9-7-1984

Ad Hoc Executive Committee of Medical Staff of Memorial Hospital v. Runyan

COLORADO SUPREME COURT
Case No. 84SA10

THE AD HOC EXECUTIVE COMMITTEE OF THE MEDICAL STAFF OF THE MEMORIAL HOSPITAL; DR. T. SCOTT BRASSFIELD, DR. ELMER MONAHAN, and DR. LAWRENCE POST, individually and as members of the Ad Hoc Executive Committee of the Medical Staff of the Memorial Hospital; THE HEARING PANEL OF THE MEDICAL STAFF OF THE MEMORIAL HOSPITAL; DR. ANDRE HUFFMIRE, DR. ALLAN REISHUS, DR. THOMAS YOUNG, DR. GEORGE BOCK, individually and as members of the Hearing Panel of the Medical Staff of the Memorial Hospital; DR. DAVID JAMES, individually and as Chief of Staff of the Memorial Hospital; MARY LYNN JAMES and LORINDA K. TUCKER, as residents and taxpayers of Moffat County, Colorado,

Plaintiffs-Appellees,

v.

ROBERTA RUNYAN; JAMES E. SEVERSON; KEITH COUNTS; JOYCE LEANDER; NEIL McCANDLESS; BRUCE SEELEY and LOUIS MILLER as the BOARD OF TRUSTEES FOR THE CRAIG MEMORIAL HOSPITAL, a county hospital; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF MOFFAT, STATE OF COLORADO; and DR. THOMAS TOLD,

Defendants-Appellants.

REPLY BRIEF OF APPELLANT DR. THOMAS TOLD

APPEAL FROM THE MOFFAT COUNTY DISTRICT COURT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. CONST. Amend. I
U.S. CONST. Amend. XIV

COLO. CONST. Art. II, Section 25

STATEMENT OF THE CASE

Defendant-Appellant Dr. Thomas Told has appealed from two orders of the Moffat County District Court reversing a decision of the Board of Trustees of the (Craig) Memorial Hospital. On May 31, 1984, Dr. Told submitted his Opening Brief. Dr. Told incorporates the Statement of the Case contained in his Opening Brief as though fully set forth herein.

ARGUMENT

I. As The Board Of Trustees Was Not Required To Apply Facts To Any Criteria Established By Law, Its Action Was Not Quasi-Judicial; Therefore, The Board Of Trustees' Decision Was Not Subject To Review Pursuant To Rule 106(a)(4), C.R.C.P.

Defendant-Appellant Dr. Thomas Told incorporates by this reference the arguments contained in Part I of his Opening Brief as though fully set forth herein.

Plaintiff-Appellee the Executive Committee argues in its Reply Brief that the Board of Trustees has "committed themselves to an articulated and ascertainable standard of professional and ethical performance by physicians." Reply Brief of Plaintiff Appellee, p. 6. The Executive Committee is simply wrong. Sections 25-3-301, et seq., C.R.S. grant to the Board of Trustees unfettered discretion to determine hospital staff privileges. Similarly, Sections 12-43.5-101, et seq., C.R.S., which authorize the Board of Trustees to create a peer review committee and allow the peer review committee to make "recommendations" concerning disciplinary action, do not provide any limitations on the power of the Board of Trustees to ignore such recommendations, nor do

these statutory provisions set forth any grounds upon which a reversal of such recommendations must be based.

The Board of Trustees' proceedings in reviewing the disciplinary actions of the Executive Committee and Hearing Committee are governed exclusively by Article X, Section 6 of the Bylaws. Nowhere in Section 6 or indeed anywhere in the Bylaws is the Board required to apply any criteria to the facts before it in affirming or reversing the action of the Executive Committee. Rather, the "Board may affirm, modify or reverse the adverse decision or action, or, in its discretion, may refer the matter back to the Hearing Committee for further review and recommendation." Bylaws, Article 8, Section 6(I).

