

**Matter of Ascherman v American Psychoanalytic
Assoc., Inc.**

2013 NY Slip Op 31922(U)

August 12, 2013

Sup Ct, New York County

Docket Number: 100206/13

Judge: Alice Schlesinger

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2/5/13

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

ALICE SCHLESINGER

PART **IA** PART 16

PRESENT: SCHLESINGER
Justice

ASCHERMAN, M.A., LEE I., ETAL.

INDEX NO. 100206/13

MOTION DATE _____

- v -
THE AMERICAN PSYCHOANALYTIC ASSOCIATION, INC.

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ proceeding and all counterclaims are determined in accordance with the accompanying memorandum decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: AUG 12 2013

Alice Schlesinger
ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
In the Matter of the Application of

Index No. 100206/13
Motion Seq. No. 001

LEE I. ASCHERMAN, M.D., DWARAKANATH G. RAO,
M.D., COLLEEN L. CARNEY, Ph.D., DONALD L.
ROSENBLITT, M.D., WILLIAM E. BERNSTEIN, M.D.,
CALVERN E. NARCISI, M.D., and ELIZABETH A.
BRETT, Ph.D.,

UNFILED JUDGMENT

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and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

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

-against-

THE AMERICAN PSYCHOANALYTIC ASSOCIATION, INC.,

Respondent.

-----X
SCHLESINGER, J.:

Petitioners, all of whom are members of the respondent professional organization known as The American Psychoanalytic Association, Inc. (the Association), commenced this proceeding seeking Article 78, declaratory, and injunctive relief. Specifically, petitioners seek to enjoin the Association from implementing any new standards for the appointment of Training Analysts and from certifying any new Training Analysts by any method other than one approved by the Association's Board on Professional Standards (BOPS) on June 13, 2012 and codified in the Standards For Education and Training in Psychoanalysis (OSC, Exh A). In its counterclaims, the Association seeks a judgment mandating that BOPS adopt new standards for the appointment of Training Analysts that are "objective and verifiable" and declaring that the Executive Council, as the Board of Directors of the Association, retains the ultimate authority to set the standards for the appointment of Training Analysts.

When the proceeding was commenced, this Court issued a temporary restraining order (TRO) after hearing argument from both parties. In the TRO, the Court granted the injunctive relief requested by petitioners on an interim basis, but expressly allowed an Ad Hoc Committee of the Association's members to meet to develop new standards. All issues have now been fully briefed, and oral argument has been held, allowing for this determination on the merits.

Background

The resolution of this "turf" war depends on a close reading of the documents governing the respective roles of the parties and the interplay between provisions in those documents and the New York Not-For-Profit Corporation Law (N-PCL).

The Association is a professional membership organization incorporated in or about 1951 under the N-PCL; in addition to its national organization, its membership includes 31 accredited training institutes and 38 affiliate societies throughout the United States. According to the Certificate of Amendment of the Certificate of Incorporation (Exh B), the purpose of the Association is "to study and advance psychoanalysis; to advocate and maintain standards for the training of psychoanalysts and for the practice of psychoanalysis; to foster the integration of psychoanalysis with other branches of science, and to encourage research in all fields having to do with the scientific knowledge and welfare of man."

The Association is governed in large part by its bylaws (Exh C). According to Article V of the bylaws, the terms "Board of Directors" and "Directors" as used in the Certificate of Incorporation refer respectively to the Association's Executive Council and Councilors. While citing different legal authority, both sides here agree that the

Association is managed by its Executive Council, which has broad authority “except as limited by these bylaws.” Art V, Section 2.

One such arguable limitation is found in Article VII, Section 4 of the bylaws. That provision establishes a committee known as the Board on Professional Standards (BOPS) whose “duties ... shall be to 1) set principles, minimum standards and prerequisite requirements for the selection of applicants for psychoanalytic education and clinical training; ... [and] 3) set principles and minimum standards for training in psychoanalysis ...” As evidence of the claimed independence of BOPS from the Executive Council, petitioners note that Article VII of the bylaws specifies that BOPS shall be composed of representatives from each of the Association’s approved institutes; such specificity is conspicuously absent with respect to the structuring of other committees, which the Executive Council has broad discretion to define.

In contrast, as evidence of the claimed authority of the Executive Council over BOPS, the respondent Association notes that Article VII obligates BOPS to “report its proceedings and actions to the Executive Council.” The Association further argues that the bylaws in no way grant BOPS the sole authority to set standards and that, to the contrary, N-PCL § 701(a) obligates the Executive Council as a Board of Directors to oversee the activities of the Association and its committees.

