

Petition for Writ of Mandamus: APPELLATE PROCEDURE—Improper Relief—Petition for Writ of Mandamus was not an appropriate manner of seeking relief from a decision of an administrative board denying a discovery request. The Motion to Quash Petition is granted and the Petition is quashed. *Stephen Foshey and Amiee Heinemann v. Pasco County Sheriff's Office Career Service Appeal Board*, No. 14-CA-1738-WS (Fla. 6th Cir. App. Ct. December 12, 2014).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION**

**STEPHEN FOSHEY and
AMIEE HEINEMANN,**
Petitioners,

UCN: 512014CA001738CAAXWS

v.

**PASCO COUNTY SHERIFF'S OFFICE
CAREER SERVICE APPEAL BOARD,**
Respondent.

_____/

Petition for Writ of Mandamus,

Kerry A. O'Connor, Esquire,
for Petitioners,

David M. Brickhouse, Esquire,
Richard Corcoran, Esquire,
for Respondent.

ORDER

Petitioners seek relief as permanent employees of the Pasco Sheriff's Office in the form of a Petition for Writ of Mandamus, requiring the Pasco Sheriff's Office Career Service Appeal Board to issue witness subpoenas requested by Petitioners in proceedings before the Board reviewing Petitioners' termination of employment. We find Petitioners failed to demonstrate a clear right to the relief requested, and a lack of other available adequate remedies. We therefore grant Respondent's Motion to Quash Petition.

STATEMENT OF THE CASE AND FACTS

Petitioners filed a Petition for Writ of Mandamus on May 9, 2014, seeking review of the unanimous decision of the Pasco County Sheriff's Office Career Service Appeal Board (Board) on February 7, 2014, after notice and a hearing, denying Petitioners' request for the issuance of witness subpoenas in Petitioners' Employee Witness List and Request for Subpoena Issuance and Service. The February 7 hearing addressed mainly the issue of the Sheriff's Office's objection to the Witness List, and at the conclusion of the hearing the Board voted to postpone the review proceedings in this matter based on Petitioners' expressed intent to seek review in this Court of the decision denying the Request for Subpoenas. This Court issued an order directing Respondent to show cause why the relief should not be granted. Respondent then filed a Motion to Quash the Petition, claiming mandamus was not the appropriate manner of seeking the relief Petitioners request, and further, that Petitioners failed to demonstrate entitlement to such extraordinary relief from a discretionary decision by the Board.

LAW AND ANALYSIS

Petitioners request this Court issue a Writ of Mandamus compelling the Board to issue witness subpoenas for the purpose of Petitioners' hearing before the Board, reviewing Petitioners' termination of employment by the Sheriff's Office. Petitioners claim they are unable to obtain effective review before the Board without the issuance of certain requested subpoenas. Petitioners seek to invoke the jurisdiction of this Court pursuant to Article V, § 5(b) of the Florida Constitution (the circuit court has the "power of direct review of administrative action prescribed by general law"), and Fla. R. App. P. 9.030(c)(3) ("Circuit courts may issue writs of mandamus . . . and all writs necessary to complete the exercise of the court's jurisdiction").

To demonstrate entitlement to mandamus relief, a party must "establish the existence of a clear legal right to the performance of a clear legal duty by a public officer and that no other legal remedies are available." *Randall v. Fla. Dep't of Law Enforcement*, 791 So. 2d 1238, 1240 (Fla. 1st DCA 2001). Mandamus as a form of relief is an extreme remedy, therefore "the allegations must be sufficiently explicit to show

clearly the petitioner's right to the relief sought." *Glendinning v. Curry*, 14 So. 2d 794, 801 (Fla. 1943).

Petitioners rely on Pasco County Code § 54-40(e), which provides that the Board's decision "shall be final and binding on the employee and the sheriff unless a state's court jurisdiction is invoked by appeal or certiorari to review the board's action." Petitioners were employees of the Pasco County Sheriff's Office until they were terminated by notice on November 27, 2013. Petitioners were afforded the right to seek appeal of their respective terminations pursuant to §§ 54-31 to 54-44, Pasco County Code, as having attained permanent employee status, and Petitioners each filed timely requests for a hearing before the Board. Petitioners each individually filed an Employee's Witness List and Request for Subpoena Service.

At the February 7 hearing, the Sheriff's Office contended that the witnesses were not relevant to the issues pending before the Board, and that it was premature to issue subpoenas to potential rebuttal witnesses whose relevancy could not be demonstrated prior to the hearing, but who may be called during the hearing depending on the evidence presented. The Sheriff's Office further maintained that unless Petitioners could demonstrate a need to call additional witnesses during the hearing, subpoenas should not be issued to witnesses who were not involved in the initial investigation which led to Petitioners' termination. Petitioners claim that specific argument on the relevancy of the witnesses was only provided as to the request for a subpoena directed to Pasco Sheriff Chris Nocco, and that otherwise only general argument was provided in objection. Petitioners contend the majority of the witnesses on the list were anticipated to be called as rebuttal witnesses, that the subpoenas are necessary to fully present their case before the Board, and that it is improper for the Board to apply technical rules of evidence to deny the request for subpoenas.

Petitioners rely on *Pleus v. Crist*, 14 So. 3d 941 (Fla. 2009), as support for the Petition. In *Pleus*, the Court held that "to be entitled to mandamus relief, the petitioner must have a clear right to the requested relief, the respondent must have an indisputable legal duty to perform the requested action, and the petitioner must have no other adequate remedy available." *Id.* at 945 (granting the petition and finding "a clear

and indisputable legal duty” on behalf of the Governor to fill a judicial vacancy which was separate from the “discretionary decision as to the actual appointment to fill the judicial vacancy”).

Pasco Code § 54-34 provides that the Sheriff’s Office has authority to “adopt such rules, standards and regulations as are needed for the implementation and administration of this article, including all time limits and procedures not specified in this article.” § 54-34. The Code provides a procedure by which a permanent employee may appeal termination to the Board, which is vested with certain powers and duties controlling review proceedings. Specifically, § 54-39(c) provides:

The board shall, in the conduct of such hearings, have power to administer oaths, issue subpoenas, compel the attendance of witnesses, and require the production of books, records, accounts, papers, documents, testimony and other evidence.

The Board found it unnecessary to issue subpoenas prior to the hearing to potential rebuttal witnesses who were not a part of the initial investigation into Petitioners’ termination. Petitioners contend that because they are entitled to review of the decision terminating their employment, and the Board has the sole authority to issue witness subpoenas during such proceedings, Petitioners have a clear right to the issuance of the requested subpoenas, and are therefore entitled to mandamus relief from this Court compelling the Board to exercise its power to issue the requested subpoenas. The Code further provides:

Any such hearing will be conducted as informally as compatible with justice, and both the office of the sheriff and the employee will be afforded an opportunity to present their cases. During such hearings, the technical rules of evidence and civil procedure shall not apply. The employee and sheriff’s representative will be given an opportunity to present documentary evidence and witnesses on their behalf and to examine and cross examine witnesses.

§ 54-40. Petitioners claim Respondent has a clear duty to issue the requested subpoenas because the Board has the sole power to issue such subpoenas. See § 54-39(c). Petitioners maintain that the witnesses must be available to testify in order to fully

prepare for and present their case, and that they have no other adequate remedy at law, because the power to issue witness subpoenas lies exclusively with the Board.

Respondent claims Petitioners cannot demonstrate entitlement to mandamus relief for the issuance of subpoenas by the Board. Appeals proceedings before the Board are limited in nature to a review and determination of whether the Sheriff had just cause to take disciplinary action in the matter at hand. See Pasco County Code §§ 54-39(b)(2), 54-40(d), 54-37(b); § 54-40(c) (“Testimony and evidence will be restricted to the charges or reasons given for the disciplinary action taken”); § 54-41(d) (“The finding of cause by the career service appeal board shall be based exclusively on the record evidence before the board”); and § 54-35.¹ Although Petitioners correctly state that the Board has the power to issue witness subpoenas, Petitioners provided no authority for the proposition that the Board lacks discretion over the exercise of this power. Rather, the Pasco County Code provisions support the contention that the decision of the Board was an exercise of discretion in managing proceedings before the Board.

Respondent contends mandamus is not the appropriate manner of seeking relief from a decision of a lower tribunal, including an administrative board. See *Anoll v. Pomerance*, 363 So. 2d 329, 330-31 (Fla. 1978) (“Mandamus may not be employed as an appellate remedy to review the quasi-judicial action of an administrative agency”); *Solomon v. Sanitarians’ Registration Bd.*, 155 So. 2d 353, 356 (Fla. 1963). Respondent characterizes the Board’s decision regarding discovery as quasi-judicial and therefore not appropriate for mandamus relief. See *Anoll*, 363 So. 2d at 331 (“a judgment becomes judicial or quasi-judicial, as distinguished from executive, when notice and hearing are required and the judgment of the board is contingent on the showing made at the hearing”); *State ex rel. Allen v. Rose*, 167 So. 21, 27 (Fla. 1936) (distinguishing ministerial acts, “where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment,” from judicial acts, which involve an “exercise of discretion or judgment”).

¹ “Nothing in this article shall restrict the constitutional authority of the sheriff over his appointees. This article shall be construed as a grant of limited and reserved privileges on behalf of the sheriff to his appointees and employees. This article shall not create any rights or interest, whether express or implied, and none shall be inferred.”

Respondent contends the appropriate avenue for challenging an order granting or denying discovery is by appeal and not mandamus, and any review which may have been available to Petitioners would appropriately have been sought by the timely filing of a petition for writ of certiorari. See *Mathews v. Crews*, 132 So. 3d 776, 779 (Fla. 2014) (restating the principle “that the extraordinary writ procedure is not a substitute for the appeal or discretionary review process”); *Anoll*, 363 So. 2d at 331; *State ex rel. Everglades Cypress Co. v. Smith*, 139 So. 794, 795 (Fla. 1932); *Powell v. Civil Serv. Bd. of Escambia Cty.*, 154 So. 2d 917, 919 (Fla. 1st DCA 1963). Having failed to timely file a petition seeking a writ of certiorari to review the Board’s decision, Petitioners may not seek review by mandamus now, more than 90 days after the Board’s decision. A “writ of mandamus cannot be sued to review an allegedly erroneous judicial decision,” and it is not “the appropriate vehicle to seek review of an allegedly erroneous decision by another court, nor is it the proper vehicle to mandate the doing or undoing of a discretionary act.” *Mathews*, 132 So. 3d at 778-79. See *State ex rel. Allen*, 167 So. at 23.

We find Petitioners failed to establish the three elements necessary to demonstrate entitlement to mandamus relief. “Mandamus is a common law remedy used to enforce an established legal right by compelling a person in an official capacity to perform an indisputably ministerial duty required by law.” *Austin v. Crosby*, 866 So. 2d 742, 744 (Fla. 5th DCA 2004). Further, mandamus is not appropriate because other adequate legal remedies exist. A timely petition for writ of certiorari would have been the appropriate remedy for Petitioners in this matter. See *Mathews*, 132 So. 3d at 778-79; *Powell*, 154 So. 2d at 919; Fla. R. App. P. 9.100(c); Fla. R. App. P. 9.190(b)(3). Because Petitioners failed to seek relief within 30 days of the Board’s decision, Petitioners have waived the right to any interlocutory appellate review of the Board’s decision which may have been available.

When the petitioner’s right to the requested relief appears doubtful, a motion to quash must be granted. See *State ex rel. Allen*, 167 So. at 23; *State ex rel. Murray v. Lee*, 4 So. 2d 117, 118 (Fla. 1941). The motion to quash admits as true all facts sufficiently pled in the Petition, but does not admit “allegations of conclusions of law,

allegations of conclusions of facts not sustained by the facts alleged,” or “allegations that the law does not permit to be proven.” *State ex rel. Thompson v. Davis*, 169 So. 199, 208 (Fla. 1936). We agree that to the extent any relief sought by Petitioners may have been available, mandamus is not the appropriate manner of relief. Based on the timing of the filing of the Petition, this Court is unable to consider the availability of alternative methods to review the Board’s decision. We therefore grant the Motion to Quash Petition.

CONCLUSION

Petitioners failed to demonstrate entitlement to the extraordinary remedy of mandamus relief. Relief by petition for mandamus is only available when no other adequate remedy is available. Any review Petitioners may have been entitled to in this Court is precluded from consideration due to the timing of the filing of the Petition. The Motion to Quash is hereby GRANTED.

It is ORDERED AND ADJUDGED that the Petition for Writ of Mandamus is hereby QUASHED.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this 12th day of December, 2014.

Original order entered on December 12, 2014 by Circuit Judges Stanley R. Mills, Daniel D. Diskey and Shawn Crane.