

1992

Jack W. Pickett and Servus Drug Co. v. Utah Department of Commerce: Brief of Petitioners

Utah Court of Appeals

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DOCKET NO. 920556 CA

IN THE UTAH COURT OF APPEALS

| | | |
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| In Re: |) | |
| JACK W. PICKETT and |) | |
| SERVUS DRUG CO. |) | |
| |) | |
| Petitioners/Respondent Below, |) | |
| |) | |
| vs. |) | Case No. 920556-CA |
| |) | |
| UTAH DEPARTMENT OF COMMERCE, |) | |
| Division of Occupational and |) | |
| Professional Licensing, |) | |
| |) | |
| Respondent/Plaintiff. |) | |

BRIEF OF PETITIONERS

PETITION FOR REVIEW
FROM THE DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING
ADMINISTRATIVE LAW JUDGE J. STEVEN EKLUND

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Argument priority cl
29(15).

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BRIEF OF PETITIONERS

JURISDICTION

The Court of Appeals has appellate jurisdiction over final orders and decrees resulting from formal adjudicative proceedings of state agencies as provided by Utah Code Annotated § 78-2a-3(2) (Supp. 1992). Judicial review of formal adjudicative proceedings is also set forth in the Administrative Procedures Act, Utah Code Annotated § 63-46b-16 (1988) vesting jurisdiction for review in the Court of Appeals.

STATEMENT OF THE ISSUES FOR REVIEW

1. The order is not justified by the findings of fact in

that revocation of petitioner's license to dispense controlled substances is tantamount to depriving him of his lifetime profession for dispensing therapeutic doses of drugs to one, long time customer who was entitled to the drugs by physicians' diagnosis and oral approval of refills. The order is thus arbitrary and capricious particularly when compared to penalties imposed in other cases involving licensed pharmacists. Under Utah Code Ann. § 63-46b-16(4)(h)(iii) (Supp. 1991), the appellate court must grant relief if the agency action is contrary to the agency's prior practice, and substantially prejudices the party seeking judicial review, unless the agency demonstrates a fair and rational basis for the inconsistency.

2. The Director was present at the proceedings and participated in the examination of the petitioner. Thus, the Director was an advocate, not a tribunal, and Petitioner was deprived of due process of law. Constitutional questions are characterized as questions of law to which a correction-of-error standard of review applies giving no deference to the agency's decision. See Questar Pipeline Co. v. Utah State Tax Comm'n., 817 P.2d 316, 318 (Utah 1991).

3. The findings were not signed by the presiding officer, who was the ALJ designated to conduct the proceeding, as required by Utah Code Annotated § 63-46b-10(1) (1988). The Director, who was neither the presiding officer nor the agency head, signed the Order adopting the findings. This is a question of law to which a correction-of-error standard applies. See Morton Intern. Inc.

v. Auditing Div., 814 P.2d 581 (Utah 1991).

4. No concurrence of the State Board of Pharmacy was obtained as required by Utah Code Annotated § 58-1-16 (1988), although two members of the Board appeared to submit the findings, conclusions and recommended order. This is a question of law to which a correction-of-error standard applies. See Morton, 814 P.2d at 585.

STATUTES

The following Utah Code Annotated statutes are relevant to the consideration of this appeal.

58-1-16 Notice of disciplinary action -- Hearing officers
-- Director's powers -- Evidence.

(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.

63-46b-2. Definitions.

(1) As used in this chapter:

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

(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.

63-46b-10(1)

In formal adjudicative proceedings:

(1) Within a reasonable time after the hearing, or after the filing of any post-hearing papers permitted by the presiding officer, or within the time required by any applicable statute or rule of the agency, the

presiding officer shall sign and issue an order that includes:

(a) a statement of the presiding officer's findings of fact based exclusively on the evidence of record in the adjudicative proceedings or on facts officially noted;

(b) a statement of the presiding officer's conclusions of law;

(c) a statement of the reasons for the presiding officer's decision;

(d) a statement of any relief ordered by the agency;

(e) a notice of the right to apply for reconsideration;

(f) a notice of any right to administrative or judicial review of the order available to aggrieved parties;

13-1-12. Order by hearing officer or body -- Appeals 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.

63-46b-16. Judicial review - Formal adjudicative Proceedings.

(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:

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

follow prescribed procedure;

- (h) the agency action is:
 - (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.

