IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

IN THE MATTER OF:	:	**Case No.** A 1 4 0 0 5 0 2
LEBANON ROAD SURGERY CENTER	:	
Appellant,	:	**Judge**
vs.	:	
STATE OF OHIO DEPARTMENT OF HEALTH	:	
Appellee.	:	**EMERGENCY MOTION TO SUSPEND AND STAY THE ORDER OF THE OHIO DEPARTMENT OF HEALTH FROM WHICH APPELLANT APPEALS AND MEMORANDUM IN SUPPORT**

D105037227

MOTION

Pursuant to R.C. § 119.12 Appellant hereby moves for an order staying the Adjudication Order issued by the Ohio Department of Health which is the basis of this appeal, on the grounds that if the order is executed, appellant would suffer an unusual hardship. A stay would merely preserve the status quo. Without the stay Appellant would be forced to close its medical business. The effective date of the Adjudication Order is February 4, 2014. Unless this Court grants a stay, Appellant will have to close its business on February 4, 2014. If this Court denies the stay, it would effectively close one of two abortion clinics in the Greater Cincinnati area making this community the largest metropolitan area in the country served by only one abortion clinic. See http://news.cincinnati.com/article/20140121/NEWS010801/301210037/. Appellant therefore requests that the revocation order be suspended until there is a final resolution of this appeal.

MEMORANDUM

I. INTRODUCTION

This is an administrative appeal of the revocation of an Ambulatory Surgical Facility ("ASF") license. Dr. Martin Haskell, the owner of Appellant Lebanon Road Surgery Center ("LRSC"), has been providing reproductive health care to women in Ohio since his first medical office was opened in Cincinnati, Ohio in 1979. Dr. Haskell has been licensed to practice medicine in Ohio since 1974. Haskell TR 70.[1] Due to political pressure on local hospitals from anti-abortion activists, LRSC was unable to obtain a written transfer agreement with a local hospital, as is required by Ohio Department of Health regulation OAC §3701-83-19(E). The rule requires ASFs have an effective procedure for the safe and immediate transfer of patients from the facility to a hospital. In 2010, the Ohio Department of Health ("ODH") granted LRSC a variance allowing it to meet the hospital transfer agreement requirement in an alternative manner by having backup physicians available to admit patients if need be.

In 2012, ODH proposed to not renew and to revoke LRSC's license, citing the lack of a written transfer agreement. LRSC requested a hearing before ODH regarding renewal of the variance and of the ASF license. After the hearing the Director of ODH issued an Adjudication Order revoking LRSC's license and not renewing its license. LRSC seeks a stay of ODH's order revoking and not renewing its license during the pendency of its appeal. For the last three years the facility has safely operated and provided services to women in Cincinnati without a hospital transfer agreement and will continue to do so during the appeal.

A. Administrative Procedures

On October 21, 2010, the Director of the Ohio Department of Health issued a variance to LRSC exempting it from the administrative requirement that ambulatory surgical facilities obtain

[1] All references are to the transcript and exhibits contained in the administrative record below.

a written transfer agreement with a hospital. Ex. 6. ODH approved the renewal of LRSC's license in 2011 without issue. Ex. 10. After passing its annual inspection, ODH granted another renewal of LRSC's license on October 18, 2012. Ex. 22. But the following day, October 19, 2012, ODH proposed to non-renew LRSC's license. Ex. U. More than a month later, on November 23, 2012, ODH proposed to revoke LRSC's renewed license, claiming the renewal was a clerical error. Ex. X. The Director cited the same reason for both the non-renewal and the revocation of the license: the lack of a written transfer agreement with a hospital. ODH permitted LRSC to have a license and maintain a license without the transfer agreement for the past 3 years and three months.

In response to the proposed non-renewal and revocation, LRSC requested a hearing before the Director of ODH. On September 6, 2013 a hearing was held and a report was promptly issued October 8, 2013 recommending non-renewal and revocation of LRSC's license. LRSC filed objections to the Hearing Examiner's Report on October 21, 2013. The Director ruled three months later on January 17, 2014, affirming the hearing officer's recommendations and issuing an adjudication order revoking the license. It is this order from which this appeal is made.

B. Grounds for Non-Renewal of the Variance and Revocation of the License

The sole reason for denying the variance and revoking LRSC's license is the fact that LRSC cannot obtain a written transfer agreement from a local hospital. No hospital will give LRSC an agreement because abortions are performed at the facility. The Center has no transfer agreement because of pressure on local hospitals by anti-abortion activists. Most local hospitals are religious based.

Dr. Haskell has been safely providing medical services in Cincinnati for almost thirty years. The facility he operates in Dayton, Women's Med Center ("WMC Dayton"), also has been unable to obtain a hospital transfer agreement since 2003, yet the Dayton facility has safely operated with an ASF license for the last 11 years. The Ohio Department of Health is misusing its licensing power to deny Dr. Haskell the right to continue operating his business. Dr. Haskell requests the status quo be maintained until his appeal is finally adjudicated.

C. The Need for a Stay of the Adjudication Order

If the stay is not granted Appellant will suffer an unusual hardship – that is the facility, which has been licensed without a transfer agreement since 2010, will have to close during the appeal process.

II. ARGUMENT

The purpose of a stay order is to maintain the status quo until a full hearing on plaintiffs' claims can be heard. *See Yudin v. Knight Industries, Corp.*, 109 Ohio App. 3d 437, 439, 672 N.E.2d 265 (6th Dist.1996). LRSC is seeking merely to keep the status quo as it has been since this litigation began in October 2012 when ODH first proposed to not renew LRSC's license. The administrative process has taken 15 months[2] during which the facility has remained opened.

Ohio Revised Code§ 119.12 dictates that a court should suspend an agency order that is the subject of an appeal if the appellant demonstrates that an unusual hardship will result if the agency's order is executed. The court is not limited in the factors to be considered in granting or denying suspension of the agency order. Courts have identified four factors that are of particular importance in the decision:

1. The substantial likelihood that the moving party will ultimately prevail on the merits of the appeal;

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[2] ODH took four months to appoint a hearing officer and three months to issue a final decision. ODH's unhurried pace supports maintaining the status quo.

2. The substantial threat of irreparable harm to the moving party by denial of the stay;

3. Whether the issuance of a stay will cause harm to others; and

4. Whether issuance of the stay would serve the public interest.

Bob Krihwan Pontiac-GMC Truck, Inc. v. Gen. Motors Corp., 753 N.E.2d 864, 868, 753 N.E.2d 864 (10th Dist. 2001) citing *Hamlin Testing Labs., Inc. v. United States Atomic Energy Comm.*, 337 F.2d 221 (6th Cir. 1964). See also *Lake County Board of MRDD v. SERB*, Franklin C.P. No. 92CVF02-1504, 1992 WL 699882 (Apr. 14, 1992) (stay granted to maintain the status quo); *Hudson Township Trustees v. SERB*, Summit C.P. CV 86 3 0903, 1986 WL 295943 (May 30, 1986) (stay granted because it was in the best interest of the parties).

A. Likelihood of Success on the Merits

The first factor, likelihood of success, is of limited importance in this case. When the law has not been developed, "whether or not the moving party will prevail on the merits is not a particularly helpful factor since a motion for a stay comes at a time when the merits of an appeal have not been fully examined." *Lake County*, 1992 WL 699882 at *69; See also, *Hudson Township*, 1986 WL 295943 at *1.

