

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD)
OF PHARMACY,)
)
Petitioner,)
)
vs.) Case No. 00-2211
)
ROBERT G. McLESTER, III, R.PH.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on September 20-21, 2000, at Fort Pierce, Florida, before Florence Snyder Rivas, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Lawrence F. Kranert, Jr., Esquire
Department of Health
2727 Mahan Drive
Tallahassee, Florida 32317

For Respondent: Kevin S. Doty, Esquire
Hatch & Doty, P.A.
1701 Highway A1A, Suite 220
Vero Beach, Florida 32963

STATEMENT OF THE ISSUE

At issue is whether Respondent committed the offenses set forth in the Administrative Complaint dated March 3, 2000, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

At the commencement of the hearing, Respondent's counsel invoked the Rule and also moved to exclude witnesses from the hearing room, in advance of the commencement of testimony. Counsel represented to the undersigned that in St. Lucie County, it was customary to exclude witnesses from preliminary legal argument and opening statements. The motion to exclude witnesses from the hearing room prior to the commencement of testimony was denied. The motion to invoke the Rule was granted without objection.

Respondent also renewed his motion to strike unidentified witnesses originally filed on September 11, 2000. This motion was denied without prejudice to object to specific witnesses as they were called.

At hearing, the Department of Health ("Department") called Respondent as a hostile witness; Detective Scott Silverman, Robert Blakely,¹ Robert Steve Howard, Jr., the complaining witness, and Daryl Fruth.

Respondent called Phil Monaco and Ava Forsythe, and testified in his own behalf.

During the hearing, an incident occurred which should not pass unremarked. According to Ava Forsythe's unrebutted testimony, while waiting to testify at the final hearing, witnesses were engaged, "in idle conversation without talking

about the case or whatever and something was brought up in a very light manner and he [Howard] referred to me as being a traitor. And I didn't like that very much. . . . He said it in a kind of giggly way. 'Oh, you're here for Bob. You're a traitor.' And then he just kind of giggled. And I'm like, what am I supposed to do. You know, I kind of took offense to that. I thought it was very unprofessional and improper."

The Department made no effort to explain or refute this allegation.

Howard's comments to Forsythe can most charitably be described as infantile. While Howard's feelings toward McLester, if any, are utterly irrelevant to the question of whether McLester violated any statute or rule governing the practice of pharmacy, it is profoundly disturbing that Ms. Forsythe, or any witness in a proceeding of this seriousness, should be subjected to an intimation that she has committed an act of treachery to her employer by discharging a fundamental duty of citizenship--to respond to a subpoena or request to attend and testify under oath in an administrative or judicial proceeding.

Department presented Exhibits numbered 2-6, which were entered without objection. Exhibit 1, Detective Silverman's report, and Exhibit 7, the Department's investigative report compiled by Fruth, were objected to only as to the annexed

records of Winn-Dixie, which Respondent argued did not qualify under the business record exception to the hearsay rule. The undersigned overruled the objection and received the exhibits into evidence. Respondent's Exhibits numbered 1 and 2 were received into evidence with no objection.

At the close of the Department's evidence and at the close of the case, Respondent moved to dismiss for failure to prove the charges by clear and convincing evidence. Those motions were denied without prejudice.

At the conclusion of the hearing, pursuant to Rule 28-106.216, Florida Administrative Code, the undersigned offered the parties the opportunity to submit a Proposed Recommended Order no later than ten days after the filing of the hearing transcript. The transcript was filed with the Division on October 20, 2000. Neither party timely filed a Proposed Recommended Order, nor did either party seek an enlargement of time to file pursuant to Rule 28-106.204(5).

On November 2, 2000, Respondent's counsel wrote to the undersigned requesting an additional ten days in which to submit a Proposed Recommended Order and stated his "intention" to provide a Proposed Recommended Order no later than Friday November 10, 2000, a legal holiday.

