

ALBERTA COLLEGE OF PHARMACISTS

IN THE MATTER OF
THE HEALTH PROFESSIONS ACT

AND IN THE MATTER OF A HEARING REGARDING THE
CONDUCT OF

CALVIN BOEY
ACP COMPLAINT FILE #3921

**DECISION OF THE HEARING TRIBUNAL
ON ORDERS FOR PENALTY**

1. PRELIMINARY MATTERS

As outlined in detail in the Decision of Hearing dated March 9, 2016, the ACP attempted multiple times and methods to contact Mr. Boey in advance of the November 17, 2015 hearing. At one point he was in correspondence with the Hearings Director, but that ceased after he was given notice of the expected date of hearing. As such, he was not present at the hearing on November 17, 2015. The tribunal was satisfied the ACP had met the requirements under the *Health Professions Act* (the “Act”) to notify Mr. Boey of the hearing. The hearing thus proceeded in Mr. Boey’s absence.

On March 9, 2016, the Hearing Tribunal made findings of unprofessional conduct and issued written reasons for the same. The March 9, 2016 decision did not address orders for penalty. Given the seriousness of the allegations, the findings of unprofessional conduct and the potential seriousness of the submissions on penalty expected from the Complaints Director, the hearing tribunal decided that the ACP should again make reasonable efforts to contact Mr. Boey in order to allow him an opportunity to participate in the penalty phase of the hearing, if he could be contacted. In this way, the investigated member would be given a fair opportunity to read the decision and findings of unprofessional conduct and would be given a reasonable chance to respond with submissions on penalty.

On March 9, 2016, Ms. Margaret Morley, Hearings Director for the ACP, sent a letter of notice to Mr. Boey. The letter was sent via registered mail with signature required upon receipt, along with a full copy of the decision, to Mr. Boey’s last known mailing address, as well as to the e-mail address through which he had previously been corresponding with Ms. Morley, hkevinboey@me.com.

The letter outlined that the hearing was held on November 17, 2015 and that the finding was that of unprofessional conduct. It informed Mr. Boey that prior to ruling on penalty, “the hearing tribunal has requested written submissions from both parties on appropriate orders”.

It also described for Mr. Boey that the College’s legal counsel has 14 days to provide submissions on penalty to Ms. Morley and that when Mr. Boey receives a copy of the submission on penalty for the Complaints Director, he will have 14 days to provide his own submissions on penalty. If Ms. Morley received a submission from Mr. Boey, she would provide it to Mr. Jardine, College’s legal counsel, upon which he would have 5 days to provide a response to Ms. Morley, which would then be forwarded to Mr. Boey. The letter concluded by indicating that all submissions received will be considered by the hearing tribunal.

After receipt of the Complaints Director’s written submissions on penalty, Ms. Morley e-mailed the Complaints Director’s submissions on penalty to Mr. Boey on March 22, 2016 using the hkevinboey@me.com e-mail address. Ms. Morley advised Mr. Boey that he had until April 12, 2016 to provide written submissions on penalty and that if he did not provide any written submissions on penalty by that date, that the Hearing Tribunal would proceed with only the written submissions of the Complaints Director.

The registered envelope containing the letter and the written decision of the hearing tribunal was received back at the ACP office on March 30, 2016, marked “unclaimed” by Canada Post. Further, no response was received from Mr. Boey via e-mail within the specified timelines.

In the circumstances, the hearing tribunal is satisfied that the ACP met the requirements under the *Health Professions Act* to notify Mr. Boey of the hearing on penalty and to provide him with a reasonable opportunity to provide submissions on penalty.

Ultimately, Mr. Boey did not contact the ACP at any time nor did he provide any submissions on penalty.

The members of the Hearing Tribunal met by teleconference on April 27 at 11am MST to consider the submissions on penalty. On the call were Ayla Akgungor, independent counsel for the tribunal, Rakhee Patel and Kevin Kowalchuk, pharmacist members of the tribunal, Tony Nickonchuk, pharmacist member and chair of the hearing and Peter Van Bostelen, public member for the tribunal.

