VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

SEP 19 2014

ENTRY ORDER

2014 VT 111

SUPREME COURT DOCKET NO. 2013-303

APRIL TERM, 2014

David Shaddy	}	APPEALED FROM:
	}	
	}	
v.	}	Superior Court, Washington Unit, Civil Division
	}	
State of Vermont Office of Professional Regulation	}	DOCKET NO. 732-10-12 Wncv

In the above-entitled cause, the Clerk will enter:

The judgment of the superior court is reversed. The judgment of the appellate officer is reinstated.

FOR THE COURT:

John A. Dooley, Associate Justice

Concurring:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

2014 VT 111

No. 2013-303

David Shaddy — Supreme Court

On Appeal from
Superior Court, Washington Unit,
Civil Division

v.

State of Vermont Office of Professional Regulation — April Term, 2014

Robert R. Bent, J.

Gabriel M. Gilman, Montpelier, for Appellant.

David Shaddy, Pro Se, Kyburz, California, Appellee.

PRESENT: Reiber, C.J., Dooley, Skoglund, Robinson and Crawford, JJ.[1]

¶ 1. **DOOLEY, J.** This is an interlocutory appeal from a decision of the superior court, on appeal from a decision of an appellate officer, remanding this disciplinary case to the Board of Nursing to determine whether the Board intends that the case be continued. The central question is whether an attorney for the Office of Professional Regulation (OPR) within the office of the Vermont Secretary of State has the power to appeal from a Board of Nursing decision vacating an earlier consent order suspending from practice appellee, David Shaddy. We conclude that the attorney had this power and reinstate the decision of the appellate officer.

¶ 2. The underlying controversy resulted from a charge by Brattleboro Retreat, an in-patient mental health facility, that while working there as a nurse, Mr. Shaddy improperly took

[1] Justice Crawford was present for oral argument, but did not participate in this decision.

into his possession certain narcotic drugs. The charge and its consequences have been the subject of two earlier reported decisions from this Court. Shaddy v. Brattleboro Retreat, 2012 VT 67, 192 Vt. 215, 57 A.3d 700; Shaddy v. Dep't of Labor, 2009 VT 103, 186 Vt. 633, 987 A.2d 311. This case started with a report from Brattleboro Retreat to the Board, stating its determination that Mr. Shaddy diverted the narcotics. In response, the Board director referred the case to an OPR attorney to bring a summary suspension proceeding and created an investigation team consisting of the OPR attorney, the Board director, and a Board member. The OPR attorney filed a charging document in the name of the State of Vermont alleging unprofessional conduct based on the violation of four statutes and sought, and obtained, a summary suspension of Mr. Shaddy's license to practice nursing.

¶ 3. The process at this point in the case was conducted pursuant to 3 V.S.A. § 129(c), which provides:

> A board may assign one or more members of the board to investigate complaints and license applications. These members shall have the assistance of an investigator for the Office and an attorney assigned by the Office of Professional Regulation who shall be responsible for prosecuting disciplinary and licensing cases before the board.

According to 3 V.S.A. § 123(a), the function of OPR is to "provide administrative, secretarial, financial, investigatory, inspection, and legal services to the boards."

¶ 4. The OPR attorney and Mr. Shaddy, then represented by counsel, reached a consent order in February of 2011, and it was approved by the Board in April 2011. The consent order states that it is not an admission of liability by Mr. Shaddy but he does not dispute that the State could prove its charges by a preponderance of the evidence. The consent order continued Mr. Shaddy's suspension and set the conditions for reinstatement of his license. Just over a year later, in April 2012, Mr. Shaddy, without counsel, sent the Board a letter seeking that the Board vacate or amend the stipulated order because he did not commit the unprofessional conduct alleged and he signed the stipulation under duress from his attorneys who threatened to cease representing him if he did not sign. He included with the letter a packet of supporting materials. The OPR lawyer filed an objection to Mr. Shaddy's request for relief. The Board held a hearing, presided over by a different OPR lawyer,[2] at which Mr. Shaddy was the only witness. Relying upon V.R.C.P. 60(b)(6), the Board granted Mr. Shaddy most of the relief he requested, finding his testimony was "well organized and credible," that he showed "a good reason for his request for relief," that he sought relief "within a reasonable time," that his claims were "supported by the documentation he provided at the hearing," that "the evidence against Mr. Shaddy is insufficient," that "there has been a miscarriage of justice," and that the facts demonstrated an extraordinary situation "that warrant[s] the reopening of final judgment." The Board vacated the consent order and suspension and dismissed the charges against Mr. Shaddy without prejudice to bring them again.

¶ 5. The OPR attorney appealed the Board decision, on behalf of the State, pursuant to 3 V.S.A. § 130a(a). Under the statute, the Director of OPR assigns the appeal to an appellate officer, who conducts an on-the-record review without taking new evidence. Id. Generally, the appellate officer is bound by the fact-finding of the Board and can overturn the Board decision only "if substantial rights of the appellant have been prejudiced" for any of seven listed reasons. Id. § 130a(b). In this case, the appellate officer reversed[3] the Board of Nursing decision for multiple reasons: (1) the Board should not have considered evidence related to the merits of the

[2] The facts do not show the internal organization of OPR. The OPR lawyer who appeared as the prosecutor was the same lawyer who filed the charges against Mr. Shaddy. He has been replaced by the lawyer who appears for OPR here and identifies herself as "State Prosecuting Attorney." The OPR lawyer who presided at the hearing of the Board of Nursing is identified as "Presiding Officer."

[3] The appellate officer reversed the Board decision, without a remand, but added "with the recommendation that if any further proceedings occur in this matter before the Vermont Nursing Board, then the case should be assigned to an independent hearing officer appointed by the Vermont Nursing Board pursuant to 3 V.S.A. § 129(f)."

disciplinary charges, (2) the Board improperly failed to find grounds to vacate the earlier judgment, (3) the facts and circumstances did not meet the standard of Rule 60(b)(6), (4) the Board made no findings of fact, and (5) the Board improperly deprived the State of the opportunity to offer evidence. Mr. Shaddy then appealed the appellate officer's decision to the superior court, raising one relevant argument: the OPR attorney had no power to appeal the Board of Nursing decision, and, as a result, the appellate officer decision has to be struck.

¶ 6. In an extensive decision, the superior court ruled that the power to prosecute a disciplinary complaint is vested in the Board and not in OPR. Thus, it ruled that if the Board's decision was intended to exercise its power of prosecution by withdrawing the disciplinary complaint, its decision was final and could not be appealed by the OPR attorney. It reached this conclusion despite its conclusion that "the appellate officer explained in detail that the Board's Rule 60 proceeding and decision were egregiously flawed and the court agrees." The court's order remanded the case to the Board of Nursing "for clarification whether its Rule 60 decision represents a determination that the original decision to prosecute Mr. Shaddy has been replaced by a decision not to prosecute Mr. Shaddy and any further proceedings consistent with this decision." On the request of the OPR attorney, the court granted an interlocutory appeal to this Court.

¶ 7. Although this appeal ostensibly involves one issue, there are actually two issues: (1) whether the State could appeal the decision of the Board of Nursing pursuant to 3 V.S.A. § 130a(a); and (2) whether the OPR attorney acts for the State in filing and pursuing the appeal. The State argues that the first issue is determined by our decision in In re Lakatos, 2007 VT 114, 182 Vt. 487, 939 A.2d 510. Lakatos was also a disciplinary action, albeit for a different profession, and the professional argued that the State could not appeal an adverse decision of the superior court to this Court. We answered:

> Respondent has moved to dismiss the appeal on the ground that the State is not a party that may appeal the superior court's ruling. The assertion is unpersuasive. The statutory scheme governing appeals from professional boards such as the Board of Dental Examiners provides that a "party aggrieved" by a final decision of a board may appeal to the director and have the matter heard by an appellate officer. 3 V.S.A. § 130a. Thereafter, a "party aggrieved" by the decision of the appellate officer may appeal to the superior court. Id. The State, as the prosecuting agency, was plainly a party to the proceedings and as such would have been entitled to pursue an administrative appeal and an appeal to the superior court, and was further entitled to appeal from an adverse ruling by the superior court to this Court.

Id., 2007 VT 114, ¶ 5, n.6 (citing Office of Prof'l Regulation v. McElroy, 2003 VT 31, ¶ 1, 175 Vt. 507, 824 A.2d 567 (mem.); In re Smith, 169 Vt. 162, 164, 730 A.2d 605, 607 (1999)). We agree with the State's position.

¶ 8. We do not accept the rationale of the superior court that the charging decision resides in the Board, and the Board could simply drop the charges for any or no reason. The statute describes the role of the OPR attorneys as "prosecuting disciplinary and licensing cases." 3 V.S.A. § 129(c). Even though disciplinary cases are not criminal cases, we view the designation of the OPR lawyer as a prosecutor as significant. "Because prosecutors function as delegates of the executive, they retain broad discretion to enforce the law including—so long as probable cause is present—the decisions whether to prosecute in any given case and what charge to file." State v. Wesco, Inc., 2006 VT 93, ¶ 11, 180 Vt. 345, 911 A.2d 281. As we noted in State's Attorney v. Attorney General, "the legislature has often exercised its power to provide for the commencement of prosecutions by officers other than State's Attorneys." 138 Vt. 10, 13, 409 A.2d 599, 601 (1979). The trial court's interpretation of the Board's power deprives the prosecuting officer of the most important power—to determine what charges to file, if any. We cannot conclude that this interpretation is consistent with the statute.

¶ 9. Our conclusion is consistent with the procedure followed in this case as well as the applicable rules defining the procedure in disciplinary cases. In this case, the Board followed the investigatory team procedure outlined in § 129(c). Thus, there is nothing in the record to indicate that the Board of Nursing had any role in the charging decision in this case. Indeed, the statute provides that a Board member involved in an investigation "shall not sit in adjudication of the case and shall not participate in ex parte communications with other board members regarding the case." 3 V.S.A. § 129(c). Exactly how the charging decision was made is unclear, but it came from either the designated OPR attorney or the investigatory team as a whole, not the Board.

¶ 10. The procedure should be viewed in the context of the rules governing disciplinary cases. By statute, the Board is authorized to adopt procedural rules governing disciplinary cases. 3 V.S.A. § 129(a)(1). The Board of Nursing has adopted the procedures compiled by OPR, called Administrative Rules of Practice. Vermont Board of Nursing, Administrative Rules, § 11.3 (June 23, 2011), https://www.sec.state.vt.us/media/540194/Nursing-Rules-2011-0623.pdf. The OPR rules define a case as initiated "by filing a complaint, specification of charges, petition or other application with the Docket Clerk" at OPR. Office of Professional Regulation, Administrative Rules of Practice Rule 3.2 (Feb. 1, 1999), https://www.sec.state.vt.us/media/477012/OPR-Rules-for-Web-April-2014.htm. There is no indication in these rules of procedure that the "hearing authority," the term for the applicable Board, has any role in case initiation.

¶ 11. This brings us to the second issue—whether an attorney for the Office of Professional Regulation has the power to appeal on behalf of the State. Although a lawyer in the Secretary of State's office appeared for the State and presumably filed the notice of appeal for the State, the decision did not address whether the lawyer had that power.

¶ 12. OPR was created within the Secretary of State's office by legislation in 1990. 1989, No. 250 (Adj. Sess.), § 1 (creating 3 V.S.A. § 122). Although the office provided "administrative, secretarial, financial, investigatory, inspection and legal services" to the professional licensing boards on request, id. (codified at 3 V.S.A. § 123(a)), this legislation did not change the Attorney General's role in prosecuting disciplinary cases before the boards. Thus, the boards had the obligation to investigate complaints of unauthorized practice of the profession, but the product of the investigation was a report to the attorney general, 3 V.S.A. § 127(a), who could bring an injunction request to the court. Id. § 127(b). Complaints of unprofessional conduct were to be "forwarded to the Attorney General." Id. § 129(a). Section 129(c) provided, as it does today, that a board could assign one or more of its members to investigate complaints and that "[t]hese members shall have the assistance of an investigator for the office and the Attorney General who shall be responsible for prosecuting cases before the board."

