STATE OF VERMONT
BOARD OF MEDICAL PRACTICE

In re: Mitchell R. Miller, M.D. a/k/a Mitch Miller	))))	Docket No.: MPC 76-1100

STATE'S ANSWER TO RESPONDENT'S MOTION TO RECONSIDER SUMMARY SUSPENSION

The State of Vermont, by and through Attorney General William H. Sorrell and undersigned counsel, answers as follows regarding Respondent's Motion to Reconsider Summary Suspension and to Immediately Reinstate Dr. Mitchell R. Miller's License. Respondent's motion is wholly without merit. For the reasons set forth below and those that may be subsequently presented, the State urges that Respondent's motion be denied.

Background

This matter arose when the State of Vermont, on March 31, 2009, filed with the Board of Medical Practice a detailed Specification of Charges against Respondent Miller and at the same time filed with the charges a Motion for Summary Suspension of Dr. Miller's license to practice, pursuant to 3 V.S.A. § 814(c). The State's charges were detailed, specific, and addressed multiple aspects of Respondent's practice and prescribing. The charges and The Board of Medical Practice entered a detailed order of summary suspension of Respondent's Vermont medical license on April 1, 2009.

Respondent subsequently filed with the Board, on April 20, 2009, a motion requesting additional time for Respondent to answer the State's charges. The State did not oppose Respondent's motion. Notwithstanding his motion for additional time and the attendant, resulting delay, resulting delay, Respondent on April 30, 2009 filed a second

Office of the ATTORNEY GENERAL
109 State Street
Montpelier, VT
05609

motion, i.e., Motion to Reconsider Summary Suspension and to Immediately Reinstate Dr. Mitchell R. Miller's License, claiming harm to Dr. Miller if suspension of his medical license were to continue. Respondent's motion was 23 pages in length and included a Memorandum of Law, Analysis, and a copy of a fundamentally inapposite, 12-page order by a trial court judge deciding a factually distinct, non-Medical Board matter.

Respondent Miller's motion repeatedly cites case law that is readily distinguishable from the immediate facts and circumstances, cites selectively, and unhelpfully quotes at length and out of context from case law. As such, the motion as submitted is without a sound factual or legal basis and should be denied by the Board.

Memorandum

Stripped of its extended argumentation and multiple claims, Respondent's Motion to Reconsider Summary Suspension misconstrues the requirements of 3 V.S.A. § 814(c) and in essence claims (1) that the Board of Medical Practice denied Respondent due process; and (2) that the summary suspension provision of the Vermont Administrative Procedure Act is unconstitutional; and (3) that the Board's order of summary suspension in this case is defective and fatally flawed as written. Respondent's assertions are without merit.

I. THE LAW AND THE BOARD OF MEDICAL PRACTICE.

The Board of Medical Practice is an administrative body with expertise in its area of oversight. Among it duties, the Medical Board is charged by statute with adjudicating charges of unprofessional conduct. 26 V.S.A. § 1353(1). The Board is obliged to proceed in a manner consistent with the constitutional due process requirements and the law. Here,

Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609

Respondent's claim of violations of his due process rights by the Medical Board go to the very core of this stage of the present proceedings involving Dr. Miller and represent a challenge to the Board's early actions in a case in which detailed charges of unprofessional conduct have already been filed against Dr. Miller. Respondent is well aware of the charges against him, represented by counsel, and readily able to prepare for a hearing on the merits.

Respondent in his motion seeks to challenge the provisions of the Vermont Administrative Procedure Act, directing his argument to the provisions of 3 V.S.A. § 814. Respondent's challenge is baseless and hyperbolic. Section 814(c) authorizes an agency, where "emergency action" is necessary, to order summary suspension of a license "pending proceedings for revocation or other action." The statute requires that "[t]hese proceedings shall be *promptly* instituted and determined." 3 V.S.A. § 814(c) (emphasis added).

Contrary to Respondent's repetitive allegations, the statute satisfies the requirements of due process by expressly providing for a prompt post-deprivation hearing on the merits. *See Barry v. Barchi*, 443 U.S. 55, 64-66 (1979) (Due Process Clause not affronted by summary suspension without a pre-suspension hearing when a timely post-suspension hearing is provided). Here, Respondent's claims are best described as a constitutional challenge to the Medical Board's application of its rules and § 814 in his own case.

