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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CARL E. HAYES,

Plaintiff and Appellant,

v.

CEDARS-SINAI MEDICAL CENTER et
al.,

Defendants and Respondents.

B166463

(Los Angeles County Super. Ct.
No. BS079294)

APPEAL from a judgment of the Superior Court of Los Angeles County. David Yaffe,
Judge. Reversed.

Law Offices of Henry R. Fenton, Henry R. Fenton and Dennis E. Lee for Plaintiff and
Appellant.

Bingham McCutchen, Susan L. Hoffman, Hwannie Lee; Greines, Martin, Stein &
Richland, Robin Meadow and Michael D. Fitts for Defendants and Respondents.

Appellant Carl Hayes, M.D., appeals from the denial of a petition for writ of mandamus against respondents Cedars-Sinai Medical Center, its Board of Directors, and Michael Langberg, M.D., individually and as Chief Medical Officer (collectively “the hospital”). Doctor Hayes contends that under the fair procedure doctrine, the hospital was required to hold a hearing before denying his application for medical privileges. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Application for Medical Privileges

Doctor Hayes has been licensed to practice medicine in California since 1989. He has been board certified in obstetrics and gynecology since 1991. In 2001, Doctor Hayes submitted an application for medical privileges to the hospital.

In the section of the application requesting information about previous affiliations, Doctor Hayes stated that he had formerly had privileges at King-Drew Medical Center from 1990 until he left the staff in 1994 for other job opportunities and at California Medical Center from 1992 until his privileges were suspended in 1995.

In the current affiliations section of the application, Doctor Hayes stated that he had been appointed to: (1) the hospital in 1989, but was currently on administrative leave;¹ (2) Daniel Freeman Memorial Hospital in 1994 and his status was currently active; and (3) Queen of Angels/Hollywood Presbyterian Hospital in 1995 and his status was currently active.

¹ Doctor Hayes’s prior or current affiliation with the hospital, his status as on administrative leave, and the necessity for a new application are not explained in the record.

Hospital's Medical Staff Governing Documents

Article III of the hospital's medical staff constitution concerns membership. Section 1, subdivision (a) of that article sets forth the membership qualifications in pertinent part as follows: "Except as hereinafter specifically provided, eligibility for membership is limited to Physicians who: (i) hold an unrestricted license to practice their profession in the State of California which is subject to no current medical disciplinary conditions (i.e., license revocation, suspension and/or probation) . . . ; (ii) document their background, education, training, experience, current competence, adherence to the ethics of their profession, good reputation, and physical and mental health status with sufficient adequacy to assure the Medical Staff and Board that any patient treated by them will receive high quality of medical care; . . . [and] (iv) have the interest, ability and willingness to function effectively as instructors of and role models for Physicians-in-Training and Medical Staff members."

The minimum criteria for applicants is set forth in Section 3, subdivision (b) of Article III of the medical staff constitution. That section provides that all applicants accepted for medical staff membership at the medical center must: (i) provide evidence of current and unrestricted California license subject to no current disciplinary conditions (i.e., license revocation, suspension and/or probation); (ii) have no felony convictions and no current medical disciplinary conditions imposed by any other state licensing board; (iii) provide evidence of current D.E.A. Registration; (iv) provide evidence of board certification or graduation from certain residency training programs; (v) provide evidence of adequate professional liability insurance; (vi) sign an agreement to abide by the hospital's governing documents; (vii) satisfy basic computer literacy requirements; and "(viii) [meet] other criteria as set forth in the Medical Staff Rules and Regulations."

Other criteria for applicants are set forth in the medical staff rules and regulations. Article XI, Section 11.1 of the rules and regulations provides: "All Physicians seeking appointment or reappointment shall provide information concerning his or her: (a) professional performance; (b) professional judgment; and (c) clinical and/or technical skills,

all of which may be indicated as applicable by the results of quality assessment and improvement activities. In connection with all documentation required for Applications for appointment, reappointment, or reapplication, the Physician shall have the burden of producing information for an adequate evaluation and resolution of reasonable doubts concerning the applicant's current qualifications for staff privileges and membership.”