2. SUBMISSIONS ON PENALTY

The Complaints Director's submission began with an outline of the purposes of discipline proceedings in a self-regulated profession. In particular, it highlighted that discipline proceedings enhance protection of the public, aim to maintain the integrity of the profession, ensure fairness to the investigated member and promote deterrence. Regarding deterrence, the purpose is to ensure both specific and general deterrence. Specific deterrence is that which deters the investigated member from any repetition of the unacceptable conduct. General deterrence is that which demonstrates to all members of the profession that such conduct is unacceptable and must be avoided.

Next the ACP outlined the factors referenced in *Jaswal v. Newfoundland (Medical Board)* (1996), 42 Admin. L.R. (2d) 233 and described the application of the factors in this case as follows:

1. Nature and gravity of the proven allegations

The College submitted that the allegations of unprofessional conduct found as proven by the hearing tribunal are very serious, particularly diversion of controlled substances, creation of fictitious patient profiles to conceal this diversion, diversion of medications for beyond personal use and active circumvention of the abuse monitoring and support provisions ordered by a previous hearing tribunal.

2. The age and experience of the member

The College submitted that although Mr. Boey is a relatively new registrant, this instance of unprofessional conduct is a repeat occurrence and, as such, cannot be excused on the basis of lack of experience.

3. The presence or absence of prior complaints convictions

The College submitted that this is a "particular aggravating factor" in this case. Given Mr. Boey's previous discipline proceedings for almost identical conduct and that the orders in that case did not deter him from engaging in similar conduct, the ACP suggests this emphasizes the need for more serious sanctions in this case.

4. The number of times the offence was proven to have occurred

The hearing tribunal established that the unprofessional conduct was ongoing and not isolated. The conduct occurred over approximately 8 months and continued until discovered by Mr. Boey's employer.

5. The role of the member in acknowledging what has occurred

Upon termination of his employment, Mr. Boey did contact the ACP and admitted his conduct. However, after that he made no attempts to cooperate with the hearing or to provide an admission of unprofessional conduct.

6. The presence or absence of any mitigating circumstances

The ACP submitted that they are unaware of any particular mitigating circumstances.

7. The need to impose specific and general deterrence

The ACP submitted that the need for specific deterrence is obvious in this case because Mr. Boey's conduct was "grossly unprofessional and unacceptable" and the sanctions must ensure that he is not in a position to repeat this conduct in the future. For general deterrence, the ACP submitted that all members of the profession need to see that this sort of conduct will not be tolerated and sanctions will be very serious.

8. The need to protect the public

The ACP submitted that the public must be protected against any potential recurrence of Mr. Boey's conduct in the future.

9. The need to maintain the public's confidence in the integrity of the profession of pharmacy in Alberta

The ACP submitted that the public must be able to trust that the profession of pharmacy is capable of governing itself in a self-regulating manner. They suggested that Mr. Boey's conduct undermines this trust and in order to maintain confidence in the ACPs integrity as a self-governing profession it must be demonstrated that this conduct will not be tolerated and will have serious consequences.

10. The degree to which the conduct is clearly outside the range of permitted conduct

The ACP simply submitted that it is "clear that the conduct in this case is far beyond the range of permitted conduct".

11. The range of sentences in similar cases

The ACP submitted cases similar in nature to this case in terms of the nature and gravity of the unprofessional conduct.

The first case they referenced is Mr. Boey's previous hearing. In this case, a temporary suspension of practice permit was ordered, as well as conditions on the permit, a recovery

maintenance/relapse prevention plan including a monitoring and compliance agreement, costs up to \$10,000 and supervision orders when he returned to practice. As is clear from the presence of this case, those sanctions were insufficient to ensure deterrence.

The ACP highlighted two other cases in which the members stole from their place of employment in similar circumstances.

The first was that of Karen Nevett. Ms. Nevett admitted to diversion of large amounts of hydromorphone tablets over 13 months until she was detected. She also created fictitious records to conceal her diversion. The hearing led to an Agreed Statement of Facts and the member confirmed she did not intend to practice pharmacy again. The Hearing Tribunal ordered that her ACP registration be cancelled and that she pay full costs of the investigation and hearing.

