

Reyes-Arguelles v Daines

2009 NY Slip Op 32991(U)

December 21, 2009

Supreme Court, New York County

Docket Number: 113538-2009

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Zeniaida Reyes-Anguelles
M.D.

INDEX NO. 113538/09
MOTION DATE 12/21/09
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

- v -

Richard F. Daines, ET AL.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
DEC 23 2009
NEW YORK
COUNTY CLERK'S OFFICE

The order to show cause and cross-motion are decided in accordance with the transcript (Lee Ruthen, Court Reporter), and the annexed Memorandum Decision; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

ORDERED that all stays are lifted.
This constitutes the decision and order of the Court.

Dated: 12/21/09

HON. CAROL EDMEAD J.S.C.
HON. CAROL EDMEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
ZENAIDA REYES-ARGUELLES M.D.,

Petitioner,

Index No. 113538-2009

-against-

DECISION/ORDER

RICHARD F. DAINES, Commissioner of the New York
State Department of Health and
THE NEW YORK STATE DEPARTMENT OF HEALTH ,

Respondents.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this Article 78 proceeding, petitioner, Zenaida Reyes-Arguelles M.D. (“plaintiff”) moves by order to show cause to stay respondents, Commissioner Richard F. Daines and the New York State Department of Health (collectively “DOH” or “respondents”) from proceeding against her upon the Statement of Charges, dated June 22, 2009 at a hearing before a committee of professional conduct of the State Board of Professional Medical Conduct (the “Committee”) (the “underlying proceeding”), on the ground that the Administrative Law Judge (“ALJ”) improperly deemed petitioner’s Answer untimely and deemed the allegations in the Statement of Charges admitted.

Factual Background

Petitioner was served with a Statement of Charges detailing numerous claims of professional misconduct relating to a portion of her medical practice in which she evaluates and treats patients injured in automobile accidents and seeks payment through New York no-fault insurance system. After unsuccessful attempts to negotiate a settlement of the matter, petitioner

contends that she served her Answer in the underlying proceeding eight days prior to the date of the September 30, 2009 hearing. At a pre-hearing conference with the ALJ and DOH on September 23, 2009, DOH moved pursuant to Public Health Law 230-c (5) ("PHL") to have the allegations in the Statement of Charges deemed admitted because petitioner failed to file her Answer more than 10 days prior to the hearing as required. Over plaintiff's objection, the ALJ, relying on PHL 230.10(c)(2), granted DOH's request and deemed such allegations admitted. The ALJ further stated that the "issue will be noted to the panel that the answer was not filed within the provision and that their charge at the hearing will be to determine, what, if any, penalty would be imposed based on the specifications and charges set forth" The hearing was to be "strictly on the penalty phase."

Order to Show Cause

Petitioner now argues that the ALJ's determination was arbitrary and capricious and violated his Due Process rights. Petitioner points out that DOH initially had no objection to the Answer, and that the ALJ denied petitioner's request for an adjournment of the hearing to comply with the 10-day requirement, and issued its ruling in the absence of any showing of any prejudice to DOH. Petitioner maintains that the ALJ also misinterpreted PHL 10(c)(2), which should be read in harmony with 10 NYCRR 51.5, and that her Answer was in fact due no later than three days before the hearing. The ALJ's failure to accept petitioner's Answer was an abuse of discretion, as she was empowered to accept such Answer.

Opposition and Cross-Motion to Dismiss

DOH argues that the Court lacks jurisdiction over this proceeding because petitioner failed to exhaust her administrative remedies by seeking administrative review under PHL 230-

c(1), (4) and then by the Appellate Division, that the ALJ properly applied PHL 230 10(c)(2), the 2-day delay is not excusable as *diminimus*, and that petitioner received notice of the 10-day requirement from the ALJ.

Reply

Petitioner adds that this case falls within the exceptions to the exhaustion rule, such as when an agency's action is challenged as unconstitutional or beyond its grant of power, or when resort to an administrative remedy would be futile. Petitioner also argues that there is no caselaw supporting the ALJ refusal to accept petitioner's Answer.

Discussion

Section 7801(1) of the CPLR unequivocally states that no determination shall be challenged in an Article 78 proceeding "which is not final or can be adequately reviewed by appeal to a court or to some other body or officer...." A determination is deemed final and binding and thereby ripe for review "when it 'has its impact' upon the petitioner who is thereby aggrieved" (*Parent Teacher Ass'n of P.S. 124M v Board of Educ. of City School Dist. of City of N.Y.*, 138 AD2d 108, 529 NYS2d 761 [1st Dept 1988], citing *Matter of Edmead v McGuire*, 67 NY2d 714, 716, 499 NYS2d 934, 490). "A petitioner is aggrieved once the agency has issued an unambiguously final decision that puts the petitioner on notice that all administrative appeals have been exhausted" (*New York City Transit Auth. v New York State Div. of Human Rights*, 5 Misc 3d 1021, 799 NYS2d 162 [Sup Ct Kings County 2004] citing *Carter v State of New York, Executive Dept, Div. of Parole*, 95 NY2d 267, 270 [2000]). When a final determination has not been issued and "there are further administrative steps available to secure a change in result, a party must pursue them before going to court" (*New York City Transit Auth.*, citing (*Matter of*

Geherin v Sylvester, 75 AD2d 991 [4th Dept 1980]). The rule that all administrative remedies must be exhausted prior to the judicial review of an agency's determination "need not be followed [however] ... when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power or when resort to an administrative remedy would be futile" (*New York City Transit Auth., citing Watergate II Apartments v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]).

PHL 230-c(1) provides, in pertinent part, that

There is hereby created an administrative review board for professional medical conduct for the purpose of reviewing determinations of committees on professional conduct of the state board for professional medical conduct.

PHL 230 (7)(a) provides that

The board, by its committees on professional conduct, shall conduct disciplinary proceedings as prescribed in this section

PHL 230-c(4) provides, in pertinent part, that

(a) The determinations of a committee on professional conduct of the state board for professional medical conduct may be reviewed by *the administrative review board* for professional medical conduct.

It is uncontested that PHL 230-c(5) provides, in pertinent part, as follows:

An order of the administrative review board for professional medical conduct or a determination of a committee in which no review by the administrative review board was requested may be reviewed pursuant to the proceedings under *article seventy-eight of the civil practice law and rules*. Such proceeding shall be returnable before *the appellate division of the third judicial department* and such decisions shall not be stayed or enjoined except upon application to such appellate division after notice to the department and to the attorney general and upon a showing that the petitioner has a substantial likelihood of success.

(Emphasis added).

These sections reveal that petitioner's challenge to the ALJ's determination should be made before the Administrative Review Board, and then, before the Appellate Division, Third

Department, none of which occurred herein. Therefore, petitioner's submissions failed to establish that there is a final and binding determination in petitioner's misconduct proceeding.

Respondent's sole argument in this regard, that this case falls within the exceptions to the exhaustion rule, is unpersuasive. There is no indication that the rule upon which the ALJ relied raises a constitutional issue or was beyond her grant of power. Further, petitioner made no showing that an appeal to the administrative review or the Appellate Division, Third Department would be futile.

Therefore, this Court lacks jurisdiction over the petition, and the respondents' cross-motion to dismiss the petition on such ground is granted.

Conclusion

ORDERED that the order to show cause for an order enjoining respondents from proceeding against petitioner upon the June 22, 2009 Statement of Charges at any hearing before a committee on professional conduct of the State Board of Professional Medical Conduct, and enjoining respondents from proceeding in any such hearing where such action violates petitioner's due process rights, is denied; and it is further

ORDERED that the respondents' cross-motion to dismiss the Petition is granted, and the Petition is hereby dismissed; and it is further

ORDERED that respondents serve a copy of this order with notice of entry upon all

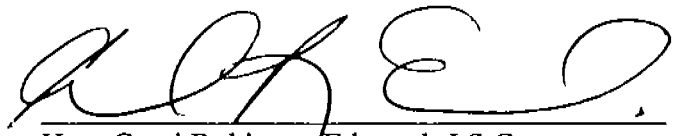
parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly; and it is further

ORDERED that all stays are lifted.

This constitutes the decision and order of the Court.

Dated: December 21, 2009



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

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