Administrative expertise of regulatory boards, such as the Medical Board, plays a crucial role in constitutional adjudication. Agency expertise assists in the development of facts and in the construction of applicable statutes and rules. *Travelers Indemnity Co. v. Wallis*, 176 Vt. 167, 173-175 (2003). Moreover, constitutional claims, such as here, involve a board or agency having to weigh competing interests. *Id.* at 174.

Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609

Respondent seeks reversal of the Board's decision in his case and it order of summary suspension of his medical license. If the Board denies that, his motion seeks to require the Board to provide a second summary suspension hearing. Respondent asserts, "due process requires the State to provide a meaningful pre-suspension hearing". Respondent, however, is unable to identify any clear citation of Vermont authority for this point.

The Medical Board's authority and responsibilities are defined by law. The Board of Medical Practice has express authority to "[i]nvestigate all complaints and charges of unprofessional conduct against any holder of a license or certificate, or any medical practitioner practicing pursuant to section 1313 of this title, and to hold hearings to determine whether such charges are substantiated or unsubstantiated." 26 V.S.A. § 1353(1). The Board also has related authority to issue subpoenas, administer oaths, take or cause depositions to be taken, require licensees and applicants to submit to examinations, and "[u]ndertake any such other actions and procedures specified in, or required or appropriate to carry out, the provisions of this chapter." *Id.* § 1353(1)-(5). The Board's decisions are appealed to the Vermont Supreme Court. 26 V.S.A. § 1367. The Board's actions and decision-making do not occur in secret and are subject to public and legal scrutiny.

Respondent's claim of egregious and improper deprivation of his right to due process cannot withstand close scrutiny. Respondent received by mail notice of the State's charges of unprofessional conduct and the State's motion for summary suspension as required by statute. 3 V.S.A. § 814(c). The Medical Board determined based on the State's pleadings, the attached affidavit of it investigator, and from testimony of the investigator

Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609

that the "public health, safety, and welfare imperatively requires emergency action" and incorporated an express finding on this point in summarily suspending Respondent's medical license. 3 V.S.A. § 814(c). The State agrees that the summary suspension statute requires the Board to provide a prompt post-suspension hearing.

A. Under Vermont Law, the Board of Medical Practice Acted Properly In Ordering the Summary Suspension.

Given the steps taken by the Board, Respondent cannot state a claim for violation of his right to due process based on the summary suspension of his medical license. Respondent incorrectly claims that the Board suspended his license without a hearing and implies that this occurred "in a closed meeting", and "in secret proceedings", with no recourse to ensure a mistake has not been made.

In fact, the Board did provide a hearing on the State's summary suspension motion, one consistent with statutory requirements, and after deliberation made the required finding regarding the need for emergency action. The Board's detailed written decision and order make clear that the order of summary suspension was carefully considered and determined. Respondent, nonetheless, claims that the Board's pre-suspension hearing was inadequate to meet the demands of due process. Respondent, however, fails to cite for the Board clear authority in support of this claim, with regard to the field of professional regulation. Respondent, nonetheless, appears to urge that due process will always require a full-blown, pre-deprivation, pre-suspension hearing.

Due process, however, has been held to be far more "flexible" concept than Respondent would seek to claim. *See Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). The demands of due process vary based on the nature of the private interest at stake, the nature of the government's interest, and the quality of the existing procedures, including the risk

Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609

of erroneous deprivation and the probable value, if any, of additional or different procedures. *Id.* at 334-35. *And see also Barry v. Barchi*, 443 U.S. 55, 64 (1979) (rejecting contention that summary suspension always requires pre-suspension hearing).

Here, the Medical Board had before it serious allegations that Respondent Miller was prescribing large quantities of high strength narcotics for patients without adequate medical evaluation, supervision of patient use of these drugs, or proper medical record keeping. Records of narcotics prescribing were alleged to be entirely missing. This misconduct and improper care of patients was alleged to have been repeated, frequent, and current.

