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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ALLYSON A. GONZALEZ,

Plaintiff and Appellant,

v.

EXECUTIVE MEDICAL BOARD OF
THE MEDICAL STAFF OF UCLA et al.,

Defendants and Respondents.

B278291

(Los Angeles County
Super. Ct. No. BS158775)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joanne O'Donnell, Judge. Affirmed.

Law Offices of John D. Harwell and John D. Harwell for Plaintiff and Appellant.

Nelson Hardiman, Sara E. Hersh, John A. Mills, and Farooq J. Mir for Defendants and Respondents.

I. INTRODUCTION

Plaintiff Allyson Gonzalez, M.D., appeals from a judgment denying her petition for writ of administrative mandate pursuant to Code of Civil Procedure section 1094.5. Defendants terminated plaintiff from her medical staff position and revoked all of her clinical privileges.¹ Plaintiff contends she was provided with inadequate notice. We affirm.

II. BACKGROUND

A. *Factual Background*

Plaintiff is a medical doctor who specializes in obstetrics and gynecology. She joined the medical staff of Santa Monica-UCLA Medical Center (Medical Center) in 1997. On July 23, 2013, the Executive Medical Board of the medical staff at the Medical Center (Board) considered a request by the chair of the Obstetrics/Gynecology Department of the Medical Center to initiate a corrective action process to review quality care concerns pertaining to plaintiff.

A three-doctor ad hoc committee reviewed patient records and conducted interviews regarding six patient cases. On September 24, 2013, the ad hoc committee issued its report, and concluded that plaintiff had “substantial knowledge deficiencies, combined with legitimate concerns regarding communication and

¹ Respondents on appeal are identified as the Executive Medical Board of the Medical Staff of UCLA Santa Monica Hospital, UCLA Santa Monica Hospital, and the Regents of the University of California.

coordination of care with the labor and delivery nursing staff, and legitimate concerns about adherence to the department policies and national professional standards.” The members of the ad hoc committee disagreed about which course of action it should recommend to the Board. The “recommendations range[d] from a board review course in obstetrics; to [continuing medical education] in obstetrics to a requirement for board recertification to maintain medical staff privileges; to revocation of medical staff privileges.”

On September 24, 2013, the Board, after reviewing the ad hoc committee’s report, noted that five of the six cases had a peer review ranking of level three, which indicated a significant deviation from usual clinical standards. On October 22, 2013, plaintiff spoke to the Board in rebuttal of the ad hoc committee’s report. The Board, however, agreed with the ad hoc committee’s findings. Because of plaintiff’s significant deviation from care, the Board determined additional educational courses or a board certification exam would be insufficient to remediate plaintiff’s deficiencies. The Board recommended termination of plaintiff’s medical staff membership and clinical privileges. On October 30, 2013, the Board notified plaintiff of its recommendation.

B. Administrative Proceedings

Plaintiff requested a judicial review hearing pursuant to Article XV, section 2(a) of the medical staff bylaws (Bylaws). On December 20, 2013, the Board issued a Notice of Hearing. The Notice of Hearing included a Notice of Charges, listing five patient cases in which plaintiff was alleged to have provided care that was below the applicable standard. The Notice of Hearing

advised plaintiff that on October 22, 2013, the Board had unanimously voted to “terminate your medical staff membership and clinical privileges at [the Medical Center].”

On June 2, 2014, the Board issued its First Amended Notice of Charges, adding charges pertaining to a sixth case.² The First Amended Notice repeated that the Board had unanimously voted to terminate plaintiff’s staff and clinical privileges. We summarize the relevant cases as follows.

1. Case No. 1

A 36-year-old patient was reporting intrauterine contractions at 41 and one-half weeks. The infant was eventually delivered. However, the infant was followed by a gush of “3+ mustard-colored meconium” (first intestinal discharge by an infant).³ The infant was placed on the patient’s abdomen and tactile stimulation was given. The father clamped the umbilical cord. Placing the infant on the mother’s abdomen and allowing the father to clamp the umbilical cord deviated from the standard of care. The standard of care for thick meconium is to quickly clamp the umbilical cord, avoid stimulation of the infant, and transfer the infant to the warmer. There was a 90-second delay in this case. The delay may have contributed to the infant’s subsequent seizures.

