

ALBERTA COLLEGE OF PHARMACY

IN THE MATTER OF
THE HEALTH PROFESSIONS ACT

AND IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF

David Hiebert

Registration Number 13801

DECISION OF THE HEARING TRIBUNAL

I. INTRODUCTION

The Hearing Tribunal held a hearing into the conduct of David Hiebert, registered pharmacy technician. In attendance on behalf of the Hearing Tribunal were: Sharon Van Wert, pharmacy technician and chairperson; Jennifer Bean, pharmacy technician; Kelly Boparai, pharmacy technician and Dave Rolfe, public member.

In attendance at the hearing were: Annabritt Chisholm, legal counsel from Shores Jardine LLP for the Complaints Director; Leah Macklin, student-at-law at Shores Jardine and James Krempien, Complaints Director with the Alberta College of Pharmacy. David Hiebert was not in attendance and not represented by legal counsel.

Gregory Sim of Field LLP attended as independent legal counsel for the Hearing Tribunal.

The hearing took place on Tuesday, June 18, 2019 in the second floor conference center at 8215 112 Street NW in Edmonton, the location of the Alberta College of Pharmacy. The hearing was held under the terms of Part 4 of the *Health Professions Act*.

There were no objections to the composition of the Hearing Tribunal or the jurisdiction of the Hearing Tribunal to proceed with a hearing.

II. ALLEGATIONS

The Notice of Hearing entered into evidence listed the following allegations that were referred to hearing concerning Mr. Hiebert:

1. During the period of March 1, 2017 to September 24, 2018, while you were working as a registered pharmacy technician at Bow Island Apple Drugs (the "Pharmacy"), you
 - a. diverted approximately
 - i. 100 Mylan-fentanyl 75ug patches, and
 - ii. 1160 Mylan-fentanyl 100ug patches (collectively, the "Fentanyl Patches")from the Pharmacy on multiple occasions;
 - b. manually adjusted the Pharmacy's electronic inventory records to conceal your diversions of the Fentanyl Patches; and

- c. continued to divert Fentanyl Patches until your diversions were discovered by your employer and your employment was terminated.
2. You failed to comply with a request or cooperate with the investigator by:
 - a. suggesting you had not received a copy of the complaint despite Canada Post Records indicating the letter was signed for on October 25, 2018 and an email delivery receipt indicating you received a copy of the same by email from the Complaints Director on November 20, 2018; and
 - b. not providing a written response to the concerns raised by the complainant.

IT IS ALLEGED THAT your conduct in these matters:

- a. Breached the trust placed in you as a pharmacy technician by the Alberta College of Pharmacy and by your employer;
- b. Undermined the integrity of the profession;
- c. Decreased the public's trust in the profession;
- d. Was contrary to accepted pharmacist technician practice; and
- e. Failed to exercise the professional and ethical judgment expected and required of an Alberta pharmacy technician.

IT IS ALLEGED THAT your conduct constitutes a breach of the following statutes and standards governing the practice of pharmacy:

- Standard 1 (sub-sections 1.1 and 1.2) of the Standards of Practice for Pharmacists and Pharmacy Technicians;
- Sections 31(2)(a) and 38 of the *Pharmacy and Drug Act*;
- Section 4(1) of the *Controlled Drugs and Substances Act*;
- Principles 10(1 and 2) and 11(1, 3 and 4) of the Alberta College of Pharmacy's Code of Ethics;

and that your conduct set out above and the breach of some or all of these provisions constitutes unprofessional conduct pursuant to the provisions of sections 1(1)(pp)(ii), 1(1)(pp)(iii), 1(1)(pp)(vii)(B) and 1(1)(pp)(xii) of the *Health Professions Act*.

As the investigated member, David Hiebert, was not in attendance in person or by counsel to admit or deny the allegations, the Hearing Tribunal proceeded as though the allegations were denied.

III. PRELIMINARY MATTERS

Ms. Chisholm first called evidence in support of an application to proceed with the hearing in Mr. Hiebert's absence. Margaret Morley was called upon to provide evidence of the College's efforts to serve Mr. Hiebert with the Notice of Hearing, as well as the Notice to Attend. Ms. Morley testified:

She is the Hearings Director for the Alberta College of Pharmacy and her role includes ensuring parties to Hearing Tribunal proceedings are served with the Notice of Hearing and Notice to Attend the hearing. She carried out that role in relation to this hearing.