An applicant whose application for medical staff membership is denied is entitled to request a hearing under certain circumstances. Article XIII, Section 1, subdivision (a), of the medical staff constitution provides for a hearing before a hearing committee when a medical staff membership application is denied based upon a medical disciplinary cause or reason subject to reporting to the National Practitioner Data Bank and/or the Medical Board of California or the California Board of Dental Examiners.

Conversely, the hospital's denial of an application for administrative reasons is not grounds for a hearing. Under subdivision (b) of article XIII, section 1, the medical staff constitution provides: “Denials of Medical Staff membership, Privileges or reappointment . . . which are not based upon a medical disciplinary cause or reason subject to reporting to the National Practitioner Data Bank or the Medical Board of California or the California Board of Dental Examiners, do not constitute grounds for a hearing. Such administrative violations include, without limitation: [¶] (i) Failure to provide proof of required medical malpractice liability insurance; [¶] (ii) Insufficient clinical activity as provided by the applicable Departmental Rules and Regulations; [¶] (iii) Failure to meet the minimum criteria for submitting an application for Medical Staff membership as described at Article III, Section 3(b) of this Constitution; [¶] (iv) Failure to return a completed reappointment form within the period specified in the Medical Staff Rules and Regulations; [¶] (v) Failure to respond to committee requests . . . ; [¶] (vi) Failure to complete medical records; [¶] (vii) Failure to pay dues within the periods specified . . . ; [and] [¶] (viii) Failure to complete the designated number of proctoring cases.” Article XIII of the medical staff constitution also sets forth the hearing procedures.

We note that Article III of the medical staff constitution provides the following grounds as cause for disciplinary action at the hospital: “(i) unsatisfactory services to patients; (ii) professional incompetence or professional care below acceptable standards; [and] (iii) personal or professional conduct detrimental to the welfare of patients or the Medical Center.”

Hospital Requests Additional Information

On February 5, 2002, Doctor Langberg wrote to Doctor Hayes. Doctor Hayes’s application had been reviewed by the Department of Obstetrics and Gynecology. Doctor Langberg wrote: “After reviewing your Application, the Department recommended denying your Application. However, before proceeding with issuing you a formal notice denying your Application, I have decided instead to delineate the concerns expressed by the Department. In doing so, I am offering you an opportunity to provide additional documentation and to explain your perspective of the Department’s concerns for its reconsideration.”

Doctor Langberg continued: “The Department reviewed your Application and expressed concerns regarding your past performance both during the period of time that you were on the Medical Staff at Cedars-Sinai Medical Center (‘Cedars-Sinai’) and while at California Hospital Medical Center (‘California Hospital’). Specifically, during your tenure on Cedars-Sinai’s Medical Staff your performance was deemed to be ‘below average’ due to your: (1) history of failing to timely respond to the delivery of your patients; (2) failing to timely respond to telephone calls regarding your patients; and (3) failing to meet the medical record obligations required of all Medical Staff members. In addition, your California Medical License was placed on probation following reports of similar behaviors at California Hospital. [¶] Due to the foregoing, the Department has expressed concerns that if you were admitted to the Cedars-Sinai’s Medical Staff, the Department might, once again, encounter the same unacceptable behaviors by you which would place Cedars-Sinai’s patients and physicians-in-training at risk. [¶] As an Applicant for Medical Staff membership, you have the burden of producing sufficient information for the evaluation of your Application and resolution by the

Medical Staff of reasonable doubts concerning your current qualifications for Medical Staff membership and Clinical Privileges. . . . Accordingly, please provide me with compelling and objective evidence regarding your recent performance (within the past two (2) years) at other institutions which demonstrates that you have not continued to exhibit the types of unacceptable behaviors noted above while exercising the same Privileges you are requesting at Cedars-Sinai.”

Doctor Langberg quoted the eligibility requirements of the medical staff constitution for medical staff membership as limited to physicians who “(ii) document their background, education, training, experience, current competence, adherence to the ethics of their profession, good reputation, and physical and mental health status with sufficient adequacy to assure the Medical Staff and Board that any patient treated by them will receive high quality of medical care.” In addition, he quoted Article XI, Section 11.1 of the medical staff rules and regulations providing the applicant with the burden of producing information for an adequate evaluation and resolution of reasonable doubts concerning the applicant’s current qualifications for medical staff privileges and membership.

