COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HEALTH

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| Department of Health, Bureau of Community Program Licensure and Certification | : | |
| vs. | : | Docket No. AB APP 09-001 |
| Steven Chase Brigham, M.D., American Medical Associates, P.C., d/b/a American Women's Service and State College Medical Services and Allentown Medical Services | : | |

# ADJUDICATION AND ORDER

## Background

This appeal is before the Agency Head of the Department of Health (Department) pursuant to a brief on exceptions filed by American Medical Associates, P.C. (Medical Associates), Allentown Medical Services (AMS), and Dr. Steven Chase Brigham (collectively Respondents) to the September 29, 2009 Proposed Report and Order of Hearing Officer Jackie Wiest Lutz.

The proceedings below were initiated by an Order to Show Cause filed by the Department of Health, Bureau of Community Program Licensure and Certification (Bureau) on March 3, 2008 against Steven Chase Brigham, M.D., American Medical Associates, P.C., d/b/a American Women's Service and State College Medical Services and Allentown Medical Services (Respondents) alleging violations of the terms of a settlement agreement entered into between the Department and Respondents in July 2004 and seeking enforcement of the terms of the settlement agreement based on those violations.

Following a hearing held on February 3 and 4, 2009, the Hearing Officer issued a Proposed Report and Order in which the Hearing Officer found that the Respondents breached the terms of the Settlement Agreement. The Proposed Order recommends enforcement of the terms of the Settlement Agreement; that all registrations of the Respondents to operate abortion facilities in this Commonwealth be revoked, that Medical Associates and AMS be precluded from registering any facility in this Commonwealth as a freestanding abortion facility, and that any entity in which Dr. Brigham has a controlling ownership or equity interest be precluded from registering a facility in this Commonwealth as a freestanding abortion facility.

In their Brief on Exceptions, Respondents assert that they have owned and operated abortion facilities in the Commonwealth of Pennsylvania for more than ten years, that during this time, they have worked diligently to provide high quality services to their patients despite the intense political and other pressures that are inextricably linked with the provision of abortion services. Respondents state that they have no desire to foster or prolong an adversarial relationship with the Department, but, if necessary, will vigorously defend their right to provide essential, constitutionally-protected services to women in Pennsylvania and will contest efforts by the Bureau to shut down their abortion facilities.

Respondents have requested that the Department reject the recommendations of the Hearing Officer and dismiss the Order to Show Cause for the reasons listed in their Brief on Exceptions. In the alternative, Respondents request that the Department adopt the proposal submitted by Respondents in their Post-Hearing Brief, in response to the request of the Hearing Officer at the close of the hearing. Respondents proposed to (1) provide free cervical cancer screening and

free testing for STD's for victims of rape or incest; (2) implement substantial changes to their policies and procedures to protect against future errors in the credentialing of licensed personnel; and (3) pay a fine of $10,000 to be applied toward the cost of an external auditor to confirm Respondents' compliance with the Settlement Agreement or to defray the costs of the Department's investigation.

Respondents list the following reasons for rejecting the Hearing Officer's Proposed Report and Proposed Order:

(1) The Department has no authority under the Abortion Control Act to register abortion facilities and, therefore, no authority to revoke the Respondents' registrations to operate abortion facilities or to preclude Respondents from registering any facility in the Commonwealth as a freestanding abortion facility.

(2) Respondents were deprived of their constitutional right to a fair hearing in a fair tribunal.

(3) Adoption of the recommendation will violate the constitutional rights of Respondents and of women seeking abortions.

(4) The proposed revocation of Respondents' registrations is predicated on selective enforcement of the Department's regulatory authority against abortion providers.

(5) Respondents did not violate the Settlement Agreement and are not subject to sanction.

(6) Even if Respondents did violate the Settlement Agreement, revocation is an unfair and unreasonable penalty given the *de minimus* nature of the violations and the mitigating evidence.