Neither the applicable statutes nor the Bylaws provide any "criteria to be taken into account" by the Board. The discretionary decision of the Board of Trustees reversing the suspension of Dr. Told's staff privileges was not quasi-judicial and therefore was not subject to review pursuant to Rule 106(a)(4), C.R.C.P. Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975).

II. The Executive Committee Does Not Have Standing To Seek Review Of The Decision Of The Board Of Trustees, A Superior Entity Designated To Review The Executive Committee's Actions.

Defendant-Appellant Dr. Thomas Told incorporates by this reference the arguments contained in Part II of his Opening Brief as though fully set forth herein.

The Executive Committee was created by the Board of Trustees and is a sub-agency of the Medical Staff and the Board of Trustees. The Board of Trustees is designated by statute and by the Bylaws to review

the Executive Committee's decisions. Regardless of whether the Executive Committee can be considered a "party" to the proceedings below*, following a decision by the superior body, the Board of Trustees, the Executive Committee has a ministerial duty to implement the Board of Trustee's decision. Absent express statutory authority, the Executive Committee does not have standing to challenge the decision of the Board of Trustees. See, Lee v. Civil Aeronautics Board, 225 F.2d 950 (D.C. Cir. 1955); Broadway Petroleum Corporation v. City of Elyria, 247 N.E.2d 471 (Ohio 1969). See also, County Commissioners v. Love, 172 Colo. 122, 470 P.2d 861 (1970). To hold otherwise would be akin to ruling that a district court has standing to seek review of its reversal by an appellate court.

The Executive Committee asserts that Section 12-43.5-103, C.R.S. "could" provide a statutory grant of standing. Reply Brief of Plaintiff-Appellees, page 8. This assertion is erroneous. Section 12-43.5-103(3), C.R.S., which grants hospital boards of trustees and their members immunity from suit, states that "nothing in this subsection(3) shall preclude judicial review of the action of a board of trustees."

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*The Executive Committee asserts that it was the "prosecuting agency" and so is entitled to be considered a "party." Reply Brief of Plaintiff-Appellee, page 7. This argument is logically inconsistent, as the Executive Committee is, in the first instance, a hearing tribunal and, as such, is not entitled to seek review of a reversal of its decision.

This statute nowhere expressly grants a peer review committee standing to challenge a decision of a hospital board of trustees. Moreover, the immediately preceding statutory provision, Section 12-43.5-102(3)(e), C.R.S., clearly contemplates that only physicians may seek judicial review of disciplinary actions of a peer review committee or board of trustees.

The Executive Committee's reliance on Turner v. City and County of Denver, 146 Colo. 336, 361 P.2d 631 (1960) for the proposition that it has standing to seek Rule 106 review of the Board of Trustee's decision is likewise misplaced. In Turner, supra, the City and County of Denver, the Mayor, and the Manager of Safety sought reversal of a decision of the Civil Service Commission of the City and County of Denver. The Civil Service Commission was an administrative body created by the Denver City Charter. Id. at 634. The Turner Court held only that the City could seek review of the Commission's order. Id. It never specifically addressed the issue of whether the Manager of Safety, whose decision had been reversed by the Commission, had standing. Turner, supra, only stands for the proposition that a superior entity may seek review of an action of an inferior body. It does not hold that an inferior agency such as the Executive Committee has standing to challenge the actions of

the Board of Trustees, the superior body specifically designated to review the Executive Committee's decisions.**

III. The District Court's Ruling That The Board Of Trustees Was Required To Apply An Arbitrary Or Capricious Standard Of Review To The Hearing Committee's Decision Was Plainly Erroneous And So Must Be Reversed.

