UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STUART T. GUTTMAN, M.D.

Plaintiff/Appellant,

Case No. 10-2167; 10-2172

v.

G.T.S. KHALSA; LIVINGSTON PARSONS, and THE STATE OF NEW MEXICO

Defendants/Appellees.

PLAINTIFF/APPELLANT STUART T. GUTTMAN, M.D.'S REPLY BRIEF

On appeal from the United States District Court
for the District of New Mexico,
District Court Cause No. Civ.-03-463
Hon. M. Christina Armijo, Magistrate Judge, presiding

Submitted by:
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ORAL ARGUMENT IS REQUESTED

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INTRODUCTION

The State has largely conceded its procedural errors, and now attempts to excuse its failure to afford Dr. Guttman with Due Process. The State argues for the first time on appeal that it was exempt from providing pre-deprivation process because of an alleged "imminent danger". Dr. Guttman raised the issue of denial of his right to pre-deprivation process in his Motion for Partial Summary Judgment. (See, App. 170-75). The State never raised the alleged imminent danger excuse in response, and understandably so. (See, Doc. 143). Such argument is contrary to the allegations and undisputed facts here.

Nothing in the NCA included an allegation that Dr. Guttman posed an imminent threat to patient safety. Indeed, there were no such charges against him when the IPC was convened. Nor did the IPC ever determine that Dr. Guttman posed an imminent danger to his patients or anyone else. In fact, as the State concedes, there was never an issue with the quality of Dr. Guttman's medical practice. The summary suspension was false from inception and cannot be justified after the fact. The State's defenses and immunity arguments fail as a result.

ARGUMENT

I. The facts and constitutional violations remain clear; the summary suspension was false.

A. The standard and pertinent facts

The State devoted considerable space in its Response to a "Statement of Facts" that does not contradict Dr. Guttman's facts, but appears to be an attempt to re-frame some of the basic truths of the case. Such attempt is not only misleading, but is futile in light of the standard of review on motions to dismiss, that accepts Dr. Guttman's well-pleaded facts as true and that requires viewing the facts in the light most favorable to Dr. Guttman. See, *Beedle v. Wilson*, 422 F.3d 1059, 1063(10th Cir 2005).

In addition, the State's statement serves to highlight some of its problems. First, it cannot dispute the procedural defects, including the lack of pre-deprivation process and Dr. Layman's lack of licensure. Second, Layman who was not qualified to serve is clearly identified as the driving force behind the IPC's illegal actions against Dr. Guttman. (Response. 5-9). It was the allegations of dishonesty at the second meeting that the State contends changed Layman's mind to recommend revocation of Dr. Guttman's license. (Resp. 6).

The State never gave Dr. Guttman notice of this second meeting or the charges subsequently raised and considered by the IPC and the Board. To cloud this truth, the State cited to one letter from Dr. Guttman that was sent two weeks after the meeting,

on February 8, 2000. (App. 219). This letter was not included in the NCA. It was a response to an investigative inquiry from Mr. Khalsa after the IPC had already met. It was not even provided to the IPC. (App. 124, ¶ 40). Nor was it a concession of misstatement as the State suggests. To the contrary, it explained there were conflicts in Gallup, and represented a continued offer by Dr. Guttman to address any questions of the IPC–an opportunity the State never afforded Dr. Guttman. (App. 219).

That he was denied pre-deprivation process is also clear from other facts the State neglected to mention. For example, Dr. Guttman sent an additional letter of clarification dated February 14, 2000. (App. 124, ¶ 40). It was also never shown to the IPC. (App. 124, ¶40). Despite the fact the IPC never saw it and Dr. Guttman was never afforded the opportunity to address either the Board or the IPC about it, the February 14 letter was eventually made part of the NCA. Aside from the due process issues that raises, the letter also supports Dr. Guttman's well-pleaded allegations; that is, in 2000, after the IPC met, Khalsa gave Dr. Guttman twenty-four hours to explain well-over twenty alleged complaints dating back to 1993 and 1994 regarding patients from Gallup whose charts Dr. Guttman could not access. (App. 300, 133, ¶¶ 105-106). He was even asked to explain persons not identified. Dr. Guttman emphasized his inability to recall much about the events from 6 years prior. It was an impossible condition. (App. 106).

