



arguments that have the effect of improperly depriving individuals of protected rights, particular such important rights as a license to practice medicine. A grave injustice and devastating mistake has occurred here, and to the extent any of the harm to Dr. Miller can be repaired, that can only happen if an immediate correction is made by this Board. Accordingly, and for all the reasons set forth below in the incorporated Memorandum of Law, this Board's summary suspension Order must be immediately reversed. If not, Dr. Miller requests that a hearing on the summary suspension be set to take place at or before the Board's next regularly scheduled meeting on May 6, 2009.

### **Memorandum of Law**

#### **I. APPLICABLE LAW**

The Due Process Clause of the United States Constitution provides in relevant part, "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "The due process requirements imposed by Article 10 of the Vermont Constitution mirror those imposed by the United States Constitution." *In re Smith*, 169 Vt. 162, 171 (1999). Due process demands a hearing before any individual is deprived of such an essential right as the right to earn a living practicing medicine. Only in extraordinary cases where there are findings based on sufficient evidence and conclusions rationally tied to those facts that immediate harm will happen, may a state deprive an individual of such important rights with no pre-deprivation hearing. Even in those rare cases, procedural safeguards must be strictly adhered to 1) to ensure that fatal, irreversible mistakes are not made, 2) to provide for an immediate post-deprivation hearing, and 3) to limit any summary action to only protect against the imminent harm found to exist. This Board's Order is invalid to the extent it directly violates

these basic requirements of due process, and therefore, it must be reversed and Dr. Miller's license reinstated.

**A. The United States Constitution Guarantees Dr. Miller The Right To Earn A Living As A Physician.**

A license to practice medicine, and the ability to earn a living through that practice, are property rights protected by the Fourteenth Amendment and the Vermont Constitution. See e.g., *Bell v. Burson*, 402 U.S. 535, 539 (1971); see also *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 263 (1987); *Parratt v. Taylor*, 451 U.S. 527, 538 (1981). “Unquestionably, the magnitude of a [licenseholder’s] interest in avoiding suspension is substantial . . . .” *Barry v. Barchi*, 443 U.S. 55, 64 (1979) (addressing horse trainer’s license). “Once obtained, a physician has a property interest in his or her medical license. . . . Our courts have frequently recognized the ‘severity of depriving a person of the means of a livelihood.’” *Shah v. State Board of Medicine*, 589 A.2d 783, 789 (Pa. Comm. Ct. 1991) (quoting *Brock*, 481 U.S. at 263).

As the Vermont Supreme Court recently explained, “[w]here the state confers a license to engage in a profession . . . such license becomes a valuable personal right which cannot be denied or abridged in any manner except after due notice and a fair and impartial hearing before an unbiased tribunal.” *In Re Licensing Appeal of J.H.*, 2008 VT 97, ¶ 15 (quoting *Devous v. Wyo. State Bd. of Med. Exam’rs*, 845 P.2d 408, 415 (Wyo. 1993)). Thus, if the State is to take away a person’s medical license, and deprive him of his ability to earn a living through the practice of medicine, it must do so in strict compliance with the requirements of due process.

**B. Due Process Requires The State To Provide A Meaningful Pre-Suspension Hearing.**

Both the United States Supreme Court and the Vermont Supreme Court have long recognized that the most basic requirement of due process is the right to a contested hearing prior

to the deprivation of property. “[A]t a minimum,” the Due Process Clause requires “that deprivation of life, liberty, or property by adjudication be **preceded by notice and opportunity for hearing appropriate to the nature of the case.**” *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (internal quotations omitted) (emphasis added). Suspending a professional’s license “without first providing [the licensee] an opportunity to be heard, [is] contrary to the basic elements of due process.” *In Re Licensing Appeal of J.H.*, 2008 VT 97, ¶ 15. A meaningful hearing, in turn, requires “timely and adequate notice and ‘an effective opportunity to defend by confronting any adverse witnesses and by presenting the [appellant’s] own arguments and evidence orally.’” *Burtnieks v. City of New York*, 716 F.2d 982, 986 (2d Cir. 1983) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970)).

In order to meet the requirements of due process, the hearing must normally take place before, not after, the deprivation occurs. “[T]he Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided **before** the deprivation at issue takes effect.” *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (emphasis added). In so holding, the Supreme Court has recognized that “a **prior** hearing is the only truly effective safeguard against arbitrary deprivation of property.” *Id.* at 83 (emphasis added). Further, such personal rights as a license to practice a profession “cannot be denied or abridged in any manner **except after due notice and a fair and impartial hearing before an unbiased tribunal.**” *In Re Licensing Appeal of J.H.*, 2008 VT 97, ¶ 15 (quoting *Devous*, 845 P.2d at 415) (emphasis added).

The reasons for the prior hearing requirement should be obvious, but bear repeating. First, as the Vermont Supreme Court recently reiterated, due process is “specifically designed to prevent such arbitrary action [as suspending a license with no opportunity to be heard].” *Id.* Second, were due process not demanded when substantial rights are at issue, “no one would be

safe from oppression wherever power may be lodged, one might be easily deprived of important rights with no opportunity to defend against wrongful accusations. This would subvert the most precious rights of the citizen.” *Id.* (quoting *Devous*, 845 P.2d at 415); see also *Fuentes*, 407 U.S. at 92, n.22 (“Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.”) As well, “**it has long been recognized that ‘fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.’**” *Fuentes*, 407 U.S. at 81 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring) (emphasis added)).

**C. The State Can Forego A Pre-Suspension Hearing Only In Truly Unusual Emergency Situations.**

Because the prior hearing requirement is the single most fundamental aspect of due process, the Supreme Court has limited a state’s ability to postpone a hearing until after a property deprivation to only “emergency situations.” *Bell*, 402 U.S. at 542 (internal quotations omitted); see *Boddie*, 401 U.S. at 378-79 (only “extraordinary situations” justify postponing a hearing); see also *Hodel v. Virginia Surface Mining and Reclamation Assoc.*, 452 U.S. 264, 299-300 (1981) (“emergency situations” only). “Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been *directly necessary* to secure an important governmental or general public interest. Second, there has been a *special need for very prompt action*. Third, the state has kept strict control over such summary procedures by requiring that a government official determine, under

the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.” *Fuentes*, 407 U.S. at 90-91 (emphasis added). “These situations, however, must be truly unusual.” *Id.* “[I]t is clear that” post-deprivation due process “is an exception and not the rule.” *Wayfield v. Town of Tisbury*, 925 F. Supp. 880, 886 (D. Mass. 1996). A post-deprivation hearing will only satisfy due process when the circumstances “necessitate quick action, the length and severity of the deprivation is not serious, and the procedures underlying the decision to effect the deprivation sufficiently minimize the risk of an erroneous deprivation.” *Hegarty v. Addison County Humane Soc.*, 2004 VT 33, ¶ 18, 176 Vt. 405 (citations omitted).

Section 814(c) of Title 3 authorizes the Board to summarily suspend a license in those rare cases where it finds emergency action is warranted: “If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.” 3 V.S.A. § 814(c); see also Board Rule 15.1(d). Judge Teachout recently explained when the emergency action under Section 814(c) is warranted in a case where she vacated the summary suspension of a pharmacist: “The difference between a regular suspension of a professional license, which requires notice and opportunity for a hearing, and summary suspension of a professional license, which does not, is the existence of a threat to public health, safety, or welfare that is so imminent that it ‘imperatively requires emergency action.’ 3 V.S.A. § 814(c).” *In re Glenn Myer*, Docket No. 140-2-07 Wncv, Decision on Merits of Appeal of Summary Suspension Order, at 9. (A copy of Judge Teachout’s January 31, 2008 decision in *In re Myer* (hereafter “*In re Myer*” decision) is included as Attachment A to this Motion.)

1. Before Taking Summary Action, The Board Must Make Sufficient Findings And Conclude Rationally From Those Findings That The Conduct At Issue Imperatively Requires Emergency Action To Avoid Imminent Harm.

Before taking summary action, the Board must make specific findings of fact to support its conclusions, the conclusions must be rationally linked to the findings, and in the case of a summary suspension, that conclusion must satisfy the emergency situation requirement set forth in Section 814(c). For the summary suspension order to be valid, “[t]he Board must expressly make a finding to that effect [meaning that there is a threat to public health, safety, or welfare that is so imminent that it imperatively requires emergency action] as a prerequisite to exercising its authority to summarily suspend. The key inquiry . . . is therefore whether the Board made a sufficient finding supported by substantial evidence that emergency action was imperatively required.” *In re Myer*, at 9.

In the *Myer* case, Judge Teachout further explained, “[i]n the context of summary suspensions [ ] the Board has the special legal duty to make findings that are not only supported by substantial evidence, but that specifically show that the conduct ‘imperatively requires emergency action;’ in other words, the imminent harm would occur before [the licensee] could be provided with notice and an opportunity to respond at a hearing held with notice of charges.” *Id.* at 13.

2. The Board’s Procedure For Making Its Underlying Decision To Effect The Deprivation Must Sufficiently Minimize The Risk Of An Erroneous Deprivation.

