8-1-1984

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

SUPREME COURT, STATE OF COLORADO

Case No. 84-SA-10

REPLY BRIEF OF PLAINTIFF-APPELLEES

THE AD HOC EXECUTIVE COMMITTEE OF THE MEDICAL STAFF OF THE MEMORIAL HOSPITAL; DR. T. SCOTT BRASSFIELD, DR. ELMER MOHAHAN, 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 BOCH, 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 LYNNE JAMES and LORINDA K. TUCKER, as residents and taxpayers of Moffat County, Colorado,

Plaintiffs - Appellees,

vs.

ROBERTA RUNYAN; JAMES E. SEVERSON; KEITH COUNTS: JOYCE LEANDER; NEIL McCANDLESS; BRUCE SEELEY and LOUISE 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.

APPEAL FROM THE MOFFAT COUNTY DISTRICT COURT

FOURTEENTH JUDICAL DISTRICT

HONORABLE CLAUS J. HUME

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COMES NOW the Plaintiff-Appellee, the Ad Hoc Executive Committee of the Medical Staff of the Memorial Hospital ("Executive Committee"), by and through its attorney, Harry A. Tucker, Jr., and hereby submits the Reply Brief of Plaintiff-Appellee.

ISSUES PRESENTED

I. WHETHER THE DISTRICT COURT ERRED IN RULING THAT IT HAD JURISDICTION TO REVIEW THE ACTIONS OF THE BOARD OF TRUSTEES OF THE CRAIG MEMORIAL HOSPITAL UNDER RULE 160(a)(4), C.R.C.P.?

II. WHETHER THE DISTRICT COURT ERRED IN RULING THAT THE AD HOC EXECUTIVE COMMITTEE OF THE MEDICAL STAFF OF MEMORIAL HOSPITAL HAD STANDING TO SEEK REVIEW OF THE DECISION OF THE BOARD OF TRUSTEES UNDER RULE 106(a)(4), C.R.C.P.?

III. WHETHER THE DISTRICT COURT ERRED IN RULING THAT THE BOARD OF TRUSTEES WERE REQUIRED TO FIND THAT THE DECISION OF THE EXECUTIVE COMMITTEE WERE ARBITRARY, UNREASONABLE, OR CAPRICIOUS OR LACKED ANY SUBSTANTIAL FACTUAL BASIS IN ORDER TO REVERSE THE PRIOR DECISION?

IV. WHETHER THE DISTRICT COURT ERRED IN RULING THAT THE DECISION OF THE BOARD OF TRUSTEES IN REVERSING DR. TOLD'S SUSPENSION WAS "ARBITRARY, CAPRICIOUS OR UNREASONABLE?

V. WHETHER THE DISTRICT COURT ERRED IN RULING THAT THE ACTIONS OF THE PEER REVIEW COMMITTEE, TAKEN PURSUANT TO ARTICLE II, SECTION 2 AND ARTICLE IX, SECTION 1 OF THE BYLAWS DID NOT EXCEED THE STATUTORY AUTHORITY DELEGATED TO THOSE COMMITTEES?

VI. WHETHER THE DISTRICT COURT ERRED IN RULING THAT ARTICLE II, SECTION 2 AND ARTICLE IX, SECTION 1 OF THE BYLAWS WERE NOT UNCONSTITUTIONALLY BAGUE AND OVERBROAD IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION?

STATEMENT OF THE CASE

The Executive Committee agrees with and adopts by reference the Statement of the Case as contained in the Opening Brief of Dr. Thomas Told.

STATEMENT OF FACTS

The Executive Committee agrees with and adopts by reference the Statement of Facts as contained in the Opening Brief of Dr. Thomas Told.

ARGUMENT

I.

THE ACTIONS OF THE BOARD OF TRUSTEES IN REVIEWING A THIRTY (30) DAY SUSPENSION OF THE HOSPITAL PRIVILEGES OF DR. THOMAS TOLD WERE QUASI-JUDICAL IN NATURE.

