

<b>Matter of Olson v Education Dept. of the State of N.Y.</b>
2007 NY Slip Op 32351(U)
July 20, 2007
Supreme Court, New York County
Docket Number: 0100092/2007
Judge: Judith J. Gische
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: GISCANE  
Justice

PART 10

VERA ANN OLSON  
- v -  
NY STATE DEPT OF EDUCATION

INDEX NO. 100092/07  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 2  
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  
This is submitted to be decided with prior motion (\*)

Motion decided in accordance  
with the accompanying  
memorandum.

**FILED**  
JUL 31 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 7/20/07

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X  
In the Matter of the Application of  
VERA ANN OLSON,

Petitioner,

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

-against-

THE EDUCATION DEPARTMENT OF THE  
STATE OF NEW YORK, OFFICE OF  
PROFESSIONAL DISCIPLINE,

Respondent.  
----- X

**DECISION/ORDER**

Index No.: 100092/07

Seq. No. : ~~001~~/002

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

<b>Mot. Seq. # 001 - Papers</b>	<b>Numbered</b>
Pet's Pet w/ exhs .....	1
Resps' Ver. Ans. w/ mem of law, exhs .....	2
Pet's reply affirm (MHS) .....	3
Aff of Orfanos .....	4
Pet's reply affid (VAO) .....	5
<b>Mot. Seq. # 002 - Papers</b>	<b>Numbered</b>
Pet's OSC .....	1

**FILED**  
JUL 31 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

*Upon the foregoing papers, the decision and order of the court is as follows:*

Motion sequence 001 is an application pursuant to Article 78 of the Civil Practice Rules and Laws ("CPLR"). Petitioner seeks a judgment: (1) reversing the August 29, 2006 decision by the New York State Education Department's Office of Professional Discipline (respondent or "OPD") which refused to refer petitioner's January 4, 2006

petition (the "Petition to Reopen") to the New York State Board of Regents (the "Board"). OPD has answered the petition.

Under motion sequence 002, petitioner seeks an order sealing the evaluation report of Dr. Spyros Orfanos, annexed as Exhibit "A" to the Affidavit of Spyros D. Orfanos (the "evaluation report"). This motion is unopposed.

The court's decision follows.

### **BACKGROUND**

The facts relevant to this petition are largely undisputed. Petitioner is a psychologist licensed in New York. After investigating complaints lodged by former clients, OPD commenced a disciplinary proceeding against petitioner in 2000. As a result, petitioner signed an Application for Consent Order (the "First C. O. Application"), dated September 7, 2000, where she admitted the charges of professional misconduct. The First C.O. Application also provided that petitioner's license as a psychologist in New York State be suspended until five conditions were met. Pertinent among those conditions was that "a psychologist/psychiatrist chosen by the New York State Education Department" must find petitioner "fit to practice psychology." Thereafter, petitioner would be placed on probation for a period of five years.

Before petitioner signed the First C.O. Application, the New York State Education Department (the "Education Dept.") had already appointed Dr. Orfanos to evaluate her. By July 28, 2000, petitioner completed six sessions with Dr. Orfanos, who allegedly indicated to petitioner, at that time, that he believed she was fit to practice psychology and that he would submit his report to the OPD, to that effect, in two weeks. Petitioner nonetheless states she "repeatedly called Dr. Orfanos to remind him that the report

needed to be submitted," but by December 15, 2000, the time petitioner's First C.O. Application came before the Board for its approval, Dr. Orfanos' report had still not been submitted. The Board, therefore, suspended petitioner's license in accordance with the First C.O. Application which conditioned maintenance of her license on the finding of a state-appointed psychologist/psychiatrist that petitioner was fit to practice psychology.

Thereafter, it is undisputed that petitioner practiced psychology, while her license was suspended. She claims she was unaware of the suspension and that she thought Dr. Orfanos had timely submitted his report. Petitioner allegedly learned of her suspension on January 16, 2001 from a supervisor at her workplace.