In order for a pre-hearing order to satisfy due process, the Board’s procedure for making its “underlying decision to effect the deprivation must sufficiently minimize the risk of an erroneous deprivation.” *Hegarty*, 176 Vt. at 412. In fact, the very “function of legal process is to minimize the risk of erroneous decisions.” *Addington v. Texas*, 441 U.S. 418, 425 (1979).

The standard or burden of proof utilized by the decisionmaker “serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.” *Id.* at 423. “The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.” *Id.* (citations omitted). As several courts have observed, “The risk of error is high in a proceeding seeking to revoke a medical license ... [and] the risk increases where the agency acts as investigator, prosecutor, and decision maker.” *Nguyen v. State, Department of Health Medical Quality Assurance Commission*, 29 P.3d 689, 695-96 (2001) (quoting *Painter v. Abels*, 998 P.2d 931, 941 (Wyo. 2000)).

- a. In the context of determining whether to summarily suspend a doctor’s license to practice, the clear and convincing burden of proof must be used.

Where the interests at stake involve more than mere loss of money and include important individual interests, the Supreme Court has applied the clear and convincing standard of proof, which requires a higher showing of proof than the preponderance of evidence standard. See *Addington*, 441 U.S. at 424. The recent trend has been for courts to require this higher standard of proof in professional license disciplinary proceedings. See *Nguyen v. State, Department of Health Medical Quality Assurance Commission*, 29 P.3d at 691 (applying clear and convincing standard); see also *Painter*, 998 P.2d 931 (both due process and equal protection require clear and convincing standard in medical disciplinary proceedings); *Johnson v. Bd. of Governors*, 913 P.2d 1339 (Okla. 1996) (due process requires clear and convincing standard in medical disciplinary proceeding as license revocation is quasi-criminal in nature); *Robinson v. State ex rel. Okla. State Bd. of Med. Licensure & Supervision*, 916 P.2d 1390 (Okla. 1996) (clear and

convincing standard required for professionally licensed persons); *In re Zar*, 434 N.W.2d 598 (S.D. 1989) (all professional license revocation proceedings require clear and convincing standard); *Davis v. Wright*, 503 N.W.2d 814 (1993) (medical discipline like attorney discipline requires clear and convincing standard); *Devous*, 845 P.2d 408 (clear and convincing in medical disciplinary hearings); *Silva v. Superior Court*, 17 Cal.Rptr.2d 577 (Cal. Ct. App. 1993) (clear and convincing standard required); *Bernard v. Bd. of Dental Exam'rs*, 465 P. 2d 917 (Or. Ct. App. 1970) (license revocation requires clear and convincing).

If the clear and convincing standard is required in the context of physician disciplinary proceedings, it must certainly be applied in the summary suspension context where the risks and consequences of an erroneous deprivation are high, and where there are virtually no other procedural safeguards implemented such as notice and a hearing at which the licensee can present evidence and contest the State's allegations. See *Addington*, 441 U.S. at 424. Thus, before summarily suspending any doctor's license, this Board must make its findings based on a clear and convincing standard of proof. In this case, as discussed further below, the Board did not even make findings based on a preponderance of the evidence standard, and, in fact, made no findings.

- b. Where summary suspension of a doctor's license to practice is sought based on claims of improper prescribing of controlled substances, this Board must also apply the standards set forth in its Policy for the Use of Controlled Substances for the Treatment of Pain.

Where summary suspension is sought in a case alleging improper use of controlled substances, this Board must also comply with the mandates it has imposed for reviewing such cases as set out in Board's Policy for the Use of Controlled Substances for the Treatment of Pain ("Board Policy"). For example, in the Board Policy, the Board promises Vermont doctors, *inter*

*alia*, that 1) “**The Board will refer to current clinical practice guidelines and expert review in approaching cases involving management of pain;** 2) The Board will judge the validity of the physician’s treatment of the patient based on available documentation, **rather than solely on the quantity and duration of medication administration;** and 3) **Allegations of inappropriate pain management will be evaluated on an individual basis.**”

3. Any Pre-Hearing Deprivation Must Be Narrowly Tailored To Address The Emergency Found To Exist.

Even when an emergency situation calls for a pre-hearing deprivation of property, that deprivation must be narrowly tailored to address the public interest that necessitates the emergency action. As the Supreme Court has put it, the pre-hearing deprivation must be “*narrowly drawn to meet [the] unusual condition*” justifying summary action. *Fuentes*, 407 U.S. at 93 (emphasis added). Summary orders that deprive a citizen of more rights than are necessary to protect the public interest at stake violate the requirements of Due Process. Summary orders suspending a doctor’s right to practice are considered overbroad where the emergency order relates to only one aspect of the physician’s medical care and there are no findings or evidence to suggest any inadequate care in other areas of the physician’s practice. *Cunningham v. Agency for Health Care Admin.* 677 So.2d 61, 61-62 (Fla. App. 1 Dist., 1996) (reversing overbroad order suspending doctor’s license because the findings, based on expert opinion testimony addressed only one aspect of the doctor’s practice and no findings were made as to other areas); see also *Eley v. Medical Licensure Commission of Alabama*, 904 So. 2d 269, 287-88, n.10 (Ct. Civ. App. Ala. 2003) (reversing sanction revoking physician’s license as too harsh a penalty and disproportionate to the wrong committed and citing similar cases).

**D. Even In Emergency Situations, The State Must Offer A Prompt Post-Deprivation Hearing On The Propriety Of The Summary Suspension.**

In those rare circumstances where a pre-hearing deprivation may be justified, the Due Process Clause requires that the State provide a “prompt postsuspension hearing, one that [will] proceed and be concluded without appreciable delay.” *Barchi*, 443 U.S. at 66. Put differently, even in emergency situations, prehearing deprivation is only allowed when it is “coupled with the availability of some meaningful means by which to assess the propriety of the state’s action.” *Parratt v. Taylor*, 451 U.S. at 538-39; see also *Hegarty*, 2004 VT 33, ¶ 18.

In the case of a medical license, the State must provide for review of the summary suspension decision before that suspension destroys the physician’s ability to earn a living as a doctor. See e.g., *Barchi*, 443 U.S. at 66 (licensee must be able to present evidence regarding summary suspension before full penalty is imposed). To postpone the hearing until the physician’s practice has been completely destroyed would render the post-deprivation hearing meaningless, and therefore unconstitutional. Most states meet their constitutional duty by statutorily prescribing the brief period in which their medical boards must hold the post-suspension hearing to address the propriety of the summary action.<sup>1</sup>

**II. ANALYSIS**

The actions by the State and this Board have resulted in serious deprivations of Dr. Miller’s due process rights. First, there was no emergency to justify the State’s request for summary suspension, and, further, no findings or conclusions were made by the Board sufficient to support its summary suspension Order. Second, therefore, because this was not an emergency situation, the State and Board were required to provide Dr. Miller with notice of the charges

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<sup>1</sup> For example, in New York, Rhode Island and New Hampshire, the hearing must occur within ten days of the summary suspension; and in Massachusetts it is seven days. See *NY Public Health Law* § 230 (12) (a); *RI Gen. Laws* § 5-37-8; *NH Board of Medicine Rules* 409.01; *Mass. Reg. Code, Tit. 243* § 1.03 (a).

against him and a pre-deprivation hearing before his license was suspended. Third, even if the Board's Order was justified, which it was not, by preventing Dr. Miller from practicing medicine altogether, instead of ordering him to no longer see the ten patients listed in the Specification of Charges, the Order was overbroad and thus invalid as not tailored to address the alleged risks. Finally, since it took its summary action, this Board has continued its deprivation of Dr. Miller's rights by failing to provide him with a prompt post-deprivation hearing.

**A. There Was No Emergency To Justify The Request For A Summary Suspension Order.**

Dr. Mitchell R. Miller is a family practitioner who has provided medical care to individuals in the southern Vermont area since 1997, when he joined a family medicine practice group in Ludlow, Vermont. He currently lives in Chester, Vermont with his wife and their two teenage children. In 1999, Dr. Miller became the Medical Director of the Gill Odd Fellows Home, a skilled nursing facility in Ludlow, Vermont. In 2001, Dr. Miller opened his own family practice office in Ludlow, and in 2003, Dr. Miller began working for the Vermont Department of Corrections ("DOC") as a part-time independent contractor providing medical treatment to inmates. Over the course of the next four years, Dr. Miller continued to provide part-time medical services for the DOC, while maintaining his private practice in Ludlow. In the fall of 2007, Dr. Miller was hired by Prison Health Services, Inc. ("PHS") to work full time as the Regional Medical Director serving the Vermont DOC facilities. Because the Regional Medical Director position was full-time, Dr. Miller decided to close his private practice and began the long process of transferring his hundreds of patients to other area family practitioners.

1. The Facts Alleged In The State's Filings Are Inaccurate.

On March 31, 2009, the State moved to summarily suspend Dr. Miller's license to practice medicine based on allegations that Respondent provided "deficient care of patients,

improper prescribing of narcotics, and failure to prepare and maintain proper medical records” based on the State’s purported review of records for ten patients Dr. Miller had seen in his private practice. In fact, a careful review of the specific claims reveals that, there is not a single claim that the medications prescribed by Dr. Miller were not medically appropriate treatment for the individual patients’ pain. Nor could the State make this claim as it did not consult with either the patients or another physician to determine if Dr. Miller’s treatment was medically appropriate. Nor are there any claims that any of these patients had been harmed in any way by Dr. Miller or that as to any of these patients, there was evidence to suggest that they had diverted the medications they were prescribed by Dr. Miller. Rather the essential thrust of the State’s claims and charges against Dr. Miller is that he failed in his medical record documentation in certain respects as to these ten patients.

