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

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In the matter of the Complaint of STEVEN REISNER,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

Index No. 115400-2010

- against -

LOUIS CATONE, Director of the New York Office of Professional Discipline, New York State Department of Education; THE OFFICE OF PROFESSIONAL DISCIPLINE of the New York State Department of Education; and THE NEW YORK STATE DEPARTMENT OF EDUCATION,

Respondents.

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MEMORANDUM OF LAW IN SUPPORT OF THE RESPONDENTS' CROSS-MOTION TO DISMISS THE VERIFIED PETITION

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Introduction

Respondents Louis Catone, Director of the New York Office of Professional Discipline, New York State Department of Education ("Catone"); the Office of Professional Discipline of the New York State Department of Education ("OPD"); and the New York State Department of Education ("NYSED"), by their counsel Attorney General Eric T. Schneiderman, submit this memorandum in support of their cross-motion to dismiss the Verified Petition ("Petition"), pursuant to CPLR §7804(f), for lack of standing and failure to state a cause of action.

Briefly stated, this proceeding arises from a complaint petitioner Steven Reisner made to the NYSED in its capacity as the State agency responsible for conducting disciplinary proceedings against various professionals in New York State, alleging that Dr. John Francis Leso, a psychologist licensed by New York State, committed professional misconduct while employed by the U.S. Department of Defense eight years ago "in designing, implementing, and participating in a system of abusive interrogations at the United States Naval Station at Guantanamo Bay, Cuba" (Petition, ¶ 16). The OPD, a unit within the NYSED which investigates misconduct by licensed professionals including psychologists, declined to open an investigation based on petitioner's complaint because it found that the conduct alleged did not constitute the practice of psychology as defined by New York State (Petition, Exhibit 2). Petitioner then brought this proceeding seeking an order of mandamus requiring the respondents to conduct an investigation of Dr. Leso.

As discussed hereinafter, this proceeding must be dismissed because (1) petitioner does not have standing to seek the relief he requests, and (2) the Petition fails to state a cause of action for mandamus.

Regulatory Background

The NYSED and the Commissioner of Education, its chief administrative officer, administer the practice of professions in New York State under the supervision of the Board of Regents (Education Law §§ 101, 6506-8). The OPD is the NYSED administrative unit "responsible for the investigation, prosecution and determination of alleged violations of professional conduct" (Id., § 6507[h]).

Education Law § 6510(1)(b) provides that the NYSED "shall investigate each complaint which alleges conduct constituting professional misconduct."

Under Education Law § 6509(2), professional misconduct includes "[p]racticing the profession fraudulently, beyond its authorized scope, with gross incompetence, with gross negligence on a particular occasion or negligence or incompetence on more than one occasion." Regulations promulgated under Education Law § 6509(9) provide that unprofessional conduct also includes "conduct in the practice of a profession which evidences moral unfitness to practice the profession" (8 NYCRR § 29.1[b][5]); "performing professional services which have not been duly authorized by the patient or client or his or her legal representative" (8 NYCRR § 29.1[b][11]); "willfully harassing, abusing or intimidating a patient either physically or verbally" (8 NYCRR § 29.2[a][2]); and "ordering of excessive tests, treatment, or use of treatment facilities not warranted by the condition of the patient" (8 NYCRR § 29.2[a][7]).

The practice of psychology is statutorily defined in New York State by Education Law § 7601-a, which provides that:

> 1. The practice of psychology is the observation, description, evaluation, interpretation, and modification of behavior for the purpose of preventing or eliminating symptomatic, maladaptive or undesired behavior; enhancing interpersonal relationships, personal, group or organizational effectiveness and work and/or life adjustment; and improving behavioral health and/or mental health. The practice includes, but is not limited to psychological (including neuropsychological) testing and counseling; psychoanalysis; psychotherapy; the diagnosis and treatment of mental, nervous, emotional, cognitive or behavioral disorders, disabilities, ailments or illnesses, alcoholism, substance abuse, disorders of habit or conduct,

the psychological aspects of physical illness, accident, injury or disability, psychological aspects of learning (including learning disorders); and the use of accepted classification systems.

2. The term "diagnosis and treatment" means the appropriate psychological diagnosis and the ordering or providing of treatment according to need. Treatment includes, but is not limited to counseling, psychotherapy, marital or family therapy, psychoanalysis, and other psychological interventions, including verbal, behavioral, or other psychological interventions, including verbal, behavioral, or other appropriate means as defined in regulations promulgated by the commissioner.

(Added L.2002, c. 676, Sec. 3, eff. Sept. 1, 2003).

Factual Background

1. Petitioner's Complaint To The NYSED

Petitioner, a psychologist licensed by New York State, filed a complaint against Dr. Leso with the NYSED's Office of Professions on July 7, 2010 (Petition, ¶ 16; Affirmation of Taylor Pendergrass, dated November 24, 2010, Ex. 1 [hereinafter "Pet. Comp."]). Petitioner annexed various documents to his complaint, including reports by the United States Senate Armed Services Committee and the Department of Defense ("DOD") (Petition, ¶ 16; Pet. Comp., Ex. 9 and 20). Based on the documents he annexed, petitioner alleged that "Dr. Leso was employed by the DOD as the ranking psychologist on the Behavioral Science Consultation Team ("BSCT"), a team of mental health professionals, at the U.S. detention facility at Guantanamo from approximately June 2002 to January 2003," that as "Clinical Psychologist" his mission was to "[p]rovide behavorial science consultation in

support of [the] GTMO interrogation mission," and that he "relied on his New York psychologist licensure in order to hold this position" (Petition, ¶ 17).

Petitioner alleged that Dr. Leso (a major in the U.S. military) committed "numerous instances of serious misconduct and abuse . . . in his professional capacity as a psychologist," including: (a) "Dr. Leso in October 2002 prepared and presented a memorandum to Guantanamo commanders and advisors proposing three categories of interrogation techniques to be employed sequentially or in combination, each category representing a different level of severity in cruelty," (b) Dr. Leso stated that "psychological stressors such a sleep deprivation, withholding food, isolation, and loss of time were 'extremely effective' and recommended employing fear-based approaches and other 'psychological stressors,'" (c) "Dr. Leso recommended applying psychological methods of abuse to detainees, including sleep deprivation 'non-injurious physical consequences,' removal of clothing, exposure to cold, threats, prolonged isolation, and sensory deprivation," (d) Dr. Leso "actively supervised the implementation of these techniques and, on at least one occasion, personally participated in their application to a detainee," and (e) Dr. Leso was present for the interrogation of detainee Mohammed al Qahtani, when "dogs were used to torment him, when he was forcibly injected with fluid causing his limbs to swell, when he was sleep deprived, when he was denied prayer, and when, as a result, he was evidencing behavior consistent with extreme psychological trauma . . . In this context, Dr. Leso advised interrogators on how to keep Mr. al Qahtani awake, disoriented, and vulnerable" (Petition, ¶ 19; Pet. Comp. at p. 3).

Petitioner further alleged that "Dr. Leso established a provider-patient relationship with those detainees on whom he applied treatments in order to modify their behavior [and that his] patients included the population of detainees who were subjected to his treatments, those detainees whose interrogations [he] personally supervised while his techniques were applied, and those detainees for whom [he] prescribed specific interventions in the course of interrogation, including Mohammed al Qahtani" (Petition, ¶ 21).

Petitioner claimed that "New York Education Law [7601-a] defines the practice of psychology as 'the observation, description, evaluation, interpretation, and *modification of behavior* for the purpose of preventing or eliminating symptomatic, maladaptive or undesired behavior . . . Dr. Leso used his training in psychology to design interrogation techniques that manipulate the psychological condition of a detainee, induce Stockholm syndrome in the detainee, and modify the detainee's behavior for the purpose of eliminating undesired, uncooperative behavior and in turn make the detainee more susceptible to interrogation. The use of this training constitutes the practice of psychology, pursuant to New York Education Law 7601-a" (Pet. Comp. at p. 23) (emphasis added by petitioner).

Petitioner conceded that Dr. Leso was never reprimanded for his conduct at Guantanamo by either the U.S. military, the American Psychological Association, or the State of New York (Pet. Comp. at p. 1). Nor has petitioner alleged that the U.S. Department of Justice or any other governmental agency has reprimanded Dr. Leso, or even made a complaint to the respondents about his conduct.

Petitioner's complaint annexed extracts from a report by the Senate Armed Services Committee, entitled "Inquiry Into The Treatment Of Detainees In U.S. Custody ("Senate Report") which stated that the Committee "reviewed more than 200,000 pages of classified and unclassified documents" and "interviewed over 70 individuals in connection with its inquiry" (Pet. Comp., Ex. 9 at p. viii). There is no indication therein that the Senate Committee found fault with Dr. Leso for his role in the Guantanamo interrogations. Moreover, the Senate Report indicated that the use of aggressive interrogation techniques on Guantanamo detainees was approved at the highest levels of government (see id. at p. xiii: "Presidential Order Opens the Door to Considering Aggressive Techniques", and p. xix: "Secretary of Defense Rumsfeld Approves Aggressive Techniques").

Petitioner also annexed a report by the U.S. Army entitled: "Army Regulation 15-6: Final Report. Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility" (Dated April 1-9, 2005) (Pet. Comp. Ex. 20). The Executive Summary of the Army's report stated that although "[d]etention and interrogation operations at Joint Task Force Guantanamo (JTF-GTMO) cover a three-year period and over 24,000 interrogations," its investigation "found only three interrogation acts in violation of interrogation techniques authorized by Army Field Manual 34-52 and DOD guidance" (id at p. 1). The U.S. Army found that those acts "did not rise to the level of being inhumane treatment," and it did not hold Dr. Leso responsible for them (id).

2. The OPD's Response

In response to petitioner's complaint, OPD Director Catone advised petitioner by letter, dated July 28, 2010, that the allegations in his complaint provided "no legal basis for instituting an investigation into Dr. Leso's activities while in the military service of the United States" (Pet. Comp., Ex. 2 ["Catone letter"], at p. 1). The Catone letter stated that under the definition of psychology established by Education Law § 7601-a, it did not appear "that any of the conduct complained of constitutes the practice of psychology as understood in the State of New York" (Id., at p. 2). It further stated that "there does not appear to have been any therapist-patient relationship between Dr. Leso and any of the Guantanamo detainees," and that the statutory phrase "modification of behavior for the purpose of . . . eliminating . . . undesired behavior" referred to treatment of a patient and did not apply to the conduct petitioner alleged (id). Additionally, the Catone letter stated that because Dr. Leso's alleged conduct did not constitute the practice of psychology, he could not be found guilty of practicing the profession with gross negligence, incompetence or "engaging in conduct in the practice of the profession evidencing moral unfitness to practice," etc., as defined by Educ. Law § 6509(2) and (9) (id).

Director Catone further explained in his letter that the military's requirement "that one hold a particular professional license as a condition of obtaining a position . . . without more, does not mean that some or all of the activities performed for that employer constitute the practice of a profession" and "[t]he fact that Dr. Leso may have possessed special knowledge gained through his

education, training, and/or experience as a psychologist that made him useful to the military in developing interrogation techniques does not mean that Dr. Leso's conduct in that regard constituted the practice of psychology" (Id. at p. 2).

Finally, OPD Director Catone stated that "I appreciate that there is a considerable difference of opinion among reasonable people as to whether some of the interrogation techniques utilized on detainees at Guantanamo Bay were appropriate. But it is not within this Office's purview to express an opinion on that issue. We are limited to investigating instances of possible professional misconduct by licensees, and your complaint simply does not allege facts that show that the complained-of conduct constituted the practice of psychology as understood by the State of New York" (Catone letter at p. 2).

By letter to Director Catone dated August 26, 2010, petitioner's attorneys sought reconsideration of the determination, claiming among other things that Dr. Leso's "numerous professional abuses" included "directing interrogators to use techniques that were in the best interest of the U.S. military, rather than the detainees" (Petition, ¶ 28). Their request stated that "[w]e appreciate your concern that it is not within the purview of [OPD] to express an opinion as to whether some of the interrogation techniques utilized on detainees at Guantanamo Bay were appropriate, and we have not requested that of you" (Pendergrass Aff., Ex. 3 at p. 8). It nevertheless stated that "[s]ince the Complaint details multiple instances in which, in his capacity as a professional psychologist, Dr. Leso crossed the line and

committed misconduct, [the OPD] must investigate" (id). Reconsideration was denied (Petition, ¶ 30).

ARGUMENT

POINT I

PETITIONER LACKS STANDING TO SUE FOR THE RELIEF DEMANDED IN THIS PROCEEDING

1. Petitioner Has Not Alleged The Necessary "Injury In Fact" In Order To Confer Standing

Standing is "an aspect of justiciability which, when challenged, must be considered at the outset of any litigation." Society of Plastics Indus. v. County of Suffolk, 77 N.Y.2d 761, 769 (1991). "Standing to sue is critical to the proper functioning of the judicial system. It is a threshold issue . . . requiring that the litigant have something truly at stake in a genuine controversy." Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 812 (2003).

"[T]he core requirement" for standing is that petitioner must allege an "injury in fact - - an actual legal stake in the matter being adjudicated." Society of Plastics Indus., 77 N.Y.2d at 772. As further explained by the Court of Appeals, "the critical element of in-fact injury" requires that petitioner "will actually be harmed by the challenged administrative action" and that his injury is "more than conjectural." New York State Ass'n of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211-12 (2004) (citing Society of Plastics Indus., 77 N.Y.2d at 773; Matter of Colella v. Board of Assessors, 95 N.Y.2d 401, 409-10 [2000]).

The Court of Appeals also has held, repeatedly, that the "injury in fact" alleged by a petitioner must be "distinct from that of the general public." Transactive Corp. v. New York State Dept. of Social Services, 92 N.Y.2d 579, 587 (1998) (citing Society of Plastics Indus., 77 N.Y.2d at 771-74). The Court explained that "[t]his is so since, under common law, a court is without power to right a wrong where civil, property or personal rights are not affected." Id.

Here, petitioner does not claim that he was subjected to disciplinary action by the respondents, or that he was subjected to, affected by, or even witnessed Dr. Leso's conduct in 2002-03, and fails to state harm of any kind against him traceable to the respondents' determination not to bring an investigation eight years later and nearly two thousand miles away from where the events occurred. Nor does petitioner claim to represent an aggrieved party, or an organization having a cognizable interest in this matter. Indeed, petitioner's views seemingly were not shared by the American Psychology Association ("APA") at the relevant time, as petitioner's own submission states that the APA "collaborat[ed] with the Defense Department" and sought to "legitimiz[e] U.S. interrogation policies and practices in the 'war on terror'" (Pet. Comp., Ex. 18, "The American Psychological Association and War on Terror Interrogations," p.186).

Petitioner's only claimed injury is that the OPD refused to investigate Dr. Leso based on his complaint. This is patently insufficient to constitute an "injury in fact," as petitioner fails to allege that he suffered an actual harm, much less one "different in kind or degree from that suffered by the public at large." Matter of

Parkland Ambulance Serv. v. New York State Dept. of Health, 261 A.D.2d 770, 772 (3d Dept. 1999) (dismissing petition for lack of standing where allegations were "devoid of any particularized harm"). Petitioner nowhere alleges that the OPD's decision personally impacted him or his practice. Cf. New York County Lawyers' Ass'n v. State, 294 A.D.2d 69, 75 (1st Dept. 2002) (finding a potential injury in fact based on claims that an administrative determination would render petitioner "unable to satisfactorily discharge its responsibilities"). Though petitioner may be highly motivated about the issues he alleges, that does not confer standing. Cf., Matter of Citizens Emergency Comm. to Preserve Preservation v. Tierney, 70 A.D.3d 576 (1st Dept. 2010) ("a general - or even special - interest in the subject matter is insufficient to confer standing"); Comm. to Save Polytechnic Univ. v. Bd. of Trustees of Polytechnic Univ., 22 Misc. 3d 1116A at *4 (Sup. Ct. Albany, 2009) (dismissing petition for lack of standing, as "[t]he donation of time, money and effort to an enterprise and investing pride in it simply are not enough to confer standing").

In McAllan v. New York State Dep't of Health, 60 A.D.3d 464 (1st Dept. 2009), for example, the Court dismissed for lack of standing a petition by a retired paramedic that challenged an administrative determination allowing non-paramedics to be staffed on first response units. The Court held that "[p]etitioner's concern that the Health Department's determination might adversely affect him as a citizen, if he requires an ambulance or a fire engine in the future, is too speculative. Moreover, he concedes that this is a concern that he shares with millions of other New York City residents. Therefore, he has not suffered an injury

'different in kind or degree suffered by the public at large.'" Id. at 464 (citing Parkland, 261 A.D.2d at 772).

Specifically in the area of disciplinary matters, the First Department has repeatedly held that individuals do not have standing to sue to compel authorities to investigate misconduct complaints about other individuals. This is so because they cannot show that they "personally suffered some actual or threatened injury as a result of the putatively illegal conduct." Sassower v. Commission on Judicial Conduct of State, 289 A.D.2d 119 (1st Dept. 2001) (affirming the dismissal of a petition seeking to compel the Commission to investigate a petitioner's complaint of judicial misconduct); Matter of Morrow v. Cahill, 278 A.D.2d 123 (1st Dept. 2000) (affirming dismissal of Article 78 proceeding by petitioner who sought to compel disciplinary committee to institute proceedings against his former counsel, finding that "[p]etitioner, who is not the licensee, does not have standing since there is no direct and harmful effect upon him"). cf., Matter of Wade v. Suffolk County Med. Soc'y, 88 A.D.2d 602 (2d Dept. 1982) (member of medical society has no standing to challenge a decision not to impose disciplinary measures against another member). See also, Weisshaus v. New York, No. 08 Civ. 4053(DLC), 2009 WL 2579215, at *4 (S.D.N.Y. Aug. 20, 2009) (explaining that an individual's role in filing a grievance "does not give her a legally cognizable interest in the disciplinary proceedings that follow the filing of her grievance").

Here, petitioner cannot plausibly claim that he was actually or directly harmed by the respondents' refusal to investigate Dr. Leso. Rather, he is merely

one professional who made a complaint about another member of his profession. Under well-settled law, that does not give him standing to sue the respondents.

2. Petitioner Does Not Have "Public Interest Standing"

Perhaps in an attempt to overcome the obvious lack of an "injury in fact" that would make this case justiciable, petitioner asserts that he "has standing to bring this action as a citizen, resident, and taxpayer of the State of New York because the case at bar is a matter of public interest" (Petition, ¶ 15). That allegation is erroneous and it cannot save the Petition from dismissal for lack of standing.

The Court of Appeals has made clear that an individual does not gain standing to bring a lawsuit merely by alleging that it is a "matter of public interest." To the contrary, the Court expressly held as follows: "That an issue may be one of 'vital public concern' does not entitle a party to standing. Courts surely do provide a forum for airing issues of vital public concern, but so do public hearings and publicly elected legislatures, both of which have functioned here. By contrast to those forums, a litigant must establish its standing in order to seek judicial review." Society of Plastics Indus., 77 N.Y.2d at 769.

Thus, a petitioner who "is doing nothing more than advancing interests shared by the public at large" lacks standing to sue. Matter of Hassig v. New York State Dep't of Health, 5 A.D.3d 846, 847 (3d Dept. 2004) (founder of organization to combat cancer lacked standing to compel the Health Department to develop and implement a breast cancer prevention program); see also, Stray from the Heart, Inc. v. Dep't of Health and Mental Hygiene of the City of New York, 25 Misc.3d 1214(A)

at *1 (Sup. Ct. N.Y. Cty. 2009) (holding that "in matters of great public interest" a party can bring a mandamus proceeding but "[t]o confer standing, there must be a determination that the challenged action would cause the petitioner direct harm. While standing principles are broadly construed in actions such as this, it remains incumbent upon the party challenging administrative action to show that it would suffer direct harm, injury that is somehow different from that of the public at large" (citing Society of Plastics Indus., 77 N.Y.2d 761).

To be sure, courts in the Appellate Division, Third Department have at times stated that "in matters of great public interest, a citizen may maintain a mandamus proceeding to compel a public officer to do his [or her] duty." Matter of Hebel v. West, 25 A.D.3d 172, 176 (3d Dept. 2005); Matter of Gardner v. Constantine, 140 Misc.2d 894, 899 (Sup. Ct. Lawrence Cty. 1988) (accord). However, Hebel observed that "this ground for standing must be narrowly applied." 25 A.D.2d at 176. Moreover, Hebel has not been followed by other Departments and "public interest standing" plainly conflicts with the Court of Appeals' view that standing requires an "injury-in-fact" that is "distinct from that of the general public." See Transactive Corp., 92 N.Y.2d at 587; Society of Plastics Indus., 77 N.Y.2d at 771-74.

Nor would petitioner have "public interest standing" in any event. Notably, petitioner does not even allege that this a matter of "great public interest," much less a "vital public concern" (see Petition, ¶ 15). To the contrary, petitioner claimed that this matter does not involve the broader issues concerning whether "the interrogation techniques utilized on detainees at Guantanamo Bay were

appropriate," but only the narrow issue of whether a particular psychologist "crossed the line and committed misconduct" under New York's professional disciplinary rules (Pendergrass Aff., Ex. 3 at p. 8). Cf. Hebel, 25 A.D.3d at 176 (finding it to be "a matter of obvious statewide concern" that a local public official was issuing marriage licenses that would "effectively amend the marriage laws of this State with input from neither the Legislature nor the courts"). If petitioner had standing here, then arguably any disciplinary complaint made against a judge, lawyer or licensed professional would confer standing - a result clearly at odds with well-established law. See Sassower, 289 A.D.2d 119; Morrow, 278 A.D.2d 123.

The lack of a "great public interest" in this matter is further evident in light of the singular nature of the events in question and the unlikelihood that a professional misconduct investigation of Dr. Leso would be of general benefit to New York residents. Dr. Leso's conduct occurred eight years ago, nearly 2000 miles from New York State and had no connection with this venue. Petitioner's submissions indicate that the subject interrogation techniques were approved by the U.S. Defense Department and investigated exhaustively by federal authorities including the U.S. Army, Senate and Department of Justice, none of which charged or reprimanded Dr. Leso, or complained to the respondents about his conduct. There simply is no precedent, or rationality, for conferring "public interest" standing here in order for petitioner to compel the State to undertake a misconduct investigation.

As a final matter, petitioner also plainly lacks either statutory or common law authority to proceed based on "taxpayer standing," as he is not challenging a

wrongful expenditure of state funds or a legislative action. Transactive Corp., 92 N.Y.2d at 588-89. cf. In re Saint Vincents Catholic Med. Ctrs. of New York, No. 10 Civ. 4531(JSR), 2010 WL 4456975, at *2 (S.D.N.Y. Oct. 26, 2010) (taxpayer standing is "narrowly construed and does not extend" to a State's "non-fiscal activities").

POINT II

THE PETITION FAILS TO STATE A CAUSE OF ACTION FOR MANDAMUS

The Petition also must be dismissed because it fails to state a cause of action.

It is well-settled that mandamus to compel is "an 'extraordinary remedy' that is available only in limited circumstances." County of Fulton v. State, 76 N.Y.2d 675, 678 (1990) (internal cites omitted). Mandamus may only be used "to enforce a clear legal right where the public official has failed to perform a duty enjoined by law [and it] does not lie to enforce the performance of a duty that is discretionary, as opposed to ministerial." New York Civil Liberties Union v. State, 4 N.Y.3d 175, 184 (2005) (citing Matter of Brusco v. Braun, 84 N.Y.2d 674, 679 [1994]). Here, petitioner fails to state a cause of action for mandamus both because he does not have a clear legal right to the relief he seeks, and because the act which he challenges is not ministerial, but involves the exercise of judgment and discretion.

1. Petitioner Does Not Have A "Clear Legal Right" To Compel The Respondents To Investigate His Complaint

In determining whether a petitioner has a "clear legal right" to the relief demanded, the courts have repeatedly held that "[m]andamus is available only where the petitioner's right to performance is so clear as to admit of no doubt or

controversy." Matter of Coastal Oil New York, Inc. v. Newton, 231 A.D.2d 55, 57 (1st Dept. 1997); Matter of Petersen v. Incorporated Village of Saltaire, 77 A.D.3d 954 (2d Dept. 2010) (accord).

In this case, petitioner cannot reasonably claim that his purported right to compel the respondents to investigate his complaint against Dr. Leso "is so clear as to admit to no doubt or controversy." Indeed, Education Law § 6510 contains no provision authorizing a complainant to bring a lawsuit to compel an investigation. The only authorization for a judicial proceeding therein is found at subsection (5), which provides that "the decisions of the board of regents may be reviewed" under Article 78 in the Appellate Division, Third Department. However, petitioner is not challenging a decision by the Board of Regents, it is not named as a respondent, nor was this case filed in the stated venue. Cf. Public Health Law § 230(10)(j) (authorizing licensees in pending physician disciplinary matters to bring Article 78 proceedings in Supreme Court to redress statutory non-compliance).

Indeed, petitioner fails to cite any case where an order was granted under Education Law § 6510 directing the NYSED to commence an investigation, or, for that matter, directing any disciplinary agency to conduct an investigation. To the contrary, courts have repeatedly held that the determination whether to conduct an investigation is discretionary in nature (see Point II(2), infra). As such, he can hardly claim to have a "clear legal right" to such relief.

Further, petitioner's claim that Dr. Leso's role in assisting the interrogations of Guantanamo detainees constituted professional misconduct itself is hardly

"without doubt or controversy." His claim that the Guantanamo detainees were Dr. Leso's "patients" is in defiance of reality - - They were suspected terrorists who were being interrogated by the U.S. military in order to obtain information to assist in preventing further attacks against this country, similar to the devastation that occurred on September 11, 2001. Indeed, the detainee petitioner heavily focuses on - Mohammed Al Qahtani - was "a high value detainee suspected of being connected to the Sept. 11, 2001 attacks" (Pet. Comp., Ex. 9 at p. 57). Dr. Leso obviously was not acting as Al Qahtani's counselor, therapist or health care provider when his alleged role was to devise "harmful and abusive psychological techniques" that might overcome that person's resistance to interrogation (Petition, ¶ 19).

Petitioner cannot reasonably equate this matter with cases arising from patient/provider therapeutic relationships, such as where a psychologist verbally abused and threatened a female patient and her parents upon their refusal to schedule more family therapy sessions. Matter of Stein v. Sobol, 162 A.D.2d 786 (3d Dept. 1990). See also Ackerman v. Ambach, 73 N.Y.2d 323, 335 (1989) (psychiatrist found guilty of engaging in numerous sexual acts with his patients). Nor can he reasonably compare this case with prior disciplinary cases involving professionals who provided services beyond their licensed authority. Cf. Salob v. Ambach, 73 A.D.2d 756 (1979) (chiropractor disciplined for taking unauthorized x-rays).

The essential fact is that Dr. Leso's alleged conduct at Guantanamo Bay was of a singular nature and did not come within any precedent for taking disciplinary action against a psychologist, or any other professional. Although petitioner claims

that Dr. Leso's efforts to "modify" the behavior of the detainees comes within the definition of practicing psychology under Education Law § 7601-a (Petitioner's Memorandum of Law ["Pet. Mem."] at 5-7), such reading is implausible. The statutory language focuses on therapeutic, healing type activities (describing the purpose of the practice of psychology as "preventing or eliminating symptomatic, maladaptive or undesired behavior; enhancing interpersonal relationships, personal, group or organizational effectiveness and work and/or life adjustment; and improving behavioral health and/or mental health") (Id. at § 7601-a[1]). Nothing in that statute remotely suggests that it extends to the type of activity alleged in this case - - providing assistance for the aggressive interrogation of military detainees.[1]

Nor can petitioner expand the statutory and regulatory definitions of professional misconduct beyond their plain meaning. Notably, petitioner repeatedly omits the critical term "patient" when quoting the very regulations that prohibit "abuse and harassment" of patients (8 NYCRR § 29.2[a][2]) and "unauthorized and unwarranted treatment" of patients (8 NYCRR § 29.1[b][11] and 8 NYCRR § 29.2[a][7]) (See Petition at ¶ 10; Pet. Mem. at 1-2). Petitioner similarly misreads 8 NYCRR § 29.1(b)(5) ("conduct in the practice of a profession which evidences moral unfitness to practice the profession"), by contending that it is "a charge not predicated on . . . acts taken within the 'practice of psychology.'" (Pet. Mem. at 12).

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1 The regulatory predecessor to Educ. Law § 6501-a, former 8 NYCRR § 72.6, similarly focused on therapeutic applications. See People v. R.R., 12 Misc.3d 161, 169 at n11 (Sup. N.Y. Cty. 2005) (practice of psychology includes "the psychological evaluation, prevention, diagnosis and amelioration of personality and behavior disorders").

At bottom, even if reasonable people may dispute the meaning of a statute or regulation, it is well-settled that the interpretation adopted by the agency responsible for its enforcement "should be accorded great weight and accepted by the courts if not unreasonable or irrational." Matter of DiMarsico v. Ambach, 48 N.Y.2d 576, 581-82 (1979); Matter of Fox v. Board of Regents, 140 A.D.2d 771, 772-73 (3d Dept. 1988) (deferring to expertise of Board of Regents and NYSED in determining whether applicants fulfilled requirements for licensing examination in psychology); Matter of Elcor Health Servs. v. Novello, 100 N.Y.2d 273, 280 (2003) (an agency's interpretation of its own regulations is "controlling and will not be disturbed in the absence of weighty reasons") (quoting Matter of Cortlandt Nursing Care Ctr. v. Whalen, 46 N.Y.2d 979, 980 [1979]).

Here, the respondents reasonably determined that the definitions of the practice of psychology and professional misconduct set forth in the Education Law and regulations were not intended to apply to the type of conduct that Dr. Leso allegedly engaged in during his military service at Guantanamo Bay. Although petitioner disputes that determination, he utterly fails to demonstrate a purported right to compel an investigation that is "so clear" as to be beyond "doubt or controversy." He therefore does not have a cause of action for mandamus. Coastal Oil New York, 231 A.D.2d at 57; Petersen, 77 A.D.3d 954.

2. Respondents' Duty To Investigate Is Not Ministerial, But Involves The Exercise of Discretion

Petitioner's cause of action for mandamus also fails because the respondents' duty to conduct a professional investigation after receiving a complaint is not strictly ministerial, but involves discretion and judgment.

The Court of Appeals has held that "[a] discretionary act 'involve[s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result.'" NYCLU v. State, 4 N.Y.3d at 183-84 (quoting Tango v. Tulevech, 61 N.Y.2d 34, 41 [1983]).

The decision whether to undertake an investigation of improper or illegal conduct is generally considered to be a matter of discretion which does not give rise to a cause of action for mandamus. See, e.g., Sassower, 289 A.D.2d at 119 (affirming dismissal of petition seeking to compel a judicial misconduct investigation "since respondent's determination whether to investigate a complaint involves an exercise of discretion and accordingly is not amenable to mandamus"); Iocovello v. City of New York, 272 A.D.2d 201 (1st Dept. 2000) (dismissing petition seeking to compel the City to investigate petitioner's termination from the Department of Sanitation, because "the decision not to conduct an investigation was a matter of discretion and the remedy of mandamus does not lie to compel action involving the exercise of discretion or judgment"). As explained in Clouden v. Lieberman, No. 92 CIV. 139, 1992 WL 54370, at *1 (E.D.N.Y. Mar. 5, 1992), when dismissing an action seeking

to compel an investigation of a client's former counsel, a disciplinary committee "is in the same position as a public prosecutor required to exercise 'independence of judgment' in deciding how to use the limited resources of the office."

Education Law § 6510(1)(b) provides that the NYSED "shall investigate each complaint which alleges conduct constituting professional misconduct," and thus requires a threshold judgment on whether "professional misconduct" is alleged by a complaint. Although petitioner contends that his complaint set forth facts sufficient to constitute professional misconduct, it obviously was within the province of the respondents to make that initial determination.

In Mantell v. New York State Com'n on Judicial Conduct, 181 Misc.2d 1027 (Sup. Ct. N.Y. Cty.), aff'd, 277 A.D.2d 96 (1st Dept. 2000), for example, the Appellate Division dismissed a mandamus petition seeking to compel a judicial misconduct investigation under Judiciary Law § 44(1), which provides that "[u]pon receipt of a complaint (a) the [Commission on Judicial Conduct] shall conduct an investigation of the complaint; or (b) the commission may dismiss the complaint if it determines that the complaint on its face lacks merit." The Appellate Division broadly held that the "[p]etitioner lacks standing to assert that, under Judiciary Law § 44(1), respondent is required to investigate all facially meritorious complaints of judicial misconduct. Respondent's determination whether or not a complaint on its face lacks merit involves an exercise of discretion that is not amenable to mandamus." Mantell, 277 A.D.2d at 96.

Education Law § 6510(1)(b) differs from Judiciary Law § 44(1) in that it does not affirmatively state that the NYSED may dismiss a case for lack of facial merit. However, as the Appellate Division held, a threshold determination as to "whether or not a complaint on its face lacks merit involves an exercise of discretion that is not amenable to mandamus." Mantell, 277 A.D.2d at 96. Although petitioner asserts that his complaint alleged acts constituting professional misconduct, the respondents were not required to accept his interpretation of the Education Law and the NYSED's regulations, or his application of those laws to the facts alleged in his complaint. Cf. DiMarsico, 48 N.Y.2d at 581-82; Elcor, 100 N.Y.2d at 280 (according deference to the agency's interpretation of the statutes and regulations it enforces). They were required to use their own independent judgment.

The OPD necessarily exercises judgment in deciding how best to use its limited resources and, especially since Education Law § 6510(1)(a) allows anyone to make a complaint, the OPD must evaluate whether each such complaint "alleges conduct constituting professional misconduct." Education Law § 6510(1)(b). Here, the OPD rationally found that Dr. Leso's alleged role in assisting the interrogation of Guantanamo Bay detainees did not constitute misconduct in the practice of psychology, in light of the relevant statutes and regulations and the absence of any precedent for taking disciplinary action in such circumstances. The OPD is allowed to make assessments about expending resources investigating matters which, on their face, fall outside of the practice of a profession or the misconduct provisions as understood by the State of New York. Moreover, in view of the distant location of

the events, the passage of time, national security implications and the fact that relevant information was likely unavailable,[2] conducting an investigation here would plainly require a major investment of the NYSED's resources - - regarding actions that did not involve New York State residents.

Although petitioner takes issue with the decision made by the respondents in this case, that does not alter the fact that making such determination necessarily involved the use of judgment and discretion. For precisely that reason it is not amenable to a mandamus petition. NYCLU v. State, 4 N.Y.3d at 184; Sassower, 289 A.D.2d at 119; Iocovello, 272 A.D.2d at 201.

CONCLUSION

For all of the foregoing reasons, the respondents' motion should be granted and the Petition and this proceeding should be dismissed.

Dated: New York, New York
January 14, 2011

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[2] Notably, key documents annexed to petitioner's complaint including the Senate Report and BSCT's Standard Operating Procedures were heavily redacted to avoid disclosing classified information (Pet. Comp., Ex. 9 and 11).

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