Nevertheless, Appellant can show likelihood of success on the merits because it has complied with the purpose of the written transfer agreement in an alternative manner for over three years at LRSC and for over six years at its sister facility, Women's Med Center in Dayton. Since 1996 when the ASF regulations were enacted, ODH broadly interpreted the written transfer agreements requirement. Written transfer agreements have no standard format or required content and vary widely in length and content. Ex. CC. The transfer agreements in evidence all have two things in common – a promise by the hospital to admit emergency patients

and a mechanism for making that happen. If an ASF cannot meet this, or any other ASF rule, it may seek a "variance" of the requirement. The Director has the authority to grant a variance of a requirement if "the director determines that the requirement has been met in an alternative manner." O.A.C. § 3701-83-14(C). Thus, even without the transfer agreement, if the ASF can meet the purpose of the transfer agreement in an alternative manner, the ASF can be licensed.

In 2010 the Director first granted LRSC's request for a variance of the transfer agreement requirement. Ex. 6. Dr. Haskell has taken a number of precautions to protect the safety of his patients which together satisfy the letter and spirit of the transfer agreement requirement more thoroughly than many of the official transfer agreements obtained by other ASFs. Even ODH employees believed that the LRSC met the purpose of the transfer agreement requirement in an alternative way. At the hearing, former ODH Bureau Chief Roy Croy testified that the "spirit and intent" of the variance rule is to get assistance for a patient in need, and that LRSC met the spirit and intent of the requirement. Croy TR. 189, 165. As set out below, LRSC protocols have ensured that its patients are properly cared for and receive continuity of care, and therefore the LRSC has in fact complied with the transfer agreement regulation.

Appellant appeals the agency's decision, at least in part, because it is not supported by reliable, probative, and substantial evidence. O.R.C. § 119.12. "[A]n agency's findings of fact are presumed to be correct and must be deferred to by a reviewing court unless that court determines that the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable." *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471, 613 N.E.2d 591 (1993). Appellant will show on appeal that the agency's decision is not supported by the record.

1. LRSC Has Written Protocols To Ensure The Safe Transfer Of Patients To Local Hospitals.

In Dr. Haskell's lengthy experience, abortion patients very rarely require hospitalization. Only one patient has been transferred from LRSC to a local hospital in over three years. To address the rare instance where a patient requires hospitalization, Dr. Haskell has implemented detailed written protocols addressing exactly how admission will be accomplished. Ex. D. Each staff member has a list of tasks prioritized by importance. The protocol facilitates communication and continuity of care with the hospital where the patient is transferred. It establishes a procedure to ensure that the patient's file goes with the patient to the hospital. Haskell TR 251.

2. LRSC has Backup Physicians With Admitting Privileges at Local Hospitals Who Can Secure Hospital Admissions for LRSC Patients.

In addition to the written protocols for transferring patients to local hospitals, LRSC has agreements with three backup physicians with admitting privileges at two local Cincinnati hospitals. These physicians are able to secure admission for LRSC patients using their admitting privileges. In fact, when a patient needed to transferred, one of the three backup physicians was called and was able to care for the patient at the hospital. Haskell TR 237-38. A backup physician can accomplish more than a hospital transfer agreement. Paramedics transporting a patient will take the patient to the closest hospital, regardless of whether the ASF has a transfer agreement with a different hospital. Haskell TR 236. Transfer agreements do not give patients any priority. If the patient arrives at a hospital unattached, i.e., without an admitting physician (which is very common), the emergency physician treats the patient and finds an on-call physician at the hospital to admit the patient if needed. The transfer agreements in evidence all accept patients provided bed space and resources are available. Ex. CC p. 17-83. This limitation

does not apply to the backup doctors. Haskell TR 250. LRSC's protocol for hospital transfers shortens response time for patients that require emergency treatment because the patient need not be triaged in the emergency room, but can be seen immediately by a backup doctor. *Id.*

3. Federal Law Prohibits Hospitals From Transferring or Discharging Patients Who Require Emergency Care.

Under the Emergency Medical Treatment and Active Labor Act (EMTALA), all hospitals must accept and treat every emergency patient until they are stabilized before sending the patient to another hospital. 42 U.S.C. § 1395dd (b); *Moses v. Providence Hospital and Medical Centers, Inc.*, 561 F.3d 573, 583 (6th Cir. 2009). Hospitals must accept every emergency patient irrespective of whether the patient arrives under the care of a physician with hospital privileges or arrives without a transfer agreement from an ASF. The formal written transfer agreements admitted into this record do not establish any priority for patient admission. *See* Ex. CC pp. 17-83. Indeed, they typically have language that states that the admission will be accomplished "provided admission requirements in accordance with federal and state laws and regulations are met." *Id.* Thus, EMTALA trumps any formal written transfer agreement and will provide for emergency admission of any patient.

For these reasons, Appellant is likely to succeed on the merits that despite its inability to obtain a written transfer agreement with a local hospital it has fulfilled the purpose of the regulation.

B. <u>LRSC Faces a Substantial Threat of Irreparable Harm Unless There Is a Stay.</u>

In addition to likelihood of success on the merits, LRSC can also show that it would be irreparably harmed by ODH's decision to revoke its license unless a stay is granted. Irreparable harm is injury where there is no plain, adequate and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete. *City of Cleveland v. Cleveland*

Electric Illuminating Company (8th Dist 1996), 115 Ohio App.3d 1, 13. Irreparable harm is best avoided by maintaining the status quo. *Lake County*, 1992 WL 699882 at *70. The threshold for demonstrating irreparable harm is relatively low. Even slight harm to appellant weighs in favor of granting a stay when the purpose of the stay is to maintain the status quo. *Hudson Township*, 1986 WL 295943 at *1. In *Hudson Township* the employer alleged that it would suffer harm by posting a notice that SERB had determined the employer violated the law. The Court held while this was not irreparable harm, it was "harm nonetheless and weighs slightly in favor of granting the stay." *Id.* In *Lake County* the Court found that a past history of labor unrest, including strikes, was enough to show irreparable harm. 1992 WL 699882 at *70.

Ohio courts have granted stays of ODH orders against abortion clinics to preserve the status quo during the pendency of the proceedings on the basis that no potential harm to the public was present after the order was issued that was not present prior to the order. Prior to applying for an ASF license after the ASF laws were passed, two abortion facilities appealed ODH's adjudication order finding they needed to be licensed. The Franklin County common pleas court in those cases granted a stay during the appeals. *See, Founder's Women's Health v. Ohio Department of Health* (Franklin Cty. C.P. 2000), Case No. 00CVF05-4276 (copy attached); *Women's Med Centers v. Ohio Department of Health* (Franklin Cty. C.P. 2000), No. 00CVF05-4347 (copy attached). The Montgomery County common pleas court also granted a stay of the adjudication order appealed by WMC Dayton in 2008 (copy attached).[3]

A physician's loss of his medical practice, his sole means of support, has also been found to constitute irreparable harm sufficient to enjoin a hospital from breaching a non-compete contract. *Robert W. Clark, M.D., Inc. v. Mt. Carmel Health* (Franklin Cty. 1997). 124 Ohio App.3d 308, 317. Irreparable harm may also result when a business is forced to abruptly stop

[3] This case was settled shortly after the stay was granted.

operating. *Matter of Columbus Skyline Securities, Inc.*, 10th Dist. Franklin No. 93AP-790, 1994 WL 198780, *7 (May 19, 1994) (*rev'd on other grounds*); *Pentco v. Moody*, 474 F. Supp. 1001, 1006 (S.D. Ohio 1978); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

Without a stay LRSC will be forced to close its doors. Leaving the Greater Cincinnati area with only one clinic to perform abortions will cause irreparable harm to LRSC and its patients. Therefore, a stay is the appropriate solution and should be granted.

