STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

Anthony Hernandez, Michelle Hughes, Katelyn Knight, Aberdeen Rodriguez, Cynthia Cain, et. al.,

Plaintiffs,

v.

Minnesota Board of Teaching,

Defendant.

Court File No.: 62-CV-15-1979
Case Type: Civil Other

ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The above entitled matter came before the Honorable Shawn M. Bartsh, judge of district court, on June 25, 2015, on Plaintiffs' motion for partial summary judgment and on Defendant's motions to dismiss and to stay discovery. Rhyddid Watkins, Esq., and Nathan Sellers, Esq., appeared on behalf of Plaintiffs. Nathan Hartshorn, Assistant Attorney General, appeared on behalf of Defendant. Defendant withdrew its motions on October 14, 2015.

Based upon the filings, records, and proceedings herein,

IT IS HEREBY ORDERED:

1. Plaintiffs' motion for partial summary judgment is **GRANTED.**
    a. **Declaratory Judgment**: Defendant is violating Minnesota law by failing to operate licensure via portfolio as mandated in Minnesota Statute Section 122A.21.
    b. **Injunctive Relief:** Defendant is enjoined to reinstate the licensure via portfolio program and to promulgate rules governing its application.
        i. Defendant must immediately
            1. reinstate the licensure via portfolio program;
            2. accept applications for licensure via portfolio;

3. Review and process the applications and issue licenses under its jurisdiction to persons the board finds to be qualified and competent for their respective positions.

ii. Specifically, Defendant must comply with the mandates of Section 122A.21 subdivision 2(d).

1. Within 90 calendar days after a portfolio is received, Defendant must inform the applicant whether or not the portfolio is approved.
2. If the portfolio is not approved, the board must immediately inform the applicant how to revise the portfolio to successfully demonstrate the requisite competence.
3. An applicant that receives a rejection on his/her first portfolio may resubmit a revised portfolio at any time.
4. Defendant must approve any subsequent, revised portfolio within 60 calendar days of receiving it.

iii. As to any Plaintiff who has previously sought licensure via portfolio, Defendant shall immediately process that application. No Plaintiff who previously applied is required to apply again for an initial decision.

iv. Defendant must immediately being developing rules and procedures for the operation of the licensure via portfolio program and the requirements necessary for individual applicants to receive approval.

v. A compliance review hearing is hereby set for **January 29, 2016** , at 1:30 pm at which time Defendant shall provide the court with a detailed report identifying:

1. Proof that it is complying with Section 122A.21 and this court's order.
2. What specific actions are being taken and/or rules being developed to prospectively comply with the law and this court's order.

2. The attached memorandum is incorporated into this order.

BY THE COURT:

Date: December 31, 2015

Shawn M. Bartsh
Ramsey County District Court Judge

MEMORANDUM

On April 21, 2015, Plaintiffs filed their first amended complaint ("F.A.C.") in which they allege the Minnesota Board of Teaching ("Defendant" or "the Board") has systemically failed to comply with Minnesota law regarding the licensure of teachers by failing to operate the licensure via portfolio program. *See* Minn. Stat. § 122A.21 subd. 2 (2014). Plaintiffs are teachers seeking licensure or expanded licensure in Minnesota. Count III of their complaint seeks declaratory judgment regarding licensure by portfolio and Count IV seeks injunctive relief.

Defendant did not file an answer.[1] On May 28, 2015, Plaintiffs moved for leave to amend their complaint and for partial summary judgment on their declaratory judgment claim, which addresses the issue of whether Defendant is violating Minnesota law by failing to operate the

[1] Defendant filed a motion to dismiss on April 22, 2015 on the grounds that the court lacked subject matter jurisdiction and that Plaintiffs' complaint failed to state a claim upon which relief can be granted. Defendant filed a motion to stay discovery with the motion to dismiss. On October 14, 2015, Defendant withdrew its motion to dismiss and its motion to stay discovery.

licensure via portfolio program. Plaintiffs' motion to Amend is addressed in a separate Order.

This Order and Memorandum deal with Plaintiffs' motion for partial summary judgment on their declaratory judgment claim and their request for injunctive relief regarding the issue of licensure by portfolio. *See* Minn. Stat. § 122A.21 subd. 2 (2014). The court heard oral arguments on the motions on June 25, 2015. Immediately after arguments, the parties engaged in court-aided settlement discussions for approximately three months. In consideration of those discussions, on September 24, 2015 the parties waived the court's 90-day deadline for issuance of an order on the June 25 motions. *See* Minn. Stat. § 546.27(a) (2014). On October 7, 2015, the parties reached an impasse and sought a ruling from the court on Plaintiffs' pending motions.

UNDISPUTED FACTS

The court has been presented with facts via affidavit and deposition testimony, both of which are properly considered in a motion for summary judgment. Although the court assumes facts in a light most favorable to the non-moving party, *Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 661 (Minn. 2015), Defendant did not file an Answer nor did it dispute any of the facts asserted by the Plaintiff. (*See generally* Def.'s Mem. Opp'n Summ. J. at 5) Defendant's challenges to Plaintiffs' summary judgment are procedural; It did not argue that any material facts were in dispute, thus, for purposes of Plaintiff's motion, the Court assumes the following facts are not in dispute. *See Johns v. Harborage I, Ltd.*, 664 N.W.2d 291, 299 (Minn. 2003) (finding the facts presented may be deemed undisputed where an non-moving party only presents alternative legal theories and does not argue the existence of questions of material fact).

