BEFORE THE BOARD OF MEDICAL EXAMINERS
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-05-0305-MED REGARDING:

THE DISCIPLINARY TREATMENT OF THE LICENSE OF DAVID JACK MORRIS, MD, License No. 9693.	)))))	Case No. 2661-2005

ORDER RECOMMENDING SUMMARY JUDGMENT AND REVOCATION OF LICENSE

I. INTRODUCTION

The Business Standards Division of the Department of Labor and Industry has moved for summary judgment due to Licensee David Jack Morris' failure to respond to requests for admissions and the implication of deeming those requests admitted upon the only material issues in this case. Having considered the Department's motion, as well as the licensee's oral response to the motion (he did not file a written response though directed to do so), the motion should be granted for the reasons stated below. In addition, because the licensee has admitted that nothing short of revocation can protect the public and the admitted facts of this case establish that nothing short of revocation can protect the public, the hearing examiner recommends that the Board of Medical Examiners revoke the licensee's license to practice medicine in Montana.

II. PROCEDURAL FACTS

1. The Business Standards Division (BSD) of the Department of Labor and Industry served the licensee with notice of its complaint and proposed board action in this matter on June 22, 2005. The licensee opposed the proposed action and the matter was transferred to the Hearings Bureau for contested case hearing.

2. On November 7, 2005, the hearing examiner held a scheduling conference with counsel for the BSD and the licensee in attendance. At that time,

BSD counsel and the licensee agreed to a pre-hearing and hearing schedule. The parties agreed that discovery would be completed by February 17, 2006 and the parties would exchange a list of witnesses and exhibits no later than February 24, 2006. The parties also agreed that the hearing in this matter would take place on March 20, 2006.

3. On November 8, 2005, the hearing examiner issued a scheduling order memorializing the above deadlines and dates and forwarded a copy to both the BSD counsel and the licensee. The licensee very shortly thereafter received the scheduling order.

4. On January 13, 2006, BSD counsel forwarded requests for admissions to the licensee. Those requests for admissions very plainly indicated what the licensee was required to do in order to answer the requests. The requests also plainly told the licensee that he was required to answer the request within 30 days. Finally, the requests indicated not once but twice that failure to respond to the requests could result in the imposition of sanctions against the licensee.

5. The licensee timely received the requests for admissions, but failed to act on them.

6. Thereafter, the licensee's father in California either became ill or his illness took a turn for the worse. The licensee indicates that sometime around the last week of January or the first week of February 2006, he went to California to be with his father. His father subsequently died around February 15, 2006. The licensee then returned to Utah sometime during the last week of February.

7. At no time prior to his leaving to go to California did the licensee undertake any efforts to respond to the requests for admissions or otherwise seek additional time to respond to the requests for admissions. This is true even though the licensee plainly was aware of the impending deadline not only for the requests for admissions but also other discovery deadlines and the hearing.

8. On February 23, 2006, BSD filed a motion for summary judgment and request to have requests for admissions deemed admitted as the licensee had not responded to any of BSD's discovery requests. Upon receipt of the motion, this hearing examiner, on February 27, 2006, issued an order directing the licensee to respond in writing to the motion no later than March 9, 2006. The order also advised the licensee that oral argument on the motion would occur at the time of the final pre-hearing conference on March 13, 2006. Finally, the order advised the

licensee that his failure to respond to the motion or his failure to appear at the final pre-hearing would result in the hearing examiner granting the motion for summary judgment.

9. The licensee failed to respond to the motion for summary judgment. Instead, on March 9, 2006, the licensee for the first time brought this matter to the attention of an attorney in Utah (who is licensed to practice in Montana, but who deals only in criminal law) by leaving some documentation with that attorney's secretary. That attorney never filed a notice of appearance in this matter. That attorney then forwarded the matter to a Utah attorney who is not licensed to practice in Montana.[1] The licensee finally retained Montana counsel in this matter on March 23, 2006, ten days after the hearing examiner held the oral argument on the motion for summary judgment and informed the parties that summary judgment would be granted.

10. There is no summary suspension in place at present that would prevent the licensee from practicing in Montana. At the time of the final pre-hearing conference in this matter, the licensee indicated that he would be willing to enter into a stipulation for a summary suspension while the matter is pending. Counsel for BSD was unwilling to agree to summary suspension, citing the amount of time that had passed while everyone, except the licensee, was preparing to meet and meeting the deadlines in this matter. Furthermore, it is doubtful that BSD counsel could bind the Board to enter into a summary suspension pending the outcome of a contested case hearing. Thus, despite the licensee's offer, summary suspension at this point in time is not a viable option to ensure the protection of the public.

11. Based on the licensee's actions up to this point, as demonstrated by both his failure to act and his inconsistent responses to the hearing examiner's questions during the motion hearing, it is evident that the licensee's father's illness and death are not the basis for his failure to respond or at least to make efforts to get an extension of time to respond to the requests for admissions. Rather, the licensee has delayed responding in this case in the hopes that his Utah matter, which serves as part of the allegations in this case, would be resolved and thus, to the licensee's way of thinking, resolve his Montana case.

