At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga on August 3, 3021.

PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN THE MATTER OF THE APPLICATION OF

JUN WANG, M.D.,

Petitioner,

FOR A JUDGMENT PURSUANT TO CPLR ARTICLE 78 AND CPLR SECTION 3001

v.

LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondent.

DECISION AND ORDER ON PETITION

Index No.: 004977/2021

APPEARANCES: **CATHERINE A. GALE, ESQ., OF GALE GALE & HUNT, LLC**
For Petitioner

MAUREEN A. MACPHERSON, ESQ., OF OFFICE OF THE ATTORNEY GENERAL
For Respondent

The petitioner commenced this special proceeding to challenge the determination of the respondent made on March 4, 2021 declining the petitioner's request for representation by the Department of Law of the State of New York in the case of *Omar Alvarez v. Cortland Regional Medical Center, Inc., et al,* (Index No. 805085/2015), commenced in New York County Supreme Court. The petition seeks the following relief: a determination pursuant to CPLR

Article 78 vacating respondent's determination and a declaratory judgment[1] that the State of New York defend and indemnify petitioner for legal actions arising from care he provided to Alvarez in September of 2012. The petitioner made said request pursuant to Public Officers Law (POL) section 17 and Correction Law section 24-a. POL section 17 provides state employees defense and indemnification in any civil action arising out of any alleged acts or omissions committed while acting within the scope of employment. Correction Law section 24-a extends the benefits of section 17 to "any person holding a license to practice", such as a physician "who is rendering or has rendered professional services authorized under such license while acting at the request of the department or a facility of the department in providing health care and treatment …to inmates of state correctional facilities …without regard to whether such health care and treatment or professional consultation is provided within or without a correctional facility." *Correction Law § 24-a.*

Alvarez commenced the medical malpractice action in March of 2015 alleging negligent medical care by defendants, including Cortland Regional Hospital f/k/a Cortland Memorial Hospital. He was an inmate of the Department of Corrections and Community Supervision (DOCCS) and was housed at Auburn Correctional Facility. Dr. James Dolan, a physician at the facility, treated Alvarez for a possible boil or cyst with antibiotics and then recommended a surgical evaluation for excision/biopsy or drainage after it failed to resolve. He referred Alvarez to Robert Cotie, M.D., who provided general surgery services to inmates. Cotie recommended an excisional biopsy and Dr. Pang Kooi, the facility's Health Services Director and a named defendant in the underlying civil matter, approved the biopsy recommendation. DOCCS approved the biopsy and scheduled in September of 2012 at defendant Cortland Hospital. The

[1] Petitioner subsequently withdrew the request for said relief.

petitioner here interpreted the specimen and submitted it to SUNY Upstate and opined that the specimen was "lymph node with reactive lymphoid hyperplasia," a benign condition. Approximately a year later, Alvarez was diagnosed with Hodgkin's lymphoma and commenced the medical malpractice action, alleging that the cancer was present in September of 2012 and defendants failed to diagnose the mass. Defendant Cortland Hospital commenced a third-party action against petitioner on March 2, 2021. A tender of defense letter requesting defense and indemnification of petitioner was served on respondent on March 4, 2021 and on the same date respondent denied the request, finding that petitioner treated and billed Alvarez within the scope of his employment with the hospital through a private practice and billing arrangement, that there was no contract or agreement between the State and either petitioner or his private business, Cortland Pathology, P.C., for any work performed upon inmates by the hospital laboratory or petitioner, and concluded that the work performed was not within the scope of any agreement that would authorize the State to provide petitioner or Cortland Pathology, P.C. with legal representation. Petitioner requested reconsideration and respondent reiterated its previous decision in its March 23,2021 letter.