Dr. Orfanos finally submitted his report on February 8, 2001. On February 15, 2001, petitioner's suspension was then lifted. Shortly thereafter though, the OPD commenced new disciplinary proceedings in connection with her practice of psychology while her license was suspended, between December 26, 2000 and January 17, 2001. Petitioner made another Application for Consent Order (the "Second C.O. Application") where, among other provisions, petitioner would be suspended for one month suspension followed by a probationary period of five years. The Board approved the Second C.O. Application, thereby issuing a second Consent Order on September 13, 2002.

Over three years later, on January 4, 2006, petitioner brought the Petition to Reopen, seeking to reopen the prior disciplinary proceedings and expunge both suspensions from the public record. On August 29, 2006, Louis J. Catone ("Catone"), Director of the OPD, informed petitioner that the Petition to Reopen would not be referred to the Board. This constituted a denial of the Petition to Reopen. He stated that there

was "no showing of an error of law, of new and material evidence, or circumstances that have occurred subsequently which warrant reconsideration of the measure of discipline."

### **Arguments of the Parties**

Petitioner contends that the OPD's refusal to refer the Petition to Reopen the prior proceedings was arbitrary and capricious. Petitioner, referring to an "interest of justice" standard, argues that the "suspensions should never have happened in the first place. She contends that the suspensions should be expunged from the public record because "[s]he would never have been suspended had Dr. Orfanos submitted his report timely, which means that the second proceeding would never have been brought." Petitioner also claims that the refusal of the OPD to refer the OPD Petition to the Board of Regents was an attempt "to conceal the negligence and fault of its evaluating psychologist." She states that the record of the suspensions makes it impossible for her to find employment as a psychologist. Specifically, she says she has been repeatedly turned down for jobs because she has to disclose that she had been suspended.

In motion sequence 002, petitioner also seeks an order sealing Dr. Orfanos' evaluation report, citing New York Education Law § 6510(8). Petitioner contends that the state violated this statute when it submitted the affidavit of Dr. Orfanos. Moreover, petitioner contends that the evaluation report is irrelevant and should have been redacted, except for certain dates, to protect its confidential nature.

OPD argues its decision must be sustained as petitioner failed to make a threshold showing warranting reconsideration of the agreed-upon penalties in both disciplinary proceedings. It contends that the basis for petitioner's Petition to Reopen and the instant petition, the allegedly new and material evidence with respect to the

dilatory submission of Dr. Orfanos' report, was known to her in early 2001. OPD argues that by the time petitioner made the Second C.O. Application, if she thought the imposition of a second suspension for practicing while under the ban of the first suspension was unfair, she should have raised such issue during the discussions leading to the second Consent Order, or elected to go forward with formal disciplinary proceedings and raise them as a defense. Petitioner instead agreed to the terms of her second suspension which necessarily renders her claim that there is now new and material evidence transparent and unsupportable.

OPD has not opposed petitioner's motion to seal the evaluation report.

## **DISCUSSION**

### **Motion Sequence 001**

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision was: made in violation of lawful procedure; affected by an error of law; or arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion. CPLR § 7803 (3). An agency abuses its exercise of discretion if it lacks a rational basis in its administrative orders.

It is important to note at the outset that petitioner's referral to an "interest of justice" standard is incorrect. "[T]he proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after quasi-judicial hearings required by statute or law." Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 231 (1974) (emphasis removed); Matter of Colton v. Berman, 21 N.Y.2d 322, 329 (1967).

8 N.Y.C.R.R. § 3.3(f) provides that an application for reconsideration of a

determination of the Board of Regents in disciplinary proceedings will not be granted "in the absence of a showing that the determination was based on an error of law, or that there is new and material evidence which was not previously available, or that circumstances have occurred subsequent to the original determination which warrant a reconsideration of the measure of discipline."

8 N.Y.C.R.R. § 3.3(f) further state that "the director of the Office of Professional Discipline, who, *in the exercise of discretion*, shall determine whether the application warrants referral to the Board of Regents for its determination based upon any of the grounds set forth by the applicant as the basis for the application" (emphasis added).

Petitioner argues that Dr. Orfanos dilatory submission of his evaluation report was the cause of the two suspensions, thus requiring the Director of the OPD to refer her Petition to Reopen to the Board. The court rejects this contention. Petitioner was aware that Dr. Orfanos failed to submit his report timely prior to the Second C.O Application. Therefore, it was not an abuse of discretion nor irrational for the OPD to conclude that petitioner's claim, that untimely submission of the evaluation report constitutes new and material evidence not previously available, is untenable on her Motion to Reopen.

