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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CAHN Justice

PART 49

KALPANA PATEL, MD

- v -

COMMISSIONER OF NY STATE DEPT OF HEALTH

INDEX NO. 116677/07

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/14/08

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 49

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In the Matter of the Petition pursuant to CPLR Article 78 of KALPANA PATEL MD,

Petitioner,

-against- Index No. 116677/07

RICHARD F. DAINES MD in his official capacity as Commissioner of New York State Department of Health; *et al.*,

Respondents.

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HERMAN CAHN, J.:

Petitioner Kalpana Patel, M.D., moves for an order: (1) preliminarily enjoining respondents from charging her with professional misconduct and with a violation of Education Law § 6530 (28) for her alleged failure to respond to respondents' contested demands for production of certain medical records; and (2) preliminarily enjoining respondents, pending a hearing and determination of the underlying proceedings and the relief sought in the verified petition, from acting with respect to the claimed threats and demands for medical records set forth in respondents' letters.

Respondents cross-move to dismiss the petition, CPLR 3211 (a) (2) and (a) (7) and CPLR 7804 (f).

Background

The legal controversy at issue arises from, and is fully set forth in, the exchange of correspondence described below.

Respondent, New York State Department of Health, Office of Professional Management

Conduct (OPMC)[1] (by Carolyn Zemko, Senior Medical Conduct Investigator) wrote petitioner, on November 9, 2007, stating that OPMC was investigating a complaint filed with it against her, and that OPMC was requesting that petitioner send to it a "**complete certified copy** of the medical record" of eleven identified patients (emphasis in original). The letter further stated that the response, due by November 26, 2007, should include "physician's notes and orders, laboratory tests, medication sheets, billing records, and all other documents in the patient file."

By an eight-page letter, dated November 20, 2007, counsel for petitioner, Jacques Simon, Esq., responded to OPMC's November 9, 2007 letter, setting forth in detail petitioner's substantive and procedural objections to OPMC's request, on statutory and common-law grounds: procedurally, that the request failed to grant at least 30 days in which petitioner had to respond, allegedly in violation of Education Law § 6530 (28) and 8 NYCRR 29.1, and, substantively, that the request lacked specificity, and failed to state the relevancy of the demand of the medical records of eleven patients as it relates to the subject matter of the investigation. Petitioner requested further information, such as identifying the specific issues being investigated, and specifying the exact portions of the medical records being sought. Petitioner also requested 30 days from the receipt of such request for disclosure within which to comply with what then would be a specific request for relevant medical records.

OPMC sent a second letter to petitioner (rather than to her attorney) dated November 26, 2007, essentially repeating the request set forth in the November 9, 2007 letter, but affording petitioner 30 days in which to comply, and stating that failure to do so may constitute a violation

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[1] OPMC is a branch of the New York State Department of Health responsible for investigating and monitoring misconduct (*Matter of Michaelis v Graziano*, 5 NY3d 317 [2005]).

of Education Law § 6530 (28).

Counsel for petitioner, Simon, again responded, by letter dated November 27, 2007, making a "second request for the information sought" in the prior letter of November 20, 2007, and noting that OPMC's November 26, 2007 letter "adds a new dimension," namely, holding "above my client's head the disciplinary provisions of Education Law § 6530 (28) along with the time constraints of the same," while at the same time failing to provide her with the information necessary to comply with the request.

By letter dated November 28, 2007, this time addressed to Simon rather than to petitioner, Kevin C. Roe, Esq., associate counsel for OPMC, stated that he was following up on the prior letters from OPMC, and that OPMC was investigating the entire care provided to the named patients of petitioner. Therefore, complete medical records were necessary. He also stated that he did not believe that Simon's objections and requests for further information regarding the investigation had merit.

The following day, Simon sent Roe a letter, "to further memorialize and summarize the substance" of their prior day's telephone conference, i.e., that OPMC would not comply with the request for additional information as to the investigation, and that the failure to comply will be deemed a violation of Education Law § 6530 (28), and that it would proceed to charge petitioner with such violation. Simon reiterated that the failure to provide the additional information would impede petitioner's ability to comply with the "black letter" of Education Law § 6530 (28), and he again sought to have OPMC reconsider its position.

On November 30, 2007, Roe wrote to Simon, stating that Simon's summary of their conversation was inaccurate in that choosing not to provide the records *may* constitute a violation

of Education Law § 6530 (28), and that petitioner would be afforded the full protections and safeguards provided by Public Health Law § 230. This proceeding ensued.

As set forth in the petition, and as described above, petitioner objects to the fact that respondents are investigating the "entire care" that she provided to eleven named patients, over a five-year period, for different ailments with different medical and diagnostic modalities. Allegedly, the medical records for all of these patients exceed 2,500 pages, and they encompass a variety of ailments and treatments that are neither specified nor identified in any of respondents' demands. Without this, petitioner argues, she does not know which relevant part of the medical records she should release.