Doctor Langberg wrote further: “By submitting to me this additional documentation of your recent performance, you will enable the Department to more completely evaluate your current qualifications for Medical Staff membership and better enable the Department to determine whether you have adequately met your burden of proof. [¶] If you respond to this letter within thirty (30) calendar days of its receipt, I will forward your response, along with any additional documentation submitted by you, to the Department for its review and recommendation. Your response to this letter will be deemed as completing your Application and any action taken by the Medical Staff on the available information will be final. *If I do not receive a response within thirty (30) calendar days of your receipt of this letter, your Application will be deemed incomplete and automatically withdrawn.* In the alternative, you may choose to *voluntarily withdraw* your Application pending your ability to accumulate the requested experience at other institutions. Documentation of such experience may enable you to satisfy your burden of proof at a later date. [¶] In accordance with the Constitution and the

Rules and Regulations, any such withdrawal (voluntary or automatic) of your Application would *not* be based upon a medical disciplinary cause or reason subject to reporting to the National Practitioner Data Bank or to the Medical Board of California. Accordingly, since any withdrawal of your Application would *not be reportable* to either state or federal governmental agencies, it would *not* constitute grounds for a hearing, pursuant to Article XIII, Section 1(b) of the Constitution.”

The Hospital Denies Application

Doctor Hayes submitted additional documentation.² On June 11, 2002, Doctor Langberg wrote to Doctor Hayes and denied his application. Doctor Langberg reiterated the concerns he had expressed in his original letter and added that during Doctor Hayes’s tenure at the hospital, he had failed to demonstrate the interest, ability and willingness to function effectively as an instructor of and role model for physicians-in-training.

Doctor Langberg wrote: “In response to [the request for additional information], you had indicated to me that you were unaware of any such circumstances at Cedars-Sinai, and had asked that we clarify ‘for the record’ that no such events have been formally documented. In performing as complete a search as possible of all of our records, we discovered documentation of events in 1999 at Cedars-Sinai corroborating the concerns outlined in the February 5th letter. Consequently, although we received reference letters on your behalf from David Miller, M.D. at the University of Southern California and Scott A. Beasley, M.D. at Daniel Freeman Memorial Hospital, these reference letters were deemed to be insufficient by the Department to adequately address its concerns that your past behavior at Cedars-Sinai and at California Hospital, with subsequent licensure restrictions, merits your Application being rated ‘above average.’”

² The additional documentation was not part of the record in the trial court or on appeal.

Doctor Langberg stated that he agreed with the Department's recommendation to deny the application. He noted that Doctor Hayes had the burden of producing sufficient information for evaluation of his application and resolution of reasonable doubts. Therefore, he wrote: "The denial of your Application is based upon your failure to meet the minimum criteria for submitting an Application for Medical Staff membership as described at Article III, Section 3(b)(iii) of the Medical Staff Constitution ('Constitution'). In accordance with the Constitution and the Medical Staff Rules and Regulations [], the denial of your Application is *not* based upon a medical disciplinary cause or reason subject to reporting to the National Practitioner Data Bank or to the Medical Board of California. Accordingly, since this action is *not reportable* to either state or federal governmental agencies, it does *not* constitute grounds for a hearing, pursuant to [the Constitution]." Doctor Langberg attached a portion of the hospital's medical staff constitution to the letter. Doctor Hayes requested a hearing. The hospital denied his request.

On October 24, 2002, Doctor Hayes filed a petition for writ of mandamus pursuant to Code of Civil Procedure section 1085. He filed a declaration stating that he had suffered severe and irreparable harm as a result of the denial of his application and the hospital's refusal to provide him with a hearing. He declared that his ability to practice medicine had been impaired, his ability to treat patients had been compromised, and he could not accommodate his many patients who had requested the hospital for their labor and delivery needs based on the hospital's reputation.