² The judicial review committee subsequently found the Board had failed to meet its burden of demonstrating plaintiff acted below the standard of care for case No. 6.

³ In context, “3+” seems to refer to thick meconium.

2. Case No. 2

A 33-year-old patient began pre-term labor. The birth was a breech delivery (infant's feet appeared first during birth). The infant's head became entrapped for approximately three minutes. Plaintiff used a method known as the Wood's Corkscrew maneuver, a method not used for vaginal breech deliveries, to help deliver the infant.

Standard care for a pre-term breech is to perform a Cesarean section (C-section), not to attempt a vaginal breech delivery. If a vaginal breech delivery was planned, the obstetrician should have the skills necessary to perform the delivery maneuvers. Plaintiff had performed only six vaginal breech deliveries in her career. The registered nurse who was present recommended that the patient be moved to the operating room in the event a C-section was needed. Plaintiff did not move the patient into an operating room or apply anesthetic, which was a deviation from the standard of care. Plaintiff had not ordered an ultrasound prior to the attempted vaginal breech delivery, which also was a deviation of the standard of care.

3. Case No. 3

A 39-year-old pregnant patient was completely dilated and had been pushing for almost three hours. Plaintiff decided to perform a vacuum delivery. The vacuum was placed on the fetal scalp. After 4 contractions and 3 "pop-offs,"⁴ with minimal movement, one of the nurses in attendance advised plaintiff to discontinue. Plaintiff stated she wanted to try one more time and

⁴ "Pop-offs" referred to the vacuum cup disengaging.

then proceeded to apply the vacuum and had another pop-off. A nurse told plaintiff that was enough and that the vacuum attempts should be discontinued. Plaintiff ignored the nurse and attempted again, resulting in another pop-off. Plaintiff finally discontinued her attempts at vacuum delivery. A C-section was finally conducted. The infant suffered a head injury. Plaintiff indicated she had used a Kiwi vacuum extraction device, but had never read any product information for it. The Board asserted that standard protocol was to discontinue a vacuum delivery after three pop-offs.

4. Case No. 4

A 27-year-old patient, who was beyond her due date, was admitted for an induced birth. Plaintiff was informed of the patient's condition at around 6:49 a.m. The patient was found to have abnormal fetal heart tracings. Plaintiff did not come to the hospital until 12:30 p.m. After looking at the heart tracing strip, plaintiff left and did not return until 2:30 p.m., at which point she began treating the patient. The patient's temperature reached 102 degrees despite receiving antibiotics. Delivery was otherwise normal. The standard of care was to timely evaluate a patient with an elevated temperature and abnormal fetal heart tracing after being contacted by a nurse. The standard of care was also to timely deliver the infant in light of the patient's condition and the fetal heart rate.

5. Case No. 5

A 32-year-old patient who was 37-weeks pregnant was sent to the hospital for treatment of pregnancy-induced hypertension, a potentially life-threatening condition. The patient had elevated blood pressure for four days. Plaintiff ordered further laboratory work for the patient on Friday, but did not review the laboratory results until the subsequent Monday. The standard of care was to send the patient to the Medical Center on Friday, for further evaluation and induction of birth.

6. Judicial Review Committee

On June 30, 2014, the hearing commenced before the judicial review committee, composed of five other medical doctors. Cary Miller served as the hearing officer and presided over the proceedings. After seven evidentiary sessions, the parties delivered oral argument on December 2, 2014. The judicial review committee issued its decision on December 22, 2014, and found that the Board had met its burden of proving plaintiff had violated the standard of care in the cases identified above. The judicial review committee agreed with the ad hoc committee's conclusion that plaintiff had substantial knowledge deficiencies, and there were legitimate concerns as to her communication and coordination of care with labor and delivery nursing staff. The judicial review committee agreed with the Board that educational courses and a board certification exam would not be sufficient to remediate the issues proven at the hearing. The judicial review committee found the recommendation to terminate plaintiff's

medical staff membership and clinical privileges to be reasonable and warranted.

