

**Matter of Pearl v Office of the Medicaid Inspector
Gen.**

2009 NY Slip Op 32492(U)

October 26, 2009

Supreme Court, Albany County

Docket Number: 5702-08

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of
RICHARD PEARL, M.D.,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

DECISION and ORDER
RJI NO.: 01-08-ST9086
INDEX NO.: 5702-08

THE OFFICE OF THE MEDICAID INSPECTOR
GENERAL, an office within the New York State
Department of Health,

Respondent.

Supreme Court Albany County All Purpose Term, October 16, 2009
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Petitioner commenced this Article 78 proceeding challenging Respondent's denial of his application to be removed from its Medicaid Disqualified Provider List. Respondent answered the petition, raised a single affirmative defense, and submitted an affirmation along with a copy

of the record before the agency below. Because Respondent's denial was arbitrary and capricious, the petition is granted and the matter is remanded to the Respondent for further proceedings in accord with this Decision and Order.

Applicable to this Article 78 proceeding, "[t]he scope of judicial review... is limited to whether respondents' decision was rationally based." (Rockland Medilabs Inc. v. New York State Dept. of Social Services, 186 AD2d 953 [3d Dept. 1992]). In other words, at issue is whether the Respondent's determination was "arbitrary and capricious." (Karanja v. Perales, 163 AD2d 264 [1st Dept. 1990], CPLR §7803[3]).

The parties do not dispute Petitioner's loss of his New York State medical license (hereinafter "medical license") and its subsequent restoration. On July 17, 2001, the New York State Board for Professional Medical Conduct revoked Petitioner's New York medical license. Such revocation, by operation of 18 NYCRR §504.7[d][1], caused Petitioner's enrollment as a Medicaid provider to be terminated. In September 2004, Petitioner applied to the New York State Education Department for restoration of his medical license. After a lengthy review process, including an investigation conducted by the New York State Education Department's Office of Professional Discipline, hearings and interviews, Petitioner's medical license was restored without restriction. As part of the re-licensure review process, The Peer Committee considered the record, the investigation and its interview of Petitioner. The Peer Committee determined that Petitioner "has met the goals of remorse, rehabilitation and reeducation." Similarly, the New York State Education Department's Committee on the Professions also considered the record before it and Petitioner's testimony in determining that Petitioner "is highly unlikely to engage again in the misconduct that led to the loss of his license."

With his medical license restored, Petitioner applied for a limited enrollment in the Medicaid program. Petitioner's application demonstrates that he does not wish to be fully enrolled as a provider of Medicaid services, because he does not wish to bill the Medicaid program. Rather, his limited enrollment seeks only the removal of his name from the Respondent's Disqualified Individuals List. Petitioner alleges, and Respondent does not deny, that inclusion on such list prevents his being granted medical staff privileges at any hospital he intends to be affiliated with. Because Respondent is an orthopaedic surgeon, his inability to work in a hospital setting effectively prohibits him from performing any surgeries or engaging in his profession. Removal from the Disqualified Individuals List, at issue in this proceeding, would allow Petitioner to again use his medical license and perform surgeries.

18 NYCRR §515.10 sets forth the standards applicable to Respondent in considering Petitioner's "Reinstatement". Contrary to Respondent's contention, Petitioner has properly sought removal of his name from the Disqualified Individuals List because he is authorized to "request reinstatement, or removal of any condition." (18 NYCRR §515.10[a][emphasis added]). Reinstatement is granted "only if it is reasonably certain that the violation(s) that led to sanction will not be repeated." (18 NYCRR §515.10[e]). As such, Respondent must consider the limited relief sought by Petitioner in conjunction with its mandate to grant reinstatement only upon the condition that the "violation that led to the sanction will not be repeated."

On this record, Respondent's denial is arbitrary and capricious. It is uncontested that Petitioner was removed from the Medicaid program because his medical license was revoked. Thus, the "violation that led" to his removal from the Medicaid program was Petitioner's loss of his medical license. Respondent, on this reinstatement application, was required to consider and

ensure that Petitioner's loss of his medical license "will not be repeated." Respondent's June 5, 2009 denial, and its subsequent affirmance, set forth no factors or analysis supporting its conclusion that Petitioner failed to demonstrate that the loss of his medical license will not be repeated. Such unexplained denial is "arbitrary because [Respondent's denial letter] did not explain its reasons for doing so." (Katzer v. County of Rensselaer, 1 AD3d 764 [3d Dept.2003]). This is especially so in light of the New York State Department of Education's Committee on the Professions' finding, as set forth above, that it "is highly unlikely [that Petitioner will] engage again in the misconduct that led to the loss of his license."

Moreover, Respondent's denial of Petitioner's application to have his name removed from its Disqualified Individuals List is irrational because it usurps the function of the Department of Education's licensing of Petitioner. The New York State Department of Education along with the Board of Regents oversees the licensing of physicians. (Education Law §6524). "[T]he State carefully regulates the licensing of physicians and other health care professionals and monitors such activities to prevent untoward consequences to the public from the ministrations of incompetent, incapable, ignorant persons." (Ash v. New York University Dental Center, 164 A.D.2d 366, 370 [1st Dept. 1990] quoting People ex rel. Bennett v. Laman, 277 NY 368 [1938]). Whereas, Respondent "is responsible for detecting and preventing fraud and abuse of the [Medicaid] program." (Pharmacists Soc. of State of New York, Inc. v. Pataki, 58 AD3d 924, 925 [3d Dept. 2009]). The Department of Education's re-licensing of Petitioner implicitly, and as set forth above explicitly, acknowledges Petitioner's competence and fitness to practice medicine in this State. Respondent's refusal to remove Petitioner's name from the Disqualified Individuals List effectively prevents Petitioner from using his license to practice

medicine, despite his re-licensure, and is unrelated to Respondent's fundamental purpose of preventing fraud in the Medicaid program. As such, Respondent's denial of Petitioner's application is irrational.

Accordingly, the Petition is granted. This matter is remanded to the Respondent and Respondent is directed to remove Petitioner's name from its Disqualified Individuals List.

This Decision and Order is being returned to the attorneys for the Petitioner. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: October 26, 2009
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated August 28, 2009, Verified Petition, dated August 27, 2009, Affirmation of Anthony Scher, dated August 27, 2009, with accompanying Exhibits 1 - 4.
2. Answer, dated October 8, 2009, Affirmation of John Sitterly, dated October 9, 2009, with attached Exhibits "A" - "K".
3. Reply of Anthony Scher, dated October 16, 2009.