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STATE OF WISCONSIN
BEFORE THE PHARMACY EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST PETER F. BJERKE, R.Ph., RESPONDENT.	: : : : :	FINAL DECISION AND ORDER (Case No. LS9203021PHM)

The parties to this proceeding for purposes of s. 227.53, Stats., are:

Peter F. Bjerke, R. Ph.
522 Wheaton Street
Chippewa Falls, WI 54729

Pharmacy Examining Board
Department of Regulation and Licensing
P O. Box 8935
Madison, WI 53708

Division of Enforcement
Department of Regulation and Licensing
P.O. Box 8935
Madison, WI 53708

The rights of a party aggrieved by this decision to petition the board for rehearing and to petition for judicial review are set forth in the attached "Notice of Appeal Information"

A hearing was held in this matter before an Administrative Law Judge on May 29 and July 7, 1992. Respondent Peter F. Bjerke appeared in person and with counsel, Attorney Eric J. Wahl of the firm Wiley, Wahl, Colbert, Norseng Cray & Herrell, S.C., 1280 W. Clairemont Avenue, Eau Claire, Wisconsin 54702-0629. Complainant Division of Enforcement was represented by Attorney Arthur Thexton.

The Administrative Law Judge issued a Proposed on December 29, 1992. Respondent's attorney filed written objections to the decision, under date of January 19, 1993. Complainant's attorney filed written objections to the decision on January 25, 1993. Oral argument by counsel was presented before the board at its meeting on March 11, 1993.

Based on the entire record of this proceeding, the Pharmacy Examining Board makes the following Findings of Fact, Conclusions of Law, and Order as its Final Decision in this matter.

FINDINGS OF FACT

1. Respondent is Peter F. Bjerke, (dob 4/21/48), and was at all times material to this complaint licensed as a Registered Pharmacist in the state of Wisconsin with license number

8328. Respondent's last address on file with the department of regulation and licensing is 522 Wheaton Street, Chippewa Falls, WI 54729. As to all of the conduct described in this complaint, respondent either personally filled the prescriptions described, or was responsible for the filling of the prescriptions by virtue of his position (at all times relevant to this complaint) as managing pharmacist and owner of The Medicine Shoppe, a licensed pharmacy in Chippewa Falls, Wisconsin, where all of the described prescriptions were filled.

COUNT I--Patient James M.

PROPOXYPHENE:

2. On November 24, 1986, respondent filled a telephoned prescription from a Michigan physician for patient James M. for 60 propoxyphene, a Schedule IV controlled substance, to be taken one, four times per day. The patient's address did not appear on the prescription. Two refills were authorized. Respondent refilled this prescription twelve days later, on December 6, and again on December 22, 1986.

3. On January 5, 1987, respondent filled another telephoned prescription for 60 propoxyphene to be taken one, four times per day, apparently authorized by the same Michigan physician. This prescription also did not have the patient's address, and authorized two refills Respondent refilled the prescription on January 20 and February 3, 1987.

4. On January 5, 1987, respondent filled a written prescription for Tylox from the same Michigan physician, which prescription did not contain the patient's address.

5. On February 4, 1987, respondent filled another prescription for 60 propoxyphene to be taken one, four times per day, written by the same Michigan physician. This prescription also did not have the patient's address, and authorized two refills. This prescription was refilled on February 23 and March 6, 1987.

6. On March 13, 1987, respondent filled another telephoned prescription for 60 propoxyphene to be taken one, four times per day, apparently authorized by the same Michigan physician. This prescription also did not have the patient's address, and authorized two refills. This prescription was refilled on March 25 and April 2, 1987.

7. On April 13, 1987, respondent filled another telephoned prescription for 60 propoxyphene to be taken one, three-to-four times per day, apparently authorized by a different physician. This prescription also did not have the patient's address, and authorized one refill. The prescriber's DEA number does not appear on the prescription. This prescription was refilled on April 23, 1987.

8. On May 15, 1987, respondent filled another telephoned prescription for 116 propoxyphene to be taken one, three-to-four times per day, from the same prescriber described in Par. 7, above. The prescription does not contain the prescriber's DEA number or the patient's address. The pharmacist has apparently written upon the prescription a note that the patient received "60 4/87." Respondent noted upon the patient's profile that this was a 29 day supply.

9. On June 18, 1987, respondent filled another telephoned prescription for 30 propoxyphene, to be taken one every 6-8 hours, apparently authorized by a third physician. No refills were authorized. The patients' address and the physician's DEA number do not appear on the prescription. On the back of the telephone prescription record, respondent has apparently written: "Told nurse he is someone to watch. [i/] 6/18."

10. On July 27, 1987, respondent filled another telephoned prescription for 15 propoxyphene, from the third physician. The prescription contains neither the address of the patient nor the DEA number of the physician.

11. On September 10, 1987, respondent filled a telephoned prescription for 30 propoxyphene, to be taken one every 6-8 hours, apparently authorized by the third physician. Four refills were authorized. Neither the patient's address nor the prescriber's DEA number appear on the prescription. This prescription was refilled by respondent on September 25, October 5, October 16, and October 26, 1987.

12. On December 1, 1987, respondent filled a telephoned prescription for 30 propoxyphene, to be taken one every 6-8 hours, apparently authorized by the third physician. Five refills were authorized. Neither the patient's address nor the physician's DEA number appear on the prescription. This prescription was refilled by respondent on December 18, 1987, and January 5, January 14, January 25, and February 1, 1988.

13. On February 8, 1988, respondent filled a written prescription for 60 propoxyphene, from the third physician and dated February 2, 1988. The prescription's dosage instructions were one, twice a day, and 5 refills were authorized. Respondent listed this supply on the patient's profile as being for 30 days. This prescription was refilled on February 20, March 8, March 21, March 28, and April 12, 1988. On the back of the prescription form, the following is written: "3/28/88 Called MD about usage He says OK to refill--"Backs are tricky" [i/]."

14. On May 5, 1988, respondent filled a telephoned prescription for 60 propoxyphene, from the third physician, to be taken one, twice a day, and to be refilled until September 4, three times. Respondent listed this supply on the patient's profile as being for 30 days. This prescription was refilled on May 25, June 15, and July 11, 1988.

15. On August 11, 1988, respondent filled a telephoned prescription for 60 propoxyphene, from the third physician, to be taken one, twice per day. Respondent listed this supply on the patient's profile as being for 30 days. No refills were authorized on the face of the prescription, and the prescription does not bear the address of the patient or the DEA number of the prescriber. Respondent refilled this prescription on September 2, September 23, and October 19, 1988.

CARISOPRODOL:

16. On November 22, 1986, respondent filled a telephoned prescription from a Michigan physician for 100 carisoprodol, a prescription-only muscle relaxant which is not a controlled substance, for patient James M. The dosage instructions were to take one, four times per day, and two refills were authorized. Respondent refilled this prescription on December 6, 1986, and January 5 and 20, 1987. The back of the prescription bears the notation: "1/20/87 OK 1x per MD [i/]."

17. On February 4, 1987, respondent filled another telephone prescription from the same Michigan prescription for 100 carisoprodol, to be taken one, four times per day. Two refills were authorized. Respondent refilled this prescription on February 23 and March 6, 1987.

18. On March 13, 1987, respondent filled another telephone prescription from the same Michigan physician for 100 carisoprodol, to be taken one, four times per day. Two refills were authorized. Respondent refilled this prescription on April 2 and May 4, 1987.

19. On April 13, 1987, respondent filled a telephoned prescription for 100 carisoprodol from a second physician, to be taken one, four times per day. One refill was authorized. Respondent refilled this prescription on April 23, 1987.

20. On May 18, 1987, respondent filled a telephoned prescription for 116 carisoprodol from the second physician, to be taken one, four times per day. On June 24, 1987, respondent filled a written prescription from a third physician for 30 carisoprodol to be taken, one, twice per day. On July 1, 1987, respondent filled a telephoned prescription from a fourth physician for 15 carisoprodol. On July 6, 1987, respondent filled a telephoned prescription from the third physician for 30 carisoprodol, to be taken one every 6-8 hours. On July 27, 1987, respondent filled a prescription from a fifth physician for 15 carisoprodol, to be taken one, every 6-8 hours.

21. On September 10, 1987, respondent filled a telephoned prescription for 30 carisoprodol to be taken one, up to twice a day as needed, from a sixth physician. Four refills were authorized, and respondent refilled this prescription on September 25, October 5, 16, and 26, 1987.

22. On December 1, 1987, respondent filled a telephoned prescription for 30 carisoprodol from the sixth physician, to be taken one up to twice a day. Eight refills were authorized. Respondent refilled this prescription on December 18, 1987, January 5, 14, 20, and 25, February 1, 8, and 15, 1988.

23. On February 20, 1988, respondent filled a written prescription dated February 2, 1988, from the sixth physician, for 100 carisoprodol, to be taken one, twice per day, and to be refilled "q. mo. x12." Respondent filled and refilled this prescription with 30 carisoprodol on February 20 and 24, March 2, 8, 15, 21, and 28, April 5, 12, 20, and 26, May 3, 11, 18, 25, and 31, June 8, 15, 22, and 28, July 5, 11, 18, and 25, and August 2 and 10, 1988.

24. On August 11, 1988, respondent received a telephoned prescription from the sixth physician for 30 carisoprodol to be taken one, twice a day, and to be refilled 11 times. Respondent noted in the patient's profile that this was a 10 day supply of the medication, and filled and refilled this prescription on August 11, 22, and 29, September 2, 10, 16, and 23, October 3, 12, and 19, November 1 and 9, 1988.

COUNT II--Patient Kevin M.

25. On April 6, 1987, respondent filled a telephoned prescription for 60 Valium 10 mg., a Schedule IV controlled substance, for patient Kevin M. The instructions were to take one, twice per day. Two refills were authorized. The prescription does not bear the DEA number of the prescriber or the patient's address. Respondent refilled the prescription on April 24 and May 18, 1987.

26. On June 15, 1987, respondent filled a written prescription from the same physician for 100 Valium, take one before meals and at bedtime, and authorizing one refill. Respondent refilled this prescription on July 16, 1987.

27. On August 31, 1987, respondent filled a written prescription from the same physician for 60 Valium with the same dosage instructions, and authorizing three refills. The prescription does not bear the address of the patient. The prescription was apparently not refilled.

28. On September 14, 1987, respondent filled a telephoned prescription from the same physician for 60 diazepam (generic Valium), with the same instruction, authorizing 2 refills. Respondent refilled the prescription on September 24 and October 12, 1987, and noted in the patient's profile that this prescription was for a 15 day supply of the medication. The prescription does not bear the address of the patient or the physician's DEA number.

29. On October 23, 1987, respondent filled a telephoned prescription from the same physician for 60 diazepam, with the same instructions, and authorizing 3 refills. The physicians DEA number and the patient's address do not appear on the prescription. Respondent refilled the prescription on November 4 and 23, and noted in the patient's profile that this prescription was for a 15 day supply of the medication.

30. On November 24, 1987, respondent filled a written prescription signed by the same physician, and apparently typed by respondent onto one of respondent's forms, for 60 diazepam, take one, twice per day. On the face of the prescription is the handwritten notation: "11/23 refill lost--per MD." Neither the patient's address nor the DEA number of the prescriber appears on the prescription. No refills are indicated on the copy signed by the physician.

