

STATE OF VERMONT
BOARD OF MEDICAL PRACTICE

In Re:)
 DAVID S. CHASE,) Docket No. MPC 15-0203, et al.
 Respondent)

DECISION ON RESPONDENT'S
RENEWED MOTION TO DISMISS
SUPERCEDING SPECIFICATION OF CHARGES

Respondent has filed a Renewed Motion to Dismiss Superceding Specification of Charges in the above-captioned matter pending before the Vermont Board of Medical Practice (Board). The Vermont Attorney General's Office (AGO) has filed the State's Memorandum in Opposition to Respondent's Third Motion to Dismiss. The Respondent subsequently filed his Reply Memorandum In Support of Renewed Motion to Dismiss. On 3/1/06, the Board held a hearing on Respondent's Renewed Motion to Dismiss. The Board Hearing Panel included James D. Cahill, M.D.; Sharon L. Nicol, Public Member; Alexander Northern, Public Member; Toby Sadkin, M.D.; Katherine A. Silta, PA-C; and John B. Webber, Esq., Public Member. Phillip J. Cykon, Esq. served as Presiding Officer for the Board. Joseph L. Winn, Esq. appeared on behalf of the State of Vermont. Eric S. Miller, Esq. and R. Jeffrey Behm, Esq. appeared on behalf of Respondent, David S. Chase, M.D., who was present at the hearing.

BACKGROUND

By Motion for Summary Suspension dated 7/20/03, the Vermont Attorney General's Office requested that the Vermont Board of Medical Practice (Board) suspend Respondent's license to practice medicine. Effective 7/21/03, the Board ordered the summary suspension of Respondent's license. Subsequent to that order, the Attorney General's Office filed an initial Specification of Charges, and later, Superceding Specification of Charges dated 12/1/03 were filed.

After numerous discovery and other motions, on or about 2/17/04, Respondent filed a Motion to Reinstate License and Dismiss Superceding Specification of Charges. After the hearing, the Board issued its 3/31/04 Decision denying the Motion to Dismiss and granting the Motion to Reinstate License. Subsequently, Respondent filed a Motion to Reconsider, and the Board issued its 4/29/04 Decision reaffirming its prior Decision and emphasizing certain language of that Decision. On or about 7/8/04, Respondent filed his Second Motion to Dismiss,

which was denied by the Board in its 8/13/04 Decision. Respondent moved the Board to Reconsider that Decision, which was denied by the Board in its 9/2/04 Decision.

Shortly thereafter, on or about 9/13/04, Respondent filed a motion which requested the Board to stay the hearing on the merits of the Superceding Specification of Charges pending conclusion of his imminent federal criminal case. Respondent asserted that requiring him to defend the Board's charges and the criminal charges at the same time would have jeopardized several of his constitutional rights and burdened him in various other ways. Over the State's objection, the Board granted a stay of Board proceedings. The stay of the Board hearing was to remain in effect until the conclusion of any criminal proceedings filed against Respondent. Those criminal proceedings have concluded as a result of acquittals and dismissals of all criminal charges filed against Respondent.

OPINION

Respondent's Renewed Motion to Dismiss resurrects his prior motion to dismiss the superceding specification of charges against him. As grounds for this request, Respondent asserts that in light of irregularities presented by State actions, he cannot receive his constitutional guarantee of due process, therefore, the matter should be dismissed. Respondent contends that an affidavit the State used in support of its Motion for Summary Suspension was obtained under false pretenses and contained false or inaccurate statements. Respondent further contends that letters dated 12/4/03 and 12/18/03 sent by the State to several witnesses have interfered with his ability to interview those witnesses, and that this interference and the questionable summary suspension have combined to deny him his due process right to the opportunity to a fair hearing. In addition, Respondent contends that all charges should be dismissed in the interests of justice and because further disciplinary proceedings will not serve any legitimate purpose. The Board again addresses the issues raised by Respondent.

A. DUE PROCESS

The heart of Respondent's claim is that because of the actions of the State, he cannot receive due process at the hearing on the merits of the charges pending against him. The Board fully understands its responsibility to afford due process to the licensees that it regulates. The numerous proceedings that have taken place in this matter and the Board's prior decisions demonstrate its awareness of the importance of these rights. Addressing the issue of due process requirements in administrative adjudication, the Vermont Supreme Court referred to language of the United States Supreme Court, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Langlois v. Dept. of Employment & Training, 149 Vt. 498, 501 (1988) (quoting Brock v. Roadway Express, Inc., 481 U.S. 252, 260-61 (1987)).

