

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 3

Neil T. Noesen,

Petitioner-Appellant,

vs.

Appeal No.
06-AP-1110

State of Wisconsin, Department of Regulation
& Licensing, Pharmacy Examining Board,

Respondent-Appellee.

ON APPEAL FROM AN ORDER OF THE CIRCUIT COURT AFFIRMING
THE FINAL DECISION AND ORDER OF THE PHARMACY EXAMINING BOARD
OF THE DEPARTMENT OF REGULATION & LICENSING,
THE HONORABLE JAMES BABLER, PRESIDING

BRIEF OF PETITIONER-APPELLANT NEIL T. NOESEN

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Table of Contents

Table of Authorities ii

Statement of the Issues Presented for Review iv

Statement Regarding Oral Argument v

Statement Regarding Publication of Opinion v

Statement of the Case 1

Argument:

I. THE PHARMACY EXAMINING BOARD VIOLATED NOESEN'S
RIGHT TO DUE PROCESS OF LAW UNDER THE DUE PROCESS
CLAUSE OF THE FOURTEENTH AMENDMENT BY SUBJECTING
HIM TO DISCIPLINE FOR VIOLATION OF A PROFESSIONAL
STANDARD OF CARE WITHOUT GIVING HIM FAIR NOTICE OF
THAT STANDARD 31

II. IN DISCIPLINING NOESEN FOR REFUSING TO TRANSFER A
PATIENT'S PRESCRIPTION FOR ORAL CONTRACEPTIVES OR
ADVISE HER HOW SHE COULD OBTAIN HER PRESCRIPTION,
THE PHARMACY EXAMINING BOARD VIOLATED HIS RIGHT OF
CONSCIENCE PROTECTED BY ART. I, § 18, OF THE
WISCONSIN CONSTITUTION 41

III. THE PHARMACY EXAMINING BOARD ABUSED ITS DISCRETION
IN INSTITUTING FORMAL DISCIPLINARY PROCEEDINGS
AGAINST NOESEN WHERE THE ALLEGED MISCONDUCT WOULD
HAVE WARRANTED ISSUANCE OF AN ADMINISTRATIVE
WARNING 44

IV. THE PHARMACY EXAMINING BOARD ABUSED ITS DISCRETION
IN ASSESSING THE FULL COSTS OF THE DISCIPLINARY
PROCEEDING 46

Conclusion 50

Certificate of Compliance

Table of Authorities

Cases:

Bence v. Breier, 501 F.2d 1185 (7th Cir. 1974) 32

Bouie v. City of Columbia, 378 U.S. 347(1964) 33

Elections Board of the State of Wisconsin v. Wisconsin Manufacturers & Commerce,
228 Wis.2d 650, 597 N.E.2d 721 (Wis. 1999) 33

Nevada State Board of Pharmacy v. Garrigus,
496 P.2d 748 (Nev. 1972) 40

State v. Miller, 202 Wis.2d 56,
549 N.W.2d 235 (Sup. 1996) 41, 42

State ex rel. Hennekens v. City of River Falls Police & Fire Comm'n, 124 Wis.2d 413, 369 N.W.2d 670
(Sup. Ct. 1985) 32

State ex rel. Kalt v. Board of Fire & Police Commissioners for the City of Milwaukee,
145 Wis.2d 505, 427 N.W.2d 408 (Ct. App. 1988) 32

Verhaagh v. Labor & Industry Review Comm'n,
204 Wis.2d 154, 554 N.W.2d 678 (Ct. App. 1996) 47

Statutes and Regulations:

U.S. Const. amend. XIV, § 1 32

WIS. CONST. art. I, § 18 (West 2002) 41, 42, 43

WIS. REV. STAT. § 237.485(3) (West Supp. 2006) 47

WIS. REV. STAT. § 440.22(2) (West 2005) 46, 48, 49

WIS. REV. STAT. § 440.205 (West 2005) 44-45

WIS. REV. STAT. § 450.02(3) (e) 39

WIS. ADMIN. CODE PHAR. 10.03(2) 31

WIS. ADMIN. CODE RL 2.18 47

WIS. ADMIN. CODE RL 8.03 45

Other Authorities:

Code of Ethics for Pharmacists,
American Pharmacists Association 33, 37

Pharmacist Conscience Clause,
American Pharmacists Association 19, 35, 36, 37

1997-98 Policy Committee Report,
Pharmacist Conscience Clause,
American Pharmacists Association . . 17, 19, 23, 33, 39

Statement of the Issues Presented for Review

Whether Neil Noesen was denied procedural due process of law when the Pharmacy Examining Board disciplined him for "unprofessional conduct" on the basis of violating a professional standard of care for pharmacists without giving him fair notice of that standard. Neither the Board nor the circuit court addressed this issue.

Whether the Pharmacy Examining Board violated Noesen's right of conscience protected by art. I, § 18, of the Wisconsin Constitution when it disciplined him for refusing to transfer a patient's prescription for oral contraceptives or advise her how she could obtain her prescription. Both the Board and the circuit court addressed this issue and resolved it adversely to Noesen.

Whether, assuming that Noesen engaged in unprofessional conduct, the Pharmacy Examining Board abused its discretion in not imposing an administrative warning in lieu of a reprimand. Neither the Board nor the circuit court addressed this issue.

Whether, assuming that the Pharmacy Examining Board properly reprimanded Noesen, the Board abused its discretion in assessing the full costs of the disciplinary proceeding against him. Both the Board and the circuit court addressed this issue and resolved it adversely to Noesen.

Statement Regarding Oral Argument

The Court should grant oral argument in this case because of the novel legal issues presented, particularly with respect to the first, second and fourth issues.

Statement Regarding Publication of Opinion

The Court should publish its opinion disposing of this appeal because this case presents questions of first impression regarding the Due Process Clause of the United States Constitution as it relates to fair notice of enforcement of an unstated and unwritten standard of pharmacy care; regarding the right of conscience guarantee of the Wisconsin Constitution (art. I, § 18) as it relates to a pharmacist who has religious and moral objections to participating in contraception; and regarding the appropriate standard for assessing costs in disciplinary proceedings under WIS. REV. STAT. § 440.22(2). A published opinion on these questions would be of valuable assistance in providing needed guidance to the Department of Regulation & Licensing, administrative law judges and circuit court judges reviewing disciplinary proceedings, as well as pharmacists and the general public.

Statement of the Case

This is an appeal from the decision of the Circuit Court of Barron County affirming the Final Decision and Order of the Pharmacy Examining Board disciplining Neil T. Noesen, a registered pharmacist. The Board determined that Noesen had engaged in "unprofessional conduct" by refusing to transfer a refill prescription for oral contraceptives to another pharmacy, and by refusing to advise the patient presenting the prescription how she could obtain a refill elsewhere. The Board reprimanded Noesen, limited the conditions under which he may practice pharmacy and assessed the full costs of the disciplinary proceedings against him.

On July 17, 2002, Amanda Renz (whose married name is Phiede) filed a complaint with the Department of Regulation & Licensing, against Neil Noesen, a registered pharmacist. R. 242-245 (Exh. No. 1). Ms. Renz complained that on July 6, 2002, Noesen refused to refill or transfer a prescription for birth control pills for her, and that he also refused to advise her as to how she could obtain her prescription because "he didn't believe in contraceptives." R. 243. Following an investigation, the Department of Regulation & Licensing filed a formal complaint against Noesen with the Pharmacy Examining Board on October 8, 2003. R. 521-522. The complaint alleged that Noesen had violated four state

statutes and three administrative rules relating to the practice of pharmacy.¹ An amended complaint was filed on March 12, 2004, which deleted all of the alleged statutory charges and one of the three alleged administrative rule charges. R. 468-471. One of the two remaining rule charges, alleging a violation of PHAR. 10.03(9) (“[r]efusing to render professional services to a person because of race, color, sex, religion, or age”), was dismissed immediately before the disciplinary hearing commenced. R. 151 (Tr. 7).²

Noesen has been licensed as a registered pharmacist in Wisconsin since 1999. R. 175 (Tr. 103). On June 5, 2002, Noesen entered into an independent contractor agreement with RPh On the Go, Inc., a pharmacy placement service. R. 176, 194 (Tr. 108, 177); R. 252-259 (Exh. No. 3). The agreement provided that Noesen would “furnish to customers of RPh On the Go all services generally performed by a registered pharmacist in the customary manner and extent ordinarily performed at pharmacies, all of which shall be performed in

¹ *Id.* citing WIS. REV. STAT. §§ 146.83(2), 146.83(4)(b), 450.10(1)(a)(2) and 450.10(1)(a)(6) (West 2005 & 2006)), and WIS. ADMIN. CODE PHAR. 7.01, 10.03(2) and 10.03(9). Another complaint, making the same allegations, was filed on October 30, 2003. See R. 509-510.