STATEMENT OF THE CASE

The Division of Occupational & Professional Licensing of the Department of Commerce commenced proceedings against the Petitioner, Pickett, by "Notice of Agency Action" to impose "appropriate sanctions" against Pickett for alleged violations of the licensing act and statutes related to dispensing controlled substances. After a hearing before an Administrative Law Judge, the division issued orders revoking Pickett's license to dispense controlled substances and requiring Servus Drug Co. to employ another pharmacist to deal with controlled substances. Pickett appealed the order to the Executive Director, who affirmed.

STATEMENT OF FACTS

A "Notice of Agency Action" was served upon Pickett notifying him that he was entitled to a hearing and that "The presiding officer at the hearing will be J. Steven Eklund, Administrative Law Judge, Department of Commerce." (R 67). Present at the hearing on May 26, 1992, were the ALJ and two members of the State Board of Pharmacy. Three remaining members of the Board were absent. David E. Robinson, the Director of the

Division of Occupational and Professional Licensing was present.
(R 35).

The Board's unsigned Findings of Fact are as follows (R 36-37):

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 times 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, [or] Esgic, a Schedule III controlled substance, without a physician's authorization to do so. On occasions, 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. Schriver 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 the specific nature of corrective measures

Respondent may have undertaken in that regard.

Pickett testified at the hearing responding to questions of his counsel; cross examination by Ms. Welch, respondent's counsel; answered questions of a Board Member; the ALJ; and then the Director of the Division, Mr. Robinson aggressively interrogated Pickett (Tr 2). Since petitioners challenge the propriety of the participation by the Director, we copy herein the questions and answer resulting from examination by the Director (Tr 20-33):

THE COURT: Mr. Robinson?

E X A M I N A T I O N

BY MR. ROBINSON:

Q. Mr. Pickett, my name is David Robinson. I'm the director of the Division. I'm not a pharmacist, so my questions come from not being a pharmacist.

MR. ROBINSON: Does he have a copy of this document (indicating)?

MS. WELCH: That's correct.

Q. (By Mr. Robinson) Look at this document, the stipulation. I'd like to ask you some questions about it.

A. Okay.

Q. On the bottom of Page 1 it says, on or about May 20th, 1991, you dispensed 30 doses of Tranxene, a Schedule 4 substance, to Todd Schryver. Was there a prescription for that drug?

A. Originally there was.

Q. What was that original prescription?

A. I would have to go back on my records.

Q. What's your recollection?

A. I would say within six months.

Q. On May the 25th -- on Page 2, it says, on May the 25th, 1991, he came in again for Tranxene and you forged a prescription.

A. No. That was -- that's a case of updating. In other words -- I don't see the reason they put forging there, it's because I didn't have prior approval.

Q. Was there -- did you create a document?

A. Well, what you have to do is that after the prescription has been filled for certain length of time

or a number of times, you got to update your record.

Q. How did you update the record? What did you do?

A. What you do is --

Q. Are we talking about a computer record or are we talking about a paper record?

A. Written record.

Q. So what did you do to create a record to support this? Did you fill out a prescription for him?

A. Uh-huh (affirmative).

Q. And you signed the doctor's name to it?

A. Just the same as if it had been phoned in.

Q. And you did not talk with the doctor?

A. No, not until afterwards. That's my problem. These were okayed afterwards.

Q. What is Tranxene for, what kind of drug?

A. He was using it for anxiety. That's the mildest form of it.

Q. And what was his diagnosis?

A. That was what it was diagnosed for, was anxiety.

Q. Did you see the medical record?

A. No. But that's what he told me.

Q. He told you that?

A. Uh-huh (affirmative).

Q. The physician didn't tell you?

A. No.

Q. He told you?

A. He told me that.

Q. Do you always rely upon what your patients tell you?

A. You just about have to.

Q. On June the 14th, 1991 -- well, let me ask you a question. On May the 20th you gave him 30 doses of Tranxene. Do you remember what he was -- what his dosage was, how much?

A. Three times a day.

Q. Three times a day. Five days later when he should have taken 15 doses you gave him 30 more?

A. I think that was when he wanted to go to Bear Lake. I think that was the time. I think that's the only time.

Q. How long was he going to go to Bear Lake?

A. He was going to be gone a week.

Q. He already had a five-day supply unused, didn't he?

A. Yeah. But that's less than a week.

Q. On June the 14th, 1991, you gave him 30 doses of Esgic without a physician's order to do so. Why was that? I mean, you had no prescription for Esgic. What was his diagnosis?

