

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE BOARD OF PHARMACY

In the Matter of [ ], R. Ph.  
License No. [ ]

**ORDER ON PANEL'S MOTION FOR  
PARTIAL SUMMARY DISPOSITION**

This matter came before Administrative Law Judge Jim Mortenson on the Minnesota Board of Pharmacy Complaint Review Panel's (Panel) motion for partial summary disposition, dated October 23, 2015. A motion hearing was held on November 12, 2015. Following the motion hearing the Administrative Law Judge issued a Recommended Order for Dismissal, dated November 20, 2015. The Order was based on Respondent's Motion for Dismissal and/or Summary Disposition. The Board of Pharmacy (Board) declined to dismiss the matter and remanded the case to the Administrative Law Judge on December 30, 2015.

Hans Anderson and Lucas T. Clayton, Assistant Attorneys General, appeared on behalf of the Panel. Michael Weber, Weber & Nelson Law Office, PLLC, appeared on behalf of [ ] (Respondent).

Based upon the record, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

**ORDER**

**IT IS HEREBY RECOMMENDED** that:

1. The Panel's Motion for Partial Summary Disposition be **GRANTED**; and
2. The Panel may take appropriate disciplinary action on the Respondent's license on the grounds of unprofessional conduct.

Dated: March 2, 2016



JIM MORTENSON  
Administrative Law Judge

## MEMORANDUM

On October 23, 2015, the Panel filed a motion for partial summary disposition. This motion was based on Respondent's admission that she diverted a Schedule II controlled substance from her place of employment in 2010. Respondent, in her response to the motion, dated November 6, 2015, argues that her involvement in the diversion of a controlled substance in 2010 was previously resolved.

### SUMMARY DISPOSITION STANDARD

Summary disposition is the administrative law equivalent of summary judgment.<sup>1</sup> A motion for summary disposition may be granted when there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law.<sup>2</sup> The Office of Administrative Hearings follows the summary judgment standards developed in the state district courts when considering motions for summary disposition of contested case matters.

The function of the Administrative Law Judge on a motion for summary disposition, like a trial court's function on a motion for summary judgment, is not to decide issues of fact, but to determine whether genuine factual issues exist.<sup>3</sup> In other words, the Administrative Law Judge does not weigh the evidence; instead, the judge views the facts and evidence in a light most favorable to the non-moving party.<sup>4</sup>

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.<sup>5</sup> A fact is material if its resolution will affect the outcome of the case.<sup>6</sup> If the moving party meets the initial burden, then the burden shifts to the non-moving party to prove the existence of any genuine issue of any material fact.<sup>7</sup> A genuine issue is not a "sham or frivolous" one and it cannot rely on mere allegations or denials.<sup>8</sup> Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.<sup>9</sup>

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<sup>1</sup> *Pietsch v. Minnesota Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); see also Minn. R. 1400.5500(K) (2015).

<sup>2</sup> See *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985).

<sup>3</sup> See e.g., *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

<sup>4</sup> See *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).

<sup>5</sup> See *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

<sup>6</sup> See *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996) (citing *Zappa v. Fahey*, 245 N.W.2d 258, 259-260 (Minn. 1976)).

<sup>7</sup> See *Thiele*, 425 N.W.2d at 583.

<sup>8</sup> See *Highland Chateau, Inc. v. Minnesota Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984) (citing *A & J Builders, Inc. v. Harms*, 179 N.W.2d 98, 103 (Minn. 1970)).

<sup>9</sup> See Minn. R. Civ. P. 56.05.

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.<sup>10</sup> Thus, summary disposition is only proper when no fact issues need to be resolved.<sup>11</sup>

## ANALYSIS

The Panel argues that there are no facts in dispute with regard to Respondent's diversion of a Schedule II controlled substance in 2010. The act admitted to, according to the Panel, constitutes a violation of law which is unprofessional conduct under the Board's rules. Unprofessional conduct, according to the Panel, warrants disciplinary action.

Respondent admitted that when she worked as a pharmacist at [ ] Hospital Pharmacy she diverted waste Dilaudid from approximately August 2010 to December 2010.<sup>12</sup> Respondent does deny, however, that her diversion of Dilaudid constitutes unprofessional conduct.<sup>13</sup> The Respondent claims the Board addressed her diversion of Dilaudid in 2013 and decided not to take disciplinary action.

Respondent relies on a March 28, 2013 letter from the Board which states, in pertinent part: "you tested positive for the presence of o[x]ycodone, despite the fact that it was not prescribed for you. Since HPSP has decided that it will continue to monitor you and since you are not currently practicing as a pharmacist, the Board will not take any action at this time."<sup>14</sup> This letter was based on a report the Executive Director of the Board received from the Health Professionals Services Program (HPSP). There is no reference in the letter to diversion of a controlled substance in 2010. There is no evidence the Board knew anything about the 2010 diversion of a controlled substance at the time it sent Respondent the March 28, 2013 letter. Thus, Respondent's argument that any issue regarding the 2010 diversion was resolved is without factual support.

Whether Respondent's diversion of a controlled substance is unprofessional conduct upon which the Board may issue discipline is a legal question, not a factual one. Diversion of a controlled substance is against the law,<sup>15</sup> and so the action is unprofessional conduct pursuant to Minn. R. 6800.2250, subp. 1(H) (2015). Respondent's disagreement with this does not create a factual dispute.

## CONCLUSION

Because Respondent has not shown there is a genuine dispute of material fact with regard to her diversion of a controlled substance in 2010, and because her diversion of a controlled substance in 2010 was unprofessional conduct, the Panel is entitled to

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<sup>10</sup> See *Sauter*, 70 N.W.2d at 353.

<sup>11</sup> See *id.*

<sup>12</sup> Exhibit (Ex.) A, Respondent's Responses to the Complaint Review Panel's First Set of Requests for Admissions at 10 (August 28, 2015).

<sup>13</sup> *Id.* at 11.

<sup>14</sup> [Respondent] Aff. at Ex. F (October 22, 2015).

<sup>15</sup> See Minn. Stat. § 152.025, subd. 2 (2014).

summary disposition on this issue, as a matter of law. Disciplinary action may ensue, pursuant to Minn. Stat. § 151.06, subd. 1(7)(v), (ix) (2014).

**J. R. M.**