

6 December 2024

REF: SHA/26270

**APPEAL AGAINST BLACK COUNTRY ICB DECISION
REGARDING A BREACH NOTICE AT NSB
HEALTHCARE LTD T/A SUTTON PHARMACY (FQ029),
121 CHESTER ROAD, STREETLY, SUTTON
COLDFIELD, B74 2HE**

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)(b) of Schedule 3 to the Regulations, I substitute the decision of the Commissioner to issue the Breach Notice with the decision to issue a remedial notice with the same wording except for the changes below:
 - 1.1.1 substitute all references to “breach notice” and “regulation 71” with reference to “remedial notice” and “regulation 70”;
 - 1.1.2 substitute the requirement to not repeat the breach with the requirement to remedy the breach within the notice period; and
 - 1.1.3 the Commissioner must indicate to the Appellant how and in what format the questionnaire should be completed. The timescale for remedy will be 30 days from the date of that communication.

A copy of this decision is being sent to:

NSB Healthcare Ltd t/a Sutton Pharmacy
Black Country ICB

Advise / Resolve / Learn

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1 The Breach Notice

A Breach Notice dated 30 July 2024 was sent to NSB Healthcare Ltd t/a Sutton Pharmacy in respect of 121 Chester Road, Streetly, Sutton Coldfield, B74 2HE.

- 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 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 A response to the CPAF Screening Questionnaire was submitted.
- 1.6 Following a review of the Screening Questionnaire submission, further information was required to assess compliance to the Terms of Service and NHSBSA were instructed to invite you to complete the CPAF Pre-Visit Questionnaire. This was action [sic] 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:
- 1.11 Via email to: nhsr.appeals@nhs.net
- 1.12 Or, in writing to: NHS Resolution,
- 8th Floor,
- 10 South Colonnade,
- Canary Wharf,
- London, E14 4PU
- 1.13 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.
- 1.14 This may include removal of the premises from the pharmaceutical list under Regulation 73 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013."

2 The Appeal

In an undated letter, received on 4 August 2024 via email, addressed to NHS Resolution, NSB Healthcare Ltd t/a Sutton Pharmacy ("the Appellant") appealed against the Commissioner's decision. The grounds of appeal are:

2.1 “I am writing to you to appeal the above breach notice.

History

2.2 I am the current director of NSB Healthcare; the pharmacy was taken over by us on 28 August 2023. As part of the handover process, we requested NHS email login details from the previous owners. Unfortunately, they did not provide these, citing that they were not able to access the login details of the NHS email account of pharmacy.fq029@nhs.net.

2.3 To overcome this, I emailed the NHS email administration team several times to allow me access to the above account via my personal NHS email (bhasker.bhakta@nhs.net). The NHS helpdesk advised me that in order for them to fulfil this request, an email needed to be sent from the shared mailbox of pharmacy.fq209@nhs.net. Unfortunately, I was not able to access this shared mailbox, which was the original reason for my email to them. All of the above added to delays in the administrative task.

Appeal

2.4 I would like to appeal the breach notice as I was not in receipt of the following emails from NHSBSA due to issues with accessing the shared mailbox of pharmacy.fq029@nhs.net:

2.4.1 06/11/2023

2.4.2 13/11/2023

2.4.3 20/11/2023

2.4.4 04/12/2023

2.4.5 07/12/2023 (final reminder)

2.5 Notwithstanding the email reminders, if an additional written letter has been sent for the final reminder, I would have been informed and therefore actioned CPAF Pre-Visit Questionnaire.

2.6 This letter is to summarise the information required for the appeal against the breach notice FQ029.

2.7 I look forward hearing from you [sic] with an appropriate resolution.”

Within the appeal, the Appellant provided 10 separate email exchanges that had been undertaken between the Appellant and the NHSmail Helpdesk ranging from 17 December 2023 to 9 January 2024.

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 matters 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 Pre-visit Questionnaire) sent on 6 November 2023 and details of the email address and/or postal address to which it was sent;
- 3.2.2 Submit a copy of the reminders sent on 6, 13, 20 and 27 November along with those sent on 4 and 7 December 2023;
- 3.2.3 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 Confirm if the Commissioner was aware of the issues you were having in accessing the shared mail box for Sutton Pharmacy (FQ029) and what contact details you were using to communicate with the Commissioner through the daily running of the pharmacy.
- 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 final observations on those comments. We will then make a final determination on this appeal."