¶ 13. In two statutes in 1996, the Legislature deleted the obligation of the boards to send a report on an unauthorized practice complaint to the Attorney General as contained in § 127(a) and to forward complaints of unprofessional conduct to the Attorney General as contained in § 127(b). 1995, No. 138 (Adj. Sess.), § 12; 1995 No. 171 (Adj. Sess.), §§ 8, 9.

¶ 14. Finally, in 2003, the Legislature removed the Attorney General from the investigation process in § 129(c) and substituted "an attorney assigned by the office of professional regulation." 2003, No. 66, § 85 (amending 3 V.S.A. § 129(c)). At the same time, the Legislature amended § 129(b) to give an OPR attorney the power to seek an injunction against unauthorized practice from the court or a civil penalty of $1000 or less from the appropriate board. Id. § 84. The 2003 act that accomplished these modifications was the appropriations act. In the same act, the Legislature enacted a section entitled "ONE-TIME APPROPRIATION; PROFESSIONAL LICENSING UNIT TRANSFER," which provided: "(a) In order to facilitate the transfer of the professional licensing unit from the office of the attorney general to the secretary of state, $25,000.00 in general funds is appropriated to the attorney general on a one-time basis." Id. § 57b.

¶ 15. One statutory section, unmodified since adopted in 1997, is important to our understanding of the actions of the Legislature. 3 V.S.A. § 129a(c) provides that the "burden of proof in a disciplinary action shall be on the state to show by a preponderance of the evidence that the person is engaged in unprofessional conduct." This is a legislative recognition that a disciplinary proceeding is prosecuted by the State of Vermont.

¶ 16. When construing a statute, "our primary goal is to give effect to the Legislature's intent." Lydy v. Trustaff, Inc./Wausau Ins. Co., 2013 VT 44, ¶ 6, 194 Vt. 165, 76 A.3d 150. We recognize that the Legislature could have been more explicit in defining the role in disciplinary cases that it assigned to OPR and its attorneys. We are satisfied, however, that the Legislature intended in its 2003 enactments that OPR attorneys assume the role formerly played by the Attorney General and represent the State of Vermont in such proceedings to discharge the burden imposed by 3 V.S.A. § 129a(c). We construe the statutes in Title 3, Chapter 5, Subchapter 3, with respect to professional regulation and OPR, to embody this power. Thus, OPR attorneys represent the State of Vermont and may exercise the State's power to appeal from an adverse decision of a board pursuant to 3 V.S.A. § 130a(a).

The judgment of the superior court is reversed. The judgment of the appellate officer is reinstated.

FOR THE COURT:

Associate Justice

VT SUPERIOR COURT

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

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CIVIL DIVISION
Docket No. 732-10-12 Wncv

FILED

David Shaddy
Appellant

v.

State of Vermont
Appellee

DECISION

This is a highly unusual unprofessional conduct case in which the licensee (a nurse) supports the nursing board's decision and the Office of Professional Regulation (OPR) is seeking to reverse it. On Mr. David Shaddy's Rule 60(b) request, over the objection of the OPR prosecuting attorney, the nursing board vacated a stipulation to professional discipline it had earlier approved and then dismissed the charges against Mr. Shaddy that had led to the stipulation. OPR appealed to an appellate officer. Mr. Shaddy argued before the appellate officer, and now argues here, that OPR lacked lawful authority to appeal the board's decision. OPR argued that the board's Rule 60 decision was seriously flawed and should be reversed. The appellate officer reversed the board's decision, effectively reinstating the stipulation, and Mr. Shaddy appealed to this court. The authority of OPR to prosecute the disciplinary case and appeal from the board's Rule 60 decision is the only matter Mr. Shaddy raises in this court that is within the scope of the court's jurisdiction on appeal.

Facts

This case began with a mandatory report of unprofessional conduct by the Brattleboro Retreat, which employed Mr. Shaddy at the time as a registered nurse, to the effect that Mr. Shaddy was suspected of diverting narcotics.[1] Upon receiving the report, the executive director of the nursing board referred the matter to an OPR prosecuting attorney for summary suspension proceedings and assigned a board member (who is no longer part of the board) to an investigative team. The investigative team included the executive director, the assigned board member, and the OPR attorney. The summary suspension of Mr. Shaddy's professional license and the filing of a specification of

[1] Some facts related to the initiation of the prosecution of this case against Mr. Shaddy appear in the record. Others were supplied by Attorney Gilman in a June 13, 2013 filing responsive to the court's inquiry.

charges alleging unprofessional conduct occurred in due course. The charging document was signed by Edward Adrian, an OPR prosecuting attorney, on behalf of the Secretary of State. It was not signed by any member of the nursing board. The specification was filed with the board of nursing and docketed as No. NU64-0108.

Mr. Shaddy and OPR (through Attorney Adrian) eventually agreed to the terms of a "stipulation and consent order" that was intended to resolve the disciplinary case. According to the terms of the stipulation, Mr. Shaddy neither admitted liability nor disputed "that the State could prove these charges by a preponderance of the evidence if this matter went to a hearing." Stipulation 3 (filed with the board Apr. 12, 2011). Mr. Shaddy also stipulated that he had the opportunity to consult with counsel, was not coerced into signing the stipulation, waived a contested hearing before the board, and waived any right to appeal. Mr. Shaddy signed the stipulation on February 23, 2011. Attorney Adrian signed the stipulation on February 28, 2011. It was "approved and so ordered" by the board by signature of its chairperson on April 11, 2011. Discipline according to its terms then was imposed.

About a year later, Mr. Shaddy asked the board to vacate the stipulation and summary suspension and expunge all records of any proceedings against him. At a hearing on June 11, 201~~1~~2, Mr. Shaddy claimed that he was actually innocent of all charges and had agreed to the stipulation under duress (he claimed that his attorney at the time forced him to sign). Attorney Adrian appeared at the hearing and opposed Mr. Shaddy's request. Mr. Shaddy's presentation persuaded the board. In a decision signed on June 12, 2012, the board vacated all disciplinary action taken against him and dismissed the charges "without prejudice." It did not expunge the record. This order includes the following notification: "A party aggrieved by a final decision of a board may appeal this decision by . . . ."

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A different OPR prosecuting attorney, Gabriel Gilman, filed a notice of appeal with a 12-count statement of questions. An appellate officer was appointed to hear the case. Mr. Shaddy filed a motion to dismiss. Among other things, he argued that the prosecuting attorney, and OPR generally, has no lawful power to act independently of the board it represents. The prosecuting attorney, he argued, represents the board's interests, not the state's. The board is the licensee's opposing party (i.e., the state) in the disciplinary proceeding, not OPR or the prosecuting attorney. When the board chose to vacate the prosecution against him, Mr. Shaddy reasoned, OPR was powerless to object and could not appeal contrary to the wishes of the board. Mr. Shaddy's Motion to Dismiss (signed Aug. 10, 2012). OPR objected that in undertaking the prosecution it represents the interests of the state, is a party, and properly appealed. The appellate officer summarily ruled in OPR's favor on this issue. See Conclusions of Law and Rulings on Motions Filed by David Shaddy During Appeal 3 (signed Sept. 14, 2012).

Eventually, the briefs were filed and oral argument occurred. The appellate officer reversed the board's order, stating that it no longer had any effect. According to the appellate officer, among other defects in the underlying proceeding, the board misconstrued Rule 60 and OPR never had a fair chance to oppose Mr. Shaddy's request. The case was remanded to the board with the suggestion that further proceedings, if any, be assigned to an independent hearing officer. Mr. Shaddy then appealed to this court.

Here, Mr. Shaddy renews his argument that OPR does not represent the interests of the "the state" and acted without lawful authority when it appealed the board's Rule 60 decision. Mr. Shaddy's argument strikes at a fundamental question not explicitly addressed in the statutory scheme controlling OPR and the board of nursing (and numerous other such boards as well).

Analysis

OPR is an "office" within the office of the secretary of state. 3 V.S.A. § 122. It provides "administrative, secretarial, financial, investigatory, inspection, and legal services *to the boards*" that regulate professions. 3 V.S.A. § 123 (emphasis added). Among the legal services it provides is the prosecution of disciplinary cases. 3 V.S.A. § 129(c). However, nothing in the statutes expressly endows OPR or an OPR prosecuting attorney with independent prosecutorial powers except in the case of unauthorized practice, which does not apply in this case. See 3 V.S.A. § 127(b) (Upon complaint, "an attorney assigned by the office of professional regulation may elect to bring an action . . . .").

Boards, on the other hand, are authorized to adopt rules "governing the investigatory and disciplinary process." 3 V.S.A. § 129(a)(1); see also 26 V.S.A. § 1574(7), (9) (authority of the nursing board). Neither OPR nor the secretary of state has any similar, independent authority. Nothing in the statutes specifically governing the nursing board, 26 V.S.A. §§ 1571–1616, or the board's rules, however, expressly states how a decision to prosecute an unprofessional conduct case is arrived at, how subsequent prosecutorial decisions are made, and how the board interfaces with OPR in these regards.

It is clear that "the state" is the opposing party in a disciplinary proceeding. See 3 V.S.A. § 129a(c) (requiring that the "burden of proof in a disciplinary action shall be on the state"). It is similarly clear that "[a] party aggrieved by a final decision of a board" may appeal. 3 V.S.A. § 130a(a). Therefore, the state, a party, may appeal a board decision.

In Mr. Shaddy's view, the power to prosecute belongs to the board (or a member or members thereof). Though represented by OPR in the disciplinary proceeding, the board remains "the state" under § 129a(c) and the opposing party with the power to appeal under § 130a(a). In this case, Mr. Shaddy essentially argues, OPR stepped outside of its representative function in an improper effort to usurp the board's authority.

In OPR's view, OPR and its prosecuting attorney represent the interests of the state (not the board) and as such are empowered to prosecute disciplinary cases and appeal from board decisions.[2] In this case, the prosecution essentially began when the executive director of the board referred to case to OPR for summary suspension. Then, OPR assumed *independent* prosecutorial power. The independence of that prosecutorial power, however, simply does not expressly appear in the statutes. OPR nevertheless argues that the Vermont Supreme Court has acknowledged it. In *In re Lakatos*, 2007 VT 114, ¶ 5 n.6, 182 Vt. 487, the Court ruled as follows:

> Respondent has moved to dismiss the appeal on the ground that the State is not a party that may appeal the superior court's ruling. The assertion is unpersuasive. The statutory scheme governing appeals from professional boards such as the Board of Dental Examiners provides that a "party aggrieved" by a final decision of a board may appeal to the director and have the matter heard by an appellate officer. 3 V.S.A. § 130a. Thereafter, a "party aggrieved" by the decision of the appellate officer may appeal to the superior court. *Id.* The State, as the prosecuting agency, was plainly a party to the proceedings and as such would have been entitled to pursue an administrative appeal and an appeal to the superior court, and was further entitled to appeal from an adverse ruling by the superior court to this Court. See *Office of Prof'l Regulation v. McElroy*, 2003 VT 31, ¶ 1, 175 Vt. 507 (after appellate officer reversed Real Estate Commission decision, State appealed to the superior court, which reversed and reinstated Commission decision); *In re Smith*, 169 Vt. 162, 164 (1999) (after superior court reversed disciplinary decision of the Board of Nursing, the State appealed to this Court, which reversed the superior court and reinstated the Board's decision).

Lakatos, however, does not control this case. The question here is not whether the state may appeal, but who *is* the state—OPR or the board—in the circumstances presented; that is, who has the power to exercise the prosecutorial function when the time for appeal comes. Moreover, in *Lakatos* and the cited cases, "the state" was acting to support the underlying board decision. Here, OPR is seeking to reverse the board's decision. The circumstances presented here address a fundamentally distinct set of facts.

Mr. Shaddy's interpretation of the statutes contains a fundamental flaw. If the board is "the state" and "the state" is a party with the power to appeal a decision of the board, then where is the mechanism by which a board ever might appeal its own decision? The disciplinary process plainly is adversarial and both adversaries are parties

[2] The office of the attorney general filed an amicus brief in this case to the same effect.

with a right to appeal. Yet there is no apparent board entity set to retain supervision of the prosecution once the rest of the board assumes the quasi-judicial function of hearing the case. At some point, then, OPR must assume an independent prosecutorial function as the state. There is no one else.

At least in a case that does not begin with summary suspension proceedings, this appears to first occur on decision of the board at the conclusion of the investigation that leads to charges. Under 3 V.S.A. § 129(c), a board "may assign one or more members of the board to investigate complaints and license applications." Investigating board members have the assistance of an OPR investigator and the OPR attorney who will prosecute the case. *Id.* Though the statutes do not at all articulate how an investigation turns into a prosecution, the practice is described on the OPR website as follows. Once a complaint is filed, jurisdiction is determined and a case is opened. An investigation team that includes a board member or advisor is assembled. This investigation team eventually evaluates the investigator's findings and develops a recommendation about whether to prosecute or not. The recommendation then is given to the board or the OPR director (presumably in cases of boards with advisor appointees). See Vermont Secretary of State, Office of Professional Regulation, What Happens After a Disciplinary Complaint is Filed, available at http://www.vtprofessionals.org/ conduct/Complaint_Process.pdf. The board presumably then decides whether to prosecute. If the decision is to prosecute, OPR, through its prosecuting attorney, then has the case, and prosecutes it in the name of the state. If the board chooses not to prosecute, there presumably is no prosecution—there is no statutory authority enabling OPR to disregard the board and prosecute anyway. OPR thus derives its authority to prosecute entirely from the board. Why the legislature has not articulated this more expressly in the statutes, and the board in its rules, is wholly unclear.

In this case, the executive director received a mandatory report, made the referral to OPR to prosecute a summary suspension, and established an investigative team. The case then resolved by stipulation. Once the stipulation was filed, the board expressly approved it. It is clear that, at least by then, OPR had the case to prosecute independently. If there was any defect in how the prosecution initially was commenced or in how the charges were brought, it was rendered harmless by the board's explicit assent to the stipulation.

Mr. Shaddy has framed the issue before the court principally as whether OPR has the independent authority *to appeal* from the board's Rule 60 decision. He has consistently maintained that OPR's appeal from the board's decision contradicts the board's intent. The question may be better understood, in light of the analysis above, as whether the board, ostensibly by dismissing the charges against Mr. Shaddy, intended thereby to reverse the decision to prosecute that originally committed this case to OPR for prosecution. Mr. Shaddy clearly thinks so but he cannot speak for the board. OPR takes the position that once it begins to prosecute, it is responsible for all prosecutorial decisions thereafter, including whether to appeal. In this case, it claims that authority allowed its participation in post-judgment proceedings and to decide to appeal the Rule 60 decision. The board declined to intervene in this case to state its position on the matter.

The board's Rule 60 decision purported to vacate the stipulation and consent order, vacate the summary suspension order, and *dismiss the charges* against Mr. Shaddy. Board's Rule 60 Decision 3 (dated June 12, 2012). One might reasonably interpret the foregoing to exhibit an intent to completely drop all prosecution of this case against Mr. Shaddy. However, the dismissal of the charges was expressly "without prejudice." But without prejudice to what? This might have been intended to permit any of the following: the creation of a new investigative team to recommend whether new charges on the same conduct should be brought; to ensure that there was no perceived restriction on the creation of a new investigative team in the event of new charges predicated on different conduct; to ensure that OPR was able to appeal the Rule 60 decision; or it may simply have been superfluous and misleading. Simply put, under the circumstances, the court is unable to reconcile the board's decision to drop the charges with the caveat that it did so only without prejudice.

Granting Rule 60(b) relief does not necessarily mean that the board also intended to withdraw OPR's independent prosecutorial power and thereby prevent it from appealing. The purpose of an appeal from the decision of a professional board is to determine whether it is:

> (1) in violation of constitutional or statutory provisions;
> (2) in excess of the statutory authority of the board;
> (3) made upon unlawful procedure;
> (4) affected by other error of law;
> (5) clearly erroneous in view of the evidence on the record as a whole;
> (6) arbitrary or capricious; or
> (7) characterized by abuse of discretion or clearly unwarranted exercise of discretion.

3 V.S.A. § 130a(b). Ordinarily, one would expect that a board would not *consciously* make any of these sorts of errors and thus would invite an appeal by *any* party who might believe such an error exists, whether to ensure that it did not err or to clarify the error so that any prejudice could be corrected. Thus, one might assume that a board would *not* act to withdraw OPR's prosecutorial power simply to prevent it from bringing an appeal. Indeed, in this case, the appellate officer explained in detail that the board's Rule 60 proceeding and decision were egregiously flawed and the court agrees.

Nevertheless, the board expressly stated that it intended to drop the charges against Mr. Shaddy. The decision is ambiguous as to whether the board thereby intended to withdraw OPR's prosecutorial power by changing its decision to prosecute him and thus prevent OPR from appealing its decision.

If the board intended to withdraw OPR's prosecutorial power, and thereby prevent the appeal, the court would need to determine whether the board retained the power to do so when it did. If it was so empowered, then OPR lacked authority to appeal and there could be no appellate jurisdiction. If it was not so empowered, then the board's flawed Rule 60 decision would be reversed for the reasons described by the appellate officer.

If the board did not intend to withdraw OPR's prosecutorial power in its Rule 60 decision, then OPR properly appealed and the board's Rule 60 decision is reversed for the reasons described by the appellate officer.

Other matters

Mr. Shaddy has submitted numerous filings to the court outside of the briefing schedule. Most of these filings, including several characterized as seeking declaratory relief, essentially consist of additional argument on the general issue of OPR's authority to prosecute and appeal. The court's decision adequately responds to such filings and the court otherwise declines to address them further.

Other filings of Mr. Shaddy's appear to be efforts to alter the caption of this case, nominally change the parties, raise issues related to the Brattleboro Retreat or a department of labor proceeding, and raise other issues having no apparent bearing on this case. As the court explained in its May 24, 2013 decision, the court's jurisdiction in this case is limited to the appeal of the appellate officer's decision and those issues properly cognizable as within the scope of that appeal. This proceeding is not a general opportunity to raise collateral or wholly unrelated matters, regardless of their potential merit. Thus, to the extent that Mr. Shaddy has continued to raise such issues, they are outside the scope of this appeal, moot, and the court declines to address them further.

For its part, the State has filed a motion requesting that the court order Mr. Shaddy to properly send copies of his filings to the State and, further, to order Mr. Shaddy to cease "harassing" Attorney Gilman directly and by virtue of his prolific contacts with other state employees. In the litigation of this case, Mr. Shaddy has exhibited difficulty conforming his behavior to a standard acceptable under Rule 11 (not to mention conventional standards of politeness). To the extent that he may have beset Attorney Gilman with an endless stream of frivolous direct and indirect contacts or accusations, the court finds that unfortunate. In the context of this case the court does not see any law or rule authorizing it to intervening in Mr. Shaddy's efforts at contacting officials of the State or its subdivisions, particularly in light of the first amendment issues involved, and will not pursue the matter further. As for his failure to serve his filings on the State, today's decision ends the proceeding in this court and thus moots the matter.

ORDER

This case is remanded to the board of nursing for clarification of whether its Rule 60 decision represents a determination that the original decision *to prosecute* Mr. Shaddy has been replaced by a decision *not to prosecute* Mr. Shaddy and any further proceedings consistent with this decision.

All pending motions, whether filed by Mr. Shaddy or the State, are denied as moot.

Dated at Montpelier, Vermont on July 18 2013.

Robert R. Bent, Presiding Judge

STATE OF VERMONT
SECRETARY OF STATE
BOARD OF NURSING

IN RE:	)	
DAVID R. SHADDY	)	Docket No. M2011-84
License No. 026.0029631	)	

DECISION ON APPEAL FROM FINDINGS AND ORDER VACATING NURSING LICENSE SUSPENSION BY STIPULATION

This is an appeal from an administrative decision by the Vermont Nursing Board. The appeal was heard by Appellate Officer George K. Belcher. The appeal was taken by the State of Vermont acting through the prosecuting attorney, Gabriel M. Gilman, Esq., who was on the brief and made oral argument. David Shaddy is the Appellee and he appeared pro se. He filed an Appellee's brief and participated on his own behalf in oral argument.

Procedural Facts

The registered nursing license of Mr. Shaddy was suspended by stipulated order of the Vermont Nursing Board. The stipulation arose after charges had been filed alleging that Mr. Shaddy had diverted drugs from his nursing employment with the Brattleboro Retreat. The stipulation was agreed between State Prosecuting Attorney, Edward G. Adrian, Esq., representing the State of Vermont on February 28, 2011 and David R. Shaddy on February 23, 2011. The stipulation was approved and ordered by the Chairperson of the Vermont Nursing Board on April 12, 2011. The stipulation read in part,

> This Stipulation is neither an admission of liability by the Respondent [Mr. Shaddy] nor a concession by the State of Vermont that its charges are not well founded. To avoid delay, uncertainty, inconvenience, and expense of protracted litigation of the charges above, the Parties reach a full and final Stipulation pursuant to these understandings and the Order below. The Respondent does not dispute that the State could prove these charges by a preponderance of the evidence if this matter went to a hearing and agrees that the conditions below are necessary to protect the public. [Stipulation, Page 3, Para. (b)]

On or about May 1, 2012 Mr. Shaddy filed a petition requesting that the stipulated order be vacated or amended and that record be sealed or expunged. The thrust of the petition was that Mr. Shaddy had been misled by his attorneys in the negotiation of the stipulation (see paragraphs 12-18 of petition to the Vermont Board of Nursing). He further claimed in the petition that he was innocent of the drug diversion. On June 11, 2012, the Vermont Nursing Board held a hearing on his petition. On the following day the Board granted Mr. Shaddy's motion to vacate the stipulation and consent order. It dismissed without prejudice the charges which had previously been filed against Mr. Shaddy's license. The Board did not order that the record be expunged. The State of Vermont appealed and filed a statement of 12 questions concerning the appeal.

In order to understand the issues in this case it is essential to have in mind what the Nursing Board decided and the reasoning given for its decision. The Board decision states in part,

> The Board considered all the documents submitted by the parties. The threshold issue is whether the Board has authority to grant Mr. Shaddy relief from the Stipulation and Consent Order. We take Mr. Shaddy's motion as one for relief under V.R.C.P. 60 (b)(6). Under Rule 60(b)(6) we may grant relief for "any other reason justifying relief from the operation of the judgment. The motion shall be filed within a reasonable time…." Mr. Shaddy explained how the collateral consequences of the Stipulation and Consent Order became obvious to him over time. He explained his efforts, eventually successful, to have his name removed from a federal exclusion list. We found Mr. Shaddy's testimony in the hearing to be well-organized and credible. "Any other reason" is a mixed question of fact and law. As we are permitted, we conclude that Mr. Shaddy has shown a good reason for his request for relief.
>
> Based on our review of the evidence submitted and the nature of Mr. Shaddy's claim that the Stipulation and Consent Order represented a miscarriage of justice, we conclude that his request to vacate was made within a reasonable period of time.
>
> Mr. Shaddy's arguments about the validity of the underlying charges in this case made in his original letter to the Board and in his Motion to Vacate and Dismiss (May 25, 21012) are strongly supported by the documentation he provided at the hearing. The documents in evidence leave the Board with no confidence that it was Mr. Shaddy and not someone else who diverted the Adderral he was charged with diverting as set forth in the State's Specification of Charges or in the Stipulation and Consent Order. *On what we have seen in this hearing, the evidence against Mr. Shaddy is insufficient.* [See page 2 of the Findings of Fact, Conclusions of Law, and Order, emphasis added.]

The State of Vermont has raised issues which fall into three general areas. First, issues were raised concerning the admission of evidence by the Board. (See Questions 7-12 of the Appellant.) Second, the State raised issues surrounding the use and application of V.R.C.P. 60(b)(6) including the standard used by the Board in application of this rule. (See Questions 3-5.) Finally, the Appellant raised issues whether sufficient facts were properly found to justify the ultimate decision. These issues will be addressed below.