² For ease of reference, all citations to the proceedings before the administrative law judge shall include both a record page number (from the circuit court record) and an internal transcript page number (from the record of the administrative hearing).

a professionally competent manner." R. 253, ¶ 3. The agreement did not mention or otherwise refer to any moral objections Noesen had to any of the services that are generally performed by a pharmacist. R. 177 (Tr. 109).

Shortly after entering into the agreement with RPh On the Go, Noesen, on July 2, 2002, sent a letter, via e-mail, to John Scott of RPh On the Go, memorializing in writing his conscientious objections "to participating in the work of contraception." R. 177 (Tr. 109-110); R. 260 (Exh. No. 4). The letter was also addressed, but not sent, to "K-Mart Pharmacy - Rhinelander & Menominee." R. 177 (Tr. 111); 179 (Tr. 120). Noesen testified that he "had intended for those letters to go through my agency [RPh On the Go]." R. 189 (Tr. 157). In his letter, Noesen requested to be excused from being required to perform the following actions:

- (1) Sale of or counsel for drug therapy or physical barriers, e.g. condoms, spermicidal creams, etc., that render the act of sexual intercourse sterile, any drug therapy related to a sterilization procedure of the male or female sexual organs.

- (2) A procedure involving a drug or device that may prevent the implantation of a fertilized human ovum. This includes, but is not limited to, drugs which are prescribed as contraceptives or "emergency contraceptives," or drugs which have post-fertilization effects, regardless of the primary indication, in menopausal patients.

- (3) An abortion, as defined in Wisconsin State Statutes 253.10(2)(a)[.]

(4) An experiment or medical procedure involving any of the following:

(a) The destruction of a human embryo.

(b) A human embryo or unborn child, at any stage of development, in which the experiment or procedure is not related to the beneficial treatment of the human embryo or unborn child.

(5) A procedure, including a transplant procedure[,] that uses fetal tissue or organs other than fetal tissues or organs from a stillbirth, spontaneous abortion, or miscarriage.

(6) The withholding or withdrawal of nutrition or hydration, unless the administration of nutrition or hydration is medically contraindicated.

(7) An act that causes or assists in causing the death of an individual, such as by assisted suicide, euthanasia, or mercy killing.

R. 260-61.

Noesen acknowledged at the hearing that his July 2, 2002, letter did not expressly state that he would not "transfer" a prescription for contraceptives. R. 179 (Tr. 119-120). Nevertheless, he testified that his unwillingness to transfer such a prescription was clearly implied in the broad, all-encompassing statement of his moral objections to contraception and, in particular, in the definition of the term, "[p]articipate in." R. 178, 179, 180, 191 (Tr. 114, 119-120, 123, 168). "Participate in" was defined in the letter to mean "to perform, assist in, recommend, counsel in favor of, make referrals for, dispense or administer drugs

for, or otherwise promote, encourage, or aid." R. 261. Noesen testified, "with a good conscience, I can't aid, abet, encourage, refer, transfer, participate in any way with something that I feel would be impairing the fertility of a human being." R. 176 (Tr. 105). He reiterated these objections throughout his testimony. See R. 191, 196 (Tr. 165-166, 186-190).

In his July 2, 2002, letter, Noesen proposed a protocol that could be followed in situations that might arise in connection with his objection to oral contraceptives:

Before starting work each day, I will make my conscientious objection clearly known to the rest of the pharmacy staff. I will describe that I have a conscientious objection about participating in the provision of contraceptives to patients, receiving phone calls pertaining to contracepting, or the provision of information to patients directly related to contracepting.

When confronted with an objectionable situation, which most likely be a refill or new prescription for an oral contraceptive, I understand the necessity of responding in a professional manner with the patient(s), medical staff, and pharmacy staff. I will *immediately* notify the patient of my conscientious objection and offer to call the prescriber or give the original prescription to the patient if it has not yet been filled. In the event that the prescriber is temporarily unavailable, I will contact a nurse or other staff that is working with the prescriber. If a nurse or other staff is unavailable I will inform the patient that I was unable to contact the prescriber or the prescriber's nurse. If the patient has not yet filled the prescription, I will offer to give the original unfilled prescription back to the patient.

R. 261 (emphasis in original).

No one associated with K-Mart Pharmacies saw Noesen's July 2, 2002, letter to John Scott of RPh On the Go at any time before disciplinary proceedings were brought against him. R. 166, 168, 169-170 (Tr. 65, 67, 73, 80-81).

Fr. Kevin Gordon, vicar for clergy with the Diocese of Superior, testified on Neil Noesen's behalf regarding the Catholic Church's view of the immorality of contraception. R. 209 (Tr. 233-235). According to Fr. Gordon, "the church views the use of contraceptives to be an intrinsic evil[,] meaning that the use of contraceptives in all cases is immoral because it stops the procreative character of human sexuality and so to prevent conception through the use of artificial means is to act contrary to the will of God." R. 209 (Tr. 235). If a pharmacist has a conscientious objection to dispensing oral contraceptives, his refusal to dispense contraceptives would be consistent with the teaching of the Catholic Church. R. 210 (Tr. 237). Based on his familiarity with Neil Noesen and many discussions he has had with him, Fr. Gordon expressed the opinion that Noesen's refusal to dispense contraceptives derives from a good faith belief that it would be wrong to do so. R. 210 (Tr. 238-239).

Fr. Gordon testified further that indirect (formal) cooperation with an intrinsically evil act may be just as

immoral as direct (material) cooperation. R. 210-211 (Tr. 239-242). This reflects the "actual teaching of the church" R. 211 (Tr. 241). In Fr. Gordon's opinion, it would violate Noesen's sincere, conscientious beliefs and his understanding of Catholic moral principles for him to "transfer[] a prescription for oral contraceptives [to another pharmacist]." R. 211 (Tr. 242). Fr. Gordon's opinion was supported by an April 13, 2004, memorandum from Dr. Edward Furton, an ethicist with the National Catholic Bioethics Center. R. 211 (Tr. 243). In his memorandum, Dr. Furton expressed the view that, in Catholic moral theology, "[a]ny activity that requires a person to provide willing and knowing assistance to another person who engages in an intrinsically evil action is prohibited formal cooperation." R. 300 (Exh. No. 10). Applying that principle to the facts at issue, Dr. Furton said that, as a Catholic, Noesen "cannot facilitate the dispensing of [a contraceptive] drug by serving as a knowing and willing intermediary," because "[t]hat would constitute formal cooperation." R. 300. In Dr. Furton's opinion, Noesen's "exercise of his right of conscience is well-founded in Catholic teaching and . . . should be respected by all pharmacists." R. 300.

Early in July 2002, RPh On the Go assigned Noesen to work at the K-Mart Pharmacy located in Menominee, Wisconsin.

R. 165-166 (Tr. 64-65). He had worked for the K-Mart Pharmacy in Rhinelander for a few days before he was assigned to the Menominee location. R. 166, 184 (Tr. 65, 137-138). Before Noesen began to work at K-Mart, John Scott (RPh On the Go) told Randal Smith, the K-Mart Pharmacy District Manager, about Noesen's conscientious objection, informing Smith that Noesen "did not want to dispense birth control pills." R. 166 (Tr. 65). Smith could not recall whether Scott had mentioned any other restrictions on what Noesen would or would not do. R. 166 (Tr. 65-66). On cross-examination, Smith admitted that he did not remember what specific language Scott used in informing him of Noesen's objection to contraceptives. R. 167 (Tr. 72). Smith never received a copy of the July 2, 2002, letter Noesen had e-mailed to Scott, R. 166 (Tr. 65), and never spoke with Noesen. R. 166, 168 (Tr. 67, 73).

Smith testified that procedures were put in place at both K-Mart pharmacies to "work around" Noesen's objection to oral contraceptives. R. 166 (Tr. 67). According to Smith, both Ken Jordanby, the managing pharmacist at the Menominee K-Mart, and the (unidentified) managing pharmacist at the Rhinelander K-Mart agreed to come into work and fill any prescriptions that needed to be filled promptly, and, in all other situations, to have their pharmacy technicians

prepare the prescriptions for them to check and dispense when they came back to work. R. 166 (Tr. 68). No procedures were put in place to deal with a situation in which Noesen might refuse to transfer a prescription because Smith just "assumed" that Noesen would transfer any prescription he did not want to refill. R. 167 (Tr. 69).

Ken Jordanby, the managing pharmacist at the Menominee K-Mart, testified that on Saturday, July 6, 2002, Noesen personally informed him that, because of his religious beliefs, he would not fill or dispense prescriptions for oral contraceptives. R. 169-170 (Tr. 80-81). Jordanby did not receive a copy of the July 2, 2002, letter Noesen had e-mailed to John Scott of RPh On the Go, and he did not recall discussing with Noesen whether he (Noesen) would transfer a refill prescription for oral contraceptives. R. 169-170 (Tr. 80-81, 82). To accommodate Noesen, Jordanby agreed to come into the store when he was off duty and handle any prescriptions for oral contraceptives that needed to be filled or dispensed while Noesen was on duty. R. 170, 194 (Tr. 82, 179-180). He agreed to do this to avoid losing any customers. R. 170 (Tr. 83). On two or three occasions (it is not clear when) Jordanby came into the store to fill (or refill) prescriptions for Noesen. R. 170 (Tr. 83).

