

[Cite as *Blaine v. OhioHealth Corp.*, 2011-Ohio-4925.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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|--------------------------------|---|----------------------------|
| James E. Blaine, Jr., D.P.M., | : | |
| Plaintiff-Appellant, | : | |
| v. | : | No. 10AP-1137 |
| | : | (C.P.C. No. 10CVH-8-12756) |
| OhioHealth Corporation et al., | : | (ACCELERATED CALENDAR) |
| Defendants-Appellees. | : | |

D E C I S I O N

Rendered on September 27, 2011

Richard Cline & Co., LLC, and Richard A. Cline, for appellant.

Bricker & Eckler LLP, James J. Hughes, III, Vladimir P. Belo, and Allen R. Killworth, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, James E. Blaine, Jr., D.P.M., appeals from a judgment of the Franklin County Court of Common Pleas in which the trial court granted summary judgment in favor of appellees, OhioHealth Corporation ("OhioHealth") and Grady Memorial Hospital ("the hospital"). For the following reasons, we affirm.

{¶2} Appellant graduated from the Ohio College of Podiatric Medicine in 2002. In March 2005, he joined the staff of the hospital in Delaware, Ohio and successfully completed a 36-month residency program in podiatric medicine and surgery. The hospital is a member of the OhioHealth system.

{¶3} On December 21, 2005, the hospital granted appellant clinical privileges, which he exercised until June 30, 2007. The hospital reappointed appellant on March 25, 2009 for a two-year term ending on March 24, 2011.

{¶4} The parties stipulated that, in 2005 and again in 2008, appellant acknowledged in writing that he was subject to the hospital's medical staff bylaws. Pursuant to the hospital's bylaws, each practitioner must satisfy several requirements in order to maintain medical staff appointment and privileges. One of those requirements, §3.2-2(b), states that each practitioner must:

Have completed an approved residency program for a Physician, Dentist, Oral Surgeon or Podiatrist and Board certification within five (5) years of residency or fellowship completion. Board certification and/or residency program must have been in the specialty in which the Practitioner seeks Privileges. Recognized certification boards are the: American Board of Medical Specialties, American Osteopathic Association, American Board of Oral & Maxillofacial Surgery, and American Board of Podiatric Surgery or the American Board of Professional Psychology. Exceptions to board certification may be recommended to the Board by the Medical Executive Committee after considering current competence.

{¶5} To satisfy the board-certification requirement in §3.2-2(b), appellant attempted to obtain certification from the American Board of Podiatric Surgery ("ABPS"); however, he failed the written examination in June 2005, June 2007, June 2009, and June 2010. While appellant was waiting to receive the results of the June 2010

examination, he asked the hospital to extend the five-year certification deadline in §3.2-2(b), which was currently scheduled to expire on June 30, 2010. The hospital agreed and permitted him to obtain the requisite certification by September 1, 2010.

{¶6} On July 7, 2010, appellant mailed a letter to Cathy Holloway, project manager of the hospital's medical staff services department, announcing that he would not seek certification from ABPS but would instead seek certification from the American Board of Lower Extremity Surgery ("ABLES"), a board not included among the list of "recognized certification boards" set forth in §3.2-2(b). Appellant stated his belief that the hospital's bylaws did not require certification through ABPS, and that any such requirement would violate the hospital's nondiscrimination policy as set forth in §3.5 of the bylaws.

{¶7} On July 16, 2010, Thomas P. Hubbell, M.D., the Medical Staff President and Medical Executive Committee ("MEC") Chair, responded, by way of letter, to appellant's July 7, 2010 correspondence, which Dr. Hubbell construed as a "request" for alternate board certification. The letter informed appellant that the Credentials Committee and the MEC reviewed and denied the request, and that appellant was required to submit documentation of ABPS certification by September 1, 2010.

{¶8} On August 1, 2010, appellant obtained certification from ABLES. By letter dated August 1, 2010, ABLES notified appellant that his status would not be elevated to "Board Certified in Podiatric Surgery" until his satisfactory completion of ABLES case-study requirements.

