

**STATE OF VERMONT
BOARD OF MEDICAL PRACTICE**

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

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MPN 12-0302

**REPLY OF STATE TO MOTION
OF RESPONDENT TO ALTER FINAL BOARD ORDER**

The State of Vermont, by and through Attorney General William H. Sorrell and undersigned Assistant Attorney General, James S. Arisman, provides this response to Respondent's motion¹ to alter the order that the Board of Medical Practice entered in this matter on March 20, 2007. The State respectfully requests that the Board of Medical Practice review this response and render such decision as it may deem to be just and consistent with due process and law.

I. Background.

1. The Board of Medical Practice entered its final order in this matter on March 20, 2007. However, the final order was never mailed to the undersigned, contrary to the requirements of statute and Board rules. See Vermont Administrative Procedure Act, 3 V.S.A. § 812(a); Board Rule 16.4. E-mail transmissions of the final order and other related communications were sent to the wrong address and not received by the Office of the Attorney General. It was not until March 26, 2007, that the undersigned learned through happenstance: (a) that the Board had entered a final order in this matter; (b) that Respondent was seeking alteration of the Board's final order; and (c) that Board staff

1. Following filing with the Board, Respondent's motion was forwarded to the Office of the Attorney General by facsimile transmission from the Board of Medical Practice on March 29, 2007.

already had scheduled a hearing on Respondent's request to alter the Board's final order. No formal written notice of this scheduled hearing was distributed to the parties, and no public notice of the hearing was posted. But see 3 V.S.A. § 2222(c). Further, no attempt appears to have been made to contact the undersigned by telephone to inquire as to the State's position regarding Respondent's request to alter the final Board order, to determine the availability of the undersigned for a hearing, or to provide notice of the date and time of the scheduled hearing. Such circumstances were prejudicial to the State's legal responsibilities in this matter.

2. In light of the above circumstances, the State filed a motion to continue to a later date the hearing that had been scheduled for March 27, 2007. A panel of Board members considered the State's motion on March 27, 2007. Counsel for Respondent at various points in the proceeding characterized aspects of the Board's final order as "arbitrary", referred to the March 27 proceeding as "folderol", and dismissed the State's due process concerns as "ridiculous". Nonetheless, the State's motion to continue the matter was granted by the Board panel on the ground that the State had been denied notice and an opportunity to be heard. Respondent's counsel was directed to file a written motion with the Board, rather than E-mails.

3. The State is well aware that counsel for Respondent finds the current proceedings objectionable. It is worthy of note, however, that the instant matter before the Board panel results from Respondent's unwillingness to accept the Board's final order as written. Respondent wishes to have the Board's final order altered. In short, the consumption of even more Board time and attention and the filing of still more pleadings in this matter has been set in motion by Respondent himself.

4. Remarkably, Respondent's most recently filed motion includes no explanation of any kind as to why it is necessary or better for him to begin his period of suspension immediately rather than comply with the terms of the Board's final order as written and issued. Nor does his motion address, even in passing, how he will see that the needs of his patients for continuity of medical care are met while he is suspended from the practice of medicine.

5. With regard to the Board's final order and sanction in this matter, the State urges that the language and content of the order be presumed to have been (a) carefully and knowingly chosen; and (b) prepared consistent with the Board's statutory responsibility for protection of patients, the public, and the integrity of the profession of medicine.

II. Respondent's "Motion" Is Without Support.

6. As directed by the presiding officer, counsel for Respondent on or about March 29, 2007 filed by E-mail a "motion" with the Board. Staff of the Board forwarded a copy of this pleading to the undersigned by facsimile on March 29, 2007.

7. Respondent asks that the Board "amend" its March 20, 2007 final order "so that the twenty-day license suspension begins immediately, instead of sixty days from that date."

8. Conspicuous by its absence from Respondent's motion is any citation of law, recitation of facts, or reasoning in support of his request to alter an order of the Board that is final and effective. Compare V.R.C.P. 7(b) (motion shall be in writing and state with particularity grounds for the motion "including a concise statement of the facts and law relied on").

