

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON
REFERRAL FROM THE BOARD OF PHARMACY**

In the Matter of)
)
OMRO PHARMACY)
_____)

OAH No. 18-0850-PHA
Board Case No. 2018-00963

DECISION

I. Introduction

Dennis L. Hunt Pharmacy, Inc., which does business as Omro Pharmacy, applied in April of 2018 for an out-of-state pharmacy registration in Alaska. Omro Pharmacy is based in Wisconsin, but is registered in a number of states. The Alaska Board of Pharmacy initially denied Omro’s application on the basis that its owner had two felony convictions. Omro had disclosed the convictions on the face of its application. Omro requested an administrative hearing to seek to persuade the Board to reverse the initial denial.

As a general matter, an out-of-state registration is a license that the Board may—but is not required to—deny if an owner of the applying pharmacy has ever been convicted of a felony. The purpose of a hearing is to develop a fuller factual record than is available to the Board in its initial consideration of a license. It is Omro’s burden to use that opportunity to show that it ought to receive the registration.

In this case, Omro met that burden by showing important distinctions between this case and the Board’s only known prior denial of an out-of-state registration on grounds of an owner felony. Omro’s showing consisted primarily of the following:

- The convictions were unrelated to pharmacy.
- In the decades since the convictions, both the business and its owner have performed well in their community, and have developed a good reputation with law enforcement.
- Omro’s record with other states’ regulatory bodies contains nothing of serious concern.
- Although not offering anything to Alaskans that they cannot obtain from other sources, Omro’s presence in the Alaska market could benefit consumers.

In sum, while the felony convictions were troubling and merited close evaluation, this decision recommends that the application proceed and that Omro receive the registration it has applied for.

II. Facts

A. Hearing

A recorded hearing took place in Anchorage on January 14, 2019, attended in person by Kenneth Bressers, the owner whose convictions were of concern. Mr. Bressers testified and subjected himself to cross-examination. A licensing examiner testified for the Division of Corporations, Business and Professional Licensing, which serves as staff to the Board. Division Exhibits 1-10, Omro Exhibits 1-5, and supplemental Omro Exhibits A and B were admitted without objection. No evidence was excluded. Supplemental information regarding prior Board handling of out-of-state registrations was received on January 16 and February 7, 2019, and the record closed on the latter date.

B. Omro Pharmacy

Omro Pharmacy has operated for many years in the small Wisconsin town of Omro, about ten miles west of Oshkosh. In January of 2000, Dennis L. Hunt sold it to one of his employees, Kenneth Bressers, who has owned it ever since. The current pharmacist-in-charge is Patrick Beiermeister, although Mr. Bressers filled that role from 2014 until 2018.¹

Omro operates from a single Main Street location and remains, in part, a storefront pharmacy. In recent years, however, it has begun selling to out-of-state customers in a few areas, apparently marketing the experience of friendly personal phone contact with a small-town midwestern pharmacy, coupled with affordable prices.² Omro holds itself out as having more personal customer interaction than Walmart or Walgreens have presently, or than Amazon will have when it rolls out its Internet pharmacy business.³

Omro holds a license in good standing in Wisconsin. In addition, Omro currently has out-of-state licenses in 13 states: Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Indiana, Missouri, Nevada, New Jersey, New York, Pennsylvania, and the State of Washington.⁴ Mr. Bressers describes various demographic links that make for groups of customers in some of these states; it was the connection with snowbird retirees that started the process of branching out

¹ Omro Ex. 4, 5; Bressers testimony.

² Bressers testimony.

³ *Id.*

to other states, but now there are other connections that create small markets outside the snowbird states. With Alaska, he feels that similarities with the Northern Wisconsin population, coupled with high local prices, could make this a place where Omro could have “a few dozen” customer families, if permitted. Omro’s prices for some common medications are apparently lower than with some chain pharmacies in Alaska.⁵ Omro would ultimately like to have VIPPS (Verified Internet Pharmacy Practice Sites) accreditation.

