IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

DR. TRUDY BOND, et al.,	:	
	:	
Relators	:	CASE NO. 11CV-4711
	:	
vs.	:	JUDGE BEATTY
	:	
STATE BOARD OF PSYCHOLOGY,	:	MAGISTRATE SKEENS
	:	
Respondent	:	

MAGISTRATE'S DECISION ON RESPONDENT'S MOTION TO DISMISS FILED MAY 18, 2011, RESPONDENT'S MOTION TO STAY DISCOVERY FILED MAY 18, 2011, AND RELATORS' MOTION FOR ORAL HEARING FILED AUGUST 24, 2011

SKEENS, MAGISTRATE

This case was referred for a Decision on Respondent's Motion to Dismiss, Respondent's Motion to Stay Discovery, and Relators' Motion for Oral Hearing. The Magistrate's Decision is as follows.

FACTUAL BACKGROUND

On April 13, 2011, Relators Dr. Trudy Bond, Michael Reese, Rev. Colin Bossen, and Dr. Josephine Setzler filed a Complaint seeking a writ of mandamus against Respondent Ohio State Board of Psychology (the "Board").

Relators allege that on July 7, 2010, they filed a complaint with the Board against Dr. Larry C. James, a psychologist licensed by the Board. Complaint, ¶2. The complaint to the Board alleged that Dr. James was responsible for the abuse and exploitation of detainees as a psychologist at the U.S. military facility at Guantanamo Bay, in violation of Ohio law and Board ethics rules. *Id.* Relators allege that their complaint further detailed how Dr. James violated Ohio law and Board ethics rules after leaving Guantanamo Bay by publishing confidential patient histories in his 2008 memoir and by

misleading the public and the Board about his role. *Id.*, ¶3. Relators allege that they supported their Board complaint with documentation, including reports, records and hearings from the U.S. military, Senate, Department of Justice, and Central Intelligence Agency, as well as statements from survivors and witnesses. *Id.*, ¶5. Relators allege that their complaint was further supported by a report by psychologist Bryant L. Welch, who concluded that the factual allegations, if true, constituted serious ethical breaches by Dr. James. *Id.*, ¶50.

Relators allege that on September 30, 2010, they and their counsel met with Supervising Board member Jane Woodrow, Board Executive Director Ronald Ross, Board Investigator Carolyn Knauss, and the Board's legal counsel to discuss their complaint. *Id.*, ¶53. On January 26, 2011, the Board's investigator issued a letter to Relators stating that it had completed its review of the complaint and had determined that it was unable to proceed to formal action in this matter. *Id.*, ¶55.

Relators allege that they have been denied justice through the Board's decisions to not fully investigate and not proceed to formal action. *Id.*, ¶74. Relators seek a writ of mandamus requiring the Board to proceed to formal action on, or investigate in good faith, their allegations against Dr. James and to provide reasons for any decision. *Id.*, ¶81.

On May 18, 2011, Respondent filed the Motion to Dismiss Complaint in Mandamus pursuant to Civ. R. 12(B) for lack of standing and failure to state a claim upon which relief can be granted. On the same date, Respondent filed the Motion to Stay Discovery pending resolution of the Motion to Dismiss. Relators filed briefs opposing

these motions, and Respondent filed replies. On August 24, 2011, Relators filed a Motion for Oral Hearing on the Motions to Dismiss and to Stay.

On October 24, 2011, the Court issued an Order referring the above motions to the Magistrate.

CONCLUSIONS OF LAW

Respondent seeks dismissal of this action on two bases, first pursuant to Civ. R. 12(B)(1) for lack of standing, and second pursuant to Civ. R. 12(B)(6) for failure to state a claim.

Standing

Civ. R. 12(B)(1) provides that a claim may be dismissed if the Court lacks subject matter jurisdiction over the claim. The Court must determine "whether the plaintiff has alleged any cause of action cognizable by the forum." *Avco Financial Services Loan, Inc. v. Hale* (1987), 36 Ohio App.3d 65, 67.

