

appealable.” *State ex rel. Gaylor, Inc. v. Goodenow*, 125 Ohio St. 3d 407, 2010-Ohio-1844, 928 N.E.2d 728, at ¶16.

The regulatory scheme established by R.C. 4732 was designed to protect the public. In accordance with this legislative purpose, the statute imposes clear legal duties to protect the public by licensing and disciplining psychologists to ensure that they comply with codified ethical standards. The rules and regulations that implement the statute impose on the Board specific duties—including a clear legal duty to investigate complaints against licensees, and to proceed to “formal action” when the Board has jurisdiction and there is substantial evidence that “a violation is likely to have occurred.” Members of the public have a corresponding clear legal right to file complaints and have their complaints investigated in accordance with the Board’s specific duties.

The circumstances of the present case trigger the above rights and duties in R.C. 4732 and the rules and regulations that give effect to the statute’s purpose. On July 7, 2010, Petitioners filed a complaint [hereinafter “Board Complaint”] with the Board against Dr. Larry C. James, a psychologist licensed by the Board. The Board Complaint alleges violations of eighteen provisions of Ohio statutes and Board rules stemming from Dr. James’s role as a senior psychologist at the U.S. military prison at Guantánamo Bay, Cuba. Specifically, the Board Complaint alleges that Dr. James bore responsibility for abuse and exploitation, some of which rose to the level of torture, of people held at Guantánamo Bay. The Board Complaint also details how Dr. James, after leaving Guantánamo Bay, improperly disclosed confidential patient history and misled the public and the Board about his role in the exploitation of detainees at Guantánamo Bay.

The alleged conduct fell squarely within the Board's jurisdiction, and the allegations were supported by over one thousand pages of documentation, including reports, records, and hearings from the U.S. military, Senate, Department of Justice, Central Intelligence Agency, as well as statements from survivors and witnesses. Indeed, some of the violations were supported or definitively established by Dr. James's own public admissions. In these circumstances, the Board had duties to investigate and to proceed to formal action based on the evidence presented.

Instead, the Board ignored these duties, and in a cursory letter, dismissed Petitioners' Board Complaint without justifying its decision in law or evidence. By disregarding both its jurisdictional mandate and the clear weight of the evidence, the Board abrogated its duties to regulate psychologists and to protect the public, and thereby abused its discretion. The Board's failure to conduct a meaningful and good faith investigation, and its perfunctory dismissal of Petitioners' Board Complaint without explanation constituted additional acts of arbitrary and unreasonable abuse of discretion.

The Board's action harmed Petitioners and the public by failing to address Petitioners' serious allegations and concerns and by denying Petitioners' rights. In order for the rights and duties articulated in the statute to be meaningful, R.C. 4732 may not be interpreted to permit arbitrary dismissal of allegations of serious violations supported by substantial evidence that the violations likely occurred; such interpretation would render the statute meaningless. See *State ex rel. Selected Properties v. Gottfried* (1955), 163 Ohio St. 469, 471, 127 N.E.2d 371; *Thomas v. Mills* (1927), 117 Ohio St. 114, 122-23, 157 N.E. 488.

Petitioners have no available remedy at law to correct the injustice caused by the Board's arbitrary dismissal, which was in derogation of its legal duties and Petitioners' rights. In the absence of constitutional and statutory appeal mechanisms, the injustice can be remedied only

through a writ of mandamus ordering the Board to proceed to formal action. Alternatively, the Court should compel the Board to investigate meaningfully and in good faith. Additionally, the Court should compel the Board to provide clearly articulated reasons grounded in fact or law for any decision, and to show that it investigated meaningfully and/or carried out a formal disciplinary proceeding in good faith. In these circumstances, a writ of mandamus must issue.

ARGUMENT

A writ of mandamus should be granted where respondents have a “clear legal duty” to perform the relief requested, petitioners possess a “clear legal right” to the requested relief, and no other adequate remedy at law exists. *State ex rel. Nat. City Bank v. Board of Ed. of Cleveland City School Dist.* (1977), 52 Ohio St.2d 81, 84, 6 O.O.3d 288, 369 N.E.2d 1200. Each element is met in this case.

I. THE REGULATORY SCHEME ESTABLISHED BY R.C. 4732 LIMITS THE DISCRETION OF THE BOARD BY ARTICULATING THE BOARD’S CLEAR LEGAL DUTIES AND THE CORRELATIVE CLEAR LEGAL RIGHTS OF THOSE WHO BRING COMPLAINTS BEFORE THE BOARD.