More importantly, these were all allegations and matters which the Board had already reviewed years before, and had cleared Dr. Guttman of any wrongdoing there. (App. 120-121, ¶¶ 19, 21). The Board itself removed all restrictions on Dr. Guttman's license on May 22, 1995. (App. 297-98). The State tries to rationalize how the Board managed to shoe-horn these allegations back in despite the undisputed two-year limitations period, but it remains information that it considered and the Board had exonerated Dr. Guttman of these charges years before. They could not form the basis for action against him six years later.

B. There was no imminent danger.

Regardless of the State's attempts to shade the story, the central facts remain clear. Dr. Guttman posed no immediate danger. The IPC was convened in December of 1999. (App. 207). The IPC met on January 10, 2000 and made a report on the same date, noting that the prominent questions it reviewed were about Dr. Guttman's behavior, not primarily about his competence as a diagnostician. (App. 208). In fact, though the IPC made only a truncated reference to the November 7, 1999 letter from Dr. Busby in its report, it is clear that Dr. Busby concluded Dr. Guttman posed no imminent danger to patients. (*Id.*). The IPC agreed. The IPC even noted Dr. Guttman had already resigned his position at Sierra Vista by May of 1999, the locale around which the allegations centered. (App. 209). He posed no danger to patients

there as he had already left and confined his practice to an office setting. With the materials in hand that the Board provided, the IPC recommended "ongoing monitoring of his deportment and practice." (*Id.*). It did not recommend suspension or revocation of his license, and certainly did not find Dr. Guttman posed an imminent danger to patients. (*Id.*).

Subsequently the IPC was furnished additional material and considered new charges, though neither it nor the Board gave Dr. Guttman notice of the second IPC meeting nor gave him an opportunity to respond to the new charges. In its second report of January 25, 2000, the IPC still did not find Dr. Guttman posed any imminent threat to patient safety. In fact, rather than finding a basis for immediate suspension, the IPC included in its report a recommendation that restrictions on Dr. Guttman's license be considered. (App. 217-18). The IPC took pains to describe such recommendations, yet did not even mention the idea of immediate suspension. (*Id.*).

The Board, nevertheless, without ever affording any pre-deprivation process to Dr. Guttman, ordered a summary suspension of his medical license on March 7, 2000. (App. 303). This suspension did not take into account either of Dr. Guttman's letters of clarification. The request letters from Khalsa were also omitted. (*Id.*). Based on five- to six-year -old allegations of which Dr. Guttman had been cleared, forty-two days after the IPC recommended consideration of restrictions on Dr.

Guttman's license and without ever giving Dr. Guttman an opportunity to attend the second IPC meeting, the Board *stated* it found that Dr. Guttman's "continuation in practice would constitute an imminent danger to public safety." (App. 303). The subsequent Databank publication of this was false on its face as it listed the "temporary" suspension as "indefinite" and the stated basis was inconsistent. (App. 306). More importantly, the finding itself was fundamentally false.

The Notice of Contemplated Action did not contain any allegations of harm or imminent harm to patients, nor contained any alleged complaints by patients of malfeasance. Quite to the contrary, the Hearing Officer conceded at the hearing in October of 2000, that there were no allegations against the quality of Dr. Guttman's practice. To quote Defendant Parsons: "Correct me if I'm wrong, Mr. Khalsa, but I don't think there was anything in the Board of Medical Examiners' NCA, Notification of Action, that the Board had a problem with Dr. Guttman's quality of practice, or the manner in which he conducted his practice." (App. 323-24). Khalsa agreed this matter was not about patient care.

For the first IPC meeting, the Board simply gave Dr. Guttman notice that it had reason to believe he was "impaired", but no explanation was given as to the alleged impairment despite his attorney's request for clarification. (App. 119). None of the allegations dealt with threats to patient safety, but dealt with alleged difficulty with interpersonal issues. (App. 208). Despite the inadequacy of the notice of those first

charges, Dr. Guttman was heard and, at least in part, able to respond. However, the charges then changed to allegations of dishonesty and involved acts that pre-dated the statutory limitations period. It is undisputed that Dr. Guttman never got any notice of these charges before the second meeting of the IPC nor before the Order of Summary Suspension. (App. 303). These facts show the lack of process, and completely undermine the State's attempt to conflate this case with cases involving suspensions based on an imminent danger to public safety.

