

**STATE OF VERMONT
BOARD OF MEDICAL PRACTICE**

In re:	)	MPC 15-0203	MPC 110-0803
	)	MPC 208-1003	MPC 163-0803
David S. Chase,	)	MPC 148-0803	MPD 126-0803
	)	MPC 106-0803	MPC 209-1003
Respondent.	)	MPC 122-0803	MPC 89-0703
	)		MPC 90-0703
	)		MPC 87-0703

**DR. CHASE’S MOTION FOR BOARD MEMBER SHARON NICHOL TO RECUSE
HERSELF OR, IN THE ALTERNATIVE, BE DISQUALIFIED FROM
PARTICIPATING IN THE MERITS HEARING PANEL**

Respondent, David S. Chase, M.D., by and through his counsel, respectfully moves that Medical Practice Board (the “Board”) Member Sharon Nichol recuse herself or, in the alternative, be disqualified from participating on the three-person, merits hearing panel in this case. Ms. Nichol actively participated in the summary suspension of Dr. Chase’s medical license in violation of his constitutional due process rights which gave rise to a lawsuit recently filed and pending in Washington Superior Court, styled *David S. Chase, M.D. v. Paula v. DiStabile et al.* This lawsuit seeks injunctive and monetary relief based upon, *inter alia*, the destruction of Dr. Chase’s medical practice through a constitutionally defective summary proceeding. Although Ms. Nichol has not yet been named as a defendant in this very recently filed lawsuit, her significant role in the transgression of Dr. Chase’s due process rights makes it a real possibility that she may become a defendant in that action.¹ Because the amount of damages due to Dr. Chase from the unconstitutional Board conduct will likely be substantially affected by the outcome of the merits hearing, Ms. Nichol’s participation on the hearing panel creates a situation

¹ Dr. Chase would prefer to conduct additional discovery and research before making a final decision to name certain additional individuals including Ms. Nichol, as defendants in the pending Superior Court lawsuit.

posing a constitutionally intolerable risk of bias. Recusal or disqualification is therefore necessary to prevent an unconstitutional merits hearing.

MEMORANDUM OF FACT AND LAW

I. Administrative Adjudications Must Be Determined By Impartial Decisionmakers.

It is axiomatic that a “fair trial in a fair tribunal is a basic requirement of due process.” *In re Murchison*, 349 U.S. 133, 136 (1955). This axiom applies to both the courts and to administrative agencies which adjudicate. *Withrow v. Larkin*, 421 U.S. 35, 46 (1975) (citing *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973)). In *Withrow*, the Court emphasized the importance of a neutral, impartial decision maker in satisfying the requirements of the Due Process Clause of the United States Constitution:

Not only is a biased decision maker constitutionally unacceptable but ‘our system of law has always endeavored to prevent even the probability of unfairness.’ In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome.

Withrow, supra, 421 U.S. at 47; accord *In re Crushed Rock*, 150 Vt. 613 (1988). The Due Process Clause’s requirement of an impartial decisionmaker applies to adjudicators of state licensing agencies. *Gibson* 411 U.S. at 579.

II. The Pending Lawsuit In Washington Superior Court.

Dr. Chase filed a Complaint in Washington Superior Court on May 24, 2006, against the State of Vermont, Paula DiStabile as the Director of the Vermont Medical Practice Board, John Howland, Philip Ciotti, Cynthia D. Laware and Paul Jarvis. That Complaint alleges, among other things, that the Defendants unconstitutionally violated Dr. Chase’s right to due process of law by summarily suspending his license to practice medicine without affording him a

meaningful opportunity to be heard at a meaningful time and by substantially basing the suspension upon fabricated evidence.²

In summary, the Complaint alleges that Dr. Chase was provided only four hours of notice of the summary suspension proceeding and had no opportunity to prepare for it. At the initial Board proceedings held the same day, Dr. Chase had no opportunity to confront the evidence against him as the State relied entirely upon argument and affidavits without presenting any witness testimony. Furthermore, Dr. Chase was not allowed to present witnesses or other evidence in his own behalf. The proceeding lasted less than an hour before the Board, after deliberating less than 15 minutes, summarily suspended Dr. Chase's license, a result that was foreordained by the completely one-sided nature of the proceeding. The Board justified its failure to provide Dr. Chase with a meaningful pre-suspension hearing on the ground that the State's Motion and attachments to it (three probatively deficient affidavits) demonstrated that the public safety made emergency action imperative. (Complaint, ¶ 16.) Thus, although Dr. Chase had been diagnosing cataracts and performing surgery in the same essential way for the preceding 20 years, on July 21, 2003, the Board determined those practices required immediate suspension without any meaningful inquiry.