On Saturday, July 6, 2002, Amanda Renz (Phiede) went to

the K-Mart Pharmacy in Menominee, where Noesen was on duty alone, to obtain a refill of her prescription for Loestrin FE 1/20, an oral contraceptive. R. 157-158, 183 (Tr. 31-33, 133). Ms. Renz testified that she put her empty pill pack on the pharmacy counter and showed it to Noesen. R. 162 (Tr. 50). Noesen never touched the packet, which contained prescription information. R. 162 (Tr. 51). When presented with the request to refill the prescription, Noesen asked Ms. Renz, in private, if she intended to use the pills for purposes of birth control and she confirmed that this was her intent. R. 181, 185 (Tr. 127, 141). Noesen informed her that he objected to oral contraceptives and said that he would not refill her prescription. R. 158, 183, 186, 192 (Tr. 36, 136, 148, 169). Noesen did not ask Ms. Renz when she was to begin taking the new medication, or on what day her new cycle was to begin, and he was not aware of how many days of her medication she would miss as a result of his objection. R. 158, 186-187 (Tr. 35-36, 148-149). Ms. Renz testified that she had already taken her birth control pill for Saturday (the day on which Noesen refused to refill her prescription) and was supposed to start the next cycle of medication on Sunday (the following day). R. 159 (Tr. 38). Noesen also refused to tell Ms. Renz where she could go to

have her prescription refilled. R. 158 (Tr. 36).³ Ken Jordanby, the managing pharmacist, was not able to come into the store and refill Ms. Renz's prescription personally because he was driving a float for his daughter in a chamber of commerce parade which was being held in another city more than an hour's drive from Menominee. R. 170 (Tr. 84).

After Noesen informed Ms. Renz that he would not refill her prescription, she went to a nearby Wal-Mart pharmacy in an attempt to have her prescription refilled. R. 158-159 (Tr. 36-37). The Wal-Mart pharmacist (Stacey Wirth) called Noesen at the K-Mart pharmacy and asked him to transfer Ms. Renz's prescription to Wal-Mart. R. 159, 187 (Tr. 37, 152). Noesen refused to transfer the prescription because of his conscientious objection to contraceptives. R. 187 (Tr. 152). According to Noesen, Ms. Wirth (the Wal-Mart pharmacist) told him that he had a right to refuse to transfer the prescription. R. 187 (Tr. 152). Ms. Wirth (who did not testify at the disciplinary hearing) then advised Ms. Renz that she could not refill her prescription. R. 159 (Tr. 37-

³ Noesen admitted that in dealing with Ms. Renz he did not follow the protocol he had proposed in his July 2, 2002, letter. R. 181-182 (Tr. 128-129). No one at K-Mart, however, was aware of the contents of that letter, or had accepted his proposal for addressing issues of conscientious objection in handling prescriptions. Moreover, as Ms. Baird herself noted, see R. 202-203 (Tr. 211-213), the letter only specified a procedure for new prescriptions, not refills.

38). On cross-examination, Ms. Renz admitted that the Wal-Mart pharmacist (Ms. Wirth) did not suggest to her that she could have had her prescription refilled by contacting her prescribing physician and having him reissue the prescription to Wal-Mart. R. 161 (Tr. 47).

Noesen explained that, in order to transfer a prescription, the transferring pharmacist must provide, among other information, his or her name, the transferring pharmacy's phone number, the patient's name, the patient's doctor's name, the original prescription date, the first date the prescription was filled, the original number of refills, the remaining number of refills and the date of the last refill. R. 191 (Tr. 166). See also R. 204 (Tr. 217). Noesen refused to transfer the birth control prescription to Wal-Mart because, in his judgment, that would constitute participation in contraception in violation of his "sincerely held religious belief." R. 191 (Tr. 165-166). He expressed the opinion that to transfer a prescription for oral contraceptives to another pharmacist would be inducing another person to perform a sinful act. R. 203-204 (Tr. 216-217). Noesen knows of no state statute or administrative rule that requires a pharmacist to transfer prescriptions. R. 190 (Tr. 163). And, in fact, no statute or rule requires a pharmacist to transfer a prescription.

After leaving the Wal-Mart pharmacy, Ms. Renz went home and telephoned the K-Mart pharmacy where Noesen was working and spoke with the assistant store manager, Debi Wolter. R. 159 (Tr. 38).⁴ Ms. Wolter (who did not testify) asked Ms. Renz if she could wait until Monday when the managing pharmacist (Ken Jordanby) would be on duty and could refill her prescription. R. 159 (Tr. 39). Ms. Renz informed Ms. Wolter that she could not wait because she was supposed to begin her new cycle of pills the very next day, which was Sunday. R. 159 (Tr. 39). Ms. Renz spoke with Ms. Wolter later that day and Ms. Wolter told her that Jordanby would be able to refill her prescription on Sunday. R. 159 (Tr. 39). Jordanby, however, did not return to the Menomonee area until Sunday night. R. 170 (Tr. 84). On cross-examination, Ms. Renz admitted that Ms. Wolter did not inform her that she could contact her prescribing physician to have the prescription reissued to a different pharmacy. Tr. 161 (Tr. 48). And it did not occur to her to go to the K-Mart store in Eau Claire, a thirty-minute drive, to have her prescription refilled there. Tr. 161 (Tr. 48).

⁴ Ms. Wolter's name is variously spelled "Wolner" in the transcript. Some witnesses referred her to as the store manager, not the *assistant* store manager. The Department's answers to Noesen's interrogatories, however, indicate that her name is "Wolter," not "Wolner," and that her title was assistant store manager. See R. 336.

On Sunday morning, Ms. Renz called the K-Mart pharmacy in Menominee to see if her prescription had been refilled. R. 159 (Tr. 39). Ms. Wolter, the assistant store manager, informed her that her prescription had not been refilled. R. 159 (Tr. 39-40). Following this conversation, Ms. Renz sought the assistance of the police in getting her prescription refilled. R. 160 (Tr. 42). When Ms. Renz arrived at the store with two police officers, Noesen explained to them that he would not refill or transfer the prescription. R. 160 (Tr. 42). See also R. 244 (Exh. No. 1) (police report attached to complaint form signed by Ms. Renz). Ms. Wolter then called Jordanby and let Ms. Renz speak directly with him. R. 160, 188 (Tr. 43, 155-156).

Jordanby apologized to Ms. Renz and asked her to please wait until the next day, Monday, for her refill because there was no other pharmacist available at the time to refill her prescription. R. 160, 172 (Tr. 43, 90). He counseled her and explained that because she was going to be starting her birth control pills a day later than expected, she could take her "Sunday" night dose early Monday morning and take her "Monday" pill in the evening to get back on track. R. 172 (Tr. 90). Jordanby also recommended that for the entire month of July Ms. Renz should use another "back up" method of avoiding conception. R. 172, 173 (Tr. 90, 95).

The manufacturer's instructions inserted in the package with the prescription, however, state that a "back up" method is not necessary when only one pill is missed; the instructions recommend using "back up" contraception only if two or more pills are missed. See R. 246-251 (Exh. No. 2). On cross-examination, Ms. Renz admitted that she was not aware of the manufacturer's instructions. R. 162-163 (Tr. 52, 54-55). She also admitted that Jordanby had not informed her that she could have taken her empty pill pack to another pharmacy and received one replacement pill while the pharmacy attempted to contact her physician. R. 162 (Tr. 50).

Jordanby testified that it was not until Sunday, July 7, 2002, that he knew that Noesen would not transfer a prescription for oral contraceptives to another pharmacy. R. 171 (Tr. 88). See also R. 188 (Tr. 156) (Noesen testimony). This came as a surprise to him. R. 172 (Tr. 89). Jordanby had simply assumed that Noesen would transfer such prescriptions to a competitor. R. 174 (Tr. 97).⁵ Noesen explained his reasons for refusing to transfer Ms. Renz's prescription, which related to matters of conscience. R. 171 (Tr. 88). Noesen never told Jordanby that he would

⁵ Jordanby immediately qualified this answer by stating that, in order to retain the patient as a customer, his preferred approach would have been to talk with the patient himself and arrange for her to come into the pharmacy the following day to obtain her prescription. R. 174 (Tr. 98).

transfer a prescription for oral contraceptives and Jordanby had never demanded that he do so. R. 175 (Tr. 95). It did not occur to Jordanby to ask Noesen about the extent of his conscientious objection to contraceptives. R. 174 (Tr. 98).