Petitioner argues that the denial was improper because he was acting at the request of DOCCS as the specimen was removed by Cotie, who recommended the biopsy and submitted the request to DOCCS, that DOCCS approved it and that both DOCCS and Cotie were aware that the purpose of the procedure was not only removal of the lesion if possible but to determine the nature of the specimen and whether it was cancerous. Petitioner argues that he was working under the approval obtained by Cotie, which was paid by DOCCS and that therefore, Correction Law section 24-a explicitly applies and mandates the State to defend and indemnify him.

The respondent provided the Return in this matter and points to the Cotie deposition testimony concerning the civil matter that establishes that he was a private surgeon retained as an outside consultant/independent contractor by DOCCS. In his private practice, he was affiliated with Cortland Hospital. He further testified that he took surgical specimens of the mass for a pathology inspection. He sent the specimen, as he routinely did, to the hospital pathology department lab. Cotie further testified that whenever he sent any specimen to the hospital's department of pathology for interpretation, he relied on whatever pathologist was on duty in the lab to inform him of the results. He testified that he was never able to select or choose a particular pathologist, and he did not request the petitioner in this case. The respondent also points to the deposition testimony of petitioner's business partner, Dr. William Shang, who testified that both his and petitioner's pathology services were contracted for the hospital through a contract with their private group that he and petitioner owned, Cortland Pathology Services, P.C. Shang testified that they were paid a flat fee for their services at the hospital pursuant to a Pathology Services Contract, which forbade both of them from engaging in other outside consultant jobs without advance permission of the hospital board. Respondent points to petitioner's pathology report, which was printed on Cortland Hospital letterhead. According to Shang, DOCCS had no input into the contract between the hospital and the petitioner. Petitioner has not submitted any evidence that DOCCS had such authority or any supervisory authority over petitioner or Shang during the relevant time. Only petitioner, Shang, and the hospital had any control over the staff who worked at the hospital pathology laboratory. Both Kooi and Cotie testified that they relied on petitioner's pathology report that the mass was benign in formulating their treatment plans. Respondent likewise points to the bill that DOCCS paid for the surgical pathology services performed on the biopsy specimen was issued by and paid to the hospital,

which made no reference to petitioner. No separate bill was submitted by petitioner to DOCCS and no bill was paid separately to petitioner. Respondent, therefore, contends that at the time petitioner issued his pathology report, he was not an employee or independent contractor of DOCCS.

Based upon the record before it, this Court finds that the respondent's determination was proper in this matter. While POL section 17 permits the state to fund the defense and indemnification of employees and certain volunteers sued in the course of their employment, it does not provide such coverage for independent contractors. *See, POL § 17.* Corrections Law section 24-a provides an exception for DOCSS independent contractors by and provides section 17 coverage to independent contractors who are licensed medical professionals under certain circumstances. *See, Correction Law § 24-a.* Respondent is correct that the statute does not provide defense and indemnification of all medical professionals who treat inmates. A 1980 Attorney General's opinion which confirms the legislative history of the statute and further confirms how strictly construed the grant of section 17 rights must be, stating: "the legislative history of chapter 466 of the Laws of 1978 by which both Correction Law section 24-a and Public Officers Law section 17 were enacted contains very little discussion of Correction Law section 24-a. The memorandum to the Governor …makes no mention of Correction Law section 24-a or its provisions. The Department of Health …pointed out however that: this bill extends the benefits Public Officers Law section 17 to non-employee health professionals of both the Department of Correction and the Department of Mental Hygiene who render professional care at the request of those agencies. This Department has proposed legislation providing similar protection for consultant physicians rendering part- time health care services in hospitals operated by it ." *1980 Op Atty Gen 40.* It further provides that that the Department of Health

proposed legislation by which the benefits of section 17 could be made available to persons rendering professional services "on a contract basis" to the department and that the memorandum therefore reflects the preference as a matter of policy for an interpretation which would make such indemnification available. *See, id.* It also states that section 17 applies to the negligence or alleged negligence of both non- professional and professional "employees" of the State and that section 24-a would therefore add little if anything to the law existing in its absence if it were interpreted so strictly as to deny extension of the benefits of section 17 to "identified independent contractors", concluding that "such an interpretation should be avoided ." *Id, citing, McKinney's Statutes § 98.*

