5-31-1984

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.

OPENING BRIEF OF APPELLANT DR. THOMAS TOLD

CALKINS, KRAMER, GRIMSHAW & HARRING
Charles E. Norton, No. 10633
Charles B. Hecht, No. 13270
Attorneys for Defendant-Appellant
Dr. Thomas Told
One United Bank Center
1700 Lincoln Street, Ste. 3800
Denver, Colorado 80203
Telephone: (303) 839-3800

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ISSUES PRESENTED

1. Whether the District Court erred in ruling that it had jurisdiction to review the discretionary actions of the Board of Trustees of the Craig Memorial Hospital under Rule 106(a)(4), C.R.C.P.?

2. Whether the District Court erred in ruling that the Ad Hoc Executive Committee of the Medical Staff of the Memorial Hospital had standing to seek review of the Board of Trustees' decision under Rule 106(a)(4), C.R.C.P.?

3. Whether the District Court erred in ruling that the Board of Trustees were required to find that the decisions of the Ad Hoc Executive Committee and of the Medical Staff were arbitrary, unreasonable, or capricious or lacked any substantial factual basis in order to reverse the prior decisions?

4. Whether the District Court erred in ruling that the decision of the Board of Trustees of the Craig Memorial Hospital in reversing Dr. Told's suspension was "arbitrary, capricious, or unreasonable"?

5. 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 of the Craig Memorial Hospital, did not exceed the statutory authority delegated to those bodies?

6. Whether the District Court erred in ruling that Article II, Section 2 and Article IX, Section 1 of the Bylaws of

the Memorial Hospital were not unconstitutionally vague and overbroad in violation of the First and Fourteenth Amendments of the United States Constitution?

STATEMENT OF THE CASE

I. Nature Of The Case, Course Of Proceedings, And Disposition Below.

Defendant-Appellant Dr. Thomas Told appeals from two orders of the Moffat County District Court reversing a decision by the Board of Trustees of the (Craig) Memorial Hospital. That decision had reversed earlier actions of the Medical Staff of the Memorial Hospital wherein the staff privileges of Dr. Told were suspended for a period of thirty (30) days. Dr. Told was suspended for making various statements to a patient and member of the Craig Hospital Staff, Lois Stoffle. Dr. Told had advised Mrs. Stoffle to seek a second opinion concerning complicated medical procedures that she was scheduled to undergo and had allegedly criticized another physician for failing to advise him of Ms. Stoffle's forthcoming treatment. Findings and Conclusions of the Medical Staff Hearing Committee, January 13, 1983, Nos. 5, 6, and 7.

Following a formal investigation and a hearing held on November 3, 1982, the Ad Hoc Executive Committee of the Medical Staff of the Craig Memorial Hospital (hereinafter "Executive Committee") recommended disciplinary action against Dr. Told based on the above-mentioned statements and a previous disciplinary action taken by that Committee against Dr. Told. Dr. Told appealed

the recommendation of the Executive Committee to the Medical Staff Hearing Committee of the Craig Memorial Hospital (hereinafter "Hearing Committee"), and a hearing was held on January 12, 1983. The Hearing Committee upheld the findings, conclusions, and recommendations of the Executive Committee, suspending Dr. Told's staff privileges for thirty (30) days and further recommending that at the conclusion of the suspension Dr. Told be assigned to permanent Associate Staff status. The Hearing Committee also recommended that Dr. Told undergo psychological counseling prior to his reinstatement.

Dr. Told appealed the Hearing Committee's decision to the Hospital Board of Trustees (hereinafter "Board of Trustees"), which held a formal hearing on March 15, 1983. The Board voted 4-3 to reverse the decision of the Hearing Committee. The Board of Trustees issued no written findings or conclusions.

On April 12, 1983, the Plaintiffs-Appellees filed a Complaint For Relief Pursuant To Rule 106(a)(4), C.R.C.P. The Complaint alleged that the Board of Trustees' action was arbitrary, capricious, and an abuse of discretion and sought reversal of the decision of the Board of Trustees. In an order dated October 18, 1983, the Moffat County District Court denied Dr. Told's Motion to Dismiss, holding that the District Court had subject matter jurisdiction over the appeal and that the Executive Committee had standing to seek relief under Rule 106(a)(4), C.R.C.P. Then, in an order dated December 21, 1983, the District Court vacated the

ruling of the Board of Hospital Trustees and re-instated the ruling of the Hearing Committee. Dr. Told appeals from both of these orders. The Board of Trustees and the Board of County Commissioners of Moffat County join in his appeal.

II. Statement Of Facts.

This appeal primarily raises questions of law. Therefore, no statement of facts other than those contained in the immediately preceding section will be set forth at this point. Where facts from the records below are required, they will be set forth with appropriate references. (It should be noted that only Volume 1 of the Trial Court Record, hereinafter "Record", has been paginated. References to documents contained in Volume 2 will simply be to the document itself.)

ARGUMENT

SUMMARY OF ARGUMENT

The District Court did not have jurisdiction to review the decision of the Board of Trustees. In a Rule 106(a)(4), C.R.C.P. action, a court only has jurisdiction to review "judicial or quasi-judicial" decisions. The state statutes and Bylaws governing the Board of Trustees' review provide no "criteria to be taken into account" by the Board; rather the Board has complete discretion concerning the hiring and retention of hospital staff members. Therefore, its action was not quasi-judicial, and the

decision of the Board to reverse the suspension of Dr. Told's hospital privileges is not subject to judicial review.

