STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: May 11, 2017]

LEO BLAIS, RPH	:	
	:	
v.	:	
	:	**C.A. No. PC 12-5791**
RHODE ISLAND DEPARTMENT OF	:	
HEALTH and MICHAEL FINE, M.D. in his	:	
Capacity as Director of Department of Health	:	
And Individually	:	

DECISION

PROCACCINI, J. The matter before the Court is Round Three of the litigation related to disciplinary action taken by the Rhode Island Department of Health (DOH) against Plaintiff pharmacist Leo Blais (Mr. Blais) for egregious pharmaceutical errors made in erroneously dispensing morphine in prescriptions for two children in 2012. Mr. Blais now brings a lawsuit against the Rhode Island Department of Health and Michael Fine, M.D. (Director Fine) former Director of the DOH, in both his official and individual capacities. In his suit, Mr. Blais alleges state and federal constitutional violations and seeks money damages under 42 U.S.C. § 1983 and declaratory relief under G.L. 1956 §§ 9-30-1 et seq. The parties have filed cross-Motions for Summary Judgment. On December 14, 2016, this Court heard oral arguments on the cross-Motions. After hearing arguments, this Court requested a conference with counsel. At the conference both parties agreed—at this Court's request—to submit supplemental briefs on immunity and statutory authority in an effort to direct this Court's focus to dispositive issues. A hearing on the limited issues was held on February 15, 2017. For the reasons set forth in this Decision, this Court finds that Defendants are entitled to judgment as a matter of law on all

counts. Accordingly, this Court grants Defendants' Motion for Summary Judgment as to all counts in the Third Amended Verified Complaint.

I

Facts and Travel

The facts underlying this case are essentially undisputed and set out in further detail in Blais v. R.I. Dep't of Health, No. PC20125791, 2014 WL 7368789 (R.I. Super. Dec. 22, 2014). The travel of this case is outlined below.

On November 9, 2012, Mr. Blais filed a complaint in Superior Court. On July 16, 2013, Mr. Blais filed an Amended Verified Complaint that added an appeal from Director Fine's Final Decision to the existing constitutional claims. In April 2014, Justice Matos bifurcated the constitutional claims from the administrative appeal and determined that the administrative appeal portion would be dealt with first. On December 22, 2014, this Superior Court, Nugent, J., decided the administrative appeal concluding that no legally competent evidence existed to support Director Fine's rejection of Hearing Officer Warren's recommended sanctions and revocation of Mr. Blais's pharmacist license. See Blais v. R.I. Dep't of Health, 2014 WL 7368789, at *8. Justice Nugent ordered that Hearing Officer Warren's less stringent recommended sanctions be imposed. Accordingly, Mr. Blais's pharmacist license was immediately reinstated, and a two-year probationary period with continuing education classes commenced. See id. On June 6, 2015, the State filed a petition for writ of certiorari. The Rhode Island Supreme Court denied the petition.

On March 3, 2015, Mr. Blais filed a Second Amended Verified Complaint that added an equal protection monetary damages claim under 42 U.S.C. § 1983. Subsequently, on December 9, 2015, Mr. Blais filed a Third Amended Verified Complaint that added Director Fine in his

individual capacity as a defendant. The Third Amended Verified Complaint consists of seven counts: Count I – Violation of the Due Process Clause of the Rhode Island State Constitution due to the Director's Summary Suspension—Substantive and Procedural; Count II – Violation of 42 U.S.C. § 1983 for Violation of Due Process—Substantive and Procedural; Count III – Violation of the Equal Protection Clause of the Rhode Island State Constitution due to the Director's Summary Suspension; Count IV – Violation of the Equal Protection Clause of the Rhode Island State Constitution due to the Director's Rejection of the Hearing Officer's Decision; Count V – Violation of 42 U.S.C. § 1983 for Violation of Equal Protection; Count VI – Violation of the Non-delegation Doctrine Under Rhode Island State Constitution Article VI, Sections I and II; Count VII – Appeal of the Director's Final Decision. See Third Am. Verified Compl. 9-17.

On May 3, 2016, Mr. Blais filed a Motion for Litigation Expenses arising out of and related to his appeal of Director Fine's Final Decision under the Equal Access to Justice for Small Businesses and Individuals Act. See G.L. 1956 §§ 42-92-1 et seq. This Court heard the Motion and on July 21, 2016, held that Mr. Blais was entitled to recover reasonable litigation expenses totaling $43,140.45. This Court calculated the expenses after the issuance of Director Fine's Final Decision because it determined that the Director's actions up until that decision were "substantially justified." See Blais v. R.I. Dep't of Health, No. PC-2012-5791, 2016 WL 4039819 (R.I. Super. July 21, 2016). On September 2, 2016, the parties filed cross-Motions for Summary Judgment that are presently before this Court.

II

Standard of Review

Summary judgment on cross-motions is proper when in ". . . viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party, the [C]ourt

determines that there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law." CCF, LLC v. Pimental, 130 A.3d 807, 810 (R.I. 2016); Curran v. Cousins, 509 F.3d 36, 44 (1st Cir. 2007). The purpose of summary judgment is "'issue finding, not issue determination.'" Estate of Giuliano v. Giuliano, 949 A.2d 386, 391 (R.I. 2008) (quoting Indus. Nat'l Bank v. Peloso, 121 R.I. 305, 307, 397 A.2d 1312, 1313 (1979)). Moreover, a "'[c]omplete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'" Beauregard v. Gouin, 66 A.3d 489, 494 (R.I. 2013) (quoting Lavoie v. N.E. Knitting, Inc., 918 A.2d 225, 228 (R.I. 2007)). "Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990).

III

Analysis

A

Count VI

The cross-Motions for Summary Judgment before this Court focus on the first five of the seven counts in Mr. Blais's Third Amended Verified Complaint. Count VI alleges a violation of the non-delegation doctrine under the Rhode Island State Constitution. In a footnote in Mr. Blais's supplemental memorandum on limited issues, submitted on December 30, 2016, he acquiesces that the statute in question does not violate the non-delegation doctrine. See Pl.'s Suppl. Mem. 10 n.2; G.L. 1956 § 5-19.1-5. Therefore, Defendants are entitled to judgment as a

matter of law on Count VI because Mr. Blais admits that there are no issues of material fact in dispute regarding the non-delegation doctrine. See CCF, LLC, 130 A.3d at 810.

B

Count VII

Count VII is the appeal of Director Fine's Final Decision to revoke Mr. Blais's pharmacist license. This Court finds that judgment has been entered in the administrative appeal. See Blais v. R.I. Dep't of Health, 2014 WL 7368789. In that decision, this Superior Court, Nugent, J., found that "no legally competent evidence" supported Director Fine's Final Decision and ordered that Hearing Officer Warren's recommended sanctions be enforced, thereby reinstating Mr. Blais's pharmacist license. Id. Accordingly, Defendants are entitled to judgment as a matter of law on Count VII. See CCF, LLC, 130 A.3d at 810.

C

Law of the Case Doctrine

Both parties assert that this Superior Court's two prior decisions in this case constitute the law of the case. See Blais v. R.I. Dep't of Health, 2014 WL 7368789; Blais v. R.I. Dep't of Health, 2016 WL 4039819; see also Pl.'s Mem. Obj. to Defs.' Mot. Summ. J. 11; Defs.' Suppl. Mem. 13; §§ 42-92-1 et seq.

The law of the case doctrine is applied in cases wherein a judge decided an interlocutory matter in the suit and another judge, at a later stage, is confronted with "'the same question in the identical manner.'" Chavers v. Fleet Bank (RI), N.A., 844 A.2d 666, 677 (R.I. 2004) (quoting Paolella v. Radiologic Leasing Assocs., 769 A.2d 596, 599 (R.I. 2001)). In such cases, the doctrine constrains the second judge's decision-making in order to avoid disturbing the previous ruling. See id. The law of the case doctrine is "particularly applicable when the rulings under

consideration pertain to successive motions for summary judgment . . . ." McNulty v. Chip, 116 A.3d 173, 179 (R.I. 2015) (citing Ferguson v. Marshall Contractors, Inc., 745 A.2d 147, 151 (R.I. 2000)).

