

**STATE OF RHODE ISLAND
DEPARTMENT OF HEALTH
THREE CAPITOL HILL
PROVIDENCE, RHODE ISLAND 02908**

In the Matter of:

Stephen T. Skoly, DMD

Respondent.

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Compliance Order

**RE: ORDER ON MOTION TO CONTINUE PRACTICE DURING
ADMINISTRATIVE APPEAL OF COMPLIANCE ORDER**

I. INTRODUCTION

This matter arose from a compliance order (“Compliance Order”) issued on October 1, 2021 pursuant to R.I. Gen. Laws § 23-1-20¹ by the Department of Health (“Department”) to Dr. Stephen T. Skoly (“Respondent”). The Respondent is licensed (“License”) as a dentist pursuant to R.I. Gen. Laws § 5-31.1-1 *et seq.* The Compliance Order requires that the Respondent cease acting as a “health care provider” as defined by 216-RICR-20-15-8 *Requirement for Immunization Against Covid-19 for all Workers Licensed Health Care Facilities and Other Practicing Health Care Providers* (“Regulation”) until he has complied with the Regulation. The Respondent

¹ R.I. Gen. Laws § 23-1-20 provides as follows:

Compliance order. Whenever the director determines that there are reasonable grounds to believe that there is a violation of any law administered by him or her or of any rule or regulation adopted pursuant to authority granted to him or her, the director may give notice of the alleged violation to the person responsible for it. The notice shall be in writing, shall set forth the alleged violation, shall provide for a time within which the alleged violation shall be remedied, and shall inform the person to whom it is directed that a written request for a hearing on the alleged violation may be filed with the director within ten (10) days after service of the notice. The notice will be deemed properly served upon a person if a copy of the notice is served upon him or her personally, or sent by registered or certified mail to the last known address of that person, or if that person is served with notice by any other method of service now or later authorized in a civil action under the laws of this state. If no written request for a hearing is made to the director within ten (10) days of the service of notice, the notice shall automatically become a compliance order.

requested a hearing on the Compliance Order, and a prehearing conference was held on November 5, 2021.² The Respondent requested that he be allowed to continue to practice dentistry pending a full hearing on the Compliance Order to which the Department objected. A hearing on this motion was held on November 8, 2021.

II. JURISDICTION

The administrative hearing was held pursuant to R.I. Gen. Laws § 42-18-1 *et seq.*, R.I. Gen. Laws § 23-1-1 *et seq.*, R.I. Gen. Laws § 23-1-20, and R.I. Gen. Laws § 23-1-22.

III. ISSUE

Whether an order should be issued allowing the Respondent to continue as a health care provider pending a hearing/final order in this matter.

IV. DISCUSSION

A. Legislative Intent

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047 (R.I. 1994). If a statute is clear and unambiguous, “the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.” *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. DEM*, 553 A.2d 541 (R.I. 1989) (citation omitted). In cases where a statute may contain ambiguous language, the Rhode Island Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131, 1134 (R.I. 1998).

² Pursuant to delegation of authority by the director of the Department.

B. The Regulation

Pursuant to R.I. Gen. Laws § 23-1-1, the Department is authorized in part as follows:

The department of health shall take cognizance of the interests of life and health among the peoples of the state; shall make investigations into the causes of disease, the prevalence of epidemics and endemics among the people, the sources of mortality . . . and all other conditions and circumstances on the public health, and do all in its power to ascertain the causes and the best means for the prevention and control of diseases or conditions detrimental to the public health, and adopt proper and expedient measures to prevent and control diseases and conditions detrimental to the public health in the state. . . . The department shall adopt and promulgate rules and regulations that it deems necessary, not inconsistent with law, to carry out the purposes of this section.

