STATE OF NEW HAMPSHIRE

SUPREME COURT

2018 Term
June Session

Docket No. 2017-0729

BRIEF OF THE APPELLANT SANDRA BROWN, DVM

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R. James Steiner or Michael A. Chen will present oral argument.

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> No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself. Every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defense, by himself, and counsel. No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land; provided that, in any proceeding to commit a person acquitted of a criminal charge by reason of insanity, due process shall require that clear and convincing evidence that the person is potentially dangerous to himself or to others and that the person suffers from a mental disorder must be established. Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the

expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court.

RSA 21-G:10.....2, 13, 28

Administratively Attached Agency. –

I. An agency administratively attached to a department shall:
(a) Exercise its powers, duties, functions and responsibilities independently of the department and without approval or control of the department, except as otherwise specifically provided by statute;
(b) Submit the budget requests required by RSA 9 through the department; and
(c) Submit reports required of it by law or by the governor through the department.

RSA 318:8.....*passim*

Enforcement of Law. – It shall be the duty of the board, through officials and employees appointed by it or under its supervision for that purpose, and of all peace officers within the state, and of all county attorneys, to enforce all the provisions of this chapter. When so requested, the department of health and human services and its officials and employees shall cooperate with the board in collecting and analyzing samples of drugs and medicines sold, or suspected of being sold, in violation of this chapter. The members of the board, its inspectors and investigators shall have free access during business hours to all places where drugs, medicines, poisons or hypodermic devices are held, stored, or offered for sale and to all records of sale and disposition of drugs.

RSA 318:8-a.....*passim*

Inspection and Regulation of Certain Users of Prescription Drugs – All physicians, veterinarians, dentists, advanced registered nurse practitioners, physician assistants, and clinics under contract to the department of health and human services and agricultural, technical, or industrial users of prescription drugs shall be subject to inspection and regulation by the board of pharmacy with regard to the storage, labeling, distribution, and disposal of prescription drugs.

RSA 318:9-a.....*passim*

Inspectional Services – The pharmacy board shall provide inspectional services under this chapter and RSA 318-B:25 to the board of medicine, the board of veterinary medicine, the board of podiatry, the board of registration in optometry, the board of dental examiners, and the board of nursing.

RSA 318-B:10, II.....*passim*

Professional Use of Narcotic Drugs. – A veterinarian, in good faith, in the course of his

professional practice only, and not for use by a human being, may administer and prescribe controlled drugs, and the veterinarian may cause them to be administered to an animal under his care, but only in a quantity not to exceed a 48-hour supply of a schedule II substance or a 7-day supply of schedule III, IV, or V substances.

RSA 318-B:12, I.....*passim*

Records to be Kept; Confidentiality. – Practitioners, including physicians, podiatrists, dentists, veterinarians, optometrists, advanced practice registered nurses, manufacturers, wholesalers, pharmacists, clinics, hospitals, and laboratories, shall keep separate records, so as not to breach the confidentiality of patient records, to show the receipt and disposition of all controlled drugs. Such records shall meet the requirements of the department of health and human services and federal laws and regulations relative to the receipt, manufacture, inventory, distributions, sale, dispensing, loss, theft, and any other disposition of controlled drugs. The records shall indicate at least the name, dosage form, strength, and quantity of the controlled drug; the name and address of any person to whom the drug was administered, dispensed, sold or transferred and the date of any and all transactions involved with the controlled drug.

RSA 318-B:12, II.....7

Records to be Kept; Confidentiality. – Prescription orders and records required by this chapter and stocks of controlled drugs shall be open for inspection only to federal, state, county and municipal law enforcement officers; all officers, agents, inspectors, and representatives of the board of pharmacy who are charged with the responsibility to enforce this chapter; all peace officers within the state; the attorney general; and all county attorneys whose duty it is to enforce the laws of this state or of the United States relating to controlled drugs. No officer having knowledge by virtue of his office of any such prescription, order, or record shall divulge such knowledge, except in connection with a prosecution or proceeding in court or before a licensing or registration board or officer, to which prosecution or proceeding the person to whom such prescriptions, orders or records relate is a party.

RSA 318-B:18.....14, 30

Notice of Conviction to be Sent to Licensing Board. – On the conviction of any person for violation of any provision of this chapter, a copy of the judgment and sentence, and of the opinion of the superior court if any opinion is filed, shall be sent by the clerk of the court to the board by whom the convicted defendant has been licensed or registered to practice his profession or to carry on his business. The board may summarily suspend, limit or revoke the license or registration of the convicted defendant to practice his profession or to carry on his business.

RSA 318-B:23.....*passim*

Enforcement and Cooperation. – It is hereby made the duty of the department of health

and human services, its officers, agents, inspectors, and representatives; the pharmacy board, its officers, agents, inspectors and representatives; and of all peace officers within the state, and of all county attorneys, to enforce all provisions of this chapter, except those specifically delegated, and to cooperate with all agencies charged with the enforcement of the laws of the United States, of this state, and of all other states relating to controlled drugs.

RSA 318-B:25.....2, 10, 16

Authority for Inspection. – All officers, agents, inspectors and representatives of the department of health and human services who are charged with the responsibility to enforce this chapter; all officers, agents, inspectors, and representatives of the pharmacy board who are charged with the responsibility to enforce this chapter; all peace officers within the state; the attorney general and all county attorneys; and federal, state, county and municipal law enforcement officers are authorized to enter during normal business hours upon the premises used by a practitioner for the purpose of his practice and to inspect such original records or prescriptions or both for controlled drugs as defined herein. Every practitioner, his clerk, agent, or servant shall exhibit to such person on demand every such original record or prescription or both so kept on file.

RSA 318-B:26.....*passim*

Penalties –

I. Any person who manufactures, sells, prescribes, administers, or transports or possesses with intent to sell, dispense, or compound any controlled drug, controlled drug analog or any preparation containing a controlled drug, except as authorized in this chapter; or manufactures, sells, or transports or possesses with intent to sell, dispense, compound, package or repackage (1) any substance which he represents to be a controlled drug, or controlled drug analog, or (2) any preparation containing a substance which he represents to be a controlled drug, or controlled drug analog, shall be sentenced as follows, except as otherwise provided in this section:
(a) In the case of a violation involving any of the following, a person shall be sentenced to a maximum term of imprisonment of not more than 30 years, a fine of not more than $500,000, or both. If any person commits such a violation after one or more prior offenses as defined in RSA 318-B:27, such person may be sentenced to a maximum term of life imprisonment, a fine of not more than $500,000, or both:
(1) Five ounces or more of a mixture or substance containing any of the following, including any adulterants or dilutants:
(A) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; or
(B) Cocaine other than crack cocaine, its salts, optical and geometric isomers, and salts of isomers; or
(C) Ecgonine, its derivatives, their salts, isomers, and salts of isomers.
(2) Lysergic acid diethylamide, or its analog, in a quantity of 100 milligrams or more including any adulterants or dilutants, or phencyclidine (PCP), or its analog, in a quantity

of 10 grams or more including any adulterants or dilutants.
(3) Heroin or its analog, crack cocaine, or a fentanyl class drug in a quantity of 5 grams or more, including any adulterants or dilutants.
(4) Methamphetamine or its analog, in a quantity of 5 ounces or more, including adulterants or dilutants.
(b) In the case of a violation involving any of the following, a person may be sentenced to a maximum term of imprisonment of not more than 20 years, a fine of not more than $300,000, or both. If any person commits such a violation after one or more prior offenses as defined in RSA 318-B:27, such person may be sentenced to a term of imprisonment of not more than 40 years, a fine of not more than $500,000, or both:
(1) A substance or mixture referred to in subparagraph I(a)(1) of this section, other than crack cocaine, in a quantity of 1/2 ounce or more, including any adulterants or dilutants;
(2) A substance classified in schedule I or II other than those specifically covered in this section, or the analog of any such substance, in a quantity of one ounce or more including any adulterants or dilutants;
(3) Lysergic acid diethylamide, or its analog, in a quantity of less than 100 milligrams including any adulterants or dilutants, or where the amount is undetermined, or phencyclidine (PCP) or its analog, in a quantity of less than 10 grams, including any adulterants or dilutants, or where the amount is undetermined;
(4) Heroin or its analog, crack cocaine, or a fentanyl class drug in a quantity of one gram or more, including any adulterants or dilutants;
(5) Methamphetamine or its analog, in a quantity of one ounce or more including any adulterants or dilutants;
(6) Marijuana in a quantity of 5 pounds or more including any adulterants or dilutants, or hashish in a quantity of one pound or more including any adulterants and dilutants;
(7) Flunitrazepam in a quantity of 500 milligrams or more.
(c) In the case of a violation involving any of the following, a person may be sentenced to a maximum term of imprisonment of not more than 7 years, a fine of not more than $100,000, or both. If any person commits such a violation after one or more prior offenses as defined in RSA 318-B:27, such person may be sentenced to a maximum term of imprisonment of not more than 15 years, a fine of not more than $200,000, or both:
(1) A substance or mixture referred to in subparagraph I(a)(1) of this section, other than crack cocaine, in a quantity less than 1/2 ounce including any adulterants or dilutants;
(2) A substance or mixture classified as a narcotic drug in schedule I or II other than those specifically covered in this section, or the analog of any such substance, in a quantity of less than one ounce including any adulterants or dilutants;
(3) Methamphetamine, or its analog in a quantity of less than one ounce including any adulterants or dilutants;
(4) Heroin or its analog, crack cocaine, or a fentanyl class drug in a quantity of less than one gram, including any adulterants or dilutants;
(5) Marijuana in a quantity of one ounce or more including any adulterants or dilutants, or hashish in a quantity of 5 grams or more including any adulterants or dilutants;
(6) Flunitrazepam in a quantity of less than 500 milligrams;
(7) Any other controlled drug or its analog, other than those specifically covered in this section, classified in schedules I, II, III or IV.
(d) In the case of a violation involving any of the following, a person may be sentenced to

a maximum term of imprisonment of not more than 3 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior offenses as defined in RSA 318-B:27, such person may be sentenced to a maximum term of imprisonment of not more than 6 years, a fine of not more than $50,000, or both:
(1) Marijuana in a quantity of less than one ounce including any adulterants or dilutants, or hashish in a quantity of less than 5 grams including any adulterants or dilutants;
(2) Any schedule V substance or its analog.
II. Any person who knowingly or purposely obtains, purchases, transports, or possesses actually or constructively, or has under his or her control, any controlled drug or controlled drug analog, or any preparation containing a controlled drug or controlled drug analog, except as authorized in this chapter, shall be sentenced as follows, except as otherwise provided in this section:
(a) In the case of a controlled drug or its analog, classified in schedules I, II, III, or IV, other than those specifically covered in this section, the person shall be guilty of a class B felony, except that notwithstanding the provisions of RSA 651:2, IV(a), a fine of not more than $25,000 may be imposed. If any person commits such a violation after one or more prior offenses as defined in RSA 318-B:27, such person shall be guilty of a class A felony, except that notwithstanding the provisions of RSA 651:2, IV(a), a fine of up to $50,000 may be imposed.
(b) In the case of a controlled drug or its analog classified in schedule V, the person shall be sentenced to a maximum term of imprisonment of not more than 3 years, a fine of not more than $15,000, or both. If a person commits any such violation after one or more prior offenses as defined in RSA 318-B:27, such person shall be guilty of a class B felony, except that notwithstanding the provisions of RSA 651:2, IV(a), a fine of not more than $25,000 may be imposed.
(c) In the case of more than 3/4 ounce of marijuana or more than 5 grams of hashish, including any adulterants or dilutants, the person shall be guilty of a misdemeanor. In the case of marijuana-infused products possessed by persons under the age of 21 or marijuana-infused products as defined in RSA 318-B:2-e, other than a personal-use amount of a regulated marijuana-infused product as defined in RSA 318-B:2-c, I(b), that are possessed by a person 21 years of age or older, the person shall be guilty of a misdemeanor.
(d) In the case of 3/4 ounce or less of marijuana or 5 grams or less of hashish, including any adulterants or dilutants, the person shall be guilty of a violation pursuant to RSA 318-B:2-c. In the case of a person 21 years of age or older who possesses a personal-use amount of a regulated marijuana-infused product as defined in RSA 318-B:2-c, I(b), the person shall be guilty of a violation pursuant to RSA 318-B:2-c.
(e) In the case of a residual amount of a controlled substance, as defined in RSA 318-B:1, XXIX-a, a person shall be guilty of a misdemeanor if the person is not part of a service syringe program under RSA 318-B:43.
III. A person shall be guilty of a misdemeanor who:
(a) Except as provided in RSA 318-B:2-c, controls any premises or vehicle where he or she knows a controlled drug or its analog is illegally kept or deposited;
(b) Aids, assists or abets a person in his presence in the perpetration of a crime punishable under paragraph II of this section, knowing that such person is illegally in possession of a controlled drug or its analog.