31. On November 23, 1987, respondent received a telephoned prescription from the same physician for 60 diazepam, take one with meals and at bedtime, and authorizing 3 refills. Neither the DEA number of the physician nor the address of the patient appears on the prescription. Respondent dispensed this prescription on December 1, 1987, and refilled it on December 9 and 23, 1987, and January 13, 1988. On the back of the prescription is the handwritten notation: "12/9/87 OK early per call to MD Told Kevin qid [i/]"

32. On February 8, 1988, respondent filled a telephoned prescription from the same physician for 60 diazepam, take one with meals and at bedtime, no refills. The prescription bears neither the patient's address nor the physician's DEA number.

33. On February 15, 1988, respondent filled a telephoned prescription from the same physician for 60 diazepam, take one with meals and at bedtime, no refills. On the face of the prescription is the handwritten notation: "2/15 OK early fill per call back Sam. [i/]." The prescription bears neither the patient's address nor the physician's DEA number.

34. On April 6, 1988, respondent filled a telephoned prescription for 60 diazepam "refill," take one with meals and at bedtime, no refills. The prescription bears neither the patient's address nor the physician's DEA number.

35. On May 11, 1988, respondent filled a telephoned prescription for 60 diazepam with the same instructions, no refills. The prescription bears neither the patient's address nor the physician's DEA number.

36. On May 23, 1988, respondent filled a telephone prescription for 60 diazepam with the same instructions, and 2 refills authorized. Respondent refilled this prescription on June 3 and 20, 1988. The prescription bears neither the patient's address nor the physician's DEA number.

37. On May 25, 1988, respondent filled a telephone prescription from the same physician for 60 Acetaminophen with Codeine, a Schedule III controlled substance which was and is known to have an additive or potentiating effect when administered with CNS depressants such as diazepam. The prescription bears neither the patient's address nor the physician's DEA number.

38. On July 18, 1988, respondent filled a telephone prescription from the same physician for 60 diazepam, take one twice per day, two refills authorized. The prescription bears neither the patient's address nor the physician's DEA number. Respondent apparently did not refill this prescription On July 20, 1988, respondent filled a telephoned "refill" prescription from the same physician for 60 diazepam, take one with meals and at bedtime. On the face of the prescription is noted: "A bottle for Kevin's office." Neither of these prescriptions bears the patient's address nor the physician's DEA number.

39. On August 11, 1988, respondent filled a telephoned "refill" prescription from the same physician for 60 diazepam, take one with meals and at bedtime, no refills. The prescription bears neither the patient's address nor the physician's DEA number.

40. On September 1, 1988, respondent began filling a series of prescriptions for propoxyphene, from the same physician. The first prescription was telephoned and was for 30 tablets, take one every 6 hours for pain, no refills. The prescription bears neither the address of the patient nor the DEA number of the physician.

41. On September 8, 1988, respondent filled a telephoned prescription from the same physician for 30 diazepam, take one three times a day, no refills. The prescription bears neither the address of the patient nor the DEA number of the physician.

42. On September 16, 1988, respondent filled a telephoned "refill" prescription for 60 diazepam, take one with meals and at bedtime, no refills. The prescription bears neither the address of the patient nor the DEA number of the physician.

43. Also on September 16, 1988, and via the same prescription, respondent dispensed 60 propoxyphene, take one every 6 hours, no refills. The prescription bears neither the address of the patient nor the DEA number of the physician.

44. On October 14, 1988, respondent filled a telephoned prescription from the same physician for 60 diazepam, with the same instructions and no refills. The prescription bore neither the patient's address nor the physician's DEA number.

45. Also on October 14, and via the same prescription, respondent dispensed 60 propoxyphene with the same instructions. The prescription bears neither the address of the patient nor the DEA number of the physician.

46. On October 31, 1988, respondent filled a written prescription from the same physician for 60 diazepam, with the same instructions and two refills. The prescription bears neither the patient's address nor the physician's DEA number. Respondent refilled this prescription on November 11 and 17, 1988. On the back of the prescription is handwritten: "11/17/88--9 days early--OK to refill per call to MD [i/]."

47. Also on October 31, and via the same prescription, respondent dispensed 60 propoxyphene with the same instructions, apparently 2 refills authorized. Respondent refilled this prescription on November 7 and 14, 1988.

48. On November 22, 1988, respondent filled a written prescription from the same physician for 60 propoxyphene, take one every 8 hours, 2 refills. The prescription bears neither the physician's DEA number nor the patient's address. On the face of the prescription is written: "filled 11/14, 11/7." Respondent refilled this prescription on November 28 and 29, 1988. On the back of the prescription is written: "Ok early per Sam 11/28 [i/]" and "11/29/88 lost bottle in woods--confirmed with MD [i/]."

49. On November 29, 1988, respondent filled a telephone prescription from the same physician for 60 diazepam, take one with lunch and at bedtime, no refills. The prescription bears neither the address of the patient nor the DEA number of the physician.

50. On December 5, 1988, respondent filled a written prescription from the same physician for 45 diazepam, same instructions. The prescription does not contain the patient's address.

51. Also on December 5, and via the same prescription, respondent dispensed 60 propoxyphene, take one, twice per day, 2 refills. Respondent refilled this prescription on December 7 and 10. On the face of the prescription are the following notes: "12/7--we refused to refill this AM. Sam called 2 PM "OK to fill today" [i/]" and "12/10/88 OK per call from MD [i/]." The prescription does not contain the address of the patient.

52. On December 21, 1988, respondent filled a written prescription from the same physician for 60 propoxyphene, same instructions, 2 refills. The patient's address does not appear on the prescription. Respondent refilled this prescription on December 26 and 28, 1988. On the back of the prescription are the following notes: "12/26 OK to refill per Sam [i/]" and "12/28 Refill refused until Sam called to OK [i/]." The prescription does not contain the address of the patient.

53. On January 2, 1989, respondent filled a written prescription from the same physician for 60 diazepam, take one with meals and at bedtime, two refills. Respondent noted in the patient's profile that this was a 15 day supply of medication. Respondent refilled the prescription on January 7, 1988. The following handwritten notation appears on the back of the prescription: "1/7/89 OK to refill per call from MD. He will talk to Kevin [i/]" The prescription did not contain the patient's address.

54. Also on January 2, 1989, respondent filled a separate written prescription for the same physician for 60 propoxyphene, take one, twice per day, 2 refills. On the face of the prescription is written: "1/2 Filled 6 days prior--OK Sam." Respondent refilled this prescription on January 4 and 7, 1989. On the back of the prescription is written: "1/4/89--refused to fill Rx until I could consult MD. Kevin had Samuelson call: "OK to refill. He needs that" [i/]" and "1/7/89 OK to refill per call from MD. He will talk to Kevin [i/]." The prescription does not contain the patient's address.

55. On February 27, 1989, respondent filled a telephoned prescription from the same physician for 30 diazepam, take one at bedtime, no refills. The prescription contained neither the patient's address nor the physician's DEA number.

56. On March 8, 1989, respondent filled a telephoned prescription from the same physician for 60 propoxyphene, same instructions, no refills. The prescription bears neither the patient's address nor the physician's DEA number.

57. On March 17, 1989, respondent filled a written prescription dated March 15, 1989 from the same physician for 60 propoxyphene, take one every 6 hours for back pain, 2 refills. The prescription does not contain the address of the patient. Respondent refilled the prescription on March 22 and 27, 1989. On the face of the prescription appears the following undated note: "OK early per call to MD Told him we will need a call authorizing refills. [i/]." On the back of the prescription are the following notes: "3/22/89 [i/] OK per call from MD" and "3/27/89 OK to refill per Sam [i/]."

58. On March 21, 1989, respondent filled a telephoned prescription from the same physician for 60 propoxyphene, take one twice per day, "must last until 4/19/89," no refills. The prescription contained neither the patient's address nor the physician's DEA number.

59. On March 30, 1989, respondent filled a written prescription dated March 29, 1989 from the same physician for 60 diazepam, instructions illegible, 2 refills. The prescription does not contain the patient's address. Respondent refilled the prescription on April 3 and 6, 1989. On the back of the prescription are written: "4/3--Refused Kevin a refill Dr. Sam OK [i/]" and "4/6--OK MD to refill [i/]."

60. On April 7, 1989, respondent filled a written prescription from the same physician for 60 diazepam, with the same instructions "must last 30 days," no refills. The prescription contained neither the patient's address nor the physician's DEA number.

61. On April 10, and via the same April 7 prescription form, respondent dispensed 60 propoxyphene, take one twice per day, 2 refills. The "2" in the refills is crossed out, and the following is written: "0 per call to MD 4/7/89 Told MD and patient we must have written Rx each time." The prescription contained neither the patient's address nor the physician's DEA number.

62. On May 10, 1989, respondent filled a written prescription for 60 acetaminophen with codeine, take one four times per day as needed for pain, one refill. Respondent refilled the prescription on May 15, 1989. A handwritten notation on the front states: "5/15--OK to refill per Sam. Told we need new written Rx each time please [i/]." The prescription does not bear the patient's address.

63. The back of the May 10, 1989 prescription for acetaminophen with codeine contains a prescription for 60 diazepam, take one with meals and at bedtime, 1 refill. Respondent refilled the prescription on May 18, 1989. This side of the prescription bears the following handwritten note: "5/18/89 Refill OK per Sam. Told need new Rx each time please [i/]."

64. On May 19, 1989, respondent filled a written prescription from the same physician for 60 propoxyphene, take one every 6 hours as needed for pain, 1 refill. Respondent refilled this prescription on June 2, 1989. The prescription does not contain the patient's address or the prescriber's DEA number.

COUNT III--Sandra M.

65. This patient received substantial amounts of propoxyphene, codeine, and 5 kinds of benzodiazepines, together with smaller amounts of ulcer, high blood pressure, and muscle relaxant medications, and proventil inhalers. Almost all of her medications are from the same physician (referred to above as "Dr. S." and in the pharmacist's notes referred to below as "M.D." or "Sam"), and are under her former name of Sandra P. This patient married patient James M., the subject of Count I, above, in 1989.

CODEINE: all of the described medications are Schedule III:

66. On January 9, 1987, respondent filled a telephoned prescription from a Dr. F. for 40 tablets of ACET with codeine 30 mg, take one every 4 hours. He noted this on his profile as being a 10 day supply. The prescription does not contain the patient's address or the physicians's DEA number.

67. On January 26, 1987, respondent filled a written prescription from Dr. S. (who wrote all prescriptions for this patient unless otherwise noted) for 30 Fiorinal with codeine 30 mg, take one every 6 hours as needed for headache. Respondent noted this in his profile as being a 30 day supply. The prescription does not contain the patient's address.

68. On February 5, 1987, respondent filled a telephoned prescription from a Dr. K. for 4 tablets of ACET with codeine, 15 mg., take one every 4 hours. The prescription does not contain either the physician's DEA number or the patient's address.

69. On February 6 or 7, 1987, respondent filled a telephoned prescription for 30 Fiorinal with codeine 30 mg, "sig: [One] tid q6o pha [i.e. for headache]." The prescription contains neither the patient's address nor the physician's DEA number. Respondent noted on the patient's profile that this was a 30 day supply.

70. On February 28, 1987, respondent filled a telephone prescription for 30 Fiorinal with codeine 30 mg, take one every 8 hours as needed for headache. The prescription contains neither the patient's address nor the physician's DEA number. Respondent noted upon his profile that this was a 15 day supply.

71. On March 19, 1987, respondent filled a telephoned prescription for 30 Fiorinal with codeine 30 mg, same instructions. The prescription contains neither the patient's address nor

the physician's DEA number. The prescription contains the following note on its face: "OK early per call back to MD." The prescription form also includes a prescription for Xanax, and it cannot be determined which (or both) prescription is referred to by looking at the script. Respondent noted upon his profile that this was a 10 day supply.

72. On April 14, respondent filled a telephoned prescription for 12 Tylenol with codeine 30 mg, take every 6 hours as needed for pain. The prescription contains neither the patient's address nor the physician's DEA number. Respondent noted upon his profile that this was a 3 day supply.

73. On May 11, 1987, respondent filled a telephone prescription for 30 Fiorinal with codeine 30 mg, take one each 8 hours as needed for headache. Neither the patient's address nor the physician's DEA number is on the prescription. Respondent noted that this was a 10 day supply, on the profile.

74. On May 20, 1987, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, take one every 6 hours as needed for headache. The patient's address does not appear on the prescription. Respondent noted in the profile that this was a 15 day supply.

75. On June 12, 1987, respondent filled a telephoned prescription for 60 Fiorinal with codeine 30 mg. take one with meals and at bedtime. Neither the patient's address nor the physician's DEA number appears on the prescription. Respondent noted in the profile that this was a 15 day supply.

76. On July 17, 1987, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, take one every 6 hours for pain, one refill. The prescription does not contain the patient's address. Respondent noted in the profile that this was a 15 day supply of the medication. Respondent refilled this prescription on July 28, 1987.

77. On August 26, 1987, respondent filled a written prescription for 30 Fiorinal with codeine 30 mg, take one four times per day for headache, one refill. The prescription does not contain the patient's address. Respondent noted that this was a 10 day supply of the medication, and refilled the prescription on August 31, 1987.

78. On September 6, 1987, respondent received a telephoned prescription from Dr. F. for 20 ACET with codeine 30 mg, take one every 3-4 hours for pain. The prescription contains neither the patient's address nor the prescriber's DEA number. A telephone number is written under the physician's name, but no other note appears on the prescription form. The prescription was dispensed on September 11, 1987, and respondent noted in the profile that this was a 10 day supply.

79. On October 7,1987, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, take one twice per day. The prescription does not contain the patient's address. Respondent noted in the profile that this was a 30 day supply.

80. On October 23, 1987, respondent filled a written prescription for 30 Fiorinal with codeine 30 mg, take one every 6 hours as need for headache. The prescription does not contain the patient's address. On the back of another prescription dated and apparently presented on the same day, is written: "left message with secretary; Sandy got 30 Restoril and 60 F#3 on 10/7. Please tell Dr. 10/23/98 [i/]." Respondent noted in the profile that this was a 30 day supply. The prescription contains neither the patient's address nor the prescriber's DEA number.

81. On November 23, 1987, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. The prescription does not contain the patient's address. Respondent noted in the profile that this was a 15 day supply.

82. On December 7, respondent filled a telephoned prescription for 60 Fiorinal with codeine 30 mg, same instructions. The prescription does not contain the patient's address or the physician's DEA number. There is written "11/23/87" in what appears to be the pharmacist's handwriting on the face of the prescription. Respondent noted in the profile that this was a 15 day supply.

83. On December 19, 1987, respondent filled a telephone prescription for 60 Fiorinal with codeine 30 mg, same instructions. The prescription does not contain the patient's address or the physician's DEA number. Respondent noted in the profile that this was a 15 day supply.

84. On January 19, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. The prescription does not contain the patient's address. Respondent noted in his profile that this was a 30 day supply.

85. On February 1, 1988, respondent filled a written prescription for 30 Fiorinal with codeine 30 mg, take one twice per day, one refill. Neither the patient's address nor the physician's DEA number appears on the prescription. Respondent noted on the profile that this was a 15 day supply. There is no record of a refill.

86. On February 16, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, take one every 6 hours as needed for headache. Neither the physician's DEA number nor the patient's address is on the prescription. Respondent noted upon the profile that this is a 15 day supply.

87. On March 1, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, take one twice per day. Neither the physician's DEA number nor the patient's address appears on the prescription. Respondent noted on the profile that this was a 30 day supply.

88. On March 16, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, take one twice per day. Neither the patient's address nor the physician's DEA number is on the prescription. Respondent noted that this was a 30 day supply in the profile.

89. On April 12, 1988, respondent filled a written prescription for 30 Fiorinal with codeine 30 mg, take one every 6 hours as needed for headache. The patient's address does not appear on the prescription. Respondent noted that this was a 15 day supply, on the profile.

90. On April 22, 1988, respondent filled a written prescription for 30 Fiorinal with codeine 30 mg, take one twice per day. The patient's address is not on the prescription Respondent noted in the profile that this was a 15 day supply.

91. On May 9, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. The patient's address is not on the prescription. Respondent noted in the profile that this was a 30 day supply

92. On May 24, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, take one every 6 hours as needed for headache. The patient's address does not appear on the prescription. Respondent noted in the profile that this is a 30 day supply.

93. On June 7, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. The patient's address is not on the prescription. Respondent noted in the profile that this is a 30 day supply. Another prescription (for Vasotec) which apparently accompanied the Fiorinal prescription does have the patient's address inserted, and a note that a change in dosage for that medication was changed "OK per MD."

94. On June 20, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. The patient's address does not appear on the prescription. Respondent noted in the profile that this was a 30 day supply.

95. On July 5, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. The patient's address does not appear on the prescription. Respondent noted in the profile that this was a 30 day supply. On the back of the prescription is the following note: "Called MD (1) Diazepam 5 still qid usage (2) F#3 ditto (3) Early refill on Temazepam 6/29 was not necessary. He says OK to fill prescription but we'll have to watch her. [i/]."

96. On July 18, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. The patient's address does not appear on the prescription. Respondent noted in the profile that this was a 15 day supply.

97. On August 1, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. The patient's address does not appear on the prescription. Respondent noted in the profile that this was a 15 day supply.

98. On August 12, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. The patient's address does not appear on the prescription. Respondent noted in the profile that this was a 15 day supply.

99. On September 1, 1988, respondent filled a telephoned prescription for 30 Fiorinal with codeine 30 mg, same instructions. Neither the patient's address nor the physician's DEA number appears on the prescription. Respondent noted in the profile that this was a 10 day supply.

100. On September 9, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. Neither the patient's address nor the physician's DEA number is on the prescription. Respondent noted in the profile that this is a 15 day supply.

101. On September 14, 1988, respondent filled some other prescriptions for this patient from this physician. On the back of one of them appears: "Called MD to tell him: She's still using Valium qid, She got 60 F#3 5 days ago, She got Restoril 12 days ago. He says OK--he's cutting down the strengths. [i/]."

102. On September 26, 1988, respondent filled a telephone prescription for 60 Fiorinal with codeine 30 mg, same instructions. Respondent has apparently written the date (9/9/88) and number of the previous Fiorinal prescription on the face of this prescription, and at the bottom of the prescription is written: "(No Refill until Oct. 10)." Neither the patient's address nor the physician's DEA number appears on the prescription. Respondent noted in the profile that this is a 15 day supply.

103. On October 10, 1988, respondent filled a telephone prescription for 60 Fiorinal with codeine 30 mg, same instructions. Neither the patient's address nor the physician's DEA number appears on the prescription. Respondent noted in the profile that this was a 15 day supply.

104. On October 24, 1988, respondent filled a telephone prescription for 60 Fiorinal with codeine 30 mg, same instructions, and apparently caused the physician to personally sign the pharmacy's copy. Neither the patient's address nor the physician's DEA number appears on the prescription. Respondent noted in the profile that this is a 15 day supply.

105. On November 4, 1988, respondent filled a written prescription for 30 Fiorinal with codeine 30 mg, same instructions. Neither the patient's address nor the physician's DEA number appears on the prescription. Respondent noted in the profile that this is a 15 day supply.

106. On November 14, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. Neither the patient's address nor the physician's DEA number is on the prescription. Respondent noted in the profile that this is a 30 day supply.

107. On November 28, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. Neither the patient's address nor the physician's DEA number is on the prescription. Respondent noted in the profile that this is a 20 day supply.

108. On December 13, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. Three refills are authorized, and the patient's address is shown as a street address in Neenah, Wisconsin. The physician's DEA number does not appear on the prescription. Respondent noted in the profile that this is a 15 day supply, and refilled the prescription on January 3, 13, and 25, 1989. Stapled to another prescription dated and apparently presented on December 13, is written: "Val2/60 12/13 1/3 1/13. F#3/60 ditto. 1/25/89--Informed MD of above dates of dispensing. He says OK to refill today. "She needs those." Told Sandy we can't bill MA. [i/]."

109 On February 1, 1989, respondent filled a written prescription dated January 27, 1989 for 60 Fiorinal with codeine 30 mg,with A&C/butalbital with codeine 30 mg., same instructions. The patient's address does not appear on the prescription. Respondent noted in the profile that this was a 30 day supply.

110. On February 10, 1989, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, with A&C/butalbital with codeine 30 mg., same instructions. The patient's address does not appear on the prescription. Respondent noted in the profile that this is a 15 day supply.

111. On February 20, 1989, respondent filled a written prescription for 30 Fiorinal with codeine 30 mg, with 30 A&C/butalbital with codeine 30 mg, same instructions. The patient's address does not appear on the prescription. Respondent noted in the profile that this was a 0 (zero) days supply.

112. On March 7, 1989, respondent filled a written prescription dated March 6, 1989 for 60 Fiorinal with codeine 30 mg, with 60 A&C/butalbital with codeine 30 mg, same instructions. The patient's address does not appear on the prescription. Respondent noted in the profile that this is a 20 day supply.

113. On March 17, 1989, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, with 60 A&C/butalbital with codeine 30 mg, same instructions. The patient's address is not on the prescription. Respondent noted in the profile that this is a 0 (zero) days supply.

114. On March 18, 1989, respondent filled a written prescription from a different physician, apparently at St. Joseph's Hospital, Chippewa Falls, for 10 Tylenol with codeine 30 mg, with ACET with codeine 30 mg, take one every four hours as needed for pain. Neither the patient's address nor the physician's DEA number appears on the prescription. Respondent noted in the profile that this was a 5 day supply.

115. On March 21, 1989, respondent filled a written prescription from Dr. S. for 60 Tylenol with codeine 15 mg, with 60 APAP with codeine 15 mg, take one every 6 hours as needed for headache. The patient's address does not appear on the prescription. Respondent noted in the profile that this is a 20 day supply.

116. On April 1, 1989, respondent filled an undated written prescription from Dr. S. for 60 Fiorinal with codeine 30 mg, with 60 A&C/butalbital with codeine 30 mg, take one every 6 hours as needed for headache. The patient's address does not appear on the prescription. Respondent noted in the profile that this is a 30 day supply.

117. On April 21, 1989, respondent filled a written prescription for 30 Fiorinal with codeine 30 mg with 30 A&C/butalbital with codeine 30 mg, take one twice per day. The patient's address is not on the prescription. Respondent noted in the profile that this was a 15 day supply.

118. On May 8, 1989, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, with 60 A&C/butalbital with codeine 30 mg, take one every 6 hours as needed. The patient's address is not on the prescription. Respondent noted in the profile that this was a 15 day supply.

<u>PROPOXYPHENE</u> a Schedule IV substance:

119. On April 8, 1987, respondent filled a telephoned prescription for 30 propoxyphene compound 65, take one every 6 hours as needed for headache. The prescription contains neither the patient's address nor the physician's DEA number. Respondent noted in the profile that this was a 10 day supply.

120. On April 20, 1987, respondent filled a telephoned prescription for 30 propoxyphene compound 65, take one twice per day. The prescription contains neither the patient's address nor the physician's DEA number. Respondent noted in the profile that this was a 15 day supply.

121. On June 24, 1987, respondent filled a written prescription for 30 propoxyphene compound 65, same instructions, one refill. The prescription does not contain the patient's address. Respondent noted in the profile that this was a 15 day supply, and refilled the prescription on July 6, 1987.

122. On August 10, 1987, respondent filled a written prescription for 30 propoxyphene compound 65, same instruction, one refill. The prescription does not contain the patient's address. Respondent noted in the profile that this is a 30 day supply, and refilled the prescription on August 14. On the face of the prescription is the note: "8/14--OK to refill early per call to M.D."

123. On September 14, 1987, respondent filled an undated written prescription for 30 propoxyphene compound 65, take one every 6 hours as needed for pain, 2 refills. This prescription apparently was presented with other, dated prescriptions. The patient's address is not on the prescription. Respondent noted in the profile that this is a 15 day supply, and refilled the prescription on September 28 and October 1, 1987. On the back of the prescription is handwritten: "10/1/87 OK to refill per Sam [i/]."

BENZODIAZEPINES: all are Schedule IV substances:

124. Between January 1987 and February 1989, Respondent dispensed substantial quantities of Halcion, Xanax, Restoril, Valium and Dalmane, all of which are Schedule IV substances, to patient Sandra M.

125. Substantially all of the prescriptions were written by one local physician.

126. On a regular basis, Respondent was filling prescriptions for at least two benzodiazepines for the same patient on or about the same time, and he was regularly refilling prescriptions for one or more of the benzodiazepines earlier than the prescribed dose frequency and supply would justify. Respondent or respondent's staff contacted the prescribing physician about a number of the early refills. On each such occasion, the physician approved the early refill, often with the justification that he had told the patient to exceed the prescribed dose frequency, but without changing the prescription itself.

CONCLUSIONS OF LAW

1. By filling prescriptions for controlled substances, which prescriptions did not contain the DEA number of the physician or the address of the patient, Respondent violated Sec 450.10(1), Stats., and Sec. Phar 8.05(1), Wis. Admin. Code.

2. By dispensing controlled substances at greater frequency than the physician's prescription would justify, and by cooperating with the physician in dispensing controlled substances in greater frequency than the prescription would justify, and by dispensing combinations of controlled substances to the same patient in substantial amounts and frequently shorter than prescribed intervals, with and without the prescribing physician's knowledge and approval, Respondent violated Sec. 450.10(1)(a)6, Stats., and sec. Phar 10.03(3), Wis. Admin. Code.

ORDER

NOW, THEREFORE, IT IS ORDERED that Peter F. Bjerke, R.Ph., shall be, and hereby is reprimanded.

FURTHERMORE, IT IS ORDERED that the assessable costs of this proceeding be imposed on Peter F. Bjerke, R.Ph., pursuant to Sec. 440.22, Stats., to be paid within 6 months of the date of this Final Decision and Order.

FURTHERMORE, IT IS ORDERED that Peter F. Bjerke, R.Ph., shall pay a forfeiture in the amount of $1,000.00, pursuant to Sec. 450.10(2), Stats., to be paid within 60 days of the date of this Final Decision and Order.

EXPLANATION OF VARIANCE

The board has accepted the Findings of Fact and Conclusions of Law recommended by the Administrative Law Judge (ALJ) in his Proposed Decision. It has also accepted that part of the Order providing that the respondent be assessed the costs of this proceeding. However, the board has altered the recommended suspension of respondent's license to provide instead for a reprimand and a $1,000.00 forfeiture.

The board agrees with the rationale stated within the ALJ's opinion for adopting the factual findings, as well as the violations found resultant of respondent's conduct. Simply stated, the ALJ phrases the crux of this case in his decision, at p. 19, as follows:

> "It is beyond legitimate question that controlled substances, particularly narcotics and benzodiazepines, present danger of harm to a patient if the drugs are not used appropriately. It is beyond legitimate question that a pharmacist who regularly sees the same patient returning early, and often significantly early, for refills of potent medications, has reason to know that there is a problem with the patient's use of the medications in question. The Respondent's defense in this case is that he is not a physician, but merely a pharmacist, and in no position to second guess the prescriptive practices of a physician. To some extent, this defense is true."

It is also true, however, that it is unprofessional conduct for a pharmacist to dispense drugs to a patient when the pharmacist should have known that the medications would harm the patient. Sec. Phar 10.03(3), Wis. Admin. Code. A professional pharmacist may not disregard his pharmacological knowledge that the excessive use of the substances involved may cause serious harm to patients at the instruction of a physician. A pharmacist's obligations to the public clearly go beyond the mere mechanical function of filling and refilling prescription orders upon demand.

The primary issue in this case deals not with whether or not respondent engaged in unprofessional conduct; but rather, the appropriate sanction to be imposed under all the circumstances presented. In determining discipline, it must be recognized that the interrelated purposes for applying such measures are: 1) to promote the rehabilitation of the licensee, 2) to protect the public, and 3) to deter other licensees from engaging in similar misconduct. State v. Aldrich, 71 Wis.2d 206, 209 (1976). Punishment of the licensee is not an appropriate consideration. State v. MacIntyre, 41 Wis.2d 481, 485 (1969).

The board's review of several mitigating factors present in this case leads it to the conclusion that the functions served by the discipline of a professional licensee are better realized through a reprimand and the imposition of a forfeiture, rather than through a lengthy six month suspension from practice. These factors include the following:

1. Respondent did a reasonable job of communicating with the physician. Had respondent not done so, a substantial suspension would clearly be appropriate in this case.

2. The contacts initiated by the physician were intended to, and did, notify the physician of respondent's concerns regarding patient over-medication. Despite this, the physician continued to insist that the medications be dispensed.

3. An extremely delicate and difficult situation often arises whenever a pharmacist questions the instructions of a physician regarding matters impacting upon patient drug treatment. The board recognizes the practical obstacles often faced by pharmacists in situations such as respondent's.

4. Respondent's conduct here stemmed from bad judgement, and not from a lack of concern for the patients involved or flagrant disregard for those responsibilities owed those patients.

5. Respondent has been licensed as a pharmacist in this state for over 20 years. He has not been the subject of a disciplinary proceeding or sanction previously.

The responsibility of the board is to fashion a discipline which appropriately recognizes the need to deter other licensees from abdicating their professional responsibilities in the face of prescription orders clearly inconsistent with the health, safety and welfare of patients, yet which is also reflective of the mitigating circumstances present in this individual case.

In the board's opinion, a reprimand combined with a substantial forfeiture and the imposition of the costs in this proceeding meets this responsibility. A lengthy suspension would unduly discredit the efforts taken to respond to a difficult situation and discount the years of competent practice in which it may be presumed that respondent has engaged.

The misconduct here stems primarily from respondent's decision to continue dispensing medication as the method by which to resolve patient and professional problems created through clearly inappropriate medication orders. Although respondent's decision was not professionally acceptable in light of a pharmacist's responsibilities to the public, and was implemented over a substantial period of time, it must also be recognized that the conduct involved the patients of the same physician.

Respondent did not initiate the circumstances under which patients received excessive medications. He communicated with the physician regarding his concerns. In doing that, the board views respondent as confronting and attempting to resolve the problems he found. The fact that respondent essentially acquiesced in the physician's improper orders for a substantial period of time is clearly grounds for the imposition of disciplinary action. Nevertheless, a suspension under all of the circumstances presented in this case is neither necessary nor appropriate.

Dated. September 14, 1993

STATE OF WISCONSIN
PHARMACY EXAMINING BOARD

Charles H. Dinkel, R.Ph.

Charles H. Dinkel, R.Ph.
Chairman

bdls2-2510

STATE OF WISCONSIN
BEFORE THE PHARMACY EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST	:	AFFIDAVIT OF COSTS BOARD LEGAL SERVICES
PETER F. BJERKE, R.PH., RESPONDENT.	:	LS 9203021 PHM

STATE OF WISCONSIN,
COUNTY OF DANE, ss:

James E. Polewski, being first duly sworn on oath, deposes and says:

1. That he is an attorney licensed to practice in the state of Wisconsin, and is employed by the Department of Regulation and Licensing, Office of Board Legal Services.

2. That in the course of that employment, he was assigned Administrative Law Judge in the captioned case, and that in the course of that assigned he expended the following time and incurred the following expenses:

Date	Activity	Time
3/18/92	Prepare Prehearing Notice	15 m.
3/26/92	Preside at Prehearing Conference	15 m.
	Prepare Prehearing Memorandum and Order	20 m.
5/29/92	Read Respondent's Memorandum of Law	30 m.
	Preside at Hearing	7 hr.
6/1/92	Prehearing conference and Memo.	15 m.
7/7/92	Preside at hearing	3 hr. 30 m.
10/10/92	Research	3 hr.
10/12/92	Research	1 hr 45 m.
12/16/92	Draft proposed decision	3 hr.
12/23/92	Draft proposed decision	3 hr. 30 m.
12/29/92	Draft proposed decision	1 hr.
	TOTAL TIME	24 hr. 20 m.

Administrative Law Judge expense, 24.33 hr @ $24.75: $ 602.17

Reporter (Magne-Script, Madison) $1315.90
TOTAL ASSESSABLE COSTS, BOARD LEGAL SERVICES: $1918.07

James E. Polewski
James E. Polewski

Sworn to and Subscribed before me this 7th day of January, 1993.

Marguerite B. Rothstein
Notary Public
My Commission is Permanent.

STATE OF WISCONSIN
BEFORE THE PHARMACY EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS AGAINST PETER F. BJERKE, R.PH., RESPONDENT.	: : : : :	AFFIDAVIT OF COSTS 89 PHM 90

STATE OF WISCONSIN
COUNTY OF DANE:

Being on affirmation, I depose and state as follows:

1. That I am an attorney licensed in the state of Wisconsin and am employed by the Wisconsin Department of Regulation and Licensing, Division of Enforcement:

2. That in the course of those duties I was assigned as a prosecutor in the above-captioned matter; and

3. That set out below are the costs of the proceeding accrued to the Division of Enforcement in this matter, based upon Division of Enforcement records compiled in the regular course of agency business in the above-captioned matter.

PROSECUTING ATTORNEY EXPENSE

Date	Activity	Time Spent
12/4/91	Review file	1.5
12/5/91	Review file	2.0
2/10/92	Draft proposed complaint	8.0
2/11/92	Continue work on complaint	7.0
2/12/92	Meet with Board Advisor, work on complaint	6.0
2/13/92	Continue work on complaint	3.0
2/19/92	Finish complaint draft, submit to supervisor, sign and file complaint, arrange for service	1.0
3/5/93	Telephone conference with J. Ehlers, R.Ph., expert witness, draft letter to him	0.7
3/6/92	Telephone conference with Atty Wahl, draft proposed stipulation	1.0
3/17/92	Receive, review and file Answer	0.3

3/30/93	Telephone conference with Mr. Ehlers	0.3
4/2/92	Telephone conference with Mr. Ehlers, memo	0.7
4/20/92	Telephone conferences with Mr. Wahl, Board Advisor, Mr. Ehlers, send Ehlers CV to Mr. Wahl	1.1
4/22/92	Telephone conferences with Mr. Wahl and Mr. Ehlers re: deposition scheduling	0.4
5/6/92	Letter to Mr. Ehlers	0.4
5/13/92	Deposition of Mr. Ehlers	1.5
5/27/92	Travel to Mayville, meet with Mr. Ehlers	7.0
5/28/92	Prepare for hearing	2.0
5/29/92	Conduct hearing	9.0
6/1/92	Telephone conferences with Mr. Wahl, ALJ Polewski, Mr. Wahl again. Letter to Mr. Ehlers	1.0
7/6/92	Review file, prepare for continued hearing	4.0
7/7/92	Conduct continued hearing	5.5
1/5/93	Receive and review ALJ proposed decision, telephone conference with Mr. Wahl	1.0
1/7/93	Prepare draft of objections	1.0
1/25/93	Finalize and file state's objections. Receive and review Respondent's Objections, start response	6.0
1/28/93	Research at Supreme Court library, finalize Response to Respondent's Objections	2.5
1/30/93	Receive, review and file letter from P. Braatz re: oral argument.	0.3
2/12/93	same	0.3
2/26/93	same	0.3
3/11/93	Prepare for and conduct oral argument before Board	1.8
4/22/93	Prepare affidavit of costs	2.0
	TOTAL HOURS	78.6 hours

Total attorney expense for 78.8 hours at $30.00 per hour (based upon average salary and benefits for Division of Enforcement attorneys) equals: $ 2,358.00

INVESTIGATOR EXPENSE FOR JOHN G. JOHNSON

Date	Activity	Time Spent
3/22/90	Review file, initial memo	0.5
5/3/90	Letters	5.0
7/1/90	Summarize prescriptions	7.0
8/31/90	Case summary memo and letter	1.5
9/20/90	PIC summary memo	2.0
TOTAL HOURS		17.0 hours

Total investigator expense for 17.0 hours at $18.00 per hour (based upon average salary and benefits for Division of Enforcement investigators) equals: $ 306.00

COSTS OF DEPOSITIONS

Deposition of James W. Ehlers $ 50.00

EXPERT WITNESS FEES

James W. Ehlers, R.Ph. $ 1,725.00

MISCELLANEOUS DISBURSEMENTS

Mileage for travel to Mayville, 120 mi RT @ .25 $ 30.00

TOTAL ASSESSABLE COSTS $ 4,469.00

Arthur Thexton
Prosecuting Attorney

Subscribed to and affirmed before me this 22 day of April, 1993.

Notary Public
My Commission is permanent.

akt
3943

NOTICE OF APPEAL INFORMATION

(Notice of Rights for Rehearing or Judicial Review, the times allowed for each, and the identification of the party to be named as respondent)

The following notice is served on you as part of the final decision:

1. Rehearing.

Any person aggrieved by this order may petition for a rehearing within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes, a copy of which is attached. The 20 day period commences the day after personal service or mailing of this decision. (The date of mailing of this decision is shown below.) The petition for rehearing should be filed with the State of Wisconsin Pharmacy Examining Board.

A petition for rehearing is not a prerequisite for appeal directly to circuit c urt through a petition for judicial review.

2. Judicial Review.

Any person aggrieved by this decision has a right to petition for judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes, a copy of which is attached. The petition should be filed in circuit court and served upon the State of Wisconsin Pharmacy Examining Board

within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing of this decision is shown below.) A petition for judicial review should be served upon, and name as the respondent, the following: the State of Wisconsin Pharmacy Examining Board.

The date of mailing of this decision is September 14, 1993.

STATE OF WISCONSIN
BEFORE THE PHARMACY EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST PETER F. BJERKE, R.Ph., RESPONDENT.	: : : : :	NOTICE OF FILING *PROPOSED DECISION* LS9203021PHM

TO: Eric J. Wahl, Attorney
1280 W. Clairemont Avenue
Eau Claire, WI 54702-0629
Certified P 992 818 914

Arthur Thexton, Attorney
Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708

PLEASE TAKE NOTICE that a Proposed Decision in the above-captioned matter has been filed with the Pharmacy Examining Board by the Administrative Law Judge, James E. Polewski. A copy of the Proposed Decision is attached hereto.

If you have objections to the Proposed Decision, you may file your objections in writing, briefly stating the reasons, authorities, and supporting arguments for each objection. Your objections and argument must be received at the office of the Pharmacy Examining Board, Room 178, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708, on or before January 25, 1993. You must also provide a copy of your objections and argument to all other parties by the same date.

You may also file a written response to any objections to the Proposed Decision. Your response must be received at the office of the Pharmacy Examining Board no later than seven (7) days after receipt of the objections. You must also provide a copy of your response to all other parties by the same date.

The attached Proposed Decision is the Administrative Law Judge's recommendation in this case and the Order included in the Proposed Decision is not binding upon you. After reviewing the Proposed Decision, together with any objections and arguments filed, the Pharmacy Examining Board will issue a binding Final Decision and Order.

Dated at Madison, Wisconsin this 4th day of January, 1993.

James E. Polewski
James E. Polewski
Administrative Law Judge

STATE OF WISCONSIN
BEFORE THE PHARMACY EXAMINING BOARD

IN THE MATTER OF	:	
DISCIPLINARY PROCEEDINGS AGAINST	:	
	:	PROPOSED DECISION
PETER F. BJERKE, R.PH.,	:	
RESPONDENT	:	LS 9203021 PHM
	:	

The parties to this proceeding for purposes of s. 227.53, Stats., are

Peter F. Bjerke, R. Ph.
522 Wheaton Street
Chippewa Falls, WI 54729

Pharmacy Examining Board
Department of Regulation and Licensing
P.O. Box 8935
Madison WI 53708

Division of Enforcement
Department of Regulation and Licensing
P.O. Box 8935
Madison WI 53708

A hearing was held in this matter on May 29 and July 7, 1992. Respondent Peter F. Bjerke appeared in person and with counsel, Attorney Eric J. Wahl of the firm Wiley, Wahl, Colbert, Norseng Cray & Herrell, S.C., 1280 W. Clairemont Avenue, Eau Claire, Wisconsin 54702-0629. Complainant Division of Enforcement was represented by Attorney Arthur Thexton.

Based on the entire record of this proceeding, the Administrative Law Judge recommends that the Pharmacy Examining Board adopt the following Findings of Fact, Conclusions of Law, Order and Opinion as its Final Decision in this matter.

FINDINGS OF FACT

1. Respondent is Peter F. Bjerke, (dob 4/21/48), and was at all times material to this complaint licensed as a Registered Pharmacist in the state of Wisconsin with license number 8328. Respondent's last address on file with the department of regulation and licensing is 522 Wheaton Street, Chippewa Falls, WI 54729. As to all of the conduct described in this complaint, respondent either personally filled the prescriptions described, or was responsible for the filling of the prescriptions by virtue of his position (at all times relevant to this complaint) as managing pharmacist and owner of The Medicine Shoppe, a licensed pharmacy in Chippewa Falls, Wisconsin, where all of the described prescriptions were filled.

COUNT I--Patient James M.

PROPOXYPHENE:

2. On November 24, 1986, respondent filled a telephoned prescription from a Michigan physician for patient James M. for 60 propoxyphene, a Schedule IV controlled substance, to be taken one, four times per day. The patient's address did not appear on the prescription. Two refills were authorized. Respondent refilled this prescription twelve days later, on December 6, and again on December 22, 1986.

3. On January 5, 1987, respondent filled another telephoned prescription for 60 propoxyphene to be taken one, four times per day, apparently authorized by the same Michigan physician. This prescription also did not have the patient's address, and authorized two refills. Respondent refilled the prescription on January 20 and February 3, 1987.

4. On January 5, 1987, respondent filled a written prescription for Tylox from the same Michigan physician, which prescription did not contain the patient's address.

5. On February 4, 1987, respondent filled another prescription for 60 propoxyphene to be taken one, four times per day, written by the same Michigan physician. This prescription also did not have the patient's address, and authorized two refills. This prescription was refilled on February 23 and March 6, 1987.

6. On March 13, 1987, respondent filled another telephoned prescription for 60 propoxyphene to be taken one, four times per day, apparently authorized by the same Michigan physician. This prescription also did not have the patient's address, and authorized two refills. This prescription was refilled on March 25 and April 2, 1987.

7. On April 13, 1987, respondent filled another telephoned prescription for 60 propoxyphene to be taken one, three-to-four times per day, apparently authorized by a different

physician. This prescription also did not have the patient's address, and authorized one refill. The prescriber's DEA number does not appear on the prescription. This prescription was refilled on April 23, 1987.

8. On May 15, 1987, respondent filled another telephoned prescription for 116 propoxyphene to be taken one, three-to-four times per day, from the same prescriber described in Par. 7, above. The prescription does not contain the prescriber's DEA number or the patient's address. The pharmacist has apparently written upon the prescription a note that the patient received "60 4/87." Respondent noted upon the patient's profile that this was a 29 day supply.

9. On June 18, 1987, respondent filled another telephoned prescription for 30 propoxyphene, to be taken one every 6-8 hours, apparently authorized by a third physician. No refills were authorized. The patients' address and the physician's DEA number do not appear on the prescription. On the back of the telephone prescription record, respondent has apparently written: "Told nurse he is someone to watch. [i/] 6/18."

10. On July 27, 1987, respondent filled another telephoned prescription for 15 propoxyphene, from the third physician. The prescription contains neither the address of the patient nor the DEA number of the physician.

11. On September 10, 1987, respondent filled a telephoned prescription for 30 propoxyphene, to be taken one every 6-8 hours, apparently authorized by the third physician. Four refills were authorized. Neither the patient's address nor the prescriber's DEA number appear on the prescription. This prescription was refilled by respondent on September 25, October 5, October 16, and October 26, 1987.

12. On December 1, 1987, respondent filled a telephoned prescription for 30 propoxyphene, to be taken one every 6-8 hours, apparently authorized by the third physician. Five refills were authorized. Neither the patient's address nor the physician's DEA number appear on the prescription. This prescription was refilled by respondent on December 18, 1987, and January 5, January 14, January 25, and February 1, 1988.

13. On February 8, 1988, respondent filled a written prescription for 60 propoxyphene, from the third physician and dated February 2, 1988. The prescription's dosage instructions were one, twice a day, and 5 refills were authorized. Respondent listed this supply on the patient's profile as being for 30 days. This prescription was refilled on February 20, March 8, March 21, March 28, and April 12, 1988. On the back of the prescription form, the following is written: "3/28/88 Called MD about usage He says OK to refill--"Backs are tricky" [i/]."

14. On May 5, 1988, respondent filled a telephoned prescription for 60 propoxyphene, from the third physician, to be taken one, twice a day, and to be refilled until September 4, three times. Respondent listed this supply on the patient's profile as being for 30 days. This

prescription was refilled on May 25, June 15, and July 11, 1988.

15. On August 11, 1988, respondent filled a telephoned prescription for 60 propoxyphene, from the third physician, to be taken one, twice per day. Respondent listed this supply on the patient's profile as being for 30 days. No refills were authorized on the face of the prescription, and the prescription does not bear the address of the patient or the DEA number of the prescriber. Respondent refilled this prescription on September 2, September 23, and October 19, 1988.

CARISOPRODOL:

16. On November 22, 1986, respondent filled a telephoned prescription from a Michigan physician for 100 carisoprodol, a prescription-only muscle relaxant which is not a controlled substance, for patient James M. The dosage instructions were to take one, four times per day, and two refills were authorized. Respondent refilled this prescription on December 6, 1986, and January 5 and 20, 1987. The back of the prescription bears the notation: "1/20/87 OK 1x per MD [i/]."

17. On February 4, 1987, respondent filled another telephone prescription from the same Michigan prescription for 100 carisoprodol, to be taken one, four times per day. Two refills were authorized. Respondent refilled this prescription on February 23 and March 6, 1987.

18. On March 13, 1987, respondent filled another telephone prescription from the same Michigan physician for 100 carisoprodol, to be taken one, four times per day. Two refills were authorized. Respondent refilled this prescription on April 2 and May 4, 1987.

19. On April 13, 1987, respondent filled a telephoned prescription for 100 carisoprodol from a second physician, to be taken one, four times per day. One refill was authorized. Respondent refilled this prescription on April 23, 1987.

20. On May 18, 1987, respondent filled a telephoned prescription for 116 carisoprodol from the second physician, to be taken one, four times per day. On June 24, 1987, respondent filled a written prescription from a third physician for 30 carisoprodol to be taken, one, twice per day. On July 1, 1987, respondent filled a telephoned prescription from a fourth physician for 15 carisoprodol. On July 6, 1987, respondent filled a telephoned prescription from the third physician for 30 carisoprodol, to be taken one every 6-8 hours. On July 27, 1987, respondent filled a prescription from a fifth physician for 15 carisoprodol, to be taken one, every 6-8 hours.

21. On September 10, 1987, respondent filled a telephoned prescription for 30 carisoprodol to be taken one, up to twice a day as needed, from a sixth physician. Four refills were authorized, and respondent refilled this prescription on September 25, October 5, 16, and 26, 1987.

22. On December 1, 1987, respondent filled a telephoned prescription for 30 carisoprodol from the sixth physician, to be taken one up to twice a day. Eight refills were authorized. Respondent refilled this prescription on December 18, 1987, January 5, 14, 20, and 25, February 1, 8, and 15, 1988.

23. On February 20, 1988, respondent filled a written prescription dated February 2, 1988, from the sixth physician, for 100 carisoprodol, to be taken one, twice per day, and to be refilled "q. mo. x12." Respondent filled and refilled this prescription with 30 carisoprodol on February 20 and 24, March 2, 8, 15, 21, and 28, April 5, 12, 20, and 26, May 3, 11, 18, 25, and 31, June 8, 15, 22, and 28, July 5, 11, 18, and 25, and August 2 and 10, 1988.

24. On August 11, 1988, respondent received a telephoned prescription from the sixth physician for 30 carisoprodol to be taken one, twice a day, and to be refilled 11 times. Respondent noted in the patient's profile that this was a 10 day supply of the medication, and filled and refilled this prescription on August 11, 22, and 29, September 2, 10, 16, and 23, October 3, 12, and 19, November 1 and 9, 1988.

COUNT II--Patient Kevin M.

25. On April 6, 1987, respondent filled a telephoned prescription for 60 Valium 10 mg., a Schedule IV controlled substance, for patient Kevin M. The instructions were to take one, twice per day. Two refills were authorized. The prescription does not bear the DEA number of the prescriber or the patient's address. Respondent refilled the prescription on April 24 and May 18, 1987.

26. On June 15, 1987, respondent filled a written prescription from the same physician for 100 Valium, take one before meals and at bedtime, and authorizing one refill. Respondent refilled this prescription on July 16, 1987.

27. On August 31, 1987, respondent filled a written prescription from the same physician for 60 Valium with the same dosage instructions, and authorizing three refills. The prescription does not bear the address of the patient. The prescription was apparently not refilled.

28. On September 14, 1987, respondent filled a telephoned prescription from the same physician for 60 diazepam (generic Valium), with the same instruction, authorizing 2 refills. Respondent refilled the prescription on September 24 and October 12, 1987, and noted in the patient's profile that this prescription was for a 15 day supply of the medication. The prescription does not bear the address of the patient or the physician's DEA number.

29. On October 23, 1987, respondent filled a telephoned prescription from the same physician for 60 diazepam, with the same instructions, and authorizing 3 refills. The physicians DEA number and the patient's address do not appear on the prescription. Respondent refilled the prescription on November 4 and 23, and noted in the patient's profile that this prescription

was for a 15 day supply of the medication.

30. On November 24, 1987, respondent filled a written prescription signed by the same physician, and apparently typed by respondent onto one of respondent's forms, for 60 diazepam, take one, twice per day. On the face of the prescription is the handwritten notation: "11/23 refill lost--per MD." Neither the patient's address nor the DEA number of the prescriber appears on the prescription. No refills are indicated on the copy signed by the physician.

31. On November 23, 1987, respondent received a telephoned prescription from the same physician for 60 diazepam, take one with meals and at bedtime, and authorizing 3 refills. Neither the DEA number of the physician nor the address of the patient appears on the prescription. Respondent dispensed this prescription on December 1, 1987, and refilled it on December 9 and 23, 1987, and January 13, 1988. On the back of the prescription is the handwritten notation: "12/9/87 OK early per call to MD Told Kevin qid [i/]"

32. On February 8, 1988, respondent filled a telephoned prescription from the same physician for 60 diazepam, take one with meals and at bedtime, no refills. The prescription bears neither the patient's address nor the physician's DEA number.

33. On February 15, 1988, respondent filled a telephoned prescription from the same physician for 60 diazepam, take one with meals and at bedtime, no refills. On the face of the prescription is the handwritten notation: "2/15 OK early fill per call back Sam. [i/]." The prescription bears neither the patient's address nor the physician's DEA number.

34. On April 6, 1988, respondent filled a telephoned prescription for 60 diazepam "refill," take one with meals and at bedtime, no refills. The prescription bears neither the patient's address nor the physician's DEA number.

35. On May 11, 1988, respondent filled a telephoned prescription for 60 diazepam with the same instructions, no refills. The prescription bears neither the patient's address nor the physician's DEA number.

36. On May 23, 1988, respondent filled a telephone prescription for 60 diazepam with the same instructions, and 2 refills authorized. Respondent refilled this prescription on June 3 and 20, 1988. The prescription bears neither the patient's address nor the physician's DEA number.

37. On May 25, 1988, respondent filled a telephone prescription from the same physician for 60 Acetaminophen with Codeine, a Schedule III controlled substance which was and is known to have an additive or potentiating effect when administered with CNS depressants such as diazepam. The prescription bears neither the patient's address nor the physician's DEA number.

38. On July 18, 1988, respondent filled a telephone prescription from the same physician for 60 diazepam, take one twice per day, two refills authorized. The prescription bears neither the patient's address nor the physician's DEA number. Respondent apparently did not refill this prescription. On July 20, 1988, respondent filled a telephoned "refill" prescription from the same physician for 60 diazepam, take one with meals and at bedtime. On the face of the prescription is noted: "A bottle for Kevin's office." Neither of these prescriptions bears the patient's address nor the physician's DEA number.

39. On August 11, 1988, respondent filled a telephoned "refill" prescription from the same physician for 60 diazepam, take one with meals and at bedtime, no refills. The prescription bears neither the patient's address nor the physician's DEA number.

40. On September 1, 1988, respondent began filling a series of prescriptions for propoxyphene, from the same physician. The first prescription was telephoned and was for 30 tablets, take one every 6 hours for pain, no refills. The prescription bears neither the address of the patient nor the DEA number of the physician.

41. On September 8, 1988, respondent filled a telephoned prescription from the same physician for 30 diazepam, take one three times a day, no refills. The prescription bears neither the address of the patient nor the DEA number of the physician.

42. On September 16, 1988, respondent filled a telephoned "refill" prescription for 60 diazepam, take one with meals and at bedtime, no refills. The prescription bears neither the address of the patient nor the DEA number of the physician.

43. Also on September 16, 1988, and via the same prescription, respondent dispensed 60 propoxyphene, take one every 6 hours, no refills. The prescription bears neither the address of the patient nor the DEA number of the physician.

44. On October 14, 1988, respondent filled a telephoned prescription from the same physician for 60 diazepam, with the same instructions and no refills. The prescription bore neither the patient's address nor the physician's DEA number.

45. Also on October 14, and via the same prescription, respondent dispensed 60 propoxyphene with the same instructions. The prescription bears neither the address of the patient nor the DEA number of the physician.

46. On October 31, 1988, respondent filled a written prescription from the same physician for 60 diazepam, with the same instructions and two refills. The prescription bears neither the patient's address nor the physician's DEA number. Respondent refilled this prescription on November 11 and 17, 1988. On the back of the prescription is handwritten: "11/17/88--9 days

early--OK to refill per call to MD [i/]."

47. Also on October 31, and via the same prescription, respondent dispensed 60 propoxyphene with the same instructions, apparently 2 refills authorized. Respondent refilled this prescription on November 7 and 14, 1988.

48. On November 22, 1988, respondent filled a written prescription from the same physician for 60 propoxyphene, take one every 8 hours, 2 refills. The prescription bears neither the physician's DEA number nor the patient's address. On the face of the prescription is written: "filled 11/14, 11/7." Respondent refilled this prescription on November 28 and 29, 1988. On the back of the prescription is written: "Ok early per Sam 11/28 [i/]" and "11/29/88 lost bottle in woods--confirmed with MD [i/]."

49. On November 29, 1988, respondent filled a telephone prescription from the same physician for 60 diazepam, take one with lunch and at bedtime, no refills. The prescription bears neither the address of the patient nor the DEA number of the physician.

50. On December 5, 1988, respondent filled a written prescription from the same physician for 45 diazepam, same instructions. The prescription does not contain the patient's address.

51. Also on December 5, and via the same prescription, respondent dispensed 60 propoxyphene, take one, twice per day, 2 refills. Respondent refilled this prescription on December 7 and 10. On the face of the prescription are the following notes: "12/7--we refused to refill this AM. Sam called 2 PM "OK to fill today" [i/]" and "12/10/88 OK per call from MD [i/]." The prescription does not contain the address of the patient.

52. On December 21, 1988, respondent filled a written prescription from the same physician for 60 propoxyphene, same instructions, 2 refills. The patient's address does not appear on the prescription. Respondent refilled this prescription on December 26 and 28, 1988. On the back of the prescription are the following notes: "12/26 OK to refill per Sam [i/]" and "12/28 Refill refused until Sam called to OK [i/]." The prescription does not contain the address of the patient.

53. On January 2, 1989, respondent filled a written prescription from the same physician for 60 diazepam, take one with meals and at bedtime, two refills. Respondent noted in the patient's profile that this was a 15 day supply of medication. Respondent refilled the prescription on January 7, 1988. The following handwritten notation appears on the back of the prescription: "1/7/89 OK to refill per call from MD. He will talk to Kevin [i/]" The prescription did not contain the patient's address.

54. Also on January 2, 1989, respondent filled a separate written prescription for the same physician for 60 propxyphene, take one, twice per day, 2 refills. On the face of the prescription

is written: "1/2 Filled 6 days prior--OK Sam." Respondent refilled this prescription on January 4 and 7, 1989. On the back of the prescription is written: "1/4/89--refused to fill Rx until I could consult MD. Kevin had Samuelson call: "OK to refill. He needs that" [i/]" and "1/7/89 OK to refill per call from MD. He will talk to Kevin [i/]." The prescription does not contain the patient's address.

55. On February 27, 1989, respondent filled a telephoned prescription from the same physician for 30 diazepam, take one at bedtime, no refills. The prescription contained neither the patient's address nor the physician's DEA number.

56. On March 8, 1989, respondent filled a telephoned prescription from the same physician for 60 propoxyphene, same instructions, no refills. The prescription bears neither the patient's address nor the physician's DEA number.

57. On March 17, 1989, respondent filled a written prescription dated March 15, 1989 from the same physician for 60 propoxyphene, take one every 6 hours for back pain, 2 refills. The prescription does not contain the address of the patient. Respondent refilled the prescription on March 22 and 27, 1989. On the face of the prescription appears the following undated note: "OK early per call to MD Told him we will need a call authorizing refills. [i/]." On the back of the prescription are the following notes: "3/22/89 [i/] OK per call from MD" and "3/27/89 OK to refill per Sam [i/]."

58. On March 21, 1989, respondent filled a telephoned prescription from the same physician for 60 propoxyphene, take one twice per day, "must last until 4/19/89," no refills. The prescription contained neither the patient's address nor the physician's DEA number.

59. On March 30, 1989, respondent filled a written prescription dated March 29, 1989 from the same physician for 60 diazepam, instructions illegible, 2 refills. The prescription does not contain the patient's address. Respondent refilled the prescription on April 3 and 6, 1989. On the back of the prescription are written: "4/3--Refused Kevin a refill Dr. Sam OK [i/]" and "4/6--OK MD to refill [i/]."

60. On April 7, 1989, respondent filled a written prescription from the same physician for 60 diazepam, with the same instructions "must last 30 days," no refills. The prescription contained neither the patient's address nor the physician's DEA number.

61. On April 10, and via the same April 7 prescription form, respondent dispensed 60 propoxyphene, take one twice per day, 2 refills. The "2" in the refills is crossed out, and the following is written: "0 per call to MD 4/7/89 Told MD and patient we must have written Rx each time." The prescription contained neither the patient's address nor the physician's DEA number.

62. On May 10, 1989, respondent filled a written prescription for 60 acetaminophen with codeine, take one four times per day as needed for pain, one refill. Respondent refilled the prescription on May 15, 1989. A handwritten notation on the front states: "5/15--OK to refill per Sam. Told we need new written Rx each time please [i/]." The prescription does not bear the patient's address.

63. The back of the May 10, 1989 prescription for acetaminophen with codeine contains a prescription for 60 diazepam, take one with meals and at bedtime, 1 refill. Respondent refilled the prescription on May 18, 1989. This side of the prescription bears the following handwritten note: "5/18/89 Refill OK per Sam. Told need new Rx each time please [i/]."

64. On May 19, 1989, respondent filled a written prescription from the same physician for 60 propoxyphene, take one every 6 hours as needed for pain, 1 refill. Respondent refilled this prescription on June 2, 1989. The prescription does not contain the patient's address or the prescriber's DEA number.

COUNT III--Sandra M.

65. This patient received substantial amounts of propoxyphene, codeine, and 5 kinds of benzodiazepines, together with smaller amounts of ulcer, high blood pressure, and muscle relaxant medications, and proventil inhalers. Almost all of her medications are from the same physician (referred to above as "Dr. S." and in the pharmacist's notes referred to below as "M.D." or "Sam"), and are under her former name of Sandra P. This patient married patient James M., the subject of Count I, above, in 1989.

CODEINE: all of the described medications are Schedule III:

66. On January 9, 1987, respondent filled a telephoned prescription from a Dr. F. for 40 tablets of ACET with codeine 30 mg, take one every 4 hours. He noted this on his profile as being a 10 day supply. The prescription does not contain the patient's address or the physicians's DEA number.

67. On January 26, 1987, respondent filled a written prescription from Dr. S. (who wrote all prescriptions for this patient unless otherwise noted) for 30 Fiorinal with codeine 30 mg, take one every 6 hours as needed for headache. Respondent noted this in his profile as being a 30 day supply. The prescription does not contain the patient's address.

68. On February 5, 1987, respondent filled a telephoned prescription from a Dr. K. for 4 tablets of ACET with codeine, 15 mg., take one every 4 hours. The prescription does not contain either the physician's DEA number or the patient's address.

69. On February 6 or 7, 1987, respondent filled a telephoned prescription for 30 Fiorinal with codeine 30 mg, "sig: [One] tid q6o pha [i.e. for headache]." The prescription contains neither the patient's address nor the physician's DEA number. Respondent noted on the patient's profile that this was a 30 day supply.

70. On February 28, 1987, respondent filled a telephone prescription for 30 Fiorinal with codeine 30 mg, take one every 8 hours as needed for headache. The prescription contains neither the patient's address nor the physician's DEA number. Respondent noted upon his profile that this was a 15 day supply.

71. On March 19, 1987, respondent filled a telephoned prescription for 30 Fiorinal with codeine 30 mg, same instructions. The prescriptions contains neither the patient's address nor the physician's DEA number. The prescription contains the following note on its face: "OK early per call back to MD." The prescription form also includes a prescription for Xanax, and it cannot be determined which (or both) prescription is referred to by looking at the script. Respondent noted upon his profile that this was a 10 day supply.

72. On April 14, respondent filled a telephoned prescription for 12 Tylenol with codeine 30 mg, take every 6 hours as needed for pain. The prescription contains neither the patient's address nor the physician's DEA number. Respondent noted upon his profile that this was a 3 day supply.

73. On May 11, 1987, respondent filled a telephone prescription for 30 Fiorinal with codeine 30 mg, take one each 8 hours as needed for headache. Neither the patient's address nor the physician's DEA number is on the prescription. Respondent noted that this was a 10 day supply, on the profile.

74. On May 20, 1987, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, take one every 6 hours as needed for headache. The patient's address does not appear on the prescription. Respondent noted in the profile that this was a 15 day supply.

75. On June 12, 1987, respondent filled a telephoned prescription for 60 Fiorinal with codeine 30 mg. take one with meals and at bedtime. Neither the patient's address nor the physician's DEA number appears on the prescription. Respondent noted in the profile that this was a 15 day supply.

76. On July 17, 1987, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, take one every 6 hours for pain, one refill. The prescription does not contain the patient's address. Respondent noted in the profile that this was a 15 day supply of the medication. Respondent refilled this prescription on July 28, 1987.

77. On August 26, 1987, respondent filled a written prescription for 30 Fiorinal with codeine 30 mg, take one four times per day for headache, one refill. The prescription does not

contain the patient's address. Respondent noted that this was a 10 day supply of the medication, and refilled the prescription on August 31, 1987.

78. On September 6, 1987, respondent received a telephoned prescription from Dr. F. for 20 ACET with codeine 30 mg, take one every 3-4 hours for pain. The prescription contains neither the patient's address nor the prescriber's DEA number. A telephone number is written under the physician's name, but no other note appears on the prescription form. The prescription was dispensed on September 11, 1987, and respondent noted in the profile that this was a 10 day supply.

79. On October 7,1987, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, take one twice per day. The prescription does not contain the patient's address. Respondent noted in the profile that this was a 30 day supply.

80. On October 23, 1987, respondent filled a written prescription for 30 Fiorinal with codeine 30 mg, take one every 6 hours as need for headache. The prescription does not contain the patient's address. On the back of another prescription dated and apparently presented on the same day, is written: "left message with secretary; Sandy got 30 Restoril and 60 F#3 on 10/7. Please tell Dr. 10/23/98 [i/]." Respondent noted in the profile that this was a 30 day supply. The prescription contains neither the patient's address nor the prescriber's DEA number.

81. On November 23, 1987, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. The prescription does not contain the patient's address. Respondent noted in the profile that this was a 15 day supply.

82. On December 7, respondent filled a telephoned prescription for 60 Fiorinal with codeine 30 mg, same instructions. The prescription does not contain the patient's address or the physician's DEA number. There is written "11/23/87" in what appears to be the pharmacist's handwriting on the face of the prescription. Respondent noted in the profile that this was a 15 day supply.

83. On December 19, 1987, respondent filled a telephone prescription for 60 Fiorinal with codeine 30 mg, same instructions. The prescription does not contain the patient's address or the physician's DEA number. Respondent noted in the profile that this was a 15 day supply.

84. On January 19, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. The prescription does not contain the patient's address. Respondent noted in his profile that this was a 30 day supply.

85. On February 1, 1988, respondent filled a written prescription for 30 Fiorinal with codeine 30 mg, take one twice per day, one refill. Neither the patient's address nor the

physician's DEA number appears on the prescription. Respondent noted on the profile that this was a 15 day supply. There is no record of a refill.

86. On February 16, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, take one every 6 hours as needed for headache. Neither the physician's DEA number nor the patient's address is on the prescription. Respondent noted upon the profile that this is a 15 day supply.

87. On March 1, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, take one twice per day. Neither the physician's DEA number nor the patient's address appears on the prescription. Respondent noted on the profile that this was a 30 day supply.

88. On March 16, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, take one twice per day. Neither the patient's address nor the physician's DEA number is on the prescription. Respondent noted that this was a 30 day supply in the profile.

89. On April 12, 1988, respondent filled a written prescription for 30 Fiorinal with codeine 30 mg, take one every 6 hours as needed for headache. The patient's address does not appear on the prescription. Respondent noted that this was a 15 day supply, on the profile.

90. On April 22, 1988, respondent filled a written prescription for 30 Fiorinal with codeine 30 mg, take one twice per day. The patient's address is not on the prescription. Respondent noted in the profile that this was a 15 day supply.

91. On May 9, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. The patient's address is not on the prescription. Respondent noted in the profile that this was a 30 day supply.

92. On May 24, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, take one every 6 hours as needed for headache. The patient's address does not appear on the prescription. Respondent noted in the profile that this is a 30 day supply.

93. On June 7, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. The patient's address is not on the prescription. Respondent noted in the profile that this is a 30 day supply. Another prescription (for Vasotec) which apparently accompanied the Fiorinal prescription does have the patient's address inserted, and a note that a change in dosage for that medication was changed "OK per MD."

94. On June 20, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. The patient's address does not appear on the prescription. Respondent noted in the profile that this was a 30 day supply.

95. On July 5, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. The patient's address does not appear on the prescription. Respondent noted in the profile that this was a 30 day supply. On the back of the prescription is the following note: "Called MD (1) Diazepam 5 still qid usage (2) F#3 ditto (3) Early refill on Temazepam 6/29 was not necessary. He says OK to fill prescription but we'll have to watch her. [i/

96. On July 18, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. The patient's address does not appear on the prescription. Respondent noted in the profile that this was a 15 day supply.

97. On August 1, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. The patient's address does not appear on the prescription. Respondent noted in the profile that this was a 15 day supply.

98. On August 12, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. The patient's address does not appear on the prescription. Respondent noted in the profile that this was a 15 day supply.

99. On September 1, 1988, respondent filled a telephoned prescription for 30 Fiorinal with codeine 30 mg, same instructions. Neither the patient's address nor the physician's DEA number appears on the prescription. Respondent noted in the profile that this was a 10 day supply.

100. On September 9, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. Neither the patient's address nor the physician's DEA number is on the prescription. Respondent noted in the profile that this is a 15 day supply.

101. On September 14, 1988, respondent filled some other prescriptions for this patient from this physician. On the back of one of them appears: "Called MD to tell him: She's still using Valium qid, She got 60 F#3 5 days ago, She got Restoril 12 days ago. He says OK--he's cutting down the strengths. [i/]."

102. On September 26, 1988, respondent filled a telephone prescription for 60 Fiorinal with codeine 30 mg, same instructions. Respondent has apparently written the date (9/9/88) and number of the previous Fiorinal prescription on the face of this prescription, and at the bottom of the prescription is written: "(No Refill until Oct. 10)." Neither the patient's address nor the physician's DEA number appears on the prescription. Respondent noted in the profile that this is a 15 day supply.

103. On October 10, 1988, respondent filled a telephone prescription for 60 Fiorinal with codeine 30 mg, same instructions. Neither the patient's address nor the physician's DEA

number appears on the prescription. Respondent noted in the profile that this was a 15 day supply.

104. On October 24, 1988, respondent filled a telephone prescription for 60 Fiorinal with codeine 30 mg, same instructions, and apparently caused the physician to personally sign the pharmacy's copy. Neither the patient's address nor the physician's DEA number appears on the prescription. Respondent noted in the profile that this is a 15 day supply.

105. On November 4, 1988, respondent filled a written prescription for 30 Fiorinal with codeine 30 mg, same instructions. Neither the patient's address nor the physician's DEA number appears on the prescription. Respondent noted in the profile that this is a 15 day supply.

106. On November 14, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. Neither the patient's address nor the physician's DEA number is on the prescription. Respondent noted in the profile that this is a 30 day supply.

107. On November 28, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. Neither the patient's address nor the physician's DEA number is on the prescription. Respondent noted in the profile that this is a 20 day supply.

108. On December 13, 1988, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, same instructions. Three refills are authorized, and the patient's address is shown as a street address in Neenah, Wisconsin. The physician's DEA number does not appear on the prescription. Respondent noted in the profile that this is a 15 day supply, and refilled the prescription on January 3, 13, and 25, 1989. Stapled to another prescription dated and apparently presented on December 13, is written: "Val2/60 12/13 1/3 1/13. F#3/60 ditto. 1/25/89--Informed MD of above dates of dispensing. He says OK to refill today. "She needs those." Told Sandy we can't bill MA. [i/]."

109. On February 1, 1989, respondent filled a written prescription dated January 27, 1989 for 60 Fiorinal with codeine 30 mg,with A&C/butalbital with codeine 30 mg., same instructions. The patient's address does not appear on the prescription. Respondent noted in the profile that this was a 30 day supply.

110. On February 10, 1989, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, with A&C/butalbital with codeine 30 mg., same instructions. The patient's address does not appear on the prescription. Respondent noted in the profile that this is a 15 day supply.

111. On February 20, 1989, respondent filled a written prescription for 30 Fiorinal with codeine 30 mg, with 30 A&C/butalbital with codeine 30 mg, same instructions. The patient's

address does not appear on the prescription. Respondent noted in the profile that this was a 0 (zero) days supply.

112. On March 7, 1989, respondent filled a written prescription dated March 6, 1989 for 60 Fiorinal with codeine 30 mg, with 60 A&C/butalbital with codeine 30 mg, same instructions. The patient's address does not appear on the prescription. Respondent noted in the profile that this is a 20 day supply.

113. On March 17, 1989, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, with 60 A&C/butalbital with codeine 30 mg, same instructions. The patient's address is not on the prescription. Respondent noted in the profile that this is a 0 (zero) days supply.

114. On March 18, 1989, respondent filled a written prescription from a different physician, apparently at St. Joseph's Hospital, Chippewa Falls, for 10 Tylenol with codeine 30 mg, with ACET with codeine 30 mg, take one every four hours as needed for pain. Neither the patient's address nor the physician's DEA number appears on the prescription. Respondent noted in the profile that this was a 5 day supply.

115. On March 21, 1989, respondent filled a written prescription from Dr. S. for 60 Tylenol with codeine 15 mg, with 60 APAP with codeine 15 mg, take one every 6 hours as needed for headache. The patient's address does not appear on the prescription. Respondent noted in the profile that this is a 20 day supply.

116. On April 1, 1989, respondent filled an undated written prescription from Dr. S. for 60 Fiorinal with codeine 30 mg, with 60 A&C/butalbital with codeine 30 mg, take one every 6 hours as needed for headache. The patient's address does not appear on the prescription. Respondent noted in the profile that this is a 30 day supply.

117. On April 21, 1989, respondent filled a written prescription for 30 Fiorinal with codeine 30 mg with 30 A&C/butalbital with codeine 30 mg, take one twice per day. The patient's address is not on the prescription. Respondent noted in the profile that this was a 15 day supply.

118. On May 8, 1989, respondent filled a written prescription for 60 Fiorinal with codeine 30 mg, with 60 A&C/butalbital with codeine 30 mg, take one every 6 hours as needed. The patient's address is not on the prescription. Respondent noted in the profile that this was a 15 day supply.

PROPOXYPHENE a Schedule IV substance:

119. On April 8, 1987, respondent filled a telephoned prescription for 30 propoxyphene compound 65, take one every 6 hours as needed for headache. The prescription contains neither

the patient's address nor the physician's DEA number. Respondent noted in the profile that this was a 10 day supply.

120. On April 20, 1987, respondent filled a telephoned prescription for 30 propoxyphene compound 65, take one twice per day. The prescription contains neither the patient's address nor the physician's DEA number. Respondent noted in the profile that this was a 15 day supply.

121. On June 24, 1987, respondent filled a written prescription for 30 propoxyphene compound 65, same instructions, one refill. The prescription does not contain the patient's address. Respondent noted in the profile that this was a 15 day supply, and refilled the prescription on July 6, 1987.

122. On August 10, 1987, respondent filled a written prescription for 30 propoxyphene compound 65, same instruction, one refill. The prescription does not contain the patient's address. Respondent noted in the profile that this is a 30 day supply, and refilled the prescription on August 14. On the face of the prescription is the note: "8/14--OK to refill early per call to M.D."

123. On September 14, 1987, respondent filled an undated written prescription for 30 propoxyphene compound 65, take one every 6 hours as needed for pain, 2 refills. This prescription apparently was presented with other, dated prescriptions. The patient's address is not on the prescription. Respondent noted in the profile that this is a 15 day supply, and refilled the prescription on September 28 and October 1, 1987. On the back of the prescription is handwritten: "10/1/87 OK to refill per Sam [i/]."

BENZODIAZEPINES: all are Schedule IV substances:

124. Between January 1987 and February 1989, Respondent dispensed substantial quantities of Halcion, Xanax, Restoril, Valium and Dalmane, all of which are Schedule IV substances, to patient Sandra M.

125. Substantially all of the prescriptions were written by one local physician.

126. On a regular basis, Respondent was filling prescriptions for at least two benzodiazepines for the same patient on or about the same time, and he was regularly refilling prescriptions for one or more of the benzodiazepines earlier than the prescribed dose frequency and supply would justify. Respondent or respondent's staff contacted the prescribing physician about a number of the early refills. On each such occasion, the physician approved the early refill, often with the justification that he had told the patient to exceed the prescribed dose frequency, but without changing the prescription itself.

CONCLUSIONS OF LAW

1. By filling prescriptions for controlled substances, which prescriptions did not contain the DEA number of the physician or the address of the patient, Respondent violated sec. 450.10(1), Stats., and s. Phar 8.05(1), Wis. Admin. Code.

2. By dispensing controlled substances at greater frequency than the physician's prescription would justify, and by cooperating with the physician in dispensing controlled substances in greater frequency than the prescription would justify, and by dispensing combinations of controlled substances to the same patient in substantial amounts and frequently shorter than prescribed intervals, with and without the prescribing physician's knowledge and approval, Respondent violated Wis. Stat. s. 450.10(1)(a)6 and s. Phar 10.03(3), Wis. Admin. Code.

ORDER

NOW THEREFORE IT IS ORDERED that the license previously issued to Peter F. Bjerke to practice pharmacy in the state of Wisconsin be and hereby is SUSPENDED for a period of 6 months, commencing thirty days following the date of this Order.

IT IS FURTHER ORDERED that the assessable costs of this proceeding be imposed on Peter F. Bjerke, pursuant to Wis. Stat. s. 440.22.

OPINION

Mr. Bjerke was not using independent professional judgment in the operation of his pharmacy, but instead relied upon the representations of physicians who may or may not have had the best interests of the patients at heart. It is clear from the evidence in this case that Mr. Bjerke and members of his staff had questions about the propriety of several of the prescriptions which were presented to them to be filled, that he and his staff called the physician responsible for various of the prescriptions, and allowed themselves to be reassured by representations of the situation which were clearly contrary to the facts known to the pharmacy staff.

Mr. Bjerke defends this procedure as one which comports with the minimum acceptable standards of the practice of pharmacy. The theory of the defense is that Mr. Bjerke is a pharmacist, not a physician, and it is not his responsibility to second-guess the physician who prescribes the medications. It is the theory of the defense that once the pharmacist calls the physician to alert the physician to a problem, the pharmacist may accept the physician's direction to proceed as directed without qualm.

Respondent's counsel cites to several cases in other jurisdictions which seem to support the proposition that the pharmacist's duty is met when the pharmacist accurately fills the prescription presented. There are no Wisconsin cases on the point; there is, however, the administrative regulation which defines unprofessional practice of pharmacy to include dispensing medications to a patient when the pharmacist should have known that the medication would harm the patient. Sec. Phar 10.03(3), Wis. Admin. Code.

It is beyond legitimate question that controlled substances, particularly narcotics and benzodiazepines, present danger of harm to a patient if the drugs are not used appropriately. It is beyond legitimate question that a pharmacist who regularly sees the same patient returning early, and often significantly early, for refills of potent medications, has reason to know that there is a problem with the patient's use of the medications in question. The Respondent's defense in this case is that he is not a physician, but merely a pharmacist, and in no position to second guess the prescriptive practices of a physician. To some extent, this defense is true. Here, however, it is clear that Respondent did not call the physician on even most of the early refill demands, but instead refilled the medication supply on the patient's demand, as if the prescription had no effect on the rate of consumption permitted. In short, Respondent acted contrary to the clear implication, if not the explicit direction, of a number of prescriptions and did so frequently.

Respondent's failure to confine his dispensing of controlled substances to the terms of the various prescriptions makes his reliance on the direction of the prescribing physician less than persuasive. It is true that there are a number of instances where he or his staff did call the prescribing physician to point out an early refill, but it is also true that he or his staff would accept the physician's response as sufficient to permit the continued dispensing of the medication even when the response was squarely contrary to the facts known to the pharmacist. Finally, it is the pharmacist's training in pharmacology upon which the physician (and the patient) is supposed to be able to rely, and it is the pharmacist's duty to refrain from dispensing drugs to a patient when he should know that dispensing the drugs will harm the patient.

Implicit in the defense that the pharmacist is just following the physician's orders is the rejection of the idea that the pharmacist has any duty to the patient, other than accurately filling the prescription. The law in Wisconsin is clearly opposed to the notion that it is enough for the pharmacist to fill the prescription; the pharmacist must also think of the patient's welfare. It is common knowledge that drug abuse is harmful to the people who engage in it, and it is a matter of common knowledge that narcotics and benzodiazepines are commonly abused drugs. It is a matter of professional responsibility for a pharmacist to recognize the significance of a medication being listed as a controlled substance on any of the various schedules, and it is a matter of professional responsibility for a pharmacist to question whether the medication will harm the patient if it is dispensed.

The harm from dispensing controlled substances in substantial amounts, in greater than prescribed frequency, in combination with other similar and with other inter-active controlled substances, should have been apparent to the Respondent throughout the course of events described in the Findings of Fact.

The appropriate discipline here is that which will be sufficient to deter other licensees from similar disregard of the professional aspects of the practice of pharmacy in contrast to the mechanical counting of pills. Appropriate discipline requires that Respondent be strongly encouraged to reform his practice of pharmacy from that course demonstrated in this proceeding, for his rehabilitation and for the protection of patients who will come to him for professional assistance in the future. I believe that a six month suspension of the Respondent's license will be adequate to achieve those ends.

Dated this 29th day of December, 1992.

James E. Polewski

James E. Polewski
Administrative Law Judge

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