The Department has general authority to issue regulations pursuant to R.I. Gen. Laws § 23-1-1 and R.I. Gen. Laws § 23-1-17. The Regulation was issued as an emergency regulation which is provided for in R.I. Gen. Laws § 42-35-2.10. The Department found that Covid19 had mutated in the dangerous delta variant necessitating mandatory Covid19 vaccinations by health care workers and providers to protect the spread of Covid19 among vulnerable patients.³ The Regulation was promulgated on August 17, 2021. Section 8.2(A)(6) of the Vaccine Regulation provides as follows:

“Health care provider” means any person licensed by the Department to provide or otherwise lawfully providing health care services, including, but not limited to, a physician, dentist, nurse, optometrist, podiatrist, physical therapist, social worker, pharmacist, emergency medical service practitioner, or psychologist, provided such person is either directly involved in patient care or potentially exposed to infectious agents that can be transmitted from person to person.

³ The reason for the adoption of the Regulation is as follows:

The novel coronavirus SARS-CoV-2, also known as COVID-19, has mutated into a more contagious variant, known as the Delta variant. As of July 4, 2021, Rhode Island had a “moderate transmission” rate of 11.2 cases per 100,000 people, but as of August 17, 2021, Rhode Island’s transmission rate has increased to “high transmission” of more than 187 cases per 100,000 people. New hospitalizations by week have more than quadrupled within that same time period. Health care workers and health care providers interact with some of Rhode Island’s most vulnerable populations: individuals who are immunocompromised and individuals with co-morbidities. These vulnerable populations are at risk for adverse health outcomes from COVID-19. As COVID-19 positive individuals are often asymptomatic or presymptomatic, health care workers and health care providers may unintentionally spread infection to these vulnerable patients. In order to protect these vulnerable populations, RIDOH is mandating that all health care workers and health care providers be vaccinated against COVID-19 by October 1, 2021.

See <https://rules.sos.ri.gov/regulations/part/216-20-15-8>

The Regulation provides that all health care providers as defined in the Regulation must be vaccinated against Covid19 by October 1, 2021 unless they fall under certain medical exemptions contained in the Regulation. The Respondent is a licensed dentist who is directly involved in patient care.⁴ As such, he falls under the definition of health care provider in the Regulation. The Regulation provides for certain medical exemptions provided for in accordance with the Advisory Committee on Immunization Practices. For the purpose of the November 8, 2021 hearing, the Respondent did not dispute that he has not received any Covid19 vaccinations.⁵

C. Arguments

The Respondent argued there is no regulatory or statutory authority for the Department and/or director to prevent the Respondent from continuing his practice while he appeals the Compliance Order. The Respondent argued the compliance order statute does not provide for the immediate compliance with said order. The Respondent argued that no action has been taken against his License so he can continue to practice as a dentist. The Respondent argued that nothing in the Regulation provides for the Department to stop the Respondent from practicing as a dentist pending a hearing. The Respondent argued that other health care providers have been granted more time to comply with the Covid19 vaccine mandate and allowed to continue to work as health care providers. The Respondent argued that he was seeking a declaratory order under R.I. Gen. Laws § 42-35-8⁶ to continue to practice as a dentist.

⁴ The Respondent's lawyers indicated that he has a State contract to see dental patients from Zambarano and Slater hospitals and has a private practice.

⁵ Also for the purpose of the November 8, 2021 hearing, it is assumed that the Respondent does not meet any of the medical exemptions in the Regulation.

⁶ R.I. Gen. Laws § 42-35-8 provides in part as follows:

Declaratory order. (a) A person may petition an agency for a declaratory order that interprets or applies a statute administered by the agency or states whether, or in what manner, a rule, guidance document, or order issued by the agency applies to the petitioner.

(b) An agency shall promulgate rules prescribing the form of a petition under subsection (a) and the procedure for its submission, consideration, and prompt disposition. ***

The Department argued that the Regulation clearly requires that health care providers directly involved in patient care be vaccinated against Covid19 by October 1, 2021. The Department argued that the Respondent admitted that he is in violation of the Regulation so that the Compliance Order was issued. The Department argued that the Respondent is essentially requesting a stay and that allowing a stay would be contrary to law. The Department represented that it will take action against those in violation of the Regulation as such violations come to light. The Department argued that it is authorized by the compliance order statute and the Regulation to prohibit the Respondent from violating the Regulation.