Justice Nugent's decision was part of the bifurcated administrative appeal and therefore separate from the constitutional claims presently before this Court. In that decision, Justice Nugent sat as an appellate court "'. . . limited to an examination of the record to determine whether some or any legally competent evidence exist[ed] to support . . .'" Director Fine's Final Decision. Blais v. R.I. Dep't of Health, 2014 WL 7368789 (quoting Mine Safety Appliances Co. v. Berry, 620 A.2d 1255, 1257-58 (R.I. 1993) (internal quotations omitted)). Justice Nugent determined that Director Fine's Final Decision to reject Hearing Officer Warren's recommended sanctions and revoke Mr. Blais's license was not supported by "'substantial evidence in the record.'" Blais v. R.I. Dep't of Health, 2014 WL 7368789 (quoting Envtl. Scientific Corp. v. Durfee, 621 A.2d 200, 210 (R.I. 1993)).

Furthermore, this Court's separate decision regarding litigation fees was also part of the administrative appeal portion of this case. See Blais v. R.I. Dep't of Health, 2014 WL 4039819. In that decision, this Court applied the Equal Access to Justice standard providing that fees are awarded if the agency was not "'substantially justified'" in its actions. See Blais v. R.I. Dep't of Health, 2016 WL 4039819 (quoting § 42-92-3(a)); see also §§ 42-92-1 et seq. This Court found that Director Fine's Final Decision to revoke Mr. Blais's license was not "substantially justified" and awarded fees accordingly.

In looking at the two prior decisions in this case, this Court finds that not only do the standards in those decisions—"substantially justified" and "supported by legally competent evidence"—differ from the constitutional standards in the present case, but the issues governed

by those standards differ as well. Thus, the completely distinct legal issues presently before this Court must be answered separate and apart from those of the prior decisions. See Balletta v. McHale, 823 A.2d 292, 295 (R.I. 2003) (holding that the issue did not arise in an identical manner before the two justices). Accordingly, this Court finds that neither Justice Nugent's nor this Court's decisions constitute law of the case as to the issues herein. See Blais v. R.I. Dep't of Health, 2014 WL 7368789; Blais v. R.I. Dep't of Health, 2016 WL 4039819.

D

Claims Regarding Summary Suspension of License

During the February 15, 2017 hearing on limited issues before this Court, Mr. Blais conceded on the record that Director Fine had the authority to summarily suspend Mr. Blais's license pursuant to § 42-35-14. Therefore, Defendants are entitled to judgment as a matter of law on Count I and Count III of the Third Amended Verified Complaint, which contest the summary suspension. Therefore, because Mr. Blais admits that there are no issues of material fact in dispute regarding the summary suspension of his license, Defendants are entitled to judgment as a matter of law on those counts. See CCF, LLC, 130 A.3d at 810.

E

Claims Regarding Rejection of Recommended Sanctions and Revocation of License

1

Federal Law Claims

In Counts II and V[1] of the Third Amended Verified Complaint, Mr. Blais seeks monetary relief under section 1983 for alleged due process and equal protection violations. In addition, in

[1] A portion of Mr. Blais's section 1983 equal protection claim in Count V contests the summary suspension—an argument that he has since conceded. Thus, this Court's equal protection analysis will focus solely on the portion of Count V that contests Director Fine's rejection of

Count V, Mr. Blais seeks declaratory relief pursuant to §§ 9-30-1 et seq. for his equal protection claim. See Third Am. Verified Compl. 1.

A court's decision to grant or deny declaratory relief is "purely discretionary." Sullivan v. Chafee, 703 A.2d 748, 751 (R.I. 1997). In order to have standing to bring a declaratory relief claim, Mr. Blais must establish that an "actual justiciable controversy" exists. Id. To establish standing, Mr. Blais must show a ". . . sufficient likelihood that he will again be wronged in a similar way." Am. Postal Workers Union v. Frank, 968 F.2d 1373, 1376 (1st Cir. 1992); Boyer v. Bedrosian, 57 A.3d 259 n.27 (R.I. 2012) (holding that "[p]ast exposure to harm will not, in and of itself, confer standing upon a litigant to obtain equitable relief"). Mr. Blais has alleged only past unconstitutional conduct by Director Fine. See id. He has not put forth any evidence of continuing conduct or likelihood of future injury. See id. Therefore, while Mr. Blais's allegations of past constitutional violations give him standing to bring the section 1983 claims for damages, they fail to establish standing for declaratory relief. See Am. Postal Workers Union, 968 F.2d at 1376. Accordingly, Defendants are entitled to judgment as a matter of law as to Mr. Blais's declaratory relief claims.

Therefore, this Court will address Mr. Blais's section 1983 claims that remain. "'Section 1983 supplies a private right of action against a person who, under color of state law, deprives another of rights secured by the Constitution or by federal law.'" Harron v. Town of Franklin, 660 F.3d 531, 535 (1st Cir. 2011) (quoting Santiago v. Puerto Rico, 655 F.3d 61, 68 (1st Cir. 2011)). In order "[t]o make out a viable section 1983 claim, a plaintiff must show both that the conduct complained of transpired under color of state law and that a deprivation of federally secured rights ensued."

Hearing Officer Warren's recommended sanctions and revocation of Mr. Blais's pharmacist license.

a

Director Fine in his Official Capacity and the DOH

Mr. Blais brings federal constitutional claims pursuant to section 1983 against the DOH and Director Fine in his official capacity. For section 1983 purposes, neither the State nor its officials in their official capacities are considered a "person." See 42 U.S.C. § 1983; Pontbriand v. Sundlun, 699 A.2d 856, 868 (R.I. 1997) (quoting Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989)) (holding that summary judgment was appropriate for federal constitutional claims against the Governor because in his official capacity he was not a "person" for purposes of section 1983). Accordingly, this Court finds that no cause of action under section 1983 can be asserted against Director Fine in his official capacity and the DOH. See id. Therefore, Director Fine in his official capacity and the DOH are entitled to judgment as a matter of law on all section 1983 claims. See CCF, LLC, 130 A.3d at 810.

b

Director Fine in his Individual Capacity

i

Qualified Immunity

Director Fine affirmatively raised qualified immunity as a defense to Mr. Blais's section 1983 substantive and procedural due process and equal protection claims. See Defs.' Answer to Third Am. Verified Compl. 8 (noting Director Fine's assertion of qualified immunity after Mr. Blais added him as an individual defendant). The qualified immunity doctrine provides immunity from lawsuits, so courts should decide whether qualified immunity applies at the summary judgment stage. See Pearson v. Callahan, 555 U.S. 223, 231 (2009); Rocket Learning, Inc. v. Rivera-Sánchez, 715 F.3d 1, 8 (1st Cir. 2013) (determining that immunity should be

"resolved at the earliest possible stage of litigation") (citing Maldonado v. Fontanes, 568 F.3d 263, 268 (1st Cir. 2009)). The qualified immunity analysis consists of two questions: "(1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) if so, whether the right was 'clearly established' at the time of the defendant's alleged violation." Maldonado, 568 F.3d at 269. The second prong of qualified immunity is comprised of two additional inquiries. The first inquiry ". . . focuses on the clarity of the law at the time of the alleged civil rights violation . . . ." To overcome this first inquiry, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right." Id. The second inquiry focuses on the specific facts of the case and asks, "whether a reasonable defendant would have understood that his conduct violated the plaintiff['s] constitutional rights." Id. "The doctrine's prophylactic sweep is broad: it leaves unprotected only those officials who, 'from an objective standpoint, should have known that their conduct was unlawful.'" Alfano v. Lynch, 847 F.3d 71, 75 (1st Cir. 2017) (quoting MacDonald v. Town of Eastham, 745 F.3d 8, 11 (1st Cir. 2014)). A court can address the questions in the qualified immunity analysis in any order. See id. If the facts alleged fail to make out a constitutional violation under the first prong, then Director Fine has no need to avail himself of the qualified immunity protections. See id. Under the second prong, if the right was not clearly established at the time of his conduct, Director Fine can shield himself from liability through qualified immunity. See id. This Court will address both prongs of the qualified immunity analysis. See id.

