

19 June 2024

FILE REF: SHA/26186

8th Floor
10 South Colonnade
Canary Wharf
London
E14 4PU

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

DECISION MAKING BODY: COVENTRY AND
WARWICKSHIRE
INTEGRATED
CARE BOARD
("the Commissioner")

PHARMACIST: CHEMYCARE STECHFORD LTD
("the Applicant")

PREMISES: 48 KENPAS HIGHWAY
COVENTRY
CV3 6BP

**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]**

Outcome

- 1.1 The application cannot have been made pursuant to paragraph 26 of Schedule 4 of the Regulations. The application is to increase core hours. Paragraph 26 refers to an application to change hours in a way that reduces the total number of hours or keeps that number the same. I cannot therefore determine this matter pursuant to paragraph 26 and I cannot identify any other provision of the Regulations under which I may determine this matter.
- 1.2 I therefore have no jurisdiction to determine this matter.

A copy of this decision is being sent to:

Chemycare Stechford Ltd
Office of the West Midlands on behalf of Coventry and Warwickshire ICB

FILE REF: SHA/26186

8th Floor
10 South Colonnade
Canary Wharf
London
E14 4PU

Advise / Resolve / Learn

NHS Resolution is the operating name of NHS Litigation Authority – we were established in 1995 as a Special Health Authority and are a not-for-profit part of the NHS. Our purpose is to provide expertise to the NHS on resolution concerns fairly, share learning for improvement and preserve resources for patient care. To find out how we use personal information, please read our privacy statement at <https://resolution.nhs.uk/privacy-cookies/primary-care-appeals/>

DECISION MAKING BODY: COVENTRY AND
WARWICKSHIRE
INTEGRATED
CARE BOARD
("the Commissioner")

PHARMACIST: CHEMYCARE STECHFORD LTD
("the Applicant")

PREMISES: 48 KENPAS HIGHWAY
COVENTRY
CV3 6BP

**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]**

1 Introduction

- 1.1 The Applicant has applied to the Commissioner to change the times at which it is obliged to provide pharmaceutical services at the above premises. The Applicant seeks to increase the total number of core opening hours whilst also offering a different distribution of these hours during the week.
- 1.2 The Commissioner has refused the application. The Applicant seeks to appeal to NHS Resolution.

Rights of appeal

- 1.3 Where the Commissioner has determined an application under paragraph 26 of Schedule 4 of the Regulations and has granted it in part only or has taken an action that has the effect of refusing it, paragraph 26(9) provides a right of appeal to the Secretary of State for Health and Social Care ("the Secretary of State").
- 1.4 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

- 1.5 A pharmacy's opening hours may be categorised as:
- 1.5.1 "core opening hours" (at the hours during which the pharmacy must be open by virtue of paragraph 23(1) of Schedule 4 of the Regulations), which may incorporate a direction of the Commissioner requiring fewer or greater than 40 hours and at set times and days; or
- 1.5.2 "supplementary" opening hours (other hours during which the pharmacy premises are open which are in addition to the core hours), pursuant to paragraph 23(3) of Schedule 4 of the Regulations.

Alteration of core opening hours

- 1.6 In accordance with paragraphs 1(7)(c) and 1(7)(d) of Schedule 2 of the Regulations, the pharmacy must provide, as part of an application for entry in the pharmaceutical list:
- 1.6.1 the proposed core opening hours in respect of the premises; and
 - 1.6.2 the total proposed opening hours for the premises (having regard to both the proposed core opening hours and any supplementary opening hours).
- 1.7 The Commissioner maintains pharmaceutical lists that include the days on which and times at which, at those premises, the listed person is to provide those services during the core opening hours and any supplementary opening hours of the premises.
- 1.8 The days on which or times at which a pharmacy is obliged to provide pharmaceutical services at the premises may only be altered by the pharmacy on application under paragraph 26(1) of Schedule 4 of the Regulations, so long as the effect of that application is to reduce the total number of hours for which a pharmacy is obliged to provide, or keep the total number of hours the same.

Alteration of supplementary opening hours

- 1.9 Supplementary opening hours may be altered by the pharmacy giving notice to the Commissioner, in accordance with paragraph 23(6)(a) of Schedule 4 of the Regulations, without the need to make an application to the Commissioner.
- 1.10 There is no specific right of appeal to NHS Resolution in respect of notices given under paragraph 23(6)(a).

