IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Steven Chase Brigham, M.D., American Medical Associates, PC d/b/a American Women's Services and State College Medical Services and Allentown Medical Services, Petitioners	:	
v.	:	No. 1582 C.D. 2010
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Department of Health, Bureau of Community Licensure and Certification, Respondent	:	Argued: March 8, 2011

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: June 15, 2011

Steven Chase Brigham, M.D. (Dr. Brigham) and American Medical Associates, PC (AMA) d/b/a American Women's Services (AWS), State College Medical Services (SCMS), and Allentown Medical Services (AMS) (collectively, Petitioners) petition for review of the Adjudication and Order of the Deputy Secretary for the Pennsylvania Department of Health (Department): denying their exceptions to the Proposed Report and Order of a Department hearing examiner; adopting the Proposed Report and Order in its entirety, with the exception of the Conclusions of Law; substituting his own Conclusions of Law in place of those in

the Proposed Report and Order; and denying their petition to reopen the record. The Proposed Order recommended that: (1) all registrations of AMA and AMS to operate freestanding abortion facilities in the Commonwealth pursuant to the Abortion Control Act (Act)[1] should be revoked; (2) AMA and AMS shall be precluded from registering any facility as a freestanding abortion facility under the Act; and (3) Dr. Brigham shall be precluded from registering any facility as a freestanding abortion facility under the Act either directly, or indirectly through any professional corporation, nonprofit corporation, or any other entity in which he has a controlling ownership or equity interest. We affirm.

AMA is a professional corporation that has registration from the Department to operate a freestanding abortion facility in Pittsburgh, and operates that facility under the AWS fictitious name. AMA also has a registration from the Department to operate a freestanding abortion facility in Erie that also operates under the AWS fictitious name. AMA also has a registration from the Department to operate a freestanding abortion facility in State College that operates under the SCMS fictitious name. In addition, AMS is a nonprofit stock corporation that has registration from the Department to operate a freestanding abortion facility in

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[1] 18 Pa.C.S. §§ 3201 – 3220. Section 3207(a) of the Act provides:

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

18 Pa.C.S. § 3207(a).

Allentown. At all relevant and material times, Dr. Brigham was the sole shareholder and chief executive officer of both AMA and AMS.

In 2003 and 2004, a number of abortions were performed at the AMA and AMS facilities by a physician who was not appropriately licensed.[2] As a result, rather than facing disciplinary action[3], on July 27, 2004, Dr. Brigham, AMA, and AMS entered into a Stipulation and Settlement Agreement with the Department. See Certified Record (CR) at 30a-39a.

The Settlement Agreement included the following relevant provisions:

> 1. Immediately prior to initially employing, engaging or otherwise permitting a physician or other health care practitioner (practitioner) to provide health care services relating to an abortion in an abortion facility [AMA] or AMS operates in this Commonwealth, [AMA] or AMS, as appropriate, will ask the practitioner for the practitioner's current license status, secure from the practitioner a copy of the practitioner's current license or license registration certificate, and check the website the Department of State maintains on practitioner license status, to verify that the practitioner is currently licensed or has a currently registered license to ensure that the health care services the practitioner would be providing in the facility are within the scope of the practitioner's license.

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[2] The physician in question possessed an active-retired license to practice medicine. An active-retired license only permits a physician to provide medical care, including the prescription of drugs, to the physician and his or her immediate family.

[3] Section 29.33(3) of the Department's regulations provides that "[a]bortions shall be performed only by a physician who possesses the requisite professional skill and competence as determined and approved by the medical facility in accordance with appropriate procedures." 28 Pa. Code § 29.33(3). In addition, Section 29.43(d) of the Department's regulations provides, in pertinent part, that "[f]acility approval for performance of abortions may be revoked if this subchapter is not adhered to." 28 Pa. Code § 29.43(d).

5. [AMA] and AMS will prohibit any practitioner from performing a health care service relating to an abortion at any abortion facility [AMA] or AMS operates in this Commonwealth, when the practitioner is known by [AMA] or AMS to be prohibited from performing that service due to lack of scope or license, or no current registration of the license.