Constitutional Violation

Equal Protection

Mr. Blais has alleged that Director Fine violated his equal protection rights by "selectively and maliciously" treating him differently from other similarly situated pharmacists through selective enforcement. See Pl.'s Mem. Supp. Mot. Summ. J. 43. At the summary judgment stage, the qualified immunity analysis requires that this Court first ask whether the facts, viewed most favorably to Mr. Blais, make out a selective enforcement violation. See Diaz-Bigio v. Santini, 652 F.3d 45, 52 (1st Cir. 2011).

The Equal Protection Clause requires that "all persons similarly situated should be treated alike." City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). In order to prevail on a selective enforcement equal protection claim, Mr. Blais must show: "(1) [he], compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." LeClair v. Saunders, 627 F.2d 606, 609-10 (2d Cir. 1980).

Similarly Situated

In order to satisfy the similarly situated prong, Mr. Blais must first "identify and relate specific instances when persons situated similarly in all relevant aspects were treated differently." Cordi-Allen v. Conlon, 494 F.3d 245, 249 (1st Cir. 2007). While the comparison between persons does not have to be an exact correlation, Mr. Blais "must show an extremely high degree of similarity . . . to warrant a reasonable inference of substantial similarity." See id. at 250; Tapalian v. Tusino, 377 F.3d 1, 6 (1st Cir. 2004). Mr. Blais contends that other pharmacists in Rhode Island who have been disciplined for a dispensing error constitute those

persons with which he is similarly situated. See Pl.'s Mem. Supp. Mot. Summ. J. 5-9. In support of his contention, Mr. Blais provides a summary of the relevant DOH disciplinary records dating back to 1980. See id. at 4-8.

The comparison Mr. Blais attempts to draw is vague and overly generalized for a number of critical reasons. First, Mr. Blais has not put forth any information regarding the disciplinary histories of the other pharmacists, thereby rendering it impossible to compare Mr. Blais's sanctions with the sanctions that were imposed on the other pharmacists. Collins v. Nuzzo, 244 F.3d 246, 250 (1st Cir. 2001). For example, in Collins, the plaintiff's license renewal for his car dealership was denied. See id. In response, the plaintiff brought a section 1983 claim against the City's board of alderman alleging that the license denial violated his equal protection rights. See id. In support of his claim, the plaintiff alleged that his car dealership was similarly situated to other dealership license applicants. See id. at 251. The plaintiff had a history of license violations. See id. However, he did not put forth any evidence that the other license applicants also had past violations. See id. Thus, without this necessary information, the Collins Court concluded that the plaintiff failed to show that those applicants were similarly situated. See id. (concluding that the "differential treatment" was "not nearly grave enough to trigger constitutional concern").

Similarly, this Court finds that Mr. Blais has failed to put forth comparators that shared similar instances of past disciplinary infractions crucial for this Court to make a proper comparison. See id. The record indicates that Mr. Blais had three prior disciplinary actions in fifteen years. See Dir. Fine's Final Decision 3-4. In fact, one of Mr. Blais's past violations was the same as one of the current violations—storing expired drugs and maintaining a disorderly pharmacy. See Vallejo v. Santini-Padilla, 607 F.3d 1, 8 (1st Cir. 2010) (noting that an appellate

court's review of the severity of sanctions takes into account the repetition of violations). See also Hr'g Officer Warren's Decision 29.

Moreover, in this case, the errant drug that was mistakenly dispensed in a children's medication for acid reflux was morphine. Mr. Blais contends that the fact that the drug was morphine is not material for purposes of comparison or sanctioning. See Pl.'s Mem. Supp. Mot. Summ. J. 50. This Court notes that the effect the errant morphine had on both children in this case was alarming. See Defs.' Mem. Supp. Mot. Summ. J. 2. After ingesting several doses of the morphine-tainted medication, the infant presented with staring spells, an inability to keep her eyes open, and was taken to the hospital. See id. The second child, a two-year-old, had been sleeping more than usual. See id. at 3. This Court further notes that Rhode Island categorizes morphine—an opiate—as a Schedule II controlled substance. See G.L. 1956 § 21-28-2.08; see also Barbour v. Director, TDCJ-CID, CIVIL ACTION NO. 4:11CV365, 2014 WL 4354050 (E.D. Tex. Sept. 2, 2014) (noting that the hazards of morphine—particularly in relation to a child—are generally understood with common sense and general knowledge). Mr. Blais's assertion that the type of drug should not be considered when reviewing a dispensing error is baseless and offensive to this Court. The potential harmful effects of the type of drug involved should be considered and do distinguish Mr. Blais from other pharmacists disciplined for dispensing errors.

Mr. Blais also fails to provide this Court with any information about the number of people affected by the dispensing errors committed by the other pharmacists. In this case, Mr. Blais's dispensing error endangered two separate children who not only received, but ingested, multiple doses of the morphine-tainted medication. Another relevant comparator overlooked by Mr. Blais's generalizations is whether the other pharmacists, like Mr. Blais, were simultaneously

cited for other violations. See Hr'g Officer Warren's Decision 29. Mr. Blais was cited for two additional violations—storing expired drugs and maintaining a disorderly pharmacy—in addition to the dispensing error violation. See id; Cordi-Allen, 494 F.3d at 249.

For all the foregoing reasons, this Court finds that Mr. Blais has failed to meet his "very significant burden" of showing an "extremely high degree of similarity" through "specific instances" between himself and other Rhode Island pharmacists disciplined for dispensing errors since 1980. See Cordi-Allen, 494 F.3d at 249 (holding that a plaintiff cannot overcome this "very significant burden" by oversimplifying the analysis and failing to put forth "[v]arious factual traits, circumstantial nuances, and peculiarities" that have the capacity to set individuals apart and thereby render any differential treatment constitutional). Accordingly, this Court concludes that there is no genuine issue of material fact as to the existence of disparate treatment between Mr. Blais and other similarly situated persons. See id. at 254. Thus, Director Fine is entitled to judgment as a matter of law on the selective enforcement equal protection claim. See CCF, LLC, 130 A.3d at 810.

Malicious or Bad Faith Intent to Injure

Although Mr. Blais's selective enforcement claim is unavailing without a showing that Mr. Blais was treated differently from those similarly situated, this Court further concludes that the selective enforcement claim also fails on the malice/bad faith prong. See Providence Teachers' Union Local 958, AFL-CIO, AFT v. City Council of City of Providence, 888 A.2d 948, 956 (R.I. 2005). Since Mr. Blais has not alleged different treatment based on his race, religion, or any attempts to prevent him from exercising a constitutional right, this Court reviews the record for any evidence that Director Fine had a malicious or bad faith intent to injure Mr. Blais. See LeClair, 627 F.2d at 610-11. The bad faith element of a selective enforcement claim

must be "scrupulously met." Yerardi's Moody St. Rest. & Lounge, Inc. v. Bd. of Selectmen of Town of Randolph, 932 F.2d 89, 94 (1st Cir. 1991). The Rhode Island Supreme Court has looked to the federal courts for guidance on selective enforcement and has held that cases meeting this bad faith/malice standard for selective enforcement are "infrequent." Yerardi's Moody St. Rest. & Lounge, Inc., 932 F.2d at 94 (quoting LeClair, 627 F.2d at 611); Providence Teachers' Union Local 958, AFL-CIO, AFT, 888 A.2d at 954.