A. Again, he had had a prescription.

Q. How long?

A. Probably on that one probably for -- oh, maybe two years previously he had.

Q. Two years previously to that he had had a prescription?

A. He'd seen the doctor in the meantime, and each time --

Q. How do you know? Did he tell you?

A. No. When we're working quite closely with the doctors, we pretty well know when they go in. He went for anxiety in the meantime, so he had to see him then.

Q. What's Esgic for?

A. It's just for pain.

Q. And what was the pain caused by?

A. He complained of backache.

Q. Complained of backache?

A. Un-huh (affirmative).

Q. And you gave him 30 doses on June 14th. What was his -- how much was he to take each day?

A. Three times a day.

Q. Three times a day. And yet he didn't fill that again until July 5th for 30 doses. He would have used those 30 doses of Esgic in ten days. So on June the 24th he would have been without Esgic, right?

A. If he were using it properly.

Q. If he were using the prescribed doses; is that right?

A. Uh-huh (affirmative).

Q. June the 24th. And yet he didn't come back to you for 11 days later. Tell me, Mr. Pickett, does that suggest to you that he may have been getting his drugs some other place.

A. No, not at all.

Q. Did you ever think about that?

A. No, because people do that all the time.

Q. Was it possible that he was getting drugs from another source?

A. Things are always possible, but not --

Q. Do you know for sure he was not?

A. No. I know for sure, as far as my knowledge is concerned, he was not.

Q. Mr. Pickett, when you look at this pattern of you supplying him drugs and you look at the daily doses he was to be taking, do you see a discrepancy here, showing that either he went too long or he went too short?

A. No, because we run into that all the time especially on paid medication.

Q. If you look at this pattern and you calculate the number of doses he was to take of the drug and you look at the frequency with which he filled them, have you noticed the fact that they don't necessarily follow

a pattern, sometimes they're longer and sometimes they're shorter, have you noticed that?

A. Yes. But people with pain medication or backache do that. In other words, they don't use it every day. When they need it, they use it. When they don't, they don't.

Q. On July 15th he comes to you and gets 30 doses of Soma. What's Soma for?

A. That's a muscle relaxant for the back.

Q. That's a relaxant?

A. Uh-huh (affirmative).

Q. And that again was without a physician's order?

A. That was the same type of situation originally.

Q. Two years?

A. Originally they had prescribed a hundred at a time.

Q. How long ago?

A. Well, they gave him that before they gave him the Esgic.

Q. So it was more than two years?

A. Well, originally it could have been more than two years.

Q. How old is Mr. Schryver?

A. Oh, 30, 35 -- about 30, 35, somewhere in that vicinity.

Q. Does he work?

A. Uh-huh (affirmative). He's working.

Q. Was this paid for by insurance or by him, personally?

A. No, by him personally. In fact, most the time it was charged.

Q. Mr. Pickett, when Ms. Welch asked you the question -- she asked you the question, what was the risk? Do you remember your answer to that? What was the risk of dispensing these drugs without a prescription? Do you remember your answer?

A. Always the possibility of someone running into problems.

Q. That wasn't your first answer. What was your first response?

A. No, I don't remember it.

Q. Your first response was not to the patient's welfare at all, your response was that -- you said that the doctor will say no. That was your first view of the risk, that the doctor would say no and you'd be hung out to dry. Not of the patient's welfare, that was not the first thought that came to your mind. Is that curious?

A. You're always taught to take care of Number One.

Q. You first?

A. Who's Number One?

Q. When Ms. Welch asked you the question about your continuing education, you indicated that you had made no attempts to remain current with continuing professional education, and then you said, quote, they, referring to the pharmacy association and the state, they haven't done a good job in keeping us up to date.

A. On state law, that's true.

Q. Is that our responsibility to keep you advised of the law?

A. No, it isn't your responsibility.

Q. Whose is it?

A. The think is, when --

Q. Whose is it?

A. When the legislature meets, it's impossible to keep track of the changes that occur, and they should advise you of the changes, the pharmacy board should, or the state board of pharmacy should, advise you of those changes. There's no education system within the state or within the pharmacy that keeps you up to date on that.

