

**STATE OF NEW HAMPSHIRE
OFFICE OF PROFESSIONAL
LICENSURE AND CERTIFICATION**

BOARD OF PHARMACY

**In Re: Rite Aid Pharmacy- 1631 Elm Street,
Manchester, New Hampshire,
Permit # 0522**

Docket No.: 24-PHARM-002

NOTICE OF DECISION DATED 2/27/2024

Enclosed please find a copy of the Board's Order dated 2/27/2024 relative to:

HEARING FINAL DECISION AND ORDER

MOTIONS/PETITIONS FOR RECONSIDERATION OR REHEARING:

Pursuant to N.H. Code Admin. R. Plc 206.29(a) ("Rules") and RSA 310:14, II, motions/petitions for reconsideration or rehearing shall be filed within 30 calendar days after service of a final adjudicative order. Pursuant to Rule 206.29(b), the Motion/Petition shall: 1) clearly identify points of law or fact that the movant asserts the Board and/or Presiding Officer has overlooked or misapprehended; 2) contain such argument in support of the motion as the movant desires to present; and 3) be served by the movant on all other participants in accordance with Rule 206.11. Pursuant to Rule 206.29, no answer to a motion/petition for reconsideration or rehearing shall be required, but any answer or objection filed shall be delivered to the Presiding Officer's Office within 5 working days following receipt of service of the motion/petition for reconsideration. Pursuant to RSA 541:5, upon the filing of such motion/petition for rehearing or reconsideration, the Board or Presiding Officer shall within ten days either grant or deny the same, or suspend the order or decision complained of pending further consideration, and any order of suspension may be upon such terms and conditions as the Board or Presiding Officer may prescribe.

RIGHT TO APPEAL:

Pursuant to RSA 310:14, III, appeals from a decision on a rehearing and/or motion for reconsideration shall be by appeal to the New Hampshire Supreme Court pursuant to RSA 541. Pursuant to RSA 541:6, within 30 days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the New Hampshire Supreme Court. Pursuant to RSA 310:14, III, no sanction shall be stayed by the Board during an appeal.

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Permit # 0522**

Docket No.: 24-PHARM-002

FINAL DECISION AND ORDER – 02/21/24

I. PARTICIPANTS:

Board Members and Support Staff and Counsel:

David A. Rochefort, Board President and Member
Lindsey L. Laliberte, Board Vice President and Member
Carl Peicker, Board Secretary and Member
Purvi Patel, Board Member
Eric Lessard, Board Member
Robert Theriault, Board Member

Alexander Fisher, OPLC Board Administrator
Carson Hansford, OPLC Board Administrator
Cassandra Brown, OPLC Board Counsel

Presiding Officer:

Attorney Nikolas Frye, OPLC Hearings Examiner

Parties:

Collin Phillips, Esq., Hearing Counsel
Brian Quirk, Esq., Counsel for the Permittee
Rite Aid, Permittee

II. CASE SUMMARY/PROCEDURAL HISTORY:

On or about 01/10/2024, the Office of Professional Licensure and Certification, Division of Enforcement (“OPLC Enforcement”) sent the New Hampshire Board of Pharmacy (“Board”) a

Confidential Memo pertaining to Rite Aid Pharmacy-1631 Elm Street, Manchester, New Hampshire (“Permittee”) discussing ongoing concerns with flooding in its building. After investigation, the Board voted to initiate a disciplinary adjudicative proceeding in this matter. A final hearing in this matter was held on 02/21/24. This final decision and order follows.

III. SUMMARY OF THE PROPOSED EVIDENCE AND EVIDENTIARY RULINGS:

The Board received the following evidence pursuant to RSA 541-A:33 and Plc Rules 206.22 and 206.18(d):

A. Exhibits were submitted by Hearing Counsel, numbered as follows:

1. Inspector Simoneau Confidential Memo, dated January 10, 2024 (Bates #HC001-002);
2. Attachment 1: Drive Through Log (Bates #HC003-008);
3. Attachment 2: Photograph: Brown Spots on Ceiling (Bates #HC009);
4. Attachment 3: Photograph: Gutter Drainage Photograph (Bates #HC010);
5. Attachment 4: Photograph: No visible water pooling outside drive-thru. Gutter improvements visible. (Bates #HC011);
6. Attachment 5: Video of carpet saturation, dated January 10, 2024 (Video Exhibit; 01:58 run time) (Bates #HC012-013);
7. Attachment 6: Video of carpet saturation, dated January 10, 2024 (Video Exhibit; 00:18 run time) (Bates #HC012; 014);
8. Settlement Agreement, dated May 17, 2023. (Bates #HC015-024).

