

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals
14 Summer Street, 4th Floor
Malden, MA 02148
www.mass.gov/dala

Board of Registration in Medicine,
Petitioner

v.

Docket No. RM-22-0333

John Diggs, M.D.,
Respondent

Date: JAN 24 2025

**ORDER OF DEFAULT
RECOMMENDED DECISION**

Procedure leading to Order of Dismissal Recommended Decision

On August 4, 2022, the Board of Registration in Medicine issued the Statement of Allegations against Dr. Diggs. It was later amended.

On September 22, 2022, I set a hearing for eight days in January and February 2023. The hearing was later continued.

On January 5, 2023, I emailed Dr. Diggs's lawyers in two separate law offices – John Kiernan and Amy Magher of Kiernan Trebach; and Richard Chambers of Chambers Law Office – as follows:

To Mr. Kiernan, Ms. Magher, and Mr. Chambers:

Please explain in advance how you will coordinate your efforts in hearing examinations and pleadings.

You will be responsible for coordinating logistics between the two law offices. The lawyers will be responsible for coordinating with anyone who assists them administratively.

I say this to head off any possible lack of coordination that has occurred in previous cases in which two law offices represented one party.

Twenty-six days went by without a response. On January 31, 2023, I emailed as follows:

Mr. Kiernan, Ms. Magher, and Mr. Chambers:

If you responded to my email below, please resend. If you did not respond to my email below, please respond by 5:00 p.m. tomorrow.

Also on January 31, 2023, Mr. Kiernan responded by email as follows:

We (all counsel for Dr. Diggs) take full responsibility for coordinating our efforts before DALA. We will speak with one voice on behalf of Dr. Diggs. All pleadings will be filed by my office (after coordination among the attorneys)....Thank you for your courtesy and patience.

On April 3, 2023, the then-Complaint Counsel reported that he had had an emergency medical issue. He proposed hearing dates in June 2023. I could not hold a hearing in June 2023 and, on both April 3 and 4, 2023, asked the parties for other dates.

On April 4, 2023, Dr. Diggs, through his lawyers, stated that he would confer with the then-Complaint Counsel and propose other dates for the hearing.

On May 31, 2023, not having heard from the parties, I emailed them to ask for proposed dates for the hearing.

On June 1, 2023, the then-Complaint Counsel emailed me: "I apologize for the delay. I will confer with counsel for the Respondent and submit some dates for your consideration."

On June 20, 2023, I emailed the then-Complaint Counsel:

If there is something that keeps this case from moving forward, please let me know. If BRM is not proceeding with this case, please let me know. I want this case either on my docket and moving forward or off my docket.¹

¹ Dr. Diggs contends about my email: "It is unclear to the Respondent why the Respondent would have to show cause for the delays that the Magistrate acknowledged were caused by BRM." (E.g., Opposition of John R. Diggs to Petitioner's Motion to Remand and Request for Hearing 3) I note two things. One, I did not acknowledge that all delays to that date were caused by BRM. I did acknowledge that the then-Complaint Counsel had taken the lead in conferring with Dr. Diggs's lawyers and proposing hearing dates. Two, my later order to show cause to Dr.

Also on June 20, 2023, the then-Complaint Counsel emailed me, "We will be submitting dates for a hearing to you soon." By "we," I assume that the then-Complaint Counsel meant the parties.

On August 1, 2023, I proposed dates in September 2023 for the hearing. It was not held in September 2023.

On December 12, 2023, I emailed the parties:

For months now, I have been chasing down the parties. Soon I will issue an order to show cause to Dr. Diggs why his appeal [sic] should not be dismissed for failure to prosecute; an order to show cause to BRM why I should not issue a recommendation that its Statement of Allegations be dismissed for failure to prosecute it; or both.

On May 7, 2024, I emailed the parties:

I received the status report of May 1, 2024, which seems to resemble the status report of March 6, 2024. Not much seems to have happened.

The May 1 status report, like the March 6 status report, requests that the conference be rescheduled.

....

I grant the motion that the parties provide another joint status report on or before June 15, 2024.

However, I repeat what I stated on June 20, 2023: "I want this case either on my docket and moving forward or off my docket." If I receive another status report that shows that not much has happened, I will explore removing this case from my docket.

On May 13, 2024, Dr. Diggs's lawyers emailed me two oppositions. The email stated, "Hard copies will be sent via First Class Mail." Hard copies did not arrive on my desk.

On May 28, 2024, I emailed Dr. Diggs's lawyers, "Were these mailed?" They did not

Diggs was not based on the unspecified delays that I referred to on June 20, 2023. My order to show cause specified Dr. Diggs's failures to prosecute his defense.

respond. On June 6, 2024, I ordered Dr. Diggs, through his lawyers, to mail or otherwise convey to me both oppositions in paper form by June 10, 2024. Dr. Diggs, through his lawyers, complied.²

On June 15, 2024, the parties filed a joint status report. On June 18, 2024, I emailed the parties:

I received the parties' status report. I had hoped for something more substantive, such as reporting that the parties were ready for a hearing or would be ready after certain events.³

I scheduled a status conference and emailed:

Parties should be prepared to discuss the following issues:

* Why has this case been on DALA's docket for almost two years?

....

On June 24, 2024, I held a status conference. Mr. Chambers did not participate but Dr. Diggs's other lawyers reported that Mr. Chambers still represented Dr. Diggs. At the conference, Complaint Counsel explained reasons for the case's delay. The reasons included the change in complaint counsels, the amount of discovery, and an amended Statement of Allegations. (Dr. Diggs later agreed that these were among the reasons for the delay. (*E.g.*, Objections of John R. Diggs to the Recommended Decision (dated 8/21/2024) at 2-4)) I accept that these are the major

² When Dr. Diggs's lawyers complied, they did not explain (1) why they did not mail paper copies when they said they would mail paper copies and (2) why they did not respond to my email. Months later, on September 13, 2024, Dr. Diggs's lawyers provided an explanation why they thought that they did not have to mail paper copies or respond to my email, namely, that my need for paper copies was moot. (*E.g.*, Motion of John R. Diggs at 4-5) Their explanation, which also appears to blame me for their failure to do what they said they would do and their failure to answer my email, is unpersuasive, especially because they did not offer it three months earlier.

³ Dr. Diggs, through his lawyers, later stated that this status report "was actually prepared by Complaint Counsel." (*E.g.*, Motion of John R. Diggs to Remand This Matter to DALA and Request for Hearing 5) The point is not who prepared the status report – *especially because Dr. Diggs reported that he* "help[ed] to draft status reports." (*E.g.*, Motion of John R. Diggs at 2). The point is that neither party, *including Dr. Diggs*, had advanced the case.

reasons for the delay. I do not issue this Order of Default Recommended Decision based on the length of time that this case has taken or on the major reasons for the delay. Rather, I issue this order based on the factors that I specify later.) Also at the status conference, I ordered the parties to propose hearing dates by July 12, 2024.

In recounting the June 24, 2024 status conference, Complaint Counsel states, “The parties and the Magistrate tentatively discussed hearing dates during the week of November 18,” 2024. (Petitioner’s Motion to Remand at 2) The mention of the week of November 18 was so tentative that I did not record it in my notes of the status conference, pencil it into my calendar, request a hearing room, schedule a Webex hearing, or, as far as I can tell, put it in an email to the parties.⁴

On July 12, 2024, Complaint Counsel asked for an extension until July 28, 2024 to finalize hearing dates.⁵ (July 28, 2024 was a Sunday.) I granted the extension and emailed, “The parties will make every reasonable effort to move this case *forward*.”

Instead of finalizing hearing dates on Monday, July 29, 2024,⁶ Ms. Magher emailed on July 30, 2024:

⁴ Dr. Diggs, through his lawyers, has mischaracterized November 18, 2024 as “the previously agreed upon hearing date” and the “agreed upon hearing date.” (E.g., Motion of John R. Diggs to Remand This Matter to DALA and Request for Hearing 7, 8, 9 (two references)) In contrast, Ms. Magher, in her July 30, 2024 email, characterized the hearing date as “proposed,” which was different and more accurate.

⁵ In my Order of Dismissal Recommended Decision, I wrote “propose” instead of “finalize.” I used July 28 as the date, rather than July 29.

⁶ In my Order of Dismissal Recommended Decision, I wrote “proposing” instead of “finalizing.” Dr. Diggs contends:

[O]n June 24, 2024, November 18, 2024 was the date selected for the hearing, subject to the confirmation of the witnesses and experts for both parties. The Recommended Decision is not correct that the Magistrate was awaiting proposed hearing dates.

(E.g., Motion of John R. Diggs to Remand This Matter to DALA and Request for Hearing 5-6) I dispute that the word “selected” is accurate, even with the modification of “subject to.” The fact that I wrote “propose” and “proposing” in my Order of Dismissal Recommended Decision,

We are trying to confirm the availability of one of our expert witnesses for the *proposed* hearing date of November 18th....I expect to be speaking with him shortly, and hope to be able to *confirm* his and our availability for November 18th within the next day or two. Our apologies for the delay.

(Emphasis added) (That is, November 18, 2024 was a proposed hearing date that had not been confirmed.) I did not hear from Dr. Diggs's lawyers within the next day or two.⁷ On August 6, 2024, I issued an Order to Show Cause that stated in part:

It [is] now past a day or two. It has been a week since I have heard from Dr. Diggs's lawyers. Dr. Diggs's lawyers continue to force me to chase them down, which constitutes a failure to prosecute the appeal. The key event of an appeal [sic] is the hearing. If Dr. Diggs's lawyers cannot confirm hearing dates, it constitutes a failure to prosecute the appeal.

I also stated: "The survival of this appeal [sic] is at stake." I continued:

Dr. Diggs will show cause under 801 CMR 1.01(7)(g)2 why I should not issue an Order of Dismissal Recommended Decision because he has failed to prosecute this case. Dr. Diggs's response will include an explanation why this case has lingered for two years, why I have had to chase his lawyers down, and any attempt they may wish to make to assure that I will not have to continue to chase his lawyers down.

In effect, I asked for three things and invited a fourth optional thing: (1) an explanation why I should not issue an Order of Dismissal Recommended Decision; (2) an explanation why this case had lingered; (3) an explanation why I had had to chase Dr. Diggs's lawyers down; and optionally (4) any assurance that I would not have to continue to chase his lawyers down.

On August 7, 2024, Ms. Magher responded. The response did not include an explanation

instead of "finalize" and "finalizing," is not terribly significant. The point is that I was waiting to hear from the parties before scheduling a hearing.

