

BEFORE THE INDIANA
BOARD OF PHARMACY
2013 IBP 0083

IN THE MATTER OF THE INDIANA
NON-RESIDENT PHARMACY PERMIT OF:

PARK AND KING PHARMACY, INC.,
PERMIT NUMBER: 64000990A

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FILED

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Indiana Professional
Licensing Agency

**RULING ON "PARK AND KING PHARMACY INC.'S MOTION TO SET ASIDE
DEFAULT AND MODIFY/RECONSIDER REVOCATION OF PHARMACY
PERMIT AND IN THE ALTERNATIVE NOTICE OF APPEAL"**

On November 4, 2013, the Indiana Board of Pharmacy ("Board") heard argument from Darren Covington, Deputy Attorney General and Randall Fearnow, attorney for Park and King Pharmacy, Inc. ("Park"), on "Park and King Pharmacy Inc.'s Motion to Set Aside Default and Modify/Reconsider Revocation of Pharmacy Permit and in the Alternative Notice of Appeal." After considering the presentations of counsel, the Board voted 6 to 0 to deny Park's motion for the following reasons.

DISCUSSION

Procedural History

The Board issues permits to pharmacies (non-resident pharmacies) that ship drugs to Indiana residents. Ind. Code § 25-26-17. The Board issued a permit to Park on July 27, 2009.

In 2012, a non-resident pharmacy (New England Compounding Center) distributed drugs in this state that killed ten Indiana citizens and dozens of others nationwide. In an effort to prevent this from happening again, the Board decided to gather information from all the non-resident pharmacies to which it issued permits to

discover if they used safe practices in storing, shipping, or compounding drugs. Non-resident pharmacies are required by law to keep the Board informed of their address.

A nonresident pharmacy must register with the board. To register with the board, a nonresident pharmacy must submit the following to the board: . . .

(2) The location, names, and titles of all principal corporate officers and pharmacists who are dispensing drugs to residents of Indiana. This disclosure must be made on an annual basis. The nonresident pharmacy must notify the board within thirty (30) days after any change of office location, corporate officer, or pharmacist in charge.

Ind. Code §25-26-17-3

In November 2012, the Board sent a letter to Park asking for its last inspection report and information regarding their compounding practices. The letter was mailed to the address provided to the Board by Park but Park did not respond to it.

On or about January 16, 2013, the Board filed a consumer complaint with the Attorney General's Office alleging that Park was not complying with Indiana law, which requires it to provide information to the Board upon request. "A non-resident pharmacy must: . . . comply with all requests for information made by the board . . ." Ind. Code § 25-26-17-4. The Attorney General's Office sent a letter to Park informing it of the consumer complaint on February 1, 2013, and asked for a response. There was no response.

On July 26, 2013, the Attorney General's Office filed formal charges and sent a copy of the "Complaint" to Park at the Park Street address. The "Complaint" came back without a forwarding address and, on further investigation by the Attorney General's Office, it was discovered that Park had a new address on Oxford Avenue. The case was

set for a final hearing on August 21, 2013, and the Board sent notice of the hearing to Oxford Avenue on August 9, 2013. The notice was not returned.

Park did not appear at the hearing and the Board issued a "Notice of Proposed Default Order" on August 23, 2013. The Board mailed the notice to the Oxford Avenue address and Park did not respond to it. At its September 9, 2013, meeting the Board noted that Park did not respond to the "Notice of Proposed Default Order" and conducted further proceedings as allowed by statute. Ind. Code § 4-21.5-3-24(d). The Board issued an Order of Default, took evidence about Park, and decided to revoke the permit because the Board could not assure itself that Park was following safe practices. The Board mailed out "Findings of Fact, Ultimate Findings of Fact, Conclusions of Law and Order" ("Findings") on September 13, 2013, to the Oxford Avenue address as well as to Park's Florida attorney, Martin Dix.

Park variously maintains that it received the "Notice of Proposed Default" on September 5 or 6, 2013,¹ and mailed a "Motion to Set Aside Default Order" on September 10, 2013 (file stamped September 11th). As noted above, the Board had already made its decision by the 10th and the written Findings were mailed on the 13th. On September 18, 2013, Park filed its Motion to Set Aside and Modify.

The Board met on October 7, 2013, but Park's Motion to Set Aside and Modify was not on the agenda. Neither party asked that the argument be heard in October and the case was considered at the following monthly Board meeting on November 4, 2013.

¹ In an affidavit from the pharmacist at Park, it is alleged the notice was not received "prior to September 5, 2013". In the Motion to Set Aside and Modify, counsel states it was received on the 5th. In the "Motion to

Legal Considerations

The Administrative Orders and Procedures Act provides that a party must respond to a notice of proposed default in writing within 7 days (plus 3 for mailing) and if it does not do so, the Board *shall* issue a default order. "If the party has failed to file a written motion under subsection (b), the administrative law judge shall issue the default or dismissal order." Ind. Code § 4-21.5-3-24(c). Our Supreme Court has observed that issuing the default order is mandatory.

It is apparent that the legislature had foreseen that a person may not wish to respond, for it has declared that if a party has failed to file a written motion under subsection (b), the administrative law judge *shall* issue the default or dismissal order. Ind. Code Ann. § 4-21.5-3-24(c)(2002).

We have customarily regarded shall as imposing a mandatory obligation. . . . It was well within the Breitweiser's right to decide not to reply to the proposed notice of default, as they suggest. Judge Penrod, on the other hand, was compelled by statute to issue a default ruling against the Breitweisers when they did not submit a response to the proposed notice of default within seven days.

Breitweiser v. Indiana Office of Environmental Adjudication, 810 N.E.2d 699, 703 (Ind.2004)

As is the practice of the Board, immediately after it defaulted Park, it took evidence and decided upon a final resolution which it served (mailed) on September 13, 2013.

Once the final order is mailed out, the Board continues to have jurisdiction over the matter until the Respondent has filed a judicial review or thirty days has expired, whichever period of time is shorter. Ind. Code § 4-21.5-3-31(a). Those time periods are

Set Aside Default Order" counsel alleges it was the 6th. Park did not keep the envelope that contained the

not flexible. "An action of a petitioning party or an agency under this section neither tolls the period in which a party may object to a second agency under section 30 of this chapter nor tolls the period in which a party may petition for judicial review under IC 4-21.5-5." Ind. Code § 4-21.5-3-31(e).

Simply seeking relief from the Board during the thirty day time period, as happened here, does not stop the period of time from running.

As we stated above, the Board's August 1, 1994, order was a final order subject to judicial review. Although Bowman had the option of filing a motion to correct clerical mistake or other error rather than a petition for judicial review, I.C. § 4-21.5-3-31(e) makes it clear that filing a motion does not alter the time limits for filing a petition for judicial review.

Bowman v. Indiana State Bd. of Nursing, 663 N.E.2d 1217, 1220 (Ind.Ct.App.1996).

ORDER

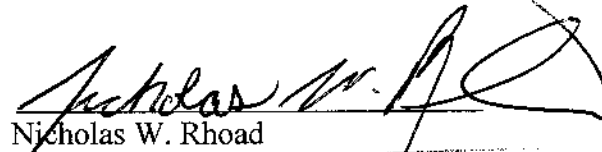
Park had a permit to ship potentially dangerous substances into this state but violated Indiana law by not providing the licensing authorities with its' proper address. It then ignored an order to appear at an administrative hearing. Subsequently, it failed to respond to a notice of proposed default in a timely manner. And finally, even if the Board were inclined to grant Park any relief, the time period in which it could do so has run.

For the foregoing reasons, and to whatever extent the Board does have jurisdiction to rule on this matter, Park's request is **DENIED**.

SO ORDERED, this 22nd day of November, 2013.

INDIANA BOARD OF PHARMACY

By:


Nicholas W. Rhoad
Executive Director
Indiana Professional Licensing Agency

CERTIFICATE OF SERVICE

I certify that a copy of the "Ruling on Park and King Pharmacy Inc.'s Motion to Set Aside Default and Modify/Reconsider Revocation of Pharmacy Permit and in the Alternative Notice of Appeal" has been duly served upon:

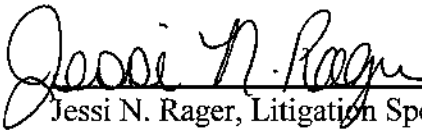
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Explanation of Service Methods

Personal Service: by delivering a true copy of the aforesaid document(s) personally.

Service by U.S. Mail: by serving a true copy of the aforesaid document(s) by First Class U.S. Mail, postage prepaid.

Service by Email: by sending a true copy of the aforesaid document(s) to the individual's electronic mail address.