

1992

Jack W. Pickett and Servus Drug Co. v. Utah Department of Commerce, Division of Occupational and Professional Licensing : Brief of Respondent

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

**JACK W. PICKETT and,
SERVUS DRUG CO.**

Petitioners,

V.

UTAH DEPARTMENT OF COMMERCE,
DIVISION OF OCCUPATIONAL AND
PROFESSIONAL LICENSING,

Respondents.

Case No. 920556-CA

Priority 29(15)

RESPONDENTS' BRIEF

ON PETITION FOR REVIEW OF FINAL ORDER OF THE
DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING,
DEPARTMENT OF COMMERCE OF THE STATE OF UTAH
FOLLOWING A FORMAL ADJUDICATIVE PROCEEDING

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COURT OF APPEALS

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STATUTES REPRODUCED

Utah Code Ann. § 13-1-12 (Supp 1992).

(1) (a) At the close of an adjudicative proceeding, the administrative law judge or an occupational board or representative committee with assistance from the administrative law judge, shall issue an order.

(b) The order may be appealed to the executive director or the division director for review.

(2) If a division director is unable for any reason to fairly review or rule upon an order of the administrative law judge or a board or committee, the executive director shall review and rule upon the order.

Utah Code Ann. § 58-1-2 (1990).

For purposes of this title:

(1) "Department" means the Department of Commerce.

(2) "Director" means the director of the Division of Occupational and Professional Licensing.

(3) "Division" means the Division of Occupational and Professional Licensing.

(4) "Executive director" means the executive director of the Department of Commerce.

(5) "Licensee" includes any holder of a license, certificate, permit, student card, or apprentice card authorized under this title.

(6) "Unprofessional conduct" means acts, knowledge, and practices which fail to conform with the accepted standards of the specific licensed occupation or profession and which could jeopardize the public health, safety, or welfare and includes the violation of any statute regulating an occupation or profession under this title.

Utah Code Ann. § 58-1-4 (Supp. 1992).

(1) The division shall be under the supervision, direction, and control of a director. The director shall be appointed by the executive director with the approval of the governor. The director shall hold office at the pleasure of the governor.

(2) The director shall perform all duties, functions, and responsibilities assigned to the division by law or rule and, where provided, with the collaboration and assistance of the boards established under this title.

Utah Code Ann. § 58-1-6 (Supp. 1992).

The duties, functions, and responsibilities of the division include, but are not limited to, the following:

- (1) prescribing, adopting, and enforcing rules to administer this title;
- (2) investigating the activities of any person governed by the laws and rules administered and enforced by the division;
- (3) subpoenaing witnesses, taking evidence, and requiring by subpoena duces tecum the production of any books, papers, documents, records, contracts, recordings, tapes, correspondence, or information relevant to an investigation upon a finding a sufficient need by the director;
- (4) taking administrative and judicial action against persons in violation of the laws and rules administered and enforced by the division, including, but not limited to, the issuance of cease and desist orders;
- (5) seeking injunctions and temporary restraining orders to restrain unauthorized activity;
- (6) giving public notice of board meetings;
- (7) keeping records of board meetings, proceedings, and actions and making those records available for public inspection upon request;
- (8) issuing, refusing to issue, revoking, suspending, renewing, refusing to renew, or otherwise acting upon any license or licensee;
- (9) preparing and submitting to the governor and the Legislature an annual report of the division's operations, activities, and goals;
- (10) preparing and submitting to the executive director of the department a budget of the expenses for the division;
- (11) establishing the time and place for the administration of examinations; and
- (12) preparing lists of licensees and making these lists available to the public at cost upon request unless otherwise prohibited by state or federal law.

Utah Code Ann. § 58-1-8.5 (1990).

All boards created under the authority of this chapter shall comply with the procedures and requirements of Title 63, Chapter 46b, in their adjudicative proceedings.

Utah Code Ann. § 58-1-15 (Supp. 1992).

The division may refuse to issue or renew, and may suspend, revoke, or place on probation the license of any licensee who:

(1) is or has been guilty of unprofessional conduct, as defined by statute or rule;

(2) has been convicted of a crime involving moral turpitude which, when considered with the functions and duties of the occupation or profession for which the license was issued, demonstrates a threat to the public health, safety, and welfare;

(3) has obtained or attempted to obtain a license by misrepresentation; or

(4) fails to pay the renewal fee or secure a renewal of the license within the time fixed by statute or rule.

Section § 58-1-16 (Supp. 1992)

(1) (a) Before suspending, revoking, placing on probation, or refusing to renew a license, and before issuing a cease and desist order, the division shall comply with the procedures and requirements of Title 63, Chapter 46b, Administrative Procedures Act; however, before proceeding under the provisions of Section 63-46b-20, providing for emergency adjudicative proceedings, the division shall review the proposed action with a committee of licensees appointed by the licensing board established under this title for the profession of the person against whom the action is proposed.

(b) By complying with the procedures and requirements of Title 63, Chapter 46b, the director may hold or cause to be held administrative hearings regarding any other matter affecting the division or the activities of any person authorized to practice his occupation or profession under this title.

(2) (a) All adjudicative proceedings shall be held before an appropriate presiding officer, as designated by the director. (b) The presiding officer shall make written recommendations for action, findings of fact, and conclusions of law.

(c) The director, with the concurrence of the appropriate board, may issue a written order based on the recommendations but is not bound to follow the recommendations of the presiding officer.

(d) If the director does not issue an order within ten days after the presiding officer has made the recommendations, the recommendations of the presiding officer shall become the order.

(3) (a) The director or his designee may administer oaths, issue subpoenas, and compel the attendance of witnesses and the production of papers, books, accounts, documents, and evidence.

(b) Any party to any action permitted under this section may issue subpoenas and compel the attendance of witnesses and the production of papers, books, accounts, documents, and evidence.

Utah Code Ann. § 58-17-9 (Supp. 1992).

The division, in collaboration with the board, may refuse to issue or renew, or may suspend, revoke, or restrict the license of any person, upon one or more of the following grounds:

(1) any condition that prevents a pharmacist or licensed intern from engaging in the practice of pharmacy with reasonable skill, competence, and safety to the public;

(2) being found guilty by a court of competent jurisdiction of one or more of the following:

(a) a felony;

(b) any act involving moral turpitude or gross immorality;

(c) violations of the pharmacy, drug, alcohol, and chemical dependencies laws of this state or rules pertaining to them, or of statutes, rules, or regulations of any other state in which the licensee engages in the practice of pharmacy, or of the federal government;

(3) fraud or intentional misrepresentation by any licensee in securing the issuance or renewal of a license;

(4) engaging or aiding and abetting an individual to engage in the practice of pharmacy without a license, or falsely using the title of pharmacist;

(5) being found by the board to be in violation of this chapter or rules adopted under this chapter;

(6) acts of unprofessional conduct as defined by statute or by rule of the division, in collaboration with the board, as follows:

(a) willfully deceiving or attempting to deceive the board or its agents as to any relevant matter;

(b) paying rebates to practitioners or any other health care providers, or entering into any agreement with a medical

practitioner or any other person for the payment or acceptance of compensation or its economic equivalent for recommending of the professional services of either party, except that price discounts that are conditional upon volume purchases are not prohibited;

(c) misbranding or adulteration of any drug or device, or the sale, distribution, or dispensing of any misbranded or adulterated drug or device;

(d) engaging in the sale or purchase of drugs or devices that are samples or packages bearing the inscription "sample" or "not for resale" or similar words or phrases;

(e) accepting back and redistribution of any unused drug, or a part of it, after it has left the premises of any pharmacy, unless the drug is in the original sealed unit dose package or manufacturer's sealed container;

(f) being employed as a pharmacist or intern, or sharing or receiving compensation in any form arising out of an act incidental to the professional activities in which any person requires him to engage in any aspects of the practice of pharmacy in violation of this chapter; and

(g) violation of the federal Controlled Substances Act, the Utah Controlled Substances Act, or rules and regulations adopted under either of them.

Utah Code Ann. § 58-17-11 (1990)

(1) Upon finding grounds for discipline of any person holding a license, seeking a license, or a renewal license under this chapter, the division, in collaboration with the board, may impose one or more of the following penalties:

(a) suspending the offender's license for a term to be determined by the board;

(b) revoking the offender's license;

(c) restricting the offender's license to prohibit the offender from performing certain acts or from engaging in the practice of pharmacy in a particular manner for a term to be determined by the division, in collaboration with the board;

(d) refusing to renew the offender's license;

(e) placing of the offender on probation and supervision for a period to be determined by the division in collaboration with the board.

