

July 2015

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Recommended Citation

O'Neill, Lynne (1988) "Updating Ohio's Medical Practice Act (O.R.C. 4731): Automatic and Summary Suspensions of Physicians' Licenses," *Akron Law Review*: Vol. 21 : Iss. 4 , Article 6.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol21/iss4/6>

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UPDATING OHIO'S MEDICAL PRACTICE ACT (O.R.C. 4731): AUTOMATIC AND SUMMARY SUSPENSIONS OF PHYSICIANS' LICENSES

In recent years, many states have updated their medical practice acts.¹ Often, the reforms have been prompted by newspaper exposés² which criticized various state medical boards for being too lax in their enforcement of medical professional standards.³

In April, 1985, *The Plain Dealer* followed suit, running a series of articles entitled "Doctoring The Truth."⁴ Subsequently, a special Ohio House subcommittee investigated the Ohio State Medical Board.⁵ On November 21, 1986, the investigation culminated in the passage of Amended Substitute House Bill No. 769.⁶ The Act became effective on March 17, 1987.

The main purpose of this comment is to review two major areas of change in Ohio's Medical Practice Act. The first area deals with automatic suspensions⁸ of physicians' licenses. The second area deals with summary suspensions⁹ of physicians' licenses. In both of these areas, the Ohio State Medical Board now has the authority to suspend a physician's license before conducting a disciplinary hearing.¹⁰

Part I of this comment begins by reviewing the current composition of the Board so that the reader will understand how the Board functions in taking disciplinary action against a physician. Part I then explains the new provisions governing automatic and summary suspensions of physicians' licenses. Part I also points out several sections of the new Medical Practice Act which appear to be in conflict with other sections of the Ohio Revised Code, and offers some possible resolutions. Part II begins by analyzing the physician's right to practice medicine. Part II then discusses whether Ohio's Medical Practice Act allows

¹Feinstein, *The Ethics Of Professional Regulation*, 312(12) NEW ENG. J. MED. 801, 802 (1985).

²*Id.* Kusserow et al., *An Overview Of State Medical Discipline*, 257(6) J. A.M.A. 820, 821 (1987); Porter, *The Ohio State Medical Board. An Interim Report*, 82(10) OHIO ST. MED. J. 677, 677 (1986).

³Relman, *Professional Regulation And The State Medical Boards*, 312(12) NEW ENG. J. MED. 784, 785 (1985).

⁴Webb, *Doctoring The Truth*, Cleve. Plain Dealer, [series beginning] Apr. 7, 1985, at 7-A1, col. 1. This series of articles gives an interesting, although somewhat sensationalized, version of the disciplinary problems existing in the medical profession.

⁵Porter, *supra* note 2, at 677. State Representative John D. Thompson, Jr. headed the special House subcommittee. *Id.*

⁶Ohio Amended Substitute House Bill No. 769 (1986 Ohio Legis. Serv. 5-792) (Baldwin).

⁷*Id.* In amending Ohio's Medical Practice Act, the legislature relied on *A Guide To The Essentials Of A Modern Medical Practice Act*, as well as the medical practice acts of various other states. Attorney Lauren Lubow. Ms. Lubow is employed by the Ohio State Medical Board as "case controller." The writer of this comment interviewed Ms. Lubow, by phone, on January 15, 1988.

⁸OHIO REV. CODE ANN. § 4731.22(F) (Baldwin Supp. 1987).

⁹OHIO REV. CODE ANN. § 4731.22(D) (Baldwin Supp. 1987).

¹⁰*Id.*; OHIO REV. CODE ANN. § 4731.22(F) (Baldwin Supp. 1987).

the Board to deprive a physician of that right, while still protecting the physician's due process rights.

PART I

Members Of The Board

As amended, O.R.C. Sec. 4731.01 provides that the Ohio State Medical Board be composed of twelve appointed members.¹¹ Seven members must hold the degree of doctor of medicine.¹² One member must hold the degree of doctor of osteopathy.¹³ One member must hold the degree of doctor of podiatric medicine.¹⁴ Three members must represent consumer interests, with two of the three consumer members prohibited from being associated with a health care provider or profession.¹⁵ The only change in O.R.C. Sec. 4731.01 is the addition of a second consumer member prohibited from being associated with a health care provider or profession.¹⁶ The addition follows a nationwide trend; most state medical boards now have at least one or two non-physician members.¹⁷

While attempting to provide for consumers' interests, Ohio has also attempted to protect physicians' interests by requiring the majority of the Board to be made up of physicians.¹⁸ The majority requirement is important to Ohio physicians because Ohio permits the Board to use its own expertise to determine whether a physician has breached the minimum standard of care.¹⁹

Officers Of The Board

As amended, O.R.C. Sec. 4731.02 provides for the Board to elect three officers.²⁰ The first officer is the president, who must be a board member.²¹ The second officer is the supervising member, who also must be a board

¹¹ OHIO REV. CODE ANN. § 4731.01 (Baldwin Supp. 1987).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Ohio Legis. Serv. Commission, [material on] Am. Sub. H.B. 769 (as passed by the House), 116th Gen. Assembly (1985-86), at 20. Before the amendment, the Board had only eleven members, two of whom were consumer members. *Id.*

¹⁷ Kusserow et al., *supra* note 2, at 822.

