STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
JOHN DOE, M.D.,

Petitioner,

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

-against-

RICHARD F. DAINES, M.D., Commissioner of Health of the State of New York; KATHERINE A. HAWKINS M.D., J.D., Executive Secretary of the State Board of Professional Medical Conduct; KEITH W. SERVIS, Director of the Office of Professional Medical Conduct, New York State Department of Health; OFFICE OF PROFESSIONAL MEDICAL CONDUCT; THE STATE BOARD OF PROFESSIONAL MEDICAL CONDUCT; and NEW YORK STATE DEPARTMENT OF HEALTH.

Respondents.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-09-ST1099 Index No. 460-10

Appearances:

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, a physician licensed to practice medicine in the State of New York, is under investigation for alleged professional medical misconduct. He has commenced the above-captioned CPLR Article 78 proceeding to review a determination made on December 7, 2009 with respect to his request to delay publication of the charges until after a final administrative determination thereon.

To briefly review the procedural context of the instant application, the respondent New York State Board for Professional Medical Conduct ("BPMC"), a part of the New York State Department of Health ("DOH"), is charged with the responsibility of investigating complaints of medical misconduct on the part of licensed physicians (see Public Health Law ("PHL") § 230 [10] [a] [i]). Where there is suspected professional misconduct, the Director of the Office of Professional Medical Misconduct must cause a preliminary review to be conducted to ascertain whether further investigation is warranted (see PHL § 230 [10] [a] [i]). As a part of the review process the physician under investigation must be afforded an opportunity to be interviewed, in order to enable the physician to provide an explanation with regard to the matters under investigation (see PHL § 230 [10] [a] [iii]). After the interview, the Director may either close the investigation without presentation to an investigation committee (see PHL § 230 [10] [a] [iii] [D]), or refer the matter to an investigation committee to conduct a disciplinary proceeding (see PHL § 230 [5], [6], [7], [10]). The committee must consist of two physicians and one lay person (see PHL § 230 [6]) The initial

responsibility of the committee is to determine if a hearing is warranted (see PHL § 230 [a] [10] [iv]). Where a majority of the committee finds that a hearing is warranted (and after consultation with the executive secretary of OPMC) the Director must order OPMC counsel to prepare charges (see id.). As relevant here, "[i]f the investigation committee is unanimous in its concurrence that a hearing is warranted, the charges *shall be made public* under paragraph [d] of this subdivision." (see id., emphasis supplied).

In this instance, in a letter dated January 9, 2009 the Office of Professional Medical Conduct ("OPMC") of the New York State Department of Health ("DOH"), advised the petitioner that it was conducting an investigation in connection with eleven patients allegedly examined and/or treated by the petitioner in 2007. In accordance with PHL § 230 (10) (a) (iii), the petitioner was afforded an opportunity to participate in an interview to provide an explanation with regard to what transpired in each case. The Director of OPMC, respondent Keith S. Servis, found that further investigation was warranted and, pursuant to PHL § 230 (10) (a), referred the matter to a committee on professional conduct. The committee met and, by unanimous vote, determined that formal charges should be prepared and a hearing conducted. By letter dated November 17, 2009 addressed to respondent Servis, an attorney representing the petitioner requested that the respondents delay publication of the charges until there had been a final administrative determination in the proceeding. In the determination at issue (infra), the Chief Counsel for DOH responded by indicating that the charges would be made public in accordance with the Public Health Law, no earlier than five business days after the charges were served.

In his first cause of action (under CPLR 7803 [2]) the petitioner alleges that the

respondents are about to proceed without or in excess of their jurisdiction. In his second cause of action (under CPLR 7803 [3]) he alleges that the December 7, 2009 determination is arbitrary and capricious, affected by an error of law and an abuse of discretion. Among petitioner's arguments, he maintains that while the Public Health Law mandates that the charges be made public, it does not direct when this should occur. He argues that the matter is purely discretionary, and that the respondents may properly exercise their discretion by delaying publication of the charges until after the final administrative determination is made. As a part of the foregoing, the petitioner maintains that he is not currently in private practice and is not treating patients, and that it would serve no useful purpose to make the charges public until after the final administrative determination. He asserts that he presents no danger to the public, that no public good would result from publication of the charges, and that if the charges are made public, his professional reputation will be irreparably damaged, resulting in a violation of his constitutional right to due process and equal protection.