Dr. Thomas Told ("Dr. Told") and the Board of Trustees of the Memorial Hospital ("Board") assert that judical review of the Board's action is not available under Rule 106(a)(4) because the Board operated in an executive, rather than a quasi-judical capacity, in reversing the decision of the Medical Staff to suspend Dr. Told's staff privileges for a period of thirty (30) days. This argument is grounded on Article X, Sec. 6(I) of the Bylaws and Rules and Regulations of the Medical Staff of the Memorial Hospital ("Bylaws"), which Appellants allege give to the Board complete and unfettered discretion to reverse the suspension of Dr. Told on any grounds that the Board deems appropriate, and, therefore, does not require application of facts to an ascertainable standard. However, a complete review of the Bylaws clearly establish that this is not the case.

The Memorial Hospital in Craig, Colorado ("Hospital") is a county hospital created prusuant to C.R.S. 1973, 25-3-301 and is administered by a Board of Trustees as provided for in said statute. C.R.S. 1973, 25-3-304 expressly provides that the hospital board "shall make and adopt...bylaws, rules and regulations for its own guidance and for the government of the hospital...." C.R.S. 1973, 12-43.5-101 et seq authorizes the creation by hospital bylaws of peer review committees in order to protect patients against the unauthorized, unqualified and improper practice by a physician.

Pursuant to this statutory authority the Board of Trustees approved and adopted Bylaws on May 5, 1982, as recommended by the Medical Staff on April 29, 1982. A complete copy of said Bylaws are included in the Record of Proceedings.

The Bylaws adopted by the Medical Staff and the Board of Trustees are expressly designed, "to maintain the highest possible standard of patient care" in the hospital (Bylaws, Preamble). Amoung the purposes of the organization of the Medical Staff of the hospital are:

> To serve as the primary means for accountability to the Board for the professional performance and ethical conduct of its members and allied health professionals. (Bylaws, Art. I, Sec. 1G) (Emphasis Added)

The Medical Staff is responsible:

> To initiate and pursue corrective action, when warranted, with respect to practicioners (Bylaws Art. I, Sec. 2E)
>
> and
>
> To administer, recommend amendments to, and seek compliance with these Bylaws and Rules and

> Regulations and other Hospital policies. (Bylaws Art. I, Sec. 2F)

Ethical conduct is specifically required and extensively defined in Article II, Sec. 2 of the Bylaws. Amoung many other matters, Staff Members are required by that section to accept the self imposed disciplines of the medical profession and are prohibited from soliciting patients and from discussing presumed deficiencies of any other physician with their patients or with members of the general public for the purpose of improving the health and well-being of the individual and the community.

Article IX, Sec. 1, sets forth the causes for corrective action and provides:

> A staff member's privileges in the Memorial Hospital may be reduced, limited, suspended, or terminated, or his Medical Staff membership may be suspended, terminated, or not renewed, for lack of professional qualifications; for for professional or clinical incompetence (which is defined as failing to exercise that degree of knowledge, skill, judgment, and care that is possessed and exercised by other physicians in the same field or practice in the State of Colorado); for violation of, or non-compliance with the Medical Staff Bylaws and Rules and Regulations; for actions disruptive to the operations of the hospital; for a handicap or impairment of effectiveness or judgment, by reason of age, accident, illness (physical or emotional), or overuse of drugs or alcohol; for failure to keep abreast of current diagnostic and therapeutice methods; or for unprofessional or unethical conduct.

The Bylaws, in Articles IX and X also contain extensive provisions concerning the procedures to be followed when a request for corrective action is received, including: 1) Investigation of the alleged misconduct; 2) Notice to affected parties; 3) A hearing (or hearings) permitting representation by legal

counsel, presentation of evidence, argument, examination and cross examination of witnesses; and 4) Burdens of proof.

Dr. Told and the Board choose to ignor the entirety of the Bylaws and rely only on Article X, Section 6(I) of the Bylaws concerning Appellate Review, which provides:

> I. Action Taken: The Board may affirm, modify, or reverse the adverse decision or action, or in its descretion, may refer the matter back to the Hearing Committee for further review and recommendations to be returned to it within 7 days after receipt of such recommendation after referral, the Board shall take action.