¹⁸ The Federation of State Medical Boards of the United States recommends that physicians constitute the majority of board membership. Fed. St. Med. Boards U.S., *A Guide To The Essentials Of A Modern Medical Practice Act*, § III(E), at 5 (1985).

¹⁹ *Arlen v. State*, 61 Ohio St.2d 168, 172-73, 399 N.E.2d 1251, 1254-55 (1980). The courts view the Board as possessing its own expertise. *Id.* Therefore, additional expert testimony is not required. *Id.* For a general discussion on expert testimony during medical board proceedings, see Annotation, *Admissibility and Necessity of Expert Evidence in Proceeding for Revocation of License of Physician, Surgeon, or Dentist*, 6 A.L.R.2d 675 (1949).

²⁰ OHIO REV. CODE ANN. § 4731.02 (Baldwin Supp. 1986). The Board elects each of its officers to a one-year term. *Id.*

member.²² The third officer is the secretary, who must be a physician in good standing in her/his profession.²³ The secretary does not have to be a board member.²⁴

As amended, O.R.C. Sec. 4731.22(C)(1) provides that the supervising member and the secretary shall function together to oversee any investigations into violations of medical practice which the Board conducts.²⁵ Formerly, individual board members were selected on a rotating basis to oversee investigations.²⁶ Although the secretary and the supervising member are normally supposed to oversee any investigations, the president has the power to replace the supervising member with another board member,²⁷ if a particular case falls within that board member's area of professional expertise.²⁸ The new law retains the rule that any member who supervises the investigation of a case is prohibited from participating in further adjudication of the case.²⁹

Attorney Hearing Examiner

The most significant addition to the Board's staff is the position of attorney hearing examiner.³⁰ O.R.C. Sec. 4731.23(A) provides that the Board must employ an attorney³¹ to serve as a hearing examiner in any hearing which the Board has power³² to conduct.³³ The position of hearing examiner replaces the former position of hearing officer, which was held by a board member.³⁴ Providing for an attorney hearing examiner allows the entire Board (except for the supervising member)³⁵ to take part in the final adjudication of the case.³⁶

The attorney hearing examiner's function is to conduct the hearing, consider all of the evidence, and then prepare written proposed findings of fact

²²*Id.* The supervising member replaces the former position of treasurer. [material on] Am. Sub. H.B. 769 (as passed by the House, *supra* note 16, at 20.

²³[material on] Am. Sub. H.B. 769 (as passed by the House), *supra* note 16, at 20.

²⁴*Id.* at 19.

²⁵OHIO REV. CODE ANN. § 4731.22(C)(1) (Baldwin Supp. 1987); [material on] Am. Sub. H.B. 769 (as passed by the House), *supra* note 16, at 20.

²⁶OHIO REV. CODE ANN. § 4731.22(D)(1) (Baldwin 1984) (amended 1986).

²⁷OHIO REV. CODE ANN. § 4731.22(C)(1) (Baldwin Supp. 1987).

²⁸[material on] Am. Sub. H.B. 769 (as passed by the House), *supra* note 16, at 20.

²⁹OHIO REV. CODE ANN. § 4731.22(C)(1) (Baldwin Supp. 1986); [material on] Am. Sub. H.B. 769 (as passed by the House), *supra* note 14, at 17.

³⁰OHIO REV. CODE ANN. § 4731.23(A) (Baldwin Supp. 1987).

³¹The attorney must be an administrative law attorney examiner, or an administrative law attorney examiner administrator under the state job classification plan in OHIO REV. CODE § 124.14. *Id.*

³²As a state administrative agency, the Board's power to conduct adjudication hearings is pursuant to OHIO REV. CODE § 119 — Administrative Procedure. *Id.*

³³*Id.*

³⁴[material on] Am. Sub. H.B. 769 (as passed by the House), *supra*, note 16, at 17.

³⁵As previously noted, a member who has investigated a case cannot take part in the adjudication of that case. OHIO REV. CODE ANN. § 4731.22(C)(1) (Baldwin Supp. 1987).

³⁶[material on] Am. Sub. H.B. 769 (as passed by the House), *supra* note 16, at 17.

and conclusions of law.³⁷ Within thirty days of the hearing's conclusion, the attorney hearing examiner must submit the written proposals to the Board for its consideration.³⁸ After receiving the hearing examiner's proposals, the Board has sixty days to render a final decision and take action in the case.³⁹ If the Board votes⁴⁰ to suspend or revoke a physician's license, the physician has the right to appeal⁴¹ to the Franklin County Court of Common Pleas.⁴² Pending appeal, the court may suspend the Board's order if it appears that: (1) execution of the Board's order will result in unusual hardship to the physician, and (2) suspension of the Board's order will not result in a threat to the public's health, safety, and welfare.⁴³

Automatic Suspension Of Physicians' Licenses

One major change in Ohio's Medical Practice Act is that O.R.C. Sec. 4731.22(F) requires⁴⁴ the Board to automatically suspend a physician's license if the physician pleads guilty to, or has been found guilty⁴⁵ of committing certain violent crimes.⁴⁶ The automatic suspension operates from the date of the guilty plea or judicial finding of guilt.⁴⁷ Once the Board suspends the physician's license, continued practice will be considered practicing medicine without a license.⁴⁸ The Board's obligation to automatically suspend the physician's license applies whether the criminal proceeding was brought in Ohio, any other state or territory, or the District of Columbia.⁴⁹

Once the Board has notified⁵⁰ the physician of the suspension, the physician must make a timely request for an adjudicatory hearing, or the Board will

³⁷ *Id.*; OHIO REV. CODE ANN. § 4731.23(A) (Baldwin Supp. 1987).

³⁸ OHIO REV. CODE ANN. § 4731.23(A) (Baldwin Supp. 1987). The Board also receives copies of the hearing transcript, and all documents and exhibits which were presented at the hearing. OHIO REV. CODE ANN. § 4731.23(B) (Baldwin Supp. 1987).

³⁹ OHIO REV. CODE ANN. § 4731.23(D) (Baldwin Supp. 1987).

⁴⁰ At least six members of the Board must vote in favor of suspending or revoking the physician's license. OHIO REV. CODE ANN. § 4731.22(B) (Baldwin Supp. 1987).

⁴¹ OHIO REV. CODE ANN. § 4731.23(E) (Baldwin Supp. 1987).

⁴² OHIO REV. CODE ANN. § 119.12 (Baldwin 1987).

⁴³ *Id.* Any such suspension of the Board's order automatically terminates when the court of common pleas issues its final order, or fifteen months after the physician files her/his notice of appeal with the court of common pleas (whichever comes first). *Id.*

⁴⁴ [material on] Am. Sub. H.B. 769 (as passed by the House), *supra* note 16, at 1.

⁴⁵ An automatic suspension is also required when a court finds that a physician is eligible for treatment in lieu of conviction. OHIO REV. CODE ANN. § 4731.22(F) (Baldwin Supp. 1987).

⁴⁶ *Id.* The violent crimes listed are: aggravated murder, murder, voluntary manslaughter, felonious assault, kidnapping, rape, sexual battery, aggravated arson, and aggravated robbery. *Id.*

⁴⁷ *Id.*

⁴⁸ *Snyder v. State Medical Bd.*, 18 Ohio App. 3d 47, 48, 480 N.E.2d 496, 497-98 (1984); *see also* OHIO REV. CODE ANN. § 4731.22(F) (Baldwin Supp. 1987).

⁴⁹ OHIO REV. CODE ANN. § 4731.22(F) (Baldwin Supp. 1987).

⁵⁰ The Board must notify the physician by certified mail, or in person as specified on OHIO REV. CODE § 119.07. *Id.*

enter a final order revoking the physician's license.⁵¹

Rather than requiring the physician to request a hearing, the Board should probably institute proceedings simultaneously with the order of automatic suspension. The Federation of State Medical Boards of the United States recommends that when a state medical board issues an order of summary suspension, it should simultaneously institute proceedings for a formal disciplinary hearing.⁵² Although the Federation does not address the subject of automatic suspensions, it would seem that the same recommendation should apply. In both situations, the Board deprives a physician of the use of her/his medical license without first affording the physician the chance to be heard.⁵³

Summary Suspension Of Physicians' Licenses

A second major change in Ohio's Medical Practice Act is that O.R.C. Sec. 4731.22(D) grants the Board discretionary authority⁵⁴ to summarily suspend a physician's license prior to a formal disciplinary hearing.⁵⁵ Formerly, the Board had to obtain a temporary restraining order (from a court of common pleas) against the physician's license.⁵⁶

Currently, if the secretary and supervising member decide there is clear and convincing evidence that: (1) a physician has violated O.R.C. Sec. 4731.22(B)⁵⁷ and (2) the physician's continued practice presents a danger of immediate and serious harm to the public, they may ask the Board to summarily suspend the physician's license before conducting a formal hearing.⁵⁸ If the Board votes⁵⁹ to summarily suspend the physician's license, the Board must

⁵¹ *Id.*

⁵² Fed. St. Med. Boards U.S., *supra* note 18, Sec. X(E) at 18.

⁵³ OHIO REV. CODE ANN. § 4731.22(F) (Baldwin Supp. 1987); OHIO REV. CODE ANN. § 4731.22(D) (Baldwin Supp. 1987).

⁵⁴ The Federation of State Medical Boards of the United States recommends that the Board "be empowered . . . to exercise full discretion and authority with respect to disciplinary actions." Fed. St. Med. Boards U.S., *supra* note 18, Sec. X(A) at 18.

⁵⁵ [material on] Am. Sub. H.B. 769 (as passed by the House), *supra* note 16, at 8.

⁵⁶ *Id.*; OHIO REV. CODE ANN. § 4731.22(E) (Baldwin 1984) (amended 1986).