2. Application

In this case, the Applicant provided the following information in its application form and supporting information dated 6 February 2024:

- 2.1 "This is an application to permanently change core opening hours.
- 2.2 Current core opening hours for these premises:

Monday	09:00 - 12:00; 17:30 - 21:00
Tuesday	09:00 - 12:00; 17:30 - 21:00
Wednesday	09:00 - 12:00; 17:30 - 21:00
Thursday	09:00 - 12:00; 18:00 - 21:00
Friday	09:00 - 12:00; 17:30 - 21:00
Saturday	09:00 - 12:00; 18:00 - 21:00
Sunday	12:00 - 14:00

- 2.3 Proposed core opening hours for these premises:

Monday	09:00 – 13:00; 14:00 – 19:00
Tuesday	09:00 – 13:00; 14:00 – 19:00
Wednesday	09:00 – 13:00; 14:00 – 19:00
Thursday	09:00 – 13:00; 14:00 – 19:00
Friday	09:00 – 13:00; 14:00 – 19:00
Saturday	09:00 – 13:00
Sunday	12:00 - 14:00

- 2.4 If this is a permanent change, please state below the date from which you would like the change to take effect: As soon as allowed.

- 2.5 Our previous application was refused as it would lead to no Sunday provision of core hours within a mile. Whilst we believe our original application with the evidence provided satisfied the requirements of Paragraph 24 1 a) and b) we acknowledge the decision.
- 2.6 We now propose to open Sundays 12-2pm to take into account the views of the PSRC and ICB in an effort to find a solution that is satisfactory to both parties. All other factors remain the same and the application and evidence presented below is identical apart from opening Sundays.
- 2.7 The proposed change of hours requested would increase our core hours from 40 to 51 hours and maintain an adequate service provision of service for both public and current patients.
- 2.8 Change in patient habits and investigation of current trends, in conjunction with neighbouring surgery opening hours have shown the benefits of guaranteed opening hours between 12:00 -17:30/18:00 Monday -Friday.
- 2.9 Our main surgery Sky Blue Medical Group is open until 17:00 Mon to Friday and closed Saturday and Sunday.
- 2.10 After reviewing Weekday late hours 19:00 to 21:00 & Saturday after 13:00 & Sunday hours over a 4 week period, we have concluded a reduction in hours at these times would maintain the existing service level provision as there is very little demand for pharmaceutical services between these times and on these days. We do not have any substance misuse clients and the majority of the pharmaceutical activities are completed Monday-Friday before 19:00. Our audit shows that barely any patients visit the pharmacy on a Saturday after 13:00 or Sunday and after 19:00 Weekdays.
- 2.11 The current locum rates and business overheads result in net loss for the business which makes it unsustainable financially especially on weekday late nights, Saturdays afternoons & Sundays. These current opening hours are unnecessary when taking into account demand for pharmaceutical services as shown by our audit.
- 2.12 Currently service from other pharmacies within a mile range shows 2 other pharmacies to provide pharmacy services on a Saturday after 13:00 and Sunday. Listed below:
 - 2.12.1 Earlsdon pharmacy- CV5 6EP Sat 9-5.30pm
 - 2.12.2 Boots Pharmacy- CV4 7EH Sat 9.30-5pm & Sun 10-4
- 2.13 There is also one pharmacy within 1.8 miles that is open till 9pm seven days per week
 - 2.13.1 Wellbeing Pharmacy CV4 9DR"

3. **The Decision**

In a letter to the Applicant dated 6 March 2024 the Commissioner decided to refuse the application. The Commissioner stated:

- 3.1 "Further to your application to change the core opening hours at the above address, I am writing to confirm that it has been refused.
- 3.2 Committee agreed to refuse the application as it doesn't meet paragraph 24(1)a or 24(1)b of the regulation. There would not be any provision on Saturday evening within a mile.
- 3.3 In considering the two specific matters set out in paragraph 24(1), Schedule 4 of the 2013 regulations:

- 3.4 24.—(1) Subject to paragraph 26(2A), where NHS England issues a direction for setting any days or times for opening hours under this Part, or determines them without issuing a direction, it must in doing so seek to ensure that the days and times at which pharmacy premises are open for the provision of pharmaceutical services in the area in which the premises that are the subject of the direction are located are such as—
- 3.5 (a) to maintain as necessary the existing level of service provision for the people in that area or other likely users of the pharmacy premises; or
- 3.5.1 Not met – The existing level of provision would not be maintained.
- 3.6 (b) to maintain a sustainable level of adequate service provision for the people in that area or other likely users of the pharmacy premises, in circumstances where maintained.
- 3.6.1 Not met – A sustainable level of adequate service provision would not be maintained.
- 3.7 The existing level of provision would not be maintained, and a sustainable level of adequate service provision would not be maintained.
- 3.8 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 receiving this notice to nhsr.appeals@nhs.net or:

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

4. The Appeal

In a letter to NHS Resolution dated 20 March 2024, received on 23 March 2024, the Applicant appealed against the Commissioner’s decision. The grounds of appeal are:

- 4.1 “We wish to appeal against the decision to refuse our second core hour application by the ICB, with the reason stated as would be no satisfactory provision on Saturday evening within a mile. [sic]
- 4.2 Our first application was refused at appeal ref SHA/26114 and although disappointed with the decision we have attempted to work with the ICB and informally reached out to see what hours would be satisfactory but were told to liase [sic] with our local LPC. The only reason we could see for their decision on [sic] was when the redacted minutes were sent in response to the appeal and stated there would be no Sunday provision of core hours of any pharmacy within a mile.
- 4.3 This application (see Appendix 1) mirrors the first application apart from Sunday where we have committed to open 12-2pm to try and satisfy the concern of the local commissioner and we were therefore surprised to see it refused on the basis that there would be no Saturday provision in the evenings within a mile (see Appendix 2). If this was a concern you would have expected it to be mentioned in the first application so we can only draw the conclusion that the ICB are just looking for reason to refuse the application without any regard to the revised regulations and perhaps just a lazy response as they are getting potential directed hours for ‘free’ but not taking into account the revised legal test and the degradation of the services provided to patients when a pharmacy is operating as a loss maker (we will return to this later) and therefore

is at a real risk of closing. We feel the responsible course of action should be to work with the contractor as opposed to forcing it to close and then have no hours available from that site. The change in the regulations were introduced for scenarios like this to try and stabilise the network and unfortunately it has led to a post code lottery where responsible ICBs are working with contractors and approving core hours changes and others are just refusing without making any comment on the evidence provided.

- 4.4 As stated earlier this application mirrors the first application with the exception of adding Sunday core hours of 12-2pm. Although we still firmly believe there is no demand for Sunday hours it was an attempt to gain approval to close earlier on Monday to Saturday where the data shows no demand and allowing the pharmacy to reduce our cost base and to try and stabilise the financial position of the pharmacy.
- 4.5 Attached is the same format of data (Appendix 3a 3b 3c) as shown in the first application but in addition we have asked patients what mode of transport they used to arrive and what they would do if we were closed in terms of getting to either Wellbeing Pharmacy CV4 9DR or Asda CV3 4AR both pharmacies who have core hours as follows:
 - 4.5.1 Wellbeing Pharmacy
 - 4.5.1.1 Distance 1.7 miles from Chemycare.
 - 4.5.1.2 Driving time less than 10 mins.
 - 4.5.1.3 Mon – Friday 08.30 – 14:00 ,15:00 -21:00
 - 4.5.1.4 Sat 13:00 – 16:00, 17:00- 21:00
 - 4.5.1.5 Sun 08:00- 21:45
 - 4.5.2 Asda CV3 4AR
 - 4.5.2.1 Distance 2 miles from Chemycare.
 - 4.5.2.2 Driving time less than 10 minutes
 - 4.5.2.3 Mon -Sat 09:00- 21:00
 - 4.5.2.4 Sunday 10:00-16:00
- 4.6 The data was gathered over a 3-week period commencing 24/2/24. For clarity we see on average of 200 patients daily between 9-7pm Mon-Friday.
- 4.7 All patients apart from one drove to the pharmacy and had no issue with driving a maximum of another 10 minutes to either Wellbeing or Asda both of whom have car parking right outside the pharmacy. The one patient who walked stated they had a car and would use that if we were not open. It is worth noting that the A45 is a main arterial road in Coventry and would be used by patients travelling by car to go either to Wellbeing or ASDA and the journey time at off peak times (7-9pm Mon- Friday, 1pm - 9pm Sat and 10am -12pm Sunday) is more likely to be around 5minutes). [sic] I have driven to both locations at these times and the average journey time by car to Wellbeing was 5 minutes and Asda 6 minutes.
- 4.8 We have attached a location map (Appendix 4) showing the pharmacies within the area and please note pharmacy 12 (Wellbeing) and pharmacy 13 (Asda). As you can see from the map patients have a simple car journey to either pharmacy either turning left from our pharmacy on the A45 and driving 1.8miles to Wellbeing or taking a right and

going via the A45 /A444 to ASDA a 2 mile journey on major arterial roads making both journeys simple and straightforward.