4 Further Representations

4.1 THE APPELLANT

- 4.1.1 "Thank you for your letter dated 7 October 2024 with regards [sic] to your request of further information relating to:
 - 4.1.1.1 "Confirmation if the Commissioner was aware of the issue you were having in accessing the shared mailbox for Sutton Pharmacy (FQ029) and what contact details you were using to communicate with the Commissioner through the daily running of the pharmacy."
- 4.1.2 I can confirm an email was sent on 7 December 2023 to dee.william-jones@nhs.net to inform the ICB that we were experiencing issues with access to the NHS shared mailbox (Annex 1). The administration team for NHS.net mail were not the most helpful in resolving my on-going issues and they did not provide any adequate resolutions, thus delaying this even further. ICB were also informed of my personal email from myself and the previous owner (Annex 2). If copies of the following emails regarding the breach notice were sent to my personal email (06/11/2023, 13/11/2023, 20/11/2023, 04/12/2023, 07/12/2023), I would have been informed and as such would have been actioned.
- 4.1.3 Please do not hesitate to contact me if you require any further information."

4.2 No response was received from the Commissioner.

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 Pre-Visit Questionnaire via the MYS Portal within the “specified timescale”. I note that reminders were sent via email, by NHS BSA, 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.” The Commissioner states that no response was received and the questionnaire was not completed. I have not been provided with a copy of this communication. Although I have not been provided with copies of the communication, the Appellant does not dispute that these communications were sent, only that it was unable to access them.
- 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 the CPAF Pre-Visit Questionnaire. As confirmed in the Breach Notice, the CPAF Screening Questionnaire was completed in July 2023.
- 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 requirement 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 arrangement 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 inspections, 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 residential accommodation without the consent of the resident.

(3) P must, at the request of the NHSCB or of X, allow it or X access to any information which it or X reasonably 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 an 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 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).

(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 pharmaceutical remuneration of NHS pharmacists on the terms of the request.

5.10 I note the Appellant took over as director and superintendent pharmacist of the pharmacy in August 2023, following which it had problems accessing the shared mailbox.

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. There is no dispute from the Appellant that the Commissioner sought to contact the pharmacy on several occasions throughout November and December 2023 to complete the CPAF Pre-visit

Questionnaire. I have not been provided with a copy of the initial invite to complete the questionnaire or any of the copies of subsequent reminder emails but these are matters not in dispute.

- 5.12 I note that the Appellant has provided a copy of an email sent by the previous director and superintendent pharmacist of the pharmacy, dated 26 August 2023, to Primary Care Support England informing of the Appellant's new role within Sutton Pharmacy and that this email provided personal contact details for the Appellant; including a mobile phone number and a personal Hotmail.co.uk email address.
- 5.13 I note that the Appellant states that following the takeover of the pharmacy, it was unable to access the shared NHSmail address. I further note that the Appellant has provided a copy of the email sent to the NHSmail Helpdesk dated 17 December 2023 which states "*I am unable to access the shared email for Sutton Pharmacy. We have taken over this Pharmacy in August and there is no one with admin authority to add me on to the shared box*". The Commissioner was also informed, as seen from the evidence provided by the Appellant, of the struggles that the Appellant was having accessing the shared mailbox via an email sent on 7 December 2023 from the Appellant's personal Hotmail.co.uk address.
- 5.14 I note that the Appellant has not disputed that the email reminders were sent to the shared mailbox for the pharmacy and that the Breach Notice was also sent to the shared mailbox. I note that, according to the Breach Notice, the initial invitation to complete the CPAF Pre-Visit Questionnaire was sent on 6 November 2023. This predates the email that the Appellant sent to the Commissioner about having problems accessing the shared mailbox and the Helpdesk log surrounding the same issue. I note that the Appellant, in its Helpdesk Support log, states that it took over the running of the pharmacy at the end of August 2023 and did not request Helpdesk assistance until the beginning of December 2023. This either means that the shared mailbox for FQ029 was not accessible in a period of three months or the problems accessing the account was novel to the December Helpdesk request.
- 5.15 I note that Schedule 4, Part 4, paragraph 29C states:
- Contact via NHSmail, pharmacy profiles and the Central Alerting System*
- 29C.-(1) An NHS pharmacist (P) must ensure that pharmacy staff at pharmacy premises (including locums) have access to, and are able to send and receive NHSmail from, a premises specific NHSmail account.*
- (2) P must ensure that at least two members of the pharmacy staff have live, linked NHSmail accounts to the premises specific NHSmail account (unless fewer than two members of the pharmacy staff are engaged in the provision of NHS services).*
- 5.16 Given the above terms of service, it is clear that the Appellant has a responsibility to ensure that its NHS mailbox is both accessible and monitored by more than one member of staff as indicated. The Regulations do not allow for any discretion on these terms of service in the case of a change of ownership or change of directors and/or superintendent pharmacists, as is the case in this matter.
- 5.17 I note the Appellant's comments that "*I was not in receipt of the... emails from NHSBSA due to issues with accessing the shared mailbox of pharmacy.fq029@nhs.net*". Whilst the Appellant has provided information to confirm that it was investigating possible solutions to accessing the shared mailbox (and that it had informed the Commissioner of the problems experienced), this did not happen until 7 December 2023 at which point the final reminder for completing the CPAF Pre-Visit Questionnaire would have been sent.
- 5.18 Although I have not been informed of the date that the Appellant gained access to the shared mailbox, it appears that the Appellant did not have access to the mailbox from

