code, section 846, as charged in Count 5 of the Indictment, a felony.

4. On July 7, 1989, Respondent David W. Sloman was found and adjudged in United States District Court for the Northern District of Iowa, Cedar Rapids Division, to be guilty of a violation of Title 21, United States Code, section 846, conspiracy to distribute, dispense, and possess with intent to distribute or dispense Schedule II controlled substances, as charged in Count 5 of the Indictment, a felony. See Order Accepting Defendant's Plea of Guilty, United States of America v. David Sloman, No. CR 89-0007, page 3.

5. On October 2 and 3, 1989, Respondent David W. Sloman appeared for sentencing in United States District Court for the Northern District of Iowa, Cedar Rapids Division, before Judge David Hansen. The Respondent David W. Sloman was adjudged guilty of one count of conspiracy to distribute, dispense, and possess with intent to distribute or dispense morphine, oxycodone, hydromorphone, and codeine, Schedule II controlled substances, in violation of Title 21, United States Code, section 846, a felony. Respondent David W. Sloman was sentenced to serve a term of imprisonment of 27 months followed by a three-year term of supervised release. See Judgment Including Sentence Under the Sentencing Reform Act, United States of America v. David Sloman, No. CR 89-7, pages 1 through 3. Morphine, oxycodone, hydromorphone, and codeine are substances classified in Schedule II which are narcotic drugs.

6. General pharmacy license number 746, issued on February 3, 1989, in the name of Medicap Pharmacy, with David W. Sloman as pharmacist in charge and owner, was reissued on October 18, 1989, in the name of Medicap Pharmacy, with James D. Palmer as pharmacist in charge and David W. Sloman as corporate owner and officer. General pharmacy license number 746 is current until December 31, 1989.

7. Respondent is guilty of violating 1989 Iowa Code section 155A.15(2)(a) by virtue of the allegations in paragraphs 2 through 6.

Iowa Code section 155A.15(2) provides, in part, the following:

...The board may refuse to issue or renew a license or may impose a fine, issue a reprimand, or revoke, restrict, cancel, or suspend a license, and may place a licensee on probation, if the board finds that the applicant or licensee has done any of the following:...

a. Been convicted of a felony...or if the applicant is an association, joint stock company, partnership, or corporation, that a managing officer has been convicted of a felony...under the law of this state, another state, or the United States.

8. Respondent is guilty of violating 657 Iowa Administrative Code section 9.1(4)(e) by virtue of the allegations in paragraphs 2 through 6.

657 Iowa Administrative Code section 9.1(4) provides, in part, the following:

The board may impose any of the disciplinary sanctions set out in subrule 9.1(2)...when the board determines that the licensee or registrant is guilty of the following acts

or offenses:...

e. Conviction of a felony. A copy of the record of conviction or a plea of guilty shall be conclusive evidence.

The Iowa Board of Pharmacy Examiners finds that paragraphs 7 and 8 constitute grounds for which Respondent's license to operate a pharmacy in Iowa can be suspended or revoked.

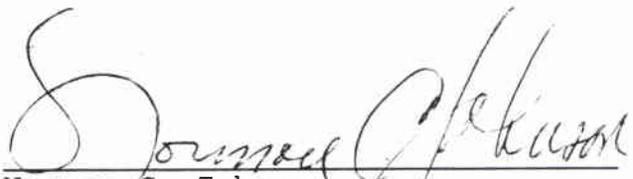
WHEREFORE, the undersigned charges that Respondent has violated 1989 Iowa Code section 155A.15(2)(a) and 657 Iowa Administrative Code section 9.1(4)(e).

IT IS HEREBY ORDERED that David W. Sloman appear on behalf of Medicap Pharmacy before the Iowa Board of Pharmacy Examiners on Monday, December 11, 1989, at 10:00 o'clock a.m., in the second floor conference room, 1209 East Court Avenue, Executive Hills West, Capitol Complex, Des Moines, Iowa.

The undersigned further asks that upon final hearing the Board enter its findings of fact and decision to suspend or revoke the license to operate a pharmacy issued to Medicap Pharmacy on October 18, 1989, and take whatever additional action that they deem necessary and appropriate.

Respondent may bring counsel to the hearing, may cross-examine any witnesses, and may call witnesses of its own. The failure of Respondent to appear could result in the permanent suspension or revocation of its license. Information regarding the hearing may be obtained from Thomas D. McGrane, Assistant Attorney General, Hoover Building, Capitol Complex, Des Moines, Iowa 50319.

IOWA BOARD OF PHARMACY EXAMINERS


Norman C. Johnson
Executive Secretary

IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY

DAVID W. SLOMAN,)
Petitioner,) NO. LA 15515
vs.)
BOARD OF PHARMACY EXAMINERS) RESPONDENT'S BRIEF
OF THE STATE OF IOWA,)
Respondent.)

FILED
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LINN COUNTY, IOWA

This is an appeal of agency action pursuant to Iowa Code @ 17A.19 (1987). Petitioner was charged with violations of Iowa law regulating pharmacists and sale of controlled substances. After a hearing before the Iowa Board of Pharmacy Examiners and a hearing officer, a Decision and Order was issued finding that the charges had been substantiated, and discipline was imposed.

Petitioner was charged with selling Schedule V controlled substances for other than legitimate medical purposes. The charges under Code sections 155.13(3) & (8), 204.308(4), 204.402(1)(a) and Iowa Board of Pharmacy Examiners Rules, Iowa Admin. Code 620-10.1(4)(b), (j) and (u). The charges were based on information showing a very large number of sales of controlled cough syrups repeatedly to persons during a period from 1983 through June 1986.

Petitioner in his appeal alleges several errors; these will be dealt with as listed in his judicial review petition.

1. Vagueness.

Petitioner alleges that the offense charged is unconstitutionally vague and indefinite. In reviewing this, as applied to Petitioner, two things bear strong consideration. First, he is a professional pharmacist and, second, he was charged with similar violations previously.

The charges are that Petitioner sold controlled substances for other than medical purposes. Iowa Code § 204.308(4) specifically prohibits this. Also, the controlled substance act indicates that drugs are scheduled because they have a potential for abuse. See §204.211. The question then is whether

Petitioner was sufficiently on notice that his actions were prohibited by the statute.

He contends that medical purpose is so undefined that sales are made at the pharmacist's peril, not knowing when the sale will be found to be a violation. The alleged vagueness of the standard must be measured as applied to Petitioner.

In applying it to Petitioner reference to a 1983 decision of the Board is in order. See In the Matter of David Sloman, Decision and Order, August 1983. (Hearing Exhibit 4). There the Board found:

11. Mr. David W. Sloman did engage in a practice harmful to the public in violation of rule 620-10.1(4)(c) in that over the course of a nine-month period he dispensed to a single customer approximately 57 quantities of a Schedule V Exempt Narcotic, without regard to whether the customer was abusing the substance.

1983 Order, pp. 607. From this it is clear Petitioner was on notice that indiscriminate sales of Schedule V substances were forbidden.

Also, a pharmacologist/professor of pharmacy testified that the number of pattern of sales by Petitioner were "inappropriate use of this particular type of medication," Hearing Tr. p. 23, and, more importantly for this issue, that "responsible pharmacist" would check on these sales and stop the sales if a physician was not seen by the purchaser. Hrg. Tr. pp. 26-27.

It thus is clear a responsible pharmacist should have known that these purchases were for other than a lawful or medical purpose, and was sufficiently warned by the statute and regulation. . .