C. The law required pre-deprivation process.

The State admits what is clear from *Cleveland Bd. of Educ. v. Loudermill*: Due Process generally requires pre-deprivation process before one is deprived of a significant property interest. (See, Response, p.15). The State tries to downplay the importance of Dr. Guttman's constitutionally protected property interest, and tries to justify its failures. There is no doubt that his medical license is a significant property interest protected by the Constitution. See, *Keney v. Derbyshire*, 718 F.2d 352, 354 (10th Cir. 1983). The process afforded when such interest is implicated need not be elaborate, nor does the right depend on a certainty of success, but there must be a pre-deprivation opportunity to respond. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 544, 545-46 (1985). Dr. Guttman never got the opportunity to respond and present his side of the story.

Implicitly conceding its constitutional error, the State has emphasized that there

are two situations where it can deny a subject his constitutional rights to pre-deprivation process. One is when it would be "impractical", where an act is "random and unauthorized". The second instance is where the State must act "quickly" in the interest of public safety. Neither exception applies here. Though the State cited the first exception, it has no argument for its application. Very clearly the State action was not random and unauthorized. It was directed by the Board which convened the IPC. A meeting was in no way impractical, much less impossible, because the IPC convened a second time. It simply failed to notify Dr. Guttman.

As noted above factually, there was no imminent danger. This new argument also has other fatal flaws. The information the State supposedly relied upon to find Dr. Guttman posed an "imminent" risk was information regarding Dr. Guttman's stint in Gallup. The Board had the Gallup information in its possession for over five years, after Dr. Guttman had fully released it to the Board in 1994. (App. 188). Use of this material for State licensing review in 1999 and 2000 violated the established two year limitations period against the Board acting on it from the date of the discovery of the alleged conduct. See, NMSA 1978, § 61-1-3.1. Its use also proves beyond peradventure that Dr. Guttman posed no "imminent" risk to patients. Possessing such information when it was ripe for consideration, the Board in 1995 actually lifted all restrictions from Dr. Guttman's medical license and cleared him of such charges. (App. 196; App. 120-21). Quite opposite from an imminent risk, with the same

information in hand the Board found Dr. Guttman was "capable of practicing medicine without continued stipulation and monitoring of his practice." (App. 196).

The Board again found no imminent danger when it provided what it considered to be the relevant material to the IPC in December of 1999 without suspension. After meeting with Dr. Guttman in 2000, the IPC likewise found no imminent danger based on the material provided. (App. 210). Even after receiving additional out-dated material from Gallup in 1993 and 1994 and after its unconstitutional second meeting, the IPC still found no imminent danger to patients. (App. 217-18). Nevertheless, without any additional notice to Dr. Guttman and with no hearing, receiving no new information and without any recommendation from the IPC to support it, the Board made a finding of imminent danger and entered an Order of Summary Suspension. (App. 303). The Board's finding of imminence was made 42 days after it received the IPC's second report dated January 25, 2000, 70 days after the IPC was appointed and nearly 6 years after it had received the pertinent Gallup information. As such, this case is like *Gillihan*, where this Court found:

> the record does not reveal "the necessity of quick action by the State or the impracticability of providing any predeprivation process," see *Logan*, 455 U.S. at 436, . . . and the facts alleged by plaintiff indicate that defendants could have provided plaintiff with a hearing prior to depriving him of his property, we conclude that plaintiff stated a claim for relief based on a deprivation of his property without due process. Therefore, the district court erred in dismissing plaintiff's due process claim.

Gillihan v. Shillinger, 872 F.2d 935, (10th Cir. 1989), *overruled on other grounds by,*

Clark v. Wilson, 625 F.3d 686, 691 (10th Cir. 2010).

These facts also make *DiBlasio* persuasive. The State tried to draw a distinction between Guttman and *DiBlasio* because *DiBlasio* involved suspension, and not revocation. But Guttman suffered a suspension, as well. The Second Circuit noted that in *DiBlasio*, "the commissioner exercises her 'virtually unfettered authority' to accept the recommendation of suspension hearing committee--a panel appointed primarily by the commissioner." *Applewhite v. Briber*, 506 F.3d 181, 182 (2d Cir. 2007)(citing, *DiBlasio v. Novello*, 344 F.3d 292, 299 (2d Cir. 2003) *cert. denied*, 541 U.S. 988 (2004)). In addition, the commissioner there was free to disregard any later recommendation by the same committee to terminate such suspension. *Id*. Such process is practically indistinguishable from the facts and procedures followed here.