The State’s filings inaccurately suggest that Dr. Miller was prescribing excessive amounts of pain medications to at least the ten patients identified in the Charges. In fact, as of March 2009, Dr. Miller was only continuing to treat three of the ten patients identified in the Specification of Charges. The other seven had already terminated their physician-patient relationship with Dr. Miller. And, in fact, of these three remaining patients listed in the Charges, only one, Patient D, was still receiving pain medications from Dr. Miller. Patient D had been a patient of Dr. Miller’s since at least 1999. She had a contract for the use of controlled medications, was also being seen by an orthopedic specialist for her chronic elbow pain, had a plan for surgery in 2009, and with medications to control the pain in her elbow, was able to maintain full time employment in a physically demanding job.

Dr. Miller’s private practice was not expanding as the State would have the Board believe. To the contrary, his primary work involved providing medical care as the Regional

Medical Director for PHS and the Medical Director for the Gill Odd Fellows Home. His few remaining private practice patients represented only a fraction of his medical work and he was in the process of closing his private practice. However, a reality of practicing medicine in rural Vermont is that you cannot simply close your door to your patients. Indeed, as this Board knows, it would be unprofessional to abandon patients. See 26 V.S.A. § 1354(a)(4). The State's insinuation that Dr. Miller must be doing something improper because he has not been able to transfer all of the hundreds of patients he once cared for demonstrates how disconnected the State is from the practice of family medicine in rural Vermont. The transfer of patients has been a long process for Dr. Miller, and it surely is for many Vermont physicians closing a practice, due to a number of factors including 1) the limited number of family practitioners in the Ludlow area, 2) the inability or reluctance on the part of other physicians to accept new patients, particularly chronic pain patients being prescribed narcotics, and 3) resistance on the part of some patients to leave the care of their long time physician, Dr. Miller.

2. The Facts Alleged Relate To Only One Small Aspect Of Dr. Miller's Medical Practice.

The State's Charges and Motion do not contain any allegations about patients Dr. Miller treated through his primary work as the Regional Medical Director for PHS or the Gill Home. Rather, the State simply speculates that Dr. Miller was a threat to those he treated in DOC facilities because of his alleged practice of overprescribing pain medications to certain patients he saw in his private practice. Of course, in purporting to do an "investigation" of Dr. Miller, the State did not talk to a single person at DOC or the Gill Odd Fellows Home. Had it, it would have learned that Dr. Miller was a well liked and well respected physician. His colleagues in those settings were not concerned with his prescribing of controlled substances. And further, the Board's theory that inmates are a "vulnerable population" possibly threatened by Dr. Miller is

completely unsupported by the evidence presented to the Board or based in reality. Had the State made an inquiry of PHS or DOC, it would have learned that due to the institutional controls in place in DOC facilities, there is little risk overprescribing of controlled substances could occur and little risk that drugs could be diverted because medications are administered dose by dose by medical and correctional staff.

3. Even As Alleged, The State's Charges Evince The Absence Of An Emergency.

Even if Dr. Miller engaged in the conduct as alleged, there are not sufficient factual allegations to demonstrate an immediate danger. Many details are missing from the affidavit of Investigator Ciotti; one is that many of the records requested from Dr. Miller were provided to the State months before the charges were filed. Moreover, as even the State's charges indicate, most of the ten patients in the Charges had terminated their physician-patient relationship with Dr. Miller in 2008. These facts serve to further undercut the immediacy of the alleged danger. See *St. Michael's Academy, Inc. v. State of Florida*, 965 So.2d 169, (Fl. Dist. Ct. App. 2007) (finding gap in time between alleged problematic conduct and order undercut the immediacy of the alleged danger); cf. *Kammerling v Massanari*, 295 F.3d 206, 214 (2d Cir. 2002), (any delay in seeking enforcement of request for injunction is an indication of at least a reduced need for such drastic, speedy action.); *Le Sportsac, Inc. v Dockside Research, Inc.*, 478 F. Supp. 602, 609 (S.D.N.Y. 1979) (failure to act sooner "undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury").

Moreover, the allegations in this case do not even begin to approach the type of misconduct present in those cases where courts have affirmed the summary suspension of a doctor. Such cases generally involve patient complaints of egregious and improper actions by

the doctor such as sexually touching patients and treating patients while inebriated. See e.g., *Morgan v. Department of Financial and Professional Regulation*, 871 N.E.2d 178 (Ill. Ct. App. 2007) (a clinical psychologist was summarily suspended after he sexually assaulted a female patient during a therapeutic hypnosis session); *Board of Physician Quality Assurance v. Mullan*, 848 A.2d 642 (Md. Ct. App. 2004) (summary suspension of pediatrician affirmed due to treating patients while under the influence of alcohol); *Dahnad v. Buttrick*, 36 P.3d 742 (Ariz. Ct. App. 2001) (dentist summarily suspended after he administered nitrous oxide to a prospective female employee, and then took advantage of her inebriated condition by groping her); see also *In re Myer*, at 9 (Judge Teachout identifies cases involving the “type of misconduct that generally warrants the summary suspension of a professional license”).

**B. There Was No Emergency To Justify The Summary Action Taken On The State’s Motion.**

Before summarily suspending a physician’s license to practice, the Board must first determine whether that emergency action is “directly necessary” to protect the public and whether the State has shown a “special need for very prompt action.” *Fuentes*, 407 U.S. at 90-91. Absent such a “truly unusual” emergency – that a summary action is the only means of protecting the public – the Due Process Clause requires the Board to afford a doctor a contested hearing prior to restricting his medical license.

The only imminent risk to the public alleged here is that Dr. Miller was providing controlled substance prescriptions that may have harmed the specific identified patients or been diverted for sale or use by the public. However, that most of the patients listed were no longer being seen by Dr. Miller as of March 2009, undercuts the State’s claim of an emergency. Further, while the State suggested Dr. Miller posed a threat to patients in DOC custody, in fact, this is nothing more than the State’s speculation. There are no allegations at all with respect to

any DOC patient or aspect of Dr. Miller's care within DOC. In short, just as in the *Myer* case, "[t]here was no discernible reason why the [] prosecutor needed to seek summary action, without notice and an opportunity to respond to the charge." *In re Myer*, at 10. If the Board had concerns about Dr. Miller's recordkeeping in connection with prescribing controlled substances to his handful of remaining private patients, it could have investigated them while Dr. Miller continued with his primary practice at PHS. In the absence of allegations of an emergency, there was no justification for the Board's decision to depart from the core due process requirement that Dr. Miller be allowed to confront the State's evidence and present his own evidence before having his livelihood taken away.

**C. There Was No Emergency To Justify The Summary Suspension.**

Summary suspension of a medical license with no prior notice and opportunity to present evidence to contest the allegations made by the State must be reserved for emergency situations to protect the public. In other words, there must be a finding that, "the imminent harm would occur before [the licensee] could be provided with notice and an opportunity to respond at a hearing held with notice of charges." *In re Myer*, at 13.

The Board must make specific findings of fact to support its conclusions, its conclusions must be rationally linked to the facts found, and in the case of a summary suspension, that conclusion must satisfy the emergency situation requirement set forth in Section 814(c). See *In re Myer*, at 9, 13. Findings necessary to support the required conclusion must be found clearly and convincingly. See e.g. *Addington*, 441 U.S. at 424. Further, because the allegations here involved claims related to the use of controlled substances, this Board was obligated to abide by its pledges contained in the Board Policy as to how it would review such cases.

Here, allowing Dr. Miller to continue to practice medicine presented no imminent threat of harm to the public and, in fact, the Board found none. Indeed, the Board made no fact findings at all, much less any findings of fact supported by substantial evidence or facts that specifically show the conduct of Dr. Miller imperatively required emergency action.

1. The Board Made No Fact Findings As To Dr. Miller.

The Board's Order does not contain any factual findings as to Dr. Miller. Instead, in what it identifies as the "allegations of fact and findings" section of its Order, the Board incorporates by reference the State's allegations, then states that "in summary, these allegations of fact, **if proven**, would show the Respondent as a physician who abuses his professional privileges" in those ways alleged. The Board also recites testimony from Investigator Ciotti that Dr. Miller "wrote for [sic] narcotics prescriptions in breach of his 2004 undertakings to the Board that were dated and filled as late as March 23, 2009." The Board does not state it is adopting this testimony as fact. Further from this statement alone, it is unclear what specific breach Investigator Ciotti believed occurred. Even if the Board did adopt this testimony from Investigator Ciotti as a finding, it would not begin to support the conclusion to summarily suspend Dr. Miller's license. In *Myer*, where, unlike here, there were at least some findings made, Judge Teachout explained, "The problem is that there is no finding connecting the nature of the flawed and unprofessional judgment to the defined risks that imperatively called for emergency suspension." *Id.* at 13. The same reasoning applies with even greater force here as no findings of fact were made, nor conclusions rationally linked to any such facts to support a finding that an immediate situation imperatively called for emergency suspension. See *id.*

2. The Board Did Not Conclude That Dr. Miller's Continued Practice Presented An Immediate Threat To The Public.

In its Order summarily suspending Dr. Miller's license, the Board states:

The Board found that the Respondent's alleged practices **could** threaten the public in a number of ways. **If proven**, the Respondent's alleged substandard medical care and inadequate supervision of the patients who he treated at his office threatened their health, safety and welfare. **His alleged excessive prescribing** in terms of numbers of drugs, amount, and frequency, increased the risk that potent narcotic drugs would find their way to the black market and be used by the purchasers without medical supervision and without knowledge of or regard to side effects, interactions, or overdoses, with the consequent threat to the users' health, safety, and welfare. Further, the Board found that Respondent's **alleged history of excessive narcotic prescribing** and other substandard care rendered his current position as the physician charged with the medical care of inmates at the Springfield prison a threat to the health, safety, and welfare of this very vulnerable population.