PHL § 230 (10) (d) (ii), added in 2008 (see L 2008 C 477 § 6) recites as follows:

> "(ii) The charges *shall be made public*, consistent with subparagraph (iv) of paragraph (a) of this subdivision, no earlier than five business days after they are served, and the charges shall be accompanied by a statement advising the licensee that such publication will occur; provided, however, that charges may be made public immediately upon issuance of the commissioner's order in the case of summary action taken pursuant to subdivision twelve of this section and no prior notification of such publication need be made to the licensee." (PHL § 230 [10] [d] [ii], emphasis supplied)

The determination dated December 7, 2009 recites as follows:

> "I write in response to your November 17, 2009 letter in which you request that the Office of Professional Medical Conduct

> ("OPMC") not publish charges against your client until a final administrative determination is made. OPMC rejects your request.
>
> "We have carefully reviewed your letter, and we decline to engage in any constitutional or other legal arguments with you at this time in this context. In accordance with the Public Health Law, charges will be made public no earlier than five business days after they are served, and such publication will include a statement advising that the charges are only allegations which may be contested by the licensee in an administrative hearing.
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> "You inquired whether the Investigation Committee's vote to bring charges was unanimous. The Investigation Committee unanimously concurred with the directive of OPMC's determination that a hearing was warranted. Therefore, a second vote by the Investigation Committee regarding the publication of charges was unnecessary."

Turning first to the constitutional issues, the Court observes that it is well settled that "all legislative enactments enjoy an exceedingly strong presumption of constitutionality" (McLean v City of Kingston, 57 AD3d 1269, 1270-1271[3rd Dept., 2008], internal quotes omitted; see also Maresca v Cuomo (64 NY2d 242, 250 [1984]; Cohen v State of New York, 94 NY2d 1, 7-8 [1999]; Matter of Travis S. (Anonymous), 96 NY2d 818, 820 [2001]; Schulz v State Legislature, 5 AD3d 885, 888-889 [3d Dept., 2004]; Hunter v Warren County Board of Supervisors, 21 AD3d 622, 624 [3rd Dept., 2005]), a burden which must be satisfied beyond a reasonable doubt (see Maresca v Cuomo, supra; Hunter v Warren County Board of Supervisors, supra; Matter of Travis S. (Anonymous), supra).

"The common sense principle at the heart of the due process guarantees in the United States and New York Constitutions is that when the State seeks to take life, liberty or property from an individual, the State must provide effective procedures that guard against

an erroneous deprivation" (The People v David W., 95 NY2d 130, 136, citing U.S. Const, amend XIV, § 1; NY Const, art I, § 6; Mathews v Eldridge, 424 US 319, 334-335, 96 S Ct 893, 47 L Ed2d 18; Wisconsin v Constantineau, 400 US 433, 436, 91 S Ct 507, 27 L Ed 2d 515). In Mathews v Eldridge (supra), it was stated that due process is a flexible concept requiring different levels of protection in different circumstances (see Mathews v Eldridge, 424 US 319, supra, at 334). In general, three factors must be considered when deciding whether due process requirements have been satisfied: the private interest affected by the state's action, (2) the risk of an erroneous deprivation of that interest through the procedures used and the probable value, if any, of additional safeguards, and (3) a consideration of the government's interest (see id., at 335).

In the context of due process, under what is known as the "stigma plus" doctrine, it is well settled that damage or injury to reputation (a "stigma") does not, of itself, constitute a deprivation of a liberty or property interest without an additional, tangible deprivation (a "plus") (see Neu v Corcoran, 869 F2d 662, 667 [2d Cir., 1989], cert denied 493 US 816; Plante v Bechard, 159 Fed. Appx. 279, 280 [2d Cir., 2005]; Boss v Kelly, 306 Fed. Appx. 649, 651 [2d Cir. 2009]; Ruggiero v Phillips, 292 AD2d 41, 45 [4th Dept., 2002]; Matter of Agnew v North Colonie Cent. School Dist., 14 AD3d 830, 831 [3d Dept., 2005]). In this instance, the petitioner's unsupported, conclusory allegations with regard to the irreparable harm which he will suffer if the charges are published fail to satisfy the "plus" element. As such, the petitioner has failed to demonstrate a violation of his constitutional right to due process.

The Fourteenth Amendment of the Federal Constitution forbids States from denying

to any person within their jurisdiction the equal protection of the laws, but does not prevent the States from making reasonable classifications among persons (Western & S.L.I. Co. v Bd. of Equalization, 451 US 648, 68 L Ed 2d 514, 523 101 S Ct 2070 [1981]). Where the action under review does not involve a suspect class or fundamental right, it is not subject to strict judicial scrutiny, but rather is examined using the rational basis standard to determine if the action violated the equal protection clause (see, Massachusetts Bd. of Retirement v Murgia, 427 US 307, 49 L Ed 2d 520, 524, 96 S Ct 2562 and Maresca v Cuomo, 64 NY2d 242, 250). Inasmuch as the challenged classification does not involve fundamental right (petitioner's liberty interest) or a suspect class, it is not entitled to heightened scrutiny. As such, the rational basis test applies (see Massachusetts Bd. of Retirement v Murgia, supra; Maresca v Cuomo, supra; Matter of Niagara Mohawk Power Corporation v. New York State Department of Transportation, 224 AD2d 767, 768-769 [3d Dept., 1996]). Moreover, "[u]nder the rational basis standard, the Legislature, in creating a classification, 'need not actually articulate at any time the purpose or rationale supporting its classification. Instead, a classification must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification'" (Port Jefferson Health Care Facility v Wing, 94 NY2d 284, 290 [1999], quoting Heller v Doe, 509 US 312, at 320).

In the Court's view the requirement that charges against physicians, as opposed to other licensed professionals (including attorneys), be made public has a rational basis soundly rooted in concerns for the health, safety and welfare of the public. In this respect the Court does not disagree with respondent's argument that, as a group, physicians are more

likely on a day-to-day basis to deal with life and death issues with regard to patient health care, as compared to other licensed medical professionals (for example, dentists, podiatrists and psychologists, all of which are licensed and regulated under the Education Law).[1] In the Court's view the respondents have demonstrated the existence of a rational basis for the requirement that professional misconduct charges against physicians be made public at an early stage of the proceeding. For this reason, there is no equal protection violation.

The Court finds that the petitioner has failed in his heavy burden of demonstrating that Public Health Law § 230 (10) is unconstitutional either facially, or as applied, under either the due process clause or equal protection clause.[2]

Turning to petitioner's specific causes of action, "[a] petition seeking Article 78 relief in the nature of prohibition should be granted upon a showing that a 'body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction'" (Matter

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[1]Respondents also make reference to a letter submitted in support of the Legislation under review (L 2008 C 477) by the Senate Sponsor, Kemp Hannon. In the letter Senator Hannon cited a 2006 survey conducted by the Center for Medical Consumers which revealed that New York was only one of five states out of 46 survey respondents which did not make charges public at an early stage of a physician's professional misconduct proceeding (see Bill Jacket to L 2008 C 477, Letter of Senator Kemp Hannon dated July 29, 2008).

[2]The petitioner also asserts concomitant claims of due process and equal protection violations under the New York State Constitution (see NY Const. Art I, § 6 [Due Process]; NY Cont. Art I § 11 [Equal Protection]). Significantly, New York Courts have consistently applied the federal stigma plus test in reviewing alleged violations of the New York State Due Process Clause (see People v David W., 95 NY2d 130 [2000], at 137; Lee TT v Dowling, 87 NY2d 699 [1996], at 708-709). In addition, it has been repeatedly held that the New York State Equal Protection Clause is no broader than its federal counterpart (see Hernandez v Robles, 7 NY3d 338, at 362 [2006], citing Under 21, Catholic Home Bur. for Dependent Children v City of New York, 65 NY2d 344, 360 n 6). Thus, the Court discerns no meaningful distinction with respect to application of federal or state constitutional law in this matter, as it relates to principles of equal protection or due process.

of Garner v New York State Department of Correctional Services, 10 NY3d 358, 361[2008], quoting CPLR 7803 [2]; Matter of Chasm Hydro, Inc. v New York State Department of Environmental Conservation, 14 NY3d 27, 29, 13-32 [2010]; Matter of Raheem v New York State Board of Parole, 66 AD3d 1270, 1270-1271 [3rd Dept., 2009]). "[S]uch relief is extraordinary, and should only be granted in limited circumstances" (see Matter of Garner v New York State Department of Correctional Services, supra, quotation and citation omitted). It may only be granted where there is a clear right to the relief requested (see id., Matter of Raheem v New York State Board of Parole, 66 AD3d 1270, 1270 [3rd Dept., 2009]).

In this instance, in view of the explicit language of the statute, petitioner has not demonstrated a clear right to the relief which he seeks. Nor have the respondents, in following the dictates of Public Health Law § 230 (10) (a) (iv), and (d) (ii) proceeded in excess of their jurisdiction or authority. The Court finds that the cause of action has no merit and must be dismissed.

With respect to petitioner's second cause of action, the Court is mindful that the Court's role in reviewing an administrative determination is not to substitute its judgment for that of the agency, but simply to ensure that the agency determination has a rationale basis, and is not arbitrary and capricious or affected by an error of law (see Matter of Peckham v Calogero, 12 NY3d 424, 431 [2009]; Matter of Warder v Board of Regents, 53 NY2d 186, 194; Matter of Flacke v Onondaga Landfill Sys., 69 NY2d 355, 363; Akpan v Koch, 75 NY2d 561, 570). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (Matter of Peckham v Calogero, supra), citing Matter of Pell

v Board of Educ., 34 NY2d 222, 231 [1974]). As noted, the Public Health Law directs that the charges "shall be made public. . . no earlier than five business days after they are served" (see PHL § 230 [10] [d] [ii]). The determination at issue (supra) does nothing more than track the language of the statute, without indicating when the charges will be made public. Significantly, PHL § 230 (10) (a) (iv) and (10) (d) do not include language creating an exception where the physician is no longer engaged in the practice medicine. Under all of the circumstances, the Court finds that petitioner has failed in his burden to demonstrate that the determination was made in violation of lawful procedure, is affected by an error of law, is irrational, arbitrary and capricious, or an abuse of discretion. The Court finds that the cause of action must be dismissed.

In view of all of the foregoing, the Court finds that petitioner's motion for a preliminary injunction must be denied as moot. The motion for a permanent injunction must be denied on the merits by reason of petitioner's failure to demonstrate, prima facie, entitlement to such relief, including the existence of irreparable harm (see Di Marzo v Fast Trak Structures, 298 AD2d 909, 911 [4th Dept., 2002]; McDermott v City of Albany, 309 AD2d 1004, 1005 [3d Dept., 2003]).

The Court concludes that the petition must be dismissed.

Lastly, the petitioner has requested that the papers submitted in this proceeding be sealed. The Court is mindful that misconduct charges have not yet been served. There is no reason not to preserve petitioner's confidentiality at this early stage of the administrative proceeding. Because it is possible to discern the identity of the petitioner in the papers submitted (even though attempts were apparently made to redact petitioner's name) the Court

finds that there is good cause to direct that they be sealed. The Court will so direct by separate order.

Accordingly, it is

ORDERED, ADJUDGED and DECLARED, that petitioner failed in his burden to demonstrate that Public Health Law § 230 (10) (a) (iv) and (d) (ii) violates petitioner's right to due process of the law or equal protection of the law under either the state or federal constitution, facially or as applied herein; and it is further

ORDERED, that petitioner's application for a preliminary injunction, for a permanent injunction, for an order directing that respondents rescind their December 7, 2009 determination, and for an order directing that the respondents cease, desist and refrain from breaching the confidentiality of the disciplinary hearings be and hereby are denied; and it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: June 10, 2010
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause To Proceed Anonymously and Under Seal, dated January 21, 2010
2. Order To Show Cause For Injunctive and Declaratory Relief, dated January 21, 2010
3. Verified Petition and Supporting Papers
4. Answer dated March 12, 2010
5. Affidavit of Keith W. Servis, sworn to March 11, 2010, Supporting Papers and Exhibits
6. Reply Affirmation of Todd J. Krakower, Esq., dated April 20, 2010 and Attachments

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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Respondents.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-09-ST1099 Index No. 460-10

SEALING ORDER

The following documents having been submitted for consideration in the above matter: Order To Show Cause To Proceed Anonymously and Under Seal, dated January 21, 2010; Order To Show Cause For Injunctive and Declaratory Relief, dated January 21, 2010; Verified Petition and Supporting Papers; Answer dated March 12, 2010; Affidavit of Keith W. Servis, sworn to March 11, 2010, Supporting Papers and Exhibits; Reply Affirmation of Todd J. Krakower, Esq., dated April 20, 2010 and Attachments.

For good cause shown, it is hereby

ORDERED, that the foregoing designated documents, including all duplicates and copies thereof, shall be filed as sealed instruments and not made available to any person or public or private agency unless by further order of the Court.

ENTER

Dated: June 10, 2010
Troy, New York

Supreme Court Justice
George B. Ceresia, Jr.