The second case was that of Phillip Leung. The Hearing determined that Mr. Leung stole large quantities of Oxycontin and other narcotics from his employer and only stopped when detected. He manipulated the computerized inventory system and did not properly cooperate with the Complaints Director. The Tribunal found all allegations to be proven and ordered immediate cancellation of registration and practice permit, three fines of \$10,000 (one for each proven allegation), payment of all costs of investigation and hearing and reference of the hearing decision to the Minister of Justice and Solicitor General.

The third case referenced was that of Bryan McIntyre. He was found to have diverted 35,000 tablets of narcotics to a specific individual and that these diversions went beyond personal use by that individual. He was ordered to pay a fine of \$10,000, have his practice permit suspended for 24 months and pay all costs of the investigation and hearing. He also had conditions placed on his practice permit to take effect once reinstated.

3. ORDERS PROPOSED BY THE ACP

Considering all of the reasons in the submission on penalty, the ACP proposed the following orders for Mr. Boey:

1. Cancellation of Mr. Boey's registration with the ACP;
2. Payment of four fines of \$10,000 each in respect to the proven allegations of diversion of the drugs (Allegation 1); abuse of trust by creating fictitious patient profiles and prescriptions (Allegation 2); diversion of medication for beyond his personal use (Allegation 4); and actively circumventing the abuse control and monitoring provisions of the previous hearing tribunal's orders (Allegation 5).
3. An order that Mr. Boey pay all of the expenses, costs and fees related to the investigation and hearing of this matter on a payment schedule satisfactory to the ACP; and
4. An order that the Hearings Director send a summary of this decision to the Minister of Justice and Solicitor General under section 80(2) of the *Health Professions Act*.

4. REASONS SUBMITTED BY THE ACP FOR THE REQUESTED ORDERS

1. Request for cancellation

The ACP submitted that because Mr. Boey breached orders of a previous hearing tribunal, the ACP and the public cannot be confident that the imposition of practice permit conditions alone will prevent recurrence of the same conduct in the future. The ACP submitted that cancellation is the only appropriate order that can achieve the goals of protection of the public, prevention of recurrence, maintaining public trust in the profession and general and specific deterrence.

2. The four fines of \$10,000

The ACP submitted that given the amount of drugs that were diverted were beyond those for personal use and that this is a second offence, the fines are “necessary to deal with the possible financial benefits of diversion for beyond personal use” and for the purposes of general and specific deterrence.

3. The order for payment of costs

The ACP submitted that the main reason for this order was that the hearing was required because of the serious unprofessional conduct of Mr. Boey, which was proven in the hearing. Without the occurrence of these proven acts of unprofessional conduct, a hearing would not have been necessary and, therefore, the costs and expenses arising from that hearing and the investigation that led to it would not have been incurred by the ACP. As such, they submitted that the ACP and its members should not bear expenses that arose as a “direct result of unprofessional conduct of Mr. Boey”. The ACP acknowledged in its submission that any order for payment of costs could lead to consideration of a monthly payment schedule satisfactory to the ACP.

4. The order to send the hearing decision to the Minister of Justice and Solicitor General

The ACP drew the tribunal’s attention to section 80(2) of the Act. This section states that if the hearing tribunal has “reasonable and probable grounds” to believe that in the course of the unprofessional conduct that was proven to have occurred a criminal offence also occurred, that the tribunal can direct the Hearings Director to provide a copy of the decision to the Minister of Justice and Solicitor General.

5. ORDERS

After careful consideration of the submission by the Complaints Director, the Hearing Tribunal imposes the following orders on Mr. Boey:

1. Immediate cancellation of Mr. Boey’s registration with the ACP;

2. Payment of four fines of \$10,000 each in respect to the proven allegations of diversion of the drugs (Allegation 1); abuse of trust by creating fictitious patient profiles and prescriptions (Allegation 2); diversion of medication for beyond his personal use (Allegation 4); and actively circumventing the abuse control and monitoring provisions of the previous hearing tribunal's orders (Allegation 5);
3. Mr. Boey must pay any and all of the expenses, costs and fees related to the investigation and hearing of this matter on a payment schedule satisfactory to the ACP; and
4. The Hearings Director shall send a summary of this decision to the Minister of Justice and Solicitor General under section 80(2) of the *Health Professions Act*.