D. Discussion

a. Authority

The director of the Department may issue a compliance order for any violation of a statute or regulation administered by the director. Thus, the Department may issue a compliance order to an individual who may or may not be licensed by the Department. For example, the Department could issue a compliance order (or an immediate compliance order) against an individual who was not licensed as a nurse, emergency medical technician, physician, etc. but was engaging in such activities without an appropriate license. Or the Department could issue a compliance order against a licensee ordering the licensee to come into compliance with a statute or regulation.⁷

The Department used its statutory authority under R.I. Gen. Laws § 21-1-20 to issue the Compliance Order to the Respondent. The director determined there were reasonable grounds that the Respondent was violating a rule adopted by her. Indeed, there is no dispute that the Regulation requires health care providers to be vaccinated against Covid19, and the Respondent is not so

⁷ For example, the Department issued a compliance order in 2016 against one of its licensees of Doctor of Acupuncture and Oriental Medicine. Said compliance order required that respondent to stop engaging in certain misleading statements in his promotional materials. *Department of Health v. Tadeusz Szykowski*, DA 00020 (3/6/17). See <https://health.ri.gov/discipline/DATadeuszSzykowski3.pdf>.

vaccinated. Contrary to the Respondent's arguments, the Department had the authority to issue the Compliance Order as his failure to receive the Covid19 vaccination gave the Department reasonable grounds to believe he was in violation of a regulation administered by the Department.

Once a compliance order becomes final, the Department may enforce it by seeking an injunction in Superior Court. R.I. Gen. Laws § 23-1-23. Penalties are provided for in R.I. Gen. Laws § 23-1-25. In terms of violations of the Regulation, § 8.4 of the Regulation provides in part as follows:

Health care facilities and health care providers that violate any provisions of this Part [the Regulation] are subject to administrative action by the Department, and any other action provided for under applicable law and regulations, including R.I. Gen. Laws § 23-1-25, in addition to any action against the professional and/or facility license, as applicable.

The Respondent argued that there are no provisions in the Regulation allowing the Department to order the Respondent to stop practicing as a dentist via the issuance of a Compliance Order. There does not need to be. In § 8.4, the Regulation includes information about the possible consequences of a violation of the Regulation. The consequences include as follows: 1) administrative action as provided by either statute or regulation; 2) such administrative action could include action pursuant to R.I. Gen. Laws § 23-1-25 (but also could be under other applicable law or regulation); or 3) action against a professional license.

The Compliance Order is a different enforcement mechanism from taking action against a professional license. The Department could seek to suspend or revoke one of its licensee's license for a myriad of reasons. It can also decide to seek compliance by issuing a compliance order rather than seeking a sanction against a professional license. The fact that the Department chose in this matter to issue the Compliance Order rather than seeking to suspend or revoke the Respondent's License does not mean the Department has no authority to issue the Compliance Order. Instead,

the Department chose, at this time, to issue the Compliance Order rather than initiate an action against the Respondent's License. It certainly has the authority to bring an action against his License if it decides to in the future. There are different ways for the Department to enforce its statutory mandates and regulations. In this matter, it chose a compliance order.

The Compliance Order found that the Respondent was in violation of the Regulation and subject to disciplinary action pursuant to 216-RICR-40-05-2.15.1(A)(24) which is the professional licensing regulation for dentists. However, the Compliance Order is not seeking a sanction on the Respondent's License. Rather, the Department ordered the Respondent to cease acting as a health care provider as defined in the Regulation until he complied with the Regulation. The Compliance Order provided that failure to comply with said order may result in additional sanctions and penalties by law. In other words, at this time, the Department is not seeking a sanction on the Respondent's License. While such other action is possible, right now, the Department ordered the Respondent to comply with the Regulation or cease acting as a health care provider as defined by the Regulation.

