

STATE OF NEW HAMPSHIRE

STRAFFORD, SS.

SUPERIOR COURT

David E. Strang, M.D.

v.

Frisbie Memorial Hospital

00-C-0021

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The plaintiff brings this action alleging the defendant, Frisbie Memorial Hospital ("Frisbie" or "the hospital"), breached a contract arising from the hospital's bylaws when it informed the plaintiff that he should no longer provide coverage for emergency department physicians. Specifically, the plaintiff contends the bylaws, which govern the exercise of medical staff privileges, create contractual rights to "employment opportunity" which the hospital violated by refusing to allow him to work on a part-time basis following his resignation as a full-time employee. In addition, the plaintiff asserts that the hospital breached the covenant of good faith and fair dealing contained in

the aforementioned contract. The defendant moves for summary judgment on these claims. The plaintiff objects.

The court may grant summary judgment only if the moving party has demonstrated that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. See RSA 491:8-a; Opinion of the Justices (SLAPP Suit Procedure), 138 N.H. 445, 450 (1994). The court must consider the evidence in the light most favorable to the non-moving party and give that party the benefit of all favorable inferences. See id.

The undisputed facts are as follows. The plaintiff began working for the hospital in September, 1995.¹ He applied for, and eventually received, active medical staff privileges from the hospital credentials committee. Following a controversial three-year employment, the plaintiff announced his resignation on May 13, 1998, at a staff meeting of the hospital's Department of Emergency Medicine. The plaintiff addressed a letter, dated May 11, 1998, to Karen Dutcher ("Dutcher"), Vice President of Patient Care Services, stating simply, "[e]ffective July 10[,] 1998[,] I am resigning from my position as Emergency Department Physician."

Def. ex. B. The letter made no mention of an intention on the part of the plaintiff to continue working at the hospital in any

¹ The plaintiff signed a "compensation/benefits agreement for Emergency Department Physicians" on June 20, 1995. See Donn. ex. 3. The document establishes the requisite minimum hours, rate of pay, incentives, and benefits for Emergency Department physicians at the hospital. Karen Dutcher sent the document to the plaintiff, and the plaintiff returned it to her, with his signature and notations.

capacity. The plaintiff then began working full-time with Central New Hampshire ER Associates, P.A.

The defendant asserts that, at the May 13, 1998, Emergency Medicine meeting, "[h]e indicated to his colleagues . . . that he intended to be able to cover shifts in the emergency department as needed." On July 25, 1998, the plaintiff covered a shift at the hospital at the request of one of his former colleagues in the Emergency Department. A letter to the plaintiff from

Dutcher, dated July 27, 1998, states, [s]ince you are no longer an employee, Accounting will mail you a check for your professional services [on July 25, 1998] and follow up with a Form 1099. Per your letter of May 11, 1998, we have accepted your resignation from the Emergency Department as of July 10, 1998. We will not be scheduling you for any further shifts and we request that you do not make individual arrangements with [hospital] physicians to provide coverage.

Def. ex. C. The same day, Dutcher wrote and distributed a memo listing the names of those physicians "authorized" to work as Emergency Department staff. See Dutcher ex. 14. The plaintiff's name was not included on that list.

In response, the plaintiff forwarded a letter to Dutcher, dated August 1, 1998, stating,

[t]here appears to be a misunderstanding on your part in regard to my practice intentions in the Emergency Department at Frisbie. Whereas I did resign from my full-time position in the Emergency Department, I have not resigned my hospital privileges and have every intention of making myself available for coverage whenever possible. I announced this at the departmental meeting on May 13 when I formally announced my resignation and my colleagues have been well aware of my

availability as evidenced by Dr. Lanzetta's request that I cover his shift July 25th. I hope this clears up any confusion about this matter.

Dutcher ex. 15. Dutcher never responded to this letter.

The plaintiff claims that the hospital deliberately prevented him from continuing to work at the hospital on a fill-in basis, contrary to both his medical staff privileges to do so and past practice at the hospital. He asserts that, following his resignation, he maintained Courtesy Medical Staff privileges, which, pursuant to the hospital's bylaws, established a contract entitling him to continued part-time employment. He asserts that, in preventing his continued employment, the hospital breached both the contract created by the bylaws and the covenant of good faith and fair dealing arising from that contract.

The hospital moves for summary judgment asserting the plaintiff had no contractual right to continued employment with and compensation from the hospital. The hospital contends that the plaintiff's medical staff status and clinical privileges at the hospital do not create a contract for continued part-time employment. It asserts that, although the New Hampshire Supreme Court has held that medical staff bylaws create certain procedural rights which may be enforced by courts, see Bricker v. Sceva Speare Memorial Hospital, 111 N.H. 276, 279-80 (1971), New Hampshire law has never addressed whether those bylaws create an enforceable contract between the hospital and the medical staff. Citing the case law of other jurisdictions, the hospital

contends that, even if the bylaws constitute a contract between the plaintiff and the hospital, the contract pertains to medical privileges and does not create employment rights.

The "Bylaws - Rules and Regulations of the Frisbie Memorial Hospital Medical Staff" ("bylaws") delineate the categories of the hospital's medical staff, as well as the rules, requirements, and privileges attendant thereto. See Appendix I(A), Defendant's Memorandum of Law in Support of [Its] Motion for Summary Judgment. Article III, Section III(C) of the bylaws states that "[a]ppointment to the Medical Staff shall confer on the appointee only such clinical privileges as have been requested by the appointee and granted by the Board of Trustees in accordance with these [b]ylaws." Id. at 5. "Membership on the Medical Staff (except Honorary Staff membership) cannot be maintained without maintaining clinical privileges." Id. at 6. Clinical privileges are defined as "permission to provide medical or other patient care services in the [h]ospital within well-defined limits, based upon the individual's professional license, training, experience, ability and judgment." See id. at 1.