6. REASONS FOR DECISION

(a) Cancellation of registration

The allegations of unprofessional conduct proven in the hearing were by their nature very serious. Diversion of controlled substances is in itself a serious offence, as is the creation of fictitious records to conceal that diversion. It is an abuse of the trust placed in pharmacists by the profession and by the public to safely manage the distribution of medications and to uphold the laws and regulations that govern that distribution.

The quantities diverted were substantial and, in light of evidence presented during the hearing, were more probable than not for purposes beyond personal use. This not only breaches multiple standards of professional conduct but potentially puts members of the public at risk.

The conduct is particularly egregious in light of it not only being a repeat offence but a violation of orders handed down by a previous tribunal. Pharmacy, as a self-regulated profession, must be able to govern itself. Members who demonstrate that their conduct cannot be regulated within the profession become ungovernable and, as such, it becomes unjustifiable to allow this individual to remain a part of the profession of pharmacy in Alberta.

Mr. Boey repeated his offence not long after having his practice permit reinstated. He did so under an ongoing monitoring program ordered by the ACP and did not inform the ACP, the monitoring program staff or his employer. This demonstrates poor professional judgment, absence of the integrity and honesty expected of pharmacists by the ACP and the public and willful and conscious disregard for orders made by his professional regulatory authority.

As such, the hearing tribunal felt it was incumbent upon them to ensure that the orders for penalty prevent Mr. Boey from repeating such conduct in the future and to demonstrate to the entire profession not only how unacceptable such conduct is but that

it cannot and will not be tolerated by any member at any time. Failing to achieve this would be to put public safety at risk and would jeopardize the confidence the public currently holds in the integrity the profession of pharmacy in Alberta.

The Hearing Tribunal closely considered the three comparator cases submitted by the ACP to establish precedent on penalties. Mr. Boey's previous case was helpful inasmuch that it demonstrated that a repeat of the penalties ordered in that case was clearly not an option in this case. By definition, those orders did not achieve the goals of specific deterrence nor protection of the public, as the almost identical conduct was repeated shortly after reinstatement of Mr. Boey's practice permit.

Of particular interest to the Hearing Tribunal were the Nevett and Leung cases. Both of these cases included diversion of substantial quantities of controlled substances with coincident concealment of that diversion through dishonourable methods. The penalties in both cases included cancellation of registration and practice permit and payment of full costs. Mr. Leung's case included payment of a \$10,000 fine for each of the proven allegations and referral of the decision to the Minister of Justice and Solicitor General.

It was helpful as well for the Hearing Tribunal to compare the present case to the McIntyre case. The cases had similarities, and so the \$10,000 fines applied as well. The difference was that Mr. Leung was not cooperative with the Complaints Director, whereas Mr. McIntyre was throughout the process. As such, in the latter case, the tribunal ordered a 24 month suspension of his practice permit instead of cancellation as was ordered in the Leung case.

Taking into account the factors and precedent cases described above, the Hearing Tribunal is satisfied that it is appropriate to cancel Mr. Boey's registration with the ACP.

(b) Fines

As will be described further below, the Hearing Tribunal is satisfied that this is an appropriate case in which to order fines. However, the Hearing Tribunal wishes to comment on one submission from the Complaints Director regarding fines, in particular with regards to diversion beyond personal use. The Complaints Director submitted that these fines "are necessary to deal with the possible financial benefits of diversion for beyond personal use" and for the sake of general and specific deterrence.