As in the *DiBlasio* process, the Board appointed the IPC and the Board exercised unfettered authority to act apart from the IPC recommendations–which it did here. There was no finding by the IPC of imminent danger, nor any determination by the IPC to summarily suspend Dr. Guttman's license. Yet, without hearing or an opportunity to appeal the summary suspension outside of the Board, Dr. Guttman lost his license while he waited for a hearing seven months later, not on the suspension but on the charges contained in the NCA seeking to revoke his license.

Even under the statute authorizing temporary suspensions, the Board may order a temporary suspension "simultaneously with the institution of proceedings" only "if it finds the evidence in support of the examining committee's determination is clear and convincing and that. . . the continuation in practice would constitute an imminent danger to public health and safety." NMSA 1978, § 61-7-8 (D) (1995). On a fraud charge, evidence is not even deemed substantial if it is not "clear, strong and convincing." *Seidenberg v. N.M. Bd. of Med. Exam'rs*, 80 N.M. 135, 137, 452 P.2d 469, 471 (N.M. 1969).

Here, there was no such evidence nor could there have been had the IPC been given the letters of clarification and Dr. Guttman been given an opportunity to attend the second meeting. He had no meeting with the IPC on the pertinent charges. Nor was there a simultaneous institution of proceedings. The IPC was convened on one charge, met again on a second charge and the Board thereafter instituted a separate NCA, all while Khalsa continued to pursue further investigation even apart from that. A physician is also entitled to a hearing within 60 days of the suspension. NMSA 1978, § 61-7-8 (D). The IPC here did not make any determination that summary suspension or revocation was required, nor determined there was any imminent danger. Nor did the Board hold a post-suspension hearing to even consider reviewing or setting aside the suspension, while Dr. Guttman was suspended from the practice for a year before his license was ultimately revoked.

The cases cited by the State in support of its arguments for imminent danger are also inapposite. In *Ferrraro*, the complaint against that physician was not unprofessional interpersonal behavior, but involved actual physical violations of patients. The allegations against Ferraro were not five or six years old. After two reports in June of 1995, the doctor there was confronted within about a week of the second alleged incident and allowed an opportunity to respond. After reports by two other staff of another alleged incident of groping an anesthetized patient on August 13, 1996, the doctor was confronted and suspended within three days. *Ferraro v. Board of Trustees of Labette County Med. Cntr*, 106 F.Supp.2d 1195, 1199 (D. Kan. 2000). Within two weeks of the suspension, a medical executive committee requested a hearing held that day, giving notice of the allegations and providing excerpts of statements made against him. *Id*. Neither the board nor the medical committee in that case waited five years to find that alleged conduct posed an immediate threat to patient safety. Similarly, in *Camuglia*, a restaurant's permit was pulled on the day that the investigator determined a food safety violation had occurred, due to misapplication of pesticide chemicals. *Camuglia v. The City of Albuquerque*, 448 F.3d 1214, 1216-17 (10th Cir. 2006). The permit was restored the following day after the problem was remedied. *Id*. Neither case involved Title II ADA claims either. The State even noted *Camuglia* is distinct because, unlike this case, it involved a public health issue. (See, Response, p. 22).

Nor does *Gilbert v. Homar* support the State's claim that pre-deprivation process was excused here as in cases where there is "a substantial assurance that the deprivation was not baseless or unwarranted." See, *Gilbert v. Homar*, 520 U.S. 924, 930-31 (1997). In *Gilbert*, a state employed policeman at a state university was arrested by state police and charged with multiple drug charges, including a felony, on August 26, 1992. *Id*. at 926-27. He was immediately suspended without pay, and was provided the opportunity to respond on September 18. *Id*. The arrest and state felony charge gave some assurance that his suspension was not baseless.

By contrast, Dr. Guttman was not charged with any crime. In fact, the Board had long-concluded that Dr. Guttman was "capable of safely practicing medicine," despite full knowledge of his prior practice, including his stint in Gallup. By initiating an IPC based on material it had long had in its possession, the Board admitted that there was no immediate risk posed by Dr. Guttman–especially since it involved claims for which he had been exonerated. By thereafter using the same material it had in its possession for over 5 years to summarily suspend Dr. Guttman's license, without notice and without a statutorily-required determination by the Board-appointed IPC, the Board's actions were in violation of due process and void.

D. Equal protection

These facts also support Dr. Guttman's well-pleaded claims that he was singled out based on his known disability, in violation of his constitutional rights.

This disparate treatment likewise supports his claim that the State, and how it treated Dr. Guttman, violated equal protection as other non-disabled physicians are not so treated, a claim that he has consistently and sufficiently raised and argued.

II. The actions of the Board are void.

A. The law of voids.

Instead of rebutting its numerous due process violations, the State tries to excuse them as "hyper-technical." Because of the violations' clear implications, the State spends considerable time seeking to obfuscate applicable precedent. First, this proceeding is not directly a collateral attack on a judgment, and instead it sets out new federal claims. Even if it were, though, such action is authorized under well-established Supreme Court principles. See, *U.S. v. Bigford*, 365 F.3d 859, 864 (10th Cir. 2004)(citation omitted); RESTATEMENT (SECOND) JUDGMENTS § 12 (1982). The Defendants have conceded that no other forum had jurisdiction to litigate these claims. (See, Doc. 5, p. 9; Doc. 17, attached Sur-Surreply, p. 4). The question that answers itself still lingers: How could Dr. Guttman litigate an ADA claim in front of the very Board accused of such violation but before the violation was even consummated, especially if the Board lacked jurisdiction to consider such claim?

Second, whatever may be of the so-called "trend" in New Mexico law against the "indiscriminate use" of the terms "jurisdictional error" and "voidness" is esoteric in the present context. The *VanderVossen* case cited by Defendant for this

proposition involved issues of zoning, and did not involve violations of due process. See, *VanderVossen v. City of Espanola*, 130 N.M. 287, 24 P.3d 319 (N.M. Ct. App. 2001), *cert. granted*, 22 P.3d 681 (N.M. 2001). Nor did *VanderVossen* or the cases it relied upon eliminate the concept of void judgments or lack of jurisdiction. See, e.g., *State v. Bailey*, 118 N.M. 466, 882 P.2d 57, 60 (N.M. Ct. App. 1994) (A contempt proceeding, where "here, the district court had personal and subject matter jurisdiction, and therefore, the district court had the authority to proceed."). "'[J]urisdictional error'" is still found in instances where the court was not competent to act. *Id*. at 60.

Similarly, the workers compensation case that Defendants relied upon does not excuse the constitutional and jurisdictional defects in this case. See, *Alvarez v. County of Bernalillo*, 115 N.M. 328, 850 P.2d 1031, (N.M. Ct. App., 1993). The plaintiff in *Alvarez* unsuccessfully appealed a workers compensation order, and then later moved in state court to set aside the order. *Id.* The case did not involve un-litigated federal constitutional and ADA claims, where both sides concede there was no jurisdiction by the agency or the district court to try such claims. Here, neither the Board or the district court were competent to act on Dr. Guttman's claims. The district court did not even review the ADA claims, finding they were "not preserved" for appellate review, even though the Board was not competent to try the claims in the first place. (App. 338).

Moreover, regardless of any trend as to use of the terms "jurisdictional error" and "voidness", the New Mexico appellate courts around the same time and subsequently were discriminately applying such well-established legal principles. See, *State of New Mexico v. Bargas*, 2000-NMCA-103, 14 P.3d 538 (N.M. Ct. App. 2000) (affirming the reversal of a license revocation where mandatory provisions in the act were violated); see also, *Foster v. Board of Dentistry of State of N.M.*, 103 N.M. 776, 777, 714 P.2d 580, 581 (N.M. 1986) ("Foster argues that the Board's failure to render and sign its decision under the terms of the Uniform Licensing Act, Section 61-1-13(B) makes its decision null and void. We agree."). An administrative agency only has authority delegated to it by the legislature. *Foster*, 714 P.2d at 581.

The fact that there are differences between Dr. Guttman's case and *Lopez* does not change the application of the law. *Lopez* did not limit jurisdictional defects to the 90 day-deadline procedure, as Defendant contends. See, *Lopez v. New Mexico Board of Med. Exam'rs*, 107 N.M. 145, 147, 754 P.2d 522, 524 (N.M. 1988) ("*procedures such as* those in effect here constitute a vital property right, the deprivation of which is a deprivation of due process of law under the Fourteenth Amendment of the United States Constitution."(emphasis added)(citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430-31 (1982)). Also, the fact that Dr. Guttman did not receive relief on direct appeal does not affect the merits of his new federal claims where the underlying agency lacked jurisdiction and its action was void.