(2) Any drug outlet found by the board, after a hearing before the board, to have engaged in the practice of pharmacy in Utah without a license under this chapter or to have permitted any person to engage in the practice of pharmacy in Utah from that drug outlet in violation of this chapter, and any

out-of-state mail service pharmacy found by the board, after a hearing before the board, to have, without a license under this chapter:

(a) shipped, mailed, or delivered by any means a dispensed legend drug to a resident in Utah;

(b) provided information to a resident of this state on drugs or devices which may include, but is not limited to, advice relating to therapeutic values, potential hazards, and uses; or

(c) counseled pharmacy patients residing in this state concerning adverse and therapeutic effects of drugs, shall be subject to the following:

(i) revocation, suspension, or probation of license;

(ii) a fine of up to \$2,000 for each day in which the violation occurred;

(iii) assessment of costs associated with the investigation, hearing, and all litigation required to finally resolve the finding.

(3) Any person whose license to practice pharmacy in this state has been suspended, revoked, or restricted under this chapter, whether voluntarily or by action of the division, may at reasonable intervals petition the division for reinstatement of the license. The petition shall be made in writing and in a form prescribed by the division. Upon investigation and hearing, the division may grant or deny the petition, or it may modify its original finding to reflect any circumstances which have changed sufficiently to warrant the modifications.

(4) Nothing in this chapter bars criminal prosecutions for violations of this chapter if the violations are deemed criminal offenses under other statutes of this state or of the United States.

(5) Final decisions by the division are subject to judicial review under Title 58, Chapter 1.

Utah Code Ann. § 63-46b-2 (1989)

(1) As used in this chapter:

(a) "Adjudicative proceeding" means an agency action or proceeding described in Section 63-46b-1.

(b) "Agency" means a board, commission, department, division, officer, council, office, committee, bureau, or other administrative unit of this state, including the agency head, agency employees, or other persons acting on behalf of or under the authority of the agency head, but does not mean the Legislature, the courts, the governor, any political subdivision

of the state, or any administrative unit of a political subdivision of the state.

(c) "Agency head" means an individual or body of individuals in whom the ultimate legal authority of the agency is vested by statute.

(d) "Declaratory proceeding" means a proceeding authorized and governed by Section 63-46b-21.

(e) "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by statute.

(f) "Party" means the agency or other person commencing an adjudicative proceeding, all respondents, all persons permitted by the presiding officer to intervene in the proceeding, and all persons authorized by statute or agency rule to participate as parties in an adjudicative proceeding.

(g) "Person" means an individual, group of individuals, partnership, corporation, association, political subdivision or its units, governmental subdivision or its units, public or private organization or entity of any character, or another agency.

(h) (i) "Presiding officer" means an agency head, or an individual or body of individuals designated by the agency head, by the agency's rules, or by statute to conduct an adjudicative proceeding.

(ii) If fairness to the parties is not compromised, an agency may substitute one presiding officer for another during any proceeding.

(iii) A person who acts as a presiding officer at one phase of a proceeding need not continue as presiding officer through all phases of a proceeding.

(i) "Respondent" means a person against whom an adjudicative proceeding is initiated, whether by an agency or any other person.

(j) "Superior agency" means an agency required or authorized by law to review the orders of another agency.

(2) This section does not prohibit an agency from designating by rule the names or titles of the agency head or the presiding officers with responsibility for adjudicative proceedings before the agency.

Utah Code Ann. § 63-46b-12 (1989).

(1) (a) If a statute or the agency's rules permit parties to any adjudicative proceeding to seek review of an order by the agency or by a superior agency, the aggrieved party may file a written request for review within 30 days after the issuance of

the order with the person or entity designated for that purpose by the statute or rule.

(b) The request shall:

- (i) be signed by the party seeking review;
- (ii) state the grounds for review and the relief requested;
- (iii) state the date upon which it was mailed; and
- (iv) be sent by mail to the presiding officer and to each party.

(2) Within 15 days of the mailing date of the request for review, or within the time period provided by agency rule, whichever is longer, any party may file a response with the person designated by statute or rule to receive the response. One copy of the response shall be sent by mail to each of the parties and to the presiding officer.

(3) If a statute or the agency's rules require review of an order by the agency or a superior agency, the agency or superior agency shall review the order within a reasonable time or within the time required by statute or the agency's rules.

(4) To assist in review, the agency or superior agency may by order or rule permit the parties to file briefs or other papers, or to conduct oral argument.

(5) Notice of hearings on review shall be mailed to all parties.

(6) (a) Within a reasonable time after the filing of any response, other filings, or oral argument, or within the time required by statute or applicable rules, the agency or superior agency shall issue a written order on review.

(b) The order on review shall be signed by the agency head or by a person designated by the agency for that purpose and shall be mailed to each party.

(c) The order on review shall contain:

- (i) a designation of the statute or rule permitting or requiring review;
- (ii) a statement of the issues reviewed;
- (iii) findings of fact as to each of the issues reviewed;
- (iv) conclusions of law as to each of the issues reviewed;
- (v) the reasons for the disposition;
- (vi) whether the decision of the presiding officer or agency is to be affirmed, reversed, or modified, and whether all or any portion of the adjudicative proceeding is to be remanded;
- (vii) a notice of any right of further administrative reconsideration or judicial review available to aggrieved parties; and

(viii) the time limits applicable to any appeal or review.

Utah Code Ann. § 63-46b-16 (1989).

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

Utah Code Ann. § 78-2a-3 (1992).

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) appeals from the circuit courts, except those from the small claims department of a circuit court;

(e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(f) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;

(g) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any

other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(h) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons except in cases involving a first degree or capital felony;

(i) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(j) appeals from the Utah Military Court; and

(k) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, in its review of agency adjudicative proceedings.

STATEMENT OF JURISDICTION

This is an appeal of a final order issued by an administrative agency of the State of Utah following a formal adjudicative proceeding. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. §§ 78-2a-3(2)(a)(1992) and 63-46b-16 (1989).

ISSUES PRESENTED FOR REVIEW AND STANDARDS OF REVIEW

The Utah Administrative Procedures Act ("UAPA"), Utah Code Ann. § 63-46b-1 to -22 (1990), applies to this appeal.

1. Was the Division's order revoking Pickett's license to prescribe controlled substances and placing his pharmacy license on three years probation arbitrary and capricious or an abuse of its discretion?

Standard of Review: The Division and Pharmacy Board are vested with broad discretion to impose disciplinary sanctions ranging from probation or restricting a license, to revocation or suspension of a license. Utah Code Ann. § 58-17-9 and -11 (1990), The court should defer to the agency's exercise of its discretion in imposing discipline unless the agency's decision is "clearly unreasonable" or a clear abuse of its discretion. Johnson Bowles Co. v. Division of Securities, 829 P.2d 101 (Utah App. 1992), Utah Code Ann. § 63-46b-16(h)(i)(iv) (1989).

2. Did the Division Director's participation in the proceedings deprive Pickett of due process of law.¹

Standard of Review: The court reviews constitutional questions for correctness. Morton International, Inc. v. Utah Tax Comm'n, 814 P.2d 581 (Utah 1991).

3. Is the Division's order invalid due to the lack of a signature by an appropriate presiding officer?

Standard of Review: This issue presents a question of law which the court should review for correctness - Morton International, Inc. v. Utah Tax Comm'n, 814 P.2d 581 (Utah 1991).

4. Is the Division's order invalid due the failure of the Division to obtain the concurrence of the Board of Pharmacy as required under Utah Code Ann § 58-1-16 (1990)?

Standard of Review: This issue presents a question of law which the court should review for correctness - Morton International, Inc. v. Utah Tax Comm'n, 814 P.2d 581 (Utah 1991).

STATEMENT OF THE CASE

On January 28, 1992, the Division of Occupational and Professional Licensing ("Division") issued a Notice of Agency Action commencing formal adjudicative proceedings against the licenses of Appellant, Jack W. Pickett, ("Pickett") to practice

¹. Pickett does not reveal whether he is challenging the Division Director's conduct under the Utah or Federal Constitutions.

as a pharmacist and dispense controlled substances in the State of Utah. The Notice of Agency Action and Petition alleged numerous violations of the Controlled Substances Act and Rules as well as the Statutes and Rules governing the practice of Pharmacy.

A formal hearing on the charges was heard on May 26, 1992 by the Pharmacy Licensing Board and Administrative Law Judge, J. Steven Eklund. As a result of the hearing, Pickett's license to practice as a pharmacist was placed on three months probation and his license to dispense controlled substances was revoked. The order of the Division was subsequently reviewed and affirmed by the Department of Commerce on July 30, 1992. This appeal followed.

STATEMENT OF FACTS

Because Pickett does not dispute the Division's factual findings, (Brief at 20), the following findings of fact are taken essentially verbatim from the findings of fact issued by the Division on June 24, 1992.

At all times relevant to this proceeding, Respondent, Jack W. Pickett ("Pickett") has held separate licenses to practice as a pharmacist and to dispense controlled substances in the State of Utah. Pickett initially received his pharmacist license around 1954. Respondent, Servus Drug Co., has been licensed at

all times relevant to this proceeding as a pharmacy and dispensary of controlled substances in the State of Utah. Pickett is employed by Servus Drug Co. which is owned by Pickett's spouse.

On twelve separate occasions between May 20, 1991 and July 30, 1991, Pickett dispensed various dosages of either traxene, a schedule IV controlled substance, or Esgic, a Schedule III controlled substance, without a physician's authorization to do so. On occasions, Pickett dispensed medications in either unlabeled prescription vials or a paper bag bearing no labels or instructions.

There is a lack of sufficient evidence that Pickett made false or forged prescriptions as to dispense the above-stated controlled substances or other medications. Further, there is a lack of sufficient evidence to conclude Pickett knew Mr. Schriver was drug dependant, Pickett acknowledges his prescriptive practices were improper and he failed to adequately document the controlled substances or other medications which he dispensed. Pickett often dispensed those controlled substances or other medications in the manner requested by Mr. Schriver, who often suggested the used of either an unlabeled vials or other inappropriate containers.

There is no substantial evidence Pickett has improperly dispensed controlled substances or other medications to other individuals. Pickett asserts he has taken remedial measures to address the acknowledged deficiencies in his practices now under review. However, there is a lack of substantial evidence as the specific nature of the corrective measures Pickett may have taken in that regard.

SUMMARY OF ARGUMENT

I. THE DIVISION AND BOARD IMPOSED A REASONABLE SANCTION AGAINST PICKETT'S LICENSES.

The decision of the Division of Occupational and Professional Licensing ("Division") revoking Pickett's license to dispense controlled substances and placing his pharmacist's license on three years probation was reasonable and well within the discretion vested in the Division and the Pharmacy Board. The order was not unreasonable in lieu of the Board's past treatment of professional misconduct by pharmacists and is not subject to the obscure limitations of stare decisis. Pickett's conduct involved numerous serious violations of the controlled substances act as well as the statutes and rules that govern the pharmacist profession. The court should not disturb the sanction imposed by the Division unless it finds that the Division abused its discretion and imposed an unreasonable sanction.

II. THE DIVISION FOLLOWED THE PROPER PROCEDURES FOR FORMAL ADJUDICATIVE PROCEEDINGS.

Pickett alleges that the Division violated its own statutory procedures by allowing the participation of the Division Director as a presiding officer and by failing to obtain the signatures of the ALJ and Board on the findings of fact, conclusions of law and order. Pickett also alleges that the Division failed to obtain the necessary concurrence from the Board before issuing its order.

Pickett's arguments should fail for two reasons. First, Pickett was given adequate notice concerning the manner in which the hearing would be conducted. (R./61, 67) However, Pickett did not raise any objection prior to, or during the hearing. Pickett's failure to preserve this issue on appeal prevent him from obtaining any relief based on alleged procedural errors.

Second, Pickett's procedural challenges to the involvement of the Division Director as a presiding officer is ignorant of the fact that the section 58-1-16 as well as sections 58-17-9 and -11 vest authority in the Division and its Director to take appropriate disciplinary action in concurrence with the Pharmacy Board. Utah Code Ann. §§ (1990 and Supp. 1992). The Division Director is an agency head as contemplated by the Utah Administrative Procedures Act and may substitute one presiding officer for another at different phases of a proceeding.

Moreover, Pickett has failed to demonstrate how he was prejudiced in any manner by the Division's failure to follow the correct statutory procedures.

III. THE DIVISION DIRECTOR DID NOT DEPRIVE PICKETT OF A FAIR HEARING.

Pointed and direct questions asked by the Director, David E. Robinson, at the hearing does not constitute a violation of due process. Given the minimal detail surrounding the events that led up to the bringing of disciplinary proceedings against Pickett's licenses, the Director was entitled to ask questions and probe into matters that were not adequately addressed during direct and cross-examination by respective counsel. The Director's questions did not rise to a level of due process violation. Moreover, no objection was raised by Pickett, who was represented by counsel, to any of the questions posed by the Director. Consequently, Pickett has waived the right to raise this as an issue on appeal.

IV. THE EXECUTIVE DIRECTOR WAS NOT BIASED AGAINST PICKETT

Pickett has raised insufficient grounds to even cast an inference of bias on the part of the Executive Director of the Department of Commerce. There can be no inference of bias by virtue of the fact that David Robinson was appointed by the last Executive Director of the Department of Commerce (and approved by the Governor). The Executive Director conducted agency review in

accordance with the Utah Administrative Procedures Act. No rehearing was required and no oral argument was taken because none was requested. (R./1)

V. PICKETT WAIVED THE REQUIREMENT OF A QUORUM

Pickett urges that he waived the requirement of a quorum so that the hearing could be conducted but intended for there to be a quorum of the board to deliberate on his case. (Brief at 17) Other than Pickett's bald assertion there is not support for his contention in the record. His intent that a complete quorum deliberate on his case was not expressed to the Division nor is it reflected in the record. Consequently, Pickett has not marshalled the evidence to support his argument on this issue on appeal.

ARGUMENT

1. THE DIVISION'S ORDER REVOKING PICKETT'S CONTROLLED SUBSTANCE LICENSE AND PLACING HIS PHARMACIST'S LICENSE ON PROBATION WAS REASONABLE AND WITHIN THE DIVISION'S DISCRETION.

Pickett does not dispute the Division's factual findings, nor has he ever denied that the conduct he engaged in was violative of the statutory and regulatory standards governing the dispensing of controlled substances or the licensure of pharmacists. (Brief at 7-8, 20) However, Pickett urges on appeal that the sanction imposed by the Division is not justified in light of the Pharmacy Board's findings of fact and prior

decisions of the Pharmacy Board in prior cases.² Before addressing this issue on the merits, it is necessary to determine which standard of review the court will apply in reviewing the sanction imposed by the Division and the Board.

A. ABUSE OF DISCRETION STANDARD OF REVIEW SHOULD APPLY TO DIVISION'S IMPOSITION OF A SANCTION.

In reviewing Pickett's appeal on this issue, the Court of Appeals should review the Division's order under the abuse of discretion standard of review. See, Johnson-Bowles v. Division of Securities, 829 P.2d 101, 115, (1992)(Applying Morton ³ standard of review analysis.) In Johnson, the court reviewed a statute granting the Division of Securities the power to impose sanctions and concluded that the Division possessed broad discretionary authority to impose disciplinary action against registered brokers or agents of the Division.⁴ Id. at 116.

². No adverse findings or sanction was imposed against appellant, Servus Drug Co. It is unclear why the company is appealing other than for reasons that the sanction imposed against Pickett bears some negative consequences for the company.

³. Morton International, Inc. v. Utah Tax Comm'n, 814 P.2d 581 (Utah 1991). Sparing a detailed standard of review analysis, Morton provides a comprehensive analysis of cases addressing the standards of appellate review from administrative agency decisions.

⁴. The statute granting sanction powers to the Division of Securities provides in pertinent part:

Upon approval by the executive director and a majority of the Securities Advisory Board, the executive director may issue and order

Based on the broad range of disciplinary options available to the Division, the court concluded that the type of sanction and the "reasonableness" of the sanction "is a matter of agency discretion" which would not be disturbed unless "clearly unreasonable or otherwise an abuse of discretion." Id.

The Division of Occupational and Professional Licensing, like the Division of Securities, is a subdivision of the Department of Commerce and likewise has been given a broad range of regulatory powers including the express authority to impose discipline against licensee's who violate the applicable statutes and rules of the profession. First, in a more general delegation, section 58-1-15 provides that the Division "may refuse to issue or renew, and may suspend, revoke, or place on probation the license of any licensee who: (1) is or has been guilty of unprofessional conduct, as defined by statute or rule . . ." Utah Code Ann. § (1992 Cum Supp.).