⁷ In Dr. Diggs's response to my order to show cause, Ms. Magher wrote that she "genuinely believed that she would have a response for the Magistrate with time stated." (Response on Behalf of Respondent and By Counsel to the Order to Show Cause (8/6/2024) at 2, ¶ 7) That is not the issue. I do not doubt that Ms. Magher genuinely expected to talk to the expert on July 31 or August 1, 2024. I do not fault Ms. Magher for stating her expectation to me in an email. The issue is what Ms. Magher did when she did not talk to the expert; she went silent and did not explain why she missed the deadline for finalizing a hearing date. That's what I fault her for.

related to #1. The response did state that Dr. Diggs's lawyers agree that the case should move forward, and apologized for the "recent delay in scheduling," but those are not arguments why Dr. Diggs should not be defaulted. Pages 1-2 (as I discuss below) explained the recent delay in the case, but the explanation: is not an argument against default; confirmed that Dr. Diggs's lawyers have failed to defend his case, and militated in favor of default.

The response included an explanation related to #2 (pp. 2-4), which I accept, as I have written above, but nothing related to #3. Dr. Diggs's lawyers have not explained, as I have ordered, why I have had to chase them down. It is possible that they mistakenly believe that they have been consistently responsive in their prosecution of Dr. Diggs's defense and have not been lackadaisical. Nonetheless and ironically, with their absence of an explanation, they have continued their pattern of ignoring my orders and requests.

The response chose not to include an assurance related to #4. Although any such assurance was optional, Dr. Diggs's lawyers have left me suspecting that if this case were to continue, which in my opinion, it should not, I will continue to have to chase them down and force them to prosecute Dr. Diggs's defense.

Pages 1-2 of the response stated as follows: Mr. Chambers "is very much a part of the defense team, and had been working with the defense experts."

"Following the status conference," that is, at some unspecified time after June 24, 2024, Ms. Magher "had not been able to reach Attorney Chambers to discuss a litigation strategy" or to confirm his and defense experts' availability for the hearing. Ms. Magher left messages for Mr. Chambers and tried to contact the defense expert directly. (The response refers to both expert and experts in the plural.)⁸

⁸ Dr. Diggs, through his lawyers, stated:

According to the response, Ms. Magher “was informed” – the response did not state by whom – that the defense expert was out of the country, but would return and contact her on July 29, 2024.⁹ On July 28, 2024, Ms. Magher did not have a response from the defense expert or Mr. Chambers. (Ms. Magher’s email to me on July 30, 2024 did not indicate that she did not have a response from Mr. Chambers.)

According to the response, on July 30, 2024, Mr. Chambers advised Ms. Magher that a family member had been hospitalized out of state. He stated that he would try to contact her

In fact, *as previously represented to the Magistrate*, counsel for the Respondent was desperately working to confirm the availability of co-counsel, Richard Chambers[,] and the experts with whom he was working.

(*E.g.*, Motion of John R. Diggs to Remand This Matter to DALA and Request for Hearing at 6) (emphasis added) Dr. Diggs’s lawyers may have been *desperately* working, but they did not represent that to me, not in the email of July 30, 2024 and not in the answer to my order to show cause.

⁹ My Order of Dismissal Recommended Decision included this sentence above.

Dr. Diggs, through his lawyers, later contended:

Although not included in the Magistrate’s quotation from the email, Attorney Magher advised that she was informed that the expert was out of the country.

(*E.g.*, Motion of John R. Diggs to Remand This Matter to DALA and Request for Hearing at 6) I did not quote the email, but I did paraphrase it. Dr. Diggs does not explain the significance of my not quoting the email on this point.

In Dr. Diggs’s response to my order to show cause, Ms. Magher stated:

The undersigned counsel was informed that the defense expert was out of the country, but would be returning the weekend before the July 28, 2024 deadline and would contact counsel the following Monday.

(Response on Behalf of Respondent and By Counsel to the Order to Show Cause (8/6/2024) at 1, ¶ 5) “[T]he following Monday” certainly sounded like Monday, July 29, 2024. In Dr. Diggs’s motion, Ms. Magher contended:

She did not, as the Recommended Decision states, advise the magistrate that an expert would contact her on July 29, 2024.

(Motion of John R. Diggs to Remand This Matter to DALA and Request for Hearing at 6)

My Order of Dismissal Recommended Dismissal sounds correct on this point. Even if I were incorrect, Dr. Diggs does not explain how that means that he did prosecute his defense.

when he had time to confirm his and the expert's availability. The response reported, "He did not respond."

The response continued that "we were informed" – I assume that means Ms. Magher and Mr. Kiernan, although the response does not specify who informed them – that the family member died on August 2, 2024. The response reported that "we...understand" that the funeral would be held at the end of the week, that is, around August 9, 2024. The "we...understand" may have indicated that Mr. Chambers had not been in direct contact with Ms. Magher and Mr. Kiernan. There, the response's narrative ended.

On August 21, 2024, I issued the Order of Dismissal Recommended Decision (which I will refer to as "Order of Dismissal").

Procedure after Order of Dismissal

Complaint Counsel's motion to remand

On September 6, 2024, in Petitioner's Motion to Remand, Complaint Counsel moved that BRM remand the case to DALA. Complaint Counsel alleged that in my Recommend Decision Order of Dismissal, I had used

terminology which would benefit from clarification and allow the Board of Registration in Medicine...to issue an unambiguous Final Decision and Order.

Complaint Counsel moved that BRM remand the case to DALA. Complaint Counsel sought that DALA make four specific findings, which I find below.

Dr. Diggs's motion to remand and for a hearing

On September 13, 2024, Dr. Diggs, through his lawyers, moved that BRM remand the case to DALA for a hearing. (Motion of John R. Diggs to Remand This Matter to DALA and Request for Hearing) Mr. Kiernan and Ms. Magher signed it.

Among other things, Dr. Diggs's motion stated that he,

through or with his counsel has never failed to respond to requests by the BRM for conferences, interviews, or information and has never failed to participate in any conferences with the Magistrate.

(Motion of John R. Diggs at 1) Dr. Diggs's interactions with BRM were not the basis of my Order of Dismissal and are not the basis of this Order of Default Recommended Decision. Nor have I faulted or do I fault Dr. Diggs's lawyers for having failed to participate in conferences with DALA.

Dr. Diggs, through his lawyers, argued that my Order of Dismissal was "on its face, invalid" because it erroneously referred to his appeal. (Motion of John R. Diggs at 1) See also Objections of John R. Diggs to the Recommended Decision (dated 8/21/2024) and Request for Hearing at 5 (same); and Opposition of John R. Diggs to Petitioner's Motion to Remand and Request for Hearing at 2 ("This matter is not an appeal"). I regret the error and correct it in this Order of Default Recommended Decision.

Dr. Diggs's motion to remand also discusses an email that I sent to the parties on December 12, 2023. To provide context for Dr. Diggs's discussion, I quote the email in its near entirety.

To the parties:

1. On June 20, 2023 I wrote to BRM: "If there is something that keeps this case from moving forward, please let me know. If BRM is not proceeding with this case, please let me know. I want this case either on my docket and moving forward or off my docket."

For months now, I have been chasing down the parties. Soon I will issue an order to show cause to Dr. Diggs why his appeal [sic] should not be dismissed for failure to prosecute it; an order to show cause to BRM why I should not issue a recommendation that its Statement of Allegations be dismissed for failure to prosecute it; or both.

2. Please do not make me ask any party again to comply with the Instructions for

Communicating with DALA, which I have sent at least three times....¹⁰

My Order of Dismissal used the following language, which I repeat in this order:

On December 12, 2023, I emailed the parties:

For months now, I have been chasing down the parties. Soon I will issue an order to show cause to Dr. Diggs why his appeal [sic] should not be dismissed for failure to prosecute...

Dr. Diggs's motion to remand states:

The magistrate notes in his Recommended Decision, against Respondent, that "On December 12, 2023, I emailed the parties: For months now, I have been chasing down the parties. Soon I will issue an order to show cause to Dr. Diggs why his appeal should not be dismissed for failure to prosecute..." This statement actually followed a numbered paragraph *directed to the Board* quoting an email to the board dated June 20, 2023, that stated: "If there is something that keeps this case from moving forward, please let me know. If BRM is not proceeding with the case, please let me know. I was this case on my docket and moving forward or off my docket." It is unclear to the Respondent why the Respondent would have to show cause for the delays that the Magistrate acknowledged were caused by the BRM.

(Motion of John R. Diggs at 2-3) (emphasis in the original)

My December 12, 2023 email was addressed "*To the parties*" and referred to "*the parties*." I meant both parties. I quoted an earlier email to Complaint Counsel and then addressed *both* parties, stating that I had had to chase down *both* parties (which I have had to do), and notifying *both* parties that the case was at risk of ending to their detriment. In my Order to Show Cause, I did not order Dr. Diggs to show cause for the Complaint Counsel's delays. That is simply not in my Order to Show Cause. In both my Order to Show Cause and my Order of Dismissal, I partially quoted my December 12, 2023 email to demonstrate that I had notified Dr. Diggs that his failure to prosecute his defense of the case had put it at risk.

¹⁰ This second topic is not relevant here. I include part of the topic to provide context for Dr. Diggs's discussion.

On June 6, 2024, I issued my Order Barring Electronic Filing, which was addressed to both parties and quoted my December 2023 email: "For months now, I have been chasing down the parties...."

More than once, I have had to chase Dr. Diggs's lawyers down; more than once, I have told Dr. Diggs's lawyers that I have had to chase them down; and they contend that I have meant unfairly that I have had to chase down the complaint counsels.

In his motion to remand, Dr. Diggs also stated:

As further explained to the Magistrate, in response to the order to show cause...Attorney Chambers contacted Attorney Magher on July 30, 2024, the same day she sent the advisory and apology to the Magistrate, but *after* she contacted the Magistrate.¹¹ Attorney Chambers shared that a member of his family was hospitalized out-of-state. Attorney Chambers did state that he would not be able to respond to Attorney Magher until the following day after 5:00 p.m.,¹² but Attorney Magher did not receive any further response from him.

(Motion of John R. Diggs to Remand This Matter to DALA and Request for Hearing 6)

Dr. Diggs's motion to remand continued:

¹¹ I do not see this contention in Dr. Diggs's response to my motion to show cause and his lawyer did not provide a page or paragraph number.

As I wrote in my Order of Dismissal Recommended Decision and as I repeat in this order:

July 30, 2024 was the date that Ms. Magher (1) learned about the medical emergency in Mr. Chambers's family and (2) emailed me at 7:23 p.m. If she knew about the medical emergency before she emailed me, she did not mention it. If she learned about the medical emergency after she emailed me, she did not update me.

