

BEFORE THE BOARD OF PHARMACY  
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-06-0066-PHA REGARDING:

THE PROPOSED DISCIPLINARY ) Case No. 1169-2006  
TREATMENT OF THE PHARMACIST )  
LICENSE OF SHARON BENGTON, RPh, )  
License No. 3763. )  
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**PROPOSED FINDINGS OF FACT; CONCLUSIONS OF LAW;  
AND RECOMMENDED ORDER**

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**I. INTRODUCTION**

In this matter, the Business Standards Division of the Department of Labor and Industry (BSD) alleged that Sharon Bengton violated Mont. Code Ann. § 37-1-316(2), (16) and (18), Mont. Code Ann. § 37-7-301(1) and (2), and Admin. R. Mont. 24.174.2301(1)(a), (i), and (s). Prior to the hearing, Bengton entered into a stipulation (incorporated here by reference) with BSD wherein she admitted that she violated the above provisions. Pursuant to that stipulation, the focus of the hearing was then narrowed to the issue of the appropriate sanction to be imposed.

A hearing to consider the appropriate sanctions was held on March 27, 2006. Lorraine Schneider, agency legal counsel, represented BSD. Bengton represented herself. Bill Sybrant, investigator for the Board of Pharmacy, and Bengton both testified under oath. BSD's Exhibits 1 through 9 were admitted by stipulation. Bengton's Exhibits A through E were also admitted into evidence. Additional Exhibits 10, 11, and 12 were also admitted into evidence. Because Exhibits 11 and 12 are "blister" packs which contain actual prescription drugs (including Zoloft, a controlled substance, which must be secured under lock and key), the Department has been permitted to retain and properly secure those exhibits.

Subsequent to the conclusion of the hearing, Stephen Potts, Attorney at Law, entered his notice of appearance and requested the opportunity to submit a post-hearing brief on the sanctions to be imposed. Agency counsel agreed to a post-hearing briefing schedule and each party was permitted to submit post-hearing briefs.

Based on the evidence adduced at the hearing and the post-hearing briefing of the parties, the hearing examiner makes the following findings of fact, conclusions of law, and recommended decision regarding the appropriate sanctions to be imposed in this case.

## II. FINDINGS OF FACT

1. At all times material to this case, Bengtson has been licensed as a pharmacist in Montana, holding license number 3763 issued by the Board of Pharmacy.

2. Bengtson began her career as a pharmacist at the K-Mart store located in Great Falls, Montana. She subsequently resigned in order to become the pharmacist in charge at the Apothecary Drug Store in Great Falls, Montana. The owner of that establishment is not a pharmacist.

3. As the pharmacist in charge at the Apothecary Drug Store, Bengtson is responsible for preparing and properly dispensing prescription drugs. One of the methods of dispensing prescription drugs is through a system called the “Doc-U-Dose” System. This system utilizes blister packs that contain the exact amount of prescribed medication which a patient then takes to ensure that the patient receives the correct amount of medication. The Doc-U-Dose is prepared in accordance with the prescription ordered by the patient’s physician. Each of the doses is only supposed to contain the exact amount of the prescription to be taken. Bengtson was responsible for ensuring that each dose was exactly measured out and properly labeled in order to ensure that a patient did not receive an improper amount or incorrect type of drug.

4. Bengtson permitted unlicensed pharmacy employees (including delivery drivers) who were neither pharmacists nor pharmacy technicians to both add medication to and take medication from the Doc-U-Dose packs without Bengtson’s supervision and inspection. In one instance, a delivery person erroneously attached seizure medication to each of four compartments on the Doc-U-Dose instead of only one to the entire package. That incorrectly dispensed seizure medication was then delivered to the patient. Fortunately, the patient’s care giver caught the error before the patient took the incorrect doses.

5. Bengtson also allowed delivery persons to take medications home with them in the evening if they had been unable to deliver the medications instead of immediately returning those medications to the Apothecary Store where they could

be properly secured. Some of these medications included controlled substances which were required to be returned to the drug store for secure storage.

6. Bengtson's conduct resulted in a complaint being initiated with the Board of Pharmacy in order to stop the practice. After Board of Pharmacy investigator Bill Sybrant investigated the complaint in May, 2005, Bengtson revamped the drug store's policies. Bengtson no longer permitted technicians to remove medications from the Doc-U-Dose packs but she still permitted them to add medications to the pack. In addition, she no longer permitted delivery drivers to take undelivered medications home. Instead, all medications must now be returned to the drug store if they cannot be delivered.