The State also alleged that Respondent failed to show proper professional attention and concern with regard to possible drug abuse, drug seeking, and adverse patient side effects, including dependency. Testimony at hearing established that Respondent's prescribing of narcotics was ongoing over time and continued up to the eve of the Board's suspension hearing.

The Board's decision to hold a hearing immediately and proceed in light of the State's charges, the investigator's affidavit, and the hearing testimony was reasonable, given the overriding government interest in public health and safety. Numerous cases that address the requirements for pre-suspension process support the propriety of the Board's action in this case. As the Eighth Circuit has pointed out, the available pre-deprivation and post-deprivation procedures must be considered together when assessing a due process claim such as this one. The Court explained:

> Assess[ing] the risk of an erroneous deprivation and the probable value of additional procedural safeguards. . . . involves consideration of both the predeprivation and postdeprivation procedures utilized here. In general,

Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609

> "something less" than a full evidentiary hearing has been held sufficient prior to adverse administrative action. An assessment of the adequacy of predeprivation procedures depends on the availability of meaningful postdeprivation procedures.

Winegar v. Des Moines Indep. Community Sch. Dist., 20 F.3d 895, 901 (8th Cir. 1994). Here, it is undisputed that the Board by statute is required to offer Respondent a prompt post-suspension hearing on the merits of the State's charges against him. These charges have already been filed by the State of Vermont. In fact, it bears repeating that the State's charges were filed contemporaneously with its motion for summary suspension. It should be noted that the record as yet includes no request from Respondent for the prompt evidentiary hearing on the charges against him, a hearing that is due to him by law. 3 V.S.A. § 814(c). The hearing on the State's charges would be conducted as a contested case under the Vermont Administrative Procedures Act, complete with the right to cross-examine witnesses and challenge in full the State's case and allegations.

Where, as here, the government offers a full-fledged post-deprivation hearing, a less formal pre-deprivation hearing is acceptable. *See, e.g., D'Acquisto v. Washington*, 640 F. Supp. 594, 615 (N.D. Ill 1986) ("Roughly, the more complete the process at the later stage, the more informal the earlier stage process can be. . . . [T]he existence of a later hearing replete with procedural protection means that the first stage can be far less thorough.") This principle is drawn from, and fully supported by, the United States Supreme Court's decisions on administrative due process. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985) (requirements for pre-termination hearing may vary depending on interests at stake and nature of subsequent proceedings; something less than full evidentiary hearing is sufficient prior to adverse administrative action); *Mathews*, 424 U.S. at 340-45, 348-49 (due process standard permitted initial termination of disability benefits based on

Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609

written response of recipient, where recipient had right to post-termination evidentiary hearing). As a matter of law, and given the Medical Board's duty to provide a prompt, full-fledged evidentiary hearing on the State's charges, nothing more was appropriate than the hearing that occurred prior to the Board's order of summary suspension.

The United States Supreme Court's decision in *FDIC v. Mallen*, 486 U.S. 230 (1988), is instructive. In *Mallen*, the Supreme Court upheld the FDIC's summary, pre-hearing suspension of a bank president indicted on criminal charges. The Court found the suspension was justified by the government's objective and interest in protecting depositors and maintaining "public confidence in our banking institutions." *Id.* at 241.

B. The Board's pre-suspension hearing and availability of a prompt post-suspension hearing satisfy the requirements of due process.

To the extent plaintiff argues that he is entitled to a post-deprivation hearing that is focused solely on the summary suspension proceedings, not the merits of the charges against him, he is wrong as a matter of law. Nor do the facts support him.

Respondent's medical license was suspended on April 1, 2009. Some twenty days passed thereafter without action by Respondent to seek a hearing on the State's charges or respond to them in any way. On April 20, 2009, Respondent requested not a hearing but, rather, 45 additional days to provide a written answer to the State's charges. Respondent's request for more time, and the confusing signals it conveyed, are at odds with his claims of a denial of due process.

It is undisputed that Respondent by law is due a prompt post-deprivation hearing to contest the charges against him.