The District Court erred in holding that the Executive Committee had standing to appeal the decision of the Board of Trustees. The Executive Committee has no statutory right to appeal. The Executive Committee is simply an inferior administrative agency and as such lacks standing to obtain judicial review of a decision of the Board of Trustees, the agency charged by statute and by the Bylaws with reviewing the Committee's decision.

Additionally, the District Court's ruling that the Board of Trustees was required to find that the Hearing Committee's earlier decision was arbitrary or capricious was plainly erroneous. The Bylaws do not require that the Board of Trustees apply any particular standard of review. 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 Board of Trustees' decision to reverse the suspension of Dr. Told's staff privileges was not arbitrary or capricious as it was clearly supported by competent evidence in the record before the Board. The Hearing Committee's decision was based in part upon a finding of prior misconduct that was subsequently overturned by the District Court. Similarly, both the Executive Committee and the Hearing Committee based their decisions on the unwarranted

premises that Lois Stoffle was not a patient of Dr. Told and that Ms. Stoffle had not solicited Dr. Told's comments. As the Hearing Committee's decision was based on unfounded premises, the Board of Trustees' reversal of that decision was supported by competent evidence. The District Court erred in vacating the Board's decision.

The peer review committees are statutorily limited to disciplining physicians for actions which directly affect the quality of patient care. Enactment and enforcement of the Bylaws upon which Dr. Told's suspension was based exceed this statutory authority. Dr. Told was suspended for making statements that were not related to the quality of patient care provided, and this suspension was improper. The District Court erred in reinstating the decisions of the Executive Committee and the Medical Staff.

The terms "unprofessional" and "unethical" are broad and ambiguous, containing no objective standards. These terms do not provide fair warning of prohibited conduct or guard against arbitrary or discriminatory enforcement and so violate the due process clause of the Fourteenth Amendment. The Board of Trustees acted properly in reversing the Hearing Committee's suspension of Dr. Told's staff privileges based on these unconstitutionally vague provisions. The vacating of the Board's decision was erroneous.

Finally, as applied to Dr. Told, Article II, Section 2(I) of the Bylaws is unconstitutionally vague and overbroad in violation of the First Amendment. This Section attempts to completely

proscribe Dr. Told's protected, ideological speech. Finally, Article II, Section 2(I) is impermissibly vague in violation of the First Amendment, "chilling" the exercise of First Amendment rights. Since the Bylaws applied to Dr. Told are vague and overbroad in violation of the First Amendment, the Board of Trustees' reversal of the Hearing Committee's decision was proper. The District Court erred in vacating the Board's decision and must be reversed.

I. As The Board Of Trustees' Action Was Not Quasi-Judicial In Nature, The District Court Did Not Have Jurisdiction To Review Its Decision.

The Complaint initiating this action sought relief pursuant to Rule 106(a)(4), C.R.C.P. By its express terms, Rule 106(a)(4) only applies "[w]here an inferior tribunal (whether court, board, commission or officer) exercising judicial or quasi-judicial functions, has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy." Rule 106(a)(4), C.R.C.P. (Emphasis added). See, Margolis v. District Court, 638 P.2d 297 (Colo. 1981). Because the Board of Trustees had complete discretion to reverse the suspension of Dr. Told on any grounds that they deemed appropriate, the Board's action was not "quasi-judicial" and therefore was not subject to review by the District Court under Rule 106(a)(4), C.R.C.P.

This Court has enunciated a specific test to determine if agency action is "judicial or quasi-judicial" and therefore subject to Rule 106 review. Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975). Agency action will be deemed quasi-judicial only

if it is made under the terms of a state or a local law which requires that the body "make a determination by applying the facts of a specific case to certain criteria established by law." Id. at 374 (Emhasis added.). See also, Margolis v. District Court, supra; City and County of Denver v. Eggert, 647 P.2d 216 (Colo. 1982); Kizer v. Beck, 30 Colo. App. 569, 496 P.2d 1062 (1972) (ordinance "setting forth the criteria to be taken into account by the Commission in arriving at its decision" established a quasi-judicial procedure). As neither the applicable State statutes nor the Bylaws and Rules and Regulations of the Medical Staff of the (Craig) Memorial Hospital (hereinafter "Bylaws") limit the "criteria to be taken into account" by the Board, the decision of the Board of Trustees reversing the suspension of Dr. Told's staff privileges was not a quasi-judicial decision and therefore was not subject to review under Rule 106(a)(4), C.R.C.P.

The Craig Memorial Hospital is a "county hospital" established pursuant to Section 25-3-301, C.R.S. See, Complaint for Relief Pursuant to Rule 106(a)(4), C.R.C.P., Paragraph 15; Record at page 2. The Board of Trustees, appointed by the County Commissioners, is the policy-making body of the hospital. It has the power to "make and adopt such bylaws, rules and regulations for its own guidance and for the government of the hospital as it deems expedient . . ." Sections 25-3-302, 304, C.R.S. "The Board of Trustees shall have the power to hire, retain, and remove agents

and employees, including administrative, nursing and professional personnel . . ." Section 25-3-304, C.R.S. Additionally,

> [w]hen such hospital is established, the physicians . . . shall be subject to such rules and regulations as said public hospital board may prescribe. Section 25-3-310, C.R.S.

