

Christman v. DHSS
C.A. No. K12A-10-003 JTV
January 28, 2014

OPINION

The appellant, Jacqueline Christman, M.D. ("Christman"), has filed this appeal from a decision of the Merit Employee Relation Board ("MERB") which found that Christman's employer, the Division of Public Health ("DPH") of the Department of Health and Social Services ("DHSS"), had just cause to terminate her from employment with DPH.

FACTS

Christman was employed as a Medical Director of DPH until her termination on December 29, 2011. Originally, DPH had two Medical Directors. As one of them, Christman was responsible for the administration of the Office of Health Equity, the Minority Health Program, and the Women's Health Program. In addition, Christman was involved in the development of various standing orders and supervised the Standing Orders Team for DPH.¹ The other Medical Director, Herman Ellis, M.D. ("Ellis"), was the supervisor for the community health clinics, which included both administrative and clinic care responsibilities, and was responsible for signing and implementing standing orders. Ellis also had "line" supervisory authority over the

¹ A standing order is a written document containing rules, policies, procedures, regulations, and orders for the conduct of patient care by non-physicians in various clinical situations. They normally specify the conditions and prescribe the action to be taken by non-physicians in caring for the patient, including the dosage and route of administration for a drug or the schedule for the administration of therapeutic procedure. Record of the Merit Employee Relations Board at 3 [hereinafter "R. at ___"].

A Standing Order Team revises the contents of the standing orders periodically in response to new developments in medical diagnosis and treatment. R. at 3.

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nurses in the clinics and was responsible for making sure the standing orders were followed at the community health clinics and by school nurses.

In November 2011, Ellis announced his retirement, effective November 18, 2011. Karyl Rattay, M.D. (Rattay), Director of DPH, took the opportunity of Ellis' retirement to consolidate the two Medical Director positions, creating just one Medical Director position focused on clinical care. Christman was to be the one Medical Director.

On November 3, 2011, Rattay and Crystal Webb ("Webb"), the Deputy Director of DPH, met with Christman to review Christman's revised performance plan as the sole Medical Director at DPH. At this meeting Rattay and Webb informed Christman that her new responsibilities included: "medical leadership for Community Health Services. Review, maintain, and sign off on medical standing orders for clinic operations and school nurses. Obtain Medical Malpractice Insurance. Obtain an NPI (National Provider Identification) number.² Sign collaborative agreements with advanced practice nurses." On November 10, 2011, Rattay and Webb had a second meeting with Christman regarding specifics of Christman's new responsibilities and deadlines. Afterwards, Webb sent Christman an e-mail summarizing the meeting, changes to Christman's performance plan, and specific deadlines. Christman was required to (1) sign her new performance plan and return it to Webb by 9:00 a.m. on November 14, 2011, (2) obtain medical malpractice insurance and an NPI number by

² An NPI number is a unique identification number required by the Health Insurance Portability and Accountability Act (HIPAA) for covered health care providers for all administrative and financial transactions. R. at 5.

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noon on November 15, 2011, and (3) sign standing orders for DPH by noon on November 16, 2011. Webb emphasized the importance of the deadlines and added, "[f]ailure to meet deadlines may result in disciplinary action." On November 12, 2011, Christman responded, stating: "I will attempt to meet your deadlines although they are remarkably close."

From Rattay, Webb and Christman's initial meeting on November 3, 2011, throughout the month of November, the parties exchanged multiple e-mails discussing the deadlines, Christman's signing of standing orders, and medical malpractice providers. On November 15, 2011, Christman e-mailed Rattay and Webb informing them that she could not meet the November 15, 2011 deadline for medical malpractice. Additionally, Christman advised: "

I will not obtain an NPI number which will make me responsible for the billings of this state's clinics unless I have approval authority over the staff to handle my approval of the billings. To do otherwise would be to subject myself to legal liability under federal and perhaps state law. Your deadline will not be met and I am advising you of that fact.

Webb replied requesting additional information regarding Christman's attempt to obtain medical malpractice insurance and reminding Christman that "[o]btaining an NPI number is part of your job responsibilities and failure to do so will subject you to potential disciplinary action." Christman provided information about her efforts to procure medical malpractice insurance but reiterated her belief that she would be subject to possible legal liability if she obtained an NPI number in her individual

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capacity. DPH gave Christman the name and information of an insurance broker who could quickly provide a medical malpractice policy and offered to pay \$5,000 toward the annual premium. It then offered to pay the full amount of the annual premium. Additionally, Rattay extended the initial deadlines to obtain insurance to the end of business on November 17, 2011.

On November 15, 2011, after consulting with her attorney, Christman advised DPH that she "cannot and will not sign the standing orders because it is a violation of state regulations in the absence of supervisory authority and I do not have insurance to protect me against legal liability which should arise from the standing orders."

On November 17, 2011, Christman's attorney contacted Mark Monroe, Labor Relations Specialist at DPH, to inform him that Christman believed the supervisory role for signing the standing orders was not appropriate without direct supervision under Regulation 21.1.1 of the Board of Medical Licensure and Discipline ("Medical Board").³ To address this concern, DPH solicited legal advice from a Deputy Attorney General from the Delaware Department of Justice on the issue.

On November 23, 2011, Deputy Attorney General Allison E. Reardon ("DAG Reardon") e-mailed DPH advising them:

³ Regulation 21.1.1 provides: "Any physician who delegated medical responsibility to a non-physician is responsible for that individual's medical activities and must provide adequate supervision Supervision may be direct or indirect depending on the type of medical treatment delegated." *available at* <http://regulations.delaware.gov/register/february2012/final/15%20DE%20Reg%201184%2002-01-12.pdf>.

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As counsel to the Board of Medical Licensure and Practice (Board), you have asked for my interpretation of the supervisory responsibilities under Rule 21 of the Board's rules and regulations. My understanding of the history of the standing orders at DHSS/DPH is that the agency has been exempted from the direct supervision provisions for medications and therapeutics under Rule 21.1.6 and from the 30 minute requirement for indirect supervision. My reading of the regulation is that the physician signing the standing orders is responsible for ensuring that the medical activities of the non-physician delegees are in compliance with the standing orders and that the physician is in a position to be readily available if needed for assistance and consultation in regard to the delegated medical acts.

I do not believe that the regulations require that the physician who signs the standing orders in the facility to assume responsibility for the day to day activities of each individual employee in the facilities where the signing orders apply such that they would necessarily be responsible for evaluations, performance plans and the like. There could be facilities where that could be the case depending on the organizational structure but I do not Believe it is a requirement of the regulation.

DAG Reardon opined that, in her professional opinion, the Medical Director at DPH was not responsible for day-to-day supervision of non-physician delegees or evaluations. Additionally, DAG Reardon testified that the Medical Board has never issued a case decision or advisory opinion regarding Regulation 21. Rattay forwarded DAG Reardon's email to Christman on November 23, 2011 and warned Christman of termination if Christman did not sign the standing orders and collaborative agreements, and obtain an NPI number by noon on November 28, 2011.

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Rattay explicitly informed Christman that her failure to sign standing orders and collaborative agreements would put the medical practice of DPH employees and the health of the population that relies on DPH in jeopardy.

Christman neither signed the standing orders and collaborative agreements nor obtained an NPI number by the November 28, 2011 deadline. On November 29, 2011, Rattay e-mailed Christman to remind Christman of DAG Reardon's opinion related to Christman's concerns regarding 21.1.1 and assured Christman of the authority that the sole Medical Director has to oversee non-physician employees and the revised collaborative agreements.

On November 30, 2011, Rattay notified Christman of her intent to terminate Christman for insubordination in connection with Christman's refusal to sign standing orders and collaborative agreements and Christman's failure to obtain an NPI number. Following her termination, Christman sought a pre-termination hearing conducted by DPH. On December 21, 2011, Christman presented her case to DPH and in a letter dated December 29, 2011, the Secretary of DHSS terminated Christman.

Christman appealed DHSS's decision to the MERB. The MERB conducted a hearing and upheld Christman's termination. In its opinion the MERB made a series of findings of fact, including significant factual findings that: (a) DPH restructured the Medical Director position to make Christman responsible for signing standing orders and collaborative agreements; (b) DPH set deadlines, which Christman missed, to sign standing orders and collaborative agreements and obtain an NPI number; (c) Christman was granted the authority to supervise non-physicians and did not have an objectively reasonable belief that by signing the standing orders she would risk losing

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her medical license; and (d) Christman's belief that she could face possible personal liability for errors in billing practices related to her obtaining an NPI was not objectively reasonable because her concerns were based on anecdotal old evidence. Based on these findings of fact, the MERB concluded that DHSS had just cause to terminate Christman for insubordination.

Additionally, the MERB concluded that Christman had the necessary authority to sign standing orders, that she did not have an objectively reasonable belief that by signing such orders she might violate her responsibilities under Regulation 21.1.1, and that Christman was willfully insubordinate. The MERB also concluded that DPH's directive that Christman obtain an individual NPI number was reasonable and valid. In closing, the MERB found that dismissal was appropriate under the circumstances because of Christman's refusal to sign standing orders and collaborative agreements and obtain an individual NPI number.

STANDARD OF REVIEW

This Court has appellate jurisdiction over final agency decisions pursuant to 29 *Del. C.* § 10142. On appeal from a decision of an administrative board, this Court must determine whether the board's decision is supported by substantial evidence to support the board's findings of facts and conclusions of law and free from legal error.⁴ Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁵ In the appeal context, this Court does not weigh

⁴ *Olney v. Cooch*, 425 A.2d 610, 613 (Del. 1981).

⁵ *Majaya v. Sojourners' Place*, 2003 WL 21350542, at *4 (Del. Super. June 6, 2003).

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evidence, determine questions of credibility, or make its own factual findings.⁶ If there is substantial evidence and no mistake of law, the administrative board's decision must be affirmed.⁷

DISCUSSION

Christman contends that the MERB committed error in finding that she had been given authority to enforce compliance with standing orders, that she had no reasonable belief that by signing standing orders she could jeopardize her medical license, and that she was willfully insubordinate for not agreeing to sign such orders; that the MERB committed error in finding that she had no reasonable belief that agency use of her personal NPI number could create liability on her part, and that, despite efforts to comply with a short deadline she was willfully insubordinate in not obtaining an NPI; and that the MERB committed error in not admitting evidence of her Pre-Decision Statement for consideration.

Merit Rule 12.1 provides:

Employees shall be held accountable for their conduct. Disciplinary measures up to and including dismissal shall be taken only for just cause. "Just cause" means that management has sufficient reasons for imposing accountability. Just cause requires showing that he employee has committed the charged offense; offering specified due process rights specified in this chapter; and

⁶ *Id.*

⁷ *City of Newark v. Unemployment Ins. Appeal Bd.*, 802 A.2d 318, 323 (Del. Super. 2002).

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imposing a penalty appropriate to the circumstances.⁸

The MERB articulated a three-element test for the offense of insubordination.⁹ In applying that test, it concluded that Christman received specific orders from DPH (to sign standing orders, collaborative agreements, and obtain a personal NPI number), that Christman willfully refused to follow those orders, and that under the circumstances, DPH's orders were reasonable and valid. The MERB reasoned that Christman did not have any reasonable belief that the orders she received from DPH might risk disciplinary action against her license or cause her to incur personal liability. In conclusion, the MERB determined that termination was the appropriate penalty when Christman "dug in her heels" and left DPH no choice but to terminate her.¹⁰

In support of her contention that she had an objectively reasonable belief that by signing the standing orders she could jeopardize her medical license, Christman argues that did not have necessary authority to sign standing orders and supervise non-physicians. She argues that, while Ellis was employed at DPH as a Medical Director, Ellis, not Christman, had the sole authority for direct supervision over the clinics and standing orders. She further argues that DHSS provided only generalities

⁸ Merit R. 12.1, *available at* <http://www.delawarepersonnel.com/mrules/>.

⁹ The legal elements for the offense of insubordination are: "(1) an employee must refuse to obey an order (or rule or regulation); (2) the refusal must be willful; and (3) the order (or rule or regulation) must be reasonable and valid." *Butts v. Higher Educ. Interim Governing Bd./Shepherd College*, 569 S.E.2d 456, 459 (W.Va. 2002).

¹⁰ R. at 14.

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as to the extent of her authority and that Christman's signing of standing orders and collaborative agreement would be outside the scope of the general authority DHSS granted her.

The MERB concluded, by reviewing the Nursing Practice Act, the collaborative agreements and Christman's performance plan, that DPH had properly assured Christman that she had the necessary authority to sign standing orders. The MERB heard testimony from Rattay and Webb describing the steps DPH took to address Christman's concerns regarding the necessary authority to sign standing orders, which included obtaining a legal opinion from DAG Reardon on the issue. While Ellis, not Christman, originally had authority to sign standing orders, the MERB was presented evidence of the restructuring of the Medical Director position which would grant the necessary authority to Christman, as the new sole Medical Director. As mentioned, the MERB concluded that Christman was granted the necessary authority to sign and enforce standing orders and collaborative agreements.

This Court will not reexamine the evidence presented to an administrative board in order to reach its own factual conclusions.¹¹ The court's role is to determine if the MERB's decision is sustainable.¹² Christman does not advance any persuasive evidence or reasoning to explain why the MERB decision is not supported by the evidence presented or is legally incorrect. She simply restates or reargues that she

¹¹ *Gibson v. Merit Emp. Relations Bd.*, 2010 WL 2877234, at *4 (Del. Super. June 17, 2010).

¹² *Id.*

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didn't have the necessary authority to sign standing orders and collaborative agreements. The MERB considered the evidence, analyzed any discrepancies in the testimony, and found that the DPH had assured Christman that she had the necessary authority to sign standing orders and collaborative agreements and that she was granted that authority, and that DAG Reardon's opinion would not require a doctor to "assume responsibility for day to day activities of each individual employee in the facilities where the standing orders apply."¹³ These findings are supported by substantial evidence.

Turning to the NPI number, Christman contends that the MERB erred in holding that she was insubordinate for refusing to obtain an individual NPI number; that an NPI number is not a pre-requisite for the Medical Director position; that DPH did not have a legal right to compel her to obtain an NPI number to keep her job; that she never categorically refused to obtain an NPI number, but wanted insurance to protect her against personal liability from the use of such number; that she believed that Ellis had alleged problems with inappropriate use of his personal NPI number and that the federal government had sought significant sanctions against institutions and individuals for the inappropriate expenditures of federal monies in relation to NPI numbers; and that her belief that she could be subject to personal liability is reasonable because there is no explanation as to why the federal government could not go after her based on improper billing.

The MERB found that Christman's belief that she might be subject to personal

¹³ R. at 12.

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liability if she obtained an individual NPI number was speculative, based on anecdotal information and not sufficient to support any reasonable belief of personal liability for obtaining an individual NPI number; that she would enjoy qualified immunity from personal liability as long as her conduct was not willful or wanton; that she would be entitled to legal representation from the Department of Justice for acts within the scope of her employment; that as a state employee she would be entitled to indemnification; and that she was insubordinate for refusing to obtain an individual NPI number.

In reaching these conclusions, the MERB thoroughly considered evidence presented by Christman regarding information she learned about the federal government pursuing medical institutions and individual physicians regarding the misuse of NPI numbers. The information Christman provided was from the 1990's, years ago, and was vague and unsubstantiated by actual facts. Christman's other evidence, the testimony of Ellis, did not support Christman's assertions. Ellis testified that his NPI number was not involved in his concerns raised by Christman. The MERB ultimately concluded, based on the evidence presented by Christman, that Christman's belief of possible personal liability was unreasonable. I find that the MERB's findings are supported by substantial evidence.

Finally, Christman contends that the MERB erred by not admitting Christman's Pre-Decision Statement as an exhibit for the MERB's consideration. The document, however, was included as Grievant Exhibit 20 and was admitted for the MERB's consideration.

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CONCLUSION

The decision of the MERB is **affirmed**.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
File