1. The Minnesota Board of Teaching

The Defendant, Board of Teaching, is a statutorily created board. Minn. Stat. § 122A.07 (2014). The Board is an 11 member administrative agency[2] comprised of teachers, administrators and members of the public that is tasked with licensing teachers for the State of Minnesota. Minn. Stat. § 122A.07 subds. (1), (2) (2014); Minn. Stat. § 122A.18 subd. 1(a) (2014). Under Chapter 122A [Teachers and Other Educators] the Board "must adopt rules to license public school teachers..." Minn. Stat. § 122A.09 subd. 4(a) (2014). Further, the Board is responsible for creating rules and processes by which teachers trained in other states can become licensed in Minnesota. Minn. Stat. § 122A.23 (2014).

2. Teacher Licensure via portfolio – Board of Teaching initiative, 2004

In 2004, the Board adopted a "licensure via portfolio" process as an alternative pathway to licensure for teachers and as a way to help fulfill the mandate of the No Child Left Behind Act,[3] which required core academic subjects be taught by "highly qualified teachers."[4] (May 28, 2015 Rhyddid Watkins Aff. Exs. 2 "Minnesota Board of Teaching: Report to the Legislature," and 4 "Minnesota Department of Education: Revised State Plan for Meeting the Highly Qualified Teacher Goal.") Licensure via portfolio considered an applicant's relevant experience and training; the program could be utilized by qualified individuals whose backgrounds (often out-of-state) may

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[2] Minn. Stat.§ 14.02 Subd. 2 defines agency to include a board such as the Board of Teaching.

[3] In order to address academic concerns with low-achieving children and, specifically, the gap between low and high-achieving children Congress passed the No Child Left Behind Act in 2002. 20 U.S.C. § 6301 (2012). Attempting to improve teaching quality, the Act required all teachers of core academic subjects to be "highly qualified" by the end of the 2005-2006 school year. 20 U.S.C. § 6319(a)(2)(A) (2012). Among other aims, the Act granted funds to States and local teachers corps that established or expanded programs of "alternative routes to certification" in order to recruit and retain highly qualified teachers. 20 U.S.C. §§ 6681(1), (2) (2012); 20 U.S.C. § 6683(g)(2)(G)(ii) (2012).

[4] "Highly qualified" means "the teacher has obtained full State certification as a teacher (including certification obtained through alternative routes to certification) or passed the State teacher licensing examination, and holds license to teach in such State..." 20 U.S.C. § 7801(23)(A)(i) (2012). The Minnesota Legislature has recognized compliance with the Act: "For purposes of the federal No Child Left Behind Act, a highly qualified teacher is one who holds a valid license under this chapter..." Minn. Stat. § 122A.16(b) (2014).

not match the exact teacher training in Minnesota (i.e., at Minnesota colleges and/or universities). (Watkins Aff. Exs. 4 "Minnesota Department of Education: Revised State Plan for Meeting the Highly Qualified Teacher Goal"; 7 "Aff. of Jim Bartholomew"; 33 "Aff. of Karen Klinzing"; *see also* Ex. 36: Letter from the Board's Executive Director, Karen Balmer, to an applicant urging use of licensure via portfolio.) A former State Legislature and former member of the Minnesota Department of Education ("MDE") described licensure via portfolio as a process "intended to reduce teacher shortages in high-need areas" and for teachers trained and with relevant experience in others states. (Watkins Aff. Ex. 33 "Aff. of Karen Klinzing.")

In 2006, the MDE explicitly recognized the role licensure via portfolio played in increasing the number of highly qualified teachers in Minnesota and found it "may be a viable option for schools that have been identified as having inequities" due to high poverty. (Watkins Aff. Ex. 4 "Revised State Plan for Meeting the Highly Qualified Teacher Goal.") Supporting that statement, statistics show the licensure via portfolio program helped a significant number of teachers become licensed. (Watkins Aff. Ex. 6, 13.) Between 2004 and 2011, 531 teachers received Minnesota licensure through the portfolio process. (Watkins Aff. Ex. 12 "2012 Proposed Changes to Licensure via Portfolio.")

3. Teacher Licensure via portfolio – Minn. Stat. § 122A.21 subd. 2.

The Minnesota Legislature codified the licensure via portfolio process in 2008 by amending Minnesota Statute Section 122A.21. Subdivision 2 of the statute as enacted read:

> (a) An eligible candidate may use licensure via portfolio to obtain an initial licensure or to add a licensure field, consistent with the applicable Board of Teaching licensure rules.
> (b) A candidate for initial licensure must submit to the Educator Licensing Division at the department one portfolio demonstrating pedagogical competence and one portfolio demonstrating content competence.

(c) A candidate seeking to add a licensure field must submit to the Educator Licensing Division at the department one portfolio demonstrating content competence.
(d) A candidate must pay to the executive secretary of the Board of Teaching a $300 fee for the first portfolio submitted for review and a $200 fee for any portfolio submitted subsequently. The fees must be paid to the executive secretary of the Board of Teaching. The revenue generated from the fee must be deposited in an education licensure portfolio account in the special revenue fund. The fees set by the Board of Teaching are nonrefundable for applicants not qualifying for a license. The Board of Teaching may waive or reduce fees for candidates based on financial need.

Act of July 1, 2008, Ch. 363, 2008 Minn. Laws Art. 2, § 2 (codified as amended at Minn. Stat. § 122A.21 subd. 2).

In 2015 the legislature amended the Section 122A.21 subdivision 2 to read:

(d) The Board of Teaching must notify a candidate who submits a portfolio under paragraph (b) or (c) within 90 calendar days after the portfolio is received whether or not the portfolio was approved. If the portfolio was not approved, the board must immediately inform the candidate how to revise the portfolio to successfully demonstrate the requisite competence. The candidate may resubmit a revised portfolio at any time and the Educator Licensing Division at the department must approve or disapprove the portfolio within 60 calendar days of receiving it.