The Board does not affirmatively conclude as required by Section 814(c) and applicable case law, that any conduct on the part of Dr. Miller imperatively requires emergency action to protect the health, safety, or welfare of the public; it merely speculates about possible harms. However, even if the Board's "conclusions" were interpreted to state more than a mere possibility of a threat, there were insufficient fact findings and inadequate evidence to support any conclusion that Dr. Miller's continued practice of medicine presented an immediate threat. There was no allegation or evidence that the medication provided to the ten patients was not medically necessary and the Board made no such finding. There was no evidence diversion of drugs had been a problem among Dr. Miller's patients and the Board made no such findings. No facts support the Board's statements regarding the "black market." Basing its decision on "numbers of drugs, amount and frequency" with no expert opinion and no consideration of the individual situation was in direct violation of the Board's Policy on the use of controlled substances. Indeed, any time a physician prescribes a controlled substance it could be said there is a risk it will be diverted to someone lacking knowledge of how it should properly be used.

Moreover, there was no evidence whatsoever regarding Dr. Miller's job responsibilities at PHS, how medical services are provided to inmates, what policies are in place for prescribing

narcotics, how narcotics are administered or how likely and widespread drug diversion is in the very structured and controlled prison setting. Accordingly, the Board could make no findings regarding the risks inherent in providing medications in this setting and had no evidentiary basis to make its conclusions that incarcerated individuals are a “very vulnerable population,” or that Dr. Miller’s continued practice of medicine within DOC posed any threat whatsoever.

In sum, these “conclusions” by the Board are simply insufficient to satisfy the requirement that the Board affirmatively conclude that conduct on the part of Dr. Miller “imperatively requires emergency action.” See *In re Myer*, at 9, 13; 3 V.S.A. 814(c). This failure is fatal to the validity of the summary suspension Order, as no reviewing court could find that the Board’s “conclusions” are “rationally derived from the findings.” See *Braun v. Bd. of Dental Examiners*, 167 Vt. 110, 114 (1997) (Reviewing court will only “affirm the Board’s findings as long as they are supported by substantial evidence, and its conclusions if rationally derived from the findings and based on a correct interpretation of the law.”)

**D. The Board Did Not Narrowly Tailor Its Order To Address The Alleged Harm.**

Even when an emergency situation calls for a pre-hearing deprivation of property, that deprivation must be narrowly tailored to address the public harm that necessitates the emergency action. See *Fuentes*, 407 U.S. at 93. Both summary and disciplinary actions against physicians must be tailored to address the harm based on the wrongdoing found. Overbroad orders violate the Due Process Clause. See *id.*; *Eley*, 904 So.2d at 287-88; *Cunningham*, 677 So.2d at 61-62.

The only imminent risk to the public alleged in the State’s Motion related to Dr. Miller’s prescribing of controlled substances to certain patients, in amounts the State claimed were “large,” but without certain documentation in his records. There was no hint in the State’s Motion or the Board’s order that Dr. Miller represented any other type of risk to the public other

than the claimed deficiencies in his prescribing of controlled substances. If the Board had concerns about his continued prescribing of controlled substances to these ten patients, it could have investigated them while allowing Dr. Miller to continue his practice on the condition that he discontinue treating these patients. If it was concerned about the medical records he kept in order to support his decisions to prescribe controlled substances, again, it could have still allowed him to practice medicine, but with the same condition that he not provide any treatment to the ten patients identified in the Specification of Charges. While the Board's Order is invalid for the other reasons discussed above, it is also clearly overbroad.

Ultimately, the Board's decision which prevents Dr. Miller from treating any of his patients for any of their conditions, has increased, rather than decreased, the potential for harm to the public. Dr. Miller's handful of remaining patients have had to scramble, some unsuccessfully to find other physicians, while their prescriptions including those to treat depression and prevent heart attacks and strokes have been cancelled. Dr. Miller's elderly patients at the Gill Odd Fellows Home have lost their longtime and trusted physician. The Order has cost him his full time employment at PHS, his means of supporting his family, and irreparably damaged his reputation in the community.

The unchallenged statements of the State's investigator regarding the veracity of Dr. Miller, and the prosecutor's allegations that Dr. Miller has misled the Board as to his 2004 letter to the Board cannot alone support the Board's overstatement that "nothing in the Respondent's professional history suggests that the Board can rely on his previous undertakings to cease his course of alleged unprofessional conduct." This statement by the Board does not justify the overbroad Order. In the *Myer* case, much like here, a focus of the action taken against the licensee was an alleged lack of credibility. As Judge Teachout recognized, statements made by a

prosecutor about the veracity of an accused are inherently prejudicial, particularly where, as here, they go unchallenged because the Respondent is not provided a chance to respond. *In re Myer*, at 12. “The prejudice arises from the risk that the finder of fact will ‘give special weight to this opinion because of the prestige of the prosecutor and the fact-finding facilities available to the office.’” *Id.* The very heart of due process is protecting citizens from government officials’ overbearing concern for efficiency. *Fuentes*, 407 U.S. at 92, n.22. Moreover, “it has long been recognized that ‘fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights...’” *Id.* at 81.

These concerns articulated by Judge Teachout and the Supreme Court are even more salient in this case. First, the Board’s conclusion in this regard is problematic because of the prejudicial impact of having the prosecuting attorney and investigator inject their personal views into this matter that Dr. Miller has been untruthful. Second, this Board has already had to revise one summary suspension order because of the false information prepared by the same investigator involved here. See *In re Chase*, State of Vermont Board of Medical Practice, Docket No. 15-0203, Decision on Respondent’s Motion to Reinstate License and Dismiss Superceding Specification of Charges, March 31, 2004. Third, unlike in *Myer*, here, the Respondent has yet to have any chance whatsoever to present his response to the 66 pages of charges lodged against him; instead, in a closed meeting the Board heard and considered only the State’s version of events. Finally, this Board simply cannot rely on hearsay and double hearsay information, and assume the truth of it without giving the Respondent any chance to respond. *In re Myer*, at 13.

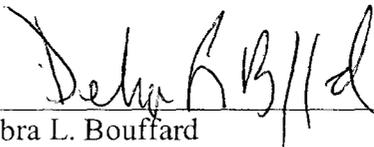
### III. CONCLUSION

The due process rights of Dr. Miller have already been egregiously violated. He has lost his license to practice medicine, his employment and his livelihood, without being provided with any opportunity to respond to the Motion seeking to summarily destroy his career. If the summary suspension of Dr. Miller's license remains in place, any chance of him resuming a medical career will be lost. There was no emergency that justified the pre-hearing deprivation of Dr. Miller's essential right to earn a living as a physician. For all of these reasons, and those set forth above, the Board should reconsider its Order and immediately reinstate Dr. Miller's license. If not, the hearing on a summary suspension should be scheduled to take place at or before the Board's next regularly scheduled meeting on May 6, 2009.

Dated at Burlington, Vermont, this 30th day of April, 2009.

SHEEHEY FURLONG & BEHM P.C.

By: \_\_\_\_\_

  
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# Attachment A

STATE OF VERMONT  
WASHINGTON COUNTY

FILED

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IN RE: GLENN MYER

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Washington Superior Court  
Docket No. 140-2-07Wncv

Appeal of Summary Suspension Order of June 2, 2005

**Cross-Motions to Strike  
DECISION ON MERITS OF APPEAL**

The Vermont Board of Pharmacy summarily suspended appellant Glenn Myer's pharmacist's license on June 2, 2005, based on allegations of unprofessional conduct. Mr. Myer appeals from the Summary Suspension Order and argues that (1) the issuance of the order without proper notice and hearing violated his due process rights and (2) the Board's findings and conclusions were not supported by the evidence. Mr. Myer is represented by Harold Stevens, Esq. Appellee Vermont Office of Professional Regulation (OPR) is represented by Robert H. Backus, Esq. For the following reasons, the Summary Suspension Order is *vacated*.

