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STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 530-10-19 Wncv

In Re: Person Doe,
Petitioner

v.

Non-Applicable,
Defendant

Opinion and Order on Motion to Enforce and Motion to Quash Subpoena

“Person Doe” has filed a motion to enforce a subpoena *duces tecum* to the Office of Professional Regulation (OPR). In turn, OPR has filed a motion to quash the subpoena. For the following reasons, the Court agrees that the subpoena must be quashed.

Background

The essential facts are as follows. OPR opened an investigation of Doe in multiple dockets. Doe was informed of the allegations and submitted responses to those allegations. Doe’s counsel here also represents Doe in those proceedings. OPR has informed Doe that the investigations are ongoing and that no decision has been made as to whether to charge Doe with any disciplinary violation.

Doe’s counsel served a subpoena upon OPR attempting to obtain documents concerning the ongoing investigations of Doe. He has also filed a motion to enforce the subpoena in light of OPR’s failure to produce the requested investigatory files.

He asserts that Section 129 of Title 3 authorizes the subpoena. OPR has filed a motion to quash the subpoena arguing that there is no authority allowing a licensee that is being investigated to obtain OPR's investigatory file— at least in the absence of charges being filed against him or her.

Analysis

The Court does not believe 3 V.S.A. § 129(a)(2) supports Doe's subpoena request. Section 129(a)(2) states:

In addition to any other provisions of law, a board may exercise the following powers:

* * *

(2) Issue subpoenas and administer oaths in connection with any authorized hearing, investigation, or disciplinary proceeding. Subpoenas may be issued ex parte by the chair of the board, the Director, or any attorney representing a party. Depositions may be taken after charges upon due notice to all parties without specific authorization by the board.

While Doe's counsel maintains that he is an "attorney representing a party," the Court believes the Legislature chose the word "party" with care. To be a party to an OPR proceeding presupposes that an OPR proceeding has been initiated. In this case, the opposite is true. It is undisputed that the investigation of Doe remains open, and no disciplinary action has been instituted against Doe. As a result, Section 129 does not grant authority to Doe's counsel to issue subpoenas.

That conclusion is reinforced by the confidentiality provisions of 3 V.S.A. § 131. The Legislature stated its purpose in drafting that section was:

“both to protect the reputation of licensees from public disclosure of unwarranted complaints against them, and to fulfill the public’s right to know of any action taken against a licensee when that action is based on a determination of unprofessional conduct.” In cases, where no charges have been filed, such as this one, the Legislature allowed the Secretary of State to reveal only generic and anonymous information about complaints made against a professional. *Id.* § 131(c)(1). The law makes plain that: “Neither the Secretary nor [OPR] shall make public any other information regarding unprofessional conduct complaints, investigations, proceedings, and related records except the information required to be released under this section.” *Id.* §131(d).

The statute also addresses how those ultimately charged with unprofessional actions are to obtain records concerning the underlying investigation. Section 131(e) expressly provides that the “discovery rules ... shall apply to and govern the provision of investigatory files those charged with unprofessional conduct.”

Taking those provisions together, the Court believes any subpoena power under Section 121 arises only in the event Doe becomes a party to a disciplinary action, and, at that juncture, the scope of any discovery of the investigatory file would be governed by the civil rules governing discovery, *id.* § 131(e). While the Court understands Doe’s desire to obtain information

regarding the allegations, allowing Doe the type of access sought at this stage is in direct conflict with Section 131.¹

WHEREFORE, Doe's motion to enforce is denied, and OPR's motion to quash is granted.

Dated this __ day of December 2019 at Montpelier, Vermont.

Timothy B. Tomasi,
Superior Court Judge

¹ Doe's citation of generic administrative law provisions is insufficient to overcome the specific laws discussed in the text. In any event, those provisions are also limited to those with party status.