The Ohio General Assembly created the Board to regulate the profession for the purpose of protecting the public from the unsafe practice of psychology. See R.C. 4732; Ohio Adm. Code 4732; Ohio State Board of Psychology, Guidelines for Disciplinary Actions and Corrective Orders, at 2. The Board must do so first by ensuring that everyone who receives a license meets professional standards, and second by monitoring the behavior of psychologists once they are licensed to ensure that they continue to adhere to those standards. The Board cannot withhold licenses or discipline psychologists arbitrarily, but must guide itself by defined criteria to ensure that it upholds its standards and treats individuals fairly. Guidelines for Disciplinary Actions and Corrective Orders, supra, at 2. When engaging in its monitoring role, the Board has a duty to receive and investigate complaints, and proceed to formal disciplinary action when there is

jurisdiction and there is enough evidence to indicate that a violation likely occurred. All concerned individuals have a right to bring these complaints, and complainants that present substantial evidence that a violation likely occurred have a clear legal right to have their complaint be the subject of investigation and formal action by the Board.

The Board has a broad duty to protect the public by regulating the profession of psychology¹ and disciplining those engaged in the practice of psychology. This responsibility starts with a duty to apply defined professional standards to the granting of licenses² and continues with a duty to monitor—also applying defined criteria—the behavior of psychologists once they are licensed. This latter duty requires the Board to evaluate misconduct, including misconduct that occurred prior to licensure and outside of Ohio,³ and to discipline psychologists for misconduct.⁴ Taken together, these provisions articulate a clear legal duty to oversee the practice of psychology by Ohio licensees, including by granting licenses only to those who meet the standards and by disciplining those licensees who subsequently violate them.

A fundamental component of the Board's responsibility to discipline the misconduct of its licensees is the clear legal duty to receive and investigate complaints and proceed to formal

¹ The Attorney General of Ohio and Ohio courts have found that “the purpose of statutory licensing schemes * * * [is] protection of the public and those whom practitioners serve,” 2004 Ohio Atty. Gen. Ops. No. 20, at 7, and that “[o]ne of the obvious purposes of the regulation of professions is to prevent damage * * * before any person in the general public is damaged.” *In re Barnes* (1986), 31 Ohio App.3d 201, 206; 510 N.E.2d 392.

² See, e.g., R.C. 4732.091(B) (stating that the Board “*shall not* grant a license to an applicant for an initial license *unless* the applicant complies with sections 4776.01 to 4776.04 of the Revised Code”) (Emphasis added); R.C. 4732.10(A) (requiring that Board “appoint an entrance examiner who *shall* determine the sufficiency of an applicant’s qualifications for admission to the appropriate examination”) (Emphasis added); R.C. 4732.10(B)(2) (stating that a “[r]equirement[] for admission to examination for a psychologist license *shall* be that the applicant * * * [i]s of good moral character”) (Emphasis added).

³ See Ohio Adm. Code 4732-17-01(A)(2) (“The rules of professional conduct *shall* apply to the conduct of all psychology and school psychology licensees and applicants, including the applicant’s conduct during the period of education, training, and employment that is required for licensure. The term ‘psychologist,’ as used within these rules of professional conduct, shall be interpreted accordingly, whenever psychological services are being provided in *any context*.”) (Emphasis added).

⁴ See, e.g., Ohio Adm. Code 4732-19-01 (stating that “[l]icensed psychologists and licensed school psychologists governed by Chapter 4732 of the Revised Code and by these rules *shall* be disciplined in accordance with Chapters 4732 and 119 of the Revised Code for violation of these rules”) (Emphasis added).

action when the Board has jurisdiction and there is substantial evidence that a serious violation is “likely to have occurred.”⁵ The process of receiving and responding to complaints is one of the principal means by which the Board monitors the conduct of psychologists.⁶ In describing its own investigation process, the Board acknowledges that it “has the responsibility to *enforce* the Law and Rules Governing Psychologists, found in ORC and OAC Chapters 4732.” (Emphasis added.) Ohio State Board of Psychology, Investigation Process Summary (Rev. December 2005), ¶1. The obligation to enforce the standards of conduct imposes defined limits on the Board’s discretion. In particular, *serious* violations of the professional standards that call directly on the Board’s responsibility to protect the public cannot go unaddressed. In this context, “enforce” means that the Board must investigate complaints and proceed to formal action when there is substantial evidence that a serious violation is likely to have occurred.

Selective enforcement based neither on evidence nor on law will fail to fulfill the Board’s duties. The Board acknowledges that its own Guidelines for Disciplinary Actions and Corrective Orders are grounded in the Board’s obligation to the public and its licensees to provide “for optimal levels of consistency and fairness in the determination of sanctions for a given violation.” Guidelines for Disciplinary Actions and Corrective Orders, *supra*, at 2. These guidelines recognize that some regulations, including ones alleged to have been violated in the Board Complaint, reflect more serious misconduct and historically have required the Board’s intervention through regulatory compliance/enforcement actions. *Id.* at 2, 5-7, 9, 15. In recognition of the more serious nature of these violations, the Board refers to minimum sanctions

⁵ See Ohio State Board of Psychology, State Board of Psychology Regulatory Compliance Handbook (Rev. 2002), ¶6 (indicating that formal action is appropriate where the investigation reveals “information suggesting that violations are likely to have occurred”), ¶¶2-3 (complaints are evaluated for “clarity, specificity, actual violation, and the authority of the Board of Psychology” and proceed past initial evaluation when “a complaint appears to allege a violation of ORC Chapter 4732.”).