"It is well established that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 469.

Relators allege that they have two independent grounds for standing in this case. First, they assert that they have personal, beneficial interests in this matter because they have been injured by the Board's alleged abuse of discretion. Second, they assert that they have standing based on the "public right" standing doctrine because this case involves an issue of great importance and public interest.

To establish standing as a private litigant seeking a writ of mandamus, a relator must show that he has a personal stake in the outcome of the case, which is more than a

mere interest in the action. *State ex rel. Village of Botkins v. Laws* (1994), 69 Ohio St.3d 383, 387. A private litigant must generally show that he has suffered or is threatened with direct and concrete injury, in a manner or degree different from that suffered by the public in general. *Sheward, supra*, 86 Ohio St.3d 451, 469-470.

The Complaint alleges that each Relator has been harmed by the Board's actions. Dr. Bond, a psychologist licensed in Ohio, asserts that her interest in her psychology license is affected because the Board's actions damage the integrity of the psychology profession in Ohio. Complaint, ¶65. Rev. Bossen asserts that he can no longer trust that when he refers members of his congregation to Ohio-licensed psychologists, they will be helped rather than harmed. *Id.*, ¶66. Dr. Setzler, a mental health advocate, alleges that she can no longer trust that the Board will protect vulnerable Ohio residents from psychologists who abuse the privilege of their license. *Id.*, ¶67. Mr. Reese, who receives treatment at Veterans Affairs Hospitals, alleges that he can no longer trust that the Board will discipline Ohio-licensed military health professionals who violate ethical rules. *Id.*, ¶68.

In essence, the harm alleged by each Relator involves damage to the psychology profession from the Board's decision not to take formal action against Dr. James. The allegations of harm are vague, conclusory, and immeasurable. Relators have not alleged how damage to the psychology profession affects them individually in any actual or specific way. Rather, Relators allege concern about potential harm to patients from treatment by unidentified psychologists who may not be properly disciplined. Relators have not alleged direct and concrete injury as required for private litigant standing.

Relators have cited no authority finding private litigant standing under similar circumstances. There is ample authority demonstrating that the types of injury claimed by Relators do not confer standing.

In *Bowers v. Ohio State Dental Board* (2001), 142 Ohio App.3d 376, the Tenth District Court of Appeals held that a dentist did not have standing to obtain a writ of mandamus compelling the Dental Board to adopt regulations regarding dental examinations. Despite the dentist's membership in the profession at issue, the Court stated that he did not have a personal or beneficial interest in the requested writ. *Id.*, p. 381.

In *Reisner v. Cantone* (Supreme Court of New York, New York County, 2011, Case No. 115400/2010; Ex. 2 to State's Reply brief), Dr. Reisner, a psychologist licensed in New York, sought an order compelling a government agency to take disciplinary action based on his complaint against Dr. John Leso, a psychologist who served at the military facility at Guantanamo Bay. In response to Dr. Reisner's argument that the value of his license was diminished by the agency's failure to act, the court stated that such an assertion is so "speculative and immeasurable that it is not a cognizable injury in fact." *Id.*, p. 8.

In essentially the same case as this, *Bond v. Louisiana State Board of Examiners* (Louisiana Court of Appeal 2011), 2009 CA 1735, 39 So.3d 855, at p. 3-4, the court held that Dr. Bond did not have standing to bring an action requiring the Louisiana State Board of Examiners of Psychologists to take action against Dr. James. The court stated:

> Without some peculiar, special, and individual interest, a citizen has no standing in court to champion a cause or subject matter that pertains to the whole people in common, nor has an individual citizen legal standing in

> court to enforce the performance of a duty owed to the general public. Here, Dr. Bond has shown no particular, special, or individual interest.

As noted, Relators also argue that they have standing based on the "public right" standing doctrine.