On Monday, July 8, 2002, Ms. Renz went back to the K-Mart pharmacy in Menominee and received the refill for her oral contraceptives. R. 160 (Tr. 44). She admitted that she waited until "mid-afternoon" on Monday (instead of early morning, as Jordanby had recommended) to get her pills, and then took two doses immediately. R. 160, 161-162 (Tr. 44, 48-50). Per Jordanby's instructions, she used a secondary form of contraception during that month. R. 160 (Tr. 44-45).

The Department called Paul Rosowski, R. Ph., a licensed pharmacist, to testify as an expert witness on the rights and responsibilities of a pharmacist who has conscientious objections to providing certain services. R. 214-215 (Tr. 255-259). Rosowski testified that "a minimally competent pharmacist may exercise a right of conscience" and refuse to dispense a prescription if to do so would conflict with his or her "own morals and ethics." R. 216 (Tr. 260). He qualified this statement by adding that the pharmacist must consider the patient's needs in determining whether (and how) to exercise his right of conscience. R. 216 (Tr. 260).

Rosowski stated that a minimally competent pharmacist

should put his conscientious objections in writing and specify for the benefit of his employer (or the managing pharmacist) precisely what activities he finds morally objectionable. R. 216 (Tr. 261). Notwithstanding his objections, a pharmacist has a duty to the patient to meet his or her health care needs and desires. R. 216 (Tr. 261). In support of his opinion regarding the standard of care, Rosowski relied upon a policy committee report prepared for the American Pharmacists Association. R. 216 (Tr. 261). See also R. 224 (Tr. 294). That report, R. 265-282 (Exh. No. 6), recommended that "pharmacists be allowed to excuse themselves from *dispensing* situations which they find morally objectionable, but that removal from participation must be accompanied by responsibility to the patient and performance of certain professional duties which accompany that refusal." R. 265 (emphasis added). More specifically,

Pharmacists choosing to excuse themselves from such a situation continue to have a responsibility to the patient—ensuring that the patient will be referred to another pharmacist or be channeled into another available health system. Exercising the authority to excuse themselves from the *dispensing* process, and thus avoiding having personal, moral decisions of others placed upon them, requires the same consideration of the patient—the patient should not be required to abide by the pharmacist's personal, moral decision. Providing alternative mechanisms for patients in this situation ensures patient access to drug products, without requiring the pharmacist or the patient to abide by personal decisions other than their own.

R. 265 (emphasis added).

Based on the policy committee's report, Rosowski found that Noesen's refusal to transfer Ms. Renz's prescription to another pharmacy failed to meet the standards of a minimally competent pharmacist in several respects: First, Noesen never communicated his objections to oral contraceptives in writing to K-Mart management or the managing pharmacist of the K-Mart pharmacy in Menominee (Ken Jordanby); second, his July 2, 2002, letter to John Scott of RPh On the Go did not state any specific objection to transferring (as opposed to dispensing) certain prescriptions; third, he did not follow the protocol that he himself had outlined in his July 2, 2002, letter, explaining how he would handle his objections; and, finally, he failed to transfer Ms. Renz's prescription or take other steps to ensure that she was able to have her prescription refilled. R. 218-220 (Tr. 268-279). With respect to the last matter, Rosowski expressed the opinion that, even after asserting his objection, Noesen had a duty to inform Ms. Renz of her options for getting her prescription refilled. R. 219 (Tr. 274-275).

On cross-examination, Rosowski admitted that the cover page accompanying the policy committee's report expressly recited that the report was "*informational only* and its recommended policies (if any) are subject to consideration

by the House of Delegates. *Only policies approved by the House may be considered official APhA policy.*" R. 225-226 (Tr. 297-300), quoting Exh. No. 12, R. 310 (emphasis added).

In 1998, the American Pharmacists Association adopted, as its official policy, a "Pharmacist Conscience Clause," which differs in significant respects from the recommendations of the earlier policy committee report on which Rosowski based his expert opinions. The "Pharmacist Conscience Clause" states, in its entirety:

APhA [American Pharmacists Association] recognizes the individual pharmacist's right to exercise conscientious refusal and supports the establishment of systems to ensure [the] patient's access to legally prescribed therapy without compromising the pharmacist's right of conscientious refusal.

R. 283 (Exh. No. 7).⁶

The "Pharmacist Conscience Clause" does *not* require a pharmacist's conscientious objections to be stated in writing; it does *not* state *when* those objections must be made or *how* specific they must be; it does *not* purport to restrict the scope of conscientious objections a pharmacist may raise (*e.g.*, by limiting objections to *dispensing*, as opposed to *transferring*, prescriptions); and it does *not*

⁶ Rosowski acknowledged that the "Pharmacist Conscience Clause" adopted by the American Pharmacists Association, and not the policy committee's earlier report, represents the Association's official policy. R. 226 (Tr. 300).

place the responsibility for "ensur[ing] [a] patient's access to legally prescribed therapy" upon the objecting pharmacist, rather than the managing pharmacist. Rosowski admitted that the American Pharmacists Association's official policy does *not* require a pharmacist to put his objections in writing, or, in asserting a conscientious objection, to inform a patient of her other options. R. 225 (Tr. 296). And neither does anything in the pharmacy code or regulations. R. 222, 224 (Tr. 285, 294). His opinion regarding the requirement of a statement in writing was based in part upon what he had been taught "in generalities in pharmacy school." R. 222 (Tr. 286).

On further cross-examination, Rosowski expressed the opinion that the Wal-Mart pharmacist, after attempting to transfer Amanda Renz's prescription from the K-Mart pharmacy in Menominee, did not fulfill *her* duty as a pharmacist and violated the "standard of care" when she failed to inform Ms. Renz of her options for having her prescription refilled. R. 223-224 (Tr. 290-292). And when Ken Jordanby spoke with Ms. Renz on the telephone on Sunday, July 7, 2002, he "should have mentioned something to her about how she could seek care immediately." R. 224 (Tr. 294).

Rosowski testified that it is important to take oral contraceptives as stated by the manufacturer in the package

insert. R. 220 (Tr. 227). A pharmacist should recognize that an unwanted pregnancy is a danger to a patient taking birth control pills. R. 220-221 (Tr. 279-280). Whether a woman would be at risk from pregnancy, however, would depend upon her particular medical condition. R. 221 (Tr. 280-281). Rosowski is not a pharmacologist. R. 221 (Tr. 282).

Dr. Jerome Wernow testified as an expert witness on Noesen's behalf. R. 231 (Tr. 323). Dr. Wernow is a licensed pharmacist who also holds a Ph.D. in medical ethics from the University of Louvain (Leuven, Belgium), among his other degrees. R. 231-231 (Tr. 324-325). Dr. Wernow has had extensive experience in pharmacy practice, management, training and administration, including in both pharmacies and hospitals. R. 232 (Tr. 324-326). He also has published numerous articles on medical ethics. R. 232 (Tr. 326-327).⁷ In Dr. Wernow's opinion, he is qualified to testify regarding the standard of care for a licensed pharmacist who has exercised a right of conscience by refusing to participate with contraception. R. 232-233 (Tr. 327-328).

Dr. Wernow understood that the Department was seeking to discipline Noesen "because he's refusing to transfer the patient's prescription order in the circumstances of his

⁷ Dr. Wernow's *curriculum vitae* (Exh. No. 8) may be found at R. 284-289.

conscientious objection," and because his refusal violated PHAR. 10.03(2). R. 233 (Tr. 328-329). After reviewing the depositions of Neil Noesen, Amanda Renz and Paul Rosowski, the original and amended complaints, the interrogatories, professional codes and the applicable statutes and rules, Dr. Wernow expressed the opinion that Noesen "practiced due diligence in good faith within the criteria of standards of practice of American Pharmaceutical [Pharmacists] Association for the exercise of conscientious objection in dispensing oral contraceptives." R. 233 (Tr. 329). Dr. Wernow based his opinion "on the APhA codes and standards of practice for conscientious objection." R. 233 (Tr. 330).

Dr. Wernow testified that in Noesen's July 2, 2002, letter to John Scott, RPh On the Go, and in his discussions with Ken Jordanby, the managing pharmacist at the K-Mart pharmacy in Menominee, Noesen stated his conscientious objection and formulated an ethically acceptable arrangement for referring requests for dispensing contraceptives to Jordanby. R. 233 (Tr. 330). Once Jordanby became aware of Noesen's refusal to refill Ms. Renz's prescription, it was his (Jordanby's) responsibility either to come into the pharmacy himself and dispense the oral contraceptives to Ms. Renz, or inform her that she could call her prescribing physician or his on-call service to have the prescription

transferred to another pharmacy. R. 233 (Tr. 331). Dr. Wernow added that a reasonable person would understand from Noesen's July 2, 2002, letter that he was "not willing to participate in any aspect of the dispensing of medication," including transferring a medication, because, in transferring a medication he would be providing "material support" to contraception or would be "complicit[] in the act of dispensing the medication which would impugn his moral conscience according to the expression of his Roman Catholic belief." R. 235-236 (Tr. 339-340).