The cited statutes clearly grant to the Board of Trustees nearly unlimited discretion to determine hospital staff privileges. This power of the Board to make determinations concerning staff privileges is not altered in any way by the existence of "peer review committees" created pursuant to Sections 12-43.5-101, et seq., C.R.S. While the review committee has the power to investigate and hear charges relating to allegations of substandard care by physicians, the peer review committee only makes "recommendations" to the governing board of the hospital regarding discipline. Section 12-43.5-102, C.R.S. A physician has "the right to appeal the [recommendation] of the review committee to the governing board or other body to which the recommendations are made." Id. Sections 12-43.5-101, et seq., C.R.S. do not in any way limit the power of the governing body of the hospital to ignore a recommendation of the peer review committee or set forth any grounds on which a reversal of a recommendation must be based.

Similarly, the Bylaws contain no limitations on the power of the Board of Trustees to reverse a decision of the Hearing Committee. The "Appellate Review Procedure" of the Board of Trustees is governed by Section 6 of Article X of the Bylaws. Section 6 contains no limitation or "criteria to be taken into

account" by the Board. Unlike the proceedings before the Hearing Committee, no burdens of proof are specified nor is any standard of review set forth. 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 X, Section 6(I).

Thus, under the Bylaws and the applicable statutes, the Board of Trustees has broad discretion concerning the disciplining of physicians. The Board is the ultimate arbiter concerning staff privileges. It alone determines what constitutes "unprofessional" or "unethical" conduct.

Recent opinions by Colorado Appellate Courts have reiterated the principle that decisions involving the broad exercise of discretion are not quasi-judicial and thus not subject to judicial review. See, In Re Questions Concerning State Judicial Review, 199 Colo. 463, 610 P.2d 1340 (1980) (decision of the Colorado State Parole Board to grant or deny [parole] is not subject to judicial review); Johnson v. Jefferson County Board of Health, 662 P.2d 463 (Colo. 1983) (where a governing body has discretionary authority to retain or fire a public employee, the termination of such employee is not subject to judicial review unless the decision was discriminatory or otherwise unconstitutional). See also, Kaufman v. City of Fort Collins, 30 Colo. App. 23, 489 P.2d 355 (1971).

Identically, the governing body of the Memorial Hospital has discretionary authority concerning the disciplining of physicians. It may "affirm, modify, or reverse, . . . or in its discretion, may refer the matter back". Bylaws, Article X, Section 6(I). Neither the Bylaws nor the statutes authorizing the creation of the Board and granting the Board the power to review a recommendation of a peer review committee direct how the Board's discretion is to be exercised. There are no "criteria established by law" or otherwise to which the Board must adhere. Snyder v. City of Lakewood, supra. The decision of the Board to reverse the suspension of Dr. Told's hospital privileges is not subject to judicial review under Rule 106(a)(4), C.R.C.P. In re Questions Concerning State Judicial Review, supra, Johnson v. Jefferson County Board of Health, supra. The District Court's decision that it did have jurisdiction was erroneous and must be reversed.

II. The Executive Committee Did Not Have Standing to Seek Review of the Board's Decision; The District Court's Decision Was Erroneous And Must Be Reversed.

Prior to addressing the merits of the Plaintiffs' claims, Dr. Told filed a Motion to Dismiss, asserting that all of the Plaintiffs lacked standing to seek review of the Board of Trustees' decision. The District Court denied Dr. Told's Motion, finding that, although the other named plaintiffs lacked standing, the Executive Committee was a party to the proceedings before the Board of Trustees and therefore was a proper plaintiff. The Executive Committee is an entity created by the Bylaws. See Complaint,

Paragraph 1; Record at page 2. The Executive Committee is essentially a sub-agency of the Board of Trustees and the Medical Staff, created to administer the Hospital on a day-to-day basis. In the context of a disciplinary action, the Executive Committee is empowered to act as investigator, prosecutor, and initial adjudicator. See, Bylaws, Article XI, Section 3(A); Article 1, Section 2; Articles IX and X. However, it is the Board of Trustees, empowered by both the Bylaws and statutes to review the recommendations of the Executive Committee, that must make the final decision concerning the retention, suspension, or termination of a physician. Following action upon a recommendation made by the Executive Committee, that Committee, like any inferior administrative agency following a decision by the superior agency, then has a ministerial duty to implement the decisions of the Hearing Committee or of the Board. As such, the Executive Committee does not have standing to seek judicial review of the decisions of the Board. The ruling of the District Court was erroneous and must be reversed.