B. Exhibits were submitted by the Permittee and labeled as follows:

- A. Work Orders of remedial repairs performed at the store located at 1631 Elm Street, Manchester, New Hampshire;
- B. Photograph of inside view of Pharmacy Drive-Thru;
- C. Engineering Report of Bureau Veritas dated February 20, 2024; and
- D. Mold Remediation Report

C. Sworn testimony was received from:

1. Kaitlyn Simoneau, OPLC – Chief Pharmacy Inspector (via offer of proof)(called by Hearing Counsel
2. Viral Shah (via offer of proof)(called by Permittee)
3. Sarah Corpe (via offer of proof) (called by Permittee)
4. Catherine Barnes (via offer of proof) (called by Permittee)

The Presiding Officer fully admitted all exhibits by agreement of the parties.

IV. CONDUCT OF THE HEARING AND EVIDENCE PRESENTED:

The hearing was held pursuant to RSA 310:10 with the burden of proof, by a preponderance of the evidence, placed upon Hearing Counsel. *See* Rule 206.07(e). The issues before the Board were:

- (1) Whether or not the Permittee committed professional misconduct as defined at Ph 2201.01(k) by allegedly violating any of the terms of the Settlement Agreement in Docket #23-Pharm-006.
- (2) Whether or not the Permittee committed professional misconduct as defined at Ph 2201.01(k) by, after approval of the aforementioned settlement agreement, allegedly having conditions on its premises that compromised the safety of medications, patients, and/or pharmacy staff.
- (3) If a finding of misconduct is made pursuant to RSA 318:29, II(a), what if any disciplinary action the Board should take in accordance with RSA 318:29, II(a) and/or RSA 310:12.

NOH at II(c).

The Board then heard evidence related to these inquiries as summarized below.

HEARING COUNSEL'S CASE-IN-CHIEF:

Offer of Proof from Hearing Counsel (Kaitlyn Simoneau):

Ms. Simoneau verified that the report she submitted to the Board on 01/10/24 was true and accurate to the best of her knowledge and belief. According to the offer of proof, she inspected the Permittee's pharmacy in January of 2024 and found the drive thru area to be wet. While there, Ms. Simoneau reviewed a logbook kept by the Permittee that showed the various times that the drive thru area at the pharmacy had been wet. The offer of proof explained that Ms. Simoneau had not been notified of all the times that the drive thru area was wet. She also took video recordings of the area during her inspection, which shows the area was wet.

On cross examination, Ms. Simoneau acknowledged the wet area was limited to the drive thru; the Permittee has since shut off the drive thru area with a metal shutter; the Permittee has sought and obtained an engineer's report to address the wetness in the drive thru; and the Permittee is committed to moving

forward with the engineer's suggestions to fix the issue. When questioned by the Board she stated she had not seen the drive thru area with the metal shutter completely down, but reviewed it in Exhibit B.

PERMITTEE'S CASE-IN-CHIEF:

The Permittee acknowledged there were some issues with timely reports of leaks to the Board but otherwise felt it had followed the requirements of the May 2023 Settlement Agreement. It noted that there was a misunderstanding about how to handle the reports after OPLC Inspector Croteau went on a leave absence. The Permittee reviewed all the steps it had taken to address the wetness issue in its drive thru since implementation of the settlement agreement. It explained that even after these steps, it was still experiencing problems. Consequently, it hired an engineer who created a report for it to follow in rectifying the underlying water issue. The Permittee also said that it had a mold remediation expert test the area to ensure there was no mold issue. According to the offer of proof, the expert found no sign of observable mold. The Permittee reaffirmed its commitment to addressing the wetness in the drive thru area and keeping the area closed off until it was fixed.