A regulation is presumed to be valid. Milholin v. Vorhies, 320 N.W.2d 552 (Iowa 1982). The evaluation of vagueness in an action such as this, where the purpose of the regulation is the protection of the public is less strict than if criminal penalties were attached or first amendment rights were infringed. See United States v. National Dairy Products Corp., 372 U.S. 29, 32-33, 9 L. Ed.2d 561, 565-66, 83 S. Ct. 594 (1963). It is

enough if a reasonable person has notice of what is forbidden. As applied to Petitioner, and the violation here, that reasonable person is a reasonable pharmacist in a commercial setting. He has notice that scheduled drugs have a "potential for abuse" and for physical dependence or psychological dependence, although that potential is low for Schedule V narcotics. See Iowa Code § 204.211(1) & (3). Petitioner also had the notice from the previous charge in 1983.

It cannot thus be claimed that Petitioner was not on notice that he might be in violation of the statute.

2. Dual function of Board.

Petitioner asserts that the Board exercises a dual function as initiator-prosecutor of charges and judge of those charges and thus violates his constitutional right to due process of law.

This challenge has been answered by the U.S. Supreme Court in Withrow v. Larkin, 421 U.S. 35, 43 L. Ed.2d 712, 95 S. Ct. 1456 (1975). That case involved a doctor and the Wisconsin medical licensing board. The Court held:

"The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that under a realistic appraisal of psychological tendencies and human weakness, conferring-investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

421 U.S. at 47, 43 L. Ed.2d at 723-24. The Court went on to hold there was no violation even though, after investigating and noticing the licensee of a hearing on the violations, the Board "without a doubt...anticipated that the proceeding would eventuate in an adjudication of the issue;..." Id. 421 U.S. at 54, 43 L. Ed.2d at 727.

Petitioner here has made no showing of actual bias or any unfairness that would take this case out of the rule set out by the Supreme Court. The investigation here was actually done by a

staff member, not a Board member, see Hrg. Ex. 1, and a hearing officer presided at the hearing and wrote the decision. (Despite the latter, it is clear, however, that the Board held the hearing and made the decision.)

Petitioner had an opportunity to inquire of the Board before the hearing, and did so to a limited extent. No showing of bias or prejudice was made there to invalidate the Board decision.

3. Evidence in advance.

Just prior to the hearing, the members of the Board are provided with copies of documentary evidence. In the instant case this included a large number of pages from Petitioners exempt narcotic book, a summary of Schedule V sales and an investigative report. Hrg. Ex. 1. All of this evidence was proved up, supported by testimony, at the hearing. In this posture Petitioner cannot claim any prejudice.

The hearing procedure of the Board allows for questions by the Board members. The provision of the documentary evidence allows them to have a better basis for their questions, and to follow testimony without having to look at the documents for the first time while they are hearing the testimony.

Petitioner has shown no error from these proceedings. Had the documentary evidence not been supported it could have been stricken, a procedure allowed where evidence is presented and later ruled improper even in criminal cases. See State v. Williams, 315 N.W.2d 45, 55-56 (Iowa 1982). Thus had there not been proof, Petitioner could have moved the hearing officer and Board to not consider the documents which were not supported.

Petitioner has not shown that the procedure was wrong, see Withrow v. Larkin, 421 U.S. 35, 43 L. Ed.2d 712, 95 S. Ct. 1456 (1975), or that he was prejudiced.

4. Statement of Underlying Facts.

The decision and order of Board sets out quite clearly its findings of fact and shows what testimony supported it by reference to exhibits or witnesses. The requirement which

Petitioner argues requires statement of underlying facts applies where the findings are "set forth in statutory language..." Iowa Code § 17A.16(1). The decision here does not do that. Rather it sets forth each finding of fact on which the violation is based. The statement of underlying facts the legislature required was to be provided where, for example, the finding of fact was "petitioner did distribute on the premises...drugs for...other than lawful purposes." See 155.13(3). The legislature deemed it necessary in such cases for the agency to show how that violation occurred.

The decision in the instant case, in great detail, makes explicit findings of underlying facts which show sales for other than lawful purpose.

The order is not in improper form. There were clearly sufficient findings set out to support the decision, to show full consideration of the issues, including defenses, and to allow review. See Hurtado v. Iowa Dept. of Job Service, 393 N.W.2d 309, 311 (Iowa 1986). If the ruling is not clear enough to allow review of the findings of fact, then the remedy is to remand. See Taylor v. Iowa Dept. of Job Service, 362 N.W.2d 534, 537 (Iowa 1985). The decision here is replete with detailed findings of fact and reference to the witnesses who supplied the evidence. On this record, no remand is necessary and the Court should affirm.

5. Unsupported by substantial evidence.

The record in the instant case shows that there were numerous sales of Schedule V drugs, in a repetitious fashion, to Petitioner's customers. A professor of pharmacy testified he found the pattern of sales to be irresponsible, and not in accord with good practice. The Schedule V drugs are by statute susceptible to abuse and can cause chemical or psychological dependency.

From the above brief summary it is clear that the Board

could conclude that the sales were for other than a medical purpose; for an unlawful purpose.

The findings of an agency are binding if supported by substantial evidence; evidence which a reasonable mind would accept. Meads v. Iowa Dept. of Social Services, 366 N.W.2d 555, 557-58 (Iowa 1985). Findings are binding even if the Court differs with the agency on the conclusions or the inferences to be drawn from the evidence. Harlan v. Dept. of Job Service, 350 N.W.2d 192, 193 (Iowa 1984).

In the instant case the Board could clearly infer from the repeated sales, particularly with the testimony of the pharmacologist/pharmacy professor, and the statutory drug scheduling language about dependency and abuse, that the sales were for other than a medical purpose. There is no doubt the sales were made and were repeated. Thus there is clear support for the decision.

6. Excessive Sanctions.

The decision of the Board ordered that Petitioner was suspended from the practice of pharmacy for one year, but suspended all but 90 days of this if certain conditions were fulfilled. The Board also imposed 5 years of probation during which sales of Schedule V narcotics by him were restricted, required he file reports on his employment, inform any employer who might hire him of this action, and limited his ability to supervise pharmacy-student interns. The Board also imposed a \$1,000 civil penalty.

The Board authority to impose discipline is in § 155.13 which allows for suspension or revocation, and § 258A.3, which allows a professional licensing Board to impose sanctions and to tailor them to the need. This statute gives authority to revoke or suspend a license, § 258A.3(2)(a) suspend or revoke the privilege to engage in specified procedures, § 258A.3(2)(b), impose probation with conditions, § 258A.3(2)(c) require education, § 258A.3(2)(d), and impose a civil penalty by rule

§ 258A.3(2)(e).

Board rule Iowa Admin. Code § 620-10.1(2)(i) & (4) provided for a penalty of up to \$1,000. (Because of reorganization the current rule is Iowa Admin. Code 657-9.1(2)(i) and 9.1(4) and allows a \$25,000 civil penalty.)

The above shows that the penalties were clearly within the authority of the Board.

