

13 December 2023

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FILE REF: SHA/26113
DECISION MAKING BODY: NHS SOUTH EAST

Tel: 0203 928 2000
Email: nhsr.appeals@nhs.net

PHARMACIST: MEDIPHARMACY LTD
("the Appellant")

PREMISES: 23 OAKHILL ROAD
HORSHAM
WEST SUSSEX
RH13 5SD

**THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL AND LOCAL PHARMACEUTICAL
SERVICES) REGULATIONS 2013**

**SCHEDULE 4 [Terms of Service of NHS Pharmacists]
PART 3 [Hours of Opening]**

1 Outcome

1.1 I confirm the action of the Commissioner to issue the direction.

A copy of this decision is being sent to:

Medipharmacy Ltd
NHS South East

Advise / Resolve / Learn

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THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL AND LOCAL PHARMACEUTICAL SERVICES) REGULATIONS 2013 ["THE REGULATIONS"]

**SCHEDULE 4 [Terms of Service of NHS Pharmacists]
PART 3 [Hours of Opening]**

DIRECTION OF ADDITIONAL CORE OPENING HOURS

1 Introduction

- 1.1 Relying on Paragraph 25 of Schedule 4, the Commissioner has requested that the Appellant open from 2pm to 5pm on Tuesday 26 December 2023 (Boxing Day).
- 1.2 The Appellant seeks to appeal to NHS Resolution.

2 Consideration

Rights of appeal

- 2.1 Where the Commissioner has directed a pharmacist to provide pharmaceutical services for its premises at set times and on set days in accordance with paragraph 25 of Schedule 4 of the Regulations, paragraph 25(7) provides a right of appeal to the Secretary of State for Health and Social Care ("the Secretary of State").
- 2.2 The Secretary of State has directed NHS Resolution to determine such appeals. As an authorised officer of NHS Resolution, I have considered the appeal and have determined it, in accordance with my delegated powers.

Opening hours

- 2.3 A pharmacy's opening hours may be categorised as:
- 2.3.1 'core' opening hours (days on and times at which the pharmacy is obliged to be open), which may incorporate a direction of the Commissioner requiring fewer or greater than 40 hours; or
- 2.3.2 'supplementary' opening hours (other days on and times at which the pharmacy undertakes to provide pharmaceutical services, as notified to the Commissioner).

Alteration of 'core' (including 'directed') opening hours

- 2.4 In accordance with paragraph 1(7)(c) of Schedule 2 to the Regulations, the pharmacy must provide, as part of an application for entry in the pharmaceutical list, the proposed core opening hours in respect of the premises during which it will be obliged to provide pharmaceutical services under paragraph 23(1) of Schedule 4 to the Regulations. These may be subject to a direction under paragraph 23(1)(c), (d) or (e).

Alteration of 'supplementary' opening hours

- 2.5 Other days or times at which services are to be provided (as set out in the original application for entry in the pharmaceutical list pursuant to paragraph 23(3) of Schedule 4 as "supplementary hours") may be altered by giving notice to the Commissioner, in accordance with paragraph 23(6)(a) without the need to make an application.
- 2.6 Notices under paragraph 23(6)(a) are not subject to review by NHS Resolution.

The Commissioner's Request

- 2.7 The Commissioner wishes the Appellant to open from 2pm to 5pm on Tuesday 26 December 2023 (Boxing Day), a day on which it would otherwise be closed.

Information provided by parties

- 2.8 In a letter to the Appellant dated 1 November 2023, the Commissioner stated

"We wrote to you on 26th September 2023 regarding the proposal for provision of pharmaceutical services on Boxing Day Tuesday 26th December 2023 at 14:00-17:00.

Your representations have been considered, however Sussex ICB has reviewed the provision of services in town on Boxing Day Tuesday 26th December 2023 and it has been determined that pharmacy services are required.