⁶ See Guidelines for Disciplinary Actions and Corrective Orders, *supra*, at ¶2 (recognizing Board’s responsibility to protect public includes duty to “investigat[e] complaints regarding the professional conduct [of] Ohio’s Psychologists, and levy[] sanctions for violations”).

for psychologists found to have violated these provisions. *Id.* at 2. The Board defines a set of mitigating factors that allow departure from the guidelines if warranted by the circumstances, but should the Board make such a departure, it must specify these factors in its deliberations or negotiation of a consent agreement. *Id.* However, the Board's own disciplinary guidelines do not contemplate anything but formal action in response to these serious violations. See *id.*

Hand in hand with these duties, all members of the public have a clear legal right to file complaints.⁷ To ensure this right is upheld and to ensure that the Board fulfills its purpose to "provid[e] protections for the public and for consumers of psychological services," complaints must be investigated meaningfully and in good faith, and result in sanctions when appropriate. Guidelines for Disciplinary Actions and Corrective Orders, *supra*, at 2. According to the Board's own understanding of its purpose and its duties as well as the complainants' corresponding rights, the Board must be held "accountable to the public to appropriately sanction licensees who engage in misconduct, in an effort to foster the safe provision of psychological services and confidence in the profession." *Id.*

Here, as the Board is "accountable to the public," there are defined limits as to the permissible actions that the Board can take when presented with a well-substantiated complaint of serious violations. When complainants themselves can support their allegations with evidence indicating that a violation is likely to have occurred, they have a clear legal right to have their complaint be the subject of formal action in accordance with the Board's own procedures.

The facts of this case trigger the Board's duties and implicate the rights of Petitioners. The Board Complaint alleges that Dr. James committed misconduct while engaged in the

⁷ See, e.g., Ohio Adm. Code 4732-17-01(J)(4) (explicitly discussing psychologists' and "client's *right* to file a complaint") (Emphasis added); State Board of Psychology Regulatory Compliance Handbook, *supra*, at ¶1 (clarifying that "[a]n initial complaint may be received from a current or former patient/client of an applicant/psychologist/supervisee, from another professional (psychologist, physician, lawyer, etc.) or from a concerned citizen").

practice of psychology as defined by Ohio law. It further specifies violations of eighteen provisions of Ohio statutes and rules and provides over one thousand pages of supporting documentation, including admissions from Dr. James. Having received allegations of extraordinary and well-substantiated violations of norms within its jurisdiction, the Board's duties to investigate and proceed to formal action were triggered. Instead, the Board disregarded its obligations under Ohio statutes and its own rules when it refused to proceed to formal action on the basis of the Board Complaint. The Board dismissed the Board Complaint without explanation, thus violating the rights of the complainants to have their Board Complaint meaningfully considered.

II. IN ORDER TO ENSURE THAT THE COMPLAINANTS' RIGHTS AND THE BOARD'S DUTIES ARE MEANINGFUL, THE REGULATORY SCHEME MUST BE READ TO PROHIBIT ARBITRARY DISCRETION AND TO PROVIDE DEFINITE CRITERIA FOR THE GUIDANCE OF THE BOARD AND THE PROTECTION OF THE CITIZENS OF OHIO.

The statute and its corresponding regulatory scheme, in imposing the aforementioned duties on the Board, establishes clear limits and imposes definite criteria to guide the Board and constrain its discretion. Indeed, to read the statutory scheme differently, as endowing the Board with standardless discretion and the power to act arbitrarily, would be to deprive it of meaning. See *State ex rel. Selected Properties v. Gottfried*, 163 Ohio St. at 471 (finding statute cannot be read to give board "absolute and uncontrolled discretion" with lack of sufficient standards or criteria or enable it to "act on capricious rules of its own or * * * without any rules whatsoever"); *Thomas v. Mills*, 117 Ohio St. at 123 (finding statute "would be unconstitutional" if it gave agent of executive "power to act arbitrarily, and at mere whim").