C. <u>There Is No Potential Harm to ODH or the Public Should the Stay Be Granted</u>

In addition, no harm will be caused by granting the stay order. Maintaining the status quo is sufficient to show there is no harm to the non-moving party. *See Lake County*, 1992 WL 699882 at *70; *Hudson Township*, 1986 WL 295943 at *1.

ODH delayed appointing a hearing officer for four months and later delayed its ruling for three months, during which time the facility continued to operate safely. Nothing has changed since. In fact, ODH inspected the facility in March 2012 and found the facility to be operating in compliance with all laws. Haskell TR 239. ODH's non-urgent pace underscores the fact that the continued operation of LRSC poses no danger to the health of women. There is no evidence the public would be harmed by maintaining the status quo during the pendency of this appeal. Dr. Haskell has operated several women's health clinics safely for over thirty years. Dr. Haskell and the physicians who work with him have an excellent record for patient care. As described above, LRSC has numerous precautions in place for the rare instances when a transfer is necessary. These precautions satisfy the purpose of the written transfer agreement requirement and justify the issuance of a variance. The Court need not be concerned that continued operation of the LRSC will endanger the health and safety of any of its patients. As there are no real health or

safety concerns raised by granting a stay, ODH will not be harmed and the stay should be granted.

D. Issuance of the Stay Would Serve the Public Interest

Finally, the public interest will be served by granting the stay. Maintaining the *status quo* is sufficient to show there is no harm to the public. *Lake County*, 1992 WL 699882 at *70; *Hudson Township*, 1986 WL 295943 at *1. In addition, while politically unpopular, access to abortion services is a necessary and important public service. *Jane Roe v. Simon Leis*, 2001 WL 1842459, (S.D. Ohio 2001) (Order granting injunction to transfer inmate from jail to abortion clinic); *Jane Doe v. John Barron*, 92 F.Supp.2d 694, 697 (S.D. Ohio 1999) (same). Lebanon Road Surgery Center is one of only two facilities in the Cincinnati area to perform abortions for women. Thousands of women depend upon LRSC for safe pregnancy termination services each year, however if LRSC is forced to close its doors, women in the greater Cincinnati area will be left with one option.

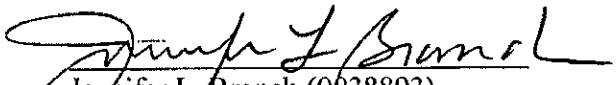
III. CONCLUSION

For the foregoing reasons, appellant LRSC has shown that a stay is necessary to protect it and its patients while this court fully considers the merits of this case. Maintaining the status quo will not harm ODH or the public. Therefore, LRSC respectfully requests that this stay be granted and the Director's order revoking LRSC's license to be suspended indefinitely.

IV. ORAL ARGUMENT REQUESTED

Appellant requests oral argument given the important issues raised in this Motion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served January 28, 2014 by fax and U.S. Mail first class postage prepaid on:

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IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

IN THE MATTER OF:	:	**Case No.**
LEBANON ROAD SURGERY CENTER	:	
Appellant,	:	
	:	**Judge**
vs.	:	
STATE OF OHIO DEPARTMENT OF HEALTH	:	
	:	**ORDER GRANTIN MOTION TO**
Appellee.	:	**STAY THE ORDER OF THE OHIO**
	:	**DEPARTMENT OF HEALTH**

This case is before the Court on Appellant's motion for a stay of the Ohio Department of Health's Adjudication Order. For the reasons contained in Appellant's motion, and for good cause shown, the motion to stay is GRANTED for the period of time until all appeals are exhausted. The Court believes the status quo should be preserved during the pendency of the appeal. There appears to be no potential harm to the general public which is present now that was not present before ODH issued its order.

_____

Judge Hamilton County Court of Common Pleas

1992 WL 699882

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Common Pleas, of Ohio, Franklin County

LAKE COUNTY BOARD OF MENTAL RETARDATION [AND DEVELOPMENTAL DISABILITIES], Appellant

v.

STATE UNEMPLOYMENT [sic] RELATIONS [BOARD], Appellee.

No. 92CVF02-1504. | April 14, 1992.

Opinion

*69 D. JOHNSON, Judge.

This matter is before the Court on appellant's motion for stay of enforcement pending appeal. This is an appeal by the Lake County Board of Mental Retardation and Developmental Disabilities ("MRDD") from a directive of the State Employment Relations Board ("SERB") certifying the merger of two bargaining units into a single unit and certifying election results.

The SERB directive merged the Deepwood Employees Association ("DEA") and the Professional Association for Training of the Mentally Retarded ("PATMR") into a single bargaining unit to be represented by PATMR. The directive also certified an employee vote approving the merger.

R.C. 119.12 provides that the Court of Common Pleas may suspend the order of an agency if it appears that an unusual hardship to the appellant will result from execution of the order pending appeal. In order to stay a SERB directive because of unusual hardship, the moving party must demonstrate:

(1) The substantial likelihood that the moving party will ultimately prevail on the merits of the appeal;

(2) The substantial threat of irreparable harm to the moving party by denial of the stay;

(3) The potential harm to opposing parties should the stay be granted; and

(4) Whether issuance of the stay would serve the public interest.

Hudson Township Trustees v. SERB (CP, Summit, 5-30-86), 1984-86 SERB 449, 450; *City of Ravenna v. SERB* (CP, Portage, 5-7-86), 1984-86 SERB 446, 449. See also *Hamlin Testing Lab, Inc. v. United States Atomic Energy Commission* (C.A. 6, [AEC] 1964), 337 F.2d 221.

Appellee contends that it is unlikely that MRDD will prevail on the merits because the SERB order is supported by reliable, probative and substantial evidence. However, such order must also be in accordance with law. See R.C. 119.12. In a well reasoned opinion, a SERB hearing officer concluded that, as a matter of law, the DEA and PATMR bargaining units cannot be consolidated into a single unit. The SERB directive does not discuss this recommended determination and apparently SERB summarily rejected it.

As the *Hudson Township* Court aptly observed, whether or not the moving party will prevail on the merits is not a particularly helpful factor since a motion for a stay comes at a time when the merits of an appeal have not been fully examined. However, based on the discussion in the hearing officer's report, this Court cannot conclude that it is substantially unlikely that MRDD will prevail.

Furthermore, MRDD could suffer irreparable harm should a stay not issue. From the evidence presented, it appears that MRDD has suffered labor unrest in the past, including strikes. If the SERB directive is enforced, two bargaining units will be merged into one. If this Court later concludes that such merger is contrary to law, the subsequent shuffling *70 of bargaining units could create substantial labor unrest. Consequently, the Court finds that irreparable harm is best avoided by maintaining the status quo.

The Court also finds that, should a stay issue, the potential harm to opposing parties is minimal. It is least harmful to all parties to maintain the status quo rather than to risk shuffling employees from one bargaining unit to another and then back again.

Finally, a stay is in the public interest. Considering the nature of the services provided by MRDD and the potential for labor unrest, the public is best served by maintaining the status quo until the merits of this appeal are fully developed and decided.

Upon consideration of the memoranda submitted herein and the record, it appears that appellant will suffer undue hardship should the SERB directive be enforced pending appeal. The Court finds that MRDD is entitled to a stay of enforcement pending appeal. Accordingly, appellant's motion is SUSTAINED. Counsel for appellant shall prepare an appropriate entry.