⁵⁷ OHIO REV. CODE § 4731.22(B) lists the grounds on which the Board may suspend or revoke a physician's license, pursuant to an adjudicatory hearing. OHIO REV. CODE ANN. § 4731.22(B) (Baldwin Supp. 1987).

⁵⁸ OHIO REV. CODE ANN. § 4731.22(D) (Baldwin Supp. 1987). The Federation of State Medical Boards of the United States recommends that the Board be "authorized to summarily suspend a license prior to a formal hearing when it believes such action is required to protect the public health and safety." Fed. St. Med. Boards U.S., *supra* note 18, Sec. X(E) at 18. Thus, Ohio's "clear and convincing" standard appears to provide the Board with less discretion than the Federation recommends. The Federation's recommendation is consistent with what it suggests should be the "primary responsibility and obligation" of state medical boards: "to protect the public." *Id.* While the language of OHIO REV. CODE § 4731.22(D) indicates that the legislature is interested in having the Board protect the public from dangerous physicians, the "clear and convincing" standard indicates that the legislature is also interested in protecting physicians' due process rights.

⁵⁹ The Board must first review the written allegations which the secretary and supervising member have prepared. OHIO REV. CODE ANN. § 4731.22(D) (Baldwin Supp. 1987). After reviewing the allegations, at least six members of the Board (excluding the supervising member) must vote in favor of summarily suspending the physician's license.

issue a written order of summary suspension to the physician.⁶⁰ The physician may then request an adjudicatory hearing by the Board.⁶¹ If she/he does so, the hearing must be conducted from seven to fifteen days after the physician requests the hearing.⁶²

O.R.C. Sec. 4731.22(D) specifically states that a summary suspension order *cannot* be suspended by a court of law, pending appeal.⁶³ At first glance, the prohibition against suspending the Board's order appears to be in conflict with O.R.C. Sec. 119.12 which specifically states that "[i]n the case of an appeal from the state medical board, the court *may* grant a suspension and fix its terms if" certain conditions are met.⁶⁴ However, O.R.C. Sec. 119.12 deals with appeals filed by "any party (physician) adversely affected by any order of an agency (state medical board) issued pursuant to an adjudication."⁶⁵ The term "adjudication" implies a hearing.⁶⁶ Therefore, the stipulation in O.R.C. Sec. 119.12 could be construed as not applying to summary suspension orders because they are issued prior to a formal hearing.⁶⁷

O.R.C. Sec. 4731.22(D) creates another conflict by requiring the Board to issue its final adjudicative order within sixty days *after completion of its hearing*.⁶⁸ This provision conflicts with O.R.C. Sec. 4731.23(D) which requires the Board to make its decision within sixty days *after receiving the hearing examiner's written proposals*.⁶⁹ Because the hearing examiner has thirty days *after completion of any hearing* in which to prepare the proposals,⁷⁰ O.R.C. Sec. 4731.23(D) would actually give the Board as much as ninety days *after completion of the hearing* in which to issue its final order. One way to resolve the conflict is to assume that the legislature wanted the Board to act more quickly under O.R.C. Sec. 4731.22(D) because the physician's license remains summarily suspended until the Board issues its final adjudicative order.⁷¹

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* If the physician and the Board agree to another time, the hearing may be held at the mutually agreed upon time. *Id.*

⁶³ *Id.*; [material on] Am. Sub. H.B. 769 (as passed by the House), *supra* note 16, at 8.

⁶⁴ OHIO REV. CODE ANN. § 119.12 (Baldwin 1987). There are two conditions: the court must find that (1) execution of the Board's order will result in an unusual hardship to the physician, *and* (2) suspension of the Board's order will not threaten the health, safety, and welfare of the public. *Id.*

⁶⁵ *Id.*

⁶⁶ See "adjudication," Black's Law Dictionary 39 (5th ed. 1979).

⁶⁷ OHIO REV. CODE ANN. § 4731.22(D) (Baldwin Supp. 1987). The language of OHIO REV. CODE § 4731.22(D) — "any summary suspension . . . shall remain in effect . . . until a final adjudicative order is issued by the board . . ." — further implies that summary suspension orders were not intended to be final adjudicative orders. Therefore, the summary suspension would not be subject to OHIO REV. CODE § 119.12.

⁶⁸ *Id.*

⁶⁹ OHIO REV. CODE ANN. § 4731.23(D) (Baldwin Supp. 1987).

⁷⁰ OHIO REV. CODE ANN. § 4731.23(A) (Baldwin Supp. 1987).

⁷¹ OHIO REV. CODE ANN. § 4731.22(D) (Baldwin Supp. 1987).

To further complicate matters, if the Board fails to issue its final adjudicative order within sixty days of the hearing's completion, O.R.C. Sec. 4731.22(D) provides that the summary suspension automatically dissolves (but such dissolution does not invalidate any subsequent adjudicative order issued by the Board).⁷² Requiring the Board to make its final decision more quickly when a physician's license has been summarily suspended will not provide the physician with any real advantage, because the summary suspension automatically dissolves sixty days after the hearing has been completed, thus restoring the physician's license. One possible result of requiring the Board to make its final decision more quickly when a summary suspension is involved, is that the Board may make its decision in a hurried fashion. It seems that reaching a hurried decision is exactly what the Board should not do in a case so serious that it warranted the Board's issuing of a summary suspension initially.