The Department may issue compliance orders and immediate compliance orders. An immediate compliance order requires that along with a violation of law or regulation, the Department also finds that immediate action is required to protect the health, welfare, or safety of the public.⁸ Such an order will issue stating the violation and action deemed necessary and is effective immediately. A request for hearing cannot be made on an immediate compliance order.

⁸ R.I. Gen. Laws § 23-1-21 provides as follows:

Immediate compliance order. Whenever the director determines that there exists a violation of any law, rule, or regulation within the jurisdiction of the director which requires immediate action to protect the health, welfare, or safety of the public or any member of the public, the director may, without prior notice of violation or hearing, issue an immediate compliance order stating the existence of the violation and the action he or she deems necessary. The compliance order shall become effective immediately upon service or within the time specified by the director in the order. No request for a hearing on an immediate compliance order may be made.

Thus, the immediate compliance order could require immediate compliance or the steps required to be taken might have to be completed in a few days or a week. Such a determination would depend on the types of violations and threats to public health and safety. Thus, an immediate compliance order is final, and no hearing can be held. It takes immediate effect.

While the Department has the statutory authority to issue the Compliance Order to the Respondent and there need not be authorization for a Compliance Order in the Regulation and there need not be an action against his License, the Respondent also argued that the Compliance Order cannot prevent the Respondent from continuing his practice pending the outcome of the hearing. In other words, the Respondent argued that because there has been a request for hearing and no final compliance order has been issued, the Respondent can continue to practice as a dentist.

The compliance order statute provides that the “notice shall be in writing, shall set forth the alleged violation, shall provide for a time within which the alleged violation shall be remedied.” The statute provides that if no hearing request is made that the notice of compliance order shall become final. R.I. Gen Laws § 23-1-22⁹ provides for a hearing after an appeal of the compliance order. That statute provides that if after a hearing, the compliance order is sustained, the compliance order shall state a time within which the violation shall be remedied, and the original time specified in the notice of violation shall be extended to the time set in that order.

⁹ R.I. Gen. Laws § 23-1-22 provides as follows:

Hearing. If a person upon whom a notice of violation has been served under the provisions of § 23-1-20 or if a person aggrieved by any notice of violation requests a hearing before the director within ten (10) days of the service of notice of violation, the director shall set a time and place for the hearing, and shall give the person requesting a hearing at least five (5) days written notice of the hearing. After the hearing, the director may make findings of fact and shall sustain, modify, or withdraw the notice of violation. If the director sustains or modifies the notice, that decision shall be deemed a compliance order and shall be served upon the person responsible in any manner provided for the service of the notice in § 23-1-20. The compliance order shall state a time within which the violation shall be remedied, and the original time specified in the notice of violation shall be extended to the time set in that order.

As a request for hearing was received, the Compliance Order did not become a final order. The Compliance Order provided that the Respondent shall cease as a health care provider “unless and until he has complied with the terms and conditions of” the Regulation. The Compliance Order did not provide, for example, that the Respondent had ten (10) days to come into compliance with the Regulation. Instead, the Department ordered the Respondent to cease acting as a health care provider as defined in the Regulation until he complied with the Regulation. The Compliance Order itself is not final as it was appealed. Unlike the immediate compliance order which becomes effective upon issuance, a compliance order becomes effective if there is no appeal within ten (10) days or after an appeal and hearing and final order is issued.

The Respondent had from August 17, 2021 until October 1, 2021 to comply with the Regulation. He chose not to. The Department is requiring the Respondent to not be “directly involved in patient care” until he complies with the Regulation. There may be activities as a licensed dentist that a dentist could engage in that are not directly involved in patient care (e.g. document review for an insurance company). In other words, the Respondent could change his practice and not have to be vaccinated. Thus, the timing is up to the Respondent: either comply to be involved in direct patient care or change one’s practice so that the Regulation does not apply.

