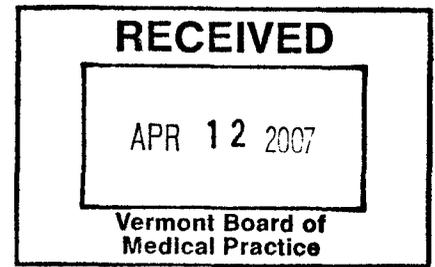


**STATE OF VERMONT
BOARD OF MEDICAL PRACTICE**



In re: William A. O'Rourke, Jr., M.D.,)
Respondent)
)
)

Docket No. MPN 19-0302

BOARD HEARING PANEL:

Russell P. Davignon, M.D., Physician Member
Margaret F. Martin, Public Member
James D. Cahill, M.D., Physician Member
David W. Clauss, M.D., Physician Member
Katherine A. Silta, PA-C, Physician Assistant Member

PRESIDING OFFICER:

Phillip J. Cykon, Esq.

DELIBERATION ON MOTIONS:

April 11, 2007

**THE BOARD'S DECISION ON RESPONDENT'S MOTION TO AMEND
THE BOARD OF MEDICAL PRACTICE'S JUDGMENT
AND ORDER DATED MARCH 20, 2007 AND STATE'S MOTION TO STRIKE**

BACKGROUND

On October 30, 2006, this matter initially came before the Hearing Committee (Committee) of the Vermont Board of Medical Practice (Board) for a disciplinary hearing on the Amended Specification of Charges dated May 13, 2005. At that Hearing, the parties presented testimony, exhibits, and oral argument. In addition, pursuant to agreement, the parties submitted the following post-hearing documents: Respondent William A. O'Rourke, Jr., M.D.'s Request to Find and Conclusions of Law dated November 1, 2006, and the State's Proposed Findings of Fact dated November 10, 2006. Based upon its consideration and deliberation of the above-stated material, the Committee, pursuant to 26 V.S.A. § 1355(b), reported its Findings of Fact and Conclusions of Law to the Board as set forth in the Hearing Committee Report entered December 20, 2006. As allowed under 26 V.S.A. § 1355(b), the State filed its State's Exceptions to Report of Hearing Committee dated January 15, 2007; and Respondent filed his Conditional Exceptions to the Hearing Committee Report dated January 16, 2007. On February 7, 2007, the Board consisting of five members, which constitutes a quorum under 26 V.S.A. § 1360(a), heard oral argument from the parties, and then went into deliberative session to consider the evidence in the record before it and render judgment thereupon. The date of entry of the Board's Judgment and Order is March 20, 2007.

By motion dated March 28, 2007, Respondent moved the Board to amend its Judgment and Order to order that Respondent's twenty-day license suspension begin immediately rather than sixty days from the date of the Judgment and Order. The State filed a response entitled "Reply of State to Motion of Respondent to Alter Final Board Order" and dated April 5, 2007.

Subsequently, the State filed a Motion to Strike Improper E-Mail Communication and to Prohibit Further E-Mail Communication in this Matter. The motion is dated April 9, 2007. Respondent filed a Memorandum in Opposition dated April 9, 2007. The parties did not request an oral hearing, and on April 11, 2007, the Board deliberated on the matters raised by the parties.

DECISION

1. Motion to Strike and Prohibit

The State's motion to strike email communications of March 29, 2007 and April 6, 2007 is GRANTED. Those communications were not considered and had no bearing on the Board's deliberation of the pending Motion to Amend Judgment and Order. Regarding the State's request to prohibit further email communications and to order a general procedure prohibiting such communications, the Board believes that raises an issue involving Board administrative matters, which would be more appropriately handled through rule-making procedures rather than through the adjudicatory process; therefore, that portion of the State's motion is DENIED.

2. Motion to Amend Judgment and Order

The State asks the Board to deny Respondent's Motion to Amend the Judgment and Order and argues that the Board's Judgment and Order is final, Respondent failed to provide reasons or authority to support his motion, and the five-member Board may not lawfully alter its own order. The Board disagrees.

The Vermont Administrative Procedure Act, other Board statutes, and Board Rules provide no specific guidance as to what constitutes a final judgment or order, or the process for the Board to amend its own order. When faced with no clear statutory guidance, the Board has turned to the Vermont Rules of Civil Procedure (V.R.C.P.) for such guidance. The Vermont Supreme Court has opined that "The Rules of Civil Procedure, however, are applicable only to matters pending in a superior or district court" and that "administrative hearings are not included within the purview of the Rules." Condosta v. D.S.W., 154 Vt. 465, 467 (1990). However, the Court has held that even though the rules are not applicable to administrative hearings, it is "logical" for an administrative board to "consult" the rules to administer its adjudicative functions. In re Appeal of Kenneth Houston, 2006 VT 59, ¶ 11.

V.R.C.P. 59(e) is entitled "Motion to Alter or Amend a Judgment" and reads "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." The Reporter's Notes to Rule 59(e) read: "Rule 59(e) gives the court broad power to alter or amend a judgment on motion within ten days after entry thereof." The Notes further explain that the rule permits amendments for a broader range of reasons than, for example, clerical mistakes or ministerial changes.