As the Supreme Court has more recently noted: "A void judgment is a legal nullity." *United Student Aid Funds, Inc. v. Espinosa*, 130 S.Ct. 1367, 1377, 176 Led.2d 158 (2010) (citation omitted). A judgment is void if it resulted from jurisdictional error or on a violation of due process that deprived a party of notice and an opportunity to be heard. *Id*. As such, "[a] judgment may therefore be attacked in a collateral proceeding in another jurisdiction on the basis that it was rendered without jurisdiction."*U.S. v. Bigford*, 365 F.3d 859, 864 (10th Cir. 2004)(citation omitted)). To be clear, a judgment rendered in violation of due process or by a court that lacked jurisdiction to enter it is void. See, *V.T.A., Inc. v. Airco, Inc*., 597 F.2d 220, 224-25 (10th Cir. 1979)(citations omitted). Defendant's Response does not rebut that clear rule. And this Court has already found here that "the district court does have subject matter jurisdiction to hear the case." *Guttman v. Khalsa*, 446 F.3d 1027, 1029 (10th Cir. 2006). It is clear that Dr. Guttman had no notice or opportunity to be heard at the IPC meeting that lead to the suspension of his medical license.

B. Biased hearing officer and no individual immunity

The State did not even address the issue raised asserting that immunity does not extend to the individuals on all claims, except to emphasize in arguing for collateral estoppel that the individuals were dismissed upon a finding they were acting in a quasi-judicial capacity. (Response, p. 49, citing, *Southworth v. Santa Fe Servs., Inc*., 963 P.2d 566, 569 (N.M. Ct. App. 1998)). However, the State did not respond to the

fact that its hearing officer was biased and constitutionally infirm. As such, the very test the State set out for applying collateral estoppel to the administrative proceeding undermines its arguments. (*Id*.). In addition to the other problems identified, Defendant Parsons had knowledge of evidentiary facts, and that remains undisputed. (See, Brief, p. 19-22; App. 321-22). On the record he acknowledged that he drew from his personal knowledge of such facts in conducting the hearing. (App. 321-22). As a member of the Board he also provided Gallup material to the IPC. Parsons lacks immunity. The law remains clear and uncontroverted: Parsons was incompetent to hear the case, and the Board's jurisdiction was undermined. (Brief, p. 19-22).

The State's Statement of Facts acknowledging Khalsa's investigation of collateral matters prior to institution of the NCA further implicates lack of immunity. (Response, p. 6). As noted herein, neither request letter was presented to the IPC. This also further undermines the State's arguments for applying collateral estoppel. The applicability of absolute immunity is based on a functional approach, see *Burns v. Reed*, 500 U.S. 478, 486 (1991), and the State's argument is limited to the quasi-judicial function. (See, Response, p. 49). This Court through Judge Lucero relied on *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) and *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484,1489 (10th Cir. 1991) to cloak the individuals with immunity on the original complaint. *Guttman v. Khalsa*, 446 F.3d 1027, 1034 (10th Cir. 2006). Under

the current facts, in addition to the false databank report, there was an investigation into matters that had not been formally referred by the Board, and fabrication of evidence.

Absolute immunity does not protect a prosecutor who steps into the role of complaining witness and makes false statements. See, *Scott v. Hern*, 216 F.3d 897, 909-10 (10th Cir. 2000). A prosecutor who participates in a libelous press release, or who pursues further investigation or originates or augments false information contained in an application for an order lacks immunity. See, *Snell v. Tunnell*, 920 F.2d 673, 694 (10th Cir. 1990); see also, *Buckley v. Fitzsimmons*, 509 U.S. 259, (1993)(fabricating false evidence); *Rex v. Teeples*, 753 F.2d 840, 843-44 (10th Cir. 1985)(gathering evidence that may blossom into prosecution). Similar to why absolute immunity does not preclude stigma plus, it does not apply in general.

The IPC was the proper body to make determinations. The Board may serve notice of an NCA for an alleged violation. NMAC 16.10.6.13. An administrative prosecutor has authority to prepare the case once the NCA is served. See, NMAC 16.10.6.1. The Board has the sole authority to authorize investigation in conjunction with its sole power to issue an NCA. The investigative requests by Khalsa were not matters that had been formally referred by the Board, but were new issues. See, *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484,1490-91 (10th Cir. 1991)(discussing the absence of absolute immunity where individuals investigate matters that have not

been formally referred by the Board). Just as with the stigma plus claim, the individual defendants stepped out of their quasi-judicial roles. This is important not only as to the issue of immunity, but in avoiding the application of collateral estoppel.

