

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

NO. SJ-2016-0109

BHARANIDHARAN PADMANABHAN,

Plaintiff,

v.

BOARD OF REGISTRATION IN MEDICINE
and DIVISION OF ADMINISTRATIVE LAW
APPEALS,

Defendants.

DEFENDANTS MOTION TO DISMISS
PLAINTIFF'S PETITION FOR CERTIORARI REVIEW

Defendants Board of Registration in Medicine ("board"), and the Division of Administrative Law Appeals ("DALA"), respectfully submit this motion to dismiss the petition filed by plaintiff, Bharanidharan Padmanabhan ("Dr. Padmanabham"), who appears here pro se. In his petition, Dr. Padmanabhan, for the second time, seeks the intervention of this Court, under the certiorari statute, G.L. c. 249, § 4, to require the board to take a number of measures, including producing a letter of apology and terminating further action against him, as well as further injunctive relief both on his own behalf, as well as other "similarly situated physicians." Dr. Padmanabhan is currently the subject of disciplinary proceedings by the board.

The Court should deny Dr. Padmanabhan's request for relief and dismiss his premature petition for failure to state a claim upon which relief may be based, because certiorari review is unavailable where, as here, an alternative remedy exists, namely, an action for judicial review

under G.L. c. 30A, § 14, and G.L. c. 112, § 64, following completion of the hearing process at DALA and a final decision by the board.

PROCEDURAL AND FACTUAL BACKGROUND

The procedural and factual background relevant to this motion, as set forth in the petition and documents referred therein, is as follows.

In November 2010, Dr. Padmanabhan, who is licensed to practice medicine in Massachusetts, was terminated from his employment at Cambridge Health Alliance. *See* Ex. 1, Renewed Complaint in the Nature of Petition for a Writ of Certiorari (“New Complaint”), p. 5. Dr. Padmanabhan contends that he was terminated based on “false charges” that he had harmed patients, allegedly in retaliation for his action in reporting patient neglect and insurance fraud by other staff at Cambridge Health Alliance. *Id.*, pp. 5-6. The board then initiated disciplinary proceedings against him, based on the same “false charges” of patient harm made against him at Cambridge Health Alliance. *Id.*, p. 7.

The board referred the matter to DALA. Following an evidentiary hearing, the DALA Magistrate issued a tentative decision on August 17, 2015 (Ex. 2). Contrary to Dr. Padmanabhan’s allegations, the Magistrate found that in some instances, Dr. Padmanabhan acted below the standard of care, particularly in the management of medical records (Ex. 2, pp. 91-92). The Magistrate also found that DALA may discipline Dr. Padmanabhan for those violations of the standard of care. *Id.* However, the Magistrate also found that of the nine cases under review, in only two cases did Dr. Padmanabhan misdiagnose the patient’s condition. *Id.*

On January 16, 2016, the board issued an Order of Remand, requesting that the Magistrate revise his decision in a number of ways including: adding credibility determinations, commenting on the written reports submitted by the parties and on the weight he gave them,

commenting on evidence contrary to the board's experts and the weight given to that evidence, clarifying certain inconsistencies, and correcting several typographical errors. Ex. 3. The Magistrate is in the process of issuing a revised decision. Ex. 4.

In the New Complaint, Dr. Padmanabhan alleges that the board failed to issue a final decision within 180 days of the tentative decision, thereby rendering the tentative decision a final decision, in accordance with 801 CMR 1.01(11)(c)(3). Ex. 1, ¶ 70. Dr. Padmanabhan also alleges a plethora of due process violations before, during, and after, the course of the evidentiary hearing. Among the remedies he seeks for these alleged violations are: the restoration of his professional record, a signed letter of apology from the board, an order that the board cease and desist from future acts of retaliation, and a declaration that it is unlawful to routinely recall physician MCSRs (Massachusetts Controlled Substance Registration Certificate) by the Department of Public Health in the absence of any wrongdoing. Ex. 1, p. 22.

ARGUMENT

The petition should be dismissed for failure to state a claim, because the Magistrate's tentative decision is an interlocutory order that is not subject to judicial review at this time. At the conclusion of the board's proceedings, if Dr. Padmanabhan is aggrieved by the board's final decision, he will be entitled to seek review under G.L. c. 30A, § 14, and G.L. c. 112, § 64.