Nothing in the law, statute, framework, or the Board's own understanding of its duties indicates that it has unbridled discretion. The Supreme Court of Ohio has noted that even "a

broad discretion * * * vested in administrative officers * * * does not permit a mere arbitrary choice.” *State ex rel. Hutton v. Indus. Comm.* (1972), 29 Ohio St.2d 9, 14, 278 N.E.2d 34. The General Assembly intended to constrain the Board’s action in order to effectively protect the public and the integrity of the profession, and the statute must be construed to give effect to this purpose. *Humphrys v. Winous Co.* (1956), 165 Ohio St. 45, 49, 133 N.E.2d 780 (“The primary duty of a court in construing a statute is to give effect to the intention of the Legislature enacting it.”). No other body has been entrusted with this important duty to oversee and regulate the practice of Ohio-licensed psychologists; the power to investigate ethical misconduct and grant, suspend, or revoke a psychologist’s ability to practice in Ohio is vested in this Board. The statute cannot be read to frustrate the legislature’s intent to provide oversight by permitting the Board to make arbitrary decisions that would indicate it had limitless discretion.

The statutory scheme grants the Board *bounded* discretion. The Board needs and enjoys some range of discretion. At the disciplinary stage, R.C. 4732.17(A) grants the Board some discretion to decide whether and how to discipline a psychologist after concluding formal proceedings. However, even that discretion is limited by the Board’s duty to enforce the rules consistently and fairly. *Guidelines for Disciplinary Actions and Corrective Orders*, at 2. Similarly, at the investigatory stage, the Board has the authority to dismiss frivolous complaints. However, it must investigate non-frivolous complaints, and those investigations must be meaningful and in good faith. The Board does not have discretion to undertake an inadequate, bad faith investigation nor to avoid an investigation altogether. Moreover, the statute cannot be read to allow the Board to arbitrarily dismiss *serious* allegations where there is evidence that the allegations are likely to have occurred and the Board has jurisdiction. No reasonable policy objective would be served by such a rule. Furthermore, the interpretation would not comport

with the Board's own disciplinary guidelines nor with the regulatory scheme's purpose in protecting the public. Therefore, the Court must read the statutory duties and rights, in accordance with the legislative purpose, to constrain the Board's ability to summarily dismiss complaints that have presented substantial evidence that serious violations are likely to have occurred.

The legislature intended to have a functioning regulatory regime by limiting the discretion of the Board. The Board's failure to proceed to formal action in this case constitutes a dereliction of duty that endangers the public, frustrates legislative intent, and fails to prevent injustice.

III. THE BOARD ABUSED ITS DISCRETION BY FAILING TO PROCEED TO FORMAL ACTION AND FAILING TO PROVIDE ANY REASONS FOR ITS DECISION.

On a petition for a writ of mandamus challenging the decision of an administrative agency, the Court reviews an agency's decision for abuse of discretion. *State ex rel. Schachter v. Ohio Pub. Emps. Ret. Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704, 905 N.E.2d 1210, at ¶24. Abuse of discretion "means an unreasonable, arbitrary, or unconscionable decision." *State ex rel. Pipoly v. State Teachers Ret. Sys.*, 95 Ohio St. 3d 327, 2002-Ohio-2219, 767 N.E.2d 719, at ¶14. The Court must find an abuse of discretion if the record indicates no basis in law or fact to support the agency's decision. See *State ex rel. Hutton v. Indus. Comm'n*, 29 Ohio St.2d at 14 ("where the record indicates no possible basis for the choice adopted except an arbitrary rejection of all pertinent evidence relating to the subject under consideration, an abuse of discretion has been shown"); see, also, *State ex rel. Mager v. State Teachers Ret. Sys. of Ohio*, 123 Ohio St.3d 195, 2009-Ohio-4908, 915 N.E.2d 320, at ¶¶12-17, 24 (finding that agency had ignored plain meaning of relevant statute and that record indicated petitioner was entitled to benefit).

Although the Board stated that it was “unable to proceed to formal action” (emphasis added) it provided no basis, in law or fact, to support this statement, most likely because there is no possible basis that would support such a dismissal. The Board ignored the law, which grants the Board authority and jurisdiction. The Board also ignored the substantial evidence of extraordinary violations presented in the Board Complaint. In these circumstances, the Board’s refusal to proceed to formal action is unreasonable, arbitrary, or unconscionable.

The Board’s failure to provide any reasons for its action, based in law or fact, is an independent abuse of discretion.

A. The Board abused its discretion by dismissing this case in complete disregard of the law and evidence.

1. The law clearly provides the Board with jurisdiction to proceed to formal action over the allegations in the Board Complaint.

The Board has jurisdiction over the allegations presented in the Board Complaint. The Board Complaint presents evidence of violations of Ohio statutes and Board rules that the Board has both the authority and duty to enforce. The Board also has jurisdiction because Dr. James engaged in the practice of psychology in his role as a senior psychologist at Guantánamo Bay, and the Board must examine the conduct of Ohio licensees and applicants while engaged in the practice of psychology, including prior conduct, conduct outside of Ohio, and conduct engaged in while serving in the military. Because the alleged conduct meets these conditions, the Board has the power and duty to investigate the Board Complaint and proceed to formal action.