7. After the formal complaint was filed, Bengtson put a stop to permitting anyone but the pharmacist from adding medications to the Doc-U-Dose packs.

8. During the discovery phase of this matter before the hearing, Bengtson forwarded through regular US Mail a Doc-U-Dose blister pack containing medication, including Zolofit which is a controlled substance. She submitted this evidence for the purpose of including it as an exhibit in this case. See., e.g., Bengtson letter to hearing examiner dated February 21, 2006, submitted by Bengtson as notice of the exhibits she intended to introduce at hearing. The Doc-U-Dose blister pack containing the controlled substance was unaccompanied by any instruction or notice as to proper securing of the drug or even any indication that the drug had to be secured. Mailing the controlled substance by regular United States Mail in the manner that Bengtson did did not comport with proper procedures to secure the controlled substance that was included in the blister pack.

9. Bengtson's conduct in permitting unlicensed and untrained individuals to add and delete medications from Doc-U-Dose packs, permitting employees to take controlled substances home at night, and in mailing a controlled substance to the Hearings Bureau shows disturbingly poor judgment on her part. Her poor judgment and her conduct in this case requires that her work be continuously monitored in order to ensure the health, welfare and safety of the public.

10. Unfortunately, there is no practical method for the Board of Pharmacy to monitor Bengtson in her practice at the Apothecary Drug Store on a routine basis since she is the only pharmacist at the store and is the pharmacist in charge. Only Sybrant could undertake monitoring on behalf of the Board of Pharmacy. He, however, is not in a position to properly monitor Bengtson's conduct at the

Apothecary Drug Store since he has many other persons and entities to monitor in the State of Montana.

### III. CONCLUSIONS OF LAW<sup>1</sup>

1. Bengtson stipulated that she violated Mont. Code Ann. § 37-1-318(2) and (18) and Mont. Code Ann. § 37-7-301(1) and (2) as alleged in the complaint filed by the screening panel of the Board of Pharmacy. The only issue left for determination in this case is the appropriate sanction to be imposed in light of the admitted violations.

2. In determining which sanctions are appropriate, the Board must first consider sanctions that are necessary to protect the public and only after that determination has been made may the Board then consider and implement requirements designed to rehabilitate the licensee. Mont. Code Ann. § 37-1-312(2). Upon a determination that the licensee has committed a violation, the Board may issue an order providing for, among other things, suspension of the license for a fixed or indefinite term, for remedial education and probation for a designated period of time. Mont. Code Ann. § 37-1-312(1).

3. BSD has urged this tribunal to impose a one year suspension upon Bengtson's license. There are several facts in this case that point toward imposing a period of suspension in this matter both in order to protect the public and to ensure the licensee's rehabilitation. First, the licensee permitted unlicensed individuals to add and take away medication from the Doc-U-Dose packs without pharmacist oversight for some time. Bengtson was aware that this was going on yet it appears that this did not strike her as problematic until it was brought to her attention by the Board of Pharmacy investigation. Second, the licensee permitted pharmacy delivery personnel to take controlled substance prescriptions home without ensuring that the drugs were properly secured. Not only did this violate proper pharmaceutical protocol for securing controlled substances, it showed a disturbing lack of common sense.

4. Bengtson argues that the appropriate sanction in this matter is the imposition of a \$500.00 fine and no more. In urging the imposition of this minimal sanction, Bengtson argues that the hearing examiner may not consider her conduct of sending a controlled substance through the US Mail to the hearing examiner with no

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<sup>1</sup> Statements of fact in the conclusions of law are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

precaution for the proper securing of the drug. She posits that to do so would violate her due process rights by forcing her to defend against conduct that had not been properly charged in the complaint.

The hearing examiner does not agree with this proposition for several reasons. First, Bengtson of her own free will created the situation by unsolicited disclosure of the blister pack containing the controlled substance as part of the discovery process. No one required or asked Bengtson to forward the blister pack to the Hearings Bureau. Second, despite ample opportunity to do so at the time of the hearing, Bengtson never objected to soliciting any testimony regarding the propriety of her sending a controlled substance through the US Mail which was not properly secured. Her failure to object to the admission of this testimony amounts to a waiver. *State v. Weeks* (1995), 270 Mont. 63, 891 P.2d 477, 491.

