

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

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

**ORDER ON RESPONDENT'S MOTION
FOR DISMISSAL OR SUMMARY
DISPOSITION**

This matter came before Administrative Law Judge Jim Mortenson on [] (Respondent's) motion for dismissal or 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 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 Minnesota Board of Pharmacy Complaint Review Panel (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 ORDERED that:

1. Respondent's Motion for Dismissal or Summary Disposition is **DENIED**;
and
2. This matter will proceed to hearing on the following Panel allegations and claims:
 - a. Allegations:
 - i. On, or about, February 1, 2013, Respondent submitted a toxicology screen as requested by the Health Professionals Support Program (HPSP). The screen was positive for Oxycodone. Respondent did not have a prescription for Oxycodone.

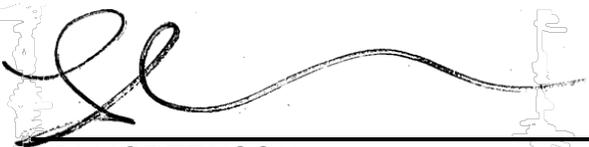
- ii. On, or about, March 3, 2013, a representative from Respondent's aftercare program at Treatment Program #5 contacted HPSP and relayed concerns about Respondent and her recovery. In particular, the program representative noted that the program met weekly, but Respondent only attended once per month and exhibited behaviors including hyperactivity, withdrawal, and fatigue, as well as dilated eyes. The program representative reported that other program participants were skeptical about Respondent's recovery. The program representative also reported that she was surprised Respondent had an AA sponsor because Respondent requested that the program representative sign Respondent's quarterly AA HPSP form instead of Respondent's sponsor.
- iii. On, or about, April 25, 2013, Respondent failed to call the toxicology line as requested by HPSP to determine whether she needed to submit to a toxicology screen that day.
- iv. On, or about, October 5, 2013, Respondent failed to call the toxicology line as requested by HPSP to determine whether she needed to submit to a toxicology screen that day.
- v. On, or about, November 18, 2013, Respondent failed to call the toxicology line as requested by HPSP to determine whether she needed to submit to a toxicology screen that day.
- vi. On, or about, January 9, 2014, Respondent failed to submit a toxicology screen as requested by HPSP.
- vii. On, or about, January 30, 2014, Respondent was unsatisfactorily discharged from HPSP because it was unable to verify her sobriety due to her having four missed toxicology screens since April 2013.

b. Claims

- i. At the time the alleged conduct occurred, did it constitute a violation of the following:
 - 1. Habitual indulgence in the use of narcotics, stimulants, or depressant drugs, in violation of Minn. Stat. § 151.06, subd. 1(a)(7)(iv) (2012);
 - 2. A physical or mental disability which could cause incompetency in the practice of pharmacy, in violation of Minn. Stat. § 151.06, subd. 1(a)(7)(xi) (2012);

3. Unprofessional conduct or conduct endangering public health, in violation of Minn. Stat. § 151.06, subd. 1(a)(7)(v) (2012); and
- ii. At the time this matter was initiated, whether the alleged conduct demonstrates Respondent's inability to practice pharmacy with reasonable skill and safety to patients by reason of illness, drunkenness, use of drugs, narcotics, chemicals, or any other type of material or as a result of any mental or physical condition, in violation of Minn. Stat. § 151.071, subd. 2(14) (2014).

Dated: March 2, 2016



JIM MORTENSON
Administrative Law Judge

MEMORANDUM

INTRODUCTION

On October 23, 2015, Respondent filed a motion for dismissal or summary disposition.¹ In the motion, Respondent argues that: 1) the Panel's claims are barred by the statute of limitations or equitable estoppel; 2) the Panel is proceeding without a verified complaint; and 3) the Panel's claims lack a constitutional or statutory basis because there is no nexus between Respondent's substance diagnosis and her professional practice.

The Panel, in its response to the motion, dated November 2, 2015, argues that the statute of limitations does not bar disciplinary action in this matter; that equitable estoppel does not prohibit the Board from taking action; that a "verified written complaint" is not required; and that Respondent mischaracterizes the allegations and grounds for disciplinary action.²

¹ Respondent's Memorandum in Support of Motion for Dismissal and/or Summary Disposition (October 23, 2015).

² Memorandum of Law in Opposition to Respondent's Motion for Dismissal and/or Summary Disposition (November 3, 2015).

By Recommended Order dated November 20, 2015, the Administrative Law Judge recommended that the Board dismiss the matter because of a lack of evidence of a complaint. The Board remanded the matter to the Administrative Law Judge to, among other things, develop the evidentiary record regarding whether a complaint had been filed. Prior to the start of the evidentiary hearing on that question, on February 18, 2016, the parties reached an agreement to drop the issue regarding the complaint. They also agreed to drop allegations arising prior to March 24, 2009, thereby eliminating any defenses based on the statute of limitations. Therefore, the remaining issues for determination on this motion are: 1) does equitable estoppel bar any remaining claims;³ and 2) does the Panel lack a constitutional or statutory basis to pursue discipline against Respondent's license because of a lack of nexus between the alleged behavior and her practice of pharmacy?