"Public right" standing allows a party that has not suffered an actual injury to have standing "when the issues sought to be litigated are of great importance and interest to the public." *Sheward*, *supra*, 86 Ohio St.3d at 471. In *Sheward*, the Court limited the application of "public right" standing as follows: "this court will entertain a public action only 'in the rare and extraordinary case' where the challenged statute operates, 'directly and broadly, to divest the courts of judicial power.'" *Id.*, at 504.

In *State ex. Rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Comp.*, 2002-Ohio-6717, the Court held that "public right" standing permitted a state and national labor union to challenge the constitutionality of legislation that permitted warrantless drug and alcohol testing of injured workers. The court stated that the challenged legislation implicates a public right because it "affects virtually everyone who works in Ohio. The right at stake, to be free from unreasonable searches, is so fundamental as to be contained in our Bill of Rights." *Id.* at ¶12.

In response to the argument that "public right" standing existed in *Bowers*, *supra*, the Tenth District Court of Appeals stated as follows:

> Application of the public action rule of standing … is limited ….[C]ourts entertain such actions only where the alleged wrong affects the citizenry as a whole, involves issues of great importance and interest to the public at large, and the public injury by its refusal would be serious. [ ] The vast majority of such cases involve voting rights and ballot disputes ….
>
> Here, the writs sought by appellants would compel appellees to adopt regulations specifying which exams prospective dentists must take for licensure in Ohio. While such relief may be of interest to many Ohioans

> and may tangentially affect their lives as a result of who is permitted to practice dentistry in Ohio, the duty sought to be compelled is not in any meaningful sense for the benefit of the public as a whole. It does not affect the citizenry at large, it is not of great importance and interest to the general public, and the alleged public injury is not serious. Rather, the issues raised by this case are of significant interest to only a select group of people--those who may seek licensure to practice dentistry in Ohio. Simply put, the Board's alleged obligation to adopt a rule designating which exams prospective dentists must take to obtain an Ohio license to practice dentistry is not a public duty. 142 Ohio App.3d at 381.

In *Reisner*, *supra*, the court rejected Dr. Reisner's argument that the regulation of the profession of psychology is a matter of sufficiently significant public interest to confer "public interest" standing upon him. Ex. 2 to State's Reply Brief, p. 11.

The above legal authority establishes that "public right" standing is limited to those rare cases that rise to the level of the legislation at issue in *Sheward* and *Ohio AFL-CIO*. This case involves a complaint seeking disciplinary action against the license of a single psychologist, Dr. James. As in *Reisner*, *supra*, the harm alleged by Relators relates to potential damage to the psychology profession if disciplinary action is not taken. As in *Bowers*, *supra*, the Board's decision on whether to take action against Dr. James "does not affect the citizenry at large, it is not of great importance and interest to the general public, and the alleged public injury is not serious."

For the foregoing reasons, the Magistrate concludes that Relators do not have standing to pursue this action. Pursuant to Civ. R. 12(B)(1), this case must be dismissed for lack of subject matter jurisdiction.

Failure to State a Claim

Civil Rule 12(B)(6) tests the sufficiency of the claims asserted in a complaint. Dismissal of a case pursuant to Civil Rule 12(B)(6) is appropriate only where it appears beyond doubt from the complaint that the plaintiff can prove no set of facts in support of

the claim at issue which would entitle him or her to relief. *York v. Ohio State Highway Patrol* (1991), 60 Ohio St.3d 143, 144. The Court, in construing a complaint upon a motion to dismiss for failure to state a claim, must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192.

In order to obtain a writ of mandamus, a Relator must demonstrate that: (1) Relator has a clear legal right to the relief sought; (2) Respondent has a clear legal duty to provide the requested relief; and (3) Relator has no plain and adequate remedy in the ordinary course of the law. *State ex. rel. Gill v. School Emp. Retirement Sys. of Ohio*, 2009-Ohio-1358, ¶18. A party seeking a writ of mandamus must plead the existence of all necessary facts to support the claim. *State ex rel. Temke v. Outcalt* (1977), 49 Ohio St.2d 189, 190-191.

