

COMMONWEALTH OF MASSACHUSETTS

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

Elaine Yoke,  
Petitioner

v.

Docket No. CR-21-0543

Norfolk County Retirement System,  
Respondent

Date: June 21, 2023

**ORDER OF DISMISSAL**

This appeal has been plagued by two related factors: the inability or unwillingness of the petitioner's lawyer, William Gately, and his office to comply with logistical orders; and the protracted inability of Mr. Gately to prosecute the appeal, ultimately amounting to a failure to prosecute it.

On November 12, 2021, the Division of Administrative Law Appeals (DALA) sent to the parties a Notice of Receipt of Appeal. Among other things, it noted that an appeal may be submitted for decision on written submissions. It added, quoting 801 CMR 1.01(10)(c),

Submission of a case without a hearing does not relieve the parties from the necessity of proving the facts supporting their allegations or defenses....

....

If a party elects to submit the matter on written materials without a hearing, all parties will be required to submit any documents they intend to be included as part of the evidentiary record...along with their proposed Findings of Fact and any written arguments they want to be considered....

....

All submissions to DALA must be filed on 8 1/2" by 11" paper *and include a statement that they have been sent to all other parties involved in the case.* Papers may be filed by hand, United States Mail or telecopier (fax). One of

these forms of filing is required even in instances in which parties are also required to submit electronic copies of particular documents.

(Emphasis in original)

On April 25, 2022 DALA sent a First Pre-Hearing Order to the parties. It ordered, among other things, that exhibits be attached to the prehearing memorandum, and that the memorandum list the petitioner's prospective witnesses along with "a summary of each witness's expected testimony." It stated, "The Failure to comply with this order...without showing good cause may result in... dismissal."

On August 5, 2022 the parties filed their joint prehearing memorandum. It listed 24 exhibits, but DALA has no record of receiving the exhibits. It stated that the petitioner would testify but did not summarize her testimony.

On September 13, 2022 I emailed the parties:

I have reviewed the file of this appeal, which is scheduled for a hearing on December 14, 2022.

The first prehearing order ordered that the parties provide a witness list *and each witness's expected testimony*. The joint prehearing memorandum lists the petitioner as a witness but does not provide her expected testimony.

It seems to me that the issue that the petitioner raises can be resolved through submission of documents and that the petitioner's testimony would not establish that two medical panelists' opinions were flawed.

Please let me hear from you on this issue by September 20, 2022.

I attach Instructions for Communicating with DALA, including using the name and docket number in the subject line of any email, and cc'ing DALApleadings@mass.gov.

(Emphasis in original)

My Instructions for Communicating with DALA order, in part:

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:

- include the other side. If you do not, DALA will not consider the communication.
- 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.

On all **U.S. mail to DALA**, you must:

- send a copy to the other side.
- indicate that you have sent a copy to the other side by email, U.S. mail, or fax. If you do not, DALA may send the mail back to you.
- make sure not to send an additional copy by fax. Choose one method, U.S. mail or fax.

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

- send a copy to the other side by email, U.S., or fax.
- indicate that you have sent a copy to the other side.
- make sure that the total submission, including the cover sheet, is not longer than 5 pages. If your submission is longer than 5 pages, you must send it by U.S. mail.
- make sure not to send an additional copy by U.S. mail. Choose one method, fax or U.S. mail.

(Bold in original)<sup>1</sup>

Mr. Gately did not communicate with me by September 20, 2022. On October 11, 2022 I emailed him:

I don't believe that I have heard from you on this matter. If you have responded, please resend. Please respond today or tomorrow.

On October 11, 2022 Mr. Gately forwarded an email dated July 31, 2022 responding to a different issue but stating:

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<sup>1</sup> It should not be necessary to instruct lawyers to send all submissions to the other party, either in DALA's prehearing order and my instructions. It is standard practice for lawyers to send submissions to the other party.

We have non [sic] objection

On that date, I emailed the parties: “Briefs – in hard copy – are due on Dec. 1, 2022.”