This decision pertains only to the Summary Suspension Order of June 2, 2005 and the Supplemental Findings and Conclusions of June 6, 2005 (collectively, "Summary Suspension Order"). This was an order issued at the beginning of a professional disciplinary proceeding against Mr. Myer. A final suspension hearing was held on August 24, 25, and 26, 2005, resulting in a Final ~~Suspension~~ Order dated September 7, 2005, which was affirmed by this Court on November 14, 2006, in Docket No. 52-1-06Wncv and by the Vermont Supreme Court in Docket No. 2007-063 (Aug. 8, 2007) (unpublished mem.). This matter, the appeal of the initial Summary Suspension Order, remained pending. As noted below, this Court ruled on September 25, 2006 that the appeal of the Summary Suspension Order did not become moot when the Final Suspension Order was entered. Therefore, the appeal is addressed on its merits.

**I. Factual Background**

Appellant Glenn Myer is a pharmacist who received his Vermont pharmacist's license in 2001. He was previously a pharmacist in Pennsylvania. He opened a pharmacy in Stowe, Vermont, in January 2005.

On May 21, 2005, Mr. Myer went to the home of a recently-deceased patient, Roy Cleary, and removed several medications from the home. The medications included at least one controlled substance. Mr. Myer combined the medications into a single container which he took to a local medical clinic where he flushed the contents down a

toilet in the presence of a receptionist. Mr. Myer did not inventory the medications before destroying them.

On May 27, 2005, Appellee Vermont Office of Professional Regulation ("OPR") filed a Request for a summary suspension of Mr. Myer's license with the Vermont Board of Pharmacy.<sup>1</sup> The Request was based upon allegations that Mr. Myer (1) improperly removed medications from Mr. Cleary's home and improperly disposed of them, and (2) provided inconsistent explanations for his actions. The Request also contained allegations of (3) improper billing practices, based on prescription labels recovered from Mr. Cleary's home, (4) improper dispensation of Ibuprofen 800 mg and Oxycontin to a person without a prescription during the summer of 2002, (5) improper dispensation of Ultram and Celebrex without prescription in 2002; and (6) improper use of the appellation "Dr." The Request cited specific Board of Pharmacy regulations alleged to have been violated by the allegedly improper billing practices and improper dispensation. However, the request did not cite any specific regulation or statute alleged to have been violated by the removal of medications.

On May 28, 2005, the Vermont Board of Pharmacy scheduled a hearing on the summary suspension Request for June 2, 2005. OPR sent a notice of the hearing to Mr. Myer at the address provided on his license application via certified mail, return receipt requested.

The hearing began on June 2, 2005 without Mr. Myer present. The presiding officer of the Board noted Mr. Myer's absence and explained that the file contained a notice of failed delivery from the U.S. Postal Service dated May 29, 2005. The notice said, "We attempted to deliver your item at 8:18 a.m. on May 28, 2005, in Stowe, Vermont, and a notice was left. It can be redelivered or picked up at the post office. If the item is unclaimed, it will be returned to the sender. Information available is updated every evening, please check again later." The Board began receiving evidence in Mr. Myer's absence.

The prosecuting attorney first called a Stowe police officer to testify about Mr. Myer's actions in removing the medications from Mr. Cleary's home. The police officer introduced hearsay statements from Mr. Cleary's son, Robert, and double-hearsay statements attributed to Mr. Myer. For example, on the issue of Mr. Myer's explanations in removing the medications from the home, the officer testified that "[Robert] told me that Glenn [Myer] told him that he was there because HIPAA regulations require that he remove any medications that have Roy's name on them." The police officer also introduced hearsay statements from Mr. Myer on the same issue. The Board later noted

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<sup>1</sup> Appellee Vermont Office of Professional Regulation (OPR) is the section of the Vermont Secretary of State's Office generally responsible for licensing, certification, registration, and disciplinary matters for a number of professional occupations, including pharmacy. 3 V.S.A. §§ 122, 123. In this case, the OPR was represented by prosecuting attorney Robert H. Backus, Esq. The Vermont Board of Pharmacy is a licensing board within the OPR composed of five pharmacists and two laypersons responsible for the enforcement of the pharmacy laws and regulations. 26 V.S.A. §§ 2031, 2032. With respect to complaints of unprofessional conduct, OPR is responsible for investigating the complaint and prosecuting the complaint before the Board. The Board makes the final disciplinary decision.

that the hearsay statements attributed to Mr. Myer conflicted with the double-hearsay statements attributed to Mr. Myer. All of this testimony was presented in Mr. Myer's absence.

The police officer then recounted his conversation with the receptionist who observed Mr. Myer destroy the medications. The testimony included hearsay statements attributed to the receptionist and double-hearsay statements attributed to Mr. Myer. The police officer then described his conversation with Mr. Myer, which included hearsay statements attributed to Mr. Myer. Again, the Board noted that the hearsay statements attributed to Mr. Myer conflicted with the double-hearsay statements attributed to Mr. Myer. Again, Mr. Myer was not present for any of this testimony.

After approximately one half hour of testimony, the prosecuting attorney offered to call Mr. Myer at the pharmacy to advise him that proceedings were underway. While the phone call was being placed, the police officer continued to introduce hearsay statements attributable to the receptionist who observed Mr. Myer destroying the medications. He also introduced hearsay statements attributable to Dan Franks, the person who informed Mr. Myer of the patient's death. These hearsay statements conflicted with double-hearsay statements attributed to Mr. Myer earlier in the testimony. Again, Mr. Myer was not present for this testimony.

The prosecuting attorney, Robert Backus, then advised the Board that Mr. Myer had been contacted by phone and notified of the hearing. Mr. Backus also advised that Mr. Myer had stated that he received his personal mail at the pharmacy rather than at his home address. Apparently, a dispute between Mr. Myer and his condominium association prevented him from regularly receiving mail at his home address. The Board decided to adjourn while Mr. Myer traveled from Stowe to the hearing room in Montpelier. When Mr. Myer arrived, the prosecuting attorney summarized the morning's testimony in an off-the-record conversation. The hearing then continued. Mr. Myer was not represented by an attorney. Mr. Myer had not received actual notice of the Request for summary suspension, specifying the charges, before he arrived. It is not clear whether he was or was not given a copy upon his arrival.

After briefly concluding testimony by the police officer, the prosecuting attorney called Mr. Myer as a witness. Mr. Myer testified that he removed the medications from Mr. Cleary's home because Mr. Cleary lived in an apartment complex inhabited by several known drug addicts and the apartment was being guarded by a person with known mental disabilities. The Board later found that this explanation conflicted with other statements of persons the police officer interviewed, and whose statements he related before the Board.

Mr. Myer also testified that he disposed of the medications by placing them into one large container and flushing them down the toilet in the presence of a receptionist. The Board found that this testimony was inconsistent in a number of small ways with the hearsay and double-hearsay statements introduced by the police officer. For example, the Board regarded Mr. Myer's testimony about the physical appearance of the pills

destroyed (including pink, red, and white pills) as inconsistent with the receptionist's hearsay description of the physical appearance of the pills ("at least two different color pills").

The Board also heard testimony from Carl Packer, an investigator with the OPR, regarding the allegedly improper billing practices. For billing purposes, Mr. Myer apparently entered different names for the prescribing doctor and the billing doctor. This practice permitted Medicaid reimbursement for some otherwise-ineligible prescriptions. Mr. Myer testified that he had received permission for this practice from the relevant doctors. Mr. Packer introduced hearsay statements attributable to three doctors involved in the allegations. The hearsay testimony contradicted Mr. Myer's testimony. For example, Mr. Packer introduced hearsay statements attributable to Dr. Richard Mansfield that asserted that Mr. Myer had not received permission from Dr. Mansfield. Hearsay statements attributed to Dr. Barbara O'Meara and Dr. Jonathan Cohen also contradicted Mr. Myer.

Finally, to prove that Mr. Myer dispensed Ibuprofen 800 mg and Oxycontin without a prescription, the prosecutor introduced an affidavit dated November 12, 2004. The affiant stated that Mr. Myer had given him the medications during the summer of 2002. Mr. Myer objected to the admission of the affidavit and noted his inability to cross-examine the affiant.

Mr. Myer's credibility became a major issue at the hearing. In addition to introducing the conflicting hearsay and double-hearsay statements, the prosecutor also elicited testimony from a police officer regarding the officer's personal opinion of Mr. Myer's veracity. In the closing arguments, the prosecutor also repeatedly accused Mr. Myer of lying. The following excerpts from the closing arguments provide an illustration:

I think I'd like to start off with the issue of credibility and whether or not anything which Mr. Myer says is credible. . . . [Tr. p. 166]

I believe that the record shows quite clearly that Mr. Myer lied on several occasions. . . . [Tr. p. 168-69]

You know, these, these are very different stories. They're not just different a little bit. They are stories where, when [Mr. Myer] gets cornered, everybody gets told a different story. He lies because he's got something to cover up. He lies and that means he should not be believed. . . . [Tr. p. 171]

The prosecutor acknowledged that misuse of medications by Mr. Myer of the medications removed from the Cleary home could only be a matter of conjecture, and

stated that Mr. Myer's lack of credibility was the real reason why his license should be summarily suspended:

So, the reason that I'm here asking for a summary suspension is very simple. We do have a regulated, a controlled substance disappearing from the residence. We know that from Glenn Myer's statement. We have other drugs disappearing from the residence. We have absolutely no way of knowing what in fact happened to those drugs once they left the residence. We have no way of knowing if they went back into circulation, nothing. Zero protection to the public. And on top of that, because Mr. Myer has just lied so consistently in this proceeding, he has lied so consistently to the investigators when he was being talked to, I believe that the Board should assume that he is completely incredible, no promises or commitments he makes are worth anything. No, no, no series of conditions can protect the public for the simple reason that there's no reason to believe that he's going to follow those conditions. I know it's an extreme thing, I think he should be shut down now, as soon as you're done deliberating. The store shut down until someone can be found to take it over who will make sure that the laws of the state are relied on, because Mr. Myer gives this board no reason to believe that he serves the public in a way that is safe and I argue strongly to the Board that if we're to protect the public, this pharmacist needs to be put out of business right now. [Tr. p. 176]

At the conclusion of the hearing, Mr. Myer objected to the prosecutor's characterizations and to the circumstances under which the hearing had been conducted. "What really bothers me," Mr. Myer explained, "is due process. Here I'm called in my store at 10:30 to come to defend my license. And then [the prosecutor] sits on his closing and says I'm a liar just based on pure accusations. I think I should have the right to bring Penny Walker, have the right to have Mr. Cleary here, to have the right to bring evidence to support my case."

