

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1271-04T5

IN THE MATTER OF
JEBAMONI AMBROSE, M.D.,

Submitted October 25, 2005 - Decided February 3, 2006

Before Judges Skillman and Payne.

On appeal from a Final Administrative
Decision of the New Jersey State Board
of Medical Examiners.

Eldridge Hawkins, attorney for appellant.

Peter C. Harvey, Attorney General, attorney
for respondent New Jersey Board of Medical
Examiners (Andrea M. Silkowitz, Assistant
Attorney General, of counsel, Daniel S.
Goodman, Deputy Attorney General, on the
brief).

PER CURIAM

Defendant Jebamoni Ambrose, M.D., appeals from an order of
the Board of Medical Examiners, based upon its determination
that he had failed to cooperate with an investigation conducted
by the Board's Preliminary Evaluation Committee, and its
imposition of a formal reprimand, a fine of \$10,000, and fees
and costs.

On appeal, Dr. Ambrose makes the following general arguments:

POINT ONE

"THE INITIAL INQUIRY" OR HEARING OF JUNE 16, WAS AN INFORMAL PROCEEDING WITH NO STATUTORY BASIS, SET UP PURELY TO AFFORD Dr. AMBROSE THE OPPORTUNITY TO DISCUSS THE MATTER WITH MEMBERS OF THE BOARD AND THE ATTORNEY GENERAL REPRESENTATIVE.

POINT TWO

THE ACTIONS OF THE OFFICE OF THE ATTORNEY GENERAL AND THE BOARD OF MEDICAL EXAMINERS EXCEEDED THEIR LEGISLATIVE AND CONSTITUTIONAL AUTHORITY THUSLY VOIDING THEIR ACTIONS AS THEY PERTAINED TO DR. AMBROSE.

We affirm, finding no constitutional, statutory or evidential grounds for reversal of the Board's disciplinary determination. In re Taylor, 158 N.J. 644, 656 (1999); Matter of Musick, 143 N.J. 206, 216 (1996).

I.

In a letter dated February 26, 2004, written pursuant to the investigative authority granted by N.J.S.A. 45:1-18b, Dr. Ambrose was requested to appear at an inquiry before the Board of Medical Examiners' Preliminary Evaluation Committee¹ and to

¹ Contrary to the Doctor's suggestion, this committee is distinct from the Medical Practitioner Review Panel established by N.J.S.A. 45:9-19.8 as part of the Professional Medical Conduct Reform Act, N.J.S.A. 45:9-19.4 to -19.15.

give testimony under oath regarding his care and treatment of three named patients. He was told that the matters might involve violations of N.J.S.A. 45:1-21 (the statutory provision enumerating grounds for license revocation), and he was requested to bring with him original patient and billing records and imaging studies, his curriculum vitae and a list of continuing medical education courses completed. The presence at the inquiry of an attorney retained by Dr. Ambrose was authorized. Dr. Ambrose was informed: "The purpose of this appearance is to enable the Board to make an appropriate inquiry by affording you an opportunity to discuss this matter with members of the Board and the assigned Deputy Attorney General." He was also informed that: "The Board will then determine whether the inquiry can be resolved at this stage or whether formal procedures appear warranted." Dr. Ambrose retained Eldridge Hawkins as his attorney.

Hawkins then sought, in a series of letters addressed to the deputy attorney general assigned to the Board, a specification of the charges against Dr. Ambrose as well as discovery with respect to the charges, and he raised due process objections to the proceedings. Hawkins was told that charges had not been filed, and that neither the Uniform Enforcement Act (UEA), N.J.S.A. 45:1-1 to -27 or the Administrative Procedure

Act (APA), N.J.S.A. 52:14B-1 to -14, afforded him a right to discovery at that investigative phase. However, a letter from Deputy Attorney General Daniel S. Goodman, dated June 14, 2004, also informed Hawkins that:

[I]n order to facilitate your client's appearance before this Committee, Dr. Ambrose should be prepared to discuss his entire care and treatment for the following three (3) patients: [S.B.] (deceased), [E.J.D.], and [C.D.] More specifically, Dr. Ambrose should be prepared to discuss his prescribing practices with regard to these patients, as well as his record keeping practices. Should a question arise during this proceeding where you believe that Dr. Ambrose's 5th Amendment rights need to be protected, you can certainly place your objection on the record at that time. Otherwise, Dr. Ambrose will be expected to fully cooperate during this inquiry, pursuant to the provisions of the Board's Duty to Cooperate regulations, N.J.A.C. 13:45C-1.1 et seq.

Dr. Ambrose appeared before the Committee on June 16, 2004. However, he did not testify and, indeed, he was not even administered an oath as the result of various constitutional and statutory objections to the proceedings interposed by Hawkins. The hearing was adjourned.

After the adjournment, on July 30, 2004, the Attorney General filed a verified complaint and order to show cause alleging failure by Dr. Ambrose to cooperate in the Committee's investigation of his practice in violation of N.J.S.A. 45:1-18

and of N.J.A.C. 13:45C-1.2 and -1.3(a)(5), which was claimed to constitute professional misconduct under N.J.S.A. 45:1-21(e) and (h). The relief sought included suspension of Dr. Ambrose's license to practice medicine until he gave testimony, an order compelling his appearance and civil penalties and costs. An order was entered by the Board, as permitted by N.J.A.C. 1:1-9.2,² requiring Dr. Ambrose to appear before it on August 11, 2004 (later adjourned to September 8, 2004) and to answer the charges against him.

Dr. Ambrose responded by filing in the Superior Court his own verified complaint and order to show cause seeking an injunction, which pleadings were dismissed in their entirety by Judge F. Patrick McManimon on the morning of September 8 – the date of the Board's scheduled disciplinary hearing. A hearing before the Board was then conducted. Relying on the statutory and constitutional arguments of his counsel, Dr. Ambrose declined to testify during the liability portion of the hearing. At the conclusion of that aspect of the hearing and following a review of documentary evidence, the Board found against Dr. Ambrose on the issue of his failure to comply with his duty to

² See also In the Matter of A-1 Jersey Moving & Storage, Inc., 309 N.J. Super. 33, 42 (App. Div. 1998) (validating the issuance of an order to show cause as a means for expeditiously bringing compliance issues before an administrative board).

cooperate as set forth in relevant regulations, and it continued the hearing to consider the penalty.

An order and exhaustive opinion was then filed by the Board on September 29, 2004. A supplemental order was entered by the Board on April 21, 2005 assessing costs against Dr. Ambrose in the amount of \$17,419.70. The September 29 opinion reiterated the facts of the matter and found liability based upon Dr. Ambrose's refusal to testify and provide requested materials during a lawful investigation, without providing good cause or bona fide privilege for his failure to cooperate. Additionally, the Board ordered, as we have previously stated, that Dr. Ambrose be publicly reprimanded, assessed a \$10,000 civil penalty and all costs of the proceeding including attorney's fees, and it directed Dr. Ambrose to appear before The Preliminary Evaluation Committee on November 3, 2004 to answer questions regarding his treatment of the three previously identified patients and his practice of medicine generally.³ The Board did not suspend Dr. Ambrose's license. The Board's

³ In his legal argument on appeal, Dr. Ambrose has not directly challenged the nature or amount of the penalties assessed against him. To the extent that a challenge is otherwise contained in the brief submitted on Dr. Ambrose's behalf, we reject it, finding the penalties to have been within the Board's discretion to impose. N.J.S.A. 45:1-22a and -22b; N.J.S.A. 45:1-25a and -25d; Matter of Polk, 90 N.J. 550, 578 (1982).

opinion carefully addressed in turn each of Hawkins' statutory and constitutional arguments, dismissing them as legally or factually unsupportable. These arguments, as well as others, have now been raised on appeal.

II.

In the text following his first argument heading, Dr. Ambrose contends that the Board lacked the authority to command his cooperation in its investigation and violated his rights under the Fifth⁴ and Fourteenth Amendments to the United States Constitution, and under Article I, Paragraph 1 of the New Jersey Constitution. Specifically, Dr. Ambrose claims that

A. If he were to be compelled to cooperate with the Committee's investigation, the Board was required to summon him by subpoena and provide him "formal notice" of the charges against him.