Following submission of the Respondents' Brief on Exceptions, and submission of the Department's Brief in Opposition to Exceptions, Respondents filed a Petition to Reopen the Record. The Petition asserts that Respondents Medical Associates and AMS no longer operate abortion facilities in the Commonwealth of Pennsylvania, having conveyed the abortion facilities, including the registrations, to Rose Health Services Company, a Pennsylvania non-profit corporation, on January 8, 2010. The Petition also asserts that Respondent, Steven C. Brigham, M.D., has no controlling ownership or equity interest in Rose Health Services Company; that such change in ownership constitutes a material change of fact, and that since Respondents Medical Associates and AMS no longer operate abortion facilities in the Commonwealth, the proposed recommendation that their registrations be revoked is moot. Respondents requested that the Agency Head reopen the record to consider the material change of fact and its effect on the pending proceeding.

**Discussion Regarding Petition to Reopen the Record**

The Respondents' assertion in its Petition to Reopen the Record that Medical Associates and AMS have conveyed their registrations to operate abortion facilities in the Commonwealth of Pennsylvania to Rose Health Services Company is incorrect, as those registrations may not be transferred to another entity as part of a sales transaction. Any attempt to convey those registrations would be void. Even if Medical Associates and AMS had managed to convey their registrations to Rose Health Services Company, however, the basic issue to be resolved, whether Medical Associates and AMS should be permitted to operate abortion facilities in the Commonwealth of Pennsylvania going forward, will not have been resolved. Until such time as Medical Associates and AMS have surrendered their registrations, or the Department has taken

action to revoke those registrations, the question whether Medical Associates and AMS may operate abortion facilities in this Commonwealth going forward will not have been resolved. Moreover, the Proposed Order also recommended that Dr. Brigham be precluded, directly, or indirectly, from registering a facility in the Commonwealth as an abortion facility. This issue must be resolved and may be resolved without reopening the record to hear evidence concerning the change of ownership of Medical Associates and AMS. The Petition to Reopen the Record will be denied.

## Findings of Fact

The Agency Head adopts the Hearing Officer's Findings of Fact, numbers 1 through 72, and they are incorporated in this Adjudication and Order as if set forth fully herein.

## Conclusions of Law

1. The Department has jurisdiction in this matter.
2. The Department has authority under the Abortion Control Act to register abortion facilities and, therefore, has authority to revoke the Respondents' registrations to operate abortion facilities or to preclude Respondents from registering a facility in the Commonwealth as a freestanding abortion facility.
3. The Respondents were notified of the charges against them and were afforded a fair opportunity in a fair tribunal to present evidence in response to those charges.

4. The Respondents violated a duty imposed upon them by paragraph 1 (page 4) of the Settlement Agreement when, using the license number on the license certificate supplied by Ms. Gitzen-Grover, they verified LPN licensure for a "Mary Grace Glover," not "Mary Gitzen-Grover," prior to hiring Ms. Gitzen-Grover to serve as office manager and to provide health care services in its Pittsburgh abortion facility. Findings of Fact Numbers 45, 46, 48, 49, 59 and 60.

5. The Respondents violated a duty imposed upon them by paragraph 4 (page 5) of the Settlement Agreement when they failed to include Ms. Gitzen-Grover on the list of health care practitioners working for the Respondents whose licensure status was being monitored by Respondents through the Department of State website at three-month intervals. Findings of Fact Numbers 63 and 64.

6. The Respondents violated a duty imposed upon them by paragraph 7 (page 6) of the Settlement Agreement when they failed to document that, before they employed Ms. Gitzen-Grover as an LPN, they secured from her a copy of her current LPN license certificate. Findings of Fact Numbers 50, 52, 65, 66, 67 and 68.

7. The Respondents violated a duty imposed upon them by paragraph 9 (page 6) of the Settlement Agreement when they failed to report to the State Board of Nursing that Ms. Gitzen-Grover provided nursing services at its Pittsburgh abortion facility without having an LPN license. Finding of Fact Number 69.

8. The Respondents violated a duty imposed upon them by paragraph 10 (pages 6 and 7) when they failed to disclose to patients receiving health care services from Ms. Gitzen-Grover while Ms. Gitzen-Grover worked at the Pittsburgh abortion facility that Ms.

Gitzen-Grover was unauthorized to provide health care services because she did not have an LPN license. Finding of Fact Number 71.

9. The Respondents have not presented evidence to establish that the Order to Show Cause seeking enforcement of the Settlement Agreement is an unconstitutionally motivated selective enforcement action.

10. The Respondents have not presented evidence that is sufficient to support a decision to depart from the terms of the Settlement Agreement and impose a sanction or sanctions different from those set forth in the Settlement Agreement for breach of the Agreement.

**Discussion**

Each of the reasons offered by Respondents for rejecting the Hearing Officer's Proposed Report and Proposed Order will be addressed in the order in which it was raised.

**The Department has no authority under the Abortion Control Act to register abortion facilities and, therefore, no authority to revoke the Respondents' registrations to operate abortion facilities or to preclude Respondents from registering any facility in the Commonwealth as a freestanding abortion facility.**

Respondents argue that the Abortion Control Act, 18 Pa. C.S. § 3207(a) (the "Act")[1], does not confer authority to license, permit, register or certify abortion facilities; nor does it confer supervisory authority over abortion facilities. Respondents argue that the Department's putative authority pursuant to regulation at 28 Pa. Code § 29.43(a), to "approve" medical facilities that

[1] Respondents actually cite to Section 3207(b), but it is clear from their argument that they meant to cite Section 3207(a).

perform abortions is illusory and that the Department cannot enlarge its authority by regulation. The Respondents argue that that express authority to approve medical facilities must be granted by the Act and it is not.

The Act provides that the Department:

> shall have the power to make rules and regulations pursuant to this chapter, with respect to performance of abortions and with respect to facilities in which abortions are performed, so as to protect the health and safety of woman having abortions and of premature infants aborted alive. These rules and regulations shall include, but not be limited to, procedures, staff, equipment and laboratory testing requirements for all facilities offering abortion services.

Section 3207(a) of the Act, 18 Pa. C.S. § 3207(a).

The Act gives the Department express authority to establish through the rulemaking process the minimum requirements for the performance of abortions and for the operation of facilities that perform abortions. The power to establish requirements for the operation of facilities that perform abortion necessarily implies the power to approve and disapprove facilities, based upon whether the facility complies with the minimum requirements for operation. Powers are also granted if they are necessarily implied from statute. *Commonwealth, Department of Environmental Resources v. Butler County Mushroom Farm,* 454 A.2d 1 (Pa. 1982) (Authority to issue order requiring check system to identify persons entering and exiting underground areas of operation is necessarily implied from language authorizing agency to issue instructions to correct statutory and regulatory violations).

When the legislature conferred the express authority to promulgate regulations to establish requirements for the operation of abortion facilities, it gave implied authority to oversee those

facilities and ensure compliance with established standards. Ensuring compliance necessitates the ability to withhold or revoke the authority of abortion facilities who fail to meet those standards.

Respondents cited *St. Elizabeth's Child Care Center v. Department of Public Welfare,* 963 A.2d 1274 (Pa. 2009) in their brief. Thus, Respondents are aware that the Pennsylvania Supreme Court recently upheld the licensing authority of another state agency despite the absence of express statutory authority. St. Elizabeth's, a day care center, had challenged a DPW regulation requiring all child day care centers providing care for seven or more children to obtain a certificate of compliance before commencing operations, arguing that the applicable statute only permits DPW's supervision of nonprofit, religious child care providers and does not authorize licensing. The Court noted that Article IX of the Public Welfare Code, 62 P .S. §§901 – 922, granting DPW supervision over "all children's institutions within this Commonwealth" does not explicitly forbid nor require DPW to issue regulations mandating that supervised institutions have a certificate of compliance. In holding that DPW could require St. Elizabeth's to hold a certificate of compliance from DPW, the Court stated that "[s]ubstantive rule-making is a widely used administrative practice, and its use should be upheld whenever the statutory delegation can reasonably be construed to authorize it." *Id., quoting Hospital Association of Pennsylvania v. MacLeod,* 487 Pa. 516, 410 A.2d 731, 733 (1980). The Court also acknowledged that "[t]he interpretation of a statute by those charged with its execution is entitled to great deference, and will not be overturned unless such construction is clearly erroneous." *Id., quoting Caso v. Workers' Comp. Appeal Bd.,* 839 A.2d 219, 221 (Pa. 2003) *and citing* 1 Pa. C.S. § 1921 (c)(8). Finally, the Court noted that DPW's interpretation of its enabling statute is not clearly erroneous

and that the DPW regulations have been in effect in some form since 1978 and have not been disturbed by the legislature thereby suggesting that DPW's regulations are not inconsistent with legislative intent. *Id.*

The Department's regulation at 28 Pa. Code § 29.43(a) has been in existence since 1983 and there has been no effort by the legislature to invalidate the regulation. To the contrary, in 2006, the General Assembly amended the Medical Care Availability and Reduction of Error ("MCARE") Act, 40 P.S. §§ 1303.101 – 1303.910, to require certain freestanding abortion facilities to comply with its terms. Failure to report a serious event or infrastructure failure, according to the statute, "may be a basis for revocation of approval pursuant to 28 Pa. Code § 29.43 (relating to facility approval)." 40 P.S. § 1303.313(f). If the Department has authority to revoke an approval pursuant to 28 Pa. Code § 29.43, it follows that the Department has authority to require the approval in the first place.

**Respondents were deprived of their constitutional right to a fair hearing in a fair tribunal.**

Respondents argue that they were deprived of the chance to defend themselves before a fair and impartial tribunal; that the Hearing Officer was biased in favor of the Bureau, and that her bias was evident in her rulings on the Department's Motion in Limine and underscored by her rulings at the hearing. Respondents assert that the Hearing Officer's refusal to schedule an immediate telephone conference and to rescind her ruling on the Motion in Limine as soon as Respondents advised her that they had been deprived of the opportunity to respond can only be explained by bias in favor of the Bureau and against the Respondents. Respondents also assert that although

Respondents were promised the same latitude in the presentation of its case as that permitted Bureau, the Hearing Officer denied Respondents such latitude. Respondents assert that they were precluded from introducing material evidence related to mitigation of penalty and to the reasonableness of the penalty imposed by the Bureau, in violation of their constitutional right to be heard and contrary to the Agency Head's ruling in the Motion in Limine.

The Hearing Officer acknowledged her mistake in ruling on the Motion in Limine prior to allowing Respondents an opportunity to respond, and although she did not schedule the immediate telephone conference call as requested by Respondents, ultimately she certified the Motion in Limine to the Agency Head for a ruling. Certification of the Motion in Limine to the Agency Head cured the Hearing Officer's mistake and ensured a fair determination of the Motion in Limine.

Respondents assert that the Hearing Officer also demonstrated bias when she did not allow them to present as mitigating evidence Respondents' determination to provide constitutionally protected healthcare services despite significant anti-abortion activity and testimony related to the energy, dedication and human and financial resources required to survive in a hostile atmosphere while complying with the Settlement Agreement. Respondents assert that, in precluding this evidence, the Hearing Office committed an error of law, and that her refusal to permit introduction of this testimony and other documentary evidence supportive of the Respondents' position at a later point in the hearing violated Respondents' right to present mitigating evidence.

In ruling on the Motion in Limine to preclude the Respondents from introducing any mitigating evidence at the hearing, this Agency Head ordered that Respondents be allowed to "explain all circumstances, including any circumstances they deem mitigating, surrounding the breach" if the Bureau were to prove a breach of the Settlement Agreement. The Hearing Officer was correct when she suggested that the mitigating evidence to be offered might include "steps that the organization took to try to prevent the type of alleged violation that occurred from happening." As the Bureau suggested, "if the Respondents could show that an employee assigned responsibilities under the Settlement Agreement had deliberately acted to sabotage the Respondents' compliance with their duties under the Settlement Agreement, or that an act the Respondents were required to perform within a prescribed time was delayed due to some extraordinary event, that would be evidence in mitigation of sanction." Bureau's Brief at p. 23. Evidence of Respondents' determination to provide constitutionally protected healthcare services despite significant anti-abortion activity and evidence related to the energy, dedication and human and financial resources required to survive in a hostile atmosphere while complying with the Settlement Agreement was not the type of evidence this Agency Head had contemplated when writing the order to permit introduction of mitigating evidence. Respondents were not denied due process during the hearing when they were precluded from presenting as mitigating evidence their dedication and determination to provide abortion services in a hostile environment.

**Adoption of the recommendation will violate the constitutional rights of Respondents and of women seeking abortions.**

In support of this Argument, Respondents incorporate by reference Subsection C of their Memorandum in Opposition to Motion in Limine. However, the General Rules of Administrative Practice and Procedure require that a brief on exceptions state the grounds upon which the exceptions rest *and* the argument in support of the exception, and require that the brief shall be self-contained. *See* 1 Pa. Code § 35.212(a)(1)(iii) and (iv), and § 35.212(c). (Emphasis added.)

Even if this Agency Head were to credit Respondents with having raised in its Brief on Exceptions the same argument defended in their Memorandum in Opposition to the Motion in Limine, that imposition of the sanction in the Settlement Agreements against the Respondents would unconstitutionally deprive a woman of her liberty to choose to undergo an abortion by placing an undue burden upon the exercise of that right in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution, this argument must be rejected as Respondents do not have standing to raise this argument. Respondents did not except to the ruling by this Agency Head that they have no standing to make that constitutional argument.

**The proposed revocation of Respondents' registrations is predicated on selective enforcement of the Department's regulatory authority against abortion providers.**

Again, Respondent seek to incorporate into their Brief on Exceptions an argument raised in their Memorandum in Opposition to the Motion in Limine, contrary to the General Rules of Administrative Practice and Procedure. *See* 1 Pa. Code § 35.212(a)(1)(iii) and (iv), and § 35.212(c).

Respondents had argued in their Memorandum in Opposition to the Motion in Limine that enforcement of the Settlement Agreement will violate the Respondents' constitutional right to be free from the selective enforcement of the Department's regulatory authority, and that they should be permitted to introduce evidence in support of this argument. In response, this Agency Head ordered that Respondents could present evidence that there are other health care providers in the Commonwealth who potentially violated a settlement agreement with the Department addressing quality assurance issues, and, if Respondents were able to present such evidence, they also would be permitted to present evidence that the selection of the Respondents for the Settlement Agreement enforcement action was unconstitutionally motivated. Respondents neither presented nor attempted to present evidence as permitted by this Agency Head's Order of November 10, 2008. Thus, Respondent's argument in its Brief on Exceptions is rejected.

**Respondents did not violate the Settlement Agreement and are not subject to sanction.**

This argument is rejected. *See* Conclusions of Law.

**Even if Respondents did violate the Settlement Agreement, revocation is an unfair and unreasonable penalty given the *de minimus* nature of the violations and the mitigating evidence.**

Respondents point out that the Bureau has not accused Respondents of intentionally violating the Settlement Agreement. Referring to what they have labeled an "otherwise unblemished record of compliance," Respondents suggest they have carried out their obligations under the Settlement

Agreement in good faith. Although they acknowledge that they made errors in credentialing, they have accepted responsibility and have already implemented significant changes in the hiring process as a result of the experience with Mary Gitzen-Grover. Respondents suggest that if the Agency Head concludes that Respondents violated the Settlement Agreement and that the violations warrant the imposition of a penalty, such penalty must be crafted taking the mitigating circumstances into consideration. Mitigating circumstances include: the valuable reproductive healthcare services Respondents provide; Respondents' diligent efforts to comply with the Settlement Agreement; the fact that Respondents did not intentionally violate the Settlement Agreement; the fact that no patient was harmed; Respondents' efforts to rectify their errors and to ensure those errors are not repeated; the resources Respondents must expend to survive in a hostile climate; and Respondents' cooperation with the Department. Most importantly, Respondents assert, the penalty should take into account the services Respondents provide and should not unduly restrict or eliminate access to and availability of reproductive healthcare services to patients.

The Settlement Agreement exists in order to ensure that Respondents' health care practitioner credentialing errors were not repeated. Respondents were already on notice that their ability to provide valuable reproductive healthcare services could be impacted for their failure to rectify their credentialing procedures. Respondents may not have intentionally failed to meet their responsibilities as set forth in the Settlement Agreement; nevertheless, their failure signals a reckless and careless attitude toward those whom they have served and seek to continue to serve. That no patient was harmed is a relief but not a reason to vary the consequences for Respondents for their numerous violations of the Settlement Agreement.