Before discussing the specific issues of the case, it is worthwhile to review the statutory criteria used in appeals from administrative bodies. The review is based upon the record created before the board. Reversal or remand is only possible if "substantial rights of the appellant have been prejudiced" because the board's findings, inferences conclusions or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the board; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the evidence on the record as a whole; (6) arbitrary or capricious; or (7) characterized by an abuse of discretion or clearly unwarranted exercise of discretion. See 3 VSA Sec. 130a(b). The discretion of the trier of fact in a Rule 60(b)(6) motion is broad and granted great deference. It has been said that a motion to set aside a judgement for hardship under VRCP 60(b)(6) is not subject to appellate review unless it clearly and affirmatively appears on the record that discretion was withheld or abused. Adamson v. Dodge, 174 Vt. 311, 816 A.2d 455 (2002).[1] An entity, vested with discretion, abuses that discretion when it behaves as if it

[1] The Adamson case stands for the proposition that great deference is due the trial court in ruling on Rule 60(b)(6) motions, but the facts of that case involved the trial court refusing to upset a divorce decree which the appellant was trying to vacate. In its decision the Vermont Supreme Court stated:

> The trial court found that the stipulation was "negotiated over many months with the input of a mediator." The final form of the stipulation included terms more favorable to father than those found in earlier drafts. The court found father to be a highly intelligent, educated man, who was not subjected to any pressure or threats and had "every opportunity to read over the

has no other choice than the one it has taken, or when it makes a decision for which there is not adequate support. Bennington Housing Authority v. Bush, 2007 VT 60, 933 A.2d 207 (2007).

The Evidence before the Board

In pre-hearing conferences, Mr. Shaddy identified several items he wanted to be considered by the Nursing Board. Exhibit A was a partial copy of the Stipulation and Consent Order (the Stipulation and Consent Order was admitted in its entirety by agreement). Exhibit B was an email from Mr. Shaddy's attorney to Mr. Shaddy dated February 3, 2011 (which was significantly redacted). An objection was made by the State unless the State was given an opportunity to respond at a subsequent hearing date. (See State's Response to Hearing Exhibits dated 4 June, 2012). Exhibit C was a drug screen report dated April 24, 2012. This was objected to as irrelevant to the issue of vacating an order made in April of 2011.

In addition to Exhibits A, B, and C. Mr. Shaddy presented to the Board two large packets of papers. One is entitled "Memorandum of Undisputed Factual Evidence." This document is 14 pages long and is dated May 25, 2012. The memorandum alleged facts and events. It also contained factual conclusions. The second packet is entitled "Addendum to Memorandum of Undisputed Factual Evidence." This document contains approximately 195 pages of records, transcript segments from depositions, and segments of trial transcripts. The State filed a written objection to these two packets prior to the hearing. The State objected that the packets essentially constituted a request for admission under VRCP 36 (which process is not available under the Administrative Rules for the Office of Professional Regulation (Rule 2.4)). The State also objected that the evidence in the packets could only be considered if the Board vacated the stipulation and, thus, the evidence was "premature" to the issue before the Board. The State also objected on the ground that some of the material came from a criminal trial of Mr. Shaddy which was under an order of expungement under 13 VSA Sec. 7041(e) and therefore should not be considered. Finally, the State objected to evidence being offered which had already been stipulated by Mr. Shaddy to have been sufficient to prove a charge of unprofessional conduct.

At the close of the hearing Attorney Adrian representing the State, stated, "[W]e just want to reiterate, although Mr. Shaddy's entitled his memorandum of undisputed factual evidence as such, we obviously dispute it. Now's not the time and place for the state to put forward its case on - - on the facts themselves, but I just wanted to make sure that was clear on the record." Page 59-60 of transcript.

The Board's order however is clear that, "The Board considered all the documents submitted by the parties." See Order, Page 2. As such, the record and the quoted Findings of Fact show that the evidence which was subject to the objections was admitted and considered. This was manifest error for the following reasons.

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stipulation, ask questions, and obtain legal representation." He voluntarily signed the stipulation agreeing to a generous financial package for the benefit of his former wife and four children. Interests of finality require that relief from a previous judgment should be granted only in extraordinary circumstances. Riehle v. Tudhope, 171 Vt. 626, 627, 765 A.2d 885, 887 (2000) (mcm).

First, it was made clear both at the hearing and in the order that, "The email from his [Mr. Shaddy's] attorney [Exhibit B] was received with the understanding that if the Board was inclined to give it any weight, the prosecution would be given an opportunity at a later date to offer any evidence it wished in response." See Order, Page 2 and Transcript, page 8. If the board considered "all the documents submitted by the parties" then it was obligated to give the State an opportunity to present evidence in response to Exhibit B. The Board did not do so. If Exhibit B was objectionable on privilege or other grounds, it should neither have been admitted nor "considered" without allowing a further hearing.

Second, the Board appears to have admitted substantive evidence improperly because the Board invisibly shifted into consideration of the merits of the case, before it had decided whether grounds existed to vacate the earlier judgement. It decided that the charges were dismissed and it stated, "Because our decision is based only on the *factual merits of the charge* against Mr. Shaddy, we do not address his claims of duress or undue influence." See page 3 of Order, emphasis added. Under the Vermont Administrative Procedure Act, 3 VSA Sec. 810, the rules of evidence as applied in civil cases in the superior courts of the state shall be followed. There is a relaxation of the rules of evidence in administrative proceedings "when necessary to ascertain facts not reasonably susceptible to proof under those rules." Id. Evidence is ordinarily taken from sworn witnesses in open court or by sworn affidavits or depositions. See VRCP 43 (a) and (e). See also Simpson v. Rood, 175 Vt. 546, 830 A.2d 4 (2003). In this case, Mr. Shaddy's "Memorandum of Undisputed Factual Evidence" was not sworn. Moreover, the second packet of almost 200 pages of transcript excerpts, documents, and one photograph did not meet the most elementary evidentiary standards. There was no foundation laid for the voluminous material. The declarants and authors of the material were not available to be cross-examined. Mr. Adrian had not been a party to the depositions. See Transcript of hearing, page 54. (See also Nichols v. Brattleboro Retreat, 2009 VT 4, 970 A.2d 1249 (2009) requiring a finding that witnesses are unavailable before admitting deposition testimony. No such finding was made.) It was obvious that Mr. Adrian did not feel the need to object to each and every item since he made his understanding clear that this was not a merits hearing, but only a hearing on whether grounds existed to vacate the stipulation.

Moreover, there was never a ruling made by Board counsel during the hearing upon the admission or exclusion of the evidence of the voluminous material contained in the memorandum. Had such a ruling been made during the hearing, it is possible that the State could have moved for a continuance to meet the evidence. The failure by the Board to make a definitive ruling on the evidence during the hearing is contrary to the usual evidentiary procedure. See. VRE 103.

Most importantly, admission of the excerpts from the criminal depositions and criminal trial allowed Mr. Shaddy to select only those sections of the transcript which benefited him. The State was precluded from independently gathering and introducing countervailing evidence, or even securing the entire deposition or trial transcript due to the order of expungement. The State made this objection clearly in writing before the hearing. The admission of such broad evidence which supported one side, without allowing an opportunity for response, was an error which prejudiced the State.[2] The Board stated that, "The evidence in support of Mr. Shaddy's request is compelling." Page 3 of Findings and Order. It is unknown from the order which items of evidence were so compelling. One must ask whether such evidence, even if admissible, would be "compelling" if countervailing evidence had been allowed and considered.

One final point about the evidence must be made. The charges in this case alleged that Mr. Shaddy diverted the drug Adderall on January 20, 2008, and that there was evidence that Mr. Shaddy was the only nurse who had unobserved access to the medication storage place during the time period of the tampering. While the charges included allegations about prior incidents of missing medication, the only allegation that Mr. Shaddy diverted the drug was for the incident on January 20, 2008. Mr. Shaddy's "Memorandum of Undisputed Evidence" raised issues about whether he worked on shifts when the same drug had been tampered with on two earlier occasions earlier in November of 2007 but these incidents were not the primary allegation of unprofessional conduct before the Nursing Board. As to the evidence concerning his exclusive access to the drug storage area on January 20, 2008, he produced some evidence, which if admitted, would show that another nurse or nurses may have had access to the drug storage area alone. He concluded that other incidents of tampering were done with a "modus operandi" and that his evidence, if admitted, supported the conclusion that Wendi Bedard, RN, was the only person who could have tampered with the medication. See Memorandum, Paragraph 27. He went on to allege that Registered Nurses Wendi Bedard, Beth Rivera, Margaret Athey all actively "lied". Id. Para. 32. He alleged that the Brattleboro Retreat Pharmacist "intentionally misled" the State investigator to implicate him and to exclude Nurse Bedard. Id. Para. 30(c).

The Board used "the documents in evidence" to determine that there was "no confidence that it was Mr. Shaddy and not someone else who diverted the Adderal he was charged with diverting…." (See page 3 of Order) What the above cited "evidence" makes abundantly clear is: (1) that there were issues of credibility which would have to be resolved if there were a hearing on the merits[3]; (2) that the issues involved in the case were subtle, including "modus operandi" issues, which might have fallen either way had all witnesses been able to testify; (3) the admission of only one side's evidence on such a complex and subtle case was simply unfair; (4) in the original stipulation Mr. Shaddy admitted that the State could prove its charges as a tactical judgement on his part, weighing the evidence which had been assembled against him and how that evidence might be presented. It is important to understand that the deposition testimony was taken in March of 2009 and the trial testimony was taken in September of 2009. Thus, the bulk

[2] The deposition transcript segments and trial transcript segments almost exclusively contain examination conducted by counsel for Mr. Shaddy. There is almost none of the cross-examination testimony of the witnesses contained in the packets. Thus, the selected portions of the transcripts were "cherry picked". While the documents included in the packet are identified by Mr. Shaddy in his memorandum, the authenticity and foundation for these documents was lacking.

[3] In the Vermont Supreme Court case which was referenced by Mr. Shaddy on page 48 of the Transcript of the hearing, the Vermont Supreme Court reviewed much of the same evidence and determined that credibility the nurses was at issue, and, therefore, further hearings were required. See David Shaddy v. Department of Labor, 2009 VT. 103, 987 A.2d 311 (2009). "Thus, the strength of the evidence against claimant depended largely on the credibility of other witnesses who themselves had access to the medication room on the days in question." At p. 314.

of the "evidence" which was presented in the Memorandum was available to Mr. Shaddy long before his stipulation of April of 2011. Page 50, Transcript.

The "evidence" should have been excluded or admitted only after a full evidentiary hearing.

The Standard of VRCP 60 (b)(6)

The pertinent part of VRCP 60 (b) states as follows:

> 60(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be filed within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Under the facts of this case the original order was made in April of 2011 and the motion to vacate was not filed within 12 months of the entry of that order. Thus, the grounds for relief under VRCP 60 (b) 1-3 were unavailable.

It has been determined that if a cause for relief is barred under VRCP 60(b) 1-3, then the same grounds cannot be used for a 60(b)(6) finding.

> [C]ases also certainly seem to establish that clause (6) and the first five clauses are mutually exclusive and that relief cannot be had under clause (6) if it would have been available under the earlier clauses. This reading seems required also by the language of the rule. Despite a few earlier cases that appeared to overlook this point, there is now much authority that the provisions are mutually exclusive. Wright, Miller and Kane, *Federal Practice and Procedure*, Sec. 2864, P. 362 . See also Perrott v. Johnston, 151 Vt. 464, 562 A.2d 459(1989).

Therefore if Mr. Shaddy's grounds for relief were grounded in his own neglect in making the stipulation, or mistakes by his counsel in formulating the stipulation, those grounds could not form the basis for a 60(b)(6) finding. In fact, Mr. Shaddy testified in the hearing that he had been misled by his attorneys, that he had misunderstood the meaning of the stipulation, that he was pressured into signing the stipulation since his attorneys were refusing to continue their representation of him, and that he signed the stipulation even though he disagreed with it. Mr. Shaddy alleged duress and misrepresentation in his petition to vacate and it was reasonable for the State to understand that these were the primary issues to be addressed at the hearing. Rule 60(b)(6) is not to be used as a substitute for one of the first five sections of V.R.C.P. 60(b). Relief under Rule 60(b)(6) is available only when a ground justifying relief is not encompassed within any of the first five classes of the rule. See. Pierce v. Vaughan, 2012 VT 5, 44 A.3d 758 (2012) reversing trial court's grant of Rule 60(b) motion.
Under our cases, relief under VRCP 60(b) is ordinarily unavailable to relieve one from the effects of a stipulation freely made. Goshy v. Morey, 149 Vt. 93, 539 A.2d 543

(1987). Courts have held that the movant's hurdle of overcoming a stipulated agreement is "more formidable than if they had litigated and lost." U.S. Steel Corp. v. Fraternal Assn. of Steelhaulers, 601 F.2d 1269; 1274 (3d Cir., 1979). Likewise, Rule 60(b)(6) may not be used to protect a party from tactical decision which in retrospect may seem ill advised. Okemo Mouintain, Inc. v. Okemo Trailside Condominiums, Inc. 139 Vt. 433, 431 A.2d 457 (1981). The catchall provision of VRCP 60(b)(6) referring to "any other reason justifying relief" is intended to accomplish justice in extraordinary situations where extraordinary circumstances warrant relief. Donley v. Donley, 165 Vt. 619, 686 A.2d 943 (1996); Town of Washington v. Emmons, 2007 VT 22, 925 A.2d 1002 (mem. 2007).[4] See also Wright, Miller and Kane, *Federal Practice and Procedure*, Sec. 2857. Extraordinary circumstances rarely exist from a judgment that resulted from a party's deliberate choices. Budget Blinds, Inc. v. White, 536 F.3d 244 (3d Cir., 2008). A party's misunderstanding of a term in a stipulation for settlement that he consciously entered into with advise of counsel, was not a party litigation "mistake" contemplated by the rule allowing relief from final judgement because of mistake. Cashner v. Freedom Stores, Inc. 98 F.3d 572 (10th Cir., 1996). Fault on the part of the person making a Rule 60(b)(6) motion usually means that there are no "extraordinary circumstances". See Wm. Moore, *Moore's Federal Practice*, Sec. 60.48, 3d ed. (2004). Error by counsel is rarely determined to be extraordinary circumstances unless there is gross neglect by counsel. Hawkins v. Lindsley, 327 F.2d 356 (CA2d, 1964). As was held by the U.S. Supreme Court in Ackermann v. U.S., 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1951), the voluntary, deliberate, free, untrammeled choice of a party not to appeal does not constitute extraordinary circumstances under Rule 60(b)(6).

It appears that the Board did not apply the "extraordinary circumstances" rule. The order itself states that "Mr. Shaddy has shown a *good reason* for his request for relief." See Order, Page 2, emphasis added. Towards the end of the hearing the following exchange took place:

Unidentified Female Board Member:

> Do we need to decide whether or not we can consider this before we proceed or is it all wrapped up?

Board Counsel:

> It's all sort of one big question. I mean, if you find Mr. Shaddy provided you with an *adequate* reason, you can go ahead and decide. (emphasis added). Page 44, transcript.

In deciding Rule 60(b) motions, the policy of the law to favor a hearing of a litigant's claim on the merits, must be balanced against a desire to achieve finality in litigation. See Wright, Miller and Kane, *Federal Practice and Procedure*, Sec. 2857. It is for this reason that many of the cases granting relief from judgements are those which set aside default judgments in favor of allowing a litigant his day in court so that the matter might be heard on the merits. See Childs v. Hart, 131 Vt. 241, 243, 303 A.2d 139, 140-41 (1973); Hahlteich v. Knott, 139 Vt. 588, 433 A.2d 287 (1981); Desjarlai v. Gilman, 143 Vt. at 157, 463 A.2d at 236. In the case of Mr. Shaddy before the Board, the decision overshoots in the other direction. The decision effectively denied the State of Vermont a

[4] In the Emmons case a *pro se* party stipulated to a judgement and later tried to retract it. The court stated, "The simple failure to raise these issues is not an 'extraordinary circumstance' justifying relief from judgment under Rule 60 (b)(6)."

hearing on the merits of the charges which had been filed, and denied the State the benefit of an agreement validly made with Mr. Shaddy. More importantly, the decision ignored the rule that Rule 60(b) motions "are ordinarily unavailable to those whose tactical choices turn out to be ill advised." Quoting Goshy v. Morey, supra at p. 97. See also Darken v. Mooney, 144 Vt. 561, 481 A.2d 407 (1984); Estate of Emilo v. St. Pierre, 146 Vt. At 424, 505 A.2d at 666 and Cooper v. Savage, 145 Vt. 223, 485 A2d. 1258 (1984).

In addition to Mr. Shaddy deriving the benefit of his stipulation, there is a certainty that the State will be prejudiced if the stipulation is undone at this late stage. As argued by the State,

> The Board's expansive interpretation of the mandate granted by V.R.C.P. 60 (b) call into question the integrity of each and every consent order negotiated between the State and its professional regulatees; undermines the finality of judgements; threatens the integrity of reciprocal discipline in sister states, invites inconsistent judgments; and exposes mandated reporters, public officials and witnesses for the State to interminable retaliatory litigation... See Appellant's brief, Page 4

One of the consequences which was raised as an issue in this case was the effect of an expungement by deferred sentence in a collateral criminal matter involving Mr. Shaddy. The record did not show the date which the expungement order took effect under 13 VSA Sec. 7041(e) but it is clear that Mr. Shaddy took the benefit of the expungement which he was likely able to secure by the passage of time while the stipulation was in effect. It is ironic that during his challenge of his own stipulation as being unfair, he was able to use the benefit of the passage of time resulting in the expungement of any criminal record.[5] One need not speculate to consider the effect of reopening a factual controversy which occurred in the year 2008 where witnesses move, memories fade, and documents and records are destroyed. The Nursing Board findings and order did not address the issue of prejudice to the State. Prejudice to a party is a factor which should be weighed in a finding of extraordinary circumstances. Relief from a judgment may be inappropriate if parties have relied upon it or if circumstances are such that setting it aside would cause prejudice to a party. See Wm. Moore, *Moore's Federal Practice*, Sec. 60.22, 3d ed. (2004).

The appellate officer could find no case where a stipulated judgement was set aside under Rule 60(b)(6) based upon grounds that one party could not prove its underlying case without a hearing which allowed the non-moving party to present its evidence following notice.

As Rule 60(b) states, "On motion and *upon such terms as are just*, the court may relieve a party or party's legal representative from a final judgment, order or proceeding for the following reasons: ..." emphasis added. The rule has been held to prohibit setting aside a judgment and the simultaneous granting of affirmative relief beyond what was granted in the original order. See Wm. Moore, *Moore's Federal Practice*, Sec. 60.25, 3d

[5] See Transcript of June 11, 2012 hearing page 56
Mr. Novins: And there was an agreement with the State?
Mr. Shaddy: Yeah
Mr. Novins: And you entered a plea?
Mr. Shaddy: I don't have to say.

ed. (2004). In Mr. Shaddy's case, the Nursing Board's order could be described as opening the April 2011 judgment and then granting an immediate summary judgement in favor of Mr. Shaddy. In Vermont, our law as stated in Smith v. Smith, 139 Vt. 234, 427 A.2d 378 (1981) held that upon the granting of a Rule 60 (b) motion a new trial was required on the underlying matter. The Smith case was overruled in part in the case of Cliche v. Cliche, 143 Vt. 301, 466 A.2d 314 (1983), where the trial court granted a Rule 60(b) motion and then modified the underlying order. In the Cliche case, however, "a full evidentiary hearing was held on disputed issues at the time of the Rule 60(b) hearing." Id. at 307. In the Shaddy case there was not a full evidentiary hearing on underlying disputed issues.

Finally, one must look at what the Board excluded as grounds for its decision. The Board expressly determined that Mr. Shaddy's arguments of duress and undue influence were not the basis of its decision. (See page 3 of Order). Because of the one-year time limit of Rule 60(b)(1-3) the Board effectively excluded grounds of mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, misrepresentation and misconduct by an adverse party. In his testimony before the Board Mr. Shaddy admitted (1) that he was represented by counsel in the negotiation of the stipulation; (2) that he had an opportunity to read the stipulation before signing it; (3) that he was not coerced into signing the stipulation; (4) that the stipulation was modified at the request of his counsel and that compromises were made by both sides in negotiating the stipulation; (5) that the stipulation represented the entire understanding between the parties; (6) that he thought the stipulation was unfair when he made the stipulation but that he signed it anyhow; and (7) that the facts set forth in the stipulation were true. See pages 25-41 of the transcript of the June 11, 2012 hearing.

Mr. Shaddy had the burden of proof at the June 11, 2012 hearing to establish that there were extraordinary circumstances which justified relief from the operation of the judgement. Given his admissions recited above, the inadmissible evidence which was "considered", and the precedents concerning the finality of stipulations, it is clear that the Board's conclusion that there had been a "miscarriage of justice" cannot stand. There were no extraordinary circumstances under the case law as applied to these facts. The decision of the Nursing Board vacating the prior suspension must be reversed as an abuse of discretion, as an error of law concerning the correct legal standard for a Rule 60(b)(6) motion, and as the product of an improper procedure where the merits of a case are considered by only hearing the evidence in defense of the charge without an opportunity for the State to present its evidence. The legal standard for a Rule 60(b)(6) motion is a legal standard and is reviewable upon appeal.

The Lack of Findings of Fact

Under Vermont law, if a Rule 60(b) motion is filed concerning a default judgment a hearing must be held. When a hearing is held, "the decision must state such findings and conclusions as will enable [the appellate authority] to determine the basis for the decision and to show how the court used its discretion." Goshy v. Morey, 149 Vt. 93 at 99. In this case the decision of the Vermont Nursing Board sets forth the position of the parties and some of the testimony of Mr. Shaddy. The Board decision then goes directly to conclusions. The Board concluded that Mr. Shaddy's testimony was "well-organized," that his request was made in a "reasonable time," that the Board had no confidence that it was Mr. Shaddy and not someone else who diverted the drugs, that the evidence against Mr. Shaddy was insufficient, that the evidence in support of his request was "compelling," and that there had been a "miscarriage of justice."

The manifest problem with the decision is that the Board did not identify which documentary or testimonial evidence it relied upon. More importantly, it did not make findings of facts to support its conclusions. A recitation of testimony is not a finding of fact and will not, alone support a judgement. Corrette v. Town of St. Johnsbury, 140 Vt. 315; Rutland Country Club v. City of Rutland, 140 Vt. 142 (1981) and Valsangiacomo, v. Page and Campbell, Inc., 136 Vt. 278. (1978). The trier of fact has an obligation to sift the evidence and make a clear statement so that the parties and the appellate authority know what was decided and how the decision was reached. Krupp v. Krupp, 126 Vt. 511 (1967). Where a Rule 60(b)(6) motion is granted but the grounds for granting the motion are not stated with particularity, the matter may be reversed due to the inability of the appellate court to determine whether discretion was used. See Pierce v. Vaughn, 2012 VT 5, 44 A.3d 758 (2012), footnote 3 of opinion. As written, the Board's order states, "As we are permitted, we conclude that Mr. Shaddy has shown a good reason for his request for relief." Page 2 of Order. One wonders what that good reason was, particularly since the law required an extraordinary reason. Likewise, when the order states, "On what we have seen in this hearing, the evidence against Mr. Shaddy is insufficient." Order page 2. Which evidence and what were the facts which justified this conclusion?

Another statement in the Order is that "[Mr. Shaddy] has gone to great lengths to acquire evidence to show his innocence and to be relieved of the consequences of previous orders." See Order, Page 3.[6] It is unclear what, if any, evidence supports this statement. What were the previous orders? The Board did report that Mr. Shaddy "...explained his efforts, eventually successful, to have his name removed from a federal exclusion list." See Page 2 of Order. The decision by the Federal Office of the Investigator General to prosecute an exclusion of Mr. Shaddy from a list of providers was never offered into evidence. In Mr. Shaddy's petition to vacate he stated, "After a little more than a year, *for whatever reason*, the Federal Office of the Investigator General dropped the charges against me and closed the file on my case." See petition paragraph 22, (emphasis added). This does not establish innocence.

Similarly, in testimony before the Board, Mr. Shaddy testified under oath,

> And the Supreme Court of Vermont has already ruled on this set of --- this whole case that it's more likely that the person who did all three of those recorded incidents was the person who actually did all three of those incidents, the person who could have. And there's only one person (inaudible) and it's not me.[7]

The case of David Shaddy v. Department of Labor, 2009 VT. 103, 987 A.2d 311 (2009) the Vermont Supreme Court found that if a subpoena had been issued by an administrative law judge, then Mr. Shaddy *might have been able* to show that the three incidents were connected.[8] His testimony before the Board was a flagrant misstatement

[6] If the evidence which he gathered constituted "newly discovered evidence" then it would have supported an exclusive ground of relief which was time-barred. VRCP 60(b)(2).