Even if the undersigned were to treat this letter as a timely motion for enlargement of time, which it is not, the

enlargement should not be granted. The Rule requires a showing of good cause in support of a request to enlarge time. In his letter, Respondent's counsel failed to even attempt to make a showing of good cause. Accordingly, if and when Respondent files a Proposed Recommended Order, it will not be considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent, Robert Gibson McLester, III ("McLester") is a licensed pharmacist with a heretofore unblemished record.

2. McLester graduated from the University of Florida with a degree in pharmacy in August 1977.

3. He was licensed by the State of Florida to practice pharmacy in February 1978.

4. He currently holds an Alabama pharmacy license, and was previously licensed in Mississippi but at some point ceased to pay the state's licensing fee; the license thus lapsed by operation of law.

5. McLester received a Master of Science degree in hospital pharmacy from the University of Mississippi in December 1987 and a Master of Health Care Administration from the same institution the following May.

6. McLester entered the Navy as an aviator cadet in June 1965, and was commissioned as a naval aviator in February 1967.

He flew 103 missions with Attack Squadron 147 and was honorably discharged as a lieutenant in December 1970.

7. Following a brief stint in the insurance and investment business, McLester applied unsuccessfully to medical school.

8. McLester entered the University of Florida's pharmacy school in September 1974 and following his graduation in August 1977, has been continuously employed as a pharmacist when not pursuing advanced degrees in pharmacy and related fields.

9. Much of McLester's pharmacy employment has been in the Navy, which he reentered in February 1978 as an ensign in the Medical Service Corps.

10. McLester served in a variety of posts before retiring as a lieutenant commander in August 1992, including at the National Naval Medical Center in Bethesda, Maryland, where he supervised in excess of 25 pharmacists and pharmacy technicians in the preparation of an average of 1600 outpatient prescriptions per day.

11. McLester continued the practice of pharmacy as a civilian, working briefly as a relief pharmacist for the Eckerd Drug chain in the Vero Beach area before being hired full time by Winn-Dixie in August 1992.

12. Under McLester's supervision, Store No. 2358 enjoyed high sales volume and was used as a training site for other Winn-Dixie pharmacies.

13. At all times during McLester's employment at Winn-Dixie, reports of annual inspections of his pharmacy conducted by the Agency for Health Care Administration ("AHCA") pursuant to law showed no deficiencies of any kind.

14. McLester worked at the Winn-Dixie Store No. 2358 until June 17, 1998.

15. McLester's separation from Winn-Dixie was voluntary.

16. McLester left Winn-Dixie because he considered the hours assigned to him by his new supervisor, Steve Howard ("Howard") to be "slave hours."

17. Following McLester's departure, sales and customer satisfaction at Store No. 2358 deteriorated.

18. For most of the time relevant to this case, McLester was responsible for filling in the neighborhood of 150 prescriptions per day.

19. That number placed his store at the high end of Winn-Dixie pharmacy productivity. 3 During the course of his employment at Winn-Dixie, McLester had occasion to report approximately a dozen instances of prescription drug fraud to the authorities, including St. Lucie County Detective Scott Silverman (Silverman).

20. Following his resignation from Winn-Dixie, McLester worked briefly with various services which would find him work as a relief pharmacist.

21. On the instructions of Howard, McLester was not permitted to work at any of the Winn-Dixie stores in the area.

22. In October 1998, McLester found full-time employment with Doctors' Clinic Pharmacy in Vero Beach, a "closed pharmacy" which serves only the patients of that multi-specialty practice.

23. During his term of employment at Winn-Dixie, McLester was assisted by about a half dozen pharmacy technicians.

24. Pharmacy technicians are licensed by the state and must work under the close supervision of a registered pharmacist.

25. Tasks which the law permits to be delegated to pharmacy technicians and which, in fact, are typically delegated to a pharmacy technician include ordering drugs, including controlled substances; receiving drugs and other inventory; counting and transferring drugs from their original containers to packages for individual prescriptions; shelf maintenance; department maintenance; and stocking shelves.