Mr. Blais contends that Director Fine undertook a malicious campaign to revoke Mr. Blais's pharmacist license. See Pl.'s Mem. Supp. Mot. Summ. J. 48-53. Even in drawing all reasonable inferences in Mr. Blais's favor, this Court concludes that Mr. Blais has only asserted speculative and conclusory allegations of malice and bad faith that are insufficient to make out a selective enforcement violation. See Yerardi's Moody St. Rest. & Lounge, Inc., 932 F.2d at 93. The inference that Mr. Blais asks this Court to draw—that Director Fine's summary suspension of Mr. Blais's license,[2] rejection of the consent agreement between Mr. Blais and the board of pharmacy, rejection of Hearing Officer Warren's recommended sanctions, and revocation of the license rise to the level of malice or bad faith—is "unreasonably speculative" and unsupported by any other facts. Id.; see Providence Teachers' Union Local 958, AFL-CIO, AFT, 888 A.2d at 954 (holding that plaintiff failed to show any malice or bad faith when defendants acted pursuant to an ordinance, even despite a clerical error made by the school administrator); see also Pl.'s Mem. Supp. Mot. Summ. J. 47.

[2] Mr. Blais has since conceded that Director Fine had the authority to summarily suspend Mr. Blais's license. See § 42-35-14(c) (providing that if ". . . public health, safety, or welfare imperatively requires emergency action . . . [a summary suspension of a license] may be ordered pending proceedings").

Furthermore, the record indicates that Director Fine's decisions in this case were based purely on his responsibility as agency head to safeguard public health on behalf of the DOH.[3] In Barrington Cove Ltd. P'ship v. R.I. Hous. and Mortg. Corp., 246 F.3d 1, 9 (1st Cir. 2001), the plaintiff brought an equal protection claim against the Rhode Island Housing and Mortgage Finance Corporation (RIHMFC) for wrongfully imposing an application fee in excess of regulatory limits. There, the Court found that the mere fact RIHMFC wrongfully imposed a fee has "no direct bearing on whether [RIHMFC] violated [plaintiff's] equal protection rights." Id. The plaintiff also presented evidence that RIHMFC officials made comments stating that they "wouldn't give the [plaintiff's] project another dime" and they would leave the plaintiff "holding the bag." Id. The Barrington Cove Ltd. P'ship Court held that such statements are "readily explained as rational reactions to the perceived imprudence demonstrated by [plaintiff]." Id. Furthermore, the Barrington Cove Ltd. P'ship Court determined that the ambiguous comments were insufficient to establish malice or bad faith and in fact, demonstrate the overall "tenuousness" of plaintiff's equal protection claim. Id. Similarly, Director Fine's actions can be reasonably construed as "rational reactions" to the seriousness of Mr. Blais's errors, the potential for injury, the repetition of violations, and the overarching public health concerns. See id. Therefore, this Court finds the fact that Director Fine summarily suspended Mr. Blais's license, rejected the consent agreement, rejected Hearing Officer Warren's recommended sanctions, and

[3] See G.L. 1956 § 23-1-1 (requiring that the DOH "take cognizance of the interests of life and health among the peoples of the state); § 5-19.1-21 (providing that the board of pharmacy, "with the approval of the director[,]" has the authority to revoke or otherwise discipline a licensee for violations of the state laws or rules and regulations of the board or for incompetent or negligent conduct that fails to meet the minimal standards acceptable for pharmacy practice); § 5-19.1-1 (providing that "every pharmacy and pharmacist practicing in the state [must] meet minimum standards for safe practice [and] [p]harmacists who fall below minimum competency or who otherwise present a danger to the public shall be prohibited from practicing in this state"); see also Dir. Fine's Final Decision 3-4; Defs.' Mem. Obj. to Pl.'s Mot. Summ. J. 19.

ultimately revoked the license does not, without more evidence, support Mr. Blais's contention that Director Fine acted with malice or bad faith. See id.

Accordingly, this Court concludes that Mr. Blais has failed to show that Director Fine selectively treated him differently from those similarly situated and that any selective treatment by Director Fine was fueled by malice or bad faith. See Cordi-Allen, 494 F.3d at 249; Providence Teachers' Union Local 958, AFL-CIO, AFT, 888 A.2d at 954. For these reasons, this Court finds there are no issues of material fact in dispute regarding Mr. Blais's selective enforcement claim and Director Fine is entitled to judgment as a matter of law. See CCF, LLC, 130 A.3d at 810.

Due Process

In addition to his equal protection claim, Mr. Blais also asserts substantive and procedural due process claims against Director Fine. This Court recognizes that for purposes of due process, Mr. Blais has a constitutionally protected property interest in his pharmacist license. See Lowe v. Scott, 959 F.2d 323, 334-35 (1st Cir. 1992) (holding that a physician's license to practice medicine in Rhode Island is a constitutionally protected property right). Therefore, this Court's analysis focuses on whether this right was infringed upon by Director Fine's actions. See id. at 339.

Substantive Due Process

Mr. Blais alleges that his substantive due process rights were violated by Director Fine's rejection of Hearing Officer Warren's recommended sanctions and revocation of his license. See Third Am. Verified Compl. 11. He argues that Director Fine's actions were "arbitrary and unreasonable" and "without any legal basis" because he possessed no statutory authority and failed to give proper deference to Hearing Officer Warren's recommended sanctions. Pl.'s Mem.

Supp. Mot. Summ. J. 17. At the summary judgment stage, the qualified immunity analysis requires that this Court first ask whether the facts, taken most favorably to Mr. Blais, make out a substantive due process violation. See Díaz-Bigio, 652 F.3d at 52. Substantive due process claims prevent ". . . the use of governmental power for purposes of oppression, or abuse of governmental power that is shocking to the conscience, or legally irrational action that is not keyed to a legitimate state interest." L.A. Ray Realty v. Town Council of Cumberland, 698 A.2d 202, 211 (R.I. 1997). Government actions ". . . that shock the conscience must be truly outrageous, uncivilized, and intolerable . . . [and] . . . the requisite arbitrariness and caprice must be stunning, evidencing more than humdrum legal error." Harron, 660 F.3d at 536 (internal quotations omitted). The First Circuit has held that:

> "'. . . [a] hallmark of successful [substantive due process] challenges is an extreme lack of proportionality, as the test is primarily concerned with violations of personal rights so severe[,] so disproportionate to the need presented, and so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.'" Id. (quoting González-Fuentes v. Molina, 607 F.3d 864, 881 (1st Cir. 2010)).

Mr. Blais's allegations fail to show that Director Fine's actions shock the conscience. See id. Even if Director Fine lacked statutory authority for his actions or failed to give the proper deference to Hearing Officer Warren, his actions fall woefully short of a substantive due process violation. Even assuming arguendo that Director Fine's decision to reject Hearing Officer Warren's recommended sanctions and revoke Mr. Blais's license is rationally characterized as mistaken, rash, or harsh, such actions by a state official do not rise to the level of conscience shocking conduct necessary to establish a substantive due process violation. Barrington Cove Ltd. P'ship, 246 F.3d at 7. Stated another way, protections provided by substantive due process are not a ". . . guarantee against incorrect or ill-advised . . ." actions by

government officials. Bishop v. Wood, 426 U.S. 341, 350 (1976); Burton v. Town of Littleton, 426 F.3d 9, 18 (1st Cir. 2005).