Hearing Counsel and the Board had extensive questioning for the Permittee's representatives relating to the log documenting days when the drive thru was wet. Most of these questions focused on why it took so long for the Permittee to report some of the entries to the Board and OPLC.

V. DISCUSSION, FINDINGS OF FACTS, AND CONCLUSIONS OF LAW:

Based upon the evidence that was presented to the Board at the hearing, and considering the presentation and demeanor of all the witness, the Board makes the following findings of facts:

1. Rite Aid Pharmacy ("Rite Aid"), operating at 1631 Elm Street, Manchester, NH, is a licensed pharmacy under permit number 0522.
2. Rite Aid was subject to prior disciplinary proceedings in docket number 23-PHARM-006.
3. Rite Aid entered into a Settlement Agreement on 5/17/2023 to resolve that matter.
4. The Board takes administrative notice of the entirety of the 2023 Settlement Agreement.

5. The facts contained in paragraph 6 of the Settlement Agreement are incorporated by reference herein in their entirety.
6. Rite Aid, pursuant to the 2023 Settlement Agreement, consented to discipline and penalties, including operation under a restricted permit and payment of an administrative fine.
7. On or about June of 2023, Rite Aid engaged Bureau Veritas, a civil engineering firm, to perform a Civil and Water Intrusion Assessment (“2023 Assessment”).
8. Rite Aid acted upon some, but not all, of the recommendations of the 2023 Assessment to address the water intrusion.
9. Rite Aid did not timely notify OPLC and the Board regarding every incident of water intrusion in the drive-thru area.
10. Rite Aid failed to immediately notify OPLC Enforcement and the Board as required by the 2023 Settlement Agreement regarding water intrusion in the drive-thru area on the following dates:
 - i. 9/10/2023
 - ii. 9/11/2023
 - iii. 10/30/2023
 - iv. 12/4/2023
 - v. 12/11/2023
 - vi. 12/28/2023
 - vii. 1/26/2023
 - viii. 1/29/2024
 - ix. 2/1/2024
 - x. 2/8/2024
11. On 12/19/2023, Rite Aid notified the Board Administrator of continued water intrusion and plans to remedy the issues.
12. On 1/10/2024, Inspector Kaitlyn Simoneau conducted an unannounced inspection following a rain event as required by the 2023 Settlement Agreement.
13. Inspector Simoneau discovered the carpet in the drive-thru area was wet, indicating continued water intrusion into the building, and was provided Rite Aid’s record recording ongoing water intrusion into the drive-thru area.

14. Rite Aid engaged Bureau Veritas to complete an additional Civil and Water Intrusion Assessment (“2024 Assessment”).
15. The issues of water intrusion at the drive-thru area have improved but are not up to acceptable industry standards.
16. On February 14, 2024, Rite Aid conducted an air quality test and confirmed that the air contains no evidence of mold growth.

Based upon the findings of fact made by the Board, the Presiding Officer makes the following conclusions of law and renders the following legal opinion:

1. Hearing Counsel established, by a preponderance of the evidence, that the Permittee committed professional misconduct as defined at Ph 2201.01(k) by violating paragraph 8.b.5 of the Settlement Agreement in Docket #23-Pharm-006.
2. Hearing Counsel failed to establish, by a preponderance of the evidence, that the Permittee committed professional misconduct as defined at Ph 2201.01(k) by, after approval of the aforementioned settlement agreement, having conditions on its premises that compromised the safety of medications, patients, and/or pharmacy staff.