The petition demands judgment against respondents as follows: (1) directing respondents to disclose to petitioner all of the information sought in Simon's letters of November 20, 2007 and November 27, 2007 pertaining to the demand for medical records, including (a) the scope of the inquiry as it relates to the purported complaint that OPMC has received and is purportedly investigating, (b) a copy of the complaint that OPMC is purportedly investigating, (c) the purported "professional misconduct" of petitioner that respondents are purportedly investigating, and (d) the necessity for disclosure of the entire medical records of the eleven named patients and the relevancy of the same; (2) adjudicating the demand of medical records contained in Zemko's letters of November 9, 2007 and November 26, 2007, and the failure to respond to petitioner's request for additional information; (3) adjudicating the threats of professional misconduct contained in Zemko's and Roe's letters; and (4) enjoining respondents from acting outside their legal obligations.

Petitioner argues that respondents must make a showing of legitimate purpose for the

request of medical records, and that such information be disclosed to the investigated physician upon a challenge and demand by the physician.

Respondents argue that: (1) the proceeding should be dismissed because petitioner has no legal right to the information that she seeks and petitioner has not exhausted her administrative remedies; and (2) petitioner has not satisfied any of the requirements for a preliminary injunction.

Discussion

One who objects to the acts of an administrative agency must exhaust available administrative remedies prior to litigating the issue in a court of law (*Martinez 2001 v New York City Campaign Fin. Bd.*, 36 AD3d 544 [1st Dep't 2007]). This rule need not be followed when the agency's action is challenged as either unconstitutional or wholly beyond its grant of power, when resort to an administrative remedy would be futile, or when its pursuit would cause irreparable injury (*id.* at 548).

Respondents argue that petitioner has failed to exhaust her administrative remedies because the investigation is in its preliminary stages, and, in the event that the preliminary investigation determines that further investigation is warranted, petitioner will be afforded an opportunity for an interview to provide an explanation of the issues under investigation and to participate in hearings to determine if any misconduct has occurred.

Respondents have not identified, however, any administrative remedies that are available to petitioner to challenge the method of investigation (rather than the results of the investigation), and the reality is that she may eventually be charged with a violation of Education Law § 6530 (28) for failing to comply with the document request. Indeed, OPMC itself noted that petitioner's failure to comply may constitute a violation of Education Law § 6530 (28). Contrary

to respondents' contention, that petitioner's conduct *may* constitute, rather than *will* constitute, a violation of Education Law § 6530 (28), provides little comfort to the recipient of such potentially coercive communication. Thus, the matter is ripe for review because the proceeding purports to impose an obligation on petitioner, and the failure to comply could result in actual injury (*Matter of Gordon v Rush*, 100 NY2d 236, 242 [2003]; *Matter of Essex County v Zagata*, 91 NY2d 447, 453 [1998]).

Moreover, in other related actions, the Court of Appeals adjudicated the merits of the dispute pertaining to the obligation to comply with OPMC's investigation (*see, e.g.*, *Matter of Shankman v Axelrod* (73 NY2d 203 [1989] [challenge to OPMC's warrant authorizing it to inspect premises, question patients, and remove and copy records]; *Matter of Michaelis v Graziano* (5 NY3d 317, 322 [2005] [challenge to OPMC's transmittal to the medical doctor/petitioner of a "Directors' Order of Comprehensive Review of Patient and/or Office Records," stating that it determined that evidence existed of a pattern of inappropriate medical practice, advised petitioner that an OPMC staff person would visit the office to select a number of patient records for copying, and advised that failure to comply with the order would constitute professional misconduct within the meaning of Education Law § 6530 [15]).

As for the merits, petitioner is not entitled to the broad disclosure sought in her petition, i.e., directing respondents to disclose to petitioner (a) the scope of the inquiry as it relates to the purported complaint that OPMC has received and is purportedly investigating, (b) a copy of the complaint that OPMC is purportedly investigating, (c) the purported "professional misconduct" of petitioner that respondents are purportedly investigating, and (d) the necessity for disclosure of the entire medical records of the eleven named patients and the relevancy of the same.

An administrative agency is "clothed with those powers expressly conferred by its authorizing statute as well as those required by necessary implication" (*Matter of Shankman v Axelrod*, 73 NY2d at 206). Generally, respondents have the power to request patient records pursuant to Public Health Law § 230 (10) (a) (i) which provides, in part:

> The board for professional medical conduct, by the director of the office of professional medical conduct, may investigate on its own any suspected professional misconduct, and shall investigate each complaint received regardless of the source.

Thus, the director of the office of professional medical conduct is charged with the duty of investigating every complaint received and has the authority to launch the investigation *on its own*. That it has this power is buttressed by Public Health Law § 230 (10) (l) which provides, in part:

> The board or its representatives may examine and obtain records of patients in any investigation or proceeding by the board acting within the scope of its authorization.