The Board Complaint alleges violations of eighteen provisions of Ohio statutes and Board rules over which the Board has jurisdiction.⁸ The General Assembly enumerated some of

⁸ The Board Complaint alleged violations of the following provisions:

1. Good Moral Character, R.C. 4732-10(B)(2)
2. Negligence in the Practice of Psychology, R.C. 4732-17(A)(5)
3. Willful, Unauthorized Communication, R.C. 4732-17(A)(4)

these provisions in R.C. 4732, in furtherance of the duty it assigned to the Board to protect the public through the regulation of the profession. It also gave the Board the power to promulgate additional rules of professional conduct so that the Board could fulfill this broad duty. The Board has the power and duty to investigate alleged violations of these codified ethical standards and to proceed to formal action where the allegations are sufficiently substantiated.

The Board has not disputed that Dr. James was engaged in the practice of psychology while engaging in the conduct that gave rise to the violations. As a senior psychologist at Guantánamo Bay, Dr. James provided “service[s] involving the application of psychological procedures * * * to the assessment * * * of psychological adjustment or functioning.” R.C. 4732.01(B). He did so by applying psychological “principles, methods, [and] procedures of understanding, predicting, or influencing behavior.” R.C. 4732.01(C). These included “principles pertaining to * * * interviewing, counseling, behavior modification, [and] environmental manipulation.” *Id.* Dr. James and those allegedly under his command and supervision studied and sought to influence the detainees’ responses to specific techniques and environmental conditions. As Dr. James admits, his team even evaluated detainees by reviewing their medical information prior to interrogation. Furthermore, Dr. James admits to supervising both the treatment and interrogation of three juveniles less than fifteen years of age.

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4. Negligence, Ohio Adm.Code 4732-17-01(B)(1)
 5. Misrepresentation of Affiliations, Ohio Adm.Code 4732-17-01(B)(3)
 6. False/Misleading Public Statements, Ohio Adm.Code 4732-17-01(B)(3)(c)
 7. Conflict of Interest, Ohio Adm.Code 4732-17-01(C)(1)
 8. Dependency, Ohio Adm.Code 4732-17-01(C)(4)
 9. Welfare of the Client-Informed Choice, Ohio Adm.Code 4732-17-01(C)(5)
 10. Prohibited Multiple Relationships, Ohio Adm.Code 4732-17-01(E)(2)(a)(ii)
 11. Confidentiality, Ohio Adm.Code 4732-17-01(G)
 12. Preventing Client Identification, Ohio Adm.Code 4732-17-01(G)(1)(b)
 13. Limiting Access to Client Records, Ohio Adm.Code 4732-17-01(G)(1)(d)
 14. Former Client Confidentiality, Ohio Adm.Code 4732-17-01(G)(1)(e)
 15. Safeguarding Confidential Information, Ohio Adm.Code 4732-17-01(G)(2)(d)
 16. Notice of Limits of Confidentiality, Ohio Adm.Code 4732-17-01(G)(2)(e)
 17. Use of Fraud, Misrepresentation, or Deception, Ohio Adm.Code 4732-17-01(I)(2); and
 18. Reporting Violations to Board, Ohio Adm.Code 4732-17-01(J)(4).

Additionally, the Board's jurisdiction over Dr. James's conduct is not limited to conduct after licensure. In order to fulfill its statutory duty to determine if an applicant or licensee is of "good moral character," the Board must inquire into past actions. Only thus can the Board determine if the applicant or licensee shows "a *pattern of behavior* conforming to a profession's ethical standards and showing an absence of moral turpitude." (Emphasis added.) *Staschak v. State Med. Bd. of Ohio*, No. 03AP-799, 2004-Ohio-4650, at ¶28; R.C. 4732.10(B)(2). The Board cannot maintain the integrity of its licensing process if it disregards evidence that its applicants or licensees engaged in grave professional misconduct prior to licensure in Ohio.

To fully effectuate the regulatory scheme, the Board must not limit itself to examining conduct inside the state. Neither Ohio law nor the Board rules limit the Board's jurisdiction to conduct in Ohio; indeed, both authorities state that the rules of professional conduct apply "whenever psychological services are being provided *in any context*." (Emphasis added.) Ohio Adm.Code 4732-17-01(A)(2). The Board also must review out-of-state conduct in the context of evaluating "good moral character," especially for out-of-state applicants. R.C. 4732.10(B)(2). The Revised Code expressly acknowledges the relevance of out-of-state conduct through its mandate that the Board discipline licensees or applicants for convictions by other state courts. R.C. 4732.17(A)(1).