C. Collateral Estoppel does not apply

The Board lacked jurisdiction. It illegally responded to IPC questions in violation of the rules which precluded it from answering questions, and thereafter disqualified it from acting. (App. 224). The State also did not dispute what it has previously conceded; that is, the Board lacked jurisdiction to try an ADA claim or to adjudicate due process claims. (See, Doc. 5, p. 9; Doc. No. 17; attached Sur-Surreply, p. 4) (citing, See, *Martinez v. N.M. State Engineer's Office*, 2000-NMCA-074, ¶ 27, 129 N.M. 413, 9 P.3d 657, *cert. denied* (N.M. 2000)).

Since the Board lacked jurisdiction and the judgment is void, Dr. Guttman had no full and fair opportunity to litigate his constitutional claims and claims under the ADA. The state court in a one-page order simply affirmed the agency decision, under an arbitrary and capricious deferential standard of review, and explicitly refused to consider or litigate the ADA claims which encompass all of Dr. Guttman's jurisdictional, procedural due process, equal protection and other constitutional claims. (App. 338). There was no consideration given to Dr. Guttman's federal claims, and they certainly were not litigated. The New Mexico Court of Appeals and

New Mexico Supreme Court did not accept Dr. Guttman's petitions to review the state district court's record review, nor examined the federal claims. (App. 339-340). These facts undermine application of collateral estoppel here.

But beyond the Board's lack of jurisdiction, Defendants cannot point to any finding or conclusion by the Board which applied or even referenced provisions of the ADA. The State cited to findings that were made by the Board following the hearing on the NCA, but none of these make reference to the ADA nor concluded that Dr. Guttman cannot be reasonably accommodated under the ADA. What Defendants are essentially arguing is that one can infer the Board found there could be no accommodation under the ADA. Under the standard of review, however, Dr. Guttman is entitled to all reasonable inferences being drawn in his favor.

A number of courts have also recognized that the absence of a finding regarding the possibility of reasonable accommodations under the ADA precludes the use of the doctrine of collateral estoppel based on prior finding, even those made in Social Security Disability claims. See, *Sheehan v. Marr*, 207 F.3d 35, 40 (1st Cir. 2000)(citing, *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999). Consequently, several circuits have held plaintiffs are not precluded from pursuing ADA claims even though there has been prior adjudication regarding their disability in the context of other benefit schemes. *Id*. (citing, *Aldrich v. Boeing Co.*, 146 F.3d 1265, 1268 (10th Cir. 1998)(others omitted). Plaintiff's claims here concern distinct

issues that have never been litigated, nor could they have been. (App. 338); see also, *Martinez*, 2000-NMCA-074, ¶ 27.

Moreover, Dr. Vogel, member of the IPC, stated that Dr. Guttman could safely practice medicine. (App. 125, ¶ 49). Similarly, Dr. Tashijian, Psychiatrist and Chair of the IPC, Dr. Tashijian conceded that it was possible Dr. Guttman could come up with some proposal of accommodation. (App. 127, ¶59). Yet contrary to the ADA, the Board acted as if the burden was on Dr. Guttman to do so. (*Id.*). The Board refused to consider any reasonable accommodations, and made no requisite findings. (App. 126-27). The findings it did make in the context of the hearing on the NCA are not sufficient and, more fundamentally, void. They cannot collaterally estop Dr. Guttman's current claims as a matter of law.

III. The Eleventh Amendment issue is jurisdictional.

The State does not deny it stipulated to jurisdiction, and that such stipulation has not been withdrawn, notwithstanding its statement of alleged defenses. Issues of jurisdiction can be raised for the first time on appeal. *Forest Guardians v. U.S. Forest Service*, 495 F.3d 1162, 1170, n. 7 (10th Cir. 2007); *Joslin v. Secretary of Dep't of Treasury*, 832 F.2d 132, 134 (10th Cir. 1987). This issue, though, as well as the waiver of immunity, has long been raised in this case. (Doc. 9). Consistent with and after its stipulation, the State filed a third motion to dismiss on other grounds that neglected to raise Eleventh Amendment Immunity. (Doc. 59, 11-12)(Attempting to

distinguish the abrogation of Eleventh Amendment Immunity under Title II). In short, there is jurisdiction over the State for Dr. Guttman's claims.