Under 26 V.S.A. § 1353, the Board has the authority "to investigate all complaints and charges of unprofessional conduct against any holder of a license or any medical practitioner ... and to hold hearings to determine whether such charges are substantiated or unsubstantiated." See also 26 V.S.A. §§ 1355 and 1360. Board Rule 16.1 sets forth that such disciplinary hearings shall be conducted according to the Vermont Administrative Procedure Act (VAPA), 3 V.S.A. § 809-815. The rights provided under VAPA and the preponderance of

evidence burden of proof placed on the State comply with “the constitutional process due” to the Respondent. In re Smith, 169 Vt. 162, 172 (1999).

1. WITNESS AFFIDAVIT

Regarding the investigator-prepared witness affidavit, which Respondent maintains constitutes prejudicial misconduct, the Board emphasizes that it understands the serious nature of the allegation. The Board expressed its concern about the affidavit by its earlier decision to strike the summary suspension order. However, based on the state of the evidence, the Board did not find a due process violation, and for the same reasons, does not find one now. The Board was, and is, aware of the controversy concerning the affidavit and subsequent testimony, and the inconsistencies which have arisen. Neither the witness nor the investigator has testified in person on this issue before the Board. The Board believes that any such inconsistencies are relevant to the witnesses' credibility, and the credibility of those witnesses will be assessed by the Board if and when those witnesses testify before the Board. Compare Smith v. CVH, Inc., 177 Vt. 640, 645 (2004) (contradictory statements in expert witness's deposition and affidavit not cause for excluding his opinions, but “such contradictions go solely to the expert's credibility, and are to be assessed by the jury when weighing the expert's testimony”). Should the testimony of the witnesses demonstrate to the Board that the affiant's affidavit statements were misrepresented, and the misrepresentation has or had a material effect on the entire proceedings against Respondent, then the Board will consider what appropriate action could be taken. Furthermore, as the Board has previously held, and holds again, the questionable or inconsistent portions of the affidavit are not connected sufficiently to the allegations in the Superceding Specification of Charges to warrant dismissal of the entire matter.

2. INTERVIEW LETTERS

As for the interview letters sent to witnesses, the Board previously recognized that the prosecutor's actions did not comport with the Vermont Supreme Court's view of witnesses and pre-trial discovery and ordered that the Respondent had the right to interview prospective witnesses without interference from opposing counsel. The Board has not condoned and does not condone this practice. As the Board previously wrote:

The Board is mindful of the Vermont Supreme Court's view of witnesses in relation to the situation at hand. Compare State v. Messier, 146 Vt. 145, 155 (1985) (in reference to V.R.Cr.P. 16.2, the rule is in accord with the principle that witnesses in a criminal trial are the property of neither the state nor the defendant); Schmitt v. Lalancette, 2003 VT 24, ¶ 13 (counsel for all parties have a right to interview an adverse party's witnesses, the witness willing, in private, without the presence or consent of opposing counsel). Based on this viewpoint, any prospective witness in this proceeding may speak with the attorneys that represent Respondent if the witness so desires, and the Respondent's attorneys can continue to pursue such interviews, discussing with the witnesses the viewpoint expressed in this written decision from the Board.

Board Decision on Respondent's Motion to Reinstate License and Dismiss Superceding Specification of Charges, 3/31/04.

Upon Respondent's Motion to Reconsider that Decision, in which he contended that the Board did not adequately address the witness problem, the Board again summarized the language from the Vermont Supreme Court and wrote it in bold and enlarged font:

WITNESSES ARE THE PROPERTY OF NEITHER PARTY. COUNSEL FOR ALL PARTIES HAVE A RIGHT TO INTERVIEW AN ADVERSE PARTY'S WITNESSES, THE WITNESS WILLING, IN PRIVATE, WITHOUT THE PRESENCE OR CONSENT OF OPPOSING COUNSEL

The Board further wrote:

Both the Attorney General's Office and Counsel for Respondent have the responsibility to ensure that any prospective witness in this proceeding has been given a copy of this decision and order. It is incumbent on both parties to make sure that any prospective witness is informed that they can be interviewed by counsel for either party without interference from opposing counsel.