The particular standards at issue in this tug-of-war relate to the role and appointment of Training Analysts. Pursuant to the written standards approved by BOPS in June 2012 (Exh A), a candidate seeking to become a psychoanalyst must fulfill three requirements: (1) complete a curriculum of psychoanalytic study at, and graduate from, an Association-approved institute; (2) conduct at least three supervised psychoanalytic

treatments, consisting of at least four sessions per week with different genders; and (3) undergo personal psychoanalysis conducted by a Training Analyst, who is a certified psychoanalyst. Because of the active role a Training Analyst plays in the training process, the appointment to that role is considered prestigious and can significantly increase one's earning potential.

As such, the appointment process for Training Analysts is quite rigorous. The local training institute first chooses which aspiring Training Analysts, in their judgment, warrant further consideration. The institute then vets the individual's clinical work and cases to determine if the work meets the particular institute's criteria — criteria which the respondent Association here criticizes as “unwritten, unpublicized, not verifiable and highly subjective, and in many cases the determinations are not subject to appeal.” (Answer, ¶ 37). The Association further criticizes the process in that the “Training Analysts in charge of vetting aspiring Training Analysts may have a vested economic interest in limiting the number of Training Analyst appointments,” causing the process to become “political” and “a frequent source of complaints from the Association membership” and leading some members to advocate for reform. (Answer, ¶¶ 37-42).

In the fall of 2011, three members of the Association posted comments on the membership listserv, urging the creation of a Training Analyst appointment system that was “objective, with collectively defined and easily verifiable certification criteria” so as to make the system “immune to politics and manipulation at both the national and local levels.” Those members, Dr. Pyles, Dr. Perlman and Dr. Procci, urged BOPS to consider the idea at its January 2012 meeting and to prepare a proposal for implementation by June 2012. (¶¶ 45-46). BOPS, however, purportedly declined to

discuss the idea at its January meeting, preferring to receive a formal written proposal for discussion in June. (¶ 47).

In response, at its own meeting the following day, the Executive Council approved the formation of a five-person task force to work with Dr. Pyles to develop the Perlman-Pyles-Procci proposal (PPP Proposal). The stated goal was to “present the proposal to BOPS in a timely manner so that BOPS can properly consider it at its June 2012 meeting.” (See January 2012 Executive Council meeting minutes, Pyles Aff. Exh 11). A few months later, on April 4, 2012, the task force released its formal Proposal for Establishment of a National TA System, and it gave a copy to BOPS for consideration at its June 13 meeting. The proposal provided for, among other things, a central listing of Training Analysts, criteria for Training Analyst appointment, documentation of approval fulfillment requirements, and the universality of the Training Analyst designation.

At the June 13, 2012 BOPS meeting, Dr. Pyles outlined the proposal, but no vote was taken. Instead, BOPS appointed a “Reference Committee” to evaluate the proposal, compare it with existing internal documents, and recommend ways of reconciling any inconsistencies. In response to the perceived delay, the Executive Council at its own meeting the next day approved a motion stating that: “It is the policy of the Association that the appointment of Training Analysts shall be based on objective and verifiable criteria, and the Executive Council encourages the Board of Professional Standards to develop methodology to implement this policy.” The policy was approved by a vote of 27 to 13. (OSC, Exh D).

Petitioners assert that the Executive Council's June 14 motion "directly contravenes the Bylaws of the [Association] by bypassing the BOPS standard setting function." (Petition, ¶ 19). Attempts in the Fall to mediate the dispute with the assistance of conflict management consultant Harvard Law Professor Robert Mnookin failed, and the power struggle continued. Then, on January 16, 2013, BOPS passed a motion at its meeting calling for a "moratorium" on efforts by the Executive Council to establish education standards and urging the Council to join with BOPS to "reorganize the entire governance" of the Association. (Answer, ¶ 62).

The next day, January 17, — in what petitioners characterize as another contravention of the bylaws and respondent Association characterizes as a necessary step in light of BOPS' refusal to take any constructive action — the Executive Council narrowly approved the "Fishkin Motion." The Motion stated in relevant part that: "It will be the official policy of [the Association] that the appointment of Training Analysts shall be based on objective and verifiable criteria ..." (OSC, Exh E). Additionally, under the Fishkin Motion the Association sought to assert control over the appointment process by: 1) adopting the "Temporary List of Objective and Verifiable Requirements to Obtain Designation as a Training Analyst"; and 2) authorizing the President of the Association to "appoint an Ad Hoc Committee ... to determine whether applicants for Training Analyst appointment meet the objective and verifiable criteria adopted by the Executive Council." However, the Fishkin Motion emphasized that the adopted criteria were temporary and intended as an "interim mechanism for the appointment of [Training Analysts] using these objective and verifiable criteria until the BoPS is ready to take over this function." Pyles Aff. Exh 27.

At the Association's January 18 membership meeting, the Fishkin Motion was brought before the membership for ratification. Petitioners contend that the members voted 50 to 4 to disapprove the Motion, operating as a veto. (Ascherman Aff at p 4). The Association maintains that a quorum was lacking to give the vote any effect. Pyles Aff ¶ 50. What is more, the membership vote was later disavowed and the Association's control reasserted in an email sent by Bob Pyles, the Association's President, and President-elect Mark Smaller on January 22, 2013 (OSC, Exh G). The email stated that the membership vote "violated procedural rules in several ways" and that the standards adopted in the Fishkin Motion were the "official policy" of the Association.

Faced with two sets of conflicting standards and confusion among its membership, petitioners commenced this Article 78 proceeding for a determination as to which body — BOPS or the Association's Executive Council — is the body authorized to promulgate standards for the appointment of Training Analysts. The differences between the two sets of standards, according to petitioners, is that the Fishkin standards do not include a formal peer review process, impose some additional requirements, and are inconsistent with the standards of the International Psychoanalytic Association, of which the Association is a component society. (Petition, ¶¶ 22-25). According to the respondent Association, the primary difference implemented by the Fishkin Motion is the "removal of the highly subjective and controversial local training institute recommendation and vetting process in place under the BOPS standards [and the creation of] a set of standardized, national, objective criteria, including the number of years from graduation and the number of cases handled that, if met, would qualify a potential Training Analyst for consideration as a nationally-appointed Training Analyst." (Answer, ¶ 65).

Discussion

As the above facts reveal, this case involves a power struggle between The American Psychoanalytic Association's Board on Professional Standards and its Executive Council. Like Presiding Justice Harold Hughes in *Simoni v The Civil Service Employees Association, Inc., et al.*, 133 Misc.2d 1, 3 (Sup. Ct., Albany Co. 1986), this Court "enters the fray reluctantly, well aware that in the ordinary case the judiciary will not interfere with the internal affairs of a not-for-profit corporation ... absent a showing of fraud or substantial wrongdoing." However, as all attempts at a resolution of the dispute have failed, the Court must assume the task of determining the rights and obligations of the parties. The task is made all the more difficult by the fact that the determination depends more on an interpretation of the Association's internal documents than on case law, and both parties — with the assistance of extremely competent counsel — offer compelling arguments in their favor. Nevertheless, the Court finds that petitioners' arguments are the most persuasive.

The Association's founding document is its Certificate of Incorporation. As relevant here, the Certificate of Amendment of the Certificate of Incorporation states that the purpose of the Association is "to advocate and maintain standards for the training of psychoanalysts and for the practice of psychoanalysis." The Certificate does not specify which body is charged with the duty to develop those standards. For that level of specificity, the Court must turn to the bylaws. Indeed, the Certificate itself recognizes the significance of the bylaws in internal affairs, stating, for example, that the Board of Directors of the Association "shall be constituted as specified in its bylaws."

Wholly unavailing is the Association's claim that only the Certificate of Incorporation can limit the Executive Council's authority and that any grant of standard-setting authority to BOPS not mentioned in the Certificate would serve as such a limitation in violation of N-PCL § 701(a). First and foremost, Article V(2) of the bylaws, which defines the authority of the Executive Council, expressly provides that the Executive Council has broad management powers, "except as limited by these bylaws ...". Similarly, N-PCL § 701(a) cited by the Association focuses on the Executive Council's "management" powers only, stating in relevant part that: "Except as otherwise provided in the certificate of incorporation, a corporation shall be managed by its board of directors," which in this case is the Executive Council.

While the not-for-profit law does give a board of directors "the power and duty to manage the general affairs of the corporation, [o]n the other hand, the board of directors must conduct its management within the framework of the ... by-laws ...". *Simoni*, 133 Misc.2d at 9, citing *Ballas v McKiernan*, 41 AD2d 131, *aff'd* 35 NY2d 14, *Republic Corp v Carter*, 22 AD2d 29, *aff'd* 15 NY2d 661.¹ This Court does not find that the duty to set standards for Training Analysts is a management function reserved to the Executive Council within the meaning of the Certificate of Incorporation or the not-for-profit law; nor would the delegation of standard-setting authority to BOPS contravene the Certificate of Incorporation or N-PCL § 701(a).

Quite the contrary, this Court finds that various provisions in the bylaws delegate to BOPS the authority to set educational and professional standards such as those for

¹ The First Department cited *Simoni* with approval in *Matter of LaSonde v Seabrook*, 89 AD2d 132, 137 (2011).

Training Analysts at issue here. And a bylaw of a corporation has “all the force of a statute, and is as binding upon the company and its members as any public law of the state.” *Abraham v Diamond Dealer’s Club, Inc.*, 27 Misc.3d 663, 667-8 (Sup. Ct., N.Y. Co., 2010), citing *Fe Bland v Two Trees Mgt. Co.*, 66 NY2d 556, 564 (1985).

Article VII of the bylaws is entitled “Committees of the Corporation,” and Section 4 of that Article is devoted solely to the Board on Professional Standards. As noted above, Section 4(D) sets forth the duties of BOPS, which “shall be to: 1. set principles, minimum standards and prerequisite requirements for the selection of applicants for psychoanalytic education and clinical training; [and] 3. set principles and minimum standards for training in psychoanalysis.” Item 4 in the list of duties similarly empowers BOPS to “set principles and minimum standards for periodic approval or provisional approval of psychoanalytic institutes and new training facilities.” Interestingly, item 6 on the list gives the Executive Council limited responsibility for ethical standards jointly with BOPS, but reserves related powers solely to BOPS. Specifically, item 6 empowers BOPS to “set standards for character and professional qualifications, and, with the Executive Council, establish standards for ethical qualifications in psychoanalysis, and issue a Certification in Psychoanalysis to individuals who are determined, after examination and evaluation by the Board on Professional Standards, to meet established standards.” No other item even mentions the Executive Council.

Wholly unavailing is the Association’s reliance on item 7 to argue that the bylaws empower the Executive Council to set standards for Training Analysts. Consistent with the Executive Council’s overall management function discussed above, item 7 directs BOPS to “report its proceedings and actions to the Executive Council.” The purpose is

to allow corporate oversight, recognizing that the Executive Council would have authority to stop wrongdoing such as fraud or criminality. The setting of professional standards is not part of that role or authority.

The bylaws further recognize that BOPS is unique among the Association's various committees. Article VII provides that the other committees (Standing Committees, Special Standing and Special Ad Hoc Committees, and Ad Hoc Committees of the Corporation) are all composed of appointments by the President of the Association. In sharp contrast, the composition of BOPS is specifically delineated in the bylaws to exclude the influence of the Executive Council.

Specifically, Art. VII(4)(A) specifies that BOPS shall consist of representatives approved by the institutes; i.e., the educational establishments where psychoanalysts receive their primary training. The apparent purpose is to staff the committee charged with setting educational standards with those professionals most knowledgeable about the education process. That same provision in the bylaws specifies that the President, President-Elect, Secretary and Treasurer "shall be nonvoting ex-officio members," a designation that limits the power and influence of the Executive Council over BOPS.

The authority of BOPS to set standards is also found in Art. VII(4)(6), which states that: "All officers and Fellows of the Board, members of the committees of the Board, and all training and supervising analysts must be certified in accordance with the standards established by the Board on Professional Standards." Art. VII(4)(B) and (C) also mention Training Analysts, indicating that the various institutes shall designate such persons to serve as Board Fellows, and the Board in turn shall elect a training or supervising analyst to serve as its Chair and Secretary.

In sum, petitioners have presented ample authority for their assertion that BOPS, rather than the Executive Council, has the authority to set standards for Training Analysts pursuant to the bylaws. The Association has failed to point to any provision in the corporate documents or the law that provides otherwise. In fact, many of the Association's actions, such as the designation of the Fishkin Motion standards as "temporary", implicitly acknowledged the standard-setting authority of BOPS.

As was done at oral argument, this Court again urges BOPS and the Executive Council to work together to develop a set of standards for Training Analysts that reflect the members' high degree of professionalism and integrity. If a resolution of the dispute cannot be amicably reached, the Association's remedy is to ask its membership to amend the bylaws to limit the authority of BOPS to set standards. But as the bylaws now stand, and as this Court now finds, it is BOPS — and not the Executive Council — that has the authority to set the standards at issue here.

Accordingly, it is hereby

ADJUDGED, ORDERED AND DECLARED that the petition is granted, the standards for the appointment of Training Analysts promulgated by the Executive Council are contrary to law and null and void, and respondent is enjoined from implementing any new standards or certifying any new Training Analysts by any method other than that approved by the Board on Professional Standards, unless the bylaws of the Association are amended to expressly provide otherwise; and it is further

ADJUDGED, ORDERED AND DECLARED that respondent's counterclaims are denied in their entirety and dismissed.

Dated: August 12, 2013

UNFILED JUDGMENT
AUG 14 2013

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J.S.C.
ALICE SCHLESINGER