
Division Medical Assistance v. Dalgish
Cite as 3 *N.J.A.R.* 23

**THE DIVISION OF MEDICAL
ASSISTANCE AND HEALTH SERVICES,**
Petitioner,
v.
LAWRENCE DALGLISH, M.D.,
Respondent.

Decided March 19, 1981

Initial Decision

SYNOPSIS

The Division of Medical Assistance and Health Services sought to suspend the respondent, a licensed physician, as a provider of services in the Medicaid Program, pursuant to *N.J.A.C.* 10:49-1.17 which allows for the disqualification of individuals who have been convicted of a crime involving moral turpitude.

The administrative law judge found that respondent's criminal indictments stemmed from his use of an illegal wiretap during the course of a bitter domestic squabble with his wife from whom he was subsequently divorced. By order of the Superior Court, the respondent was placed in a Pretrial Intervention Program in December 1980.

The administrative law judge observed that *N.J.A.C.* 10:49-1.17, on which the proposed suspension of the respondent was based, calls for a disqualification of an individual who has been convicted of a crime of moral turpitude. Here, the judge noted, the respondent had not been convicted of a crime, but had been accepted into the Pretrial Intervention Program. Additionally, the judge found that the crime of which the respondent was accused was not one of moral turpitude since, viewed in its totality, it could not be described as "an act of baseness, vileness or depravity," *State Board v. Weiner*, 68 *N.J. Super.* 468, 483 (App. Div. 1961); nor did the charge relate to the physician's practice of medicine.

Accordingly, the administrative law judge concluded that respondent should not be suspended from his position as a Medicaid provider and ordered that his suspension be reversed.

Ivan J. Punchatz, Deputy Attorney General for Petitioner (John J. Degnan, Attorney General of New Jersey, Attorney)

Stanley J. Hausman, Esq., for Respondent

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GEIGER, ALJ:

The Division of Medical Assistance and Health Services (DMAHS) seeks to suspend respondent as a provider of services in the Medicaid Program, pursuant to *N.J.A.C.* 10:49-1.17. The action of suspension is based upon respondent's indictment on six criminal counts returned in the Superior Court of New Jersey on March 25, 1980.

The matter was determined a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.* and a hearing was held November 18, 1980, and briefs were submitted.

The applicable regulation, *N.J.A.C.* 10:49-1.17, in this matter reads as follows:

Program Participation -

Suspension means an exclusion from State contracting for a temporary period of time, pending the completion of an investigation or legal proceedings.

. . . Any of the following, among other things, shall constitute a good cause for debarment, suspension or disqualification of a person engaged in State contracting, as defined herein, by the Division of Medical Assistance and Health Services: . . .

(21) conviction of any crime involving moral turpitude.

The facts regarding the offense for which respondent was indicted are summarized as follows:

Respondent is a duly licensed Medical Doctor having practiced medicine in the State of New Jersey for the past 21 years. He is 53 years old and currently maintains a practice in the Town of Montclair. He has had no other involvements with the law or the criminal justice system. Underlying his offense was a bitter domestic squabble. Respondent and his wife were married December 28, 1977, and took up residence at the wife's home. Respondent began to pay the family bills and generally maintain the family abode; however, a little more than one year had elapsed when discord began to strain the marriage. In June 1979, respondent's wife, without any warning or explanation, disappeared and remained away from the home for approximately seven days. During that period of time, the respondent conceived the idea of placing an illegal wiretap on the family telephone to discover whether or not his wife had taken another lover. As a result, respondent learned that his wife had gone to Las Vegas, Nevada with a parish priest. Respondent's efforts to salvage the marriage by speaking with the clergyman and his superior were to no avail. Some time in July 1979, respondent's wife removed all his belongings from the household to the garage and locked him out, seeking a divorce on the grounds of extreme cruelty. In attempting to obtain material for a counter claim in the divorce,

respondent continued to use the wiretap even though he had removed himself from the home and had been advised against its use. His wife informed the law enforcement authorities regarding the wiretap and respondent was indicted even though he never made any use of the conversations obtained from it. On March 24, 1980, a Judgment of Divorce was granted to his wife.

On December 19, 1980, Judge Felix A. Martino ordered that the respondent be accepted into the Pretrial Intervention Program. Pretrial Intervention (PTI), was initially authorized in New Jersey during 1970 under *R. 3:28* as a procedural alternative to the traditional system of prosecuting and incarcerating criminal suspects. Consequently, it can be seen that under the regulations contained in *N.J.A.C. 10:49-1.17* that to be disqualified under the regulation for moral turpitude, one must have been convicted of a crime involving moral turpitude. Participation in PTI does not act as a conviction. Furthermore, in the circumstances of this case, wiretapping does not appear to be a crime involving moral turpitude. In *State Board of Medical Examiners v. Weiner*, 68 *N.J. Super.* 468 (App. Div. 1961), the court defined moral turpitude as, "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow man. . . ." *Id.* at 483. The court acknowledged the difficulty in applying the definition to specific acts, but made it clear that the "common moral sense of the community" must be taken into consideration. *Id.* at 484. The court felt "the crime must be viewed in all of its potential factual shadings." *Id.* at 486. In *Division of Alcoholic Beverage Control v. McNally*, 91 *N.J. Super.* 513 (App. Div. 1966), turpitude in an ABC case is an inference derived from the facts of the case, while in *Gauli v. Board of Trustees Police and Firemen's Retirement System*, 143 *N.J. Super.* 480 (App. Div. 1976), the plea of guilty to a charge of weapons possession does not, in itself, admit to moral turpitude; the case was remanded to discover the circumstances of the crime.