The State's putative justification for this precipitous suspension, as set forth in the State's Motion and the hearing transcript, was based primarily upon an alleged affidavit provided by Amy Landry (Complaint ¶¶ 10-12), who worked for Dr. Chase for less than a year in a relationship characterized by mutual dissatisfaction. However, the State's factual excuse for dispensing with the pre-suspension hearing, that Dr. Chase was recommending and performing unnecessary cataract surgery, was completely vitiated by Dr. Chase's offer to consent to an order

² Amended Complaint, Dkt. No. 211-4-06 (May 24, 2006) ("Complaint"). The Complaint is attached as Exhibit A. Attached as Exhibit B is Plaintiff's Motion for Preliminary Injunction and Supporting Memorandum of Fact and Law ("Motion"), which sets forth the rationale and law supporting the Plaintiff's Complaint and request for injunctive relief.

preventing him from recommending or providing cataract surgery until the Board could complete a reasoned and thorough investigation. (Complaint, ¶¶14-15.) Thus, the truly unusual emergency situations that justify dispensing with a pre-suspension hearing did not exist in this case and the Board's suspension of Dr. Chase's entire right to practice medicine violated the Due Process Clause. (*See* cases cited in Motion at 22-25.)

Moreover, even if there had been a valid emergency justifying suspension of his entire authority to practice medicine, the Board would still have been required by the Due Process Clause to provide Dr. Chase with a prompt, post suspension hearing at which he could have confronted the evidence against him and presented his own evidence. (Motion at 25-26.) Yet, neither the Board's Rules nor the Vermont Administrative Procedures Act provides for such a post deprivation hearing, in contradistinction to the laws of most states,³ and, in any event, the Board afforded Dr. Chase with no prompt hearing after it summarily suspended his license to practice medicine. (Complaint ¶¶ 17-18.) Instead, the first opportunity Dr. Chase had to challenge his suspension was to occur at the merits hearing which, even after the State returned its Superceding Specification of Charges over four months after the summary suspension, could not be held until discovery on those charges was completed. As set forth in the Complaint, this process was further delayed by unethical conduct and dilatory practices perpetrated by the Board's prosecutor and investigator in order to hinder Dr. Chase's discovery efforts. (Complaint ¶¶ 22-28.) As a result of the summary suspension, the adverse publicity encouraged and facilitated by the Board's then Executive Director, and the absence of a prompt post-suspension hearing, Dr. Chase's medical practice and 35-year career as a practicing physician were destroyed. (Complaint ¶¶19-20.) Dr. Chase had a considerable capital investment exceeding \$1

³ For example, New York, New Hampshire, and Rhode Island all require a post-suspension hearing within ten days of the summary suspension of medical license, and Massachusetts requires the hearing to be held within 7 days. (Motion, p. 26 n.9.)

million in that practice, employed 15 persons at the time of his suspension and, in the ten years preceding his suspension, had earned several hundred thousand dollars in annual net income from the practice. Dr. Chase's compensatory money damages from the destruction of his practice and career easily exceed \$5 million.

Dr. Chase's first opportunity to confront Amy Landry occurred five months after the summary suspension when she was deposed. At her deposition, Ms. Landry gave testimony to the effect that her "affidavit" was procured through fraud by the Board's investigator and that key portions of it were false. (Complaint, ¶¶29-39.) The State's fabrication and use of evidence against a doctor in a license suspension hearing is itself a violation of the Due Process Clause. (Motion at 26-27.) The Respondent repeatedly has requested and moved the Board to conduct a hearing and make findings that Investigator Ciotti had fraudulently obtained the putative affidavit and had disregarded her objections to materially inaccurate statements in it. (Complaint ¶¶42-47.) The Board has repeatedly refused to make this inquiry and suggested, instead, that Dr. Chase can explore the credibility of Amy Landry and Phil Ciotti through questioning at the merits hearing. (Complaint, ¶¶42-47,54-62.)

III. Ms. Nichol's Involvement In The Board Proceedings Against Dr. Chase.

Ms. Nichol has participated as a Board member in every significant hearing in the Board proceedings against Dr. Chase. For example, in the most significant Board proceeding underlying Dr. Chase's civil claim in Washington Superior Court, Ms. Nichol was an active and vocal proponent of the summary suspension of Dr. Chase's authority to practice medicine and to reject his compromise offer to refrain from recommending or performing cataract surgery while the Board completed its investigation. In advocating the rejection of Dr. Chase's offer to cease recommending or performing surgery as a means of addressing the alleged "imminent threat" to the public welfare supposedly represented by his cataract surgery practices, Ms. Nichol stated:

I would have to feel after reading the material here and listening to what's happened, if a practicing physician can't judge whether or not a surgery is necessary, which seems to be the case here, or decides that he's going to do a surgery whether it's necessary or not to the patient, how can he do appropriate medical care otherwise?

