

**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 AND OPPOSITION TO
RESPONDENT'S LETTER MOTION TO AMEND
MEDICAL BOARD'S PROCEDURAL ORDER**

The State of Vermont, by and through Attorney General William H. Sorrell and undersigned counsel, answers as follows and opposes Respondent's motion to amend the procedural order, dated May 7, 2009, issued by the Presiding Officer for the Board of Medical Practice, following hearing on Respondent's earlier-filed motion for reconsideration of the Board's summary suspension order. Respondent's motion should be denied without hearing for the reasons set forth below and those that may be subsequently presented.

I. Background.

1. This instant 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. The State, based on the gravity of the circumstances, filed at the same time a Motion for Summary Suspension of Dr. Miller's license to practice medicine, pursuant to 3 V.S.A. § 814(c). The State's motion was supported by an investigator's affidavit and testimony of the investigator. Moreover, the State's charges against Respondent were detailed, specific, and addressed multiple deficient aspects of Respondent's practice and narcotic prescribing.

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

2. Following hearing on April 1, 2009, the Board of Medical Practice entered its detailed order summarily suspending Respondent's Vermont medical license and making the findings required by statute.

A. Respondent's First and Second Motions.

3. Subsequently Respondent 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, Respondent on April 30, 2009 then filed another 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.

4. The Board of Medical Practice on May 6, 2009, heard Respondent's motion to reconsider, receiving lengthy argument by counsel for the parties and receiving a supplemental affidavit from the Board investigator.

5. Subsequently, on May 7, 2009, the Board's Presiding Officer issued a detailed order for the Board under the heading, "Procedural Order on Respondent's Motion to Reconsider Summary Suspension and to Immediately Reinstate Dr. Mitchell R. Miller's License". The Board's procedural order deferred decision on Respondent's motion to reconsider. The Board's procedural order stated that the Board "wished to take testimony on certain limited issues", The Board procedural order set a date for further hearing on May 20, 2009 "to hear limited testimony" on specific matters identified within the order.

B. Respondent's Third Motion.

6. Notwithstanding the limited scope and purposes carefully identified by the

Board procedural order, Respondent on May 12, 2009 filed yet another motion by letter addressed to Board Director Wargo. This motion, Respondent's third, seeks to substantially amend the Board's procedural carefully written order. Subsequently, the Board Director responded to Respondent's letter of May 12, 2009. Respondent's counsel on May 13, 2009, apparently not satisfied, wrote two additional letters to Board Director Wargo regarding particulars relating to the hearing scheduled for May 20, 2009.

II. Memorandum.

A. Respondent's Letter Motion and Correspondence Has Been Misfiled.

7. Respondent by letter directed to the Board Director, William Wargo, moved to amend the Board's May 7, 2009 procedural order. Respondent's motion to amend the order was filed in the form of a letter to Board Director William Wargo and sought various specific points of amendment. For example, Respondent requested that the hearing be expanded to permit him to call witnesses at the hearing, in addition to testifying himself.

8. Respondent's motion has been wrongly filed. Director Wargo has no statutory authority to provide anything that Respondent seeks. He possesses no authority to amend an order or decision of the Board of Medical Practice or to act on any of Respondent's various claims. *See* 26 V.S.A. §§ 1351 & 1353 (describing board appointments, organization, and powers of Board). Further, the Board Rules identify no decisional role for the Board director in adjudicative matters.

9. Director Wargo, nonetheless, provided a written response to Respondent's motion, attempting to clarify subjects identified in Respondent's motion. Further, Director Wargo promptly provided all documentation requested by Respondent.

10. For the record, it is the State's position that nothing in Director Wargo's responsive letter to counsel should be understood to constitute in any way revision of the Board's May 7, 2009 procedural order, as it was issued to the parties.

**B. Respondent's Motion to Amend the Board's
Order Fails to Identify a Factual or Legal Basis.**

11. Respondent bears the burden with regard to his motion to amend the Board's procedural order. Respondent's motion to amend the Board's procedural order fails to provide facts, reasoning, or citation of legal authority. If Respondent objects to the Board's procedural order as written, his motion should be properly filed with the Board and should explain the basis for his objections and cite any legal authority in support. Respondent has not bothered to do this. As such, Respondent's motion to amend should be denied without hearing or further briefing.