Q. What's your responsibility to go to -- how long since you've been to State Pharmacy Association meeting?

A. Quite some time.

Q. Are you aware of any education classes they conduct at those meetings?

A. Uh-huh (affirmative). Yeah.

Q. Would that be a good place to become informed?

A. Probably. Probably.

Q. Did you feel any need to do that?

A. Well, when you're working the store alone and with no relief help, it's about impossible to attend meetings.

Q. When we began this, you talked about your -- you did this to service your customer. How long have you been at Servus Drug?

A. Close to 20 years.

Q. Twenty years ago at Servus Drug were you one of the primary prescription fillers in the city of Bountiful?

A. Not quite, not quite. There were quite a -- there were a number.

Q. That's changed dramatically over the years with the introduction of Smith's, Albertson's, and Shopko.

A. Oh, sure.

Q. And that's had an impact on your business.

A. Sure.

Q. How much has the fact that these chains have come in and those large stores comes in and impact your

business, how much did that play in your decision to try to give these products to Mr. Schryver without the necessary protections, simply because you were competing and you were feeling the competition?

A. I don't think that was a problem. I never considered it that way. I've always considered right from the start to be as much a service as we can to our customers.

Q. Even if it means violating the law?

A. We haven't. The law enforcement has varied.

Q. Well, Mr. Pickett, you were charged with a felony, weren't you?

A. Yes. But that was mainly --

Q. And you plead guilty to a felony -- or no contest?

A. I didn't plead guilty, that's no contest.

Q. Is that different than a plea of guilty?

MR. FADEL: May I intervene? The diversion agreement is not a conviction, it's an agreement that they would set aside the information and the indictment if he met the conditions of the diversion agreement. So it's true he was charged with a felony, he made no plea to it, and it's not considered a conviction. I'll just read briefly from the statute that says that diversion is not a conviction. And if the case is dismissed, the matter should be treated as if the charge had never been filed.

MS. WELCH: And that was the penal code section 772-2 on subsequent 772-8.

MR. ROBINSON: Ms. Welch, I'm not sure the Board and the Division would consider it as though the charge had never been filed, that may be for future criminal reference. I don't think the Board and the Division would do so and consider it a fact in argument. We commonly refer to the fact equating a no contest plea, a guilty -- equal to a guilty plea.

MS. WELCH: Well, my understanding is a nolo contendere plea is equal to no criminal liability, but it does create that civil admission.

MR. ROBINSON: Let me go on, if I can.

Q. (By Mr. Robinson) You refer to a Dr. Guymon. Who is Dr. Guymon?

A. Guymon. G-U-Y- --

Q. Okay. I have that.

MR. WHITE: Guymon and Clark.

MR. ROBINSON: Your Honor, one of the things that troubles me, as I hear Mr. Pickett, is that I'm not sure that he understands the significance of what's been done here.

THE COURT: Well, the --

MR. ROBINSON: The reason I ask that is I have a couple of exhibits that I think would be helpful to him

that I don't think bear on the action that would be taken in this case. It might be helpful to him in this matter if I could use them, but I would look to your direction.

THE COURT: Well, you say they don't bear on the action to be taken in this case.

MR. ROBINSON: They don't bear, I don't think, on anything that the Board would recommend.

THE COURT: What would they -- why would we be making reference to these?

MR. ROBINSON: Because of the fact that doctor -- or Mr. Pickett has said that he, in response to my questions, doesn't -- has not considered at all the obtaining of drugs from another source and the affect that that might have upon a patient.

THE COURT: What do you intend to offer? What's the nature of what it is you want to present?

MR. ROBINSON: I would like to show him some examples of similar cases and the affect of those cases.

THE WITNESS: Let me put it this way, too. When that happens, you see evidence of it from the person. You see that he's slurring his words, you see that he's having difficulty walking, you see it in his coordination.

Q. (By Mr. Robinson) Do addicts always appear that way?

A. I've never known one that hasn't, unless they've had enough time between when they have taken something and when they see you.

MR. ROBINSON: I'll withdraw my suggestion.

Mr. Robinson continued his examination following questions by the ALJ and the answer of Pickett that "Apparently he (Schryver) was getting drugs somewhere else." (Tr 34-35).