Third, in considering this conduct, the hearing examiner is not attempting to find the licensee guilty of some type of uncharged conduct. Rather, the hearing examiner is simply taking into consideration all relevant evidence in order to fashion a remedy that both protects the public and properly rehabilitates the licensee. Such action does not amount to finding the licensee guilty of uncharged conduct nor does it deprive the licensee of due process. *See, e.g., Wilkens v. Department of Health*, 289 A.D. 634, 635-36, 733 N.Y.S. 788, 790 (App. 2001) (imposition of aggravated license sanction due to licensee's "lack of insight into his deficiencies and his propensity to blame others dealt with appropriateness of the hearing committee's penalty, which considerations repeatedly have been found relevant in determining an appropriate penalty"). Even in the criminal law arena, where the due process considerations of an accused are undoubtedly greater than those of the licensee in this proceeding, a sentencing court is free and indeed required to review all pertinent evidence in imposing sentence. The court may consider evidence even though it would not be admissible at the trial on the merits. *See, e.g., Mont. Code Ann. § 46-18-302* (which provides in death penalty cases that "[a]ny evidence that the court considers to have probative force may be received regardless of its admissibility under the rules governing admission of evidence at criminal trials"). *See also, State v. D.B.S.* (1985), 216 Mont 234, 248, 700 P.2d 630, 639-40 (affirming the power of a sentencing judge, under the strictures of Montana Code Annotated § 46-18-302 to consider all relevant evidence whether or not admissible at trial before a jury on the merits); overruled on other grounds, *State v. Olsen*, (1997), 286 Mont. 364, 951 P.2d 571.

5. Weighing all of the factors in the balance, it is imperative that Bengtson not be permitted to be a lead pharmacist or pharmacist in charge for at least a period

of one year until she can demonstrate that she has undertaken adequate remedial training to ensure the protection of the public. While the evidence has not shown that Bengtson lacks the technical competence to properly fill prescriptions, it is patently obvious that she lacks the judgment (at this point) to implement and enforce proper pharmacy policies that will ensure proper dispensing of medication to patients. If Bengtson can find employment in a large pharmacy setting (such as, for instance, her previous employment at K-Mart) where she can be monitored in her daily work by a supervising pharmacist, she will not present any threat to the public. If no such position exists, then the public cannot be adequately protected and suspension until such time as Bengtson can demonstrate that she has garnered judgment skills which are appropriate for her profession is required.

#### **IV. RECOMMENDED ORDER**

Based on the foregoing, the hearing examiner recommends that the pharmacist's license of Sharon Bengtson be placed on probation for a period of three years with the following conditions:

(1) Within twelve (12) months of the date of the entry of the Board's final order in this matter, Bengtson shall enroll in and successfully complete such additional training and education as prescribed by the Board or its designee;

(2) Bengtson's license shall be restricted for a period of one year during which restriction she shall only hold a position as a pharmacist or pharmacy technician wherein she will be subject to daily monitoring by a supervising pharmacist duly licensed by the Board of Pharmacy. Any position that Bengtson accepts while her license is under probation shall be first approved by the Board of Pharmacy. In addition, Bengtson shall be subject to monitoring as prescribed by the Board of Pharmacy to ensure that she is complying with all state statutes and regulations applicable to licensed pharmacists and any directives or requirements imposed upon her by the Board of Pharmacy;

(3) Bengtson shall obey (a) all provisions of Title 37, Chapters 1 and 7, Montana Codes Annotated, (b) all provisions of Title 24, Chapter 174 of the Administrative Rules of Montana, and all requirements or directives imposed by the Board; and

(4) In the event Bengtson fails to comply with any of the above terms and conditions of her probation, her license shall be suspended indefinitely until such

time as she has provided proof acceptable to the Board that she has completed all requirements set forth herein.

DATED this 10th day of August, 2006.

DEPARTMENT OF LABOR & INDUSTRY  
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT  
GREGORY L. HANCHETT  
Hearing Examiner

**NOTICE**

Mont. Code Ann. § 2-4-621 provides that the proposed order in this matter, being adverse to the licensee, may not be made final by the regulatory board until this proposed order is served upon each of the parties and the party adversely affected by the proposed order is given an opportunity to file exceptions and present briefs and oral argument to the regulatory board.