In Dr. Wernow's opinion, Noesen did not violate any standard of practice set forth in state law or in any professional standards of practice, including the recommendations set forth in the policy committee report on which Rosowski relied. R. 233-234 (Tr. 331-334). Dr. Wernow noted the irony in sanctioning Noesen because he did not provide K-Mart with a written statement of his objections, when the State itself does not have a written policy on whether conscientious objections must be set forth in writing. R. 233 (Tr. 331). To avoid any ambiguity regarding what is required of pharmacists who have conscientious objections to dispensing certain prescriptions, and to ensure equitable application of a uniform standard, Dr. Wernow expressed the view that the State should adopt rules

requiring that objections be put in writing, specifying the criteria that must be followed in asserting an objection and setting forth the procedures a pharmacist must follow in resolving an objection. R. 234 (Tr. 335).

If the State Board of Pharmacy is going to sanction penalties, the pharmacist needs to know or needs to at least be notified and warned that if indeed they're going to express a conscientious objection here, . . . the criteria that they must follow, and so there needs to be some type of specific criteria laid down that they'd be holding . . . the pharmacist up against as well as the managing pharmacist too.

R. 234-235 (Tr. 335-336).

This guidance from the Board is necessary "so that the pharmacist is not vaguely aware of what he may or may not be violating." R. 235 (Tr. 336). In Dr. Wernow's opinion, Noesen did not violate the standard of care applicable to pharmacists in similar situations. R. 236 (Tr. 340).

Dr. Wernow testified further that the Wal-Mart pharmacist (Stacey Wirth), after learning of Noesen's refusal to transfer the prescription to her pharmacy on the ground of conscience, knew that Ms. Renz had a valid refill prescription. R. 235 (Tr. 337). At that point, Ms. Wirth had two options: First, she could have called Ms. Renz's prescribing physician or his on-call service to have the prescription reissued to Wal-Mart. R. 235 (Tr. 337-339). Second, she could have relied on the "the standard of

practice of professional discretion" and "taken two tablets from a packet, put it in a vi[al], label it, and request[] that the patient return on Monday" for the balance of the prescription. R. 235 (Tr. 337). Ms. Wirth did neither.

Dr. Ralph Miech, M.D., Ph.D., also testified for Noesen. R. 227 (Tr. 307). Dr. Miech is a retired professor of pharmacology and a retired emergency medicine physician. R. 228 (Tr. 308). Dr. Miech holds a doctorate in pharmacology from the University of Wisconsin and taught biochemistry and pharmacology at Brown University School of Medicine. R. 228 (Tr. 308). He has published in the fields of pharmacy, biochemistry and medical ethics. R. 228 (Tr. 309-310). Dr. Miech explained that "[a] pharmacologist studies two areas, one is called pharmacodynamics which means the mechanism of action of the drug, and the other area is pharmacokinetics which deals with the absorption, distribution, metabolism, and excretion of drugs." R. 228 (Tr. 309). "A pharmacist is trained in the compounding and the dispensing of medicines." R. 228 (Tr. 309).

In Dr. Miech's medical and scientific opinion, Noesen's refusal to refill or transfer Ms. Renz's prescription, which resulted in her missing the first dose of Loestrin, did not pose a danger to her health and would not have created an elevated risk of pregnancy. R. 229-230 (Tr. 313-314, 316).

After explaining in pharmacological terms why missing one dose of her prescription would not have increased Ms. Renz's risk of pregnancy, see R. 229 (Tr. 314-315), Dr. Miech pointed out that neither the Physician's Desk Reference (PDR) nor the package insert included with the pills by the manufacturer recommends using a "back up" method of contraception when only one dose has been missed. R. 229-230 (Tr. 315-316). The risk of pregnancy would not be affected by irregularity in menstrual cycles. R. 230 (Tr. 316).

Dr. Miech testified that the probability of a woman becoming pregnant while she is taking Loestrin as directed is 2.4%, which rises slightly to 2.6% if she misses one or two doses. R. 230 (Tr. 317). The increase in risk (0.2%) would be even lower when, as in the case of Ms. Renz, only one dose—the first one—was missed. R. 230 (Tr. 317).⁸

On February 28, 2005, the administrative law judge (Colleen Baird) filed her Proposed Final Decision and Order, see R. 2-25, including the following findings of fact:

19. The standard of care ordinarily exercised by a pharmacist is to inform the managing pharmacist or the employing pharmacy with specificity of those activities that the pharmacist will not perform at the pharmacy based upon his or her conscientious objection.

⁸ To put this percentage in perspective, missing only one dose of Loestrin would have increased the odds of Ms. Renz's becoming pregnant by less than one in five hundred.

* * *

44. The effectiveness of [Ms. Renz's] oral contraceptive medication was decreased as [a] result of her inability to take the first tablet of her next cycle until the second day of the cycle.

45. The risk of pregnancy to [Ms. Renz] was increased based on the number of doses of the contraceptive which she missed due to her inability to obtain her medication.^[9]

46. [Noesen] did not ask [Ms. Renz] any questions about her medical condition and did not know whether she had a medical condition that would cause harm to her if she became pregnant.

47. [Noesen] did not ask [Ms. Renz] when she had taken the last dose of her previous prescription or when she was to take the first dose of the refill prescription. He had no knowledge of how many doses she would have missed because of his refusal to transfer her prescription.

48. [Noesen] did not follow the protocol that he proposed in his July 2, 2002 letter, such as contacting [Ms. Renz's] prescriber, the prescriber's nurse, or other staff working with the prescriber.

49. [Noesen] did not assess the risk of harm to [Ms. Renz] as a result of his refusal to transfer her refill prescription or of his refusal to provide her information about her options to obtain her prescribed medication.

⁹ In her Proposed Final Decision and Order, Ms. Baird stated that at the time of the hearing in 2004, Ms. Renz had become pregnant after "missing just one dose of her contraceptive medication." R. 21. This misstated the evidence. Ms. Renz said that she became pregnant as the result of missing one or two doses of her contraceptive when she failed to use backup contraception. See R. 164 (Tr. 58).

50. The fear of unwanted pregnancy could harm [Ms. Renz], or another woman, physically or emotionally.

51. An unwanted pregnancy could harm [Ms. Renz], or another woman, physically or emotionally.

52. The standard of care ordinarily exercised by a pharmacist requires a pharmacist to dispense medication to a patient when presented with a valid prescription order, unless the pharmacist in his professional opinion believes that the prescription has the potential for causing harm to the patient.

53. There was no evidence adduced at the hearing that refilling the prescription would harm [Ms. Renz].

54. The standard of care ordinarily exercised by a pharmacist requires that a pharmacist who exercises a conscientious objection to the dispensing of a prescription must ensure that there is an alternative mechanism for the patient to receive his or her medication, including informing the patient of their options to obtain their prescription.

55. [Noesen] did not ensure that there was an alternative mechanism in place so that [Ms. Renz] could receive her medication.

R. 7-8 (Proposed Final Decision and Order at 6-7).

After determining that the Board had jurisdiction over the matter, Ms. Baird made two other Conclusions of Law:

2. As set forth in the Findings of Fact above, by failing to clearly inform the managing pharmacist that based upon his conscientious objection [Noesen] would not transfer a prescription for oral contraceptives, [Noesen] has engaged in practice which constitutes a danger to the health, welfare, or safety of a patient and has practiced in a manner which substantially departs from the standard of care ordinarily

exercised by a pharmacist and which harmed or could have harmed a patient, in violation of Wis. Adm. Code § Phar. 10.03(2).

3. As set forth in the Findings of Fact above, by failing to provide information to the patient [Ms. Renz] regarding her options for obtaining a refill of her prescription which he refused to dispense or transfer, [Noesen] has engaged in practice which constitutes a danger to the health, welfare, or safety of a patient and has practiced in a manner which substantially departs from the standard of care ordinarily exercised by a pharmacist and which harmed or could have harmed a patient, in violation of Wis. Adm. Code § Phar 10.03(2).

R. 8 (Proposed Final Decision and Order at 7).

In her Proposed Final Decision and Order, Ms. Baird ordered that Noesen be reprimanded (§ 1) and that his license be limited under the following conditions (§ 2):

a. Prior to providing pharmacy services at any pharmacy, [Noesen] shall prepare a written notification *specifying in detail*

i. The pharmacy practices he will decline to perform as a result of his conscience; and

ii. The steps he will take to ensure that a patient's access to medication is not impeded by his declination(s).

b. The written notification referred to in § 2(a) above shall be provided to a potential pharmacy employer at least five (5) business days prior to [Noesen] commencing practice at the pharmacy.

c. [Noesen] shall provide a copy of this Final Decision and Order together with and at the

same time of any provision of written notification pursuant to ¶ 2(a) above.

d. [Noesen] shall immediately notify the Department Monitor if he fails to comply with any provisions of this Order.

e. [Noesen] shall take a minimum of six (6) credit hours of continuing education in [e]thics for pharmacy practice, which shall be pre-approved by the Board. The continuing education shall be completed within six (6) months of the date of this order.

f. [Noesen] shall pay the full costs of these proceedings.