**Medipharma Limited t/a Nories Pharmacy FWT44
23 Oakhill Road, Horsham, West Sussex, RH13 5SD**

is directed to open on **Boxing Day Tuesday 26th December 2023** from **14:00-17:00** (a total of three hours) in accordance with Schedule 4 Paragraphs 24 and 25 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 as amended.

A payment of **£300.00** per hour will be made on submission of the enclosed claim form. Please submit the claim form within 28 days of fulfilling your rota duties.

Thank you for making appropriate arrangements to deliver the required service.

The reason for the direction is set out in Appendix A.

We have consulted the Local Pharmaceutical Committee in drawing up the arrangements for Bank Holiday cover – including the voluntary enhanced service and directions where they are needed.

Pharmacy opening hours will be shared with other NHS organisations such as NHS 111, hospitals and GPs for signposting patients. However, it is really important that the information is correct on the DoS and NHS website. **Please can you ensure that you have updated the NHS Profile Manager** so that NHS 111 can direct patients to your service and also so that anyone using the NHS Website will know you are open.

Please can you provide confirmation to ENGLAND.southeastcommunitypharmacy@nhs.net, that you have received the

direction and will open the pharmacy accordingly on Boxing Day Tuesday 26th December 2023 between 14:00-17:00.

You have a right of appeal to the Secretary of State against the issuing of this direction. Should you choose to appeal then you should send a concise and reasoned statement of the grounds for your appeal within 30 days of the date of this letter to nhsr.appeals@nhs.net or:

Primary Care Appeals

NHS Resolution, 8th Floor, 10 South Colonnade, Canary Wharf, London, E14 4PU”

“Appendix A: Reason for the direction

Pharmacies are not required by their terms of service to open on Christmas Day, Good Friday, Easter Sunday or on a bank holiday, although they may choose to do so. We have asked pharmacies in the area whether they are intending to open and have also offered payment to open as part of an enhanced service. However, we have not been notified of any pharmacies that will be open in Horsham on Boxing Day Tuesday 26th December 2023.

Sussex ICB is obliged to ensure adequate pharmaceutical services are available for the population. This includes arrangements on the aforementioned days when pharmacy contractors are not required to open. (Section 126 of the NHS Act 2006 (Arrangements for pharmaceutical services))

As part of the process for assessing the need for pharmacy cover in Horsham on Boxing Day Tuesday 26th December 2023, we have considered reasonable geographical coverage and travel times as well as population density. The opening times being directed are intended to allow the maximum number of people who need to access pharmaceutical services to be able to do so.

Whilst demand for the full range of pharmaceutical services may be lower on this day compared to a Tuesday that is not a bank holiday, there is still a need for availability of pharmaceutical services for people who live within the area of the Sussex ICB or who are visiting the area for the bank holiday period.

Pharmacy services are a vital part of the health service which complement and support other services that are available on bank holidays such as NHS 111, GP Out of Hours Service, A&E and Ambulance services. Your pharmacy will be available to deliver services not only to your immediate community but as there will be limited resources on the day, also to patients from further afield.

In addition to the factors associated with assessment of overall need for a service, when reviewing the need to direct a particular pharmacy we have considered; the pharmacy location, any voluntary opening by other pharmacy contractors, distances from other available services, access including road links, nearby parking, frequency of any previous direction notices and the other pharmacies available in the area excluding Distance Selling pharmacies. We ensure that pharmacies are selected for direction in a fair way that means that all pharmacies in a given area take their turn.”

2.9 In an email to NHS Resolution dated 9 November 2023 the Appellant stated:

“I am writing to you on behalf of Nories Pharmacy FWT44: 23 Oakhill Road, Horsham, West Sussex, RH13 5SD to appeal the direction to open on boxing day 2023 within the hours of 2pm to 5pm.

I am concerned about the implications of this decision on both our employees and the overall well-being of the organisation. I would like to highlight the current challenges we are facing, particularly the difficulty in finding adequate staffing for this particular day. Our attempts to secure sufficient personnel have been met with limited success

due to the decline in staff morale, because of more strenuous working conditions resulting from the reduction in funding across the board.