The last sentence remains true.

¹² Despite the language, "As further explained to the Magistrate, in response to the order to show cause," Dr. Diggs's response actually alleges slightly different facts: Mr. Chambers "advised that he would try to reach out when he had time to confirm his availability (and that of the expert)." (Response on Behalf of Respondent and By Counsel to the Order to Show Cause (8/6/2024) at 2, ¶ 7) The discrepancy is not directly significant. However, it is another inaccuracy in Dr. Diggs's submissions through his lawyers, which throws the credibility of the assertions in general into doubt.

With due respect to the Magistrate, Attorney Magher and Attorney Kiernan did not feel it appropriate to provide the minimal details she received about Attorney Chambers' personal family medical emergency in an e-mail or pleading.

(Motion of John R. Diggs to Remand This Matter to DALA and Request for Hearing 7) The motion also refers to Mr. Chambers's "*personal* emergency/crisis." (Motion at 7) (emphasis in the original) This is an astonishing contention. Dr. Diggs, through his lawyers, could have and should have emailed me along the lines of: "Mr. Chambers is experiencing a family emergency and is unavailable to confirm his availability and that of experts." In the history of the law, parties have conveyed thousands of comparable messages about medical emergencies and deadlines, as in the form of motions, to tribunals.

Dr. Diggs's motion to remand continued:

[A]t worst, prior to the entry of the Order to show cause, they [Ms. Magher and Mr. Kiernan] believed that they would be ordered to proceed with the agreed upon hearing date of November 18th, with or without confirmation.

(Motion of John R. Diggs to Remand This Matter to DALA and Request for Hearing 8) Dr. Diggs's lawyers provide no basis for this unreasonable belief. I ordered Dr. Diggs, through his lawyers, to show cause why his case should not end for failing to prosecute his defense, as I had previously notified him that I might do. I did not order the case to proceed to a hearing without confirmation that all vital participants would be available; I did not previously notify the parties that I might order the case to proceed to a hearing even if all vital participants would not be available; and it would not have been reasonable for me to so order. Nor, as I have stated, was November 18, 2024 an agreed upon hearing date.

Dr. Diggs's opposition to Complaint Counsel's motion to remand

Also on September 13, 2024, Dr. Diggs opposed Complaint Counsel's motion to remand the case and again moved for a hearing. (Opposition of John R. Diggs to Petitioner's Motion to

Remand and Request for Hearing) Dr. Diggs's opposition repeated many of the arguments from his motion to remand, filed the same day.

Dr. Diggs's objections to the recommended decision

On September 19, 2024, Dr. Diggs filed Objections of John R. Diggs to the Recommended Decision (dated 8/21/2024) and Request for Hearing (which this order calls "Dr. Diggs's objections"). Mr. Kiernan and Ms. Magher signed it. It was Dr. Diggs's third motion for a hearing. (As with Dr. Diggs's two previous submissions in September 2024, it was not signed by Mr. Chambers, did not explain the apparent absence of Mr. Chambers, and did not accompany any withdrawal of appearance by Mr. Chambers.)

Dr. Diggs's objections repeated many of the arguments from his motion to remand and his opposition.

Complaint Counsel's response to Dr. Diggs's motion to remand

On September 20, 2024, Complaint Counsel responded to one of Dr. Diggs's three submissions in September 2024.

BRM's ruling on motions to remand

On October 24, 2024, BRM remanded the case to DALA. (Ruling on Motions for Remand)

BRM's ruling included this footnote:

The Board defers to the DALA Magistrate on whether non-responsiveness in this matter rises to the level of failure to defend such that an entry of default as permitted by G.L. c. 30A, § 10 might be warranted.

(BRM ruling, p. 2, n.5) That statute authorizes agencies to informally dispose "any adjudicatory proceeding by...default."

Dr. Diggs's lawyers' inability or unwillingness to follow instructions

On August 16, 2022, DALA sent to the parties a Notice of Pre-Hearing Conference. DALA's standard practice, when mailing such notices in my cases, is to include Instructions for Communicating With DALA. (The instructions constitute my instructions, not DALA's as an agency.)

The instructions include the following:

On **all communications** with the Division of Administrative Law Appeals (DALA), whether email, U.S. mail, or fax, you must:

- ☐ include the name of the case *and* the docket number.

On all **emails to DALA**, you must:

....

- ☐ send a copy to DALA's automatic docketing system, DALApleadings@mass.gov. If you do not, the Administrative Magistrate may ask you to resend it.

- ☐ make sure that the total submission, including any attachments, is not longer than two pages. If your submission is longer than two pages, you must send it by U.S. mail.

(Emphasis in original)

My notes indicate that at the prehearing conference on September 2, 2022, I reviewed my Instructions for Communicating With DALA, including the necessity of cc'ing DALApleadings@mass.gov and explaining that that email address is DALA's automated docketing system.

On December 1, 2022, Dr. Diggs, through his lawyers, filed motions without DALA's docket number.

On November 8, 2023, Dr. Diggs, through his lawyers, submitted a cover letter to DALA and seven submissions. The letter and submissions all lacked DALA's docket number.

On November 29, 2023, I emailed the parties: "Please use DALA's docket number on all submissions."

