

**STATE OF VERMONT  
BOARD OF MEDICAL PRACTICE**

<b>In re:</b>	)	<b>MPC 15-0203</b>	<b>MPC 110-0803</b>
	)	<b>MPC 208-1003</b>	<b>MPC 163-0803</b>
<b>David S. Chase,</b>	)	<b>MPC 148-0803</b>	<b>MPD 126-0803</b>
	)	<b>MPC 106-0803</b>	<b>MPC 209-1003</b>
<b>Respondent.</b>	)	<b>MPC 122-0803</b>	<b>MPC 89-0703</b>
	)		<b>MPC 90-0703</b>
	)		<b>MPC 87-0703</b>

**RESPONDENT DAVID S. CHASE’S REPLY TO THE STATE’S MEMORANDUM  
IN OPPOSITION TO MOTION FOR RECUSAL OR DISQUALIFICATION OF  
BOARD MEMBER SHARON NICOL FROM THE HEARING COMMITTEE**

Respondent David S. Chase submits this Reply to the State’s Memorandum in Opposition to Motion for Recusal or Disqualification of Sharon Nicol (“Opposition”). The State makes three arguments in its Opposition: (1) that the Motion for Recusal or Disqualification (“Motion to Recuse”) is an attempt to manipulate the Board by threatening the possibility of a lawsuit against Ms. Nicol; (2) that Ms. Nicol has no direct pecuniary interest in the potential lawsuit; and (3) that Ms. Nicol has absolute immunity from suit. The first two claims are completely wrong and the third claim is only partially accurate.

Respondent’s Motion to Recuse was a responsible action undertaken to alert the Board to a real and easily avoidable problem that, if it transpires, will abort the merits hearing and unnecessarily waste substantial resources of both the State and Dr. Chase. The merits hearing and any subsequent briefing, including appellate court litigation in the event of a Board ruling adverse to Dr. Chase, will require the investment of hundreds of thousands of dollars of the State’s resources. Dr. Chase has contended almost since the outset of this litigation three years ago that the Board’s summary suspension violated his due process rights. Sharon Nicol actively supported that suspension and, indeed, was the most vocal advocate of the license suspension

and the Board's rejection of a more narrowly tailored suspension order limited to recommendations and performance of surgery. Dr. Chase has filed a lawsuit in Vermont Superior Court against various state officials, including past and present directors of the Medical Practice Board, alleging, *inter alia*, that the summary suspension of his license violated his constitutional right to due process of law. The facts underlying Dr. Chase's civil lawsuit pre-date and exist independently of the Board's appointment of the hearing committee, and constitute actions that Dr. Chase has been challenging before the Board for nearly three years. The civil lawsuit was initiated only after this Board made clear that it would not investigate Dr. Chase's complaints that his summary suspension was based upon a deficient procedure, fabricated evidence and official misconduct. None of those facts or legal claims were, or could have been, contrived in order to manipulate the composition of the three-person hearing panel in this matter.

Rather than unexpectedly torpedoing the hearings after they commence by amending his civil action to include Ms. Nicol as a defendant, the Respondent afforded the Board an opportunity to avoid the significant waste of resources and compromised proceedings that would result from such an event by giving the Board advance notice of the risk. It is a risk that is easily avoided by selecting a third member of the hearing committee who, unlike Ms. Nicol and like the two remaining committee members, played no role in the summary suspension proceeding. Neither Ms. Nicol nor the Board has any legitimate, compelling interest in Ms. Nicol's appointment to the hearing committee to the exclusion of other qualified persons who were not involved in the Board's summary suspension proceedings. The Motion to Recuse was not a contrived manipulation. Rather, it was advance notification to the Board of a real and impending issue, made to permit the Board to act in time to protect the integrity of its proceeding and to conserve scarce State resources. Providing advance notice of this issue to the Board was simply

the right, the fair, and the just thing to do under the circumstances. The State's own precipitous, hurried and flawed actions at the summary suspension proceeding underscore the essential role that advance notice plays in achieving fair, well-considered and correct decision-making.

Second, the State's claim that the inclusion of Ms. Nicol as a defendant in Dr. Chase's lawsuit would not provide her with a direct pecuniary interest in the outcome of this Board proceeding is clearly wrong under controlling law. The pecuniary interests of the disqualified decision makers in *Gibson v. Berryhill*, 411 U.S. 564 (1973), and *Ward v. Monroeville*, 409 U.S. 57 (1972)<sup>1</sup> were far less direct, immediate, and significant than would be the interest of a defendant in Dr. Chase's civil suit who had the ability to diminish her liability in that case by supporting a decision against Dr. Chase in this Medical Board proceeding. There is no question that formally including Ms. Nicol as a defendant in the civil lawsuit will require her immediate disqualification from the hearing committee. The State's alternative argument appears to be that the converse of this proposition is also true: that no disqualification of Ms. Nicol is required until she is formally named as a defendant in the civil lawsuit. However, that conclusion is neither logical nor warranted by existing law.

