STATE OF VERMONT
WASHINGTON COUNTY

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WASHINGTON SUPERIOR COURT

IN RE: GLENN MYER) 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on November 14, 2006, in Docket No. 52-1-06Wncv and by the Vermont Supreme Court in Docket No. 2007-063 (Aug. 8, 2007) (unpublished mem.).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.[1] 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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[1] 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]
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> I believe that the record shows quite clearly that Mr. Myer lied on several occasions. . . . [Tr. p. 168-69]
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> 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.
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> ¶ 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).[2] 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

[2] *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 31st day of January, 2008.

Mary Miles Teachout

Hon. Mary Miles Teachout
Superior Court Judge