The Board summarily suspended Mr. Myer's license later that day. The order issued by the Board was conclusory in nature and recited only the allegations contained in the summary suspension request. The sole finding was that "a sufficient number of the allegations in the request for summary suspension have been established to the necessary degree. The public health, safety, and welfare imperatively requires emergency action."

The Board issued supplemental findings and conclusions on June 6, 2005. In making its conclusions, the Board identified no specific regulation or rule violated by Mr. Myer's actions in removing the medications from Mr. Cleary's home. The findings

identified poor judgment and focused upon Mr. Myer's credibility and the alleged inconsistencies revealed during the hearing. The Board found that "Mr. Myer's testimony showed such a lack of credibility that he cannot be trusted to meet his professional responsibilities" and that the "public health safety and welfare does imperatively require emergency action at this time."

On June 10, 2005, Mr. Myer filed a motion to reconvene and submit additional evidence. He asserted that he would have presented the additional evidence at the hearing if he had been offered an opportunity to prepare. The Board denied the motion on June 13, reasoning that Mr. Myer received actual notice of the hearing by telephone, and that it was Mr. Myer's fault that the mailed notice was ineffective. A similar motion to take additional evidence on appeal was also denied.

On August 24, 25, and 26, 2005, the Board held a final suspension hearing. A Final Suspension Order was issued on September 7, 2005, suspending Mr. Myer's license for one year and imposing a variety of conditions. The Board's final order found that neither the removal of the medications nor the allegedly-improper billing practices amounted to unprofessional conduct. The Board also dismissed the charge related to unauthorized distribution of Ibuprofen and Oxycontin. On a number of additional charges, including many that were not brought at the summary suspension hearing, the Board found that Mr. Myer had committed unprofessional conduct. The Board accordingly suspended Mr. Myer's professional license for one year and imposed a variety of conditions.

The appellate officer then dismissed the appeal of the Summary Suspension Order as moot. This Court reversed the decision on mootness in light of the collateral effects of the summary suspension on Mr. Myer's license and reputation. *In re: Glenn Myer*, No. 600-10-05Wncv (Sept. 25, 2006) (Decision, Appeal of Summary Suspension Order of June 2, 2005). As this Court explained, "[t]he implication of the Summary Suspension Order is that Mr. Myer represented such a risk that the public needed to be protected from him on an emergency basis." *Id.*

On remand, the appellate officer affirmed the Summary Suspension Order. The officer concluded that (1) there were no procedural due process violations given the emergency nature of the hearing and (2) the Board's findings were supported by the evidence. Mr. Myer now appeals from this decision. 3 V.S.A. § 130a(c).

## II. Cross-Motions to Strike

The parties' Cross-Motions to Strike present the first issue, as they require the Court to determine the content of the record to be considered by this Court in addressing the issues on appeal. 3 V.S.A. § 130a(c) provides that, on appeal, this Court "shall review the matter on the basis of the records created before the board and the appellate officer." The records created before the board and the appellate officer include: "(1) all pleadings, motions, [and] intermediate rulings; (2) all evidence received or considered; (3) a statement of matters officially noticed; (4) questions and offers of proof, objections,

and rulings thereon; (5) proposed findings and exceptions; and (6) any decision, opinion, or report.” 3 V.S.A. § 809(e) (setting forth record in contested cases); accord Administrative Rules for the Office of Professional Regulation § 4.2.

Both parties have filed motions to strike material appearing in either the printed case or the supplemental printed case on the grounds that they were not properly part of the record on appeal.

*A. Appellee's Motion to Strike, filed June 28, 2007*

In his printed case, Mr. Myer has included materials that he attempted to submit to the Board via his Motion to Reconvene and Submit Additional Evidence, filed on June 10, 2005, and his Motion to Submit Additional Evidence on Appeal, filed on July 3, 2005, prior to the appeal before the hearing officer. The Board and the hearing officer denied both motions. As a result, the evidence attached to those motions was neither “received nor considered” by the Board. Appellee moves to strike the materials as beyond the scope of the record on appeal.

The Court has considered the circumstances of the hearing in ruling upon this motion. At the hearing, Mr. Myer indicated that he would have submitted certain evidence but for the lack of notice. However, none of the additional proffered evidence matches the descriptions he provided at the hearing, and none of it was reviewed by the Board. As a result, the Court cannot construe the materials as having been offered or received by the Board. The Court cannot consider the materials as evidence on the substantive matters before the Board on June 2, 2005.

To clarify that the Court has not considered such matters as evidence, Appellee’s motion to strike is *granted* as to the following items: (1) partial deposition transcript from an unrelated civil proceeding, pp. 36–39; (2) photocopies of prescriptions and labels, pp. 40–41; (3) testimonials on behalf of Mr. Myer, pp. 53–58; and (4) the deposition of Cheryl Walker (following p. 109).

The following items were part of the record created by the Board and the appellate officer, and therefore Appellee’s motion to strike is *denied* as to: (1) typed responses to the summary suspension request, pp. 29–35; (2) documents from proceedings in Washington Superior Court to stay the summary suspension, pp. 64–70 & 106–109, as these documents were considered by the appellate officer; (3) the Board’s Final Suspension Order of September 7, 2005, pp. 71–96; and (4) Mr. Myer’s motion to reconvene and submit additional evidence to the Board dated June 10, 2005, pp. 42–58.

While these items are part of the record created by the Board and were therefore before the appellate officer, the Court does not consider the factual statements or findings contained therein as evidence. Material on pages 50, 51, and 52 of the record were part of the Board’s record relating to notice to Mr. Myer of the Request for summary suspension and the hearing scheduled for June 2, 2005, and have been considered in relation to the claim of lack of notice of the hearing. However, in reviewing the Board’s

findings based on the June 2, 2005 hearing, none of the materials Appellee objects to have been considered. Finally, the Court has disregarded the portions of Appellant's brief that refer to or rely on documents or facts that were not part of the record before the Board on June 2, 2005.

*B. Appellant's Motion to Strike, filed July 12, 2007*

The Court *grants* Appellant's motion to strike the documents included in Appellee's supplemental printed case pertaining to the Board of Professional Responsibility complaint, pp. 1-20. This complaint was not part of the record created by the Board.

### III. Standard of Review

This Court will "affirm the Board's findings as long as they are supported by substantial evidence, and its conclusions if rationally derived from the findings and based on a correct interpretation of the law." *Braun v. Bd. of Dental Exam'rs*, 167 Vt. 110, 114 (1997). "Evidence is substantial if, in looking at the whole record, it is relevant and a reasonable person could accept it as adequate to support the particular conclusion." *Id.* (citations omitted). In reviewing the evidence, the Court will defer to the finder of fact when there is conflicting evidence in the record. 3 V.S.A. § 130a(b); *Devers-Scott v. Office of Professional Regulation*, 2007 VT 4, ¶ 6, 18 Vt. L. Wk. 1. The ultimate question is the reasonableness of the Board's decision. *Braun*, 167 Vt. at 114.

In this case, the Board's decision is entitled to an additional degree of deference because a majority of the Board members are pharmacists. Additional deference is owed where "a professional's conduct was evaluated by a group of his peers." *Id.*

### IV. Analysis

Mr. Myer argues that the Board failed to provide adequate notice of the hearing or a meaningful opportunity to be heard. He also argues that the Board's finding that the public health, safety, and welfare imperatively required emergency action was not supported by substantial evidence. OPR argues that notice is not required by statute in summary suspension proceedings and that, in the alternative, the notice was adequate under the circumstances. OPR also urges the Court to defer to the Board's finding that emergency action was warranted.

As explained in more detail below, the Court's decision is that the Board's summary order was not supported by a finding sufficiently specific on the reason for an imperative need for emergency action. Mr. Myer's procedural due process rights were also violated by the Board's failure to provide notice and a meaningful opportunity to be heard. Accordingly, the Summary Suspension Order cannot stand.

The general rule in Vermont is that due process requires notice and a meaningful opportunity to be heard prior to any adverse action against a professional license. The

Vermont Administrative Procedure Act prohibits the suspension of a professional license “unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license.” 3 V.S.A. § 814(c).