In González-Droz v. González-Colón, 660 F.3d 1, 15 (1st Cir. 2011), the Puerto Rico Board of Medical Examiners (The Board) suspended the plaintiff's medical license for five years with a $5000 fine for failing to conform to a new regulation that prohibited physicians from performing cosmetic procedures without a proper certification in that field. The plaintiff claimed that this sanction was so "heavy-handed" that it amounted to a substantive due process violation. See id. The González-Droz Court rejected the plaintiff's claim outright holding that none of the Board's actions ". . . remotely approach the level of a substantive due process violation." See id. Like the Board's actions in González-Droz, Director Fine's actions, even if regarded as "heavy-handed," do not rise to the ". . . truly outrageous, uncivilized, and intolerable" level necessary to prevail on a substantive due process claim. 660 F.3d at 15; Harron, 660 F.3d at 536; see L.A. Ray Realty, 698 A.2d at 211 (holding that plaintiffs' substantive due process rights were violated when town officials improperly adopted a referendum to terminate rights and falsified an ordinance); Brunelle v. Town of S. Kingstown, 700 A.2d 1075, 1084 (R.I. 1997).

Although Mr. Blais's substantive due process claim fails because he has not satisfied the "shock the conscience" element, this Court further finds that his claim also fails because he has not demonstrated that Director Fine's actions had no ". . . substantial relation to the public health, safety, morals, or general welfare." Id. at 1084. During a deposition in this case, Director Fine stated that he was charged—in his review of Mr. Blais's case—to protect the health and safety of the people of Rhode Island on behalf of the DOH. See Defs.' Mem. Obj. to Pl.'s Mot. Summ. J. 19. In his written Final Decision, Director Fine cited the "potential danger [that] morphine poses to a baby," and Mr. Blais's "twice repeated serious neglect of his public safety obligations." Dir.

Fine's Final Decision 4. This Court finds that under Mr. Blais's watch, a real-life nightmare occurred for two families that jeopardized the health and safety of two small children—the most vulnerable of patients. Simply put, but for a miracle, Mr. Blais's error did not have deadly consequences. See Collins, 244 F.3d at 251 (holding that although plaintiff's relationships with the board and a particular board member were contentious, the plaintiff had repeat violations which, on their own, made the board's decision ". . . far from legally irrational"). The record indicates that Director Fine's actions were tied to legitimate state interests in public health and safety. See Brunelle, 700 A.2d at 1084; L.A. Ray Realty, 698 A.2d at 211.

Mr. Blais's substantive due process claim cannot overcome summary judgment because he has not shown that Director Fine's actions were either shocking to the conscience or unrelated to public health. This Court notes that Mr. Blais's claim also fails because he has not demonstrated that Director Fine's conduct was "clearly arbitrary or unreasonable." Brunelle, 700 A.2d at 1084. Mr. Blais's primary contention is that Director Fine's actions were arbitrary and capricious because he lacked statutory authority to revoke Mr. Blais's license and failed to give the requisite deference to Hearing Officer Warren's Decision. See Pl.'s Mem. Supp. Mot. Summ. J. 17.

The statutes governing Director Fine's position are reasonably interpreted to give Director Fine the authority to revoke Mr. Blais's license and reject Hearing Officer Warren's recommended sanctions. Under Rhode Island statutory law, "[t]he director shall . . . revoke, suspend, or otherwise discipline licensees. . . ." Sec. 5-19.1-7.

Section 23-1-17 provides, in pertinent part:

> ". . . the director is further authorized to promulgate and adopt rules and regulations for the establishment of information collection, minimum sanitary requirements, and other duties give not the director by § 23-1-1 or by any other provision of law, and

> to enforce those rules and regulations. The director is further authorized to issue licenses or permits, and to revoke, suspend, or annul them, to aid in the enforcement of those rules and regulations." Sec. 23-1-17 (emphasis added).

These above provisions provide Director Fine with the authority to revoke a pharmacist's license. The language included in these provisions is "clear and unambiguous." Pierce v. Providence Ret. Bd., 15 A.3d 957, 962 (R.I. 2011). Therefore, this Court must apply the "plain and ordinary meaning" of that language. Id. In both statutes, the director of DOH is explicitly authorized to revoke a license. See §§ 5-19.1-7 and 23-1-17. In addition, § 5-19.1-5 provides that "[t]he board, subject to the approval of the director, shall . . . [c]onduct hearings for the revocation or suspension of licenses [and] these . . . hearings may, at the board's discretion, also be conducted by an administrative hearing officer . . . ." Sec. 5-19.1-5 (emphasis added).

Section 5-19.1-21 further provides, in pertinent part:

> "The board of pharmacy, with the approval of the director, may . . . revoke or otherwise discipline the licensee upon proof that:
>
> "(2) The licensee has violated any of the laws of this state . . . relating to the practice of pharmacy . . . or has violated any of the rules and regulations of the board of pharmacy . . .
>
> "(6) The licensee's conduct is incompetent, or negligent which shall include, but not be limited to, any departure from or failure to conform to the minimal standards acceptable and prevailing pharmacy practice as determined by the board . . . ." Sec. 5-19.1-21 (emphasis added).

Section 5-19.1-26 also provides:

> "In any case of the refusal, suspension or revocation of a license by the board, with the approval of the director, under the provisions of this chapter, appeal may be taken in accordance with the Administrative Procedures Act, chapter 35 of title 42." Sec. 5-19.1-26 (emphasis added).

Furthermore, these above sections provide the Board of Pharmacy with authority that is "subject to" or "with the" approval of the director. The Rhode Island Supreme Court interpreted similar statutory language in Monahan v. Girouard, 911 A.2d 666, 671 (R.I. 2006). In that case, the Pawtucket Housing Authority (PHA) had a personnel policy that provided the executive director of the PHA with responsibilities that are "subject to the review and approval of the Board of Commissioners." Id. The Supreme Court held that the "subject to" clause gave the board the ". . . prerogative to approve or overrule . . ." any decisions made by the executive director. Id. In this case, a similar clause—present in a number of the statutes—gives Director Fine the same authority. See id.; §§ 5-19.1-26, 5-19.1-21, 5-19.1-5. Therefore, even if Director Fine were overzealous in exercising his authority to its fullest extent against Mr. Blais, his actions were not arbitrary for substantive due process purposes because a reasonable interpretation of the statutes provided him with the ". . . prerogative to approve or overrule . . ." the board's decisions, including those related to hearings and hearing officers. See Monahan, 911 A.2d at 671; Brunelle, 700 A.2d at 1084. Moreover, Director Fine was also reasonable in his belief that he had direct authority to revoke Mr. Blais's license. See §§ 5-19.1-7, 23-1-17. Furthermore, in light of the public safety concerns in this case, this Court notes that the DOH and Director Fine, as agency head, are charged with taking "cognizance of the interests of life and health among the peoples of the state . . . ." Sec. 23-1-1. Accordingly, this Court finds that, for purposes of substantive due process, Director Fine was reasonable in his belief that he possessed authority to revoke Mr. Blais's license.

Mr. Blais further contends that Director Fine acted arbitrarily and in violation of his substantive due process rights when he allegedly did not afford the requisite deference to Hearing Officer Warren's recommended sanctions by rejecting those sanctions and revoking the

license. See Dir. Fine's Final Decision 3; see also Envtl. Scientific Corp., 621 A.2d at 203. Mr. Blais cites to Envtl. Scientific Corp. for the deference standard: "[t]he director should give great deference to the hearing officer's findings and conclusions unless clearly wrong." 621 A.2d at 209. Since this Court's review is focused on the constitutional claims and not the administrative appeal already decided, Director Fine's deference is assessed, in light of the governing administrative procedure standards, based on the "clearly arbitrary and unreasonable" substantive due process standard. Brunelle, 700 A.2d at 1084.