Similarly, the fact that Dr. James committed these violations during his service in the military does not exempt these actions from the Board's jurisdiction. The military relies on the state professional boards to license, regulate, and sanction the conduct of military health professionals,⁹ and requires that these boards are active in investigating and acting upon reports of misconduct "regardless of the practitioner's military status or residency."¹⁰

⁹ This requirement is enumerated in 10 U.S.C. § 1094 as well as Department of Defense Regulations. *Department of Defense Regulation* 6025.13, "Medical Quality Assurance (MQA) in the Military Health System (MHS)" ¶5.2.2.2

Ignoring repeated opportunities to do so, the Board never raised to Petitioners any concern regarding jurisdiction or its power to investigate the Board Complaint. Petitioners nevertheless presented evidence and supplemental briefing on the Board's jurisdiction, see Exhibit 4, Complainants' Supplemental Jurisdictional Submission To the Ohio State Board of Psychology Complaint against Larry C. James (Nov. 24, 2010), to which the Board never responded except to acknowledge receipt. The Board's decision to dismiss the Board Complaint gives no indication that lack of jurisdiction was the reason for dismissal, and indeed, jurisdiction is appropriate in this case.

2. Petitioners presented the Board with substantial evidence that serious violations are likely to have occurred, thus triggering the Board's duty to proceed to formal action against Dr. James.

The meticulously documented, fifty-page Board Complaint contained substantial evidence of conduct by a licensee that, if proven, would plainly constitute professional misconduct under Ohio statutes and rules. Petitioners presented the Board with over one thousand pages of documentation to support the Board Complaint, drawing from reports, records, and hearings from the U.S. military, Senate, Department of Justice, and the Central Intelligence Agency as well as Dr. James's own public admissions and statements from witnesses and survivors. Dr. James admits that he was a member of the Behavioral Science Consultation Team [hereinafter "BSCT"], Bd. Compl. at ¶3, and had the authority to set BSCT policy, Id. at ¶5. According to the Department of Defense, the BSCT used their psychological and mental health training and applied psychology and behavioral science to evaluate detainees

(May 4, 2004) (requiring that health professionals "have and maintain a current, valid, and unrestricted license . . . in accordance with the issuing authority, before practicing within the defined scope of practice for like specialties.")

¹⁰ The Department of Defense, in a regulation implementing the police guidance promulgated in the Directive cited above, defines a healthcare license as "valid" only if "[t]he issuing authority [for that license] accepts, investigates, and acts upon quality assurance information, such as practitioner professional performance, conduct, and ethics of practice, regardless of the practitioner's military status or residency." Department of Defense Regulation 6025.13-R, "Military Health System (MHS) Clinical Quality Assurance (CQA) Program Regulation" ¶DL1.1.23.2 (June 11, 2004).

and exploit their vulnerabilities for use in interrogations. Id. at ¶14, fn. 38 (citing Memorandum from Kevin C. Kiley, Army Surgeon General, to Commanders, MEDCOM Major Subordinate Commands, Behavioral Science Consultation Policy (Oct. 20, 2006) (on file with author)). John Leso, the first BSCT psychologist declared that “[a]ll aspects of the [detention] environment should enhance capture shock, dislocate expectations, foster dependence, and support exploitation to the fullest extent possible.” Id. at ¶8. Dr. James also describes an incident where he witnessed an interrogator and three prison guards wrestle a man, whom they forced to wear pink women’s panties and lipstick and a wig, to the floor. Id. at ¶¶37-42. Dr. James admits that he did not immediately intervene and instead “opened [his] thermos, poured a cup of coffee, and watched the episode play out * * * .” Id. at ¶39. Dr. James additionally admits to using his treatment relationship with his child patients to exploit them for intelligence purposes. “There was no mistaking our intentions,” he explained in his book. “We needed these boys to talk to us and we established a program that would help us get to know them and encourage them to trust us.” Id. at ¶47. The evidence strongly supports a finding that Dr. James, through the practice of psychology, abused and exploited detainees at Guantánamo Bay.

The Board Complaint includes evidence of specific instances of Dr. James’s misconduct, derived from admissions in his 2008 memoir, that independently warrant formal action by the Board. For example, the Board Complaint documents that Dr. James disclosed confidential patient information in his memoir and alleges that, in doing so, he indisputably breached his ethical obligations. Id. at ¶¶86-90.

Finally, the Board Complaint alleges and documents how, through statements Dr. James made to the Board in his licensure application, and to the public in his memoir and elsewhere, Dr. James misrepresented his behavior and the nature of his service at Guantánamo, conduct that

constitutes additional grounds for formal action. Id. at ¶¶52-53. In fact, in his original licensure application to the Board, Dr. James omits any reference to his position at Guantánamo, even though the Board required “a complete list of all psychological training and work experience.” Id. at ¶53.

