MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MARK IBSEN, M.D.,

Petitioner,

v.

MONTANA STATE BOARD OF MEDICAL EXAMINERS,

Respondent.

Cause No. DDV-2016-283

MOTION TO MANDAMUS
THE MONTANA STATE BOARD OF MEDICAL EXAMINERS, and
EXAMINER CHRIS D. TWEETEN
FOR FAILING TO PERFORM
THE LEGAL DUTY THIS COURT ORDERED

COMES NOW the Petitioner, Mark Ibsen, M.D., by undersigned counsel, John P. Flannery, II, appearing *pro hac vice* in this matter, and by John Doubek, local counsel in this matter, to move this Honorable Court to mandamus the Montana State Board of Medical Examiners ("Board"), and its latest assigned Hearing Examiner ("Examiner"), in accordance with 27-26-102 MCA, to compel both the Board and Examiner to perform their legal duty as specified by this Court in its order dated June 24, 2018, directing the Board to:

(a) "appoint an objective, detached and qualified hearing examiner to review the record,"

(b) to supplement the record if necessary,

(c) to take additional testimony if necessary,

(d) to conduct a proper hearing if necessary, and

(e) for the Board of Medical Examiners to conduct "further proceedings,"

However, the Board has blithely ignored its legal duty, as specified by this Court, and

done none of these assigned functions, in fact, done nothing in the 18 months following this Court's order, after the Board appointed a successor Examiner, namely:

(1) they have failed to “supplement” the record,

(2) not conducted any hearing,

(3) not conducted any further proceedings except to deny a request to dismiss the matter,

(4) not reached or entered any further findings, and

(5) not entered any intermediate or final decision;

Thus, the Petitioner requests that this Honorable Court mandamus the respondent parties, the Board and its Examiner, directing that they perform their legal duty, as ordered by this Court, and that they be directed to do so within 30-days after this Court enters its Order of Mandamus, and, if the Board and Examiner fail to comply with this schedule, that the disciplinary proceedings, long pending against Petitioner, be dismissed in their entirety;

COMES NOW the Petitioner, by counsel, further, to move this Honorable Court to reconsider an amendment to its original order, dated June 24, 2018, as this Court, by that order, removed the blameless Hearing Examiner, Mr. David A. Scrimm, resulting in his replacement by an Examiner proven to be still and inert and therefore in violation of this Court's directions, and to remedy the Board’s and Examiner’s failure to act, to do anything, as is manifest and transparent to any observer, by reinstating the original hearing officer, Mr. David A. Scrimm, who had acted in good faith, without any demonstrable error, after Mr. Scrimm had reviewed all the evidence (including the demeanor of the witnesses (and this is important

because the succeeding Examiner insists the parties must waive demeanor as an element of evaluating the testimony of witnesses.));

COMES NOW further the Petitioner to move this Honorable Court, in reliance on 25-10-711, MCA, to grant Petitioner the fees and expenses suffered by Petitioner because of a succession of due process violations by the Board and its second assigned Examiner, from 2013, when they issued notice of the disciplinary proceedings against Petitioner, continuing since that day to this, plainly evidencing the Board's bad faith, and its denial of fundamental fairness, and constitutional due process;

COMES NOW further the Petitioner to move this Honorable Court to grant such other relief as this Court may deem fit and just.

In support of this application for relief, Petitioner, by counsel, further states as follows:

I. STATEMENT OF FACTS

1. **THE TARDINESS OF THESE DISCIPLINARY PROCEEDINGS – SPANNING SEVEN YEARS.** This matter has been pending too long for the subject matter at issue, particularly given the findings that the First Examiner, David A. Scrimm, issued, that were mostly favorable to Petitioner, but nothing has happened to resolve this matter with a final decision, though seven years have passed, going back to at least July 9, 2013, when the Board of Medical Examiners issued its notice of a proposed board action, placing Dr. Ibsen's medical license at risk, reported publicly, forcing Dr. Ibsen to defend himself, damaging his professional reputation in the bargain, because when you are explaining you are often losing, thus compromising Dr. Ibsen's medical practice, and his ability to earn a living.