BY MR. ROBINSON:

Q. He was?

A. Apparently so.

Q. Why do you say that?

A. Well, it's on the information I have here that says he was using Darvocet. I've never dispensed Darvocet to him.

Q. Paragraph 8 on Page 7 of this petition starts with the sentence, because Respondent dispensed controlled substances to a drug dependent person. You're telling me you didn't have any reason to believe he was drug dependent?

A. No, I did not.
Q. So you're not making an admission here --
A. No.
Q. -- that you thought he was?
A. No, not at all.
Q. You don't know whether he is?
A. Other than the fact that they told me about him when they came in.
Q. "They" who?
A. Mr. Prisk.
THE WITNESS: And who was with you? Was the narcotic with you?
MR. PRISK: Nick Sweat.
THE WITNESS: Oh, yes, there he is.
THE COURT: So from other sources you've been told?
THE WITNESS: Yes.
THE COURT: Perhaps not on your observation of Mr. Schryver - THE WITNESS: No.

SUMMARY OF ARGUMENT

The order was not justified by the findings of fact in that revocation of Pickett's license to dispense controlled substances is tantamount to depriving him of his lifetime profession for dispensing therapeutic doses of drugs to one, long-time customer who was entitled to the drugs by physicians' diagnosis and oral approval of refills. The order is thus arbitrary and capricious particularly when compared to penalties imposed in other cases involving licensed pharmacists.

The Director who signed the Order, was present at the proceedings and participated in the examination of the petitioner. Therefore, the Director was an advocate, not a tribunal, and Pickett was deprived of due process.

The presence and participation of the Director unduly influenced the findings, conclusions and recommended order.

The findings were not made and signed by the presiding officer who was the ALJ designated to conduct the proceeding as required by Utah Code Annotated § 63-46b-10(1) (1988), they appear to have been unsigned Findings, Conclusions & Recommendations of the Board.

ARGUMENT

I. THE AGENCY ACTION OF REVOCATION IS CONTRARY TO THE AGENCY'S PRIOR PRACTICE AND IS DISCRIMINATORY, ARBITRARY, AND CAPRICIOUS.

The standard of review of the final action of the Agency is set forth in the statute creating review of formal adjudicative proceedings of administrative agencies. Utah Code Ann. § 63-46b-16(4)(e) and (h) (1988) state that the appellate court shall grant relief where upon the record it is determined that the person seeking review has been substantially prejudiced by unlawful procedure, abuse of discretion or where the agency action is otherwise arbitrary or capricious. See D.B. v. Div. of Occupational Pro. Licensing, 779 P.2d 1145, 1147 (Utah App. 1989).

A. Unlawful Procedure

Utah Code Ann. § 58-1-16(2)(a) (1988) provides that all adjudicative proceedings shall be held before an appropriate presiding officer, as designated by the director. "Presiding officer" is defined in § 63-46b-2(h) as "an agency head or an individual or body of individuals designated by the agency head . . . to conduct an adjudicative proceeding." "Agency head" is

defined as the individual in "whom the ultimate legal authority of the agency is vested by statute." Utah Code Ann. § 13-1-2 (Supp. 1990) creates a Department of Commerce with six divisions, one of which is the Division of Occupational and Professional licensing. The Department of Commerce is stated to be under the supervision, direction and control of the executive director of commerce who is therefore, apparently the "Agency head". Utah Code Ann. § 13-1-3 (Supp. 1990) and 58-1-2 (1989). The director of the Division of Occupational and Professional Licensing ("Division") is appointed by the executive director, Utah Code Ann. § 58-1-4 (1985), who is also responsible to appoint a board of five persons for each profession or occupation licensed, a majority of whom constitute a quorum. Utah Code Ann. § 58-1-7 (1985).