Board's Decision on Respondent's Motion to Reconsider, 4/29/04.

As the Board held then and holds now, the letters sent to the witnesses have not prejudiced Respondent's due process right to a fair hearing. The Board previously wrote:

Respondent still has the opportunity to afford himself of any investigation and discovery rights that are available to him in an administrative proceeding. He is free to do further interviews, conduct depositions, and, if necessary, utilize the statutory subpoena process set forth in 3 V.S.A. § 809a. At the administrative hearing, Respondent will have full opportunity to call witnesses, present evidence, and present argument on all issues in this matter. 3 V.S.A. § 809(c). He will have the opportunity to cross-examine all witnesses presented against him. 3 V.S.A. § 810(3).

Board Decision on Respondent's Motion to Reinstate License and Dismiss Superceding Specification of Charges, 3/31/04.

The fact that the Board of Professional Responsibility has determined such conduct to be unethical doesn't strengthen the due process claim. The unethical nature of the action has been dealt with as deemed appropriate by the proper authority in the proper forum. The question still remains whether that conduct, which the Board had previously found contrary to proper practice and the Professional Responsibility Board has found unethical, has deprived Respondent of his due process right to a fair hearing. For the reasons stated previously and reaffirmed here, the Board holds that it has not. Respondent has had time to interview or depose any witnesses that he felt necessary. He has had time to prepare his defense. As Respondent has asserted, the

same witnesses apparently testified at the criminal trial on charges factually identical to the charges pending before the Board. Indeed, the absence of any prejudicial effect on his ability to prepare a defense has been demonstrated by his acquittal and the dismissal of the criminal charges against him.

3. CUMULATIVE EFFECT

The cumulative effect of the two actions does not deprive Respondent of his due process right to a fair hearing. As set forth above, the specific rights and procedures that VAPA, the Medical Board statutes, and the Board Rules provide to Respondent more than guarantee him a right to a fair hearing. It is true that the civil rules of procedure are inapplicable to administrative hearings. Condosta v. D.S.W., 154 Vt. 465,467 (1990) and International Assoc. of Firefighters Local #2287 v. Montpelier, 133 Vt. 175, 177 (1975). However, the combination of rights and procedures provided to Respondent prior to the hearing on the merits and that will be provided at the hearing well-surpass the trial-type hearing contemplated by the U.S. Supreme Court in Goldberg v. Kelly, 397 U.S. 254 (1970) and Mathews v. Eldridge, 424 U.S. 319 (1976). As stated in the Board's prior decision, it is up to the Respondent to afford himself of these rights and procedures, and it appears that he has.

B. INTERESTS OF JUSTICE

Respondent contends that the Board should dismiss the charges of unprofessional misconduct in the interest of justice. Respondent primarily bases this request on the fact that he was found not guilty of 69 of the 71 criminal charges against him in federal criminal court, and the remaining counts were dismissed. At the hearing, Respondent submitted to the Board the Notice of Dismissal filed in U.S. District Court dismissing the civil complaint against him as well.

The fact that the criminal and civil charges, as Respondent maintains, were factually identical to the administrative charges of unprofessional conduct does not establish legal authority for dismissal of the administrative charges. It is very clear that an individual can be found not guilty of criminal charges and yet be found guilty of administrative charges. "[A]n administrative proceeding against a licensee is a different cause of action than a criminal proceeding against the same licensee, even if based on the same facts which resulted in acquittal of licensee in the criminal case." Thangavelu v. Dept. of Licensing and Regulation, 386 N.W.2d 584, 589 (Mich. App. 1986); See also Lyness v. Commonwealth of Pa. State Board of Medicine, 561 A.2d 362, 369 (Pa. Cmnlwth. 1989) and State v. Mastaler, 130 Vt. 44, 50 (1971) (distinguishing between a criminal proceeding and an administrative proceeding).

It is not clear that the Board has the statutory authority to dismiss pending administrative charges prior to a hearing on the merits. 26 V.S.A. § 1361(c) reads:

(c) If the person complained against is found not guilty, or the

proceedings against him are dismissed, the board shall forthwith order a dismissal of the charges and the exoneration of the person complained against.