The preferable way to resolve the above conflicts is for the legislature to issue a clarification of its intent, or to amend Chapter 4731 of the Revised Code to completely eliminate the conflicts. If the legislature does not act, the conflicts will undoubtedly result in litigation, and the courts will be left to second-guess the legislature's intent.

PART II

The Medical License As Property

Since the 1960's, the concept of "the new property"⁷³ has led the courts to view a variety of "indirectly valuable" items as establishing a property right in the holder.⁷⁴ An occupational license is one of those items.⁷⁵ The courts view occupational licenses as conveying a restricted property right on the licensee.⁷⁶ As such, a license to practice medicine has been accepted as a property right, subject to the reasonable regulation of a state medical board.⁷⁷

Procedural Due Process

After establishing the premise that a medical license creates a property

⁷²*Id.*

⁷³In 1964, an article entitled *The New Property* was published. Reich, *The New Property*, 73 YALE L.J. 733 (1964). It subsequently became the leading article on the subject, frequently cited and relied on by various courts of law. See *Goldberg v. Kelly*, 397 U.S. 254, 262, n.8 (1970).

⁷⁴Reich, *supra* note 73, at 734. Although a piece of paper licensing a person to engage in a particular activity has no inherent value, its value lies in what it enables its holder to obtain. *Id.* Generally, a professional license enables its holder to obtain her/his primary income. *Id.* In addition, a professional license often provides its holder with "wealth" in the form of community status. *Id.*

⁷⁵*Id.* at 734.

⁷⁶*Commission on Medical Discipline v. Stillman*, 291 Md. 390, 405, 435 A.2d 747, 755 (1981). The property right is restricted, rather than absolute, because the state distributes the "new property" subject to conditions which protect the public interest. Reich, *supra* note 73, at 733.

⁷⁷*Stillman*, 291 Md. at 405, 435 A.2d at 755; *In Re Polk*, 90 N.J. 550, 562, 449 A.2d 7, 13 (1982). (Physician's license revoked with state medical board using preponderance of the evidence standard). See also *Survey, Physicians And Surgeons*, 13 SETON HALL L. REV. 654, 655 (1983).

right in the physician, one must accept the fact that a state medical board cannot deprive the physician of her/his license without due process of law.⁷⁸ The crucial issue then becomes *not whether due process should apply* to the suspension or revocation of a physician's license, but rather, *how much process is due* in administrative proceedings to fulfill the purpose of the Fourteenth Amendment's due process clause?⁷⁹

In 1976, the United States Supreme Court answered this question in *Mathews v. Eldridge*.⁸⁰ Although *Mathews* did not involve a state medical board proceeding, the analysis outlined in *Mathews* provides the current standard by which the procedures of all administrative agencies are measured.⁸¹

In *Mathews*, the Supreme Court called for a three-step analysis of the private and governmental interests affected by an administrative agency's decision to deprive a person of a recognized property interest.⁸² Step one requires the court to evaluate the private interest.⁸³ Step two requires the court to determine the degree to which the existing procedure involves a risk that the agency might reach an erroneous decision.⁸⁴ Step three requires the court to evaluate the governmental interest.⁸⁵

Step One: The Private Interest

The private interest involved in a proceeding to suspend or revoke a physician's license is, of course, the license to practice medicine.⁸⁶ More extensive consideration reveals that the license provides the physician with her/his primary source of income,⁸⁷ as well as community and professional status.⁸⁸ Therefore, the private interest involved would appear to be substantial.⁸⁹ However, when evaluating the private interest, the *Mathews* court also called for consideration of the degree to which the person affected would be deprived of her/his

⁷⁸ Reich, *supra* note 73, at 741.

⁷⁹ Terrell, "Property," "Due Process," And The Distinction Between Definitions And Theory In Legal Analysis, 70(2) GEO. L.J. 861, 883 (1982). See also Redish and Marshall, *Adjudicatory Independence And The Values Of Procedural Due Process*, 95 YALE L.J. 455, 456 (1986).

⁸⁰ *Mathews v. Eldridge*, 424 U.S. 319 (1976). See also Annotation, *Supreme Court's Views as to Propriety Under Federal Constitution's Due Process Guaranties of Summary Administrative Deprivation of Property Interest*, 69 L. Ed. 2d 1044 (1982).

⁸¹ The Court in *In Re Polk* applied the *Mathews* analysis to the procedures which the New Jersey State Board of Medical Examiners employed in revoking Dr. Polk's license. *In Re Polk*, 90 N.J. at 562, 449 A.2d at 13.

⁸² *Mathews*, 424 U.S. at 334-35.

⁸³ *Id.* at 335.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *In Re Polk*, 90 N.J. at 562, 449 A.2d at 13.

⁸⁷ Reich, *supra* note 73, at 734.