The Executive Committee has asserted and the District Court held that to sustain the Board of Trustees' reversal of the Hearing Committee's decision, the "evidentiary record" must support a finding that the Hearing Committee's decision "'lacked any substantial factual basis or that the Committee's conclusions were arbitrary, unreasonable or capricious' as would be required under Article X, Section 3G of the Hospital's Bylaws." Order, December 21, 1983, Record at p. 156; Reply Brief of Plaintiff-Appellees, Part III. However, the Bylaws do not require that the Board of Trustees apply any particular standard of review, let alone that imposed on the Hearing Committee. Even if the District Court was correct in holding that the Board of Trustees had to apply the same standard of review as the Hearing Committee, by the express terms of the Bylaws, the arbitrary and capricious standard was not applicable to the instant matter. The District Court erred and so must be reversed.

**Insofar as the Executive Committee asserts that it would be judicially unsound to rule that no one but the affected physician has standing to seek review of the Board of Trustees' decision, the Executive Committee is in error. A board of trustees is the policymaking body of a county public hospital. See, Sections 25-3-301, et seq., C.R.S. It would be poor public policy resulting in administrative chaos to allow a sub-agency to whom a board has delegated some responsibility to challenge the decisions of the board. Further, such a ruling is entirely consistent with the Colorado General Assembly's legislative scheme. See, Section 12-43.5-102(3)(e), C.R.S. (clearly contemplating that only physicians may seek judicial review of a decision of a peer review committee or of a board of trustees.

As support for its ruling that the Board of Trustees was required to apply the same standard of review as the Hearing Committee, the District Court cited Article X, Section 6(F) of the Bylaws. Section 6(F) states that "[t]he Board has all the powers granted to the Hearing Committee and any additional powers that are reasonably appropriate to, or necessary for, the discharge of its responsibilities." From this, the District Court reasoned that the Board of Trustees was "charged by the Bylaws with similar duties and responsibilities as the Medical Staff and so was required by to apply the standard of review which Article X, Section 3(G) of the Bylaws imposed on the Hearing Committee." Order, December 21, 1983, Record at p. 155.

The reasoning of the Distrct Court and of the Executive Committee is erroneous. While the Executive Committee asserts that Article X, Section 6 "cannot be considered in isolation" (Reply Brief of Plaintiff-Appellees, page 10), an examination of the Bylaws shows a sequential series of procedures culminating in a review by the Board of Trustees. The review procedures of the Board of Trustees are governed exclusively by Article X, Section 6. Nowhere in Section 6 is the Board of Trustees required to utilize the procedures, standards of review, or burdens of proof of the inferior hearing tribunals. Nowhere in Section 6 is any standard of review mandated. Rather, the Board "may affirm, modify, or reverse the adverse decision or action, or in its discretion, may refer the matter back to the Hearing Committee" as it chooses. Bylaws, Article X, Section 6(I). Similarly, the statutes authorizing the Board of Trustees to review decisions of the peer review committees,

Sections 12-43.5-101, et seq., C.R.S., do not require the application of any particular standard of review or burden of proof. This lack of any specific standard of review is simply reflective of the Board of Trustees' statutory role as policymaker for the Hospital. See, Sections 25-3-301, et seq., C.R.S. Indeed, the District Court's requirement that the Board of Trustees apply an arbitrary and capricious standard of review would force the Board to improperly delegate to the Hearing Committee and Executive Committee the authority to hire and retain employees. Such a delegation would improperly contravene the intent of the statutes granting this authority to the Board of Trustees. See, Section 25-3-304(2), C.R.S. See also, Johnson v. Jefferson County Board of Health, 662 P.2d 463 (Colo. 1982) ("a political subdivision of the state, may not by rule or regulation abdicate the authority and responsibility delegated to it by the legislature.").