Absent express statutory authorization, an inferior administrative agency or officer, even one that has served like a prosecutor and thus has the attributes of a party, does not have standing to seek review of decisions by a superior administrative agency designated to review the inferior body. Thus, in Lee v. Civil Aeronautics Board, 225 F.2d 950 (D.C. Cir. 1955), it was held that the administrator of the Civil Aeronautics Board (CAB) who had

recommended the suspension of pilots' licenses did not have standing to seek review of the decision of the CAB not to suspend the pilots' licenses. This was so despite a statute authorizing an appeal "by any person disclosing a substantial interest in such order." Though the administrator, like the CAB, had an interest in suspension proceedings to promote air safety by enforcing the Civil Aeronautics Act,

> [f]inal decision regarding suspension for violation of regulations . . . rest[ed] with the Board. We think it follows that the Administrator is not what the Act means by "any person disclosing a substantial interest" in the Board's order, and lacks standing to petition for review. The right to review of agency action is usually restricted to persons whom the agency regulates and affects adversely . . . We have found no case in which agency action has been reviewed on the application of an official whose function is to prosecute claims in and for the same agency. Id. at 951-52. (Citations and footnotes omitted, Emphasis added.)

See also, Broadway Petroleum Corporation v. City of Elyria, 247 N.E.2d 471, 476-77 (Ohio 1969) (when the legislature creates a reviewing body, it does so with the intention that such review be final with respect to others within the administrative unit, and such persons lack standing to "attack or avoid" the decisions of the entity); Scearce v. Simmons, 294 S.W.2d 673 (Mo. Ct. App. 1956).

While there are no discovered Colorado cases directly on point, Colorado Courts have clearly held that "'in the absence of an express statutory right, a subordinate state agency . . . lacks the standing or any other legal authority to obtain judicial review

of a superior state agency . . .' Martin v. District Court, Colo., 550 P.2d 864." People in the Interest of R.J.G., 38 Colo. App. 148, 557 P.2d 1214, 1217 (1976). Similarly, in County Commissioners v. Love, 172 Colo. 122, 470 P.2d 861 (1970), this Court held that the County Assessor and Board of County Commissioners lacked standing to question the action of the State Board of Equalization. Quoting People v. Hively 139 Colo. 49, 336 P.2d 721 (1959), this Court reasoned that

> [a]fter respondent had completed his assessment and submitted his assessment role to the County Board of Equalization . . . his quasi-judicial functions were ended, and his duties thereafter to be performed were purely ministerial, and that which is subsequently done by other boards, with jurisdiction to act in the premises, cannot be changed or questioned by him . . . It is the imperative duty of a ministerial officer to obey the act of a tribunal invested with the authority in the premises directing his action; not to question or decide upon its validity . . .

The Executive Committee has no statutory right to appeal a decision of the Board of Trustees. While it may serve like a prosecutor before the Hearing Committee, when the Medical Staff or the Board of Trustees acts, the Executive Committee's "quasi-judicial functions were ended, and [its] duties thereafter . . . were purely ministerial." County Commissioners v. Love, supra. The Executive Committee must simply "implement policies of the Medical Staff." Bylaws, Article XI, Section 3(A)(4). The Executive Committee is simply an inferior administrative agency and does not have standing to challenge the decision of the Board of Trustees which is charged by statute and by the Bylaws with

reviewing its decision. People in the Interest of R.J.G., supra, Lee v. Civil Aeronautics Board, supra; Broadway Petroleum Corporation v. City of Elyria, supra.[3] The District Court's ruling that the Ad Hoc Executive Committee did have standing, and denying Told's Motion to Dismiss, was erroneous and must be reversed.

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

The District Court held that in order to sustain the Board of Trustee's 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. However, the Bylaws do not require that the Board of Trustees apply any particular standard of review. The District Court erred and so must be reversed. This issue will be discussed in greater depth in the Opening Brief of Defendant-Appellant Board of Trustees for the Craig Memorial Hospital.

IV. The Board Of Trustees' Decision To Reverse The Suspension Of Dr. Told's Staff Privileges Was Not Arbitrary Or Capricious As It Was Clearly Supported By Competent Evidence; The District Court Erred In Vacating The Board Of Trustees' Decision.

In a proceeding brought pursuant to Rule 106(a)(4), C.R.C.P., a reviewing court may only overturn the inferior tribunal's decision if the decision is not supported by any

competent evidence in the record. Corper v. City and County of Denver, 191 Colo. 252, 552 P.2d 13 (1976). The Plaintiffs have the burden of proving that the decision was arbitrary and capricious beyond a reasonable doubt. Id. Further, as the District Court recognized, acts of an administrative board are clothed with the presumption of regularity and validity. Leonard v. Board of Directors, Powers County Hospital District, Colo. Ct. App., No. 81CA0428, Volume 7 Brief Times Reporter, Issue No. 43, page 994, November 4, 1983. The Board's decision was supported by competent evidence, and the District Court must be reversed. See, Opening Brief of Defendant-Appellant Board of Trustees for the Craig Memorial Hospital.

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

It is axiomatic that "[a]dministrative agencies are without power . . . to exceed the authority conferred upon them by statute. The actions of administrative agencies . . . which exceed the scope of their delegated duties and powers are void." Colorado Division of Employment and Training v. Industrial Commission Of The State of Colorado, 665 P.2d 631, 633 (Colo. App. 1983) (Citations omitted.). The peer review committees are statutorily limited in Colorado to disciplining physicians for actions which directly effect the quality of care provided to patients. The Bylaws under

which Dr. Told was suspended and the statements for which Dr. Told was disciplined did not concern matters adversely affecting patient care. The enactment and enforcement of the Bylaws upon which Dr. Told's suspension was based exceeded the statutory authority conferred on the peer review committees and thus were void. This basis alone supports the decision of the Board to reverse the Hearing Committee.