* * *

9. Within three days after discovery, [AMA] and AMS will report to the [Department] and the appropriate licensure board, a practitioner who provided at any of the abortion facilities [AMA] or AMS operates in this Commonwealth, health care services relating to an abortion prohibited by lack or scope of license, or no current registration of the license, and explain to the Department and the appropriate licensure board the circumstances under which the prohibited practice occurred and was discovered.

10. Within 10 days after discovery, [AMA] and AMS will disclose to each patient (or the patient's authorized representative) who received, at any of the abortion facilities [AMA] or AMS operates in this Commonwealth, health care services relating to an abortion after the effective date of this Agreement from a person unauthorized to provide such services due to lack or scope of license, or no current registration of the license, the name of the person who provided the prohibited services and a general description of those services.

* * *

13. Should [AMA] or AMS violate any term of this Agreement, the Department will revoke all registrations of [AMA] and AMS to operate abortion facilities in this Commonwealth, subject to [AMA] and

AMS being afforded procedural and substantive rights guaranteed by the Administrative Agency Law[4]….

14. Should [AMA] or AMS violate any term of this agreement, neither [AMA] nor AMS shall thereafter seek to register any facility in this Commonwealth as a freestanding abortion facility, nor shall Dr. Brigham directly, or indirectly through any professional corporation, nonprofit corporation, or any other entity in which he has a controlling ownership or equity interest, seek to register a facility in this Commonwealth as a freestanding abortion facility, subject to [AMA], AMS and Dr. Brigham being afforded procedural and substantive rights guaranteed by the Administrative Agency Law.

CR at 33a-36a, 37a.

On October 11, 2006, AMA hired an office manager for its Pittsburgh office named Mary Grover who held herself out to be a licensed practical nurse (LPN), and indicated that she held a Pennsylvania license. She provided AMA with a license number that belonged to a different person named "Mary Grace Glover".[5] While employed by AMA, she assisted a physician on occasion when he performed abortions and administered anesthesia; she occasionally worked in the recovery room and oversaw the patients in the recovery room including monitoring their color, pulse, and blood pressure; and she prepared notes that she signed as the recovery room nurse.[6] Mary Grover tendered her resignation to AMA in January

[4] 2 Pa.C.S. §§ 501-508, 701-704.

[5] Immediately prior to her employment, the registry of nurses accessible through the Department of State's website showed a Mary Grover as the holder of an inactive RN license in Pennsylvania. However, at that time, the registry also showed a Mary Grace Glover as the holder of an active LPN license in Pennsylvania.

[6] Section 29.33(13) of the Department's regulations provides:

(13) Each patient shall be supervised constantly while

(Continued....)

of 2007. The improper health care services provided by Mary Grover were not reported to either the appropriate licensure board or any patients as required by the Settlement Agreement.

On March 3, 2008, the Department issued an Order to Show Cause against Dr. Brigham, AMA, AWS, SCMS, and AMS in which it sought to impose the penalty provisions of the Settlement Agreement.[7] On April 3, 2008, Petitioners

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> recovering from surgery or anesthesia, until she is released from recovery by a registered nurse or a licensed practical nurse under the direction of a registered nurse or a physician. The nurse shall evaluate the condition of the patient and enter a report of the evaluation and orders in the medical record of the patient.

28 Pa. Code § 29.33(13).

[7] Section 31.1(a) of the General Rules of Administrative Practice and Procedure (GRAPP) expressly provides that the GRAPP "[g]overn[] the practice and procedure before agencies of the Commonwealth…", with exceptions that are not relevant here. 1 Pa. Code § 31.1(a). In turn, Section 31.3 of the GRAPP define "agency" to include "[a] department, departmental administration board or commission, officer, independent board or commission, authority or other agency of the Commonwealth now in existence…." 1 Pa. Code § 31.3.

In addition, Section 35.14 of the GRAPP provides:

> Whenever an agency desires to institute a proceeding against a person under statutory or other authority, the agency may commence the action by an order to show cause setting forth the grounds for the action. The order will contain a statement of the particulars and matters concerning which the agency is inquiring, which shall be deemed to be tentative and for the purpose of framing issues for consideration and decision by the agency in the proceeding, and the order will require that the respondent named respond orally, or in writing (as provided in § 35.37 (relating to answers to orders to show cause)) or both.

1 Pa. Code § 35.14. Thus, pursuant to Section 35.14, whenever an administrative agency desires to institute a proceeding against an individual "under statutory or other authority", the agency can commence the action by filing an order to show cause. Id.

In addition, as noted above, in the Settlement Agreement, the parties agreed that "[s]hould [AMA] or AMS violate any term of this Agreement, the Department will revoke all

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filed an Answer and New Matter to the Order to Show Cause[8] in which they alleged, inter alia, that the Department was engaging in selective enforcement of its regulatory authority because they were abortion providers, in violation of their rights and the rights of women seeking abortions.[9] On April 14, 2008, the Department filed an Answer to the New Matter.

On June 9, 2008, prior to a hearing before a Department hearing examiner, the Department filed a motion in limine in which it sought, inter alia, to preclude Petitioners from presenting evidence in support of their selective enforcement claims. The hearing examiner initially granted the motion, but later certified the motion to the Department's Deputy Secretary for disposition. On

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registrations of [AMA] and AMS to operate abortion facilities in this Commonwealth, subject to [AMA] and AMS being afforded procedural and substantive rights guaranteed by the Administrative Agency Law…." CR at 37a. Thus, by the express terms of the Settlement Agreement, AMA and AMS specifically agreed that it would be automatically subject to sanctions by the Department, with the enumerated requisite due process, based upon a single violation of its terms. Id.

[8] Pursuant to Section 35.37 of the GRAPP, the answer filed by the person upon whom the order to show cause has been served, must be drawn so as to specifically admit or deny the allegations or charges in the order, set forth the facts upon which the respondent relies, and concisely state the matters of law relied upon. 1 Pa. Code § 35.37. Mere general denials of the allegations in the order, which are unsupported by specific facts upon which the respondent relies, will not be considered to be in compliance with Section 35.37. Id. Moreover, general denials may be deemed to be a basis for the entry of a final order without a hearing on the basis that the response had not raised an issue requiring a hearing or further proceedings. Id.

[9] More specifically, Petitioners alleged the following, in pertinent part:

> 50. In filing the Order to Show Cause seeking the revocation of the registrations of [AMA and AMS], and attempting to activate certain terms of the [Settlement Agreement] against [Petitioners], the Department is engaging in the selective enforcement of regulations against abortion providers in violation of the rights of [Petitioners] and women seeking abortion to due process and equal protection of the law.

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November 10, 2008, the Deputy Secretary issued an order granting in part, and denying in part, the motion in limine. In pertinent part, the order denied the Department's motion to prohibit evidence on selective enforcement, but required Petitioners to initially establish that there are other similarly situated health care providers, "[i].e. that there are other health care providers in Pennsylvania potentially in violation of a settlement agreement with the Department addressing quality assurance conditions for continued registration or licensure as a health care provider…." CR at 424a. Only if Petitioners could present evidence of other "similarly situated" health care providers could they then present evidence relating to the Department's selective enforcement. Id.

A hearing was conducted on February 3 and 4, 2009. Petitioners did not present evidence of selective enforcement at the hearing. On September 29, 2009, the hearing examiner issued a Proposed Report and Order in which she determined, inter alia, that Petitioners had violated the provisions of the Settlement Agreement. See CR at 1342a-1345a. As a result, the Proposed Order recommended that the Settlement Agreement's penalty provisions be imposed. More specifically, the Proposed Order recommended that: (1) all registrations of AMA and AMS to operate abortion facilities in the Commonwealth should be revoked; (2) AMA and AMS should be precluded from registering any freestanding abortion facility in the Commonwealth; and (3) Dr. Brigham should be precluded from either directly or indirectly registering a freestanding abortion facility in the Commonwealth. See id. at 1346a.

On October 28, 2009, Petitioners filed exceptions to the Proposed Report and Order. On July 7, 2010, the Deputy Secretary issued the instant

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CR at 25a-26a.

Adjudication and Order: (1) denying the Petitioners' exceptions to the Proposed Report and Order of the hearing examiner; (2) adopting the Proposed Report and Order in its entirety, with the exception of the Conclusions of Law; (3) substituting his own Conclusions of Law in place of those in the Proposed Report and Order; and (4) denying the Petitioners' petition to reopen the record. Petitioners then filed the instant petition for review of the Deputy Secretary's Adjudication and Order.[10]

In this appeal, the sole claim raised by Petitioners is that they were wrongly denied an opportunity to present evidence that the Department's imposition of the Settlement Agreement's penalty provisions was based upon the selective enforcement of the Department's regulatory authority. However, we discern no error in the Department's actions in the case sub judice.[11]

It must be noted that a settlement agreement encompasses the compromise of a pending legal claim. Oakmont Presbyterian Home v. Department of Public Welfare, 633 A.2d 1315 (Pa. Cmwlth. 1993).[12] It is merely an agreement between the parties; that is, a contract binding the parties thereto. Global Eco-

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[10] This Court's scope of review is limited to determining whether necessary findings of fact are supported by substantial evidence, whether the Department committed an error of law, or whether Petitioners' constitutional rights were violated. Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704; Sklar v. Department of Health, 798 A.2d 268 (Pa. Cmwlth. 2002).

[11] It is well settled that this Court may affirm the Department's order on any basis appearing in the record. See, e.g., White v. Workmen's Compensation Appeal Board (Good Shepherd Rehab Hospital), 666 A.2d 1128, 1131 n. 6 (Pa. Cmwlth. 1995) ("This court may affirm the judgment of an administrative agency where the result is correct, even though the reason given is erroneous, when the correct basis for the decision is clear on the record.") (citation omitted).

[12] See Sofronski v. Civil Service Commission, 695 A.2d 921, 926 (Pa. Cmwlth. 1997) ("As the Superior Court has stated: '[s]ettlement of matters in dispute are favored by the law and must, in the absence of fraud and mistake, be sustained. Otherwise, any settlement agreement will serve no useful purpose.' *Greentree Cinemas, Inc. v. Hakim*, [432 A.2d 1039, 1041 (Pa. Super. 1981)]….").

Logical Services, Inc. v. Department of Environmental Protection, 789 A.2d 789 (Pa. Cmwlth. 2001); Commonwealth v. United States Steel Corp., 325 A.2d 324 (Pa. Cmwlth. 1974). As a result, the enforceability of settlement agreements is determined according to principles of contract law. Pennsbury Village Associates, LLC v. McIntyre, ___ Pa. ___, 11 A.3d 906 (2011); Mazzella v. Koken, 559 Pa. 216, 739 A.2d 531 (1999). "[B]ecause a settlement agreement is considered a contract under Pennsylvania law, the document must 'speak for itself' and cannot be given a meaning other than that expressly stated within the agreement itself." Oakmont Presbyterian Home, 633 A.2d at 1320 (citation omitted). Courts will enforce a settlement agreement if all its material terms have been agreed upon by the parties. Pennsbury Village Associates, LLC.

In addition, a settlement agreement between the Department and a private party, affecting personal or property rights, constitutes an appealable "adjudication" of the Department under the Administrative Agency Law. Pennsylvania Association of Independent Insurance Agents v. Foster, 616 A.2d 100, 102 (Pa. Cmwlth. 1992) (citing Department of Health v. Rehab Hospital Services, 561 A.2d 342 (Pa. Cmwlth. 1989), petition for allowance of appeal denied, 525 Pa. 607, 575 A.2d 571 (1990)). Where, as here, there has been no appeal of such an "adjudication", any collateral attack on the content, validity, or enforceability of the agreement is barred in a subsequent enforcement proceeding. Global Eco-Logical Services, Inc.[13] In short, as between Petitioners and the

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[13] See also 36 Standard Pennsylvania Practice 2d § 166:231 at 341-342 ("[T]he doctrine of administrative finality precludes a collateral attack of an administrative action where the party aggrieved by that action forgoes his or her statutory appeal remedy. Thus, the failure to take a timely appeal from the agency action complained of precludes collateral attack on that action by resort to a reviewing court's original jurisdiction, or in subsequent proceedings for enforcement of that agency's order. Since a consent order by an administrative agency is equivalent to an

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Department, the provisions of the Settlement Agreement constitute the law governing the disposition of this case. See Buttermore v. Aliquippa Hospital, 522 Pa. 325, 330, 561 A.2d 733, 735 (1989) ("[H]owever improvident their agreement may be or subsequently prove for either party, their agreement, absent fraud, accident or mutual mistake, is the law of their case. In the instant case, there is no allegation of fraud, accident or mutual mistake, therefore, as between them their agreement is their law.").

As noted above, in the Settlement Agreement, both Petitioners and the Department specifically agreed that "[s]hould [AMA] or AMS violate any term of this Agreement, the Department will revoke all registrations of [AMA] and AMS to operate abortion facilities in this Commonwealth, subject to [AMA] and AMS being afforded procedural and substantive rights guaranteed by the Administrative Agency Law…." CR at 37a. In construing these provisions, they must "speak for themselves", and cannot be given a meaning other than that expressly stated within the Settlement Agreement itself. Oakmont Presbyterian Home. Thus, by the plain terms of the Settlement Agreement, Petitioners expressly agreed that they would be automatically subject to the imposition of sanctions by the Department, subject to the procedural and substantive rights guaranteed by the Administrative Agency Law, based upon a single violation of the terms of the Settlement Agreement by either AMA or AMS. CR at 37a.

By entering into the Settlement Agreement, and under its express terms, Petitioners bargained away their rights to contest the prior violations of the

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order from which no appeal has been taken, any collateral attack on the content or validity of the order in an enforcement proceeding is barred. The party against whom the order is issued may challenge the agency's assertion that it has violated the consent order, but cannot challenge the existence, language, or enforceability of the order. ") (citations omitted).

Department's regulations, and voluntarily subjected themselves to immediate disciplinary action by the Department for any subsequent violations of its terms. As a result, Petitioners were precluded from contesting, in the instant enforcement proceedings, the enforceability of the penalty provisions of the Settlement Agreement under the guise of a selective enforcement claim. See, e.g., Department of Environmental Resources v. Landmark International, Ltd., 570 A.2d 140, 142 (Pa. Cmwlth. 1990) ("[W]hat Landmark is seeking, in effect, is an appeal of the consent order, a right which it waived by voluntarily entering into the order. Since the consent order is the equivalent of an order from which no appeal was taken, any collateral attack on the content or validity of the order in an enforcement proceeding is barred. *Commonwealth v. Derry Township, Westmoreland County*, 466 Pa. 31, 351 A.2d 606 (1976).[7] … **7.** This is not to say that Landmark cannot challenge DER's assertion that it has violated the consent order. They may merely not challenge the existence of the order, its language, and its enforceability. The language of the order may very well be subject to such an interpretation that this Court could disagree with DER's position that penalties are due….").[14,15] In short,

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[14] See also Global Eco-Logical Services, Inc., 789 A.2d at 796 ("[A]tlantic appears to ignore the fact that DEP initially exercised its discretion regarding Atlantic's violations when it issued the Revocation Order on March 3, 1999. Atlantic could have pursued the prior litigation, i.e., its appeal of that Revocation Order, thereby forcing DEP to prove that its enforcement action was not an abuse of discretion; however, Atlantic chose instead to enter into the [Consent Order and Agreement] with DEP. By taking this course of action, Atlantic obviated the need for the EHB to determine whether Atlantic's violations justified Permit revocation. In other words, Atlantic bargained away any arguments that its failure to submit Annual Operations Reports and to timely pay civil penalties justified Permit revocation, Facility closure and Surety Bond forfeiture.") (footnote omitted).

[15] See also Pennsbury Village Associates, LLC, ___ Pa. at ___, 11 A.3d at 915 ("This Court has yet to contemplate the intersection of settlement agreements and anti-SLAPP legislation such as the Environmental Immunity Act[, 27 Pa.C.S. §§ 8301-8305]. We look to other jurisdictions' decisional law, and as appellant provided, *Daimler-Chrysler Motors* [*Co. v.*

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the Department did not err in rejecting Petitioners' selective enforcement claim, and Petitioners' assertion to the contrary is patently without merit.[16]

Lew Williams, Inc., 142 Cal.App.4th 344, 48 Cal.Rptr.3d 233 (2006)] and *Duracraft* [*Corp. v. Holmes Products Corp.*, 427 Mass. 156, 6921 N.E.2d 935 (1998)] are instructive. Those cases stand for the proposition that where pre-existing legal relationships preclude a party from engaging in the activity protected by anti-SLAPP legislation, that party cannot claim immunity for actions taken in violation of its pre-existing legal obligation. Anti-SLAPP legislation will not shield a party from liability where a party 'waived the very constitutional right it seeks to vindicate.' *Daimler-Chrysler Motors* at 240. *Duracraft* provided '[a] quintessential example of such a waiver is a settlement agreement, in which a party releases legal claims against an adversary that otherwise properly could be prosecuted by petitioning the court.' *Duracraft* at 942…. [A]s in *Buttermore*, there has been no allegation of fraud, accident, or mutual mistake; 'therefore, as between them their agreement is their law.' *Buttermore*, [522 Pa. at 330, 561 A.2d] at 735 Accordingly, as in *Daimler-Chrysler Motors* and *Duracraft*, appellee will not enjoy immunity for attempting to defeat the stipulation's terms, because the stipulation provides an overriding legal basis defeating appellee's immunity claim.").

[16] Moreover, even if it is assumed that Petitioners were not precluded from contesting the enforceability of the Settlement Agreement's penalty provisions, their allegation of error regarding the Deputy Secretary's order disposing of the Department's motion in limine is likewise without merit. As this Court has previously noted:

> The doctrine of selective prosecution applies to enforcement by administrative agencies. The agency has sole responsibility to assess whether a violation has occurred and whether to expend agency resources on one particular enforcement action as opposed to another. To bring a claim for selective prosecution, a party must demonstrate that: (1) others, similarly situated, were generally not prosecuted for similar conduct, and (2) it was intentionally and purposefully singled out for an invidious reason. The discretion involved in subjective assessment of the strength of a given claim and whether the best allocation of resources are spent on enforcement may not be compelled, and is not subject to judicial review, because such actions are not adjudicatory in nature.

Koken v. One Beacon Insurance Co., 911 A.2d 1021, 1030-1031 (Pa. Cmwlth. 2006) (citations and footnotes omitted). In determining those who are "similarly situated", all relevant factors must be examined and "[d]efendants are similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them." United States v. Lewis, 517 F.3d 20, 27 (1st Cir. 2008) (quoting United States v. Olvis, 97 F.3d 739, 744 (4th Cir. 1996)).

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Accordingly, the Adjudication and Order of the Department's Deputy Secretary is affirmed.

JAMES R. KELLEY, Senior Judge

As noted above, in this case, the Deputy Secretary's order required Petitioners to initially establish that there are other similarly situated health care providers, "[i].e. that there are other health care providers in Pennsylvania potentially in violation of a settlement agreement with the Department addressing quality assurance conditions for continued registration or licensure as a health care provider…." CR at 424a. The foregoing factors, including the common types of violations previously committed, and the common legal status as between the Department and the purported offender, are clearly relevant and material factors to be considered by the Department in determining whether to proceed in an enforcement action. As a result, the Deputy Secretary did not err in adopting these factors in disposing of the Department's motion in limine. See, e.g., Lewis, 517 F.3d at 28 ("In this case, the district court took account of these precepts and configured the pool of similarly situated offenders with reference to the nature and numerosity of the offenses and the incidence of possible links to terrorism. While the defendant labors to persuade us that this configuration is too specific, we are not convinced. Each of the items that the district court factored into the configuration calculus is relevant and material. Those criteria are, therefore, appropriate.").

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Steven Chase Brigham, M.D., American Medical Associates, PC d/b/a American Women's Services and State College Medical Services and Allentown Medical Services, Petitioners	:	
v.	:	No. 1582 C.D. 2010
Department of Health, Bureau of Community Licensure and Certification, Respondent	:	

O R D E R

AND NOW, this 15th day of June, 2011, the Adjudication and Order of the Deputy Secretary for the Pennsylvania Department of Health, dated July 7, 2010 at No. AB APP 09-001, is AFFIRMED.

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JAMES R. KELLEY, Senior Judge