

After long consideration and exhaustive research, the undersigned holds that there is no jurisdiction to hear the case at hand.

In *Department of Consumer & Industry Services v Greenberg*, 231 Mich App 466; 586 NW2d 560 (1998), the Board of Optometry Disciplinary Subcommittee found against and disciplined the appellant after the filing of an administrative complaint. Citing MCL 333.16232(3), the appellant argued “that the complaint against him should have been dismissed because the subcommittee violated the requirement that it meet and impose a penalty on appellant within sixty days after receiving the hearing referee’s proposal for decision.”

The Michigan Court of Appeals held that the statutory section did not provide for dismissal of a complaint when the subcommittee was tardy, that there was no statutory sanction for a violation, and that the statutory scheme contemplated that delays would occur in the disciplinary process. *Id.* at 468-469. The Court concluded that, under the circumstances, the timeframe was permissive in nature despite being framed in mandatory terms and that the timeframe was primarily a guideline.

The Court held specifically that “the passage of more than sixty days, especially in the complete absence of any specific allegations of prejudice suffered by appellant, did not require dismissal of the complaint.” *Id.* at 469.

Similarly, the Court decided in *Department of Community Health v Anderson*, 299 Mich App 591, 593-594; 830 NW2d 814 (2013), that the principles in *Greenberg* applied when an administrative disciplinary action was required by statute to be completed within one year of the initiation of an investigation and the penalty was not completed within this statutory timeline; in that case, appellant’s request for a dismissal of the matter was denied.

Thus, based on these two decisions, a violation of time restrictions alone does not warrant a preemptory dismissal of the hearing request at hand, as there is no statutory sanction for a violation of this timeline, in either state or federal law.

However, in *Smelser v. Department of Human Services*, decided on February 27, 2014, the Michigan Court of Appeals held that the principles established in *Greenberg* and *Anderson* do not automatically allow for a cause of action to continue if statutory timelines are violated; rather, *Greenberg* holds that a statutory timeline violation may allow for a continued cause of action “in the complete absence of specific allegations of prejudice suffered by the appellant.”

The *Smelser* Court also found that, when time restrictions were not merely violated, but when there is “egregious noncompliance,” there may be cause to enforce the deadlines when the “extensive and inexcusable delay is coupled with ... language that absolutely precluded” further proceedings given an expired time period.

In the current case, the undersigned believes that there is no serious argument that can be made that the seven intervening years between the case referral to the OIG and the request for hearing constitutes anything but egregious noncompliance as contemplated by the Court in *Smelser*.

Furthermore, the policy at BAM 720 specifically says that the OIG **will** file a request for hearing within eighteen months at the very most. The undersigned believes that this clause, phrased in the imperative tense, absolutely precludes further proceedings after that time period.

Finally, with regard to "prejudice suffered," as per *Greenberg*, given the length of time that has passed, the undersigned does not believe that any respondent could adequately mount a defense, remember precise details, or properly document what had happened, which is a clear prejudice against the respondent.

Therefore, as all prongs of the tests given by the courts in *Greenberg* and *Smelser* have been met, and given that the policy in place at the time OIG received the case states that the OIG had eighteen months to refer a hearing to Administrative Hearings, the undersigned Administrative Law Judge holds that policy and case law effectively prevent the case in question from being referred for hearing.

As such, the Administrative Law Judge rules that there is no jurisdiction to hear the case at hand.

Accordingly, the request for a disqualification hearing is **DISMISSED**.



Michael J. Bennane
Administrative Law Judge
for Nick Lyon, Director
Department of Health and Human Services

Date Signed: **10/21/2015**

Date Mailed: **10/21/2015**

MJB / pf

NOTICE OF APPEAL: A party may appeal this Hearing Decision in the circuit court in the county in which he/she resides, or the circuit court in Ingham County, within 30 days of the receipt date. A copy of the claim or application for appeal must be filed with the Michigan Administrative Hearing System (MAHS).

CC:

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