

12 October 2018

1 Trevelyan Square
Boar Lane
Leeds
LS1 6AE

REF: SHA/19953

**APPEAL AGAINST, NHS COMMISSIONING BOARD,
LONDON AREA TEAM ("NHS ENGLAND") DECISION
REGARDING A BREACH NOTICE AT LLOYDS
CHEMIST, SAINSBURYS STORE, 11 WALTHAMSTOWE
AVENUE, CHINGFORD, E4 8ST**

Tel: 0113 86 65500
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Email: appeals@resolution.nhs.uk

1 The Breach Notice

A Breach Notice dated 23 July 2018 was sent to Lloyds Pharmacy in respect of Lloyds Chemist, Sainsburys Store, 11 Walthamstow Avenue, E4 8ST.

- 1.1 NHS England refer to these regulations, and Lloyds Chemist, Sainsburys Store, 11 Walthamstow Avenue, Chingford, E4 8ST
- 1.2 This letter relates to requests for information about the opening hours of your above pharmacy.
- 1.3 Since January 2018, NHS England (London Region) has had a system in place to monitor and review 100 hour reporting monthly returns on a quarterly basis. The protocol for the submission of monitoring returns requires a nominated responsible person to complete the monthly declaration form for the preceding month. It is not a requirement that the nominated responsible person is a pharmacist; however the nominated person will be declaring the total number of hours per month that a pharmacist has been available to provide pharmaceutical services.
- 1.4 NHS England (London Region) has communicated with the Pharmacy, as part of this process, as follows:
 - 1.4.1 On 8th January 2018 advice on 100 hour reporting was sent to all Community Pharmacies open under this exemption. This was sent to the email address used for correspondence with the Pharmacy.
 - 1.4.2 On the 4th April 2018 a reminder email was sent to all Community Pharmacies (as above) detailing where the monthly 100 hour reporting information should be sent to and by what date.
 - 1.4.3 On 24th May 2018 a follow-up reminder letter was sent to all Community Pharmacies who had made, either, no return or a partial return. (As part of the wider communication all London LPCs were informed of the progress of monthly reporting).

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Accredited
(April 2020)



- 1.5 NHS England records indicate that the pharmacy has failed to make a return for the period January to March 2018.
- 1.6 For the reasons set out in the attached breach notice NHS England consider that the non-return of information requested to have been a breach of the terms and conditions of service.
- 1.7 You are required to ensure all future forms are submitted within the required timeframe.

Regulation 71 of the NHS (Pharmaceutical Services) Regulations 2013 (Breaches of Terms of Service):

Breach Notice

- 1.8 To: Lloyds Chemist, Sainsburys Store, 11 Walthamstow Avenue, Chingford, E4 8ST.
- 1.9 NHS England considers that you have breached your terms of service in the following manner:

Breach

- 1.10 NHS England monitors pharmacies that opened under the 100 hour pharmacy exemption are complying with the contractual requirement to open for a minimum of 100 hours per week.
- 1.11 Since January 2018, NHS England (London Region) has had a system in place to monitor and review 100 hour reporting monthly returns on a quarterly basis. The protocol for the submission of monitoring returns requires a contractor to complete the monthly declaration form for the preceding month. It is not a requirement that the individual making the declaration is a pharmacist; however they will be declaring the total number of hours per month that a pharmacist has been available to provide pharmaceutical services for this contractor and must be authorised by the contractor to do this.
- 1.12 NHS England (London Region) has communicated with your Pharmacy, as part of this process, as follows:
 - 1.12.1 On 8th January 2018 advice on 100 hour reporting was sent to all Community Pharmacies open under this exemption. This was sent to the email address used for correspondence with the Pharmacy.
 - 1.12.2 On the 4th April 2018 a reminder email was sent to all Community Pharmacies (as above) detailing where the monthly 100 hour reporting information should be sent to and by what date.
 - 1.12.3 On 24th May 2018 a follow-up reminder letter was sent to all Community Pharmacies who had made, either, no return or a partial return. (As part of the wider communication all London LPCs were informed of the progress of monthly reporting)
- 1.13 NHS England records indicate that the pharmacy has failed to make a return for the period January 2018 to March 2018.
- 1.14 NHS England considers that the breach cannot be remedied.

Withholding of payments

- 1.15 We have determined that payment withholdings are not to apply in respect of this breach.

Summary of Terms of Service (Regulation) breached Regulation 35(3) of Schedule 4 of the 2013 Regulations

Inspections and access to information

35.—(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 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 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 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.