⁴ Dr. Ambrose never personally and properly asserted his Fifth Amendment right against self-incrimination at the hearings held by the Board. State v. Jennings, 126 N.J. Super. 70, 75 (App. Div.) (describing proper manner of invocation), certif. denied, 60 N.J. 512 (1972); see also State v. Jamison, 64 N.J. 363, 378 (1974). As a consequence, we decline to address arguments that claim a violation of those rights. We find that the doctor's blanket refusal to testify, conveyed through his attorney, can serve as a foundation for the charges against him. Only if the Fifth Amendment were properly invoked and the doctor were then directed to testify by the Attorney General must immunity be afforded pursuant to N.J.S.A. 45:1-20. Hirsch v. N.J. State Bd. of Med. Examiners, 252 N.J. Super. 596, 608-09 (App. Div. 1991), aff'd o.b., 128 N.J. 160 (1992).

B. The Committee was not statutorily authorized, and thus was not empowered to command his appearance or cooperation.

C. Since the proceeding was conducted pursuant to N.J.S.A. 45:1-18, which authorizes investigative "hearings," he was entitled under the state and federal constitutions to notice of specific charges against him and to remain silent in the face of potentially inculpatory questioning.

D. It was inappropriate for Committee members to participate in the investigatory proceedings as well as vote on any Board actions brought against him.

In his second argument, Dr. Ambrose claims that because the Attorney General and the Board exceeded their legislative and constitutional authority, the Board's action against him was void. In support of this position, Dr. Ambrose presents the following additional arguments:

A. The Attorney General and the Board did not have jurisdiction to bring an order to show cause or suspend his license when no subpoena was issued and no order was entered directing him to give testimony after he asserted a Fifth Amendment defense.

B. The Attorney General and the Board did not first grant him immunity and direct him to testify prior to alleging his refusal to testify. N.J.S.A. 45:1-20.

C. The State did not file the proceedings specified by N.J.S.A. 45:1-23, which required application to the Superior Court.

D. The court had exclusive jurisdiction to hear and determine the constitutional issues raised at the hearing.

E. The actions of the Attorney General and the Board violated Article III and VI of the New Jersey Constitution, since only the court has authority to hear orders to show cause.

F. The regulations and "27 NJR 2964" as administered by the Attorney General and the Board exceed and are in conflict with the statutes authorizing them, N.J.S.A. 45:1-18 through -23.

G. Neither the Attorney General nor the Board constitute the Office of Administrative Law, which is also empowered to issue an order to show cause.

H. The procedures of the Attorney General and the Board violated the Fourth Amendment as set forth in See v. Seattle, 387 U.S. 541, 87 S. Ct. 1737, 182 L. Ed. 2d 943 (1967).

I. Because no statutory authorization for a Board Vice-President exists, the order to show cause signed by a person in that capacity was void.

J. He was denied due process.

K. The Board engaged in retaliatory action against him because of Hawkins's objections to the proceedings.

L. The Committee members also actively participated in the Board meeting resulting in the imposition of penalties.

M. None of the provisions of N.J.S.A. 45:1-21 authorized the suspension of Dr. Ambrose's license, and an improper procedure was adopted by the Board.

N. The requirements of N.J.S.A. 45:1-22 were not followed by the Attorney General,

who failed to file a complaint against him, issue a subpoena, or order him to testify, and he was thus precluded from asserting a defense pursuant to N.J.S.A. 45:1-20.

We find Dr. Ambrose's arguments to be without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only the following comments.

Under N.J.S.A. 45:1-18 ("Investigative powers of boards, director or attorney general"):

Whenever it shall appear to any board, the director or the Attorney General that a person has engaged in, or is engaging in any act or practice declared unlawful by a statute or regulation administered by such board, or when the board, the director or the Attorney General shall deem it to be in the public interest to inquire whether any such violation may exist, the board or the director through the Attorney General, or the Attorney General acting independently, may exercise any of the following investigative powers:

* * *

b. Examine under oath any person in connection with any act or practice subject to an act or regulation administered by the board;

* * *

In order to accomplish the objectives of this act or any act or regulation administered by a board, the Attorney General may hold such investigative hearings as may be necessary and the board, director or Attorney General may issue subpoenas to compel the attendance of any person or the

production of books, records or papers at any such hearing or inquiry.

