

STATE OF VERMONT
WASHINGTON COUNTY

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SUPERIOR COURT
WASHINGTON COUNTY

PETER A. LAKATOS, D.M.D.)
Plaintiff,)
v.)
OFFICE OF PROFESSIONAL)
REGULATION, VERMONT)
SECRETARY OF STATE,)
Defendant.)

Washington Superior Court
Docket No. 588-10-06 Wncv

DECISION
Plaintiff's Motion for Writ of Mandamus
Defendant's Motion to Dismiss

In a separate case, Plaintiff Peter A. Lakatos, D.M.D., appealed to this court from a decision of the Board of Dental Examiners concluding that Dr. Lakatos committed unprofessional conduct and sanctioning him. Concluding that the Board failed to follow statutorily required procedures and failed to provide due process, the court vacated the Board's decision and remanded for a new hearing. The case is on appeal to the Vermont Supreme Court. In this separate case, Dr. Lakatos seeks Rule 75 review of governmental action and damages for defamation: he requests a mandamus compelling the Office of Professional Regulation (OPR) to remove from its website any reference to the vacated Board decision, and he claims that the manner in which OPR has posted information on its website regarding the disciplinary proceedings is misleading and amounts to defamation.

The parties have briefed the mandamus issue and OPR's motion to dismiss the defamation claim. Oral argument was heard on January 10, 2007. Plaintiff is represented by Attorney Kaveh S. Shahi. Defendant is represented by Assistant Attorney General Eve Jacobs-Carnahan.

Rule 75 Petition for Relief in the Nature of Mandamus

Dr. Lakatos seeks relief from OPR's refusal to remove an electronic copy of the vacated Board decision from its website. See Letter from Kaveh Shahi to Robert Backus (dated Aug. 1, 2006). OPR has declined to remove the Board's decision from the website, explaining that it will be removed if it is "dismissed" by the prosecuting attorney or a final decision on appeal; otherwise it will remain posted. That is, in no event will OPR remove the Board decision from the website while the disciplinary case remains pending before the Supreme Court. See Letter from Christopher Winters to Kaveh Shahi (dated Aug. 21, 2006); Letter from Robert Backus to Kaveh Shahi (dated Aug. 2, 2006).

There is no statutory right of review available to Dr. Lakatos in these circumstances. Dr. Lakatos' request is for relief in the nature of mandamus under Rule 75. See V.R.C.P. 81(b) (abolishing the extraordinary writs). OPR argues first that this court should not address the Rule 75 issue because Dr. Lakatos failed to raise it in a timely manner. See V.R.C.P. 75(c) (requiring the complaint to be filed within 30 days after notice of action or refusal to act). OPR urges that the 30-day period began to run on the date of the letter from Christopher Winters to Kaveh Shahi, August 21, 2006. In that letter, Christopher Winters explained the basic rationale for posting the Board decision, affirmed OPR's view that the posted information is "correct," and invited Attorney Shahi to "feel free to write to me directly if you have any further questions or concerns." Attorney Shahi then wrote to Attorney Backus seeking permission to contact Christopher Winters directly and expressly citing the "need to have a definitive answer to the August 1, 2006 demand." Letter from Kaveh Shahi to Robert Backus (dated Aug. 23, 2006). Apparently receiving no response to the Attorney Shahi's August 23 letter, Dr. Lakatos initiated this case on October 2, 2006. The court concludes that these circumstances suggest too uncertain a "refusal" to trigger the 30-day filing period of Rule 75(c); the six-month filing period applicable to a "failure to act," which Dr. Lakatos met, applies instead. The court therefore will address the mandamus issue.

Relief in the nature of mandamus is available only in the following circumstances: "(1) the petitioner must have a clear and certain right to the action sought by the request for a writ; (2) the writ must be for the enforcement of ministerial duties, but not for review of the performance of official acts that involve the exercise of the official's judgment or discretion; and (3) there must be no other adequate remedy at law." *Town of Victory v. State*, 174 Vt. 539, 544 (2002) (quoting *In re Fairchild*, 159 Vt. 125, 130 (1992)). Dr. Lakatos fails to meet the first element of this claim, a clear and certain right, and thus the court does not address the second and third elements.

At the January 11, 2007 hearing, the parties agreed that OPR's website now contains the same information that OPR considers to be public pursuant to 3 V.S.A. § 131. It did not when the suit was filed. Specifically, at the time of filing, a person visiting the website would have web access to the Board decision disciplining Dr. Lakatos, but not to the Superior Court decision vacating it and remanding to the Board for a new hearing. Now, a web visitor has access to both decisions. In any event, Dr. Lakatos' Rule 75 claim is not based on differences that previously existed between what information OPR considers public and what information OPR makes electronically available on its website, but an overall claim that the Board decision should be confidential pursuant to 3 V.S.A. § 131 regardless of the medium of public access.¹

The issue, then, is whether Dr. Lakatos has a clear and certain right to the confidentiality of the Board decision. Section 131 makes meetings and hearings of professional boards generally open to the public, and controls what information related to disciplinary proceedings is confidential or publicly accessible. It reflects the legislature's effort to balance the need for protection of "the reputation of licensees from public disclosure of unwarranted complaints

¹ At oral argument, Plaintiff's attorney raised the new issue that the manner of presentation currently on the website suggests that the license may be "conditioned" or "suspended" despite the fact that it is described as "ACTIVE." Plaintiff's letter of August 1, 2006 requesting OPR action did not include a request to change this aspect of the web information, and thus it is not subject to review in this action.

against them” with the “public’s right to know of any action taken against a licensee when that action is based on a determination of unprofessional conduct.” 3 V.S.A. § 131(a). The general rule is that all information related to a disciplinary proceeding is confidential unless expressly made public under § 131. 3 V.S.A. § 131(d).