⁸⁸ *Id.* at 738.

interest.⁹⁰ "Degree" can refer to the length of deprivation as well as the amount of deprivation.⁹¹

In Ohio, with respect to physicians' licenses, the degree to which the physician is deprived of her/his private interest varies with the type of action taken by the Board. When the Board automatically or summarily suspends a physician's license, the suspension is not considered a final order.⁹² Therefore, neither automatic nor summary suspensions necessarily result in permanent deprivation of the physician's right to practice medicine.⁹³ In fact, even if the Board issues a final order suspending the physician's license, O.R.C. Sec. 4731.22(G) requires the Board to inform the physician, in writing, of the conditions under which she/he may be reinstated to practice.⁹⁴

Another factor to consider is that when the Board issues an automatic or summary suspension, it notifies the physician of her/his right to request a hearing.⁹⁵ The physician is then guaranteed a hearing within fifteen days of when she/he requests it.⁹⁶ Furthermore, if the Board fails to issue a final order within sixty days after the hearing's completion, the summary suspension automatically terminates.⁹⁷ In addition, the Franklin County Court of Common Pleas is required to provide appellants of summary suspension orders with a "hearing at the earliest possible time," and to give such appeals "precedence over all other actions."⁹⁸

Procedurally, the legislature appears to have provided for the quickest possible action when the Board issues a summary suspension order. Although the summary suspension deprives the physician of the use of her/his license prior to a formal hearing,⁹⁹ the time-saving procedures attempt to assure the physi-

⁹⁰ *Id.*; *Mathews*, 424 U.S. at 341.

⁹¹ *Mathews*, 424 U.S. at 341.

⁹² OHIO REV. CODE ANN. § 4731.22(D) (Baldwin Supp. 1987).

⁹³ *In Re Polk*, 90 N.J. at 564, 449 A.2d at 14.

⁹⁴ OHIO REV. CODE ANN. § 4731.22(G) (Baldwin Supp. 1987). Before a physician's license may be reinstated, at least six members of the Board must vote in favor of the reinstatement. *Id.*

⁹⁵ OHIO REV. CODE ANN. § 4731.22(D) (Baldwin Supp. 1987); OHIO REV. CODE ANN. § 4731.22(F) (Baldwin Supp. 1987). Once again, the Federation of State Medical Boards of the United States recommends that a state medical board institute proceedings for a formal hearing simultaneously with the issuance of a summary suspension order. Fed. St. Med. Boards U.S., *supra* note 18, Sec. X(E) at 18. If a physician does not request a "timely" hearing after receiving notice that her/his license has been automatically suspended, the Board will issue a final order revoking her/his license. OHIO REV. CODE ANN. § 4731.22(F) (Baldwin Supp. 1987). In such a case, it appears that the Board may deprive a physician of her/his license without any hearing. This seems to run contrary to the generally accepted rule that when an administrative agency attempts to deprive an individual of a property right some kind of hearing is required at some point. Van Alstyne, *Cracks In "The New Property": Adjudicative Due Process In The Administrative State*, 62(I) CORNELL L. REV. 445, 458 (1977); see generally Friendly, *Some Kind Of Hearing*, 123 U. PA. L. REV. 1267 (1975). However, the Ohio Board does provide the physician with notice of her/his right to request a hearing, and failure to request a hearing could be viewed as a waiver of her/his right to a hearing.

⁹⁶ OHIO REV. CODE ANN. § 4731.22(D) (Baldwin Supp. 1987).

⁹⁷ *Id.*

⁹⁸ OHIO REV. CODE ANN. § 119.12 (Baldwin 1987).

⁹⁹ OHIO REV. CODE ANN. § 4731.22(D) (Baldwin Supp. 1987).

cian that she/he will not be arbitrarily deprived of her/his license for an extended period of time. Because most practicing physicians are probably not surviving at the poverty level, it is also unlikely that suspending a physician's license for less than a three-month period would deprive the physician of "the very means by which she/he lives while she/he waits" for a final decision.¹⁰⁰

The fact that automatic and summary suspension orders are not final orders, combined with the relatively short period of time during which the physician is deprived of her/his right to practice medicine pursuant to these orders, indicates that the automatic and summary suspension orders probably do not violate the first level of the *Mathews* standard.

Step Two: The Risk Of Erroneous Deprivation

When determining the risk of error inherent in the existing procedures, the court considers the "fairness and reliability" of the existing procedures, as opposed to the probable value of additional procedures.¹⁰¹ Before the Board may summarily suspend a physician's license, it must have "clear and convincing" evidence that the physician has committed a specific violation of O.R.C. Sec. 4731.22(B), and that the physician's continued practice presents a danger of immediate and serious harm to the public.¹⁰² While the amended statute allows the Board to act quickly, eliminating the previous requirement of a temporary restraining order,¹⁰³ the dual evidentiary requirement should provide the Board with a "reliable" decision.¹⁰⁴

Additionally, any action taken by the Board is subject to judicial review.¹⁰⁵ The knowledge that its actions are subject to judicial review should encourage the Board to make "fair" decisions, rather than arbitrary ones.¹⁰⁶ Further contributing to a "fair" decision is the rule prohibiting any Board member who participates in the investigation of a case from participating in the actual

¹⁰⁰ In *Goldberg*, the court required a pre-deprivation hearing, partly because Kelly, a welfare recipient, was surviving solely on government welfare payments. *Goldberg*, 397 U.S. at 264. In *Mathews*, the court found that depriving Eldridge of his disability payments for approximately one year did not necessarily place him "below the subsistence level." *Mathews*, 424 U.S. at 342. Therefore, a pre-deprivation hearing was not required. *Id.*

¹⁰¹ *Id.* at 343.