The Board suspended respondent's license on April 1, 2009. The State filed charges of unprofessional conduct on March 31, 2009 with its motion for summary suspension. In

Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609

the intervening days, Respondent, however, has requested neither a pre-hearing conference nor a prompt date for an evidentiary hearing before the Board. Instead, Respondent has filed a motion that essentially is a distraction and a backdoor effort to obtain a second summary suspension hearing, with the hope of a different outcome. Respondent apparently feels he is entitled to a second hearing, after the suspension of his license, where he could avoid litigation of the merits of the charges against him but, instead, could contest the propriety of the Board's action of summary suspension. This notion fails for three reasons.

First, as argued above, plaintiff received pre-deprivation process, i.e., a hearing on the State's motion and a written determination by the Board. The prosecutor presented the State's charges and the Board investigator provided an affidavit and testimony. The Board considered the State's charges and made the statutorily required findings regarding the imperative need for action to protect the public health, safety, and welfare by suspending Respondent Miller's Vermont medical license pending further proceedings before the board. The Board's hearing was pre-deprivation less formal than a merits hearing, but it satisfied the due process requirements relating to summary suspensions.

Respondent's attempt to obtain a second hearing on the matter of the summary suspension should be denied. Having provided a pre-suspension hearing with a prompt hearing on the merits being available, Respondent cannot now claim that he has a due process right to a second, time-consuming post-deprivation hearing that focuses solely on the summary suspension, as opposed to seeking a hearing on the merits. None of the cases cited by plaintiff support the claim he seeks to assert.

Office of the ATTORNEY GENERAL
109 State Street
Montpelier, VT
05609

Barry v. Barchi, 443 U.S. 55 (1979), a principal case on which plaintiff relies, did not even consider the issue. In *Barchi*, the State summarily suspended a horse trainer's license for 15 days without a prior hearing of any kind. The Court upheld the summary suspension, but found the post-suspension process inadequate, because neither state law nor the regulatory body assured a sufficiently prompt post-suspension hearing. *Id.* at 66. The Court found it likely that the trainer would suffer the full penalty of suspension before having an opportunity to put the State to its proof at a post-suspension hearing. *Id.* The Court in no way suggested that a post-suspension hearing could be limited to the propriety of the initial summary suspension, as opposed to a hearing on the merits of the charges. *See id.* at 66.

As the Court held in *Barchi*, due process requires that a hearing be held at a meaningful time and in a meaningful manner. 443 U.S. at 66. As a matter of law, the availability of a prompt hearing on the merits of the charges filed against Respondent fully satisfies this standard.

C. There is no basis for reinstatement of Respondent Miller's license to to practice medicine before the merits hearing on the State's charges.

Respondent's claim that the Medical Board has an obligation as a matter of due process to reinstate (or "unsuspend") his Vermont medical license is meritless. Contrary to Respondent's allegations, the Board can be presumed to be able consider fairly Respondent's due process claims, in light of the public protection requirements of 3 V.S.A. § 814(c). Respondent's motion and its allegations regarding the Board's process are aimed solely at the Board's functions, decisions, and actions as an adjudicative body. However, the manner in which the Board adjudicates charges of unprofessional conduct and responds to misconduct and emergency circumstances is a responsibility granted to the

Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609

Board by the legislature. Under 3 V.S.A. § 814(c), however, the Board has no authority to "narrowly tailor" its summary order. Under the statute the Board may only enter summary suspension of a license when it finds protection of the public health, safety, and welfare requires emergency action.[1]

D. It is Well-Settled that the Standard of Proof for Suspension of a Professional License in Vermont Is Preponderance of the Evidence, Not Clear and Convincing, As Claimed by Respondent.

In 1997 in an act, entitled "An Act Relating to Efficiency in the Regulation of Professions and Occupations", the legislature codified an express provision that the "burden of proof in a disciplinary action shall be on the state to show by a preponderance of the evidence that the person has engaged in unprofessional conduct."[2] (Emphasis added.) Subsequently, in 1999, the Vermont Supreme Court heard a case addressing the evidentiary standard for professional licensing actions but rejected the contention that professional discipline is a quasi-criminal process that required either the clear and convincing or beyond a reasonable doubt standards. *In re Smith*, 169 Vt. 162, 171-172 (1999).