On December 12, 2022 Mr. Gately’s office faxed me a letter from him. It stated, among other things, that the petitioner “is currently scheduled for a hearing...on December 14, 2022.” The letter asked for a continuance. The letter mentioned conferring with the respondent’s lawyer, but neither the letter nor the fax indicated that Mr. Gately had sent a copy to the respondent.

In addition, Mr. Gately’s office emailed me the same letter.

On December 13, 2022 I emailed Mr. Gately and his office:

Please refer to Instructions for Communicating with DALA, which I have sent. Please do not send the same communication, such as the Dec. 12 letter, or pleading by two different forms of communication, such as email and fax. We simply don’t have the resources to handle each document twice. I don’t have the time to review each document twice and realize that I have already seen it. That’s why I sent out Instructions for Communicating with DALA.

On December 12, 2023, in response to Mr. Gately’s request for a continuance to the hearing, I emailed him, in part:

1. Please see email of Nov. 11, 2022.<sup>2</sup> There is no hearing on Dec. 14. Briefs were due on Dec. 1.
2. Where is Ms. Yoke’s brief?

On the same day, Mr. Gately emailed me

I apologize. I thought the Joint Memo outlined the Petitioner’s positions. I will surely repurpose that into a Brief and respectfully ask through 12/30 to file same.

On the same day, I emailed Mr. Gately:

You can rely on the Joint Memorandum or you can repurpose it, in which case you have until Dec. 30.

On December 29, 2022 Mr. Gately’s office emailed me his seven-page brief. The email did not cc the respondent or otherwise indicate that Mr. Gately had sent it to the respondent. He

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<sup>2</sup> This should have been October, not November.

did not send the brief to DALApleadings@ mass.gov, DALA's automated docketing system. In other words, he did not properly file the brief.

On the same day, I emailed Mr. Gately's office as follows:

Please refer to Instructions for Communicating with DALA. I will not consider this pleading until it is correctly filed.

Mr. Gately's office did not respond to my email. He did not file a hard copy or indicate that he had sent it to the respondent. He did not send it to DALApleadings@mass.gov.

On May 8, 2023 I emailed the parties as follows:

I picked up this file to begin writing a decision and found no exhibits in the file. If the parties filed exhibits with the prehearing memorandum, they did not make it into the file and I apologize for having to ask for them again. In any event, I ask the parties to confer and decide who will send me a hard copy of the exhibits.

In response to the email, I did not receive the exhibits.

On May 30, I issued an order to show cause. I quoted my May 8, 2023 email, noted that I did not receive the exhibits, and added:

Since this appeal is the petitioner's, under the Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.01(7)(g)(2), I order Ms. Yoke to show good cause why her appeal should not be dismissed for lack of prosecution.

She must provide sufficient evidence of good cause for not sending the exhibits; do so by June 9, 2023; do so in writing; and send a copy to me and to the other party. If she does not comply, her appeal will be dismissed.

On June 9, 2023, rather than sending an answer to my order to show cause, Mr. Gately's office sent an email stating:

Attached please find the agreed upon exhibit index along with exhibits 1-13 in the above-mentioned matter. Exhibits 14-24 will be sent in a second email due to the size of the attachment. A hard copy will follow in the mail for your convenience.<sup>3</sup>

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<sup>3</sup> Hard copies of exhibits are more than a convenience; both DALA as an agency, and I as an Administrative Magistrate *ordered* them. As of this writing, the hard copies have not arrived in the mail.

On the same day, Mr. Gately's office sent a second email stating:

The second email I sent with 3 separate attachments, was rejected by your server.<sup>4</sup> I apologize for the inconvenience, but I will be sending 2 additional emails<sup>5</sup> in hopes that your server will accept the attachments. Thank you and I apologize for the technical issues.

On the same day, Mr. Gately's office sent a third email stating, "Attached please find the last set of exhibits for the above-mentioned matter."

Mr. Gately's office did not send the three June 9, 2023 emails to DALApleadings@mass.gov. His office did not send the last two emails to the respondent, or at least did not indicate that he had done so.

On the same day, I emailed Mr. Gately stating:

1. I did not issue an order to provide exhibits by today. I issued an order to show cause by today.

Will you be responding to the order to show cause?