SUMMARY DISPOSITION STANDARD

Summary disposition is the administrative law equivalent of summary judgment.⁴ 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.⁵ 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.⁶ 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.⁷

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.⁸ A fact is material if its resolution will affect the outcome of the case.⁹ 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.¹⁰ A genuine issue is not a "sham or frivolous" one and the non-moving party cannot rely on mere

³ It has already been determined, based on the Panel's motion for partial summary disposition, that the diversion of a controlled substance in 2010 was unprofessional conduct which is grounds for discipline. See Order on Panel's Motion for Partial Summary Disposition (March 2, 2016).

⁴ *Pietsch v. Minnesota Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); see also Minn. R. 1400.5500 K (2015).

⁵ 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).

⁶ See, e.g., *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

⁷ See *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).

⁸ See *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

⁹ 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).

¹⁰ See *Thiele*, 425 N.W.2d at 583.

allegations or denials.¹¹ Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.¹²

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.¹³ Thus, summary disposition is only proper when no fact issues need to be resolved.¹⁴

ANALYSIS

Equitable Estoppel

Equitable estoppel is not applicable in this case. “A party seeking to invoke the doctrine of equitable estoppel has the burden of proving three elements: (1) that promises or inducements were made; (2) that it reasonably relied upon the promises; and (3) that it will be harmed if estoppel is not applied.”¹⁵

Respondent argues that the Board promised her it was dismissing issues raised in the Notice of Hearing, Allegations Nos. 2 to 37. Those allegations spanned a range of time from 2004 to March 2013, when the last letter upon which her argument is based was written. In that letter, dated March 28, 2013, the Executive Director of the Board advised Respondent that the HPSP had reported to the Board that Respondent tested positive for Oxycodone and that Respondent lacked a prescription for the drug. The Executive Director then stated: “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.”¹⁶ The letter advised Respondent that if additional reports of the presence of un-prescribed drugs were received, her case would be presented “to the Committee on Professional Standards for consideration of disciplinary action.”¹⁷

The Panel alleges that Respondent failed to continue to participate in HPSP monitoring and was discharged from the program in January 2014. Respondent does not dispute this, and alleges that she has maintained sobriety.¹⁸ The Board advised Respondent in the March 2013 letter that it was “not tak[ing] any action at this time” because, in part, Respondent was being monitored by HPSP. There was no explicit dismissal, as argued by Respondent in her motion. Because continued monitoring was a stated basis for the Board’s decision to decline to pursue disciplinary action in March 2013, Respondent, having discontinued monitoring, could not reasonably rely upon that decision. Consequently, equitable estoppel does not apply.

¹¹ 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).

¹² See Minn. R. Civ. P. 56.05.

¹³ See *Sauter*, 70 N.W.2d at 353.

¹⁴ *Id.*

¹⁵ *Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 919 (Minn. 1990)

¹⁶ Affidavit (Aff.) of [Respondent] at ¶¶ 18, 19, and Exhibit (Ex.) F (October 22, 2015).

¹⁷ *Id.*

¹⁸ [Respondent] Aff. at ¶ 20.

Legal Nexus

Respondent admits that she “missed four toxicology screens during the nine- to ten-month period from April 2013 to January 2014” and was subsequently discharged from the HPSP monitoring program.¹⁹ She also argues that the presence of oxycodone in her body in February 2013 was a single occurrence that may have been the result of sleepwalking.²⁰ Respondent argues that the Panel’s claims are based on her “substance diagnosis alone.”²¹ Respondent argues further that discipline may only be imposed for the alleged conduct if there is a nexus between the conduct and her pharmacy practice.

Viewing the facts in the light most favorable to the non-moving party, the Panel, it is clear there is a genuine issue of material fact. The record must be developed to show whether: 1) Respondent engages in the habitual indulgence of narcotics, stimulants, or depressant drugs; 2) she has a physical or mental disability which could cause incompetency in the practice of pharmacy; 3) Respondent engaged in unprofessional conduct or conduct endangering public health; and 4) in March 2015, Respondent was unable to practice pharmacy with reasonable skill and safety to patients as a result of the alleged conduct.

These are statutory grounds for disciplinary action. They are operative by their terms. Whether the grounds are constitutional is a question for a Court and will not be addressed here.²²

When the facts are fully developed and determined by the Administrative Law Judge, they can be applied to the legal grounds for discipline raised by the Panel. At that time, the Administrative Law Judge can draw legal conclusions about whether there have been any violations not already addressed in this matter. Because there is a genuine issue regarding material facts, summary disposition is not appropriate and the matter will proceed to hearing.

CONCLUSION

Neither dismissal based on equitable estoppel nor summary disposition are appropriate based on the remaining arguments of Respondent following the stipulations reached on February 18, 2016. There are numerous disputes regarding material facts. The remaining allegations and claims will proceed to an evidentiary hearing to be scheduled at a subsequent prehearing conference.

J. R. M.

¹⁹ [Respondent] Aff. at ¶ 20.

²⁰ [Respondent] Aff. at ¶¶ 16, 17.

²¹ Respondent’s Memorandum in Support of Motion for Dismissal and/or Summary Disposition, at 11.

²² *In the Matter of the ON-SALE LIQUOR LICENSE, CLASS B, Held by T.J. Management of Minneapolis d/b/a Gabby’s Saloon and Eatery*, 763 N.W.2d 359, 371 (Minn. Ct. App. 2009), citing *Nw. Airlines, Inc. v. Metro. Airports Comm’n*, 672 N.W.2d 379, 383 (Minn. Ct. App. 2003), *review denied* (Minn. Feb. 25, 2005). (“The law does not permit an ALJ to address constitutional issues because a constitutional challenge is a controversy that requires judicial interpretation.”).