Similar provisions, but more specifically tailored to pharmacy profession, are two provisions which require the Division to act in collaboration with the Pharmacy Board when

denying, suspending or revoking any agent, broker-dealer, or investment adviser registration if he finds that the order is in the public interest . . .

Utah Code Ann. § 61-1-6(1)(1989).

imposing sanctions against licensed pharmacists. Section 58-17-9 provides that the Division, in collaboration with the Board, may refuse to issue or renew, or may suspend, revoke, or restrict the license of any person, upon one or more of grounds (which are both numerous and lengthy) stated in that provision. Utah Code Ann. § 58-17-9 (1992 Supp.) In addition, there is section 58-17-11 which provides that:

(1) Upon finding grounds for discipline of any person holding a license, seeking a license, or a renewal license under this chapter, the division, in collaboration with the board, may impose one or more of the following penalties:

(a) suspending the offender's license for a term to be determined by the board;

(b) revoking the offender's license;

(c) restricting the offender's license to prohibit the offender from performing certain acts or from engaging in the practice of pharmacy in a particular manner for a term to be determined by the division, in collaboration with the board;

(d) refusing to renew the offender's license;

(e) placing of the offender on probation and supervision for a period to be determined by the division in collaboration with the board.

Utah Code Ann. § (1990)

Given the broad grant of authority to the Division and Board to impose sanctions for violations of its statutes, the court should defer to the Division's discretion and not disturb the Division's order unless it found to be a clear abuse of its

discretion. Utah Code Ann. § 63-46b-16(h)(i)(1989).

**B. THE SANCTION IMPOSED BY THE BOARD AND DIVISION WAS
NOT AN ABUSE THEIR DISCRETION**

Besides finding numerous violations of the statutes and rules applicable to professional pharmacists (which are uncontroverted), the Pharmacy Board and the Division concluded that Pickett was "grossly negligent in his practice of pharmacy." (R./40) The Board also characterized Pickett's "misconduct" as a "egregious departure from those standards which govern his profession." (R./41)

Specifically, the Board found that Pickett dispensed prescription drugs on twelve separate occasions "without any practitioner's authorization to do so." (R./40) The Board also found that "[u]nder the circumstances, [Pickett] should have known Mr. Schriver was attempting to obtain drugs by either fraud or misrepresentation." (R./40)

Pickett also improperly dispensed medications by placing controlled substances in an unlabeled vial or paper bag. (R./1)(Trans. at 7, 17-18) Pickett also failed to properly label the medication indicating what kind of medicine it was and the instructions for administering the correct dosage. (R./1)(Trans at 7, 18).

Pickett's conduct resulted in the bringing of a criminal charge which was resolved by Pickett's plea of no contest to a

charge of Illegal Dispensing of a Controlled Substance, a third degree felony.(R./56)(Trans at 13, 14, 30, 31) The conviction was resolved by a diversion agreement between Pickett and the Second District Court in Davis County. While the conviction did not serve as the basis of the Division's disciplinary action it does serve to illustrate the serious nature of Pickett's misconduct.

The action taken by the Board and Division was reasonable due to the serious nature of Pickett's misconduct and was imposed in order to protect the public health and safety. The Board and Division manifested their intent to protect the public while monitoring Pickett's future conduct and to "prompt necessary corrective and remedial action." (R./41)

Pickett asserts that the revocation of his license to dispense controlled substances is "tantamount to depriving him of his lifetime profession" (Brief at 2). However, a review of the Division's order reflects an intent to protect the public while monitoring and promoting rehabilitative efforts on the part of Pickett. First, no action was taken against the license of Servus Drug Co. which is owned by Pickett's spouse.(R./36) Moreover, Pickett's pharmacist license was placed on three years probation. Consequently, Pickett will be able to maintain viable employment at Servus Drug during the probationary period

and there is nothing to preclude Servus Drug from dispensing controlled substances so long as Servus Drug employs someone with a valid Utah controlled substance license to issue such prescriptions.

The order also reflects an intent to monitor Pickett's practices and encourage rehabilitative efforts on his own behalf. The order requires to Pickett to submit a practice plan requiring Servus Drug to employ a pharmacist to "establish proper record keeping, inventory control and dispensary procedures for controlled substances at the pharmacy." (R./42) Pickett is also required to meet with the Board every month for three months and then every six months thereafter until his probation is complete. (R./42) The purpose of the meetings is to allow the Board to review and adequately monitor the terms of the probation and assure that proper procedures are being implemented at Servus Drug. The Division will also perform period audits of the controlled substance records. (R./42) Finally, Pickett will be required to take the jurisprudence examination to assure that he is aware of the laws and rules governing the practice of pharmacy.

The order issued by the Division and Board is an excellent example of effective governmental regulation. Rather than merely sanctioning Pickett and leaving him to go his own way. The

Division and Board is assuming an active role in the monitoring and rehabilitation of Pickett's practices. It is difficult to imagine a more effective way to assure the public protection while preserving Pickett's property interest in his license to practice as a pharmacist. It is worthy to note that the revocation of Pickett's controlled substance license is not the equivalent of a license death penalty. It is possible for a license to be reissued after revocation in the event the Division and the Board is satisfied that the licensee is competent to practice and the public health and safety is no longer under any threat.

C. PRIOR SANCTIONS OF THE PHARMACY BOARD AND DIVISION ARE NOT CONTROLLING

Pickett urges that the order of the Division and Board is out of line with sanctions imposed by the Division and Board in prior cases. (Brief at 20). Pickett cites to ten case that were handled by the Pharmacy Board between 1986-1989. Beyond his own brief summary of the facts and results in those cases, Pickett has not met his burden of showing that the decision of the Board and Division is clearly unreasonable. The current Pharmacy Board is not bound by the disciplinary actions of past boards. Administrative agencies are generally free as a matter of law "of the limitations of stare decisis." Williams v. Public Service Commission, 754 P.2d 41, 52 (Utah 1988); see also, Reaveley v.

Public Service Commission, 436 P.2d 797, 20 Utah 2d 237 (1968);
Almon, Inc., v. Utah Liquor Control Comm'n., 696 P.2d 1210, 1213
(Utah 1985).

Merely because a sanction appears more harsh than imposed in other cases does not render the sanction invalid. In Butz v. Glover Livestock Commission Co., 411 U.S. 182, 187, 36 L.Ed.2d 142, 93 S.Ct. 1455 (1973), the Supreme Court confirmed that the employment of a sanction within the authority of an administrative agency is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases.

The order of the Division and the Pharmacy Board was specifically tailored to meet the specific circumstances surrounding Pickett's violations. As specified above, the order is specifically designed to protect the public while allowing Pickett to practice his profession. The order also demonstrates an intent to protect the public and rehabilitate the offender. Like judges in regular courts of law, the Board must be given the discretion to mete out discipline in response to the unique circumstances of the case before it. In the instant case, the Board and Division has struck an appropriate balance to allow Pickett to continue to engage in his profession while providing adequate protection to the public.

2. PICKETT'S FAILURE TO RAISE PROCEDURAL ERRORS AT OR BEFORE THE HEARING CONSTITUTE WAIVER.

The Division's failure to comply with its own statutory procedures is one of the grounds asserted by Pickett to support reversal of the Division's order. (Brief at 16.) Before addressing this issue on the merits, the Division objects to Pickett's failure to properly preserve this issue on appeal. In its Notice of Agency Action of January 28, 1992 (R./67), the Division provided notice to Pickett that he was entitled to a hearing "conducted before the Pharmacy Board." (R./67) The notice also stated,

During the hearing, you will have the opportunity to present evidence, argue, respond, conduct cross-examination and submit rebuttal evidence to the Board. After the hearing the Board will submit findings of fact, conclusions of law and a recommended order to the Director of the Division of Occupational and Professional Licensing for his subsequent review and action.