The Rhode Island Supreme Court addressed the issue of deference in its Birchwood Realty, Inc. decision. See Birchwood Realty, Inc. v. Grant, 627 A.2d 827, 831 (R.I. 1993); Envtl. Scientific Corp., 621 A.2d at 208. In Birchwood Realty, Inc., the plaintiff relied on Envtl. Scientific Corp. to argue that the acting Department of Environmental Management (DEM) director improperly overturned the hearing officer's findings of fact when he rendered his final decision. Id. The plaintiff contended that the acting DEM director was bound by the hearing officer's findings. Id. The Birchwood Realty, Inc. Court explained that in Envtl. Scientific Corp.—when it held that the DEM director's final agency opinion was not supportable—its focus was on deference to credibility determinations made by the hearing officer. See id.

In this case, Mr. Blais contends that Director Fine's failure to give proper deference to Hearing Officer Warren's Decision rendered his Final Decision arbitrary and unreasonable in violation of his substantive due process rights. However, similar to the acting DEM director in Birchwood Realty, Inc., Director Fine wrote in his Final Decision that he accepted Hearing Officer Warren's findings and conclusions, and thereby gave deference to her credibility determinations. See 627 A.2d at 831. Director Fine's disagreement was permissibly based solely on Hearing Officer Warren's recommended sanctions and the weight that she gave to

certain facts. See id.; Dir. Fine's Final Decision 3. In his review of the record, Director Fine gave great weight to Mr. Blais's disciplinary record, particularly the similarity of some of the past infractions to the present violations. See id. Director Fine rationally interpreted the similarity between violations as an ". . . indifference to certain aspects of proper pharmaceutical practice and public safety." Id.; see Barrington Cove Ltd. P'ship, 246 F.3d at 7. He also gave great weight to the potential danger that morphine poses to small children. See id. at 4. During his deposition, Director Fine further explained that he believed the recommended sanctions were not appropriate in this case because to treat Mr. Blais's conduct as a "simple dispensing error, did not fit the public health facts of the case." Defs.' Obj. to Pl.'s Mot. Summ. J. 19. He went on to explain that the recommended probation sanction would have no practical effect because there would be no supervision. See id. In addition, Director Fine noted that the continuing education sanction would not address the issues present in Mr. Blais's case because an error in management was the problem, not a lack of education. See id.

In its procedures, the DOH must adhere to its own regulations, in addition to Rhode Island statutory law, promulgated pursuant to the Administrative Procedures Act, chapter 35 of title 42. According to DOH rules and regulations, an Administrative Hearing Officer is "authorized by law or duly designated by the Director and/or Board, to hear and decide, or to make a recommended order and/or decision to the Director or Board." R.I. Admin. Code 31-1-15:1.2. Moreover, the Federal Administrative Procedure Act (APA)[4] "does not require separation of functions at the highest level of the agency." See II Richard J. Pierce, Jr., Administrative Law Treatise, § 9.9 at 888 (5th Ed. 2010); 5 U.S.C. § 500 et seq. Agencies are

[4] The structure and the language of the Rhode Island APA and the Federal APA are virtually identical. See Charles S. Kirwan, Administrative Discovery Case Law, in Prac. Guide Discovery and Depositions Rhode Island, Sec. 29.4 (Mark B. Morse, MCLE 2016).

allowed to treat initial decisions, by hearing officers or administrative law judges, as recommendations, with ". . . all ultimate decisionmaking power held by the agency head." Id. Therefore, the agency adopts the initial decision "only if, and to the extent that, it agrees with the decision." Id. Thus, Director Fine, as the agency head, possessed "all the ultimate decisionmaking power." Id.

Furthermore, in Hearing Officer Warren's Decision, she wrote that she "recommends" the violations and sanctions. See Hr'g Officer Warren's Decision 29. She then signed and dated her Decision. See id. Below her signature is an "ORDER" section that includes a signature line with Director Fine's name and title printed underneath. See id. The "ORDER" section reads: "I have read the Hearing Officer's Decision and Recommendation in this matter, and I hereby take the following action with regard to the Decision and Recommendation." Id. Accompanying that statement are three options for Director Fine to choose from: Adopt, Reject, Modify. See id. It is well-settled under the Federal APA that an agency is allowed to reverse any "recommended" and "initial" decisions and render its own final decision. 5 Jacob Stein & Glenn Mitchell, Administrative Law, § 39.02[1] (2016); see 5 U.S.C. § 557(b) (noting that ". . . a recommended decision does not become final unless it is adopted as a final decision by the agency"). Here too, the format of Hearing Officer Warren's Decision complies with the DOH rule that authorizes a hearing officer to make a recommended decision to the agency. See R.I. Admin. Code 31-1-15:1-2. Thus, Director Fine, as the agency head, acted reasonably in believing that he had the authority to modify and reject Hearing Officer Warren's recommended sanctions based on DOH regulations, Rhode Island and Federal APA, the format of Hearing Officer Warren's Decision, and his deference to her credibility determinations. See id; 5 U.S.C. § 557(b); § 42-35-15; Hr'g Officer Warren's Decision 29. Additionally, as required under the APA, Director Fine explained

his reasons for not accepting Hearing Officer Warren's recommended Decision. See Dir. Fine's Final Decision 3 (citing the dangerousness of Mr. Blais's error, his past and repeat violations, the lack of supervision for a probationary sanction, and the uselessness of more education for an error in oversight). Furthermore, any misjudgment on Director Fine's part was far from "outrageous" or "stunning" as is necessary to support a substantive due process violation. Any misjudgment by Director Fine's was more akin to a "humdrum legal error," previously resolved by the administrative appeal portion of this case. Harron, 660 F.3d at 536.

Accordingly, this Court finds that Mr. Blais has failed to demonstrate a genuine issue of material fact as to his substantive due process claim. Therefore, for the reasons set forth above, Director Fine is entitled to judgment as a matter of law on Mr. Blais's substantive due process claim. See CCF, LLC, 130 A.3d at 810.

Procedural Due Process

Mr. Blais also brings a procedural due process claim against Defendants. See Third Am. Verified Compl. 11. He contends that the hearing before Hearing Officer Warren was a meaningless sham because it was Director Fine's "explicit intent" from the commencement of the proceedings to revoke Mr. Blais's pharmacist license. See Lowe, 959 F.2d at 334-35; Pl.'s Mem. Supp. Mot. Summ. J. 38. The United States Supreme Court has stated that "'. . . the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law.'" See L.A. Ray Realty, 698 A.2d at 213 (quoting Zinermon v. Burch, 494 U.S. 113, 125 (1990)). Additionally, "[d]ue process requires that a hearing must be a real one, not a sham or a pretense." Ciechon v. City of Chicago, 686 F.2d 511, 517 (7th Cir. 1982) (internal quotations omitted). At the summary judgment stage, the qualified immunity

analysis requires that this Court first ask whether the facts, taken most favorably to Mr. Blais, make out a procedural due process violation.

This Court finds that Mr. Blais has made only speculative and conclusory allegations regarding any procedural due process violation. Mr. Blais's sole argument is that when Director Fine's actions are taken together—summarily suspending Mr. Blais's license[5], rejecting the consent agreement between Mr. Blais and the Board, and rejecting Hearing Officer Warren's recommended sanctions and revoking his license—they indicate an "explicit intent to permanently suspend Mr. Blais's license" in violation of his procedural due process rights. See Pl.'s Mem. Supp. Mot. Summ. J. 38. To support his argument, Mr. Blais relies heavily on the Ciechon case. See 686 F.2d at 520; Pl.'s Mem. Supp. Mot. Summ. J. 37. In Ciechon, after a paramedic responded to a call, a patient subsequently died. See id. at 514-15. There, the patient's family threatened the City with adverse publicity about the patient's death, and in response, the City ultimately discharged the paramedic from her position. See id. at 516. The Ciechon Court found that the paramedic, who had no prior disciplinary violations, was discharged for a single alleged infraction because of the City's "panic under pressure from the media and a vengeance-seeking family." Id. at 517. The Ciechon Court held that the City's panic caused the disciplinary proceedings to be tainted with illegitimate bias that resulted in the deprivation of due process of law. Id. at 521. Mr. Blais's contentions do not even remotely come close to the public pressure that unfairly influenced the hearing in Ciechon. See id. For the reasons set forth above, this Court finds there are no issues of material fact in dispute regarding Mr. Blais's procedural due process claim and Director Fine is entitled to judgment as a matter of law. See CCF, LLC, 130 A.3d at 810.