R. 8-9 (Proposed Final Decision and Order at 7-8) (emphasis in original). The order provided that Noesen could petition the Pharmacy Board to modify the limitations placed on his license no earlier than two years from the date of the order. R. 9 (Proposed Final Decision and Order at 8, ¶ 3).

The Pharmacy Examining Board adopted Ms. Baird's Proposed Final Decision and Order. R. 1.¹⁰ On May 13, 2005, Noesen filed his Petition for Judicial Review of the Pharmacy Board's Final Decision and Order. See App. 30-34. On February 3, 2006, the circuit court affirmed the Pharmacy Board's Final Decision and Order. See App. 35-51. On May 4, 2006, Noesen filed his notice of appeal. See App. 52-53.

¹⁰ Over Noesen's objection, the Board, on June 22, 2005, entered an "Order Fixing Costs" in the amount of \$20,767.89. See App. 54.

ARGUMENT

I.

THE PHARMACY EXAMINING BOARD VIOLATED NOESEN'S RIGHT TO DUE PROCESS OF LAW UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY SUBJECTING HIM TO DISCIPLINE FOR VIOLATION OF A PROFESSIONAL STANDARD OF CARE WITHOUT GIVING HIM FAIR NOTICE OF THAT STANDARD.

Noesen initially contends that the Pharmacy Examining Board violated his right to due process of law under the Due Process Clause of the Fourteenth Amendment by subjecting him to discipline for violating a professional standard of care without giving him fair notice of that standard. Noesen was disciplined for violating Phar. 10.03(2), which describes, as "unprofessional conduct,"

Engaging in any pharmacy practice which constitutes a danger to the health, welfare, or safety of a patient or public, including but not limited to, practicing in a manner which substantially departs from the standard of care ordinarily exercised by a pharmacist which harmed or could have harmed a patient.

WIS. ADMIN. CODE PHAR. 10.03(2).

More specifically, "[t]he central issue in this case," as the administrative law judge observed, "is whether by refusing to transfer the patient's prescription on the basis of his conscientious objection, [Noesen] departed from a standard of care ordinarily exercised by a pharmacist and which harmed or could have harmed the patient." R. 9 (Proposed Final Decision and Order at 8). Noesen submits

that the Department failed to give him "fair notice" of this standard, and that his conduct neither caused (nor could have caused) harm to the patient.

The Court of Appeals has recognized, as "a fundamental constitutional rule," that "'a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'" *State ex rel. Kalt v. Board of Fire & Police Commissioners for the City of Milwaukee*, 145 Wis.2d 505, 510, 427 N.W.2d 408 (Ct. App. 1988), quoting *Bence v. Breier*, 501 F.2d 1185, 1188 (7th Cir. 1974). This rule applies to administrative regulations as well as penal statutes. *Kalt*, 145 Wis.2d at 510. "The concept of vagueness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *State ex rel. Hennekens v. City of River Falls Police & Fire Comm'n*, 124 Wis.2d 413, 420, 369 N.W.2d 670 (Sup. Ct. 1985). Consistent with United States Supreme Court precedent, the Wisconsin Supreme Court has acknowledged that "a deprivation of the due process right of fair warning can occur not only from vague statutory language, but also from unforeseeable and retroactive interpretation of that statutory language."

Elections Board of the State of Wisconsin v. Wisconsin Manufacturers & Commerce, 228 Wis.2d 650, 679-80, 597 N.E.2d 721 (Wis. 1999), citing *Bouie v. City of Columbia*, 378 U.S. 347, 352, 355 (1964). In the case at bar, Noesen was subjected to discipline based upon an "unforeseeable and retroactive interpretation" of the "unprofessional conduct" language of PHAR. 10.03 by the Board, an interpretation for which the Department's evidence was woefully inadequate.

In determining that Noesen had violated professional standards of care, the Board relied upon the testimony of the Department's expert witness, Paul Rosowski; a policy committee report prepared for the American Pharmacists Association; and the Association's "Code of Ethics for Pharmacists." R. 14-16 (Proposed Final Decision and Order at 13-15).¹¹ None of these sources established a standard of care with which Noesen was or should have been familiar in communicating and acting upon his conscientious objection to the use of contraceptives. Accordingly, he did not have "fair notice" of the standard and should not have been subjected to disciplinary proceedings for its "violation."

Rosowski expressed the opinion that Noesen's refusal to

¹¹ See also, *id.* at 19 (Proposed Final Decision and Order at 18): "The evidence in this case shows that [Noesen] fell far short of satisfying the standard of care articulated by Mr. Rosowski and as reflected in the APhA report and Pharmacist Code of Ethics."

transfer Ms. Renz's prescription to another pharmacy failed to meet the standards of a minimally competent pharmacist in four respects: First, he never communicated his objections to oral contraceptives in writing to K-Mart management or the managing pharmacist of the K-Mart pharmacy in Menominee; second, his July 2, 2002, letter to John Scott did not state any specific objection to transferring (as opposed to dispensing) certain prescriptions; third, he did not follow the protocol that he had outlined in his July 2, 2002, letter, explaining how he would handle his objections;¹² and, finally, he failed to transfer Ms. Renz's prescription or take other steps to ensure that she was able to have her prescription refilled. R. 218-220 (Tr. 268-279).

Apart from "generalities" that he had been taught in

¹² Ms. Baird criticized Noesen for not following this protocol. See R. 14 (Proposed Final Decision at Order at 13). Her critique overlooks two salient facts: First, the July 2, 2002, letter merely proposed ("offer[ed]") this protocol. See 194-195 (Tr. 180-181) (referring to the letter as a "proposal"). John Scott never discussed the substance of the letter with Noesen, R. 194 (Tr. 178-179), and no one associated with K-Mart ever saw the letter. R. 166, 168, 169-170 (Tr. 65, 67, 73, 80-81). Thus, it cannot be said that Noesen's legal right to assert his moral objections to "participat[ing] in" contraception in his employment was in any way forfeited by his failure to follow his own protocol. The statement of Noesen's moral objections was unqualified and absolute; his protocol for resolving them was qualified and conditional. Second, as Ms. Baird herself recognized, see R. 202-203 (Tr. 211-213), the July 2, 2002, letter specifies a protocol only for dealing with new prescriptions, not *refills*. This case, however, involved a prescription for a refill.

pharmacy school, R. 222 (Tr. 286), Rosowski's opinion that Noesen failed to meet minimum professional standards of care was based upon a policy committee report (Exh. No. 6) on conscientious objection that had been prepared for the American Pharmacists Association. See R. 216, 224 (Tr. 261, 294). The cover page of the committee report expressly recited that the report was "*informational only* and its recommended policies (if any) are subject to consideration by the House of Delegates. *Only policies approved by the House may be considered official APhA policy.*" R. 310 (Exh. No. 12) (emphasis added). Rosowski admitted that only the "Pharmacist Conscience Clause," discussed below, and not the policy committee's report, represents official Association policy. R. 226 (Tr. 300). The policy committee report does *not* establish minimum professional standards of care which pharmacists may be expected (or required) to follow.¹³

The "Pharmacist Conscience Clause," which represents

¹³ Ms. Baird stated: "Mr. Rosowski explained that the APhA's report reflects the consensus of professional opinion on this subject." R. 16 (Proposed Final Decision and Order at 15). This statement is incorrect. First, as noted above, Exhibit No. 6 is a policy committee report prepared for the American Pharmacists Association, not a report of the Association. Second, Rosowski never testified that the report "reflects the consensus of professional opinion on [the] subject." Instead, he referred to "the APhA consensus statement on this issue." R. 224 (Tr. 294). The "consensus" to which Rosowski referred was the consensus of the *policy committee*, not the Association, much less the profession.

the *official* policy of the American Pharmacists Association, "recognizes the individual pharmacist's right to exercise conscientious refusal and supports the establishment of systems to ensure [the] patient's access to legally prescribed therapy without compromising the pharmacist's right of conscientious refusal." R. 283 (Exh. No. 7). The conscience clause thus *affirms* the right of a pharmacist to "exercise conscientious refusal." The clause urges adoption of policies that ensure that a patient has access to legally prescribed drugs, but "without compromising the pharmacist's right of conscientious refusal."