In this case the agency failed to follow proper procedure and thereby substantially prejudiced Pickett. The "Notice of Agency Action" designated J. Steven Eklund, Administrative Law Judge, Department of Commerce as the presiding officer (R 67). The presiding officer is responsible for signing and issuing an order which includes his findings of fact, conclusions of law, reasons for his decision, relief ordered by the agency, and information of the right for administrative or judicial review. Utah Code Annotated § 63-46b-10 (1988). In the Pickett case, there were two board members present with the ALJ and Director Robinson. Pickett consented to a hearing with only two board members but did not waive consideration by a quorum of the board

(R 35). The Findings of Fact, Conclusions of Law And Recommended Order were recited as being "By The Board" but were issued unsigned (R 35-43). The Order revoking Pickett's license was signed by the division director, Robinson, wherein he adopted the Findings of Fact, Conclusions of Law And Recommended Order attached to his Order. This appears to be contrary to the requirements of § 63-46b-10 which places responsibility upon the ALJ as presiding officer to sign the findings and order. In absence of signing by the ALJ there is no record proof that the findings and order were not solely those of the division director who was neither authorized by law, nor by reason of his adversarial activity, entitled to usurp the statutory authority vested in the "presiding officer." Pickett filed a "Request For Review of Agency Action" and alleged therein as grounds for review that the findings and order were not signed by the presiding officer; the presence of the Director and his position as an advocate rather than as an impartial tribunal deprived Pickett of due process; and the presence and participation of the director unduly influenced the order (R 32).

B. Due Process

As stated in 16 Am. Jur. 2d Constitutional Law § 855 (1979) due process requires that the tribunal be a fair and impartial one, and this requirement also applies to administrative hearings. The United States Supreme Court in Withron v. Larkin, 421 U.S. 35, 43 L. Ed. 2d. 712, 95 S. Ct. 1256 (1975), held that a state board, which conducted preliminary investigative

proceedings against a physician to revoke his license, was not precluded from conducting a subsequent adjudicative hearing, in absence of specific foundation that the board was prejudiced by its investigation to the extent it would impugn the board's fairness at a later adversary hearing. See Id., 421 U.S. at 55. However the Court did state that:

Clearly, if the initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised.

Id. at 58.

The Court's footnoted comment also cited Supreme Court cases which held that when review of an initial decision is mandated, the decision maker must be other than the one who made the decision under review. The agency head, Executive Director Buhler, review the Order signed by the division director, Robinson, and upheld the Order of his appointee division director, in its entirety without further hearing or independent consideration (R 8). This amounts to a decision maker evaluating his own prior decisions. An impartial independent reviewer may have been more inclined to modify the penalty to one more fitting to the Pickett defaults which were essentially harmless negligence in distributing tranquilizers to one, long-time customer who had a prescription and verbal refill orders from physicians.

C. Penalty is Discriminatory, Arbitrary and Capricious

The Executive Director, Buhler, adopted the Findings of Fact

of the "Board" (R 2). The findings as reviewed above and as recited by the Executive Director were that on twelve occasions Pickett dispensed prescription drugs without a physician's advance authorization or without proper labels, to one customer (R 2-3). Pickett does not dispute the facts set forth in the Findings of Facts. Pickett cites as error the penalties imposed as set forth in the Conclusion of Law and the Order of revocation as being discriminatory when compared to penalties recorded in previous Agency actions as summarized by Pickett (R 10-12):

1. Case: William Edmund Leatherwood #OPL-86-72.

Leatherwood and Hyland Drug admitted that from June 1985 to June 1986, he repeatedly sold controlled substances without a valid physician prescription and repeatedly signed prescription forms for the files, and falsely represented that a physician authorized the same.

Penalty: Two year suspension and five years probation, which was amended by the Board following a hearing on October 28, 1987, terminating the suspension.

2. Case: Richard Ernest Lee #OPL-89-39.

Lee continued to dispense prescription drugs while on suspension.

Penalty: Revocation held in abeyance in favor of one-year suspension and probation. Supervision terminated before expiration of one year.

3. Case: H. John March #OPL-88-78.

March distributed cocaine to practitioners without

documenting transfer on DEA Order Forms between 1982 and 1987; he also acknowledged some 20 other violations including one third degree felony of forged prescription for a controlled substance.

Penalty: License suspended for 70 days and denied ability to dispense drugs or have access to drugs, but could work otherwise as a pharmacist.

4. Case: Robert Riches Hunter #OPL-88-29.

Hunter admitted having over billed Medicaid for prescriptions on 12 occasions for three different customers, and pleaded "no contest" to Medicaid fraud, a class B misdemeanor.

Penalty: Probation which was terminated 14 months later.

5. Case: Donald Albert Truman, et al. #OPL-88-41.

Respondents dispensed 3,964 doses of Fiorinal to one customer over an 18 month period, many of which were unauthorized refills.

Penalty: Three years probation.

