

22 November 2024

REF: SHA/26267

**APPEAL AGAINST HEREFORDSHIRE AND
WORCESTERSHIRE INTEGRATED CARE BOARD
DECISION REGARDING A BREACH NOTICE AT
BLUECROSS HEALTH LTD T/A CREST PHARMACY –
LINDEN AVENUE (FTH46), 46 LINDEN AVENUE,
KIDDERMINSTER, DY10 3AB**

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

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

1 Outcome

- 1.1 Pursuant to paragraph 9(5)(a) of Schedule 3 to the Regulations I substitute the decision of the Commissioner to issue a breach notice with a decision to not issue a breach notice.

A copy of this decision is being sent to:

Bluecross Health Ltd t/a Crest Pharmacy
Herefordshire and Worcestershire ICB

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1 The Breach Notice

A Breach Notice dated 30 July 2024 was sent to Bluecross Health Ltd t/a Crest Pharmacy – Linden Avenue in respect of 46 Linden Avenue, Kidderminster, DY10 3AB. The Breach Notice stated:

- 1.1 “This is a breach notice issued under regulation 71 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013.

Nature of the breach:

- 1.2 The 2023-24 CPAF was carried out in accordance with the new NHS Regulations introduced at the end of 2020 and it is a requirement of the Terms of Service that contractors complete the process. See below for the relevant Regulation:

Terms of Service of NHS Pharmacists, Schedule 4, Paragraph 35 – Inspections and access to information

(5) P must, at the request of the NHSCB or a person authorised in writing by the NHSCB to make the request, send to the NHSCB or that person by means of an electronic communication, a duly completed questionnaire, which is –

(a) In a format approved by the NHSCB; and

(b) For the purpose of enabling NHSCB, or a person authorised in writing by the NHSCB, to determine whether or when it is necessary or expedient for a person authorised in writing by the NHSCB to undertake an inspection of P's premises pursuant to sub-paragraph (1).

- 1.3 The initial invitation to complete the CPAF Screening Questionnaire was sent, via email, on behalf of the ICB by NHSBSA, to you on 03 July 2023 with a deadline for completion until no later than 11:59pm 30 July 2023. The CPAF Screening Questionnaire was to be completed via the MYS Portal within the specified timescale.

- 1.4 Reminders were sent weekly, via email, from NHSBSA, on the following dates:

1.4.1 Initial Invite - 03/07/2023

1.4.2 Reminder - 10/07/2023

1.4.3 Reminder - 17/07/2023

- 1.4.4 Reminder - 23/07/2023
- 1.4.5 Final Reminder - 26/07/2023
- 1.5 No response was received and you failed to submit the CPAF Screening Questionnaire.
- 1.6 Further action was taken and the CPAF Pre-Visit Questionnaire was sent, via email, on behalf of the ICB by NHSBSA, to you on 06 November 2023 with a deadline for completion until no later than 11:59pm 17 December 2023. The CPAF Pre-Visit Questionnaire was to be completed via the MYS Portal within the specified timescale.
- 1.7 Reminders were sent weekly, via email, from NHSBSA, on the following dates:
 - 1.7.1 Initial Invite - 06/11/2023
 - 1.7.2 Reminder - 13/11/2023
 - 1.7.3 Reminder - 20/11/2023
 - 1.7.4 Reminder - 27/11/2023
 - 1.7.5 Reminder - 04/12/2023
 - 1.7.6 Final Reminder - 07/12/2023
- 1.8 You failed to submit the completed CPAF Pre-Visit Questionnaire.
- 1.9 You are required not to repeat the breach again.
- 1.10 You have a right of appeal to the Secretary of State against the issuing of this breach notice. 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 notice to:
 - 1.10.1 Via email to: nhsr.appeals@nhs.net
 - 1.10.2 Or, in writing to: NHS Resolution
 - 8th Floor
 - 10 South Colonnade
 - Canary Wharf
 - London
 - E14 4PU
- 1.11 Please note that should you fail to comply with the requirements of this breach notice we reserve the right to exercise our powers to take further action in relation to your inclusion in the pharmaceutical list in respect of the above named premises.
- 1.12 This may include removal of the premises from the pharmaceutical list under Regulation 73 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013."

The Breach Notice was sent via post to the Appellant's pharmacy and stated at the bottom of the cover letter: "Cc also sent via email to: pharmacy.fth46@nhs.net".