2. **HEARING EXAMINER SCRIMM'S ORIGINAL FINDINGS.** The original complaint, the Hearing Examiner Scrimm found, originated with a disgruntled employee, Dr. Sarah Damm, a chiropractor, who worked for Dr. Ibsen but was fired.

3. In the original findings, Hearing Officer Scrimm's findings of fact and conclusions of law, filed on June 15, 2015, at p.2, stated that he gave Dr. Damm's testimony ". . . less weight because her motivations for bringing the complaint against Dr. Ibsen were guided more by a personal interest than a legitimate interest in protecting the public welfare."

4. Other witnesses questioned Dr. Ibsen's mental health. Specifically Jeremy Otteson, Robert Gardipee, and Michael Ramirez, but Examiner Scrimm observed, that they didn't prove their health claims. Id.

5. The principal charges that concerned Hearing Examiner Scrimm was whether there was an abuse of opioids in the prescription practices of Dr. Ibsen, focusing on nine patients who did, in truth and fact, suffer from long-term chronic pain.

6. Scrimm noted that the medical body of knowledge and practice following Dr. Russell Portnoy's paper in 1997 was that opioids could be rightly used to treat and relieve long-term chronic pain. Id., at pp. 3-4. In such cases, the failure to treat with opioids may prompt the chronic pain patient to commit suicide rather than suffer the relentless and unbearable pain

7. Examiner Scrimm approved of the fact that Dr. Ibsen had a multi-disciplinary process he followed to redress the patients' pain including a referral model for patients to seek out other disciplines to ease their chronic pain. Id., pp. 5-6. In other words, the evidence was that Dr. Ibsen was concerned with healing patients, not "dealing" in opioids, acting in accordance with the Controlled Substances Act. Examiner Scrimm

therefore dismissed the notion that Dr. Ibsen ran a "pain clinic" - as his patients suffered from a range of maladies and he administered and treated accordingly. Id., p.10.

8. Examiner Scrimm explained that his concern was that the weight of Dr. Damm's testimony was that she "cherry pick[ed]" patients "whose records she thought would be damaging." Id. P.11.

9. Hearing Examiner Scrimm reviewed 5,000 pages of Exhibit

10. s and transcripts to reach his findings. Id., p. 11.

11. Dr. Ned Camden Kneeland, the Examiner Scrimm observed, "did not specifically criticize the care of any of those nine patients" Id., p. 12

12. Ms. Starla Blank was concerned about the treatment of three of the nine patients. Id. Examiner Scrimm reviewed each of the patients and found nothing remarkable and no evidence that Dr. Ibsen had failed to treat the pain. Id., pp. 12-29

13. Examiner Scrimm discussed the pain patients of another doctor who was prosecuted for his questionable pain prescription practices. Examiner Scrimm, however, found Dr. Ibsen's prescriptions for a subset of those patients were legitimate. Id., at p. 33.

14. Examiner Scrimm concluded that Dr. Ibsen's treatment of these pain patients that had been "treated" by another doctor who was under investigation, did not involve any over-prescribing by Dr. Ibsen; Indeed, Dr. Ibsen's treatment showed clear evidence of [Dr. Ibsen] tapering off opioid prescriptions among the majority of these patients . . ." Id., at p.44.

15. Examiner Scrimm found that no sanction was therefore appropriate because Dr. Ibsen's standard of care was appropriate for these pain patients. Id., at p.47.

16. On the other hand, the Examiner was concerned with Dr. Ibsen's record-keeping. Id., at p. 48. And that was the only truly adverse finding against Dr. Ibsen.

17. The Examiner made his findings public on June 15, 2015; somewhat short of five years ago.

18. **THE BOARD DID WASTE TIME MAKING ITS DECISION.**. There was even more delay after the Hearing Examiner's findings.

19. The parties had agreed to a one-day hearing before the Examiner on June 23, 2014, but department counsel asked for additional time, to October 2014, months later.

20. In October and December 2014, the hearing examiner, David A. Scrimm, heard the case.

21. The Examiner's findings were published on June 15, 2015.

22. Because the proceedings were public, and the details were public, Dr. Ibsen's practice and reputation suffered from critical media coverage that questioned the regularity of his practice; his patients spoke favorably of his practice; Dr. Ibsen did what he could to answer the charges; but the public ink stained and compromised his public reputation. See eg., T. Corrigan, "Physician's license on the line; Patients say he's the best," Independent Record (Dec. 3, 2014).

23. On September 21, 2015, the Board issued its order to allow for exceptions to Hearing Examiner Scrimm's proposed order.

24. **THE MEDICAL BOARD PUT ITS THUMB ON THE SCALES OF JUSTICE.** This was when the most egregious due process violations occurred.

25. **First,** there was an objection by the Board panel that the Hearing Examiner was not a medical doctor, not qualified, and the Board rejected 40 of the Examiner's findings. The Board had assigned the Examiner and found he was qualified at the outset of the case, no party objected to his assignment, that is, not until the panel reviewed his findings – and those findings plainly did not conform with the outcome they preferred. The panel did not evaluate

the supposed "error" in any of the 80 findings. The attack against the Examiner was a makeweight to reject findings they disapproved. This Court said it was like a "party asking for the selection of another jury."

26. **Second,** a Board panel member, Mary Anne Guggenheim, made slanderous charges against Dr. Charles Anderson, Dr. Ibsen's expert witness, stating she knew Dr. Anderson, giving no notice to anyone during the hearings held, statements not subject to cross by Dr. Ibsen's counsel. Ms. Guggenheim formed a view of the matter in conflict with the evidence before her.

27. **Third,** Ms. Guggenheim relied on two letters by Dr. Ned Camden Kneeland, who made slanderous remarks against Dr. Anderson, and these letters were not before the Examiner, nor admitted in evidence.

28. The separation of the investigative and adjudicative function is critical to due process. This standard was ignored in this case to reach an inequitable judgment. Also, there was no notice to cure these *ex parte* considerations.

29. On November 19, 2015, the Board panel heard oral comments on the parties' exceptions to the order.

30. Public media reports persisted, most unflattering and critical of Dr. Ibsen, any effort by Dr. Ibsen, overwhelmed by the fear of pain medication. See e.g., Angela Brandt, "Embattled Dr. Mark Ibsen closing Helena Practice," The Gazette (December 4, 2015).

31. **THE BOARD'S FINAL ORDER.** On March 22, 2016, about three years after the original notice to Dr. Ibsen, the Board issued its final order and suspended Dr. Ibsen's medical license.

32. **APPEAL TO THIS DISRICT COURT.** Dr. Ibsen petitioned this District Court for judicial review of the Board's Final Order.

33. This Court found that several practices enumerated above violated constitutional due process. See Court "Order on Petition for Judicial Review," dated June 24, 2018, attached hereto as Exhibit A, at p10.

34. We make note of the fact that the Hearing Officer, Mr. Scrimm, was in no way responsible for the constitutional and procedural infirmity created by the Board, and found by this Court.

35. The errors, constitutional and otherwise, occurred after Mr. Scrimm had performed his duties and issued his findings.

36. Of course, we cannot overlook how the administrative and enforcement process by the Board was indifferent to the extended delays continued by the newly appointed hearing examiner on remand from this Court to the Board.

37. **THE DELAYS BEFORE THIS COURT'S DECISION.** § 2-4-623(1)(a), MCA, requires that the Board issue its decisions within ninety (90) days after a contested case hearing is considered submitted for a final decision. The Examiner submitted his report in June 2015; the Board issued its decision on March 24, 2016. That's about 9 months later - or 275 days after the Hearing Examiner's Report.

38. Thus, it was not within 90 days, the statutory requirement, not even close, unquestionably in violation of the statutory requirement that applies to these disciplinary proceedings.

39. The statute states that: "[a] final decision or order adverse to a party in a contested case must be in writing. A final decision must include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the findings. Except as provided [in sections dealing with a different subject matter than at

issue here], a final decision must be issued within 90 days after a contested case is considered to be submitted for a final decision unless, for good cause shown, the period is extended for an additional time not to exceed 30 days (underscoring supplied)."

40. There was no "good cause" for the delay. And the extension of time suffered far exceeded the additional 30 days provided for in the statute had there been "good cause."

41. The statute plainly says a final decision "must" issue but this statutory deadline was treated by the Board more like it a "suggestion" than a statutory direction.