Even if the District Court was correct in its holding that the Board of Trustees had to apply the same standard of review as the Hearing Committee, the Court erred in finding that the applicable standard of review was that specified in Article X, Section 3(G). By its express terms, the burden of proof specified in Section 3(G) only applies "[w]hen a hearing relates to Section 1.A.1(a), (e), or (h)" of Article X of the Bylaws. Thus, Section 3(G)'s standard of review only applies to: "(a) [d]enial of initial Staff appointment;" "(e) [d]enial of requested appointment to, or advancement in Staff category;" or "(h) [d]enial or restriction of requested clinical privileges." Bylaws, Article X, Sections 1.A.1. The disciplinary suspension of Dr. Told's staff

privileges for thirty (30) days and his reduction to permanent associate staff category do not fall under any of these three "triggering events." Since Section 3(G) is not applicable to the instant matter, the Bylaws do not even require the Hearing committee, let alone the Board of Trustees to apply any particular standard of review. The District Court erred in holding that Section 3(G) stated the applicable standard of review and so must be reversed.

IV. On Their Face And As Applied To Dr. Told, The Bylaws Upon Which Dr. Told's Suspension Was Based Exceeded The Authority Statutorily Delegated To The Executive Committee. The Actions Of The Executive Committee And Hearing Committee Were Void And The District Court Erred In Re-Instating These Decisions.

Defendant-Appellant Dr. Thomas Told incorporates by this reference the arguments contained in Part V of his Opening Brief as though fully set forth herein.

Dr. Told's suspension was based on an alleged violation of Article II, Section 2 of the Bylaws. See, Findings Of The Medical Staff Executive Committee; Findings And Conclusions Of The Medical Staff Hearing Committee. Section 12-43.5-102, C.R.S., authorizes investigation by a peer review committee of "the quality of care given patients by [a] physician." It does not delegate to the Executive Committee any authority to regulate ethics and ethical relationships or, more importantly, to regulate the speech of physicians, as Article II, Section 2(I) of the Bylaws purports to do. To the extent that the Colorado General Assembly has authorized the regulation of professional and ethical conduct of physicians, it has delegated this authority to the State Board of Medical Examiners in Sections 12-36-101, et seq., C.R.S.

See especially, Section 12-36-117, C.R.S. (defining "unprofessional conduct"). On their face, the Bylaws at issue exceed the statutory authority conferred upon the Executive Committee, and so the actions taken by the Executive Committee were void. Colorado Division of Employment and Training v. Industrial Commission of the State of Colorado, 665 P.2d 631 (Colo. App. 1983). As applied to Dr. Told it is even clearer that the Bylaws at issue exceeded the authority delegated to the Executive Committee. It simply cannot be asserted that a recommendation to obtain a second opinion concerning complicated medical treatment "indicate[s] a substant lack of quality of care rendered by [the] physician." Section 12-43.5-102(3)(b)(I), C.R.S.

The disciplinary action against Dr. Told was predicated in part upon his alleged discussion of the "presumed deficiencies" of another physician in violation of Article II, Section 2(I) of the Bylaws. The Executive Committee apparently asserts that since the hospital has "construed the term 'presumed deficiencies' to [mean] medically related professional deficiencies which have not been proven or substantially confirmed" (Reply Brief of Plaintiff-Appellee, page 17), Article II, Section 2 of the Bylaws is "consistent" with the statutory limitation on the power of peer review committees to investigate "matter[s] affecting the quality of care provided." First, nowhere in the record is there any support for the proposition that the Executive Committee has limited the term "presumed deficiencies." Moreover, even assuming that the Bylaw has been so construed, Dr. Told's advise to seek a second opinion, if somehow construed to be a discussion of "presumed deficiencies" of another

physician, does not evidence any "lack in the quality of care rendered" by him to his patient. See, Opening Brief of Appellant Dr. Told, page 18.

Similarly, the Executive Committee asserts that the "'ability to work with others' is reasonably related to the hospital's object of ensuring patient welfare." Reply Brief of Plaintiff-Appellees, page 18. This statement begs the issue before this Court. First, the Bylaws at issue concern ethics and the speech of physcians, not a physician's ability to work with others. Second, nowhere in the "Findings of Medical Staff Executive Committee" or the "Finding And Conclusions" of the Medical Staff Hearing Committee is there any mention whatsoever that Dr. Told's statements interfered with his ability to work with others or were detrimental to patient welfare.

Finally, the Executive Committee states that "Dr. Told also asserts that regulating ethics is not contemplated by the statute and relies upon Rosner v. Eden Township, 125 Cal. Rptr. 551, 375 P.2d 431 (1962) in support of this position." Reply Brief of Plaintiff-Appellee, page 17. Dr. Told relies upon Sections 12-43.5-101, et seq., C.R.S. for that proposition that peer review committees do not have authority to regulate ethics or the speech of physicians. Dr. Told cites Miller v. Eisenhower Medical Center, 166 Cal. Rptr. 826, 614 P.2d 258 (1980) for the proposition that, at a minimum, the grounds for exclusion from staff privileges at a public hospital must relate to the quality of patient care given by a physician and that the alleged offending conduct must be shown "to present a real and substantial danger that patients treated by him might receive other than 'a high quality of medical care'". Id. at 267. See also, Weissman v. Board of Education of

Jefferson County School District, 190 Colo. 414, 547 P.2d 1267 (1976). No rational nexus between Dr. Told's alleged statements and the quality of care rendered by him was alleged or found by the Executive Committee. The Executive Committee exceeded its statutory authority and its actions were void. Colorado Division of Employment and Training, supra. The District Court erred and must be reversed.

V. Article II, Section 2 And Article IX, Section 1 Of The Bylaws Are Unconstitutionally Vague And Overbroad, Both As Applied And Facially, In Violation Of The First And Fourteenth Amendments To The United States Constitution.

Defendant-Appellant Dr. Thomas Told incorporates by this reference the arguments contained in Part VI of his Opening Brief as though fully set forth herein.

Dr. Told stands on the argument in his Opening Brief that the terms "unethical" and "unprofessional" do not provide fair notice of what conduct is prohibited and do not contain any objective standards so as to prevent arbitrary or discriminatory enforcement.*** These broad and ambiguous terms are therefore unconstitutionally vague in violation of

***The Executive Committee asserts that the Bylaws and a code of ethics promulgated by the State Board of Medical Examiners confine these broad terms, saving them from impermissible vagueness. Reply Brief of Plaintiff-Appellate, page 19. The State Board of Medical Examiners' code of ethics has never before been referred to in this case, and there is no evidence whatsoever that the Executive Committee confined its conception of "ethical conduct" to this code. As for the Bylaws, Dr. Told was disciplined for violating Article II, Section 2(I) (a physician shall not discuss "presumed deficiencies" . . .). This particular proscription is in and of itself unconstitutionally vague. The impermissible vagueness of the challenged Bylaws is further shown by the fact that they have been arbitrarily applied to Dr. Told on more than one occassion. See e.g., Order of the Moffatt County District Court, dated July 7, 1983 (Dr. Thomas Told v. The Ad Hoc Credentials Committee of the Medical Staff of the Memorial Hospital, et al., Action No. 82CV190), contained in the record.

the Fourteenth Amendment to the United States Constitution and Article II, Section 25 of the Colorado Constitution. LDS, Inc. v. Healy, 589 P.2d 490 (Colo. 1979); Trail Ridge Ford, Inc. v. Colorado Dealer Licensing Board, 190 Colo. 82, 543 P.2d 1245 (1975).

Dr. Told further stands on the argument contained in his Opening Brief that as applied to him, the terms "unethical" and "unprofessional" are impermissibly vague and overbroad in violation of the First Amendment of the United States Constitution. While the Executive Committee's Reply Brief nowhere addresses these First Amendment claims, one point must be remarked upon. To the extent that the Executive Committee implies that they Bylaws are presumed to be constitutional and that Dr. Told has the burden of proving beyond a reasonable doubt that the Bylaws at issue are unconstitutionally vague in violation of the First Amendment, the Executive Committee is wrong. The presumption of validity is simply not applicable in First Amendment cases. City of Lakewood v. Colfax Unlimited Association, Inc., 634 P.2d 52 (Colo. 1981). See, Opening Brief of Appellant Dr. Told, page 26, footnote 1.

Article II, Section 2(I) of the Bylaws is also facially overbroad in violation of the First Amendment to the United States Constitution. Article II, Section 2(I) concerns only pure speech, not conduct. Therefore, the doctrine of "substantial overbreadth" is inapplicable. Even if "substantial overbreadth" analysis is germane, it

was misapplied by the District Court.**** Dr. Told does have standing to challenge Article II, Section 2(I) on the grounds that it could be unconstitutionally applied to others. Section 2(I) is in fact facially overbroad as it "chills" the potential exercise of First Amendment rights by sweeping within its ambit constitutionally protected speech while vesting inordinate discretion in the Executive Committee. This unconstitutional provision was improperly used as the basis for disciplining Dr. Told. Thus, the Board of Trustees' reversal of Dr. Told's suspension was required, and the District Court erred in vacating that decision.

The District Court apparently concluded that Dr. Told did not have standing to assert a facial overbreadth claim, ruling that "the threshold showing to establish facial overbreadth has not been met." Order, December 21, 1983, Record at p. 159. This Court has adopted the substantial overbreadth doctrine enunciated in Broadrick v. Oklahoma, 413 U.S. 601 (1973) to determine whether a party has third-party standing to assert a facial overbreadth challenge to a statute regulating expressive conduct. See, City of Lakewood v. Colfax Unlimited Association, Inc., 634 P.2d 52 (Colo. 1981). See also, Veterans of Foreign Wars v. City of Steamboat Springs, 195 Colo. 44, 575 P.2d 835 (1978). However, no case

****Plaintiff-Appellant Executive Committee appears to misunderstand the doctrine of "substantial overbreadth." Substantial overbreadth is a standing inquiry undertaken to determine if a party may challenge the constitutionality of a statute or regulation as it may be applied to others. The substantial overbreadth test is inapplicable to the actual determination of whether the challenged statute is facially overbroad.

could be discovered in which this Court applied the substantial overbreadth doctrine to regulations of pure speech. This Court should not do so as substantial overbreadth analysis is inapplicable to regulations of pure speech.

While a "substantial overbreadth" requirement has been imposed where a law regulates conduct because the "function [of expanded third-party standing rules] . . . attentuates as the behavior moves from 'pure speech' towards conduct and that conduct--even if expressive--falls within the scope of otherwise valid criminal laws . . .," Id. at 615, "claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate 'only spoken words.'" Broadrick v. Oklahoma, supra at 611. (Citing Gooding v. Wilson, 405 U.S. 518, 520 (1972).

> In such cases, . . . the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes.

Broadrick v. Oklahoma, supra.

Article II, Section 2(I) of the Bylaws states that "[S]taff members shall not discuss presumed deficiencies of any other physician with their patients or with members of the general public." Article II, Section 2(I), by its terms, attempts to regulate "only spoken words," not conduct. The speech purported to be regulated by Article II, Section 2(I) is not within the legitimate scope of the Hearing Committee's delegated powers. See, Appellant's Opening Brief, Part V. Moreover, even assuming the truth of the findings of the Hearing

Committee, Dr. Told's statements do not fall within the proscriptions of Section 2(I) as that provision was interpreted by the District Court. Advising a patient to seek a second opinion can hardly be said to be a discussion of a medically related presumed deficiency of another physician.

Because Section 2(I) seeks to regulate "only spoken words," the substantial overbreadth analysis is inapplicable. Broadrick v. Oklahoma, supra. Dr. Told's challenge to this Bylaw on the grounds that it is facially overbroad must be heard to protect society's compelling interest in ensuring that protected speech is not inhibited. Gooding v. Wilson, supra. The District Court must be reversed.

Even if "substantial overbreadth" is the appropriate test to determine whether Dr. Told has standing, the District Court's application of the test was erroneous. In determining whether a statute or regulation is substantially overbroad, the factors to be considered are:

> if [the regulation] is within the constituional power of the government; if it furthers an important or substantial governmental interest; the governmental interest is unrelated to the expression of free speech; and the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest . . .

Veterans of Foreign Wars v. City of Steamboat Springs, 575 P.2d at 840.

Applying this four-prong test to the facts of the instant case, Article II, Section 2(I) is substantially overbroad. Section 2(I) exceeds the statutorily delegated powers of the Hearing Committee. See, Appellant's Opening Brief, Part V (Sections 12-43.5-101, et seq., C.R.S. limit a peer review committee's power to discipline physicians to actions

which directly affect the quality of patient care; these statutes in no way delegate any authority to restrict physicians' speech, let alone speech which does not directly affect patient care). While it has been admitted that the State does have an interest in providing for quality patient care, Section 2(I) does not directly relate to this interest. Rather, by its express terms, this regulation is concerned directly with speech, proscribing all comments by one physician about another concerning any subject. Section 2(I) nowhere mentions any concern with patient care. Any governmental interest in patient care is at best indirectly served.

Further, this no-comment rule is not an "incidental" restriction on speech. It directly and substantially regulates speech, imposing far greater restrictions on protected speech "than is essential to the furtherance" of any governmental interest." Id. For example, if the Hearing Committee legitimately desired to ensure quality patient care, it might proscribe those statements which posed a "serious and imminent" danger to a patient or even to the hospital's functioning. See e.g., Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975). As drafted, Article II, Section 2(I) is substantially overbroad. The District Court erred in holding otherwise.

Whether it is determined that Article II, Section 2(I) is "substantially overbroad" or that the substantial overbreadth test is inapplicable to this regulation of pure speech, it is clear that Dr. Told has standing to challenge the facial validity of this provision. Once it has been determined that Dr. Told has standing to challenge the facial

overbreadth of Article II, Section 2(I), the test is the same as that applied when a party challenges a regulation as being overbroad as applied. See e.g., Opening Brief of Appellant Dr. Thomas Told, Part VI,B. Applied to the facts of this case, Section 2(I)'s prohibition of all comments concerning "presumed deficiencies" is clearly overbroad on its face. Any number of examples can easily be envisioned in which the Bylaw could be used to "impermissibly proscribe . . . constituionally protected expression." City of Lakewood v. Colfax Unlimited Association, Inc., supra at 58. For instance, on its face the Bylaw prohibits on physician from commenting publicly about the qualifications of another physician who is seeking public office. Such speech clearly could not be proscribed by the Hearing Committee. However, the breadth and ambiguity of Section 2(I) would allow such application. As importantly, the broad sweep of Section 2(I) allows for discriminatory and arbitrary enforcement by the Hearing Committee. Such possibilities can only serve to deter staff members from making statements which they have a basic right to make as citizens. This is the precise evil which the First Amendment guards against. Id.

Article II, Section 2(I) of the Bylaws is facially overbroad and therefore unconstitutional. It "sweeps within its ambit . . . activities that constitute an exercise of" protected expressive rights. Thornhill v. Alabama, 310 U.S. 88, 97 (1940). The Board of Trustees properly reversed Dr. Told's suspension based on an alleged violation of this unconstitutional provision. The District Court erred in vacating the Board's decision.

CONCLUSION

For all the foregoing reasons and for those reasons set out in Appellant's Opening Brief, the District Court erred in vacating the decision of the Board of Trustees. The District Court's decision must be reversed and the decision of the Board of Trustees re-instated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing REPLY BRIEF OF APPELLANT DR. THOMAS TOLD has been served upon the following counsel by depositing same, properly addressed and postage prepaid in the United States Mail this 7th day of September, 1984.

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