7. Appeal Committee

On December 30, 2014, plaintiff timely appealed the judicial review committee's decision to the appeal committee, pursuant to Article XV, section 5 of the Bylaws. Plaintiff contended that the judicial review committee's decision was arbitrary, capricious, or unreasonable. Plaintiff further argued that the judicial review committee had made findings against her in case No. 3 that had not been specifically charged. On June 11, 2015, the three-doctor appeal committee affirmed the judicial review committee's decision.

C. Superior Court Proceedings

On November 4, 2015, plaintiff petitioned for a writ of administrative mandate. Plaintiff filed her first amended petition on November 10, 2015. Plaintiff argued that the judicial review committee's decision violated her right to a fair hearing. Plaintiff further argued that she was never given notice that the charges would affect her gynecological privileges. Plaintiff re-asserted her argument that the judicial review committee made findings against her in case No. 3 that were not specifically charged.

After hearing argument from the parties, the trial court denied the petition. First, the trial court found plaintiff had waived her challenge to the sufficiency of the notice for termination of her gynecological privileges because she did not

raise the issue before the judicial review committee or the appeal committee. The trial court also ruled on the merits of the petition and found plaintiff was not deprived of due process because the Board had given her adequate notice.

III. DISCUSSION

A. *Standard of Review*

“Section 1094.5 of the Code of Civil Procedure governs judicial review by administrative mandate of any final decision or order rendered by an administrative agency. A trial court’s review of an adjudicatory administrative decision is subject to two possible standards of review depending upon the nature of the right involved. (Code Civ. Proc., § 1094.5, subd. (c).) If the administrative decision substantially affects a fundamental vested right, the trial court must exercise its independent judgment on the evidence. (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32; *Bixby v. Pierno* (1971) 4 Cal.3d 130, 143.) The trial court must not only examine the administrative record for errors of law, but must also conduct an independent review of the entire record to determine whether the weight of the evidence supports the administrative findings. (*Bixby v. Pierno, supra*, at p. 143.)” (*Wences v. City of Los Angeles* (2009) 177 Cal.App.4th 305, 313.)

The parties do not dispute that depriving plaintiff of hospital privileges involves a fundamental vested right and is thus subject to independent review by the trial court. (*Sulla v. Board of Registered Nursing* (2012) 205 Cal.App.4th 1195, 1200; *Marek v. Board of Podiatric Medicine* (1993) 16 Cal.App.4th 1089,

1095.) If the trial court exercised its independent judgment, an appellate court reviews the record to determine if the trial court's judgment is supported by substantial evidence. (*Bixby v. Pierno, supra*, 4 Cal.3d at p. 143, fn. 10; *Cassidy v. California Bd. of Accountancy* (2013) 220 Cal.App.4th 620, 627.) Finally, we independently review the question of whether plaintiff was provided a fair hearing. (*Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1442.)

B. *Exhaustion and Waiver—Notice of Deprivation of Gynecological Privileges*

Plaintiff contends that because the cases listed on the Notice of Charges and the First Amended Notice of Charges “exclusively deal with questions of obstetrics care,” she was not provided with adequate notice that she would be deprived of her gynecological privileges as well. We find plaintiff failed to exhaust her administrative remedies for this issue. “[A] doctor who is challenging the propriety of a hospital’s denial or withdrawal of staff privileges must pursue the internal remedies afforded by that hospital to a final decision before resorting to the courts for relief ‘The exhaustion doctrine “is not a matter of judicial discretion, but is a fundamental rule of procedure” [citation] under which “relief must be sought from the administrative body and this remedy exhausted before the courts will act” [citation].’” (*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 619-620; accord, *Sahlolbei v. Providence Healthcare, Inc.* (2003) 112 Cal.App.4th 1137, 1146.) “Administrative agencies must be given the opportunity to reach a reasoned and final conclusion on each and every issue upon which they have jurisdiction to act before those issues are raised

in a judicial forum.” (*Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 510.) In order to exhaust administrative remedies, a litigant must raise the pertinent issue at each level of the agency at which it can be considered, including the initial hearing and administrative appeals. (*Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 592; *Lopez v. Civil Service Com.* (1991) 232 Cal.App.3d 307, 311; *Edgren v. Regents of University of California* (1984) 158 Cal.App.3d 515, 520.) Failure to exhaust administrative remedies results in the superior court lacking jurisdiction to adjudicate the issue. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70, citing *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 293.) Here, it is undisputed that whether the notice adequately apprised plaintiff that her gynecology clinical privileges could be revoked was never presented before the judicial review or appeal committees. Plaintiff, however, contends she was not required to do so because the administrative remedy was unavailable or inadequate.

“It is settled that the rule requiring exhaustion of administrative remedies does not apply where an administrative remedy is unavailable [citation] or inadequate [citation].” (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 217; *Bollengier v. Doctors Medical Center* (1990) 222 Cal.App.3d 1115, 1126-1127.) Plaintiff argues that she could not challenge the purported defective notice regarding the possible termination of her gynecology clinical privileges. We disagree.

Article XV, section 2(e) of the Bylaws addresses the initial hearing: “The hearing officer shall act to ensure that all participants in the hearing have a reasonable opportunity to be

heard and to present all relevant oral and documentary evidence, and that proper decorum are maintained. The presiding officer shall be entitled to determine the order of, or procedure for, presenting evidence and argument during the hearing, and shall have the authority and discretion, in accordance with these Bylaws, to make all rulings on questions which, with reasonable diligence, could not have been raised prior to the hearing and which pertain to matters of law, procedure, or the admissibility of evidence.” Under the Bylaws, hearing officer Miller had authority to answer questions pertaining to matters of law or procedure, and thus could resolve issues of inadequate notice.

The Bylaws also allow plaintiff to challenge a deficient notice before the appeal committee. Article XV, section 5(b)(1) provides: “The grounds for appeal for the hearing shall be: [¶] (1) Substantial failure of the Judicial Review Committee or [the Board] to comply with the procedures required by this Article XV or by these Bylaws in the conduct of hearings and decisions upon hearings so as to deny a fair hearing” Article XV, section 2(a) requires that the Board “shall give the member prompt written notice of the recommendation or the final proposed action.” Article XV, section 2(d) provides that for notice of charges: “As a part of, or together with the notice of hearing, the [Board] shall state in writing, in concise language, the acts or omissions with which the Medical Staff member is charged, a list of charges by chart number, and the reasons for the proposed action taken or recommended.” Thus, plaintiff could seek review before the appeal committee of any failure by the Board to state in writing the recommended proposed action, the acts with which she was charged, the list of charges, and the reasons for the recommended proposed action.

The Bylaws permitted plaintiff to raise the issue of defective notice for deprivation of her gynecology clinical privileges at both the initial hearing and the appeal level. It is undisputed plaintiff failed to do so. Because she failed to exhaust her administrative remedies, the trial court and this court appropriately refrain from reviewing the issue. (*Johnson v. City of Loma Linda, supra*, 24 Cal.4th at p. 70; *Abelleira v. District Court of Appeal, supra*, 17 Cal.2d at p. 293.)⁵

C. Adequate Notice—Deprivation of Obstetrical Privileges

Plaintiff also asserts that she was not provided with adequate notice as to the deprivation of her obstetrician clinical privileges. Specifically, plaintiff refers to case No. 3, in which the judicial review committee found: “Although not specifically set forth in the Charges, Dr. [Jeffrey] Phelan testified consistent with his report that [plaintiff] should have performed an immediate C-section rather than allowing the patient to continue pushing after the failed vacuum attempts. The [judicial review

⁵ Even if plaintiff had exhausted her administrative remedies, we would affirm. The Notice of Charges specifically informed plaintiff that the Board had unanimously voted to terminate plaintiff’s medical staff membership and clinical privileges. The Amended Notice of Charges repeated that “[a]t the [Board] meeting on October 22, 2013, it was moved, seconded and carried to terminate your Medical Staff membership and clinical privileges at [the Medical Center].” The Board indicated it was “concerned about [plaintiff’s] thought process and felt [plaintiff] had exhibited poor judgment and a lack of expertise in these cases.” There was no indication that “clinical privileges” referred only to plaintiff’s obstetrician clinical privileges, as opposed to all clinical privileges.

committee] finds that [plaintiff] violated the standard of care in waiting [one and one-half] hours before performing a C-section. This concern further reflects [plaintiff's] bias toward patient expectations of natural delivery.”⁶ Plaintiff exhausted her administrative remedy for this issue by raising it in her appellant brief to the appeal committee. Plaintiff contends that the judicial review committee erred by determining she performed below the standard of care based on a finding for which no charge was specifically made.

Pursuant to Business and Professions Code section 809.1, which governs the notice requirements for actions taken by a peer review body against a licensed physician, and applies here: “If a hearing is requested on a timely basis, the peer review body shall give the licentiate a written notice stating all of the following: [¶] (1) The reasons for the final proposed action taken or recommended, including the acts or omissions with which the licentiate is charged.” (Bus. & Prof. Code, § 809.1, subd. (c)(1).) As noted, Article XV, section 2(d) of the Bylaws also provides for this level of notice.

We agree with plaintiff that she was not provided with adequate notice regarding the specific finding in case No. 3 that she violated the standard of care by having the patient wait one and one-half hours after the vacuum delivery attempts failed before performing the C-section. Plaintiff was not apprised that she had to defend against such a charge in violation of Business and Professions Code section 809.1, subdivision (c) and Article

⁶ As described above, the Board had provided plaintiff with notice of a violation of a different standard of care in this same case, related to plaintiff's continued attempts at a vacuum delivery.

XV, section 2(d) of the Bylaws. (*Unnamed Physician v. Board of Trustees, supra*, 93 Cal.App.4th at p. 617.)

Plaintiff, however, must also demonstrate an error that requires reversal. (See Code Civ. Proc., § 1094.5, subd. (b) [inquiry in administrative mandamus case shall extend to questions of “whether there was any prejudicial abuse of discretion”]; *Thornbrough v. Western Placer Unified School Dist.* (2013) 223 Cal.App.4th 169, 200; *Hinrichs v. County of Orange* (2004) 125 Cal.App.4th 921, 928 [generally, “procedural due process violations, even if proved, are subject to a harmless error analysis”].) It is well-settled that a prejudicial error will not be found unless it is reasonably probable a more favorable result would have been reached absent the error. (*Thornbrough v. Western Placer Unified School Dist., supra*, 223 Cal.App.4th at p. 200.)

Here, there was ample evidence supporting the trial court’s conclusion affirming termination of plaintiff’s medical staff membership and clinical privileges. In case No. 3, the judicial review committee found, in addition to the charge for which the Board failed to give notice, that the Board had proved: “it was a violation of the standard of care to continue vacuum extraction with a Kiwi after two failed attempts, regardless of the cause of the pop-offs, when the baby’s head has not progressed.” In case No. 1, the judicial review committee found plaintiff deviated from the accepted standards of obstetrical care by allowing the father to clamp the umbilical cord, placing the baby on the mother’s abdomen, failing to quickly clamp the umbilical cord, and not promptly transferring the baby to the warmer. In case No. 2, the judicial review committee found: plaintiff lacked adequate training, skill, and expertise to attempt a breech delivery;

plaintiff violated the standard of care by failing to start an epidural in case a C-section was required; and plaintiff violated the standard of care by failing to conduct an ultrasound prior to attempting a vaginal breech delivery. In case No. 4, the judicial review committee found plaintiff violated the standard of care by failing to: timely deliver the infant in light of the prolonged labor, fetal heart tracing pattern, and the mother's fever; and timely evaluate the patient after being advised of the above conditions. Finally, in case No. 5, the judicial review committee found plaintiff violated the standard of care by failing to: order emergency laboratory tests; admit the patient who was showing high blood pressure related to her pregnancy, a life-threatening condition; and review laboratory results as soon as they were available. Plaintiff has failed to demonstrate a reasonable probability that a more favorable result would have been reached absent the error.

IV. DISPOSITION

The judgment is affirmed. Respondents are entitled to recover their costs on appeal.

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KIM, J.

We concur:

BAKER, Acting P.J.

MOOR, J.