The Vermont Supreme Court, in considering whether a court was bound by its earlier order and without the authority to amend the order, ruled as follows:

Specifically, Robinson contends that the court was bound by its earlier order and, thereafter, was without subject matter jurisdiction to grant Keir's motion to amend the order. This argument is fallacious. Pursuant to V.R.C.P. 59(e), within ten days of the June 12 order, Keir moved for the court to amend the order to allow Keir to buy out Robinson. Rule 59(e), which is substantially similar to Federal Rule 59(e), gives the court broad power to alter or amend a judgment. Reporter's Notes, V.R.C.P. 59. The federal courts invoke Rule 59(e) "to support reconsideration of matters properly encompassed in a decision on the merits." White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 451 (1982). "Under rule 59(e), the court may reconsider issues previously before it, and generally may examine the correctness of the judgment itself." Ray E. Friedman & Co. v. Jenkins, 824 F.2d 657, 660 (8th Cir. 1987) (citations omitted). Accordingly, in the instant case, the court had the authority to amend its previous order in order to allow Keir to buy out Robinson.

In re Robinson/Keir Partnership, 154 Vt. 50, 54 (1990).

The Board finds that the mechanism established by V.R.C.P. 59(e) is a reasonable process by which to amend a Judgment and Order and elects to follow that process in this situation. Since Respondent had filed his motion to amend within ten days of the date of entry of the Judgment and Order in this matter, the motion is properly before the Board, and the Board has jurisdiction to exercise its discretion whether or not to amend its prior order.

The State additionally contends that the five-member Board that is statutorily authorized to determine charges of unprofessional conduct in disciplinary actions does not have the authority to amend its own judgment and order. The State argues that the Board's judgment and order "shall be in full force and effect until further order of the board or a court of competent jurisdiction." 26 V.S.A. § 1360(d). The state reads the "board" in subsection (d) of 1361 to mean the full 17-member Board of Medical Practice.

However, the "board" in subsections (a), (b), and (c) of section 1361 clearly refers to the five-member board that is authorized by 1360(a) to determine disciplinary charges of unprofessional conduct. Section 1361 must be viewed together with 26 V.S.A. § 1360, because those statutes, along with 26 V.S.A. § 1355, collectively establish the structure of board disciplinary hearings. As the Supreme Court has stated, "[individual] statutes ... are to be construed with others *in pari materia* as parts of one system." In re Judy Ann's Inc., 143 Vt. 228, 232 (1983) (quoting Bud Crossman Plumbing & Heating v. Commissioner of Taxes, 142 Vt. 179, 185 (1982)). When construing statutes, the Supreme Court cautions courts to "avoid interpretations that would lead to "an unjust, unreasonable and absurd consequence." O'Brien v. Island Corp., 157 Vt. 135, 139, 596 A.2d 1295, 1297 (1991)". State v. Forcier, 162 Vt. 71, 75 (1994).

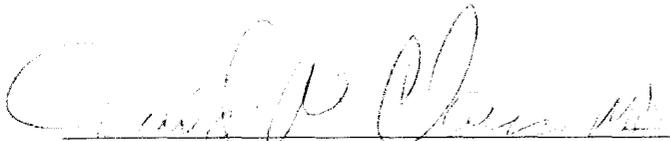
26 V.S.A. § 1360(a) establishes the quorum for disciplinary hearings. After the Hearing Committee accomplished its part in the present case, the five-member Board was constituted pursuant to statute to make its determination on the charges and issue its Judgment and Order. Since it has been determined that the Board has the discretion whether to amend its Judgment and Order under the guidance of V.R.C.P. 59(e), it is the five-member Board constituted under 26 V.S.A. § 1360(a) that has the authority to exercise that discretion. This matter is still a disciplinary action in the adjudicatory process as contemplated under Section 1360 and the statutory structure.

The Board has reviewed Respondent's motion to amend and the State's reply, and has deliberated on the merits of both arguments. For the reasons stated above, the Board exercises its discretion and Respondent's Motion to Amend the Judgment and Order is GRANTED. To ensure that both parties have received this Decision prior to the effective date of the suspension, the Board orders that Respondent's 20-day license suspension shall begin on Monday, April 16, 2007. The last paragraph of the Board's Judgment and Order entered on March 20, 2007, with the old language struck and the new language in bold letters, shall read as follows:

Based upon the pleadings filed by the parties, evidence in the record and the resulting Findings of Fact and Conclusions of Law, IT IS ORDERED BY THE BOARD that:

1. Counts 3, 5, 6, and 7 should be DISMISSED;
2. No disciplinary action should be imposed regarding Count 4;
3. Respondent is REPRIMANDED and his license to practice medicine in Vermont should be suspended for 20 consecutive days for his unprofessional conduct as concluded in Counts 1 and 2. The period of suspension shall begin ~~60 days from the date of entry of this ORDER~~ **on Monday, April 16, 2007.**

FOR THE BOARD:



David W. Clauss, M.D., Physician Member
Board Chair

4/12/07
Date

Filed with Board Office:

4/12/07
Date

Date of Entry: 4/12/07