Nothing in the "Pharmacist Conscience Clause" would have put Neil Noesen on notice that the course of conduct he followed in this case failed to meet minimum professional standards of care. The conscience clause does *not* require a pharmacist to put his conscientious objections in writing; it does *not* state *when* those objections must be made or *how* specific they must be; it does *not* restrict the scope of conscientious objections a pharmacist may assert (for example, by limiting objections to *dispensing*, as opposed to *transferring*, prescriptions);¹⁴ and it does *not* place the

¹⁴ There is no question that Jordanby knew that Noesen had conscientious objections to *dispensing* contraceptives, but he could not recall whether Noesen also had expressed objections to *transferring* prescriptions for contraceptives. See R. 169-170 (Tr. 80-81, 82). Jordanby may have "assumed"

responsibility for "ensur[ing] [a] patient's access to legally prescribed therapy" upon the objecting pharmacist, rather than the managing pharmacist or pharmacy management. In sum, nothing in the "Pharmacist Conscience Clause" would have put Noesen on notice that he failed to meet minimum professional standards of care in exercising his conscientious objection to the use of contraceptives.

The American Pharmacists Association's "Code of Ethics for Pharmacists," which was adopted four years *before* the "Pharmacist Conscience Clause," is a general statement of ethical principles to guide pharmacists in the practice of their profession. See R. 262-264 (Exh. No. 5).¹⁵ The Code does not address (or purport to address) the nature or scope of the pharmacist's right of conscience, or how the needs of patients to obtain legally prescribed medications may be met without violating pharmacists' rights of conscience. Those issues are addressed in the "Pharmacist Conscience Clause"

that Noesen would transfer such prescriptions to another pharmacy, R. 174 (Tr. 97), but he qualified this answer by stating that to retain the patient as a customer, he would prefer to talk with her himself and make arrangements for her to come into the pharmacy the next day to obtain her prescription. R. 174 (Tr. 98). In other words, Jordanby did not intend (or even want) Noesen to transfer prescriptions for oral contraceptives to other pharmacies.

¹⁵ The Department's expert witness, Paul Rosowski, did not even refer to the "Code of Pharmacist Ethics" in his testimony.

which, as explained above, does not support the Department's understanding of the applicable standards of care.

The Department attempted to provide a pedigree for its newly invented standard, but that "standard" remains a foundling with uncertain parentage, certainly none that Noesen (or any other pharmacist) is bound to recognize. Noesen, on the other hand, presented expert opinion testimony from Dr. Jerome Wernow, who holds a Ph.D. in medical ethics, that his conduct satisfied professional standards of care for pharmacists. R. 233-236 (Tr. 329-336, 339-340). It is also significant that Stacey Wirth, the Wal-Mart pharmacist who asked Noesen to transfer Amanda Renz's prescription, told Noesen in the same telephone conversation that he had a right to refuse to transfer the prescription. R. 187 (Tr. 152).¹⁶

The Department failed to show that Noesen violated an *established and recognized* standard of professional care.

¹⁶ Based upon the state of the record, Noesen does not argue that the Department has engaged in selective enforcement of its newly invented standard of care, which would present a due process issue distinct from the one raised here. Nevertheless, it should not go unnoticed that the Department's expert witness expressed the opinion that both Stacey Wirth, the Wal-Mart pharmacist, and Ken Jordanby, the K-Mart managing pharmacist in Menominee, failed to meet minimum professional standards of care, see R. 223-224 (Tr. 290-292, 294), yet the Department chose not to initiate disciplinary proceedings against either of them. Are only pharmacists with conscientious objections to be singled out for discipline?

Noesen had no "fair notice" of the Department's after-the-fact standard for expressing and handling conscientious objections.¹⁷ That, in itself, requires reversal of the Board's decision. In addition, the Department failed to show that his conduct harmed or could have harmed Ms. Renz or another patient.

It is undisputed that Ms. Renz did not become pregnant from missing her dose of Loestrin on Sunday, July 7, 2002. Moreover, it is clearly unreasonable to conclude that she *could* have become pregnant. The manufacturer's instructions on the use of Loestrin, see R. 246-251 (Exh. No. 2), do not recommend using "back up" contraception if the patient misses only one dose of the prescription; instead, she should take two doses on the following day, which is exactly what Ms. Renz did. A study cited by Dr. Miech indicated that there is only a 0.2% increase in the chance of a woman becoming pregnant from missing one or two doses of Loestrin (there is a 2.4% chance of her becoming pregnant even if she takes the drug as directed). R. 230 (Tr. 317). Ms. Renz

¹⁷ Pursuant to its authority under WIS. REV. STAT. § 450.02(3)(e) West 2006), the Department may wish to formulate a specific rule addressing conscientious objections along the lines of the recommendations of the policy committee report on which Rosowski based his opinion. In the absence of such a rule, however, pharmacists are not bound to conform their conduct to a rule woven out of whole cloth by the Department, certainly not on the basis of the record developed in this case.

missed only one dose, that being the first one of her cycle, which would have lowered the risk even further. R. 230 (Tr. 317). An increase in risk that amounts to less than a one in five hundred chance (0.2%) of occurring must be regarded as *de minimis*. Dr. Miech's opinion that Noesen's refusal to refill or transfer Ms. Renz's prescription did not pose a danger to her health and would not have created an elevated risk of pregnancy, see R. 229-230 (Tr. 313-314, 316), was uncontradicted by any testimony offered by the Department.

In the circuit court, the Department acknowledged that if the Board "applied a made-up, after-the-fact standard of care to his conduct, which could not have put him on fair notice that he was violating professional standards when he refused to fill or transfer [Ms. Renz's] contraceptive prescription," then "the Board's decision would raise due process concerns." Respondent's Rebuttal Br. at 7. That, Noesen respectfully submits, is precisely what the Board did in disciplining him under a non-existent standard of care.

"[P]harmacists have a right to know what they have violated." *Nevada State Board of Pharmacy v. Garrigus*, 496 P.2d 748, 749 (Nev. 1972) (pharmacists' licenses could not be revoked where no evidence established the contemporary standards in the profession). Noesen was denied that right. Accordingly, the Board's decision should be reversed.

II.

IN DISCIPLINING NOESEN FOR REFUSING TO TRANSFER A PATIENT'S PRESCRIPTION FOR ORAL CONTRACEPTIVES OR ADVISE HER HOW SHE COULD OBTAIN HER PRESCRIPTION, THE PHARMACY EXAMINING BOARD VIOLATED HIS RIGHT OF CONSCIENCE PROTECTED BY ART. I, § 18, OF THE WISCONSIN CONSTITUTION.

Noesen next contends that in disciplining him for refusing to transfer Ms. Renz's prescription for oral contraceptives or advise her how she could obtain her prescription elsewhere, the Pharmacy Examining Board violated his right of conscience protected by art. I, § 18, of the Wisconsin Constitution. Article I, § 18, provides, in relevant part, that "The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; . . . nor shall any control of, or interference with, the rights of conscience be permitted," WIS. CONST. art. I, § 18 (West 2002).

In *State v. Miller*, 202 Wis.2d 56, 549 N.W.2d 235 (Sup. 1996), the Wisconsin Supreme Court articulated the analysis applicable to freedom of conscience claims brought under art. I, § 18:

Succinctly stated, under this analysis, the challenger carries the burden to prove: (1) that he or she has a sincerely held religious belief, (2) that is burdened by application of the state law at issue. Upon such proof, the burden shifts to the State to prove: (3) that the law is based on a compelling state interest, (4) which cannot be served by a less restrictive alternative.

202 Wis.2d at 66.

Application of the *Miller* analysis to the facts of this case yields but one conclusion--the Board violated Noesen's right of conscience under art. I, § 18, by reprimanding him.

First, it is undisputed that Noesen has a sincerely held, religious and moral objection to participating in or cooperating with contraception *in any manner*. With respect to his practice as a pharmacist, that objection is not limited to *dispensing* contraceptives, but extends to *transferring* prescriptions for contraception or *advising* patients how they may obtain contraceptives. See R. 177-180, 191, 196-197 (Tr. 109-110, 114, 119-120, 123, 165-166, 168, 186-190); R. 260 (Exh. No. 4). Noesen's objection was best summarized when he said, "with a good conscience, I can't aid, abet, encourage, refer, transfer, [or] participate in any way with something I feel would be impairing the fertility of a human being." R. 176 (Tr. 105).

Second, given the breadth and scope of his objection to contraception, requiring Noesen to transfer prescriptions to another pharmacy or to advise patients how they may have their prescriptions filled clearly burdens him in the exercise of his religious beliefs and moral convictions. Such a burden, under art. I, § 18, may be imposed *only* if it is the least restrictive means to promoting a compelling state purpose. See *Miller*, 202 Wis.2d at 66.

Third, Noesen acknowledges that the State has a compelling interest in public health and safety, and that this interest includes ensuring that legally prescribed drugs are not improperly withheld from those for whom they have been prescribed. Thus, whether the discipline imposed in this case is permissible under art. I, § 18, turns on the fourth factor set forth in *Miller*—whether the State has chosen the least restrictive means to achieve its compelling interest. Noesen submits that it has not.