Act of July 14, 2015, 1st Sp., Ch. 3, 2015 Minn. Laws Art. 2, § 17.

4. Teacher Licensure via portfolio (2008- 2015)

The Board admitted that it discontinued processing applications for licensure via portfolio since at least 2012, and no person who has applied under the portfolio process has been granted a license since 2012. (Watkins Aff. Ex. 15 (Erin Doan Dep. at 20).) Until the Board stopped allowing persons to be licensed via portfolio in 2012, it had accepted and processed applications for licensure via portfolio and had issued 531 teacher licenses through that process. (Watkins Aff. Ex. 12 "2012 Proposed Changes to Licensure via Portfolio".)

ANALYSIS

Plaintiffs' partial summary judgment motion seeks a declaration from this court that the Board's "moratorium on licensure via portfolio applications violates Minnesota law," and seeks an injunction requiring the Board to "reinstate the process and adopt rules governing its application." (Pls.' Mem. Summ. J. at 34.) Defendant opposes the motion on the grounds that Plaintiffs do not present a justiciable controversy and have not established a right to injunctive relief. (Def.'s Mem. Opp'n Summ. J. at 2-6.)

In this case, Plaintiffs are ten men and women alleging they have been unlawfully affected by the decision of the Board to discontinue the licensure via portfolio process. (F.A.C. ¶¶ 6-63.) As alleged, Plaintiffs are either teachers trained outside of Minnesota seeking full licensure in Minnesota or teachers from Minnesota seeking to expand the scope of their current license. (*Id.*) Plaintiffs assert that they are unable to use the licensure via portfolio process and are asking the court to order the Board of Teaching to reinstate the process as required by statute.

I. Summary Judgment Standard of Review

> Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to summary judgment as a matter of law.

Minn. R. Civ. P. 56.03; *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

The moving party has the burden of showing there is no genuine issue of material fact. *Anderson v. State, Dep't of Natural Res.*, 693 N.W.2d 181, 191 (Minn. 2005). In order to oppose a motion for summary judgment, the non-moving party must demonstrate at the time of the motion that specific material facts are disputed, creating a genuine issue for the finder of fact to resolve at trial. *Hunt v. IBM Mid Am. Emp. Fed. Cr. Union*, 384 N.W.2d 853, 855 (Minn. 1986). Further, evidence presented upon a summary judgment motion must be taken in the light most favorable to

the non-moving party. *Concord Co-Op v. Sec. State Bank of Claremont*, 432 N.W.2d 195, 197 (Minn. Ct. App. 1988). In this case Defendants have not argued there are any material facts at issue. Their opposition to Plaintiff's motion is procedural.

II. Plaintiffs' Declaratory Judgment action presents a justiciable controversy.

Plaintiffs' are seeking a declaration that Defendant violated Minnesota law by discontinuing the licensure via portfolio program. *See* Minn. Stat. § 122A.21 subd. 2 (2014). Further, Plaintiffs claim Defendant's continued failure to offer this licensure method to interested persons constitutes an ongoing violation of the law. Defendant asserts this matter is not proper for a declaratory judgment action in that there is no justiciable controversy and thus this court is without jurisdiction to issue such a declaration.

Pursuant to the Minnesota Declaratory Judgment Act ("MDJA"), a court is authorized to construe the rights of parties.

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Minn. Stat. § 555.01 (2014).

> Any person ... whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

Minn. Stat. § 555.02 (2014) (emphasis added).

The purpose of the MDJA is to "afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." Minn. Stat. § 555.12 (2014). The MDJA is to be "liberally construed and administered." *Id.* Because the MDJA is not itself an independent source

of jurisdiction,[5] a declaratory judgment action must present a justiciable controversy.[6] *Hoeft v. Hennepin Cnty.*, 754 N.W.2d 717, 722 (Minn. Ct. App. 2008). Defendants have asserted that Plaintiffs have failed to establish a justiciable controversy.

Whether a justiciable controversy exists is a question of law. *Cincinnati Ins. Co. v. Franck*, 621 N.W.2d 270, 273 (Minn. Ct. App. 2001). A declaratory action is a justiciable controversy if it (a) involves definite and concrete assertions of right that emanate from a legal source, (b) involves a genuine conflict in tangible interests between parties with adverse interests, and (c) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion. *Onvoy, Inc. v. Allete, Inc.*, 736 N.W.2d 611, 617-18 (Minn. 2007). The controversy need not be current in order to be justiciable, but "there must be at least a bona fide legal interest which has been, or with respect to which the ripening seeds of a controversy is about to be, affected in a prejudicial manner." *S. Minnesota Const. Co. v. Minnesota Dept. of Transp.*, 637 N.W.2d 339, 344 (Minn. Ct. App. 2002) (quotations omitted). Notably, Defendant does not contest the first two factors for justiciability. Rather, the crux of Defendant's argument is that any declaratory relief would be advisory.

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[5] It is unclear whether this means a plaintiff must have an entirely separate cause of action or simply a legal interest which is being encroached upon. *Compare Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 915-16 (Minn. Ct. App. 2003) ("A party seeking a declaratory judgment must have an independent, underlying cause of action based on a common-law or statutory right") *with State ex rel. Smith v. Haveland*, 25 N.W.2d 474, 477 (1946) ("Although complainant need not necessarily possess a cause of action (as that term is ordinarily used) as a basis for obtaining declaratory relief, nevertheless he must, as a minimum requirement possess a bona fide legal interest which has been, or...is about to be, affected in a prejudicial manner.")