It is clear from these cases that moral turpitude is not found from a mere statutory prohibition. Rather, turpitude implies something immoral in itself as determined by the general moral sense of the community whether or not it is punishable by law.

The circumstances of this case show that the respondent used wiretapping more from desperation in the attempt to learn the identity of his wife's lover than as "an act of baseness, vileness or depravity in the private or social duties which man owes to his fellow man." The result would be different had the respondent used wiretaps in the course of his profession as a physician. In *Cincinnati Bar Association v. Massengale*, 171 *N.E. 2d*, 713 (Sp. Ct. Ohio) (1961), an attorney was disbarred for conducting wiretaps in relation to his practice of law.

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Finally, it must be noted that disqualifying by suspending the physician's license under *N.J.A.C.* 10:49-1.17 for the acts he had committed would not be in keeping with the stated policy of the regulation which is to disqualify people "on the basis of a lack of responsibility . . . for the purpose of protecting the interests of the division." It is true that the Division disqualifies physicians who either have a potential of defrauding the Division due to past dishonest activities or associations, or who fail to provide quality medical service due to repeated malpractice, neglect, or character problems. Nothing in this physician's acts, however, indicates a potential for dishonesty or baseness in character as it relates to his patients.

The attorney for the Division of Medical Assistance and Health Service argues that *R.* 3:28 does not envision PTI as the *final* disposition of an indictment until such time as the PTI program has been successfully completed. He further argues that respondent's total earnings in 1969 from Medicaid were only \$106, which supports the position that the respondent's suspension in and of itself is not harmful to respondent.

Based upon the foregoing, **I FIND:**

1. The circumstances surrounding the employment of an illegal wiretap by the respondent do not point to moral turpitude on his part.
2. Respondent has not been convicted of a crime, but has been accepted into PTI.
3. The amount of money earned by respondent from his participation in the Medicaid Program as a provider during 1979 has no direct bearing on the issue, but tends to point out that the respondent's loss of a provider number would do less harm to him than to a potential patient who can afford medical services only under the Medicaid Program.
4. Respondent's acceptance into PTI, not his successful completion of it, governs whether or not he should be disqualified.

Based upon the facts adduced at the hearing and pursuant to the regulations above cited, **I CONCLUDE** that the respondent should not be suspended from providing Medicaid services since his enrollment in the PTI program is not a conviction and thus his acts fall outside *N.J.A.C.* 10:49-1.17. Furthermore, the acts committed, though prohibited by statute, do not appear to be acts of moral turpitude when they are considered in the light of the surrounding circumstances. Further suspension of the physician on these grounds would appear to contradict the intent of the regulation. Therefore, the agency action to suspend respondent's Medicaid provider number is **REVERSED**.

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After reviewing this Initial Decision, the Division of Medical Assistance and Health Services on May 1, 1981, issued the following
Final Decision:

Based upon his full review of the record, the Director hereby affirms the recommended decision of the Administrative Law Judge and incorporates the same herein by reference.

The Director's decision to remove the suspension against Dr. Dalglish is based upon a multi-faceted approach which takes into consideration the various mitigating factors.

Although Dr. Dalglish was indicted, it is the Director's opinion that the basis of the indictment does not constitute an offense set forth in *N.J.A.C.* 10:49-1.17(d).

The specific facts of this case indicate that the respondent's indictment was based upon his violation of the statutory prohibition of the unauthorized use of a wiretap. The record indicates that the respondent only utilized the unauthorized wiretap for the personal purpose of obtaining evidence in a divorce proceeding. He did not use the wiretap within the course of his profession as a physician.

Therefore, the Director finds that the respondent's use of the wiretap does not constitute a crime involving moral turpitude.

Furthermore, the respondent's use of the wiretap was not related to any fraudulent scheme to defraud the Medicaid Program or any other public or private health care program. Therefore, his use of the unauthorized wiretap does not constitute an offense indicating a lack of business integrity or honesty.

Although the respondent's invasion of his wife's privacy through the use of the wiretap should be deplored, it did not constitute a cause, affecting his responsibility as a State contractor, of such serious and compelling nature to warrant suspension or debarment.

In conclusion, the respondent's illegal actions did not constitute a threat to either the interests of the Division or the Medicaid patients.