The rule is different in cases where the public health, safety, or welfare “imperatively requires emergency action.” In such cases, the Vermont APA authorizes summary suspensions without prior notice or an opportunity for a hearing:

If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

3 V.S.A. § 814(c).

The difference between a regular suspension of a professional license, which requires notice and opportunity for a hearing, and a summary suspension of a professional license, which does not, is the existence of a threat to public health, safety, or welfare that is so imminent that it “imperatively requires emergency action.” 3 V.S.A. § 814(c). The Board must expressly make a finding to that effect as a prerequisite to exercising its authority to summarily suspend. The key inquiry in this case is therefore whether the Board made a sufficient finding supported by substantial evidence that emergency action was imperatively required.

*A. Was Emergency Action Imperatively Required?*

There is no Vermont case law addressing the difference between the standards for summary suspensions and those for ‘regular’ suspensions. Cases of summary suspensions from other jurisdictions shed light upon the type of misconduct that generally warrants the summary suspension of a professional license. For example, in *Morgan v. Department of Financial and Professional Regulation*, a clinical psychologist was summarily suspended after he sexually assaulted a female patient during a therapeutic hypnosis session. 871 N.E.2d 178 (Ill. Ct. App. 2007). In *Dahnad v. Buttrick*, a dentist was summarily suspended after he administered nitrous oxide to a prospective female employee, and then took advantage of her inebriated condition by kissing her, rubbing her back, and lifting up and looking inside her shirt, all without her consent. 36 P.3d 742 (Ariz. Ct. App. 2001). In *Jones v. State*, a pharmacist was summarily suspended after his pharmacy received two consecutive inspection scores significantly below the statutory minimum with several violations of state and federal law. 2007 WL 1589462. In each case, summary suspension was warranted because the professional misconduct was clearly proscribed by law and constituted an “imminent danger to the public health or safety.” *Williamson v. District of Columbia Bd. of Dentistry*, 647 A.2d 389, 392 (D.C. 1994).

Summary suspension has the effect of enjoining a licensed professional from engaging in his or her professional work. Under Vermont law, preliminary injunctions may ordinarily be issued against an individual only after notice and an opportunity for a hearing. V.R.C.P. 65(b). If, however, the applicant clearly shows by specific facts "that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition," a temporary restraining order may be issued *ex parte*. V.R.C.P. 65(a). Before issuing an *ex parte* order, the court has the duty to scrutinize the application to determine whether immediate and irreparable injury will occur before the adverse party can be heard in opposition. "Every temporary restraining order granted without notice shall . . . define the injury and state why it is irreparable and why the order was granted without notice. . ." *Id.*

The duty of the Board of Pharmacy in response to a summary suspension request is analogous. By statute, summary suspension is authorized only when the Board makes a finding "that public health, safety, or welfare imperatively requires emergency action." 3 V.S.A. § 814(c). There is no reason to believe that this language suggests anything less than "imminent danger to the public health or safety," or "immediate and irreparable harm." While the language of 3 V.S.A. § 814(c) is not as detailed and directive about the nature of the finding to be made, Rule 65 (a) provides a helpful model for what should be included in a finding that a threat to public health, safety, or welfare is so imminent that emergency action is imperatively required, particularly given the significant nature of the professional's license at stake.

Perhaps the most serious allegations in the summary suspension Request was the charge that Mr. Myer provided Ibuprofen 800 mg and Oxycontin and two other drugs to persons without a prescription. If true, Mr. Myer violated Board of Pharmacy Rules 3.700 and 3.710, which prohibit the dispensation of medication to a person without a prescription.

The evidence at the hearing of the alleged improper dispensations was about two incidents that occurred approximately three years before the summary suspension Request, and there was no allegation of a risk of continuing violation. This evidence, viewed most favorably to the prosecution, did not show immediate and irreparable injury, making emergency action imperative. Furthermore, the affidavit through which OPR learned of the allegation was made and signed in November 2004, six months before the summary suspension Request. Testimony at the hearing shows that the statements OPR obtained about the incident were from persons with whom Mr. Myer was involved in litigation. There was no discernible reason why the OPR prosecutor needed to seek summary action, without notice and an opportunity to respond to the charge. Even though serious, an allegation so remote in time, without facts showing a risk of the conduct on an ongoing basis, could not have provided the basis for governmental action so urgent that notice and an opportunity for a hearing could not be afforded. There is not substantial evidence compelling immediate action based on this charge.

The allegations of improper billing practices and unauthorized use of the professional appellation "Dr." are similarly unaccompanied by a showing of imminent

harm. There were no facts presented by OPR to suggest that any person was harmed or threatened with immediate and irreparable injury by the billing practices and the Board did not make such a finding. The Board's findings show that the significance of the evidence on this issue was on Mr. Myer's judgment and credibility. While the Board found that Mr. Myer's use of the term "Dr" implied he was a medical doctor, it made no finding that this fact, or the manner in which the representation would mislead the public or individuals, imperatively required emergency action.

There was also no substantial evidence showing that Mr. Myer violated professional rules in removing the medications from Mr. Cleary's home. Neither the summary suspension Request nor the Summary Suspension Order of June 2, 2005, including the supplemental findings of June 6, 2005, identified a law or regulation violated by the removal of medications from a deceased person's home, nor did OPR establish that the law required Mr. Myer to inventory Mr. Cleary's drugs before destroying them. In other words, even if the allegations were true, and even if the conduct does not constitute good practice, the conduct was not clearly a violation of law, nor did the evidence of the incident show imminent danger to public health and safety.

In his closing argument, the prosecutor argued that the lack of an inventory meant that the Board could not be assured that the medications were not being redistributed. There was no evidence of redistribution at the hearing, however, and the prosecuting attorney acknowledged that it was "speculation" to think that it may have happened. [Tr. p. 173] Indeed, the only direct testimony regarding the ultimate fate of all of the medications was the testimony of Mr. Myer that he destroyed them, and did so in the presence of a medical receptionist. Hearsay evidence from the receptionist confirmed that she had witnessed the disposal of the medications, albeit without an inventory.

The Board's supplemental findings suggest that the evidence on all these charges was accepted by the Board as evidence of "flawed and unprofessional judgment in attending to pharmacy practice." (§ 55, quoted in full below.) The remaining basis for the Order is a group of findings by the Board regarding Mr. Myer's credibility. Indeed, this became the focus of the hearing, and the supplemental findings make clear that the Board's low opinion of Mr. Myer's credibility was the primary basis for its decision. The Board found that "[t]he full impact of Mr. Myer's testimony was that he showed flawed and unprofessional judgment in attending to pharmacy practice, and therefore to the requirements of one charged with acting in a position of trust, acting as pharmacist." Citing inconsistencies in statements of Mr. Myer, the Board also expressly found that "Mr. Myer's testimony showed such a lack of credibility that he cannot be trusted to meet his professional responsibilities."

The prosecutor's closing argument appears to have significantly influenced the Board in this regard. In that argument, the prosecutor engaged in an extended indictment of Mr. Myer's credibility that included numerous statements of personal belief regarding whether Mr. Myer was lying to the Board. For example, the prosecutor told the Board that "I believe that the Board should assume that he is completely incredible, no promises or commitments he makes are worth anything." And, "I believe that the record shows

quite clearly that Mr. Myer lied on several occasions.” Based on these beliefs, the prosecutor concluded by arguing that “I think he should be shut down now, as soon as you’re done deliberating.”

The Vermont Supreme Court has long held that such statements are prejudicial. In 1932, the Court denounced as prejudicial a prosecutor’s statement that “I naturally believe that this complaint is warranted and I think that I was justified in issuing it.” *State v. Parker*, 104 Vt. 494, 500 (1932). Recently, the Court reversed a criminal conviction in a case where the prosecutor’s closing argument expressed a personal belief that defense witnesses were lying. *State v. Rehkop*, 2006 VT 72, ¶ 34, 180 Vt. 228. The prejudice arises from the risk that the finder of fact will “give special weight to this opinion because of the prestige of the prosecutor and the fact-finding facilities available to the office.” *Id.* (quoting *State v. Ayers*, 148 Vt. 421, 425 (1987)). Such a risk is borne out in this case, where the language and tenor of the Board’s findings regarding Mr. Myer’s credibility appear to reflect the statements made by the prosecutor during the closing argument.

The Board of Pharmacy is entitled to an extremely high degree of deference in making its factual findings and conclusions. It is nonetheless subject to the requirement that it may not summarily suspend a license without making a finding in its order that public health, safety, or welfare *imperatively requires emergency action*. A conclusory statement using statutory language is not enough: the order must include a finding that demonstrates the link between specific facts, for which there is evidentiary support, and the risk of threat to public safety that makes emergency action imperative. 3 V.S.A. § 814 (c).

As to the specific accusations against Mr. Myer in the Request for summary suspension, other than inconsistencies in explanations, the above analysis shows that there is not substantial evidence to support a finding that emergency suspension was necessary in order to protect either specific persons or the public at large. Indeed, the prosecuting attorney’s own summation showed that by the end of the hearing, lying had become the primary complaint against Mr. Myer, and the Supplemental Findings and Conclusions of June 6, 2005 show clearly that this was an important basis of the summary suspension:

¶ 55. The full impact of Mr. Myer’s testimony was that he showed flawed and unprofessional judgment in attending to pharmacy practice, and therefore to the requirements of one charged with acting in a position of trust, acting as a pharmacist.