Additionally, the costs associated with hiring additional staff at peak rates during the holiday season are proving to be financially burdensome for the company. The well-being and satisfaction of our employees are critical to maintaining a productive and efficient workforce. Requiring employees to work on a day traditionally reserved for rest and celebration may further deteriorate their morale, potentially leading to long-term negative impacts on our operations and employee retention.

Furthermore, the financial strain associated with the heightened costs of operations on Boxing Day may have significant implications for our budget and long-term financial stability. In the interest of maintaining our company's fiscal health, it is imperative that we carefully consider the economic impact of opening on Boxing Day. Considering the aforementioned challenges, I kindly request a reconsideration of the directive to open on Boxing Day. We value the dedication and hard work of our employees and are committed to upholding their well-being and the financial sustainability of our organization.

As a company, we will make sure the branch does everything necessary to ensure that all their patients are serviced sufficiently to compensate for the festive closures and will do this by producing blister packs earlier to ensure sufficient supplies for patients and ensure that all medication is produced and ready for collection prior to our closure. I appreciate your understanding and consideration of this matter.”

2.10 In a letter to NHS Resolution dated 14 November 2023 the Commissioner stated:

“Paragraphs 25(1) and (2) of Schedule 4

Paragraphs 25(1) and (2) require that before any direction is made, an assessment must be undertaken and that, before the assessment is concluded, the pharmacist providing services from the premises must be given notice of the proposed changes and given 30 days to make written representations about the proposed changes.

An assessment of the need for pharmaceutical services that will meet the needs of the people in the area of Horsham or other likely users of the pharmacy specifically over the bank holidays during the Christmas period has been undertaken. Horsham is a market town with a population of over 50,000 and arrangements are always made for provision of pharmaceutical services on Bank Holidays unless one or more of the pharmacies in the town are planning to open voluntarily.

It has not previously been necessary to direct a pharmacy to open Boxing Day because one of the pharmacies in Horsham elected to open voluntarily. However, in addition to the information provided in the appendix to the direction letter, activity data, collated from submissions made by pharmacies directed on other bank holidays was considered.

The assessment for the Horsham area found that on previous bank holidays patients accessed the pharmacy with prescriptions dated the day of the bank holiday day and dated prior to that day. Patients received advice within the pharmacy that was open and over-the-counter items were obtained.

The average data is presented in the table below.

Total items dispensed	Prescription forms dated on BH date	Prescription forms dated prior to BH date	Number of people attending the pharmacy	Advice and OTC products

116	20	91	25	26
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Sussex ICB has consulted the relevant LPC in drawing up the Bank Holiday directions and agreeing the enhanced services agreements for the provision of pharmaceutical services over the Christmas and New Year Period.

The Appellant was given the opportunity to make representation before the direction letter was issued.

The Appellant submitted representations on 4th October 2023; however, the representations were based on the financial resource to staff the pharmacy, staff's mental fatigue, and the possible difficulty with booking a locum and staff to work the shift. It should be noted that payment of £300 per hour is made for pharmacies who are directed to open on Boxing Day.

Staffing levels of the pharmacy are not beyond control of the Appellant as the arrangements and the number of the pharmacists employed either as relief pharmacists or as locums procured to cover are a commercial consideration and a matter for the Appellant to ensure that there is sufficient cover.

Directions are issued on a rotational basis within the town. Nories Pharmacy has not been directed to open on any bank holiday within the past three years. Alternative pharmacies within Horsham have either volunteered to open or been directed to open. Boxing Day 2023 is Nories Pharmacy's turn to be directed to open.

It may be helpful to note that Day Lewis Carfax Pharmacy, Albion Way has been directed to open on Christmas Day 2023 and Boots Pharmacy, 17 Bartholomew Way has been directed to open on New Years Day 2024.

The Appellant did not dispute that there would be a need for pharmaceutical services for the people in the Horsham area on the directed date.

The Appellant's representation was considered and the final decision to issue a direction was notified on 1st November 2023.