{¶9} On August 2, 2010, appellant requested a hearing under §15.1-1 of the hospital's bylaws. The hospital denied the request in a letter dated August 12, 2010,

and informed appellant of its position that §15.2-3(a) of the bylaws did not require a hearing because the hospital's action was based solely on appellant's "administrative or technical failings."

{¶10} Appellant filed a complaint in the Franklin County Court of Common Pleas on August 30, 2010, seeking injunctive relief, declaratory judgment, and monetary damages. The trial court, following a hearing, issued a preliminary injunction on September 1, 2010, enjoining the hospital from terminating, revoking, suspending or limiting appellant's staff appointment and privileges.

{¶11} The parties filed cross-motions for summary judgment and stipulations of fact. On November 12, 2010, after a hearing on the motions, the trial court issued its decision and entry granting summary judgment in favor of the hospital and dissolving the injunction.

{¶12} Appellant now appeals, presenting the following five assignments of error for our consideration:

ASSIGNMENT OF ERROR NO. 1

The Trial Court Erred As a Matter of Law in Failing to Consider, Much Less Determine, That the Appellee-Hospital's Bylaws Require Board Certification Generally, and Not By a Particular Certifying Organization Selected by the Hospital.

ASSIGNMENT OF ERROR NO. 2

The Trial Court Erred As a Matter of Law in Failing to Consider, Much Less Determine, That the Appellee-Hospital's Termination of Appellant's Staff Membership and Clinical Privileges Violates the Hospital's Own Bylaws, at §3.4 and §3.5, Which Prohibit the Denial of Clinical Privileges Based Solely on Whether the Practitioner Is Certified to Practice Podiatry.

ASSIGNMENT OF ERROR NO. 3

The Trial Court Erred As a Matter of Law in Holding that the Appellee-Hospital's Termination of Appellant's Staff Membership and Clinical Privileges Does Not Violate the Non-Discrimination Provisions of R.C. 3701.351.

ASSIGNMENT OF ERROR NO. 4

The Trial Court Erred As a Matter of Law in Holding that the Appellee-Hospital Did Not Abuse Its Discretion In Terminating Appellant's Staff Membership and Clinical Privileges, In Violation of Its Own Bylaws and R.C. 3701.351.

ASSIGNMENT OF ERROR NO. 5

The Trial Court Erred As a Matter of Law in Holding that the Appellee-Hospital Did Not Abuse Its Discretion and/or Violate Its Bylaws By Failing to Provide Appellant a Pre-Termination Hearing.

{¶13} Because all five assignments of error challenge the trial court's decision granting summary judgment, we must review each under a de novo standard. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, ¶8. To obtain summary judgment, the movant must show that (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion when viewing evidence in favor of the nonmoving party and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶29. The movant bears the initial burden of informing the trial court of the basis for the motion and of identifying those portions of the record demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107.

{¶14} In his first assignment of error, appellant argues that the hospital misapplied §3.2-2(b) of its bylaws by terminating his medical staff appointment and privileges based on his failure to obtain ABPS board certification. We disagree.

{¶15} Section 3.2 of the hospital's bylaws requires "every practitioner" seeking medical staff appointment and privileges to comply with the general qualifications enumerated in that section. Pursuant to §3.2-2(b), each practitioner must:

Have completed an approved residency program for a Physician, Dentist, Oral Surgeon or Podiatrist and Board certification within five (5) years of residency or fellowship completion. Board certification and/or residency program must have been in the specialty in which the Practitioner seeks Privileges. Recognized certification boards are the: American Board of Medical Specialties, American Osteopathic Association, American Board of Oral & Maxillofacial Surgery, and American Board of Podiatric Surgery or the American Board of Professional Psychology. Exceptions to board certification may be recommended to the Board by the Medical Executive Committee after considering current competence.

{¶16} Appellant asserts that he complied with this provision by obtaining board certification through ABLES, even though ABLES is not among the "recognized certification boards" listed in the section. Appellant contends that the section does not actually require ABPS certification because "the language does not expressly state that the Practitioner must obtain board certification 'from one of the recognized certification boards listed herein.' " (Appellant's Brief at 8, emphasis sic.)

{¶17} We find appellant's interpretation of §3.2-2(b) to be unpersuasive. By delineating "recognized certification boards," the section expressly requires each practitioner to obtain board certification from one of the listed boards. It would be redundant for the section to state that a practitioner "must" obtain certification from a

"recognized" board, as appellant suggests. With the adjective "recognized," the section already connotes that a practitioner *must* obtain board certification through one of the specified certification boards. It necessarily follows that the hospital will *not* recognize certification from any other board. Accordingly, we find that §3.2-2(b) unambiguously requires practitioners seeking staff appointments and privileges to obtain board certification from one of the "recognized certification boards" delineated in that section. Appellant was therefore required to obtain board certification from ABPS, the only "recognized certification board" specializing in podiatry.

{¶18} Next, appellant argues that the hospital violated §3.2-2(b) in a different respect and points to the last sentence of that section, which states that "[e]xceptions to board certification may be recommended to the Board by the [MEC] after considering current competence." Appellant contends that, even if ABPS certification were required, the hospital violated this provision by refusing to "exercise its discretion and even consider [appellant's] request for an exception" to the ABPS certification requirement. (Appellant's Brief at 8.)

{¶19} We first note that it is unclear whether appellant actually "requested" any exception to the ABPS-certification requirement. In his July 7, 2010 letter, appellant informed an employee of the hospital that he had unilaterally decided to "eschew certification by the ABPS" and obtain certification from ABLES instead. Although the letter briefly referenced the provision for "exceptions" in §3.2-2(b), appellant made clear that he was already in the process of obtaining ABLES certification and not ABPS certification. Nevertheless, the hospital construed appellant's letter as a request for ABLES certification, as evidenced by the letter mailed to appellant by the medical staff

president on July 16, 2010. Contrary to appellant's claim that the hospital did not consider ABLES certification, the July 16, 2010 letter stated that the MEC "review[ed]" and "denied" appellant's request for ABLES certification, noting that ABPS certification was still required.

{¶20} Even if the hospital did not adequately consider appellant's "request" for exceptions to ABPS certification, the hospital was not required to consider such a request. The language in §3.2-2(b) is permissive and allows exceptions to be recommended only by the MEC, not practitioners themselves. There is simply nothing in §3.2-2(b) that *required* the hospital to consider appellant's request for alternative board certification without such recommendations being made by the MEC. Appellant's first assignment of error is overruled.

{¶21} For ease of discussion, we will address appellant's remaining assignments of error out of order.

{¶22} Appellant's third and fourth assignments of error argue that the hospital violated R.C. 3701.351(B) and abused its discretion by requiring appellant to obtain ABPS board certification. Because these two assignments of error are interrelated, we will address them together.

{¶23} The board of a private hospital has broad discretion in determining who shall be permitted to have staff privileges. *Bouquett v. St. Elizabeth Corp.* (1989), 43 Ohio St.3d 50, paragraph one of the syllabus. "Courts should not interfere with the exercise of this discretion unless the hospital has acted in an arbitrary, capricious or unreasonable manner or, in other words, has abused its discretion." *Id.*, citing *Khan v. Suburban Community Hosp.* (1976), 45 Ohio St.2d 39. Because it is the board, not the

court, which is charged with the responsibility of providing a staff of competent physicians, "a reviewing court should not 'stray[] into a morass of error,' by substituting its judgment for that of the hospital's trustees." *Christenson v. Mt. Carmel Health* (1996), 112 Ohio App.3d 161, 168, quoting *Khan* at 43.

{¶24} Although a hospital maintains considerable discretion in the selection of staff, courts cannot rely on such discretion "where *class-wide* discrimination is extant as delineated in R.C. 3701.351(B)." *Dooley v. Barberton Citizens Hosp.* (1984), 11 Ohio St.3d 216, 219 (emphasis sic). In pertinent part, R.C. 3701.351(B) states that the governing body of a hospital "shall not discriminate against a qualified person solely on the basis of whether that person is certified to practice medicine, osteopathic medicine, or podiatry, or licensed to practice dentistry or psychology."

{¶25} Appellant argues that, even if the hospital's bylaws require ABPS certification for podiatrists, then the bylaws improperly discriminate against those podiatrists who obtain certification through other podiatric boards. We disagree.

{¶26} R.C. 3701.351(B) applies only in cases of "class-wide" discrimination, i.e., where a hospital discriminates against a practitioner based solely on that practitioner's *specialization* to practice in a particular field. *Holt v. Good Samaritan Hosp. & Health Ctr.* (1990), 69 Ohio App.3d 439, 445. In *Dooley*, for instance, the Supreme Court of Ohio found that the hospital discriminated against a practitioner based solely on his certificate to practice podiatry. There, the hospital's bylaws denied surgical privileges to *all* podiatrists and relegated them to the status of "Limited Courtesy Staff," a designation which prohibited them from voting, holding office or advancing within the hospital hierarchy. Because the bylaws did not impose such restrictions on other classifications

of practitioners, the Supreme Court determined that the bylaws "were patently discriminatory against podiatrists as a *class*" and served "no rational purpose other than discrimination against a particular *classification* of practitioner." *Id.* at 220-21 (emphasis added). As such, the court concluded that the restrictions were illegally discriminatory because they were "not reasonably related to a determination of whether or not the podiatrist is qualified." *Id.* at 220.

{¶27} In this case, however, the hospital did not terminate appellant's staff privileges based solely on appellant's classification as a podiatrist. Instead, appellant failed to obtain board certification from ABPS, one of the basic requirements necessary for a podiatrist to maintain staff appointment and privileges at the hospital. This requirement is not discriminatory because every practitioner, regardless of their specialty, must obtain certification from one of the "recognized" boards in order to maintain privileges at the hospital. Thus, the hospital's requirement for podiatrists to obtain ABPS board certification does not result in "class-wide discrimination," and appellant's reliance on R.C. 3701.351(B), as interpreted by *Dooley*, is misplaced.

{¶28} Because R.C. 3701.351(B) does not apply to the facts herein, we must now turn to appellant's remaining argument that the hospital abused its discretion by requiring appellant to obtain board certification through ABPS. "[A]bsent the class-wide discrimination as the court was concerned with in *Dooley*, * * * the board of trustees of a hospital still has substantial discretion in adopting bylaws and standards applicable to all applicants for medical staff privileges, provided such criteria are reasonable and nondiscriminatory as outlined in *Khan*." *Siegel v. St. Vincent Charity Hosp. & Health Ctr.* (1987), 35 Ohio App.3d 143, 151.

{¶29} In *Khan*, the Supreme Court held that requiring a practitioner "to meet the standards required of all physicians on the hospital staff cannot be arbitrary, capricious or unreasonable." *Id.* at 45. The hospital's bylaws in *Khan* allowed surgical staff privileges to only those physicians who met one of four requirements, and the only requirement that Dr. Khan could possibly satisfy was the requirement that he become a fellow of the American College of Surgeons. When he failed to meet this requirement within the timeframe set forth in the bylaws, the hospital informed him that his privileges would be terminated.

{¶30} In upholding the hospital's bylaws, the Supreme Court held that, where a hospital adopts "reasonable, nondiscriminatory criteria for the privilege of practicing major general surgery," procedural due process is satisfied, and courts should not substitute their judgment for that of the board and order the granting of such specialty privileges to the physician. *Khan* at syllabus. Because Dr. Khan was held to the standard "required of all physicians on the hospital staff," the court held that the hospital's bylaws could not be considered arbitrary, capricious or unreasonable. *Id.* at 45. Although *Khan* was decided before the enactment of R.C. 3701.351, the Supreme Court has reaffirmed its holding since the enactment of the statute. See *Bouquett* at syllabus; see also *Nemazee v. Mt. Sinai Med. Ctr.* (1990), 56 Ohio St.3d 109, 114 (stating that *Bouquett* "reaffirmed" the principle set forth in *Khan*).

{¶31} Likewise, in this case, we do not find the board-certification requirement in §3.2-2(b) to be arbitrary, capricious or unreasonable, given that it applies to all practitioners seeking staff appointment and privileges. Each practitioner must obtain board certification from one of the "recognized certification boards" depending on their

specialization. Because ABPS is the recognized certification board in podiatry, §3.2-2(b) requires that all podiatrists obtain ABPS certification within five years. Although appellant argues that other certifying boards, such as ABLES, are highly regarded in podiatry, deciding which certification boards meet the hospital's standards falls within the discretion and expertise of the hospital board. This court will not substitute its judgment for that of the hospital in such matters. *Bouquett* at 53, citing *Khan* at syllabus. Appellant has failed to present any evidence showing that the hospital acted in an arbitrary, capricious or unreasonable manner by requiring podiatrists to obtain board certification from ABPS.

{¶32} Accordingly, appellant's third and fourth assignments of error are overruled.

{¶33} We now turn to appellant's second assignment of error, in which appellant argues that the hospital violated §3.4 and §3.5 of its bylaws by terminating his staff appointment and privileges based solely on his failure to obtain board certification through ABPS.

{¶34} First, appellant relies on §3.5, which contains wording substantially similar to R.C. 3701.351(B), and provides that "no qualified Practitioner shall be denied appointment and/or Privileges based solely on whether the Practitioner is certified to practice medicine, osteopathic medicine, or podiatry, or licensed to practice dentistry or psychology." As explained in our disposition of appellant's third assignment of error, this language prohibits "class-wide discrimination" where a hospital discriminates based upon a practitioner's particular classification. Because the hospital here did not

terminate appellant's privileges based solely on his classification as a podiatrist, we find §3.5 to be inapplicable.

{¶35} Next, appellant argues that the hospital's ABPS-certification requirement violates §3.4(c), which states that "[n]o Practitioner shall be automatically entitled to appointment or to the exercise of particular Clinical Privileges merely because he/she * * * [i]s certified by any clinical board." However, as appellees correctly note, this provision is inapplicable because it prohibits a hospital from *granting* staff appointment and privileges to a practitioner based solely on that practitioner's affiliation with a particular clinical board. Here, the hospital did not grant staff privileges to appellant, nor did it do so based on appellant's affiliation with a particular clinical board. Therefore, appellant's reliance on §3.4(c) is misplaced.

{¶36} Accordingly, appellant's second assignment of error is overruled.

{¶37} In his fifth and final assignment of error, appellant argues that the hospital violated §15.2 of its bylaws by terminating his staff appointment and privileges without first holding a hearing. We disagree. Section 15.2-3(a) of the bylaws provides that a hearing is *not* required when the MEC takes action "solely for administrative or technical failings of the Practitioner." To illustrate an "administrative or technical failing," the section lists the following example: "e.g. failure of a Practitioner to satisfy the basic qualifications for Medical Staff appointment and/or Privileges."

{¶38} Here, the hospital was not required to hold a hearing because the MEC terminated appellant's staff appointment and privileges based on appellant's "administrative or technical failing," i.e., his failure to obtain board certification in accordance with §3.2-2(b). Because board certification is one of the basic qualifications

for staff appointment and privileges, §15.2-3(a) permitted the hospital to terminate appellant's privileges without first holding a hearing. Appellant's fifth assignment of error is overruled.

{¶39} Having overruled appellant's first, second, third, fourth, and fifth assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and FRENCH, JJ., concur.