26. Other tasks which pharmacy technicians may legally perform, and which were in fact performed by technicians at Winn-Dixie stores, include logging invoices into the computer system for payment; verifying orders shipped into the store; answering telephones; taking refills from patients or doctors provided that there is no change in any element of the prescription (i.e. instructions to the patient, dosage, etc.);

requests to doctors to issue new prescriptions on behalf of a patient; preparing labels and delivering filled prescriptions to the pharmacist for final verification.

27. Because of the nature of the tasks delegated to pharmacy technicians, the relationship between pharmacist and technician must be one of, as several witnesses testified, implicit trust.

28. McLester trusted all of the pharmacy technicians with whom he worked at Winn-Dixie.

29. One of the Winn-Dixie pharmacy technicians, Tonya Tipton ("Tipton") betrayed McLester's trust, along with the trust of the State of Florida which licensed her, Winn-Dixie which employed her, and several other pharmacists under whose supervision she worked.

30. Weeks after McLester left Winn-Dixie, Tipton's betrayal of trust was discovered. Soon after, she was fired from Winn-Dixie and subsequently arrested for crimes she allegedly committed in and against the Winn-Dixie pharmacy.

31. Tipton's arrest set in motion a chain of events which led to this Administrative Complaint.

32. Following a work-related injury suffered in the early 1990s, Tipton developed a dependence upon prescription painkilling medication, including the narcotic nasal spray Stadol.⁴

33. Unbeknownst to anyone, Tipton devised a scheme by which she could steal Stadol from Winn-Dixie, and also obtain Stadol under a forged prescription.

34. At all times prior to Tipton's firing from Winn-Dixie, she was a trusted employee.

35. Tipton fell under suspicion when she stated to a co-worker that a package would be arriving the following day and that it should not be opened.

36. Store employees opened the package nevertheless and discovered it contained Stadol.

37. Thereafter, a fellow pharmacy technician followed Tipton into the ladies' room and discovered empty bottles of Stadol in the wastebasket.

38. Confronted by store employees about her inappropriate instruction to the co-worker not to open the package, as well as the empty Stadol containers in the ladies' room, Tipton admitted only to taking one bottle of Stadol from the Winn-Dixie pharmacy.

39. Abundant circumstantial evidence suggests that Tipton's dependence upon Stadol led her to commit more than the one offense to which she admitted.

40. McLester had been the primary pharmacist on duty at Store No. 2358 during many of the shifts when Tipton was alleged to have illegally obtained Stadol.

41. Following a criminal investigation by Detective Silverman and the arrest of Tipton, McLester's former supervisor, Howard, lodged a complaint against McLester with the Board of Pharmacy.

42. In his letter of complaint, Howard characterized his complaint as an effort to protect the interests of Winn-Dixie "in case this problem was found out."

43. Howard claimed that Mostafa Macida ("Macida"), who had replaced McLester as the store's primary pharmacist, "discovered" that Stadol was being stolen from the pharmacy but this testimony is rejected as inconsistent with the testimony of numerous individuals who, unlike Howard, had personal knowledge of the events surrounding Tipton's arrest.

44. Macida suspected nothing and discovered nothing.

45. Tipton's employment at Winn-Dixie began in February 1995 when she was hired as a pharmacy technician by McLester.⁵

46. In that capacity, Tipton worked not only with McLester, but also with then-Head Technician Ava Forsythe (Forsythe).

47. Forsythe trained Tipton in the technicians' duties, including the various methods by which prescription drugs, both controlled and non-controlled, may be ordered.

48. At all times relevant to this case, there are three ways in which Winn-Dixie pharmacies may procure drugs and

medical supplies requiring prescriptions for resale to the public.

49. The primary system is a computer-generated daily order.

50. The system was referred to by many witnesses as "the PDX system" ("PDX").

51. Technicians, working under the supervision of the pharmacist, would review the order to verify that the required types and quantities of supplies were being ordered.