- 4.9 For note there are bus services right outside Chemycare Pharmacy and another bus stop a 5 minute walk to Kenilworth Road (with pedestrian crossings). Service 12x runs every 30 minutes Mon-Sat until past 21:00 into the city centre from Kenilworth Road and you can then get service 6A to ASDA or 11 (Wellbeing Pharmacy). Both these journeys take approximately 30 minutes in total and cost £2.20.
- 4.10 We can confirm in the latest survey that there were no other requests for any other type of pharmaceutical services and are therefore satisfied that both Asda and Wellbeing will be able to cater for the needs of the patients (albeit low number) that are currently using our pharmacy.
- 4.11 The data also collected information about patient characteristics such as age, sex, disability and race as well as their own starting point to the pharmacy. It can be seen that the overwhelming majority of the patients were white/asian, between the ages of 20-50 and had no disability issues. Interestingly, the majority of the start points' in the journey placed them closer to either Asda or Wellbeing pharmacy with the remainder only a 5 minute drive from the pharmacy.
- 4.12 Please also note on the map the provision of pharmaceutical services from Boots No 6 and No 9 who both provide pharmaceutical services on Saturday and Sunday and whilst these may not be core hours the pharmacies tend to mirror the stores' opening times in addition to the retail park opening hours. Both are situated in retail parks and whilst we do not agree why the first appeal dismissed supplementary hours the fact that both of these pharmacies are located in retail parks with extended weekend opening hours means the opening hours are relatively secure unless of course the decision is made to close the branch. Closure could apply to any pharmacy in the current economic climate so we do not think this should be considered when looking at core hour applications.
- 4.13 We feel you have enough evidence to grant the application under 24/1/a, however notwithstanding this, wish to highlight again the loss-making aspect of the pharmacy for the purposes of satisfying 24/1/b in that that maintaining the existing level of service provision is not a realistically achievable outcome.
- 4.14 Attached (in confidence) are up to date management accounts to Dec 23 (Appendix 5) showing the loss making of the first two months continuing. The 5 months to date show a loss of £# which extrapolated to a full year of trading equates to an annual loss of £# adjusted for one time legal costs of £# equals to a loss of £#. This is worse than the Lloyds year end 22 figures demonstrating that the financial squeeze on pharmacies of the 5 year fixed deal CPCF envelope is worsening due to inflation peaking, increased cost base due to minimum wage (due to go up again in April 24) prescription item volume growth and the purchase margin squeeze evidenced by the number of concessions each month. CPE's website shows a large increase in number of products on price concessions from Nov 22 through to January 24 with the latter being the largest ever for number of these lines. No doubt this will be reflected in the purchasing lines for the 2024 management accounts demonstrating the likelihood that the rest of the year will follow at best a similar trajectory and at worst a more negative profit outturn. The purchasing costs are higher due to squeeze on Cat M lines and the rise in number of concessions reaching unprecedented levels as well as inflationary costs on medicines. Inflationary controllable costs are also at high levels and will increase conservatively at 4% this year so will impact our costs such as electricity, telephone, water, stationary (labels, bags, bottles, printer cartridges) and uniforms. As everyone is aware, community pharmacy cannot pass these extra costs onto their patients so are faced with the difficult decision to cut back on services and or reduce their staffing.
- 4.15 Lloyds being a large multiple also no doubt had access to deals from manufactures that small independents would not have.

