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HEALTH CARE LAW

Evaluating a Physician's Competency

Applicants for hosptial privileges may not be discriminated against on the basis of mental illness or past addiction

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There has been much discussion about whether stricter measures must be imposed on health care facilities to report actions taken against a practitioner for impairment, incompetency, misconduct, improper patient care or other issues that impact the practitioner's ability to practice with skill and competence.

Reporting suspicious behavior by a practitioner is a laudable goal. However, faced with strict reporting requirements, hospitals may be reluctant to grant medical staff privileges to physicians or other licensed health care practitioners who may have a mental illness or another type of disability. A physician's competence must be evaluated so that stereotypes and prejudices about mental illness or addiction are not a direct or indirect reason for a denial of privileges.

A physician obtains clinical privileges and medical staff membership in a hospital through a specifically delineated process set forth in the medical staff's bylaws. Traditionally, the determination of whether a physician is qualified for initial or continuing privileges is governed by his current competence and qualifications. However, issues arise when physicians are out of practice for a time or suffer from a health care condition that may necessitate some type of accommodation. Representing such a physician often requires advancing new legal arguments about the applicability of the Americans with Disabilities Act and other laws.

The medical executive committee (MEC) governs the medical staff and grants privileges to physicians and other health care providers. New Jersey case law mandates that a physician receive due process and fair accommodations during the decision-making process. The courts have stated that due process means that an applicant for medical staff privileges must be treated with fundamental fairness and that the methods used to make the decision must protect the applicant's rights. See *Garrow v. Elizabeth General Hospital*, 79 N.J. 549 (1979); *Gresiman v. Newcomb*, 40 N.J. 389 (1963).

In providing an impartial and equitable forum, the MEC must follow fair procedures when considering staff privileges, and it may not arbitrarily foreclose otherwise qualified doctors from the staff. *Belmar v. Cipolla*, 475 A.2d 533 (1984). The factors specified for the denial of privileges must be supported by credible evidence and the decision may not be arbitrary or capricious. *Guerrero v. Burlington County Memorial Hospital*, 70 N.J. 344 (1976).

An applicant for medical staff membership and clinical privileges is required to demonstrate his background, experience, education, training, competence, adherence to ethical principles of his profession, a good reputation and ability to work with others. He must also answer questions about his health status as it relates to his ability to exercise the privileges requested.

A physician with past problems or one who is subject to a New Jersey Board of Medical Examiners' (BME) Consent Order is not automatically disqualified from membership. The case law is clear that current competence is the determinate factor, not past failings or sins. "Only those physicians duly qualified and competent to exercise and have privileges at the hospital; that the medical staff had the duty to investigate and then recommend that only licensed, capable and qualified physicians exercise the various privileges at the hospital." *Corleto v. Shore Memorial Hospital*, 138 N.J. Super. 302 (1975).

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Pursuant to the bylaws, once an application for privileges is complete, the medical staff office forwards the application to the chairman of the appropriate department who then submits a report to the credentials committee. The chairman must establish the criteria for obtaining privileges in that specialty. The chairman of a department is the "gatekeeper" in the credentialing process and the credentials committee defers to his opinion. The credentials committee must investigate the qualifications and ability to adhere to the bylaws' requirements.

Upon the receipt of the credentials committee report, the MEC acts on the recommendation. A grant of membership must be based on the criteria in the bylaws and it must be uniformly applied to all applicants. The MEC weights the threshold criteria — evidence of the physician's licensure, relevant training and experience, current competence and health status. The duty to provide the physician with due process in the credentialing process — which means that the process should be fair in all aspects — is also mandated by the New Jersey courts, the American Medical Association, the Joint Commission on the Accreditation of Healthcare Organizations and the federal Health Care Quality Improvement Act. If a hospital refuses to appoint a physician to the staff for reasons related to competency, the hospital must report the action to the National Practitioners Data Bank and the BME.

If an applicant is denied privileges, he may request a fair hearing. The New Jersey Supreme Court has held that the record before the fair hearing panel must "contain sufficient reliable evidence, even though of a hearsay nature, to justify the result." *Garrow v. Elizabeth General Hospital and Dispensary*, 79 N.J. 549, 565 (1979). Further, a hospital's decisions concerning its medical staff must be reasonable, consistent with public interest and further the hospital's health care mission. *Desai v. St. Barnabas Medical Center*, 103 N.J. 79, 93 (1986); *Berman v. Valley Hospital*, 103 N.J. 100, 106-07 (1986). Most medical staff bylaws' state that the fair hearing panel must recommend in favor of the physician if it finds that he has proven that the recommendation was arbitrary, capricious, or not supported by credible evidence.

Thus, the MEC has an affirmative legal duty to act in a manner that does not discriminate against an applicant. For example, although mental health is not listed as a criterion, the courts have held that a qualified applicant may not be discriminated against on the basis of a diagnosis of mental illness, past addiction or treatment for substance abuse. In reviewing the constitutionality and fairness of procedures employed by hospitals in granting or denying staff privileges, the courts look to the general principle that a hospital must follow fair procedures when considering staff privileges, and may not arbitrarily foreclose otherwise qualified doctors from utilizing its facilities. *Ende v. Cohen*, 296 N.J. Super. 350 (1997).

The New Jersey courts have held that a hospital and its medical staff can be held liable for negligence when they fail to enforce their bylaws. *Corleto v. Shore Memorial Hospital*, 138 N.J. Super. 302 (Law Div. 1975). Because the right to determine the fitness or qualifications of a physician has been delegated to a hospital and its medical staff, it is their duty to discharge this responsibility properly. The *Corleto* court adopted a narrow interpretation of hospital corporate liability. It imposed a duty upon a hospital to remove a physician when it should have known that the physician is incompetent or an act of malpractice is likely to occur. Id. at 352. In other words, a hospital would only be held liable to a patient for granting a physician membership if he is clearly incompetent.

A proper review of an application focuses on clinical competence first, and then on how to accommodate a physician with a disability. Disability laws mandate that the parties must engage in an "interactive exchange" on the issue of a reasonable accommodation. *Mengine v. Runyon*, 114 F.3d 415, 419-20 (3d Cir. 1997). A party cannot jump to conclusions without discussing with the other party the options and issues relating to accommodating the limitations of the disability. An interactive exchange with the physician should be conducted to determine the ease of an accommodation of his status, without undue expense and hardship to a hospital.

Under both the New Jersey Law Against Discrimination and the Americans with Disabilities Act, places of public accommodation, such as hospitals, may not discriminate against an individual on the basis of a disability or handicap. 42 U.S.C. § 12182(a); N.J.S.A. 10:5-4; see generally *Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113 (3rd Cir. 1998) (holding that a physician with attention deficit disorder could maintain an ADA disability discrimination claim against a hospital, as a "public accommodation," based on suspension of hospital privileges).

New Jersey courts have consistently recognized that recovering drug abusers and alcoholics are protected as "handicapped" under the NJLAD. See, e.g., *Bosshard v. Hackensack Univ. Medical Center*, 345 N.J. Super. 78, 783 A.2d 731 (App. Div. 2001) (finding that it would be unlawful handicap discrimination in violation of the NJLAD for an employer to discharge an employee for drug addiction despite her successful completion of a drug rehabilitation program); *Fowler v. Borough of Westville*, 97 F.Supp.2d 602, 609-10 (D.N.J. 2000) (recovered drug abuser satisfied definition of handicapped under the NJLAD); *Matter of Cahill*, 245 N.J. Super. 397, 585 A.2d 977 (App. Div. 1991) (defining a drug addict as a handicapped person); *Clowes v. Terminix Int'l*, 109 N.J. 575 (1988) (holding that alcoholism is a protected handicap under the NJLAD). This finding is consistent with the general understanding that the NJLAD should be liberally construed to protect those with a mental or psychological handicap.

Likewise, the ADA protects non-using drug addicts and alcoholics from disability discrimination. See, e.g., 42 U.S.C. § 12114(b) (making clear the ADA protects from discrimination a person who has "successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs"). The ADA and NJLAD also prohibit discrimination against any individual because that person has a "record of such an impairment" or is "regarded as having such an impairment." 42 U.S.C. § 12102(2)(B)-(C).

Therefore, the MEC may not adopt a blanket rule that any recovered drug addict or person with a history of abuse or mental illness can be barred from hospital privileges. This is blatantly discriminatory and

unlawful. See, e.g., *Medical Society of New Jersey v. Jacobs*, 1993 U.S. Dist. LEXIS 14294 (D.N.J. Oct. 5, 1993) (holding that it was disability discrimination to impose or apply eligibility criteria — such as freedom from past substance abuse or mental illness — that screen out or tend to screen out individuals with a disability, unless those criteria are shown to be necessary for the job).

The MEC must provide a reasonable accommodation to the physician, as required by the ADA and NJLAD. Generally, a prima facie case of failure to accommodate requires proof that (1) the plaintiff had a handicap; (2) was qualified to perform the essential functions of the job, with or without accommodation; and (3) suffered an adverse employment action because of the handicap. *Seiden v. Marina Assoc.*, 315 N.J. Super. 451, 465-66, (Law Div. 1998).

The MEC must not lose sight of the fact that a hospital is not operated for private ends, but for the purpose of furnishing the medical facility to the medical profession. *Greisman v. Newcomb Hospital*, 40 N.J. 398, (1963). Hospitals and their medical staffs must balance the need to protect patients from instances of incompetence and unprofessional conduct against a possibility that a physician with a history of mental illness or substance abuse is impermissibly discriminated against. The process for evaluating a physician's competence must be performed in a painstaking manner free of bias. The movement to encourage facilities to report disciplinary actions against health care professionals must ensure that such actions truly constitute gross incompetence or impairment. ■