JUDGMENT ENTRY

This cause came to be heard on the Motion of the Lake County Board of Mental Retardation and Developmental Disabilities, Appellant in the above-entitled action, for an Order staying the Directive of the State Employment Relations Board issued on February 6, 1992 in Case No. 88-REP-11-0246, pending final disposition of Appellant's appeal which was filed with this Court on February 20, 1992.

Upon consideration of the memoranda submitted herein and the record, and being fully advised in the premises, the Court sustains Appellant's Motion for a stay pending final disposition of its appeal for reason that Appellant will suffer undue hardship should the Directive of the State Employment Relations Board be given force and effect pending appeal. It is hereby

ORDERED that the parties hereto shall be returned to the *status quo ante* as it existed prior to the issuance of the State Employment Relations Board's Directive of February 6, 1992, and enforcement of and any proceedings to enforce the Directive shall be stayed pending final disposition of Appellant's appeal.

Parallel Citations

1992 SERB 4-69

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1986 WL 295943

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

HUDSON TOWNSHIP TRUSTEES, Appellant,

v.

STATE EMPLOYMENT

RELATIONS BOARD, Appellee. *

Opinion

***450 FINDING AND ORDER**

McFADDEN, Judge.

This cause came on to be heard on May 16, 1986 upon Appellant's motion for Preliminary Injunction. Specifically, Appellant seeks a stay of the Order of the State Employment Relations Board dated January 9, 1986, wherein Appellant was ordered to post a notice and bargain collectively.

Revised Code 119.12 provides that if it appears to the court that an unusual hardship will result from the execution of the order pending determination of the appeal, the court may grant a suspension and fix its terms. The factors to be considered in determining whether a stay is appropriate include:
(1) the substantial likelihood that the moving party will ultimately prevail on the merits of the appeal;

(2) the substantial threat of irreparable harm to the moving party by denial of the stay;

(3) the potential harm to opposing parties should the stay be granted; and

(4) whether issuance of the stay would serve the public interest.

City of Ravenna v. State Employment Relations Board, et al. (May 7, 1986), [1984-86 SERB 446,] Case No. 85-CV-1687, Portage County Common Pleas Court, unreported (citations omitted) Judge Kainrad.

The first factor, that Appellant will likely prevail on the merits, does not contribute to the determination in this case. The merits of the appeal have not yet been examined, and the likely result is therefore unknown.

The second factor is likewise not determinative. Appellant has demonstrated harm, particularly in the SERB Order's requirement that a notice be posted. The notice states that the SERB has determined that Appellant violated the law, and that such determination was made "after a hearing in which all parties had an opportunity to present evidence ..." The very essence of this appeal is Appellant's assertion that such opportunity was not afforded.

While this harm does not rise to the level of irreparable harm, it is harm nonetheless and weighs slightly in favor of granting the stay.

The third factor, potential harm to opposing parties, must be decided in favor of Appellees, but not to any significant degree. At worst, granting the stay would only continue, without worsening, a situation which was called to the attention of the SERB eleven months ago.

The fourth factor, whether issuance of the stay would serve the public interest, weighs heavily in favor of granting the stay.

The sergeants are presently being denied collective bargaining negotiations. Whether rightly or wrongly so depends upon the decision on the merits of the appeal. It should be remembered that negotiations are a means to an end, not an end in themselves. That "end" in this case is the contract arrived at from the negotiations.

The negotiations are the process by which the end is to be accomplished. By their very nature, collective bargaining negotiations are seldom quick and easy. Here, the parties are aware that the ultimate issue is yet to be decided by the Court. That decision could abrogate a negotiated agreement (if indeed one could be reached in this uncertain atmosphere) and require the start of a new round of negotiation or litigation.

Such a result would not appear to be in the best interest of any of the parties. Furthermore, the public would receive an impression of official disorder in this important matter.

Based on the above considerations, the Court concludes that an unusual hardship will result from the execution of

the order pending determination of the appeal. Accordingly, Appellant's Motion for Preliminary Injunction should be granted. Appellee is hereby enjoined from enforcing its Order dated January 9, 1986 in Case No. 85-UR-06-3832, until further order of this Court.

It is so ordered.

Court of Common Pleas of Ohio, Summit County.

CV 86 3 0903. | May 30, 1986.

Parallel Citations

1984-86 SERB 449

Footnotes

* This decision relates to SERB v. Hudson Twp Trustees, SERB 85-UR-06-3832 (1-9-86).

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1994 WL 198780
Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin County.

In the Matter of COLUMBUS SKYLINE SECURITIES, INC. et al., Appellants-Appellants, (Columbus Skyline Securities, Inc. et al., Appellants/Cross-Appellees), (Mark V. Holderman, Commissioner of Securities et al., Appellees/Cross-Appellants.)

No. 93AP-790. | May 19, 1994.

Appeal from the Franklin County Court of Common Pleas.

Attorneys and Law Firms

Frost & Danchak, and Earle R. Frost, Sr., and John W.E. Bowen, Columbus, for appellants.

Lee I. Fisher, Atty. Gen., Daniel Malkoff and Marc A. Sigal, Columbus, for appellees.

Opinion

OPINION

STRAUSBAUGH, Judge.

*1 Appellants, Columbus Skyline Securities, Inc., Michael L. Eberle, Allen Herman, Harry Freeman, Sharon Fizer, Sandra Freeman, James Rapp, and Bruce Langhirt, appeal from a decision of the Franklin County Court of Common Pleas which found that an order of the Ohio Division of Securities (division) revoking the securities dealer and securities salesman licenses of the appellants was supported by reliable, probative, and substantial evidence and was in accordance with law. The revocation order has been suspended pending appeal. Appellants assert the following eight assignments of error:

"1. The Trial Court erred in applying Federal case decisions applicable to *inter* state securities dealers and their *inter* state sales brokers registered with the United States Securities and Exchange Commission ('the SEC'), SEC rules, regulations and rulings applicable to *inter* state securities dealers and their interstate sales brokers, and rules, guidelines and rulings of the National Association of Securities Dealers ('the NASD') applicable to the *inter* state securities dealers who are members thereof and their interstate sales brokers who also are members thereof in determining the market price and a price reasonably related to the market price with respect to sales of securities in the over-the-counter-market by Ohio intrastate securities dealers and their intrastate sales brokers within the meaning and contemplation of Ohio law.

"2. The Trial Court erred in finding, in substance, that *purchases of Fibercorp shares by Columbus Skyline from* time to time from other securities dealers, both intrastate and interstate, at *wholesale* prices in *large* blocks for its own ownership, account and inventory and with its own capital for purposes of trading at *retail* prices in said shares for itself as the principal and, at times thereafter, sales of shares of Fibercorp by Columbus Skyline from time to time from its inventory at *retail* prices to Ohio resident retail customers in *small* amounts of shares (compared to the large block wholesale purchases), which resulted in mark-ups described in percentages as found by the Court are in violation of Ohio law, and consequently that the findings of the Commissioner that Columbus Skyline and its sales brokers are persons not of good business repute within the meaning and contemplation of Section 1707.19(A), Ohio Revised Code, and have committed fraud within the meaning and contemplation of Section 1707.19(B), (G) and (I), Ohio Revised Code on account of 'excess' mark-ups in violation of law are supported by reliable, probative, and substantial evidence.

"3. The Trial Court erred in finding, in substance, that Ohio law proscribes that trading by Columbus Skyline in Fibercorp shares, as such was done as disclosed by the evidence, must be reasonably related to the 'current market price' within the meaning and contemplation of section 1707.19(A), Ohio Revised Code, and that due express notice to the Appellants that *federal case* law will be considered 'as a guide' in determining 'current market price' is given by the provisions of Ohio Administrative Code ('OAC') 1301:6-3-15(0)(1).