In the 19 years under Mr. Bressers’ ownership, Omro has had one issue with a licensing authority. This related to four prescriptions in 2003-2004 for thyroid and asthma medication.⁶ The prescriptions had all been filled initially at Morton’s Pharmacy in a nearby town, but then refilled at Omro Pharmacy without the proper transfer procedure. Although no action was taken against Omro Pharmacy itself, Kenneth Bressers, as pharmacist-in-charge at the time, was given a reprimand for these events. He was also required to reimburse the Wisconsin Pharmacy Examining Board’s investigation costs (\$2,276.82).⁷

C. Criminal Convictions and Subsequent Conduct of Kenneth Bressers

Kenneth Bressers is the current owner of Omro Pharmacy, and it is his felony convictions that have raised a question about the suitability of Omro for registration in Alaska. The felony conduct occurred before he was an employee or owner at Omro Pharmacy.⁸

The first of the two convictions is startling in its severity. In 1988 and 1989, when he was in his thirties and apparently living in the Milwaukee area, Mr. Bressers became involved with a criminal conspiracy connected with his wife’s jewelry store. The conduct led to a no-contest plea (not finalized until early 1991) on four felony counts, two of conspiracy to commit burglary and two of attempted receipt of stolen property. The sentence was relatively light—one year of prison on work release, plus community service and eight years’ probation—and this may reflect that the judge felt the overall circumstances suggested the defendant was a good candidate for rehabilitation. Nonetheless, this was a conviction, well into adulthood, of a series of crimes of dishonesty.⁹

⁴ Omro Ex. 2.

⁵ Mr. Bressers testified in some detail about relative prices for such medications as Crestor. He did not claim that Omro’s prices are the lowest an Alaskan could obtain, but he seemed to make a good case that Omro’s pricing would be competitive in this market.

⁶ There were two prescriptions for Levoxyl and two for Singulair. Div. Ex. 3, p. 27; Bressers testimony.

⁷ Div. Ex. 3, p. 28.

⁸ Div. Ex. 3, p. 16 (started work at Omro Pharmacy in 1992); Div. Ex. 3, p. 45 (conduct at issue in last conviction was 12/17/91).

⁹ Div. Ex. 3, pp. 31-32, 44; Bressers testimony.

The same year he was convicted of these crimes—1991—Mr. Bressers also engaged in illegal gambling. This led to an eventual, separate conviction in 1994 on one count of felony commercial gambling.¹⁰

The Wisconsin Department of Corrections chose not to revoke Mr. Bressers' parole because of the gambling, but he does seem to have served out an independent punishment for the gambling conviction, consisting of approximately nine months of an eighteen-month sentence in a combination of prison and step-down restrictions.¹¹ After that, he returned to regular probation and reportedly did well. In early 1997, the Department of Corrections stated:

Since that time, the offender has maintained a professional pharmaceutical license with active, stable employment within that profession. All court obligations and restitution have been paid. Stable residence has been maintained and a fully cooperative attitude toward the Department has been demonstrated throughout the supervision periods.

The parole sentence successfully discharged on 01-01-96, and to date, the offender has completed five years and seven months of the eight year probation without significant violation. Mr. Bressers has satisfied all the goals and objectives of supervision. The proper warrant checks and financial obligations record checks have been completed. Therefore, it is respectfully recommended that he be early discharged.¹²

Mr. Bressers was fully discharged from probation on January 29, 1997, about two years early.¹³

When asked to explain the convictions, Mr. Bressers struggles to some extent, because he clearly realizes that attempts to excuse the conduct will make it appear he is not taking responsibility for it. As a general matter, he describes having become used to a high-flying lifestyle as a sales representative for Eli Lilly, and developing a self-important image as someone who “really didn't need to be a pharmacist.”

Mr. Bressers had held a Wisconsin pharmacy license since 1975, continuing to hold it through his employment at Eli Lilly and his involvement in the jewelry business. Backtracking a little bit on the timeline, the Wisconsin Pharmacy Examining Board investigated Mr. Bressers following the above convictions, and in October of 1995 it found them to represent unprofessional conduct, imposed five years of license probation, and restricted him from being a pharmacy owner for five years.¹⁴ Eighteen months later, the board discharged these restrictions

¹⁰ Div. Ex. 3, p. 45.

¹¹ Div. Ex. 3, p. 46.

¹² *Id.*

¹³ Div. Ex. 3, p. 44.

¹⁴ Ex. 3, p. 22.

and restored him to an unlimited license.¹⁵ This occurred just after his discharge from criminal probation.