52. When the order was deemed complete, "the button was pushed" and the order electronically transmitted to Winn-Dixie's major drug supplier, Bindley-Western.⁶

53. In theory, the computer would accurately track stock in over 2,000 line items.

54. The computer was supposed to automatically add to the inventory based upon what was ordered, and subtract based upon records of what was actually dispensed to customers.

55. In reality, the computer-generated inventory was corrupt on a daily basis.

56. Because of the PDX system's unreliability, technicians often had to make adjustments by hand so that the computerized records would match what was actually in stock.

57. Orders could also be manually keypunched into a unit called a Telxon, which also transmitted orders to Bindley-Western.

58. The Telxon unit is portable. The size of a telephone, the Telxon unit at Store No. 2358 was generally kept in a drawer when not being used.

59. Finally, drugs can be ordered from Bindley-Western and/or from one of two secondary suppliers used by Winn-Dixie from any telephone, whether or not the telephone is located in a Winn-Dixie store.

60. None of the systems used by Winn-Dixie, either singly or in combination, had the ability to flag the fact that hundreds of bottles of Stadol had been ordered and paid for by Winn-Dixie, yet not placed on the shelves as pharmacy inventory in Store No. 2358, during the period of Tipton's employment.

61. Under Winn-Dixie's system, it is possible for a pharmacy technician to order medications unbeknownst to the pharmacist, to have them paid for by Winn-Dixie, and to physically divert them to his possession before the medications were logged in to pharmacy inventory.

62. Once drugs are properly entered into inventory, it is reasonable to expect that the pharmacist could be aware of large amounts of a drug being stolen from the inventory.

63. Any single incident of placing unauthorized drug orders could take place in the two or three minutes the duty pharmacist might be absent to go to the restroom, or have his attention diverted for any reason.

64. Silverman is an experienced police officer, having served for over two decades in various law enforcement positions in Florida.

65. For nearly five years Silverman has been exclusively assigned to work with pharmacies and other law enforcement agencies in St. Lucie County.

66. Silverman's job is to assist in the prevention and prosecution of crimes involving the misuse of prescription drugs.

67. Silverman's involvement in this case began when Tipton sought him out.

68. Tipton knew Silverman because her husband is a fellow St. Lucie County detective, and Tipton herself was a sworn St. Lucie officer.

69. Tipton approached Silverman to confess that she had taken a bottle of Stadol from the Winn-Dixie store where she worked.

70. Tipton's confession was not provoked by an attack of conscience. Rather, after she was fired by Winn-Dixie, she began damage control.

71. As Silverman's investigation progressed, substantial effort was made to determine how Tipton had diverted Stadol and what, if any, other crimes may have been committed.

72. Documents collected in the course of the investigation revealed that Tipton had developed a dependency on prescription painkillers dating to a back injury in 1990 in which she suffered a herniated disc.

73. Tipton developed a dependency on Stadol in 1996, after dealing with pain related to the 1990 injury.

74. Tipton claimed to Winn-Dixie security supervisor Robert Blakely ("Blakely") that she had told McLester of the problem, and that he referred her to her doctor for help.

75. Ultimately, Silverman arrested Tipton on 17 counts of insurance fraud and one count of felony possession of a controlled substance.

76. No evidence was offered regarding the disposition of Tipton's case.

77. No evidence was presented of what, if any, effort was made to determine from Tipton if McLester had any complicity in her crimes.

78. It was clear to Silverman that while Tipton had figured out a way to illegally divert Stadol to her unauthorized use, as of the date of the final hearing, "nobody knows how it was done." 7

79. There was conflicting testimony as to precisely how much Stadol was diverted by Tipton over the relevant period of time but Tipton's ability to obtain the drug through the use of fraudulent prescriptions and outright theft was audacious in scale.

80. Stadol was a legend drug until June 1997 when the Drug Enforcement Agency upgraded its status to a Schedule IV controlled substance.

81. Prior to October 19, 1996, Tipton had a legitimate prescription for Stadol.

82. On that date, Les Gessley ("Gessley"), a relief pharmacist at Store No. 2358, approved a new Stadol prescription for Tipton under a legend number.

