

Hospital Privileges: Federal v. State Law?

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Hospitals already have to deal with all sorts of litigation issues and their burden has recently become heavier. The Federal Second Circuit Court of Appeals has dimmed considerably the "bright line" that the New York State Court of Appeals had previously established for cases in which doctors seek to challenge a hospital's decision to deny or terminate their hospital privileges. The "bright line," or unambiguous rule, was based upon the relief sought: if hospital privileges are sought, physicians must first present their claims to the New York Public Health Council ("PHC") before filing a complaint for that relief in court. *Gelbard v. Genesee Hospital*, 87 N.Y. 2d 691 (1996).

However, in *Tassy v. Brunswick Hospital*, 296 F. 3d 65 (2d Cir. 2002), 2002WL 1466834, a divided federal appellate court allowed a physician's complaint for reinstatement of his hospital privileges to stand even though he had not first presented his claim to the PHC. In so holding, the United States Court of Appeals for the Second Circuit focused not upon the nature of the relief requested, hospital privileges, but rather on what it viewed as the non-medical nature of the issues presented by Dr. Tassy's complaint.

Sexual Harassment and Expertise

Dr. Tassy, a psychiatrist and a black Haitian-American, alleged that his hospital privileges had been terminated based upon allegations of sexual harassment. He denied the allegations and claimed that the hospital had discriminated on the basis of his race and national origin. According to the Second Circuit, the question whether Dr. Tassy had to first present his claim to the PHC depended upon an analysis of the judge-made doctrine of "primary jurisdiction," a principle "that in cases raising issues of fact not within the conventional expertise of judges or cases requiring the exercise of administrative discretion," courts should first await the findings of the administrative agency. The Second Circuit held that the PHC had no expertise in determining whether a doctor committed sexual harassment and therefore there was no need for the issues to be first presented to the Council.

The Second Circuit specifically found significant that Brunswick Hospital "had not made any charges regarding Tassy's treatment of his patients or his competence as a physician, and Brunswick did not review any patient charts or medical data in deciding to suspend his privileges."



who's who

John M. O'Connor has over 25 years of experience in

litigation and health care, in both government and private practice, and also counsels not-for-profit corporations. Mr. O'Connor was an Assistant U.S. Attorney in the Southern District of New York and a law clerk for Judge Samuel Rabin of the New York Court of Appeals. Mr. O'Connor has extensive trial experience in both state and federal courts and has successfully argued appeals in the New York Court of Appeals and the Second Circuit. His business cases have included real estate, financial, construction, zoning, contracts, employment, health and hospital, pharmaceutical, and regulatory issues. He has been Adjunct Professor of Law at Cardozo Law School, and has published articles in the fields of litigation and health law.

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Where's Gelbard?

How does *Gelbard* fit into this picture? A good question, but one which *Tassy* does not address. In fact, it is interesting to note that *Gelbard*, a highly pertinent decision of the New York Court of Appeals, the highest court in New York State, is not even mentioned in the majority decision in *Tassy*. (An illustration, no doubt, of that hoary principle so well known to litigators: he who writes the decision gets to say what goes in it.) Nevertheless, in our capacity as Roving-Law-Clerk-at-Large, we offer a possible reconciliation.

In *Gelbard*, the physician's claim for hospital privileges was based on state statutory law: New York Public Health Law § 2801(b), which makes it an "improper practice" for a hospital to deny or terminate hospital privileges for a reason unrelated to "patient care, patient welfare, the objectives of the institution or the character or competency of the applicant." The New York Court of Appeals held that the same statute that provided the basis for Dr. Gelbard's claim also required him to first present his claim to the Public Health Council. In contrast, Dr. Tassy made a claim under federal law, that the hospital had violated 42 U.S.C. § 1981, which guaranteed Tassy "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." See 296 F.3d at 71 n. 3.

So what then is the practical application of all this? Well, it appears that if a physician's claim to hospital privileges is based upon an allegation of a violation of Public Health Law § 2801-b, with no federal claim, then the complaint must first be presented to the PHC. However, if the physician seeks hospital privileges based upon an alleged violation of federal law, such as a discrimination claim, then whether the claim must first be presented to the PHC will depend upon whether the specific issues presented are viewed as implicating the expertise of the PHC. ■

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