42. **EVEN MORE DELAY AND BOARD INACTION AFTER THIS COURT'S DECISION.** Accordingly, these statutory deadlines were not followed before this Court's decision. Nor this Court's directive enumerated at the outset of these pleadings. See Court "Order on Petition for Judicial Review," dated June 24, 2018, attached hereto as Exhibit A.

43. This Court issued its decision on or about June 24, 2018 remanding this matter to the Board with "instructions to appoint an objective, detached and qualified hearing examiner to review the record, disregarding Dr. Guggenheim's comments and Dr. Kneeland's letter." That Examiner, who was appointed, has failed to act.

44. When this Court remanded the matter to a different hearing examiner, this Court followed the process, cited in the *Frasceli* case. But we respectfully suggest, unlike *Frasceli,* that the original hearing examiner in this case committed no error, was not biased, was objective, qualified, and reviewed the entire voluminous records and was thus able to judge the demeanor of the witnesses whereas the successor examiner cannot and admits as much (discussed below).

45. This Court further directed that, "[i]f the [hearing] officer finds it necessary to supplement the record, the officer may take additional testimony or conduct a proper hearing with prior notice to create a full record."

46. But the newly appointed examiner hasn't even been able to decide to act upon this Court's directive.

47. On May 17, 2019, 11 months after this Court's decision, Chris D. Tweeten, the newly substituted hearing examiner, entered an order in response to a motion to dismiss by Dr. Ibsen's counsel, appearing before the Medical Board.

48. The Examiner's Order is a study in inaction and confusion.

49. Examiner Tweeten stated that this Court "expressly rejected the suggestion that Mr. Scrimm's proposed disposition be reinstated in full." See Board "Order on Motion to Dismiss and Effect of District Court's Decision on Future Proceedings," dated May 17, 2019, attached hereto as Exhibit B, at p. 2.

50. On the other hand, Examiner Tweeten said that "Mr. Scrimm's proposed disposition was not disturbed by the Court, and it remains effective as a hearing examiner's proposed decision." Id, at p.3.

51. If so, then why do we suggest to change examiners if this Court grants the relief we request? We respectfully insist what has transpired proves that this Examiner has no business handling the case.

52. While Petitioner charged prejudice, given the delays and rulings and adverse effect in the community, Examiner Tweeten amazingly denied that there was any evidence that Dr. Ibsen suffered any financial hardship because of this pending proceeding. This despite the slanders and innuendo reported and repeated in news coverage since this ordeal began in 2013.

53. Examiner Tweeten refused to address Dr. Ibsen's objection that it would be "practically impossible to conduct a further hearing in this matter, due to the death of witnesses and other factors," and Mr. Tweeten insisted that argument was "premature," even as the effects of further delay, could only mean the loss of even more witnesses.

54. Examiner Tweeten, some 11 months after this Court's decision, could not decide what to do, whether further proceedings were needed, and, his "stillness" invited more repose, rather than action, making the amazing observation that "the practicality of a future hearing need not be addressed now." Id., at pp 3-4. If not then, or how about now, when ever will it be "addressed"?

55. Examiner Tweeten stated that he may make "additional findings of fact only if the parties stipulate that witness demeanor is immaterial." Id., at p. 4. That would sound like he had considered having additional witnesses. Or that he was going to review the testimony and voluminous exhibits. But, if he did, he would not have the benefit of the witness' demeanor. (We hasten to add, if we restored Hearing Examiner Scrimm who observed the demeanor of the witnesses, then no compromise of the truth or evidence need be made.)

56. On May 17, 2019, Examiner Tweeten proposed to review the original findings of the hearing examiner, and to give Dr. Ibsen a chance to consider changes that he may make, and that he may then file a supplemental finding of fact and law, and submit it to the Board. Id., at p. 5. How anything like that could happen, the truth is that nothing of the sort has happened! Silence and inaction. That's all she wrote ever since his "decision" of May 17, 2019, nine months ago.

57. Why the delay? A fair inference, given the time and earlier unconstitutional conduct by the Board, is that the Board favors a predetermined adverse outcome and has

not quite figured out how to carry it off. They can't repeat their old trick – so they do nothing.