The filing of disciplinary charges automatically renders certain information public. *Id.* § 131(c)(2). That information includes the identities of the licensee and complainants; the charges; the board’s decision; hearing transcripts and exhibits; stipulations filed with the board; and the “final disposition of the matter by the appellate officer or the courts.” *Id.* § 131(c)(2)(A)–(F).

Dr. Lakatos argues that the Superior Court decision, which vacated the Board decision, renders the Board decision confidential under § 131(d). His position is that it should be treated as if it did not happen. However, the statutory trigger rendering the Board decision a public record was the filing of disciplinary charges. 3 V.S.A. § 131 expressly makes both the Board decision and final disposition public, as well as transcripts, stipulations, and exhibits. This reflects a legislative intent that the public record includes all information about intermediate events between the filing of charges and the final disposition of the case. No provision of § 131 provides otherwise. The policy of public accountability of the Board itself also supports this interpretation of the statute.

Dr. Lakatos has not demonstrated a “clear and certain” right to the confidentiality of the vacated Board decision. Therefore, his Rule 75 petition for mandamus relief is denied.

The Defamation Claim – Motion to Dismiss

Dr. Lakatos also claims that the manner in which the vacated Board decision and other details of the disciplinary case are—or were—posted on OPR’s webpage is intentionally misleading, harmful to his professional reputation and business, and amounts to defamation for which he seeks damages. OPR has filed a motion to dismiss this claim, arguing that the State has not waived sovereign immunity. Applying 12 V.S.A. § 5601(e)(1), OPR argues that the defamation claim is barred because it 1) is based upon execution of a statute, and 2) is based upon a discretionary function of the agency. OPR also argues that even if sovereign immunity is not shown, the defamation claim nevertheless should be dismissed because the information posted to OPR’s website is “true,” ostensibly a complete defense to a defamation claim. None of these arguments on the current record, in the posture of this case, supports dismissal.

At the outset, the court rejects Dr. Lakatos’ argument that the legislature’s 1989 amendment to 12 V.S.A. § 5601(e)(6), eliminating “libel, slander” from the list of torts for which the state per se does not waive sovereign immunity, means that the state necessarily does waive sovereign immunity for a defamation claim. The 1989 amendment makes a defamation claim against the state possible, but the § 5601(e)(1) exceptions to the waiver of immunity nevertheless apply.

As OPR argues, sovereign immunity applies to acts of an employee of the state “in the execution of a statute or regulation, whether or not such statute or regulation is valid.” 12 V.S.A.

§ 5601(e)(1). However, that immunity is qualified by the requirement that the execution of the statute must be carried out with “due care.” *Id.* As Dr. Lakatos argues, “due care” implies a factual inquiry and is not appropriately resolved, in the circumstances of this case, in a motion to dismiss. The court cannot conclude that Plaintiff could not show a lack of due care. *Association of Haystack Property Owners v. Sprague*, 145 Vt. 443 (1985).

OPR also argues that sovereign immunity applies because the decision to post the vacated Board decision and other information on the website is a “discretionary function.” The Vermont Supreme Court has adopted the federal two-part discretionary function test. *Estate of Gage v. State*, 2005 VT 78, ¶ 5, 178 Vt. 212. The first step is determining whether a “statute, regulation, or policy specifically prescribes a course of action for the employee to follow.” *Id.* If not, and the action required judgment or choice, then the first step is met: the action is discretionary. The second step is determining whether the discretion exercised is the type the discretionary function exception protects. *Id.* Satisfaction of the second step is presumed unless the plaintiff adequately shows that the exercise of discretion did not involve protected policy considerations. *Id.*

Dr. Lakatos’ claim based on OPR’s web-posting is not simply the fact that the vacated decision appears on the web, but also that the posting, in the context of the other information appearing there, is misleading in a manner that defames him. The current factual record is insufficient to support a determination that the allegedly misleading configuration of information posted on the website is the result of discretion under the first step of the discretionary function test. Even if it is, Dr. Lakatos should be afforded some opportunity to develop the facts with regard to whether the discretion exercised should be protected as a “discretionary function.” These issues cannot be resolved, in the circumstances of this case, on a motion to dismiss.


OPR also argues that the defamation claim fails because the information posted to the website is “true.” This argument simply fails to acknowledge the factual scope of Dr. Lakatos’ claim, which is based primarily on the allegation that what is posted is intentionally misleading and defamatory: it leads the public to believe that the Board decision is currently in effect when it is not, as it has been vacated. That critical information is not (or has not always been) included in electronically available information. The “truth” is not complete. This presents a factual inquiry not appropriately resolved in a motion to dismiss.

ORDER

For the foregoing reasons,

1. Dr. Lakatos’ Rule 75 petition for review of governmental action is *denied*, and
2. OPR’s motion to dismiss the defamation claim is *denied*.

Dated at Montpelier, Vermont this 18th day of January, 2007.



Mary Miles Teachout
Superior Court Judge