You only want to limit him to not doing surgery at this time because of the statutes that you quoted, but I feel that he also is doing inappropriate work perhaps in other area we're not—that we're unaware of at this time, because this is the main problem that's been brought to us, so I'm not sure that just limiting him in surgery would be enough.

This statement reveals a fundamental misunderstanding regarding the nature of the factual basis needed to show an “imminent threat” justifying the abandonment of the ordinary due process safeguards of prior notice and hearing. First, the law is clear that factual situations that will justify summary suspensions are “truly unusual,” and that the pre-hearing suspension must be “directly necessary” and “narrowly drawn to meet” the imminent threat justifying emergency action. *Fuentes v. Shevin*, 407 U.S. 80, 90-93 (1972); *see also* Motion at 23-25. Furthermore, whether the evidence of physician misconduct is an emergency justifying a particular pre-hearing suspension is itself a question of fact. *DiBlasio v. Novello*, 344 F.3d 292, 304 (2d Cir. 2003).

The problem with the pre-hearing suspension of Dr. Chase's entire medical license is that there was no evidence relating to any physician misconduct outside of cataract surgery. A “feeling” that a physician is also doing work in other areas that the Board is not aware of is a completely inadequate basis, being nothing more than rank conjecture and speculation, upon which to base a pre-hearing license suspension. The State's Motion, the transcript of the summary suspension hearing, and the Board's Order make clear that the only evidence of imminent harm available to the Board related to Dr. Chase's recommendation and performance of cataract surgery. After Dr. Chase offered to cease recommending and performing cataract surgery, there was no imminent threat to the public welfare before the Board, and it was illegal for the Board to conjure such threats from the unknown and unaddressed, based only upon

hypothetical possibilities, in order to justify a suspension that was far broader than directly necessary to address the specifically alleged threat.

Ms. Nichol also revealed her strong inclination to suspend immediately, based upon inferences aggressively drawn from a description contained in Ms. Landry's untested and subsequently recanted, "affidavit" of the supposed "spiel" that Dr. Chase gave potential cataract patients, by sharing this analysis:

it's [Amy's] ...second paragraph down, she talks about if a question gets inserted, [Dr. Chase] sometimes starts over from the beginning like it broke his train of thought and he needed to start from the beginning again. So it sounded to me like it was something that he worked with the patient with, too. He'd just have this general—as she said, the general speech.

The leap in logic inherent in this narrative suggests that it too is closer to conjecture than inference. Moreover, when Amy Landry finally was asked to give her first hand personal account in sworn testimony, she testified that her alleged affidavit had been procured by State sponsored misrepresentations and was full of inaccuracies, including that she never used the word spiel, that the "speech" Dr. Chase's gave about cataracts was a proper communication of the risks and benefits of cataract surgery, and that she had prepared the written index card for her own legitimate use in performing recordkeeping. Moreover, Ms. Landry denied allegations in the "affidavit" that Dr. Chase had falsified Patient A's medical records and clarified that she was not even present when Dr. Chase examined, tested or communicated with Patient A.

If the Board had taken testimony on July 21, 2003 from Ms. Landry, whose fabricated affidavit was the sine qua non of the summary suspension order, it would have known the affidavit was grossly inaccurate and had been falsified, and it would not have relied upon it to summarily suspend Dr. Chase's license. Had it reviewed Patient A's several pages of medical records, it would have known that Dr. Chase had ordered her to undergo an extended blood sugar test before the decision to operate was made. If it had heard from a qualified ophthalmologist it

would have learned that fluctuations in blood sugar affect vision by creating vacules in the crystalline lens of the eye indistinguishable from cataracts. If it had inquired of any employee of Dr. Chase's practice, including Amy Landry, it would have been informed that before a decision is made to undergo cataract surgery, patients are provided extensive oral and written information as part of an informed consent procedure and that they undergo a detailed pre-operative examination to determine their suitability for cataract surgery. However, in its rush to judgment, the Board made none of these elementary inquiries and, in mistakenly deciding to summarily suspend Dr. Chase's license, it destroyed his career on the basis a woefully inadequate and misleading record. Ms. Nichol played a key role in that epic mistake.

IV. Ms. Nichol Has A Pecuniary Interest In The Outcome Of The Merits Hearing.

The amount of monetary damages recoverable by Dr. Chase in his pending Superior Court lawsuit will likely be substantially affected by the Board's decision in the merits hearing. A significant portion of Dr. Chase's damages are based on the claim that the denial of due process at the summary suspension proceeding resulted in an erroneous suspension that destroyed his medical practice and injured his reputation. A finding by the merits hearing panel that Dr. Chase engaged in misconduct justifying the suspension would potentially eliminate the causal link between the Board's illegal conduct in the summary suspension proceeding and the monetary damages suffered by Dr. Chase. Specifically, a determination on the merits that Dr. Chase engaged in professional misconduct justifying suspension of his license, would be strong evidence that the same result (license suspension) would have been reached even if Dr. Chase had been provided his full due process rights throughout the Board proceedings. If in fact it were proven that the license suspension was not attributable to the due process violations, Dr. Chase's damage claims, and the monetary amount due from defendants, would be substantially

diminished. Accordingly, any person with potential liability in Dr. Chase's civil lawsuit has a strong pecuniary interest in the outcome of the Board's merits hearing.