58. As of May 17, 2019, Examiner Tweeten stated that he did not "contemplate convening an additional hearing" but, "if his opinion change[d], he'd let the parties know." Id. Confused is the most charitable characterization of these proceedings.

59. The Board and its Examiner have failed to act, even to decide how to go forward. The process is one of delay, and denial, leaving Dr. Ibsen to deal with the Board's 300 days of endless ambiguity and inaction.

60. **PIVOTAL QUESTIONS FOR THE COURT.** There are three pivotal issues that we ask this Court to consider:

61. (One) the proceedings have been stalled since this Court's decision, and the "process" is so riven with delay and past unconstitutional and questionable practices that this request for a mandamus is justified, and necessary, demanding that the Board and Examiner act, perform their legal duty, on a timetable set by this Court, to conclude within 30 days or suffer the dismissal of all pending disciplinary proceedings.

62. (Two) we respectfully insist this Court re-visit its original decision and order, in reliance on *Frasceli, Inc. v. Department of Revenue Liquor Div*, 235 Mont. 152, 157, 766 P.2d 850, 853 (1988)(denying re-instatement of the first hearing officer's findings of fact and law), and reinstate the blameless Hearing Officer Scrimm, as the violations the Court found earlier in this case had nothing to do with his conduct of the hearings and Mr. Scrimm has observed demeanor and can exercise his judgment on this matter anew, and

63. (Three) that this Court, under Section 25-10-711, MCA (providing for an award of costs against a governmental entity when the suit or defense is frivolous or pursued in bad faith) should award fees and costs to Petitioner, as elaborated upon in an affidavit we

shall submit, an accounting: (a) for the Board's delays and violations of fundamental fairness, the constitutional due process, found by this Court, and (b) for the Board otherwise stonewalling and ignoring this Court's order, blocking Petitioner's case with vague and contradictory "reasoning," more like a proceeding that Kafka might concoct, and, as a result, Dr. Ibsen's reputation and practice have been compromised, and taken its toll in legal fees, expenses, a reduced medical practice, and more.

II.DISCUSSION OF THE LAW

64. **A. MANDAMUS.** The Montana Code provides a remedy "in all cases in which there is not a plain, speedy and adequate remedy in the ordinary course of law" to compel, by mandamus, "a corporation, board or person," in this case, the Board and its Examiner, to perform a legal duty that they have blithely ignored. Section 27-26-102(1) and (2), MCA.

65. Mandamus is available as a remedy when there is: (1) a clear legal duty, and (2) no speedy and adequate remedy in the ordinary course of law. *Best v. Police Department of Billings*, 299 Mont. 247 (2000).

66. This Court issued a decision, clarifying the duty of the Board and its Examiner, and it has been entirely ignored, meaning no action and an extended unjustified delay to do anything within the terms of this Court's order.

67. This Court demanded an action by its remand and Dr. Ibsen demanded a dismissal of the charges before seeking this Mandamus. *Phillips v. City of Livingston,* 268 Mont. 156 (1994).

68. The Board and its Examiner have done nothing since this Court's decision.

69. Nor does Petitioner have a plain, adequate, or anything like a "speedy" remedy. Au contraire!

70. Montana reinstated a city firefighter because he didn't have a plain, adequate and speedy remedy. *Phillips v. City of Livingston,* 268 Mont. 156 (1994). Nor do we here.
71. We hasten to add that the act to review the evidence or to make a decision is ministerial, that is, we can't insist on any specific decision, or outcome, but the act to review or decide is ministerial.
72. That said, there is context to inform this Court's discretion to mandamus the Board to act as originally directed to act.
73. We have requested, by way of relief, therefore that this Court set a deadline for the Board to act or to suffer the dismissal of the pending proceedings against Petitioner if they don't meet this deadline.
74. We seek to underscore that this failure of the Board and its Examiner to act, that this extraordinary delay, is not just a statutory violation but an abridgment of Petitioner's constitutional right to due process, to fundamental fairness.
75. It is rudimentary to this analysis that a physician confronted with disciplinary proceedings which may result in the loss or suspension of his license to practice is entitled to due process.
76. It has been a challenge, noted by the Supreme Court in *Withrow v. Larkin,* 421 US 35 (1975), to apply the principle of due process to an administrative proceeding because of "the incredible variety of administrative mechanisms in this Country [that] will not yield to any single organizing principle."
77. A more apt description of the process is of a "quasi criminal process." In re *Ruffalo,* 390 US 554, 551 (1960).
78. Due process requires notice and an opportunity to be heard. *Goldbery v. Kelly,* 397 US 254 (1970).