On December 12, 2023, I emailed the parties:

Please do not make me ask any party again to comply with the Instructions for Communicating with DALA, which I have sent at least three times. If a party does not comply with the instructions, I will not accept its submission, such as email or pleading, or respond to it - without noting that I am not accepting or responding to it.

On January 3, 2024: I wrote the parties:

I attach Instructions for Communicating with DALA, which I believe I have sent before.

Specifically:

1. All submissions to DALA must include ***DALA's*** docket number....

On June 10, 2024, Dr. Diggs, through his lawyers, submitted a cover letter to DALA with two oppositions. The letter and oppositions all lacked DALA's docket number.

On June 6, 2024, I issued my Order on Possible Cross-Motions, noting that the complaint counsel's pleadings had mentioned two cross-motions by Dr. Diggs. I stated that I had no record of receiving the cross-motions electronically and did not have paper copies. I continued that Dr. Diggs could refile any such cross-motions in hard copy by June 13, 2024.

On June 6, 2024, I issued my Order Barring Electronic Filing. It quoted my December 2023 email above and stated:

Unfortunately, at least one party's¹³ continuing non-compliance with my instructions has created an ambiguity: The party files a submission electronically but not in hard copy, the other party responds -- and neither party hears from me from me, and motions remain on my docket, not ruled on, because I am waiting for a hard copy of the submission, which will not arrive.

I will no longer chase down the parties for paper copies of submissions.¹⁴

¹³ I was referring to Dr. Diggs.

¹⁴ Despite my reference to "the parties," I have no record of the complaint counsel failing to file paper copies.

The parties in this appeal [sic] will:

- file every submission in paper, no matter the length.
- not file any submission of any length electronically; they will not send a “courtesy copy” by email.
- will instruct whoever assists them with filing to comply with Instructions for Communicating with DALA and this order.

The rest of the Instructions for Communicating with DALA remain in effect. If a party does not comply with the Instructions or this order, I may order it to explain why it has not complied.

On August 6, 2024, I issued my Order Barring Email Communications. It stated in part:

On July 30, 2024, Dr. Diggs’s lawyers emailed me without cc’ing DALA’s automated docketing system, DALApleadings@mass.gov. Rather than order any lawyer in this case to explain why they are not complying with the Instructions, I bar all email communications in this appeal. We will revert to the old-fashioned way of U.S. mail, similar delivery systems, or courier.

Parties will recognize that paper communications will take more time to arrive on my desk than email and will plan accordingly. Parties will recognize that emergency motions and late requests for extensions may no longer be feasible. Parties will not look for ways to evade this order, such as by calling or emailing any personnel at DALA and asking that a message be conveyed to me.

I reserve the possibility that I will email the parties without allowing them to respond by email. I am emailing this order and another one to the parties, but the email may be the last in this appeal.

(Emphasis added)

My cover email to my order stated:

Do not respond to this email – because *the order barring emails has ended emails from the parties in this appeal.*

(Emphasis added)

On January 2, 2025, I issued my Order Requiring Respondent’s Lawyers to Explain Electronic Filing. It stated in part:

On January 2, 2025, Dr. Diggs’s lawyers emailed Motion of Respondent to Recuse Magistrate Kenneth Bresler. By 5:00 p.m. on January 3, 2025, Dr. Diggs’s lawyers will explain in a paper submission, which they will convey by U.S. mail

or other method, but not electronically, why they submitted their motion electronically, despite my Order Barring Electronic Filing.

On January 2, 2025, Dr. Diggs, through his lawyers, stated that they filed the motion electronically "to be prudent and courteous to the Magistrate." The lawyers acknowledged that

the June 6th Order pertaining to electronic filing is still the standing order for this matter. But for the holiday, the Motion to Recuse would not have been electronically submitted....The sole reason for this electronic submission was to avoid delay between service upon counsel and the receipt by the Magistrate.

Dr. Diggs, through his lawyers, earlier stated that "the courier service was not available due to the New Year's holiday." Dr. Diggs's lawyers did not explain why, if they insisted on not using U.S. mail, they did not use another courier service or overnight service, such as FedEx. It is unclear how violating a tribunal's order is prudent. It is unclear how violating my order is courteous to me. Dr. Diggs's lawyers' explanation amounts to this: We violated the order because we had to; we violated the magistrate's order for his benefit. This explanation is unsatisfactory.

By January 7, 2025, I had not received a paper copy of Dr. Diggs's Motion of Respondent to Recuse Magistrate Kenneth Bresler. I assumed that it had had enough time to reach Malden after having been mailed in Boston on December 31, 2024. Despite my statement on June 6, 2024 that "I will no longer chase down the parties for paper copies of submissions," I emailed Dr. Diggs's lawyers:

Please mail a hard copy of the recusal motion by 5:00 p.m., January 8, 2024. It has not ended up in my file, DALA may not have received it, I will not be printing it from the electronic copy, and the file needs to be complete.

Despite my August 6, 2024 Order Barring Email Communications, Ms. Magher responded by email on January 7, 2025.

801 CMR 1.01(7)(g)2 provides:

When the record discloses the failure of a Party...to comply with orders of the Presiding Officer, or otherwise indicates an intention not to continue with the prosecution of a claim, the Presiding Officer may initiate...an order requiring the Party to show cause why the claim shall not be dismissed for lack of prosecution. If a Party fails to respond to such order within ten days, or a Party's response fails to establish such cause, the Presiding Officer may dismiss the claim with or without prejudice.