IV. The other claims and *Ex parte Young* remain.

A. Retaliation claims and plausibility

Funny the State should complain about a gap of 6 years between the protected speech and the retaliation (See, Response, p. 54-55), when the State used information from the Gallup period as a basis for suspension and revocation of Dr. Guttman's license 5 ½ years after he had fully released the information to the Board. Dr. Guttman had already been exonerated by the Board when his license was cleared in 1995. (App. 297-98). That nexus alone make the claim plausible. Beyond that, the State mis-cites the law on plausibility.

This Circuit noted that the Supreme Court in *Twombly* was critical of complaints that "'mentioned no specific time, place, or person involved" in the allegations. *Robbins v. Oklahoma ex. rel. Dep't of Humans Servs*., 519 F.3d 1242, 1247 (10th Cir. 2008)(quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 565, n. 10 (2007). Here, Dr. Guttman has taken pains to make such detailed allegations. More importantly, "plausible" at this stage does not ask the judge to weigh what he thinks of the likelihood of the truth of allegations, as the State argues. Instead, the Court is to consider the scope of the allegations. *Id*. The "bedrock" principle remains: a judge "must accept all allegations as true and may not dismiss on the

ground that it appears unlikely the allegations can be proven." *Id*. The State's arguments on "plausibility" simply lack merit.

B. Stigma plus

The State's argument on stigma plus also fails with its due process arguments. With the Board actions being void, there was no adequate process. Likewise, the State raises nothing new to show that the law on "stigma plus" was not otherwise clearly established. Before the defamatory publication in this case, and both before and after *Renaud v. Wyoming Dep't of Family Services*, 203 F.3d 723 (10th Cir. 2000), this Circuit clearly and consistently has held that a stigma plus claim is supported by alteration of a protected status, apart from employment. (See, Brief, p. 38-40; see also, *Gwinn v. Awmiller*, 354 F.3d 1211, 1216 (10th Cir. 2004)(prisoner case)). Being clearly established, the individuals lacked qualified immunity on the stigma plus claim and the District Court's decision to the contrary was erroneous.

C. Ex parte Young

The State does not even attempt to take issue with Dr. Guttman's citations under this claim, nor ever points to how Dr. Guttman supposedly waived such claim. (See, Response, p. 53). His claims here were dismissed on the basis of individual immunity, and neither the law nor the facts support such conclusion. The State has effectively conceded this by not even arguing in response. Immunity does not bar claims under *Ex parte Young*. Dr. Guttman's well-pleaded allegations are accepted

as true for these claims. See, *Robbins*, 519 F.3d at 1247. The claims remain viable, and their dismissal was erroneous.

CONCLUSION

Dr. Guttman did not pose an imminent danger to anyone. In fact, as the State concedes, there was never an issue with the quality of his medical practice. The summary suspension was false from inception, and the entire proceeding was tainted with violations of due process and equal protection. The use of statutorily out-dated material and the disregard of Dr. Guttman's procedural rights also makes unconstitutional retaliation more than plausible.

The State's Response seeking to excuse its conduct fails in light of the lack of jurisdiction and the law voiding its actions. Similarly, there is nothing indicating Dr. Guttman could have raised or litigated his ADA and constitutional claims before the Board that committed the violations and that lacked jurisdiction.

Under the ADA, Congress specifically abrogated the state's Eleventh Amendment immunity in order to allow litigants to pursue claims such as these. *Ex parte Young* also remains applicable as immunity has no impact on such claims. Taking his allegations as true as required, Dr. Guttman's claims must proceed in their entirety before the District Court. Dr. Guttman renews his request for relief as stated in his Brief in Chief.

Respectfully Submitted,

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CERTIFICATE OF VIRUS PROTECTION

I certify that the digital version of the foregoing is an exact copy of what has been submitted to the Court in written form and e-mailed to counsel of record. There are no privacy redactions to be made. The digital submission has been scanned with the most recent version of AVG, which daily scans for updates, and according to the program is virus free.

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CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

Excluding the table of contents, table of authorities and statement regarding oral argument, as directed by Rule 32(a)(7)(B)(iii), I certify to the best of my belief and knowledge that this brief contains 6,208 words as calculated by WordPerfect.

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Dated: January 10, 2011

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy hereof was served electronically this 10th day of January, 2011, to:

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