Exhibit 2, Tab 1 contained a memo authored by Ms. Morley along with supporting documentation summarizing her efforts to arrange for Mr. Hiebert to attend the hearing.

On April 5, 2019 Ms. Morley sent an email to Mr. Hiebert using his email address recorded on the College's registration record to introduce herself, her role, and attach information about the hearing. Ms. Morley said Mr. Hiebert did not reply to this email.

On April 8, 2019 Ms. Morley sent a Notice of Hearing package to Mr. Hiebert by registered mail, including the Notice of Hearing, Notice to Attend and Notice to Produce. Ms. Morley testified that she used Mr. Hiebert's home address as shown on his College registration record.

Ms. Morley next confirmed that on April 12, 2019 Mr. Hiebert received the Notice of Hearing package and this was confirmed by Canada Post. A copy of the Canada Post delivery slip with Mr. Hiebert's signature was entered into evidence.

On May 1, 2019 Ms. Morley contacted Mr. Hiebert by email to correct a discrepancy in the date on the Notice to Attend and Produce document. While the Notice of Hearing indicated the correct hearing date, the Notice to Attend and Notice to Produce indicated a date one day earlier. A corrected Notice to Attend and Notice to Produce was attached to the email. Ms. Morley received no reply from Mr. Hiebert.

On June 3, 2019 Ms. Morley called David Hiebert at the phone number on his registration record and left a voice mail requesting a return call. Ms. Morley indicated she did not receive a return call from Mr. Hiebert.

On June 5, 2019 Ms. Morley sent another email to Mr. Hiebert requesting a return phone call. He never replied.

On June 14, 2019 Ms. Morley attempted to phone and email Mr. Hiebert again. Ms. Morley said she left a voice mail for Mr. Hiebert but he never returned the call. Ms. Morley's email asked for clarification that Mr. Hiebert would be attending the hearing. Ms. Morley tagged her email to request a delivery receipt and a read receipt. Ms. Morley said she received a successful delivery receipt but no read receipt. Mr. Hiebert has not responded to Ms. Morley's email.

Ms. Chisholm argued that section 79(6) of the *Health Professions Act* permits the Hearing Tribunal to proceed with the hearing and act or decide on the matter being heard in Mr. Hiebert's absence if there is proof that he was given a Notice to Attend. Ms. Chisholm submitted that Ms. Morley had given Mr. Hiebert the Notice of Hearing and a Notice to Attend as required by section 120(3) of the *Health Professions Act*. It provides that a notice required to be given under Part 4 of the *Act* by a Hearings Director is sufficiently given if given by personal service or sent by certified or registered mail to the person at the person's address shown on the College's register. Ms. Chisholm suggested that notice was in order and the hearing should proceed despite the member's absence.

The Hearing Tribunal deliberated and determined that Mr. Hiebert had been properly notified of the hearing date, time and location and that it would be appropriate to proceed despite his absence. Mr. Hiebert received the Notice of Hearing package including the Notice of Hearing on April 12, 2019. While there was a typographical error in the date on the Notice to Attend, the error reflected that the hearing would be on June 17, 2019. The covering letter and the Notice of Hearing both reflected the correct hearing date of June 18, 2019. In addition, Ms. Morley took several subsequent steps to verify that Mr. Hiebert actually knew about the hearing on the correct date of June 18, 2019. Mr. Hiebert elected not to respond to any of Ms. Morley's attempts to contact him but the Hearing Tribunal was satisfied that Mr. Hiebert was aware of the hearing date, time and location as well as the allegations against him.

IV. EVIDENCE

James Krempien, Complaints Director for the College, was the only other witness. Mr. Krempien described the records he collected as part of his investigation and his decision to refer the matter to the hearing. Mr. Krempien's evidence may be summarized as follows:

Mr. Krempien has been the College's Complaints Director for the past 11 years.

He received a complaint about Mr. Hiebert from [REDACTED] the pharmacy licensee at Bow Island Apple Drugs. The complaint alleged that upon finding the pharmacy unlocked on September 24, 2018, the security camera footage was reviewed and Mr. Hiebert was observed to have entered the pharmacy and take narcotic medications from the locked narcotics storage cupboard in the dispensary without authorization.