It must be noted that this section does not state that the Board in its complete and absolute discretion, may for any reason, affirm, modify, or reverse the adverse decision or action. Dr. Told and the Board urge this Court to construe the section in such a manner. The Executive Committee asserts that this construction leads to an absurd result and totally ignors the standards of conduct, grounds for corrective action, burdens of proof, and procedures for corrective action set forth in the balance of the Bylaws.

The Executive Committee contends that Article X, Section 6(I) cannot be read and considered in a vacuum. The Bylaws must be taken, read and considered as a whole. Indeed, the decisions of this Court with respect to statutory construction would require such a result. This Court has often stated that in construing a section of a legislative act, it is fundamental that the whole of the act must be read and considered in context. Travelers Indemnity Co. v. Barns, 191 Colo. 278, 552 P.2d 300 (1976); Humana, Inc. v. Board of Adjustments of City of Lakewood, 189 Colo. 79,

537 P.2d 741 (1975) as only by so doing can a "consistent, harmonious and sensible effect" be given to all its parts. Tobin v. Weed, 158 Colo. 430, 407 P.2d 350 (1965).

These fundamental rules of statutory construction should also be applicable to construction of Administrative Rules such as the Bylaws. A comprehensive review of the Bylaws reveal that they require the application of facts to an ascertainable standard to arrive at a result. From the Preamble, through the purposes and responsibilities clauses in Article I, the principals adhered to in Article II, and the practices and procedures established in Articles IX and X, it is clear that both the Medical Staff and the Board have committed themselves to an articulated and ascertainable standard of professional and ethical performance by physicians. These standards must be applied to the applicable facts by the Board of Trustees upon appeal.

It is submitted that the action of the Board was quasi-judicial in nature and is properly subject to review pursuant to Rule 106(a)(4).

II.

THE EXECUTIVE COMMITTEE IS A PROPER PARTY TO SEEK REVIEW OF THE DECISION OF THE BOARD PURSUANT TO RULE 106(a)(4).

The criteria for a determination of standing to bring a Rule 106 petition has been set forth in Colorado in Miller v. Clark, 144 Colo. 431, 356 P.2d 965 (1960) and Kornfield v. Perl Mack Liquors, Inc., 193 Colo. 442, 567 P.2d 383 (1977). Both cases held that individuals seeking review must either be a party

to the action or a person aggreived by the disposition of the lower court (or tribunal).

The Bylaws, Article IX, Section 2 charges the Executive Committee with the duty to investigate allegations of improper physician's conduct. The Executive Committe is also designated as the prosecuting agency, if its investigation so warrants. The Bylaws expressly provide that the Executive Committee is the prosecuting party entitled to present evidence, to examine and cross-examine witnesses and to be represented by counsel at all hearings.

The Executive Committee was a party to the proceedings before the Board in this action, and it is submitted that under existing law in Colorado, is a proper party to seek review on an adverse ruling by the Board.

In Turner v. City and County of Denver, 146 Colo. 336, 361, P.2d 631 (1961) the Colorado Supreme Court considered an almost identical standing question. In that case two Dever policemen were discharged after a hearing before the Manager of Public Safety for alleged mistreatment of a prisoner. The officers appealed to the Civil Service Commission. The Commission, based upon review of the record of the hearing before the Manager reversed the discharge.

The City and County of Denver, the Mayor and the Manager of Safety commenced an action pursuant to Rule 106(a)(4) to review the order of the Commission. The District Court held that the Commission had acted arbitrarily and capriciously and reversed

the order of the Commission and affirmed the decision of the Manager of Safety. In seeking reversal of the District Court, counsel for the police offiers urged that the City, Mayor and Manager of Safety did not have standing to seek review of an order of the Civil Service Commission. The Supreme Court held that the Plaintiffs did have standing, stating:

> The Rules of Civil Procedure are broad enough to cover this condition. Rule 106(a)(4) provides: "...Where an inferior tribunal (whether court, Board, commission or officer) exercising judicial or quasi-judical functions, has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy..." relief may be granted. It makes no distinction between an aggrieved individual and a municipal corporation which seeks review in the interest of the public as a whole.