The purpose of the UEA, of which N.J.S.A. 45:1-18 is a part, is to "provide uniformity in the investigative and enforcement powers of all professional boards 'located within the Division of Consumer Affairs.'" Del Tufo v. J.N., 268 N.J. Super. 291, 297 (App. Div. 1993) (quoting N.J.S.A. 45:1-14) (holding that the UEA vests the Attorney General with the power to investigate and enforce matters involving professional licensing, but that the Board retains its statutory power to aid the Attorney General by participating directly in the proceeding). The grant of investigatory authority to a board has been deemed remedial in nature, and thus must be accorded a liberal interpretation. N.J.S.A. 45:1-14 (legislative findings). That authority assumes even greater importance in the context of the regulation and supervision of those who are licensed to practice medicine because of the role of the State and the Board of Medical Examiners in guarding the health and well-being of the State's citizens. In re Polk, 90 N.J. 550, 566 (1982).

Under N.J.A.C. 13:45C-1.2 ("Licensee's duty to cooperate in investigative inquiries"):

(a) A licensee shall cooperate in any inquiry, inspection or investigation conducted by, or on behalf of, a board, the

Director or the licensee's licensing agency into a licensee's conduct, fitness or capacity to engage in a licensed profession or occupation where said inquiry is intended to evaluate such conduct, fitness or capacity for compliance with applicable statutory or regulatory provisions.

(b) A licensee's failure to cooperate, absent good cause or bona fide claim of a privilege not identified in N.J.A.C. 13:45C-1.5 as unavailable, may be deemed by the board, the Director, or the licensing agency to constitute professional or occupational misconduct within the meaning of N.J.S.A. 45:1-21(e) or the agency's enabling act and thus subject a licensee to disciplinary action pursuant to N.J.S.A. 45:1-21(h) or the agency's enabling act.

Under N.J.A.C. 13:45C-1.3 ("Specific conduct deemed failure to cooperate"):

(a) The following conduct by a licensee may be deemed a failure to cooperate and, therefore, professional or occupational misconduct and grounds for suspension or revocation of licensure:

* * *

5. The failure to answer any question pertinent to inquiry made pursuant to N.J.S.A. 45:1-18 or other applicable law unless the response to said question is subject to a bona fide claim of privilege.

Although N.J.S.A. 45:1-18 does not specifically establish the form of the investigative proceeding, it does specifically authorize the conduct of investigations by the Board, and the regulations properly promulgated thereunder specify the duties

of licensees within the context of such investigations. As we have reasoned, "the powers of an administrative agency should be liberally construed to permit the agency to achieve the task assigned to it." Thus, administrative agencies have "such implied incidental powers as may reasonably be adapted to that end." In re Comm'n'r of Banking & Ins. v. Parkwood Co., 98 N.J. Super. 263, 271-272 (App. Div. 1967); see also Sheeran v. Progressive Life Ins. Co., 182 N.J. Super. 237, 247-248 (App. Div. 1981).

When the task of a regulatory agency "'is to protect the health and welfare of members of the public' by assuring that all licensed practitioners are qualified, competent and honest, the grant of implied powers is particularly important." In re Polk, supra, 90 N.J. at 574 (quoting In re Suspension of Heller, 73 N.J. 292, 303-04 (1977)).

The scope of agency investigations is proper if "the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." United States v. Morton Salt Co., 338 U.S. 632, 652, 70 S. Ct. 357, 369, 94 L. Ed. 401, 416 (1950); see also Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 208, 66 S. Ct. 494, 505, 90 L. Ed. 614, 629 (1946); Gillhaus Beverage Co. v. Lerner, 78 N.J. 499, 510-511 (1979).

In keeping with this reasoning, we find Dr. Ambrose's attack on the legislative authorization for the Committee proceedings to be inadequate, since the proceedings cannot be found to violate "express or implied legislative policies" as articulated by the UEA. In re Taylor, supra, 158 N.J. at 656. The legislature would not have specifically empowered the Board to conduct investigative proceeding prior to, and separate from, adjudicative proceedings if it believed that the full adjudicative process itself was required any time questions arise as to a licensee's conduct. The Board has an explicit statutory mandate to conduct investigative proceedings, and the manner in which it conducted them here is both explicitly and implicitly authorized by the statute and the regulations promulgated thereunder. Cf. In re L.R., 321 N.J. Super. 444, 451-52 (App. Div. 1999) (discussing investigatory powers of the Division of Youth and Family Services). Dr. Ambrose thus has failed to establish that the Board lacked the statutory authority to conduct the June 14, 2004 Preliminary Evaluation proceeding and to compel his cooperation with that proceeding.