83. Tipton used this approved prescription number subsequently when she herself prepared numerous unauthorized refills under this same number.

84. Each of these unauthorized refills was listed on daily pharmacy logs certified mostly by McLester, but also by other duty pharmacists as well.

85. Because these unauthorized prescriptions were refills rather than original prescriptions, the duty pharmacist was not required to personally view the original written prescription.

86. McLester was the pharmacist on duty a majority of the days on which Tipton is believed to have diverted Stadol

illegally. Somewhere between ten and twenty percent of the Stadol believed to have been unlawfully diverted by Tipton from Store No. 2358 was diverted after McLester had ceased to be employed there.

87. Some of the Stadol obtained by Tipton under fraudulent prescription at Store No. 2358 was obtained on days when McLester was not the pharmacist on duty.

88. In addition to Les Gessley and Mostafa Macida, other pharmacists on duty while Tipton was believed to have engaged in the criminal diversion of Stadol are Ted Kline and Al Leota.

89. McLester admitted knowing Tipton had a problem with Stadol but did not know the extent of her problem.

90. Forsythe told McLester that she thought there might be some Stadol missing from the shelves. When she shared her concern with McLester, he instructed Forsythe not to leave Tipton alone in the pharmacy.

91. No evidence placed McLester's conversation[s] with Tipton and other parties about her use of Stadol in the context of when Tipton's alleged diversions occurred.

92. According to Forsythe's unrebutted testimony,

If you were that desperate you could order any medication you wanted on the Telxon machine or verbally order without knowledge of the pharmacist knowing what you were doing. And then when the medication comes in, you pay the invoice. You throw the invoice away. You throw the copy that you

received from the computer away. The invoice is paid. The only person that will know about it will be the person at the headquarters that pays the payment on the invoice without knowing what is on it and the person gets the medication. Take the medication home via however and no one is the wiser.

93. Winn-Dixie has no security procedures in place, such as searching handbags or packages, to prevent employee theft in the pharmacy.

94. Winn-Dixie's ordering system is tailor-made to be abused by individuals who are, in Forsythe's words, "that desperate."

95. It is not illegal for pharmacy technicians to fill their own prescriptions.

96. It is possible for a pharmacy technician to fill or refill a prescription without the pharmacist knowing that had been done if he was absent from the pharmacy or had his attention diverted in some fashion.

97. It appears that Tipton refilled her own fraudulent prescription on a number of occasions, but that her preferred method of diverting Stadol was outright theft.

98. The Winn-Dixie system by which the pharmacies are stocked is flawed in a manner which allowed Tipton to divert Stadol without being detected by the duty pharmacist.

99. The Department failed to show that McLester knew or should have known that Tipton had diverted Stadol to her unauthorized use at Store No. 2358.

CONCLUSIONS OF LAW

100. The Division of Administrative Hearings has jurisdiction over the subject matter and parties pursuant to Section 120.57(1), Florida Statutes. The parties were duly noticed for the formal administrative hearing.

101. The Department of Health is a state agency charged with regulating the practice of pharmacy pursuant to Section 20.43, Florida Statutes, and Chapter 455 and 465, Florida Administrative Code.

102. The Department's authority includes the power to take disciplinary action against pharmacists based upon the grounds stated in Chapter 465, Florida Administrative Code, including the statutes and rules set forth in the Administrative Complaint which are as follows:

Section 465.016(1)(e), Florida Statutes, which provides, in pertinent part, that "The following acts shall be grounds for disciplinary action set forth in this section. . . . (e) Violating any of the requirements of this chapter; or if licensed as a practitioner in this or any other state, violating any of the requirements of their respective practice act or violating Chapter 499; 21 U.S.C. ss. 301-392, known as the Federal Food, Drug, and Cosmetic Act; 21 U.S.C. ss. 821 et seq., known as the

Comprehensive Drug Abuse Prevention and
Control Act.