Dr. James published these statements and made them publicly available. On their face, these admissions constitute textbook cases of breach of confidentiality and misrepresentation. In light of this clear evidence of a serious violation, the Board was statutorily obligated to proceed to formal action.

At no point has the Board given any indication that there is some deficiency in this evidence. In addition to the evidence supplied in the Board Complaint, at a meeting with the representatives of the Board on September 30, 2010, Petitioners repeatedly offered to address any of the Board’s questions, provide additional evidence, or provide witness testimony. Compl. at ¶52. The Board’s representatives insisted that they had no questions and declined Petitioners’ offers. Id. Faced with this substantial body of credible evidence, the Board had a duty to proceed to formal action against Dr. James and their decision not to do so constitutes an abuse of discretion.

3. The Board’s failure to proceed to formal action was unreasonable, arbitrary, or unconscionable because it had no basis in law or fact, and thus constituted an abuse of discretion.

At no point has the Board given any indication that there is a deficiency with either its jurisdiction or the evidence it received. Despite Petitioners’ repeated offers, the Board never asked a legal or evidentiary question to Petitioners, nor did it solicit any additional information or witnesses from Petitioners. Instead, the Board merely issued a cursory letter in which it stated, without explanation, that the Board Complaint had been dismissed. Letter from Carolyn

Knauss, Investigator, State Board of Psychology of Ohio, to Beth Collis, Attorney, Collis, Smiles & Collis (Jan. 26, 2011). While the Board has the authority to dismiss cases where it does not have jurisdiction, here jurisdiction is firmly established. See Section III.A.1, *supra*. Furthermore, while the Board must be allowed to dismiss frivolous or unsubstantiated cases, in this instance there is substantial evidence of not just serious but *extraordinary* violations that are supported by a credible and voluminous body of evidence, including admissions by the licensee to conduct which, on its face, constitutes violations of the Ohio laws and rules governing psychology. See Section III.A.2, *supra*. Therefore, the Board's dismissal of Petitioners' complaint could not possibly have been based on insufficient evidence or on lack of jurisdiction.

Given the substantial evidence and admissions detailed in the Board Complaint, as well as the Board's undisputed jurisdiction, the Board's failure to proceed to formal action must be considered an abuse of discretion. In light of the Board's duties to Petitioners and to the public, its decision to refrain from proceeding to formal action must be grounded in reasons of law or fact. However, faced with substantial evidence of serious misconduct that falls within its jurisdiction to discipline, the Board dismissed the Board Complaint without grounding its decision in either. As the record indicates, no possible basis exists for the dismissal except an arbitrary rejection of all the evidence, meaning that the Board's decision is a clear abuse of discretion. See *Hutton*, 278 N.E.2d at 37. To allow the Board to hide behind discretion in this case would remove any safeguard against arbitrary conduct, a result not permitted by the regulatory scheme. This abuse of discretion not only frustrates the legislative intent in defining the duties of the Board, but also violates Petitioners' right to a meaningful review of their Board Complaint and ignores the threat to public safety.

B. The Board's failure to provide any reasons for its dismissal was an independent abuse of discretion.

The Board abused its discretion again when it refused to provide any reasons for its decision not to proceed to formal action against Dr. James. Unable to justify its dismissal of the Board Complaint on any legal or evidentiary basis, the Board's dismissal letter provided no explanation at all. Letter from Carolyn Knauss to Beth Collis, *supra*. In this way, the Board has sought to use vague and obfuscating language to avoid its clear legal duty to proceed to formal action.

The Ohio Supreme Court has used the writ of mandamus to require an agency to provide reasons for its decisions when that agency's failure to adequately state the basis for its decisions threatens to mask an abuse of discretion. See *State ex rel. Noll v. Indus. Comm. of Ohio* (1991), 57 Ohio St.3d 203, 205-06, 567 N.E.2d 245. This approach has been extended to agency decisions even where there was no explicit statutory requirement that the decisions be explained. See *State ex rel. Ochs v. Indus. Comm.* (1999), 85 Ohio St.3d 674, 676, 710 N.E.2d 1126. In these cases, the Court was principally concerned with the fact that it was dealing with "real live human beings who have suffered an industrial injury," and the Court refused to adopt a rule that would allow the agency to rely on boilerplate language or vagueness in explaining its actions, for fear that "justice and fairness would be lost." *State ex rel. Noll v. Indus. Comm. of Ohio*, 57 Ohio St.3d at 206, 210.