Petitioner is not entitled to the information sought at this stage of the investigation (*see Matter of Michaelis v Graziano* (5 NY3d at 322 [when a physician makes a good faith objection to a comprehensive medical review (CMR), OPMC will not be able to charge a physician with misconduct arising from the failure to comply with the CMR order unless it first establishes the propriety of the CMR in a section 230 (10) (o) proceeding]). Here, there has not been any charge of misconduct levied against petitioner. OPMC is merely conducting a preliminary review to determine if there is any merit to the complaint warranting further investigation.

Among the disclosures that petitioner seeks is a copy of the complaint that OPMC is purportedly investigating. Petitioner would be entitled to notice of any issues identified prior to the time that OPMC brings charges relating to those issues, but she is not entitled to it prior to

producing the disclosure sought (*id.*).

Nevertheless, petitioner's objection to the investigation is not entirely without merit. OPMC, by its letters dated November 9, 2007 and November 26, 2007, stated only that it was investigating a complaint filed with it against her. As found by the Court of Appeals in *Matter of Levin v Murawski* (59 NY2d 35, 41 [1983]), that "the State Board is required to 'investigate each complaint received regardless of the source' (Public Health Law, § 230, subd 10, par [a]) does not serve to dispense with the necessity for such a preliminary showing" (i.e., prima facie proof of a justifiable basis for a good faith investigation of professional misconduct). Although *Matter of Levin v Murawski* involved the issuance of a subpoena, which has not been issued here, the Court of Appeals made it clear that the requirement of a "preliminary showing" is not limited only to situations involving issued subpoenas. The information that OPMC seeks is similar to that sought by some subpoenas (*see Matter of New York City Dep't of Investigation v Passannante*, 148 AD2d 101, 106 [1st Dep't 1989]). In *Matter of Levin v Murawski* the Court of Appeals stated further:

> What is required when investigation is triggered by receipt of a complaint is a threshold showing of the authenticity of the complaint as warranting investigation, not a threshold substantiation of the charges made in the complaint. Verification of the authenticity of the complaint addresses the propriety of undertaking the investigation and can be made without the disclosure sought by a subpoena

(59 NY2d at 41). The Court of Appeals stated that what it characterizes as a "minimal showing" of the authenticity of the complaint will necessarily vary from case to case:

> It may relate to the reliability of the complainant; it may be shown by the substance of the complaint. Specific detail as to identification of the complainant, some evidence of his good faith or reliability, disclosure of the basis for his knowledge of the substance of the complaint, with dates to establish its currency, and some revelation

> of the substance of the complaint will normally suffice, *but all or most of this data may not be necessary*. Sufficient authenticating detail may be found in the complaint itself; if not, it must be independently supplied (emphasis added)

(*id.* at 42).

As is the case here, the Court of Appeals objected to the fact that the only showing offered by the State Board was a "bare recital of the receipt of 'a complaint,'" with no identifying or authenticating detail, and it emphatically noted that "[t]his will not suffice" (*id.*) (*see also Matter of Shankman v Axelrod*, 73 NY2d at 207 [OPMC not entitled to medical records of six additional patients without a minimal threshold showing that the complaint is authentic and that it is of sufficient substance to warrant investigation]; *Matter of New York City Dep't of Investigation v Passannante*, 148 AD2d at 105 [complaint's authenticity may be found in the substance of the complaint itself or it can be independently supplied]).

To be sure, respondents may have performed this initial (albeit even if minimal) preliminary review, but the court cannot ascertain this from the papers (*cf. Matter of Brasky v City of N.Y. Dep't of Investigation*, 40 AD3d 531 [1st Dep't 2007]). Thus, the matter is remanded to OPMC for further action or clarification of whether it performed an initial review of the complaint triggering the investigation, consistent with this decision.

Finally, petitioner has not demonstrated an entitlement to a preliminary injunction. To be so entitled, petitioner must demonstrate: (1) a probability of success on the merits, (2) irreparable injury absent injunctive relief, and (3) a balancing of the equities weighing in its favor (*Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]).

Petitioner has not demonstrated irreparable injury absent injunctive relief. Petitioner seeks an order enjoining respondents from charging her with professional misconduct and a

violation of Education Law § 6530 (28), but petitioner is not presently facing any such charges. Furthermore, that the Court previously denied the request for a temporary restraining order, combined with the remand being directed, renders the request moot.

Accordingly, it is

ORDERED that the request for a preliminary injunction is denied; and it is further

ORDERED and ADJUDGED that the petition is granted to the extent that this matter is remanded to the New York State Department of Health, Office of Professional Management Conduct for the sole purpose of authenticating the complaint filed against petitioner, as set forth in the foregoing decision; and it is further

ORDERED that the cross motion to dismiss the petition is denied.

Dated: July 14, 2008

ENTER:

J.S.C.