The court also rejects petitioner's unsubstantiated claim that the OPD's refusal to refer the OPD Petition to the Board of Regents was an attempt "to conceal the negligence and fault of its evaluating psychologist." Unsubstantiated claims of bias will not suffice to show that petitioner was denied the relief she claims to be entitled to.

Warder v. Board of Regents of University of State of New York, 53 N.Y.2d 186 (1981).

Petitioner has not set forth any other argument that the OPD abused its discretion in refusing to refer the Petition to Reopen to the Board. Petitioner's claims that she

cannot find a job because of the two prior suspensions does not form the basis for a grant of the relief she seeks.

Accordingly, the instant petition is hereby denied.

### **Motion Sequence 002**

Petitioner also seeks an order sealing the evaluation report. 22 NYCRR § 216.1(a) provides that no order sealing a court record shall be entered except upon a written finding of "good cause" or where "otherwise provided by statute or rule." In determining whether good cause exists, the court is required to consider the interest of the public as well as the parties in making such determination.

There is an important societal interest in conducting any court proceeding in an open forum. Open hearings are more conducive to the ascertainment of the truth, and the presence of the public historically has been believed to enhance the integrity and quality of what transpires. Anonymous v. Anonymous, 263 A.D.2d 341 (1<sup>st</sup> Dept. 2000). Free access to filed court papers involves the same considerations. The public needs to know that all who seek the court's protection will be treated evenhandedly. Matter of Marshal, 13 Misc.3d 1203(A) (N.Y.Sup. 2006).

The rule that judicial proceedings are open to the public is not absolute; the courtroom may be closed where compelling reasons exist. Matter of Herald Co. v Weisenberg, 89 AD2d 224 (4<sup>th</sup> Dept. 1982) *aff'd*, 59 NY2d 378 (1983). There is a strong public policy favoring closure of unsubstantiated charges of professional disciplinary. Matter of Johnson Newspapers Corp. v. Melino, 151 A.D.2d 214 (3<sup>rd</sup> Dept. 1989), *aff'd* 77 N.Y.2d 1 (1980); Anonymous v. Bureau of Medical Conduct, 2 N.Y.3d 663 (2004).

In seeking closure of the evaluation report, petitioner cites Education Law §

6510(8) which provides that:

"[t]he files of the department relating to the investigation of possible instances of professional misconduct, or the unlawful practice of any profession licensed by the board of regents ... shall be confidential and not subject to disclosure at the request of any person, except upon the order of a court in a pending action or proceeding. The provisions of this subdivision shall not apply to documents introduced in evidence at a hearing held pursuant to this chapter..."

This statute is inapplicable here. Education Law § 6510(8) seeks to preserve the confidentiality of information pertaining to professional disciplinary proceedings until a final determination has been made. Matter of Johnson, *supra*.

However, the court finds that the evaluation report is irrelevant to this proceeding and should be sealed. It is undisputed that the report was not submitted timely. Petitioner did not raise any issue as to the content of the evaluation report. Most importantly, the content of the evaluation report was irrelevant to the issue of whether OPD abused its discretion in refusing to refer the Petition to Reopen to the Board.

The evaluation report contains personal information such as family history and psychological observations that did not import the reasons for the original charges. Further, each Consent Order, already made part of the public record as final determinations, details the specifications of petitioner's professional misconduct. Thus, the public's right to have access to this information has already been secured and this additional information is irrelevant.

### Conclusion

In accordance herewith, it is hereby:

**ORDERED** that the petition for an order directing OPD to refer the Petition to

Reopen is hereby denied; and it is further

**ORDERED** that the motion to seal the evaluation report of Dr. Spyros Orfanos, annexed as Exhiibt "A" to the Affidavit of Spyros D. Orfanos, is hereby granted.

The Clerk shall enter judgment in favor of respondent against the petitioner

Any requested relief not addressed expressly by the court has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
July 20, 2007

SO ORDERED:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**  
JUL 31 2007  
NEW YORK  
COUNTY CLERK'S OFFICE