[5] At the February 15, 2017 hearing, Mr. Blais conceded that § 42-35-14 gave Director Fine the authority to summarily suspend Mr. Blais's license pending his hearing.

Accordingly, because Mr. Blais has failed to make any showing of an equal protection or due process violation, this Court grants Director Fine's Motion for Summary Judgment for the section 1983 claims. Therefore, Director Fine need not avail himself of the qualified immunity protections. Alfano, 847 F.3d at 75.

Clearly Established Right

Mr. Blais has failed to make out a showing for any of his section 1983 constitutional claims sufficient to overcome Defendants' Motion for Summary Judgment. However, even assuming arguendo that Mr. Blais did set forth constitutional violations, Director Fine is nonetheless shielded by qualified immunity. See Diaz-Bigio, 652 F.3d at 55 (citing Decotiis v. Whittemore, 635 F.3d 22, 36 (1st Cir. 2011)). The second prong of the qualified immunity analysis asks ". . . whether the [constitutional] right was 'clearly established' at the time of the defendant's alleged violation." Maldonado, 568 F.3d at 269. In order to address the second prong of qualified immunity, the Court must answer two questions. First, it must ask whether "the contours of the right [were] sufficiently clear that a reasonable official would understand what he is doing violates that right." Maldonado, 568 F.3d at 269. Second, the Court must determine "whether a reasonable defendant would have understood that his conduct violated the plaintiff[']s] constitutional rights." Id. The second prong of qualified immunity aims to balance ". . . the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Wood v. Moss, 134 S. Ct. 2056, 2066-67 (2014). Simply put, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986).

Pursuant to the first question, this Court finds that Mr. Blais has a clearly established right to equal protection and substantive and procedural due process protections throughout his disciplinary proceedings and particularly when his pharmacist license was revoked. See González-Droz, 660 F.3d at 13-16 (concluding that procedural and substantive due process is necessary prior to the suspension of a medical license); Harlen Assocs. v. Inc. Vill. of Mineola, 273 F.3d 494, 499 (2d Cir. 2001) (deciding that the ". . . equal protection guarantee . . . extends to individuals who allege no specific class membership but are nonetheless subjected to invidious discrimination at the hands of government officials"). However, recognizing Mr. Blais's clearly established rights in this context does not end the qualified immunity inquiry. See Newman v. Commw. of Mass., 884 F.2d 19, 23 (1st Cir. 1989). The question that remains is whether a reasonable director of health could have objectively been uncertain about the parameters of the applicable laws or the constitutionality of the particular conduct. See Eves v. LePage, 842 F.3d 133, 141 (1st Cir. 2016).

As discussed previously, this Court concludes that an official in Director Fine's position could have reasonably believed—in light of the authorizing statutes, deference given to Hearing Officer Warren's credibility determinations, distinguishable facts from other pharmacists' dispensing errors, meaningful proceedings, and no evidence of bad faith—that his conduct would not violate Mr. Blais's equal protection or due process rights. See id. In Díaz-Bigio, the plaintiff made false allegations of possible criminal activity by a government official without supporting evidence and her employment was terminated. 652 F.3d at 52. In addition, the plaintiff had past disciplinary violations. Id. The Díaz-Bigio Court concluded that the "legitimate interest of public employers in maintaining discipline is well established." Id. (citing Rankin v. McPherson, 483 U.S. 378, 388 (1987)). The Díaz-Bigio Court ultimately held that city officials

who terminated the plaintiff were entitled to qualified immunity because a reasonable public official could have concluded that firing the plaintiff would not violate her First Amendment rights because the facts sufficiently supported a reasonable prediction that her continued employment could result in future misconduct and was representative of a "broader disciplinary problem." Id. at 54.

Similarly, in this case, an official in Director Fine's position could have reasonably believed that the nature and seriousness of the dispensing error compounded by Mr. Blais's history of disciplinary problems and his additional violations raised concerns about his ability to perform his job safely in the future. See id. Thus, Director Fine could have reasonably concluded that rejecting Hearing Officer Warren's recommended sanction and revoking Mr. Blais's license would not violate his constitutional rights. See id. Furthermore, even if Director Fine's reasoning was mistaken, as long as it was not egregiously so, he is still entitled to qualified immunity. See id. at 55. Accordingly, Director Fine is entitled to judgment as a matter of law based on qualified immunity as to Mr. Blais's equal protection, substantive due process, and procedural due process claims. See CCF, LLC, 130 A.3d at 810.

2

State Law Claims

In Count IV, Mr. Blais asserts that Director Fine violated his equal protection rights under the Rhode Island Constitution. See Third Am. Verified Compl. 14. Count IV seeks a declaration pursuant to § 9-30-1 that Mr. Blais's equal protection rights were violated. See id. In addition, Count IV also seeks attorney's fees, costs, and other expenses incurred by Mr. Blais, and any further relief this Court deems fair. See id. This Court has already determined that Mr. Blais has both failed to show that his federal equal protection rights were violated and that he has

standing to seek declaratory relief in this case. Thus, Director Fine is entitled to judgment as a matter of law regarding the state law equal protection claim as well.

Furthermore, this Court finds that Director Fine has immunity from the state law claim under Rhode Island law pursuant to § 5-19.1-25.[6] The statute provides:

> "The director of health, board members, and their agents and employees shall be immune from suit in any action, civil or criminal, based on any disciplinary proceeding or other official act performed in good faith in the course of their duties under this chapter. There shall be no civil liability on the part of, or cause of action of any nature against, the board, the director, their agents, or their employees or against any organization or its members, peer review board or its members, or other witnesses and parties to board proceedings for any statements made in good faith by them in any reports, communications or testimony concerning an investigation by the board of the conduct or competence of any licensee under this chapter. Sec. 5-19.1-25.

Mr. Blais contends that § 5-19.1-25 only shields Director Fine in his official capacity, not in his individual capacity. This Court notes, however, that if the language of a statute is "'clear and unambiguous,'" then its "'plain and ordinary meaning'" is applied. Pierce, 15 A.3d at 963 (quoting Murphy v. Zoning Bd. of Review of S. Kingstown, 959 A.2d 535, 541 (R.I. 2008)). This Court finds that the language of § 5-19.1-25 is clear and unambiguous and the plain language provides protections for the director of DOH and in no way distinguishes between the director's individual versus official capacity.[7]

Mr. Blais further argues that any statutory immunity provided by § 5-19.1-25 is limited to ". . . any statements made in good faith by them in any reports, communications or testimony

[6] Section 5-19.1-25 provides immunity from suit, not merely immunity from damages. See Rocket Learning, Inc., 715 F.3d at 1.

[7] In addition to immunity in § 5-19.1-25, § 23-1-32 also provides, in pertinent part: ". . . The director of health and his or her duly authorized agents, individually and severally, and when acting in good faith and without malice, shall not be personally liable for damages because of any act undertaken in the lawful performance of official duties. . . ." This statute further supports this Court's conclusion that the Legislature intended to immunize the director of health from suit.

concerning an investigation by the board . . . ." Sec. 5-19.1-25. The Rhode Island Supreme Court interpreted nearly identical statutory immunity language in Mills v. R.I. Dep't of Mental Health Bd. of Med. Licensure and Discipline, 863 A.2d 202, 202 (R.I. 2004); § 5-37-1.5(a). In Mills, the Court concluded that § 5-37-1.5(a)—which contains virtually identical language to § 5-19.1-25—provides the board's attorney with immunity—in both capacities—from suit. Furthermore, the Mills Court noted no limitation on that immunity based on the ". . . reports, communications, or testimony. . ." provision of the statute. Mills, 863 A.2d n.2. Therefore, this Court also finds no such limitation on the immunity provided by § 5-19.1-25. See Mills, 863 A.2d n.2.