The record discloses that Dr. Diggs's lawyers are unwilling or unable to comply with my orders that are intended to keep his case proceeding efficiently and accurately docketed, that are intended to place his submissions in my hands so that I may rule on them, and that are intended to keep his lawyers from delegating to me tasks such as adding docket numbers to their submissions, cc'ing them to DALA's automated docketing system, and printing them for DALA's files, which require paper copies.

On January 9, 2025, I ordered Dr. Diggs to, by January 21, 2025, show cause under 801 CMR 1.01(7)(g)2 why I should not issue an Order of Default Recommended Decision because he has failed to comply with my orders and failed to prosecute his defense in this case. On January 22, 2025, I received the response to my order. Although Dr. Diggs, through his lawyers, responded, they did not provide *good* cause.

Discussion

A state administrative agency "initiates a proceeding against a [p]erson...with [a] notice of the action or an order to show cause why the action should not be taken." 801 CMR 1.01(6)(a). In the case of BRM, a Statement of Allegations is an order to show cause. 243 CMR 1.01(2) (definition of "Statement of Allegations"). If a party, including a respondent-doctor in a BRM case, fails to respond to correspondence, fails to comply with orders, or otherwise indicates an intention not to continue with the prosecution of a claim," the Presiding Officer may

initiate or a Party may move for an order requiring the Party to show cause¹⁵ why the claim¹⁶ shall not be dismissed for lack of prosecution.” 801 CMR 1.01(7)(g)(2). A party, such as a doctor, who fails to defend an agency’s proceeding under 801 CMR 1.01(6)(a), can be found in default. *Board of Registration in Medicine v. Hanpu Chao, M.D.*, RM-23-0550 (DALA 2024).

Dr. Diggs, through his lawyers, has argued: “Punishing a litigant is not a reasonable response to complaints about his or her counsel.” (Motion of John R. Diggs to Remand This Matter to DALA and Request for Hearing at 8-9) Dr. Diggs provides no citation for this argument and it is incorrect.

Generally, “litigants are properly bound by the conduct of their attorneys.” *McIsaac v. Cederghren*, 54 Mass. App. Ct. 607, 612 (2002) (citations and quotation marks omitted). Litigants are responsible for the acts or non-acts of the lawyers whom they select.

If this were not so, then litigants with lawyers would be insulated from defaults and other penalties in situations such as this. *Pro se* litigants would potentially be at a double disadvantage: They would have no lawyer to represent them and have no protection from default or dismissal for failing to prosecute their cases.

Pro se litigants are held to the same standards as litigants represented by lawyers. *Neuwirth v. Neuwirth*, 85 Mass. App. Ct. 248, 257 (2014); *Maza v. Commonwealth*, 423 Mass. 1006, 1006 (1996). If litigants could not be held responsible for their lawyers’ acts or inaction, as Dr. Diggs has argued, that would turn on its head the rule about *pro se* litigants. *Pro se* litigants

¹⁵ This order to show cause under 801 CMR 1.01(7)(g)(2) is different from the order to show cause under 801 CMR 1.01(6)(a), which I refer to at the beginning of the paragraph. See Petitioner’s Motion to Remand at 2 n.1 (distinguishing between the two kinds of order to show cause).

¹⁶ The claim is not an appeal in a BRM case, as I erroneously referred to it in my Order of Dismissal Recommend Decision, and as has been pointed out. (*E.g.*, Motion of John R. Diggs to Remand This Matter to DALA and Request for Hearing at 1)

would be held to a *higher* standard than those with lawyers. *Pro se* litigants who failed to prosecute their cases would be defaulted or have their cases cut short while litigants with lawyers who failed to prosecute their cases could continue failing to prosecute their languishing cases without sanction.

I am sympathetic when lawyers experience medical emergencies and deaths in their families. I am not sympathetic when they go silent – especially when their silence, that is, a failure to defend, is part of an ongoing pattern. I do not expect lawyers to contact me immediately when they experience medical emergencies and deaths in their families. I do expect that lawyers will arrange to have me contacted at a reasonable time after emergencies. Mr. Chambers, at least in January 2023, had a paralegal who filed his notice of appearance. Mr. Chambers also had co-counsel. No one contacted me to tell me about the emergency and death in Mr. Chambers's family. Nor do I have any unambiguous indication that Mr. Chambers is still active in Dr. Diggs's case.

Despite Mr. Kiernan's statement on January 31, 2023 that Dr. Diggs's lawyers "take full responsibility for coordinating our efforts" and "will speak with one voice on behalf of Dr. Diggs," Ms. Magher and Mr. Kiernan did not inform me that they had been unable to reach Mr. Chambers or that Mr. Chambers had experienced a medical emergency in his family.

July 30, 2024 was the date that Ms. Magher (1) learned about the medical emergency in Mr. Chambers's family and (2) emailed me at 7:23 p.m. If she knew about the medical emergency before she emailed me, she did not mention it.¹⁷ If she learned about the medical emergency after she emailed me, she did not update me.