¹⁰² OHIO REV. CODE ANN. § 4731.22(B) (Baldwin Supp. 1987).

¹⁰³ OHIO REV. CODE ANN. § 4731.22(E) (Baldwin 1984) (amended 1986).

¹⁰⁴ "Reliable" is defined as "worthy of confidence." See "reliable," Black's Law Dictionary 1160 (5th ed. 1979). The Board's decision should be "reliable" because "clear and convincing" is defined as "proof which should leave no reasonable doubt in the mind of the trier of the facts. . . ." See "clear and convincing proof," Black's Law Dictionary 227 (5th ed. 1979).

¹⁰⁵ OHIO REV. CODE ANN. § 119.12 (Baldwin 1987).

¹⁰⁶ Professor Reich noted that access to judicial review was essential to the prevention of arbitrary administrative action. Reich, *supra* note 73, at 783. On review, the court considers the entire record, and additional evidence that is "newly discovered and could not have been ascertained prior to the hearing before the agency." OHIO REV. CODE ANN. § 119.12 (Baldwin 1987). The court may affirm the Board's order if the court finds "that the order is supported by reliable, probative, and substantial evidence, and is in accordance with law." *Id.* For a discussion of the "reliable, probative, and substantial" standard of review, see *Ohio Real Estate Comm'n v. Cohen*, 25 Ohio Op. 2d 165, 169, 187 N.E.2d 641, 646 (1962).

adjudication of the case.¹⁰⁷ The purpose of separating the investigative and adjudicative functions is to protect the physician's due process rights.¹⁰⁸ Because the board members who ultimately vote on the case have not taken any part in the prior investigation of the case, the likelihood that the voting members will be biased in their decision is decreased.¹⁰⁹ Thus, O.R.C. 4731.22(C)(1) attempts to satisfy the due process requirement of an independent adjudicator.¹¹⁰

Regarding automatic suspensions, the Board is required to suspend a physician's license when there is evidence that the physician has pled guilty to, or has been convicted of certain violent crimes.¹¹¹ Such evidence could be presumed "reliable" because pleas and convictions are matters of public record. Furthermore, it would hardly seem unfair to use such evidence when the physician undoubtedly knows that the evidence exists.

The strict evidentiary standards required for the Board to issue an automatic or summary suspension, combined with the availability of judicial review, and the separation of investigative and adjudicative functions within the Board, indicate that the automatic and summary suspension orders probably do not violate the second level of the *Mathews* standard.

Step Three: The Governmental Interest

The governmental interest involved in medical board proceedings is actually twofold.¹¹² First, in any administrative proceeding, the state has an interest in the administrative burden of providing additional procedural safeguards,¹¹³ such as a full evidentiary hearing prior to depriving a physician of her/his right to practice medicine. At some point, the benefit afforded a physician by an additional procedure may be outweighed by the administrative costs (in terms of time and money).¹¹⁴ Automatic and summary suspensions are intended to be used in extreme situations in which the Board needs to act quickly.¹¹⁵ Requiring a full evidentiary hearing prior to license suspension would either delay the Board's actions, or force the Board to employ additional staff. Although

¹⁰⁷ OHIO REV. CODE ANN. § 4731.22(C)(1) (Baldwin Supp. 1987); [material on] Am. Sub. H.B. 769 (as passed by the House), *supra* note 16, at 17.

¹⁰⁸ [material on] Am. Sub. H.B. 769 (as passed by the House), *supra* note 16, at 17. The Federation of State Medical Boards of the United States recommends a separation of functions "to assure fairness" to the physician. Fed. St. Med. Boards U.S., *supra* note 8, Sec. X(B) at 18. See also Fed. St. Med. Boards U.S., A GUIDEBOOK ON MEDICAL DISCIPLINE, Sec. C(3) at 6 (1986).

¹⁰⁹ For a discussion of the risk of bias created when investigative and adjudicative functions are combined, see *Withrow v. Larkin*, 421 U.S. 35 (1975). (Physician's license temporarily suspended with state medical board using probable cause standard).

¹¹⁰ The authors of one law review article propose that an independent adjudicator is the "core element" of procedural due process. Redish and Marshall, *supra* note 79, at 457.

¹¹¹ OHIO REV. CODE ANN. § 4731.22(F) (Baldwin Supp. 1987).

¹¹² Annotation, *supra* note 80, at 1049-50.

¹¹³ *Mathews*, 424 U.S. at 347-49.