Schedule 4 paragraph (25)(6)(a)

Schedule 4 paragraph (25)(6)(a) of the NHS Pharmaceutical and LPS regulations state that "the reasons for the change" must be included with the notification.

The direction letter clearly states the reasons for the direction and is based on the results of the assessment mentioned above and in the direction letter. This followed the 30-day consultation period and took into account the written representations received from the Appellant. It was concluded that the needs of the local population and likely users of pharmaceutical services in Horsham would not be met on Boxing Day 26th December 2023 if the pharmacy does not open."

- 2.11 No observations were made by the Appellant in response to the representations from the Commissioner.

Assessment

- 2.12 I have considered paragraph 25 of Schedule 4 (Determination of pharmacy premises core opening hours instigated by the NHSCB), which reads as follows:

1. Where it appears to the NHSCB, after consultation with or having considered the matter at the request of the Local Pharmaceutical Committee for the area in which the premises are situated, that the days on which or times at which pharmacy premises

are or are to be open for the provision of pharmaceutical services will not, or no longer, meet the needs of—

(a) people in its area; or

(b) other likely users of the pharmacy premises,
for the pharmaceutical services available at or from those premises, it must carry out an assessment as to whether to issue a direction requiring the NHS pharmacist (P) whose premises they are to provide pharmaceutical services at the pharmacy premises at set times and on set days (which may include Christmas Day, Good Friday and bank holidays).

2. Before concluding the assessment under sub-paragraph (1) the NHSCB must—

(a) give notice to P of any proposed changes to the days on which or times at which the pharmacy premises are to be open; and

(b) allow P 30 days within which to make written representations to the NHSCB about the proposed changes.

3. When it determines the outcome of its assessment, the NHSCB must—

(a) issue a direction (which replaces any existing direction) which meets the requirements of sub-paragraphs (4) and (5);

(b) confirm any existing direction in respect of the times at which P must provide pharmaceutical services at the pharmacy premises, provided that the existing direction (whether issued under regulation 65, this Part, the 2012 Regulations, the 2005 Regulations or the 1992 Regulations) would meet the requirements of sub-paragraphs (4) and (5); or

(c) either—

(i) revoke, without replacing it, any existing direction in respect of the times at which P must provide pharmaceutical services at the pharmacy premises (whether issued under regulation 65, this Part, the 2012 Regulations, the 2005 Regulations or the 1992 Regulations), or

(ii) in a case where there is no existing direction, issue no direction, in which case, by virtue of whichever of paragraph 23(1)(a) or (b) applies, the pharmacy will need to be open for 40 hours each week or for at least 100 hours each week.

4. Where the NHSCB issues a direction under sub-paragraph (3) in respect of pharmacy premises that are to be required to be open—

(a) for more than 40 hours each week, it must set out in that direction—

(i) the total number of hours each week for which P must provide pharmaceutical services at the pharmacy, and

(ii) as regards the additional opening hours, the days on which and the times at which P is required to provide those services during those hours,

but it must not set out in that direction the days on which or times at which P is to provide pharmaceutical services during hours which are not additional opening hours; or

(b) for less than 40 hours each week, it shall set out in that direction the days on which and times at which pharmaceutical services are to be provided at the pharmacy premises.

5. The NHSCB must not issue a direction under sub-paragraph (3) that has the effect simply of requiring pharmacy premises to be open for 40 hours each week on set days and at set times (that is, the direction must have the effect of requiring pharmacy premises to be open for either more or less than 40 hours each week).

6. *The NHSCB must notify P of any direction issued or any other action taken under sub-paragraph (3), and where it sets new days on which or times at which P is to provide pharmaceutical services at pharmacy premises, it must include with the notification a statement of—*
 - (a) *the reasons for the change; and*
 - (b) *P's right of appeal under paragraph (7).*
7. *P may, within 30 days of receiving notification under sub-paragraph (6), appeal in writing to the Secretary of State against any direction issued or any other action taken under sub-paragraph (3) which sets new days on which or times at which P is to provide pharmaceutical services.*
8. *The Secretary of State may, when determining an appeal, either confirm the action taken by the NHSCB or take any action that the NHSCB could have taken under paragraph (3).*
9. *The Secretary of State shall notify P of the determination and shall in every case include with the notification a statement of the reasons for the determination.*
10. *If the days on which or times at which P is to provide pharmaceutical services at pharmacy premises have been changed in accordance with this paragraph, P must introduce the changes—*
 - (a) *if P has not appealed under sub-paragraph (7), not later than 8 weeks after the date on which P receives notification under sub-paragraph (6); or*
 - (b) *if P has appealed under sub-paragraph (7), not later than 8 weeks after the date on which P receives notification under sub-paragraph (9).*
11. *This paragraph does not apply where regulation 65(5) to (7) applies.*

2.13 I am mindful that paragraph 23(12) of Schedule 4 states:

For the purposes of calculating the number of hours that a pharmacy premises are open during a week that includes Christmas Day, Good Friday, Easter Sunday or a bank holiday, it is to be deemed that the pharmacy premises were open on that day at the times at which they would ordinarily have been open on that day of the week.

- 2.14 I am of the view that the pharmacy would normally be closed on Boxing Day and that this would be in accordance with the Regulations.
- 2.15 I am conscious that paragraphs 25(1) and (2) require that before any direction is made, an assessment must be undertaken and that, before the assessment is concluded, the pharmacist providing services from the premises must be given notice of the proposed changes and given 30 days to make written representations about the proposed changes.
- 2.16 The Commissioner has provided, in its representations on the appeal, a letter sent to the pharmacy dated 26 September 2023 which informs the pharmacy of its intention to direct the pharmacy to open on 26 December 2023. I note that the Appellant provided representations in response to this letter by email dated 4 October 2023. The Commissioner also states in Appendix A to the direction letter that it asked pharmacies in the area whether they would be opening and also offered payment to open as part of an enhanced service. I have not been provided with a copy of this request, however I note that the Appellant has not disputed that it was circulated.
- 2.17 The Commissioner has also indicated that it consulted the relevant LPC when drawing up the Bank Holiday directions for the provision of pharmaceutical services over the Christmas and New Year period.

- 2.18 I am of the view that the Commissioner has undertaken a consultation process as set out in the Regulations and that there is no dispute from the Appellant in this regard.
- 2.19 I am mindful that the Commissioner is required by paragraph 25(6) of Schedule 4 to provide reasons for its decision. In my view, these reasons should set out the basis of any determination that days and times of opening will no longer be such as will meet the pharmaceutical needs of relevant persons and (if they are, such that a direction *may* be made) the assessment that led to the direction, taking into account any written representations from the pharmacist.
- 2.20 In Appendix A to the direction letter the Commissioner has provided reasoning as follows:
- 2.20.1 *“As part of the process for assessing the need for pharmacy cover in Horsham on Boxing Day Tuesday 26th December 2023, we have considered reasonable geographical coverage and travel times as well as population density. The opening times being directed are intended to allow the maximum number of people who need to access pharmaceutical services to be able to do so.*
- 2.20.2 *Whilst demand for the full range of pharmaceutical services may be lower on this day compared to a Tuesday that is not a bank holiday, there is still a need for availability of pharmaceutical services for people who live within the area of the Sussex ICB or who are visiting the area for the bank holiday period.*
- 2.20.3 *Pharmacy services are a vital part of the health service which complement and support other services that are available on bank holidays such as NHS 111, GP Out of Hours Service, A&E and Ambulance services. Your pharmacy will be available to deliver services not only to your immediate community but as there will be limited resources on the day, also to patients from further afield.*
- 2.20.4 *In addition to the factors associated with assessment of overall need for a service, when reviewing the need to direct a particular pharmacy we have considered; the pharmacy location, any voluntary opening by other pharmacy contractors, distances from other available services, access including road links, nearby parking, frequency of any previous direction notices and the other pharmacies available in the area excluding Distance Selling pharmacies. We ensure that pharmacies are selected for direction in a fair way that means that all pharmacies in a given area take their turn.”*
- 2.21 The Commissioner has provided further reasoning in its representations on the appeal, including to state:
- 2.21.1 *“An assessment of the need for pharmaceutical services that will meet the needs of the people in the area of Horsham or other likely users of the pharmacy specifically over the bank holidays during the Christmas period has been undertaken. Horsham is a market town with a population of over 50,000 and arrangements are always made for provision of pharmaceutical services on Bank Holidays unless one or more of the pharmacies in the town are planning to open voluntarily.”*
- 2.21.2 *“The assessment for the Horsham area found that on previous bank holidays patients accessed the pharmacy with prescriptions dated the day of the bank holiday day and dated prior to that day. Patients received advice within the pharmacy that was open and over-the-counter items were obtained.”*
- 2.22 I have no information before me with regard to the location of any health bodies in the area which might be generating prescriptions or indeed of any times when these health bodies might be open, but I am mindful that pharmaceutical services are not limited to dispensing. In this regard, I note that the Commissioner has reviewed activity reports

from previous years which indicated a need for access to services for patients as follows:

Total items dispensed	Prescription forms dated on BH date	Prescription forms dated prior to BH date	Number of people attending the pharmacy	Advice and OTC products
116	20	91	25	26

- 2.23 The Appellant's grounds of appeal are based around the challenges it is facing in securing staff for the day in question, for various reasons. I note the Appellant's comments regarding a decline in staff morale and the financial pressures of hiring staff to work on Boxing Day.
- 2.24 The Commissioner responds that payment of £300 per hour is made for pharmacies who are directed to open on Boxing Day. The Commissioner also states that *"Staffing levels of the pharmacy are not beyond control of the Appellant as the arrangements and the number of the pharmacists employed either as relief pharmacists or as locums procured to cover are a commercial consideration and a matter for the Appellant to ensure that there is sufficient cover."*
- 2.25 Whilst the Appellant has indicated that it faces difficulties in opening on Boxing Day, I do not consider that any information has been provided by which to conclude that the Appellant is actually unable to do so.
- 2.26 I am mindful that the Commissioner is required by paragraph 25(6) of Schedule 4 to provide reasons for its decision. In my view, these reasons should set out the basis of any determination that days and times of opening will no longer be such as will meet the pharmaceutical needs of relevant persons and (if they are, such that a direction may be made) the assessment that led to the direction, taking into account any written representations from the pharmacist. I am mindful that the assessment should not be reliant on which pharmacies have opened on previous bank holidays or whether it is on a fair share basis.
- 2.27 The Commissioner has also reviewed which pharmacies have opened on previous bank holidays and states that *"Directions are issued on a rotational basis within the town. Nories Pharmacy has not been directed to open on any bank holiday within the past three years. Alternative pharmacies within Horsham have either volunteered to open or been directed to open. Boxing Day 2023 is Nories Pharmacy's turn to be directed to open."*
- 2.28 I am of the view that the activity data demonstrates that pharmacies were used in the past. I am of the view that the data demonstrates numbers of patients accessing pharmacies during previous bank holiday periods. The direction states that *"reasonable geographical coverage and travel times as well as population density"* have been considered. I note that the Appellant has not sought to dispute the reasoning and data provided, rather the appeal centres around the Appellant's difficulties in securing staff for the day in question.
- 2.29 On appeal, I may (in accordance with paragraph 25(8) of Schedule 4) either confirm the action of the Commissioner or take such other action as it could have taken.
- 2.30 On the basis of the information available to me, I am satisfied that the Commissioner has demonstrated that the needs of people in its area or other likely users of the pharmacy for pharmaceutical services will not be met on 26 December 2023 (Boxing Day) such that it is appropriate to issue a direction requiring the Appellant's pharmacy to open on the day and times indicated in the direction.

3 Determination

3.1 I confirm the action of the Commissioner to issue the direction.

**Head of Appeals
NHS Resolution**