If an applicant applies for a license from a professional licensing body and is denied and requests a hearing, the applicant cannot engage in that profession pending the outcome of the hearing. When an emergency suspension of a license issues, the licensee cannot continue to act as a licensee pending a hearing. While an emergency suspension like an immediate compliance order requires an immediate threat to public health, safety, or welfare, a compliance order seeks to stop a violation of a law or regulation administered by the Department. If a compliance order issued to an individual saying that he or she cannot engage in X because that violates a Department statute,

that individual might decide not to engage in X anymore. Or the individual could challenge the compliance order and argue either that he or she is engaging in X, but it is not a violation of a Department statute or that he or she is not engaging in X (even if that was a violation). If the individual chooses the former then while the challenge is ongoing the individual is not to engage in X until it is shown that it is not a violation of a Department statute.

While no final order has been issued, the Regulation requires that health care providers be vaccinated against Covid19 by October 1, 2021. While the Respondent raises the issue of patient need (see below), there is no process in the Regulation for such a balancing act between vaccination status and patient need. The information on the record at the November 8, 2021 hearing is that the Respondent is an unvaccinated health care provider. It may be that at hearing other facts come to light which change the information on the record. The Respondent may prevail on his challenge to Compliance Order and if so, he would be able to be directly involved in patient care. Nonetheless, at this moment he is violation of the Regulation. The Department issued a Compliance Order that he cease professional conduct as a health care provider as described in the Regulation until he complied with the Regulation. (So that he could choose to change his practice so not to fall under that Regulation's definition). When a final order is issued the statute provides that the final order shall state the time in which the violation shall be remedied, and the original time shall be extended to the time in the final order. This does not mean that the violation can continue during the pendency of a hearing. It may be that some corrective measures take longer than others. The statute merely provides that a time to remedy must be given as well in the final order. A final order on the challenge to the Compliance Order may not have issued but there are no grounds to allow the Respondent to continue practicing as a health care provider in violation of the Regulation pending the hearing.

b. Declaratory Order

The Department argued that the Respondent essentially is requesting a stay of the Compliance Order (and the Regulation) pending a full hearing on his appeal of the Compliance Order. The Respondent argued it was requesting a declaratory order pursuant to R.I. Gen. Laws § 42-35-8.¹⁰ That statute provides that a person may petition an agency for a declaratory order that interprets or applies a statute administered by the agency or states whether or what manner, a rule or order issued by the agency applies to the petitioner. The Respondent has not filed such a petition regarding a statute. The Respondent is specifically challenging the Compliance Order. In *Mai v. Nolan*, 2005 WL 372047 (R.I. Super.), the respondent's license was revoked by the Department and on appeal to Superior Court, he requested a declaratory order regarding what activities he could do without said license. The Court remanded that request to the Department for consideration as a declaratory order under the statute. Here, the Respondent is not requesting the interpretation of a statute and how it might apply to him. Rather he is requesting that he be allowed to continue to be directly involved in patient care despite not being vaccinated against Covid19 as required by the Regulation.¹¹

¹⁰ R.I. Gen. Laws § 42-35-8 provides in part as follows:

Declaratory order. (a) A person may petition an agency for a declaratory order that interprets or applies a statute administered by the agency or states whether, or in what manner, a rule, guidance document, or order issued by the agency applies to the petitioner.

(b) An agency shall promulgate rules prescribing the form of a petition under subsection (a) and the procedure for its submission, consideration, and prompt disposition. The provisions of this chapter concerning formal, informal, or other applicable hearing procedure do not apply to an agency proceeding for a declaratory order, except to the extent provided in this section or to the extent the agency provides by rule or order.

(c) Not later than sixty (60) days after receipt of a petition under subsection (a), an agency shall issue a declaratory order in response to the petition, decline to issue the order, or schedule the matter for further consideration.