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[1] The attorney who is licensed only in Utah, Mr. David Moxley, appeared by telephone at the behest of the licensee during the final pre-hearing conference to explain how and when he had received the documentation provided by the licensee. Mr. Moxley appeared only to relate these facts and did not appear in this proceeding as the licensee's attorney nor did he engage in the practice of law during the telephone conference.

III. THE DEPARTMENT'S REQUESTS FOR ADMISSIONS SHOULD BE DEEMED ADMITTED

The Montana Rules of Civil Procedure are applicable to contested case proceedings brought under Title 37, Chapter 1, Part 3. Mont. Code Ann. § 37-1-310. Rule 36(a), M.R.Civ. P, provides that requests for admissions are deemed admitted "unless, within 30 days after service of the request, . . . the party to whom the request is directed serves upon the party requesting the admission a written answer . . . ." Under this rule, the Montana Supreme Court has recognized that where a party fails to respond to the requests within the time prescribed and there is no extension of time granted by the court, the matters sought in the requests for admissions are deemed admitted. *Rogers v. Relyea*, (1979), 184 Mont. 1, 601 P.2d 37.

Here, the licensee has attempted to pass his dilatory conduct off to his absence from Utah during his father's illness and also to his Utah attorneys. His arguments are not persuasive. The licensee agreed to the dates for completion of discovery and the hearing date. The licensee received the requests for admissions at least two weeks before he left to be with his father in California. He was aware of the salient dates of this case and the need to respond to the requests for admissions long before leaving for California and certainly in time to take the simple expedient of requesting an extension of time. Moreover, despite being advised by the hearing examiner that the motion for summary judgment would be granted unless a written response was received by March 9, 2006, the licensee did not even attempt to react until the day the response was due by then seeking counsel.

Far from showing reasonable efforts to participate in this process, the licensee's conduct demonstrates a lack of desire to participate and cannot be excused by his absence from Utah nor his belated attempt to retain counsel. Under these circumstances, the licensee has failed to show good cause for not deeming the request for admissions admitted.

IV. SUMMARY JUDGMENT SHOULD BE GRANTED IN THIS CASE AND THE LICENSEE'S MEDICAL LICENSE SHOULD BE REVOKED

A. *Summary Judgment Is Appropriate in Administrative Cases Where There Are No Contested Issues of Fact*

A delay or failure to respond to requests for admissions can justify the granting of a summary judgment. *Garrett v. Paccar Financial Corp.*, (1990), 245 Mt. 379, 380-

81, 801 P.2d 605, 605-606. Summary judgment is an appropriate method of dispute resolution in administrative licensing proceedings when the requisites for summary judgment are met. *Matter of Peila* (1991), 249 Mont. 272, 815 P.2d 139. Summary judgment should be granted where "the pleadings . . . and admissions on file, together with the affidavits, . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law." Rule 56(c), Mont. R. Civ. P.

The party seeking summary judgment has the initial burden of establishing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. Once the moving party meets this burden, the burden then shifts to the party opposing the motion to establish otherwise by more than mere denial or speculation. *Ravalli County Bank v. Gasvoda* (1992), 253 Mont. 399, 883 P.2d 1042.

Reasonable inferences drawn from the proof must be drawn in favor of the party opposing summary judgment. *Sherrad v. Prewett* (2001), 306 Mont. 511, 36 P.3d 378. Admissions obtained in response to Rule 36, Mont. R. Civ. P. requests for admissions may be used to demonstrate the absence of any material issue of fact and may serve as the basis for granting summary judgment. *Morast v. Auble* (1974), 164 Mont. 100, 105, 519 P.2d 157, 160. Here, the admissions which are now deemed admitted demonstrate that summary judgment in favor of the BSD is appropriate.

B. Substantive Facts Deemed Admitted by The Licensee in This Case

The following facts are deemed admitted by the licensee due to his failure to answer the requests for admissions without good cause:

1. The licensee is a medical doctor holding Montana License No. 9693.

2. On or about April 26, 2004, the State of Utah summarily suspended the licensee's Utah medical license. The basis for the suspension was the licensee's long term chemical dependency upon drugs through "splitting" prescriptions with patients. This process involved Morris writing prescriptions for patients to obtain controlled substances and then splitting the prescription with the patient so that Morris could feed his own chemical dependency with the drugs obtained through the prescription.

3. As a result of the licensee's long term chemical dependancy and his abuse of his prescription writing privileges which included "splitting" prescriptions, the Drug Enforcement Agency of the United States Department of Justice (DEA)

sought the licensee's voluntary surrender of the licensee's controlled substances prescribing privileges.

4. On May 3, 2004, the licensee, through his attorney, voluntarily surrendered his controlled substances prescribing privileges to the DEA.

