

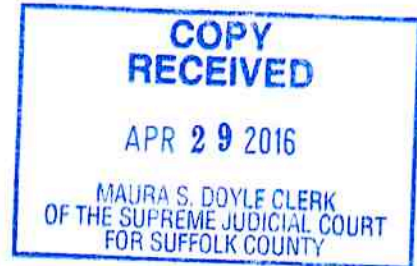
Commonwealth of Massachusetts
Supreme Judicial Court

SUFFOLK SS

Civil Action No.2016-109

Previously SJ 2014-0434

Bharanidharan Padmanabhan MD PhD)
Petitioner(Dr Bharani))
v)
)
Board of Registration in)
Medicine (BORIM))
Defendant)
and)
)
Division of Administrative Law)
Appeals (DALA))
Defendant)



Plaintiff's Opposition to Defendants' Motion to Dismiss

- 1 The Massachusetts Board of Registration in Medicine (Agency) opened a docket against Plaintiff Dr Bharani on November 11, 2010.
- 2 In October 2014, Plaintiff Dr Bharani moved this Court to obtain relief from an administrative process that had maliciously been delayed for four (4) years at that point, with the Agency being fully aware that the open docket blocked Plaintiff Dr Bharani from earning a living.
- 3 This Honorable Court ordered that Plaintiff Dr Bharani reapply for relief after exhausting his administrative remedies at the Agency.

4 Massachusetts regulation 801 CMR 1.01(11)(c)(3) declares:
“3. Failure to Issue Final Decision. 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.”

5 On August 7, 2015, a DALA hearing officer issued a
tentative decision.

6 It is undeniable that the Agency did NOT issue a Final
Decision within 180 days of the filing of this tentative
decision.

7 Counsel for the Agency have now declared in writing to this
Honorable Court that the Agency “recommitted the tentative
decision for further findings.”

8 Counsel for the Agency have engaged in conscious factual
misrepresentation.

9 The Agency did not “recommit” the tentative decision for
further findings. The term “recommit” was never used nor
implied. And no new findings were sought. See Exhibit 1

10 Instead, the Agency questioned the hearing officer’s
findings re the Agency witness’ credibility, to wit:
“include credibility determinations” and “explain the

apparent inconsistency between Dr Levin's testimony and the Magistrate's Conclusion of Law that the Respondent did not render substandard care to Patients A, B, E and I."

11 This Agency demand explicitly violates Massachusetts regulation 801 CMR 1.01(11)(c)(2) which states:

"2. Agency Action on the Tentative Decision. The Agency 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. The same procedural provisions applicable to the initial filing of the tentative decision shall apply to any re-filed tentative decision after recommittal. If the Agency does not accept the whole of the tentative decision, it shall provide an adequate reason for rejecting those portions of the tentative decision it does not affirm and adopt. However, the Agency may not reject a Presiding Officer's tentative determinations of credibility of witnesses personally appearing. The Agency's decision shall be on the record, including the Presiding Officer's tentative decision, and shall be the final decision of the Agency not subject to further Agency review."

(emphasis added)

- 12 The Agency did NOT “provide an adequate reason for rejecting those portions of the tentative decision it does not affirm and adopt.” In fact it provided NO reason at all. See Exhibit 1
- 13 The Agency further consciously violated an explicit regulation by rejecting the “Presiding Officer’s tentative determinations of credibility of witnesses personally appearing” which the Agency is explicitly prohibited from doing.
- 14 Regulations such as 801 CMR exist to ensure all Agencies comply with the requirements of equal protection and due process and the entire practice of employing a “neutral” hearing officer at DALA, outside of the specific Agency, and provides a measure of independence to the hearing officer’s findings as the person who personally observed and questioned the witness.
- 15 The documentary evidence is undeniable that the Agency did NOT issue a Final Decision, did NOT “recommit for further findings” and further violated 801 CMR by questioning the hearing officer’s credibility determination of a live witness.
- 16 The Agency has demonstrated absolute contempt for the principles of equal protection and due process as well as

conscious and total disregard for Massachusetts regulation 801 CMR.

17 The Agency's concept of the regulatory world, as explicitly laid out in its Motion to Dismiss, is one where an Agency can bounce a tentative decision back to DALA an infinite number of times, waiting 165 days each time before doing so, while blocking a physician from earning a living, in order to detain a physician in the administrative gulag and away from the oversight of this Honorable Court.

18 This Agency's concept of the regulatory environment in this Commonwealth does not comport with the reality and plain language of 801 CMR.

19 Anticipating such self-serving Agency concepts and desires, Massachusetts regulation 801 CMR gives great importance to closure and explicitly allows for Final Decisions to be imposed on a non-compliant rogue Agency, as here.

20 By black letter law, the tentative decision became the Final Decision on February 3, 2016 and is "not subject to further Agency review." Plaintiff's detention in the gulag ended that day.

21 This Honorable Court must draw an adverse inference that the Agency chose to file a consciously false Motion to Dismiss in lieu of answering the charges in the Complaint.

- 22 The Agency chose to do so knowing the charges are true and demonstrate a severe case of discrimination against a physician of color and a five-year-long campaign of retaliation against a publicly-employed health care whistle-blower for advocating for patient safety and exercising his free speech rights (Heffernan v. City of Paterson, New Jersey, 14-1280, 578 US _ (2016)) that the Agency is obstinately reluctant to end even now, five years out, by demanding yet another unlawful bite at the apple. The Agency's motion is "reminiscent of a grade schooler seeking to avoid detention." United States v. Binh Tang Vo, Cr. No. 13-168 (EGS) (D.D.C. Jan 15, 2015)
- 23 The Office of Attorney General Maura Healey has also chosen to defend this Agency's concept of the infinite ping-ponging of tentative decisions between the Agency and DALA and officially supporting the Agency's obstinate and dilatory tactics by filing a consciously false Motion to Dismiss, in conscious violation of SJC Rules of Professional Conduct Rule 3.3: Candor Toward the Tribunal, as well as SJC Rules 8.3 and 8.4, in order to avoid answering the specific allegations in the complaint.

Wherefore, Petitioner's complaint is properly before this Honorable Court, Defendants' Motion to Dismiss must be DENIED and Defendants ORDERED to answer the specific allegations in the complaint.

Unlike the Defendants, Petitioner signs willingly under the pains and penalties of perjury.

Respectfully submitted,

29 April 2016

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Certificate of service

Plaintiff certifies that he served a copy of this opposition on defendants via counsel via certified mail.

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Respectfully submitted,

29 April 2016

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