6. Case: Bruce Alan Danjanovich #OPL-86-13.

Respondent brought doses of Tiunol, Ritalin, Numbutal, Opium and Cocaine from a pharmacy in New Mexico to his residence in Utah and distributed them to a person to sell to the public. He entered pleas of guilty to two Class A misdemeanors.

Penalty: License suspended for three months.

7. Case: Jimmie N. Anderson #OPL-87-113.

Respondent dispensed Tylenol #3 to a customer without physicians authorization on 35 occasions and using fictitious prescriptions. He entered a guilty plea in federal court for

unlawful distribution of a controlled substance.

Penalty: One year probation.

8. Case: Dale D. Bain, et al. #OPL-89-26.

Respondents made false medicaid claims and entered pleas of guilty to a Class B Misdemeanor.

Penalty: Probation 10 months.

9. Case: Randy T. Tippetts #OPL-88-79.

Tippetts personally used Didrex from store inventory which was discovered during audits in 1988 showing 2,124 tablets missing from inventory. Tippetts acknowledged a drug problem.

Penalty: 6 months suspension, with 3 months stayed; 5 years probation.

10. Case: Clyde Hans Nielsen #OPL-87-82.

Nielsen on several occasions dispenses Limbitrol, Zylorin, Soma, Elavil and Darvacet to two different customers without practitioners's authorization to do so, and in three instances created false prescriptions.

Penalty: Three years probation.

Addressing Pickett's claim that the revocation penalty was too severe, the Executive Director wrote: (R 5-6)

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.

The Executive Director then referred to the cases cited by Pickett which the Agency had previously brought against other

pharmacists with penalties which were less than revocation and noted that the cases were somewhat old, the most recent being three years old. He then briefly referred to other cases not cited by Pickett: a 1985, indefinite suspension by stipulation; a 1986 default revocation of a pharmacist; and a 1988 case of a pharmacist's license suspended by stipulation. The Executive Director then stated: "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." (R 7).

Demeanor may be of some value in assessing truth of statements in preparation of Findings of Fact, although in some instances observation of demeanor, or a person whose appearance does not impress a finder favorably, results in unfair discrimination. There should have been nothing in the observation of demeanor that should have bolstered the penalty above that which the written findings would suggest. The written findings related to one customer possessing a prescription for tranquilizers, non-hardcore drugs, which were refilled mostly with oral approval of the physician at one clinic. It is difficult to imagine that observation of Pickett's demeanor, in testifying as set forth in the transcript, could be so construed as to justify revocation "to protect the public health, safety

and welfare." The "Board Finding" essentially negated public harm in paragraph 4 of its findings:

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."

(R 37).

To be upheld on appeal, where the agency action is contrary to the agency's prior practice, the agency must justify "the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency." A reference to Pickett's demeanor is not sufficient justification for the penalty imposed.

II. THERE WAS NO BOARD CONCURRENCE WITH THE DIRECTOR'S WRITTEN ORDER.

Utah Code Ann. § 58-1-16(2)(c) (1988) requires concurrence with the "appropriate board" of the director's written order:

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

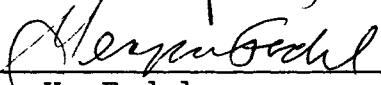
Neither the Order of the Executive Director dated July 30, 1992 (R 8) nor the Order of the director of the division of Occupational & Professional Licensing dated June 24, 1992 (R 34), indicated any concurrence by the State Board of Pharmacy, the appropriate board. Although the written Findings of Fact, Conclusions of Law and Recommended Order are prefaced as being

"By the Board" there is no signature of anyone appended thereto (R 35-43). In any event Utah Code Ann. § 58-1-16(2)(b) states that: "(b) The presiding officer shall make written recommendations for action, findings of fact and conclusions of law."

CONCLUSION

The cause should be remanded to the Agency to eliminate the revocation portion of the Order.

Dated this 30th day of November, 1992.

Respectfully


George K. Fadel
Attorney for Petitioners

**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

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
AND THE LICENSES OF
SERVUS DRUG CO.
AS A PHARMACY AND AS A DISPENSARY
FOR CONTROLLED SUBSTANCES IN
THE STATE OF UTAH

**FINDINGS OF FACT
CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

Case No. OPL-92-6

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.

Schrive 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
Carol W. Inglesby
Administrative Assistant