With repect to the City and County of Denver, the Court stated:

> In the present case the City was represented before the Civil Service Commission and must be held to be within its rights in filing certiorari in the district court.

In the present case, a statutory basis for standing by the Executive Committee could also exist. C.R.S. 1973, 12-43.5-103 provides in applicable part:

> ...but nothing in this subsection (3) shall preclude judicial review of the action of a board of trustees.

This section of the statute does not limit said judicial review to a physician against whom an adverse action has been taken.

Appellants seek to have this Court adopt a rule that would eliminate standing to appeal an administrative decision, such as the Board action, by everyone, except the affected physician. It is submitted that this result is contrary the the prior decisions of this Court, is not required by the law, nor is it judicially sound to establish such a precedent.

An action brought under Rule 106 (a)(4) is not an appeal in the traditional sense, but is limited to very narrow circumstances, where an inferior tribunal has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy. A ruling that would allow administrative tribunals to take actions without jurisdiction and then constitute the Court of last resort with respect to that action seems inconceivable and is not in the public interest.

Further, the Executive Committee is a peer review committee created not only by the Bylaws, but also pursuant to authority granted by C.R.S. 1973, 12-43.5-101 et seq. The legislature has stated that it is the policy of this state to encourage discipline and control of the practice of health care rendered by physicians by committees made up of physicians licensed to practice in this state. A decision by this Court that the Executive Committee is without standing to bring an action under Rule 106 would seriously undermine, if not destroy this legislature intent. In other words, as in this case, a Board of Trustees could act arbitrarily or capriciously or even without jurisdiction in reversing the decisions of peer review committees for adverse action, and the Courts of this State would be powerless to review these

matters in particular cases, as no one would have have standing to raise the abuse of discretion or lack of jurisdiction.

This Court should not adopt the position urged by Appellants and should find, as did the District Court, that the Executive Committee was a proper party to initiate this action under Rule 106(a)(4).

III.

THE DISTRICT COURT PROPERLY FOUND THAT THE BOARD OF TRUSTEES WAS REQUIRED TO FIND THAT THE HEARING COMMITTEE'S DECISION WAS EITHER NOT SUPPORTED BY THE EVIDENCE, OR THAT THE HEARING COMMITTEE'S CONCLUSIONS BASED THEREON WERE ARBITRARY OR CAPRICIOUS, IN ORDER TO REVERSE CORRECTIVE ACTION IMPOSED BY THE HEARING COMMITTEE.

The District Court, after careful review of the Bylaws concluded that the Bylaws, interpreted in a common sense fashion, established a burden of proof upon appellate review. The Court concluded that Article X, Section 3G is applicable to review by the Board of Trustees of corrective action taken by the Medical Staff Hearing Committee.

Appellants, relying on Article X, Section 6(I), allege that this finding by the District Court was error and that the Board of Trustees have complete and absolute discretion to reverse corrective action on any grounds.

As in the First Issue Presented, the Executive Committee contends that Article X, Section 6(I) cannot be considered in isolation. That when the Bylaws are considered in their entirety, it is clear that the Board of Trustees are not vested with absolute and total discretion and that the specific burden of proof to be applied by the Hearing Committee and the Board upon review

is set out in Article X, Section 3G.

Article IX, Section 2 requires the Medical Staff Executive Committee to investigate all request for corrective action against a member of the Medical Staff. If after said investigation, the Executive Committee takes an action deemed adverse, the physician has the right to appeal the decision to the Medical Staff for hearing or trial de novo. Upon appeal to the Hearing Committee of the Medical Staff, Article X, Section 3G provides in applicable part:

> ...The body whose adverse action or recommendation occasioned the hearing has the initial obligation to present evidence in support thereof, but the practitioner thereafter is responsible for supporting, by a preponderance of the evidence, his challenge that the adverse action or recommendation lacks any substantial factual basis or are either arbitrary, unreasonable, capricious.