Section 12-43.5-102, C.R.S. authorizes the creation of peer review committees. A peer review committee may "review and evaluate the quality of care being given patients." Section 12-43.5-102(1), C.R.S. (Emphasis added.) "An investigation may relate to the physician's professional qualifications, clinical competence, mental and emotional stability, or physical condition or any other matter affecting the quality of care provided." Section 12-43.5-102(3)(a), C.R.S. (emphasis added).

Dr. Told's suspension was based on alleged violations of Article II, Section 2 and Article IX, Section 1 of the Bylaws and Rules and Regulations of the Medical Staff of the Memorial Hospital.

Article II, Section 2 provides in pertinent part:

> Ethics and Ethical Relationships
>
> (I) Staff members shall not discuss presumed deficiencies of any other physician with their patients or members of the general public.

Article IX, Section 1 provides:

> A staff member's privileges in the Memorial Hospital may be reduced, limited, suspended, or

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Article IX, Section 1 provides:

> A staff member's privileges in the Memorial Hospital may be reduced, limited, suspended, or

> terminated, . . . for violation of, or noncompliance with the medical staff Bylaws and Rules and Regulations; for actions disruptive to the operations of the hospital . . . for unprofessional or unethical conduct. (Emphasis added.)

Sections 12-43.5-101, et seq., C.R.S. do not delegate any authority to peer review committees to regulate "ethics and ethical relationships," define professional conduct, or regulate speech by physicians, as Article II, Section 2 and Article IX, Section 1 purport to do. On their face, the Bylaws exceed the statutory authority conferred upon the peer review committees. The actions taken by the committees were void. Colorado Division of Employment and Training, supra.

As applied to Dr. Told, it is even clearer that Article II, Section 2 and Article IX, Section 1 exceeded the statutory authority delegated to peer review committees to investigate allegations of "substandard care." Section 12-43.5-102(3)(b)(II). Even assuming the truth of the findings of the Ad Hoc Executive Committee and the Medical Staff, the charges against Dr. Told in no way concern any "lack in the quality of care rendered" by him. There are absolutely no allegations of technical incompetence against Dr. Told. It was only found that Dr. Told stated that another physician was "unprofessional" in not informing Dr. Told of Mrs. Stoffle's upcoming surgery and that Dr. Told recommended that Mr. Stoffle seek a second opinion from an expert "because he only wanted what was best for her." Findings and Conclusions of the Hearing Committee, January 13, 1983, Nos. 5, 6,

7. Dr. Told's recommendation that Mrs. Stoffle obtain a second opinion concerning complicated medical treatment surely can not be said to "indicate [a] substantial lack in the quality of care rendered by [Dr. Told]." Section 12-43.5-107(3)(b)(I), C.R.S. As applied to Dr. Told, the Bylaws exceeded the statutory authority delegated to the peer review committees; the Hearing Committees' actions were void. Colorado Division of Employment and Training, supra.

Case law from other jurisdictions supports Dr. Told's position that the grounds for exclusion from staff privileges at a public hospital must relate to the quality of patient care and that Dr. Told's statements do not constitute grounds for suspension. For example, the California Supreme Court has recently held that disciplinary actions for "ethical violations" must be limited to cases where "the problem is such as to present a real and substantial danger that patients treated by [the physician] might receive other than a high quality of care." Miller v. Eisenhower Medical Center, 166 Cal. Rptr. 826, 614 P.2d 258 (1980) (requiring that a "rational nexus" between the alleged offending conduct and the adverse effect on patient care be proven and documented). See, Rosner v. Eden Township Hospital District 125 Cal. Rptr. 551, 375 P.2d 431 (1962); McElhinney v. William Booth Memorial Hospital, 544 S.W.2d 216 (Ky. 1977). See also, Weissman v. Board of Education of Jefferson County School District, 190 Colo. 414, 547 P.2d 1267 (1976) (tenured teacher could not be dismissed pursuant to statute

making "immorality" grounds for termination unless such immorality indicates his unfitness to teach). In the case at bar, there was no "real and substantial danger" to Mrs. Stoffle. If anything Dr. Told's statements were meant to insure that his patient would receive quality medical care. Miller, supra; Rosner, supra. As importantly, no "rational nexus" between Dr. Told's statements and any adverse effect upon patient care was alleged or shown.

Rosner, supra, which is factually very similar to the instant case, enunciates the important policy that permitting physician coments of the type made by Dr. Told actually promotes a higher quality of patient care. The Rosner Court reversed the denial of staff privileges despite a California statute which specifically allowed "worth in professional ethics" to be used as a criteria in granting staff privileges. Sections 12-43.5-101, et seq., C.R.S. contain no similar provisions. Dr. Told's statements actually served the purposes of the Colorado statute by encouraging a patient to explore all treatment options.

