FLEISCHMAN v. BOARD OF EXAMINERS IN PODIATRY

22 Conn. App. 181 (1990) | Cited 6 times | Connecticut Appellate Court | July 3, 1990

This is an appeal from a decision of the SuperiorCourt dismissing the plaintiff's appeal from adecision of the state board of examiners in podiatry(board) suspending the plaintiff from the practice ofpodiatry for thirty days and fining him $3500. Weaffirm the trial court's judgment.

Under General Statutes 20-59 (4), the board may takedisciplinary action against any practitioner whoengages in illegal, incompetent or negligent conduct.

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In this case, the department of health services(department) presented the board with a statement ofcharges alleging that the plaintiff had violatedGeneral Statutes 20-59 (4) in one or more of thefollowing ways while performing foot surgery on apatient, Helen Lally, in January and February, 1986.The plaintiff (1) did not keep accurate or adequatemedical records, (2) did not adequately record thepostsurgery condition of a patient, (3) failed topreserve adequately articular cartilage during a jointreconstructive procedure, (4) left large spikes of boneover a phalangeal joint, (5) caused traumatic arthritisto the phalangeal joint, (6) caused nerve entrapment,(7) performed an unauthorized sesamoidectomy, (8)performed an unauthorized partial sesamoidectomy, (9)did not document adequate preoperative care, (10) didnot document adequate postoperative care, and (11) didnot ensure sterile conditions prior to surgery.

The board commenced hearings on the charges onJanuary 13, 1988, and issued a memorandum of decisionon September 9, 1988. The board dismissed sections (3)through (6) of the above statement of charges on thebasis of insufficient evidence. The board found thatthe plaintiff was negligent in failing to take an axialview X ray of the patient's foot. In his brief to thiscourt, the plaintiff contends that the failure to takethe X ray was not included in the statement of charges.

The plaintiff unsuccessfully appealed to theSuperior Court. In his brief before this court, theplaintiff states that he wants to raise the same sixclaims that he made before the Superior Court and thathe "will discuss the claims and the trial court's viewin series." The plaintiff's brief covers only the firstfour claims, however. "`"Assignments of error which aremerely mentioned but not briefed beyond a statement ofthe claim will be deemed abandoned and will not be

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reviewed by this court."'" State v. Ramsundar, 204 Conn. 4,16, 526 A.2d 1311, cert. denied, 484 U.S.

955, 108S.Ct. 348, 98 L.Ed.2d 374 (1987).

What we will consider in this appeal are theplaintiff's claims that the board (1) lacked jurisdictionbecause it was improperly constituted, (2) deprived theplaintiff of due process by applying standards of carethat had not been promulgated in agency regulations orestablished on the record through expert testimony, (3)erroneously admitted the expert testimony of a memberof the board, and (4) erroneously found him negligentan a specification not contained in the statement ofcharges.

The board is an agency within the meaning of GeneralStatutes 4-166 (1) and is subject to the provisions ofthe Uniform Administrative Procedure Act (UAPA),General Statutes 4-166 et seq. See Donis V. Board ofExaminers in Podiatry, 207 Conn. 674, 682, 542 A.2d 726(1988). The scope of review of administrative appealsis well settled. We do not retry the facts or substituteour judgment for that of the board. GriffinHospital v. Commission on Hospitals & Health Care,200 Conn. 489, 496, 512 A.2d 199, appeal dismissed,479 U.S. 1023, 107 S.Ct. 781, 93 L.Ed.2d 819 (1986). Also,judicial review of administrative conclusions of law islimited to a determination of whether, in light of theevidence, those conclusions are unreasonable,arbitrary, illegal or an abuse of discretion.[1] Id.

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I

The plaintiff's first claim is that the board lackedsubject matter jurisdiction to adjudicate the statementof charges brought by the department because the boardwas not duly constituted as required by law. GeneralStatutes 20-51 provides that the board shall consist offive members: three resident practicing podiatrists ofgood standing and two public members. General Statutes4-9a (b) provides in part: "Public members shallconstitute not less than one third of the members ofeach board and commission within the executivedepartment . . . ." Also, General Statutes 19a-8 and19a-14 (b) (14) require that public members comprise notless than one third of the board. Public members areelectors of the state who are not affiliated with theprofession licensed by the board. General Statutes 4-9a(b).

The board that heard the charges against the plaintiffconsisted of two practicing podiatrists and onepublic member. According to a stipulation that theparties filed in the Superior Court on March 17, 1989,the board consisted of five podiatrists and no publicmembers from 1977 to 1979. In 1980, however, themembership was changed to consist of three podiatristsand two lay persons. The board retained thatcomposition through 1983. From 1984 through 1986 thetwo public members' slots were vacant. In 1987 theboard consisted of three podiatrists and one publicmember. In early 1988 the board consisted of twopodiatrists and one public member. The Superior Courtfound that Martin M. Pressman, a podiatrist, wasappointed to the board in February, 1988, but wasdisqualified from the plaintiff's case.

The Superior Court, in its memorandum of decision,correctly explained why the plaintiff's contention that

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the board was illegally constituted must be rejected.We reiterate those reasons here. As our Supreme Courtstated in an analogous context: "`The almost universallyaccepted common-law rule is . . . [that] a majorityof a quorum constituted of a simple majority of acollective body is empowered to act for the body.'FTC v. Flotill Products, Inc., 389 U.S. 179, 183, 88S.Ct. 401, 19 L.Ed.2d 398 (1967). `In the absence oflegislative restriction, the general rule is that acommittee or commission performing such functions asthose exercised by the zoning commission in this casecan take valid action at a meeting of which all membershave proper notice and at which a majority arepresent.' Strain v. Mims, 123 Conn. 275, 281,193 A. 754 (1937), and cases therein cited. There is noprovision in chapter 372 of the General Statutes, whichcreates the board of chiropractic examiners, thatabrogates the common law rule. Further, `[w]ordspurporting to give a joint authority to several personsshall be construed as giving authority to a majority ofthem'; General Statutes 1-1 (h); and `[t]he rule isthat all bodies charged with the performance of publicduties continue to function though a vacancy exists.'Brein v. Connecticut Eclectic Examining Board,103 Conn. 65, 87, 130 A. 289 (1925). A board may act aslong as there exists a quorum equal to a majority ofall the actual members of the board. Lee v. Board ofEducation, 181 Conn. 69, 83-84, 434 A.2d 333 (1980);U.S. Vision, Inc. v. Board of Examiners for Opticians,15 Conn. App. 205, 213, 545 A.2d 565 (1988) (`[t]womembers of the board constitute a majority and have allof the authority that is granted to a three memberboard'). The failure of the governor to appoint laymembers to the state optometry board did not deprivethe board of the power to act where a quorum equal to amajority of members of the board existed during thetransaction of the business

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involved. Serian v. State, 297 S.E.2d 889, 893 (W. Va.1982)." Levinson v. Board of Chiropractic Examiners,211 Conn. 508, 539-40, 560 A.2d 403 (1989).

The plaintiff relies on Dubaldo v. Department of ConsumerProtection, 209 Conn. 719, 552 A.2d 813 (1989) insupport of his claim that the board was illegallyconstituted. In Dubaldo, the court held that the stateelectrical work examining board was without authorityto suspend the license of an electrical contractorbecause the two members of the board who were requiredby General Statutes 20-331 to be engaged in the electricalcontracting business were, in reality, union employees.Contrary to the assertion in the plaintiffs brief,this case does not involve the improper constitutionof an executive board as did Dubaldo because thereis no dispute in the present case that two membersof the board really are practicing podiatrists, asrequired by General Statutes 20-51. This is a caseinvolving a vacancy on an executive board, and itis controlled by Levinson v. Board of ChiropracticExaminers, supra, and U.S. Vision, Inc. v. Board ofExaminers for Opticians, supra.

In his brief, the plaintiff states that the SuperiorCourt wrongfully held that, "the board could functionwith a majority of its three podiatrists." Thisis an inaccurate characterization. The trial courtfound that at the time of the hearing, the boardconsisted of two podiatrists and one lay person, andthat the third podiatrist, Pressman, who was appointedto the board in February, 1988, after hearings in theplaintiff's case had already started in January, wasdisqualified from sitting on the board for theremainder of the hearings. We are confident that theplaintiff's mischaracterization was inadvertent for itdoes not benefit his cause. Even if the board in thiscase consisted of three podiatrists and one lay person,so that the ratio of one in three required by General

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Statutes 19a-8 was destroyed, our Supreme Court has heldthat an executive board lacking a one in three ratiodue to a vacant public member position still hasjurisdiction to conduct disciplinary hearings. Levinsonv. Board of Chiropractic Examiners, supra, 539.

There is no merit to the plaintiffs first claim.

II

The plaintiffs second claim is contrary to the ruleof law as enunciated in Jaffe v. State Department ofHealth, 135 Conn. 339, 348-50, 64 A.2d 330 (1949). Theplaintiff claims that he was deprived of due processbecause the board did not promulgate, pursuant to theUAPA, regulations governing the standard of care to beemployed in the practice of podiatry, and becausestandards of care in podiatry were not establishedthrough expert testimony at his hearing.

Jaffe held that medical examining boards have expertisein the standards of care in their professionsbecause they are comprised of practicing members of theprofession. Id. "It is to be presumed that the membersof the defendant board, as composed under the statute,are qualified to pass upon questions of professionalconduct and competence." Leib v. Board of Examinersfor Nursing, 177 Conn. 78, 89, 411 A.2d 42 (1979).

The passage of Public Acts 1977, No. 77-614, whichchanged the composition of medical examining boards toinclude public members, did not vitiate the rule ofJaffe and Leib. Levinson v. Board of ChiropracticExaminers, supra, 522-33. In Levinson, the court heldthat expert testimony on standards of care is notrequired in disciplinary hearings before medicalexamining boards. Id., 533.

If medical examining boards can rely on their ownexpertise on standards of care in disciplinaryhearings, then they need not promulgate administrative

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regulations governing the standard of care. The UAPAprovides that any agency may use its experience, technicalcompetence and specialized knowledge in the evaluationof evidence in contested cases. See General Statutes4-178 (6).

The plaintiff admits that there was expert testimonyat the hearing on the standards of care in podiatry.Pressman offered such testimony. The plaintiff arguesthat Pressman's testimony was so general as to be"virtually irrelevant." The probative value of the evidencewas for the board to determine in the first instance,and that determination will not be disturbed on appealunless it was arbitrary or an abuse of discretion. SeeGriffin Hospital v. Commission on Hospitals & HealthCare, supra. Moreover, even supposing that Pressman'stestimony was completely irrelevant, the board was notrequired to hear expert testimony on standards of carein the first place. Levinson v. Board of ChiropracticExaminers, supra.

III

The plaintiffs third claim is that he was deprived ofdue process in that Pressman's testimony should nothave been permitted because he was a member of theboard when he testified, which created a risk of biasor undue influence on the board. The Superior Courtmade the following relevant findings of fact. Thedepartment selected Pressman to testify as an expertwitness in the case. At the second hearing, the boardannounced that Pressman had been appointed to the boardbut would not participate in the board's considerationof the plaintiff's case. Each board member indicatedon the record that he had no involvement with theselection of Pressman and that each would not be undulyinfluenced by Pressman's appointment in weighing histestimony. Pressman did not participate in the decisionof the board. On the basis of these facts, the

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Superior Court concluded that the plaintiff had made noshowing of bias or undue influence. The record supportsthis conclusion.

We agree with the Superior Court that the plaintiffhas failed to show that he was denied due processbecause of Pressman's testimony. Even if Pressman hadsat as a member of the board in this case, the plaintiffwould not have been deprived of due process. "`The[UAPA] does not and probably should not forbid thecombination with judging of instituting proceedings,negotiating settlements, or testifying.'" Withrow v.Larkin, 421 U.S. 35, 56 n. 24, 95 S.Ct. 1456, 43 L.Ed.2d712 (1975), quoting 2 K. Davis, Administrative LawTreatise 13.11, p. 249 (1958). In Withrow v. Larkin,the court held that it is not a violation of dueprocess for an agency to investigate and bring chargesagainst a person, and then to adjudicate those charges.Id., 58; see also Annot.: Suspension or Revocation ofMedical or Legal Professional License as Violating DueProcess/Federal Cases, 98 L.Ed. 851, 864 (1954).Likewise, there would seem to be no inherent unfairnessin allowing a member of a medical examining board totestify as to standards of care and also to take partin adjudicating the claim. Although the plaintiff

asksus to resolve this question today, based on his claimthat Pressman sat as a member of the board, thequestion is in fact entirely irrelevant to this appealbecause Pressman did not participate in the board'sadjudication. There is no merit to this due processclaim.

IV

Finally, the plaintiff claims that he had inadequatenotice of one of the charges against him. In section(9) of the statement of charges, the plaintiff wascharged with "failure to document adequate pre-operativecare." The board found that the plaintiffs negligentfailure to take a pre-operative axial view X ray of the

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patient's foot violated General Statutes 20-59 (4), asalleged in section (9) of the statement of charges. Theboard ordered the plaintiff to pay a $500 fine for theviolation contained in section (9).

The plaintiff had a due process right to notice ofthe charges against him. Morgan v. United States,304 U.S. 1, 18, 58 S.Ct. 773, 82 L.Ed. 1129, reh.denied, 304 U.S. 23, 58 S.Ct. 999, 82 L.Ed. 1135(1938). "The procedures required by the UAPA exceed theminimal procedural safeguards mandated by the dueprocess clause." Adamchek v. Board of Education,174 Conn. 366, 369, 387 A.2d 556 (1978). General Statutes4-177 (b) provides that "notice shall include: (1)A statement of the time, place, and nature of thehearing; (2) a statement of the legal authority andjurisdiction under which the hearing is to be held; (3)a reference to the particular sections of the statutesand regulations involved; (4) a short and plainstatement of the matters asserted. If the agency orother party is unable to state the matters in detail atthe time the notice is served, the initial notice maybe limited to a statement of the issues involved.Thereafter upon application a more definite anddetailed statement shall be furnished."

If the notice of charges does not fairly apprise theperson of the nature of the offense with which he ischarged, the court may set aside the order of an agencyfor deficiency of notice. Murphy v. Berlin Board ofEducation, 167 Conn. 368, 374-75, 355 A.2d 265 (1974)."[T]he test of whether one is given adequate notice iswhether it apprises him of the claims to be defendedagainst, and on the basis of the notice given, whetherplaintiff could anticipate the possible effects of theproceeding." Goranson v. Department of Registration,92 Ill. App.3d 496, 500, 415 N.E.2d 1249 (1980).

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The Superior Court found that section (9) of thestatement of charges adequately apprised the plaintiffof "the nature of the negligence the board found withrespect to his failure to take an X ray of thepatient's foot before operating." The plaintiff arguesthat he was deprived of due process because he wascharged with the offense of failure to documentpreoperative care, but was found to have

committed theoffense of failure to take a necessary X ray. We rejectthis argument because the plaintiff was in fact chargedin section (9) with "failure to document adequatepre-operative care. The board found that an axial viewX ray of the patient's foot was an essential part ofadequate preoperative care in this case. Of course, theplaintiff could not document or otherwise keep recordsof an X ray he never took. The plaintiff was notcharged, however, in section (9) with failure todocument adequately preoperative care.[2] He wascharged with failure to document adequate preoperativecare. Because the plaintiff did not provide adequatepreoperative care, he could not document adequatepreoperative care. Thus, he committed the violationalleged in section (9) of the statement of charges.There is no doubt that the plaintiff had adequatenotice of the charge in section (9).

The judgment is affirmed.

In this opinion the other judges concurred.

1. The Academy of Ambulatory Foot Surgery hasfiled an amicus brief for the plaintiff. Only two pagesof the amicus brief address the issues raised in thisappeal. The remainder consists of allegations thatpractitioners within the mainstream of podiatry areorganized in an attempt to suppress the practice ofminimal incision surgery. The petitioner in this casehas been a minimal incision surgeon. We simply notethat the petitioner and the amicus curiae have failedto show any hint of abuse of prosecutorial discretionon the part of the department of health services inthis case.

2. Section (1) of the statement of chargesalleged that he did not keep accurate or adequatemedical records.Page 193