

**STATE OF VERMONT
BOARD OF MEDICAL PRACTICE**

In re: Mitchell R. Miller, M.D.

)
) Docket No.: MPC 76-1100
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**RESPONDENT'S SUPPLEMENTAL MEMORANDUM OF LAW
REGARDING BOARD'S AUTHORITY TO TAKE EMERGENCY ACTION**

Dr. Mitchell R. Miller, by and through counsel, Sheehy Furlong & Behm P.C., hereby provides the Vermont Board of Medical Practice ("Board") with a Supplemental Memorandum of Law regarding the Board's authority to take emergency action under 3 V.S.A. § 814(c), as requested by the Board in its May 8, 2009 Procedural Order.

Memorandum of Law

- 1. The State has failed to prove that summary suspension of Dr. Miller's license is warranted.**

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." 3 V.S.A. § 814(c); see also Board Rule 15.1(d). As Respondent set forth in his Motion To Reconsider Summary Suspension And To Immediately Reinstate His License ("Motion to Reconsider"), there was no emergency situation that justified the State's request for an immediate, summary action, nor was the Board's Order summarily suspending Dr. Miller's license supported by sufficient findings of fact and conclusions. For the reasons set forth in the Motion to Reconsider, those asserted at the May 6 motion hearing and provided in connection with the May 20 hearing, the Board's summary suspension order should be lifted and Dr. Miller's license reinstated.

2. **Even where it is found that an imminent threat of harm imperatively requires emergency action, due process requires that any summary action be tailored to address only the specific harm found.**

This Board must comply with the requirements of due process when taking any action against a licensee. See *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) for the proposition that, “[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.”); see also *Vermont Real Estate Commission v. Martin*, 132 Vt. 309, 311 (1974) (“An administrative agency hearing on a license suspension is subject to the essentials of due process.”)

A summary order that deprives an individual of more rights than are necessary to protect the public interest at stake violates the requirements of due process. See *Fuentes v. Shevin*, 407 U.S. 67, 83 (1972). Courts in other states have found that 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).

3. This Board has the authority to agree to condition a license while the disciplinary action is proceeding.

In its filing regarding the Authority of Medical Board Acting Under Summary Suspension Provisions of 3 V.S.A. 814(c), the State suggests that this Board has limited authority in this case because the State has chosen to seek emergency action under Section 314(c). The State is wrong in several respects. First, contrary to the State's suggestion, this Board need not and should not bind itself to a rigid application of the text of Section 814(c). Even though Section 814(c) provides limited guidance on the procedure for and scope of any summary suspension, that does not obviate this Board's need to ensure that it does not take action that violates a physician's protected due process right to earn a living practicing medicine in this state.

Second, this Board's statutory and discretionary authority to regulate the practice of medicine is not limited by the State's choices as to how it will proceed on a given matter. This Board has broad authority:

The Board is broadly empowered to investigate and adjudicate charges of unprofessional conduct by licensees, 26 V.S.A. §§ 1353(a)(2), 1360, impose disciplinary sanctions, *id.* § 1361, issue licenses, *id.* § 1391, and suspend, revoke or refuse to issue licenses for "false or fraudulent representations" or "immoral, unprofessional or dishonorable conduct." *Id.* § 1398; see also *Delozier v. State*, 160 Vt. 426, 431-32, 631 A.2d 228, 231 (1993) (although not expressly conferred, Board has implicit authority to revoke license for immoral or dishonorable conduct). The Legislature has declared that the regulation of professions and occupations is "for the purpose of protecting the public." 26 V.S.A. § 3101. Indeed, the licensing of the professions, and of physicians in particular, has long been recognized as falling within a state's broad police powers for the protection of the general welfare.

Perry v. Medical Practice Board, 169 Vt. 399, 403 (1999).

The Legislature granted the Board broad discretion to impose types of sanctions and reprimands as it deems appropriate, including the ability to "condition, limit, suspend or revoke

[a license]...or take other such action relating to discipline or practice as the board determines proper.” 26 V.S.A. § 1361(b). One specific power that this Board often uses is its power to condition licenses even in absence of a formal charge or any finding of unprofessional conduct. This Board has routinely used this discretion to form a wide range of sanctions or conditions on the licenses of physicians, none of which are specifically authorized by the Board’s enabling statute. See e.g., *In Re Schulz-Heik*, Licensing Committee Matter, Stipulation and Agreement, Jan. 22, 2008 (Board grants a conditional license for “medical administration” duties but not direct patient care to a medical school graduate who never completed her residency); *In Re Kellogg*, MPC 138-1007 Interim Stipulation and Consent Order, Nov. 1, 2007 (Physician accepts pre-hearing and pre-charges “interim suspension” to allow Board to conduct investigation). As the Board clearly has the ability to condition a license even where no disciplinary action has been initiated, it surely has the same authority to do so in a case where a disciplinary proceeding is pending.

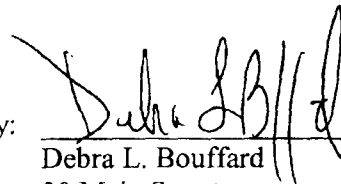
A suspension of Dr. Miller’s license under Section 314(c) is not warranted. However, although Respondent adamantly maintains that there was and is no emergency threat of imminent harm to justify summary suspension, as he previously informed the Board, given the allegations contained in the Specification of Charges, he will voluntarily agree to not provide medical care to the 10 patients listed in the Specification of Charges. As the State has “not charged Respondent with misconduct within the operations of the Department of Corrections,” or “within the operations of the Gill Odd Fellows Home,” (See State’s Motion to Strike, at 4, 5, 6.), the condition proposed by Respondent is more than adequate to address any immediate concerns of the Board regarding Dr. Miller’s care of the only 10 patients at issue here.

WHEREFORE, for the reasons set forth above and those previously stated, this Board should lift the summary suspension, and reinstate Dr. Miller's license on the condition that he not provide medical care to the 10 patients identified in the Specification Of Charges.

Dated at Burlington, Vermont this 18th day of May, 2009.

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By:



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