5. A criminal information was filed in Utah against the licensee charging him with two felony counts of controlled substances, prohibited acts for issuing false or forged prescriptions. The two substances that the licensee was attempting to obtain through falsifying or forging the prescriptions were Oxycontin and Methasose (or Methadone), both of which are controlled substances. These charges stemmed in part from the same conduct that lead to the suspension of the licensee's Utah medical license.

6. As a result of the filing of the information, a Utah District Court Judge issued an arrest warrant for the licensee. The licensee was arrested on that warrant on the same day that it was issued.

7. On July 26, 2005, the licensee pled guilty to one count of falsifying, forging or altering a prescription of a controlled substance in violation of Utah statute 58-37-8(3)(A)(III) and was placed on probation for a period of 18 months.

8. On April 11, 2005, as a result of the action taken by the Utah medical licensing authority, the State of California suspended the licensee's California medical license.

9. During his application to the Montana Board of Medical Examiners, the licensee stated that he had never been a party to the use of cocaine or any illegal drugs. In fact, the licensee had admitted to a counselor at the Meneinger Clinic that he had used both powdered and intravenous cocaine when he was 27 years old. The licensee reiterated to the Montana medical board that he had never used cocaine and he indicated surprise that the judge in his criminal proceeding in Utah had stated that the cocaine was for his own use.

10. The licensee's statements to the Montana Board discussed in the preceding paragraph were false. The licensee made the false statements described in paragraph 9 for the purpose of misleading the Montana Board of Medical Examiners to issue the licensee a license to practice in Montana.

11. Morris admitted at the time of the final pre-hearing conference in this case that he had in fact engaged in the conduct alleged in the complaint, but contended it was not his fault but was induced by his psychological condition at the time of the conduct.

12. The licensee's conduct as described above does not meet generally accepted standards of professional conduct for medical doctors and amounts to unprofessional conduct.

13. The proper sanction to be imposed in this case is revocation of Morris' license. The support for this sanction exists not only in the license's admission in this regard. The documents produced by the BSD, which the licensee admitted were true and correct, demonstrate a course of conduct that mandates revocation in order to protect the public. Morris exhibited a chemical dependency problem and repeatedly spilt prescriptions with patients in order to feed the dependency. Nothing short of revocation can protect the public in light of these admitted facts.

C. *Conclusions of Law*

1. Mont. Code Ann. § 37-1-316 provides in pertinent part:

> The following is unprofessional conduct for a licensee . . . governed by this chapter:
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> * * *
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> (7) denial, suspension, revocation, probation, fine, or other license restriction or discipline against a licensee by a state . . . or the federal government if the action is not on appeal, under judicial review, or has been satisfied.
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> (18) conduct that does not meet the generally accepted standards of practice.

2. Pursuant to administrative rule, unprofessional conduct under Mont. Code Ann. § 37-1-316(18) includes a licensee who has been subject to disciplinary action in another state based upon acts or conduct that would constitute grounds for disciplinary action under Title 37, Chapter 3, or a rule promulgated by the Board of Medical Examiners. Admin. R. Mont. 24.156.625(1)(g). Unprofessional conduct includes any act that constitutes unprofessional conduct and includes having voluntarily relinquished or surrendered a license or privileges to practice in any state. Admin. R. Mont. 24.156.625(1)(v) and Admin. R. Mont. 24.156.625(1)(ab).

3. Morris' conduct demonstrates violations of all of the above-mentioned statutes and regulations. His license has been suspended in two states as a result of his conduct and this constitutes a violation of Mont. Code Ann. § 37-1-316(7), Admin. R. Mont. 24.156.625(1)(g), Admin. R. Mont. 24.156.625(1)(v) and Mont. Code Ann. § 37-1-316(18).

4. A regulatory board may impose any sanction provided for by Mont. Code Ann. Title 37, Chapter 1, upon a finding of unprofessional conduct. Mont. Code Ann. § 37-1-307(f). Among other things, Mont. Code Ann. § 37-1-312 provides that a board may revoke a licensee's license.

5. To determine which sanctions are appropriate, the regulatory board must first consider the sanctions necessary to protect the public. Only after this determination has been made can the board then consider and include in the order requirements designed to rehabilitate the licensee. Mont. Code Ann. § 37-1-312(2).

6. Revocation of the licensee's licensee is required in this case in order to ensure the protection of the public. The licensee's admissions demonstrate a recurring issue with chemical dependency that directly endangers the health and well-being of his clients. In light of the licensee's admissions, nothing short of revocation can protect the public.

V. RECOMMENDED ORDER

Based on the foregoing, it is recommended that the Montana Board of Medical Examiners grant the Department's motion for summary judgment. In addition, it is recommended that the Board of Medical Examiners enter its order finding that David Jack Morris has violated Mont. Code Ann. § 37-1-316(7) and (18), Admin. R. Mont. 24.156.625(1)(g), Admin. R. Mont. 24.156.625(1)(v) and Admin. R. Mont. 24.156.625(1)(ab). Finally, it is recommended that the medical license of David Jack Morris, License No. 9693, be revoked.

DATED this 17th day of April, 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.