[6] Even assuming a separate, underlying cause of action is necessary, Plaintiffs' have sufficiently plead as much. Plaintiffs have alleged violations of their due process and equal protection rights under the Minnesota Constitution. Generally, there is no private right of action for damages under the Minnesota Constitution unless the Minnesota Supreme Court has established otherwise. *Riehm v. Engelking*, 538 F.3d 952, 969 (8th Cir. 2008); *but see Thomsen v. Ross*, 368 F.Supp.2d 961, 976 (D. Minn. 2005) (assuming the Minnesota Supreme Court would find a cause of action for Article 1, section 10 (due process)). Although there may be no cause of action for a violation of the due process clause (Art. I, § 7) of the Minnesota Constitution, *Hebert v. Winona Cnty.*, -- F.Supp.3d --, 2015 WL 3938194 at *3 (D. Minn. 2015), the Minnesota Supreme Court has recognized a direct cause of action for violations of the equal protection clause (Art. I, § 2) of the Minnesota Constitution. *Skeen v. State*, 505 N.W.2d 299, 312 (Minn. 1993).

A. This matter involves a definite and concrete assertion of rights.

In Minnesota, persons may not teach without first obtaining a license from the State of Minnesota. Minn. Stat. § 122A.18 subd. 1(a) (2014). The Board must license candidates that are qualified and competent for the positions they seek. Minn. Stat. § 122A.18 subd. 2(a) (2014). In order to demonstrate one's qualifications for licensure, the Minnesota Legislature has granted applicants the right to use licensure via portfolio as one method of applying for licensure. The statute reads, "An eligible candidate may use licensure via portfolio to obtain an initial licensure or to add a licensure field, consistent with applicable Board of Teaching licensure rules." Minn. Stat. § 122A.21 subd. 2(a) (2014). Defendant's assertion that "The declaration sought by Plaintiffs would not...affect their rights..." (Def.'s Mem. Opp'n Summ. J. at 3) ignores the plain reading of the statute. Under the statute persons such as Plaintiffs have a right to apply via portfolio to become licensed in Minnesota. Section 122A.21 (a legal source) expressly states (i.e., a definite and concrete assertion) that teachers may (have a right) use the portfolio process to seek licensure. Although teachers must be licensed consistent with the Board's overall rules for licensure, the statue does not restrict applicants' access to the licensure via portfolio program.[7] In addition, Plaintiffs are seeking concrete relief - an order from this court directing Defendant to put in place a procedure for licensure via portfolio and to accept and process applicants under that program.

B. There is a genuine conflict of tangible interests between the parties

The parties' disagreement over whether the Board is required to accept and process licensure applicants' portfolios creates a genuine conflict. *See e.g., Hoeft*, 754 N.W.2d at 724.

[7] At oral argument, the Board argued the manner in which it currently "operates" the program (i.e., rejecting every application) is within its statutory discretion because the program must be consistent with the Board's licensure rules. Minn. Stat. § 122A.21 subd. 2(a) (2014). This argument is, at best, ignoring the law and, at worse, disingenuous. *See infra* at 18-20. Accepting such an argument would permit the Board to negate the will of the legislature and render the statute meaningless. *Id.*

Plaintiffs' are teachers seeking licensure, or expanded licensure, in Minnesota and seek to take advantage of the current statutory framework that permits licensure via portfolio. The Board is the sole gatekeeper to licensure. If the Board does not accept and process applications, via this statutorily mandated process, then Plaintiffs are unable to use licensure via portfolio to obtain a license. The Board has refused to accept and process applications via portfolio since at least 2012. Thus, the Board's interest (not operating the program) is at odds with Plaintiffs' interest (seeking licensure through the program) and a conflict is present.

C. A declaratory judgment capable of specific resolution would not be advisory.

Defendant's sole argument against justiciability is that any declaratory relief would be an "admonishment of the Board" and would not grant Plaintiffs any "concrete relief." (Def.'s Mem. Opp'n Summ. J. at 3.) Plaintiffs have presented actual (not hypothetical) facts from which they seek judicial relief. It is undisputed that the Board has unilaterally stopped its program for processing licensure via portfolio applications despite a statute mandating such a process be made available to applicants. Defendant admitted that, prior to 2012, it had a process for accepting and processing applications for licensure by portfolio and that 531 teachers were licensed in that manner. Defendant further admitted it has ceased accepting applications via portfolio in 2012. An order of this court directing the Board to adhere to the statute and fully reinstitute the program would grant Plaintiffs an alternative avenue to licensure that is not (but should be) currently available to them. Given the struggles Plaintiffs are currently experiencing gaining licensure,[8] the relief sought is real, definite, and directly applicable to Plaintiffs' right to seek licensure. A

[8] Teachers from other states have stated they are dissuaded from coming to Minnesota because the licensure process is "difficult," "expensive," and "[t]he Board of Teaching has too much control in deciding who gets a license to teach." (F.A.C. Exs. 5, 14.) Qualified candidates from other states face "a lack of clarity and inconsistency in how their previous experience" is recognized in Minnesota. (F.A.C. Ex. 15.) Further, in a 2015 MDE report, the Board was described as imposing "testing requirements that make little educational sense" and imposing a "testing bureaucracy" whereby the Board's statutory interpretation is preventing licensure for qualified candidates. (Watkins Aff. Ex. 32.)

declaration that the Board is violating Minnesota Statue Section 122A.21 and ordering the Board re-establish a process for application via portfolio would provide tangible relief.

Because the three factors of *Onvoy* have been met, the court concludes Plaintiffs' have presented a justiciable controversy properly before the court as a declaratory judgment action. 736 N.W.2d 617-618.

III. A district court has subject matter jurisdiction to address a declaratory judgment action involving quasi-legislative action by the Board of Teaching.