The same notice also identified the presiding officer as, J. Steven Eklund, Administrative Law Judge. (R./67)

On April 21, 1992 a Notice of Hearing was delivered to Pickett. That notice identified a hearing date and reiterated that Pickett could present evidence to the Pharmacy Board and that Board would then submit a recommended order to the Director of the Division of Occupational and Professional Licensing for his subsequent review and action. (R./61)

Pickett was provided with notice well in advance of the hearing of the Board's and Division Director's involvement in the administrative proceeding. However, the record, including the transcript is devoid of any objection prior to, or during the hearing, over the propriety of the procedures being followed by the Division. Because of Pickett's failure to raise any objection to the procedures at or before the hearing, his appeal on these issues should not be reviewed by the court. In Brinkerhoff, v. Schwendiman, 790 P.2d 587, 589 (Utah Ct. App. 1990), the Court of Appeals declared that "[i]t is axiomatic in our adversary system that a party must raise an objection in an earlier proceeding or waive its right to litigate the issue in subsequent proceedings." Appellants may not allege errors on appeal if the defects could have been cured by the trial court. The Brinkerhoff court held that this long established principle "applies equally to administrative proceedings." Id. Based on this principle, the Brinkerhoff held that an appellant had waived his right to appeal an administrative agencies failure to notify the appellant that the hearing he was to appear at was to be formal or informal. Id. This rule applied notwithstanding that the appellant had raised his objection during closing argument. Id. See also, People Ex. Rel Woodward v. Brown, 770 P.2d 1373, 1375 (Colo. App. 1989)(Physician's failure to raise claim that

delay in bringing disciplinary proceeding violated his rights to due process constituted waiver and were not considered on appeal)

3. THE PHARMACY BOARD AND THE DIRECTOR OF THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING ARE APPROPRIATE PRESIDING OFFICERS.

For the first time appeal, Pickett contends that proceedings below were defective due to the Division's failure to follow the appropriate procedures. Pickett bases his contentions on two faulty assumptions. First, that the Director of the Division of Occupational and Professional Licensing is not the agency head for purposes of Utah Code Ann. § 63-46b-2(h)(1989). (Brief at 16, 17) Second that the ALJ and not the Division Director should have issued findings of fact, conclusions of law and an order. (Brief at 17)

Section 63-46b-2(h), section defines the term "presiding officer" mean "an agency head or an individual or group of individuals designated by the agency head . . . to conduct an administrative proceeding." Utah Code Ann. § (1989). The term "Agency Head" is defined by Utah Code Ann. § 63-46b-2(c)(1989) as a "individual or body of individuals in whom the ultimate legal authority of the agency is vested by statute."

Pickett's tortured interpretation of section 63-46b-2(c) negates the Division Director's role in the license disciplinary hearings in favor the Executive Director of the Department of

Commerce. While it true that the Department of Commerce is a superior agency to the Division and that the Department Director is the "agency head" over the department, this does not compel the conclusion that the executive director is the agency head over adjudications conducted by the Division.

The Director of the Division of Occupational and Professional licensing is vested with authority to "perform all duties, functions, and responsibilities assigned to the division by law or rule with the collaboration and assistance of the boards established under this title." Utah Code Ann. § 58-1-4 (Supp 1992). One of the Division's duties involves "issuing, refusing to issue, revoking, suspending, renewing, refusing to renew, or otherwise acting upon any license or licensee." Utah Code Ann. § 58-1-6 (Supp 1992).

Among the Division Director's duties is to conduct adjudicative proceedings in matters of professional discipline. Section 58-1-16 concerns the Director's powers in connection with disciplinary actions:

(1) (a) Before suspending, revoking, placing on probation, or refusing to renew a license, and before issuing a cease and desist order, the division shall comply with the procedures and requirements of Title 63, Chapter 46b, Administrative Procedures Act; . . .

(b) By complying with the procedures and requirements of Title 63, Chapter 46b, the director may hold or cause to be held administrative hearings regarding any other matter affecting the division or the activities

of any person authorized to practice his occupation or profession under this title.

(2) (a) All adjudicative proceedings shall be held before an appropriate presiding officer, as designated by the director. (b) The presiding officer shall make written recommendations for action, findings of fact, and conclusions of law.

(c) The director, with the concurrence of the appropriate board, may issue a written order based on the recommendations but is not bound to follow the recommendations of the presiding officer.

(d) If the director does not issue an order within ten days after the presiding officer has made the recommendations, the recommendations of the presiding officer shall become the order.

Utah Code Ann § (Supp. 1992). The reference to "director" in the above statutes refers specifically to the director of the Division and not the Department Director. Utah Code Ann. § 58-1-2 (1990) ("Director" means the director of the Division of Occupational and Professional Licensing.).

As the head of the Division, the Director may designate who will serve as the appropriate presiding officer at any given phase of a adjudicative proceeding. Utah Code Ann. § 63-46b-2(h), applicable to Division proceedings by statute, provides:

(i) "Presiding officer" means an agency head, or an individual or body of individuals designated by the agency head, by the agency's rules, or by statute to conduct an adjudicative proceeding.

(ii) If fairness to the parties is not compromised, an agency may substitute one presiding officer for another during any proceeding.

(iii) A person who acts as a presiding officer at one phase of a proceeding need not continue as

presiding officer through all phases of a proceeding.

Id. (emphasis added). The Director is within his statutory authority when he designates an ALJ and the appropriate board to act as the "appropriate presiding officer" at a hearing.

Designation of the Board as the presiding officer for purposes of issuing an order is also contemplated by statutes governing the Department and the Division (See eg. U.C.A. §§ 13-1-12⁵ and 58-1-8.5). The designation is "appropriate" since the Board, not the ALJ, is the entity of peers with specialized knowledge and expertise to evaluate and weigh the evidence.

Although the Notice of Agency Action identified Judge Steven Eklund as the "presiding officer" the notice also indicated that the Pharmacy Board would be receiving evidence and issuing its recommended findings to the Director for action. (R./61, 67) This consistent with section 58-17-9 which vests authority in the Division, in collaboration with the Board, to refuse to issue or

⁵. Utah Code Ann. 13-1-12. Order by hearing officer or body - Appeal of order to the division director or the executive director.

(1) (a) At the close of an adjudicative proceeding, the administrative law judge or an occupational board or representative committee with assistance from the administrative law judge, shall issue an order.

(b) The order may be appealed to the executive director or the division director for review.

(2) If a division director is unable for any reason to fairly review or rule upon an order of the administrative law judge or a board or committee, the executive director shall review and rule upon the order. (Supp. 1992)

renew, suspend, revoke, or restrict the license of pharmacists who are found in violation of any one of a number of statutory and regulatory standards. Utah Code Ann. § 58-17-9 and -11 (1992 Cum Supp.)

In addition, the fact that Division Director signed the order adopting the recommended order of the Pharmacy Board was not improper. The Division Director, was acting as the presiding officer at the time he signed the Order. Moreover, other than Pickett's bald assertion of substantial prejudice, he fails to articulate a single reason how he was prejudiced by the Board's failure also to sign the Order. The record reflects that the findings of fact, conclusions of law and recommended order were issued by the Board (R./35) and subsequently adopted as the final order by the Division Director. (R./34). This is consistent with requirements of Title 58 requiring a concurrence of the Board and Director and the Utah Administrative Procedures Act requiring that orders be signed by the presiding officer.

Any confusion over who was acting as presiding officer was resolved at the hearing. Pickett's failure to raise any objection to the adjudicative procedures below constitutes waiver of his right to raise this as an issue on appeal or claim substantial prejudice.

4. THE DIVISION DIRECTOR'S PARTICIPATION AT THE HEARING DID NOT DEPRIVE PICKETT OF A FAIR HEARING.

Pickett contends that the Division Director's involvement at the hearing deprived him of due process. (Brief at 8, 18)

Specifically, Pickett mischaracterizes Director Robinson's questions posed to him as aggressive interrogation. (Brief at 8). It well recognized that litigants in administrative adjudications have a "due process right to receive a fair trial in front of a fair tribunal." Nelson v. Department of Employment Sec., 801 P.2d 158, 162 (Utah App. 1990); Bunnell v. Industrial Comm'n of Utah, 740 P.2d 1331, 1333, (Utah 1987). However, "administrative proceedings need not possess the formality of judicial proceedings." Nelson at 163.

Pickett disapproves of the manner in which the Division Director, asked various questions of him during the trial. A partial transcript of the proceedings, including the questions posed by Director Robinson have been provided to the court. It difficult to fathom from the transcript how the questions posed by the Director can be characterized in good faith as aggressive interrogation. Not a single objection was raised by Pickett, or his counsel to the questions as they were being asked. Moreover, the Director's questions were merely aimed at filling in gaps in the story and eliciting a certain degree of detail that was lacking from Pickett's testimony. Because the relevant facts were not in dispute, few questions were asked by either counsel for the Division or Pickett's counsel about the relevant events that transpired. Moreover, Pickett's main defense was to bring

in factors to explain and attempt to mitigate matters in his favor. (Transcript at 9). It appears from the follow up questions asked by Director Robinson, that he was asking questions of Pickett to determine whether Pickett could appreciate the serious nature of the mistakes he admittedly made.