103. Rule 64B16-27.400(1)(a), Florida Administrative Code,
which provides, in pertinent part:

Those functions within the definition of the
practice of the profession of pharmacy as
defined by Section 465.003(13), Florida
Statutes, are specifically reserved to a
licensed pharmacist or a duly-registered
intern in this state acting under the direct
and immediate personal supervision of a
licensed pharmacist. The following subjects
come solely within the purview of the
licensed pharmacist.

(1) A licensed pharmacist or pharmacy intern
must:

(a) Supervise and be responsible for the
controlled substance inventory;

104. Rule 64b16-27.430, Florida Administrative
Code, which provides, in pertinent part:

The delegation of any duties, tasks or
functions to licensed interns and pharmacy
technicians must be performed subject to a
continuing review and ultimate supervision
of the Florida licensed pharmacist who
instigated the specific task so that a
continuity of supervised activity is present
between one pharmacist and one pharmacy
technician. In every pharmacy, the licensed
pharmacist shall retain the professional and
personal responsibility for any delegated
act performed by licensed interns and
pharmacy technicians in his employ and under
his supervision;

105. Section 465.015(2)(c), Florida Statutes, which
provides, in pertinent part:

"It is unlawful for any person [T]o sell or dispense drugs . . . without first being furnished with a prescription; and

106. Section 465.016 (1)(c), Florida Statutes, which provides, in pertinent part:

Permitting any person not licensed as a pharmacist in this state or not registered as an intern in this state, or permitting a registered intern who is not acting under the direct and immediate personal supervision of a licensed pharmacist, to fill, compound, or dispense any prescriptions in a pharmacy owned and operated by such pharmacist or in a pharmacy where such pharmacist is employed or on duty shall be grounds for disciplinary action set forth in this section.

107. Permissible penalties for the violations charged range from a reprimand to revocation of the pharmacist's license.

108. Each statute and rule cited in the Administrative Complaint was in effect from the commencement of McLester's employment at Winn-Dixie through the date of his voluntary separation from Winn-Dixie on June 17, 1998.

109. At all times material to the Administrative Complaint, each Statute and Rule cited therein applied to McLester in his capacity as a registered pharmacist.

110. The Administrative Complaint, to the extent it purports to charge McLester with violations which occurred after

his voluntary separation from Winn-Dixie is improper and the Department so stipulated at the final hearing.

111. The Department does not seek, nor could it lawfully seek, to hold McLester accountable for events which occurred at Store No. 2358 after McLester was no longer employed there.⁸

112. Proof greater than a mere preponderance of the evidence must be submitted in order for the Department to impose disciplinary action upon a pharmacist. Clear and convincing evidence is required. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Section 120.57(1)(h), Florida Statutes ("Findings of fact shall be based on a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute.").

113. "[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." In re Davey, 645

So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

114. The Department's position is that McLester is responsible for the criminal activity of the pharmacy technicians working on his shift, whether or not he knew, or had cause to know, of their criminal conduct.

115. Even accepting the Department's theory, the case against McLester must fail for lack of clear and convincing evidence that crimes were committed "on his watch."⁹

116. The record demonstrates that only a fraction of the drug diversions alleged were the subject of a probable cause finding against Tipton. There is no evidence of how those charges were disposed of, and for all the record shows those charges were dropped for lack of proof.

117. The Department has suggested no legal basis upon which McLester can be disciplined for criminal activity "on his watch" in the absence of clear and convincing evidence that criminal activity in fact occurred.

118. Even if the evidence had shown that Tipton had been charged with and convicted of the illegal theft or diversion under false prescription of each and every Stadol bottle alleged in the Administrative Complaint, the case against McLester must fail for lack of any evidence that McLester had any reason to know of Tipton's criminal activities.

119. In lieu of clear and convincing evidence as to what McLester knew about Tipton's activities, and when he knew it, the Department has offered only innuendo.