If the action of the Hearing Committee is adverse to the practitioner, he may request an <u>appellate review</u> before the Board. Such a proceeding is clearly characterized as "<u>appellate review</u>" by Article X, Sections 5 and 6 of the Bylaws. Review is to be conducted upon the hearing record, the Hearing Committee's Report, the written statement, and any other material accepted under Section 6E. (Bylaws, Art. X, Sec.6A). New or additional matters or evidence may be introduced only at the discretion of the Board, only if the party requesting consideration of the matter or evidence shows that it could not have been discovered in time for the initial hearing (Bylaws, Art. X, Sec. 6E). What is contemplated at this stage of the proceeding is, then, a true appellate review, based upon the previous record.

If the Board truely has absolute discretion to do as it chooses, for any reason, and as urged by Appellees, then, the burden of proof contained in Article X, Section 3 G is rendered truely meaningless. Further, the strong policy declaration by the legislature in C.R.S. 1973, 12-43.5-101, to encourage discipline and control of the practice of health care by peer review committees is defeated.

It is submitted that the Bylaws, considered in their entirety, are clear that the applicable standard for appellate review by the Board is as set out in Article X, Section 3G.

It is submitted that not only should this Court consider the Bylaws as a whole. Travelers Indemnity Co. v. Barns, supra Humana, Inc. v. Board of Adjustments of City of Lakewood, supra., but that it must also consider the objects of the Bylaws and the consequences which would follow either construction. Doenges - Glass, Inc. v. General Motors Acceptance Corp., 488 P.2d 879 (1971).

It is clearly the intent of the Bylaws to provide for peer review. While an ethics violation is involved in the present case, the same burden of proof would apply to an adverse action based upon medical incompetence of a physician. Members of the Medical Staff, who are physicians, acting as a peer review committee are uniquely qualified to determine such matters. Further, the only hearings permitted by the Bylaws are before the Executive Committee and the Medical Staff. The Hearing Committee of the Medical Staff sees and hears all the witnesses

in person and observes their manner and demeanor upon the stand. The pictures and impressions from such testimony convey far more of the real truth than the cold words on a printed page, which is the only matters reviewed by the Board. If this Court interprets Article X, Section 6(I) to vest absolute discretion in the Board, the advantages of physician peer review and the advantages of the observation of the testimony are lost.

Any common sense interpretation of the Bylaws as a whole clearly reveal that the applicable standard upon Appellate Review before the Board is that contained in Article X, Section 3G, and before the Board can reverse an adverse action, it must find that the adverse action or recommendation lacked a substantial factual basis or that the conclusions drawn from the factual basis were either arbitrary, unreasonable, or capricious.

IV

THE DISTRICT COURT CORRECTLY RULED THAT THE BOARD OF TRUSTEE'S REVERSAL OF THE ADVERSE ACTION AGAINST DR. TOLD WAS NOT SUPPORTED BY COMPETENT EVIDENCE.

The Board of Trustees made no written or recorded findings or conclusions as to the basis of their decision to reverse the adverse action by the Hearing Committee. The record is, therefore, entirely silent as to the basis of the Board's decision.

In Turner v. City and County of Denver, supra., the Colorado Supreme Court considered a similar record. As previously noted, in that case two Denver policemen were discharged after a hearing before the Manager of Safety for alleged mistreatment of a prisoner. The Manager made a detailed analysis and findings. The officers appealled to the Civil Service Commission. The Commission, based

upon review of the record of the hearing before the Manager reversed the discharge, without making any findings. Relying on Hawkins v. Hunt, 113 Colo. 468, 160 P.2d 357 the Court announced the following ruling:

> The Commission has two alternatives:
>
> 1. It may simply review the record...to determine whether...the evidence...supports the findings and conclusions of the...(hearing tribunal).... If the Commission follows this course, it is bound by the...(hearing tribunal's)...supported findings and may not adopt different conclusions without expressly determining that the findings are not supported by the evidence, or that there is an error at law.
>
> 2. The Commission may, in its discretion extend to the discharged person a "trial de novo" before the Commission. If it elects to follow such course its exercise of discretion would have to be based on the new evidence or other valid sufficient ground; new findings would then be necessary. Turner, surpa. at pages 345-346.