Should this Court find that Section 12-43.5-102, C.R.S. does allow peer review committees to consider "unethical," "unprofessional," or "disruptive conduct" as grounds for disciplinary action against a physician, this Court must, at a minimum, strictly tie the application of such concepts to a finding of an adverse affect upon "the quality of care provided" to patients. Miller, supra; Weissman v. Board of Education, supra. Since neither the Executive Committee nor the Hearing Committee in their

findings and conclusions found that Dr. Told's statements affected the quality of care given by Dr. Told, these committees exceeded their statutory jurisdiction in suspending Dr. Told's staff privileges, and their actions were void. Colorado Division of Employment and Training, supra. The Board's decision reversing those actions was proper, and should be re-instated by this Court.

VI. Article II, Section 2 and Article IX, Section 1 of the Bylaws Are Unconstitutionally Vague and Overbroad In Violation of the First And Fourteenth Amendments of the United States Constitution.

A. The Terms "Unethical" and Unprofessional" Do Not Provide Fair Notice of Prohibited Conduct or Preclude Discriminatory Enforcement; Therefore, Article IX, Section 1 of the Bylaws is Unconstitutionally Vague in Violation Of the Fourteenth Amendment.

Dr. Told was disciplined for "unprofessional" or "unethical" conduct pursuant to Article IX, Section 1 of the Memorial Hospital's Bylaws. See, Written Statement Of The Ad Hoc Executive Committee, submitted to the Board of Trustees, Undated, pp. 1-2. The terms "unprofessional" and "unethical" are broad and ambiguous. Further, they contain no objective standards. As such, they do not provide fair warning of prohibited conduct or guard against arbitrary or discriminatory enforcement and thus violate the due process clause of the Fourteenth Amendment. The Board of Trustees acted properly in reversing the Hearing Committee's suspension of Dr. Told's staff privileges based on the unconstitutional provisions, and the vacating of that decision was error.

As enunciated by this Court, the void-for-vagueness doctrine is premised "upon two closely-related principles." LDS, Inc. v. Healy, 589 P.2d 490, 491 (Colo. 1979).

> First, a statute is void for vagueness if its prohibitions are not sufficiently defined so as to give fair warning as to what conduct is prohibited. Where "men of common intelligence must guess at the law's meaning and differ as to its application," the law must fail . . . Second, a statute is too vague where it contains no explicit standards for application so that a danger of arbitrary and capricious enforcement exists. Id.

In other words, a regulation must provide an objective standard for determining whether prospective conduct reasonably falls within its prohibitions. Hejira Corp. v. McFarlane, 660 F.2d 1356 (10th Cir. 1981).

The terms "unethical" and "unprofessional" are so broad and ambiguous that "men of common intelligence must guess" at their meaning, LDS, Inc. v. Healy, supra. The terms offend both principles enunciated in Healy underlying the due process clause. There is absolutely no objective standard contained in the terms "unprofessional" and "unethical" and so no warning as to what constitutes prohibited conduct. Who would surmise that a physician's advise to seek a second opinion would constitute unethical or unprofessional conduct? Common sense mandates otherwise. Section 12-36-117, C.R.S., which specifies twelve types of actions constituting "unprofessional conduct," in no way proscribes the giving of advice to seek a second opinion or even the making of disparaging comments about another physician.

LDS, Inc. v. Healy, supra is nearly identical to the instant matter. There, this Court held that a real estate developer's license could not be suspended pursuant to a statute proscribing inter alia "unethical practices." "[W]e hold 'unethical practices' void for vagueness . . . while "either the legislature or the . . . board could confine the term to proper constitutional specificity by promulgating a code of eithics . . . [in the absence of such a code,] the provision requires licensees to speculate what acts a particular board might consider unethical." Id. at 492. Similarly, Dr. Told can not be penalized "'for violation of a standard whose meaning is dependent upon surmise or conjecture or uncontrolled application by the Board imposing the penalty.'" Id. Accord, Trail Ridge Ford, Inc. v. Colorado Dealer Licensing Board, 190 Colo. 82, 543 P.2d 1245 (1975).

While this Court has not addressed the specific issue presented, in Rosner v. Eden Township Hospital District, supra, the California Supreme Court found the risk of arbitrary and discriminatory enforcement to be too high, and reversed the suspension of a physician's staff privileges based upon a bylaw regarding "lack of worth in professional ethics" and "ability to get along with others."

> A hospital district should not be permitted to adopt standards for the exclusion of doctors from the use of its hospital which are so vague and ambiguous as to provide a substantial danger of arbitrary discrimination in their application. In asserting their views as to proper treatment and hospital practices, many physicians will become involved in a certain amount of dispute and

> friction, and a determination that such common occurrences have more than their usual significance and show temperamental unsuitability for hospital practice of one of the doctors is of necessity highly conjectural. In these circumstances there is a danger that the requirement of temperamental suitability will be applied as a subterfuge where considerations having no relevance to fitness are present. Id. at 435.

See also, McElhinney v. William Booth Memorial Hospital, 544 S.W.2d 216 (Ky. 1977) (citing Rosner, supra, in reversing the revocation of staff privileges of a physician who had been critical of the hospital's standard of patient care; the Court found that the terms "gross unethical or immoral conduct" and "gross professional incompetence" do not provide a sufficiently definite standard and thus were unconstitutionally vague. Additionally, the Court held that since criticisms of other hospital personnel do not affect the quality of patient care, such criticisms are not grounds for revocation of staff privileges); Miller v. Eisenhower Medical Center, supra.