[7] On page 48 of the transcript, Mr. Shaddy identified which Vermont Supreme Court case he referred to .

[8] "*If claimant could show* that he could not have been responsible for one of the earlier incidents, that evidence would certainly be relevant to the issue of whether he was the perpetrator of the January incidents." Quoting from Supreme Court decision. Id. (emphasis added)

of the Vermont Supreme Court decision.[9] Was this part of the evidence used by the Board to conclude that Mr. Shaddy had been successful in establishing his "innocence"? Because there are so few findings of fact which reference the particular evidence admitted, it is impossible to discern what evidence and what facts were used to support the Board's conclusions. Moreover, the State was not given a fair opportunity to present responsive evidence.

Dismissal Without Prejudice

Although not argued by the parties in their briefs, the appellate authority must address and make clear that the Board did not dismiss the charges leaving the State with no ability to file the charges again. Since the order dismissed the charges "without prejudice," it is conceivable that the State could simply bring the charges again, secure a new trial and have its day in court. One might argue that this fact avoided any prejudice to the State. While this argument might seem plausible at first blush, the dismissal "without prejudice" does not cure the problems of procedure, evidence, or the legal standard applied by the Board in this case. The State had the right to have the Rule 60(b)(6) motion decided under the principles established under Vermont law. If those rules did not justify vacating the stipulation, then a dismissal without prejudice does not resolve the errant dismissal. The State also had the right to its day in court on the charges as filed. A dismissal without prejudice would deny the State of its right to a fair hearing.

In summary, the appellate officer finds that the hearing on June 11, 2012 and the resultant Finding of Fact, Conclusions of Law and Order were: (1) in violation of Vermont statutory provisions concerning the rules of evidence in administrative proceedings; (2) were made upon unlawful procedure in that both sides of the case were not given fair opportunity to address the evidence and issues which the Board ultimately determined; (3) were made using an incorrect standard for application of VRCP 60(b)(6) as it applied to setting aside stipulated judgements; (4) were made without appropriate findings of fact pursuant to the relevant caselaw; (5) were made without appropriate evaluation of the issues of finality and prejudice to the State; and (6) were the exercise of an abuse of discretion concerning the failure to rule on evidence, failure to make clear to the parties what issues were before the Board so that relevant evidence could be brought to bear on those issues, failure to proceed in a sequence which allowed a reopening of evidence by both sides of the matter rather than simply taking only the evidence from Mr. Shaddy. I find that substantial rights of the Appellant were prejudiced by these errors.

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[9] Moreover, in a subsequent decision in the case referred to by Mr. Shaddy the Vermont Supreme Court in David Shaddy v. Dept. of Labor, No. 2010-231, 2010 WL 7789084 (Vt. Dec. 8, 2010 (unpub. mem.) the Supreme Court stated, "Upon review of the record we conclude that the evidence was more than sufficient to support the Board's denial of benefits on grounds that [Mr. Shaddy] was fired for gross misconduct." This was most likely known to Mr. Shaddy before he testified.

Order

For the reasons stated herein, the Findings of Fact, Conclusions of Law and Order of the Vermont Board of Nursing are reversed and of no further effect. The matter is remanded with the recommendation that if any further proceedings occur in this matter before the Vermont Nursing Board, then the case should be assigned to an independent hearing officer appointed by the Vermont Nursing Board pursuant to 3 VSA Sec. 129(f)

Dated this 12 th day of October, 2012.

George K. Belcher
Appellate Officer

10/15/12
Date of Entry

Pursuant to 3 VSA Sec. 130a(c) and Administrative Rules for the Office of Professional Regulation Rule 4.1(B) a party aggrieved by a decision of the appellate officer may appeal to the Superior Court, Civil Division, Washington Unit, which shall review the matter on the basis of the records created before the board and the appellate officer. A written notice of appeal must be filed with the Docket Clerk within 30 days of the date of entry of the order, in the manner provided in the Vermont Rules of Appellate procedure 3 and 4. A check for the court filing fee made payable to the Clerk of the Superior Court, Washington Unit, Civil Division, must accompany the filing. Any request for stay pending appeal should be filed with the Superior Court, Washington Unit.

STATE OF VERMONT
BOARD OF NURSING

In re: David Shaddy License No. 026-29631	} } }	Docket No. 2008-42 (NU640108) M2011-84 (follow up)

Decision on Motion to Vacate or Amend Stipulation and Consent Order and Summary Suspension and, Request to Seal or Expunge All Proceedings

Participating Board Members:
Jeanine Carr, RN, Chair
Alan Weiss, Public Member
Donna Rae Metcalf, LNA
Sandra Norton, LNA
William G. White, Jr., Public Member
Deborah Swartz, RN
Douglas Sutton, RN
Ellen Watson, APRN
Sheila Davis, LPN
Virginia Hudson, RN

Appearances:
for Petitioner, State of Vermont: Edward G. Adrian
for Respondent: Pro se

Presiding Officer: Larry S. Novins

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Vermont Board of Nursing held a hearing in the above matter on June 11, 2012 at the National Life Building in Montpelier, Vermont.

Background

Mr. Shaddy is licensed by this Board as a registered nurse. On March 10, 2008 in docket number 2008-42 (NU64-0108) his license was summarily suspended. Charges were filed against him on April 10, 2008. His case was concluded with the filing of a Stipulation and Consent Order which was accepted by the Board on April 11, 2011. Mr. Shaddy was suspended until further order of the Board. He has not been reinstated.

Just over one year later in a letter dated April 30, 2012 which was received by the Board on May 1, 2012 Mr. Shaddy asked that the Board vacate or amend the Stipulation and Consent

Order and earlier Summary suspension order. He asked also that all records of the proceedings against him be expunged.

At the hearing on June 11, 2011 Mr. Shaddy explained to the Board why he wished to have the Stipulation vacated. The underlying reason, he alleged, was that he had not committed the unprofessional conduct alleged. Mr. Shaddy explained that he entered the Stipulation and Consent Order because he was under duress when his attorneys threatened to cease to represent him if he did not.

In support of Mr. Shaddy's petition he submitted several documents. They included a "Memorandum of Undisputed Factual Evidence," which the State made clear was not undisputed, a copy of the Stipulation and Consent Order, a copy of an email from one of his attorneys, and a thick packet of sworn deposition and trial transcripts and other documents related to the original charges against him. The email from his attorney was received with the understanding that if the Board was inclined to give it any weight, the prosecution would be given an opportunity at a later date to offer any evidence it wished in response. Mr. Shaddy explained that the documentation shows that he did not commit the charged unprofessional conduct. Mr. Shaddy also submitted a legal memorandum to support his position that the Board can and should vacate his Stipulation and Consent Order.

The State objected to Mr. Shaddy's request to vacate. It submitted memoranda in opposition to Mr. Shaddy's submissions and evidence.

The Board considered all the documents submitted by the parties. The threshold issue is whether the Board has authority to grant Mr. Shaddy relief from the Stipulation and Consent Order. We take Mr. Shaddy's motion as one for relief under V.R.C.P. 60(b)(6). Under Rule 60(b)(6) we may grant relief for "any other reason justifying relief from the operation of the judgment. The motion shall be filed within a reasonable time..." Mr. Shaddy explained how the collateral consequences of the Stipulation and Consent Order became obvious to him over time. He explained his efforts, eventually successful, to have his name removed from a federal exclusion list. We found Mr. Shaddy's testimony in the hearing to be well-organized and credible. "Any other reason" is a mixed question of fact and law. As we are permitted, we conclude that Mr. Shaddy has shown a good reason for his request for relief.

Based on our review of the evidence submitted and the nature of Mr. Shaddy's claim that the Stipulation and Consent Order represented a miscarriage of justice, we conclude that his request to vacate was made within a reasonable time.

Mr. Shaddy's arguments about the validity of the underlying charges in this case made in his original letter to the Board and in his Motion to Vacate and Dismiss (May 25, 2012) are strongly supported by the documentation he provided at the hearing. The documents in evidence leave the Board with no confidence that it was Mr. Shaddy and not someone else who diverted the Adderal he was charged with diverting as set forth in the State's Specification of Charges or in the Stipulation and Consent Order. On what we have seen in this hearing, the evidence against Mr. Shaddy is insufficient.

Our review convinces us that there has indeed been a miscarriage of justice in this case. Mr. Shaddy's license was summarily suspended over four years ago based on allegations which now appear unsubstantiated. He has not been able to practice at great cost to him personally and financially. He has gone to great lengths to acquire evidence to show his innocence and to be relieved of the consequences of previous orders. For him to regain his ability to practice, time is of the essence. We do not want this case to delay him any longer.

The evidence in support of Mr. Shaddy's request is compelling. The "catch all provision" of Rule 60(b) is intended to accomplish justice in extraordinary situations that warrant the reopening of final judgement. *Miller v. Miller,* 2008 VT. 86, 184 Vt. 464 (2008). We conclude that Mr. Shaddy's case is just such an extraordinary case. Our charge is to protect the public. In this case we do so by remedying injustice.

Order

For the reasons set forth above, we **grant** Mr. Shaddy's motion to vacate the Stipulation and Consent Order. The summary suspension order issued in 2008 is **vacated**. The charges against Mr. Shaddy are **dismissed** without prejudice.

Because our decision is based only on the factual merits of the charge against Mr. Shaddy, we do not address his claims of duress or undue influence.

Knowing of no legal authority to expunge the record of this matter, we **deny** Mr. Shaddy's motion to expunge.

APPEAL RIGHTS

This is a final administrative determination by the Vermont Board of Nursing. A party aggrieved by a final decision of a board may appeal this decision by filing a written Notice of Appeal with the Director of the Office of Professional Regulation, Vermont Secretary of State, Office of Professional Regulation, National Life Bldg., North, FL2, Montpelier, Vermont 05620-3402 within 30 days of the entry of this Order.

If an appeal is filed, the Director of the Office of Professional Regulation shall assign the case to an appellate officer. The review shall be conducted on the basis of the record created before the board. In cases of alleged irregularities in procedure before the board, not shown in the record, proof on that issue may be taken by the appellate officer. 3 V.S.A. §§ 129(d) and 130a.

To request a stay of the Board's decision, please refer to the attached stay instructions.

Vermont Board of Nursing

By: Jeanine Carr
Jeanine Carr, RN, Chair

Date June 12, 2012

OFFICE OF PROFESSIONAL REGULATION

DATE OF ENTRY: 6/15/12

STATE OF VERMONT
SECRETARY OF STATE
OFFICE OF PROFESSIONAL REGULATION
BOARD OF NURSING

IN RE:	)	
DAVID R SHADDY	)	Docket No. 2008-42 (NU64-0108)
License No. 026.0029631	)	

STIPULATION AND CONSENT ORDER

STIPULATION

NOW COME the State of Vermont, by and through State Prosecuting Attorney Edward G. Adrian, and the Respondent, David R. Shaddy, RN , who stipulate and agree as follows:

Board Authority

1. The Vermont State Board of Nursing (the "Board") has authority to issue warnings or reprimands; suspend, revoke, limit, or condition current licenses; or prevent the renewal of lapsed licenses if, after disciplinary hearing, the Board finds that the Respondent has engaged in unprofessional conduct. 3 V.S.A. § 129(a); 3 V.S.A. § 129a; 3 V.S.A. § 814(d); 26 V.S.A. § 1582; the Administrative Rules of the Board of Nursing (the "ARBN"); and the Rules of the Office of Professional Regulation.

Statement of Facts

2. The Respondent, David R. Shaddy, is licensed in the State of Vermont as a Registered Nurse under license number 026-0029631. This license was originally issued on June 14, 2004, and was summarily suspended on March 10, 2008.

3. At all times relevant, the Respondent was employed as a registered nurse at the Brattleboro Retreat (the "Facility") located in Brattleboro, Vermont.