This immunity is not absolute, however, and Director Fine must also meet two additional requirements in order to benefit from its protections. The first requirement is that Director Fine must have performed an official act in good faith. Sec. 5-19.1-25. This Court finds that Mr. Blais only makes speculative and conclusory allegations of bad faith as discussed previously in relation to Mr. Blais's selective enforcement claim. See Medina-Munoz, 896 F.2d at 8. Thus, this Court finds there are no issues of material fact in dispute that Director Fine's rejection of recommended sanctions and revocation of Mr. Blais's license were in good faith. See CCF, LLC, 130 A.3d at 810.

Second, § 5-19.1-25 requires Director Fine to have acted "in the course of [his] duties" when he revoked Mr. Blais's license. Sec. 5-19.1-25. In this case, Director Fine acted in his capacity as director of the DOH when he reviewed Hearing Officer Warren's Decision and revoked Mr. Blais's license. See II Richard J. Pierce, Jr., Administrative Law Treatise § 9.9 at 888 (5th Ed. 2010); 5 U.S.C. §§ 500 et seq. (explaining that agencies are allowed to treat initial decisions, by hearing officers or administrative law judges, as recommendations, with ". . . all

the ultimate decisionmaking power held by the agency head"). This Court finds there are no issues of material fact in dispute regarding whether Director Fine acted within the course of his duties. See Hanley v. State, 837 A.2d 707, 712 (2003).

Director Fine's personal immunity under § 5-19.1-25 extends to the DOH because the same public policies that necessitate Director Fine's immunity from litigation support the extension of that immunity to the DOH. See id. Director Fine is afforded immunity to allow his decision-making to be "untrammeled by the possibility of disruptive litigation." Id. Therefore, his immunity extends to the DOH because if not, his decision-making as the director of the DOH could still be negatively impacted by his fear that the DOH will face litigation. See Calhoun v. City of Providence, 120 R.I. 619, 390 A.2d 350, 356 (1978); Pontbriand, 699 A.2d at 866 (holding that personal immunity can be extended to the state based on the doctrine of respondeat superior and the presence of public policy concerns). Accordingly, Director Fine and the DOH are entitled to judgment as a matter of law on the state law claim based on Rhode Island statutory immunity. See § 5-19.1-25.

3

Quasi-Judicial Immunity

In addition to the qualified immunity and Rhode Island statutory immunity shielding defendants from liability in this case, Director Fine is also entitled to quasi-judicial immunity in his individual and official capacities from state and federal claims against him. See Wang v. New Hampshire Bd. of Registration of Med., 55 F.3d 698, 701 (1st Cir. 1995). Quasi-judicial immunity protects agency officials who ". . . perform functions essentially similar to those of judges or prosecutors, in a setting similar to that of a court." Bettencourt v. Bd. of Registration in Med. of Commw. of Mass., 904 F.2d 772, 783 (1st Cir. 1990).

In order for quasi-judicial immunity to apply, Director Fine must show that he (1) performs a traditional "adjudicatory" function; (2) decides cases that are "sufficiently controversial" and likely to subject him to litigation; (3) ". . . adjudicate[s] disputes against a backdrop of multiple safeguards designed to protect a physician's constitutional rights." Bettencourt, 904 F.2d at 783; see Wang, 55 F.3d at 701 (concluding that after investigating the plaintiff's medical practice, conducting hearings, and issuing a written decision to revoke his medical license, the board was entitled to absolute immunity); see also Moran v. Conn. Dep't of Pub. Health and Addition Servs., 954 F. Supp. 484, 489 (1997) (holding that the Commissioner of the Department of Health was entitled to absolute immunity because his decision to suspend plaintiff's medical license pending a hearing was prosecutorial in nature). In Bettencourt, a hearing officer conducted an adjudicatory hearing to determine whether plaintiff, a licensed physician, violated various Massachusetts laws and board regulations. See 904 F.2d at 773. Subsequent to the hearing, the hearing officer issued a recommended final decision and order that called for the revocation of plaintiff's license to practice medicine. Id. at 774. After the board reviewed the hearing officer's decision and adopted the recommendations, plaintiff brought suit against the board for violations of his due process rights. Id. at 775. The Court in Bettencourt held that the board members were entitled to quasi-judicial immunity. Id. at 784.

Like the board in Bettencourt, Director Fine reviewed Hearing Officer Warren's Decision, articulated factual and legal determinations in a written decision, and chose a sanction. See id. at 783; Defs.' Mem. Supp. Mot. Summ. J. 26. Furthermore, as discussed in preceding sections, the Federal Administrative Procedure Act (APA) "does not require separation of

functions at the highest level of the agency."[8] See Pierce, § 9.9 at 888; 5 U.S.C. §§ 500 et seq. Agencies are allowed to treat initial decisions, by hearing officers or administrative law judges, as recommendations, with "all the ultimate decisionmaking power held by the agency head." Id. Therefore, in this case, Director Fine performed a traditional adjudicatory function. Bettencourt, 904 F.2d at 783. Director Fine's position as director of the DOH, including his authority to revoke pharmacist licenses, is likely to subject him to harassing litigation. See Bettencourt, 904 F.2d at 784; Defs.' Mem. Supp. Mot. Summ. J. 27; § 5-19.1-7. As in Bettencourt, adequate safeguards were present during Mr. Blais's administrative proceedings that promoted reliability and impartiality. See Bettencourt, 904 F.2d at 784; Defs.' Mem. Supp. Mot. Summ. J. 28. Such safeguards included Mr. Blais's representation by counsel; his access to a transcribed record; and his opportunity to provide documentary evidence and cross-examine witnesses. See Defs.' Mem. Supp. Mot. Summ. J. 29. Both Hearing Officer Warren and Director Fine issued written decisions. See id. Furthermore, Mr. Blais was already successful in his appeal of Director Fine's Final Decision before this Superior Court, Nugent, J., which reviewed Director Fine's Final Decision for error. See id. Additionally, Director Fine acted as the second adjudicative tier in the agency review process by examining the findings and conclusions of Hearing Officer Warren, deferring to her credibility determinations, and modifying her recommended sanction. See Dir. Fine's Final Decision 2-4; Envtl. Scientific Corp., 621 A.2d at 209. This Court concludes that Director Fine's role in this case was adjudicative in nature and he is thereby shielded by quasi-judicial immunity. Accordingly, Director Fine is entitled to judgment as a

[8] The structure and the language of the Rhode Island APA and the Federal APA are virtually identical. Charles S. Kirwan, Administrative Discovery Case Law, in Prac. Guide Discovery and Depositions Rhode Island, Sec. 29.4 (Mark B. Morse, MCLE 2016).

matter of law based on quasi-judicial immunity on all state and federal constitutional claims against him. See CCF, LLC, 130 A.3d at 810.

IV

Conclusion

For all the foregoing reasons, this Court finds that Defendants are entitled to judgment as a matter of law on all claims. Accordingly, this Court grants Defendants' Motion for Summary Judgment as to all counts in the Third Amended Verified Complaint.

Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Leo Blais, RPH v. Rhode Island Department of Health, et al.
CASE NO:	PC 12-5791
COURT:	Providence County Superior Court
DATE DECISION FILED:	May 11, 2017
JUSTICE/MAGISTRATE:	Procaccini, J.
ATTORNEYS:	
For Plaintiff:	Michael A. Kelly, Esq.
For Defendant:	Michael W. Field, Esq.; Adam J. Sholes, Esq.