Right of appeal

- 1.16 [You] have the right to appeal the issue and content of this breach notice. You must exercise that right within 30 days of receipt of this notice. You should send any notice of appeal to the Head Primary Care Appeals, NHS Resolution, Primary Care Appeals, 1 Trevelyan Square, Leeds, LS1 6AE. Your notice of appeal must include a concise and reasoned statement of the grounds of appeal. Further information about your right of appeal can be found in the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 and the NHS Resolution website <http://www.nhsla.com/FHSAU/Pages/Home.aspx>

In a letter dated 25 July 2018 and addressed to NHS Resolution, Lloyds Pharmacy appealed against NHS England's decision. The grounds of appeal are:

- 2.1 A Breach Notice dated 23rd July 2018 was received stating Lloyds have failed to return the 100 hour reporting monthly returns for the period January 2018 to March 2018. Lloyds would strongly like to refute this claims as a return was made via email on 6th June 2018 stating the hours Lloyds were opened from January 2018 to May 2018.
- 2.2 A reminder letter was received on 24th May 2018 from NHS England stating that a return should be made by Friday 8th June 2018. An email attached with the monthly returns was submitted to the return email stated in the letter – england.lon.pharmacy@nhs.net on Tuesday 5th June. See print out attached for proof of submission (Appendix 1).
- 2.3 A confirmation was later received from this same email address on Tuesday 5th June by Sandra Davies stating Lloyds Pharmacy information had been updated. (See Appendix 2).
- 2.4 Can this issue be investigated as Lloyds Pharmacy believe this breach notice was issued in error.

3 Summary of Representations

This is a summary of representations received on the appeal. A summary of those representations made to NHS England are only included insofar as they are relevant and add to those received on the appeal.

3.1 NHS ENGLAND

- 3.1.1 NHS England are writing in response to the above appeal against a breach notice.
- 3.1.2 There were a number of breach notices that were issued in June, the notices were issued for failure to provide information requested. A number of requests had been made before these breach notices had been issued.
- 3.1.3 As this contractor had indicated that the information had been sent, and has subsequently appealed this breach notice, the team conducted a further check against the records to determine if this had been received in time. After an intensive check, it has become apparent that this information had been received but was not logged against this contractor's record.
- 3.1.4 After conducting this check and finding the information had been received in time, if it had been possible, NHS England would have rescinded this breach notice, however as NHS Resolution is aware, NHS England does not have the power within the regulations to rescind a breach notice and the only remedy a contractor has is to make an appeal.
- 3.1.5 NHS England therefore, would request that NHS Resolution uses regulation 9(5)(b) of schedule 3 to substitute the decision for a decision not to issue the breach notice. NHS England apologise that this is the only remedy available. NHS England hope that in providing this information, this will make it simple for NHS Resolution to process this appeal.

4 Observations

No observations were received by NHS Resolution in response to the representations received on appeal.

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, the NHSCB 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 I note, from the letter of appeal from the Contractor, that they dispute that the forms had not been returned for the period January 2018 to March 2018. I note that the Contractor has included, with their letter of appeal a copy of an email of 5 June 2018, showing that the 100 hour reporting forms were returned to NHS England on 5 June. I further note that this email was acknowledged by NHS England on 5 June 2018 and that the email stated "Your pharmacy information has been updated".
- 5.6 I note the comments from NHS England that failure to submit the 100 hour reporting information would lead to a breach notice being issued. I note that a number of requests were made for this information with the last request being an email of 25 May 2018 in which it was stated "A response is required by the 8th June 2018".
- 5.7 I note that the breach notice served on the Contractor was in respect of failing to submit the relevant 100 hour reporting forms by this deadline of 8 June 2018.
- 5.8 I note in its representations, NHS England states that, following receipt of the appeal, with the supporting information, it had conducted a further check and has now confirmed that the reporting forms from the Contractor had been received in time, however they had not been logged against this Contractors record. I note that NHS England have now logged the reporting forms against this Contractors record and further accept that the reporting forms were received within time period as set out in the email of 25 May 2018.
- 5.9 I note that in its representations, NHS England further goes on to state that, had the information been logged on the correct record at the time of receipt, it would not have issued the breach notice. NHS England acknowledges that it is not within NHS England's power to rescind a breach notice.
- 5.10 I therefore note that NHS England is no longer challenging the position.
- 5.11 I note that there are no provisions to rescind a breach notice in the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 (the "Regulations").

- 5.12 Therefore, even though NHS England is no longer challenging the position, there would still be a record of a breach notice being issued.
- 5.13 I am of the view that under NHS Resolution's powers, as set out in paragraph 9(5) of Schedule 3 to the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 ("the Regulations"), I may either confirm the decision of NHS England to issue a breach notice, or substitute for that decision any decision that NHS England could have taken at the time.
- 5.14 I am mindful that I am re-determining this issue based on any decision that NHS England could have taken, taking into account any new information that NHS Resolution has now received on appeal.
- 5.15 I am mindful that on appeal the Contractor has provided confirmation that the reporting information was submitted within time and that NHS England has subsequently confirmed that this information was mis-filed. I am also mindful that as a result of the misfiling of this information it has meant that both parties have spent a considerable amount of time dealing with this when it could have easily been avoided with effective record keeping and filing on the part of NHS England.
- 5.16 Given that NHS England is no longer challenging the position, as well as the fact that I have evidence before me which demonstrates that the reporting forms were submitted in time, I have considered the most appropriate approach to this matter in order to ensure the formal removal of the breach notice. I determine that the decision of NHS England to issue a breach notice shall be replaced by a decision not to issue a breach notice. In these circumstances, this decision shall be substituted for that of NHS England.

6 Decision

- 6.1 Pursuant to paragraph 9(5)(b) of Schedule 3 of the Regulations, I substitute for NHS England's decision to issue a breach notice, a decision not to issue a breach notice.

Lisa Hughes
Head of Primary Care Appeals

A copy of this decision is being sent to:

Lloyds Pharmacy, Sainsburys Store
NHS England – London Area Team