

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-898

THOMAS ARNOLD LOHSTRETER,
M.D.,

Petitioner,

v.

STATE OF FLORIDA DEPARTMENT
OF HEALTH,

Respondent.

Petition to Review Non-Final Agency Action by the Florida
Department of Health.

July 27, 2020

BILBREY, J.

Petitioner challenges the emergency order of the Florida Department of Health suspending his license to practice as a medical doctor under chapter 458, Florida Statutes (2019). “The agency’s findings of immediate danger, necessity, and procedural fairness are judicially reviewable.” § 120.60(6(c)), Fla. Stat. (2019). Petitioner asserts that the emergency suspension order lacks sufficiently specific facts and reasons for finding an immediate danger to the public health, safety, or welfare. He also argues that the suspension of his license pending formal disciplinary proceedings exceeds the action necessary to protect the public

interest without explanation of why a lesser action would be inadequate. We reject Petitioner's first point and find the emergency suspension order facially sufficient in terms of specific facts to support the Department's finding an immediate serious danger to the public health, safety, or welfare requiring emergency action upon Petitioner's license. However, although the order alleges that Petitioner committed serious sexual misconduct amounting to possible felonies, the order lacks specific explanation as required by statute why suspension of the license prior to formal disciplinary proceedings, as opposed to restriction or limitation, is necessary to protect the public interest under the emergency procedure. See § 120.60(6)(b), Fla. Stat. Accordingly, we grant relief in part, quash the portion of the emergency order suspending Petitioner's license, and remand for further action. The petition is otherwise denied.

“When evaluating the sufficiency of an emergency suspension order, an appellate court is limited to examining the face of the order itself to determine if the elements were alleged with sufficient detail.” *Kruse v. Dep't of Health*, 270 So. 3d 475, 479 (Fla. 1st DCA 2019). “The agency's stated reasons for acting cannot be general or conclusory, but ‘must be factually explicit and persuasive concerning the existence of a genuine emergency.’” *Field v. State, Dep't of Health*, 902 So. 2d 893, 895 (Fla. 1st DCA 2005) (citations omitted).

The emergency suspension order in this case alleged a violation of section 458.331(1)(j), Florida Statutes (2019), regarding sexual activity with a patient.* The order set out detailed and specific facts describing Petitioner's sexual acts upon and in the presence of a female patient during an appointment for medical care within the confines of an exam room.

Our review of the sufficiency of the facts stated in the emergency suspension order does not include review of the agency's determination of the weight or credibility of the evidence submitted to the Department. *Sanchez v. Dep't of Health*, 225 So.

* The immediate suspension provisions of section 456.074, Florida Statutes (2019), are not applicable here. See *Mendelsohn v. State, Dep't of Health*, 68 So. 3d 965 (Fla. 1st DCA 2011).

3d 964, 966 (Fla. 1st DCA 2017). Such evaluation of the evidence “must be made during a full expedited evidentiary administrative proceeding” following the emergency action. *Kruse*, 270 So. 3d at 479. Here, our review for facial sufficiency shows that the emergency suspension order recited sufficiently detailed facts of the time, place, particular acts, and circumstances demonstrating an immediate serious danger to the public health, safety, or welfare requiring emergency action upon Petitioner’s license. *See* § 120.60(6).

Petitioner’s second issue, challenging the agency’s choice of license action, is well taken. We do not substitute our judgment for that of the Department on the discretionary determination of the appropriate emergency action to be taken against Petitioner’s license. *See* § 120.68(7)(e), Fla. Stat. (2019). However, section 120.60(6)(b) requires the agency’s emergency action to be “only that action necessary to protect the public interest under the emergency procedure.”

This court has previously held that in “addition to alleging an ‘immediate serious danger’” the emergency suspension order must recite detailed facts demonstrating: “(1) the complained of conduct is likely to continue; (2) the order is necessary to stop the emergency; and (3) the order is sufficiently narrowly tailored to be fair.” *Nath v. State Dep’t of Health*, 100 So. 3d 1273, 1276 (Fla. 1st DCA 2012) (quoting *Kaplan v. Dep’t of Health*, 45 So. 3d 19, 21 (Fla. 1st DCA 2010)). Because the summary emergency procedure allows the Department to “deprive licensees of a property interest prior to giving them full due process,” the emergency suspension order must “explain why less harsh remedies . . . would have been insufficient to stop the harm alleged.” *Nath*, 100 So. 3d at 1276 (quoting *Preferred RV, Inc. v. Dep’t of Highway Safety & Motor Vehicles*, 869 So. 2d 713, 714 (Fla. 1st DCA 2004)). *See also* *Burton v. State Dep’t of Health*, 116 So. 3d 1285, 1286 (Fla. 1st DCA 2013).

Like the emergency suspension order in *Nath*, the order here concludes that “no less restrictive means” other than outright suspension would adequately protect the public. While that may well be the case given the allegations, the order lacks any particularized explanation why the more narrowly tailored remedies listed in section 120.60(6) — restriction or limitation of

the license — would be insufficient under the circumstances of this case.

Accordingly, we GRANT the petition for review in part, QUASH the portion of the emergency order suspending Petitioner’s license to practice medicine, and REMAND to the Department for further proceedings consistent with this opinion. The petition is otherwise DENIED.

LEWIS and B.L. THOMAS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Bruce D. Lamb of Gunster, Yoakley & Stewart, P.A., Tampa, for Petitioner.

Major Thompson, Assistant General Counsel, Department of Health, Tallahassee, for Respondent.