In general, state district courts have original jurisdiction in all civil cases. Minn. Const. Article VI, Sec. 3. A district court is a court of general jurisdiction, with the power "to determine justiciable controversies regarding claims of statutory or common-law rights." *Anderson v. Cnty. of Lyon*, 784 N.W.2d 77, 80 (Minn. Ct. App. 2010), review denied (Aug. 24, 2010); see also Minn. Stat. § 484.01, subd. 1 (2010) (stating that district courts "shall have original jurisdiction in ... all civil actions"). Defendant argues that its actions are quasi-judicial and deprives this court of jurisdiction over Plaintiff's claim.

Defendant is correct in that there is an exception to the broad jurisdiction of the district court when an action implicates a quasi-judicial decision of an executive body. *Anderson*, 784 N.W.2d at 81 (citing *Tischer v. Hous. & Redev. Auth.*, 693 N.W.2d 426, 429 (Minn.2005)). The action of an administrative agency may be either quasi-legislative or quasi-judicial in nature. *Anderson v. Cnty. of Lyon*, 784 N.W.2d 77, 81 (Minn. Ct. App. 2010); *In re. N. States Power Co.*, 416 N.W.2d 719, 723 (Minn. 1987); *City of Moorhead v. Minnesota Pub. Utils. Comm'n*, 343 N.W.2d 843, 846 (Minn. 1984). Determining the nature of the action dictates which court properly has jurisdiction over the dispute.

A. Quasi-judicial actions involve consideration of the merits of an individual set of facts as applied against a prescribed standard with a binding decision over the disputed claim.

Defendant argues that its action was quasi-judicial, and thus not subject to review by this court. "[Q]uasi-judicial acts are specific, discretionary acts that affect the rights of an individual analogous to the discretionary decisions of a court proceeding." *Anderson*, 784 N.W.2d at 81. Judicial review of an administrative agency's quasi-judicial decision, if available, must be invoked by writ of certiorari. *Id.*

There are three indicia of quasi-judicial actions: "(1) investigation into a disputed claim and weighing of evidentiary facts; (2) application of those facts to a prescribed standard; and (3) a binding decision regarding the disputed claim." *Minnesota Ctr. for Envtl. Advocacy v. Metro. Council*, 587 N.W.2d 838, 842 (Minn. 1999). Failure to meet any of the three factors prevents a finding that an act is quasi-judicial. *Citizens Concerned for Kids v. Yellow Med. E. Indep. Sch. Dist. No. 2190*, 703 N.W.2d 582, 585 (Minn. Ct. App. 2005).

The termination of the licensure via portfolio program could not involve any of the *MCEA* factors because the act (making a policy decision to not process any applications through the licensure via portfolio method) did not involve a disputed claim or an application of a prescribed standard: the Board simply ended the program. 587 N.W.2d at 842; *see also, e.g., Beaty v. Minnesota Bd. of Teaching*, 354 N.W.2d 466, 472 (Minn. Ct. App. 1984) (reversing a quasi-judicial decision by the Board of Teaching whereby it denied an individual applicant a particular type of license.) If one of Plaintiffs were individually disputing the denial of a license by the Board, then that denial would constitute a quasi-judicial act. However, Defendant did not assert or provide any evidence that it had processed any applications or that it had weighed evidentiary facts when it discontinued the licensure via portfolio program. It also did not make any claim that it applied

the facts regarding any applicant to any prescribed standard or that it reached a binding decision regarding a disputed claim. As such, the Board's action did not constitute a quasi-judicial action.

B. Quasi-Legislative actions affect the public in general

In contrast to a quasi-judicial action, quasi-legislative acts of an administrative agency affect the rights of the public generally; the validity or construction of an administrative agency's quasi-legislative act, like a claim of right under a contract, can be determined by a district court in a declaratory-judgment action. *Interstate Power Co. v. Nobles Cnty. Bd. of Comm'rs*, 617 N.W.2d 566, 574 (Minn. 2000). *Anderson* 784 N.W.2d at 81. The Board's action in discontinuing the program affects the public in general because it dictates the method by which *any* person may receive licensure and is not tied to any one particular person. As such, the Board's action was quasi-legislative and is within the jurisdiction of this court.

IV. Plaintiffs had no administrative remedies to exhaust.

Although Section VI addresses the need for an injunction in this case, *see infra* at 23-25, the court notes here that Defendant argues Plaintiffs are not entitled to injunctive because Plaintiffs have failed to exhaust their administrative remedies. "[N]o one is entitled to injunctive protection against the actual or threatened acts of an administrative agency until the prescribed statutory remedy has been exhausted." *Garavalia v. City of Stillwater*, 168 N.W.2d 336, 347 (Minn. 1969). Defendant argues that the proper course for Plaintiffs is through the administrative and certiorari processes. (Def. Mem. Opp'n. Summ. J. at 3, 4 fn. 3.). This argument fails to recognize the nature of Plaintiffs declaratory judgment action. Plaintiffs are seeking a declaration that Defendant's termination of the licensure via portfolio process is, in and of itself, unlawful. Plaintiffs are not seeking a declaration that Defendant has unlawfully denied any of Plaintiffs' individual applications for licensure via portfolio. Defendant's confusion likely results from its inability to

recognize Plaintiffs are not challenging quasi-judicial action – the Board considered no facts, did not apply facts to a set standard, and made no findings. Plaintiffs did not receive a "decision" that could be appealed administratively.

Further, any attempt to exhaust administrative remedies (by applying and being summarily rejected) would have been futile. When seeking an injunction against an administrative agency, a party need not exhaust administrative remedies if those remedies are inadequate or nonexistent." *Builders Ass'n of Minnesota v. City of Saint Paul*, 819 N.W.2d 172, 177 (Minn. Ct. App. 2012). "[P]arties are not required to utilize administrative remedies if the administrative bodies have unequivocally committed themselves to a position and exhaustion of remedies would be futile." *Ellington & Assocs., Inc. v. Keefe*, 410 N.W.2d 857, 860 (Minn. Ct. App. 1987).

The doctrine of exhaustion of remedies is restrained by practicality. *City of Richfield v. Local No. 1215*, 276 N.W.2d 42, 51 (Minn. 1979). The Board has unequivocally stated as of 2012 the licensure via portfolio process is non-operational (*See* Watkins Aff. Ex. 14, 17, 35) and that no applicant will be licensed via portfolio. This decision is not based on the merits of the individual facts of an applicant, but on a policy decision of the Board that it does not need to process applications for licensure via portfolio. Forcing Plaintiffs through a pointless application and perfunctory rejection would be absurd.

V. The Board's failure to provide a procedure for individuals to be licensed via portfolio constitutes a violation of Minnesota law.

A. The Board of Teaching is mandated to license teachers in the State of Minnesota.

The Board is an administrative agency required, by the legislature, to license teachers for the State of Minnesota. Minn. Stat. § 122A.18 subd. 1(a) (2014). Under the statute, "The Board of Teaching *must* issue licenses under its jurisdiction to persons the board finds to be qualified and competent for their respective positions...." Minn. Stat. § 122A.18 subd. 2(a) (2014) (emphasis

added). The Board is also statutorily obligated to adopt rules for licensure of Minnesota public school teachers. Minn. Stat. § 122A.09 subd. 4(a)-(o) (2014). Among the Board's responsibilities is creating rules and processes by which teachers trained in other states can become licensed in Minnesota. Minn. Stat. § 122A.23 (2014).

B. Minn. Stat. § 122A.21 gives applicants the right to apply for a teaching license via portfolio.

Statutory interpretation presents a question of law. *Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 649 (Minn. 2012). "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2014). In considering the intent of the legislature, the court can consider "the occasion and necessity for the law," "the circumstances under which it was enacted," "the object to be attained," and "the consequences of a particular interpretation."[9] Minn. Stat. § 645.16 (1), (2), (4), (6) (2014). However, if the language of a statute is not susceptible to more than one reasonable interpretation, then the statute's plain and ordinary meaning is given effect. *White v. City of Elk River*, 840 N.W.2d 43, 52-53 (Minn. 2013).

The language of Section 122A.21 is clear that an individual "may" apply for a teaching license by using licensure via portfolio. "May" is defined as "to be permitted to" or "to be a possibility." *Black's Law Dictionary*, (10th ed. 2014). Grammatically, "may" is a modal verb referring to a subject's ability to act. In this case, the subject is an applicant. An applicant is (or

[9] The court need not consider these factors because the court finds the statute is clear. Notably, even a cursory review of these factors demonstrates the Board does not have the authority to unilaterally terminate the licensure via portfolio program. (1) "Occasion and necessity" and "circumstances under which it was enacted": Minnesota needed more highly qualified teachers because of the No Child Left Behind Act. To help with this aim, t*he Board created* licensure via portfolio and *the Board lobbied* the legislature to codify the program. (2) "The object to be attained": the object was to license more highly qualified teachers without forcing applicants through the byzantine and esoteric application procedures dictated by the Board. (3) "The consequences of a particular interpretation": most informative, adopting the Board's interpretation is incongruous. Perhaps this concern is best considered as a question: why would the legislature statutorily mandate a licensure program if the Board (an entity that has no authority save what the legislature grants it) is permitted to prevent such program from ever being used?

should be) free to choose (but is not required to choose) licensure via portfolio as a method for seeking a teaching license (compare with "an applicant *must* use licensure via portfolio").

It is not clear if an application via portfolio can still be submitted, but the distinction is irrelevant. There are two alternatives (1) applications are not accepted or (2) applications are accepted and then, without exception, rejected. If an applicant cannot submit an application via portfolio, then the Board is not permitting or making possible licensure via portfolio because it will not even accept applications. The entire process is blocked from the onset. The applicant has no freedom to choose the portfolio program to seek licensure as guaranteed by statute.[10] If applications via portfolio can still be submitted, but are summarily and categorically rejected (as stated at the hearing) regardless of content, then the Board is still not permitting or making possible licensure via portfolio because there is no metaphysical chance that an application will be successful.

Plaintiffs correctly argue the Board is required to allow applicants to obtain licensure via portfolio because it is statutorily mandated. Importantly, Plaintiffs are not challenging a specific rule of the Board.[11] Rather, Plaintiffs claim the Board has acted in a manner contrary to the dictate of the legislature. This is in accord with the plain reading of Section 122A.21, which reads, "An eligible candidate may use licensure via portfolio to obtain an initial licensure or to add a licensure field, consistent with applicable Board of Teaching licensure rules."[12] Minn. Stat. § 122A.21 subd.

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[10] At oral argument, Defendant argued the permissive language of Section 122A.21 implied Plaintiffs have no right to apply for licensure via portfolio. Defendant misreads the statute. The permissive language implies Plaintiffs are not *required* to apply for licensure via portfolio (and there is no guarantee an applicant will receive licensure). Section 122A.21 is simply one path a candidate may pursue.

[11] Any challenge to a specific rule would not be properly before this court. *See* Minn. Stat. § 14.44 (2014) ("The validity of any rule may be determined upon the petition for a declaratory judgment thereon, addressed to the Court of Appeals...")