12. Moreover, if the Board were to agree to permit Respondent to re-file his motion, such a step would pointlessly delay the proceedings involving Respondent's medical license and, most importantly, impinge on the Board's ability to manage its own docket, time, and resources.

13. The Board's written order as issued reflects the procedure that the Board established with regard to Respondent's motion for reconsideration of its summary suspension of his medical license, as determined during its deliberations. The Board's procedural order was carefully written and intended to guide the subsequent handling of Respondent's motion for reconsideration of the Board's original suspension decision. The Board's procedural order makes clear that the Board wishes only "to take testimony only on

certain limited issues” and that only “limited testimony” is to be received at the hearing. (Emphasis added). Respondent’s motion seeks to reverse these limitations.

**C. Respondent’s Motion to Amend the Board’s Written
Procedural Order Is Inconsistent with Prompt Resolution
of the Charges Against Respondent and Judicial Economy.**

14. It is important to emphasize that the Board’s May 7, 2009 procedural order was issued only after protracted written briefing by both parties, extended oral argument before the Board, and lengthy deliberation.

15. The Board already has invested substantial time, effort, and attention regarding its order of summary suspension of Respondent’s medical license. Respondent’s present efforts to amend the Board’s procedural order represent a further attempt by him to complicate and convolute the clear, straight-forward statutory procedure that the Vermont legislature has established to protect the public health, safety, and welfare. 3 V.S.A. § 814(c). No court has ever declared this statute to represent a denial of due process or to be unconstitutional.

16. Respondent initiated this strategy of complication and convolution by filing a fulsome, 23-page Motion to Reconsider Summary Suspension. The motion made numerous claims of factual errors in the State’s charges and asserted at length claims of Respondent’s innocence of any unprofessional conduct. Respondent argued that the Board had failed to make required findings and asserted that Respondent’s continued practice of medicine would not constitute an emergency.

17. Respondent’s motion went on to assert claims of “serious deprivations of Dr. Miller’s due process rights” by the Board. Despite the gravity of these claims, Respondent

could not cite for the Board any Federal, Vermont, or other state case law clearly stating or standing for the proposition that the summary suspension procedures of 3 V.S.A. § 814(c) that were followed by the Board violate due process.¹

18. Nonetheless, the Board now finds itself on the eve of a third hearing regarding Respondent. Respondent has asserted, without citation of authority, that he is entitled to a second summary suspension hearing at which he will have the opportunity to litigate the propriety of the Board's original decision to enter summary suspension of his medical license. The State's position is that such a hearing is neither warranted nor required. However, the State understands and accepts that the Board has chosen to proceed in this manner.

19. Respondent, nonetheless, by motion now seeks to expand the May 20, 2009 hearing. In addition to his own possible testimony, Respondent also seeks "to present other witness to respond to the matters referenced in Investigator Ciotti's testimony and affidavits." Respondent has provided no indication of who such witnesses would be or explain the relevance their testimony. In fact, what Respondent seeks is a kind of "hearing creep" in which the public protection purposes of a swift summary suspension proceeding are undermined, with the result that the limited pre-deprivation hearing becomes more and

1. In fact, many of these same claims and arguments were considered by the Board in *In re Chase*. There the Board wrote in deciding a motion filed by Respondent Chase, "The rights provided under the [Vermont Administrative Procedure Act—3 V.S.A. § 809-815] and the preponderance of evidence burden of proof placed on the State comply 'with the constitutional process due to the Respondent.'" *In re Chase*, State of Vermont Board of Medical Practice, Docket No. MPC 15-0203, Decision on Respondent's Motion to Reinstate License and Dismiss Superceding Specification of Charges, March 31, 2004 (citing *In re Smith*, 169 Vt. 162, 172 (1999)).

more entangled in multiple hearings, motion practice, correspondence, and further consumption of Board time and resources.

20. Respondent now seeks to present testimony from additional witnesses. As such, what Respondent seeks would further move the Board's time and resources in the direction of an unplanned, unintended merits hearing on the charges that have been filed. This is inconsistent with the requirements and purpose of the summary suspension statute, 3 V.S.A. § 814(c), and does harm to the Board's ability to regulate the profession and protect the public and damages the perception that the Board's decisions and orders are final and may be relied upon.

