

**IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO**

Donald F. Bowers, D.D.S., et al.,	:	
	:	
Plaintiffs/Relators,	:	Case No. 99CVH-10291
	:	
v.	:	Judge R. Sheward
	:	
Ohio State Dental Board, et al.,	:	
	:	
Defendants/Respondents.	:	

PLAINTIFFS’/RELATORS’ MEMORANDUM CONTRA MOTION TO DISMISS

I. INTRODUCTION

Donald F. Bowers, D.D.S. (“Bowers”) and Jefferson Jones, D.D.S. (“Jones) (hereinafter referred to collectively as Plaintiffs”) filed the present action against the Ohio State Dental Board (the “Board”) and its members, Donald E. Demkee, DDS; Stuart Silverman, DDS; William J. Lightfoot, DDS; Eleanore Awadalla, DDA; Benjamin F. Marsh, Esq.; Lynda L. Sabat, RDH; and Edward Hills, DDS (hereinafter referred to collectively as “Defendants”). Their Complaint challenges the failure of the Defendants to properly promulgate administrative rules or regulations designating the dental examinations that the Board will accept for licensure within the State of Ohio. The Board has failed to promulgate any formal rule which specifically identifies the dental examinations that the Board will accept for purposes of dental licensure pursuant to R.C. §§4715.11 and 4715.15. The provisions of R.C. §4715.11 set forth the general requirements for an examination of an applicant for initial licensure in Ohio, while the provisions of R.C. §4715.15 set forth the general requirements for an examination for the licensure of an individual previously licensed in another state. The Board has promulgated no rule relative to R.C. Chapter 4715.11, but has promulgated an invalid rule relative to R.C. §4715.15.

The Plaintiffs’ Complaint seeks a declaratory judgment, injunctive relief and/or a writ of mandamus requiring the Board to comply with the requirements of R.C. §119.02. The

Defendants have filed a Motion to Dismiss raising three specific arguments. The Defendants assert that the matter must be dismissed because: (1) the Court lacks subject matter jurisdiction pursuant to Civ. R. 12(B)(1); (2) the Complaint fails to state a claim upon which relief can be granted pursuant to Civ. R. 12(B)(6); and (3) the Plaintiffs lack standing to invoke the Court's jurisdiction. The Board's motion requests dismissal of the mandamus and declaratory judgment claims.

II. ARGUMENT OF LAW

A. BOWERS CAN MAINTAIN AN ACTION IN MANDAMUS.

In order to grant a writ of mandamus, the court must find that the relator has a clear legal right to the relief prayed for, that the respondent is under a clear legal duty to perform the requested act, and that the relator has no plain and adequate remedy at law. *State ex rel., Hodges v. Taft* (1992), 64 Ohio St.3d 1, 3. The court must also determine that the person is beneficially interested in the case in order to grant a writ of mandamus. *State ex rel., Spencer v. East Liverpool Planning Commission* (1997), 80 Ohio St.3d 297, 299. Bowers' claim falls squarely within the requirements for a writ of mandamus.

1. Bowers has Standing to Maintain an Action and Mandamus.

Initially, Defendants raise the issue of whether Bowers has standing to pursue a claim in mandamus. Although Defendants' Memorandum contains a long discussion regarding Bowers' status as an employee of the Ohio State University College of Dentistry, the Complaint clearly alleges that Bowers is bringing this suit as a taxpayer and citizen of the State of Ohio. (Complaint ¶1). It is further alleged that Bowers has an additional beneficial interest because of his concern as the Director of Admissions of the Ohio State University College of Dentistry. However, there is no suggestion that he was acting in his official capacity when filing the present

matter. Thus, Bowers standing to pursue the present claim must be analyzed relative to his status as a citizen and a taxpayer of the State of Ohio.