¹¹ Under *Narragansett Electric Company v. William W. Harsch et al.*, 367 A.2d 195, 197 (R.I. 1976), a stay will not be issued unless the party seeking the stay makes a "strong showing" that "(1) it will prevail on the merits of its appeal; (2) it will suffer irreparable harm if the stay is not granted; (3) no substantial harm will come to other interested parties; and (4) a stay will not harm the public interest." Despite the ruling in *Harsch*, the Supreme Court in *Department of Corrections v. Rhode Island State Labor Relations Board*, 658 A.2d 509 (R.I. 1995) found that *Harsch* was not necessarily applicable in all agency actions and the Court could maintain the *status quo* in its discretion when

c. **Administrative Procedures Act (“APA”)**

R.I. Gen. Laws 23-1-27 provides as follows: “[e]xemption from hearing provisions of Administrative Procedures Act. The provisions of §§ 42-35-9 through 42-35-18 shall not apply to this chapter.” The Department pointed to this statute to argue that hearings on compliance orders are not subject to the APA. The Respondent argued that the 2016 amendment to R.I. Gen. Laws § 42-35-1.1¹² applies the APA to the Department proceedings.

In 1978, the Superior Court in *Rhode Island Port Authority v. Cannon*, 1978 WL 196177 (R.I. Super.) found that R.I. Gen. Laws § 23-1-27 did not only apply to compliance orders as set forth in R.I. Gen. Laws § 23-1-20 through R.I. Gen. Laws § 23-1-26 but to the “chapter” so that the Superior Court did not have subject matter jurisdiction to hear an appeal of Department administrative decision but rather the aggrieved party was required to file a petition for a writ of certiorari to the Supreme Court. The judge found that the APA was enacted in 1964 so it was found in other situations to implicitly repeal prior statutory provisions requiring agency appeals to be by writ. However, R.I. Gen. Laws § 23-1-27 was enacted after the APA so the Court found that the legislature must have intended to exclude the Department from the requirement to bring agency appeals to Superior Court.

reviewing an administrative decision pursuant to R.I. Gen. Laws § 42-35-15(c). This is not on agency appeal to the Court. If this was a request for stay, the Department arguably has a strong showing it will prevail as the Respondent has admitted that he is not vaccinated as required and it is in the public interest and public safety to uphold public health safety regulations.

¹² R.I. Gen. Laws § 42-35-1.1 provides as follows:

Applicability. (a) This chapter applies to an agency unless the agency is exempted by Rhode Island general laws.

(b) This chapter applies to all agency proceedings and all proceedings for judicial review or civil enforcement of agency action commenced after the effective date of this chapter [June 29, 2016]. This chapter does not apply to any contested case for which notice was given before that date and rulemaking for which notice was given or a petition was filed before that date, for which all prior laws in effect at the time shall apply.

The *Cannon* case related to a sewage disposal system (now overseen by the Department of Environmental Management) and did not indicate what chapter the sewage system fell under. Indeed, most of the Department's licensees do not fall under Chapter 1 of Title 23 but under various chapters in Title 5. Certainly, *Mai v. Nolan* (licensed pursuant to R.I. Gen. Laws § 5-37.2-1 *et seq.*) was appealed to the Superior Court. And specific Department licensing acts such as pharmacy (R.I. Gen. Laws § 5-19.1-26), physicians (R.I. Gen. Laws § 5-37-7), and psychologists (R.I. Gen. Laws § 5-44-26) provide for APA appeals to Superior Court. The Respondent argued that R.I. Gen. Laws § 42-35-1.1 overrides any affect by R.I. Gen. Laws § 23-1-27 to exclude the Department from APA appeals.

Interestingly R.I. Gen. Laws § 23-1-1 *et seq.* does not include any type appeal to Superior Court of an administrative decision on a compliance order appeal but rather provides in R.I. Gen. Laws § 23-1-23 that compliance orders may be enforced by the Department in Superior Court and if the Department brings such an enforcement action, the person attacking the order shall have the burden of proving the error in the compliance order. R.I. Gen. Laws § 23-1-24 provides that Superior Court decisions may be appealed by writ to the Supreme Court. Thus, it would seem that the statute intended that a compliance order not be subject to an APA appeal after a final order.