4. On or about January 22, 2008, the Board received a complaint from the Facility regarding possible narcotic diversion by the Respondent. The complaint was based in part on the following information:

i) On or about the morning of January 20, 2008, registered nurses B.R. and M.A. were conducting the narcotics count and noted that an Adderall XR 10mg package had been tampered with. B.R. and M.A. observed that the Adderall package had been opened and some of the capsules had been either partially or completely emptied. Upon examination, it appeared that approximately six (6) capsules had been tampered with.

ii) M.A. advised that she conducted the narcotics count with the Respondent the previous evening as the Respondent was coming on duty for the evening shift. M.A. reported that at that time, she did not notice the Adderall package had been tampered with. M.A. further advised that while conducting the narcotics count on one occasion, the Respondent may have noted the new dosing strength of 10 milligrams and she thinks he said, 'oh, baby Adderall' in reference to the Adderall in stock.

iii) As the Respondent was a suspect with the regard to the tampered Adderall, a plan was devised whereby the Respondent was assigned as medication nurse on the evening shift on January 20, 2008 and therefore had unlimited access to the medication room.

iv) When registered nurses B. R. and W. B. examined the Adderall in the medication room on January 21, 2008, the day after the Respondent worked, it was determined that approximately 8 more capsules may have been tampered with.

5. In an interview with Clinical Manager at the Facility, M.W., conducted by State Investigator Karl Parker and Investigator Jeffery Krauss of the Attorney General's Office on or about January 28, 2008, M.W. advised that the Facility had experienced some past issues regarding Adderall tampering in November of 2007. M.W. further advised that the Facility had no incidents of tampering that were noticed before the Respondent was hired at the Facility. Furthermore since the Respondent was terminated from the Facility there have been no reports of tampering.

6. Additionally, M.W. advised that when the Respondent was terminated, the Respondent made a comment to M.W. that he has not done drugs in a long time and further denied the theft.

Charges

8. The acts, omissions and/or circumstances described above constitute grounds for discipline because the Respondent has committed unprofessional conduct in violation of:

i. 3 V.S.A. ' 129a(a)(3) (failing to comply with provisions of federal or state statutes or rules governing the practice of the profession);
ii. 26 V.S.A. ' 1582(3) (is unable to practice nursing competently by reason of any cause, which includes, but is not limited to, failing to conform to the essential standards of acceptable and prevailing nursing assistant practice pursuant to ARBN Chapter 4, Rule IV(II)(B)(2));
iii. 26 V.S.A. ' 1582(7) (engages in conduct of a character likely to deceive, defraud or harm the public which includes, but is not limited to, diverting supplies, equipment, or drugs for personal or other unauthorized use pursuant to ARBN Chapter 4, Rule IV(II)(D)(4)); and
iv. 3 V.S.A. '129a(b)(2) (failure to practice competently by reason of any cause on a single occasion or on multiple occasions may constitute unprofessional conduct.

Failure to practice competently includes failure to conform to the essential standards of acceptable and prevailing practice).

Understandings

a. The Respondent recognizes that he must comply with the Rules of the Board of Nursing in respect to number of hours necessary to maintain practice without having to undergo reentry course work as set forth in Board of Nursing Rules Chapter 4, Subchapter 2, V., B. .The Respondent further recognizes that if he does not comply with the Board of Nursing Rules in respect to practice hours needed for relicensure, this lack of compliance may constitute the basis for additional charges of unprofessional conduct.

b. This Stipulation is neither an admission of liability by the Respondent nor a concession by the State of Vermont that its charges are not well founded. To avoid delay, uncertainty, inconvenience, and expense of protracted litigation of the charges above, the Parties reach a full and final Stipulation pursuant to these Understandings and the Order below. The Respondent does not dispute that the State could prove these charges by a preponderance of the evidence if this matter went to a hearing and agrees that the conditions below are necessary to protect the public.

c. Respondent understands that the Nursing Board must review and accept the terms of the Consent Order. If the Board rejects any portion, the entire Stipulation and Consent Order shall be null and void.

d. Respondent specifically waives any claims that any disclosures made to the full Board during its review of this agreement have prejudiced his rights to a fair and impartial hearing in future hearings if this agreement is not accepted by the Board.

e. Respondent has read and reviewed this entire document and agrees that it contains the entire agreement between the parties.

f. Respondent is not under the influence of any drugs or alcohol at the time he signs this Stipulation and Consent Order.

g. Respondent voluntarily enters into this agreement after the opportunity to consult with legal counsel and is not being coerced by anyone into signing this Stipulation and Consent Order.

h. Respondent voluntarily waives his right to a contested hearing before the Board of Nursing and waives any right to appeal from this Stipulation and Consent Order.

i. Respondent agrees that the Order set forth below may be entered by the Board.

ORDER

Based on the Stipulation above, it is **ORDERED AND ADJUDGED** as follows:

A. The Board of Nursing hereby **CONTINUES THE SUSPENSION OF THE RESPONDENT'S LICENSE.** Prior to reinstatement, Respondent must: 1) obtain an independent evaluation report by a licensed professional specializing in drug and alcohol abuse pre-approved by the Board; 2) the results of the report with the drug and alcohol abuse independent evaluator must indicate that the Respondent does not present a risk to the safety, health or welfare of her potential patients; 3) Respondent must submit to the Board the results of a minimum of three (3) random urine analyses, collected in an observed setting, administered by a person who has been pre-approved by the Board, and analyzed by a lab qualified to analyze samples for forensic purposes and pre-approved by the Board; and 4) the results of the random urine analyses shall be negative; failure to appear for, refusal to provide, adulteration of, dilution of, or tampering with a sample for any urine analysis shall cause that screen to be presumed positive. The Respondent's license shall not be reinstated until these prerequisites are met. Once reinstated, Respondent's license will be **CONDITIONED FOR A MINIMUM OF TWO (2) YEARS** commencing with the date of reinstatement. The conditions will be as follows:

(1) Re-issue of License.
Upon the commencement of these conditions, Respondent shall be issued a license labeled "conditioned."

(2) Length of Time of Conditions Imposed.
The conditions shall remain in place until Respondent has completed all conditions ordered. Respondent shall be subject to the conditions until Respondent completes a **minimum of two (2) years** of supervised nursing in which he works at least forty (40) hours every two (2) weeks as a nurse. Part time hours of less than forty (40) hours every two (2) weeks shall be credited on a prorated basis. Respondent shall be prohibited from working more than forty (40) hours per week.

(3) Completion of Substance Abuse Counseling and Treatment Plan.
Respondent shall enter into and continue substance abuse counseling with a treating professional pre-approved by the Board until the treating professional shall certify in writing to the Board that such counseling is no longer necessary. Respondent shall enter into and comply with the substance abuse treatment plan approved by the Board and the treating professional.

(4) Notification to Treating Professional.
Respondent shall provide a copy of this Stipulation and Consent Order to his treating professional and cause his treating professional to inform the Board, in writing and on professional letterhead, of receipt of the Stipulation and Consent Order and the treating professional's ability to comply with the conditions related to treatment and with all other terms of this Consent Order.

(5) Reports from Treating Professional.

Respondent shall authorize and cause his treating professional to submit to the Board evidence of satisfactory progress with the treatment plan during the effective period of this Consent Order. These reports shall be submitted in writing on forms issued by the Board. The first report is due commencing the month after the date of the commencement of the conditions and subsequent reports are due **monthly** thereafter.

Respondent shall authorize his treating professional to provide all information requested by the Nursing Board, either orally or in writing, at any time during the period this Consent Order is in effect.

(6) Participation in Recovery Group(s).

Respondent shall participate as recommended by his treating professional in substance abuse recovery group(s), and shall submit **quarterly** reports documenting such attendance on forms issued by the Board.

(7) Random Drug and Alcohol Testing.

Respondent shall submit to random drug and alcohol screenings at the request of the Board or its designee. Respondent shall designate a person, who has been pre-approved by the Board or its designee, to administer random drug and alcohol screens. All testing shall be done on a random, unannounced basis and analyzed by a lab qualified to analyze samples for forensic purposes and approved by the Board. All urine specimens collected for tests shall be collected in an observed setting. All screens shall be negative.

Failure to appear for, refusal to provide, adulteration of, dilution of, or tampering with a sample for any urine screen shall cause that screen to be presumed positive. Any positive screen shall act as a violation of this Order.

(8) Abstain from Drug and Alcohol Use.

Respondent shall abstain completely from the consumption or possession of alcohol and drugs with the exception of medications as outlined in paragraph A.(9) for the period of time described in A.(2).

(9) Drug Use Exception.

Respondent shall not take controlled substances unless necessary. Respondent may take scheduled/controlled medications lawfully prescribed for a bona fide illness or condition by a physician, dentist, or nurse practitioner whose identity shall be made known to the Board in writing by Respondent within forty-eight (48) hours of the establishment of the practitioner/patient relationship. Respondent shall ensure that the physician, dentist or nurse practitioner informs the Board, in writing and on appropriate letterhead, of knowledge of Respondent's substance abuse issue(s) within one (1) week of entering into the practitioner/patient relationship. Respondent shall inform the Board in writing of all scheduled/controlled medications prescribed, including the name of the prescribing practitioner, within forty-eight (48) hours of receiving the prescription.

The Board or its designee may request at any time that the practitioner document the continued necessity for the prescribed scheduled/controlled medications if the term exceeds fourteen (14) days. This includes medications to be administered as necessary. It is not anticipated that Respondent would be prescribed scheduled/controlled medication during the term of this Consent Order for a period greater than fourteen (14) days, but if so, then the conditions herein may be revoked by the Board.

Respondent shall keep a written record of all medications taken, including over the counter drugs, and produce such record upon the request of the Board or its designee.

(10) Notification to Employers/Nursing School.

As long as Respondent's license remains conditional, he shall provide a copy of this Stipulation and Consent Order to all employers in any current or future setting in which Respondent practices as a nurse and inform them of Respondent's conditional license status.

Within ten (10) days of the date of entry of this Consent Order or of any subsequent nursing employment, Respondent shall cause Respondent's immediate supervisor to write to the Board, on the employer's letterhead, acknowledging receipt of the Stipulation and Consent Order and the ability to comply with the conditions in the Consent Order.

In the event the Respondent is attending a nursing program which has a clinical portion that involves actual patient care, Respondent shall provide a copy of the Stipulation and Consent Order to the Program Director. Respondent shall cause the Program Director to write to the Board, on school letterhead, acknowledging receipt of the Stipulation and Consent Order and the ability of the program to comply with the conditions in the Consent Order during clinical experience.

(11) Reports from Employers/Program Director.

Within one (1) month of the date of reinstatement or within one (1) month of the commencement of nursing employment and monthly thereafter, Respondent shall cause every nursing employer the Respondent has worked for during the month to submit to the Board an evaluation of Respondent's work performance and attendance during that month. This report shall be submitted in writing on forms issued by the Board. All employer reports shall indicate satisfactory performance and attendance.

In the event the Respondent is attending a nursing program, Respondent shall cause the Program Director to submit to the Board, on a monthly basis, a written evaluation of his performance and attendance. This report shall be submitted in writing on forms issued by the Board and accompanied by a cover letter on the school's letterhead. All nursing program reports shall indicate satisfactory performance and attendance.

(12) Practice Under Supervision.

Respondent shall practice as a nurse only in a setting where Respondent has direct supervision for the entire shift by a licensed registered nurse that is in good standing with the Board.

(13) Administration of Medications.

Respondent is prohibited from administering any controlled substances. This condition may be removed only by the Respondent filing a petition with the Board after he has worked as a nurse for twelve (12) weeks for at least forty (40) hours every two weeks (or the part time equivalent) after the date of reinstatement.

In any such petition, the Respondent must demonstrate, to the satisfaction of the Nursing Board, that he can safely and competently administer such medications. In any such petition, the Respondent must include appropriate support from his treating professional and employer or nursing school administrator and a description of the documentation and inventory control procedures in place.

The removal of this prohibition shall not automatically result in the reinstatement of all medication privileges. The Board may gradually restore those privileges through whatever intermediary steps it determines are appropriate.

(14) Types of Employment Prohibited.

Respondent shall not work in a supervisory role. Respondent shall not work for a nurse registry, traveling nurse agency, float-pool, home health care agency, temporary nursing employment agency or as a private duty nurse or personal care provider requiring a nursing or nursing assistant license during the effective period of this Consent Order.

(15) Interview with the Board or its Designee.

Respondent shall appear in person for interviews with the Board or its designee upon request.

(16) Out-of-State Practice.

Before any out-of-state practice can be credited toward fulfillment of these terms and conditions, Respondent shall first obtain approval from the Board prior to Respondent practicing nursing outside the State of Vermont. If Respondent fails to receive such approval before practicing nursing outside the State of Vermont, none of the time spent practicing nursing out-of-state will be credited toward the fulfillment of the terms and conditions of this Consent Order. The Board will approve out-of-state nursing practice so long as the Respondent can still comply with the provisions of this Consent Order.