2 The Appeal

In an email dated 31 July 2024 and addressed to NHS Resolution, the Appellant appealed against Herefordshire and Worcestershire ICB's ("the Commissioner") decision. The grounds of appeal are:

- 2.1 "I am reaching out as a director of Bluecross Health Ltd t/a Crest Pharmacy Linden Avenue, to appeal the breach notice dated 30 July 2024.
- 2.2 I understand the CPAF was not completed for 2023/24 and am aware of the implications of this. However, the letter states several reminders were sent and after careful checks of the shared mailbox I can confirm these were never received. I believe this is due to our current email being wmch.pharmacy.fth46@nhs.net and the reminders must have been sent incorrectly to pharmacy.fth46@nhs.net – this email does not exist.
- 2.3 Furthermore, please confirm whether any action needs to be taken as a result of this breach notice other than completion of 2024/25 CPAF via MYS, which has been completed.
- 2.4 If you could also possibly advise on how to resolve the aforementioned email error to ensure this does not occur again."

3 Summary of Representations

No representations were received by NHS Resolution on the appeal. Given that no representations were received and having reviewed the information before me, I decided that it was appropriate to request further information on certain issues. I sent the following to both parties:

- 3.1 "I am providing the parties to this dispute an opportunity to make further comments on specific issues in relation to the above matter.
- 3.2 I am giving the Commissioner the opportunity to:
 - 3.2.1 Submit a copy of the initial invite (for the CPAF Screening Questionnaire) sent on 3 July 2023 and details of the email address and/or postal address to which it was sent;
 - 3.2.2 Submit a copy of the reminders sent on 3, 10, 17, 23 and 26 July 2023 and details of the email address and/or postal address to which they were sent;
 - 3.2.3 Submit a copy of the initial invite (for the CPAF Pre-visit Questionnaire) sent on 6 November 2023 and details of the email address and/or postal address to which it was sent;
 - 3.2.4 Submit a copy of the reminders sent on 6, 13, 20 and 27 November 2023 along with those sent on 4 and 7 December 2023;
 - 3.2.5 Explain why, if the initial invite and reminders were sent by email only, why the breach notice was sent by post and email.
- 3.3 Additionally, I am giving the Appellant the opportunity to:
 - 3.3.1 Submit confirmation of the NHS pharmacy email address associated with Crest Pharmacy – Linden Avenue;
 - 3.3.2 Provide information to support the claim that pharmacy.fth46@nhs.net is the incorrect email address associated with Crest Pharmacy – Linden Avenue with

evidence of any notification given to the Commissioner about this being the incorrect email address.

- 3.4 The parties have 10 days from the date of this letter to provide the information above. On receipt of any additional comments within this timescale, I will consider whether it is appropriate to provide the other party with a chance to provide observations on those comments. We will then make a final determination on this appeal.”

4 Further representations

4.1 THE APPELLANT

- 4.1.1 “Please see the screenshot below which shows the email address in use (search bar):
- 4.1.2 [The screenshot provided detailed wmch.pharmacyfth46@nhs.net as the email address in an NHSmail outlook mail browser.]
- 4.1.3 There is no way to show the reminders were going to the incorrect email as these were not received, due to it being sent to another inexistent address.
- 4.1.4 Please advise on whether further clarification is required.”

- 4.2 The Commissioner did not respond to the request for further information.

5 Consideration

- 5.1 Under Regulation 71(1) “Breaches of terms of service: breach notices” of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 (“the Regulations”), a Breach Notice may be issued:

71. (1) Where an NHS chemist (C) breaches a term of service and the breach is not capable of remedy, NHS England may by a notice (“a breach notice”) require C not to repeat the breach.

