

16 December 2020

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FILE REF: SHA/24448

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DECISION MAKING BODY: NHS COMMISSIONING BOARD
(SOUTH EAST AREA TEAM)
("NHS ENGLAND")

PHARMACIST: BOOTS UK LTD ("THE APPELLANT")

PREMISES: 23 HIGH STREET
ASCOT
BERKSHIRE

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 The appeal is granted and, pursuant to paragraph 25(3)(c)(ii), no direction is issued.

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**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, NHS England has requested that the Appellant open from 10:00 to 13:00 on Friday 25 December 2020.

1.2 The Appellant seeks to appeal to NHS Resolution.

2 Consideration

Rights of appeal

2.1 Where NHS England 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 NHS England 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 NHS England).

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 NHS England, 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

NHS England's Request

- 2.7 NHS England wishes the Appellant to open from 10:00 to 13:00 on Friday 25 December (Christmas Day), a day on which it would otherwise be closed.

Information provided by parties

- 2.8 In a letter to the Appellant dated 24 September 2020, NHS England stated:
- 2.8.1 "As you will all be aware, NHS England and NHS Improvement South East Region needs to ensure that there is access to pharmaceutical services on days when pharmacy contractors are not required to be open.
- 2.8.2 NHS England and NHS Improvement South East Region has reviewed the usual provision of services on those days in your area and it has been established that regular provision still needs to be made for Friday 25th December 2020.
- 2.8.3 Your pharmacy will be asked to open from 10:00 to 13:00. Payment will be made in the sum of £400.00 per hour for Christmas Day.
- 2.8.4 As indicated above, we therefore intend to issue a Direction Notice to you in respect of Christmas Day – Friday 25 December 2020 and will do so as soon as practicable. You have the right to make representations concerning this proposal. Any representations must be made within 30 days of the date of this letter and should be emailed to england.southeastcommunitypharmacy@nhs.net. Representations should be received no later than 24 October 2020."
- 2.9 In a letter to the Appellant dated 30 October 2020, NHS England stated:
- 2.9.1 "Further to my letter dated 25 September 2020 [sic] regarding the proposal for provision of pharmaceutical services on Christmas Day – Friday 25 December 2020.
- 2.9.2 No comment or correspondence has been received and therefore in accordance with Schedule 4 Part 3 Paragraph 25 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013.

2.9.3 FW236, Boots UK Ltd
23 High Street
Ascot
Berkshire, SL5 7HG

is directed to open for the provision of pharmaceutical services on –

2.9.4 Christmas Day - Friday 25 December 2020 from 10:00 to 13:00 (a total of three hours).

2.9.5 The fee payable is £400 per hour and can be claimed using the attached form which should be submitted by 22 January 2021.

2.9.6 You have a right of appeal to the Secretary of State against 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: NHS Resolution, Primary Care Appeals service (formerly FHSAU), Arena Point, Merrion Way, Leeds LS2 8PA, By email to appeals@resolution.nhs.uk.”

2.10 In an email to NHS Resolution dated 26 November 2020 the Appellant stated:

2.10.1 “As a pharmacy FW236, Ascot High Street, we have been directed to open on Christmas day. I am writing to you today to appeal this direction.

2.10.2 The notice has been given due to correspondence not being sent from the original email, unfortunately due to staff shortages in the store and an ever-growing workload developing from the pandemic we did not see the original email until after the deadline had passed.

2.10.3 As a pharmacy we are having to rely on support from neighbouring stores in order to be able to open and close throughout December and would struggle to find appropriate resource to be able to open the pharmacy on the directed date.

2.10.4 We currently have 1 staff member who has been signed off work sick for the past 4 months extending into the new year, and another whose spouse is terminally ill in hospital, meaning that at any point in December she will need to take time off to deal with his passing. This again means that any additional days we are directed to open will be extremely difficult.

2.10.5 The staff that remain include 2 pharmacists with young children expecting to spend their first Christmas day together. I myself would have to open and lock the store for the day, I had planned to return to see my family in Kent, lockdown depending, who I have only seen once this year due to working through the pandemic and lockdown periods, combined with the distance between us.

2.10.6 Please do let me know if this direction can be moved to another pharmacy in the area who may be more equipped and willing to open on the day in question.”

2.11 In an email to NHS Resolution dated 7 December 2002 NHS England stated:

2.11.1 “Thank you for your email below dated 30 November 2020 and timed at 15:17 and for the accompanying attachments, my sincere apologies for any delayed response but we have a number of competing priorities at this time.

2.11.2 I am happy to confirm, as requested in your covering letter, that we agree to the process being truncated and that we are happy to proceed on this basis.

- 2.11.3 In this case the Final Direction Letter was sent to the branch on the 30 October 2020 (first attachment) by email to the branch shared email account at - nhspharmacy.ascotghst.bootsfw236@nhs.net; this enabled anyone with access in branch to open and review incoming mail.
- 2.11.4 Prior to the direction we issued a 1st stage consultation on the 24 September 2020, the consultation went by email to the branch shared email account at - nhspharmacy.ascotghst.bootsfw236@nhs.net; this enabled anyone with access in branch to open and review incoming mail. The consultation sent on the 24 September 2020 to the branch (second attachment) was also copied by email to the local area management and HQ contact as notified to us and held on record i.e. at;
- 2.11.4.1 Lakhminder.x.flora@boots.co.uk;
- 2.11.4.2 neha.soni@boots.co.uk;
- 2.11.4.3 sarah.y.davis@boots.co.uk;
- 2.11.4.4 Suzanne.pickford@boots.co.uk;
- 2.11.4.5 Alister.Houng@boots.co.uk;
- 2.11.5 Arrangements are regularly reviewed every three years to ensure appropriate service provision and this year, following reorganisation which saw the merger of the Wessex Area Team into the South East, the new South East Regional Team undertook that review across the whole of the South East in conjunction with the LPC's for the area.
- 2.11.6 The review resulted in new "Enhanced Service Agreements" for a period of three years where we had volunteers and in areas where we had no volunteers we followed the process for issuing "Directions". As agreed with the LPC the pharmacy chosen for direction this year was done by randomly generating the pharmacy to be directed, this was to take out any human element of unintentional bias. However, we will again look at this process for Easter 2021 to see how well it has worked and where we have received feedback from pharmacies; will look to incorporate changes such as rotational lists as an alternative to a system of random generation.
- 2.11.7 That our notice(s) were sent to Boots at a branch generic email address and specified senior management and not to a single individual demonstrates every effort being taken to communicate the intention to "Direct", that Boots operational arrangements in store resulted in their failure to respond to our communications is also an internal matter for the company, we have endeavoured to provide sufficient notice and time for them to do so.
- 2.11.8 Further, in this specific case, although we have sympathy with individual members of staff, it is not the action of the notice to "Direct" individuals but; the notice is intend for the Contractor i.e. Boots UK Ltd., and it is for the contractor to manage compliance, any associated staffing issues with working patterns, shifts, locums or related staff payments etc., We do not manage the staffing or personnel issues which is the remit of Boots Corporate body.
- 2.11.9 At this late stage any alternative arrangements would be problematic and the closure of this pharmacy on Christmas Day 2020 would result in a lack of service provision to the general public in the area.
- 2.11.10 In conclusion we have followed the process requirements of the regulations in directing the pharmacy in question, we have issued the required notices and

given the appropriate time periods for consultation and appeal, we therefore ask that the appeal be dismissed”

- 2.12 I note that no observations were received from the Appellant in response to the representations from NHS England.

Assessment

- 2.13 I note the reference in NHS England’s letter of 30 October to paragraph 25 of Schedule 4 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 therefore NHS England is directing the Appellant to open for the hours in question in accordance with paragraph 25 of Schedule 4.

- 2.14 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*

2.15 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.

2.16 I am of the view that the pharmacy would normally be closed on Christmas Day and that this would be in accordance with the Regulations.

2.17 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.

- 2.18 I note that the Appellant was notified of the proposed changes under cover of a letter dated 24 September 2020. I am mindful that the Appellant does not appear to have engaged in this process as it stated in its letter of appeal that “*we did not see the original email until after the deadline had passed*”. I am, however, of the view that NHS England did seek to engage the Appellant in the process as set out in the Regulations.
- 2.19 I note that in the initial letter from NHS England dated 24 September 2020 seeking representations it states that it “*needs to ensure that there is access to pharmaceutical services on days when pharmacy contractors are required to open*” and then sets out the proposed direction
- 2.20 I am mindful that NHS England 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.
- 2.21 In NHS England’s response to the appeal, it states that arrangements are regularly reviewed every 3 years to ensure appropriate service provision. NHS England goes on to state that “*in areas where we had no volunteers we followed the process for issuing “Directions”. As agreed with the LPC the pharmacy chosen for direction this years was done by randomly generating the pharmacy to be directed, this was to take out any human element of unintentional bias.*” From the information before me, this appears to be the only “assessment” which has preceded the issuing of the direction.
- 2.22 I am of the view that I have not been provided with any information to substantiate the view as to why the Appellant’s pharmacy will be best placed in terms of access, geography or any other factor to meet any demand for services. I have not been provided with any information as to what pharmaceutical cover may be required. I am of the view that there is no information from NHS England as to how “*randomly generating the pharmacy to be directed*” provides a robust assessment of the need for pharmaceutical provision in terms of providing services to patients.
- 2.23 I consider that NHS England has provided limited information to support the conclusion reached and it has not set out the reasoning that lies behind the direction to this particular pharmacy, which is a requirement of the Regulations.
- 2.24 On appeal, I may (in accordance with paragraph 25(8) of Schedule 4) either confirm the action of NHS England or take such other action as it could have taken.
- 2.25 The letter of 24 September 2020 and the letter dated 30 October 2020 provide me with no information which I consider sufficient to provide reasons on the basis of which I can confirm the decision, nor information upon which I might rely to make a direction for alternative reasons.
- 2.26 On the basis of the information available to me, I am not satisfied that NHS England 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 25 December 2020.

3 Determination

- 3.1 The appeal is granted and, pursuant to paragraph 25(3)(c)(ii), no direction is issued.

Head of Operations, Primary Care Appeals