

**STATE OF VERMONT
BOARD OF MEDICAL PRACTICE**

In re: Mitchell R. Miller, M.D.
a/k/a Mitch Miller

)
)
)
)

Docket No.: MPC 76-1100

**AUTHORITY OF MEDICAL BOARD ACTING UNDER
SUMMARY SUSPENSION PROVISIONS OF 3 V.S.A. § 814(c)**

The State of Vermont, by and through Attorney General William H. Sorrell and undersigned Assistant Attorney General James S. Arisman, files this Memorandum with the Vermont Board of Medical Practice, at the request of the Board through its procedural order of May 7, 2009.

MEMORANDUM

The Medical Board's May 7, 2009 procedural order requested written briefing as to the "authority [of the Board of Medical Practice] to summarily issue limitations on a respondent's [medical] license rather than a complete suspension of the license." In response, the State provides the following.

1. Under the summary suspension provisions of the Vermont Administrative Procedure Act (V.A.P.A.), State boards and commissions may order "summary suspension of a license", but only if "the agency finds that public, health, safety, or welfare imperatively requires [such] emergency action". 3 V.S.A. § 814(c). When summary suspension of a license, an agency is required an agency must (a) incorporate an express finding that emergency action is imperatively required; and (b) promptly institute proceedings for revocation or other action against the license. 3 V.S.A. § 814(c).

2. The provisions of the Administrative Procedure Act are general in application and govern the actions of State agencies, including the Board of Medical

Practice. See Board Rule 1.4 (identifying “Laws that Govern the Board”). The summary suspension provisions of 3 V.S.A. § 814(c) provide State agencies the power to order “summary suspension of a license” in emergency circumstances, with prompt “proceedings for revocation or other action” required to follow. The statute includes no express or implied authorization for an agency to take either greater or lesser action than “summary suspension” or to take some other form of action as an alternative to suspension.

3. As one example, the Vermont Supreme Court recently reviewed an action by the State Department of Education in which the Department withheld from a licensee the “paper copy” of her professional educator’s license because the Department had concluded that she might not be competent. *In re J.H.*, 958 A.2d 700 (2008). The Court found this unilateral action “arbitrary” and wrote, “If the Department believed that J.H. posed an immediate risk, then it could have availed itself of the summary suspension procedure set forth in the statute.” *Id.* at 706 (citing 3 V.S.A. § 814(c)). The Court’s decision held that the Education Department could not ignore the provisions and the steps required under 3 V.S.A. § 814(c) and, instead, simply impose an alternative, interim remedy of its own choosing.

4. The Board of Medical Practice as an administrative body “has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers as are expressly granted or necessarily implied as are necessary to the full exercise of those granted.” *Perry v. Medical Practice Board*, 169 Vt. 399, 403 (1999) (citing *Trybulski v. Bellows Falls Hydro-Elec. Corp.*, 112 Vt. 1, 7 (1941); accord *In re Professional Nurses Serv.*, 164 Vt. 529, 534 (1996).

5. The Medical Board possesses the express powers to investigate complaints and charges of unprofessional conduct and “to hold hearings to determine whether such charges are substantiated or unsubstantiated.” 26 V.S.A. § 1353(1). If following hearing, the Board finds that a licensee is “guilty of unprofessional conduct”, it possesses the express authority take disciplinary action and to “reprimand . . . condition, limit, suspend, or revoke the license.” 26 V.S.A. § 1361(b).

6. The Medical Board also possesses the express authority to suspend, revoke, or refuse a medical license after a hearing and finding of unprofessional conduct under 26 V.S.A. § 1398. In sum, the power to sanction a medical license, as conferred upon the Vermont Board by the legislature in its authorizing statute, is limited to those circumstances in which a finding of unprofessional conduct has been entered by the Board. Or, alternatively, where the Board imposes a disciplinary sanction, under 26 V.S.A. § 1361(b), by agreement of the parties and *in lieu* of the filing of formal charges, an evidentiary hearing, and formal findings and conclusions as to unprofessional conduct.

7. The Board’s disciplinary powers (such as the power to condition or limit a medical license) are authorized in Chapter 23 of Title 26 of the Vermont statutes. Nowhere within the Board’s statutory powers in Chapter 23 is their express or implied authority for the Board to take summary action against a physician’s medical license. The Board’s Rules, in fact, expressly describe the steps that must be followed in summary suspensions:

Summary Suspension: the [investigative] committee may find that certain alleged misconduct poses so grave a threat to the public health, safety, and welfare that emergency action must be taken. In such a case, the committee will request a special meeting of the hearing panel, and recommend that the Board order summary suspension of the respondent’s license, pending a hearing under the authority of 3 V.S.A. § 814(c). If the Board orders summary suspension, a hearing will be scheduled as soon as practical, and the assistant general will present the case against the suspended licensee.

Board Rule 15.1(d). It should be noted that the Board Rule for summary suspension includes no language or provision contemplating or authorizing the Board to may take any action other than ~~suspension~~ following a recommendation for the emergency action of summary suspension if the Board agrees with its investigative committee. The Board Rule for summary suspension refers only to 3 V.S.A. § 814(c) and not to any provisions of the Board's own statute, e.g., 26 V.S.A. § 1361(b). Finally, an administrative body's rules may not add to, detract from, or modify the statute that they are intended to implement. *In re Strandell* 132 N.H. 110, 119 (1989).

8. The legislature established the summary suspension procedure set forth in 3 V.S.A. § 814(c) as the mechanism for State agencies to protect the health, safety, or welfare of the public in circumstances in which emergency action is required to accomplish this end. If an agency determines that emergency action is required, the only action that is authorized less than 3 V.S.A. § 814(c) is summary suspension, to be followed by a prompt evidentiary hearing on the charges filed against the licensee. An agency may not, however, proceed under 3 V.S.A. § 814(c) but then choose to fashion and impose its own preferred alternative to summary suspension. The statutory language of 3 V.S.A. § 814(c) does not provide State agencies this discretion, nor is anything implied within 3 V.S.A. § 814(c) to suggest that agencies may assume such discretion. The reasoning that underlies the statute's provisions is that emergency circumstances warrant the imposition of a summary suspension to fully protect the public. The prompt hearing that follows provides the respondent the opportunity to challenge the State's evidence, cross-examine witnesses, and present his own side of the story.

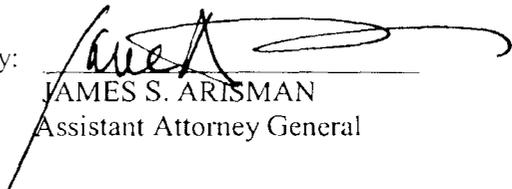
9. In sum, the authorities under discussion here appear in two different titles within the Vermont statutes and are intended to serve different purposes. The Medical Board's authority to discipline licensees appears in 26 V.S.A. § 1361(b) & § 1398 and is intended to empower the Board to regulate the profession of medicine. The summary suspension provisions that appear separately, within the Vermont Administrative Procedure Act, are a general authority granted to agencies and intended to permit swift intervention for the protection of the health, safety, and welfare of the public. The Medical Board under its own powers may conduct hearings on charges of unprofessional conduct and, if warranted, impose disciplinary action (that might include limiting or conditioning a medical license). However, under the Administrative Procedure Act, summary action pursuant to 3 V.S.A. § 814(c) must follow the express two-step procedure set forth in the statute: a) summary suspension; and b) a prompt evidentiary hearing for revocation or other action.

Dated at Montpelier, Vermont, this 15th 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