79. There is no question that Petitioner Ibsen received "notice" of the "changes" in 2013 but it's quite another question whether Petition has had the "opportunity" to be heard since this Court's remand.

80. Implicit in the right to be heard, is that it be timely, so that it's meaningful, and silence, accompanied by stillness, means one has had no opportunity to be heard.

81. We insist the risk of unfairness is intolerably high, especially given this Court's earlier findings. *Withrow,* 420 U.S. at 58.

82. Petitioner Ibsen is entitled to a fair and impartial tribunal, as guaranteed under both the United States and Montana Constitutions. *State v. More,* 268 Mont. 20, 51 (1994).

83. But we insist this administrative tribunal is neither fair nor impartial.

84. While we do insist that harm has been done by these due process violations, found earlier by this court, and the extraordinary delay and stillness since, the law does not require that we prove or allege harm, for example, the loss of reputation or of the Petitioner's medical practice. The appearance of risk or potential harm suffices. *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971).

85. Justin Harlan concurred in *Mayberry* stating that "the appearance of evenhanded justice . . . is at the core of due process."

86. The Montana courts have said, "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *May v. First National Pawn Brokers Limited*, 269 Mont. 19, 24 (1994).

87. We are concerned that "walls of division" between the investigative, prosecutorial and adjudicative phases of the Board's discipline process have been gossamer thin in Petitioner's case, despite the mandate in Montana's Administrative Procedure Act,

sections 4-101 to 711, MCA, and those statutes governing professional licensing, sections 37-1-101 through 413, MCA.

88. This Court rightly found that the "fact gathering" and "fact-finding" denied Dr. Ibsen due process in the adjudicative phase of these proceedings, and this Court's remand has had no effect on the Board or its Examiner.

89. **B. TO GUARANTEE REGULAR ORDER, RESTORE THE ORIGINAL EXAMINER.** When this Court entered its order, in accordance with Section 2-4-704, of the MCA, and relied on the holding in *Frasceli, Inc. v. Department of Revenue Liquor Div*, 235 Mont. 152, 157, 766 P.2d 850, 853 (1988):

    a. it reversed and remanded the decision of the Board of Medical Examiners, for several due process violations, by the Board of Medical Examiners, but it also,

    b. removed the blameless hearing officer who played no role in the constitutional violations.

90. In *Frasceli*, we had a case with a more immediate time horizon than this case suffers, going back as it does in this case to 2013, and still under litigation in 2020, 7 years later. We have an itch to correct, to scratch the possibility of furthering this ongoing miscarriage of justice.

91. In *Frasceli*, there were 7 applicants who insisted each was deserving of a beer and wine license. The hearing examiner awarded the license to one applicant.

92. But the Director (of the Department of Revenue) went out and conducted "a personal unannounced visit [to two of the applicants] …before he issued his final order reversing the hearing examiner." *Frasceli*, *supra*, at 153, at 850.

93. As the *Frasceli* Court noted, this stealth initiative, independently conducted by the Director, violated due process, deprived the petitioner of fundamental fairness, for it

denied the parties the right of notice of the visits, to object, to be present, to present evidence and argument, and the right to conduct cross-examination. Id.

94. In the lower court in *Frasceli*, the District Court sought to reinstate the Hearing Officer's findings and order. But, on appeal, the Supreme Court of Montana in *Frasceli*, held that the statute did not authorize the reinstatement of the hearing officer's proposed order. Id, at 157, at 853.

95. Section 2-4-704 (2), MCA, provides, in relevant part, that the standards of review allow this court to "reverse or modify the decision if substantial rights of the appellant have been prejudiced," and that's what this this Court did with regard to the Board's due process violations. Compare Section 2-4-704(2)(a)(i).

