

THE STATE OF NEW HAMPSHIRE

Merrimack County Superior Court

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NOTICE OF DECISION

BENJAMIN T KING ESQ
DOUGLAS LEONARD & GARVEY P C
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CONCORD NH 03301

05-E-0478 Terry Bennett, M.D. vs. New Hampshire Board of Medicine

Enclosed please find a copy of the Court's Order dated 6/30/2006
relative to:

Court Order

07/05/2006

William McGraw
Clerk of Court

cc: Elyse S. Alkalay, Esq.

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Terry M. Bennett, M.D.

v.

New Hampshire Board of Medicine

No. 05-E-478

ORDER

The petitioner, Terry M. Bennett, M.D., originally brought this action challenging the manner in which the New Hampshire Board of Medicine (“Board”) had been investigating and adjudicating complaints against him. The petitioner now moves for an injunction barring the Board from taking any further action relative to the complaints against him. The Board objects. The Court held a hearing on the motion on May 11, 2006. Considering the parties’ arguments and the relevant law, the Court finds and rules as follows.

I. Factual Background

In August 2005, the Board issued a Notice of Hearing informing the petitioner that it intended to hold an adjudicatory hearing in order to determine whether the petitioner had made various unprofessional comments to patients and whether those comments constituted a breach of professional ethics. The Board’s decision to hold a hearing was in response to two complaints, one by a patient identified as Patient A, and the other by a patient identified as Patient S. According to the Patient A complaint, in June 2004, the petitioner spoke harshly to Patient A regarding her weight. According to the Notice of Hearing, the petitioner is alleged to have said “You need to lose weight.

Let's face it if your husband were to die tomorrow who would want you. Well, men might want you but not the types that you want to want you. Might even be a black guy.” Motion for Injunctive Relief, Ex. A, Notice of Hearing, ¶ 6.E. The Patient S complaint alleges that in 2001, the petitioner suggested to Patient S that rather than live with her extensive brain injuries, she should purchase a gun and commit suicide to end her suffering. See Motion for Injunctive Relief, Ex. B. The petitioner denies making the comments alleged in the Patient S complaint. The Board has since added a third complaint from a patient identified as Patient D, in which the petitioner is accused of speaking harshly to Patient D in 2003 regarding her son's hepatitis condition.

The petitioner now moves, under Thompson v. N.H. Board of Med., 143 N.H. 107 (1998), to enjoin the Board from taking any further action against him as a result of the above complaints. The petitioner contends that the Board may not pursue the Patient A and Patient D complaints because to do so would violate his rights to free speech and due process under the Federal and State Constitutions and because the regulations under which the Board is operating are unconstitutionally vague. He further contends that the Patient S complaint is barred by the doctrines of *res judicata* and collateral estoppel. He does not, however, contend that the prosecution of the Patient S complaint would violate his free speech and due process rights.

II. Court Intervention

The Board contends that Thompson does not apply and that therefore, the petitioner may not circumvent the Board and the standard avenues for appeal by petitioning this Court for an injunction. In Thompson, the New Hampshire Supreme Court determined that “the superior court may grant injunctive relief where: (1) a

potential due process violation or prejudice has occurred; (2) an important collateral issue completely separate from the merits of the action can be resolved; and (3) failure to review would result in serious and immediate harm.” 143 N.H. at 109-110. But, “[p]arties cannot circumvent the statutory appeal process under the guise of a petition for injunctive relief concerning issues directly related to the merits of the underlying proceeding, such as evidentiary rulings, and collateral issues that lack immediate irreparable impact.” *Id.* at 110. “The superior court may, however, intervene prior to entry of final judgment in exceptional circumstances where . . . a party raises a due process violation that fundamentally impedes the fairness of an underlying proceeding resulting in immediate and irreparable harm to that party.” *Id.* In such an instance “the complainant has the burden of persuading the superior court that exceptional circumstances justify a departure from the basic policy of postponing review until after the entry of a final judgment.” *Id.* (quotations, brackets and ellipsis omitted).

Applying the considerations set out in Thompson, the Court finds that it is appropriate in this instance to depart from the basic policy of postponing review until after the entry of final judgment by the Board. As stated above, the superior court may intervene in exceptional circumstances where a party raises a violation that fundamentally impedes the fairness of an underlying proceeding resulting in immediate and irreparable harm to that party. Here, the petitioner alleges that the Board is acting unconstitutionally by denying him the right to free speech and that it is attempting to sanction him under unconstitutionally vague regulations. Also, he has alleged that the Board is attempting to sanction him for another complaint, the prosecution of which is procedurally barred. Such concerns are sufficient to demonstrate that the underlying

proceeding may not be sufficiently fair so as to protect the petitioner's rights. Further, permitting the underlying proceeding to proceed to final judgment might result in immediate and irreparable harm to the petitioner in that he could lose his license to practice medicine as a result of an unfair abridgment of his rights. Accordingly, the Court finds that a potential due process violation or prejudice has occurred.

Secondly, the Court finds that the petitioner has raised important collateral issues completely separate from the merits of the underlying matter. Regarding the Patient A and Patient D complaints, the petitioner contends that regulating his speech in the manner proposed by the Board would violate his rights to free speech and due process. Whether the Board has the authority to prosecute the petitioner for his comments is separate from the issue of whether his comments amounted to a breach of professional ethics. As to the Patient S complaint, the petitioner contends that the Board lacks the authority to hear the matter because it is barred from doing so by *res judicata* and collateral estoppel. A determination regarding the jurisdiction of the Board over a given matter is distinct from the issue of the petitioner's alleged breach of ethics.

As to the final Thompson factor, the Court finds that if it does not review the matter, the petitioner is at risk of losing his license to practice medicine when the Board finally hears the matter. Such a deprivation presents the risk of a serious and immediate harm to the petitioner. Therefore, the Court finds that the petitioner has met his burden in regard to the considerations raised in Thompson. Thus, the Court may intervene in this instance and grant an injunction should one be warranted.

III. Injunction

“The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy. An injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, and there is no adequate remedy at law.” Murphy v. McQuade Realty, Inc., 122 N.H. 314, 316 (1982). To obtain an injunction, a plaintiff must show: 1) a present threat of irreparable harm; 2) that there is no adequate, alternative remedy at law; 3) a likelihood of success on the merits by a balance of the probabilities; and 4) that the public interest would not be adversely affected if the court grants the injunction. See Thompson, 143 N.H. at 108 and UniFirst Corp. v. City of Nashua, 130 N.H. 11, 14-15 (1987).

A. Irreparable Harm

As stated, the petitioner is at risk of losing his license to practice medicine. The Supreme Court noted in Thompson that “the board has the power to suspend or revoke a doctor’s license.” 143 N.H. at 111. Further, “[s]uch suspension or revocation remains in effect during the appeal period and may have severe repercussions on the doctor’s livelihood.” Id. Therefore, “a physician . . . most likely would be unable to recover lost income and a decreased patient base during the appeal period.” Id. Because suspending or revoking his license may present severe repercussions to the petitioner’s livelihood, the Court finds that the petitioner faces the present threat of an irreparable harm.

B. Adequate, Alternative Remedy

The Board contends, as it did in Thompson, that the statutory appeals process is sufficient to grant the petitioner an adequate, alternative remedy at law. This Court, like the Court in Thompson, does not agree that such a remedy is sufficient. Under RSA

329:14, VIII, no sanction of the Board is to be stayed during the pendency of an appeal. The petitioner is 67 years old. If his license to practice medicine is suspended, it will remain suspended at least until any appeal is heard and decided. Even assuming he is ultimately successful, the practical effect of the sanction will be to prevent the petitioner from practicing medicine for the rest of his professional life. In such an instance the availability of a statutory appeal cannot be said to be an adequate alternative remedy.

C. Likelihood of Success on the Merits

i. Patient A and Patient D

Preliminarily, the Court notes that no party has made clear the substance of the Patient D complaint. Although generally the substance of the speech is relevant to determining whether First Amendment protection is available, the nature of the Court's determination, *infra*, makes knowledge of the substance unnecessary.

As noted, the petitioner contends that under the First Amendment to the United States Constitution and Part I, Article 22 of the New Hampshire Constitution, he is free to speak, even if his speech is offensive to some people. He further argues that his speech is not entitled to any less protection simply because he is a member of a licensed profession. Also, he contends that the Board has, in effect, imposed a content-based speech restriction, which is not narrowly drawn as required by the constitution. Finally, he contends that the Board's regulations are too vague to comply with constitutional requirements. Therefore, according to the petitioner, because the grounds on which the Board is proceeding are unconstitutional, he is likely to prevail on the merits.

The Board counters that those persons who work in licensed professions do so subject to the regulation of their respective licensing boards. Therefore, the petitioner

does not have the same rights to free speech as those outside the licensed profession and his speech within the confines of his role as a licensee may be regulated. The Board also contends that RSA 329:17, VI(d) and Med 501.02, the regulations upon which it relies in bringing the underlying action, are content neutral regulations that are part of an overall statutory scheme of investigation and enforcement of medical licensees. Since the alleged comments took place within the physician-patient relationship, the Board may investigate and regulate them through the content neutral enforcement mechanisms regarding medical licensees. Finally, the Board contends that the petitioner has not met his burden to demonstrate that the regulations he is alleged to have violated are unconstitutionally vague. Therefore, the Board is acting within the constitution, its jurisdiction and its responsibilities and will likely prevail.

It is well established that “[t]he right to speak freely, whether in a street or elsewhere, is of primary importance.” State v. Chaplinsky, 91 N.H. 310, 315 (1941). “The fundamental basis of the constitutional rule is the necessity for full and free discussion of all subjects which affect ways of life, including religious, social and governmental questions.” Id. However, “[i]n maintaining the guaranty of free speech, the authority of the State to enact laws to promote health, safety, morals and the general welfare is ‘necessarily admitted.’” Id. at 317. “The limits of this reserved authority must be determined with appropriate regard to the particular subject of its exercise.” Id. (quotations omitted). “And the power of the State stops short of interference with what are deemed to be certain indispensable requirements of the liberty assured.” Id. (quotations and ellipses omitted). “The right of speech, therefore, is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience,

and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.” *Id.* at 318 (quotations omitted).

Regarding the argument that those within regulated professions are subject to different levels of scrutiny relative to their speech, the Court does not agree. The Court agrees with the Board’s general contentions that being given the opportunity to practice a licensed profession carries with it certain responsibilities and that the adequate fulfillment of those responsibilities is something to be regulated. However, the Court does not agree that the decision by a person to subject him or herself to the regulation of a licensed profession necessarily limits his or her right to speak freely and, in fact, the Board points to no law in New Hampshire that so holds.

Instead, the Board relies on the decision of the Supreme Judicial Court of Massachusetts in Weinberg v. Board of Registration in Medicine, 824 N.E.2d 38 (Mass. 2005) for the proposition that the right of a physician to labor in the profession must yield to the right of the government to protect public health and that therefore, those who work in such professions do not possess the same rights to speak and act as those outside the profession. The Court finds Weinberg distinguishable from this case. The physician in Weinberg conceded that his sexual relationship with a patient could justify a finding that he had violated his code of medical ethics. *Id.* at 44. Moreover, the Weinberg court noted that there was evidence that the relationship between the patient and physician had resulted in harm to the patient’s admittedly fragile mental state. *Id.* at 41, 45. Here, the petitioner has neither admitted that his acts violated applicable medical standards, nor is there any evidence that he gave inappropriate medical care or that his comments led to any adverse health impacts. Thus here, unlike Weinberg, the Board is not investigating

and regulating the petitioner as one who has provided inadequate or inappropriate medical care. Accordingly, the Court does not find Weinberg applicable to this case and declines the invitation to employ its reasoning.

Having determined that there is no *per se* limitation on the speech rights of those in licensed professions, the Court turns to the petitioner's other arguments. The petitioner contends that the Board seeks to impose an impermissible content-based restriction on his speech. According to the petitioner, because the regulations under which he is being prosecuted are content-based, they must be narrowly drawn. Because the regulations are not drawn with sufficient specificity they cannot survive a First Amendment challenge. The Board counters that the regulations are content neutral and are part of an overall scheme of examination and investigation of medical licensees.

According to the Notice of Hearing, the purpose of the Board's investigation is to determine whether the petitioner violated RSA 329:17, VI(d), Med 501.02(h) and/or the American Medical Association's ("AMA") Principles of Medical Ethics, Principle I. Motion for Injunctive Relief, Ex. A, Order of Notice, ¶¶ 7A-7C. RSA 329:17, VI (Supp. 2005) states, in relevant part:

The board, after hearing, may take disciplinary action against any person licensed by it upon finding that the person:

(d) Has engaged in dishonest or unprofessional conduct or has been grossly or repeatedly negligent in practicing medicine or in performing activities ancillary to the practice of medicine or any particular aspect or specialty thereof, or has intentionally injured a patient while practicing medicine or performing such ancillary activities.

N.H. Admin. R. Med 501.02(h) states:

A licensee shall adhere to the Principles of Medical Ethics - Current Opinions With Annotations (2004-2005) as adopted by the American Medical Association.

Principle I of the AMA's Principles of Medical Ethics states:

A physician shall be dedicated to providing competent medical care, with compassion and respect for human dignity and rights.

Motion for Injunctive Relief, Ex. H, Principles of Medical Ethics, Principle I.

The petitioner contends that N.H. Admin R. Med 501.02(h) and by extension, the AMA's Principle I are insufficiently narrow to survive First Amendment scrutiny. The petitioner also argues that no statute or regulation of the Board defines the types of speech that may constitute a violation and therefore, prosecuting the petitioner under the statute cited is unconstitutional.

The Court finds that the regulations relied upon by the Board are not sufficiently specific so as to comport with the requirements of the First Amendment. Without question the Board has instituted proceedings against the petitioner as a result of the content of his speech. Thus, the regulations under which the petitioner is charged are content based for they are concerned with what was said and not merely with when or where. See e.g. In re Petition of Brooks, 140 N.H. 813, 819 (1996) ("We think it obvious . . . that the rule was triggered by the content of the expression in question. The rule suppressed speech based on the perceived beneficial effects of confidentiality, and a determination of what speech was subject to the rule could not be made without reference to the content of the speech.")

"[P]art I, article 22 (Supp. 1985) of the State Constitution, like the first amendment to the Federal Constitution, 'means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" Opinion of the Justices, 128 N.H. 46, 50 (1986) (quoting Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972)). To that end, "[t]he United States Supreme Court has stated that

‘content-based regulations are presumptively invalid . . .’” Brooks, 140 N.H. at 819 (1996) (quoting R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992)). “A content-based prohibition . . . ‘must be subjected to the most exacting scrutiny.’” Id. (quoting Boos v. Barry, 485 U.S. 312, 320 (1988)). “To survive such scrutiny, the prohibition must serve a compelling State interest and be narrowly tailored to accomplish that interest, or else the targeted speech must fall into one of a few narrowly-defined categories of expression not meriting full protection . . .”. Id. at 819-820 (citations omitted). “If the State has the power to regulate some speech, that power ‘must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.’” Id. at 820 (quoting Cantwell v. Connecticut, 310 U.S. 296, 304 (1940)).

Here, the regulations under which the petitioner has been charged are not drawn with the narrow specificity required by the State and Federal Constitutions. The AMA’s Principle I states only in general terms that physicians should treat patients with dignity and respect, but does not define the circumstances under which a physician will be found to have violated that principle. While it would be unreasonable to expect the AMA, or any other body, to define each and every utterance that might create liability, the cited principle provides little guidance as to what speech falls within its ambit. Further, whether a person is treated with dignity and respect are, at least initially, subjective determinations left to the sensitivities of the listener. Such a remarkably subjective standard is certainly not the narrow type of regulation that could comply with constitutional requirements. This failing is not cured by reference to RSA 329:17, VI(d) because to those regulated it is equally unclear what speech will create liability for “unprofessional conduct” and what speech will not.