While this subsection does refer to dismissal of proceedings, it does not specify who is requesting or ordering the dismissal, or at what stage of the proceedings they are to be dismissed. Section 1361 follows 1360, which is entitled "Hearing before board". Reading the two sections *in pari materia*, it would seem that any dismissal contemplated under Section 1361 would logically come after the Section 1360 hearing before the board. The Board Rules do not shed light on the issue by interpretation of these statutes, since the Rules do not specifically set forth a procedure for pre-hearing dismissal of proceedings. See Board Rules, Section IV, "Complaint Procedures for Physicians, Podiatrists, and Physician Assistants".

Although statutory authority is unclear, the Board will assume that it has at least the inherent authority or "incidental powers" to dismiss pending administrative charges at any stage of the proceedings. Perry v. Medical Practice Board, 169 Vt. 399, 403 (1999); See Coumaris v. D.C. Alcoholic Beverage Control Board, 660 A.2d 896, 900-901 (D.C. App. 1995) ("Accordingly, and notwithstanding the absence of explicit language authorizing dismissal of the petition, we view as inescapable the inference that the Board may (and indeed must) reject a petition which is discriminatory or unlawful).

However, dismissal without a hearing on the merits should be used only for severe and extreme circumstances. While there seems to be sparse case law on this subject, the Board finds persuasive the language of the District of Columbia Court of Appeals, "dismissal [of an administrative claim] is a drastic remedy." King v. D.C. Water and Sewer Authority, 803 A.2d 966, 970 (D.C. App. 2002) (citing Redman v. Kelly, 795 A.2d 684, 687 (D.C. App. 2002): "Dismissal should be imposed 'sparingly' [citations omitted] ... Such caution is a reflection primarily of our well-established preference for deciding cases on their merits.").

Even though involving a criminal matter, also persuasive is the language of the Vermont Supreme Court by which the Court discussed post-trial dismissal of a case pursuant to V.R.Cr.P. 48(b):

Generally, trial courts may dismiss prosecutions in furtherance of justice against the wishes of the prosecutor only in rare and unusual cases when compelling circumstances require such a result to assure fundamental fairness in the administration of justice.

The Board finds that the apparent irregularities that have occurred in this case and the disposition of parallel criminal charges do not constitute a rare and unusual set of circumstances that deprive Respondent of due process and require the pre-hearing dismissal of the administrative charges in the interest of justice.

C. LEGITIMATE PURPOSE OF HEARING

The Board believes that a hearing on the merits of this matter will serve a legitimate purpose. The Board always considers the conservation and efficient use of its time and resources, however, not at the expense of the Board's ultimate purpose, which is that of protecting the public. The Board does not believe that the claims of Respondent constitute

legitimate reasons to dismiss the charges without a hearing on the merits. While the most convenient thing to do might be to dismiss them at this point, going forward with the hearing on the merits will better serve the public interest in that there has not been a determination on whether or not unprofessional conduct has occurred. As language of the Vermont Supreme Court assessing Board discretionary authority prudently counsels:

Otherwise, the licensee could apply for admission in another jurisdiction, or subsequently reapply in the same jurisdiction, and maintain that he or she has never been disciplined for professional misconduct. This would patently defeat the underlying purposes of the regulatory scheme to protect the public and maintain the integrity of the profession.

Perry v. Medical Practice Board, 169 Vt. 399, 404 (1999). This language strikes the Board as highly relevant to the determination of whether or not a hearing on the merits serves a legitimate purpose. Its guidance leads us to the conclusion that it does.

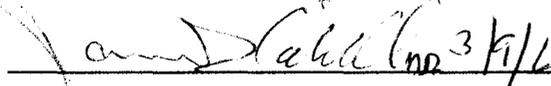
DECISION

After careful review and deliberation of the facts before it at this stage of the proceedings and each and every issue raised by Respondent concerning the affidavit, the witness interview letters, the interest of justice, and the legitimate purpose of holding a hearing on the merits, the Board unanimously (6-0) decides that Respondent's due process right to a fair hearing has not been denied and that a hearing on the merits of the Superceding Specification of Charges is mandated in the interest of the medical profession and most importantly, the public. The hearing will provide the evidence on which the Board can determine whether or not the Respondent has committed unprofessional conduct as alleged by the State.

For the reasons set forth above, Respondent's Renewed Motion to Dismiss Superceding Specification of Charges is DENIED. The Board requests that the parties inform the Board's administrative staff as to the earliest dates the parties are available for hearing.

SO ORDERED.

FOR THE BOARD OF MEDICAL PRACTICE:

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James D. Cahill, M.D., Chairman Date