120. The Department could take disciplinary action against McLester upon clear and convincing proof that he turned a blind eye to Tipton's criminal activity, whether or not the State Attorney chose to prosecute him. Under Florida law, discipline may be imposed where the conduct of the pharmacist lacks "good faith." Cohn v. Department of Professional Regulation, 477 So. 2d 1039 (Fla. 3d DCA 1985).

121. Analyzing the rule of Cohn in the context of this case, discipline would be warranted had the evidence demonstrated that McLester's familiarity with Tipton, or Tipton's doctor(s), or Tipton's use of other narcotic medications, or her observed behavior with respect to the ordering and unpacking of medications, either singly or in combination, would be sufficient to put a competent pharmacist on notice that Tipton was a person who could not be trusted with access to an ordering system which was readily subject to abuse by a person who was "that desperate" to obtain narcotic drugs.

122. Cohn is consistent with opinions from other jurisdictions which support the proposition that a pharmacist may be disciplined for "grossly unprofessional conduct," even absent proof that he had violated a specific rule or statute.

Indeed, In the Matter of the Suspension or Revocation of the Certificate of Fred F. Heller, R.P., to Practice Pharmacy in the State of New Jersey, 374 A.2d 1191 (N.J. 1977), the New Jersey Supreme Court upheld disciplinary action against a pharmacist found to have knowingly profiteered from the sale of "exempt narcotics" by selling, at exorbitant prices, huge volumes of non-prescription cough syrups.

123. Although pharmacist Heller scrupulously complied with New Jersey's statutory record-keeping requirements, the Court found that substantial credible evidence existed to support the conclusion that Heller's customers were misusing the drug, and that no pharmacist, exercising proper professional judgment, could be unaware that his sales volume was grossly in excess of the legitimate medical needs of his customers. Here, unlike in Heller, there is no evidence that McLester had any reason to know that Tipton was, to paraphrase witness Forsythe, "that desperate" for Stadol.

124. At hearing, bits of testimony were offered in an attempt to suggest that McLester may have had a reason to make aggressive inquiry into whether Tipton should be allowed access to narcotics. But these efforts failed to demonstrate that McLester was on inquiry notice, let alone actual notice, that Tipton might be willing to risk her job and her freedom to obtain Stadol by illegal means.

125. The testimony of all witnesses with personal knowledge of the operations of Winn-Dixie pharmacies demonstrated that Tipton could, and probably did, divert Stadol "on the watch" of every pharmacist with whom she worked.

126. Silverman, a well-trained law enforcement officer, operating with the full power of the state to investigate, as well as the benefit of hindsight, cannot explain how Tipton diverted Stadol. In testimony, Silverman opined that McLester "should have known" of her activities. Even had he stated the basis for his opinion, which he did not, such rank speculation could never constitute clear and convincing evidence that McLester had reason to know of Tipton's diversion of Stadol.

127. In its Pretrial Catalogue dated September 13, 2000, the Department's summary of its Factual Basis for Petitioner's Claim asserts that McLester "permitted" Tipton to engage in the conduct for which it seeks to hold McLester responsible. "Permit" is an active verb which connotes that McLester affirmatively authorized Tipton to steal Stadol and to prepare prescriptions he knew to be fraudulent. In addition to being inconsistent with the strict liability theory the Department argued at final hearing, the Department has failed to demonstrate active complicity, or even negligence on McLester's part, by clear and convincing evidence.

128. Tipton was permitted to do what any other technician was permitted to do. She took advantage of her job, and Winn-Dixie's ordering system, to divert Stadol to her own use prior to its being logged into the pharmacy inventory.

129. Any Winn-Dixie pharmacist could have been a victim of Tipton's scam. McLester and several of his colleagues were "on watch" when Tipton committed the diversions.

130. Deficiencies in the Winn-Dixie accounting system allow technicians to order drugs and divert them before they are logged in to the inventory, at which point the pharmacist could be held accountable for large scale theft.