(17) Notification of Place of Employment/Personal Address/Telephone Number.

Within five (5) days of the date of entry of this Consent Order, Respondent shall notify the Board, in writing, of his current place of employment, personal address, and telephone number. Respondent shall further notify the Board, in writing, within forty-eight (48) hours of any change in employment, personal address, or telephone number.

(18) Notification to Other States.

In the event that the Respondent is licensed in nursing in any other state(s), he must inform the nursing licensing board of the state(s) in which the Respondent is licensed of the conditional status of his Vermont nursing license within thirty (30) days of the date of entry of this Order. If the Respondent fails to provide such notification, it will be considered a violation of this Order.

(19) License Renewal.

If the Respondent's license expires while this Order is still in effect, this Order does not automatically extend the license. In that situation, in order to continue to practice as a nurse, the Respondent must timely apply for renewal, pay the applicable fee and demonstrate that he has otherwise complied with the requirements for license renewal.

(20) Release of Information Forms.

The conditions of this Order require the Respondent to authorize drug and/or alcohol treatment providers to report information in verbal and/or written format and/or to discuss the Respondent and any and all treatment rendered to the Respondent for drugs and/or alcohol with the Board or its designee. The conditions of this Order must allow any and all information from the Respondent's treatment providers to also be provided to the Office of Professional Regulation investigators and that the information may be used for further prosecutions if so warranted or if the Office of Professional Regulation determines that said information violates the terms of this Order or any rules or laws governing the profession of nursing.

The Respondent is entitled to revoke this consent at any time. However, any revocation by the Respondent of such consent to disclosure during the term of this Order shall be considered a violation of this Order.

This consent expires when the conditions are removed from the Respondent's nursing license.

This Stipulation and Consent Order shall constitute a valid written consent pursuant to the requirements of 42 C.F.R. § 2.31.

The Respondent understands that his treatment provider may require him to sign a separate and distinct consent meeting the requirements of 42 C.F.R. § 2.31.

(21) Costs.

The Respondent shall bear all costs of complying with this Consent Order.

(22) Violation of this Order.

If the Respondent violates the terms of this Order in any respect, the Board, after giving the Respondent notice and an opportunity to be heard, may rescind or modify this Order and impose additional appropriate disciplinary actions. If a complaint of unprofessional conduct is made against the Respondent during the term of this Order, this Order shall be automatically extended until the unprofessional conduct matter is concluded.

(23) Completion of Conditional License Period.

After the conditional license period, the Respondent may petition the Board to remove any and all conditions on his license. The Respondent must present proof that he has fully complied with the terms of this Order. The Respondent must also present proof of successful substance abuse rehabilitation and he must demonstrate, to the satisfaction of the Board, that he poses no danger to the public or the practice of nursing and that he can safely and competently perform the duties of a licensed nurse.

(24) Minimum Practice Hour Requirements

The Respondent must comply with the Rules of the Board of Nursing in respect to number of hours necessary to maintain practice without having to undergo reentry course work as set forth in Board of Nursing Rules Chapter 4, Subchapter 2, V., B. The Respondent further recognizes that if does not comply with the Board of Nursing Rules in respect to practice hours needed for relicensure, this lack of compliance may constitute the basis for additional charges of unprofessional conduct.

B. Notwithstanding any provision above, the Respondent must continue to meet all Nursing Board requirements for maintaining a license, license renewal and license reinstatement.

C. This Stipulation and Consent Order is a matter of public record and may be reported to other licensing authorities as provided in 3 V.S.A. §129(a).

D. This Stipulation and Consent Order will remain part of Respondent's licensing file and may be used for purposes of determining sanctions in any future disciplinary matter.

AGREED TO:

Dated: 2/28/11

STATE OF VERMONT
SECRETARY OF STATE

By: ___
Edward G. Adrian
State Prosecuting Attorney

Dated: 2/23/2011

DAVID R. SHADDY
RESPONDENT

By: ___
David R. Shaddy

APPROVED AND SO ORDERED:

Dated: 4.11.11

Date of Entry: 4/12/11

nu.shaddy.stip

VERMONT BOARD OF NURSING

By: ___
Chairperson

VERMONT SECRETARY OF STATE
OFFICE OF PROFESSIONAL REGULATION
STATE BOARD OF NURSING

In re	David R. Shaddy	}
License No.	026-0029631	}
Docket No.	NU64-0108	}

SUMMARY SUSPENSION ORDER

On Monday 10 March 2008, this matter came before the Vermont State Board of Nursing by petition of the State of Vermont. The State of Vermont seeks a summary suspension of Respondent's professional license pursuant to 3 V.S.A. § 814(c). The hearing took place at the Secretary of State's Office of Professional Regulation, National Life Building, Montpelier, Vermont.

The Board has authority to suspend summarily a license pending further proceedings if it determines that public health, safety or welfare imperatively require emergency action.

Findings of Fact &
Conclusions of Law:

Based on a review of the evidence presented at the hearing of this matter, the Board finds:

1. The Board of Nursing licenses the Respondent, and the Respondent is subject to the disciplinary authority of this Board. 26 V.S.A. Chapter 28, 3 V.S.A. § 129(a)(3); and the Administrative Rules of the Office of Professional Regulation.
2. The State filed a "Request for Summary Suspension" dated 5 March 2008, alleging that the Respondent diverted Adderall from the Brattleboro Retreat, his place of employment, in January 2008.
3. The State argues that public health, safety or welfare imperatively requires emergency action, and it asks this Board to suspend summarily the Respondent's license prior to a full hearing on the merits.
4. The Board has considered the evidence related to the allegations in the State's Request for Summary Suspension.
5. The Board finds that the State has, in its presentation of evidence, met its burden to the necessary degree of showing an imperative need for emergency action to protect the public health, safety and welfare.
6. Pursuant to 3 V.S.A. § 814(c), the Board issues the following temporary order, which shall remain in effect until further action by this Board.

ORDER

The Board of Nursing GRANTS the State of Vermont's Request for Summary Suspension.

The Respondent's license is SUSPENDED SUMMARILY pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

- END -

Vermont Board of Nursing

By: Ellen W. Leff
Ellen W. Leff, RN
Board Vice-Chairperson

Dated at Montpelier: 10 March 2008

OFFICE OF PROFESSIONAL REGULATION

DATE OF ENTRY: 3/12/08

APPEAL RIGHTS

This is a final administrative determination by the Vermont Board of Nursing.

A party aggrieved by a final decision of a Board may appeal the decision by filing a written Notice of Appeal with the Director of the Office of Professional Regulation, Secretary of State's Office, National Life Building, FL2, 1 National Life Drive, Montpelier, Vermont 05602-3402 within 30 days of the entry of the order.

For more information about the procedure for filing an appeal, please see the Administrative Rules for the Office of Professional Regulation, which you can find at: http://www.vtprofessionals.org/opr1/opr/admnrule.pdf and the Rules are also available at the Office of Professional Regulation.

If you file an appeal, the Director of the Office of Professional Regulation shall assign the case to an appellate officer. The appellate officer will review the record (the tape recording, exhibits etc.) created before the board during the hearing of your case. In cases of alleged irregularities in procedure before the board, not shown in the record, proof related to that issue may be taken by the appellate officer. 3 V.S.A. §§ 129(d) and 130a.

STATE OF VERMONT
SECRETARY OF STATE
OFFICE OF PROFESSIONAL REGULATION
BOARD OF NURSING

IN RE:
DAVID R. SHADDY)
License No. 026-0029631) Docket No. NU64-0108
)

SPECIFICATION OF CHARGES

NOW COMES the State of Vermont and makes the following Charges against the Respondent, David R. Shaddy, R.N.:

Board Authority

1. The Vermont Board of Nursing (the "Board") has jurisdiction to investigate and adjudicate allegations of unprofessional conduct committed by Nurses pursuant to 3 V.S.A. §§ 129, 129a; 26 V.S.A. Chapter 28 and; the rules of the Board and the Vermont Office of Professional Regulation.

Statement of Facts

2. The Respondent, David R. Shaddy, is licensed in the State of Vermont as a Registered Nurse under license number 026-0029631. This license was originally issued on June 14, 2004, and is currently set to expire on March 31, 2009.

3. At all times relevant, the Respondent was employed as a registered nurse at the Brattleboro Retreat (the "Facility") located in Brattleboro, Vermont.

4. On or about January 22, 2008, the Board received a complaint from the Facility regarding possible narcotic diversion by the Respondent. The complaint was based in part on the following information:

i) On or about the morning of January 20, 2008, registered nurses B.R. and M.A. were conducting the narcotics count and noted that an Adderall XR 10mg package had been tampered with. B.R. and M.A. observed that the Adderall package had been opened and some of the capsules had been either partially or completely emptied. Upon examination, it appeared that approximately six (6) capsules had been tampered with.

ii) M.A. advised that she conducted the narcotics count with the Respondent the previous evening as the Respondent was coming on duty for the evening shift. M.A. reported that at that time, the Adderall package had not been tampered with. M.A. further advised that while conducting the narcotics count on one occasion, the Respondent commented "Ooh, baby Adderall" in reference to the Adderall in stock.

STATE OF VERMONT

Prosecuting Attorney
Office of
Professional Regulation
9 Baldwin Street
Montpelier, VT
05609-1107

iii) As the Respondent was the primary suspect with regard to the tampered Adderall, a plan was devised whereby the Respondent was assigned to be responsible for medication during the day shift on January 20, 2008 and was the only nurse allowed access to the medication room unobserved that day.

iv) When registered nurses B.R. and W.B. examined the Adderall in the medication room after the Respondent's shift was over on January 20, B.R. and W.B. observed that approximately eight (8) additional Adderall capsules had been tampered with during the Respondent's shift.

5. In an interview with Clinical Manager at the Facility, M.W., conducted by State Investigator Karl Parker and Investigator Jeffery Krauss of the Attorney General's Office on or about January 28, 2008, M.W. advised that the Facility had experienced some past issues regarding Adderall tampering in November of 2007. M.W. further advised that the Facility had no issues with Adderall tampering before the Respondent was hired at the Facility. Furthermore, since the Respondent was terminated from the Facility, there have been no more reports of Adderall being tampered with.

6. Additionally, M.W. advised that when the Respondent was terminated, the Respondent made a comment to M.W. that he has not done drugs in a long time.

7. In an interview with Investigator Paker and Investigator Krauss conducted on or about January 28, 2008, both B.R. and W.B. advised that on one occasion, a patient was admitted to the Facility who had a prescription bottle with him/her containing Adderall. B.R. and W.B. advised that the Respondent took the bottle and counted the contents on his own then handed the charge nurse a sheet with the count on it. Afterwards, the Respondent left for his break and did not return.

8. The Board summarily suspended the Respondent's license on or about March 10, 2008.

Charges

9. The acts, omissions and/or circumstances described above constitute grounds for discipline because the Respondent has committed unprofessional conduct in violation of:

i. 3 V.S.A. § 129a(a)(3) (failing to comply with provisions of federal or state statutes or rules governing the practice of the profession);
ii. 26 V.S.A. § 1582(3) (is unable to practice nursing competently by reason of any cause, which includes, but is not limited to, failing to conform to the essential standards of acceptable and prevailing nursing assistant practice pursuant to ARBN Chapter 4, Rule IV(II)(B)(2));
iii. 26 V.S.A. § 1582(7) (engages in conduct of a character likely to deceive, defraud or harm the public which includes, but is not limited to, diverting supplies, equipment, or drugs for personal or other unauthorized use pursuant to ARBN Chapter 4, Rule IV(II)(D)(4)); and
iv. 3 V.S.A. §129a(b)(2) (failure to practice competently by reason of any cause on a

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single occasion or on multiple occasions may constitute unprofessional conduct. Failure to practice competently includes failure to conform to the essential standards of acceptable and prevailing practice).

Relief Requested

WHEREFORE, the license of David R. Shaddy should be revoked, suspended, reprimanded, conditioned or otherwise disciplined.

DATED at Montpelier, Vermont this 10th day of April, 2008.

STATE OF VERMONT
SECRETARY OF STATE

By:
Edward G. Adrian
State Prosecuting Attorney

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