Pickett did not object to the questions, nor was he deprived of the ability to have his counsel engage in any rehabilitative questions that counsel might have considered appropriate. Like Pickett's failure to object to the alleged procedural mistakes claimed as error on this appeal, his failure to make an object to the questions asked by the Director constitutes a waiver of his right to raise this issue on appeal. Ellison, Inc., v. Board of Review, 749 P.2d 1280, 1285 (Utah App. 1988). Moreover, there is no evidence, and none offered by Pickett, that demonstrates that the Director's questions had any impact on the Pharmacy Board's findings, conclusions and recommendations. Pickett also has also failed to show how the Director's participation predisposed the board to enter a more harsh sanction against Pickett.

5. EXECUTIVE DIRECTOR'S REVIEW DID NOT DEPRIVE PICKETT OF DUE PROCESS

Pickett urges that his right to due process were violated by the Executive Director's review of the Division's order. According to Pickett, the alleged due process violation is apparently the result of some inherent bias on the part of the

Executive Director due to the fact that the Division Director is his appointee.⁶ (Brief at 19) Pickett also assumes, without any support from the record, that the Executive Director made his decision without further hearing or independent consideration. (Brief at 19)

Pickett has not even raised an appreciable issue of bias on the part of the Executive Director that would even warrant a minimal response. It is troubling how Pickett can even raise an inference of bad motive or impartiality without so much as a shred of evidence.

Agency review by the Department was conducted pursuant to Utah Code Ann. § 63-46b-12 (1989). Both the Division and Pickett submitted briefs asserting their positions. It is also apparent from the Order on Review (R./ 1-9), that neither Pickett nor Division's counsel requested oral argument. (R./1) Consequently, none was granted. Pickett's bald assertions of impropriety and bias is completely spurious and unfounded.

6. PICKETT WAIVED THE RIGHT TO HAVE A QUORUM OF THE BOARD PRESENT.

The findings of fact, conclusions of law and recommended order indicates that only two members of the five member Pharmacy

⁶. Actually, David E. Robinson was appointed by David Buhler who no longer serves as the Executive Director. The current Director, Ted Stewart, did not appoint David E. Robinson. The Director also serves at the pleasure of the Governor.

Board were present to participate at the hearing.(R./36) The record further reflects that Pickett waived the requirement that a quorum be present. (R./36) Pickett now urges that he only intended to proceed with a hearing with two board member present but did not waive consideration by a quorum of the Board. (Brief at 17).

Other than Pickett's bald assertion, there is no evidence on the record to support his assertion. Pickett's intent was apparently silent when waiving the requirement of a quorum. The partial transcript lacks any indication of what Pickett intended. Consequently, Pickett cannot meet his burden on this appeal and should not be permitted to take back his waiver because he unexpressed intentions differed from what he received. Pickett's assertion is created as an afterthought. The lack of a quorum was not raised on review with the Department and is not supported by any evidence whatsoever on the record.

CONCLUSION

The Division's Order revoking Pickett's controlled substance license and placing his pharmacists license on three years probation was reasonable and within the Division's discretion. Pickett's allegations of procedural defects at his hearing are without merit and have not been properly preserved on this

appeal. Consequently, the Division requests that its Order be upheld on review.

Submitted this 4th day of January, 1993



CERTIFICATE OF SERVICE

I, Robert Stead, certify that on January 4, 1993.

I served two copies of the foregoing RESPONDENTS' BRIEF to George K. Fadel, counsel for Petitioner in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address:

GEORGE K. FADEL
170 West 400 South
Salt Lake City, Utah 84010



APPENDIX

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

BEFORE THE DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LICENSES OF
JACK W. PICKETT
TO PRACTICE AS A PHARMACIST AND
TO DISPENSE CONTROLLED SUBSTANCES
AND THE LICENSES OF
SERVUS DRUG CO.
AS A PHARMACY AND AS A DISPENSARY
FOR CONTROLLED SUBSTANCES IN
THE STATE OF UTAH

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O R D E R

Case No. OPL-92-6

The attached Findings of Fact, Conclusions of Law and Recommended Order are hereby adopted by the Director of the Division of Occupational & Professional Licensing of the State of Utah. Respondent Jack W. Pickett's license to dispense controlled substances is thus revoked, effective thirty (30) days from the date of this Order.

IT IS FURTHER ORDERED that the revoked license, both wall and wallet sizes, as well as the embossed certificate, thus be surrendered to the Division of Occupational and Professional Licensing.

Dated this 24th day of June, 1992.


David E. Robinson
Director

S E A L

Administrative review of this Order may be obtained by filing a request for agency review with the executive director of the Department within thirty (30) days after issuance of this Order. Any such request must comply with the requirements of the Utah Code Ann. 63-46b-12(1) and R151-46b-12 of the departmental rules which govern agency review.

BEFORE THE DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LICENSES OF	:	
JACK W. PICKETT	:	
TO PRACTICE AS A PHARMACIST AND	:	
TO DISPENSE CONTROLLED SUBSTANCES	:	FINDINGS OF FACT
AND THE LICENSES OF	:	CONCLUSIONS OF LAW
SERVUS DRUG CO.	:	AND RECOMMENDED ORDER
AS A PHARMACY AND AS A DISPENSARY	:	
FOR CONTROLLED SUBSTANCES IN	:	Case No. OPL-92-6
THE STATE OF UTAH	:	

Appearances:

Della M. Welch for the Division of Occupational and
Professional Licensing

George K. Fadel for Respondents

BY THE BOARD:

A hearing was conducted in the above-entitled matter on May 26, 1992 before J. Steven Eklund, Administrative Law Judge for the Department of Commerce, and the State Board of Pharmacy. Board members present for the hearing were Dennis R. White and Don Sterling. The remaining Board members, Frank Morris, Mark L. Johnson and Delbert A. Park, were absent. David E. Robinson, the Director of the Division of Occupational and Professional Licensing, was present. Respondents consented that the hearing be conducted as scheduled, despite the lack of a majority of Board members present for the hearing. Thereafter, evidence was offered and received.

The Board, being fully advised in the premises, now enters the following:

FINDINGS OF FACT

1. Respondent Jack W. Pickett (hereinafter, Respondent) is, and at all times relevant to this proceeding has been, licensed to practice as a pharmacist and to dispense controlled substances in the State of Utah. Respondent has been a licensed pharmacist since approximately 1954. Respondent Servus Drug Co. (hereinafter, Servus Drug Co.) is, and at all time relevant to this proceeding has been, licensed as a pharmacy and a dispensary for controlled substances in the State of Utah. This record does not reflect the exact date those licenses were issued. Respondent is employed by Servus Drug Co., a business which is owned by Respondent's wife.

2. On twelve occasions between May 20, 1991 and July 30, 1991, Respondent dispensed various dosages of either Tranxene, a Schedule IV controlled substance, Esgic, a Schedule III controlled substance, or Soma, a legend drug, to a Todd Schriver. In certain instances, Respondent dispensed those controlled substances without a physician's authorization to do so. On occasion, Respondent dispensed medications in either unlabeled prescription vials or a paper bag bearing no labels or instructions.

3. There is a lack of sufficient evidence Respondent made false or forged prescriptions as to dispense the above-stated controlled substances or other medications. Further, there is a lack of sufficient evidence to conclude Respondent knew Mr.

Schrivver was drug dependent. Respondent acknowledges his prescriptive practices were improper and he failed to adequately document the controlled substances or other medications which he dispensed. Respondent often dispensed those controlled substances or other medications in the manner requested by Mr. Schriver, who often suggested the use of either unlabeled vials or other inappropriate containers.

4. There is no substantial evidence Respondent has improperly dispensed controlled substances or other medications to other individuals. Respondent asserts he has taken remedial measures to address the acknowledged deficiencies in his practices now under review. However, there is a lack of substantial evidence as to the specific nature of corrective measures Respondent may have undertaken in that regard.

CONCLUSIONS OF LAW

Utah Code Ann. Section 58-17-9 provides the Division, in collaboration with the Board, may suspend, revoke or restrict the license of a pharmacist on one or more of the following grounds:

(5) being found by the board to be in violation of this chapter or rules adopted under this chapter;

(6) acts of unprofessional conduct as defined by statute or by rule of the division, in collaboration with the board, as follows:

(g) violation of the federal Controlled Substance Act, the Utah Controlled Substance Act, or rules and regulations adopted under either of them.

Section 58-17-10(1) provides it is unlawful for any person to:

(m) dispense a prescription drug to anyone who does not have a prescription from a practitioner or to anyone who he knows or should know is attempting to obtain drugs by fraud or misrepresentation.