131. It is irrelevant to the disposition of this case whether Tipton diverted one bottle of Stadol or one thousand. If McLester was aware of Tipton's unlawful activity, or facilitated it, he himself has broken the law. But there is no evidence that McLester knew or had reason to know of that Tipton had illegally diverted one bottle, or hundreds of bottles, of Stadol. In the absence of any such evidence, the Department has failed to sustain its heavy burden of proof.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the charges in the Administrative Complaint be dismissed.

DONE AND ENTERED this 17th day of November, 2000, in
Tallahassee, Leon County, Florida.

FLORENCE SNYDER RIVAS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of November, 2000.

ENDNOTES

¹ Blakely was Winn-Dixie's store security manager. McLester objected to permitting Blakely to testify on the grounds that the Department failed to list Blakely as a witness in violation of Judge Larry Sartin's Order of Prehearing Instructions dated July 27, 2000. The Department offered a variety of responses, including the observation that Blakely's report was contained in the Department's 91-page investigative file previously provided to McLester's counsel. The Department's response is not persuasive. The Prehearing Order seeks to lessen the burden and expense of litigation for all parties by eliminating surprise. Litigants should not have to guess which of the many individuals named in a 91-page package will actually appear and testify at final hearing. But a party's failure to comply with the Prehearing Order should not be permitted to undermine the trier of fact's search for truth, absent a specific showing of prejudice to the party objecting to the presentation of the unlisted witness. In this case, the undersigned allowed the Department to present Blakely's testimony and finds that there was no prejudice to McLester in permitting it. Blakely had no personal knowledge of any relevant fact or event and his testimony was at best cumulative as to matters which were either testified to from personal knowledge or investigated with more depth and accuracy by other witnesses.

² McLester holds Florida license number PS 0016614.

³ Other Winn-Dixie pharmacists who testified in this case fill less than half that many prescriptions daily, on average.

⁴ The exhibits reveal that Tipton had a variety of prescriptions from several treating physicians for a range of controlled and legend medications, including several narcotic painkillers.

⁵ Tipton was one of as many as six pharmacy technicians hired by McLester during his term of employment at Winn-Dixie.

⁶ There was no evidence presented to suggest that any law or rule requires a pharmacist to physically inspect and/or personally verify the contents of such orders, by whatever method they are generated.

⁷ Contrary to Silverman's belief, McLester is persuaded that he has a very clear understanding of the general method of operation used by Tipton, if not the details of which illegal activities took place when. His explanation is consistent with the theory offered by Ava Forsythe and with the less detailed testimony of other Winn-Dixie pharmacists, including the complaining witness. The Department has advanced no theory to the contrary. Silverman was an impressive witness with respect to his skills and experience as a detective. However, his testimony taken as a whole, demonstrates a sketchy familiarity with the stock management system at Winn-Dixie.

⁸ As late as September 13, 2000, a week before the final hearing commenced, Department's (Unilateral) PreTrial Catalog was replete with indications that the Department did indeed intend to discipline McLester for events which occurred after his departure from Winn-Dixie.

⁹ Although this expression does not appear in the statutes or rules applicable to this case, it was used frequently by counsel throughout the final hearing as a shorthand means of expressing the Department's view that McLester could be held strictly liable if drugs were improperly obtained from the Winn-Dixie pharmacy at times when he was present.

COPIES FURNISHED:

Lawrence F. Kranert, Jr., Esquire
Department of Health
2727 Mahan Drive
Tallahassee, Florida 32317

Kevin S. Doty, Esquire
Hatch & Doty, P.A.
1701 Highway A1A, Suite 220
Vero Beach, Florida 32963

John Taylor, R.Ph., Executive Director
Board of Pharmacy
Department of Health
4052 Bald Cypress Way
Tallahassee, Florida 32399-1701

Theodore M. Henderson, Agency Clerk
Department of Health
4052 Bald Cypress Way
Bin A02
Tallahassee, Florida 32399-1701

William W. Large, General Counsel
Department of Health
4052 Bald Cypress Way
Bin A02
Tallahassee, Florida 32399-1701

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.