R.C. 4732.17(A) provides that the Board "may" issue a reprimand or suspend or revoke the license of a psychologist on the specified grounds. Relators have cited no legal authority requiring the Board to initiate disciplinary action against a licensee or to provide an explanation of a decision not to pursue formal action.

In *State ex rel. Talwar v. State Medical Board*, 2004-Ohio-6410, the relator sought to compel the State Medical Board to take disciplinary action based on his complaint against a physician. The Ohio Supreme Court affirmed dismissal of the mandamus action, holding that the relator could not establish the requisite legal right and legal duty regarding the initiation of disciplinary action. *Id.* at ¶7. The Court noted that the governing statutes authorized the board to take disciplinary action, but did not require

that it do so, and that the board had discretion in such decisions in allocating its resources in a manner that will best protect patients. *Id.*, ¶11-12.

In *State ex rel. Westbrook v. Ohio Civil Rights Comm'n* (1985), 17 Ohio St.3d 215, the Court held that the relator was not entitled to a writ of mandamus compelling the Ohio Civil Rights Commission to investigate and file a formal complaint. The Court stated that since the Commission had discretion in determining whether to investigate and issue a formal complaint, the relator could not establish an absolute duty to do so. *Id.* at 216.

See also Gosney v. Board of Elections (Seventh App. Dist. Case No. 88-C-54), 1989 Ohio App. LEXIS 1168, at p. 5 (the court stated that where the performance of a duty is not mandatory but is discretionary, a writ of mandamus will not issue); *State ex rel. MacDonald v. Cook* (1986), 15 Ohio St.2d 85 (mandamus does not lie to compel a public officer to enforce a regulation against a specific person); and *Robinson v. Office of Disciplinary Counsel* (Tenth App. Dist Case No. 98AP-1431), 1999 Ohio App. LEXIS 3928 (affirming dismissal of the case on the basis that the decision on whether to dismiss a complaint filed with the Office of Disciplinary Counsel was discretionary).

For the foregoing reasons, the Magistrate concludes that Relators cannot establish a clear legal right to the relief sought or that Respondent has a clear legal duty to provide the requested relief. Pursuant to Civ. R. 12(B)(6), this case must be dismissed for failure to state a claim.

The Magistrate concludes that an oral hearing is unnecessary because the Motion to Dismiss raises legal issues that are sufficiently addressed by the briefs.

For the foregoing reasons, the Magistrate's Decision is that Respondent's Motion to Dismiss filed May 18, 2011 is granted, Respondent's Motion to Stay Discovery filed May 18, 2011 is moot, and Relators' Motion for an Oral Hearing filed August 24, 2011 is denied.

A PARTY SHALL NOT ASSIGN AS ERROR ON APPEAL THE COURT'S ADOPTION OF ANY FACTUAL FINDING OR LEGAL CONCLUSION, WHETHER OR NOT SPECIFICALLY IDENTIFIED AS A FINDING OF FACT OR CONCLUSION OF LAW, UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FINDING OR CONCLUSION AS REQUIRED BY CIV. R. 53(D)(3)(b).

Copies to:

Terry J. Lodge, Counsel for Relators
316 N. Michigan Street, Suite 520
Toledo OH 43604-5627

Roger F. Carroll, Counsel for Respondent
30 E. Broad Street, 26th Floor
Columbus OH 43215-3400

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Franklin County Court of Common Pleas

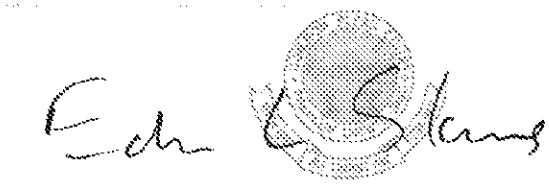
Date: 12-16-2011

Case Title: DR TRUDY BOND -VS- OHIO STATE BOARD PSYCHOLOGY

Case Number: 11CV004711

Type: MAGISTRATE DECISION

So Ordered



/s/ Magistrate Edwin L Skeens