¹⁷ Ms. Magher contended that when she emailed me, Mr. Chambers had not yet contacted her. She also contended that she so explained to me in Dr. Diggs's response to my order to show cause. (*E.g.*, Motion of John R. Diggs to Remand This Matter to DALA and Request for Hearing

I issue this Order of Default Recommended Decision based on the following facts:

On January 5, 2023, I emailed Dr. Diggs's lawyers in two separate law offices to ask how they would coordinate efforts. They did not respond. On January 31, 2023, I emailed them again about this topic.

On April 3 and 4, 2024, I asked the parties to propose hearing dates. On April 4, 2023, Dr. Diggs, through his lawyers, stated that he would confer with the then-Complaint Counsel and propose dates for the hearing. On May 31, 2023, not having heard from the parties, I emailed them, "I am waiting to hear on proposed dates for the hearing."

On June 1, 2023, the then-Complaint Counsel emailed me that he would confer with Dr. Diggs's lawyers and propose dates for the hearing.

On June 20, 2023, I emailed the then-Complaint Counsel, stating that I wanted this case either on my docket and moving forward or off my docket. Although I addressed this email to the then-Complaint Counsel, Dr. Diggs's lawyers also received my email of June 1, 2023. Dr. Diggs's lawyers knew that no one, including them, had proposed hearing dates. In addition, my June 20, 2023 email was part of a thread that began on April 4, 2023 with *Dr. Diggs's* lawyers stating that they would propose dates and then not doing so. (Dr. Diggs, through his lawyers, has emphasized that my June 20, 2023 email was directed to the then-Complaint Counsel, but they have ignored the context of it, which does involve them. (*E.g.*, Opposition of John R. Diggs to Petitioner's Motion to Remand and Request for Hearing 3))

Also on June 20, 2023, the then-Complaint Counsel emailed me, "We will be submitting dates for a hearing to you soon." By "we," I assume that the then-Complaint Counsel meant the

6) As I state above, I do not see this explanation in Dr. Diggs's response to my motion to show cause and his lawyer did not provide a page or paragraph number.

parties. Dr. Diggs's lawyers received this email and knew that no one, including them, followed up this email "soon."

On December 12, 2023, I emailed the parties that I had been chasing them down for months and notifying them that their respective cases were in danger of ending.

On May 7, 2024, I emailed the parties that their status report of May 1, 2024 indicated that "[n]ot much seems to have happened" in the case since the March 6, 2024 status report. That is, both parties, including Dr. Diggs, did not seem to be advancing the case.

Also on May 7, 2024, I stated:

I repeat what I stated on June 20, 2023: "I want this case either on my docket and moving forward or off my docket." If I receive another status report that shows that not much has happened, I will explore removing this case from my docket.

I *quoted* my June 20, 2023 email, which was literally addressed to the then-Complaint Counsel but which, in context, concerned Dr. Diggs, as I discuss above. But my May 7, 2024 email was to both parties. I stated to Dr. Diggs's lawyers that I wanted his case moving forward or off my docket. I again notified the parties, including Dr. Diggs, that their respective cases were in danger of ending.

On May 13, 2024, Dr. Diggs's lawyers stated that they would mail me hard copies of two oppositions. They failed to do so. On May 28, 2024, I emailed Dr. Diggs's lawyers to ask whether they had mailed the two oppositions. They did not respond.

On June 24, 2024, I ordered the parties to finalize hearing dates by July 12, 2024. On July 12, 2024, Complaint Counsel asked for an extension until July 28, 2024 to finalize hearing dates. I granted the extension and emailed, "The parties will make every reasonable effort to move this case *forward*."

Instead of finalizing hearing dates on July 29, 2024, Ms. Magher emailed on *July 30*,

2024 that “[w]e are trying to confirm the availability of one of our expert witnesses...” She said that she hoped to “confirm his and our availability... within the next day or two.” I did not hear from Dr. Diggs’s lawyers within the next day or two.

On August 6, 2024, with Dr. Diggs’s lawyers having gone silent, I issued an Order to Show Cause. They filed a *response* – but did not show cause why Dr. Diggs should not be defaulted.

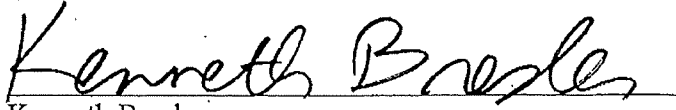
For all these reasons and especially because Dr. Diggs did not show cause why he should not be defaulted, I recommend that the Board of Registration in Medicine find:

1. Dr. Diggs has failed to defend and/or prosecute his defense of the Amended Statement of Allegations.
2. Dr. Diggs is deemed to have admitted the allegations in the Amended Statement of Allegations.
3. Dr. Diggs violated the laws outlined in the Legal Bases for Proposed Relief.
4. BRM may discipline Dr. Diggs as it sees appropriate.

Dr. Diggs’s lawyers’ inability or unwillingness to follow instructions

Dr. Diggs’s lawyers are unable or unwilling to follow instructions. They have repeatedly disobeyed my orders. They did not show good cause why Dr. Diggs should not be defaulted on this ground. Nonetheless, I do not, at this time, recommend that the Board of Registration in Medicine default Dr. Diggs on this ground.

DIVISION OF ADMINISTRATIVE LAW APPEALS

A handwritten signature in cursive script, reading "Kenneth Bresler", written in black ink over a horizontal line.

Kenneth Bresler

Administrative Magistrate

Sent to: James Paikos, Esq.
Amy Magher, Esq.
John Kiernan, Esq.
Richard Chambers, Esq.
Debra Stoller, Esq.