- 5.2 I note that in the Regulations an NHS Chemist means “an NHS appliance contractor or an NHS pharmacist”. An NHS pharmacist is defined as “a person included in a pharmaceutical list of the type referred to in regulation 10(2)(a);”. Regulation 10(2)(a) states:

10(2) “Those lists (which are pharmaceutical lists) are

(a) a list of persons who undertake to provide pharmaceutical services in particular by way of the provision of drugs;”

- 5.3 The Regulations contain no definition as to what constitutes a breach of terms of service which is not capable of remedy.
- 5.4 I note that the pharmacy is included on the pharmaceutical list and that there is no dispute between the parties with regard to this.
- 5.5 The Breach Notice was issued pursuant to Regulation 71(1) and is compliant with the requirements of a breach notice as it includes the nature of the breach and an explanation of the Appellant’s right of appeal under Regulation 77(1)(c).
- 5.6 The Breach Notice states that the NHS BSA on behalf of the Commissioner requested completion of the CPAF Screening Questionnaire via the MYS Portal within the “specified timescale”. I note that reminders were sent via email, by the NHS BSA, on the following dates “Initial Invite: 03/07/2023. Reminder: 10/07/2023. Reminder:

17/07/2023. *Reminder: 23/07/2023. Final Reminder: 26/07/2023*" and the Commissioner claims to have not received any response or completion of the CPAF Screening Questionnaire. I note that the NHS BSA sent further requests for the CPAF Pre-visit Questionnaire, via email, to the Appellant on 6 November 2023 to be completed no later than 17 December 2023. I note that reminders were sent, via email, on the following dates "*Initial invite: 06/11/2023. Reminder: 13/11/2023. Reminder: 20/11/2023. Reminder: 27/11/2023. Reminder: 04/12/2023. Final Reminder: 07/12/2023.*" Although I have not been provided with copies of the communication sent, the Appellant does not dispute that these communications were sent but that they were not received in the pharmacy's NHS mailbox as the email address was incorrect.

- 5.7 There is no dispute raised by either party that the local dispute resolution process has not been exhausted. Given that both parties do not dispute that local dispute resolution has been exhausted I am content that I can deal with this matter.
- 5.8 The Appellant seeks to appeal against the decision of the Commissioner to issue the Breach Notice for its failure to complete and submit both the CPAF Screening Questionnaire and the CPAF Pre-Visit Questionnaire.
- 5.9 I note that "Inspections and access to information" is found in Schedule 4, Part 4, 'Other Terms of Service' under Paragraph 35 and states:

35. Inspections and access to information

(1) An NHS pharmacist (P) must allow persons authorised in writing by the NHSCB to enter and inspect P's pharmacy premises at any reasonable time, for the purposes of –

(a) ascertaining whether or not P is complying with the requirements of this Schedule;

(b) auditing, monitoring and analysing–

(i) the provision made by P, in the course of providing pharmaceutical services, for patient care and treatment, including any arrangements made with a person in respect of provision of appliances, and

(ii) the management by P of the pharmaceutical services P provides, where the conditions in sub-paragraph (2) are satisfied.

(2) The conditions are that–

(a) reasonable notice of the intended entry has been given;

(b) the Local Pharmaceutical Committee for the area where the pharmacy premises are situated have been invited to be present at the inspection, where this is requested by P;

(c) the person authorised in writing (X) carries written evidence of X's authorisation, which X produces on request; and

(d) X does not enter any part of the premises used solely as resident accommodation without the consent of the resident.

(3) P must, at the request of the NHSCB or X, allow it or X access to any information which it or X reasonable requires–

(a) for the purposes mentioned in sub-paragraph (1); or

(b) in the case of the NHSCB, in connection with its functions that relate to pharmaceutical services.

(4) P must, at the request of the NHSCB, send to the NHSCB by means of electronic communication of the type specified in the request any information to which a person authorised in writing by the NHSCB would have access during an inspection of P's pharmacy premises pursuant to sub-paragraph (1), if–

(a) P has that information in a form which means it may be sent by that form of electronic communication; or

(b) it is reasonable for the NHSCB to request that P convert that information into a form which means that it may be sent by that form of electronic communication (and the NHSCB does so request)

(5) P must, at the request of NHSCB or a person authorised in writing by the NHSCB to make the request, send to the NHSCB or that person by means of electronic communication, a duly completed questionnaire, which is–

(a) in a format approved by the NHSCB; and

(b) for the purpose of enabling NHSCB, or a person authorised in writing by the NHSCB to determine whether or when it is necessary or expedient for a person authorised in writing by the NHSCB to undertake an inspection of P's premises pursuant to sub-paragraph (1).

(6) Before information is requested pursuant to sub-paragraph (5), the NHSCB must consult the person who is, for the time being, the person consulted under section 165(1)(a) of the 2006 Act, in respect of the pharmaceutical remuneration of NHS pharmacists on the terms of the request.