9. Respondent has sought to characterize alteration of a final Board order as "non-controversial", "minor", and "ministerial".² However, Respondent's motion makes no effort to explain his reasoning or his use of such terms. Respondent's motion merely asserts that the Board possesses the "inherent power" to alter an order that has been issued and become final. Yet, Respondent provides no discussion in support of his invocation of the Board's "inherent power". As such, Respondent's claim is no more than conclusory and should be denied on this ground alone.

10. Contrary to Respondent's argument that what he seeks is "minor", his request to alter the Board's order, after it has been entered and is final, raises procedural and legal questions that are far from simple.

III. The Law.

A. The Board's Order is Final.

11. Although the term "final order" is not defined in Vermont's Administrative Procedure Act, 3 V.S.A. §§ 801-849, case law has established that the test of finality "is whether [an order] makes a final disposition of the matter before the court" and disposes "of all matters that should have or could properly be settled at the time and in the proceeding before the court. In re Petition of No 152 By Central Vermont Railway, Inc., 148 Vt. 177, 178 (1987) (quoting in re Estate of Webster, 117 Vt. 550, 552 (1953)). In the instant matter, the Board's detailed Findings of Fact and Conclusions of Law; Judgment and Order in the matter demonstrate that the order is final.

2. In fact, Respondent's use of such terms appears largely inapposite and ill chosen. See e.g., Blacks Law Dictionary 899 (5th ed.): "Ministerial act. One which a person or board performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority without regard to or the exercise of his or their own judgment upon the propriety of the act being done."

12. The doctrine of res judicata provides that a valid and final judgment in favor of one party bars another action by the other party on the same claim. The United State Supreme Court has held that the doctrine of res judicata (final judgment) applies to administrative decisions. United States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (1966). According legal finality to administrative adjudication recognizes the similarity between the adjudicative procedure of administrative agencies and judicial procedure. Restatement (Second) of Judgments § 83.

13. Administrative adjudications have res judicata effect when "the proceeding resulting in the determination entailed the essential elements of adjudication" including adequate notice to the parties, the right to present evidence and legal argument, a final judgment, and accompanying procedural elements necessary to afford fair determination of the matter." Delozier v. State of Vermont, 160 Vt. 426, 429 (1993) (quoting Restatement (Second) of Judgments § 83).

14. In the instant matter, the Board's detailed Findings of Fact and Conclusions of Law; Judgment and Order conform precisely to the requirements for a "final decision or order" as set forth in the Vermont Administrative Procedure Act, including clear written findings of fact and conclusions of law and express decisions by the Board on each proposed finding submitted by the parties. 3 V.S.A. § 812(a). The Board's order also has been signed and dated by the five panel members who heard the matter, notes the date of the order's filing with the Board, and bears a "Date of Entry".

15. By statute, an order of discipline by the Board of Medical Practice is in full force and effect upon issuance by the Board. 26V.S.A. § 1361(d).

B. Motion to Alter Final Order Must Be Supported by Facts In Record; Alteration of Final Order Is Matter of Board Discretion, Not Available as Matter of Right.

16. First and foremost, Respondent possesses the right to seek relief from the Board's order by filing an appeal to the Vermont Supreme Court pursuant to 26 V.S.A. § 1367 and Board Rule 18.1. The appellate process requires litigants to cite with specificity the facts and law in support of their position and the relief sought.

17. Here, however, Respondent has chosen to return to the Board of Medical Practice and ask the Board to rewrite its final order. As noted, Respondent asserts without explanation, analysis, or authority that the Board possesses the "inherent power" to do what he asks. However, Respondent must concede that the Board may only act pursuant to the requirements of law and its own rules. The Board "has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied". Perry v. Medical Practice Board, 169 Vt. 399, 403 (1999).

