MEDICAL STAFF LEADER
MONTHLY
December 2002
FORTYSPRINGER PUBLICATIONS

The Organized Medical Staff is Part of the Hospital!

A medical staff is not a separate legal entity. It is an administrative unit of the hospital, dependent upon and accountable to the hospital Board.

That was the conclusion of the Supreme Court of New Hampshire, in [redacted], No. 2001-134 (N.H. Nov. 14, 2002). On the basis of language in the New Hampshire hospital licensing regulations, the court said that the staff did not have the legal capacity to sue the hospital.

The dispute arose after the Board of Exeter Hospital removed the elected staff president from his *ex officio* position as a trustee, in accordance with the corporate bylaws provisions authorizing removal of any trustee without cause, and required him to adhere to the Board's confidentiality policy. The AMA entered the case as amicus curiae on behalf of the staff, arguing that a medical staff is an "unincorporated association" having the capacity to sue.

The supreme court summarized the events leading up to the lawsuit as follows:

"...Upon being elected to a two-year term as medical staff president beginning January 1, 2000, Dr. Windt became an *ex officio* member of the boards [of Exeter Hospital, Inc. and Exeter Health Resources, Inc.]. Board members are subject to removal with or without cause and must sign an acknowledgement of the boards' confidentiality policy, which provides that 'members of the Board of Trustees shall maintain the confidentiality of matters considered at meetings of the Board of Trustees, including any materials distributed at or prior to such meetings that pertain to deliberations of the Board.'

"In May 2000, the executive committees of the board advised Dr. Windt that a meeting was scheduled to consider whether to remove him as a trustee and presented him with a notice of proposed removal outlining the allegations against him. On June 2, 2000, Dr. Windt received a notice of removal, which informed him that he had been removed from the boards and which contained the following 'gag order':

"'All information concerning EHR [Exeter Health Resources, Inc.], the Hospital, or any of their affiliated organizations which you have received in your capacity as a Trustee, President of the Medical Staff, or otherwise, including but not limited to all information concerning or relating to the fact and processes of [your] removals and the reasons therefore, is and shall remain strictly confidential and may not be disclosed to any person without the respective Board's prior written consent. You should be strongly advised the EHR and the Hospital will use all available legal methods to protect their interests with regard to any actual or threatened breach of this confidentiality obligation or other misuse of any such material or information.'

"The Boards informed members of the medical staff that no information regarding Dr. Windt's removal would be given to them unless they also signed confidentiality agreements."

Dr. Windt, the medical staff and the Medical Executive Committee went to court to challenge the gag order. They asked the court to declare that Dr. Windt had a legal right to disclose and discuss the reasons surrounding his removal from the Board with the medical staff and that the Executive Committee and

continued on page 2

10 Things You Can Do for Your Doctors — Without Going to Jail!

Contract Terminated for Disruptive Conduct

Sharon Siegel, a cardiac surgeon, was appointed to the medical staff of Seton Medical Center in 1990. In 1996, she entered into a contract with the hospital that placed her on "a closed panel of cardiac surgeons who were given the exclusive right to operate as lead surgeons on patients sent to Seton for cardiac surgery" under an agreement between Seton and the Kaiser Foundation Hospitals and the Permanente Medical Group. Pursuant to that agreement, Seton "provided cardiac surgery and related services for overflow patients of Kaiser."

The agreement between Seton and Dr. Siegel did not require Dr. Siegel to "limit her practice to Kaiser overflow patients." Dr. Siegel could continue to operate on other patients at Seton and at other area hospitals where she was also granted privileges. However, the agreement required that she arrange her practice "to assure that provision of services to Kaiser patients was a 'high priority.' In return, Seton agreed to pay Dr. Siegel a fixed rate per Kaiser patient."

The term of the agreement between Dr. Siegel and Seton was two years, but it could be terminated by either party at any time without cause with 90 days' written notice. The contract also explicitly stated that termination would not affect Dr. Siegel's medical staff appointment or clinical privileges.

Fourteen months into the agreement, the hospital's chief operating officer notified Dr. Siegel that the hospital was terminating the agreement in accordance with the "without cause" provision. In those 14 months, the hospital "had received in excess of 116 written complaints from Seton staff about Siegel's abusive, hypercritical, and hostile attitude and behavior toward nursing staff, anesthesiologists, and perfusionists. The complaints ranged from Siegel delaying scheduled surgeries, sometimes for hours, to her berating nurses and arguing with members of the surgical team during surgeries."

The contract between Dr. Siegel and the hospital included mandatory dispute resolution procedures, which Dr. Siegel invoked when notified of the hospital's decision to terminate, appealing to Seton's chief executive officer and then to its Board of Directors. Both upheld the decision to terminate the agreement and Dr. Siegel was removed from the Kaiser panel.

Dr. Siegel sued the hospital for wrongful termination, alleging that its true reason for terminating the agreement was to "destroy [her] ability to practice at Seton due to her vociferous advocacy for improved medical care delivery and standards at Seton."

She later sued the hospital's director of nursing and other individuals, alleging "intentional and negligent interference with prospective economic advantage, intentional and negligent infliction of emotional distress and sex discrimination."

The two suits were consolidated. The trial court granted summary judgment in favor of the hospital on Dr. Siegel's wrongful termination claim and dismissed the claims against the individual defendants. Pursuant to another provision of the contract, the court awarded attorney fees in the amount of $382,387 to the hospital and other defendants. Dr. Siegel appealed.

Patient Advocacy or Disruptive Conduct

On appeal, Dr. Siegel argued that the trial court erred in granting summary judgment to the hospital on her wrongful termination claim because she produced evidence showing that the termination of her contract violated public policy. Specifically, she pointed to a California statute that prohibits the termination of employment or contractual relationship with a physician for "advocating for medically appropriate health care."

In an attempt to prove her argument, Dr. Siegel offered two affidavits — one from an operating room nurse supervisor who worked with Dr. Siegel and one of her own. The operating room nurse supervisor said that Dr. Siegel's behavior was no worse than that of many other cardiac surgeons and that the di-

continued on page 6

Contract terminated (cont.)

rector of nursing had encouraged the staff to document incidents regarding Dr. Siegel's behavior.

In Dr. Siegel's affidavit, she claimed that she "complained vociferously to Seton administrators about the quality of medical care at Seton" and that the COO never investigated any of the complaints against her or personally observed her operating room conduct prior to terminating the agreement.

That was not enough for the appeals court to overturn the trial court's ruling in favor of the hospital. Noting that Dr. Siegel produced no direct evidence contradicting the COO's stated reasons for terminating the agreement, the court said:

"We do not find the foregoing evidence sufficient to create a triable issue of fact over whether Seton terminated the contract in retaliation for Siegel's advocacy of medically appropriate health care. First, there is no evidence that Seton encouraged or pressured nurses or other staff to lodge *false* complaints about Siegel. At most, [the operating room nurse's] declaration shows that nursing administrators encouraged nurses to *document* their complaints about Siegel and maintained a file on these complaints. There could be many reasons for this policy, including concern over potential future litigation and wanting to mollify the complaining staff. It is not reasonable to infer that Seton was attempting to fabricate a pretext for terminating the contract merely because it wanted staff complaints documented. [Emphasis supplied.]

"Further," continued the court, "evidence that [the COO] did not conduct a rigorous investigation of the facts before deciding to terminate Siegel also does not support an inference of pretext. Smith was in receipt of 116 complaints from approximately 25 staff members. An independent investigation into these complaints would have been extraordinarily time-consuming. At the same time, the sheer number of complaints and complainants, along with their consistency, provided some assurance that a problem existed even if some of the ... complaints were inaccurate or exaggerated. Especially in light of Seton's contractual right to terminate Siegel without cause, the fact that [the COO] conducted no in-depth investigation of the complaints fails to support an inference of pretext."

"The court went on to say that even if Dr. Siegel's evidence had raised an issue about whether the hospital's reason was pretextual, that still would not have been enough to overturn the lower court's decision. What Dr. Siegel had to prove was that the hospital in fact terminated her agreement because of her patient care advocacy. That she failed to do. The court said:

"Here, there is no evidence that [the hospital or the COO] were offended by Siegel's advocacy for medically appropriate care or attempted to dissuade her from engaging in it. The record evidence is to the contrary. ... [The hospital] responded to all of Dr. Siegel's communications and attempted to resolve her complaints, even agreeing that it would create special protocols for her patients. Dr. Siegel adduced no evidence, documentary or otherwise, showing that [the COO] or any other Seton administrators opposed her ideas, nor did she produce factual evidence from which such opposition might rationally be inferred."

The appeals court upheld the award of attorneys' fees. The contract included a provision stating that the losing party in any legal action related to the agreement would pay the prevailing party's legal fees. Dr. Siegel lost. She had to pay.

The facts in this case will be familiar to any physician leader who has had the unpleasant task of confronting a disruptive colleague about his or her behavior. Often, the disruptive physician's first response is: "I am the only one who cares about quality." The second is: "There are others worse than me." The first response is a smoke screen, the second is irrelevant.

Dr. Siegel's medical staff appointment and privileges were not affected, so the contract termination may not have totally solved the problem of her disruptive conduct. But there is no question that it sends a very effective message that disruptive behavior will not be tolerated — to Dr. Siegel and to other physicians on the staff.