The terms "unprofessional" or "unethical" do not give notice of what types of conduct are forbidden nor do they provide any objective standard which will prevent arbitrary enforcement. Clearly, men of ordinary intelligence must guess at their meaning and will differ at their application. LDS, Inc. v. Healy, supra. Indeed, this Court has held that "unethical" is void for vagueness. Id. The District Court erred in vacating the Board's decision and must be reversed.

B. As Applied to Dr. Told, Article II, Section 2(I) Of The Bylaws Is Unconstitutionally Vague And Overbroad In Violation of The First Amendment.

A regulation or statute is constitutionally "overbroad" and thus violative of the First Amendment "if it impermissibly proscribes or regulates constitutionally protected expression. See Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972)." City of Lakewood v. Colfax Unlimited Association, Inc., 634 P.2d 52, 58 (Colo. 1981). Dr. Told's statements are clearly "ideological" speech, protected by the First Amendment. While the State admittedly has an interest in promoting the health, safety, and welfare of the public, such an interest may not be advanced by a regulation which "sweeps within its ambit other activities that constitute an exercise of" of protected expressive rights. Thornhill v. Alabama, 310 U.S. 88, 97 (1940). Since Article II, Section 2(I), the section which Dr. Told allegedly violated, attempts to prohibit completely the protected statements made by Dr. Told, it is unconstitutional as applied. The District Court erred in overturning the Board of Trustees.

Dr. Told's statements are constitutionally protected speech. Advice by a physician and comments regarding the care given by other physicians and public hospitals clearly further important societal goals. Such statements contribute to informed public debate on public medical facilities, their agents, and the quality of health care generally. These societal interests have been recognized in decisions such as Rosner, supra and by the

medical profession itself. Thus, Section 8.11 of The Principles of Medical Ethics propounded by the American Medical Association "require[s] a physician to make relevant information available to patients, colleagues, and the public." See, Addendum A. Article II, Section 2(I) attempts to regulate pure speech; no regulation of conduct is involved. Dr. Told's statements constitute protected "ideological" speech. City of Lakewood v. Colfax Unlimited Association, Inc., supra at 57, footnote 5. As such, Dr. Told's statements are entitled to the special protections of the First Amendment and strict scrutiny by this Court.[1]

Under traditional First Amendment analysis, Section 2(I) may be viewed as either an attempt to abridge Dr. Told's expression because of its content or as an attempt to regulate indirectly Dr. Told's constitutionally protected speech in order to guard against some harmful consequence potentially occasioned by his speech. Viewed either way, Article II, Section 2(I) is invalid.

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[1]Insofar as the District Court ruled that the regulations were entitled to a presumption of constitutionality and that the burden was on Dr. Told to prove their unconstitutionality beyond reasonable doubt, the District Court again erred. Order, December 21, 1983, Record at p. 158. When a regulation is challenged on First Amendment grounds, a court "may not presume that it is constitutional, but must assess the substantiality of the interests advanced to justify the regulation and ensure that it is narrowly drawn to serve those interests. City of Lakewood, supra at 65 (the burden is on the government, here the Hearing Committee, to affirmatively advance substantial interests justifying each challenged provision).

Properly viewed, Section 2(I) is a content-based abridgement of Dr. Told's protected comments. As such, it is unconstitutional. See, Police Department of the City of Chicago v. Mosely, 408 U.S. 92, 95-96 (1972). On its face, Section 2(I) distinguishes between "presumed deficiencies" and all other "deficiencies". This distinction, based on content, is not only vague but also unreasonable. If anything, the public has a greater need to know of "presumed deficiencies" since officially documented problems would in all likelihood receive broader circulation. In this case, Section 2(I) was applied to censure the content of Dr. Told's statements, namely the advice to seek a second opinion and the attenuated implication that Mrs. Stoffle's first opinion was somehow inadequate. Such speech can not be abridged by the Hearing Committee because of their desire to suppress such information from patients and the public. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (a state's goal of maintaining professional standards among pharmacists may not be achieved "by keeping people in ignorance").

Even viewed as an indirect regulation of speech in order to protect the public health and welfare, Section 2(I) is invalid as applied. Indirect regulations of speech which must allow "breathing space" for speech as well as leaving people with access to information, require application of a balancing test. See e.g., Schneider v. State, 308 U.S. 147 (1939) (even restriction to accomplish valid governmental purpose invalid where such purpose

could be accomplished by a less restrictive means). While it is admitted that Section 2(I) could serve some valid state interests such as preventing the unnecessary frightening of a surgical patient immediately prior to surgery, the harm to First Amendment interests occasioned by this section's absolute prohibition on a physician's comments greatly outweighs any asserted state interest. As applied, this Section cuts off a patient or the general public's only reliable source of information. Any asserted governmental interest could easily be served by a much narrower restriction which would not sweep within its purview Dr. Told's constitutionally protected statements.

Article II, Section 2(I)'s blanket prohibition on any statement by a physician to patients or the public is nearly identical to the no-comment rule at issue in Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1974). In that case, the United States Court of Appeals held that local court rules and American Bar Association Canons of Ethics prohibiting a wide array of extra-judicial comments by attorneys were unconstitutional. Stressing that attorneys were particularly well-positioned to speak on judicial issues, the Court held that the no-comment rule was overbroad as it swept protected speech within its proscription. Otherwise, "an informed viewpoint would be removed from the public forum." Id. at 257. This ruling was made even though the Court had limited the application of the no-comment rule to those statements posing "a serious and imminent threat of interference "with

the fair administration of justice."