(c) Manufactures with the intent to deliver, delivers or possesses with the intent to deliver any drug paraphernalia when such paraphernalia is knowingly manufactured, delivered or possessed for one or more of the uses set forth in RSA 318-B:2, II.
(d) Places an advertisement in violation of RSA 318-B:2, III.
III-a. [Repealed.]
IV. Any person who attempts or conspires to commit any offense defined in this chapter is punishable by imprisonment or a fine or both, which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.
V. Any person who violates this chapter by manufacturing, selling, prescribing, administering, dispensing, or possessing with intent to sell, dispense, or compound any controlled drug or its analog, in or on or within 1,000 feet of the real property comprising a public or private elementary, secondary, or secondary vocational-technical school, may be sentenced to a term of imprisonment or fine, or both, up to twice that otherwise authorized by this section. Except to the extent a greater minimum sentence is otherwise provided by this chapter, a sentence imposed under this paragraph shall include a mandatory minimum term of imprisonment of not less than one year. Neither the whole nor any part of the mandatory minimum sentence imposed under this paragraph shall be suspended or reduced.
VI. Except as otherwise provided in this paragraph, a person convicted under RSA 318-B:2, XII as a drug enterprise leader shall be sentenced to a mandatory minimum term of not less than 25 years and may be sentenced to a maximum term of not more than life imprisonment. The court may also impose a fine not to exceed $500,000 or 5 times the street value of the controlled drug or controlled drug analog involved, whichever is greater. Upon conviction, the court shall impose the mandatory sentence unless the defendant has pleaded guilty pursuant to a negotiated agreement or, in cases resulting in trial, the defendant and the state have entered into a post-conviction agreement which provides for a lesser sentence. The negotiated plea or post-conviction agreement may provide for a specified term of imprisonment within the range of ordinary or extended sentences authorized by law, a specified fine, or other disposition. In that event, the court at sentencing shall not impose a lesser term of imprisonment or fine than that expressly provided for under the terms of the plea or post-conviction agreement.
VII. Any person who violates RSA 318-B:2, XI may be sentenced to a maximum term of imprisonment of not more than 20 years, a fine of not more than $300,000, or both. If any person commits such a violation after one or more prior offenses, as defined in RSA 318-B:27, such person may be sentenced to a term of imprisonment of not more than 40 years, a fine of not more than $500,000, or both.
VIII. Any person who knowingly or purposely obtains or purchases (1) any substance which he represents to be a controlled drug or controlled drug analog, or (2) any preparation containing a substance which he represents to be a controlled drug or controlled drug analog, except as authorized in this chapter, shall be guilty of a misdemeanor. If any person commits such a violation after one or more prior offenses as defined in RSA 318-B:27, such person shall be guilty of a class B felony.
IX. Any person who manufactures, sells, or dispenses methamphetamine, lysergic acid, diethylamide phencyclidine (PCP) or any other controlled drug classified in schedules I or II, or any controlled drug analog thereof, in violation of RSA 318-B:2, I or I-a, is

strictly liable for a death which results from the injection, inhalation or ingestion of that substance, and may be sentenced to imprisonment for life or for such term as the court may order. For purposes of this section, the person's act of manufacturing, dispensing, or selling a substance is the cause of a death when:
(a) The injection, inhalation or ingestion of the substance is an antecedent but for which the death would not have occurred; and
(b) The death was not:
(1) Too remote in its occurrence as to have just bearing on the person's liability; or
(2) Too dependent upon conduct of another person which was unrelated to the injection, inhalation or ingestion of the substance or its effect, as to have a just bearing on the person's liability. It shall not be a defense to a prosecution under this section that the decedent contributed to his own death by his purposeful, knowing, reckless or negligent injection, inhalation or ingestion of the substance or by his consenting to the administration of the substance by another. Nothing in this section shall be construed to preclude or limit any prosecution for homicide. A conviction arising under this section shall not merge with a conviction of one as a drug enterprise leader or for any other offense defined in this chapter.
IX-a. A qualifying patient or designated caregiver as defined in RSA 126-X:1 who sells cannabis to a person who is not a qualifying patient or a designated caregiver shall be guilty of a class B felony and shall be sentenced to a maximum term of imprisonment of not more than 7 years, a fine of not more than $300,000, or both.
X. Any penalty imposed for violation of this chapter shall be in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.
XI. Any person who violates any provision of this chapter for which a penalty is not provided by paragraphs I through IX shall be guilty of a class B felony if a natural person, or guilty of a felony if any other person.
XII. The penalty categories set forth in this section based upon the weight of the drug involved are material elements of the offense; however, the culpability requirement shall not apply to that element of the offense.
XIII. Any person who violates any provision of this chapter shall be fined a minimum of $350 for a first offense and $500 for a second or subsequent offense, except that any person who violates the provisions of RSA 318-B:26, II(c) or RSA 318-B:26, II(d) shall be fined $350. This paragraph shall not apply to violations of RSA 318-B:2-c.

RSA 332-B:3, IV.....2, 13, 28

Board; Compensation. – The board shall be an administratively attached agency, under RSA 21-G:10, to the department of agriculture, markets, and food.

RSA 332-B:14, II(d) 24, 27

Disciplinary Action; Civil Penalty. – Unfitness or incompetency to practice the profession or any particular aspect or specialty thereof as evidenced by negligent or willful acts performed in a manner inconsistent with the health or safety of animals under the care of the licensee, the intentional injury of an animal or human in a context related to the profession, or a pattern of conduct inconsistent with the basic skills and knowledge

required to practice the profession.

RSA 332-B:14, II(d), (g), (l), and (n) 5, 26

Disciplinary Action; Civil Penalty. –

(d) Unfitness or incompetency to practice the profession or any particular aspect or specialty thereof as evidenced by negligent or willful acts performed in a manner inconsistent with the health or safety of animals under the care of the licensee, the intentional injury of an animal or human in a context related to the profession, or a pattern of conduct inconsistent with the basic skills and knowledge required to practice the profession;
(g) Willful or repeated violation of the provisions of this chapter;
(l) Failure to keep the veterinary premises and equipment in a safe, clean, and sanitary condition;
(n) Dishonesty or gross negligence in the inspection of foodstuffs, maintenance of medical records, or the issuance of health, vaccination, or inspection certificates.

RSA 332-B:14, III.....4

Disciplinary Action; Civil Penalty. –

III. The board may take disciplinary action in any one or more of the following ways:
(a) By reprimand;
(b) By suspension, limitation, or restriction of license;
(c) By revocation of license;
(d) By requiring the person to participate in a program of continuing education in the area or areas in which the person has been found deficient; or
(e) By the imposition of civil penalties of up to $2,000 per violation, or in the case of continuing violations, not more than $200 per day, whichever is greater.

RSA 332-B:15.....5

Investigations. –

I. The board may investigate possible misconduct by licensees, permittees, certificate holders, and applicants, and other matters included in this chapter. Investigations may be conducted with or without the issuance of a board order setting forth the general scope of the investigation. Board investigations and any information obtained by the board pursuant to such investigations shall be exempt from the public disclosure provisions of RSA 91-A, unless such information is subsequently included in the record in a public disciplinary hearing. The board may, however, disclose information obtained in its investigations to law enforcement or health licensing agencies in this state or any other jurisdiction, or in accordance with specific statutory requirements or court orders.
II. The board may commence a formal or informal investigation, or an adjudicative

hearing, concerning allegations of misconduct and other matters within the scope of this chapter on its own motion whenever it has a reasonable basis for doing so, and the type of procedure chosen shall be a matter reserved to the discretion of the board. Formal or informal investigations may be conducted on an ex parte basis.

III. The board may administer oaths or affirmations, preserve testimony, and issue subpoenas for witnesses and for documents during any formal investigation or adjudicatory hearing, and as provided by paragraph IV of this section. Subpoenas not covered by paragraph IV shall be served in accordance with the procedures and fee schedules established by the superior court, except that:

(a) Board licensees shall not be entitled to a witness fee or mileage expenses for travel within the state.

(b) Witness fees and mileage expenses need not be tendered in advance if the subpoena is annotated: "Fees Guaranteed by the N.H. Veterinary Board."

(c) The respondent shall be allowed at least 48 hours to comply.

IV. The board may at any time subpoena the professional records of its licensees and relevant veterinary and billing records from pharmacies and drug suppliers, laboratories, veterinary suppliers, and veterinary insurers doing business with veterinary licensees in this state. Such subpoenas shall be served by certified mail or by personal delivery to the address provided to the board pursuant to RSA 332-B:15, V, and no witness or other fee shall be necessary for valid service. A minimum of 15 days' advance notice shall be allowed for complying with a subpoena duces tecum issued under this chapter.

V. Persons holding or applying for licenses or permits granted by the board shall keep the board informed of their current business and residence addresses, and shall furnish written notice to the board of any change in such addresses within 30 days from the date the change occurs. A licensee or applicant shall receive adequate notice of any hearing or other action taken by the board under this chapter if notice is mailed in a timely fashion to the most recent home or business address furnished under this paragraph.

VI. (a) Complaints of licensee misconduct shall be in writing, and shall be treated as requests for the commencement of a disciplinary hearing to which the time limitations of RSA 541-A:29 shall not apply.

(b) A complaint which fails to state a cause of action may be dismissed or summarily denied in whole or in part.

(c) The board shall fairly investigate all complaints to the extent warranted by the allegations and the resources available to the board. Following an investigation, the board shall have discretion to decline to prosecute or to defer prosecution on allegations made in any complaint based upon the board's assessment of the seriousness of the alleged misconduct and the resources and priorities of the board. Board decisions deferring misconduct prosecutions shall be final and shall not be subject to judicial review.

(d) Some or all of the allegations in a complaint may be consolidated with another complaint or with issues which the board wishes to investigate or hear on its own motion.

(e) The board may at any time settle misconduct allegations made in a complaint without the consent of the complainant, provided the complainant is given an opportunity to comment in writing upon the terms of the proposed settlement.

VII. At the commencement of an adjudicatory proceeding, or at any time during a formal or informal investigation, and without issuing a subpoena, the board, or a person to whom the board has delegated appropriate authority, may mail a statement of the allegations

being investigated to a licensee and order that person to provide a detailed and good faith written response thereto. In such circumstances the board may also require a licensee to furnish complete copies of appropriate professional records concerning matters relevant to allegations at issue and provide access for inspection of clinic or hospital premises. In both instances, the licensee shall respond within a reasonable time period of not less than 15 days as the board may specify in its written request.

RSA 541:3.....9

Motion for Rehearing. – Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.

Vet Rule 701.01.....7, 16, 33

Daily Reports. –

(a) Every veterinarian shall keep daily written reports of the animals he or she treats. Records for companion animals and horses shall be kept for each animal, but records for livestock, excluding horses, may be maintained on a group or client basis. Livestock means "livestock" as defined in RSA 21:34-a. The records shall be readily retrievable and shall be kept for a period of at least 5 years following the last treatment or examination. Records shall be kept by veterinarians who work for entities other than a veterinary hospital such as, but not limited to, a humane society, shelter or breeder.
(b) The records required by (a) above shall include, but not be limited to, the following:
(1) Name, address and telephone number of the owner;
(2) Name, number or other identification of the animal or group;
(3) Species, breed, age, sex and color of the animal;
(4) Immunization record;
(5) Beginning and ending dates of custody of the animal;
(6) A short history of the animal's condition as it pertains to its medical status;
(7) Physical examination findings and any laboratory data;
(8) Provisional or final diagnosis;
(9) Treatment and medication administered, prescribed or dispensed;
(10) Surgery and anesthesia; and
(11) Progress of the case.
(c) Computerized records shall be locked down every 24 hours so they may not be altered.

www.acepnow.com/article/emergency-departments-need-plan-deal-drug-shortages.....8

Emergency Departments Need Plan to Deal with Drug Shortages
By James J. Augustine, MD, FACEP | on August 15, 2017

In recent years, there have been countless unprecedented, unexpected, and unplanned short-term medication shortages and ever more promises that long-term remedies were being implemented. However, the manufacturers and the federal agencies that oversee drug supply and manufacturing practices—the Food and Drug Administration (FDA) and the Drug Enforcement Administration (DEA)—have continued to be at odds over safe manufacturing and quality processes, and once again, there are life-threatening problems with medication supplies for emergency providers.

The shortage crisis affects drugs across all classes of emergency medications. As of June 26, 2017, there are 69 preparations of 28 emergency care medications that are short, including most forms of adenosine, atropine, bicarbonate, calcium, dextrose, dopamine, epinephrine, fentanyl, furosemide, labetalol, magnesium, lorazepam, and the paralytic agents. There are an additional 50 large-volume intravenous fluid preparations that are unavailable. The most publicized issue has been related to the hospital shortage of bicarbonate, which affects a wide range of patients.

In response to significant pressure from health care providers, including the emergency community, the FDA has taken two actions. It has approved the sourcing of sodium bicarbonate from an Australian medication manufacturer, a step that mirrors a prior action allowing the importation of normal saline solution from a Norwegian manufacturer in 2014. The FDA has also allowed the extension of expiration dates on some lots of three emergency medications: atropine, dextrose, and epinephrine.

It is important that emergency physicians understand the details of this extension program and can share this information with hospital pharmacists, C-suite leaders, and any regulatory agencies. The details are available on the FDA website.

This extension program will assist in the crisis management of the shortage of these three emergency medications. The program, which could potentially be extended to other medications, allows emergency providers to use medications currently in stock for patient care. It will also facilitate a short-term cost savings because the replacement costs of these medications are going to be significantly higher during the shortage. For example, a recent price for a single 1 mg vial of epinephrine 1:1000 was more than $17. In recent years, it cost less than $2.

Action Plan

Emergency physicians will need to work with hospital pharmacists and logistics personnel for EMS agencies to ensure the ongoing availability of emergency medications and intravenous fluids. The FDA notification is a good reason to convene a meeting of emergency department leaders and hospital pharmacists to discuss ongoing management strategies. All emergency physicians and nurses are going to need education on any hospital program that involves using medicines beyond printed expiration dates. The printed FDA notification should be available for those providers as well as any regulatory persons who inspect the emergency department and question this practice.

If the shortage is causing EMS personnel, emergency physicians, and ED nurses to use substitute medications or ones that are not in the usual practice, there should be timely communication and extra safety practices implemented to facilitate good patient care. For example, if paralytic agent supplies are restricted, all providers must be aware of the limitation of substitution with other medications, including dosing changes. Emergency department program materials need to be available in the department to update staff and advise at the point of use about correct dosing, compatibility issues, and side effects. Some emergency departments are putting up safety cards in their medication rooms so staff members have an immediate visual prompt.

All emergency department staff members—especially the nursing personnel who do most of the medication administration—need to be educated regarding the ongoing shortage issues. The FDA suggests not writing the extension information on the drug container. An alternate mechanism will need to be crafted to allow personnel to understand the extension.