[12] The Board has only adopted two rules related to licensure. Minn. R. 8700.7600 (2015) (Institutional Program Approval for Teacher Preparation) and Minn. R. 8700.7620 (2015) (Teacher Licensure Candidate Assessment Alternatives). The latter applies to licensure via portfolio, but offers very little guidance to applicants by merely reciting the esoteric and tautologous standard of "demonstrates all qualifications required for licensure."

2(a) (2014). Plaintiffs do not dispute the Board has the authority to promulgate rules and set qualifications for teacher licensure. Plaintiffs dispute that the Board can use its rules to justify refusing to process applications via portfolio. Plaintiffs' assertion is apt. An agency is not permitted to act in contradiction to the legislature, but, rather, an agency is only permitted to make rules interpreting and consistent with statutes. Minn. Stat. § 14.05 subd. 1 (2014)

C. The Board does not have discretion to ignore the directives of Minn. Stat. § 122A.21

At the hearing, Defendant argued the Board had discretion to refuse to accept applications via the portfolio method based on the Board's interpretation of the statute and administrative Rule 8700.7620. Defendant's argument[13] was the following: Licensure via portfolio is to be "consistent with applicable [Board] licensure rules"; arguing that Rule 8700.7620,[14] allows it discretion in deciding whether to offer licensure via portfolio to potential applicants. Defendant's argument was made without authority and is contrary to the plain reading of the statute. Relying upon Rule 8700.7620, the Board decided it was within its discretion to end licensure via portfolio, but Defendant has citied no authority to justify such an action. The court finds Defendant's argument without merit. Section 122A. 21 is clear: the Board is to offer applicants licensure via portfolio.

As discussed above, *see supra* at 17-19, Section 122A.21 provides an applicant be permitted the opportunity to gain a Minnesota teacher's license using licensure via portfolio. Minn. Stat. § 122A.21 subd. 2(a) (2014). The Board is mandated by statute to issue licenses to qualified applicants. Minn. Stat. § 122A.18 subd. 1(a) (2014). In that licensure via portfolio is a statutorily permitted method for obtaining a teaching license, the Board is required to accept and process applications under licensure via portfolio to determine if an applicant is qualified. Defendant

[13] This argument was not briefed in Defendant's memorandum in opposition to summary judgment.
[14] "A teacher qualification assessment process established and maintained by the commissioner of education may be authorized by the Board of Teaching for recommending candidates for teacher licensure." Minn. R. 8700.7620 subp. 1 (2015).

makes the rather odd assertion that a person could still apply, but admitted that all applicants would be denied licensure regardless of content. A unilateral policy decision that no applicants who attempt to be licensed via portfolio will ever be licensed flies in the face of the statute and ignores the intent of the portfolio process which is intended to address an applicant's qualifications to be a teacher. The legislature reaffirmed its intent that licensure via portfolio be a viable process for applicants by amending the Section 122A.21 in 2015. Act of July 14, 2015, 1st Sp., Ch. 3, 2015 Minn. Laws Art. 2, § 17. The Board's rules cannot contradict the statute.

Defendant's reliance on Rule 8700.7620 is misplaced. An agency has discretion to promulgate rules interpreting a statute if they are consistent with the statute. Minn. Stat. § 14.05 subd. 1 (2014); *Kmart Corp. v. Cnty. of Stearns*, 710 N.W.2d 761, 771 (Minn. 2006) (finding an administrative agency cannot amend or ignore the plain language of a statute without acting "in contravention of separation of powers.") An agency has discretion to promulgate binding rules regarding statutes, but an agency's discretion is bound by the legislature's grant of authority. Minn. Stat. § 14.05 subd. 1 (2014) ("Agency shall adopt, amend, suspend, or repeal rules...pursuant to authority delegated by law.") The Board is an administrative agency with authority to adopt rules for licensure of public school teachers. Minn. Stat. § 122A.09 subd. 4(a)-(o) (2014); *see also* Minn. Stat. § 122A.23 (2014) (applicants trained in other states). Any rules promulgated by the Board are valid "only if, and to the extent, the legislature has authorized it to do so." *Hirsch v. Bartley-Lindsay Co.*, 537 N.W.2d 480, 485 (Minn. 1995).

In ascertaining whether a statute has been contravened by an agency, a court must give wide latitude. *St. Paul Area Chamber of Commerce v. Minnesota Pub. Serv. Comm'n*, 251 N.W.2d 350, 357 (Minn. 1977). When an agency acts in a legislative capacity, "its decisions will be upheld [on judicial review] unless shown to be in excess of statutory authority." *Kmart Corp.* 710 N.W.2d

at 770 (citing *St Paul Area Chamber of Commerce*, 251 N.W.2d at 357-58.); *Eagle Lake v. Becker Cnty. Bd. of Comm'rs*, 738 N.W.2d 788, 793-94 (Minn. Ct. App. 2007). Any rule, regardless of content, cannot nullify the foundation up which it stands. To hold otherwise is to permit rules to become de facto statutes because the rule then stands upon its own. The Court finds Defendant's argument that the rule negates the statutory mandate to allow licensure via portfolio to be without merit.

Although the Board grants itself discretion to decide which alternative assessment processes to authorize (i.e., Rule 8700.7620), categorical rejection of portfolio applications is not discretionary.[15] Categorical rejection is tantamount to legislation because the Board is not judging whether a candidate is appropriate for licensure. Instead, the Board is dictating the manner in which a candidate can seek licensure. Defendant's argument that it can ignore a *statutorily* imposed process because of an *agency rule* implies the legislature has given the Board the authority of discretionary usurpation of the legislature. Such an (absurd) argument is not in accordance with Minnesota law. Minn. Stat. § 14.05 subd. 1 (2014)

There is no dispute that the Board has stopped issuing licenses through the licensure via portfolio program. As such, applicants are not able to "choose" to seek licensure via portfolio in any meaningful sense. To the extent it is possible to submit an application, it is a quixotic effort. By either not accepting applications or by unconditionally denying applicants, the Board is denying everyone the chance to be licensed via portfolio. This is in direct contradiction with Section 122A.21, which mandates candidates at least have the possibility of being licensed via portfolio. The Board is acting in excess of its statutory authority.