18. Respondent apparently has concluded (for reasons that he has yet to articulate) that it would be better for him to serve his suspension from medical practice now rather than later. To permit this, the Board of Medical Practice must agree to rewrite its order of suspension. The Vermont Supreme Court, however, has held that a motion to amend a judgment is not intended as a basis for rewriting a final order simply because a litigant is unhappy with its content. A reviewing body may deny such a motion when its purpose is not to correct a mistake or omission by the issuing authority but rather to address a matter that the moving party neglected to address earlier in the proceedings.

19. The proper purpose of a motion to amend judgment is to permit revision, when warranted by the facts, of an initial order when "necessary to relieve a party against

the unjust operation of the record resulting from the mistake or inadvertence of the court and not the fault or neglect of a party." Rubin v. Sterling Enterprises, 164 Vt. 582, 588 (1996) (emphasis added). In the case at hand, Respondent made a tactical decision to argue to the Board only that all charges against him should be dismissed³ or that "in the alternative, that the Board of Medical Practice refuse to impose any further punishment."⁴ In short, Respondent made the choice not to address in his proposed filings of Findings and Conclusions how specifically any period of possible suspension of his license might be carried out and how this would be consistent with meeting the medical needs of his patients and his own interests.

20. Respondent's failure to address the matter of a possible suspension from practice, when he could and should have done so, is not attributable to mistake or inadvertence on the part of the Board. The failure is solely Respondent's, and there is no proper basis in the record upon which the Board now can base a decision to alter or amend its final order in this matter.⁵

C. The Finality of Judgments Protects the Board's Time and Resources by Ensuring that There Is an End to Litigation.

21. Any final order of a tribunal inevitably includes terms that one or both parties may not find to their liking. In fact, the State could have filed its own motion to

3. Respondent's Requests to Find and Conclusions of Law, November 1, 2006.

4. Respondent's Conditional Exceptions to the Hearing Committee Report, January 16, 2007.

5. Remarkably, the only "authority" Respondent cites in support of his motion is an out-of-context quotation from the State's written Exceptions to the Report of the Hearing Committee. In fact, the State requested a lengthy suspension Respondent's medical license, remedial coursework in ethics and medical record keeping, and entry of a public reprimand of Respondent for his unprofessional conduct. While the final Board order did not agree to all of these sanctions, the order included the approach of requiring that the period of license suspension begin on a date certain but after an

amend the Board's final order. The State did not to file such a motion, reasoning that the care and thoroughness of the Board's written findings and final order clearly indicated that due consideration had been given to the evidence and to the final disciplinary sanction imposed on Respondent.

22. Under Respondent's "inherent power" argument, the State also could disregard the finality of the Board's order and move for its own "minor revisions" of the order to make it more to the State's liking. For example, the State might have moved for the Board to alter its final order by merely changing the number "20" in the order of suspension to the number "40". Or the State could have moved that the suspension from practice be for a period of 20 "business" days. Or the State could have moved to reargue the decision by the Board not to discipline Respondent for his improper *ex parte* communication with a Board member.

23. The above revisions could be characterized as "minor" because they would merely require changing one number for another or inserting a new word or a short phrase. However, consideration of even so-called "minor" changes necessarily would result in the investment by the Board of further time and effort in a settled matter, with consequent distraction from other matters of importance.

24. As the United States Supreme Court has reasoned the finality of judgments "is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts." Federated Dep't Stores, Inv. v. Moitie, 452 U.S. 394, 401 (1981) (quotations omitted). The doctrine of res

intervening period that presumably would permit sufficient time for Respondent to make proper arrangements for the care of his patients during his absence.

judicata is intended to protect the hearing process from the burdens of relitigation of matters that have been settled and that are final. Enforcement of judicial determinations is essential to the maintenance of social order because the decisional process would not be followed or respected if conclusiveness did not attach to the final judgments of tribunals.