A hearing was held on the writ petition on January 28, 2003. Counsel for Doctor Hayes represented to the trial court that Doctor Hayes did not have copies of the letters he had submitted in response to the hospital's request for additional documentation and argued that the evidence was not necessary to determine whether Doctor Hayes was entitled to a hearing. The trial court denied the petition. The trial court found that Doctor Hayes failed to prove he was deprived of a meaningful opportunity to respond to the charges against him. Rather, the trial court found that the hospital's February 5, 2002 letter showed Doctor Hayes was given an opportunity to respond, which was the procedure to which he was entitled. The trial court

entered judgment denying the petition on February 14, 2003. Doctor Hayes filed a timely notice of appeal.

DISCUSSION

Standard of Review

“A traditional mandamus is sought to enforce a nondiscretionary duty to act on the part of a court, an administrative agency, or officers of a corporate or administrative agency. [Citations.] There are two requirements essential to issuance of a writ of mandate under Code of Civil Procedure section 1085: (1) the respondent has a clear, present, and usually ministerial duty to act; and (2) the petitioner has a clear, present, and beneficial right to performance of that duty. [Citations.] Mandate will not issue to compel action unless it is shown the duty to do the thing asked for is plain and unmixed with discretionary power or the exercise of judgment. [Citation.] Thus, a petition for writ of mandamus under Code of Civil Procedure section 1085 may only be employed to compel the performance of a duty that is purely ministerial in character. [Citation.] In addition, a petitioner is required to show there was no adequate remedy at law available to remedy the resulting harm. [Citation.]”
(*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 618.)

“In reviewing a trial court’s ruling on a writ of mandate, an appellate court is ‘ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. [Citation.]’ [Citation.] . . . When the facts are undisputed and we are confronted with questions of law only, we are to address the legal issues de novo. [Citation.]”
(*Unnamed Physician v. Board of Trustees, supra*, 93 Cal.App.4th at pp. 618-619.)

Fair Procedure Doctrine

Doctor Hayes contends that under the fair procedure doctrine, the denial of his application for medical staff privileges requires the hospital to conduct a hearing.

The right to practice a lawful trade or profession is sufficiently fundamental as to require substantial protection against arbitrary administrative interference, either by government or by a private entity. (*Ezekial v. Winkley* (1977) 20 Cal.3d 267, 272.) Certain private entities possess substantial power either to thwart an individual's pursuit of a lawful trade or profession, or to control the terms and conditions under which it is practiced. (*Ibid.*) Certain organizations, by controlling access to vital professional privileges and certifications, have a practical ability to foreclose from practice one who has already obtained a professional license. (*Ibid.*) It is well-established that the principles of the fair procedure doctrine apply to a practicing physician's access to staff privileges in private hospitals. (*Id.* at p. 271.) A hospital's staff membership decisions have the potential for arbitrary impairment of a physician's right to engage in activities authorized by his license. (*Id.* at p. 273.)

Exclusion from such entities has been deemed "arbitrary" when it is substantively unreasonable or procedurally unfair. (*Ezekial v. Winkley, supra*, 20 Cal.3d at p. 272.) The common law right to a "fair procedure" includes adequate notice of the charges and a reasonable opportunity to respond. (*Ibid.*) At a minimum, "fair procedure" implies some meaningful opportunity for the adversely affected individual to be heard in his or her defense. (*Id.* at p. 278.) However, the California Supreme Court has carefully refrained from requiring formal proceedings with all the embellishments of a court trial or fixing any rigid procedure that must invariably be observed. (*Ibid.*) Instead, the California Supreme Court has placed initial responsibility on the affected institutions to devise practical methods of providing an adversely affected individual with adequate notice of the charges against him or her and a reasonable opportunity to respond. (*Ibid.*) "In reaffirming the foregoing reasoning and conclusions, we recognize the practical limitations on the ability of private institutions to provide for the full airing of disputed factual issues. [Citations.] . . . [W]e reemphasize that

whether the procedure is ‘fair’ in a particular case depends largely on ‘the nature of the tendered issue,’ which determines, for example, whether a mere written response is adequate, or whether a personal appearance by the adversely affected individual and a more extensive hearing are required. [Citation.]” (*Id.* at pp. 278-279.)