In the present case, as in Turner, the Board of Trustees proceeded upon a record of review of the findings and conclusions of the Hearing Committee, and was, therefore, required to make findings sufficient to apprise the parties and the reviewing court of the basis of its action, so that a determination could be made whether its decision has support in the evidence and the law. Commissioners v. Salardino, 136 Colo. 421, 318 P.2d 596 (1947); Board v. Finnegan, 139 Colo. 92, 336 P.2d 98 (1959); Bauer v. Wheatridge, 182 Colo. 324, 513 P.2d 203 (1973). While technical legalistic findings are not required, the basis of the Board's ultimate ruling must either be expressed or be implicit in the Board's ultimate ruling as a matter of law. Sundance Hills v. County Commissioners, 188 Colo. 321, 534 P.2d 1212 (1975).

In the present case, there are no specifically prescribed facts which are necessarily implicit in the ultimate ruling of the Board of Trustees, and no basis was articulated by the Baord to support its ruling.

It is submitted that the record of the hearing before the Medical Staff clearly supports the findings of fact made by the Medical Staff that Dr. Told made unsolicited contact with Lois Stoffle at a time when she was another doctor's patient. During this contact he gave unsolicted advice and opinions to Mrs. Stoffle, and criticised the decisions that she had made with her physicians after outside consultation regarding her impending surgery. Dr. Told also advised Mrs. Stoffle that her present physician was "unprofessional" for having failed to inform Dr. Told of the impending surgery and stated that Dr. James would not perform surgery with him, and recommended that she should go to Denver for another opinion or for possibly different surgery at a different hospital facility. The evidence is also clear that Dr. Told's conduct during this contact violated the ethical standards established by the Bylaws and were detrimental to the hospital's purposes of extending quality medical care. There is ample evidence in the record indicating that Lois Stoffle was upset by Dr. Told's unsolicited remarks and as a patient her confidence in her decision regarding her surgery was shaken at least temporarily. There is also evidence which indicates that Mrs. Stoffle and other members of the nursing and professional staff were upset by Dr. Told's remarks, and that an aura of discontent amoung hospital

professionals and support staff existed at the hospital as a result of Dr. Told's unsolicited remarks.

On the other hand, it is submitted that there is no basis in the record for a finding by the Board of Trustees that the Committee's recommendations lacked any substantial factual basis or that the Committee's conclusions were arbitrary, unreasonable or capricious.

It is submitted that in reversing the Committee's decision under these circumstances, the Board, not the Committee, acted arbitrarily and capriciously and in excess of the authority conferred upon it by its own Bylaws.

V.

ARTICLES IX, SECTION 1, AND ARTICLE II, SECTION 2(I) OF THE BYLAWS ARE REASONABLY RELATED TO THE ENABLING STATUTE.

C.R.S. 1973, 12-43.5-102 authorizes peer review committees to consider a physician's professional qualifications, clinical competence, mental or emotional stability or physical condition or any other matter affecting the quality of care provided. C.R.S 1973, 25-3-304 expressly authorizes the Board to promulgate Bylaws, Rules and Regulations to effect this end.

Dr. Told argues that the final language of the statute means the quality of health care "provided by him". The statute, however, is not so limited, and it is submitted that "any other matters affecting the quality of care provided" is broader than Dr. Told has alleged and relates equally to the quality of care provided by the hospital.

Whether or not the statute is narrowly construed to matters affecting the health care provided by Dr. Told, or not, a growing

number of cases recognize that when considering the interest of the patient, it is not enough that his doctor possess the necessary skills of his profession. That the absence of a compatable team working together could impair the doctor's performance and consequently undermine the effectiveness of the treatment given the patient. Silver v. Castle Memorial Hospital, 53 Hawaii 475, 497 P.2d 564 (1972). See also Huffaker v. Bailey 273 Or. 273, 540 P.2d 1398 recognizing that a staff member's ability to work with others was not unrelated to promoting patient care.