¹¹⁴ *Id.*

the Board's staff is not limited by statute, it is limited by budget.¹¹⁶ Therefore, if the Board is financially unable to pay for more staff hours, it may be forced to act more slowly than it deems necessary. While financial cost is not controlling, it is a factor to consider.¹¹⁷

The second aspect of the governmental interest is the state's obligation to protect the public from incompetent or dangerous physicians.¹¹⁸ The "property" right of the physician is necessarily subordinate to the state's interest in the public's health and welfare.¹¹⁹ Once again, the Ohio legislature has set up stringent conditions under which the Board may suspend a physician's license prior to a hearing.¹²⁰ Under these limited conditions, the public's safety must take priority over the physician's right to practice medicine. Accordingly, automatic and summary suspensions probably do not violate the third level of the *Mathews* standard.

The last area of Ohio's Medical Practice Act which could be challenged on due process grounds is the provision which prohibits a court from staying a summary suspension order, pending appeal.¹²¹ Although this statutory prohibition is new to Ohio's Medical Practice Act, other jurisdictions have held similar provisions to be constitutional.¹²² For the purposes of this comment, the prohibition is best considered in relation to step three of the *Mathews* standard.

If the statutory prohibition has a "real and substantial relation" to public health interests, the prohibition carries a strong presumption of constitutionality.¹²³ In evaluating the constitutionality of such prohibitions, courts have weighed the physician's private interest in having his medical practice remain uninterrupted (*Mathews* — step one), against the state's interest in protecting the public's health (*Mathews* — step three).¹²⁴ Unless the legislature has acted "arbitrarily, oppressively, or unreasonably," the state's interest in protecting the public's health will generally outweigh the physician's interest in having his practice remain uninterrupted, pending appeal.¹²⁵

In Ohio, the Board issues summary suspension orders only when the threat

¹¹⁶ Attorney Lauren Lubow, *supra* note 7.

¹¹⁷ *Mathews*, 424 U.S. at 348.

¹¹⁸ *In Re Polk*, 90 N.J. at 565, 449 A.2d at 14.

¹¹⁹ *Id.*

¹²⁰ OHIO REV. CODE ANN. § 4731.22(D) (Baldwin Supp. 1987); OHIO REV. CODE ANN. § 4731.22(F) (Baldwin Supp. 1987).

¹²¹ OHIO REV. CODE ANN. § 4731.22(D) (Baldwin Supp. 1987).

¹²² See Annotation, *Validity and Construction of State Statutory Provision Forbidding Courts to Stay, Pending Review Judgment or Order Revoking or Suspending Professional, Trade or Occupational License*, 42 A.L.R.4th 516 (1985).

¹²³ *Stillman*, 291 Md. at 407, 435 A.2d at 756. (Physician's license revoked with court upholding statutory prohibition against staying Commission's order pending judicial review).

¹²⁴ *Id.*

to the public is greatest.¹²⁶ Therefore, the legislature would be reasonable in concluding that the public's health might be best protected if a stay is forbidden.¹²⁷

CONCLUSION

In response to allegations that the State Medical Board has failed to enforce professional standards among Ohio physicians, the legislature recently amended Ohio's Medical Practice Act.¹²⁸ Two major sections of the Act attempt to remedy the problem of lax enforcement by giving the Board increased power to suspend a physician's license prior to conducting a hearing.¹²⁹

In response to consumers' concerns, both automatic and summary suspensions should facilitate the Board in acting quickly when a physician represents a danger to the public's health and welfare. In response to physicians' concerns, the Act provides for strict evidentiary standards, and adequate procedural safeguards to prevent the Board from abusing its discretion in cases in which a physician's license may be suspended prior to a disciplinary hearing.

With the exception of some technical conflicts between Chapter 4731 and Chapter 119 of the Ohio Revised Code, the legislature should be commended for its efforts in bringing Ohio's Medical Practice Act up-to-date.¹³⁰ Ohio's legislature has acted responsibly¹³¹ by protecting the public's health without violating physicians' due process rights.¹³²

LYNNE TUREL O'NEILL

¹²⁶OHIO REV. CODE ANN. § 4731.22(D) (Baldwin Supp. 1987).

¹²⁷*Stillman*, 291 Md. at 406, 435 A.2d at 756.

¹²⁸Ohio Amended Substitute House Bill No. 769 (1986 Ohio Legis. Serv. 5-792) (Baldwin).

¹²⁹OHIO REV. CODE ANN. § 4731.22(D) (Baldwin Supp. 1987); OHIO REV. CODE ANN. § 4731.22(F) (Baldwin Supp. 1987).

¹³⁰The Federation of Medical Boards of the United States recommends that all state legislatures evaluate and revise their medical practice acts to incorporate the provisions which the Federation views as "essential" to any modern medical practice act. Fed. St. Med. Boards U.S., *supra* note 18, at iii.

¹³¹A recent editorial in the *Journal of the American Medical Association* concluded that "[t]he success of efforts to improve medical discipline will finally depend . . . on the funding, staffing, and authority of the state boards (of medicine). These can only come from state legislatures willing to act responsibly. . . . [T]he effective regulation of medical practice is in their hands." Breden, *State Medical Discipline: Defects and Hindrances*, 257(6) J. AM. MED. A. 828, 829 (1987).