The bylaws stipulate that all members of the hospital's medical staff shall be appointed to one of the following groups: Active Staff, Senior Active Staff, Courtesy Staff, Consulting Staff, or Honorary Staff. The bylaws provide that Active Medical Staff physicians are those

-who carry out all or a significant part of their hospital

practice in this hospital, and
-who are able to provide continuous care in a timely fashion for their patients, and
-who are willing to assume functions and responsibilities of the Active Staff, including assignment for emergency care and consultations, and the provision of a reasonable amount of services to the hospital and/or the Medical Staff.

See id. at 6.

The bylaws pertaining to Courtesy Medical Staff are contained within Article IV, Section V and provide as follows:

A. The Courtesy Medical Staff shall consist of physicians . . . who are unable to assume duties for Active Staff Membership at this Medical Staff for one or more of the following reasons:

1. They carry the equivalent of Active or Associate Staff membership at another hospital, and they intend to have patient interactions with no more than 20 patients in any consecutive 12 months at Frisbie Memorial Hospital.
2. They may not be able themselves to provide continuous care on a timely basis for their patients.
3. Formerly Active Staff Members who are reducing their hospital practice.

The Executive Committee shall require a Courtesy Staff Member to apply to, and assume the duties of, the Active Staff, when the member has interactions with a sufficient number of hospitalized or ambulatory patients, (i.e., in excess of 20 patients in any consecutive 12 months) to require his Active Staff status and participation in maintaining a meaningful and orderly performance improvement process in the hospital, or for other reasons consistent with the hospital's mission.

B. Courtesy Staff Members may attend patients in in- or out-patient setting; they may not vote or hold office. They may serve on committees. They are required to pay dues.

C. The term is for one provisional year; subsequent terms are not to exceed two years.

D. The extent of Courtesy Staff members' hospital practice, or the number of admissions, or of patients attended

per appointment period may be reviewed and/or curtailed, or subjected to a minimum volume requirement by the Executive Committee.

Id. at 7-8.

Article III, Section X, entitled, "Physicians . . . in the Employ of the Hospital, or Under Contractual Relationship with the Hospital," provides, in pertinent part,

C. Physicians . . . who have a contractual relationship with the hospital, or who are either an agent, employee, or principal, or a partner in an entity that has a contractual relationship with the hospital, related to providing specified patient care services at the hospital, must be members of the Medical Staff and achieve and maintain such membership and clinical privileges through the same procedure provided for other Medical Staff members.

Upon expiration or other termination of the contractual relationship with the hospital . . . such a member shall have due process rights under these [b]ylaws with regards to his membership and/or clinical privileges, unless such rights are waived under circumstances specified in the contract.

Id. at 11.

New Hampshire law requires that exclusion from staff privileges be done in accordance with the bylaws of the hospital and will be reviewed by the court and set aside if arbitrary, capricious, or unreasonable. Bricker, 111 N.H. at 279. As noted by the hospital, however, the New Hampshire Supreme Court has never determined whether the bylaws create an enforceable contract between the hospital and medical staff.

Nor must this court make such a determination. Even if a contract were formed by the bylaws, the court finds no support

for finding the contract the plaintiff alleges; specifically, there is no basis for finding the plaintiff had the employment right, under the bylaws, to continue working for the hospital on a part-time, "fill-in" basis. The bylaws specifically differentiate Active Staff from Courtesy Staff by requiring, only of Active Staff, that members be:

willing to assume functions and responsibilities of the Active Staff, including assignment for emergency care and consultations, and the provision of a reasonable amount of services to the hospital and/or the Medical Staff.

See id. at 6. By contrast, Courtesy Staff may only have "patient interactions" with twenty patients in any consecutive twelve month period. See id. at 7-8. Nothing in these provisions would entitle the plaintiff to the "right," enforceable in this court, to work as a part-time employee of the hospital.

The court finds the bylaws clearly do not contemplate the contract alleged by the plaintiff. While the plaintiff retained clinical privileges, they do not give rise to the employment contract he claims. Furthermore, the court cannot find "past practice" requires a different result, given that only one other formerly full-time physician now works on a per diem basis in the manner contemplated by the plaintiff, and that physician followed a procedure the plaintiff admits he did not. See Donnelly Depo., 9-13; Pl. Depo., Vol. 1, 155.

The plaintiff alleges that the hospital violated, generally, and without specification, Articles I, II, III, IV, and V of the

bylaws. The court finds no support for this allegation. The hospital did not prevent the plaintiff from exercising clinical privileges; rather, it prevented him from unilaterally assuming a part-time position at the hospital as an employee of the Emergency Department, following his resignation of his full-time position in that department. Although the plaintiff maintained Courtesy Staff membership, the bylaws clearly indicate that, under the circumstances as they existed in this case, the plaintiff was not in a continuing employment relationship with the hospital.

For the above reasons, the court finds there is no genuine issue of material fact and that the hospital is entitled to judgment as a matter of law on both counts of the plaintiff's writ. Accordingly, the defendant's Motion for Summary Judgment is GRANTED.

So **ORDERED**.

Date: January 30, 2002

Bruce E. Mohl
Presiding Justice