However, if this hearing is pursuant to the APA, this interlocutory appeal may be appealed to the Superior Court. R.I. Gen. Laws § 42-35-15(a)¹³ provides that a person aggrieved by a final

¹³ R.I. Gen. Laws § 42-35-15(a) provides as follows:

Judicial review of contested cases. (a) Any person, including any small business, who has exhausted all administrative remedies available to him or her within the agency, and who is aggrieved by a final order in a contested case is entitled to judicial review under this chapter. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. Any preliminary, procedural, or intermediate agency act or ruling is immediately reviewable in any case in which review of the final agency order would not provide an adequate remedy.

order in a contested case is entitled to judicial review. However, any preliminary, procedural, or intermediate agency act is immediately reviewable in which review of a final agency order would not provide an adequate remedy. As the Rhode Island Supreme Court held in *Rhode Island Chamber of Commerce v. Hackett*, 411 A.2d 300, 302 (R.I. 1980):

The general rule in administrative law is that judicial review is only available after all administrative remedies have been exhausted. While s 42-35-15(a) of the Administrative Procedures Act states the general rule, it also states in pertinent part:

“Any preliminary, procedural, or intermediate agency act or ruling is immediately reviewable in any case in which review of the final agency decision would not provide an adequate remedy.”

We read this sentence as an exception to the general rule. Thus, when an inadequate remedy would result from requiring a party to exhaust all available administrative remedies, judicial review is immediately available.

The trial justice concluded that the remedies available to both plaintiff and defendant at the administrative level were not adequate and thus assumed jurisdiction under s 42-35-15(a) to review and to decide the issue.

***We believe that such a conclusion was reasonable and therefore hold that the Superior Court had jurisdiction to consider the complaint without requiring plaintiff to exhaust its administrative remedies.

Thus, the Superior Court will entertain a review of an interlocutory order when the Court finds it appropriate under the statute.¹⁴ *Banki v. Fine*, 224 A.3d 88 (R.I. 2020) reiterated the basis for the Superior Court under the APA to take an appeal: either as a final order or as an exception for an interlocutory order where the review of a final order would not provide an adequate remedy.¹⁵ *Banki* rejected the plaintiffs’ argument that the interlocutory order in that matter was

¹⁴ For example, in *Providence Auto Body, Inc. v. Department of Business Regulation*, 2005 WL 3276221 (R.I. Super.), the Superior Court heard an interlocutory appeal regarding an administrative agency’s hearing officer’s discovery order. The Court relied on R.I. Gen. Laws § 42-35-15(a) to exercise its discretion to take the interlocutory appeal. Similarly, the Superior Court in *Southern Union Company v. Rhode Island Department of Environmental Management*, 2007 WL 2692036 (R.I. Super.) relied on R.I. Gen. Laws § 42-35-15(a) to exercise its discretion to take an interlocutory appeal regarding an administrative agency’s hearing officer’s discovery order. In contrast, when the plaintiffs appealed an agency’s hearing officer’s decision to deny a motion to dismiss, the Superior Court found that the plaintiffs would be able to later seek an adequate remedy so found that the exception allowing interlocutory appeals was inapplicable. *Allstate Ins. Co. v. Rhode Island Department of Business Regulation*, 2018 WL 468262 (R.I. Super.).

¹⁵ *Banki* also discussed the Superior Court’s equitable jurisdiction to intervene on behalf of a party who claims that he or she is being irreparably harmed by the conduct of administrative proceedings. See *La Petite Auberge, Inc. v. Rhode Island Commission for Human Rights*, 419 A.2d 274 (R.I. 1980).

really a final order. The Court addressed whether the Superior Court should have heard the appeal of said interlocutory order as an exception in R.I. Gen. Laws § 42-35-15(a). As *Banki* makes clear, the decision to take an interlocutory appeal lies within the discretion of the Superior Court and the Superior Court shall apply the standard in the APA as to whether further agency review would be futile or would review destroy the effectiveness of the appellate review of the final order. See *Hackett, supra*.

R.I. Gen. Laws § 23-1-23 envisions narrow grounds to argue against a compliance order when the Department bring an enforcement action in Court. However, R.I. Gen. Laws § 42-35-1.1 provides that the APA applies to all agency proceedings and all proceedings for judicial review unless an agency is exempt by general laws. R.I. Gen. Laws § 42-35-18 does not exempt the Department. Despite *Cannon*, arguably R.I. Gen. Laws § 23-1-27 only exempts compliance orders of Chapter 1 of Title 23.