The Board, having no basis in law or evidence upon which to dismiss this case, was unable to articulate a reason for the dismissal. The Board's letter, which constituted its sole response to Petitioners, denies Petitioners' right to have their complaint be the subject of formal action, and provides no reason for this denial. Like in *Noll*, the case at hand stems from the grave injuries suffered by real live human beings, and these injuries—arguably some of the

gravest that human beings can suffer—merit at least an explanation from the Board as to why it has deemed itself unable to act. See *State ex rel. Pipoly v. State Teachers Ret. Sys.*, 95 Ohio St.3d 327, 2002-Ohio-2219, 767 N.E.2d 719, at ¶22 (requiring showing of “comparable need” to that present in *Noll* in order to extend explanation requirement). At stake here are the same notions of justice and fairness that motivated the *Noll* decision. The Board has not disputed that Petitioners submitted substantial evidence that its licensee used his training and license in the healing arts to cause profound harm to another human being. Nor has the Board disputed that such actions constitute misconduct as defined by the statute and rules it has the authority and duty to enforce. To allow the Board to ignore the weight of this evidence and refuse to proceed to formal action, without so much as an explanation, would be to enshrine in the law a zone of impunity and ignore the statutory intent of creating a system to regulate the profession and protect the public. Justice requires that the Board be made to explain its decision in this context.

IV. THERE IS NO ADEQUATE REMEDY IN THE ORDINARY COURSE OF LAW, AND THUS A WRIT OF MANDAMUS SHOULD BE GRANTED.

Petitioners have no adequate remedy at law. Under Ohio law, there is no inherent right to appeal; rather, the right to appeal must be derived from a constitutional or statutory right. *City of Willoughby Hills v. C.C. Bar's Sahara, Inc.* (1992), 64 Ohio St.3d 24, 26, 591 N.E.2d 1203. The statutory scheme governing the Board provides a right of appeal for any party “adversely affected” by the Board’s decisions, but it limits that right to those decisions “issued pursuant to an adjudication hearing.” Ohio Adm.Code 4732-17-03(B)(6). In this case, the Board dismissed the Board Complaint during the investigative process without ever conducting the adjudication merited by the Board Complaint, effectively depriving Petitioners of a right of appeal. The availability of an appeal is strictly limited to the terms of the statute, see *Ramsdell v. Ohio Civil Rights Comm.* (1990), 56 Ohio St.3d 24, 27, 63 N.E.2d 285, and there is no statutory right of

appeal for complaints that are dismissed without an adjudication. The Board should not be able to evade judicial review of its decisions simply by refusing to proceed to formal action when there are established duties for investigation and action by the Board, and when substantial evidence of abuse has been presented in a complaint, such as this one.

Without the availability of a constitutional or statutory appeal and thus no adequate remedy of law, Petitioners' request for a writ of mandamus is proper. The writ of mandamus has historically been used as a way for courts to grant petitioners relief in extraordinary circumstances of injustice. In English common law, the writ of mandamus was created "not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial, tending to the breach of peace, or oppression of the subjects, or to the raising of faction, controversy, debate, or to any manner of misgovernment; so that no wrong or injury, either public or private, can be done, but that it shall be (here) reformed or punished by due course of law." *James Bagg's Case*, (1615) 77 Eng. Rep. 1271 (K.B.), 1277-78; 11 Co. Rep. 93 b, 98 a. Lord Mansfield remarked that the writ "ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there *ought* to be one." *R v. Barker*, (1762) 97 Eng. Rep. 823 (K.B.) 825-26; 3 Burr. 1265, 1267 (Emphasis added).

U.S. courts have utilized the writ of mandamus in this tradition for many years, and Ohio courts continue to uphold the practice by granting writs to petitioners when they have no other adequate remedy at law to obtain the relief justice demands. The Ohio Supreme Court has found that a writ of mandamus should be issued to correct the "justice and fairness * * * lost" with an agency's arbitrary action, without regard for the "additional work" the decision demands from the agency. *State ex rel. Noll v. Indus. Comm. of Ohio*, 57 Ohio St.3d at 206; see also *State ex*

rel. Mitchell v. Robbins & Myers, Inc. (1983), 6 Ohio St.3d 481, 483, 453 N.E.2d 721 (granting a writ of mandamus to correct the increasingly prevalent agency practice of dismissal without providing reasons, causing injustice to individuals). The writ of mandamus allows courts to intervene to ensure that agencies do not abuse their discretion, that petitioners' claims are heard in some forum, and that injustice is corrected. The injustice in this case calls for a writ of mandamus. The Board ignored its legal duties and Petitioners' rights. The law recognizes such wrongs and injuries and solely through a writ of mandamus will justice be served.

CONCLUSION

The Board has failed to fulfill its legal duty to regulate the profession of psychology and protect the public. The Board has violated the clear legal rights of Petitioners and placed the public at risk. Petitioners have no legal remedy for this violation of their rights, and their only recourse is to seek the writ of mandamus to correct this abuse of discretion. For the reasons set forth above, Petitioners respectfully request that the Court order the Board to proceed to formal action against Dr. James or alternatively, to fully investigate the allegations documented in the Board Complaint, and additionally fully explain any decision not to proceed to formal action.