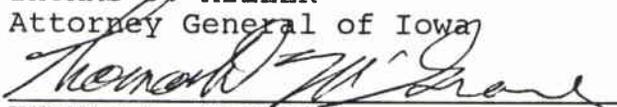
The penalty is also appropriate and clearly not excessive. Courts should be reluctant to interfere and substitute its opinion for that of a professional, regulatory board in devising appropriate penalties. Lennert v. State Board of Dental Examiners, 193 N.W.2d 428, 429 (S. Dak. 1972). And a review of the instant case shows the penalties were justified. First, in imposing the civil penalty the Board noted that the offense was Petitioner's second and that he had profited from his illegal sales. The suspension was minimal, 90 days actually, when the Board could have revoked. The second offense also justifies the future limitation on sales, the further education, the reports, and that future employers be informed. The second offense also shows a willingness to disregard professional responsibilities thus also justifying further education, the notice to future employers and, particularly the prohibition an supervising interns.

The decision on the penalties is clearly reasonable, and clearly tailored to fit Petitioners violations.

Petitioner has not carried his burden to show reversible error by the Board. The decision of the Board of Pharmacy Examiners must be affirmed.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa


THOMAS D. McGRANE
Assistant Attorney General
Hoover State Office Building
Des Moines, Iowa 50319

Copy mailed to:

Mr. Richard E. Mundy
600 Higley Building
P.O. Box 4723
Cedar Rapids, IA 52407

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above-captioned cause by enclosing the same in an envelope addressed to each such attorney of the respective names enclosed by the undersigned, and by depositing said envelope in a United States Post Office postpaid at Des Moines, Iowa, on the

10th day of March, 1988.
Steve Zimmerman

IN THE IOWA DISTRICT COURT, IN AND FOR LINN COUNTY

DAVID W. SLOMAN,)
) NO. LA 15515
)
) Petitioner,)
)
 vs.)
)
)
) BOARD OF PHARMACY EXAMINERS) RULING ON PETITION FOR
) OF THE STATE OF IOWA,) JUDICIAL REVIEW

This matter was heard before the undersigned on March 21, 1988. The Petitioner was represented by Attorney Richard E. Mundy. The Respondent was represented by Attorney Thomas McGrane. Having considered the evidence and arguments of counsel, the Court makes the following findings and conclusions.

FINDINGS

The Petitioner, David Sloman, was charged with dispensing schedule V controlled substances for other than legitimate legal or medical purposes in violation of Iowa Code Sections 155.13(3) and 204.308(4) (1987). The charges were based on information showing that Mr. Sloman, a pharmacist, had made a large number of sales of codeine cough syrups to approximately ten individuals between roughly 1983 and 1986.

On January 21, 1987, a hearing was held before the Iowa Board of Pharmacy Examiners ("Board"), the state administrative agency which handles the licensing and regulation of pharmacists. At the hearing, evidence was introduced that Board Investigator Ray Sheldon had conducted an inspection and audit of Mr. Sloman's pharmacy business. The results of the audit showed a total of 802 sales of Schedule V cough syrups between October 1983 and June 1986. The majority of these sales (60%) had been made to a group of ten individuals.

Also testifying at the hearing was Dr. Mark Winston, an associate professor of pharmacy at Drake University. Having reviewed Mr. Sheldon's audit figures, Dr. Winston gave his opinion regarding the appropriateness of Mr. Sloman's sales:

In my opinion, based on the information I had before me, I would conclude that it's probably inappropriate usage. I would have to add without knowing anything

about the individual patients, that it would be incorrect to say that there couldn't be a chance that it could be used for appropriate purposes....

Another pharmacist, Jeffrey Hartzler, testified that he personally felt that there were some problems with the way the Petitioner dispensed cough syrup. He added, however, that he knew of another pharmacist at his store who would not see anything wrong with the way Mr. Sloman dispensed cough syrups. Mr. Hartzler also testified that he felt the standards governing distribution of Schedule V medications to be "very vague". He noted that there is a specific rule prohibiting the sale of two Schedule V substances within 48 hours, and felt that this type of specific rule should be extended to cover the number of sales that could be made weekly or monthly.

In its Decision and Order of February 2, 1987, the Board found that Mr. Sloman had violated Code Section 155.13(3): "Distributing on the premises of... drugs for any other than lawful purposes." One of the Boards findings was as follows:

Based on the amounts sold and numbers of sales, it is obvious that some of the sales of Schedule V cough syrups that Mr. Sloman made were for other than a legitimate medical purpose.

The Board did not specify which sales were being referred to, or in what way they were for other than a legitimate purpose, or why it was "obvious." He was also found to have violated Sections 155.13(8) and 204.402(1)(a), which merely refer to other sections and are not at issue here. The Board also found that Mr. Sloman had not violated the specific prohibition against selling more than 120 cc of a controlled substance in a 48-hour period contained in Iowa Administrative Code Section 657-10.13(15)(b).

The Board imposed disciplinary sanctions, including a temporary suspension of Mr. Sloman's license to practice pharmacy, a period of probation, and a fine. An Application for Rehearing was denied.

The Petitioner now seeks judicial review of the agency's action in this Court pursuant to Iowa Code Chapter 17A. Among other arguments, the Petitioner asserts that the statutes under which he was sanctioned by the Board are unconstitutionally

vague. For the reasons set forth below, this Court agrees that the relevant portions of Iowa Code Sections 155.13(3) and 204.308(4) are unconstitutionally vague. Due to this determination, other arguments raised by the Petitioner need not be addressed.

CONCLUSIONS OF LAW

Civil statutes are unconstitutionally vague in violation of due process when their "language does not convey sufficiently definite warning as to proscribed conduct when measured by common understanding or practice." Millsap v. Cedar Rapids Civil Service Commission, 249 N.W.2d 679, 684 (Iowa 1977). "Thus, when persons must necessarily guess at the meaning of a statute and its applicability, the statute is unconstitutionally vague." Incorporated City of Dennison v. Clabaugh, 306 N.W.2d 748, 751 (Iowa 1981). On the other hand, statutes have been held to have "the requisite specificity if [their] meaning is fairly ascertainable by reference to similar statutes, other judicial determination and reference to the dictionary, or if the words themselves have a common and generally accepted meaning." City of Dennison, 306 N.W.2d at 751; Pottawattamie County v. Iowa Department of Environmental Quality, 272 N.W.2d 448, 452 (Iowa 1978).

These general rules, then, must be applied to the statutory terms at issue. Code Section 155.13(3) proscribes "Distributing on the premises of intoxicating liquors or drugs for any other than lawful purposes." And Code Section 204.308(4) states that "A controlled substance included in Schedule V shall not be distributed or dispensed other than for a medical purpose."

On their face, these two statutes provide no real guidance as to exactly what conduct is proscribed. The terms "lawful purposes" and "medical purpose" are not defined in the Code, and there is no indication of what criteria will be used to decide if drugs were distributed, for example, for a "medical purpose."

As noted by the Iowa Supreme Court, statutory meaning can be sharpened by reference to other sources, such as similar statutes, rules, or decisions. The specificity of Sections

155.13(3) and 204.308(4) can be contrasted with that of IAC Section 657-10.13(15)(b), which provides, in part, as follows:

Not more than... 120 cc. (4 ounces)... of any other controlled substance may be distributed at retail to the same purchaser in any given 48-hour period.

This so-called "48-hour rule" contains a clear prohibition against selling more than 120 cc of a controlled substance in a 48-hour period. By contract, the language of the two statutes at issue here does not convey any definite warning as to what conduct is prohibited. The persons to whom statutes apply, therefore, must necessarily guess at the meaning and applicability of the statutes. How much medicine may be dispensed per week, or per month to a given patient? What is a medical purpose? The Code and regulations do not specify.

Looking to other judicial determinations of similar statutes, this Court notes a strong similarity between the language of the statutes challenged here and that held to be unconstitutionally vague in State v. Webb, 156 N.W.2d 299 (Iowa 1968). In that case, a pharmacist was convicted of selling prescription drugs to customers without a prescription. Code Section 155.30 then provided that a pharmacist may engage in "acts necessary in the ethical and legal performance of his profession." The Court held that the quoted language, "when applied to licensed persons... is too vague to be enforced. There is no ascertainable standard of guilt." This Court holds that the standards at issue in the present case are no more specific than that struck down in Webb and are, therefore, constitutionally vague. In addition, this Court holds that the disputed statutes meet the test for vagueness in civil statutes enunciated above.

The Court finds further support for this decision in two cases decided by the Illinois Court of Appeals. In State v. McPherson, 382 N.E.2d 858 (Ill. App. 1978), the defendant was convicted of violating a statute requiring records to be kept in the distribution of controlled substances except as to "small quantities." Although a criminal case, the Illinois court enunciated a test for vagueness virtually identical to that cited

above for civil statutes in Iowa. The Illinois court held the term "small quantities" to be unconstitutionally vague. There was no numerical or other definition of the term in the statute. The court also noted that "a high degree of subjectivity is involved in a practitioner's determination of whether dispensing records are necessary. Ultimately, use of the phrase "small quantities" tends to leave interpretation to the discretion of judges and jurors who may agree or disagree with the practitioner's more knowledgeable determination in each instance."

By contract, the Illinois court later upheld a requirement that a pharmacist only dispense medication in "good faith." Talman v. Department of Registration, 397 N.E.2d 151 (Ill. App 1979). The Illinois court noted that the statute there explained with great specificity what the term "good faith" meant. The statute in question also contained a six-part guideline of factors which clearly defined the term.

Based on the foregoing I conclude that the action of the agency must be reversed for two reasons: (1) the agency's conclusion is not supported by substantial evidence, in that there is no evidence showing the sales were inappropriate nor is there any showing, from evidence concerning any individual recipient, that the sales were for other than a medical purpose; (2) the "standard" utilized by the agency as a basis for evaluating the petitioner's conduct was impermissibly vague and did not provide an ascertainable standard for his conduct.

IT IS, THEREFORE, ORDERED that the decision of the agency is reversed.

Clerk to notify.

Dated this 13th day of April, 1988.

4-15-88
 Date: _____
 Mailed To: R. Mundy
Thomas McGraw
Asst. Atty. General
State House
Des Moines 50319
 BY: RR
 Clerk's Office Personnel Responsible
 for Mailing Document

William L. Thomas
 JUDGE, SIXTH JUDICIAL DISTRICT OF IOWA

IN THE SUPREME COURT OF IOWA

FILED
MAY 17 1989
CLERK SUPREME COURT

DAVID W. SLOMAN)
Appellee,) Filed May 17, 1989
vs.)
BOARD OF PHARMACY) 58
EXAMINERS OF THE STATE) 88-709
OF IOWA,)
Appellant.)

Appeal from the Iowa District Court for Linn County,
William L. Thomas, Judge.

Appeal of district court decision to set aside
professional discipline imposed by the board. **REVERSED.**

Thomas J. Miller, Attorney General, and Thomas D.
McGrane, Assistant Attorney General, for appellant.

Richard E. Mundy, Cedar Rapids, for appellee.

Considered by Larson, P.J., and Carter, Lavorato,
Snell, and Andreasen, JJ.

SNELL, J.

The Iowa Board of Pharmacy Examiners appeals the decision of the district court to set aside professional discipline imposed by the board upon David W. Sloman. The district court concluded the statutes under which Sloman was disciplined were unconstitutionally vague and that there was not substantial evidence to support the board's decision. We reverse.

Substantial evidence in the record supports the following findings of fact made by the board. Sloman is a licensed pharmacist, practicing as the sole proprietor of a Medicap Pharmacy in Cedar Rapids, Iowa. In June 1986, an audit by an investigator of the board was conducted of Sloman's sales of schedule V narcotic cough preparations (defined at Iowa Code section 204.212 (1985)). The audit revealed that Sloman made a total of 802 sales from October 17, 1983 to June 23, 1986; of this total, 514 sales were made to ten individuals.

The board was able to detail the frequency of these sales to each individual. From October 13, 1984 to April 1, 1986, Sloman made ninety-two sales of schedule V cough syrup to M.F. From January 5, 1984 to June 6, 1986, seventy-two sales were made to G.M.; during roughly the same period, forty-one sales were made to A.M. From September 25, 1984 to June 17, 1986, sixty-nine sales were made to J.L. From December 21, 1984 to March 11, 1986,

sixty sales were made to B.T. From January 9, 1985 to June 4, 1986, thirty-eight sales were made to A.B.; seventeen sales were made to T.B. from May 1985 to May 1986. From December 8, 1984 to August 31, 1985, fifty-eight sales were made to G.W. From January 7, 1985 to June 17, 1986, forty-two sales were made to M.S. And from October 18, 1984 to March 12, 1986, thirty-five sales were made to R.H.

With regard to these sales, the board found no evidence that Sloman had violated its rule against multiple sales of schedule V preparations within a forty-eight-hour period. Nor did the board find any evidence that Sloman's records regarding these sales had been altered.

However, the board concluded that at least some of these sales violated Iowa Code sections 155.13(3) and 204.308(4), based on the frequency and number of the sales. The board accordingly suspended Sloman's license to practice pharmacy for one year and placed him on probation for five years after the period of suspension. The terms and conditions of Sloman's probation were also provided by the board's order.

Sloman then petitioned the district court for judicial review. The district court concluded the phrase "lawful purposes" in section 155.13(3) and the phrase "medical purpose" in section 204.308(4) were unconstitutionally vague. As an apparent corollary to this conclusion, the court determined there was not substantial evidence that Sloman's sales were for other than a medical purpose.

I. Vagueness. The claim that a statute is unconstitutionally vague proceeds from the protections provided under the due process conceptions of amendments V and XIV, United States Constitution and article I, section 9, Iowa Constitution. The root of the vagueness doctrine is a rough idea of fairness. Colten v. Kentucky, 407 U.S. 104, 110, 92 S. Ct. 1953, 1957, 32 L. Ed. 2d 584, 590 (1972).

Section 155.13(3) provides in pertinent part:

[T]he board shall have the power to deny, suspend or revoke a license, when the applicant or licensee, or any employee, providing the offense is committed on licensed premises or is in the conduct of the business licensed, is guilty of any of the following facts or offenses:

. . . .

3. Distributing on the premises of intoxicating liquors or drugs for any other than lawful purposes.
[Emphasis added.]

Chapter 204, governing controlled substances (drugs), lists these substances in five schedules, according to their currently accepted medical use and their potential for abuse and physical or psychic dependence. See Iowa Code §§ 204.203, 204.205, 204.207, 204.209, 204.211. Section 204.308(4) provides:

A controlled substance included in schedule V shall not be distributed or dispensed other than for a medical purpose.
[Emphasis added.]

Our interpretation of statutes challenged on the basis of vagueness is governed by the following guidelines:

A statute offends the Due Process Clause if it does not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. It meets the constitutional test if the meaning of the words used can be fairly ascertained by reference to similar statutes, other judicial determinations, reference to the common law, to the dictionary, or if the words themselves have a common and generally-accepted meaning.

Miller v. Iowa Real Estate Comm'n, 274 N.W.2d 288, 291 (Iowa 1979) (quoting State v. Williams, 238 N.W.2d 302, 307 (Iowa 1976)).

Whenever a constitutional challenge to a statute is made, a strong presumption of validity exists. However, when the action taken for violation of the statute is civil in nature, as here, the test for vagueness is less stringent:

Even if more specific language could be devised, it is apparent the absence of criminal sanctions requires less literal exactitude to comport with due process; unless the statute clearly, palpably and without doubt infringes the constitution it will be upheld.

Miller, 274 N.W.2d at 292 (quoting Millsap v. Cedar Rapids Civ. Serv. Comm'n, 249 N.W.2d 679, 684 (Iowa 1977)). In this regard, the Supreme Court has noted that "in the field of regulatory statutes governing business activities, where the acts limited are in a narrow category, greater leeway is allowed." Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S. Ct. 839, 843, 31 L. Ed. 2d 110, 116-17 (1972).

We reject Sloman's challenge to the phrase "lawful purposes" in section 155.13(3). This section is clearly intended to grant the board authority to discipline pharmacists whose distribution of drugs or liquor on the licensed premises is in contravention of state or federal law. In this case, the board found Sloman's sales of schedule V codeine cough syrup were "other than for a medical purpose," in violation of section 204.308(4).

Other jurisdictions have applied the vagueness test to the phrase "medical purpose" in the context of criminal proceedings. In People v. Terry, 720 P.2d 125 (Colo. 1986), a chiropractor appealed his conviction of second-degree sexual assault for inserting his fingers into a patient's vagina "for other than bona fide medical purposes." The Colorado Supreme Court defined "medical" as: "Pertaining, relating, or belonging to the study and practice of medicine, or the science and art of the investigation, prevention, cure, and alleviation of disease." Id. at 127 (quoting Black's Law Dictionary 885 (5th ed. 1979)). "Purpose" was defined as: "That which one sets before him to accomplish; an end, intention, or aim, object, plan, project." Id. (quoting Black's at 112). The court concluded that the phrase "bona fide medical purposes" provided a sufficiently clear practical guide for law-abiding behavior for a person of ordinary intelligence:

[S]exual penetration or intrusion made during treatment or examination is for other than "bona fide medical purposes" when it is not taken in good faith, honestly, and sincerely in the course of investigating, preventing, alleviating, or curing a disease or malady.

Id.

In United States v. Hayes, 595 F.2d 258, 261 (5th Cir. 1979), a pharmacist appealed his conviction of conspiracy to distribute controlled substances that were not issued for a "legitimate medical purpose." The Fifth Circuit rejected his contention that, because he was not a physician, he did not have any reasonable means of determining a prescription was valid, other than to check with the prescribing physician. The court concluded that whether the defendant knew the prescriptions were not for a legitimate medical purpose was a question of fact:

The volume of prescriptions filled for a single individual as well as the prices charged by Hayes support the jury's conclusion that Hayes also knew that the prescriptions were not issued for a legitimate medical purpose.

Id.

In Jones v. State, 684 S.W.2d 223, 224 (Tex. App. 1985), a pharmacist appealed his conviction of two counts of dispensing a controlled substance "without a valid medical purpose and not in the course of professional practice." The court rejected the defendant's vagueness challenge, finding that the evidentiary factors present in Hayes were also present in the case before it. Id. at 225. The court quoted with approval the statement in Hayes

that "the facts of this case show how a pharmacist can know the prescriptions are issued for no legitimate medical purpose without his needing to know anything about medical science." Id.

These criminal cases amply demonstrate why Sloman's vagueness challenge, made in a civil context, must fail. Sloman cannot show that the phrase "medical purpose" is so inexact that it "clearly, palpably and without doubt" infringes the Constitution. See Miller, 274 N.W.2d at 292. In fact, the meaning of "medical purpose" in the context of section 204.308(4) can be fairly ascertained: Distribution or dispensing of a controlled substance is "other than for a medical purpose" when it is not made in good faith in the course of preventing, alleviating, or curing a disease or malady. See Terry, 720 P.2d at 127.

Contrary to the contention of Sloman, this conclusion is not at odds with our decision in State v. Webb, 261 Iowa 1151, 156 N.W.2d 299 (1968). In Webb, we concluded the phrase "acts necessary in the ethical and legal performance of his profession," which provided an exemption for certain professions from a proscription on drug distribution, was void for unworkability as applied to a pharmacist. Id. at 1157, 156 N.W.2d at 303. There was nothing in the record to indicate what was or was not necessary and both ethical and legal: no code of ethics for pharmacists had been introduced into evidence. Id. at 1154, 156 N.W.2d at 301-02. We therefore concluded the statute was too vague to be enforced as applied to pharmacists. Id.

The infirmity found in the statute in Webb is not present here. The meaning of the statute at issue in this case can be fairly ascertained without reliance upon an unintroduced ethical code or other unavailable definitional aids. Our analysis that the vagueness doctrine is inapplicable here is in accord with the U.S. Supreme Court's treatment of this issue as applied to other occupational disciplines. In Parker v. Levy, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439, an army captain was court martialed for "conduct unbecoming an officer and a gentleman." The Supreme Court held the term as used in the military context was neither vague nor overbroad.

A federal employee was dismissed in Arnett v. Kennedy, under a provision of the Lloyd-LaFollette Act authorizing removal "for such cause as will promote the efficiency of the service." 416 U.S. at 140, 94 S. Ct. at 1637, 40 L. Ed. 2d at 25. In upholding the validity of the statute against a vagueness attack on conduct regulation, the court said

There are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

416 U.S. at 159, 94 S. Ct. at 1647, 40 L. Ed. 2d at 36, citing to CSC v. Letter Carriers, 413 U.S. 548, 578-579, 37 L. Ed. 2d 796, 93 S. Ct. 2880 (1973).

We hold that sections 155.13(3) and 204.308(4) are not unconstitutionally vague as applied to Sloman. These statutes are sufficiently definite to be understood by pharmacists, to whom the Board's regulatory actions are directed.

II. Sufficiency of Evidence. Judicial review of the board's determination that Sloman's sales were not for a medical purpose is pursuant to the terms of Iowa Code chapter 17A, the Iowa Administrative Procedures Act. Iowa Code § 155.16 (1985). Accordingly, our review is at law, not de novo. Ward v. Iowa Dep't of Transp., 304 N.W.2d 236, 237 (Iowa 1981). We must determine whether the board's action is supported by "substantial evidence in the record made before the agency when that record is viewed as a whole." Iowa Code § 17A.19(8)(f). We consider all of the evidence, including that which preponderates against the board's action as well as that which supports it, according proper respect for the expertise of the board. Cerro Gordo City Care Facility v. Iowa Civ. Rights Comm'n, 401 N.W.2d 192, 195-96 (Iowa 1987); Iowa Health Systems Agency v. Wade, 327 N.W.2d 732, 733 (Iowa 1982). "Substantial evidence" under this standard is that which a reasonable mind would accept as adequate to reach a given conclusion. City of Davenport v. Public Employment Relations Bd., 264 N.W.2d 307, 311 (Iowa 1978).

The record reveals Sloman sold a large amount of codeine cough syrup to a limited number of people for approximately two-and-one-half years. Expert testimony indicated these preparations would be most appropriate for short-term suppression of coughing, rather than to treat a chronic persistent cough. The medical danger presented by the abuse of these preparations is that, depending upon the situation, suppression of the cough for a long period of time can worsen the underlying condition.

One of the reasons for requiring that a pharmacist not dispense schedule V preparations for other than a medical purpose is to place the responsibility for preventing such abuse and the psychological dependence that can ensue from it upon the trained professional, instead of upon the unknowing layperson. The board concluded Sloman abdicated this responsibility by indiscriminately selling these preparations to the same people again and again. Substantial evidence in the record supports this conclusion. We therefore reverse the judgment of the district court and reinstate the decision and order of the board.

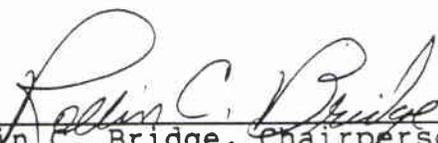
REVERSED.

BEFORE THE PHARMACY EXAMINERS
OF THE STATE OF IOWA

RE: Pharmacist License of)
DAVID W. SLOMAN)
License No. 15885) ORDER
Respondent,)
)
and)
)
Pharmacy License of)
MEDICAP PHARMACY) DIA NOS. 89PHB-5 and
License No. 746) 89PHB-22
Pharmacist in Charge)
and Owner,)
Respondent.)

Since Mr. Sloman is incarcerated in a federal penitentiary, and since an emergency suspension of Mr. Sloman's license is currently in effect, Mr. Sloman poses no threat to the public safety and welfare of the citizens of Iowa. Therefore, the hearing for the above consolidated cases is continued. The emergency suspension of Mr. Sloman's license will remain in effect until a hearing can be held before the Iowa Board of Pharmacy Examiners. Mr. Sloman and his attorney are hereby ORDERED to contact the Board office within fourteen days of Mr. Sloman's physical release from the federal penitentiary so that a hearing before the Board can be scheduled.

Dated this 12th day of December, 1989.



Rollin C. Bridge, Chairperson
Iowa Board of Pharmacy Examiners

RCB/acc/jmm

BEFORE THE BOARD OF PHARMACY EXAMINERS
OF THE STATE OF IOWA

RE: Pharmacist License of)	DIA NO. 91PHB-3
)	
DAVID W. SLOMAN)	
)	FINDINGS OF FACT,
License No. 15885)	CONCLUSIONS OF LAW,
Respondent)	DECISION AND ORDER

To: David W. Sloman

An Emergency Order and Complaint and Statement of Charges was filed by Norman Johnson, Executive Secretary of the Iowa Board of Pharmacy Examiners (Board), on April 20, 1989. The Complaint alleged that David W. Sloman, Respondent, had been indicted in United States District Court for the Northern District of Iowa on six counts, all drug related charges, and that shortages of numerous drugs had been discovered at Respondent's business, Medicap Pharmacy, in violation of a number of pharmacy related statutes and rules. The Board concluded that the public health, safety and welfare would be jeopardized if Respondent was allowed to continue in the practice of pharmacy until a hearing could be conducted and ordered an emergency summary license suspension, pursuant to Iowa Code section 17A.18(3).

On November 27, 1989, an Amendment to Complaint and Statement of Charges was filed by Norman Johnson, the Board's Executive Secretary. The Amendment alleged that Respondent had pled guilty to Count 5 of the federal indictment and was adjudged guilty and sentenced, in violation of several pharmacy related statutes and rules.

The hearing on the Amended Complaint was continued during the term of Respondent's incarceration. The hearing on the Amended Complaint was held on November 20, 1991, at 10:00 a.m. in the second floor conference room, Executive Hills West, Capitol Complex, Des Moines, Iowa. Present were the following members of the Board: Melba L. Scaglione, Chairperson; Donna L. Flower; Alan Shepley; Marian Roberts; Phyllis Olson; Rollin Bridge; and Jack Van Norman. Lynnette Donner, Assistant Attorney General, appeared on behalf of the State. The Respondent, David W. Sloman, appeared, but was not represented by counsel. Present also were members of the staff of the Board, Mrs. Sloman, and a court reporter. Margaret LaMarche, Administrative Law Judge from the Iowa Department of Inspections and Appeals, presided. The hearing was closed to the public at the request of the licensee, pursuant to Iowa Code section 258A.6(1). Following the hearing, the Board went into closed session, pursuant to Iowa Code section 21.5(1)"f" (1991), to deliberate. The undersigned Administrative Law Judge was instructed to prepare this Board's Decision and Order, in conformance with their deliberations.

THE RECORD

The evidentiary record in this case includes the Emergency Order and Complaint and Statement of Charges, the Amendment to the Complaint and Statement of Charges, Orders continuing the hearing, the recorded testimony of the witnesses, and the following exhibits:

- State's Exhibit 1: Plea Agreement, No. CR89-0007, United States District Court for the Northern District of Iowa, dated June 23, 1989
- State's Exhibit 2: Transcript of Guilty Plea Hearing held July 7, 1989
- State's Exhibit 3: Order Accepting Defendant's Plea of Guilty, dated July 7, 1989
- State's Exhibit 4: Partial Transcript of Sentencing Hearing held October 2, 1989
- State's Exhibit 5: Judgment/Sentence entered October 5, 1989 (certified copy)
- State's Exhibit 6: Decision and Order of the Board of Pharmacy Examiners dated August 19, 1983
- State's Exhibit 7: Decision and Order of the Board of Pharmacy dated February 2, 1987
- State's Exhibit 8: Emergency Order and Complaint and Statement of Charges filed April 20, 1989
- State's Exhibit 9: Amendment to Complaint and Statement of Charges filed November 27, 1989
- Respondent's Exhibit A: Program Review Reports dated August 22, 1990, November 21, 1990, May 21, 1991
- Respondent's Exhibit B: Letters of Recommendation (3)
- Respondent's Exhibit C: Work Performance Rating June 1990, April 1991 Bonus Justification (2)
- Respondent's Exhibit D: Certificate of Completion 40 Hours Drug Education Class
- Respondent's Exhibit E: Certificate of Award, Toys for Tots and newspaper article

FINDINGS OF FACT

1. The Respondent, David W. Sloman, was issued Iowa Pharmacist License Number 15885 on May 12, 1981, by examination. (Official file).

2. On June 10, 1983, the Board issued a Notice of Hearing charging Respondent with violating a number of pharmacy related statutes and rules. Following a hearing, the Board found that Respondent violated several statutes and rules by his possession and storage in his garage of prescription drugs purchased by him and not dispensed to him by prescription; by his lack of sufficient records of receipt of certain controlled substances found in the inventory of his store; by his distribution of more than 120 cc of a Schedule V controlled substance to the same purchaser in a 48-hour period; and by dispensing to a single customer over a nine-month period approximately 57 quantities of a Schedule V exempt narcotic, without regard to whether the customer was abusing the substance. The Board suspended Respondent's license for six months, but stayed the suspension and placed Respondent's license on probation for twelve months, subject to certain terms. Respondent was also ordered to pay a \$350.00 fine. (Testimony of E. Ray Shelden; State's Exhibit 6)

3. On October 21, 1986, a second Complaint and Statement of Charges was filed against the Respondent alleging violation of several pharmacy related statutes and rules. Following a hearing, the Board concluded that Respondent violated statutes and rules when he sold Schedule V cough syrups for other than a legitimate medical purpose. The Board suspended Respondent's license for a period of one year, but stayed all but 90 days of the suspension. The Board further ordered that Respondent's license be placed on probation for a period of five years, to run consecutively to the suspension, and subject to certain terms. Respondent was ordered to pay a \$1,000.00 fine. (Testimony of E. Ray Shelden; State's Exhibit 7)

4. On April 18, 1989, Respondent was indicted by a federal grand jury in the United States District Court for the Northern District of Iowa on six counts of federal drug charges. The indictment alleged that the illegal acts took place in early 1988 through April 1989. During this time Respondent's pharmacy license was still on probation pursuant to the Board's Order dated February 2, 1987. (Testimony of E. Ray Shelden; State's Exhibits 7, 8)

5. On July 7, 1989, Respondent, pursuant to a plea agreement, pled guilty to Count 5 of the indictment. Count 5 stated:

COUNT 5: Between about early 1988 and April 1989, in the Northern District of Iowa, DAVID SLOMAN did willfully, knowingly, and unlawfully combine, conspire, confederate and agree with other persons whose names are known and unknown to the Grand Jury to distribute,

dispense, and possess with the intent to distribute or dispense controlled substances, to wit: morphine, oxycodone, hydromorphone, and codeine, Schedule II controlled substances, in violation of Title 21, United States Code, Section 841(a)(1). This in violation of Title 21, United States Code, Section 846.

(Testimony of E. Ray Shelden; State's Exhibits 1 - 3, 9)

6. On July 7, 1989, Respondent was found and adjudged in United States District Court for the Northern District of Iowa, Cedar Rapids Division, to be guilty of a violation of Title 21, United States Code, section 846, conspiracy to distribute, dispense, and possess with intent to distribute or dispense Schedule II controlled substances, as charged in Count 5 of the Indictment, a felony. (Testimony of E. Ray Shelden; State's Exhibit 4)

7. On October 2 and 3, 1989, Respondent appeared for sentencing in United States District Court for the Northern District of Iowa, Cedar Rapids Division, before Judge David Hansen. Respondent was sentenced to serve a term of imprisonment of 27 months followed by a three year term of supervised release. Respondent served his 27 month term of imprisonment at the Federal Correctional Facility at Oxford, Wisconsin. He was released on June 16, 1991, and is currently serving his three year term of supervised release. (Testimony of Respondent, E. Ray Shelden; State's Exhibits 5, 6)

8. At the hearing before the Board, Respondent admitted his guilt of the charges contained in Count 5 of the indictment. One of the ways that Respondent diverted drugs for illegal sale was by giving less than the prescribed number of doses in large prescriptions for pain medications which he filled for terminally ill patients. For example, if a prescription was for 400 tablets of dilaudid, Respondent would only supply 380 tablets to the patient, and retain 20 tablets for illegal sale. (Testimony of Respondent, E. Ray Shelden)

CONCLUSIONS OF LAW

1. Iowa Code section 155A.12 provides, in part, the following:

. . . The board may refuse to issue or renew a license or may impose a fine, issue a reprimand, or revoke, restrict, cancel, or suspend a license, and may place a licensee on probation, if the board finds that the applicant or licensee has done any of the following:

. . .
3. Violated any of the provisions for licensee discipline set forth in section 147.55.

Iowa Code section 147.55 provides, in part, the following:

A license to practice a profession shall be revoked or suspended when the licensee is guilty of any of the following acts or offenses: . . .

5. Conviction of a felony related to the profession or occupation of the licensee or the conviction of any felony that would affect the licensee's ability to practice within a profession. A copy of the record of conviction or plea of guilty shall be conclusive evidence.

2. 657 Iowa Administrative Code section 9.1(4) provides, in part, the following:

The board may impose any of the disciplinary sanctions set out in subrule 9.1(2) . . . when the board determines that the licensee or registrant is guilty of the following acts or offenses: . . .

e. Conviction of a felony. A copy of the record of conviction or a plea of guilty shall be conclusive evidence.

3. The Respondent has violated Iowa Code section 155A.12(3) and 147.55(5) and 657 IAC 9.1(4) by his conviction for violating Title 21 United States Code, section 846, conspiracy to distribute, dispense, and possess with intent to distribute or dispense Schedule II controlled substances, a felony. This conviction is related to the practice of pharmacy and affects Respondent's ability to safely practice pharmacy.

DECISION AND ORDER

The Board concludes that Respondent has repeatedly failed to comply with the statutes and rules governing the practice of pharmacy despite the opportunities he has been given by the Board to demonstrate his ability to do so. Respondent practiced pharmacy for only two years before the first Complaint was filed by the Board. Just three years later a second Complaint was filed. The Emergency Order and Complaint was filed while Respondent was on probation for his second set of violations. All of the charges involved Respondent's repeated failure to obey the pharmacy laws regarding controlled substances.

The circumstances of this case are particularly abhorrent. Respondent diverted pain medications from terminally ill patients for his own personal gain. Moreover, the method used by Respondent made it practically impossible to detect this diversion through normal audit procedures. If Respondent were allowed to practice pharmacy, there is no assurance that he would not divert controlled substances again. After considering the factors outlined in 657 IAC 9.1(3), the Board concludes that it is not in the public interest to allow Respondent to continue the practice of pharmacy.

WHEREFORE, IT IS THE ORDER of the Iowa Board of Pharmacy Examiners that License Number 15885, issued to the Respondent, David W. Sloman, is REVOKED. It is further ORDERED that the Respondent may not apply for reinstatement of his license for a minimum period of ten (10) years.

Dated this 26th day of November, 1991.

Melba L. Scaglione

Melba L. Scaglione, Chairperson
Iowa Board of Pharmacy Examiners

Margaret LaMarche

Margaret LaMarche
Administrative Law Judge

ML/jmm

BEFORE THE BOARD OF PHARMACY EXAMINERS
OF THE STATE OF IOWA

RE:)	DIA NO: 03PHB017
Pharmacist License of)	
DAVID W. SLOMAN)	FINDINGS OF FACT,
License No. 15885)	CONCLUSIONS OF LAW,
Respondent)	DECISION AND ORDER

TO: DAVID W. SLOMAN

On November 26, 1991, the Iowa Board of Pharmacy Examiners (Board) issued a Decision and Order revoking the pharmacist license issued to David W. Sloman (Respondent). The Board further ordered that the Respondent would not be permitted to file an application for reinstatement for a minimum of ten (10) years. On January 13, 2003, the Respondent filed a request for reinstatement. A Notice of Reinstatement Hearing was issued.

The hearing was held on June 25, 2003 at 2:00 p.m. in the conference room at 400 SW 8th Street, Des Moines, Iowa. The following members of the Board were present for the hearing: Michael Seifert, Vice-Chairperson; Paul Abramowitz; Lemar Olson; G. Kay Bolton and Barbara Ellen O'Roake. The Respondent appeared and was not represented by counsel. The state was represented by Scott Galenbeck, Assistant Attorney General. The hearing was recorded by a certified court reporter. Margaret LaMarche, Administrative Law Judge from the Iowa Department of Inspections and Appeals, assisted the Board in conducting the hearing. The hearing was open to the public, pursuant to Iowa Code section 272C.6(1)(2003).

After hearing the testimony and examining the exhibits, the Board convened in closed executive session, pursuant to Iowa Code section 21.5(1)(f), to begin deliberations. A transcript of the hearing was ordered, and the two Board members who were not present for the hearing, Katherine Linder and Vernon Benjamin, participated in deliberations after reviewing both the transcript and the exhibits. A motion to deny the request for reinstatement was approved in open session on November 6, 2003, by a Board vote of 5-2. The administrative law judge was instructed to prepare the Board's Findings of Fact, Conclusions of Law, Decision and Order, in conformance with its deliberations.

THE RECORD

The record includes the request for reinstatement; Letter dated 3/11/03 (Jessen to Board); Notice of Reinstatement Hearing; the testimony of the witness; Respondent Exhibits A-C; State Exhibits 1-4.

FINDINGS OF FACT

Disciplinary History

1. On May 12, 1981, the Board issued the Respondent license number 15885, by examination, to engage in the practice pharmacy in Iowa, subject to the laws of the state of Iowa and the rules of the Board. (Testimony of Respondent; State Exhibit 4)

2. The Respondent has a long history of disciplinary sanctions by this Board, as well as a federal felony conviction, which resulted in the revocation of his license to practice pharmacy in Iowa.

a. On August 17, 1983, the Board issued a Decision and Order suspending the Respondent's license for a period of six months, but stayed the suspension and placed his license on probation for twelve months, subject to terms and conditions. This disciplinary action was based on the Board's finding that the Respondent possessed and stored prescription drugs, for which he did not have a prescription, at his residence; that the Respondent had insufficient records for certain controlled substances found in his store inventory; and that he distributed more than the allowed amount of a Schedule V Controlled Substance to the same purchaser in a 48 hour period. (State Exhibit 1)

b. On February 2, 1987, the Board issued a Decision and Order suspending the Respondent's license for a period of one year, but staying all but fourteen (14) days of the suspension. The Respondent's license was placed on probation for a period of five (5) years, subject to terms and conditions, including payment of a \$1,000 fine. This disciplinary action was based on the Board's finding that the Respondent sold Schedule V cough syrups for other than legitimate medical purposes. (State Exhibit 2)

c. On July 7, 1989, the Respondent was found guilty, pursuant to a plea agreement, of the federal felony of Conspiracy to Distribute, Dispense and Possess With Intent to Distribute or Dispense Schedule II Controlled Substances, in violation of Title 21 USC § 846. He was sentenced to 27 months in federal prison, followed by a three-year term of supervised release. The terms of his supervised release included restitution of \$93.00 and participation in a substance abuse program, which could include random testing of bodily fluids to determine whether the Respondent had reverted to the use of drugs or alcohol. (State Exhibit 3)

d. On November 26, 1991, the Board issued a Decision and Order revoking the Respondent's pharmacy license for a minimum period of ten (10) years. This disciplinary action was based on the Board's finding that the Respondent had been convicted of a felony related to pharmacy. The Board further found that the circumstances of the conviction were aggravated because the Respondent diverted pain medications from terminally ill patients for his own gain. In addition, the Respondent's diversion method made it practically impossible to detect through normal audit procedures. At the time of the hearing before the Board, the Respondent had already served his 27-month prison term and was on supervised release. (State Exhibit 4)

Respondent's Activities Since Revocation

3. It has been more than eleven (11) years since the Respondent's pharmacy license was revoked. Since his release from prison in 1991, the Respondent has been living in Illinois and has been employed in the field of Environmental/Industrial Hygiene. He has performed asbestos abatement, air monitoring, and other worker protection activities. He is currently working as an environmental consultant in the Chicago area. The Respondent submitted letters of recommendation concerning his work as an environmental consultant from the Director of University Health Service for the University of Illinois-Chicago and from the President of Public Health & Safety, Inc. (Testimony of Respondent; Respondent Exhibits A, C)

4. The Respondent testified that he is currently certified as an Industrial Hygienist and as a Safety Professional. He earned

a Master of Public Health from the University of Illinois in 1999 and is currently pursuing a doctorate in Public Health. (Testimony of Respondent; Respondent Exhibit B)

5. The Respondent testified that he has not committed any crimes following his release from prison and has had no further arrests or convictions. (Testimony of Respondent)

6. The Respondent has not engaged in any specific activities to remain current in pharmacy, but has read some professional journals. He has been married for twenty-seven years, and his wife is employed as the director of reimbursement at Rush Hospital in Chicago, Illinois. If his pharmacy license is reinstated, the Respondent has no plans to return to Iowa and is uncertain whether he would return to the practice of pharmacy. The Respondent has never been licensed to practice pharmacy in any other state and has not applied for a license to practice pharmacy in Illinois. (Testimony of Respondent)

CONCLUSIONS OF LAW

657 Iowa Administrative Code 36.13 provides, in relevant part:

657-36.13(17A, 124B, 147, 155A, 272C) Reinstatement. Any person whose license to practice pharmacy...has been revoked or suspended shall meet the following eligibility requirements for reinstatement:

36.13(1) Prerequisites. The individual shall satisfy all terms of the order of revocation or suspension or court proceedings as they apply to that revocation or suspension...

36.13(2) Pharmacist license revoked or surrendered-examinations required. A person whose license to practice pharmacy was revoked or voluntarily surrendered must successfully pass the North American Pharmacist Licensure Exam (NAPLEX) or an equivalent examination as determined by NABP and the Multistate Pharmacy Jurisprudence Examination (MPJE), Iowa Edition.

36.13(3) Proceedings. The Respondent shall initiated all proceedings for reinstatement by filing with the

board an application for reinstatement of the license...The application shall be docketed in the original case in which the license, registration, or permit was revoked, suspended, or relinquished. All proceedings upon petition for reinstatement, including all matters preliminary and ancillary thereto, shall be subject to the same rules of procedure as other cases before the board...

36.13(4) Burden of proof. An application for reinstatement shall allege facts which, if established, will be sufficient to enable the board to determine that the basis for the revocation or suspension no longer exists and that it will be in the public interest for the license... to be reinstated. The burden of proof to establish such facts shall be on the respondent.

36.13(5) Order. An order for reinstatement shall be based upon a decision which incorporates findings of fact and conclusions of law and must be based upon the affirmative vote of a quorum of the board. This order shall be available to the public as provided in 657-Chapter 14.

Based on the testimony and evidence in this record, the Board was unable to conclude, by a preponderance of evidence, that the basis for the revocation of the Respondent's pharmacy license no longer exists and that it is in the public interest to allow his license to be reinstated.

The Respondent was convicted of an extremely serious felony involving his pharmacy practice. The facts were particularly egregious; the Respondent repeatedly diverted pain medications from terminally ill and vulnerable patients using methods that were difficult to detect through normal audit procedures. At the reinstatement hearing, the Respondent did not specifically address the factual circumstances underlying his felony conviction. He did not acknowledge nor did he express remorse for the harm he caused to the patients and their families.

The Board must seriously consider the public health, safety, and welfare when making reinstatement decisions. The Respondent's testimony and limited evidence at hearing addressed his

professional activities since his release from prison, all of which have been unrelated to the practice of pharmacy. This evidence was inadequate to establish that the Respondent is now capable of practicing pharmacy in a safe, legal and ethical manner, consistent with the public interest.

DECISION AND ORDER

IT IS THEREFORE ORDERED that the request for reinstatement filed by David Sloman is hereby DENIED.

Dated this 26th day of November , 2003.



Katherine A. Linder, Chairperson
Iowa Board of Pharmacy Examiners

cc: Scott Galenbeck, Assistant Attorney General

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.