the period of August 2023 to, at the very least, December 2023, which is not an insignificant period of time. Given the responsibility placed on the Appellant by the terms of service as noted above, I consider that it would be reasonable to expect the Appellant to notify the Commissioner earlier where it is experiencing disruption to the use of its mailbox.

- 5.19 Whilst I appreciate that the previous director did inform Primary Care Support England (as opposed to the Commissioner directly) of the Appellant's personal contact details in August 2023, the Commissioner had no reason to believe that there was any problem in accessing the shared mailbox for the pharmacy mindful of paragraph 29C as referred to above until December 2023. I therefore do not find any fault with the steps carried out by the Commissioner.
- 5.20 I note that the Appellant commented in its appeal that "*if an additional written letter had been sent for the final reminders, I would have been informed and therefore actioned CPAF Pre-visit Questionnaire*". 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. The Commissioner did not respond to my request for this information. I must therefore assume that the reminders were sent via email only.
- 5.21 For reasons given above, I conclude that by failure to complete the CPAF Pre-visit Questionnaire when requested to do so, the Appellant was in breach of paragraph 35(5), Schedule 4 of the Regulations.
- 5.22 I next consider whether the failure to complete the CPAF Pre-visit Questionnaire is a breach which is capable of remedy. As noted in paragraph 5.3 above, the Regulations do not contain a definition as to what constitutes a breach of terms of service which is or is not capable of remedy. A common-sense interpretation is that a breach is unable to be rectified.
- 5.23 The Appellant was required to complete the pre-visit questionnaire. Completion of the questionnaire, even if not within the time period given, would have remedied or rectified the breach. Further I note there is no timescale set out in this provision of the Regulations to submit the pre-visit questionnaire. If there had been, the breach could not have been remedied.
- 5.24 Under Regulation 70 of the Regulations, a remedial notice may be issued:
- 70(1) Where an NHS chemist (C) breaches a term of service and the breach is capable of remedy, the NHSCB may be a notice ("a remedial notice") require C to remedy the breach."*
- 5.25 I consider that both remedial and breach notices carry the same weight in terms of severity of possible consequences, with the difference being that a remedial notice requires the remedy of the breach, and the breach notice requires an NHS chemist to not repeat the breach. As the Appellant has failed to complete the questionnaire within the timescale set by the Commissioner, it is entirely appropriate to require the Appellant to remedy the breach.
- 5.26 I am of the view that 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.
- 5.27 As a result of the comments I make above, I am of the view that:
- 5.27.1 the Appellant did not complete the CPAF Pre-visit Questionnaire within the timescale set by the Commissioner; and

5.27.2 such action constitutes a breach of the Appellant's terms of service by virtue of Regulation 35, which is capable of remedy.

- 5.28 As I am substituting the Commissioner's decision to issue the Breach Notice with a decision to issue a remedial notice, I determine that the Appellant is required to remedy the breach by providing the information requested (and therefore completing the questionnaire). In this regard, I note that Regulation 70(3) requires the notice period for remedying the breach to be not less than 30 days of the date on which the Commissioner indicates to the Appellant that the remedial action should be undertaken.
- 5.29 To be clear, the Commissioner must indicate to the Appellant how and in what format the questionnaire should be completed. The timescale for remedy will be 30 days from the date of that communication.

6 Decision

- 6.1 Pursuant to paragraph 9(5)(b) of Schedule 3 to the Regulations, I substitute the decision of the Commissioner to issue the Breach Notice with the decision to issue a remedial notice with the same wording except for the changes below:
- 6.1.1 substitute all references to "breach notice" and "regulation 71" with reference to "remedial notice" and "regulation 70";
 - 6.1.2 substitute the requirement to not repeat the breach with the requirement to remedy the breach within the notice period; and
 - 6.1.3 the Commissioner must indicate to the Appellant how and in what format the questionnaire should be completed. The timescale for remedy will be 30 days from the date of that communication.

**Head of Appeals
NHS Resolution**