Dr. Ambrose additionally asserts that the actions of the Board offended the State and Federal constitutions by depriving him of procedural due process. However, as the Board pointed out repeatedly, the proceedings of the Committee were not

"hearings" designed to establish fault on the part of Dr. Ambrose sufficient to inflict penalty or punishment if evidence showing a statutory or regulatory violation were adduced. Instead, the purpose of the investigation was to uncover facts with an eye toward the potential initiation of an agency adjudication or, more generally, for the purpose of facilitating the agency's regulatory goals and compliance with the law. Del Tufo, supra, 268 N.J. Super. at 299.

Administrative investigations are not adversary proceedings and do not result in judgments determining fault or legal rights. Accordingly, when only the investigative powers of an agency are utilized, it would be premature for full due process considerations to attach. L.R., supra, 321 N.J. Super. at 456-459 (App. Div. 1999) (holding that due process requirements that govern agency proceedings resulting in binding legal determinations do not apply to agency proceedings that are purely investigatory); In re Allegations of Physical Abuse at Blackacre Academy, 304 N.J. Super. 168, 182-84 (App. Div. 1997). Here, Dr. Ambrose was adequately advised of the subject of the Committee's inquiry. He has offered no competent precedent to suggest that protections other than notice were required in the circumstances.

Additionally, requiring the Board to provide Dr. Ambrose with full due process rights in preliminary proceedings where no jeopardy to him attaches would severely undermine the Board's ability to fulfill its regulatory mission of protecting the public's health and safety by establishing standards for practice, and disciplining licensees who do not adhere to those requirements.

As to Dr. Ambrose's claim that reposing investigative and subsequent adjudicative duties in the same Board members violates the Constitution, the United States Supreme Court has held that in "an administrative proceeding . . . the combination of investigative and adjudicative functions does not, without more, constitute a due process violation." Withrow v. Larkin, 421 U.S. 35, 58, 95 S. Ct. 1456, 1470, 43 L. Ed. 2d 712, 730 (1975); see also Richardson v. Perales, 402 U.S. 389, 410, 91 S. Ct. 1420, 1432, 28 L. Ed. 2d 842, 857-58 (1971); Ende v. Cohen, 296 N.J. Super. 350, 358-362 (App. Div. 1997).⁵

In order to establish that his interests were prejudiced by the combination of roles here, Dr. Ambrose must have presented a

⁵ The cases cited by the defendant to support his claims on this issue, Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) and Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), are not to the contrary. Neither case addressed the appropriateness of the same body both investigating and adjudicating a case, but instead prohibited the same body from both issuing a decision and reviewing it.

"specific foundation . . . for suspecting that [the Board] has been prejudiced by its investigation of [his] fitness or is otherwise disabled from hearing and deciding the relevant issues on the basis of evidence to be presented at a contested hearing." Ende, supra, 296 N.J. Super. at 362. As we observed in Ende, a medical staff privilege case:

The mere exposure to evidence presented in nonadversary investigative proceedings is insufficient in itself to impugn the fairness of these tribunals at later adversary hearings. We do not perceive the risk of bias or prejudgment in this sequence of functions to be intolerably high so as to warrant judicial intervention. In reaching this result, we do not suggest that there is nothing to the argument that those who have investigated should not then adjudicate. But we view as relatively remote the possibility that the adjudicators will be so psychologically wedded to their complaints that they will be unable to fairly decide the issues on the evidence. Without a showing to the contrary, members of the [hospital Medical Executive Committee] and the Board "are assumed to be [persons] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." United States v. Morgan, 313 U.S. 409, 421, 61 S. Ct. 999, 1004, 85 L. Ed. 1429, 1435 (1941).

[Ibid.]

Dr. Ambrose has not provided the requisite specific foundation that would show that the Board is so "psychologically wedded" to its investigation that they will be "unable to fairly

decide the issues on the evidence" in any future proceedings.

Ibid.

We thus find that Dr. Ambrose has failed to establish that the Committee proceeding violated his due process rights under the Federal and State Constitutions.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION