Lessons from California Appellate Court Decision in Powell v. Bear Valley Community Hospital

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PROFESSIONAL

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On March 26, 2018, the California Court of Appeal affirmed a judgment denying a physician's petition for writ of mandate in *Powell v. Bear Valley Community Hospital*.[1]

The physician had sought a writ to challenge a hospital board of directors' (Board) decision to deny his request for advancement to active staff privileges and reappointment after discovering the physician had misrepresented the reasons why his privileges were revoked at a previous hospital. The case is significant for a number of reasons described below, including but not limited to providing valuable lessons in credentialing, clarifying existing laws, and recognizing a Board's exercise of independent judgment to reach a conclusion at odds with that of the Medical Executive Committee (MEC).[2]

BACKGROUND

Dr. Powell is a general surgeon who practiced medicine in both Texas and California. In 2000, the MEC of Brownwood Regional Medical Center (Brownwood) terminated his staff membership and clinical privileges, finding Dr. Powell a) failed to advise a young boy's parents that he severed the boy's vas deferens during a hernia procedure, and b) falsely represented that he fully disclosed the circumstances to the parents, which Brownwood's MEC considered to be dishonest and obstructive, and which prevented appropriate follow-up care. The Texas State Board of Medical Examiners completed an investigation but closed the case "with no action recommended because the evidence d[id] not indicate a violation of the Texas Medical Practice Act," as documented in a 2001 letter.

Dr. Powell thereafter filed a lawsuit against Brownwood. However, this lawsuit was dismissed by the trial court on Brownwood's motion for summary judgment, and this dismissal was affirmed on appeal.[3]

In October 2011, Dr. Powell applied for appointment to the medical staff at Bear Valley Community Hospital (Bear Valley) and was provisionally appointed as a member of the medical staff for one year. During the application process, Dr. Powell told several Bear Valley MEC members that Brownwood terminated his privileges because management disagreed with his use of advanced and/or costly surgical procedures, essentially pointing to an unfavorable political and/or economic environment. In his application, he disclosed that "Brownwood . . . terminated my privileges without factual or legal justification." He disclosed that the action was reported to the Texas Board and that all allegations were

dismissed with no disciplinary action.

After Dr. Powell had been practicing at Bear Valley under provisional status for a number of months, an external surgeon reviewed the charts of 12 patients treated by Dr. Powell at Bear Valley. Eight of these charts were found to be problematic by the external reviewer. This information was not considered by the MEC, however, when it thereafter made a recommendation in the spring of 2012 to advance Dr. Powell to active medical staff membership. Instead, the MEC relied only on two peer-reviewed charts. Bear Valley's Board expressed concerns with the MEC's decision to advance Dr. Powell despite the external reviewer's findings, and the MEC then retracted its recommendation so it could review all peer-reviewed charts.

The MEC again recommended advancing Dr. Powell to active status in summer of 2012. But the Board still had lingering concerns about Dr. Powell's qualifications, and requested additional information from Dr. Powell, including the 2001 "exonerat[ion]" letter from the Texas Board. Dr. Powell did not have (or would not produce) the letter. Bear Valley's general counsel then researched and located a copy of the Texas court opinion from Dr. Powell's unsuccessful lawsuit against Brownwood, which contradicted Dr. Powell's explanations regarding why his privileges at Brownwood were terminated. and provided the court opinion to Bear Valley's chief of staff and the Board members. On behalf of the MEC, the chief of staff thereafter withdrew the MEC's recommendation, deeming the application "incomplete" due to the missing 2001 letter. The MEC then notified Dr. Powell that his provisional privileges had expired due to an incomplete application, but encouraged him to reapply.

Dr. Powell later provided the MEC a copy of a separate 2002 letter from the Texas Board noting the investigation against him had been closed, and in December 2012, the MEC again recommended Dr. Powell be granted active staff privileges. Yet, the MEC still had not received a copy of the 2001 letter from the Texas Board. Despite the MEC's recommendation, the Bear Valley Board asked Dr. Powell to attend a meeting and present additional documentation, but he declined to meet and did not provide any other materials. Specifically, he failed to produce a copy of the 2001 Texas Board letter. Following this, Bear Valley's Board reached a tentative final decision to deny Dr. Powell's request for active privileges, triggering Dr. Powell's right to a hearing.

THE JUDICIAL REVIEW COMMITTEE FOUND JUSTIFICATION IN DENIAL OF DR. POWELL'S ADVANCEMENT TO ACTIVE PRIVILEGES AFTER ADMINISTRATIVE HEARING

Following a full administrative hearing, the Judicial Review Committee (JRC) unanimously found that the Board substantiated its charges against Dr. Powell by a preponderance of the evidence and that the Board's tentative final decision to deny his request for active privileges was both reasonable and warranted.

The JRC would not have upheld the Board's decision based solely on the first charge relating to external peer review issues, but found that Dr. Powell willfully failed to produce the 2001 letter and attempted to deceive the Board by producing a different 2002 letter instead and misrepresented the reasons why his Brownwood privileges were terminated. The JRC found Dr. Powell displayed dishonesty and deceitfulness justifying the Board's tentative final decision.

THE COURT OF APPEAL UPHELD THE LOWER COURT'S DECISION ON WRIT OF MANDATE, HOLDING THE BOARD ACTED WITHIN ITS AUTHORITY AND A FAIR HEARING WAS PROVIDED

Dr. Powell challenged the Board's decision on writ of mandate under California Code of Civil Procedure, section 1094.5, seeking to void the JRC/Board's decision and have his privileges at Bear Valley reinstated. The trial court denied the petition, and the Court of Appeal affirmed.

The Court of Appeal noted that the Board properly exercised independent judgment based on the information presented, all the while according due weight to the MEC's recommendations.[4] The Board greatly deferred to the MEC on matters of which the MEC had expertise and was fully informed. The Court of Appeal did not find substantial evidence in the record that the Board had any ulterior motive. Dr. Powell failed to demonstrate that the Board exceeded its authority.

The Court of Appeal further found that Dr. Powell's eight alleged challenges to the fairness of procedure lacked merit.[5]

SIGNIFICANCE OF CASE

This case is a prime example of why medical staffs must perform their own credentialing rather than merely taking a practitioner's word on an application, especially when a red flag is raised, such as in this case where the physician's privileges were previously revoked elsewhere. A physician's dishonesty on an application for medical staff membership and privileges has been long recognized as a factor that may adversely impact patient care and may justify termination of a physician's membership and privileges.[6] The *Powell* opinion goes even further by mentioning that dishonesty could also negatively impact other physicians' provision of medical care.[7]

This case highlights why medical staffs should include an attestation statement in applications for privileges and reappointment whereby the signing physician acknowledges that dishonesty on the application can serve as grounds for denial of appointment or termination of medical staff membership or privileges.

The Court of Appeal held in *Powell* that a hospital is not required to renew or extend an existing appointment pending an internal peer review administrative hearing if no adverse action has been taken that is reportable to the Medical Board pursuant to Business and Professions Code 805(b).[8] The Court of Appeal also confirmed the existing statutes by holding that a physician is not entitled to a hearing when the reason for the adverse action is not a "medical disciplinary cause or reason."[9]

In addition, the Court of Appeal held that a lapse in clinical privileges based on submitting an incomplete application is neither reportable under section 805 nor does it trigger the right to a hearing.[10] Note that, when the Board ultimately decided to deny Dr. Powell's reappointment for a medical disciplinary cause which would trigger the reporting requirements (i.e., dishonesty, and not merely an incomplete application), it was required to, and it did, afford him hearing rights.

The case also demonstrates the importance of the Board's independent judgment. Notably, the general counsel's diligent research and follow up in this case resulted in the findings contradicting the physician's explanations, which the MEC had previously missed. It is a reminder that Boards should not rubber stamp MEC recommendations without exercising their own independent judgment. The Court of Appeal in *Powell* recognized that an MEC which is comprised of physicians might not necessarily have insight or expertise to detect dishonest and unethical conduct, and held that the Board decision was a proper exercise of its independent judgment while still giving proper deference to the findings of the MEC.[11]

Finally, one of the most common challenges to peer review proceedings is an alleged lack of fair procedure. The *Powell* opinion demonstrates that minor procedural errors that are not prejudicial do not require reversal.

[1] 22 Cal.App.5th 263 (March 26, 2018), certified for publication April 16, 2018.

[2] *See Weinberg v. Cedars-Sinai Medical Center* (2004) 119 Cal.App.4th 1098, 1109 (upholding a conclusion at odds with the MEC where "great weight" was given to the MEC findings).

[3] *See Powell v. Brownwood Reg'l Hosp., Inc.*, Tex. App. Case No. 11-03-00171-CV, 2004, Tex. App. LEXIS 8202, p. *1 (Sept. 9, 2004).

[4] 22 Cal.App.5th at 393.

[5] *Id.*

[6] *Ellison v. Sequoia Health Services* (2010) 183 Cal.App.4th 1486, 1498; *Oskooi v. Fountain Valley Regional Hospital* (1996) 42 Cal.App.4th 233, 248.

[7] 22 Cal.App.5th at 393.

[8] 22 Cal.App.5th at 391.

[9] *Id. See* California Business & Professions Code § 809.1 and § 805(b).

[10] 22 Cal.App.5th at 391.

[11] *Id.* a 393.

RELATED CAPABILITIES

Medical Staff Operations and Disputes