- 5.10 The Breach Notice states that the Commissioner requested completion of the questionnaire on a number of occasions and further that *“no response was received and you failed to submit the CPAF Screening Questionnaire”* as well as *“[the Appellant] failed to submit the completed [sic] CPAF Pre-visit Questionnaire.”*
- 5.11 I note that under Schedule 4, paragraph 29C of the Regulations, there is a requirement for NHS Pharmacists to have a premises specific NHSmail account. The Commissioner, in the Breach Notice, claims that the NHS BSA, sought to contact the pharmacy on several occasions throughout July 2023 to complete the CPAF Screening Questionnaire, and again throughout November and December 2023 to complete the CPAF Screening Questionnaire. I understand that the NHS BSA manages the CPAF process and usually issues invitations to complete the CPAF Screening Questionnaire via email however I have not been provided with a copy of the emails or reminders that were sent on this occasion.
- 5.12 The Appellant, in its appeal, claims that it believes the initial invitation and subsequent reminders were sent to an incorrect email address.
- 5.13 As I have not been provided with a copy of the emails sent to the Appellant's pharmacy, I am unable to be certain which email address they were sent to. Based on the information provided, I note that the Breach Notice was sent via post to the Appellant and stated *“Cc: also sent via email to: pharmacy.fth46@nhs.net”*. The Appellant confirmed, via screenshot, that the correct email address for Crest Pharmacy – Linden Avenue is wmch.pharmacy.fth46@nhs.net and further that this is the address used as part of this appeal.
- 5.14 In the absence of information to the contrary, I am of the view that it is highly likely that the Commissioner sent emails in relation to the CPAF Screening Questionnaire and

the CPAF Pre-Visit Questionnaire to the same email address that they cc'd the Breach Notice to i.e. pharmacy.fth46@nhs.net.

- 5.15 Having determined which address the emails relating to the CPAF Screening and Pre-visit Questionnaires were sent to, I now must consider if this was a reasonable approach for the Commissioner to adopt. As noted above, the Appellant states that wmch.pharmacy.fth46@nhs.net is the address associated with Crest Pharmacy – Linden Avenue (FTH46) and that the email address of pharmacy.fth46@nhs.net does not exist. Whilst I appreciate the effort that appears to have been made to communicate with the Appellant the requirement to complete the questionnaires, I am of the view that the Commissioner (and those acting on its behalf) should be aware of the correct contact details of the pharmaceutical providers in its area especially given the nature of communications being issued and the consequences of not responding.
- 5.16 I note that I requested confirmation from the Commissioner as to whether the invitation and reminders to complete the questionnaire were sent via email only or if these were also sent via post. I note that the Commissioner did not respond to my request for this information. I must therefore assume that the reminders were sent via email only.
- 5.17 I am of the view that the responsibility to ensure that the contact details it has on file for Contractors lies entirely with the Commissioner. Of note from the footer of the cover letter with the Breach Notice the incorrect email address is listed for the Appellant.
- 5.18 Therefore, and taking all of the above into account, I consider that the Commissioner should have known the correct email address for the Appellant. For this reason, I consider it appropriate to substitute a decision to issue the Breach Notice with a decision to not issue a breach notice.
- 5.19 I note that the Appellant confirms that the 2024/25 CPAF Questionnaire has been completed yet does not confirm if the 2023/24 Questionnaire has been completed in light of the Breach Notice. Further I have no information as to whether the Commissioner requires the pharmacy to complete the 2023/24 CPAF Screening and CPAF Pre-Visit Questionnaires.
- 5.20 I note that the Appellant has confirmed that the correct premises specific email address is wmch.pharmacy.fth46@nhs.net. I consider that the Commissioner should now communicate to the Appellant via this email whether it requires the 2023/24 CPAF questionnaires to be completed.

6 Decision

- 6.1 Under NHS Resolution's powers, as set out in paragraph 9(5) of Schedule 3 to the Regulations, I may either confirm the decision of the Commissioner or substitute for that decision any decision that the Commissioner could have taken when it took that decision.
- 6.2 Pursuant to paragraph 9(5)(a) of Schedule 3 to the Regulations I substitute the decision of the Commissioner to issue a breach notice with a decision to not issue a breach notice.

**Head of Appeals
NHS Resolution**