In *Smith*, the Vermont Supreme Court recognized that the licensee, a nurse, "has a substantial interest in maintaining her license, and thus her livelihood" but reasoned that suspension is not a permanent bar to professional practice and professional disciplinary action offer written charges and the opportunity for an evidentiary hearing as procedural

---

1. This case is not akin to *Fuentes v. Taylor*, 407 U.S. 67 (1972) or *DiBlasio v. Novello*, 344 F.3d 292 (2d Cir. 2003), in which the government provided no pre-deprivation process whatsoever and no oversight. To the extent *Fuentes* requires a summary deprivation imposed without prior hearing to be "narrowly drawn," that standard does not apply here. *Cf.* 407 U.S. at 91, 93 (seizures of property without prior hearing may be constitutional under some circumstances, but government official must act pursuant to narrowly drawn statute and determine seizure is necessary and justified).

2. At the time of passage, the Board of Medical Practice was part of the Office of Professional Regulation, under the Vermont Secretary of State.

Office of the ATTORNEY GENERAL
109 State Street
Montpelier, VT 05609

protections. *Id.* The Supreme Court, however, emphasized that the purpose of professional regulation is "safeguarding the 'life and health of the people of the state'." *Id.* at 172 (citing 26 V.S.A. § 1571). Respondent's claim that the clear and convincing standard of evidence is required in summary suspension proceeding is simply wrong and wholly unsupported by any citation to Vermont law.

II. ANALYSIS.

A. Respondent's Claim that the State's Charges Involve Only "One Small Aspect" of Respondent's Practice and there Was No Basis for Summary Suspension Is Factually Wrong and Self-Serving.

The detailed, carefully crafted Summary Decision and Order issued by the Board of Medical Practice in this matter clearly establishes that the unprofessional conduct that Respondent is alleged to have engaged in is far from *de minimis* and, in fact, implicates the substandard core skills, knowledge, and conduct on Respondent's part that reasonably can be found to endanger patients and the public. See Decision and Order at 2 and 4. In fact, the Board's decision identified seven distinct factual allegations that if proven "would show Respondent as a physician [ ] abuses his professional privileges", including: narcotic prescribing without adequate evaluation and documentation; failure to consider possible narcotics dependency and adverse side effects on patients; ignoring possible drug seeking, drug abuse, and drug diversion by patients; failure to abide by detailed commitments made to the Board regarding his prescribing of narcotics, and making false or misleading statements to the Board during its investigation. Further, Respondent's misconduct was alleged to be current, not distant in time. Decision and Order at 2.

Reading the language of the Board's decision side-by-side with the State's detailed charges, it is clear that the Board identified specifically from the allegations, the affidavit,

Office of the ATTORNEY GENERAL
109 State Street
Montpelier, VT 05609

and the testimony on April 1, 2009 the "facts or conduct which warrant the intended action" and found on that basis that protection of the "public health, safety, and welfare imperatively requires [the] emergency action of summary suspension" pending prompt further proceedings before the Board. See 3 V.S.A. § 814(c).

Respondent's assertions regarding the fact-finding by the Board's decision put the cart before the horse. To require that the State's allegations actually be proved during a summary suspension hearing would turn a protective, emergency proceeding into a full-blown merits hearing, undercutting the Board's ability to act quickly to protect the public in the face of serious allegations of misconduct and harm. In fact, at the merits hearing stage, Respondent will be able to put the State to its proof, challenge documentation, cross examine witnesses, present his own evidence, and fully contest each and every one of the State's charges.