The regulations at issue are consistent with the statute. The hospital has construed the term "presumed deficiencies" to medically related professional deficiencies which have not been proven or substantially confirmed. Certainly discussing unfounded or unconfirmed professional deficiencies with patients or the general public cannot contribute to a compatible working relationship between doctors, and particularly so in a small community such as Craig, Colorado. A rational nexus does exist between the conduct prescribed by Article II, Section 2, and the quality of health care provided.

Dr. Told also asserts that regulating ethics is not contemplated by the statute and relies upon Rosner v. Eden Township Hospital District, 125 Cal. Rptr. 551, 375 P.2d 431 (1962) in support of this position. However, the Rosner case, supra. has been subsequently constued and significantly limited upon its facts by the Miller case, supra. Moreover, the Rosner line of

California cases was rejected in Huffaker v. Bailey, supra., where the Oregon Supreme Court found that the "ability to work with others" is reasonably related to the hospital's object of ensuring patient welfare. Significantly, Colorado appears to have adopted the Huffaker rather than the Rosner line of authority in Even v. Longmont United Hospital Association, ___Colo. App. ____, 629 P.2d 1100 (1981) which upheld the regulation of "unprofessional conduct".

It is submitted that both Article IX, Section 1, and Article II, Section 2(I) are reasonably related to the standard contained is the statute of "any other matters affecting the quality of care provided".

VI

ARTICLE II, SECTION 2 AND ARTICLE IX, SECTION 1 OF THE BYLAWS ARE NEITHER UNCONSTITUTIONALLY VAUGE IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION NOR OVERBROAD IN IN VIOLATION OF THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. ARTICLE IX, SECTION 1 REGULATING "UNETHICAL CONDUCT" IS NOT UNCONSTITUTIONALLY VAGUE.

Administrative regulations which impose sactions for "unprofessional" or "unethical" conduct have consistently withstood vagueness challenges in the Colorado Appellate Courts. See: Even v. Longmont United Hospital Association, ___Colo. App. ____, 629 P.2d 1100 (1981); Cardamon v. State Board of Optometric Examiners, ___Colo. ____, 441 P.2d 25 (1968); Sapero v. State Board of Medical Examiners, 90 Colo. 568, 11 P.2d 555 (1932), Dilliard v. State Board of Medical Examiners, 69 Colo. 575, 196

P. 866 (1921); See also Coe v. U.S. District Court for the District of Colorado, 676 F.2d 412 (1982).

The only Colorado case upon which Dr. Told relys in advancing that "unethical" conduct is unconstitutionally vague is LDS, Inc., v. Healy, 197 Colo. 19, 589 P.2d 490 (1979). In that case the Court held the term "unethical procedures" in real estate developing could not pass constitutional muster because inter alia ,no code of ethics had been passed for real estate subdividers. The Court noted, however:

> We acknowledge that either the legislature or or the real estate board could confine the term to proper constitutional specificty by promulgating a code of ethics to govern business practices of subdividers. LDS, Inc. v. Healy, supra.

In the present case, the Bylaws approved by the Medical Staff and adopted by the Board of Trustees set forth in Article II, Section 2, "Ethics and Ethical Relationships". This section contains 10 separate actions, violations of which will constitute "unethical conduct". Additionally, in Colorado, the State Board of Medical Examiners have promulgated a code of ethics governing the ethical conduct of physicians, to which the Bylaws are confined.

It is submitted that the Bylaws adopted by the Board and the Code of Ethics adopted by the Board of Medical Examiners are sufficient to confine the term "unethical conduct" contained in the Bylaws to proper constitutional specificity, and are sufficient to appraise medical practitioners subject to the provisions of the Bylaws of the nature of the conduct prohibited and is capable of being rationally applied by the fact finding

tribunal so as to avoid arbitrary, capricious or prejudical discriminary actions.

As limited by the Bylaws and the Code of Ethics for medical professionals, Article IX, Section 1, is not unconstitutionally vauge.

B. AS APPLIED TO DR. TOLD, ARTICLE II, SECTION 2 (I) OF THE BYLAWS IS NEITHER UNCONSTITUTIONALLY VAGUE NOR OVERBROAD IN VILOLATION OF THE FIRST AMENDMENT.