There are other detailed medication management strategies that may be integrated by the joint emergency department and pharmacy leadership team to address the issue. For now, clinicians need to be continually updated on shortages. All staff should rotate medications in an attempt to use those medicines closest to their expiration dates. ACEP will provide updates regarding any future FDA actions related to critical drug shortages.

QUESTIONS PRESENTED

I. Whether the Board of Veterinary Medicine (the "BVM") lacked subject matter jurisdiction to adjudicate issues reserved to inspection and enforcement by the Department of Health and Human Services and the Pharmacy Board, and certain authorized law enforcement agencies only, under the Controlled Drug Act, RSA 318-B, when the Board imposed sanctions beyond the scope of its statutory authority. Motion for Reconsideration, Certified Record ("CR"), at 382; Motion for Rehearing, CR, at 415.

II. Whether the decision by the Board unconstitutionally, unlawfully, improperly, or unreasonably imposed sanctions under RSA 332-B:14, II (d), (g), (l) and (n) and RSA 318-B:10, II and RSA 318-B:12, I, in violation of Dr. Brown's due process rights. Motion for Reconsideration, CR, at 382; Motion for Rehearing, CR, at 415.

STATEMENT OF FACTS AND OF THE CASE

A. History of Dr. Brown's Veterinary Practice

Dr. Sandra Brown first received her license to practice veterinary medicine on June 23, 1998. CR, at 2. She holds license number 1365. *Id.* Dr. Brown practices veterinary medicine as MWV Mobile Veterinary Clinic, PLLC. *Id.* At the time of the hearing, Dr. Brown had an office facility where she treated patients. She uses a mobile van to transport equipment for farm and house visits. CR, at 203. In her practice, Dr. Brown treats various small and large animals. As part of her practice she prescribed and administered controlled drugs. CR, at 199-209.

B. Board of Pharmacy Inspections

RSA 318-B, known as the Controlled Drug Act, provides that it shall be the duty of the Board of Pharmacy (the "Pharmacy Board"), operating under the Department of Health and Human Services "to enforce all the provisions of [RSA 318-B]":

> It is hereby made the duty of the department of health and human services, its officers, agents, inspectors, and representatives; the pharmacy board, its officers, agents, inspectors and representatives; and of all peace officers within the state, and of all county attorneys, to enforce all provisions of this chapter, except those specifically delegated, and to cooperate with all agencies charged with the

> enforcement of the laws of the United States, of this state, and of all other states relating to controlled drugs.

RSA 318-B:23. Violations under RSA 318-B are punished by criminal action. RSA 318-B:26.

The legislature set forth that various professions shall be subject to inspection and regulation regarding prescription drugs, including veterinarians:

> All physicians, veterinarians, dentists, advanced registered nurse practitioners, physician assistants, and clinics under contract to the department of health and human services and agricultural, technical, or industrial users of prescription drugs shall be subject to inspection and regulation by the board of pharmacy with regard to the storage, labeling, distribution, and disposal of prescription drugs.

RSA 318:8-a.

Further, under the terms of RSA 318:9-a, it is the Pharmacy Board that shall provide inspectional services for various professions, including the New Hampshire Board of Veterinary Medicine ("BVM"):

> The pharmacy board shall provide inspectional services under this chapter and RSA 318-B:25 to the board of medicine, the board of veterinary medicine, the board of podiatry, the board of registration in optometry, the board of dental examiners, and the board of nursing.

RSA 318:9-a. There is no corresponding reciprocal authority for the BVM to conduct inspections regarding controlled drugs and medications. *Id.*

The authorized agencies do not include such administrative boards of professionals as the Board of Medicine - RSA 329, Board of Dentists - RSA 317-A, Board of Optometrists-RSA 327, for example, or the BVM. This is governed by the provisions of RSA 318:8-a and RSA 318:9-a providing that authority to the Pharmacy Board.

The BVM is not part of the Department of Health and Human Services, but, rather, is an agency administratively attached under RSA 21-G:10 to the Department of Agriculture, RSA 332-B:3, IV.

Consistent with its obligations under RSA 318 and RSA 318-B, the Pharmacy Board performed a "routine" inspection, CR, at 202, of Dr. Brown's veterinary clinic on February 24, 2014, a "follow-up" inspection, CR, at 205, on August 13, 2014 and a "routine" inspection, CR, at 208, inspection on October 18, 2016. CR, at 139-146 (Oct. 18, 2016 report and memorandum), and 199-209 (2/24/14, 8/13/14 and 10/18/16 reports in full).

Pursuant to the February 24, 2014 inspection, the Pharmacy Board, inspector Mr. Robert Elder, made some recommendations, but noted as "Satisfactory" all the inspected areas, including the General Facility, Exam Rooms and Controlled Drug Records. CR, at 199. The Pharmacy Board noted it issued no violations from the inspection. *Id.* (Note 37) (2/24/14 inspection).

On August 13, 2014 the Pharmacy Board, inspector Ms. Margaret Clifford, conducted another inspection of Dr. Brown's facility. CR, at 204. Likewise, the inspector made some recommendations, but noted as "Satisfactory" all the inspected areas, including the General Facility, Exam Rooms and Controlled Drug Records. CR, at 204. The Pharmacy Board noted it issued no violations from the inspection. *Id.* (Note 37) (8/13/14 inspection).

Specifically, the Pharmacy Board inspector noted at the August 13, 2014 inspection that she "found Dr. Brown to be cooperative, professional, and courteous. In the medication room I found both a DEA Binder and a Controlled Substance record book. I was able to readily retrieve records of receipt and distribution. This was a marked improvement over our first visit last year when the records could not be found." CR, at 206 (memorandum of Pharmacy Board inspector Ms. Clifford). The inspector noted that outdated medication she found is kept in a "quarantined area" and Dr. Brown noted "she would only use an outdated medication in an emergency situation." *Id.*

On October 18, 2016 the Pharmacy Board, inspector Mr. Robert Elder, conducted another routine inspection of Dr. Brown's facility. CR, at 207. Once again, the inspector made some

recommendations, but noted as "Satisfactory" all the inspected areas, including the General Facility, Exam Rooms and Controlled Drug Records. *Id.* The Pharmacy Board noted it issued no violations from the inspection. *Id.* (Note 37) (10/18/16 inspection).

C. Board of Veterinary Medicine 2015 Order and Inspections

On September 28, 2015, the BVM issued an order following a contested hearing regarding Dr. Brown's veterinary practice. The BVM concluded that Dr. Brown had violated professional veterinary practice standards under RSA 332-B:14 (d) (the Board of Veterinary Practice statute) by finding she had engaged in "a pattern of conduct inconsistent with the basic skills and knowledge required to practice the profession." Certified Record ("CR"), at 26. The BVM, however, went on to find as follows:

> Dr. Brown does have skills as a veterinarian and [the BVM] believes that she can improve. For this reason the board has not chosen to suspend or revoke Dr. Brown's license but instead is imposing a series of remedial measures designed to improve Dr. Brown's overall medical knowledge and competence.

CR, at 27-28.

RSA 332-B:14 provides the remedies the BVM may take following a contested hearing:

> III. The board may take disciplinary action in any one or more of the following ways:
> (a) By reprimand;
> (b) By suspension, limitation, or restriction of license;
> (c) By revocation of license;
> (d) By requiring the person to participate in a program of continuing education in the area or areas in which the person has been found deficient; or
> (e) By the imposition of civil penalties of up to $2,000 per violation, or in the case of continuing violations, not more than $200 per day, whichever is greater.

RSA 332-B:14, III. Unlike the authority granted under RSA 318 to the Pharmacy Board to conduct inspections of veterinary practices, the legislature has not granted the BVM authority for post-hearing inspections as part of its disciplinary remedies. *Compare* RSA 318:8-a and RSA 318:9-a

with RSA 332-B:15 (authorizing pre-hearing "investigations" only); *see also* CR, at 3 (BVM Notice of Hearing identifying pre-hearing investigation authority as distinct procedural step).

Nonetheless, the BVM imposed the requirement that it be allowed to conduct inspections of Dr. Brown's facility as a sanction under its 2015 order. CR, at 28. That order specifically stated that the BVM "will carry out hospital inspections of Dr. Brown's hospital facility during business hours, quarterly the first year and subsequently biannually or annually, in the Board's discretion, for up to three years. Records will be examined as well as a review of hospital surgical and medical practices, including management practices." *Id.* Dr. Stowe of the BVM conducted the inspections. CR, at 34, 102 and 148.

After the September 28, 2015 order, the BVM inspected Dr. Brown's practice on May 27, 2016. The second inspection took place on September 9, 2016. CR, at 101. The inspection notes erroneously cite that the inspection was in accordance with "the terms of the Settlement signed 28 September 2015. . . ." CR, at 102. There occurred no settlement; the September 28, 2015 order resulted from a contested hearing under RSA 332-B. CR, at 17. The third inspection took place on December 22, 2016. CR, at 147. Once again, the inspection reported it as the result of a signed "settlement with the Board in September 2015. . ." even though there exists no such settlement. CR, at 148. The BVM inspector, Dr. Stowe, alleged Dr. Brown to be in violation of RSA 332-B:14, II(d), (g), (l), and (n), as well as RSA 318-B:12, I and RSA 318-B:10, II as a result of the inspections.

Dr. Stowe cited Dr. Brown notwithstanding the statutory limitations in place regarding the agencies authorized by law to inspect controlled drugs, RSA 318:8a and RSA 318:9-a, the lack of civil remedies under RSA 318-B, the lack of statutory authority under RSA 332-B for post-disciplinary inspections as a remedy, and the fact that Dr. Brown had satisfactorily met the standards from the Pharmacy Board inspections of the same items inspected and cited as violations by the BVM inspector, and during the same time period. *Compare* October 18, 2016 Pharmacy Board

inspection *with* September 9, 2016 and December 22, 2016 BVM inspections. CR, at 101 (BVM inspection), 147 (BVM inspection) and 207 (Pharmacy Board inspection).

The BVM noticed a hearing on November 23, 2016 to be held on January 26, 2017. CR, at 2.

D. The BVM Hearing of January 26, 2017 and October 3, 2017 Order

Dr. Stowe, the BVM inspecting official, testified at the January 26, 2017 hearing. CR, at 433-562, and 621-691. Mr. Robert Elder, of the Board of Pharmacy, who had conducted two of the three Pharmacy Board inspections of Dr. Brown's facility, also testified. CR, at 564-621. Dr. Sandy Brown served as the only other live witness. CR, at 692-843. Although a representative from the Attorney General's office had accompanied Dr. Stowe on two of the three BVM inspections, he neither testified nor offered any substantive evidence as part of the BVM hearing. CR, at 180.

By order dated October 3, 2017, CR, at 375, the BVM made the following findings of fact as part of its decision in reliance on Dr. Stowe's inspection and testimony:

Inspection of May 27, 2016:

- controlled drug-open bottle of euthanasia solution found on counter during process of euthanizing an emergency patient on a day the veterinary clinic was closed and no staff were present;
- expired medications;
- inadequate lock box for controlled drugs; and
- use of a grooming table as a surgical table.

CR, at 376.

Inspection of September 9, 2016:

- found expired medications;
- controlled drugs-lockbox not updated and still inadequate;
- controlled drug found on counter that Dr. Brown explained had been filled for patient to take, but patient had declined, and technician had no key to lockbox and facility was closed;
- improper label on bottle in lockbox (no reference to any drugs actually in bottle);
- prescription to patient in excess of seven days of a controlled drug;
- lack of pre-anesthetic exam notes; and
- lack of written record of communication with patient despite lack of statute requiring such communication as part of record.

CR, at 376-77.

Inspection of Dec. 22, 2016:

- expired medications found;
- temperature in mobile van 48 degrees with injectable medications despite temperature control standards being recommendations only;
- controlled drug-more than seven days of tramadol prescribed to patient;
- lack of written record of communication with patient despite lack of statute requiring such communication as part of record;
- error in controlled drug substance log book; and
- controlled drug-donation of medication accepted from patient and medication was ultimately destroyed.

CR, at 378-79.

The BVM then ruled that Dr. Brown had violated RSA 332-B:14 and RSA 318-B:12, I and RSA 318-B:10, II regarding controlled substances. CR, at 379. RSA 318-B:10, II authorizes veterinarians to administer and prescribe controlled drugs. RSA 318-B:12, II addresses recordkeeping requirements, stating that the inspecting authorities are those enunciated under RSA 318 and 318-B.

The ruling as to RSA 332-B:14 (d) specifically concerned the BVM finding of a violation of prescribing expired medications. CR, at 379. The same theory served as the basis for the willful misconduct finding under RSA 332-B:14, II(g). CR, at 380. The BVM found a violation of RSA 332-B:14, II(l) because the van was disorganized, and "contained expired medications, and there were no actions being taken to maintain an appropriate temperature to store the medication properly." *Id.* RSA 332-B:14, II(l) is limited to "failure to keep the veterinary premises and equipment in a safe, clean and sanitary condition."

The BVM admitted "there are no laws requiring client communications be included in medical records." CR, at 380. This fact was noted by Dr. Stowe as part of his testimony:

> **Attorney Linson**: Vet Rule 701.01 sets out 11 categories for what goes in daily reports. And client communications is not on this list, correct?
> **Dr. Stowe**: No.

CR, at 541. The full context of Vet Rule 701.01 was admitted as an exhibit at the hearing. CR, at

231-232. Nonetheless, the BVM elected to impose a lack of client communication as a violation of a standard of care, despite the lack of any standard or authority provided under RSA 332-B. *Id.*

The BVM generally chastised Dr. Brown regarding her "ability to properly prescribe and maintain controlled substances." *Id.*

The BVM ordered that Dr. Brown could practice veterinary medicine, following a six-month suspension (that has already been served and her license to practice reinstated) but ordered that she cannot issue controlled substances, except euthanasia solution, until Dec. 31, 2021. CR, at 381. The BVM cited no authority for imposing a sanction regarding such a limitation.

Dr. Brown filed a Motion for Reconsideration, CR, at 382. She noted that the euthanasia found in her clinic on a day the clinic was closed had been retrieved from the locked cabinet solely to treat an emergency patient at the clinic at the same time the investigators from the BVM arrived. CR, at 382. Dr. Brown likewise explained that the expired dextrose at her clinic met the drug shortage issue allowing for dextrose, as one of the three emergency medications in short supply allowed to be held past their expiration date. *Id.*, at 383 (www.acepnow.com/article/emergency-departments-need-plan-deal-drug-shortages). As noted in the article, "[t]he FDA has also allowed the extension of expiration dates on some lots of three emergency medications: atropine, dextrose, and epinephrine." *Id.*

While the BVM took issue with the lockbox, Dr. Brown had passed all her prior lockbox inspections by the Pharmacy Board, which is the Board with the authority under RSA 318 and RSA 318-B to inspect lock boxes for compliance. CR, at 199, 204 and 207 (General Facility, note 1 "drugs secure from Patient Access," and note 4 "C/S Locked" over the period 2014-2016. CR, at 199-209. The Pharmacy Board failed to find the lock box other than "Satisfactory." *Id.*

By order dated November 28, 2017, the BVM denied the motion for reconsideration. CR, at 413.

On Dec 21, 2017, Dr. Brown filed a Motion for Rehearing with the BVM. CR, at 415. She noted she was filing it within thirty days of the denial of her Motion for Reconsideration under the authority, under RSA 541:3, authorizing such a motion following any order or decision by the Board. *Id.* Among other issues, the Motion for Rehearing challenged the jurisdictional authority of the BVM to impose discipline based on alleged inspections under, and alleged violations of, the Controlled Drug Act, RSA 318-B. CR, at 415.

Likewise, Dr. Brown pointed out that the mobile van she used to drive to farm and house calls did not serve as a treatment platform, but only as a mode of transportation. CR, at 804-05. Thus, she noted, the BVM erred in concluding it being in disarray served as a proper basis for finding that Dr. Brown's "veterinary premises," as a required element under RSA 332-B:14, II(l), could in fact be a violation under the statute. *Id.*

By order of Feb 8, 2018, the BVM denied the Motion for Rehearing. CR, at 424.

Pursuant to Supreme Court Rule 10, Dr. Brown filed her Notice of Appeal on December 27, 2017 (within thirty days of denial of original Motion for Reconsideration).

Likewise, by motion dated December 27, 2017, Dr. Brown filed with this Court a Motion to Dismiss the BVM decision based on lack of subject matter jurisdiction. The motion noted that subject matter jurisdiction may be raised at any point in the litigation. *Gordon v. Town of Rye*, 162 N.H. 144 (2011). The motion noted the exclusive jurisdiction in the Pharmacy Board, and local law enforcement agencies, pursuant to RSA 318-B:23 "to enforce all provisions of [the Controlled Drug Act] chapter . . . ." RSA 318-B:23. RSA 318-B notes explicitly that the authorized personnel are those "who are charged with the responsibility to enforce [RSA 318-B, the Controlled Drug Act] . . . ." *Id.* The motion then challenged the BVM exercising authority under RSA 318-B as to any controlled drugs or medications absent legal authority from the legislature.

By order of February 9, 2018, the Supreme Court denied, without prejudice, the Motion to Dismiss for Lack of Subject Matter Jurisdiction, stating it could be addressed in the Brief.

SUMMARY OF THE ARGUMENT

A. Lack of Subject Matter Jurisdiction

Administrative agencies, such as the Board of Veterinary Medicine, acting in a "quasi-judicial capacity," are granted "only limited and special subject matter jurisdiction." *In re Town of Pelham*, 154 N.H. 125, 130 (2006). RSA 332-B provides the BVM with jurisdiction to address veterinary practice. *Id.* RSA 318, and RSA 318-B, however, provide authority for inspections, instructing that "All . . . veterinarians . . . ***shall be subject to*** inspection and regulation by the board of pharmacy with regard to the storage, labeling, distribution, and disposal of prescription drugs." RSA 318:8-a (emphasis supplied). Further, RSA 318:9-a provides that "***[t]he pharmacy board shall provide inspectional services*** under this chapter and RSA 318-B:25 to the . . . board of veterinary medicine. RSA 318:9-a (emphasis supplied). As this Court has ruled:

> The intention of the Legislature as to the mandatory or directory nature of a particular statutory provision is determined primarily from the language thereof." *Appeal of Rowan*, 142 N.H. 67, 71, 694 A.2d 1002 (1997) (quotation and citation omitted). The general rule of statutory construction is that "the word 'may' makes enforcement of a statute permissive and that the word 'shall' requires mandatory enforcement." *Town of Nottingham v. Harvey*, 120 N.H. 889, 895, 424 A.2d 1125 (1980).

City of Rochester v. Corpening, 153 N.H. 571, 574 (2006).

Where an agency exceeds its authority, as provided in *Labor Ready Northeast, Inc. v. New Hampshire Dept. of Labor*, 147 N.H. 721 (2002), the conduct by the agency may be concluded to be improper as beyond the subject matter jurisdiction over which it may act. *Id.* at 723. As this court held, in *Robinson v. New Hampshire Real Estate Commission*, 157 N.H. 729 (2008), where the Real

Estate Commission acted beyond the authority governing it, RSA 331-A, its decision had to be reversed as a violation of subject matter jurisdiction. *Id.* at 731.

The same issue is present in this case between Dr. Brown and the BVM under RSA 332-B. The focus of the BVM inspections and sanctions addressed allegations of violations of the Controlled Drug Act and medications, RSA 318 and RSA 318-B. However, the authority to inspect and to enforce the Controlled Drug Act lies with the Board of Pharmacy RSA 318:8-a and RSA 318:9-a. The BVM is not authorized to inspect or to sanction a practitioner based on alleged violations of the Controlled Drug Act, or related to medications. The actions by the BVM ignored the limits placed on it by the legislature, as well as the corresponding obligatory duty imposed by the legislature on the Pharmacy Board. RSA 318:8-a; RSA 318:9-a. As this court noted in the *Robinson* decision:

> We cannot, however, consider what the legislature might have said or add language that the legislature did not see fit to incorporate in the statute. *Blackthorne Group*, 150 N.H. at 806, 848 A.2d 725.

Robinson at 732-33.

An Attorney General employee who attended two of the three BVM inspections failed to be called as a witness and failed to identify any authority for his participation other than the BVM prior order from September 2015. CR, at 180. No evidence demonstrates his role other than as acting under the BVM authority in its September 2015 decision. *State v. Sidebotham*, 124 N.H. 682, 688-89 (1984) (a title examiner, accompanied by a State Police officer, may not conduct a warrantless search under the auspices of a title examination).

The BVM relied on Dr. Stowe as having the authority to inspect; Dr. Stowe lacked the authority to inspect controlled drugs and medications. RSA 318:8-a; RSA 318:9-a, *see also infra* (extract of testimony of Dr. Stowe). By statute, the Pharmacy Board is the agency tasked "to enforce

all provisions of [the Controlled Drug Act] chapter . . . ." RSA 318-B:23, and to conduct inspections. RSA 318:8-a; RSA 318:9-a. There are no civil penalties available for violations of RSA 318-B, as the BVM has imposed; the statute contemplates only criminal penalties for violations. RSA 318-B:26.

The BVM relied impermissibly on Dr. Stowe's inspection and testimony. CR, at 375-381, CR, at 433-563, and CR, at 621-692. Dr. Stowe, however, readily admitted his lack of knowledge about controlled drug standards. *See infra.*

The ruling by the BVM that Dr. Brown had violated RSA 332-B:14 and RSA 318-B:12, I and RSA 318-B:10, II regarding controlled substances and medications, CR, at 379, impermissibly relied on alleged violations of the Controlled Drug Act and medications, RSA 318-B. CR, at 380.

The testimony of Mr. Elder, of the Pharmacy Board, demonstrated that Dr. Brown had passed every Board of Pharmacy inspection when a qualified individual, authorized by statute, conducted the inspection and applied the proper standards. CR, at 564-620.

The record demonstrates that the BVM acted outside the scope of its authority and beyond its subject matter jurisdiction in imposing sanctions and making findings against Dr. Brown.

B. The BVM Violated Dr. Brown's Due Process Rights

The BVM deprived Dr. Brown of her privilege to practice veterinary medicine in the State of New Hampshire by violating her constitutional right to due process. CR, at 375. Although she has served her suspension, the BVM likewise ordered that she may not "dispense or administer controlled substances until December 31, 2021." CR, at 381. The BVM order is beyond the scope of its authority, and it relied on faulty grounds, as such inspections are limited to action taken by the Pharmacy Board. RSA 318:8-a; RSA 318:9-a.

Under RSA 318:8, the legislature saw it fit to provide the Board of Pharmacy and certain law enforcement agencies the power to oversee and enforce the laws applicable to RSA 318:

> "It shall be the duty of the board, through officials and employees appointed by it or under its supervision for that purpose, and of all peace officers within the state, and of all county attorneys, to enforce all the provisions of this chapter. When so requested, the department of health and human services and its officials and employees shall cooperate with the board in collecting and analyzing samples of drugs and medicines sold, or suspected of being sold, in violation of this chapter. The members of the board, its inspectors and investigators shall have free access during business hours to all places where drugs, medicines, poisons or hypodermic devices are held, stored, or offered for sale and to all records of sale and disposition of drugs."

RSA 318:8. The action of inspecting specifically is delegated to the Pharmacy Board for purposes of veterinary medicine. RSA 318:8-a; RSA 318:9-a.

It is well-accepted that the legislature is "presumed to choose the words of a statute advisedly." *Caswell v. BCI Geonetics, Inc.*, 121 N.H. 1048, 1050 (1981). Therefore, as stated in *Appeal of Astro Spectacular*:

> "Courts can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include. The legislative intent is to be found not in what the legislation might have said, but rather in the meaning of what it did say."

Appeal of Astro Spectacular, 138 N.H. 298, 300 (1994). The conduct by the BVM violated Dr. Brown's due process rights by impermissibly attempting to impose standards by unqualified personnel on subjects it lacked any authority by which to address.

The BVM is an administrative agency formed under the Department of Agriculture, Markets and Food per the language of RSA 332-B:3, IV ("The board shall be an administratively attached agency, under RSA 21-G:10, to the department of agriculture, markets, and food."). Per the language of the statutes, the statutory duty to inspect veterinarians, among other professions, lies exclusively with Board of Pharmacy. RSA 318:8-a; RSA 318:9-a.

The legislature has not provided any power to the BVM to perform investigations concerning controlled drugs or medications. *Compare* RSA 332-B *with* RSA 318:8-a and RSA 318:9-a.

Nonetheless, the BVM took it upon itself to conduct multiple investigations to review controlled drugs and medications, and the BVM investigator applied standards improperly, owing to his lack of expertise in the area, in alleging violations under RSA 318-B, and parallel violations under RSA 332-B.

This Court stated, in the *Opinion of the Justices*, 121 N.H. 552 (1981) that "[t]raditionally it has been the responsibility of this court to insure that the administrative agency does not substitute its will for that of the legislature." *Id.* at 557 (sic).

Violations under RSA 318-B call for criminal prosecution. RSA 318-B:26. The statute does not provide for civil penalties. *Id.* Moreover, the testimony of the BVM investigator Dr. Stowe demonstrated that he lacked the knowledge of the standards upon which to inspect or cite a practitioner regarding controlled drugs or medications. *See infra* (testimonial extract of Dr. Stowe). As stated in RSA 318:8-a, RSA 318:9-a, and RSA 318-B:18, the jurisdiction for enforcing and prosecuting violations of the Controlled Drug Act lie with "all peace officers within the state, and of all county attorneys, to enforce all provisions of this chapter[.]" RSA 318-B:18 provides for the process by which licensing boards, such as the BVM, are notified of violations of the provisions of RSA 318-B:

> "On the conviction of any person for violation of any provision of this chapter, a copy of the judgment and sentence, and of the opinion of the superior court if any opinion is filed, shall be sent by the clerk of the court to the board by whom the convicted defendant has been licensed or registered to practice his profession or to carry on his business. The board may summarily suspend, limit or revoke the license or registration of the convicted defendant to practice his profession or to carry on his business."

RSA 318-B:18.

The BVM deprived Dr. Brown her due process of law by suspending her license and restricting her ability to prescribe and administer medications and controlled substances without adhering to the proper procedures. The BVM failed to rely on qualified personnel authorized to

inspect her premises regarding controlled drugs or the storage and dispensing of medications. CR, at 375-381. The BVM ignored the inspections by the Pharmacy Board that resulted in "Satisfactory" inspections and no violations. CR, at 199-209.

Other findings by the BVM lacked merit. Although the BVM alleged Dr. Brown had failed to conduct presurgical exams, a review of the full patient records, at the BVM hearing, demonstrated Dr. Brown had in fact conducted such exams properly. CR, at 639 (Dr. Stowe: "so yes, this is an adequate presurgical exam. But it's not the answer I got when I was there."). Upon reviewing the computer records during the BVM hearing, Dr. Stowe admitted the proper presurgical exam had been performed and noted in the records. CR, at 639, 645 ("As I said on the day of the surgery, the examination was performed it appears."), and 679-81 (admitting the standard of care had been met both as to presurgical exam and monitoring as to patient once Dr. Stowe reviewed the complete computer records for patients in question).

Similarly, the BVM cited Dr. Brown for a disorganized van as a violation of RSA 332-B:14, II(l). CR, at 380. No evidence suggested Dr. Brown treated patients in her van. She merely used it for transport. As this Court stated, in *Town of Bartlett Bd. of Selectmen v. Town of Bartlett Zoning Bd. of Adjustment*, premises means "[a] house or building, along with its grounds." *Black's Law Dictionary* 1300 (9th ed.2009)." *Town of Bartlett Bd. of Selectmen v. Town of Bartlett Zoning Bd. of Adjustment*, 164 N.H. 757, 761-62 (2013). It cannot be said, by the Court's definition of "premises" that a vehicle used to transport Dr. Brown, certain equipment and medications to and from farms and homes, qualifies as a "premises," as required to impose sanctions under RSA 332-B:14, II(l).

The same standard applies with regards to client communications being included in patient medical records. RSA 332-B and the rules promulgated by the BVM are devoid of the

requirement of veterinarians to include client communications in patient medical records. *See* CR, at 231-32 (Vet 701.01 Daily Reports requirements). Further, the BVM went so far to admit "there are no laws requiring client communications to be included in medical records." CR, at 380. Nonetheless, the BVM stated this as justification, under RSA 332-B:14, II(n), to suspend Dr. Brown's license.

Dr. Brown's failed to receive her due process rights under the Constitution regarding the allegations against her or the application of the applicable laws to her conduct. The decision of the BVM must be reversed and dismissed.

ARGUMENT

I. THE BOARD OF VETERINARY MEDICINE LACKED SUBJECT MATTER JURISDICTION TO IMPOSE SANCTIONS UNDER THE CONTROLLED DRUG ACT OR THAT RELIED ON THE CONTROLLED DRUG ACT AND THE UNAUTHORIZED INVESTIGATION BY ITS INVESTIGATING VETERINARIAN

Administrative agencies, such as the Board of Veterinary Medicine, acting in a "quasi-judicial capacity," are granted "only limited and special subject matter jurisdiction." *In re Town of Pelham*, 154 N.H. at 130. RSA 332-B provides the BVM with jurisdiction to address the practice of veterinary medicine. RSA 332-B.

RSA 318, and RSA 318-B, however, provides authority for inspections and the law concerning controlled drugs and medications. "All . . . veterinarians . . . ***shall be subject to*** inspection and regulation by the ***board of pharmacy*** with regard to the storage, labeling, distribution, and disposal of prescription drugs." RSA 318:8-a (emphasis supplied). Further, RSA 318:9-a provides that "***[t]he pharmacy board shall provide inspectional services*** under this chapter and RSA 318-B:25 to the . . . board of veterinary medicine. RSA 318:9-a (emphasis supplied). As this Court has ruled:

> The intention of the Legislature as to the mandatory or directory nature of a particular statutory provision is determined primarily from the language thereof."

> *Appeal of Rowan*, 142 N.H. 67, 71, 694 A.2d 1002 (1997) (quotation and citation omitted). The general rule of statutory construction is that "the word 'may' makes enforcement of a statute permissive and that the word 'shall' requires mandatory enforcement." *Town of Nottingham v. Harvey*, 120 N.H. 889, 895, 424 A.2d 1125 (1980).

City of Rochester v. Corpening, 153 N.H. 571, 574 (2006).

In the *Labor Ready Northeast, Inc.* case, this Court stated as follows regarding a statute failing to provide the authority being relied upon:

> Elsewhere in the labor laws, the legislature has expressly provided authority for the DOL to make wage adjustments where it determines that such action is required. *See, e.g.*, RSA 279:22-b (1999) (expressly directing the DOL to readjust minimum wages for employees). Here, although the legislature could have given the DOL similar authority, it did not. 'We will not consider what the legislature might have said or add words that the legislature did not include.' *Crowley v. Frazier*, 147 N.H. 387, 389, 788 A.2d 263, 265 (2001) (quotation omitted).
>
> We share the trial court's concern that it might make little economic sense for an employee to bring an individual wage claim where the cost of bringing the claim might outweigh the amount of recovery. Nevertheless, 'it is not the function of the judiciary to provide for present needs by an extension of past legislation. *Appeal of Naswa Motor Inn*, 144 N.H. 89, 92, 738 A.2d 349 (1999) (quotation and brackets omitted).
>
> Having determined that the DOL lacked statutory authority to order the wage adjustments in this case, we reverse the trial court's order affirming the award.

Labor Ready Northeast, Inc., 147 N.H. at 723. No differently, there is no justification to extend the limited authority granted the BVM, nor would it be permissible, regarding the inspection and citation for controlled drugs. *Id.*

Similarly, in the *Robinson* case, this Court addressed the issue of the jurisdictional limits of the Real Estate Commission in enforcing allegations brought under RSA 331-A, the Real Estate Act. *Robinson* at 731. That same issue is presented in this case with regard to the jurisdictional limits on the Board of Veterinary Medicine in enforcing the New Hampshire Veterinary Practice Act, RSA 332-B, as to inspections and discipline regarding controlled drugs and medications, which are

addressed under RSA 318 and RSA 318-B. In particular, what is the scope of the BVM when considering the limitations presented under RSA 318 and RSA 318-B, governing the inspection and reporting as to controlled drugs and medications in light of the authority for inspections granted to the Board of Pharmacy. RSA 318:8-a; RSA 318:9-a.

As this Court stated, in the *Robinson* case:

> This jurisdictional issue involves interpreting the Act, which is a question of law that we review *de novo*. *See In re Juvenile* 2004-0469, 151 N.H. 706, 707, 867 A.2d 467 (2005). We are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole. *Blackthorne Group v. Pines of Newmarket*, 150 N.H. 804, 806, 848 A.2d 725 (2004). We first examine the language of the statute, and, where possible, ascribe the plain and ordinary meanings to the words used. *Id.* When a statute's language is plain and unambiguous, we need not look beyond it for further indication of legislative intent, and we refuse to consider what the legislature might have said or add language that the legislature did not see fit to incorporate in the statute. *Id.* Furthermore, we interpret statutes in the context of the overall statutory scheme and not in isolation. *Id.* By so doing, we are better able to discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme. *Id.*

Robinson at 731.

Not unlike the purpose behind the Veterinary Practice Act, RSA 332-A, this Court addressed that the Real Estate Act provides "a comprehensive system for regulating real estate sales and brokerage practices. *Id.* at 731. That is similar to the purpose behind the Veterinary Practice Act regulating the practice as to veterinarians under RSA 332-B:1-a.

The court addressed that the Real Estate Act is intended to provide "a licensing procedure, whereby all persons who act in the capacity of real estate salespeople or brokers are regulated by the strictures of the licensing law." That is identical to the parallel provision in the Veterinary Practice Act. RSA 332-B:9 (setting forth qualifications necessary to seek license). This Court noted that the Real Estate Commission administers the Real Estate Act, which is no different than the BVM administering the Veterinary Practice Act. *Compare* RSA 331-A:26 with RSA 332-B:14. This court

concluded that the Real Estate Commission lacked subject matter jurisdiction given the provision that one who sells their own property is exempt from RSA 331-A. *Id.* at 733.

The principle behind the holding in *Robinson* is no different from the effort in this case by the BVM to impose liability under the controlled drug statute, RSA 318-B, despite the lack of authority to conduct the inspections it relies on, through the evidence collected by their investigator Dr. Stowe. As this court noted in the *Robinson* decision:

> We cannot, however, consider what the legislature might have said or add language that the legislature did not see fit to incorporate in the statute. *Blackthorne Group*, 150 N.H. at 806, 848 A.2d 725.

Id. at 732-33. As this Court concluded in the *Robinson* case:

> When interpreting two or more statutes that deal with a similar subject matter, we construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes. *Chase v. Ameriquest Mortgage Co.*, 155 N.H. 19, 22, 921 A.2d 369 (2007).
>
> * * *
>
> For all of the above reasons, therefore, we hold that the petitioner was exempt from the Act's provisions, and the Commission, thus, lacked jurisdiction to hold a hearing on the Moreiras' complaint. Should the legislature disagree with our interpretation of the Act, it is free to amend the Act as it sees fit. Moreover, we note that the chapter as a whole contains several internally inconsistent and confusing provisions; thus, the legislature may wish to revise it to make it clearer.

Id. at 733-34.

The BVM lacks subject matter jurisdiction over the inspection of controlled drugs or medications, or the authority to address alleged violations. RSA 318:8-a; RSA 318:9-a; RSA 318-B:23; *Gordon*, 162 N.H. at 144.

Even if the Attorney General employee who attended two of the three BVM inspections is one who might fit under RSA 318-B (there is no such authority under RSA 318:8-a or RSA 318:9-a), there is neither affirmative evidence in the record itself to support such a conclusion, nor did he identify himself as being present other than "under the authority of the [BVM's] Final

Order." CR, at 180. Accordingly, his reliance on his authority to be present came from the same BVM order for inspections that Dr. Stowe relied on as authority to inspect. *Id.* Neither the BVM nor its prosecutor called him as a witness. The BVM failed to make any ruling in its decision regarding his qualifications or authority beyond his stated memorandum that he acted under the authority of the BVM September 2015 order. CR, at 180. He demonstrated no material involvement in the process concerning Dr. Brown. The BVM relied on BVM investigator Dr. Stowe. The effort, to the extent the BVM argues some reliance on the presence of the representative from the Attorney General's office, without more, fails to remedy the subject matter jurisdiction issue. *State v. Sidebotham*, 124 N.H. at 688-89.

In the *Sidebotham*, case, this Court stated, in pertinent part, as follows

> We find that the search conducted by [Title Examiner] Gosselin at the Manchester Speed Shop was in substance a search brought about and orchestrated by the State police, but cast in the form of an administrative search conducted under the authority of RSA 262:11, in order to enable the police to avoid the warrant requirements of our State Constitution. *See State v. Theodosopoulos*, 119 N.H. 573, 578, 409 A.2d 1134, 1137 (1979), *cert. denied*, 446 U.S. 983, 100 S.Ct. 2964, 64 L.Ed.2d 839 (1980) ("warrantless search is per se unreasonable and invalid, unless it comes within one of a few recognized exceptions"). Gosselin conducted his search of the defendant's vehicle based upon a "tip" supplied by the police, ***while accompanied by a police officer and for the apparent purpose of aiding the police in their investigation of an alleged criminal offense--possession of stolen property.***
>
> RSA 262:11 does not confer any power upon the State police to conduct warrantless searches of motor vehicles for their vehicle identification numbers. Rather, the legislature, in enacting RSA 262:11, bestowed such power exclusively upon the director of the division of motor vehicles and his agents in order to enable these individuals to more efficiently and effectively "perform their jobs." N.H.H.R.Jour. 534 (1977); *cf. Manchester Press Club v. Commission*, 89 N.H. 442, 445-46, 200 A. 407, 409-10 (1938) (regulatory power conferred upon liquor commission by statute to conduct frequent inspections to enforce its control of liquor traffic does not include power to assist other law enforcement agencies by placing instruments in their hands to aid such enforcement).
>
> The police will not be permitted to circumvent the warrant requirements imposed upon them by our State Constitution simply by teaming up with or by employing

> the services of title investigators to conduct limited searches for them, searches which they themselves cannot legally conduct and searches by which they acquire those facts necessary to establish probable cause to justify the issuance of a search warrant. "The violation of a constitutional right by a subterfuge cannot be justified, and the circumstances of this case leave no other inference than that this is what was done ...." *Corngold v. United States*, 367 F.2d 1, 5 (9th Cir.1966) (quoting *Taglavore v. United States*, 291 F.2d 262, 266 (9th Cir.1961)).
>
> The State police, in this instance, will not be permitted to justify the warrantless search conducted by Title Investigator Gosselin, which supplied the basis for their subsequently obtained search warrant, as a valid, administrative search conducted independently by a title investigator pursuant to the provisions of RSA 262:11. Based upon our resolution of the defendant's rights under our State Constitution, we need not address his rights under the Federal Constitution. *See State v. Ball*, 124 N.H. 226, ---, 471 A.2d 347, 351 (1983). We remand this case to the superior court for further proceedings in accordance with this opinion.

Id. (emphasis supplied).

The BVM relied on Dr. Stowe as having the authority to inspect; Dr. Stowe lacked the authority to inspect controlled drugs or medications. RSA 318:8-a; RSA 318:9-a, *see also infra* (extract of testimony of Dr. Stowe). By statute, the Pharmacy Board is the agency authorized "to enforce all provisions of [the Controlled Drug Act] chapter . . . ." RSA 318-B:23 and to conduct inspections of veterinarians. RSA 318:8-a; RSA 318:9-a.

The BVM erred, both in having Dr. Stowe attempt to perform the duties reserved to the Pharmacy Board and in considering such allegations, substantively at the hearing regarding Dr. Brown. RSA 318:8-a; RSA 318:9-a.

Even the Hearings Officer recognized, during the middle of the hearing, that the issues had extended beyond the limited scope of authority provided by statute to the BVM:

> **Hearings Officer**: And I guess I just want to say one thing. Again the Veterinary Board is here to deal with negligence and misconduct as a veterinarian and I feel like we're drifting a lot onto Pharmacy Board rules and those things, and let's try to keep it towards what we are interested in, okay?

CR, at 590. Notwithstanding that admonition, the BVM order disciplined Dr. Brown for alleged controlled drug and medications violations it lacked authority to address, and over which it had no jurisdiction to address. *Robinson*, 157 N.H. at 733.

The BVM relied on the results of Dr. Stowe's inspection and testimony. CR, at 375-381, and CR, at 433-563, and CR, at 621-692. Dr. Stowe readily admitted, however, during his testimony, that he lacked knowledge about controlled drug standards and would have to refer to the Board of Pharmacy:

> **Dr. Stowe**: I mean it's one of the things [outdated stock] the Pharmacy Board looks for when they come into our practice . . . .

CR, at 442

* * *

> **Attorney Linson**: So you have standards that are higher than the Pharmacy Board inspectors, is that fair to say?
> **Dr. Stowe**: No, I've always gone by what they've told me . . . .

CR, at 515.

* * *

> **Attorney Linson**: Do you recall reviewing the Pharmacy Board reports and looking at the box where they are looking for excessive outdated stock?
> **Dr. Stowe**: No.
> **Attorney Linson**: That's one of the boxes that the Pharmacy Board checks. If you look at Tab A and you go down to Number 5, so on the first report that you look at, you look at from February 2014, it says excessive outdated stock, no. So I mean, that in and of itself shows you can have outdated stock but they're looking for excessive outdated stock. Is that – would that be accurate?
> **Dr. Stowe**: I don't know what that means, to be honest with you.
> **Attorney Linson**: Have you ever inquired about what it means?
> **Dr. Stowe**: No, no.

CR, at 525.

* * *

> **Attorney Linson**: Okay, but there's no federal or state regulation you know of that says you can't have [outdated stock] here?
> **Dr. Stowe**: I 'm not aware of any.

CR, at 550.

* * *

> **Attorney Linson**: Are you familiar with the criteria that the DEA uses to determine whether or not security controls are adequate for controlled substances?
> **Dr. Stowe**: I know basically. I mean we generally, I have never had a DEA inspection and I have relied on the New Hampshire Pharmacy Board to educate me as far as that goes and so that's the guidelines that I recall.

CR, at 508.

* * *

> **Dr. Stowe**: [S]o I think you'd have to ask the Pharmacy Board again if [a lockbox] is adequate. As far as I know it is.
> **Attorney Linson**: As far as you know it is?
> **Dr. Stowe**: I think, again, ask the Pharmacy Board . . . .
> **Attorney Linson**: And was that an AAHA requirement?
> **Dr. Stowe**: No. My understanding it was a Pharmacy Board requirement. So again, I would have to defer to them.

CR, at 514.

The focus of the inspections by Dr. Stowe impermissibly addressed alleged controlled drug violations, and/or violations as to medications, outside the scope of Dr. Stowe's authority to inspect. RSA 318:8-a; RSA 318:9-a. The resulting disciplinary order arises from inspections the BVM was not authorized to conduct or to consider. *Id.* This included, as to the May 27, 2016 inspection, the following:

- open bottle of euthanasia on counter;
- expired medications; and
- alleged inadequate lockbox.

CR, at 376. As to the September 9, 2016 inspection, the results addressed by the BVM included the following:

- found expired medications;
- controlled drugs-lockbox not updated and still inadequate;
- controlled drug found on counter that Dr. Brown explained had been filled for patient to take, but patient had declined, and technician had no key to lockbox and facility was closed;
- improper label on bottle in lockbox (no reference to any drugs actually in bottle);
- prescription to patient in excess of seven days of a controlled drug.

CR, at 376-77. As to the non-controlled drug issues, the BVM ended up concluding no violations had occurred from the record developed at the hearing. CR, at 375-81.

Likewise, the December 22, 2016 inspection impermissibly addressed items reserved by statute to be subject to inspection only by those authorized under RSA 318-B, not including the BVM:

- expired drugs found;

- temperature in mobile van 48 degrees with injectable medications despite temperature control standards being recommendations only;
- controlled drug-more than seven days of tramadol prescribed to patient;
- error in controlled drug substance log book;
- controlled drug-donation of medication accepted from patient and medication was ultimately destroyed.

CR, at 378-79.

The BVM then ruled that Dr. Brown had violated RSA 332-B:14 and RSA 318-B:12, I and RSA 318-B:10, II regarding controlled substances. CR, at 379. The ruling as to RSA 332-B:14, II(d) specifically concerned the BVM finding of a violation of prescribing expired medications. *Id.* The same theory served as the basis for the willful misconduct finding under RSA 332-B:14, II(g) notwithstanding the improper standards applied by Dr. Stowe and which the BVM ignored as to Mr. Elder's testimony and inspections. CR, at 380; CR, at 199-209. The BVM found a violation of RSA 332-B:14, II(l) because the van was disorganized, and "contained expired medications, and there were no actions being taken to maintain an appropriate temperature to store the medication properly." CR, at 380.

The evidence received by the BVM included opinions unqualified and unauthorized to be made because the BVM, and its inspecting veterinarian, lacked the authority, or training, to understand the standards they were trying to interpret, as they were acting beyond the subject matter jurisdiction set forth in the Veterinary Practice Act. RSA 332-B. CR, at 376-380; RSA 318-B:23. The basis for rulings against Dr. Brown allege violations beyond the scope of the subject matter within which the BVM may investigate absent reliance on violations cited by the Pharmacy Board, none of which exists because the Pharmacy Board inspections all concluded Dr. Brown met the standards required. CR, at 199-209.

The testimony of Mr. Elder, however, of the Pharmacy Board, served as the only competent testimony about controlled drugs, as well as the storage and recordkeeping concerning medications. CR, at 564-620. His testimony established that Dr. Brown has been in complete compliance and

received no violations over the course of three Pharmacy Board inspections between 2014-2016. CR, at 199-209 (Board of Pharmacy inspections).

The legislature, by statute, addresses the scope of authority regarding the standards for and inspections of controlled drugs and medications. RSA 318:8-a; RSA 318:9-a. This does not include Dr. Stowe or the BVM. *Id.*

Mr. Elder's testimony demonstrated the expertise he has as compared to the lack of understanding Dr. Stowe and the BVM had regarding controlled drugs or the storage and recordkeeping necessary for medications, and the applicable standards for them:

> **Attorney Linson**: And what are your duties as a compliant investigator for the Board of Pharmacy?
> **Mr. Elder**: I inspect drugstores, hospitals, Methadone clinics, public health clinics, manufacturing wholesale distributors, retail drug distributors and last but not least practitioners in the state of New Hampshire.
> **Attorney Linson**: And when you say practitioners, is that practitioners from all different occupations?
> **Mr. Elder**: Yes, physicians, advanced registered nurse practitioners, physician assistant, dentists, veterinarians, ophthalmologists, optometrists.

CR, at 564-65.

* * *

> **Attorney Linson**: Let me ask you this question. If the Pharmacy Board indicates approval in any category on your form, would it be fair to say that the veterinarian or any other practitioner would think that they're compliant and that changes don't need to be made?
> **Mr. Elder**: That is correct. We only make recommendations if we see that there's something that needs to be spoken to in order to kind of fill out or, you know, brush up on a particular line item. That's why it gives us a little extra flexibility.

CR, at 595-596.

* * *

> **Board Member**: The first one [question] is about I guess on your general inspection reports here, that point 5, that kept coming up, excessive outdated stock, how do you determine excessive?
> **Mr. Elder**: Once again, it's based on how we look at the entire pharmacy. We mentally calculate, actually take things off the shelf. It's one thing to have two or three items and that's, you know, we see that from time to time. But it's a whole other thing when 50 percent of the inventory, like six shelves worth of medications have to be taken down. And not just veterinarians. I'm talking about doctors' offices, too. The sample closets where fully three to four shelves are outdated, what's up with this? You know.

So the excessive is something that is more of a subjective than a, than a, a tool that has a specific number.

CR, at 611.

* * *

Attorney Linson: Dr. Brown had improved her outdated medication stock.
Mr. Elder: Yes.
Attorney Linson: And are you saying today that that's not accurate?
Mr. Elder: That is accurate. Compared to the February of '14 where there were several outdated medications in her general stock, I think there was only one, yes, one ophthalmic ointment was outdated. To me, yeah, that was different from February of '14.

CR, at 605.

* * *

Attorney Linson: Okay. And is it accurate to say that the Pharmacy Board hasn't found any violations at Brown's clinic?
Mr. Elder: I don't believe that we wrote one in February of '14. I can't speak for August of '14, and in October of '16, I did not write one.

CR, at 596-97.

* * *

Attorney Linson: Okay. Now at the top of this report it says: Practitioner clinic inspection report. Is this the same report you use for all practitioners?
Mr. Elder: That's correct.
Attorney Linson: So this checklist is specific to the types of things you're looking for in that practitioner setting?
Mr. Elder: All practitioner settings, yes.

CR, at 568.

Based on RSA 318 and RSA 318-B, as well as the more limited scope of authority provided to the BVM under RSA 332-B, the BVM lacked subject matter jurisdiction to inspect and conclude alleged violations under RSA 318-B as support for disciplining Dr. Brown under RSA 332-B:14, II(d), (g), (l) and (n), as well as claiming violations of RSA 318-B:10, II and RSA 318-B:12, I. CR, at 379. *Robinson*, 157 N.H. at 733. The decision must be reversed and dismissed.

II. THE DECISION BY THE BOARD OF VETERINARY MEDICINE VIOLATED DR. BROWN'S RIGHT TO DUE PROCESS UNDER THE NEW HAMPSHIRE AND UNITED STATES CONSTITUTIONS BY UNLAWFULLY, IMPROPERLY, AND UNREASONABLY IMPOSING SANCTIONS UNDER RSA 332-B:14 WITHOUT PROPER AUTHORITY TO IMPOSE SUCH SANCTIONS AND DISCIPLINE.

As provided by the New Hampshire State Constitution, Part I, Article 15:

"No subject shall be ... deprived of his property, immunities, or privileges, put out

> of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land ...."

Appeal of Mullen, 169 N.H. 392, 397 (2016).

The BVM deprived Dr. Brown of her privilege to practice veterinary medicine in the State of New Hampshire on grounds beyond the jurisdiction of the BVM. CR, at 375. The sanctions included the suspension of her license for a period of six months, and an order prohibiting Dr. Brown from dispensing or administering "controlled substances until December 31, 2021." *Id.*, at 381. One of the reasons relied on in the BVM's decision to suspend Dr. Brown's license under RSA 332-B:14, II(d), was founded in RSA 318-B as a violation of the Controlled Drug Act. *Id.* at 379. The pertinent language of the Act is found in RSA 318:8-a, RSA 318:9-a and RSA 318-B:23, which provides for the authority granted for inspection and overseeing the Controlled Drug Act. The language specifically states:

> "It is hereby made the duty of the department of health and human services, its officers, agents, inspectors, and representatives; the pharmacy board, its officers, agents, inspectors and representatives; and of all peace officers within the state, and of all county attorneys, to enforce all provisions of this chapter, except those specifically delegated, and to cooperate with all agencies charged with the enforcement of the laws of the United States, of this state, and of all other states relating to controlled drugs."

RSA 318-B:23. *See also* RSA 318:8-a; RSA 318:9-a.

Similarly, under RSA 318:8, the legislature saw it fit to provide the New Hampshire Board of Pharmacy the power to oversee and enforce the laws applicable to RSA 318:

> "It shall be the duty of the [Pharmacy] board, through officials and employees appointed by it or under its supervision for that purpose, and of all peace officers within the state, and of all county attorneys, to enforce all the provisions of this chapter. When so requested, the department of health and human services and its officials and employees shall cooperate with the board in collecting and analyzing samples of drugs and medicines sold, or suspected of being sold, in violation of this chapter. The members of the board, its inspectors and investigators shall have free access during business hours to all places where drugs, medicines, poisons or

> hypodermic devices are held, stored, or offered for sale and to all records of sale and disposition of drugs."

RSA 318:8.

It is well established through the decisions of this Court that the legislature is "presumed to choose the words of a statute advisedly." *Caswell v. BCI Geonetics, Inc.*, 121 N.H. 1048, 1050 (1981). Therefore, as stated in *Appeal of Astro Spectacular*:

> "Courts can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include. The legislative intent is to be found not in what the legislation might have said, but rather in the meaning of what it did say."

Appeal of Astro Spectacular, 138 N.H. 298, 300 (1994).

As noted above, the BVM is an administrative agency formed under the Department of Agriculture, Markets and Food per the language of RSA 332-B:3, IV ("The board shall be an administratively attached agency, under RSA 21-G:10, to the department of agriculture, markets, and food."). Per the language of the statutes, the statutory duty belongs exclusively with the appointed law enforcement agencies and the Department of Health and Human Services, specifically including the Pharmacy Board. RSA 318.

The legislature specifically provides for the inspectional services of the Pharmacy Board to be provided to the BVM under RSA 318:9-a. The Pharmacy Board conducted three inspections. CR, at 199-209. It concluded Dr. Brown's office met all of the standards required. *Id.* This included inspection of the storage, dispensing and retail of medications. *Id.*

The legislature does not provide, in either statute, any power to the BVM to perform similar investigations performed by the Pharmacy Board. *Compare* RSA 332-B *with* RSA 318 and RSA 318-B. However, the BVM took it upon itself to conduct multiple investigations, in addition to the investigations performed by the Pharmacy Board, which included reviewing and citing Dr. Brown for the manner in which medicines and controlled substances were stored, having in her possession

expired medications, and other alleged violations of RSA 318-B notwithstanding the sole inspections by the Pharmacy Board resulted in "Satisfactory" inspections and no violations. CR, 199-209. The legislature did not contemplate the BVM, or the Department of Agriculture, Markets and Food, as an enforcement or oversight agency under the Controlled Drug Act. RSA 318; RSA 318-B.

The Court, in the *Opinion of the Justices*, set the parameters for administrative agencies in New Hampshire for creating its own rules for the limited regulation of industry specifically bestowed on each individual agency by the legislature. Additionally, it provided the limitations on the delegation of law and/or rulemaking by the legislature to the administrative agencies:

> "It is well settled in this State that the legislature may delegate to administrative agencies the power to promulgate rules necessary for the proper execution of the laws. *Ferretti v. Jackson*, 88 N.H. at 298, 188 A. at 476; *Smith Insurance Inc. v. Grievance Committee*, 120 N.H. 856, 861, 424 A.2d 816, 819 (1980); *Petition of Boston & Maine Corp.*, 109 N.H. 324, 326, 251 A.2d 332, 335 (1969). But the legislature may not, of course, delegate unlimited rulemaking authority to administrative agencies. *Smith Insurance Inc. v. Grievance Committee*, supra 120 N.H. at 861, 424 A.2d at 819. Rather, the legislature must declare a general policy and prescribe standards for administrative action. *Ferretti v. Jackson*, 88 N.H. at 303, 188 A. at 479.
>
> Accordingly, the rulemaking authority which may be delegated by the legislature is limited. The administrative agency's authority allows it to "fill in details to effectuate the purpose of the statute," *Kimball v. N.H. Bd. of Accountancy*, 118 N.H. 567, 568, 391 A.2d 888, 889 (1978); *Reno v. Hopkinton*, 115 N.H. 706, 707, 349 A.2d 585, 586 (1975), and administrative rules which go beyond the filling in of details are invalid. *Kimball v. N.H. Bd. of Accountancy*, supra 118 N.H. at 568, 391 A.2d at 889; see *Reno v. Hopkinton*, supra 115 N.H. at 708, 349 A.2d at 586. "Rules adopted by State boards and agencies may not add to, detract from, or in any way modify statutory law." *Kimball v. N.H. Bd. of Accountancy*, supra 118 N.H. at 568, 391 A.2d at 889. ***Traditionally it has been the responsibility of this court to insure that the administrative agency does not substitute its will for that of the legislature***. *Id.* at 569, 391 A.2d at 889.
>
> * * *
>
> Lawmaking is primarily a legislative rather than an executive function. *See* N.H.Const.Pt. II, Arts. 2, 5. The executive is responsible for the "faithful execution of laws." N.H.Const.Pt. II, Art. 41. Although the chief executive has discretion in performing his duties, he has no authority to make laws. This being

> so, the rulemaking authority of administrative agencies in the executive branch derives solely from that power which the legislature delegates to them."

Opinion of the Justices, 121 N.H. at 557-59 (emphasis supplied).

The BVM has been provided specific limited rulemaking powers by the legislature under RSA 332-B:7-a. The rulemaking authority provided in the statute does not include the oversight, inspection or regulation of the dispensing, storing or retailing of medications and controlled substances. This is a power bestowed to the Department of Health and Human Services through the Pharmacy Board. RSA 318 and RSA 318-B. The BVM has unilaterally expanded its power beyond the scope of authority provided by the legislature to include the investigation, regulation, oversight, and eventual sanctioning of Dr. Brown with regards to the dispensing, storage, and retail of medications and controlled substances contrary to the law, and in violation of her due process rights under the State Constitution. *Appeal of Mullen*, 169 N.H. at 397.

The alleged violations of RSA 318-B were without proper adjudication by an appropriate state or federal court. RSA 318-B:26. Moreover, the testimony of the BVM investigator, Dr. Stowe, demonstrates that he lacks the knowledge upon which to inspect or cite a practitioner regarding controlled drugs. *See supra* (testimonial extract of Dr. Stowe). RSA 318-B:18 provides for the process by which licensing boards, such as the BVM, are notified of violations of the provisions of RSA 318-B:

> "On the conviction of any person for violation of any provision of this chapter, a copy of the judgment and sentence, and of the opinion of the superior court if any opinion is filed, shall be sent by the clerk of the court to the board by whom the convicted defendant has been licensed or registered to practice his profession or to carry on his business. The board may summarily suspend, limit or revoke the license or registration of the convicted defendant to practice his profession or to carry on his business."

RSA 318-B:18.

The BVM deprived Dr. Brown the due process of law by suspending her license and restricting her ability to prescribe and administer medications and controlled substances without following the procedures required to be followed, and in direct contravention of the very inspections made at the same time by the Pharmacy Board. CR, at 199-209.

Further, the Court in *In re Blizzard* provided:

> We have consistently held that "promulgation of a rule pursuant to the [Administrative Procedure Act] ... is not necessary to carry out what a statute demands on its face." *Nevins v. N.H. Dep't of Resources and Economic Dev.*, 147 N.H. 484, 487, 792 A.2d 388 (2002). Thus, although we have occasionally noted that an agency "should ... adopt rules," *Appeal of Behavior Science Institute,* 121 N.H. 928, 935, 436 A.2d 1329 (1981), or even that it "was required to promulgate rules," *Nevins,* 147 N.H. at 487, 792 A.2d 388, it has been nearly a century since we last held that failure to adopt rules, by itself, divested a regulatory body of its authority. *See Hanover Precinct v. Atkins,* 78 N.H. 308, 310-11, 99 A. 293 (1916). Our modern cases focus upon ***whether the result of the agency's failure to adopt rules "was both unfair and inconsistent with [the statute granting authority]."*** *Appeal of Behavior Science Institute,* 121 N.H. at 935, 436 A.2d 1329 (emphasis added). Therefore, when considering whether an agency's failure to adopt rules requires that its decision be overturned, we must first examine ***whether the statute is "sufficiently detailed to effectuate its purpose" without agency regulations.*** *Nevins,* 147 N.H. at 487, 792 A.2d 388. ***If the statute lacks sufficient detail on its face, then an agency must adopt rules supplying the necessary detail.*** *See id.* Next, we determine ***whether the result was unfair by examining whether the complaining party "suffered harm as a result of the lack of [required] rules."*** *Id.* at 488, 792 A.2d 388.

In re Blizzard, 163 N.H. 326, 330 (2012).

The BVM relied almost exclusively on allegations concerning controlled drugs and the management of medications reserved to the Pharmacy Board in administering the punishment meted out to Dr. Brown. It had no authority to do so. RSA 318:8-a; RSA 318:9-a.

The BVM also made findings that Dr. Brown had failed to conduct presurgical exams properly on a couple of patients. CR, at 377. However, during his testimony Dr. Stowe admitted that he had not reviewed the computer records in addition to the written records. CR, at 639 ("so yes, this is an adequate presurgical exam. But it's not the answer I got when I was there."). Upon

reviewing the computer records during the BVM hearing, even Dr. Stowe admitted the proper presurgical exam had been performed and noted in the records. CR, at 639, 645 ("As I said on the day of the surgery, the examination was performed it appears."), and 679-81 (admitting the standard of care had been met both as to presurgical exam and monitoring as to patient once Dr. Stowe reviewed the computer records).

The BVM further stated in its decision that Dr. Brown's van was disorganized and unclean, therefore she was in violation of RSA 332-B:14, II(l). CR, at 380. The BVM failed to adopt, and the legislature failed to provide, proper guidance as to the definition of "veterinary premises" to include a van used for transport. No evidence suggested Dr. Brown treated patients in her van. She merely used it for transport. The Court, in *Town of Bartlett Bd. of Selectmen v. Town of Bartlett Zoning Bd. of Adjustment*, defined "premises" as:

> "When the language of an ordinance is plain and unambiguous, we need not look beyond the ordinance itself for further indications of legislative intent." *Fox v. Town of Greenland*, 151 N.H. 600, 605, 864 A.2d 351 (2004). We determine the meaning of a zoning ordinance "from its construction as a whole, not by construing isolated words and phrases." *Feins v. Town of Wilmot*, 154 N.H. 715, 719, 919 A.2d 788 (2007) (quotation omitted). Because the ordinance in this case does not define "premises," we will look "to the common and approved usage of" the word. *Townsend*, 164 N.H. at 246, 55 A.3d 952 (quotation omitted).
>
> *Black's Law Dictionary* defines "premises," in relevant part, as "[a] house or building, along with its grounds." *Black's Law Dictionary* 1300 (9th ed.2009). *Webster's Third New International Dictionary* defines "grounds," in relevant part, as "an area appropriated to or used for a particular purpose." *Webster's Third New International Dictionary* 1002 (unabridged ed.2002). It further defines "premises," in pertinent part, as "a specified piece or tract of land with the structures on it" or "the place of business of an enterprise or institution." *Id.* at 1789. We have relied upon similar definitions of "premises" in other contexts. *See State v. Thiel*, 160 N.H. 462, 466, 999 A.2d 367 (2010) (looking to plain and ordinary meaning of word "premises" as "the place of business of an enterprise or institution" in addressing defendant's argument that her conduct did not meet requirements of shoplifting statute (quotation omitted)); *Gen. Linen Servs. v. Franconia Inv. Assocs.*, 150 N.H. 595, 597, 842 A.2d 105 (2004) (defining "premises" as relevant to the parties' agreement as "a specified piece or tract of land with the structures on it," or "the place of business of an enterprise or

> institution" (quotations omitted)). Indeed, in *General Linen Services*, we said that "' [p]remises' can identify single premises or multiple premises," and "the word, as used in a particular situation, must be understood in light of the circumstances, disclosures and context attendant to the situation." *Gen. Linen Servs.*, 150 N.H. at 597-98, 842 A.2d 105. While we need not define the precise parameters of "premises" as used in the ordinance, we conclude that the word "premises" in this case includes the buildings and grounds associated with the place of business of Attitash Mountain Village— namely, vacation ownership units, including its registration office— regardless of whether the buildings and grounds are located on separate lots.

Town of Bartlett Bd. of Selectmen, 164 N.H. at 761-62.

It cannot be said, by the Court's definition of "premises" that a vehicle used to transport Dr. Brown, certain equipment and medications to and from farms and homes, is indeed a "premises" under RSA 332-B:14, II(l). RSA 332-B:14, II(l) "lacks sufficient detail on its face" with regards to defining a "veterinary premises" to the degree of incorporating the van used for transport. *In re Blizzard,* 163 N.H.at 330.

The same standard applies with regards to client communications being included in patient medical records. RSA 332-B and the rules promulgated by the BVM are devoid of the requirement of veterinarians to include client communications in patient medical records. *See* CR, at 231-32 (Vet 701.01 Daily Reports requirements). Further, the BVM went as far to admit "there are no laws requiring client communications to be included in medical records." CR, at 380. Nonetheless, the BVM stated this as justification, under RSA 332-B:14, II(n), to suspend Dr. Brown's license. Per the holding in *In re Blizzard*, the BVM violated Dr. Brown's due process rights by the BVM's decision to deprive her of the privilege to practice veterinary medicine without due process of law.

Dr. Brown was also deprived of her right of due process as the BVM did not provide proper notice to Dr. Brown of the violations of which she was accused. She was simply provided with broad,

generic allegations with regards to alleged violations found by the BVM's inspectors. The Court stated:

> "For more than a century, the central meaning of procedural due process has been clear: Parties whose rights may be affected are entitled to be heard, and in order that they may enjoy that right, ***they must first be so notified***. *Appeal of Sch. Admin. Unit # 44,* 162 N.H. 79, 87, 27 A.3d 819 (2011). The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing. *Id.* To satisfy due process, ***the notice must be of such nature as reasonably to convey the required information and must be more than a mere gesture***. *Id.* Due process, however, does not require perfect notice, but only notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and ***afford them an opportunity to present their objections***. *Id.* Thus, our inquiry focuses upon whether notice was fair and reasonable under the particular facts and circumstances of the case. *Id.*

In re Blizzard, 163 N.H. at 335-6 (emphasis supplied).

The BVM cited Dr. Brown had violated RSA 332-B:14, II(g), for "[w]illful or repeated violations of the provisions of this chapter." However, the BVM did not provide specific conduct that would provide Dr. Brown sufficient notice to allow her to "present [her] objections." *Id.* Moreover, most of the alleged violations concerned controlled drugs/medications the BVM and its investigator Dr. Stowe lacked the authority, ability or knowledge to address. The BVM simply cited to repeated violations of RSA 332-B:14, II. The statute referenced by the BVM contains 16 different methods of misconduct that serve as the basis for disciplinary proceedings. Dr. Brown was not provided "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action[.]" *Id.* Therefore, Dr. Brown was deprived of due process.

For all of the above reasons, Dr. Brown's due process rights were violated by the conduct of the BVM and its investigator Dr. Stowe in conducting investigations on subjects beyond the statutory authority granted to the BVM by the legislature and in creating subjective standards without prior notice or the adoption of standards under the statutes and rules governing veterinarians. The decision of the BVM must be reversed and dismissed.

CONCLUSION

For the reasons set forth above, Dr. Brown respectfully requests that this Honorable Court REVERSE the decision of the Board of Veterinary Medicine appealed from and DISMISS the matter.

REQUEST FOR ORAL ARGUMENT

Dr. Brown respectfully requests to be allowed 15 minutes time to present oral argument before this Honorable Court. Attorney R. James Steiner or Michael A. Chen will present oral argument.

CERTIFICATE AS TO WRITTEN DECISION

This will certify that the written decision appealed from is appended to the brief.

Respectfully Submitted,

Dr. Sandra Brown

By and Through Her Attorneys,
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P.O. Box 3722
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Date: 6/29/18

By: _____
R. James Steiner, Esq.
N.H. Bar No. 4143

Date: 6/29/18

By: _____
Michael A. Chen, Esq.
N.H. Bar No. 266592

Certificate of Service

I hereby certify that a copy of the Brief has been forwarded to Tom Broderick, Esq., counsel for the Board of Veterinary Medicine.

_____
R. James Steiner

State of New Hampshire

Board of Veterinary Medicine

Concord, New Hampshire

In the Matter of:

Dr. Sandra Brown Case No. 2-7/13

DECISION AND ORDER

I. Introduction

On September 28, 2015, Dr. Sandra Brown was ordered by the New Hampshire Board of Veterinary Medicine ("Board") to allow board inspections, which may be announced or unannounced, for a period of four (4) years. *See* Ex. 1 at 12. Such inspections took place on May 27, 2016, September 9, 2016, and December 22, 2016. During these inspections, board members found Dr. Brown to be in violation of RSA 332-B:14, II sections (d), (g), (l), and (n); RSA 318-B:12, I; and RSA 318-B:10, II. The Board commenced an investigation and determined that there was reasonable basis for the commencement of an adjudicatory proceeding pursuant to RSA 332-B:15. A notice of hearing was issued on November 23, 2016. A hearing was held relative to the allegations on January 26, 2017. By agreement of the parties, evidence was kept open until February 10, 2017, to allow Dr. Brown to submit additional affidavits.[1]

II. Findings of Fact

a. New Hampshire Board of Veterinary Medicine Inspection Date May 27, 2016

The announced investigation was performed by Board members Dr. David Stowe and Dr. Robert Brust. *See generally* Exs. 2, 3. The goals of the investigation were to evaluate cleanliness and the adequacy of Dr. Brown's equipment in the clinic and mobile unit, to assess issues of the use of outdated drugs, and assess the thoroughness of medical recordkeeping.