V. Ms. Nichol Participation On The Merits Hearing Panel Creates A Constitutionally Intolerable Risk Of Bias And Impartial Decisionmaking.

Ms. Nichol's personal integrity, actual bias and the strength of her individual commitment to be fair and impartial in discharging her duties are **not** at issue. The inquiry under the Constitution is completely objective: is the factual circumstance of the case one that, viewed objectively, creates a probability of bias that is constitutionally intolerable.

The test, as first stated by the Supreme Court in *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), is whether the situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused." In *Ward v. Monroeville*, 409 U.S. 57,60-61 (1972), the Court made clear that the pecuniary interest need not be all that personal or substantial, holding that, in a proceeding where the town mayor decided whether charged drivers should be fined for violating a civil traffic ordinance and was contemporaneously responsible for generating town revenues, there was a constitutionally unacceptable risk that bias would influence the mayor's decision. The Court reasoned that the mayor held two inconsistent positions, one judicial and one executive, and that the risk that his executive objectives would affect his adjudicatory duties deprived alleged traffic law offenders of due process of law.⁴

The Court addressed the issue of bias in an adjudicatory state agency hearing in *Gibson v Berryhill*, 411 U.S. 564 (1973). There, the Court affirmed the Court's ruling that the optometrist

⁴ The dissents view that the result should have been different because the mayor's pecuniary interest in the outcome of the traffic violation hearing was neither direct nor personal was rejected by the Court's holding. *Id.* at 62 (White, J., dissenting).

members of the Alabama Board of Optometry could not decide whether 13 optometrists employed by an optical company should have their license revoked for unprofessional conduct because a revocation decision could possibly redound to the benefit of the Board members in the form of inherited business. *Id.* at 578-79. The Court, in reaching its decision, stated that it was clear that a person with a substantial pecuniary interest in an administrative proceeding could not have an adjudicatory role in the proceeding consistently with the dictates of the Due Process Clause, and that its recent decisions had indicated that the financial stake need not be as direct or positive as appeared in its seminal case of *Tumey v Ohio*, *supra*, decision. *Id.* at 579.

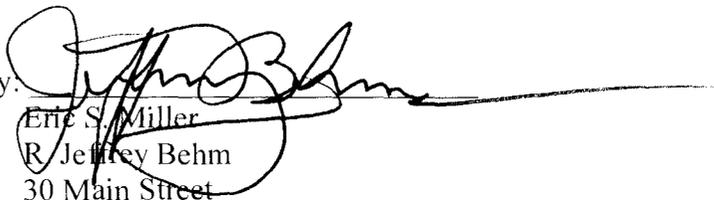
Here, Ms. Nichol faces a real possibility of being exposed to a large monetary award based in large part upon her participation in the July 21, 2003 summary suspension proceeding. Because the potential for and size of that award may be eliminated or substantially diminished by a decision in the merits hearing adverse to Dr. Chase, there is present in the current situation a risk that Ms. Nichol's decision in the merits hearing may be infected by her pecuniary interests in the outcome of the civil lawsuit. Put another way, the predominant question is whether the situation presents "an indication of a possible temptation to an average [person] sitting as a judge to try the case with bias for or against any issue presented [for decision]." *Id.* at 571 (restating the constitutional bias test applied by the District Court to reach the decision to disqualify which was upheld by Court). The Respondent respectfully submits that in the context of the situation presented in this matter, the answer is clearly yes and that Ms. Nichol should not serve on the merits hearing panel.

Ms. Nichol should not serve as a decisionmaker on the merits hearing panel because her pecuniary interests are aligned with a particular result in that hearing (a finding of professional misconduct) and are adverse to another (a finding of no misconduct). It is unfair to Ms. Nichol, Dr. Chase and the public to place her in a position where her decision, if adverse to Dr. Chase,

will always be questioned as to its impartiality. The remaining two persons designated to serve on the Merits Hearing Panel carry no such burden, as they played no role in the summary suspension proceedings. To avoid the serious problem created by Ms. Nichol's participation on the hearing panel, the Board need only substitute a person who did not participate in the July 21, 2003 hearing in this matter. This is a simple, inexpensive means of safeguarding against a constitutionally defective merits hearing that would be unfair to Dr. Chase, cast doubt on the Board and Ms. Nichol's fairness, and waste hundreds of thousands of dollars to reach a constitutionally void decision.

Dated at Burlington, Vermont, this 25th day of May, 2006.

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