The Board's decision and summary suspension order set out with clarity the two-stage analysis that the Medical Board undertook regarding the factual allegations against Respondent. Decision and Order at 3. First, the Board determined that the alleged conduct, if proven, "would be sufficiently egregious to support a decision to revoke or suspend the Respondent's license, pursuant to 26 V.S.A. § 1361(b)." Decision and Order at 4. Next, the Board determined from testimony that the alleged misconduct was current and then "considered whether the continuation of Respondent's alleged prescribing practices and other areas of substandard care were sufficiently inimical to the public health, safety, and welfare to require emergency action". *Id.* The Board expressly found that Respondent's alleged practices "could threaten the public in a number of ways" and identified these in the decision. Decision and Order at 4. Finally, the Board found that

Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609

Respondent's professional history suggested that the Board could not rely on Respondent to "cease his course of alleged unprofessional conduct." In sum, the Board's decision and order is clear, detailed, and specific in identifying the factual basis for its finding that emergency action was imperatively required to protect the public health, safety, and welfare. The Board's written decision and order fully satisfies and conforms to the requirements of 3 V.S.A. § 814(c).

B. The Facts and Reasoning of *In re Myer*, that Respondent Relies Upon, Are Readily Distinguishable from the Board's Summary Suspension of Respondent Miller.

In re Myer, the lower court decision, on which Respondent relies, turns upon the court's finding that the Board of Pharmacy summarily suspended the license of a pharmacist based on "two incidents that [had] occurred approximately three years before the summary suspension". *In re Myer*, Docket No. 140-2-07Wnev, at 10. The court found there was no allegation of continuing violations on the part of the pharmacist. *Id.* The court found accordingly, that there was no evidence of possible immediate harm and, thus, no basis for emergency action to be found to be imperatively required. *Id.*

In light of the court's own finding that emergency action was not imperatively required, the court held that the Pharmacy Board then was required to proceed by means of "ordinary" (i.e., non-summary suspension) hearing procedures. *Id.* at 15. For instance, adequate notice was found not to have been provided to the pharmacist—attempted mail delivery to him had been unsuccessful. *Id.* at 14-15. In an "ordinary" hearing, the board would be required to make further efforts to provide notice. *Id.* at 15 (emergency action by Board does not require notice). The court explained, "The rule is different in cases where the public health, safety, and welfare 'imperatively requires emergency action'." *Id.* at 9.

Office of the ATTORNEY GENERAL
109 State Street
Montpelier, VT
05609

Here, the summary suspension of Respondent Miller's license was fully warranted and imperatively required in light of the specific serious misconduct and substandard care alleged by the State. The Board of Medical Practice made the findings required to support its summary suspension of Respondent's Vermont medical license, pending the further proceedings before the Board that are required to "be promptly instituted and determined." 3 V.S.A. § 814(c).

There is no statutory language providing for a second summary suspension hearing. Any hearing on the motion that has been filed by Respondent would inevitably be duplicative of evidence that would be presented during a disciplinary hearing, pursuant to 26 V.S.A. §§ 1355—1361 & 1398 and would be contrary to the interests of judicial economy. In fact, it actually would delay the hearing on the charges against Respondent. The specification of charges as to alleged unprofessional conduct by Respondent has already been filed by the State provides detailed notice to him of the State's allegations.

III. CONCLUSION.

The summary suspension of Respondent by the Board of Medical Practice fully accords with his due process rights under Vermont law and the Constitution. Notwithstanding the hyperbole that appears throughout Respondent's motion, there is no effort afoot to "destroy his career" or deprive him of his livelihood. Respondent must concede that he practices within a regulated profession and that his profession requires that practitioners adhere to standards and commitments regarding the care of patients. The State has alleged in specific detail that Respondent has failed to practice in a manner consistent with professional standards and that his shortcomings and misconduct are serious and represent a danger to patients and the public. As required by law, Respondent

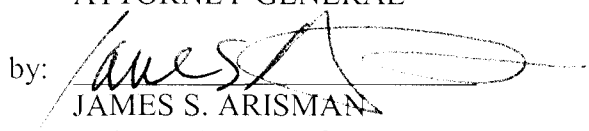
Office of the ATTORNEY GENERAL
109 State Street
Montpelier, VT 05609

will have the prompt, full opportunity to contest the State's charges and to "show his compliance with all lawful requirements for retention of [his medical] license". As such, the Board of Medical Process has provided the due process that is required at this stage.

Dated at Montpelier, Vermont, this 5th day of May 2009.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

by: 
JAMES S. ARISMAN
Assistant Attorney General

Office of the ATTORNEY GENERAL
109 State Street
Montpelier, VT
05609