Certainly, as discussed at the hearing in this matter, a party may file an appeal in the Superior Court, but it does not mean the Court will take such an appeal. If this order is appealed, the Court could decline to hear an appeal because it does not fall under its interlocutory appeal discretion for an APA appeal or it could be because there is no right of appeal. Certainly, the undersigned cannot grant appeal rights where none exist so that such determination over any appeal rights lies with the Superior Court, if appealed.¹⁶

d. Equity

The Respondent brought up the fact that other health care providers have been given extra time to comply with the vaccine mandate in the Regulation on the basis of patient need. The

¹⁶ It is noted that the Respondent indicated that there were appeal rights under R.I. Gen. Laws § 42-35-2.10. However, that statute relates to the adoption of emergency regulations. While this matter involves the applicability of an emergency regulation, this is not some kind of appeal of the regulation itself and whether it was promulgated correctly under the APA. Thus, the undersigned does not believe this matter is an appeal of the actual emergency regulation.

Respondent argued that it was fundamentally unfair to treat the Respondent this way as other health care providers still are practicing without the Covid19 vaccine. The undersigned will not reach the issue of whether such differences between providers are actually unfair. Equitable principles are not applicable to an administrative procedure. See *Nickerson v. Reitsma*, 853 A.2d 1202 (R.I. 2004) (Supreme Court vacated a Superior Court order that had vacated an agency sanction on so-called “inherent equitable powers”).


e. Conclusion

The Department has the authority to issue regulations for the protection of public health. The Department determined that the Regulation was needed for public health. It has the statutory authority to issue a compliance order to those that violate its regulations. The Respondent is a health care provider under the Regulation who has not received the Covid19 vaccine. For the purposes of this hearing, it is assumed he does not meet any of the medical exemptions contained in the Regulation. On the information at this time (which could change after a full hearing), the Respondent is a health care provider as defined by the Regulation and is in violation of the Regulation. The Compliance Order allows the Respondent to choose whether to comply with the Regulation by either being vaccinated or changing his practice, so he is not involved in direct patient care. Thus, the Compliance Order gave the Respondent an option as to the time to comply. It is noted that the Regulation only applies when the Respondent falls under said definition. The Compliance Order did not take action on the Respondent’s License, and there is no requirement that the Department take action on the Respondent’s License when enforcing the Regulation. The Compliance Order only relates to the Respondent’s actions as a health care provider as defined in the Regulation and how those are in violation of the Regulation. The Respondent exercised his

right to appeal the Compliance Order. However, there are no grounds to find that he can continue to practice in violation of the Regulation pending a full hearing on the Compliance Order.

Therefore, the Respondent's request to be allowed to continue his practice as a health care provider as defined in the Regulation without having received the Covid19 vaccine is denied.

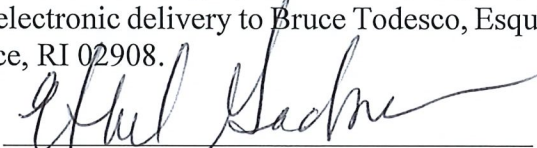
Entered this day 10th November, 2021.


Catherine R. Warren, Esquire
Hearing Officer

This is not a final order on said Compliance Order. This is an order relating to a motion brought during the hearing process.

CERTIFICATION

I hereby certify on this 10th day of November, 2021 that a copy of the within Order was sent by first class mail and by electronic mail to Christy B. Durant, Esquire, Durant Law, LLC, 875 Centerville Rd., Bldg. 4 Unit 12, Warwick, R.I. 02886 and Gregory P. Piccirilli, Esquire, 148 Atwood Avenue, #302, Cranston, R.I. 02920 and by electronic delivery to Bruce Todesco, Esquire, Department of Health, Three Capitol Hill, Providence, RI 02908.


Charles Gachne