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[15] "Administrative discretion" is an "agency's power to exercise judgment in the discharge of its duties." *Black's Law Dictionary* (10th ed. 2014). It is unclear how the Board can be using any judgment when it rejects every applicant without review.

VI. An affirmative injunction is a proper remedy for Plaintiffs and necessary to ensure the Board complies with the law.

Plaintiffs are seeking an affirmative injunction[16] pursuant to Minn. R. Civ. P. 65.02. They are requesting the court direct the Board to reinstate the licensure via portfolio program and adopt rules and procedures governing its application. A district court has the equitable authority to issue an affirmative injunction, "which commands the doing of some positive act by the defendant." *State ex rel. Swan Lake Area Wildlife Ass'n v. Nicollet Cnty. Bd. of Cnty. Comm'rs,* 799 N.W.2d 619, 626 (Minn. Ct. App. 2011) (quotations omitted). In *Swan Lake*, the court ruled that the district court did not abuse its discretion by ordering Nicollet County to establish a set crest elevation for two lakes as an equitable remedy for the county's violation of the Minnesota Environmental Rights Act. *Id.*

The Board argues Plaintiffs lack a cause of action upon which to rest injunctive relief. Injunctive relief is a remedy and not, in itself, a cause of action; a cause of action must exist before injunctive relief may be granted. *Ryan v. Hennepin Cnty.*, 29 N.W.2d 385, 387 (Minn. 1947). A declaratory judgment is a proper ground for injunctive relief. *Town of Burnsville v. City of Bloomington,* 117 N.W.2d 746, 750 (Minn. 1962) ("In declaratory judgment actions the court can

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[16] Plaintiffs' motion could have arguably been brought as a writ for mandamus. *See* Minn. Stat. § 586.01 (2014). But the distinction is likely irrelevant as the current posture of the case seems to accomplish the same end. Where a remedy should be available to address a wrong committed by a government entity courts have said,

> Whether we call it mandamus or mandatory injunction does not seem too important if we reach the merits of the dispute. We are content to leave the technical distinctions to authors of law review articles and to try to arrive at some solution that will afford relief to a litigant deprived of a right. Thus, about the only rule we can glean from our cases is that mandamus ordinarily will not lie to control the exercise of discretion by administrative agencies, but it will lie if there is no other adequate and complete remedy.

Curry v. Young, 173 N.W.2d 410, 414 (Minn. 1969) (abrogated on different grounds).

grant two-fold relief; one, a declaration of rights, and the other by injunction...") See also In *L.K. v. Gregg*, 380 N.W.2d 145 (Minn. App. 1986) Because the court has found Plaintiffs' claim for declaratory judgment is proper, Defendant's claim that injunctive relief is improper is without merit.

The court's detailed discussion regarding Plaintiffs' claim for declaratory judgment demonstrates the need and basis for injunctive relief. The need is further bolstered by recent legislative action. In 2015, the legislature amended Section 122A.21 to add language directing the Board: (1) to inform licensure via portfolio candidates within 90 days whether their applicants has been approved, (2) if the application is rejected, *immediately* inform the applicant how to cure the deficiencies, (3) to permit a rejected applicant to resubmit a revised portfolio at any time, and (4) to approve or disapprove of a revised portfolio within 60 days. Act of July 14, 2015, 1st Sp., Ch. 3, 2015 Minn. Laws Art. 2, § 17. Implicit within this amendment is the program must operate in order for these provisions to occur. The legislature's clear directive assures the decision of this court. Defendant is enjoined to reinstate the licensure via portfolio program.

The second part of Plaintiffs' injunctive relief request is for an affirmative injunction mandating the Board promulgate rules in order to implement the licensure via portfolio. The Board has the statutory mandate to promulgate rules for licensure.[17] For the reasons previously discussed, it is within this courts discretion to issue an order directing Defendant to follow the statutory mandate and adopt rules in order to accept applications for licensure via portfolio. Defendant is enjoined to promulgate rules in order to implement the licensure via portfolio program.

CONCLUSION

[17] Minn. Stat. § 122A.09 subd. 4 (a) states, "The board must adopt rules to license public school teachers and interns subject to chapter 14."

The Board of Teaching is required by Minnesota statute to issue teaching licenses to those persons it finds to be qualified and competent to teach in Minnesota. Minnesota Statute Section 122A.21 provides applicants with the opportunity to seek licensure via portfolio. As the state agency mandated with issuing teacher licenses, the Board must allow applications via portfolio. The Board acted in excess of its statutory authority by terminating the licensure via portfolio program. In light of the fact that over 500 teachers successfully received licensure through the portfolio process and given the current need for teachers in Minnesota the court is made to wonder why the Board would abandon what from all appearances was a successful program that gave licenses to qualified persons. The Board's on-going suspension of the portfolio program constitutes a violation of Minnesota law. An affirmative injunction is a proper remedy to address the Board's violation. Therefore, the Board shall be immediately enjoined to reinstate the licensure via portfolio program, to accept and process all applications, and issue teaching licenses to those persons it finds to be qualified and competent. The Board is further enjoined to promulgate rules to implement the licensure via portfolio program. Finally, the Board shall comply with all provisions of Minnesota Statute Section 122A.21 subdivision 2(d).

December 31, 2015 SMB