Identically, the no-comment rule of Article II, Section 2(I) is unconstitutional as applied to Dr. Told. A physician such as Dr. Told is particularly well-suited to address medical issues. In fact, no one else may be able to do so in an informed and articulate manner. While the state does have an interest in protecting the public's health and safety, it is difficult to see how the prohibiting of advise to seek a second opinion relates to this interest. Finally, and perhaps most importantly, far less restrictive means to advance this state interest are available. At a minimum, a physician's statements should have to pose "a serious and imminent" danger to the quality of patient care provided. Id. Such a danger is clearly not presented in the instant matter.

Article II, Section 2(I) of the Bylaws also violates the First Amendment because it is impermissibly vague. While the void-for-vagueness doctrine in the First Amendment context requires more specificity than is necessary in the due process setting, see, Smith v. Goguen, 415 U.S. 566, 573 (1974), First Amendment vagueness analysis again requires the voiding of a law which fails to provide explicit and objective standards. Absent such standards, a regulation may "chill" protected speech as the law does not provide advance notice of what expression is prohibited and also allows for arbitrary and discriminatory enforcement. City of Lakewood v. Colfax Unlimited Ass'n, Inc., 634 P.2d at 59.[6] The First Amendment

analysis is essentially analogous to the discussion of the vagueness of the terms "unprofessional" and "unethical" contained in Part VI.A. of this brief.

As applied to Dr. Told, the Bylaws at issue are unconstitutionally vague and overbroad in violation of the First and Fourteenth Amendments. The Board of Trustees properly reversed Dr. Told's suspension. The District Court erred in vacating that decision and so must be reversed.

CONCLUSION

For all foregoing reasons, 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 reinstated.

Respectfully submitted,

CALKINS, KRAMER, GRIMSHAW & HARRING

By: 

Charles E. Norton, No. 10633
Charles B. Hecht. No. 13270
One United Bank Center
1700 Lincoln Street, Ste. 3800
Denver, Colorado 80203
Telephone: (303) 839-3800

ATTORNEYS FOR DEFENDANT,
APPELANT, DR. THOMAS TOLD

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the above and foregoing OPENING BRIEF OF APPELANT DR. THOMAS TOLD has been served upon the following counsel by depositing same property addressed and postage prepaid in the United States Mail this 31, day of May, 1984.

Donley K. Rees, Esq.
439 Breeze, Suite 203
Craig, Colorado 81625

Thomas C. Thornberry
555 Breeze, Suite 250
Craig, Colorado 81625

Harry A. Tucker, Jr.
526 Barclay
Craig, Colorado 81625

Sarah Pelton

CURRENT OPINIONS OF THE JUDICIAL COUNCIL OF THE AMERICAN MEDICAL ASSOCIATION — 1982

Including the PRINCIPLES OF MEDICAL ETHICS
and RULES of the JUDICIAL COUNCIL

Prepared by the JUDICIAL COUNCIL

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Burns A. Dobbins, Jr., M.D.
Nancy Dickey, M.D.
W. Scott Chisholm, M.D.

AMERICAN MEDICAL ASSOCIATION
535 North Dearborn Street
Chicago, Illinois 60610

Addendum A

quisition charge or processing charge. The patient should be notified of any such charge in advance.

8.09 **LIEN LAWS** In states where there are lien laws, a physician may file a lien as a means of assuring payment of his fee provided his fee is fixed in amount and not contingent on the amount of settlement of the patient's claim against a third party.

8.10 **NEGLECT OF PATIENT.** Physicians are free to choose whom they will serve. The physician should, however, respond to the best of his ability in cases of emergency where first aid treatment is essential. Once having undertaken a case, the physician should not neglect the patient, nor withdraw from the case without giving notice to the patient, the relatives, or responsible friends sufficiently long in advance of withdrawal to permit another medical attendant to be secured.

8.11 **PATIENT INFORMATION** The Principles of Medical Ethics require a physician to make relevant infomation available to patients, colleagues and the public. The physician must properly inform the patient of the nature and purpose of the treatment undertaken or prescribed. The physician may not refuse to so inform patient.

8.12 **SUBSTITUTION OF SURGEON WITHOUT PATIENT'S KNOWLEDGE OR CONSENT.** To have another physician operate on one's patient without the patient's knowledge and consent is a deceit. The patient is entitled to choose his own physician and he should be permitted to acquiesce in or refuse to accept the substitution. The surgeon's obligation to the patient requires him to perform the surgical operation: (1) within the scope of authority granted by the consent to the operation; (2) in accordance with the terms of the contractual relationship; (3) with complete disclosure of all facts relevant to the need and the performance of the operation; and (4) to utilize his best skill in performing the operation. It should be noted that it is the operating surgeon to whom the patient grants consent to perform the operation. The patient is entitled to the services of the particular surgeon with whom he or she contracts. The surgeon, in accepting the patient is obligated to utilize his personal talents in the performance of the operation to the extent required by the agreement creating the physician-patient relationship. He cannot properly delegate to another the duties which he is required to perform personally.

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