The complaint also explained that the police had been contacted and charged Mr. Hiebert with theft of narcotics and fraud related to the alteration of pharmacy records.

At the time of receiving the complaint, Mr. Hiebert was registered with the College as a Pharmacy Technician.

Mr. Krempien spoke with Mr. Hiebert on October 1, 2018. During the conversation Mr. Hiebert acknowledged that he had taken some narcotics from the pharmacy without

authorization. Mr. Hiebert voluntarily agreed to move to inactive status on the College's clinical register and he verified this by email on October 3, 2018.

██████████'s complaint attached pharmacy records that she used to calculate that between March 1, 2017 and September 24, 2018 which were dates when Mr. Hiebert was employed at the pharmacy, he had diverted 100 75ug fentanyl patches and 1160 100ug fentanyl patches.

██████████ used the pharmacy's records of drug inventory received as well as the records of drugs dispensed to determine that these fentanyl patches had not left the pharmacy pursuant to proper dispensing events.

██████████ also explained that pharmacy records showing manual adjustments to the fentanyl patch inventory were most likely all made by Mr. Hiebert whether under his own Kroll login or under other staff's logins when they stepped away from their computer terminals. She had compared the inventory records with the staff vacation records and noted no manual inventory adjustments when Mr. Hiebert was away on vacation. On the other hand, Mr. Hiebert was working at the pharmacy on all of the occasions when manual inventory adjustments for fentanyl patches were made. The only exception to this was on September 24, 2018 when ██████████ made an inventory adjustment to accurately reflect her inventory after Mr. Hiebert's diversion that past weekend was discovered.

In some cases manual inventory adjustments appeared in the system to have been made by other pharmacy staff. ██████████ explained this was not possible or unlikely.

██████████ told Mr. Krempien she had confronted Mr. Hiebert with the security video footage and he admitted to having taken fentanyl patches on previous occasions.

Mr. Krempien conducted an investigation and on October 16, 2018 wrote to Mr. Hiebert by registered as well as regular mail enclosing a copy of ██████████'s complaint and seeking Mr. Hiebert's response by November 16, 2018. Mr. Krempien said that he wrote to Mr. Hiebert at his address on the College's registration record.

Mr. Krempien testified that Canada Post records confirmed that his October 16, 2018 letter with a copy of the complaint were delivered to Mr. Hiebert on October 25, 2018 and signed for by someone at the address.

On November 19, 2018 Mr. Krempien wrote to Mr. Hiebert by email noting that no response to the complaint had yet been received. Mr. Krempien requested that Mr. Hiebert respond immediately to discuss the status of his written response to the complaint.

Mr. Hiebert responded by email on November 19, 2018 and suggested he had not received a copy of the complaint.

Mr. Krempien replied to Mr. Hiebert by email and attached a copy of his October 16, 2018 letter with a copy of the complaint. Mr. Krempien asserted that Mr. Hiebert had

received his October 16, 2018 letter through Canada Post on October 25, 2018. Mr. Krempien requested that Mr. Hiebert acknowledge receipt of the complaint and Mr. Krempien's request for a response by November 21 and that he provide his written response to the complaint by November 27, 2018.

On November 21, 2018 Mr. Hiebert responded to Mr. Krempien's email again asserting that he had not received a copy of the complaint. Mr. Krempien responded and explained that the complaint had been sent but that he would send it again, for a fourth time.

Mr. Krempien confirmed that at the time of the hearing Mr. Hiebert had still not provided a written response to the complaint.

Mr. Hiebert's registration is currently inactive with no active practice permit since October 2018.

V. SUBMISSIONS

Ms. Chisholm explained that the Complaints Director has the onus to prove the allegations in the Notice of Hearing on the balance of probabilities standard and not the more onerous criminal law standard of proof beyond a reasonable doubt. Ms. Chisholm then reviewed the Notice of Hearing and the evidence with the Tribunal.