The Defendants cite several cases which outline the general proposition that a relator must have a beneficial interest in order to pursue an action in mandamus. The most recent case cited by the Defendants for this proposition is *State ex rel. Moskowitz v. Dickerson* (1961), 172 Ohio St. 551. The Defendants inexplicably ignore several recent cases which have discussed the specific topic of a taxpayer's standing in cases which do not involve a direct expenditure of public funds. In *State ex rel. Spencer*, the Ohio Supreme Court determined that a resident of the City of East Liverpool had a beneficial interest in requiring that city's planning commission to strike an illegal plat which had been filed. The Court held that Spencer's status as a resident was sufficient for him to enforce a duty that was for the benefit of the public regardless of any particular benefit to Spencer individually. The Court stated:

The court of appeals also erred in denying the writ because Spencer "has not shown where the denial of mandamus will cause any wrong or injury to [him]." A person must be beneficially interested in the case in order to bring a mandamus action. *State ex rel v. Ehrnfelt* (1993), 67 Ohio St.3d 132, 133, 616 N.E.2d 237; R.C. 2731.02. A person's status as a taxpayer is generally sufficient to establish a beneficial interest when the object is to compel performance of a duty for the benefit of the public. *State ex rel. Hodges v. Taft* (1992), 64 Ohio St.3d 1, 4, 591 N.E.2d 1186, 1189; *State ex rel. Pressley v. Indus Comm.* (1967), 11 Ohio St.2d 144, 40 O.O.2d 141, 228 N.E.2d 631, paragraph 9 of the syllabus. Residents are normally taxpayers. *State ex rel. Nimon v. Springdale* (1966), 6 Ohio St.2d 1, 6, 35 O.O.2d 1, 3, 215 N.E.2d 592, 596. Therefore, Spencer's allegation in his complaint that he is a resident of East Liverpool conferred sufficient standing on him to bring the mandamus action.

Id. at 299.

Although the Court's conclusion in *Spencer* is clearly dispositive of the issue of Bowers' standing, the Ohio Supreme Court "has long taken the position that when the issues sought to be litigated are of great importance and interest to the public, they may be resolved in a form of action that involves no right or obligations peculiar to named parties." *State ex rel. Ohio*

Academy of Trial Lawyers v. Sheward (1999), 86 Ohio St.3d 451, 471. The decided weight of authority supports the proposition that where the relief is sought merely for the protection of private rights, the relator must show some personal or special interest in the subject matter, since he is regarded as the real party in interest and his rights must clearly appear. *State ex rel. Ohio Academy of Trial Lawyers*, at 472. On the other hand, where the question is one of a public right and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party in interest, and the relator need not show that he has any legal or special interest in the result, it being sufficient that he is a citizen, and as such, is interested in the execution of the law. *Id.* at 472.

The fact that a party is a citizen and taxpayer of the State of Ohio is sufficient to demonstrate a beneficial interest in the acts of a public official of the State. *State ex rel. Hodges*. Bowers' unchallenged averment in the Complaint is sufficient to demonstrate a beneficial interest in that he is a citizen and taxpayer of the State.

2. **Bowers has a Clear Legal Right to Relief and the Defendants are Under a Clear Legal Duty to Perform the Requested Act.**

Bowers' Complaint alleges that the Board has failed to properly promulgate regulations pursuant to R.C. Chapter 119. (Complaint ¶3). The Defendants state that, "Plaintiffs failed to cite any authority creating a legal duty on the Board to enact regulations regarding R.C. 4715.11." (Defendants' Memorandum, p. 10). To the contrary, Bowers specifically alleges that the Defendants have a clear legal duty to establish by formal ORC Chapter 119 rule promulgation procedures, which dental licensure examination(s) dentists seeking a dental license in Ohio must take and pass in order to obtain a dental license in Ohio pursuant to ORC §4715.11 and/or ORC §4715.15. (Complaint ¶15). Specifically, the language of 4715.11 reads as follows:

An applicant for a license to practice dentistry shall appear before the State Dental Board at its first examination meeting after the filing of his

application, and pass an examination consisting of practical demonstrations and/or written or oral tests, or both, as the board determines necessary.

In lieu of the examination required by this section, the State Dental Board may accept and approve a certificate granted to an applicant as the result of the examination given by the National Board of Dental Examiners, or other boards, subject to such conditions as the State Dental Board may prescribe.

An applicant who graduates from a credited dental college after January 1, 1972, shall take the examination given by the National Board of Dental Examiners and submit the result thereof to the State Dental Board.

In order to determine the examinations which will be acceptable to the Board, the Board is required to promulgate an administrative rule effectuating its decision pursuant to R.C. Chapter 119. The Board has determined by policy not rule that it will accept only one regional board examination. That policy is a standard that applies to all individuals seeking licensure in Ohio. Pursuant to R.C. Chapter 119, a rule includes any rule, regulation, or standard having a general and uniform operation, adopted, promulgated and enforced by an agency under the authority of the laws governing such agency. R.C. §119.01(C). Every agency authorized by the law to adopt, amend, or rescind rules must comply with the procedures set forth in R.C. §119.01 to 119.13. R.C. §119.02. Failure of the agency to comply with the procedures invalidates any rule which was not properly adopted. R.C. §119.02.

In *Condee v. Lindley* (1984), 12 Ohio St.3d 90, the Ohio Supreme Court invalidated a uniform policy adopted by the Department of Taxation which was being utilized for the apportionment of public utility personal property taxes. The court stated:

The rule-making requirements set forth in R.C. Chapter 119 are designed to permit a full and fair analysis of the impact and validity of a proposed rule. We cannot determine in good faith, solely on the basis of the appellant commissioner's brief in the instant case, that the "70-30" formula is an equitable and valid rule. If the commissioner desires to continue application of the policy in question, only compliance with R.C. Chapter 119 and R.C. 5703.14 may permit him to do so.

Conley v. Lindley, at 93.

In addition, this Court has already determined that a properly promulgated rule is necessary for the implementation of the provisions of R.C. §4715.15. See *Jefferson W. Jones, D.D.S. v. Ohio State Dental Board*, Case No. 97CVF055499 (a copy of which is attached hereto). The Board does not have any authority to treat the implementation of R.C. §4715.11 differently. An administrative agency or board may not act by administrative fiat. The sole method by which the uniform policy or standard may be applied is through the promulgation of a specific rule pursuant to R.C. Chapter 119.

Accordingly, the Board has a clear legal duty to promulgate an appropriate rule in order to implement the provisions of R.C. §4715.11.

3. Bowers does not Have an Adequate Remedy at Law.

Bowers' Complaint includes three separate requests for relief. Those requests are for a declaratory judgment, injunctive relief or a writ of mandamus. The State has vigorously argued that there is no entitlement to the declaratory judgment. If the State is correct, Bowers only relief may be through mandamus.

It should be noted, however, that the mere fact that the declaratory judgment is a possible remedy, a writ of mandamus may still be granted. The availability of an action for declaratory judgment does not bar issuance of a writ of mandamus when the relator demonstrates a clear legal right to it, although the availability of a declaratory judgment may be considered by the court is an element in deciding whether a writ should be issued. *State ex rel. Hodges; State ex rel. Fenske v. McGovern* (1984), 11 Ohio St.3d. 120, paragraph 2 of the syllabus.

B. JONES CAN MAINTAIN AN ACTION IN MANDAMUS.

The Complaint clearly demonstrates that Jones can pursue a claim in mandamus. The Board has failed to properly promulgate a rule even after this Court issued an order requiring the Board to do so. Thus, mandamus is an appropriate remedy to enforce the failure of the Board to perform its required duties.

1. Jones has Standing to Maintain an Action in Mandamus.

The Defendants challenge Jones' right to pursue a mandamus action relating to R.C. §4715.11. The Defendants do admit that Jones has standing to pursue an action pursuant to R.C. §4715.15. Certainly, this is consistent with Jones' claims throughout the Complaint in which he claims only a beneficial interest relative to the implementation of R.C. §4715.15.

2. **Jones has a Clear Legal Right to Relief and the Defendants are Under a Clear Legal Duty to Perform the Requested Act.**

Jones was involved in an action relating to an order denying licensure that was issued on May 5, 1997. The attached decision clearly indicates that the Board had failed to promulgate any rule that specifically identifies the examination for licensure which would be accepted by Board. Consequently, the Court ordered the Board to promulgate a specific rule designating the examinations which would be accepted by the Board. The Board rebuffed the Court by adopting OAC §4715-5-03 which simply states that the Board will designate the examinations it deems acceptable **BY A VOTE OF THE BOARD AT ITS FIRST MEETING IN EACH CALENDAR YEAR**, but may **ALSO** amend the list by a vote of the Board at any time.

Unfortunately, the adopted rule is inconsistent with the clear finding in the *Jones* case.

The Court stated:

The record in this matter does not reflect Appellant would have been denied a license if the board had not effected the change of policy towards regional or national examinations. It is not the intent of the Court to find that the Board could not properly enact a rule which made a regional or national examination the only type of "similar dental board examination" which would be acceptable. However, the board may not do so under the position of a policy without properly promulgating that policy under the guidance of R.C. 119.01 *et seq.*

Jones, at 4.

The Board promulgated a rule which essentially allows the Board the freedom to do what the Court prohibits. It enacted a rule which did not indicate the examinations which would be acceptable, but simply stated that the Board would inform individuals as to the acceptable exams at any time the Board chose to designate an examination as acceptable. This is no rule at all. Therefore, the Board has never complied with this Court's order.

3. Jones Does not have an Adequate Remedy at Law.

Jones respectfully requests a writ of mandamus ordering the Board to follow the appropriate procedures to identify and designate those examinations which are appropriate. This Court's order required the designation, by rule, of the acceptable examinations. The Board argues that Jones can appeal if he is dissatisfied. However, until the Board complies with the original order, Jones is not required to tread the same path that led him to the Court originally. See *State ex rel. Olander v. Ohio Environmental Protection Agency* (1989), 45 Ohio St.3d 196. Jones is entitled to a writ of mandamus to enforce this Court's order, prior to attacking any further action by the Board. *Id.* at 197-198.

C. THE PLAINTIFFS ARE ENTITLED TO MAINTAIN CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF.

Plaintiffs are seeking declaratory and injunctive relief. The declaratory relief they seek is for a declaration that the Defendants have acted unlawfully by specifying by policy as opposed to formal regulation which licensure examinations the Board will accept. The Plaintiffs seek a declaration that this action is unlawful and violates the clear requirements of R.C. Chapter 119 and §§4715.11 and 4715.15. The Plaintiffs further seek an injunction prohibiting the Defendants from continuing to enforce their unlawful policy of accepting only the NERB regional dental examination, and to accept all regional dental examinations for the purpose of initial dental licensure as they did prior to April, 1997. These two issues are being discussed together because these issues are intertwined.

The Defendants claim that the Plaintiffs cannot pursue a claim for declaratory judgment because no controversy exists between the parties. They also claim that Jones is not entitled to a declaratory judgment because he is required to pursue his dispute through administrative proceedings. A true controversy exists because Bowers as a dentist, a professor, a resident of the state of Ohio, and an administrator of dental education is affected by the unlawful conduct of the

Defendants' improper implementation of the requirements for dental licensure. Jones a dentist seeking licensure in Ohio, is affected by the Board's improper establishment of the dental examination that he needs to satisfy to become licensed to practice dentistry in Ohio.

The Plaintiffs challenge the validity of the Defendants' creation of testing requirements by policy, as opposed to formal rule making. The Defendants have refused to rectify the situation, even after being specifically ordered to do so by this court in the *Jones* case. It is futile to pursue this claim administratively. If Jones is required to reapply and return to the Courts for relief he will have received no relief from his prior case. The Board will destroy Jones' claims through attrition. Thus, declaratory relief and a writ of mandamus are Jones' only relief.

III. CONCLUSION

In accordance with the foregoing memorandum Donald F. Bowers, D.D.S. and Jefferson Jones, D.D.S. respectfully request that this Court overrule the Defendants' Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served on Robert C. Angell, Assistant Attorney General, Health and Human Services Section, 30 E. Broad St., 26th Floor, Columbus, Ohio 43215-3428 by regular U.S. mail on the ____ day of March, 2000.

Kevin L. Shoemaker