96. But the removal and replacement of the hearing officer in this case appears, at first blush, to credit the *ex parte* objection by a Board Member to the hearing regarding the officer's credentials, and that begs the question what "evidence" in the record justifies that finding, other than the secret sniping, and a presumed outcome, in contradiction of the evidential findings of the first Examiner.

97. The original hearing officer in place was blameless as to the Board's misconduct.

98. If this Court is confined to the record, compare Section 2-4-704(a), then what factual basis is there to usurp the hearing officer?

99. The newly appointed Hearing Examiner admits he can't review the record without a waiver of witness demeanor. Not a very good substitute then.

100. Of course, the original examiner suffers no such infirmity.

101. We must consider the series of delays as a constitutional violation that has denied timely orders and decisions but also compromised Dr. Ibsen's practice, damaged his reputation in public media and the community he served, the cost in resources to fight for

his good name, fees and costs, all of it done in too slow motion, feeling glacier when not just plain immobile, and at a loss of available witnesses and memory and additional evidence, should it be necessary, for any fair hearing.

106. These later violations of unreasonable delays and arbitrary orders appear to come within this Court's standard of review for the Board acting "in excess of its statutory authority," Section 2-4-704(2)(a)(ii), and/or "made upon unlawful procedure," Section 2-4-704(2)(a)(iii), and/or upon delays and dilatory rulings by the Board and, as to the recently appointed substitute examiner, his actions, were "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion," Section 2-4-704(2)(a)(vi).

107. **C. AWARD COSTS TO DR. IBSEN**. Sections 25-10-711(1)(a) and (b), MCA, provide that a party is entitled to costs and reasonable attorney fees if the party "prevails" and if "the court finds that the claim or defense of the state … that brought or defended the action was frivolous or pursued in bad faith."

108. Dr. Ibsen "prevail[ed]" before this Court in Dr. Ibsen's last appearance. So, on its face, he is entitled to recover costs and fees.

109. The conduct of the Board and of its successor Examiner has obliterated Dr. Ibsen's due process rights by Board misconduct and extraordinary delay, and we insist that demonstrates "bad faith."

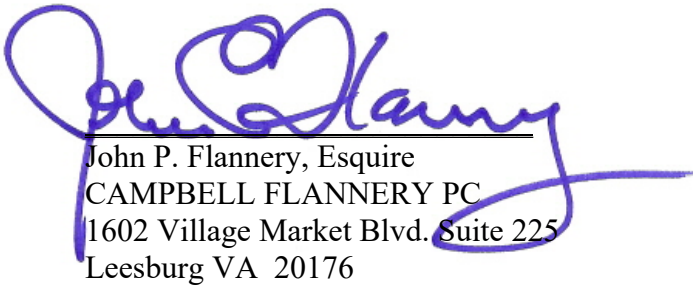
110. There can hardly be any bona fide difference of opinion that the Board and its successor have ignored the statutes and this Court's rulings and that was dead wrong. See Jones v. City of Billings, 279 Mont. 341, 927 P. 2d 9, 53 Mont. St. Rep. 1178 (Mont 1996).

III. CONCLUSION

Based on the pleadings herein, the arguments, and the exhibits attached hereto, Petitioner

seeks the relief requested above, the mandamus, and the conditions specificed, and such other relief as this Court may deem fit and just.

MARK IBSEN, MD
By Counsel



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for a Mandamus with Exhibits was served by prepaid first class U.S. Mail, on March_____, 2020, on the following:

Graden Hahn, Esq.
PO Box 200514
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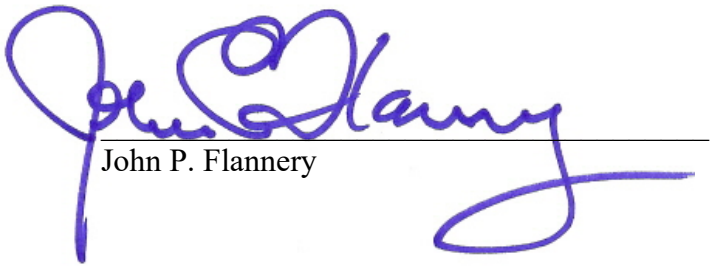
Of Medical Examiners



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