Section 58-17-22 further provides:

(8) Each drug or device dispensed shall have a label securely affixed to the container indicating the following:

- (a) the name, address, and telephone number of the pharmacy;
- (b) the serial number;

(d) the name of the patient . . . ;

(e) the name of the prescriber;

(f) the directions for use and cautionary statements, if any, which are contained in the prescription order or are needed;

(g) the trade, generic or chemical name, amount dispensed and strength of dosage form, but if multiple ingredient products with established proprietary or nonproprietary names are prescribed, those products' names may be used.

R153-17-12 of the rules which govern the practice of pharmacy further define unprofessional conduct to include:

(1) Violating any federal or state statute or rule dealing with controlled substances or other drugs;

(2) Fraud or deception in the practice of pharmacy;

(3) Negligence or incompetence in the practice of pharmacy.

With respect to a license to dispense controlled substances, Section 58-37-6(4)(a) provides such a license "may be suspended, placed on probation, or revoked" by the department upon finding that the licensee has:

(vi) violated any department rule that reflects adversely on the licensee's reliability and integrity with respect to controlled substances;

In addition to the acts and practices set forth in the just-stated statute, R156-37-9 provides the Division may revoke, suspend, restrict or place on probation a controlled substance license if the licensee:

(2) has violated any federal or state law relating to controlled substances;

(7) violates restrictions upon controlled substances, prescriptions and administration as contained in these rules; and/or

(8) knowingly prescribes, sells, gives away or administers, directly or indirectly, or offers to prescribe, sell, furnish, give away, or administer any controlled substance to a drug dependent person, as defined in Utah Code Ann., 58-37-2(14), except for legitimate medical purposes as permitted by law.

Section 58-37-6(7)(a) provides:

No person may write or authorize a prescription for a controlled substance unless he is:

(i) a practitioner authorized to prescribe drugs and medicine under the laws of this state or under the laws of another state having similar standards; and

(ii) licensed under this chapter or under the laws of another state having similar standards.

Section 58-37-6(7)(c) further provides:

(i) No controlled substance may be dispensed without the written prescription of a practitioner, if the written prescription is required by the federal Controlled Substances Act.

Section 58-37-8(3)(a) also provides it is unlawful for any person:

(i) who is subject to this chapter to distribute or dispense a controlled substance in violation of this chapter;

Finally, Section 58-37-8(4)(a) provides it is unlawful for any person knowingly and intentionally:

(iii) to make any false or forged prescription or written order for a controlled substance, or to utter the same, or to alter any prescription or written order issued or written under the terms of this chapter;

(iv) to furnish false or fraudulent material information in any application, report, or other document required to be kept by this chapter or to willfully make any false statement in any prescription, order, report, or record required by this chapter;

Respondent violated Section 58-17-10(1)(m) when he dispensed prescription drugs and controlled substances without any practitioner's authorization to do so. Under the circumstances, Respondent should have known Mr. Schriver was attempting to obtain drugs by either fraud or misrepresentation. Respondent failed to comply with Section 58-17-22(8) when he dispensed drugs in containers without appropriate labeling. Respondent violated R153-17-12(2) when he prepared documents to purportedly reflect a physician's authorization for the medication which was dispensed when, in fact, no authorization was made.

Respondent also violated Section 58-37-6(7)(a) and Section 58-37-6(7)(c)(i). By reason thereof, Respondent engaged in unprofessional conduct, as defined in R153-17-12(1). He was also grossly negligent in his practice of pharmacy, which reflects unprofessional conduct with respect to R153-17-12(3). However, there is a lack of sufficient evidence to find and thus conclude Respondent violated Section 58-37-8(4)(a)(iii) or (iv).

Thus, Respondent has engaged in unprofessional conduct and a proper basis exists to enter a disciplinary sanction with respect to his licensure as a pharmacist and his ability to dispense controlled substances in this state. However, no proper basis exists to enter any disciplinary sanction with respect to the license of Servus Drug Co. as a pharmacy or a dispensary of controlled substances.

Respondent's misconduct represents an egregious departure from those standards which govern his profession. Further, Respondent engaged in such misconduct on numerous occasions. Respondent's conduct does not merely reflect a singular, haphazard exercise of his duties as a pharmacist. Rather, Respondent repeatedly failed to properly dispense controlled substances and other medication. Various statutes and rules appropriately restrict the manner in which controlled substances may be dispensed, yet Respondent frequently failed to comply with the requirements of those statutes and rules.

Therefore, an appropriately severe sanction should enter with regard to Respondent's license to dispense controlled substances. Further, adequate restrictions must exist to appropriately protect the public health, safety and welfare and ensure Respondent continually complies with those standards which govern his profession. The recommended order set forth below is thus necessary to adequately monitor Respondent's future conduct as a pharmacist, to appropriately prompt necessary corrective and remedial action required of Respondent and to ensure controlled substances are dispensed in a manner consistent with the dictates

of state and federal law.

RECOMMENDED ORDER

WHEREFORE, IT IS ORDERED Respondent's license to dispense controlled substances is revoked.

It is further ordered Respondent's license as a pharmacist be placed on probation for three (3) years, subject to the following terms and conditions:

1. Within thirty (30) days from the date this Recommended Order may be adopted by the Director of the Division of Occupational and Professional Licensing, Respondent shall submit a written practice plan, which shall be subject to Board review and approval. Said plan shall provide for another pharmacist to be employed by Servus Drug Co. Said pharmacist shall thereafter establish proper record keeping, inventory control and dispensary procedures for controlled substances at the pharmacy.

2. Respondent and the just-referenced pharmacist shall initially meet with the Board each month during the first three (3) months of this probationary term. Thereafter, Respondent and the pharmacist shall meet with the Board every six (6) months. During those meetings, the Board will review the ongoing efforts to implement proper record keeping practices, appropriate management of controlled substance inventory and proper procedures with regard to any controlled substances which are dispensed through the pharmacy in question.

3. The Division shall periodically audit the controlled substance records of Servus Drug Co.

4. Within ninety (90) days from the date this Recommended Order may be adopted, Respondent shall successfully complete the jurisprudence examination generally required of all pharmacists licensed to practice in this state.

Should Respondent fail to comply with the terms and

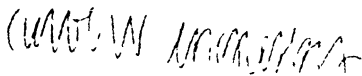
conditions set forth herein, or otherwise violate any statute or rule which governs his license as a pharmacist, further proceedings shall be conducted and a determination made whether a sanction of greater severity than that set forth herein is warranted.

MAILING CERTIFICATE

I hereby certify that on the 25 day of June, 1992, a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, RECOMMENDED ORDER AND ORDER was sent first class mail, postage prepaid, to the following:

Jack W. Pickett
Servus Drug
55 North Main
Bountiful, UT 84010

George K. Fadel
170 West 400 South
Bountiful Ut 84010



Carol W. Inglesby
Administrative Assistant

ORDER ON AGENCY REVIEW

BEFORE THE
DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LICENSES	:	
OF JACK W. PICKETT TO	:	ORDER ON REVIEW
PRACTICE AS A PHARMACIST AND TO	:	
DISPENSE CONTROLLED SUBSTANCES	:	CASE NO. OPL-92-6
AND THE LICENSES OF	:	
SERVUS DRUG CO. AS A PHARMACY	:	
AND AS A DISPENSARY FOR	:	
CONTROLLED SUBSTANCES	:	
IN THE STATE OF UTAH	:	
	:	

INTRODUCTION

On June 24, 1992, following a hearing on a petition involving Jack W. Pickett and Servus Drug Co. ("Respondents") before the Administrative Law Judge and the State Board of Pharmacy, the Director of the Division of Occupational and Professional Licensing (the "Division") adopted the Findings of Fact, Conclusions of Law and Recommended Order of the Board. The Order revoked Respondent Pickett's license to dispense controlled substances and placed his license as a pharmacist on probation for three years, subject to certain terms and conditions. Respondent was represented by an attorney throughout the proceeding, as well as on review. He requested agency review on July 1, 1992, and also was given until July 27, 1992, to supplement his brief requesting review. Oral argument was neither requested nor held.

In his request for review, Respondent requests that the Order be modified so that he may continue as a licensed pharmacist.

STATUTES OR RULES PERMITTING OR REQUIRING REVIEW

Review is conducted pursuant to Utah Code Annotated Section 63-46b-12, and Rule 151-46b-12 of the Rules of Procedure for Adjudicative Proceedings before the Department of Commerce.

