

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

In the Matter of Michael DeBernardi, R.Ph.
License No. 112554

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above-entitled matter came on for a prehearing conference before Administrative Law Judge Barbara L. Neilson on January 8, 2010, at 2:00 p.m. at the Minnesota Board of Pharmacy, 2829 University Avenue S.E., Suite 530, Minneapolis, Minnesota.

Karen B. Andrews, Assistant Attorney General, appeared on behalf of the Complaint Review Panel of the Board of Pharmacy (the "Board"). The Respondent, Michael DeBernardi, R.Ph., did not appear in person or by counsel. The Board filed a written motion for a default recommendation on January 11, 2010. The OAH record remained open until January 25, 2010, for receipt of a response from the Respondent. No response was received.

STATEMENT OF ISSUE

The issue presented in this case is whether the Board has grounds for disciplinary action against the Respondent's license to practice pharmacy because he has habitually indulged in the use of intoxicating liquors or narcotics, stimulants, or depressant drugs; has engaged in unprofessional conduct or conduct endangering public health; has a physical or mental disability which could cause incompetency in the practice of pharmacy; or has violated any provisions of Minnesota Statutes Chapter 151 or the rules adopted by the Board.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On November 18, 2009, a copy of the Notice of and Order for Prehearing Conference and Hearing was sent via first class mail to Respondent, Michael DeBernardi, at an address in Baxter, Minnesota, where the Board believed the Respondent was residing. The mailing was returned by the Post Office as undeliverable. The Board thereafter modified the Notice of and Order for Prehearing Conference and Hearing and sent it via first class mail to Respondent at an address in

Pequot Lakes, his last known address on file with the Board. This mailing was not returned as undeliverable.¹

2. The modified Notice of and Order for Prehearing Conference and Hearing scheduled a Prehearing Conference for January 8, 2010, at 2:00 p.m. at the Minnesota Board of Pharmacy, 2829 University Avenue S.E., Suite 530, Minneapolis, Minnesota 55414.

3. The modified Notice of and Order for Prehearing Conference and Hearing contained the following notice:

Respondent's failure to appear at the prehearing conference, settlement conference, or hearing may result in a finding that Respondent is in default, that the allegations contained in this Notice and Order for Prehearing Conference and Hearing may be accepted as true, and its proposed action may be upheld.²

4. The Respondent did not appear at the prehearing conference, did not obtain the prior approval of the Administrative Law Judge to be absent from the prehearing conference, did not file a Notice of Appearance, and did not request a continuance or any other relief.

5. By letter dated January 8, 2010, counsel for the Board requested that the Administrative Law Judge issue a default recommendation.

6. By the date of this report, the Respondent had not filed any response to the Board's motion for default or contacted the Administrative Law Judge to explain why he failed to appear for the prehearing conference.

7. Because Respondent failed to appear at the prehearing conference, he is in default.

8. Pursuant to Minnesota Rules, part 1400.6000, the allegations contained in the Notice of and Order for Prehearing Conference and Hearing are taken as true and incorporated by reference into these Findings of Fact.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Board of Pharmacy are authorized to consider the charges against Respondent under Minn. Stat. §§ 14.50 and 151.06, subd. 3.

¹ Affidavit of Service by Mail attached to Notice of and Order for Prehearing Conference and Hearing; Letter from K. Andrews to Administrative Law Judge dated December 4, 2009.

² Modified Notice of and Order for Prehearing Conference at 4.

2. The Respondent was sent due, proper and timely notice of the charges against him, and of the time and place of the prehearing conference. This matter is, therefore, properly before the Board and the Administrative Law Judge.

3. The Board has complied with all relevant procedural requirements.

4. Under Minn. Stat. § 151.06, subd. 1(a)(7)(iv), (v), (ix), and (xi) (2008), the Board of Pharmacy may suspend, revoke, or refuse to renew any registration or license required under Chapter 151 where the registrant or licensee has habitually indulged in the use of narcotics, stimulants, or depressant drugs, or habitually indulged in intoxicating liquors in a manner which could cause conduct endangering public health; has engaged in unprofessional conduct or conduct endangering public health; has violated any provisions of Chapter 151 or any of the rules of the Board; or has a physical or mental disability which could cause incompetency in the practice of pharmacy. Under Minn. Stat. § 151.06, subd. 5, the Board may impose a civil penalty not exceeding \$10,000 for each separate violation.

5. Under Minn. R. 1400.6000, a contested case may be decided adversely to a party who defaults. On default, the allegations of, and the issues set out in the Notice of and Order for Hearing or other pleading may be taken as true or deemed proved without further evidence.

6. The Respondent is in default herein as a result of his failure, without the Administrative Law Judge's prior consent, to appear at the prehearing conference.

7. The Board has grounds to take disciplinary action against the Respondent under Minn. Stat. § 151.06, subd. 1(a)(7), based upon his two 2007 convictions for driving while impaired; his discharge from the Health Professionals Services Program on two occasions for noncompliance; his reuse of alcohol on multiple occasions between February and May 2009; his noncompliance with toxicology screening; and his failure to refrain from the practice of pharmacy after being told to do so by HPSP.

8. The imposition of disciplinary action against the Respondent is in the public interest.

Based upon these Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge recommends that: the Board of Pharmacy take appropriate disciplinary action against Respondent's license.

Dated: February 10, 2010

s/Barbara L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Board of Pharmacy will make the final decision after a review of the record. The Board may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Board shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Board. Parties should contact the Board of Pharmacy, 2829 University Ave S.E., Suite 530, Minneapolis MN 55414 (telephone no. 651-201-2825), for information about 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 the Administrative Law Judge of the date on which the record closes.

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency 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. 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. In order to comply with Minn. Stat. § 14.62, subd. 2a, the Board must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed.