

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2006-106

NOVEMBER TERM, 2006

Irina Assur

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APPEALED FROM:

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v.

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Washington Superior Court

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Central Vermont Hospital

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DOCKET NO. 669-11-05 Wncv

Trial Judge: Helen M. Toor

In the above-entitled cause, the Clerk will enter:

Irina Assur appeals pro se from two orders of the Washington Superior Court denying her motions to enforce a subpoena against Central Vermont Hospital (CVH) and to issue a second subpoena. She contends that (1) CVH and the Vermont Office of Professional Regulation violated her due process rights; and (2) the trial court abused its discretion in denying her motions, and in failing to hold a hearing. We affirm in part, reverse in part, and remand for further proceedings.

The instant dispute arose in late March 2002, when CVH notified the Office of Professional Regulation of disciplinary action which it had taken against Assur, who worked for CVH as a registered nurse. In June 2002, Assur resigned from her employment with CVH. Thereafter, following a lengthy investigation, the State filed several charges against Assur, alleging that she had engaged in unsafe or unacceptable patient care, failed to conform to essential standards of acceptable nursing practice, and violated state statutes and rules governing the practice of her profession.

In the proceedings before the Board, Assur's attorney served CVH with a subpoena duces tecum, seeking thirty-three separate categories of documents. CVH provided a number of the requested documents but declined to produce the bulk of them, citing objections based on relevance, overbreadth, undue burden, patient privilege, and the peer-review privilege under 26 V.S.A. '1443. Later, Assur, representing herself, served a second subpoena on CVH, again seeking numerous documents.<sup>[1]</sup> CVH, in response, sent a letter to Assur stating that she lacked authority to subpoena documents under 3 V.S.A. ' 809(h), presumably because she was not a licensed attorney.<sup>[2]</sup> Assur then requested the presiding officer in the disciplinary proceeding to issue the subpoena. Following a conference among the parties, the presiding officer ruled against such issuance until such time as Ms. Assur has attempted to enforce the subpoenas in Superior Court.<sup>@</sup> The officer gave Assur 60 days to file in superior court and placed the disciplinary proceeding on hold pending the outcome of her motions.

Assur then filed two motions in superior court, one to enforce the first subpoena and a second to either compel the hearing officer to issue the second subpoena or to have the court issue it. Assur filed extensive memoranda in support of the motions, and CVH filed detailed oppositions. In February 2006, the trial court issued two brief entry orders denying the motions without a hearing. With respect to the motion to enforce, the court ruled that the first subpoena was overbroad, seeks privileged information regarding patients without their consent, and fails to establish the relevance of much of the materials sought.<sup>@</sup> As for the motion to compel issuance of the second subpoena, the court noted that the only authority cited by the parties as the source of

power to issue subpoenas in such disciplinary proceedings was 3 V.S.A. ' 809, and the court found that the statute did not include pro se parties. Assur has appealed both rulings.

The enforcement of subpoenas is entrusted to the sound discretion of the trial court. State v. Simoneau, 2003 VT 83, & 21, 176 Vt. 15. The court=s decision will not be disturbed absent a showing that it withheld its discretion or exercised it on clearly unreasonable or untenable grounds. Id. In resolving such issues, as in ruling generally, A[t]he trial court has a fundamental duty to make all findings necessary to support its conclusions, resolve the issues before it, and provide an adequate basis for appellate review.@ Agency of Natural Res. v. Irish, 169 Vt. 407, 419 (1999).

CVH raised specific objections and arguments as to each category of documents requested in the first subpoena. In denying the motion to enforce, however, the trial court failed to specify which of the objections it found to be persuasive as to each set of documents, to explain the reasons for its conclusions, or to consider whether means short of complete non-disclosureCsuch as the redaction of privileged information or the creation of summaries omitting irrelevant or objectionable materialC might be practicable. See, e.g., In re Danforth, 174 Vt. 231, 241 (2002) (citing use of both summaries and redactions as means of providing information based on strong policy favoring the Atruth seeking function of litigation@). Absent such findings and discussion, we are unable to discern, for purposes of review, the precise basis of the court=s discretionary ruling, or indeed whether the court exercised its discretion. Accordingly, we conclude that the matter must be remanded for further proceedings and decision.

Assur=s remaining claims require no extended discussion. She raises a variety of due process arguments stemming from CVH=s failure to disclose, and the State=s decision to pursue, disciplinary action. The due process claims were not adequately raised and argued below to preserve the issues for review on appeal. See In re White, 172 Vt. 335, 343 (2001) (we will not address issues that were not raised below Awith specificity and clarity in a manner which gives the trial court a fair opportunity to rule on it@). Moreover, the State is not a party to the instant discovery dispute. As for the second subpoena, we note that the hearing officer did not rule on Assur=s request for issuance of this subpoena; rather, the hearing officer deferred ruling pending the

resolution of Assur=s motion to enforce the first. Accordingly, we conclude that the issue is not ripe for decision. See In re Pelham North, Inc., 154 Vt. 651, 652 (1990) (mem.) (agency=s decision not ripe for review until it has finally disposed of the subject matter before it). Following the trial court=s decision on remand, Assur mayCif it appears to still be necessaryCrenew her request with the hearing officer for issuance of the second subpoena.

The superior court orders are reversed, and the matter is remanded to that court for further proceedings consistent with views expressed herein.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice

Although it is difficult to tell precisely, it appears that the second subpoena seeks many of the same categories of documents that were sought in the first subpoena, as well as several additional categories.

[2]

This section provides:

The chairman of a board, commission or panel, a hearing officer appointed by a board, commission or panel, or a licensed attorney representing a party before a board, commission or panel may, whether or not specifically authorized in any other provision of law, compel, by subpoena, the attendance and testimony of witnesses and the production of books and records.

3 V.S.A. ' 809(h).