"The certiorari statute provides an avenue for aggrieved parties to 'correct errors in [quasi judicial administrative] proceedings . . . which . . . are not otherwise reviewable by motions or by appeal.'" *Hoffer v. Board of Registration in Medicine*, 461 Mass. 451, 456 (2012) (quoting G.L. c. 249, § 4). "To survive a motion to dismiss, a plaintiff relying on the certiorari statute must sufficiently allege '(1) a judicial or quasi judicial proceeding, (2) from which there is no other reasonably adequate remedy, and (3) a substantial injury or injustice arising from the

proceeding under review.” *Hoffer, id.* (quoting *Indeck v. Clients’ Sec. Bd.*, 450 Mass. 379, 385 (2008)). Given this legal standard, “[c]ertiorari cannot be requested where administrative remedies terminating in judicial review are available and unexhausted.” *Cumberland Farms, Inc. v. Planning Board of Bourne*, 56 Mass. App. Ct. 605, 608 (2002) (internal citation omitted). Here, the prerequisites for certiorari review are not satisfied, because Dr. Padmanabhan has another adequate remedy, namely, the adjudicatory proceeding at DALA and the board, and – if he is aggrieved by the board’s final decision – through subsequent judicial review of that decision under G.L. c. 30A, § 14, and G.L. c. 112, § 64.

In particular, Dr. Padmanabhan’s claims that the board violated his procedural rights in its pursuit of disciplinary charges against him, and that those charges lack merit, are premature because the Magistrate has not yet issued a Final Decision. Similarly, if DALA issues a recommended decision that is adverse to him, he may raise his claims to the board in connection with its review of the DALA Magistrate’s recommended decision. Finally, he may seek judicial review of the board’s final decision under G.L. c. 30A, § 14, and G.L. c. 112, § 64. In any such action, he will have the opportunity to re-assert unsuccessful claims presented to DALA and the board, as well as to assert claims relating to the conduct of the adjudicatory proceeding before DALA and the Board, including, for example, by challenging procedural aspects of the hearings or the sufficiency of evidence presented there. *See* G.L. c. 30A, § 14(7) (court may set aside agency decision if it is in violation of constitutional provisions, based on an error of law, made upon unlawful procedure, unsupported by substantial evidence, or arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law).

Moreover, Dr. Padmanabhan’s assertion that the board failed to issue a final decision within 180 days of the filing or refiling of the decision is incorrect. Pursuant to 801 CMR

1.01(11), the board's election to empower a DALA Magistrate to render an initial decision without the board presiding over the reception of evidence, amounts to the issuance of a "Tentative Decision." 801 CMR 1.01(11)(c). Once a tentative decision has issued, the board "may affirm and adopt the tentative decision in whole or in part, and it may recommit the tentative decision to the Presiding Officer for further findings as it may direct." 801 CMR 1.01(11)(c)(2). In this case, the board recommitted the tentative decision for further findings.

The operative regulation goes on to state: "If the Agency fails to issue a final decision within 180 days of the filing or re-filing of the tentative decision, the initial decision shall become the final decision of the Agency, not subject to further Agency review." 801 CMR 1.01(11)(c)(3). Since the board has not yet received the refiled tentative decision, the 180 day period has not begun.

Simply put, the board's decision is not final, and, hence, any form of review by this Court is premature, and this action must be dismissed. *See, e.g., Cumberland Farms*, 56 Mass. App. Ct. at 608; *Town of Southbridge v. Litchfield*, 47 Mass. App. Ct. 920 (1999) (rescript) (relief in nature of certiorari was not available where town had failed to exhaust its administrative remedies through an appeal to the Contributory Review Appeal Board); *contrast Ballarin, Inc. v. Licensing Bd. of Boston*, 49 Mass. App. Ct. 506, 510-11 and n. 5 (2000) (in absence of another statutory review provision, certiorari was appropriate avenue for review of decision of local licensing authority, where plaintiff applicant "had exhausted its administrative remedies"); *Hoffer*, 461 Mass. at 454-57 (certiorari review was available where "no other reasonably available remedy" existed, including in particular where judicial review under G.L. c. 30A, § 14, was unavailable because the challenged agency action did not arise in an "adjudicatory proceeding" under chapter 30A).

Moreover, a writ of certiorari is not the appropriate form of review. As this Court stated in dismissing the plaintiff's first complaint: "At the conclusion of the board's proceedings, if the plaintiff is aggrieved by the board's decision, he will be entitled to seek review in this Court pursuant to G.L. c. 112, § 64. Certiorari review is only available for "proceedings [that] are not otherwise reviewable by motion or appeal." G.L. c. 249, § 4." Ex.5, Memorandum of Decision.

The Court accordingly should dismiss the petition.

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL

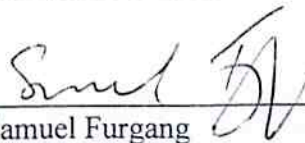


Samuel Furgang, BBO # 559062
Assistant Attorney General
Office of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 963-2678

Dated: April 14, 2016

CERTIFICATE OF SERVICE

I hereby certify that I served the above motion on the parties this 14th day of April, 2016, by sending a copy of the motion by first class mail, postage pre-paid, to Bharanidharan Padmanabhan, Pro Se, 300 Gardner Road #6A, Brookline, MA 02445.



Samuel Furgang
Assistant Attorney General