

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

MINUTES

Apr 15, 2019

Department: 302

IN RE:
IN RE: DEAN GRAFILO

Case Number: CPF-19-516531

Petitioner's Order to Show Cause for Order
Compelling Compliance with Investigational
Subpoenas

Present:

Judge: ETHAN P. SCHULMAN
Reporter: Maria Torreano CSR#8600 email
maria.torreano@gmail.com

Clerk: WILLIAM TRUPEK
Bailiff: Kyle Tauscher

Appearing:

Larry Mercer, Esq., Department of Justice
State of California, appearing for Petitioner;

Michael Machat, Esq., Machat & Associates,
appearing for Defendant Dr. Kennedy;
Jacques G. Simon, Esq, appearing for
Defendantt Dr. Kennedy; (via CourtCall)

RULING - A R G U E D. Court having reviewed the pleadings and having heard oral argument rules as follows:

The Court adopts the tentative ruling as follows:

Petitioner's Order to Show Cause for Order Compelling Compliance with Investigational Subpoenas is granted.

Respondent Dr. Kennedy is not entitled to discovery regarding the documents Dr. Blumberg relied upon to form his opinion. The investigatory subpoena power is based on specific statutory authority and courts have drawn a distinction between the subpoena power and general civil discovery. (See *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4 [holding that Medical Board could obtain peer review committee records as part of its subpoena power even though Evidence Code § 1157 provides that such records are not "subject to discovery."].) The order to show cause process set forth in Gov't Code § 11188 does not contemplate general civil discovery. In addition, Dr. Kennedy's proposed discovery request runs afoul of Gov't Code § 11183 [confidential character of information that Medical Board obtains]. The instant order to show cause involves the investigation process. Dr. Kennedy's due process rights to cross-examine

witnesses and test the Board's evidence will come into play if the Board ultimately decides to file an accusation against him. Gov't Code § 11507.6 expressly allows for discovery to respond to an accusation. Dr. Kennedy's cases, which discuss the right to cross-examination in general civil cases, are inapposite.

The Court sees no need to continue this order to show cause so that it can be consolidated with Dr. Kennedy's action for injunctive relief. Dr. Kennedy's action apparently involves subpoenas to school districts that already have been complied with. (See Henderson Decl. ¶ 8.) In addition, it is uncertain when Dr. Kennedy's motion for preliminary injunction would be heard. An open-ended delay would be improper given the exigency that this case presents.

Upon weighing the patients' right to privacy versus the state's interest in safeguarding its citizens from unvaccinated children and negligent medical care, petitioner has demonstrated good cause for the issuance of the subpoenas, which are relevant and material to its investigation of whether Dr. Kennedy is improperly issuing blanket medical exemptions from vaccinations in violation of the standard of care. (See *Fett v. Medical Bd. of California* (2016) 245 Cal.App.4th 211, 219-221 [good cause to require compliance with subpoena based on specific instances of billing irregularities]; *Whitney v. Montegut* (2014) 222 Cal.App.4th 906, 918-920 [good cause to require compliance with subpoenas based on specific instances of doctor's prescribing irregularities].)

In this case, the declaration of Dr. Dean Blumberg, an expert in pediatrics and pediatric infectious disease, provides competent evidence regarding numerous specific irregularities with regard to Dr. Kennedy's medical exemptions. The exemptions appear on preprinted forms that contain an extensive list of "conditions and disabilities" without restriction or specification of particular reasons for the exemption, apparently suggesting that each child had more than two dozen such conditions or a family history of them. (Blumberg Decl. ¶ 7.) Many of these conditions are not medically accepted contraindications to vaccination. (*Id.*) Dr. Kennedy issued blanket permanent medical exemptions from all vaccines even though a legitimate medical exemption should be vaccine-specific and there is no component common to all vaccines. (*Id.* ¶¶ 2, 3, 6, 7.) Dr. Kennedy is not a pediatrician, was trained as a psychiatrist, and the exemptions indicate he works at an "anti-aging" medical clinic. Dr. Blumberg's opinion that it is significant that Dr. Kennedy, rather than the primary care provider for two of the children in question, and did not have the children's pediatric records available to him at the time he issued the exemptions, is probative. (*Id.* ¶ 6.) Dr. Blumberg also properly relied on the children's pediatric charts, which did not document allergies, to form his opinion. In sum, Dr. Blumberg sets forth a factual foundation for his opinion, including a review of patient medical records. He sets forth specific instances which suggest that Dr. Kennedy may have departed from the standard of care. Therefore, upon considering the privacy and safety issues at stake, there is good cause to grant the petition.

Dr. Kennedy's argument about the propriety of obtaining copies of the exemptions does not change the analysis. The exclusionary rule generally does not apply to administrative proceedings and/or investigations and there are no adduced facts that would warrant its application in this case. (See *Fett v. Medical Bd.* (2016) 245 Cal.App.4th 211, 224.)

Order is signed.

Judge: Ethan P. Schulman, Clerk: W. Trupek, Court Reporter: Maria Torreano CSR#8600 email maria.torreano@gmail.com, Reported. =(302/EPS)