D. The Board's Procedural Order Should Not Be Amended. The Limited Purposes of the May 20, 2009 Hearing Should Not Be Expanded.

21. An administrative body, such as the Board of Medical Practice, has discretion in regulating the course of its own adjudicative proceedings in a manner intended to control and expedite its proceedings. Exercise of that discretion is particularly important in the present circumstances. Here the Board has proceeded with care. The Board has chosen to offer Respondent an unrequired, post-deprivation hearing and, further, has clearly identified the parameters of such a hearing. Nonetheless, Respondent now wishes to rewrite the Board's procedural order and call additional, undisclosed witnesses.

22. The Board as an administrative body should be concerned as to the finality of its decisions and the unbridled consumption of its own time and resources. If the May 20, 2009 hearing is to be expanded as Respondent seeks, the State, of course, in response will file its own motions and would seek at least the following: (a) to call Respondent Miller as a

State witness; (b) to call its own additional witnesses for the State with relevant testimony and information; and (c) introduce further documentary evidence relating to Respondent's misconduct. It goes without saying that this kind of motion practice by both counsel will consume substantial time and resources of the Board without in any way providing the "prompt" hearing on the merits of the State's charges that is required under the provisions of 3 V.S.A. § 814(c).

23. It is notable that Respondent has filed procedural motions and various writings but has yet to request the prompt hearing on the merits that is due him under 3 V.S.A. § 814(c). Each of the motions filed by Respondent has consumed the Board's time and resources while placing in doubt the finality of the Board's reasoning and decision on April 1, 2009 to summarily suspend Respondent's medical license. In fact, Respondent would rather divert attention and engage in elaborate and protracted proceedings regarding the propriety of the Board's original summary suspension order instead of proceeding to the hearing on the merits of the State's charges of unprofessional conduct. Nonetheless, it is precisely this prompt hearing on the merits of the State's charges that provides Respondent due process under 3 V.S.A. § 814(c). At that prompt evidentiary hearing, the State will present its witnesses and documentation, and the State's charges will be put to the test. Respondent will have the opportunity to present his side of the story. All witnesses will be under oath and subject to cross-examination in a well-ordered, evidentiary proceeding, consistent with statutory requirements and the Board's rules.

24. It should be noted again that the Board already has provided a hearing on the State's summary suspension motion, a hearing that was and is consistent with statutory

requirements. After deliberation, the Board made the statutorily required finding regarding the need for the emergency action of summary suspension of Respondent's medical license. 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.

E. Emergency Action to Protect Public Health, Safety, and Welfare.

25. In fact, the State's detailed specification of charges against Respondent, the attached affidavit, and testimony received by the Board all provide the basis for the reasonable inference by the Board that protection of the public health, safety, and welfare required the emergency action of summary suspension. 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 the patients' use of these drugs, or proper medical record keeping. Many records of narcotics prescribing were alleged to be entirely missing. This misconduct and improper care of patients by Respondent was alleged to have been repeated, frequent, and contemporaneous. The State also alleged that Respondent failed to show proper professional attention and concern with regard to possible drug abuse, drug seeking, and adverse medical side effects, including drug dependency. Testimony at the Board hearing by its investigator established that Respondent's prescribing of narcotics occurred over time and had continued up to the eve of the Board's suspension hearing.

26. At the request of the Board, the Board's investigator filed on May 6, 2009 a sworn Supplemental Affidavit regarding this matter. That affidavit included the following:

- a) as of March 12, 2009, Respondent was still treating a number of patients for chronic pain; only some of these patients had been required to execute narcotics contracts;
- b) Respondent told the investigator that in his opinion every patient who was being treated for chronic pain should be required to execute a narcotics contract;
- c) Respondent failed to produce to the Board copies of signed narcotics contracts, claiming these were kept elsewhere in "paper charts";
- d) Respondent admitted that least two specific patients had additional "paper charts"; Respondent claimed to have given away one of these charts;
- e) Respondent on March 12, 2009 disclosed the names of all patients he claimed were still in his care; (each was receiving narcotics prescriptions from Respondent); when directly reminded by the investigator, Respondent admitted that he had forgotten another patient who remained in his care and for whom he also had prescribed narcotics;
- f) the Board investigator found that Respondent on March 12, 2009 wrote 5 prescriptions in a single day for narcotics for one of the above patients; this patient stated that Respondent "never really checks me" when seeing her at the office; the patient is now being treated by another physician and has told the Board investigator that she believed that Respondent had prescribed narcotics for her in a manner that caused her to become drug dependent;
- g) the above patient stated that Respondent had contacted her then told her that she did not have to speak with the Board's investigators;
- h) the investigator further found that Respondent had written narcotics prescriptions for two other patients on March 24, 2009; Respondent had earlier claimed to the Board investigator that he was no longer treating one of these patients;
- i) the Board investigator found that Respondent was continuing to prescribe narcotics for a patient that Respondent had failed to disclose to the investigator; during March 2009, Respondent wrote multiple prescriptions for this particular patient, including for controlled substances; and
- j) finally, the Board investigator found that Respondent had continued to care and prescribe, into at least March 2009, for a patient who Respondent had claimed to have "transferred" from his practice in December 2008; this prescribing during March included DEA Schedule III and IV drugs.

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

27. In sum, it is entirely reasonable for the Board to infer from the allegations and supporting information from the Board investigator that Respondent's manner of

prescribing narcotics constitutes a danger to his patients and the Vermont public. Respondent failed to: a) maintain proper medical records and often failed entirely to document narcotics prescribing; b) made false, incomplete, or misleading statements to the Board's investigator; c) failed to properly care for and monitor his patient's medical needs, side effects, and possible narcotics dependency; d) ignored possible drug abuse or diversion by patients; and e) disregarded and dishonored the written commitments and promises he made to the Board of Medical Practice regarding his prescribing of narcotics. From all of this, the Board could reasonably infer that Respondent was careless, dishonest, and/or incompetent as a physician. The Board also could properly infer that Respondent's continued authority to "care" for patients and prescribe narcotics in this manner represented an immediate, serious danger to the public health, safety, and welfare that required the emergency action of summary suspension.

F. Reasonableness of the Summary Suspension Procedure Followed by the Board.

28. The Board's decision to hold a hearing immediately and proceed to summary suspension of Respondent's medical license, in light of the State's detailed charges, the investigator's affidavit, and the hearing testimony was reasonable and proper, given the overriding government interest in protecting the public health and safety. Further, at the Board's request, the investigator subsequently supplemented his earlier affidavit, indicating the currency of Respondent's narcotics prescribing.

29. It bears repeating that the availability of pre-deprivation and post-deprivation procedures must be considered together when assessing due process claims:

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,

“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 must provide 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. 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 a prompt evidentiary hearing on the charges that have been filed 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 of Respondent to cross-examine witnesses, scrutinize the evidence, and challenge in full the State’s case and allegations.

30. 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). 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 required appropriate than the hearing that occurred prior to the Board’s order of summary suspension. 3 V.S.A. § 814(c).

III. Conclusion.

31. Here, Respondent has filed a motion for reconsideration of the Board’s order of suspension and now seeks to amend the Board’s procedural order to permit him to call witnesses other than Respondent himself during that “limited” hearing. It is axiomatic that

witnesses do not “belong” to either party. *See State v. Messier*, 146 Vt. 145, 155 (1985). The State has accepted the Board’s procedural ruling that it may not call Respondent as its own witness and may only cross-examine him. However, if the Board’s May 7, 2009 procedural order is revised and expanded as Respondent has requested, the State will call Respondent as a State witness and call such other witnesses as it deems essential to its case. *See Schmitt v. Lalancette*, 175 Vt. 284, 289 (2003) (restrictions that impede development and determination of facts should be avoided wherever possible).

32. The State regards the Board’s May 7, 2009 procedural order, as written and issued, to be clear and to have placed reasonable limits on the nature and scope of the May 20, 2009 hearing. The State continues to accept the guidance of the procedural order as written and has no interest in expanding the May 20, 2009 hearing as Respondent has requested.

33. Respondent’s motion should be denied. The proper response to Respondent’s numerous accusations, claims, and arguments is for the Board to schedule the “prompt” hearing on the merits of the State’s charges that is required by the summary suspension statute. 3 V.S.A. § 814(c). This will provide Respondent all the due process to which he is entitled and allow him to promptly return to practice if the State cannot prove its case.

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