*2 "4. The Trial Court erred in finding that, pursuant to Section 1707.29, Ohio Revised Code, Appellant sales brokers Herman[,] Fizer, Rapp [,] Langhirt, and Sandra Freeman are deemed to have knowledge of the *wholesale* prices per share of Fibercorp shares which Columbus Skyline paid from time to time to other securities dealers for the purchase of *large*

blocks of such shares for its own ownership, account, and inventory and with its own capital.

"5. The Trial Court erred in sustaining the decision and orders of the Securities Commissioner revoking the respective licenses of Appellants.

"6. The decision and order of the Trial Court are not in accordance with law.

"7. The license revocation orders of the securities Commissioner are a denial of the constitutional rights of the Appellants to due process and to equal protection of the law under the Constitution of Ohio and the Constitution of the United States, and, therefore, are illegal, invalid, and contrary to law.

"8. the Trial Court erred in failing to find and order that those parts of the Regulations promulgated by the Commissioner as set forth in O.A.C. 1301:6-3-15(O)(1) which expressly and specifically include the language ' or by any administrative tribunal, state or federal', and 'or by the code of ethics of any associations of securities salesmen or dealers of which the applicant or licensed dealer or salesman was a member at the time of commission of the prohibited act or practice', as set forth in O.A.C. 1301:6-3-15(O)(8)(i), which expressly and specifically include the language 'entering into a transaction with or for a customer at a *price* not reasonably related to the *current market price* of a security' (underlining added), and; or by the code of ethics of any associations of securities salesmen or dealers of which the applicant or licensed dealer or salesman was a member at the time of omission of the prohibited act or practice', and as set forth in Ohio Administrative Code 1301:6-3-19(B)(8) which expressly and specifically include the language 'enter into any transaction with or for a customer at a *price* not reasonably related to the *current market price* of the security' (underlining added), and 'or by the code of ethics of any associations of securities salesmen or dealers of which the applicant or licensed dealer or salesman was a member at the time of commission of the prohibited act or practice', are void as an unauthorized exercised [*sic*] of rule-making power as *legislative* rule-making, rather than *interpretative* rule-making, in violation of statutory authority to adopt rules as are necessary to carry out the provisions of Chapter 1707, Ohio Revised Code, and to define statutory terms used in the Ohio Revised Code whether or not found in the provisions of Chapter 1707 thereof and, therefore, are in violation of the Constitution of Ohio." (Emphasis *sic.*)

The revocations at issue in the present appeal involve sales of FiberCorp common stock by appellants to retail customers. FiberCorp stock is penny stock sold on the over-the-counter (OTC) market. The sales at issue were made during a period dating from late December 1990 to late March 1991. The charges against appellants were premised upon the division's determination that appellants had sold FiberCorp stock at a price not reasonably related to the current market price (CMP) of the stock. The fundamental dispute between the parties to this appeal is what the CMP of the FiberCorp stock was at the time in question and how it is to be determined. Both parties to this appeal agree that neither Ohio's statutes nor case law define CMP for OTC stock. Appellee contends that industry practice, federal case law, and SEC opinions are the proper authority to rely upon for determining CMP for the purposes of R.C. 1707. The common pleas court accepted appellee's position that federal law is to be followed when determining CMP for intrastate sales of OTC stocks in Ohio. The division and the common pleas court found that during the period in question, the CMP for shares of FiberCorp ranged from fifteen cents to twenty-five cents per share; appellants' sale of these shares for a dollar a piece resulted in a markup ranging from 300% to 567%.

***3** The division order which called for the revocation of the licenses did so based upon the following Ohio Revised Code sections and Ohio Administrative Code rules: R.C. 1707.19(A)[1], 1707.19(B)[2], 1707.19(D)[3], 1707.19(H)[4], 1707.19(I)[5], and 1707.44(G)[6]; Ohio Adm.Code 1301:6-3-15(O)(1)[7], 1301:6-3-15(O)(8)(i)[8], and 1301:6-3-19(B)(8)[9].

The present appeal comes to this court pursuant to R.C. 119.12, which governs administrative appeals. A limited standard of review applies to an R.C. 119.12 appeal from a common pleas court judgment to a court of appeals. When considering questions of fact, a court of appeals is limited to determining whether the common pleas court abused its discretion. *In re Raymundo* (1990), 67 Ohio App.3d 262. When considering questions of law, including whether substantial evidence in the record supports the administrative order, this court has plenary review. *Richard W. Liss, M.D. v. State Medical Bd. of Ohio* (Sept. 24, 1992), Franklin App. No. 91AP-1281, unreported (1992 Opinions 4309), citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp.*

Relations Bd. (1992), 63 Ohio St.3d 339; *In re Raymundo, supra.*

Appellants have not argued their assignments of error separately in their brief as App.R 16(A) requires. Accordingly, we will not address each assignment of error separately. However, we will address the fundamental issues which this appeal has raised and the pertinent arguments of the parties.

Appellants contend that they had no knowledge and no way of knowing that federal and SEC law were to be used to determine CMP. Appellants disagree with the division's calculation of the CMP for the FiberCorp shares during the period in question. Appellants argue that the division's calculation of CMP does not take into account various factors such as the amount of stock being sold and the presence or absence of risk in a transaction based upon the status of the dealer, *i.e.*, whether he was acting as a principal or as an agent. Appellants assert that other dealers selling in situations comparable to those in which appellants were selling FiberCorp shares for a dollar a share were also selling it for a dollar a share.

The essential issue in the present case is whether the division violated appellants' substantive due process rights when they referred to federal and SEC law to calculate CMP when no revised code section or administrative policy or regulation specifically provided that these sources would be used to calculate CMP.

The general requirement of substantive due process is that a law should not be unreasonable, arbitrary, or capricious. *Nebbia v. New York* (1934), 291 U.S. 502. The United States Supreme Court has held that a law which forbids or requires conduct in terms so vague that a man of common intelligence must guess at its meaning and that men will differ as to its application, violates due process. *Baggett v. Bullitt* (1964), 377 U.S. 360. The Supreme Court has also noted that:

*4 " * * * Vague laws offend several important values. First, * * * we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. * * * " (Fn. omitted.) *Grayned v. City of Rockford* (1972), 408 U.S. 104, 108-109; 92 S.Ct. 2294, 2298-2299.

The Court also noted that vague laws may lead to arbitrary and discriminatory applications of these rules. *Id.*

The division asserts that provisions of the Ohio Revised Code and Ohio Administrative Code notified appellants and other people in their situation that federal and SEC law concerning the calculation of CMP applied to R.C. Chapter 1707 and promulgations made pursuant to it. The division cites to Ohio Adm.Code 1301:6-3-15(O)(1) [10], which provides as follows:

"(O) Good business repute defined

"In determining 'good business repute,' as used in sections 1707.01 to 1707.45 of the Revised Code, the division shall consider whether the applicant or licensed dealer or salesman:

"(1) Has engaged in any act or practice declared to be a fraud, fraudulent act, fraudulent practice or fraudulent transaction *and recognized as such in courts of law or equity or by any administrative tribunal, state or federal, on or after July 22, 1929,* or by the code of ethics of any associations of securities salesmen or dealers of which the applicant or licensed dealer or salesman was a member at the time of commission of the prohibited act or practice[.]" (Emphasis added.)

The division also refers to R.C. 1707.01(J), which defines fraud and fraudulent acts, practices, or transactions to include anything recognized as such in courts of law or equity on or after July 22, 1929.

The division has asserted that it is common knowledge that, consistent with federal law, dealer-to-dealer transactions form the entire basis for calculating CMP.

Several people testified at the division hearing on the subject of determining market price. Erwin Dugasz, a staff attorney with the division, testified at the hearing that while he has never seen a definition of CMP in any division regulation or policy statement, his understanding of CMP is that it may be determined pursuant to three methods: (1) contemporaneous cost, (2) dealer-to-dealer trading, and (3) pink sheets. (Pink sheets are distributed nationally by the NASD and contain bid and ask prices for certain securities.) All three of these methods are drawn from federal and SEC decisions. (Tr. 68-70.) Appellee has not argued to this court that the pink sheet quotes are a basis for calculating CMP.

The president of Skyline, Michael Eberle, testified that he priced FiberCorp shares at a dollar a share based on calls he made to other brokerage houses. He stated that Skyline basically followed the bid and asks that other market makers

and brokerage houses were quoting. He testified that the market establishes the bid and ask prices.

*5 Patrick Campbell testified as an expert on behalf of the division. He is a senior executive vice president with the Ohio Company. Campbell's understanding of CMP was that it refers to the inside market price (dealer-to-dealer arms length transaction prices). (Tr. 485, 488, 531.) He testified that the inside market price does not include markups. (Tr. 508, 762.) Campbell added that the availability of shares will affect their price and that competitive forces in the marketplace determine the allowed spread (the difference between the bid and the ask). Campbell also testified that numerous constraints affect the price a dealer quotes to retail customers, including competitive forces which oblige the dealer to price a security at a figure reasonably related to the market.

Rodger Marting testified at the request of both parties. Marting is a college professor, a lawyer, an expert witness, and was commissioner of the Ohio Division of Securities from 1983 to 1986. Marting understood CMP for a given security to mean the price of securities in a completed purchase or sale at a given point in time. (Tr. 774.) He testified that the CMP in a dealer-to-dealer transaction is different from the CMP of a dealer-to-retail customer transaction due to different characteristics of the two markets. (Tr. 774.) He explained that in the dealer-to-dealer setting, prices are negotiated and that volume and various needs of given dealers (such as the need to liquidate) dominate the determination of price. (Tr. 775.) Marting stated that due in part to the different quantities involved, substantial price differences exist between inside (dealer-to-dealer) and outside (dealer-to-customer) markets. (Tr. 796.) According to Marting, when determining market value for pricing purposes of a sale to a retail customer an intrastate dealer should not look at dealer-to-dealer transactions, but should look at dealer-to-customer transactions. While the dealer-to-dealer market influences this price, supply and demand also factor into the price determination. (Tr. 810, 811, 818.) Marting also testified that when a firm excessively marks up the security in a sale to an investor on the secondary market, an element of fraud is usually present. (Tr. 820.)

The record does not support the division's claim that it is commonly known that CMP is determined based entirely upon dealer-to-dealer transactions. While some of the people who testified at the hearing did employ the division's formula, not everybody did. Moreover, some of the people who employed this formula belong to the NASD and are obliged to follow federal and SEC law. These people admitted they were unfamiliar with the rules for intrastate dealers not bound by SEC regulations. That federal and SEC law looks to dealer-to-dealer transactions when determining CMP does not necessarily mean that Ohio dealers and salespersons not bound by federal law know or should know they must use the federal formula for state law purposes. Therefore, as a matter of law, we find that appellants had inadequate notice that CMP formulas based on dealer-to-dealer transactions applied to them.

*6 All of the charges against appellants hinge upon the finding that appellants sold FiberCorp shares at a price not reasonably related to market price. Because appellants had inadequate notice that SEC and federal law for determining CMP would be applied to them in enforcing Ohio securities law, the divisions's formula for determining CMP cannot be used to support the charges brought against appellants without violating appellant's substantive due process rights. Consequently, we find that substantial evidence does not support the division's and the common pleas court's findings that appellants sold FiberCorp shares at a price not reasonably related to the market price. We reverse the revocation of appellants' licenses to sell securities.

If appellee wants to incorporate federal and SEC law into Ohio law, this should be stated clearly in the revised code and/or administrative code. This could be done by adopting a rule establishing the method to use to calculate price which is clear and capable of consistent application. A general rule stating that federal securities law applies to Ohio intrastate securities trading would be insufficient as it would be impossible for anyone to know what standard applied.

Appellants have also asserted that their license revocations violated their constitutional right to equal protection. In support of this claim, they contend that revoking their licenses under the circumstances of the case was so severe that it was unreasonable and unwarranted and violated their constitutional rights to equal protection.

The equal protection clause guarantees that " 'no person or class of persons shall be denied the same protection of the law which is enjoyed by other persons or other classes in the same place and under like circumstances.' [Citation omitted.]" *Cahill v. Lewisburg* (1992), 79 Ohio App.3d 109, 115. While the state may draw distinctions between individuals, they may not be arbitrary or invidious, but must be relevant to a legitimate government purpose. *Id.* at 116. A state must

apply its laws nonarbitrarily and rationally. *Id.* An unequal application of a law will not violate the equal protection clause, unless intentional or purposeful discrimination is found to be present. *Id.* It is the complaining party's burden of proof to show intentional and purposeful discrimination. *Id.*

R.C. 1707.19 authorizes the division to revoke an individual's license if a violation of that section is found. Appellants have not shown that the division was intentionally or purposefully applying this statute in an arbitrary or discriminatory manner to them. Consequently, we find no equal protection violation.

A third issue raised in appellants' appeal is whether the prehearing suspension of their licenses violated their due process rights.

On September 23, 1991, the commissioner of securities of the state of Ohio issued an order which immediately suspended the Ohio securities dealer license of Columbus Skyline Securities and the securities salesperson licenses of the individual appellants, who all worked for Skyline. The suspension order was issued without a prior hearing and without any indication that appellants' business operations were being questioned as improper. Upon receipt of the order, appellants immediately closed down Skyline's business operations and halted their sales activities.

*7 The common pleas court noted that the original suspension order of September 23, 1991 was stayed on September 27, 1991. The court concluded that in light of the stays of execution, the hearing, and the appeal before the common pleas court, any deficiencies in due process involving the suspension order had been cured. The court found that it could not grant appellants any effectual relief since their due process rights had been satisfied. Finding the issue moot, the court declined to further address the due process claim.

We do not find that the issue is moot. As appellants point out, if the prehearing suspension order did violate their due process rights, there was a denial of due process rights for approximately four days. This required the expenditure of funds and effort to correct. Until the stay was obtained, appellants were unable to practice their trade. The stay did not cure any due process violation that occurred prior to the stay.

R.C. 119.06(B) provides that an order which suspends a license without a hearing is effective when there is a statute which specifically permits suspension before a hearing. R.C. 1707.19 authorizes the division to suspend a license before a hearing.

When determining whether a prior hearing is required before suspending or revoking the operating license of a business, the government interest and the private interest must be balanced. *Pentco, Inc. v. Moody* (S.D.Ohio 1978), 474 F.Supp. 1001. Irreparable harm can result when a business is forced to abruptly stop operating. See *Pentco, supra,* and *Doran v. Salem Inn, Inc.* (1975), 422 U.S. 922, 95 S.Ct. 2561. Therefore, a business has a significant interest in a hearing prior to the suspension or revocation of its license. The government interest may outweigh this private interest if the circumstances pose an immediate threat to the public's health, safety, or welfare. *Pentco, supra.*

The situations which R.C. 1707.19 identifies as circumstances which warrant a prehearing suspension pose an immediate threat to the welfare of the community. The securities industry affects the finances of many individuals and businesses, and preserving its integrity is a significant government interest. We find that the government interests represented in R.C. 1707.19 warrant prehearing suspensions and revocations. Consequently, we find no violation of appellants' due process rights.

We sustain appellants' first, fifth, sixth, and seventh assignments of error to the extent they assert due process violations except as to the prehearing suspension. We overrule appellants' seventh assignment of error insofar as it asserts an equal protection violation. Appellants' second, third, fourth, and eighth assignments of error are moot and not ruled upon.

Appellee has asserted the following assignment of error on cross appeal:

> "THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT IT WAS PRECLUDED FROM LIFTING THE STAY THAT IT HAD PREVIOUSLY GRANTED PURSUANT TO R.C. 119.12."

*8 In light of our ruling on appellants' appeal, appellee's assignment of error on cross-appeal is moot and not ruled upon.

The judgment of the trial court is reversed and remanded for proceedings consistent with the judgment of this court.

Judgment reversed; cause remanded.

BOWMAN and PETREE, JJ., concur.

STRAUSBAUGH, J., retired, of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

Footnotes

1 R.C. 1707.19(A) provides that the license of a securities dealer or salesperson may be revoked if the individual is found to lack good business repute.

2 R.C. 1707.19(B) provides that a license may be suspended or revoked if it is determined that a securities dealer or salesperson is conducting a fraudulent or illegitimate business.

3 R.C. 1707.19(D) provides that the license of a securities dealer or salesperson may be revoked if this individual intentionally violated any provision of R.C. Chapter 1707 or any rule promulgated thereunder.

4 R.C. 1707.19(H) provides that the license of a securities dealer or salesperson may be revoked if the division determines that the individual conducted business in purchasing or selling securities at such variations from the existing market that it was unconscionable under the circumstances.

5 R.C. 1707.19(I) provides that the license of a securities dealer or salesperson may be revoked if the division determines that the individual conducted business in violation of rules prescribed for the protection of investors.

6 R.C. 1707.44(G) prohibits any person from engaging in any act or practice which has been declared illegal, defined as fraudulent, or prohibited pursuant to R.C. Chapter 1707.

7 Ohio Adm.Code 1301:6-3-15(O)(1), now Ohio Adm.Code 1301:6-3-19(D)(1), discusses good business repute.

8 Ohio Adm.Code 1301:6-3-15(O)(8)(i), now Ohio Adm.Code 1301:6-13-19(A)(8) and (14), discusses good business repute.

9 Ohio Adm.Code 1301:6-3-19(B)(8), now Ohio Adm.Code 1301:6-3-19(A)(8), prohibits a licensed security dealer or salesperson from entering into any transaction with or for a customer at a price not reasonably related to the CMP of the security.

10 Presently codified in Ohio Adm.Code 1301:6-13-19(D)(1).

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2001 WL 1842459
Only the Westlaw citation is currently available.
United States District Court,
S.D. Ohio, Western Division.

Jane ROE, et al. Plaintiffs
v.
Simon L. LEIS, Jr., et al. Defendants

No. C-1-00-651. | Jan. 10, 2001.

Opinion

ORDER GRANTING PLAINTIFFS' MOTION FOR A PERMANENT INJUNCTION

DLOTT, J.

*1 This matter comes before the Court on Plaintiffs' Motion for a Preliminary Injunction. By agreement of the parties, the Court will treat this Motion as one for a Permanent Injunction. [1] Plaintiffs Jane Roe and Walter T. Bowers II, M.D., ask this Court to restrain Defendants Simon L. Leis, Jr. and Hamilton County from continuing to administer a policy in Hamilton County prisons that they claim is unconstitutional. For the reasons that follow, the Court hereby GRANTS Plaintiffs' Motion.

I. FACTUAL BACKGROUND

The parties have stipulated to all pertinent facts. [2] Defendant Simon L. Leis, Jr., in his official capacity as Sheriff of Hamilton County, administers detention facilities in that jurisdiction. Under Sheriff Leis's administration, Policy 56.00 governs pregnancy terminations and provides the following procedure:

> 3. If the inmate expresses the wish to receive an abortion, the healthcare staff will facilitate contact between the inmate and the appropriate counseling service.
>
> 4. If the Medical Director, in consultation with the Area Medical Director, judges that an abortion is therapeutically indicated, the medical care will be arranged following the procedure established at the institution providing specialty care.

Joint Ex. 2. Defendants and their medical contractors have interpreted "therapeutically indicated" to permit abortions only to save the life of the mother. The Defendants do not provide abortion services within any of their detention facilities.

In July 2000, while an inmate at 1617 Reading Road, Plaintiff Jane Roe advised Defendants that she was pregnant. They promptly transported her to University Hospital, where an ultrasound confirmed her pregnancy. She then requested access to abortion services, which Defendants denied. In an August 7, 2000 letter to Ms. Roe's attorney, Sheriff Leis explained this denial by stating that "the Hamilton County Sheriff's Office does not transport inmates for elective procedures without a court order. Upon receipt of a court order, the Hamilton County Sheriff's [*sic*] will transport inmate [Jane Roe] to her chosen health care provider." Joint Ex. 1. Having exhausted her administrative remedies, Ms. Roe and her physician, Plaintiff Walter T. Bowers II, M.D., sought relief in this Court under 42 U.S.C. § 1983. On August 9, 2000, this Court temporarily restrained Defendants Leis and Hamilton County from enforcing their policy requiring a court order before granting abortion services to an inmate and also enjoined them to provide Ms. Roe access to abortion services. Ms. Roe terminated her pregnancy.

II. STANDING

As an initial matter, Defendants contended at trial on this Motion that Dr. Bowers is not a proper plaintiff in this suit. They argue that there may never be another pregnant inmate in a Hamilton County detention facility and that even if there is, there is no guarantee that the inmate would seek the services of Dr. Bowers instead of another physician. Thus, if Ms. Roe has already terminated her pregnancy and Dr. Bowers is not a proper party, Plaintiffs' claim would be moot. If Defendants' contention was correct, the policy at issue here would be virtually unreviewable by a court. Unsurprisingly, therefore, the Supreme Court foreclosed such argument in 1976.

> *2 [T]he constitutionally protected abortion decision is one in which the physician is intimately involved. Aside from the woman herself, therefore, the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, that decision.... For these reasons, we conclude that it generally is appropriate to allow a physician to assert the rights of

> women patients as against governmental interference with the abortion decision.

Singleton v. Wulff, 428 U.S. 106, 117–18 (1976) (internal citation omitted). Defendants have offered neither authority nor logic to explain why *Singleton* does not apply here. The Court concludes that Dr. Bowers is a proper plaintiff.

III. LEGAL STANDARD FOR A PERMANENT INJUNCTION

"Where the plaintiff establishes a constitutional violation after a trial on the merits, the plaintiff will be entitled to *permanent injunctive relief upon showing* 1) a *continuing* irreparable injury if the court fails to issue an injunction, and 2) the lack of an adequate remedy at law." *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir.1998).[3]

IV. ANALYSIS

Plaintiffs challenge Defendants' policy on three grounds. They argue, first, that it is an undue burden on a woman's abortion decision, in violation of the Fourteenth Amendment; second, that it contains no health exception, in violation of the Fourteenth Amendment; and third, that it constitutes deliberate indifference to serious medical need, in violation of the Eighth Amendment. Because the Court finds Plaintiffs' first argument easily adequate to decide this case, it will not consider the others.[4]

The Supreme Court has instructed, "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). The Court's inquiry in this case is therefore two-fold. First, does Defendants' policy impinge on inmates' constitutional rights? Second, is the regulation reasonably related to legitimate penological interests?

Defendants' policy impinges on inmates' constitutional rights. State action "which imposes an undue burden on the woman's decision [whether to terminate her pregnancy] before fetal viability" is unconstitutional. *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992). "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* Defendants require that a woman in their custody seeking a non-therapeutically indicated abortion commence litigation and obtain a court order before they will provide abortion services. Without question, that policy places a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; therefore, it constitutes an undue burden.

*3 Ordinarily, the Court would next inquire whether this impingement of inmates' constitutional rights is reasonably related to legitimate penological interests, employing the four factors mentioned by the Supreme Court in *Turner*. Here, however, Defendants have not offered any legitimate penological interest to justify their policy. Nor can the Court infer one on this record. Accordingly, Defendants' policy with respect to abortion services is invalid. Plaintiffs have succeeded on the merits of their claim.

In addition, because this case concerns not an isolated incident but a standing procedure, Defendants' policy threatens continuing irreparable injury to inmates who seek abortion services. For a woman whom the government denies her constitutional right to abortion, there is obviously no adequate remedy at law. Plaintiffs have thus demonstrated all that is required for a permanent injunction.

What has been said is enough to dispose of the case. But the Court finds it appropriate to answer the implicit premise of the policy of the Sheriff and the County that they are not bound by the federal courts' holdings concerning abortion. The United States Constitution is the supreme law of the land. *See* U.S. Const. art. VI. Nearly two-hundred years ago, in the canonical case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), Chief Justice Marshall declared, "It is emphatically the province and duty of the judicial department to say what the law is." This means that the federal judiciary, not the Hamilton County Sheriff, is supreme in the exposition of the law of the land.

The application of the Constitution to the facts of this case is clear. In an eloquent and comprehensive opinion for the Third Circuit, Judge Higginbotham detailed the legal questions with which the Court is today faced and concluded, as the Court does here, that a prison policy "requiring court-ordered releases for inmates to obtain nontherapeutic, elective abortions impermissibly burdens the inmates' constitutionally protected right to choose to terminate their pregnancies." *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 351 (3d Cir.1987). Indeed, last year this Court expressly found "the reasoning of the Third Circuit to be persuasive" in granting a temporary restraining order against the Director of the River City Correctional Facility, who was employing the same policy as the one challenged here. *Doe v. Barron*, 92 F.Supp.2d 694, 696 (S.D.Ohio 1999).

In light of this precedent, it is difficult to conceive of a justification for these Defendants' continued insistence on an unconstitutional policy. Upon entering office, the Sheriff of Hamilton County, like all state executive officials, takes a solemn oath to support the Constitution. The federal judiciary has detailed a woman's constitutional right to an abortion. The Sheriff might find such a right morally repugnant. Or he might find ignoring its existence politically expedient. Nevertheless, "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). Ours is a government of laws, not of men.

*4 Therefore, the Court GRANTS Plaintiffs' request for a permanent injunction and hereby ORDERS Defendants, Sheriff Simon L. Leis, Jr. and Hamilton County, to institute a policy, consistent with this opinion, for providing abortion services to inmates who request them.

IT IS SO ORDERED.

Footnotes

1 Federal Rule of Civil Procedure 65(a)(2) so authorizes.

2 Pursuant to Federal Rule of Civil Procedure 52, the Court will set out its findings of fact in this section and its conclusions of law in subsequent sections.

3 This standard incorporates the theory behind preliminary injunctive relief, coupled with the recognition that the litigant must actually succeed on the merits, within the specific context of constitutional law. Generally, in considering a motion for a preliminary injunction, district courts consider four factors: the movant's likelihood of success on the merits, whether the movant will suffer irreparable harm absent injunctive relief, whether such relief will harm third persons, and whether it will benefit the public interest. *See Samuel v. Herrick Mem'l Hosp.*, 201 F.3d 830, 833 (6th Cir.2000). "The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n. 12 (1987).

4 *Cf. Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (counseling courts not to rule on constitutional questions unless necessary); Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 Colum. L.Rev. 1454 (2000) (critiquing judicial minimalism, but arguing that courts should decide that which is necessary to resolve a case but no more); Cass R. Sunstein, *The Supreme Court, 1995 Term–Foreword: Leaving Things Undecided*, 110 Harv. L.Rev. 4 (1996) (advocating judicial minimalism).

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IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

FOUNDER'S WOMEN"S HEALTH CENTER,	]	
Appellant,	]	**CASE NO. 00CVF05-4276**
v.	]	**JUDGE BESSEY**
OHIO DEPARTMENT OF HEALTH,	]	
Appellee.	]	
	AND	
WOMEN'S MED. CENTERS,	]	
Appellant,	]	**CASE NO. 00CVF05-4347**
v.	]	**JUDGE FAIS**
OHIO DEPARTMENT OF HEALTH,	]	
Appellee.	]	

ORDER GRANTING APPELLANTS' MOTIONS FOR STAY
FILED MAY 15 AND 16, 2000

Rendered this 14th day of June, 2000.

Bessey, J.

These cases are before the Court on Appellants' motions for stay of the Department of Health's Orders which are the subject of these appeals. The cases are being consolidated by separate Order filed today. For the reasons

stated in the motions of Appellant, and for good cause shown, the motions to stay are GRANTED for the period of time they are pending with this Court. The Court believes the status quo should be preserved during the pendency of this case. There appears to be no potential harm to the general public which is present now that was not present before the Order. If the parties desire an expedited briefing schedule, they may discuss that with Magistrate Rita Eaton. [(614) 462-5558]

JOHN P. BESSEY, JUDGE

Appearances:

Alphonse A. Gerhardestein, Esq.
Jennifer L. Branch, Esq.
Attorneys for Appellants

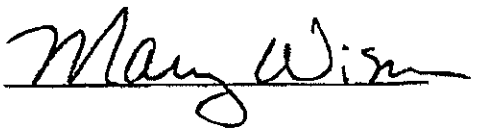
Dennis G. Nealon, Esq.
Attorney for Appellee

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY
CIVIL DIVISION

WOMEN'S MEDICAL PROFESSIONAL CORPORATION,	:	CASE NO. 08 CV 1975
	:	
	:	Judge Mary Wiseman
Appellant,	:	
v.	:	
	:	**ORDER, AND ENTRY**
STATE OF OHIO DEPARTMENT OF HEALTH,	:	**GRANTING AN INTERIM STAY FROM THE OHIO DEPARTMENT OF HEALTH'S ORDER**
Appellee.	:	
	:	**ORDER AND ENTRY SETTING BRIEFING SCHEDULE ON MOTION TO SUSPEND AND STAY THE ORDER OF THE OHIO DEPARTMENT OF HEALTH**

This matter is before the Court on Appellant Women's Medical Professional Corporation's Motion to Suspend and Stay the Order of the Ohio Department of Health. Per telephone conference with attorneys for all parties present, this Court hereby grants an interim stay to allow the Appellee State of Ohio to brief the issues in response to Appellant's motion. As such, the Appellee has until Monday March 3, 2008 to respond and Appellant shall have until March 4, 2008 to reply. The Court shall provide an opportunity oral argument on March 5, 2008 should such be necessary. This Court shall issue rule upon the pending motion on or before March 10, 2008.

SO ORDERED:



JUDGE MARY WISEMAN

Copies of this Order and Entry were forwarded to the following parties via ordinary mail this filing date.

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