THE ISSUES REVIEWED

1. Whether the Order contains procedural defects sufficient to warrant overturning it;

2. Whether Respondent was unfairly deprived of a fair hearing where the Division Director was present and participated in questioning Respondent, thus either becoming an "advocate" rather than a "tribunal", or unduly influencing the Recommended Order;

3. Whether the Order is not supported by the Findings of Fact; and

4. Whether the Order of revocation was arbitrary and capricious, particularly when compared with penalties in other cases.

FINDINGS OF FACT

1. Respondent does not contest the Findings of Fact entered into by the Board, and consequently they are adopted herein for purposes of this review.

2. The Order found that Respondent has engaged in acts or conduct which violated §58-17-10(1)(m); §58-17-22(8); and Rule 153-17-12. Specifically, it found that Respondent had, on twelve occasions, dispensed Schedule IV and Schedule III controlled substances, as well as a legend drug, without a physician's authorization, or without proper labels, to one customer.

Respondent apparently acknowledged that his prescriptive practices were improper and that he did not adequately document dispensing certain drugs. The Findings concluded that there was a lack of sufficient evidence to find that Respondent made false or forged prescriptions, as had been charged in the Petition.

3. Respondent argues as grounds for review that the Findings of Fact, Conclusions of Law, and Recommended Order were not signed by the presiding officer. They were in fact not signed by either the Board or the Administrative Law Judge. The Order adopting the Findings, Conclusions and Recommended Order was signed by the Division Director.

4. The Director was present at the hearing. However, the limited record available for review does not indicate what, if any, questions were put to Respondent, or any other witness, by the Director. No evidence or transcripts were produced by Respondent, or arguments made, which would enable a determination to be made as to whether or not the Director acted as an advocate, or whether his presence unduly influenced the process.

5. Respondent does not indicate which portions of the Order are not supported by the Findings of Fact.

6. Respondent supplemented the request for review by listing ten cases previously decided by the Division and Board against other pharmacists, in which the penalties were less than those in this case.

CONCLUSIONS OF LAW

1. In Respondent's request for review, he cites no statutory

or other authority for the proposition that the Findings, Conclusions and Recommended Order must be signed by the Board or the Administrative Law Judge. The procedure does not appear to violate the Administrative Procedures Act ("UAPA"), which, at §63-46b-10, requires that in formal proceedings, the presiding officer shall sign and issue the order. In this case, the order was signed and issued by the division director, who was the "presiding officer" for purposes of overseeing the proceedings. Pursuant to §58-1-16(2), the director may designate a presiding officer in disciplinary proceedings, which shall make written recommendations, findings of fact and conclusions of law. For purposes of conducting a hearing and making recommendations, the director designated the Board as the "presiding officer". There is no requirement that the recommendation be signed. The procedure followed herein, where the Division Director signed the final Order adopting the Board's recommendations was not improper.

2. Whether the Director's presence and participation constituted his an "advocate" is a contention which appears to be without merit. As noted above, Respondent produced no evidence, transcripts or arguments which would assist in reviewing this issue. Without such a showing, the Director's participation, if any, cannot be deemed to have been improper in any way, nor can it be declared to have unduly influenced the Board's recommendations. Common practice is for the Board to deliberate without the presence of the Director; there was no evidence presented by Respondent as to whether or not this in fact occurred -- nor that it would be

improper even if it had. If the Director were not present at the hearing, or not asking questions, could Respondent have raised the argument that he was thus not qualified to judge the case?

3. Respondent next argues that the Order is not supported by the findings of fact. It is difficult to evaluate Respondent's claim where he does not contest the findings, and provides no specific statements of where the findings may be deficient. The undisputed facts can be summarized as follows: Respondent dispensed dosages of a Schedule IV controlled substance, a Schedule III controlled substance and a legend drug, either without a physician's authorization, or dispensed them in unlabeled vials or in a paper bag with no labels or instructions. These findings constitute a legally sufficient basis for the Order. Section 58-17-9 provides that the Division may suspend, revoke or restrict a pharmacist's license for violating the law. Further, Section 58-17-10(1) specifically makes it a violation to dispense a prescription drug without a prescription, or to fail to properly label prescriptions.

4. Finally, Respondent argues that the Order revoking Respondent's controlled substance license, and imposing a three year probation on this pharmacist's license, is too severe. Respondent points out certain factors in Respondent's favor:

- a. Pharmacy is Respondent's lifetime profession;
- b. He was adjudged to have dispensed improperly only to one long-time customer, who arguably had oral approval from a physician for the refills;

c. The penalty is more severe than penalties in other cases.

5. Two separate penalties are at issue here. The first one, revocation of Respondent's controlled substance license, is mitigated somewhat by two factors. The Order allows Respondent to employ another pharmacist, under Board supervision, to establish controls with respect to controlled substances. Second, an examination of prior cases reveals that the Division and Board on occasion entertain requests to reinstate licenses. The second penalty, a three-year probation of Respondent's pharmacist license, was not the most harsh that the Order could have imposed; subsection 58-17-11 also allows the division to suspend or revoke a license. With probation, Respondent can continue practicing as a pharmacist, subject to Board supervision -- he simply cannot personally dispense controlled substances.

6. Of the other Division proceedings against pharmacists cited by Respondent, such precedent is of limited value for several reasons. The cases cited are somewhat old: the most recent are approximately three years old; other cases are as many as six years old. An examination of the cases cited by Respondent, as well as others, yields more information not disclosed in the request for review. Note, for example, that the Leatherwood and Anderson orders, cited by Respondent, were pursuant to stipulation of the parties. (Also, Respondent omits to mention that Leatherwood's penalty actually was revocation, which was stayed in favor of suspension and probation). In the Nielson case, the license of the

pharmacy itself, a corporation, was placed on probation, which was not the case in the order under review here. In other cases not cited by Respondent, severe sanctions were entered: for example, see Morrison, No. 85-63 (license indefinitely suspended by stipulation); Jensen, No. 86-05 (default revocation of pharmacist and controlled substance licenses); Evans, No. 88-20 (pharmacist license suspended, controlled substance license surrendered, by stipulation). In addition, as pointed out by counsel for Division in its Response to the request for review, the U.S. Supreme Court has held that a sanction is not invalid only because it is more severe than sanctions in other cases. Finally, where the Board, the Administrative Law Judge and Director were present at the hearing, heard the testimony and were able to observe the Respondent's demeanor, and found that restrictions were necessary to protect the public health, safety and welfare, the sanction should not be overturned or modified unless a compelling reason can be demonstrated.

7. In support of the penalty, the Order found that:

a. "Respondent should have known [the patient] was attempting to obtain drugs by either fraud or misrepresentation." (Recommended Order, page 6)

b. "Respondent violated R153-17-12(2) when he prepared documents to purportedly reflect a physician's authorization for the medication which was dispensed when, in fact, no authorization was made." (Page 6)

c. Respondent engaged in "unprofessional conduct", was

"grossly negligent" (page 6); his conduct was an "egregious departure from those standards which govern his profession", and he engaged in such misconduct on "numerous occasions" (page 7).

8. Respondent's request on review that the Order be modified so he can "continue as a licensed pharmacist" indicates an apparent misunderstanding of the Order. Under that order, Respondent can continue: his license to practice as a pharmacist is placed on probation and subject to various conditions, but he is not forbidden to practice.

ORDER

IT IS ORDERED THAT:

The order is upheld in its entirety. Pursuant to Rule 151-46b-12, the effective date of that order is ten days from the date that this order on review is mailed.

Dated this 30 day of July, 1992.



David L. Buhler, Executive Director
Department of Commerce

NOTICE OF RIGHT OF JUDICIAL REVIEW

Judicial review of this Order may be sought by filing a Petition for Review within thirty (30) days after the issuance of this Order. Any Petition for such Review must comply with the requirements set forth in Section 63-46b-14 and Section 63-46b-16.

CERTIFICATE OF MAILING

I certify that on the 30 day of July, 1992, I caused to be mailed a true and correct copy of the foregoing Order on Review, properly addressed, postage prepaid, to:

Respondent:
Jack W. Pickett
Servus Drug Co.
55 North Main Street
Bountiful, UT 84010

Attorney for Respondent:
George K. Fadel
170 West 400 South
Salt Lake City, UT 84010

and caused a copy to be hand-delivered to:

David E. Robinson, Director
Division of Occupational and
Professional Licensing
P.O. Box 45802
Salt Lake City, Utah 84145

Della Welch, Assistant A.G.
Beneficial Life Tower
11th Floor
36 South State Street
Salt Lake City, Utah 84111

CP White