Upon a finding of misconduct made pursuant to Ph 2201.01(k), the Board imposes the following disciplinary action against the Permittee pursuant to RSA 318:29, II(a) and RSA 310:12:

1. Pursuant to RSA 310:12, I(a), the Permittee is **REPRIMANDED**.
2. Pursuant to RSA 310:12, I(d), the Permittee’s permit is **RESTRICTED** subject to the following terms and conditions:
 - a. Permittee’s permit is restricted for a period of two (2) years (the “Restriction Period”) beginning on the date of the issuance of the Final Order.
 - b. Permittee shall be subject to at least eight (8) unannounced inspections during the Restriction Period, including at least two (2) inspections after a rain event.
 - c. Permittee shall have conducted a mold assessment of the pharmacy area, including the internal drive-thru area, on at least a quarterly basis during the Restriction Period and provide the results of each such assessment to the Board and OPLC Enforcement (specifically Inspector Kaitlyn Simoneau or her designee).
 - d. Permittee shall immediately report any leaks, flooding, or other possible moisture or mold contamination to the Board and OPLC Enforcement (specifically Inspector Kaitlyn

Simoneau or her designee). Permittee shall thereafter immediately cooperate with any operational and safety recommendations made by OPLC Enforcement.

- e. Within six (6) months of the date of the Final Order, Permittee shall complete recommendations made by Bureau Veritas in the 2024 Assessment. Permittee shall provide a written monthly status report concerning the implementation of recommendations to the Board and OPLC Enforcement (specifically Inspector Kaitlyn Simoneau or her designee). Should the completion of certain recommendations result in no further water intrusion as determined in writing by Bureau Veritas or other civil engineer or upon completion of all recommendations, the Permittee shall notify in writing the Board through OPLC Board Administration and OPLC Enforcement (specifically Inspector Kaitlyn Simoneau or her designee). The Permittee may request an RSA 310:10 hearing before the Board for an extension of time to complete recommendations. The Board shall grant a request for an extension of time if the Permittee can demonstrate by a preponderance of the evidence that delay was due to circumstances outside of the Permittee's control.
 - f. A representative of the Permittee shall appear at monthly Board meetings for the first six (6) months after the date of the Final Order and thereafter shall appear quarterly before the Board to provide information on compliance with the 2023 Settlement Agreement, this Final Order, and progress in implementing the 2024 Assessment recommendations.
 - g. Failure to timely complete recommendations from the 2024 Assessment or failure to abide by terms of the Final Order or any other additional finding of misconduct during the Restriction Period shall result in the Board imposing some or all of the remaining balance of the stayed administrative fine assessed by the 2023 Settlement Agreement in the amount of seventy-five thousand dollars (\$75,000.00).
 - h. Permittee shall cease operation of the drive-thru window until recommendations made by Michael Young of Bureau Veritas have been complete consistent with Paragraph 2.e. above, and an OPLC inspector inspects the drive-thru location immediately following a rain event.
3. Pursuant to RSA 310:12, I(e), the Permittee pay an **ADMINISTRATIVE FINE** in the amount of **five thousand dollars (\$5,000.00)** representing ten days of failing to immediately report any leaks, flooding, or other possible moisture or mold contamination occurring between May 17, 2024 to

February 21, 2024, assessed at **five hundred dollars (\$500.00)** per day. **Five thousand dollars (\$5,000.00)** is due and payable within thirty (30) days from the date of the Final Order.

4. Pursuant to RSA 332-G:11, the Permittee pay the **COSTS OF INVESTIGATION AND PROSECUTION** in the amount of **two thousand dollars (\$2,000.00)** which is due and payable within thirty (30) days from the date of the Final Order.
5. Except as specified by the terms of the Final Order, all sanctions and terms agreed upon and imposed by Consent Order by the 2023 Settlement Agreement remain in full force and effect.
6. If the Permittee fails to comply with any terms or conditions imposed by this Final Order, said failure shall constitute misconduct, and a separate and sufficient basis for further disciplinary action by the Board against the Permittee.
7. The Permittee is subject to the above-reference discipline as the minimum sanction that the Board believes will, based on the facts and circumstances of this particular case, both protect the public and deter the Permittee from engaging in such misconduct in the future.

VI. CONCLUSION AND DECISION:

Pursuant to RSA 310:10 and RSA 326-B:37., the Presiding Officer and Board hereby makes the herein findings of professional misconduct and imposes the stated sanctions.

DATED: 2/27/2024

_____/s/ Nikolas K. Frye, Presiding Officer _____
Presiding Officer
New Hampshire Office of
Professional Licensure & Certification
7 Eagle Square
Concord, NH 03301