The State has alternatives available that would promote its interest while respecting the rights of conscience of pharmacists. The State, for example, could establish standards for accommodating the religious and moral beliefs of pharmacists (by requiring pharmacies to have in place staffing policies and procedures that would avoid the moral dilemma in which Noesen was placed here). The State could also adopt policies regarding access to prescription records that would not require a pharmacist to violate his right of conscience. Either alternative would ensure that patients promptly obtain their prescriptions without compromising the rights of pharmacists who have conscientious objections to the use of certain drugs. Because the State had less restrictive alternatives to promote its interest, the Board's decision to reprimand Noesen should be reversed.

III.

THE PHARMACY EXAMINING BOARD ABUSED ITS DISCRETION IN INSTITUTING FORMAL DISCIPLINARY PROCEEDINGS AGAINST NOESEN WHERE THE ALLEGED MISCONDUCT WOULD HAVE WARRANTED ISSUANCE OF AN ADMINISTRATIVE WARNING.

Assuming that Neil Noesen engaged in "unprofessional conduct," the Department of Regulation & Licensing erred in initiating formal disciplinary proceedings against him. Instead, the Department should have issued an administrative warning. Accordingly, the Board's Final Decision and Order reprimanding Noesen should be vacated and the cause remanded to the Department for issuance of an administrative warning.

Under state law, "[i]f the department . . . determines during an investigation that there is evidence of misconduct by a credential holder, the department . . . may close the investigation by issuing an administrative warning to the credential holder." WIS. REV. STAT. § 440.205 (West 2005). An administrative warning may be issued under § 440.205 "only if the department . . . determines that no further action is warranted because the complaint involves a first occurrence of a minor violation and the issuance of an administrative warning adequately protects the public by putting the credential holder on notice that any subsequent violation may result in disciplinary action." *Id.* Administrative warnings "do not constitute an adjudication of guilt or the imposition of discipline and may not be used

as evidence that the credential holder is guilty of the alleged misconduct." *Id.*

Assuming that Noesen's refusal to transfer Ms. Renz's prescription to another pharmacy (or otherwise assist her in obtaining her refill prescription) constituted "evidence of misconduct," an administrative warning would have been the appropriate disposition in this case. All of the other statutory and administrative requirements for imposition of such a sanction were satisfied here. Noesen had no prior occurrences of misconduct; the "misconduct" in question was a minor violation of a rule related to the profession; and issuance of an administrative warning would have adequately protected the public. See WIS. REV. STAT. § 440.205 (West 2005); WIS. ADMIN. CODE RL 8.03.¹⁸

The decision to pursue disciplinary action in this case was an abuse of discretion. Accordingly, the Board's Final Decision and Order should be reversed and the cause remanded to the Department for issuance of an administrative warning.

¹⁸ Noesen's "misconduct" fell squarely within the definition of "minor violation" set forth in RL 8.02(6). His "misconduct" did not cause significant harm; his continued practice presented no immediate danger to the public; if prosecuted, the likely result of prosecution was a reprimand or a limitation requiring him to obtain additional education (which is precisely what the Pharmacy Examining Board ultimately ordered); the complaint did not warrant use of prosecutorial resources; and Noesen had not previously received an administrative warning.

IV.

THE PHARMACY EXAMINING BOARD ABUSED ITS DISCRETION IN ASSESSING THE FULL COSTS OF THE DISCIPLINARY PROCEEDING.

Finally, Neil Noesen contends that even if the Pharmacy Examining Board properly disciplined him, it abused its discretion in assessing the full costs of the proceeding against him. Accordingly, the order assessing costs should be reversed or the assessment substantially reduced.

Ms. Baird ordered that Noesen "pay the full costs of these proceedings." R. 9 (Proposed Final Decision and Order at 8). The Board adopted her Proposed Final Decision and Order, see R. 1, and the circuit court affirmed. The Board assessed costs in the amount of \$20,767.89. See Order Fixing Costs, June 22, 2005 (App. 54). In assessing the full costs of the proceeding, the Board abused its discretion.

The Board's authority to assess costs is derived from statute and rule. The statute provides, in part, that "[i]n any disciplinary proceeding against a holder of a credential in which . . . an examining board . . . reprimands the holder, the . . . examining board *may*, in addition to imposing discipline, assess all or part of the costs of the proceeding against the holder." WIS. REV. STAT. § 440.22(2) (West 2005) (emphasis added). The rule provides that "[t]he proposed decision of an administrative law judge following hearing shall include a recommendation *whether* all or part

of the costs of the proceeding shall be assessed against the respondent." WIS. ADMIN. CODE RL 2.18 (emphasis added).

It is apparent from the language of the statute and the implementing rule that the assessment of costs against the holder of a credential is *discretionary*, not *mandatory*. See *Verhaagh v. Labor & Industry Review Comm'n*, 204 Wis.2d 154, 160, 554 N.W.2d 678, 680 (Ct. App. 1996) (use of the term "may" in statute governing agency procedures submits issue of default orders to the agency's discretion).¹⁹ Although Ms. Baird recognized that the Board "has the discretion to impose all, some, or none of the costs of the proceeding," R. 24, her explanation for recommending an assessment of the full costs essentially turned a discretionary standard ("may") into a mandatory one ("shall").

Ms. Baird identified two factors in support of her recommendation: First, "the Department of Regulation and Licensing is a 'program revenue' agency, which means that the costs of its operations are funded by the revenue received from its licensees." R. 24. Second, "licensing fees are calculated based upon costs attributable to the regulation of each of the licensed professions and are

¹⁹ Cf. WIS. REV. STAT. § 237.485(3) (West Supp. 2006) (mandating, subject to certain exceptions, an award of costs to an individual who prevails in an administrative action brought by a state agency).

proportionate to those costs." R. 24. As a result of these factors, if the full costs of disciplinary proceedings were not assessed against persons who have engaged in misconduct, those costs would be "borne by or passed along to the other members of the profession who abide by the rules of practice and follow the law." R. 24. That, in Ms. Baird's opinion, would be "fundamentally unfair" to "the vast majority of the licensees who have not engaged in misconduct." R. 24.

The difficulty with this reasoning is that the factors Ms. Baird identified in support of her recommendation would be present in every case in which discipline was imposed. They are not, in any sense, "case specific." Had the General Assembly intended to require the holder of a credential to pay the full costs of the proceeding in every case in which discipline was imposed, it could have easily said so by using the mandatory "shall," instead of the discretionary "may." But that is not what § 440.22(2) provides.

In adopting Ms. Baird's Proposed Final Decision and Order, the Board essentially converted a discretionary standard on costs into a mandatory one. In so doing, the Board did not merely abuse its discretion, it abandoned its discretion. Under the Board's inflexible standard, *full* costs would be assessed in *all* cases in which discipline is imposed, without regard to the individual circumstances of

the case, the relative gravity of the misconduct in question or whether the credential holder obstructed the Department's investigation or needlessly prolonged the proceedings.

Entirely apart from the Board's resort to a *per se* rule assessing the full costs of the proceeding in all cases in which discipline is imposed, which alone requires reversal, the assessment of costs in this case constituted an abuse of discretion.²⁰ The professional misconduct for which Noesen was disciplined did not involve criminal activity, moral turpitude, fraud, incompetence, negligence or violation of a clearly established (and specific) standard of care. Noesen did not interfere with the Department's investigation into Ms. Renz's complaint, nor did he vexatiously delay or otherwise impede the disciplinary proceeding. Finally, it is not disputed that Noesen was acting out of sincerely held religious and moral beliefs. In assessing the full costs of the disciplinary proceeding in this case, therefore, the Board abused its discretion. Accordingly, Noesen requests that the assessment of costs be reversed. Alternatively, he requests that the assessment be substantially reduced.

²⁰ There are no reported decisions of the Wisconsin Supreme Court or this Court explaining when an assessment of costs under § 440.22(2) constitutes an abuse of discretion. This case, however, presents the Court with an appropriate opportunity to provide guidance to administrative law judges and disciplinary boards in applying § 440.22(2).

Conclusion

For the foregoing reasons, Neil T. Noesen respectfully requests that this Honorable Court reverse the decision of the Circuit Court of Barron County affirming the Final Decision and Order of the Pharmacy Examining Board. In the alternative, Noesen requests that the Board's Final Decision and Order be reversed and the cause remanded to the Department for issuance of an administrative warning. In the alternative to a remand, Noesen requests that the assessment of the full costs of the proceeding be reversed or substantially reduced.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that this brief conforms to the rules contained in § 809.19(8) (b) and (c) for a brief produced with a monospaced font. The length of this brief is fifty (50) pages.

I further certify that filed with this brief, as separate document, is an appendix that complies with § 809.19(2) (a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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