- 4.16 Line 19 to 39 are individual regular expenses which apart from legal costs will be incurred annually including insurance, repairs and renewals. Sundry expenses are not categorised as this would be too time consuming but include things like Uniforms, stationary, training, equipment for services etc and from our experience tend to be the similar year on year.
- 4.17 We are sorry that our management accounts do not include locum costs but feel the simplest and most effective way of demonstrating the effect of approving the application is to calculate the main cost saving which would be pharmacist and staff costs as Appendix 3a, 3b, and 3c show in effect negligible income for the hours we are proposing to close. We consider this income could be offset by the marginal saving on electricity. For example if we say on average we lose 10 items per week as a result of the change in hours then this equates to an approximate loss of profit of $10 \times \text{£\#}$ (av profit per item) = $\text{£\#}$. The gain in saving on electricity is approximately $\text{£\#}$ per week.
- 4.18 The main driver is salary costs so if we take these costs out for 19.5 hours per week (Mon-Friday 7pm-9pm and Sat 1.30pm -9pm and Sunday 10am-12pm) @ pharmacist average rate $\text{£\#}$ per hour and 2 staff at $\text{£\#}$ this gives us a saving of $\text{£\#}$ per week ($\text{£\#} \times 19.5 \text{ hrs}$) and a yearly saving of $\text{£\#}$. In confidence we have include an invoice (Appendix 6) from our regular locum showing his rate @£30 for Tue-Friday late hours, he works 12-9pm on Saturday and Mondays@ $\text{£\#}$ giving rise to the average rate of $\text{£\#}$ stated above.
- 4.19 A yearly saving of $\text{£\#}$ would still make the pharmacy a loss maker but not to the extent of haemorrhaging money making closure an inevitable outcome.
- 4.20 Although we are increasing core hours our total opening hours will be reduced from 76 (open 9am-9pm Mon Sat and 10am-2pm Sun) to 51 hours and we would be open when demand for pharmaceutical services from patients and surgeries is the most as seen by Appendix 3a where the average number of patients seen during the day between Mon-Friday 9-7pm is 200.
- 4.21 We hope the above evidence is sufficient to uphold the appeal as the regulations were changed to help pharmacies change core hours more easily as a recognition from the Government that the situation is stark with many community pharmacies large and small showing unsustainable losses on their reported accounts. You only have to look at the accounts of well established pharmacy chains to see how the situation as [sic] worsened from Aug 22 and continues to degrade. Indeed, Medipharma, Southcross Pharmacy and Ranveer Limited are to name just a few who have been declared insolvent in the past 18 months and we feel this year will only get worse as a direct result of the severe underfunding of community pharmacy over the last 5 years coupled with the severe inflationary pressure. Trade bodies such as the NPA and AIM have estimated the underfunding gap over 5 years to be in the region of £1 billion which explains why we are currently in the situation we are.
- 4.22 We believe if the appeal is allowed then the pharmacy will be on a much more stable footing to maintain the existing level of service provision to patients in the locality."

5. Representations

- 5.1 No representations were received.

6. Consideration

- 6.1 I have considered paragraph 26(1) of Schedule 4 of the Regulations, which states:

"26.— (1) An NHS pharmacist (P) may apply to the NHSCB for it to change the days on which or times at which P is obliged to provide pharmaceutical services during core opening hours at P's pharmacy premises in a way that—

(a) reduces the total number of hours for which P is obliged to provide pharmaceutical services at those premises each week ...; or

(b) keeps that total number of hours the same.”

- 6.2 Paragraph 26(1) clearly states that a pharmacy contractor can only apply to change its hours in a way that reduces the total number of hours or keeps that number the same.
- 6.3 The Applicant in the present case is seeking to increase the number of core hours from 40 to 51 hours a week. This is not therefore an application to reduce hours or keep hours the same.
- 6.4 As such it appears that the Applicant’s application has not been made pursuant to paragraph 26(1) of Schedule 4 of the Regulations.
- 6.5 I have not been directed to, and cannot identify, any provision of the Regulations that enables a pharmacy contractor to apply to increase its core hours. I would make the point that there is no need for a pharmacy contractor to apply to increase its core hours because a pharmacy contractor is at any time able to open for more than its core hours. These hours will be deemed supplementary opening hours.
- 6.6 As the application does not appear to be an application that the Applicant can make under the Regulations, I have no jurisdiction to consider this matter.
- 6.7 I note that the Applicant has made reference to my decision in its previous application to amend its opening hours (case SHA/26114 - decision letter dated 24 January 2024). On reflection, that application also related to an increase in core hours but was regrettably not determined in the way it should have been and led to a determination on the substantive application as opposed to a determination of no jurisdiction.

7. Determination

- 7.1 The application cannot have been made pursuant to paragraph 26 of Schedule 4 of the Regulations. The application is to increase core hours. Paragraph 26 refers to an application to change hours in a way that reduces the total number of hours or keeps that number the same. I cannot therefore determine this matter pursuant to paragraph 26 and I cannot identify any other provision of the Regulations under which I may determine this matter.
- 7.2 I therefore have no jurisdiction to determine this matter.

**Head of Appeals
NHS Resolution**