**D. A Five-Member Hearing Panel May Not Lawfully
Alter an Order of the Board that Is Final and in Effect.**

25. Even assuming there was a reasonably articulated basis for alteration of the Board's final order,⁶ the five-member hearing panel cannot lawfully take such an action. A final order of the Board may only be amended or altered by the Board acting as a body of the whole, following proper notice to the Board's members and notice to the public.⁷

E. The Lawful Role of the Panel.

26. Pursuant to statute, following an initial hearing under 26 V.S.A. § 1355(b), the Board may designate a five-member hearing panel to review the findings from the initial hearing and to take further testimony and evidence. Five members of the Board constitute a quorum only for the purposes of such a hearing.⁸ 26 V.S.A. § 1360(a). The five-member hearing panel is authorized by statute only to determine whether a Respondent is guilty of unprofessional conduct and to prepare written findings of fact,

6. At the recent hearing on this matter on March 27, 2007, counsel for Respondent argued that the Board should alter its final order as a "courtesy" to Dr. O'Rourke. In deciding the motion from Respondent, the State urges that the Board review and weigh the record regarding Respondent's conduct and his disciplinary history. Included within the record are Respondent's improper prescribing of a narcotic for a patient, his deficient medical record keeping, his unprofessional disregard of the remedial educational requirements of the Board's November 5, 2003 Stipulation and Consent Order, the Board's most recent findings of unprofessional conduct, Respondent's suspension from practice and the public reprimand for his conduct, and Respondent's failure to personally apologize or accept responsibility for his unprofessional conduct.

7. The assigned investigative committee, of course, would not be involved in this determination.

8. The Board's quorum requirement for the transaction of all other business is nine members.

conclusions, and an order of discipline and to issue these. 26 V.S.A. § 1361(a). By statute, this order, when issued, is "in full force and effect until further order of the board or a court of competent jurisdiction." 26 V.S.A. § 1361(d).

27. In sum, a five-member hearing panel has only limited authority to act for the Board and that is by hearing and receiving evidence and then issuing written findings, conclusions, and an order of discipline. This when issued is then the order of the full, legally constituted 17-member Board of Medical Practice, as appointed pursuant to 26 V.S.A. § 1351(a). Once the five-member hearing panel has issued its findings, conclusions, and order, it is without any further legal authority to take any action independently of the full Board with regard to the order. In short, a motion to amend or alter the content of a Board order that is "in full force and effect" may not be decided or acted upon by a five-member hearing panel.

28. In the interest of finality and the reasoning set forth above, the State accepts that Board's final order in this matter as already entered. The State opposes Respondent's "motion", wholly devoid of reasoning or citation of legal authority, to alter the Board's final order in this matter.⁹

F. Suspension Should Begin After 60-Day Period.

29. The State agrees with the Board's decision to include in its final order the provision that the 20-day suspension "shall begin 60 days from the date of entry" of the

8. The Board's quorum requirement for the transaction of all other business is nine members.

9. The State urges, before the Board of Medical Practice considers and decides the motion submitted by Respondent, that the Presiding Officer or counsel for the Board be requested to prepare a memorandum of law and guidance with regard to the procedure and applicable law governing possible amendment or alteration of a final Board order that already is in "full force and effect".

Board's order. The 60-day period reasonably recognizes the need for proper planning, arrangement of coverage, and advance notice to minimize adverse affects or difficulty for Respondent's patients.

30. Advance arrangements and notice to Respondent's patients and other practitioners will allow these individuals the opportunity to confer with Respondent prior to his suspension regarding chronic problems, prescribing needs, referrals, diagnostic procedures, arrangements for care, consultations, etc. As a professional with a large patient population, it is important for Respondent to have sufficient time to be able to carefully plan and prepare for the period during which he will be unable to practice, care, or prescribe for his patients. In sum, the 60-day period in advance of actual suspension from practice is well founded and protective of the best interests of patients, the public, and the profession.

G. Oral Argument Is Not Requested by the State.

31. The State does not request oral argument or a further hearing in this matter but will make itself available in the event that the Board feels further proceedings might be helpful.

WHEREFORE, the State of Vermont respectfully moves the Board of Medical Practice to consider and weigh the above reasoning and citation of authority and to deny Respondent's motion with regard to the Board's final order of discipline.

Dated at Montpelier, Vermont this 5th day of April 2007.

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STATE OF VERMONT

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