Article II, Section 2(I) of the Bylaws provides:

> Staff Members shall not discuss presumed deficiencies of other physicians with their patients or with members of the general public.

Dr. Told asserts that as applied to him, that this provision is unconstitutionally vague. However, this section of the Bylaws must be considered in connection with the language of the enabling statute, the other provisions of the Bylaws and the limiting construction of this section as determined by the hospital.

C.R.S. 1973, 12-43.5-102 expressly limits the authority of the Board to disciplinary proceedings for matters which affect the quality of health care provided by the hospital. Further, the Boards are required to act pursuant to written Bylaws which must reasonably set out matters to be regulated and the manner in which such regulations are to be effectuated and enforced in order to achieve the statutory purpose.

Article IX, Section 1 of the Bylaws specifically sets out the possible causes for corrective action, which include, "actions disruptive to the operations of the Hospital...or for unprofessional or unethical conduct." Further, the hospital has construed the

term "presumed deficiencies" to be medically related professional deficiencies which have not been proven or substantially confirmed. The section is further limited by its own terms to prohibit discussions of such presumed deficiencies with patients or members of the general public.

The Bylaws, read in conjunction with the statute require the following elements to be shown to support a disciplinary action:

1. Unethical or unprofessional conduct by an offending physician;

2. Which adversely affects the quality of health care provided by the hospital;

3. That the communication concerns a "presumed deficiency" of another physician; and

4. It must be made to a patient or to the general public.

It is submitted that so construed, the regulation is not so vauge as to violate due process and does appraise medical practicioners subject to its provisions of the nature of the conduct prohibited.

It is futher submitted, that Regulations made pursuant to Statute are presumed to be constitutional and should be rationally construed to avoid determinations of unconstitutionality where possible. State Board of Medical Examiners v. Jorgensen, 198 Colo. 275, 599 P.2d 869 (1979). That Dr. Told has the burden of proving its unconstitutionality beyond a reasonable doubt. Mr. Luckys, Inc. v. Dolan, 197 Colo. 195, 591 P.2d 1021 (1979). It is submitted that Dr. Told has failed to do so and Article

II, Section 2(I) is not so vauge as to be unenforceable.

Neither does the section violate the First Amendment of the Constitution of the United States.

Colorado had adopted a four prong test to determine whether statutes of regulations should be determined to be so substantially overbroad as to be facially invalid. This is:

1. Is the regulation within the Constitutional powerof the government?

2. Does the regulation further an important or substantial governmental interest?

3. Is the governmental interest substantially unrelated to the supression of free speech? and

4. Is the restriction on First Amendment freedoms no greater than essential to the furtherance of the purpose?

See: V.F.W. vs. City of Steamboat Springs, 195 Colo. 44, 575 P.2d 835 (1978). It is submitted that Article II, Section 2(I) satisfies these four requirements.

First, the States clearly have authority to legislate under their police powers for the health, safety and welfare of the public. The General Assembly has delegated that authority to the governing bodies of hospitals pursuant to C.R.S. 1973, 12-43.5-102, to the extent that the bylaws relate to matters which affect the quality of health care provided by the hospital.

The interest here is only incidentally and insignificantly related to the suppression of free speech. The legislation is reasonably designed to promote public safety and welfare, and

the restrictions on speech is mild, limited to regulation of time, place and manner of the execise of the First Amendment Right, and has little real chilling effect on the legitimate right of free speech.

The Bylaws also provide in Article II, Section 2(C) that members of the medical staff are required to expose without hesitation, illegal or unethical conduct of fellow members of the profession. Thus, Dr. Told had a legitimate means and forum within which he could exercise his right to express his opinion.

It is submitted that facial overbreath of the Bylaws is not present and they do not violate the First Amendment of the Constitution of the United States.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the decision of the Moffat County District Court.

Respectfully submitted.

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CERTIFICATE OF MAILING

I hereby certify that I have this 1st day of August, 1984, mailed postage prepaid, a true and correct copy of the foregoing Brief to:

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