

**STATE OF VERMONT
BOARD OF MEDICAL PRACTICE**

**In re: Mitchell R. Miller, M.D.
a/k/a Mitch Miller**

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Docket No.: MPC 76-1100

RESPONDENT'S MOTION TO STRIKE PHILIP CIOTTI'S
MAY 6, 2009 SUPPLEMENTAL AFFIDAVIT

NOW COMES MITCHELL R. MILLER, M.D., Respondent, by and through his attorneys, Sheehey Furlong & Behm P.C., and hereby moves the Vermont Board of Medical Practice ("Board") to strike Philip Ciotti's May 6, 2009 Supplemental Affidavit ("Supplemental Affidavit"), and thus, not consider it in ruling on Respondent's Motion to Reconsider the Board's April 1, 2009 decision to summarily suspend his license. In support of this Motion, Respondent states the following:

1. The Board's Summary Suspension Order Cannot Be Revised And Supported By New Reasons.

As set forth in Respondent's Motion to Reconsider the Summary Suspension, the State failed to both support and to prove its request for summary suspension and the Board's April 1 Order lacks sufficient findings and conclusions to support the Board's summary suspension of Dr. Miller's license. In ruling on the Motion to Reconsider, this Board's review should be limited to considering only that evidence the State provided to the Board as of April 1, and the responsive testimony and exhibits provided by Respondent on May 15, 2009. If after reviewing this information, the Board concludes, as it should, that there was no imminent threat of harm to the public that imperatively required it to take emergency action, its April 1 Order should be reversed and Dr. Miller's license reinstated .

Much of Supplemental Affidavit of Philip Ciotti includes purported information he claims to have gathered after April 1, 2009. Therefore, it should be stricken and not considered by this Board. As the Vermont Supreme Court has stated, “Agency decision[s] must stand or fall on the reasons given contemporaneously with the decision and not a later revision of those reasons.” See *Conservation Law Foundation v. Burke*, 162 Vt. 115, 128 (1993). In short, this Board cannot look to the supplemental affidavit to find new post hoc justifications to attempt to prop up the earlier legally and factually deficient Summary Suspension Order.

2. The Supplemental Affidavit Is Misleading, Unreliable And Largely Irrelevant.

The Supplemental Affidavit is misleading and unreliable in several significant respects, and therefore, it should not be considered at all by this Board. First, as made clear by the two former patient affidavits provided to the Board as Exhibits 1 and 2, the Supplemental Affidavit contains inaccurate and false information. Both patients clearly state that they never said certain statements Mr. Ciotti quotes them as stating.

Second, the information in the Supplemental Affidavit that Mr. Ciotti reports he obtained from pharmacists is largely irrelevant to the issue of whether “public health, safety, or welfare imperatively requires emergency action.” As this Board’s own Policy for the Use of Controlled Substances for the Treatment of Pain provides, the Board will “judge the validity of the physician’s treatment of the patient based on available documentation, rather than solely on the quantity and duration of medication administration.” And as well, rather than simply looking at what drugs were prescribed or how many, “[a]llegations of inappropriate pain management will be evaluated on an individual basis.” A list of medications prescribed to a patient, with nothing more, in no way bears on the issue of whether Dr. Miller’s continued practice of medicine presents an immediate threat of harm. Moreover, while Mr. Ciotti has suggested that there is

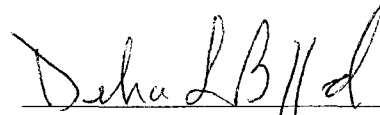
something suspect about stating on prescriptions that they cannot be filled until a certain date, this method of prescribing medications is authorized by the DEA. See 21 C.F.R. § 1306.12, a copy of which is attached.

Finally, without live testimony, Respondent cannot cross examine the witnesses that purportedly made statements quoted by Mr. Ciotti in his Supplemental Affidavit. This Board's oral and written Orders on the procedure for the May 20 hearing make clear that the Board will not hear testimony from witnesses other than Respondent. For this Board to rely on misleading double hearsay testimony would only compound the serious violation of Dr. Miller's due process rights.

WHEREFORE, Respondent requests that the Board strike the Supplemental Affidavit of Philip Ciotti and not consider it in making its decision on Respondent's Motion to Reconsider Summary Suspension.

Dated at Burlington, Vermont this 15th day of May, 2009.

By:



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Code of Federal Regulations Currentness

Title 21. Food and Drugs

Chapter II. Drug Enforcement Administration,
Department of Justice

Part 1306. Prescriptions (Refs & Annos)

Controlled Substances Listed in Schedule
II

→ **§ 1306.12 Refilling prescriptions; issuance of multiple prescriptions.**

(a) The refilling of a prescription for a controlled substance listed in Schedule II is prohibited.

(b)(1) An individual practitioner may issue multiple prescriptions authorizing the patient to receive a total of up to a 90-day supply of a Schedule II controlled substance provided the following conditions are met:

(i) Each separate prescription is issued for a legitimate medical purpose by an individual practitioner acting in the usual course of professional practice;

(ii) The individual practitioner provides written instructions on each prescription (other than the first prescription, if the prescribing practitioner intends for that prescription to be filled immediately) indicating the earliest date on which a pharmacy may fill each prescription;

(iii) The individual practitioner concludes that providing the patient with multiple prescriptions in this manner does not create an undue risk of diversion or abuse;

(iv) The issuance of multiple prescriptions as described in this section is permissible under the applicable state laws; and

(v) The individual practitioner complies fully with all other applicable requirements under the Act and these regulations as well as any addi-

tional requirements under state law.

(2) Nothing in this paragraph (b) shall be construed as mandating or encouraging individual practitioners to issue multiple prescriptions or to see their patients only once every 90 days when prescribing Schedule II controlled substances. Rather, individual practitioners must determine on their own, based on sound medical judgment, and in accordance with established medical standards, whether it is appropriate to issue multiple prescriptions and how often to see their patients when doing so.

[72 FR 64929, Nov. 19, 2007]

SOURCE: [36 FR 7799, April 24, 1971; 36 FR 13386, July 21, 1971; Redesignated at 38 FR 26609, Sept. 24, 1973; 51 FR 5316, Feb. 13, 1986; 74 FR 15624, April 6, 2009, unless otherwise noted], unless otherwise noted.

AUTHORITY: 21 U.S.C. 821, 829, 831, 871(b), unless otherwise noted.

21 C. F. R. § 1306.12, 21 CFR § 1306.12

Current through May 8, 2009; 74 FR 21560

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