The risk that Dr. Chase's civil lawsuit will be amended to include Ms. Nicol is, given the existence of a pending lawsuit against other state officials based upon the same course of conduct in which Ms. Nicol played a prominent role, not hypothetical and clearly was not devised with a purpose to manufacture a disqualification. To the contrary, the probability of pecuniary loss to Ms. Nicol from the Respondent's civil lawsuit, while not certain to come to fruition, is nevertheless real and significant. This is no less than could be said of the pecuniary risk the civil suit would pose to Ms. Nicol even if she were to be formally named as a defendant in that lawsuit. For until the civil court reaches a verdict, the civil defendant faces only a risk of

---

<sup>1</sup> The facts and reasoning of these cases is set forth in greater detail in Respondent's Motion to Recuse.

pecuniary loss from the lawsuit. Thus, simply because no civil lawsuit has been formally filed, does not mean that Ms. Nicol has no pecuniary interest in the outcome of this Medical Board proceeding. The Vermont Supreme Court cases cited by the State are completely inapposite, as they all involved actual or threatened litigation in which a pecuniary award was not being sought. *See, e.g., Secretary of ANR v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 237 (1997) (suit for equitable and not pecuniary relief did not justify disqualification); *In re: Illuzi*, 164 Vt. 623 (1995) (although no pecuniary interest involved, four Supreme Court Justices recused themselves from hearing appeal because of potential appearance of partiality); *In re Vermont Supreme Court A.D. #17*, 154 Vt. 217 (1990) (disqualification not required where judges named only as nominal party in case where they undisputably had no personal interest or bias of any kind). The facts underlying the present circumstances create a real risk to Ms. Nicol of pecuniary loss from the pending civil suit, a risk that can be eliminated or substantially diminished by an adverse ruling in the Medical Board proceeding. The combination of those facts creates a direct pecuniary interest in this Board proceeding that, viewed objectively, creates a partiality that precludes Ms. Nicol's participation on the hearing committee.

Finally, the State claims that Ms. Nicol has absolute immunity from a suit for damages brought by Dr. Chase. This claim is overbroad. A member of an administrative agency has absolute immunity from suit only when the acts complained of occur while the agency official is acting in a judicial capacity. *Butz v. Economou*, 438 U.S. 448, 515 (1978); *Mishler v. Clift*, 191 F.3d 998 (9<sup>th</sup> Cir 1999); *see also Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) (prosecutors did not have absolute immunity from section 1983 claim that they fabricated evidence used at a pre-trial hearing to revoke a criminal defendant's bail). Whether Ms. Nicol engaged in any Board activity of a non-judicial nature in connection with the summary suspension of Dr. Chase

(including the Board's reliance on fabricated evidence and its refusal to address evidence that the integrity of its proceedings had been undermined by official misconduct) is an objective of the Respondent's discovery and investigative initiatives in the pending civil lawsuit. Having himself been victimized by "shoot first, ask questions later" decision-making, Dr. Chase is conducting his civil lawsuit by gathering and evaluating the pertinent facts before lodging a formal damage claim against particular individuals. The depositions of Investigator Phil Ciotti, former Board Director John Howland and Assistant Attorney General Joe Winn are currently scheduled to be held during early July and additional discovery will follow.

In the end, there can be no question that Ms. Nicol's continued participation on the hearing panel places the integrity of these proceedings, at serious risk. If that risk is realized, the expensive efforts of the parties will have been for naught. The Board can eliminate that risk now through a simple and cost-free decision to replace Ms. Nicol with a panel member who was not involved in the summary suspension. Both the law and common sense weigh strongly in favor of such action.

Dated at Burlington, Vermont, this 21 day of June, 2006.

SHEEHEY FURLONG & BEHM P.C.  
Attorneys for DAVID S. CHASE, M.D.

By:   
Eric S. Miller  
R. Jeffrey Behm  
30 Main Street  
P.O. Box 66  
Burlington, VT 05402  
(802) 864-9891  
[emiller@sheeheyvt.com](mailto:emiller@sheeheyvt.com)  
[jbehm@sheeheyvt.com](mailto:jbehm@sheeheyvt.com)