Allegation 1(a) alleged that while working at the pharmacy, Mr. Hiebert diverted approximately 100 Mylan-fentanyl 75ug patches and approximately 1160 Mylan fentanyl 100ug patches over multiple occasions. Ms. Chisholm reviewed the pharmacy records provided by [REDACTED] and [REDACTED]'s calculations of 20 missing boxes of 75ug patches with 5 patches/box for a total of 100 missing patches. Ms. Chisholm also reviewed the records and [REDACTED]'s calculations of 232 missing boxes of 100ug patches with 5 patches/box, for a total of 1,160 missing patches. Ms. Chisholm then discussed the evidence that Mr. Hiebert was responsible for the manual inventory adjustments shown in the pharmacy records, or that the initials shown for those adjustments were for other individuals who were unable or unlikely to have done so. Ms. Chisholm also pointed to Mr. Hiebert's admission to taking the fentanyl patches and to the video evidence of an individual identified by [REDACTED] as Mr. Hiebert accessing the dispensary after hours and taking items from a secure narcotics cupboard. The evidence demonstrated that it was most likely that Mr. Hiebert was responsible for the fentanyl diversions.

Allegation 1(b) alleged that Mr. Hiebert manually adjusted the pharmacy's records to conceal his drug diversions. Ms. Chisholm again pointed to [REDACTED]'s review of the pharmacy records and her determination that Mr. Hiebert had manually adjusted the inventory to cover up his diversions. The records showed that Mr. Hiebert, "DH" was responsible for at least some of these manual adjustments. [REDACTED] had explained that the individuals represented by other initials recorded as having made manual fentanyl patch inventory adjustments were unable, or unlikely to have done so. The evidence

demonstrated that it was most likely that Mr. Hiebert was responsible for the fentanyl diversions and for the manual inventory adjustments that concealed the discrepancies in the pharmacy's inventory.

Allegation 1(c) alleged that Mr. Hiebert continued to divert fentanyl patches until his diversions were discovered by his employer and his employment was terminated. Ms. Chisholm explained that the evidence demonstrated an ongoing pattern of diversion that only ended when Mr. Hiebert left the pharmacy door unlocked and the owners viewed the security video footage and caught him.

Ms. Chisholm argued that allegation 1(a), (b) and (c) were proven and that Mr. Hiebert's proven conduct constituted unprofessional conduct.

Allegation 2(a) alleged that Mr. Hiebert failed to comply with a request or cooperate with an investigator by suggesting he had not received a copy of [REDACTED]'s complaint despite Canada Post records indicating Mr. Krempien's letter was signed for on October 25, 2018 and despite Mr. Krempien's email attaching the complaint with the delivery receipt dated November 20, 2018.

Allegation 2(b) also alleged that Mr. Hiebert had failed to comply or cooperate by not providing a written response to the concerns raised by the complaint.

Ms. Chisholm argued that Mr. Krempien had taken steps to send a copy of the complaint to Mr. Hiebert and request a response. The evidence demonstrated that Mr. Hiebert received Mr. Krempien's correspondence by registered mail and by email. Despite this, Mr. Hiebert denied having received the complaint and he has failed to provide a written response as requested. Ms. Chisholm argued that Mr. Hiebert's obligation to cooperate with the investigation continued despite the lack of a current practice permit. Mr. Hiebert remains a regulated member of the College and subject to governance. Allegation 2 was proven and Mr. Hiebert's proven conduct was unprofessional.

VI. FINDINGS

The Hearing Tribunal concluded that it was more likely than not that Mr. Hiebert diverted approximately 100 Mylan-fentanyl 75ug patches and approximately 1,160 Mylan-fentanyl 100ug patches on multiple occasions between March 1, 2017 and September 24, 2018, and that he had continued to do so until his diversions were discovered and his employment was terminated. The Tribunal also concluded it was more likely than not that Mr. Hiebert manually adjusted the pharmacy's electronic inventory records to conceal his diversions of the fentanyl patches. The Tribunal therefore concluded that allegation 1(a), (b) and (c) were factually proven.

The Hearing Tribunal relied upon the evidence that it was Mr. Hiebert who appeared on the security video recording and on Mr. Krempien's evidence of Mr. Hiebert's admissions and on the other evidence collected in the investigation. The evidence

demonstrated that after being confronted by [REDACTED] with the security video footage and admitting his theft of narcotics from the pharmacy, Mr. Hiebert contacted the RCMP and confessed to theft of Fentanyl patches. In addition, [REDACTED]'s records demonstrate that she reconciled the pharmacy's inventory records with the dispensing records and concluded that 100 Mylan-fentanyl 75ug patches and 1,160 Mylan-fentanyl 100ug patches were missing and the discrepancy had been covered up with manual inventory adjustments. The records show a number of manual adjustments having been done by Mr. Hiebert, of "DH".

The Hearing Tribunal also noted that Mr. Hiebert had failed to acknowledge receipt of the complaint reporting form completed by [REDACTED]. Mr. Krempien wrote to Mr. Hiebert at his address on the College's registration record on October 16, 2018 and enclosed a copy of the complaint. A Canada Post record entered into evidence confirmed the item was signed for on October 25, 2018 at 10:30am. In addition, Mr. Krempien emailed a copy of his October 16, 2018 letter and the complaint form to Mr. Hiebert on November 20, 2018 at 7:35am. An email delivery receipt entered into evidence confirmed that Mr. Krempien's email was received at Mr. Hiebert's email address on November 20, 2018 at 7:36 am. Despite this, Mr. Hiebert emailed Mr. Krempien on November 21, 2018 at 6:08pm and stated that he had not received the complaint.

Mr. Krempien sent a fourth copy of the complaint form to Mr. Hiebert by email on November 21, 2018 at 6:25pm, but Mr. Krempien has never received Mr. Hiebert's written response to the complaint.

The Hearing Tribunal was satisfied that allegation 2(a) and (b) were factually proven.

The Hearing Tribunal considered whether Mr. Hiebert's proven conduct amounted to unprofessional conduct. The *Health Professions Act* section 1(1)(pp) defines unprofessional conduct to include (ii) contraventions of the *Health Professions Act*, a code or standards of practice; (iii) contraventions of another enactment that applies to the profession; and (vii)(B) failure or refusal to comply with a request of or co-operate with an investigator.

The Hearing Tribunal agreed with Ms. Chisholm's submissions that Mr. Hiebert's proven conduct contravened Standards 1.1 and 1.2 of the Standards of Practice for Pharmacists and Pharmacy Technicians as well as other applicable legislation and was unprofessional. The standards required Mr. Hiebert to practice in accordance with the law and comply with its letter and spirit. Mr. Hiebert took Mylan-fentanyl patches which are a Schedule 1 controlled drug into his possession without a prescription. This is contrary to the *Pharmacy and Drug Act*, s. 31(2)(a) and contrary to the *Controlled Drugs and Substances Act*, s. 4(1). Mr. Hiebert's proven conduct also contravened principle 10 of the Alberta College of Pharmacy's Code of Ethics. Compliance with laws governing the practice of pharmacy and controlled drugs is a basic expectation of the public for regulated members of the College.

The Hearing Tribunal also agreed with Mr. Chisholm that Mr. Hiebert's failure to cooperate with the College's investigator was unprofessional. As above, the failure or

refusal to comply with a request of or co-operate with an investigator is defined as unprofessional conduct. Mr. Hiebert definitely had the complaint and Mr. Krempien's request for his written response by November 20, 2018 by email. Mr. Hiebert has consistently failed or refused to comply with Mr. Krempien's requests for a proper response to the allegations in this hearing. This involves a breach of trust. A regulated pharmacy technician who refuses to comply or cooperate with an investigator's proper demands acts contrary to the trust, authorities and responsibilities bestowed on the professional of pharmacy technicians.

VI. **ORDERS**

The Hearing Tribunal will receive submissions on sanction. If the Complaints Director or Mr. Hiebert believes that an oral hearing on sanctions is necessary they may write to the Hearing Tribunal to request an oral hearing and the Tribunal will consider such requests.

If no oral hearing is requested the Tribunal will receive written submissions on sanction. The Tribunal requests the Complaints Director to provide written submissions on sanctions within 30 days from the date of this decision and Mr. Hiebert to provide any reply submissions on sanction by November 12, 2019. If either party anticipates difficulties complying with these timeframes they may write to the Tribunal seeking an extension. The hearing tribunal directs the hearing director to facilitate the collection of written submissions for the tribunal's consideration.

Singed on behalf of the Hearing Tribunal by the Chair on September 12, 2019.

[Sharon Van Wert]

Sharon Van Wert