In 1989, the Legislature enacted Business and Professions Code section 809 et seq. Section 809 recognizes “the balance between the rights of the physician to practice his or her profession and the duty of the hospital to ensure quality care, but also the importance of a fair procedure, free of arbitrary and discriminatory acts. [Citation.]” (*Unnamed Physician v. Board of Trustees, supra*, 93 Cal.App.4th at pp. 616-617.) “The statutory scheme delegates to the private sector the responsibility to provide fairly conducted peer review in accordance with due process, including notice, discovery and hearing rights, all specified in the statute. . . . To comply with the statute’s mandate, the hospital’s medical staff must adopt bylaws that include formal procedures for “the evaluation of staff applications and credentials, appointments, reappointments, assignment of clinical privileges, appeals mechanisms and such other subjects or conditions which the medical staff and governing body deem appropriate.” [Citation.]” [Citation.] It is these bylaws that govern the parties’ administrative rights. [Citation.]” (*Id.* at p. 617.)

Under Business and Professions Code section 805, subdivision (b), the chief executive officer or administrator of any peer review body must file an “805 report” with the relevant agency whenever a licentiate’s application for staff privileges or membership is denied or rejected for a “medical disciplinary cause or reason.” Medical disciplinary cause or reason is defined as “that aspect of a licentiate’s competence or professional conduct that is reasonably likely to be detrimental to patient safety or to the delivery of patient care.” (Bus. & Prof. Code, § 805, subd.(a)(6).) A licentiate who is the subject of a final proposed action of a peer review body for which a report is required to be filed under Section 805 is entitled to written notice and has the right to request a hearing. (Bus. & Prof. Code, § 809.1.)

The statutory scheme does not provide a licentiate with the right to request a hearing when an application for medical staff privileges has been denied for other than a medical

disciplinary cause or reason. However, “[t]he legislative history confirms the intent of the statute was to provide *minimum* statutory procedural rights and protections to physicians subject to adverse action in a peer review system.” (*Unnamed Physician v. Board of Trustees*, *supra*, 93 Cal.App.4th at pp. 622-623.)

Denial of Doctor Hayes’s Application

Doctor Hayes contends that his application was denied for a medical disciplinary cause or reason, and therefore, he was entitled to a hearing under the common law doctrine of fair procedure. We agree.

After reviewing Doctor Hayes’s application, the hospital wrote to inform him of concerns about his professional conduct. The hospital informed Doctor Hayes that his previous performance at the hospital was “below average,” based on a history of failing to timely respond to his patients, failing to timely respond to telephone calls regarding his patients, and failing to meet medical record obligations. The hospital noted that Doctor Hayes’s license was placed on probation following similar conduct at California Hospital. The focus of the hospital’s concerns were charges of professional conduct reasonably likely to be detrimental to patient safety or to the delivery of patient care. In fact, the hospital expressly stated its concern that, if Doctor Hayes were admitted to the Medical Staff, the hospital might “encounter the same unacceptable behaviors by you which would place Cedars-Sinai’s patients and physicians-in-training at risk.”

The hospital invited Doctor Hayes to address the charges in writing by providing documentation of his current qualifications. The hospital specifically stated that if Doctor Hayes responded to the letter, his response would be deemed as completing the application. Doctor Hayes submitted a response. The hospital found Doctor Hayes’s response to be insufficient to overcome the concerns expressed and denied his application.

An applicant’s failure to provide sufficient proof of current qualifications to overcome reasonable doubts concerning competence is not merely an administrative violation of the

same nature as failing to provide proof of medical malpractice liability insurance or failing to respond to committee requests. The denial of Doctor Hayes's application was based on his failure to establish that his professional conduct was not reasonably likely to be detrimental to patient care. In other words, Doctor Hayes's application was denied for a medical disciplinary cause or reason. Therefore, Doctor Hayes was entitled to a hearing under the fair procedure doctrine, applicable statutes, and the governing documents of the hospital.

DISPOSITION

The judgment is reversed. The trial court is directed to vacate the judgment denying the petition for writ of mandamus and enter a new judgment granting the petition and ordering the hospital to afford Doctor Hayes a hearing on his application. Doctor Hayes is awarded his costs on appeal.

NOT TO BE PUBLISHED.

GRIGNON, J.

We concur:

TURNER, P. J.

MOSK, J.