It was during the criminal probation that Mr. Bressers located in Omro and started working at Omro Pharmacy. A few years later he purchased the business in a no-cash buyout financed by the prior owner. Quite convincingly, he describes Omro Pharmacy as his “redemption.” He says that in Omro he has rediscovered the benefits of performing a useful service in a community and earning respect and friendship for doing so.¹⁶

While this kind of testimony can sometimes be no more than self-serving pabulum, there is reason to credit it in this case. Mr. Bressers has produced an impressive array of supporting statements from the Omro community. The current chief of police says Mr. Bressers is “very well respected” in the community, basing his opinion on 11 years of interactions that include working together on investigations.¹⁷ A former chief writes that he has “done more for [Omro] than almost anyone I have ever known or worked with.”¹⁸ The current mayor, based on 20 years of knowledge, describes him as an “asset” and a “respected pharmacist.”¹⁹ A police lieutenant mentions “[s]everal cases I have worked involved fraudulent prescriptions that Ken has brought to the attention of the police department and has gone out of his way to assist . . . in apprehending the perpetrators.”²⁰ The city’s Community & Economic Development Director says Mr. Bressers has “played a vital role in the city’s growth.”²¹ A fellow parishioner who knew him “during the dark days many years ago” assures that he has “learned and grown” since that time.²² A local physician who owns an opioid addiction clinic attests that Mr. Bressers is honest and that the “reputation of his pharmacy is unparalleled in our area.”²³

There is one known lapse in Mr. Bressers’ community conduct since 1991. In 2009, in Nevada, he was charged with misdemeanor driving under the influence, which resulted in a plea agreement in which he was convicted of misdemeanor reckless driving. The blood alcohol level was .187, and Mr. Bressers apparently fell asleep at a traffic light while driving to his

¹⁵ Ex. 3, p. 25.
¹⁶ Bressers testimony.
¹⁷ Omro Ex. 1, RES 004.
¹⁸ Omro Ex. 1, RES 001.
¹⁹ Omro Ex. 1, RES 003.
²⁰ Omro Ex. 1, RES 007.
²¹ Omro Ex. 1, RES 008.
²² Omro Ex. 1, RES 013.
²³ Omro Ex. 1, RES 014.

condominium from his son's cocktail lounge. Mr. Bressers describes being mortified by the arrest, and says he has not had a drink since.²⁴

III. Discussion

This case is governed by the Administrative Procedure Act (APA)²⁵ and by the statutes and regulations governing out-of-state pharmacy registration.²⁶ In general, Omro has the burden to prove that it is entitled to the relief it seeks,²⁷ which in this case is to become registered and therefore eligible to make sales to Alaska patients on a "regular" basis.²⁸ As was its obligation under the APA, the Division of Corporations, Business and Professional Licensing has identified the "particular matters that have come to the attention of the [division] . . . that would authorize a denial" of this relief.²⁹ The single matter identified was owner Kenneth Bressers' felony convictions.

A. *The Board has Broad Discretion to Consider an Applicant's Fitness for Registration.*

Registration of an out-of-state pharmacy is a type of license³⁰ that gives businesses elsewhere authority to serve clients in Alaska based primarily on the strength of their licensure in their home jurisdictions.³¹ The Alaska Legislature established the registration procedure in 1992.³² The overall vision of the drafters seems to have been to rely primarily on the home-state authorities to regulate out-of-state pharmacies.³³ In keeping with this philosophy, the registration provision in statute expressly requires only a fairly limited array of information for registration, much of it devoted to ensuring that the pharmacy is in compliance with the pharmacy laws in its own jurisdiction.³⁴

²⁴ Ex. 3, pp. 47-58; Bressers testimony. The event was in 2009 but the resolution was in 2011.

²⁵ The APA, found in AS 44.62, is made applicable by AS 44.62.330(a)(5).

²⁶ See AS 08.01, AS 08.80, and 12 AAC 52.

²⁷ AS 44.62.460(e)(2).

²⁸ See AS 08.80.158(a), (g). "Regular" means more than two shipments, mailings, or deliveries per year. 12 AAC 52.130(c).

²⁹ AS 44.62.370(a)(2).

³⁰ See, e.g., AS 08.01.110(4) (registrations are licenses for purposes of the general licensing chapter). As described in AS 08.80.158, registration fits the common legal understanding of the word "license," which is "[a] permit, granted by an appropriate governmental body, generally for consideration, to a person, firm, or corporation to pursue some occupation or to carry on some business subject to regulation . . ." Black's Law Dict. (5th ed. 1979) at 829.

³¹ See AS 08.80.158(b); 12 AAC 52.130(b).

³² Sec. 1, ch. 56 SLA 1992).

³³ Memorandum from John Gaguine, Legislative Counsel, to Rep. Curt Menard, Feb. 6, 1990 (Ex. 2 to Division's Supplemental Brief).

³⁴ See AS 08.80.158(b).

Nonetheless, the legislature has amended AS 08.80 in a way that makes it clear the Board is not required to defer to out-of-state regulators with respect to registration. In 1996 the legislature rewrote AS 08.80.157, and included in it a provision authorizing the Board to “deny . . . the license of a facility or pharmacy” on a variety of additional grounds beyond those listed in the registration statute, including authorization to do so on the basis of “a felony conviction under federal, state, or local law of an owner of the facility or pharmacy.”³⁵ A reading of § 157 alone might leave the impression that it applies only to in-state facilities and pharmacies, but that impression is dispelled by a new definition of “pharmacy” for AS 18.80 that the legislature adopted at the same time. The new definition of “pharmacy” referred to “licensure or registration” of out-of-state pharmacies “under AS 08.80.157(b),” confirming that § 157 encompasses both in-state licenses and out-of-state registrations.³⁶

The Board’s regulation on registration, 12 AAC 52.130, is consistent with this authority. Subsection (b) of the regulation contains a checklist requiring four items: (1) completing an application provided by the department containing certain information; (2) paying the required fee; (3) submitting a certified, true copy of a current, valid facility license where the pharmacy is located; and (4) submitting an inspection report. Subsection (a) indicates that applicants must both “meet the requirements of the checklist” and “meet the qualifications in AS 08.80” to be issued a registration. Alaska Statute 08.80.157(h) and 08.80.261 are among “the qualifications in AS 08.80” applicable to registrants. The Board can therefore deny registration if it comes to the Board’s attention that an applicant falls short of the qualifications in one of those provisions.

B. The Board Is Not Required to Deny Registration to this Applicant.

Although the Board has the authority to refuse a license, including out-of-state registration, on the basis of a prior felony conviction of an owner, it is never required to do so. The statutory chapter on pharmacists and pharmacies says that the Board “may” deny a license for various enumerated reasons, not that it “shall” deny or “may not grant” the license.³⁷ This

³⁵ AS 08.80.157(h)(2).

³⁶ In 2003, the legislature amended another provision of AS 08.80 to empower the Board to deny a license of any kind if it finds the applicant incapable of engaging in the practice of pharmacy “with reasonable skill, competence, and safety for the public.” AS 08.80.261(a)(7), as amended by § 1, ch 140 SLA 2003. However, an argument can be made that AS 08.80.261 applies only to individual rather than institutional licenses. As was done in footnote 44 of *In re Pharmacy Solutions, Inc.*, OAH No. 08-0344-PHA (Alaska Board of Pharmacy 2009), this question will be left for another case in which § 261 is directly at issue.

³⁷ AS 08.80.261(a); AS 08.80.157(h). These statutes contrast with licensing statutes for some other professions, which do create mandatory barriers to licensing for some conduct. *See, e.g.*, AS 08.64.240(a) (“The [medical] board may not grant a license if”); AS 14.20.020(f) (“The department may not issue a teacher certificate to a person who has been convicted”).

means that the Board evaluates the conduct and the totality of the circumstances, and makes the decision on the merits of the particular case before it.

The Board has not uniformly considered conviction of a felony to be a disqualification from licensure. In the *Matter of Larry Dean Payton*, a negotiated memorandum of agreement adopted by the Board in late 2004, the Board renewed Mr. Payton's license with conditions notwithstanding his conviction, just two years prior, of misdemeanor larceny and felony possession of opium or derivatives.³⁸ The crimes were recent and were closely related to Mr. Payton's pharmacy practice. Nonetheless, the Board apparently was satisfied that Payton had sufficiently demonstrated rehabilitation to allow him to practice safely. On the other hand, the Board refused registration in the *Pharmacy Solutions* case, described in detail below.

C. Omro's Case for Registration is More Compelling than that of Pharmacy Solutions.

In making its initial denial of Omro's application based on a limited record, the Board relied extensively on its prior decision in *In re Pharmacy Solutions, Inc. dba Bellevue Pharmacy Solutions*, OAH No. 08-0344-PHA (Alaska Board of Pharmacy 2009).³⁹ That is the only other out-of-state registration case that has gone to full hearing before this Board and that has parallels to the present case.⁴⁰

Pharmacy Solutions, Inc. was seeking registration in Alaska to build a nationwide hormone replacement and compounding business. Its Chairman of the Board and part owner, Peter Hueseman, had been convicted of four felonies (three state and one federal). All four felonies involved fraudulent prescriptions for scheduled narcotics, with the misconduct committed in the course of his pharmacy work. The convictions were old, with the underlying misconduct occurring about 25 years before the Alaska application. Because of the direct connection to pharmacy practice, Mr. Hueseman had suffered much heavier regulatory action than Mr. Bressers, with his license revoked and not regained for a number of years thereafter.

Two aspects of the Pharmacy Solutions presentation at its hearing were striking. First, Mr. Hueseman presented only weak, vague evidence of his own and his company's current reputation. Second, when questioned about the convictions at issue, Mr. Hueseman presented a whitewashed version of his conduct that was almost certainly false. While the revisionist history

³⁸ *In re Payton*, No. 2600-04-015 (Board of Pharmacy, December 14, 2004).

³⁹ The case is published at <https://aws.state.ak.us/OAH/Decision/Display?rec=5855>.

could have been the result of poor memory or wishful thinking, it was very troubling in the context of a hearing focused on those very facts. Pharmacy Solutions was found not to have met its burden to show that it ought to be licensed.

This case has important parallels with *Pharmacy Solutions*: the age of the crimes at issue is similar (although Mr. Bressers' are a little farther in the past relative to the application), they are all felonies, and the role of the person at issue (owner) is the same. That is where the parallels end, however. Mr. Bressers' convictions, as serious as they were, did not occur in the course of practicing pharmacy, and he received probation from his state board, not a revocation. There have been no problems with his self-disclosure of the past conduct, both in Omro's application and at the hearing. The evidence of good community and law enforcement reputation in recent decades is quite strong.

D. On Balance, Omro Has Met its Burden.

Denial of out-of-state pharmacy registrations is rare in Alaska. The Division reports that 606 outside pharmacies are registered,⁴¹ and that there have been only about six denials besides Omro. One of those was Pharmacy Solutions. The other known adverse actions were as follows:⁴²

Full denial

- Meds for Vets (2009): DEA registration surrendered; registrant failed to disclose

Granted with conditions (all renewals)

- Franck's Compounding (2010): conduct unknown—fine, education, reprimand
- Prime Therapeutics (2010): failure to disclose discipline in another state—fine
- College Pharmacy (2010): recent discipline in Colorado and \$3.5 million fine to federal government—fine and probation
- Aetna Specialty (2010): false answer on renewal—fine and probation

The conditional approvals of various renewals are not relevant to this case, because they represented immediate misconduct (such as nondisclosures or pharmacy violations) for which the Alaska Board could impose discipline. The one full denial involved a very serious DEA problem the registrant did not disclose.

⁴⁰ One other registration case went to hearing, but the issues were very different from those in Omro's case. See *In re ExcelleRx, Inc.*, OAH No. 10-0582-PHA (Alaska Board of Pharmacy 2011) (<https://aws.state.ak.us/OAH/Decision/Display?rec=5856>).

⁴¹ Carillo testimony.

⁴² Details are taken from the Division's record supplements in this case, but in some cases have been supplemented or corrected based on consent agreements found in the OAH library.

In the case now before the Board, the applicant for registration has shown that it could bring healthy competition to the Alaska market. Its owner has committed serious crimes in the past, but his felony misconduct was 28 to 31 years ago and was not connected with the practice of pharmacy. There is strong evidence, much of it from law enforcement sources, that he has rehabilitated himself well. The pharmacy business he now owns has a high reputation and is in good standing with all 14 regulatory boards with which it is licensed.

The Alaska Board of Pharmacy has discretion to deny licensure to Omro Pharmacy, and, in light of the red flags that were present, the Board's initial handling of this application was entirely reasonable. However, the more complete record gathered through the hearing process has shown that this application should be granted.

IV. Conclusion

Dennis L. Hunt Pharmacy, Inc. dba Omro Pharmacy Solutions has met its burden of demonstrating that it meets the qualifications in AS 08.80 applicable to registrants. Its application for registration should therefore be granted.

DATED this 11th day of February, 2019.

By: Signed
Signature
Christopher Kennedy
Name
Administrative Law Judge
Title

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]

Adoption

The Alaska Board of Pharmacy adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of distribution of this decision.

DATED this 7th day of March, 2019.

By:

Signed

Signature
Richard Holt

Name
Board Chair

Title