

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

In the Matter of L.E., R. Ph.  
License No.

**ORDER RECOMMENDING DISMISSAL**

This matter came before Administrative Law Judge Jim Mortenson on the Minnesota Board of Pharmacy's motion for partial summary disposition; Licensee's motion for dismissal or summary disposition; and Licensee's motion to remove Panel Member Stuart Williams. A motion hearing was held on November 16, 2015, regarding Licensee's motions.<sup>1</sup> The motion hearing record closed that day.

Hans Anderson, Assistant Attorney General, appeared on behalf of the Minnesota Board of Pharmacy Complaint Review Panel (Board). Michael Weber, Weber & Nelson Law Office, PLLC, appeared on behalf of L.E. (Licensee).

Based upon the administrative record, and the law as described in the following memorandum,

**IT IS HEREBY RECOMMENDED:**

1. It is respectfully recommended that the Licensee's motion to dismiss be **GRANTED** without prejudice.
2. The remaining motions and arguments are moot.
3. Additional proceedings in this matter are **CANCELLED**.

Dated: November 20, 2015

s/Jim Mortenson  
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JIM MORTENSON  
Administrative Law Judge

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<sup>1</sup> The Board did not request a hearing on its motion.

## NOTICE

This Report is a recommendation, not a final decision. The Board of Pharmacy (the Board) will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2014), the Board shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Board must consider the exceptions in making a final decision. Parties should contact the Executive Director of the Minnesota Board of Pharmacy, Suite 530, 2829 University Avenue, S.E., Minneapolis, Minnesota 55414 (telephone: 651-201-2825), to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Board, or upon the expiration of the deadline for doing so. The Board must notify the parties and Administrative Law Judge of the date the record closes. If the Board fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2014). In order to comply with this statute, the Board must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1 (2014), the Board is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

## MEMORANDUM

### **I. Motions**

On October 23, 2015, the Board filed a motion for partial summary disposition. This motion was based on the admission of Licensee that she diverted a schedule II controlled substance from her place of employment in 2010.

On October 23, 2015, Licensee filed a motion for dismissal or summary disposition, and a motion to remove a panel member, Stuart Williams, from participation and voting in any and all Board activities related to this case. Licensee's motion for dismissal or summary disposition was based on several arguments. Because one of the arguments has convinced the Administrative Law Judge that neither he nor the Board have jurisdiction in this matter at this time, only that argument is addressed here. The remaining arguments and motions are, therefore, moot and are not addressed at this time.

### **II. The Judge and the Board Lack Authority to Proceed in a Contested Case Hearing or Issue a Decision on the Merits**

Licensee argues that there has been no "verified written complaint" against or about her, and so the Board lacks authority to schedule a disciplinary hearing or take disciplinary action, pursuant to Minn. Stat. § 214.10, subd. 2 (2014). The Board maintains

that it may initiate a complaint on its own, pursuant to Minn. Stat. § 214.103, subd. 7 (2014).

Pursuant to the Board's own regulations, disciplinary proceedings "may be initiated in one of two ways . . . ."<sup>2</sup> The first is "on a verified complaint by an individual or an agency required by law to enforce the law in question[.]"<sup>3</sup> The second is "by the board on its own motion, when its investigation discloses probable grounds for disciplinary action; the board president or director may act for the board in initiating proceedings under this part."<sup>4</sup>

The legislature has created a system for handling complaints regarding licensees of health-related licensing boards.<sup>5</sup> Included in that system are requirements for notice to a licensee that the board received a complaint, the substance of the complaint, the laws or rules allegedly violated, and whether an investigation is being conducted.<sup>6</sup> However, failure to make notifications as required "shall not deprive the board of jurisdiction to complete the investigation or to take corrective, disciplinary, or other action against the licensee that is authorized by law."<sup>7</sup> "Such a failure by the board shall not be the basis for a licensee's request for the board to dismiss a complaint, and shall not be considered by an administrative law judge, the board, or any reviewing court."<sup>8</sup> Thus, failure to provide proper notice in accordance with statute will not result in dismissal.

In this case the Board did not bring a complaint against the Licensee before starting this contested case proceeding. Failure to have a complaint is fatal to the Board's and the Administrative Law Judge's jurisdiction in this matter. Agency actions in excess of statutory authority are invalid.<sup>9</sup> Minn. Stat. § 214.103 requires a complaint *prior* to initiating a contested case hearing.<sup>10</sup> "If [it is] determine[d] that attempts at resolution of a complaint are not in the public interest, . . . [the Board] may initiate a contested case hearing under chapter 14."<sup>11</sup> Thus, while the Board cites the correct law concerning its ability to initiate a contested case hearing, it misapplies it here because no complaint was ever filed or initiated by the Board.

An administrative law judge does not have authority to hear matters "for which proper notice has [not] been given[.]"<sup>12</sup> It is arguable that the notice required for Minn. Stat. § 14.50 was provided with the Notice and Order for Prehearing, dated March 11, 2015. However, the statute also requires the judge to take "notice of the degree to which the agency has (i) documented its statutory authority to take the proposed action, [and] (ii) fulfilled all relevant procedural requirements of law or rule[.]" It is clear at this juncture

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<sup>2</sup> Minn. R. 6800.9200 (2015).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See Minn. Stat. § 214.103 (2014).

<sup>6</sup> Minn. Stat. § 214.103, subd. 1a (b).

<sup>7</sup> *Id.* at subd. 1a (f).

<sup>8</sup> *Id.*

<sup>9</sup> *State, By Spannus v. Llyod A. Fry Roofing Co.*, 246 N.W.2d 696, 700 (Minn. 1976).

<sup>10</sup> Minn. Stat. § 214.103 at subd. 7.

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

<sup>12</sup> Minn. Stat. § 14.50 (2014).

that the Board lacks the statutory authority to initiate a contested case hearing because there was no complaint. Thus, this procedural requirement was not fulfilled and there is no jurisdiction for the Administrative Law Judge or the Board to proceed.

In summary, no evidence or pleadings have been presented or filed to demonstrate that a complaint was filed or moved by the Board. Rather, the Board proceeded directly to a contested case hearing, pursuant to Minn. Stat. § 214.103, subd. 7. Given the contested case hearing was initiated without a preceding complaint, this action is outside of the Board's and the Administrative Law Judge's authority. Thus, the matter should be summarily dismissed without prejudice in order for the proper procedures to be followed by the Board and to ensure proper jurisdiction for the administrative law judge and Board if the complaint is not satisfactorily resolved.

Because the Judge lacks authority to hear this matter, the remaining arguments made by the Licensee in her motion to dismiss or summary disposition are moot. The Licensee's motion to remove Panel Member Williams is also moot, as is the Board's motion for partial summary disposition.

**J. R. M.**