¶ 56. In many respects Mr. Myer’s testimony was not credible.

¶ 57. The Board finds that Mr. Myer’s testimony showed such a lack of credibility that he cannot be trusted to meet his professional responsibilities.

¶ 58. The Board finds based on the documentation and testimony provided, and to a great extent Mr. Myer's own testimony, that Mr. Myer cannot at this time safely serve as a pharmacist.

¶ 59. The public health safety and welfare does imperatively require emergency action at this time.

The two bases of the finding that emergency action was imperatively required appear to be flawed and unprofessional judgment, and lack of credibility.

As to the finding of flawed and unprofessional judgment, there was substantial evidence at the hearing for such a finding. The problem is that there is no finding connecting the nature of the flawed and unprofessional judgment to defined risks that imperatively called for emergency suspension. Even granting all possible deference to the Board, its finding does not show the manner in which Mr. Myer's poor judgment rendered him 'unsafe' to serve as a pharmacist in the immediate future, before a hearing with notice could be held.

As to lack of credibility, it is possible that substantial evidence of lying on the part of a professional could support summary suspension, depending on the circumstances and the nature of the lying. In this case, the evidence of lying on the part of Mr. Myer is problematic for three reasons. First, some of the inconsistency attributed to Mr. Myer is based on hearsay and double hearsay statements from persons involved in an on-going civil dispute with Mr. Myer, and Mr. Myer did not have the opportunity to cross examine such persons before the Board, despite his request to do so. Under these circumstances, it is difficult to conclude that there was "substantial" evidence to support the Board's finding. Second, even if all inconsistencies are resolved against Mr. Myer, the Board's findings do not show how the nature of his lack of credibility, as set forth in the supplemental findings, imperatively required emergency action to protect public safety. Finally, there is the prejudicial impact of the prosecuting attorney having injected his personal belief that Mr. Myer was lying, and having urged the Board to shut down Mr. Myer's pharmacy immediately for that reason.

If this were a 'regular' disciplinary hearing, held after Mr. Myer had notice of charges of poor judgment and lack of credibility, the degree of deference to the Board in deciding on suspension as a sanction for such conduct would be high. In the context of summary suspension, however, the Board has the special legal duty to make findings that are not only supported by substantial evidence, but that specifically show that the conduct "imperatively requires emergency action;" in other words, that imminent harm would occur before Mr. Myer could be provided with notice and an opportunity to respond at a hearing held with notice of charges. In this case, findings that Mr. Myer exercised flawed and unprofessional judgment and lacked credibility were not linked to an imperative need for emergency action to prevent identified risk. In the parlance of V.R.C.P. 65, there was no showing of an immediate and irreparable injury that would result to the public before Mr. Myer could be heard with sufficient time to prepare a response to the charges.

The Board has no authority to impose a summary suspension unless it makes a finding that *emergency* action is *imperatively* required. 3 V.S.A. § 814(c) (emphasis added). It is possible that the Board might have been able to articulate in a finding why poor professional judgment, for which there was substantial evidence, called imperatively for emergency suspension. The link is not self-evident; moreover, an articulation of it in a finding is needed to meet the statutory requirement. Because the standard set forth in the law was not met, the Summary Suspension Order did not rest on a proper legal foundation and must be vacated.

*B. Was Adequate Due Process Provided?*

In the alternative, OPR contends that the suspension is lawful because adequate due process was provided. As noted above, § 814(c) of the Vermont APA provides that no 'regular' (non-summary) suspension is lawful unless the Board provides notice and an opportunity to be heard.

Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); accord *Dusenbery v. United States*, 534 U.S. 161, 170 (2002). Notice is essential because the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane*, 339 U.S. at 314; accord *Rich v. Montpelier Supervisory Dist.*, 167 Vt. 415, 420 (1998). As Judge Friendly famously observed, "it is fundamental that notice be given and that it be timely and clearly inform the individual of the proposed action and the grounds for it. Otherwise the individual likely would be unable to marshal evidence and prepare his case so as to benefit from any hearing that was provided." Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1280-81 (1975).

Judge Friendly's observation forms the basis of Mr. Myer's objection to the notice provided in this case. OPR sent notice via a certified letter, return receipt requested, to the address provided by Mr. Myer in his license application. The letter was sent on Friday, May 27, 2005, and delivery was unsuccessfully attempted on Saturday, May 28, 2005—the first day of the long Memorial Day weekend. The hearing was then held at 10:00 a.m. on Thursday, June 2, 2005. At the start of the hearing, the case file showed a notice of failed delivery from the U.S. Postal Service, and the presiding officer informed the Board of this fact. Nonetheless, the hearing began and was conducted in Mr. Myer's absence for approximately thirty minutes until he was telephoned. Mr. Myer arrived in the middle of the hearing without a lawyer and without any prepared evidence. At the close of the hearing, Mr. Myer objected to being "called in my store at 10:30 to come and defend my license" and argued "I think I should have . . . the right to bring evidence to support my case."

Adequate notice was not provided in this case. Both OPR and the Board knew, prior to the commencement of the hearing, that attempted delivery of the certified mail had been unsuccessful. The Board was not entitled to proceed with an ordinary

disciplinary/suspension hearing under the circumstances. See 3 V.S.A. § 814(c) (no suspension is lawful unless notice is provided). The Board was required to make further reasonable attempts at providing notice when it learned that its attempts at service had been unsuccessful. *Jones v. Flowers*, 547 U.S. 220, 227 (2006).<sup>2</sup> Furthermore, the Board's responsibility to provide adequate notice was not diminished by Mr. Myer's failure to update his address on file. *Jones*, 547 U.S. at 231–32 (2006); see also *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799 (1983) (“A party’s ability to take steps to safeguard its own interests does not relieve the State of its constitutional obligation.”).

The Board also did not provide Mr. Myer with an adequate opportunity for a hearing. The opportunity to be heard must be provided “at a meaningful time and in a meaningful manner.” *Rich*, 167 Vt. at 420. The telephone call placed to Mr. Myer thirty minutes after the commencement of the hearing did not provide Mr. Myer with an opportunity to be represented, to prepare evidence in support of his case, or to hear the testimony actually presented during the first thirty minutes. This does not amount to a meaningful hearing.

It may have been proper for the Board to conduct an *ex parte* hearing, or a hearing without proper notice, to consider the Request for summary suspension, as it was presented as a request for emergency action, which does not require notice. Upon finding that the evidence did not support emergency action, however, the Board should have denied the request for summary suspension and set a hearing with notice and an opportunity for hearing. Under 3 V.S.A. § 814 (c), if a license is summarily suspended, proceedings for revocation of the license or other disciplinary action “shall be *promptly* instituted and determined” (emphasis added). It makes sense that if a license is suspended summarily, without notice and a proper hearing opportunity, a follow-up hearing should be held “promptly.” This is in accord with V.R.C.P. 65, which specifically provides that if an *ex parte* order is issued, a hearing must be held within ten days.

While 3 V.S.A. § 814 (c) does not specify a time period within which the hearing with notice on the charges must be held, and there are no rules that do so for summary proceedings prosecuted by the OPR, given a licensee’s significant property interest in his or her professional license, due process calls for the “promptness” requirement to be taken seriously to ensure that action taken without procedural safeguards is limited in duration. By the time of the Board decision in this case, several of the bases of the summary suspension, which lasted 3 months, had been either dismissed or not proven. The court has since concluded that the suspensions was not based on a sufficient finding. This set of circumstances highlights the extent to which due process requires both (1) that a Board finding that a licensee’s conduct “imperatively requires emergency action” be

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<sup>2</sup> *Jones* was issued in 2006, after the events of this case occurred. Its central holding—that a governmental agency depriving an individual of a property right must make further reasonable attempts at providing notice when it learns that its attempts at service have failed—reflects long-standing principles of due process and might have been expected; it is not a ruling that created a departure from existing law.

sufficiently specific in order for a license to be summarily suspended, and (2) that any hearing held after a summary suspension shall be held and determined "promptly."

Mr. Myer was not provided with reasonable notice or a meaningful opportunity to be heard prior to the suspension of his license on June 2, 2005. As there was not a sufficient finding establishing that emergency action was imperatively required, the suspension was without proper legal foundation under 3 V.S.A. § 814(c).

### Conclusion

For the foregoing reasons, the Summary Suspension Order is reversed. If the matter were still pending, reversal and remand would be the outcome. Remand would serve no purpose in this case because the Final Suspension Order, which imposed sanctions and addressed prospective effect, has already become final. Therefore, the Summary Suspension Order is simply vacated.

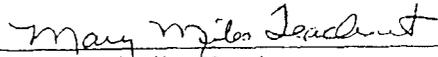
This ruling does not disturb any aspect of the Final Suspension Order of September 7, 2005 that was affirmed by the Vermont Supreme Court in Docket No. 2007-063 on August 8, 2007.

The disposition makes it unnecessary to consider Mr. Myer's additional arguments concerning bias or the admissibility of certain evidence.

### Order

The Summary Suspension Order of June 2, 2005 is *vacated*.

Dated at Montpelier, Vermont this 31<sup>st</sup> day of January, 2008.

  
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Hon. Mary Miles Teachout  
Superior Court Judge