The investigators reported finding an open bottle of euthanasia solution unattended on a counter. *See* Exs. 3, 4. The investigators noted this was improper storage of a controlled substance. Dr. Brown testified that she was in the process of euthanizing a patient. She had closed the clinic due to the investigation and had the medication out due to the emergency euthanasia.

The investigators reported the presence of numerous expired drugs. *See* Ex. 2 at 1, Ex. 3. There was a bottle of dextrose on the counter of the pharmacy that expired April of 2010. *See id; see also* Ex. 4. When asked why the dextrose was still there, Dr. Brown

[1] The Board originally stated that all evidence must be in by February 9, 2017. However, due to a snowstorm, the Board granted a one day extension, until February 10, 2017.

testified that she never used it and didn't know why it was still on the shelf. She was unable to explain why she hadn't thrown it away in the past six years. Also, there was a drawer full of expired medication. *See* Ex. 2 at 1, Ex. 3. Dr. Brown told the investigators that she used the medication on patients whose owners had financial constraints. At the time of the inspection, the investigators informed Dr. Brown expired medication should be disposed of and never used. *See id.* Expired drugs were also found in the mobile unit. *See id.*

The investigators found the lockbox in the clinic to be inadequate due to its design. *See* Ex. 2 at 1. Recommendations were made to change the design of the lockbox to better secure controlled substances.

The investigators did note that Dr. Brown had made some improvements with regards to recommendations made by the previous Board order. *See* Exs. 2, 3. Dr. Brown purchased an x-ray processor and an autoclave. But, Dr. Brown was still using a grooming table as a surgery table, despite this being noted as a deficiency in the Board's September 28, 2015 Order. See Ex. 1 at 10.

b. New Hampshire Board of Veterinary Medicine Inspection on September 9, 2016

The announced investigation was performed by Board member Dr. David Stowe and Todd Flanagan, Investigator with the Attorney General's Administrative Prosecution Unit. The goal of the investigations was to assess any improvements that had been made based on the recommendations from the previous inspection.

The drawer of expired medication was still present. *See* Ex. 11 at 2, 9; Ex. 12 at 6. The investigators found numerous expired medications in the refrigerator and medicine cabinets. *See* Ex. 11 at 1–2, 5-9; Ex. 12. Investigators also found a bottle of injectable medication with the expiration date crossed out. *See id.* Dr. Brown testified that she had asked previous investigators from the Board of Pharmacy and she was told that expired medication could be used on an emergency basis. Dr. Brown admitted she still used the expired medication on patients whose owners had financial constraints. *See* Ex. 11 at 2. Investigators recommended the disposal of the expired medication.

The lockbox had not been updated and was still found to be inadequate. *See* Ex. 11 at 2.

Investigators found a prescription of a Class IV Controlled Substance sitting on the counter. *See id.* Dr. Brown testified that she had filled it for her previous patient, but the owner had declined it. She is the only one with a key to the lockbox and had not had the time to return the controlled substance back to the lockbox.

In the lockbox, investigators found a bottle with a handwritten label of "Tram." *See* Ex. 11 at 2, 11; Ex. 12 at 6. It presumably held Tramadol (a Class IV Controlled Substance) and did not have a lot number or expiration date listed on the bottle. *See id.*

Dr. Brown testified that she used this bottle to transport Tramadol on the road to prescribe to her patients. There was no lockbox on the mobile unit in which to transport controlled substances.

Investigators reviewed random medical records and had concerns. It was found that Dr. Brown had sent a patient home with more than seven days of Tramadol. *See* Ex. 11 at 3, 16–19. Dr. Brown told Dr. Stowe that she felt it was unreasonable to expect the owner to come back every week to refill the prescription.

The investigators reviewed records for a patient named Odessa. The records did not indicate proper pre-anesthetic exam notes *See* Ex. 11 at 3, 20–21. Dr. Brown testified that she felt that by supplying a TPR on her anesthesia report she was meeting requirements for a proper exam. The anesthesia notes only listed four monitoring entries during a one hour and 40-minute procedure. *See id.* The investigators felt this did not meet standard of care for anesthesia monitoring. Dr. Brown testified that she felt she was adequately monitoring the anesthesia. *See id.*

The investigators reviewed records for a patient names Jasper. *See* Ex. 11 at 3, 23. Dr. Brown treated Jasper for a skin issue with an injection of depo-medrol. The investigator was concerned that there were no notes about a discussion with regards to potential side effects with the use of depo-medrol to the patient. *See* id. Dr. Brown testified that there is no law in the New Hampshire Practice Act that requires written records of client communications.

c. New Hampshire Pharmacy Board Inspection on October 18, 2016[2]

The investigation was performed by compliance investigators Robert Elder and James Queenan. This was reported as a routine inspection.

The investigators noted the Dr. Brown had less expired medications present in both her pharmacy and her mobile unit compared to during the Pharmacy Board inspection two years prior. *See* Ex. 14 at 1. They also noted that she had installed a thermometer inside the mobile unit. *See id.* However, they could not find any recordings of the temperature inside the unit which would alert Dr. Brown as to a potential issue if the temperature was too high or too low. *See* Ex. 13 at 2; Ex. 14 at 2; Ex. A at *9..

During this visit, the investigators had a discussion with Dr. Brown regarding the distribution of expired medications to patients. *See* Ex. 14 at 1–2. Dr. Brown told investigators that she felt she should be able to dispense expired medication to patients whose owners had financial constraints. *See id.* The investigators cited FDA regulations prohibiting the use of expired medications. *See id.* They explained that veterinarians fall under the regulations of the FDA. *See id.* Mr. Elder testified that it was his opinion that

[2] The Board of Pharmacy performs routine inspections on behalf of the Board of Veterinary Medicine. *See* RSA 318:9-a.

Dr. Brown was dissatisfied with this explanation. Mr. Elder also testified during the hearing that he felt Dr. Brown was dispensing expired medications at the time of the investigation.

Investigators noted that the lockbox was not adequate to store controlled substances. They recommended improvements. *See* Ex. 13 at 2; Ex. 14 at 2; Ex. A at *9.

d. New Hampshire Board of Veterinary Medicine Inspection on December 22, 2016

This unannounced inspection was performed by Dr. David Stowe and APU investigator Todd Flanagan. The goal of this investigation was to see if any improvements or changes had been made with regards to previous investigations and recommendations.

Investigators found expired drugs in the pharmacy and mobile unit. See Ex. 15 at 1; Ex. 16 at 1–12; Ex. 18 at 3. The drawer of expired medication was still there. See Ex. 15 at 1; Ex. 16 at 5. Dr. Brown had created a waiver for clients to sign if she prescribed expired medications. See Ex. 15 at 1; Ex 16 at 5; Ex. 17 at 1.

Investigators noted that the temperature in the mobile unit was 48 degrees. *See* Ex. 15 at 2. No action was being taken to address the situation as Dr. Brown had injectable medications that required being stored at higher temperatures. *See id.*

The investigators noted that Dr. Brown had reconfigured the lockbox to make it more adequate.

The investigators reviewed random medical records. One record was for a patient named Chewy. *See* Ex. 15 at 1–2. Dr. Brown had prescribed more than seven days of Tramadol. *See id.* Dr. Brown had previously been warned that it is illegal to prescribe more than seven days of a Class IV controlled substance. Dr. Brown testified at the hearing that she is aware it is illegal and won't prescribe more than seven days in the future.

The investigators reviewed a medical record for a patient named Tobie. *See* Ex. 15 at 2; Ex 17 at 10–15, Ex. F. Tobie died under anesthesia while in Dr. Brown's care. The Board questioned whether Dr. Brown was up front and honest with the client. In the client communications, it is noted that Tobie arrested minutes after starting anesthesia after "the oxygen pressure had elevated" and they attempted resuscitation for an hour. *See* Ex. 17 at 10. At the hearing, Dr. Brown admitted to a medical error which led to the death of Tobi. And, Dr. Brown testified that she told the owners this fact. However, there is no indication in the medical records that Dr. Brown had made that communication to the client, and there is nothing mentioned regarding this in the client communication written by SLB. *See* Ex. 17 at 10–15.

e. Controlled Substance Logs

During the investigations and hearing, the Controlled Substance Log Books for Tramadol were reviewed. Ex. 15 at 2; Ex. 16 at 11–12; Ex. C. At the hearing it was noted that there were two log books for Tramadol. Dr. Brown testified that she had been concerned with discrepancies in the original log book. She had the staff recount and recreate a log book for Tramadol. During the investigation, there appeared to be errors in both sets of log books. *See* Ex. 16 at 11–12; Ex. C.. The Board questioned why Dr. Brown hadn't looked further into the errors and recounted the medication on her own. Dr. Brown testified that she had been busy and relied on her staff to perform the task. She was now planning on recounting once she found out both log books were incorrect.

Investigators found an entry where Dr. Brown had accepted donated Tramadol from a client. *See* Ex. 16 at 11–12; Ex. C at *2. It was unclear in the logs whether that had been reentered into the inventory. Dr. Brown testified that she was unaware that it was illegal to accept back controlled substances once dispensed. She also testified that the donated Tramadol was not entered back into inventory and was destroyed two months later.

III. Discussion

Based on the evidence and testimony received during the hearing, the Board has concluded that Dr. Brown has committed professional misconduct within the meaning of RSA 332-B:14 sections (d), (g), (l), and (n). Also, Dr. Brown has violated RSA 318-B:12, I and RSA 318-B:10, II with regards to controlled substances, which constitutes unprofessional conduct under RSA 332-B:14, II(c). Specifically, the hearing testimony and evidence shows a pattern of unwillingness or inability to follow recommendations in a timely manner made by the Board and the New Hampshire Pharmacy Board.

The Board has concerns that, while Dr. Brown did eventually make 35 changes to her practice, it took two hearings, three Veterinary Board inspections, and three Pharmacy Board inspections to follow recommendations. While Dr. Brown states that she "respects the standards set forth by the licensing board," the Board feels that the changes should have been made after the first hearing prior to any inspections. She repeatedly admitted to using expired drugs after being told multiple times to stop. The lockbox was not changed until after the third inspection. The lack of compliance by Dr. Brown shows a disrespect for the standards.

Dr. Brown committed misconduct within the meaning of RSA 332-B:14 (d) by continually prescribing expired medications. This is dangerous as expired medications can develop increased potency, decreased potency, or become toxic overtime. This shows a "willful act performed in a manner inconsistent with the health or safety of animals under the care of the licensee". RSA 332-B:14, II(d). Dr. Brown went so far as to make a waiver to justify the use of expired medication.

Dr. Brown consistently showed a nonchalant attitude towards the multiple investigations and hearings. She failed to take remedial corrective measure in a timely fashion. In this way, Dr. Brown committed misconduct within the meaning of RSA 332-B:14 (g) as she showed "willful or repeated violations of the provisions of this chapter".

Dr. Brown committed misconduct within the meaning of RSA 332-B:14 (l) which states "failure to keep the veterinary premises and equipment in a safe, clean sanitary condition." The mobile unit was found to be disorganized, contained expired medications, and there were no actions being taken to maintain an appropriate temperature to store the medication properly.

While the Board admits that there is an improvement in medical record keeping since the first hearing, there is still a continued pattern of not being forthcoming with clients. While we understand there are no laws requiring client communications be included in medical records, the Board feels this is a standard of care. If it isn't written in the medical record, how can it be proved to have happened? In this way, we find Dr. Brown to have committed misconduct within the meaning of RSA 332-B:14 (n) by showing "dishonesty or negligence...in the maintenance of medical records".

Dr. Brown violated RSA 318-B:10, II by filling prescriptions for schedule IV controlled substances for more than a seven-day supply on multiple occasions. Dr. Brown also violated RSA 318-B:12, I by failing to adequately and accurately keep controlled drug records. The violation of these two statutes constitutes unprofessional conduct under RSA 332-B:14, II(c). The Board felt that Dr. Brown showed a lack of concern at the seriousness of missing Tramadol. She should have taken a more active role in investigating the incorrect log books.

Self-admitted ignorance to the laws and rules of veterinary medicine and pharmacy regulations is not an acceptable defense for Dr. Brown's actions. It is the responsibility of each licensee to know the rules and regulations under which they practice as well as being aware of the current standards of care. The Board has significant concerns regarding Dr. Brown's ability to properly prescribe and maintain controlled substances. Finally, the Board is disappointed in the lack of action and nonchalant attitude of Dr. Brown throughout this entire process over the past two years.

While the Board has chosen to suspend Dr. Brown's license, the Board chooses not to fine Dr. Brown as the Board is aware of the financial burdens that the suspension will bring.

IV. Conclusion

THEREFORE, IT IS ORDERED that Dr. Sandra Brown's license to practice veterinary medicine is suspended for a period of six months.

IT IS FURTHER ORDERED that, after the six-month suspension, the following limitations will be placed on Dr. Brown's license, pursuant to RSA 332-B:14, III(b). Dr. Brown will be limited to practice veterinary medicine without controlled substances, with the

exception of euthanasia solution. She will be unable to dispense or administer controlled substances until December 31, 2021. There are to be no controlled substance (apart from euthanasia solution) on the clinic grounds or in the mobile unit. Dr. Brown must relinquish current controlled substance inventory. Dr. Brown will maintain the ability to prescribe controlled substances via outside pharmacies.

IT IS FURTHER ORDERED that this Decision and Order shall become a permanent part of Dr. Brown's file, which is maintained by the Board as a public document.

IT IS FURTHER ORDERED that this Order shall take effect as an Order of the Board on the date it is signed by an authorized representative of the New Hampshire Board of Veterinary Medicine.

BY ORDER OF THE BOARD

Date: October 3, 2017

Kim Lavoie, Administrator
Authorized Representative of the
New Hampshire Board of Veterinary Medicine

1* BOARD MEMBERS
RECUSED
DAVID Stone, DVM