On September 13, 2022 I asked the parties whether this case could proceed on submissions. I asked to hear by September 30, 2022. On October 11, 2022 I asked you whether you would be responding. You responded that day that it could proceed on submissions.

On October 11, 2022 I set a due date of December 1, 2022 for briefs. You did not submit a brief by then. On December 12, 2022 I asked about the brief. I agreed that it could be due on December 30, 2022. You submitted it on December 29, 2022.

Assuming that you will be responding to the order to show cause, please discuss these two incidents and why they do not evidence the petitioner's intention not to pursue her appeal.

2. On September 20, 2023 I sent the parties Instructions for Communicating with DALA.

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<sup>4</sup> That DALA's server may have rejected the attachments indicates that Mr. Gately's office was attempting to email too many long documents, instead of sending them in paper form, as ordered.

<sup>5</sup> Ultimately, Mr. Gately's office sent one more email, not two.

On December 13, 2022 I asked...your office to comply with the Instructions for Communicating with DALA.

On December 29, 2022 I asked...of your office to comply with the Instructions for Communicating with DALA.

I have received various emails today from your office that do not comply with the Instructions. Please explain why that is continuing to happen.<sup>6</sup>

Please explain why your office is engaging in ex parte communications.

On May 12, 2023 Mr. Gately emailed his response:

We wish to pursue this appeal.<sup>7</sup> I thought that providing the awaited documents would satisfy the needs of the DALA for a complete record, mooted the need to show cause why not submitted.<sup>8</sup>

We understood the only remaining need of the DALA was the exhibits. So we submitted (or tried to submit)<sup>9</sup> them Friday.

I had hoped we had been clear earlier that we did not need an evidentiary Hearing and that we would rely on memos and the documentary evidence.<sup>10</sup>

Respectfully, I do not feel we are being ex parte. I am and have been in contact with attorney Feeney throughout. He was helpful and instrumental in the assembly of the exhibits submitted.<sup>11</sup>

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<sup>6</sup> Ultimately, Mr. Gately did not answer this inquiry.

<sup>7</sup> Mr. Gately stated that he wishes to pursue this appeal, but he has been lackadaisical in pursuing it.

<sup>8</sup> Mr. Gately violated the order to show cause by not responding to it. Again, I ordered him to show cause by June 9, 2023, not to provide the exhibits. It was yet another example of Mr. Gately's inability or unwillingness to comply with orders.

<sup>9</sup> Mr. Gately conceded that he may not have submitted the exhibits.

<sup>10</sup> This statement is a non sequitur, considering Mr. Gately's delay in responding to my inquiry about whether the appeal could proceed on submissions; his request for a continuance of the hearing after the case had proceeded to a briefing schedule without a hearing; and his delay in submitting a brief.

<sup>11</sup> As I have stated, it is standard practice for lawyers to send all submissions to the other party. In addition, two separate documents instructed Mr. Gately to send all submissions to the other party. I cannot forward all of Mr. Gately's and his office's communications to the other party to make sure that the other party is aware of the communications. That is not my responsibility.

I apologize if we have annoyed or inconvenienced the Magistrate<sup>12</sup> and only ask that you accept our submissions<sup>13</sup> and move the matter along to decision on the merits.<sup>14</sup>

Any diary mishaps are mine and mine alone and do not and should not reflect on this fine firm.<sup>15</sup> I had been immersed in a difficult family health challenge<sup>16</sup> in the fall<sup>17</sup> and admittedly was not on top of this matter as much as I should.

The Sept 13 and October 11 incidents are troubling to me as well. I will review our diarying protocols and insure [sic] these requests and deadlines are more vigorously recorded and reminders triggered.

Mr. Gately did not email his response to DALApleadings@mass.gov.

I cannot serve as Mr. Gately's paralegal, forwarding and cc'ing documents to the necessary email addresses; serve as Mr. Gately's printing and copying center; or serve as his minder and reminder, shepherding his client's appeal through all necessary steps. I simply don't have the time, lapse after lapse.

Mr. Gately neither responded to the order to show cause by the deadline of June 9, 2023 nor, according to his interpretation of the order to show cause, filed exhibits by that date. At this point, I have neither the petitioner's brief nor the exhibits for this appeal in the format I have ordered. Neither the petitioner's brief nor the exhibits have been docketed because Mr. Gately

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<sup>12</sup> It's not an issue of annoyance or inconvenience. It's an issue of my continued efforts to nudge Mr. Gately toward compliance with orders and deadlines; there is only so much I can do.

<sup>13</sup> I keep instructing Mr. Gately how to file his submissions and he and his office continue to do it their own way. As I say below, I do not have all of his attempted submissions in paper copy. Nor are they all docketed.

<sup>14</sup> The problem for months has been that Mr. Gately has not moved the matter along.

<sup>15</sup> The firm is not an issue, unless Mr. Gately is referring to his office's inability or unwillingness to comply with orders.

<sup>16</sup> I am sympathetic to and accommodating of both family challenges and health challenges, but I am unaware that Mr. Gately told me about his.

<sup>17</sup> The problems outlined in this order of dismissal began before fall 2022 and continued in May 2023.



and his office did not take the necessary steps to have them docketed. This appeal cannot proceed without them.

I dismiss the appeal for failing to prosecute, under 801 CMR 1.01(7)(g)2, and for multiple violations of logistical orders.

### **Notice of Appeal Rights**

Massachusetts General Laws, Chapter 32, Section 16 (4) provides that this decision:

shall be final and binding upon the board involved and upon all other parties, and shall be complied with by such board and by such parties unless within **fifteen days** after such decision, (1) either party objects to such decision, in writing, to the contributory retirement appeal board, or (2) the contributory retirement appeal board orders, in writing, that said board shall review such decision ...(emphasis added).

A party objecting to the enclosed decision shall mail specific objections to Uyen Tran, Assistant Attorney General, Chair, Contributory Retirement Appeal Board, Office of Attorney General, Maura Healy, One Ashburton Place, 18th floor, Boston, MA 02108. Copies must be sent to the **Division of Administrative Law Appeals**, 14 Summer Street, 4<sup>th</sup> Floor, Malden, MA 02148 and the **other party** or parties involved in the case.

Proceedings before the Contributory Retirement Appeal Board (“CRAB”) are governed by CRAB Standing Orders, copies of which may be found at [www.mass.gov/anf](http://www.mass.gov/anf) under the link Administrative Appeals Process/Practice and Procedures in the section entitled Hearings and Appeals. Pursuant to CRAB Standing Order 2008-1, para. 4a(2), the Notice of Appeal must include (a) the date of this decision, (b) a copy of the decision, and (c) a statement of the part or parts of the DALA decision to which objection is made. **THE NOTICE OF APPEAL MUST BE POSTMARKED OR DELIVERED IN HAND TO CRAB NO LATER THAN FIFTEEN DAYS FOLLOWING THE DATE OF THE DALA DECISION.** Electronic submissions are not permitted to satisfy this filing requirement.

Pursuant to paragraph 4a(3) of CRAB's Standing Order 2008-1, within forty days following the date of the DALA decision, the appellant must supplement the notice of objection by filing with the chair of CRAB three copies each, and serving on each other party one copy, of:

- (a) all exhibits admitted into evidence before DALA, numbered as they were numbered on admission;
- (b) a memorandum of no more than twenty pages containing a clear and precise statement of the relief sought and the findings of fact, if any, and legal conclusions to which objection is made, together with a clear and precise statement of the particular facts, with exact references to the record, and authorities specifically supporting each objection; and
- (c) if CRAB's passing on an objection may require a review of oral proceedings before DALA, the transcript of the relevant portion of those proceedings.

Do not send any such supplementary materials or exhibits to the Division of Administrative Law Appeals. Failure to follow CRAB's procedures could lead to sanctions, including dismissal of the appeal.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/

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Kenneth Bresler  
Administrative Magistrate

Notice sent to: Matthew L. Feeney, Esq.  
William J. Gately, Esq.