The Hearing Tribunal has some concern with relying on the "possible financial benefits of diversion for beyond personal use" as the rationale for ordering fines. The Decision of Hearing found the allegation that diversion was more probable than not at least partly for beyond personal use. However, no evidence was presented in the hearing to substantiate that Mr. Boey received any financial benefits as a result of the diversion and the hearing tribunal is not prepared to draw any inferences in this regard. However, the hearing tribunal accepts that fines are reasonable in this case on other grounds. The ACP

submitted that they were necessary to “make clear that this severe unprofessional conduct cannot be tolerated”. On this submission the hearing tribunal agrees with the ACP. Even if this conduct were a first time offence, it would be serious enough to warrant such fines. Any member of the profession who might consider undertaking similar conduct must be deterred from following through on that consideration. The hearing tribunal felt that a \$10,000 financial penalty per act of unprofessional conduct represents a significant deterrent.

The fines are further justified by the fact that this is a repeat offence by Mr. Boey of an almost identical nature to the first hearing he faced. In that hearing, the tribunal did not order any fines against Mr. Boey and capped his need to cover the expenses of the investigation and hearing at \$10,000. This financial penalty was not enough to deter Mr. Boey from repeat unprofessional conduct, evident from the findings of this hearing.

The fines are also justified when comparing this case to that of Mr. McIntyre and Mr. Leung. In both of those cases, a \$10,000 fine was levied against the member and, in the case of Mr. Leung, it was done so for each of the proven allegations. Mr. Boey’s unprofessional conduct is no less serious than these cases and the similarity of the present case to these cases provides further support for the fact that significant fines are reasonable here.

(c) Costs

The hearing tribunal decided that the member must bear the full cost of the investigation and hearing. The previous order for payment of expenses up to \$10,000 was clearly not enough to deter future misconduct. As such, the penalty for repeat conduct must be greater. Furthermore, Mr. Boey conducted himself well outside the boundaries of what can be considered reasonable in the profession.

Aside from the initial notification to the ACP of his relapse and termination of employment, after his employer discovered his conduct Mr. Boey made no attempts to stay in regular communication with the ACP and the Hearings Director. He did not maintain a current mailing address, as is required of any pharmacist active on the clinical register. Nor did he maintain an e-mail address at which he could be readily contacted. These are basic expectations of all members of the ACP clinical register.

When Ms. Morley was finally able to reach Mr. Boey, despite his awareness that a hearing was moving forward, he made no attempts to remain in contact to ensure he knew the date, time and location of the hearing. As such, he was absent from the hearing and has been absent since.

This shows a blatant lack of concern for the serious nature of his unprofessional conduct, for the authority of the ACP to regulate the profession of pharmacy and an absence of responsibility for his actions.

Mr. Boey's failure to communicate with the ACP deprived the Complaints Director of considering other more streamlined ways to proceed with this matter, including for example, the use of any agreed statements of fact or admissions of unprofessional conduct.

Mr. Boey engaged in the current unprofessional conduct after receiving penalties for the same conduct, so no argument can be made that he was unaware that this conduct was inappropriate. When a member of the profession knowingly conducts themselves in a manner they know to be unprofessional, the ACP and its members cannot be expected to bear the financial cost of investigating and conducting a hearing into the conduct of that member. These costs arose only because of the conduct of the member, which if discovered he knew from personal experience would lead to financial penalties.

(d) Section 80(2) of the *Health Professions Act*

The hearing tribunal also agreed with the submission of the ACP to refer the hearing decision to the Minister of Justice and Solicitor General under section 80(2) of the Act. This section of the Act states that if the tribunal is "of the opinion that there are reasonable and probable grounds to believe that the investigated person has committed a criminal offence, the hearing tribunal *must* direct the hearings director to send a copy of the written decision" (emphasis added) to the Minister of Justice and Solicitor General.

As the hearing tribunal found the allegations to be proven that Mr. Boey diverted prescription drugs, did so for beyond his personal use and falsely altered prescription records, it has reasonable grounds on which to believe that criminal offences have been committed and accordingly, directs the hearings director to send the decision to the Minister of Justice and Solicitor General.

Dated: May 25, 2016

Signed on behalf of the hearing tribunal by the chair

Per:

[Tony Nickonchuk]

Tony Nickonchuk, B. Pharm