The burden of proof in an Article 78 proceeding rests with the petitioner alone. *See, NYS Inspection Sec. In Law Enforcement Employees v. NYS Civil Service Commission*, 213 AD2d 826 (3rd Dept. 1995). This Court's review of an administrative decision is limited to whether the challenged determination was arbitrary and capricious or otherwise unsupported by substantial evidence. *See, O'Rourke v. Kirby*, 54 NY2d 8 (1981); *see also, Pell v. Board of Education*, 34 NY2d 222 (1974). An action is arbitrary and capricious if taken without sound basis in reason and without regard to the facts. *See, Pell, supra.* In addition, this Court is without authority to substitute its own judgment for that of the respondent unless the decision clearly appears to be arbitrary or contrary to law. *See, Diocese of Rochester v. Planning Board*, 1 NY3d 508 (1956); *see also, Walker v. SUNY*, 19 AD3d 1058 (4th Dept. 2005). This Court may not disturb rational inferences drawn from the evidence. *See, DiMaria v. Ross*, 52 NY2d 771 (1980). Nor may this Court usurp the administrative function by directing respondents to proceed in a specific manner which is instead within their discretion. *See, Burke's Autobody v. Ameruso,* 115 AD2d 198 (1st Dept. 1985). In addition, the respondent's determination must be judged under the deferential

standard accorded to agency determinations, specifically what constitutes an "employee" and the specific factual circumstances. *See, O'Brien v. Spitzer,* 7 NY3d 239 (2006); *see also, New York State Superfund Coalition , Inc. v. New York State Department of Environmental Conservation,* 18 NY3d 289 (2011).

The respondent has demonstrated that the determination was proper and petitioner has not established any employment relationship with DOCCS so that he may qualify for a defense and indemnification under the statutes. The Public Officers Law strictly limits state defense and indemnification to employees only, stating that those "benefits will only inure to employees." *POL § 17(5).* It further provides that "[t]he term employee shall mean any person holding a position by election, appointment, or employment in the service of the state, including clinical practice pursuant to subdivision fourteen of section two hundred and six of the public health law, whether or not compensated, a volunteer expressly authorized to participate in a state sponsored volunteer program, but shall not include an independent contractor ." *POL § 17(1)(a).* It also directs that "the state shall provide for the defense of the employee in any civil action or proceeding in any state or federal court arising out of any alleged act or omission which occurred or is alleged in the complaint to have occurred while the employee was acting within the scope of his public employment or duties." *POL § 17(2)(a).* In the present case, petitioner has been named in a third party action concerning a medical malpractice case where petitioner was randomly assigned to read a specimen removed from an inmate and there is nothing in the record to support the determination that petitioner had an employment or independent contractor relationship with DOCCS.

In addition, while Correction Law 24-a makes section 17 scheme available independent contractors working with DOCCS who are delivering services at the request of the department,

this does not apply to petitioner. Although he argues that coverage should be provided to him due to Cotie's status as an independent contractor, adopting such an argument would extend section 17 coverage to any medical provider who provides services to any inmate in any capacity. The central inquiry here is whether petitioner was acting within the scope of his public employment or duties pursuant to section 17 and the respondent's determination that petitioner does not qualify under the statutes was reasonable. Inasmuch as there is no legal basis on which the State can be held liable for coverage, there is no obligation to provide a defense. *See, Board of Education of East Syracuse Minoa District v. Continental Ins. Co.*, 198 AD2d at 816 (4th Dept. 1993). The denial of petitioner's defense was proper because as a matter of law there is no possible factual or legal basis on which the State might eventually be held to be obligated to indemnify a petitioner under section 17. *See, Servidone Construction Corp. v. Security Insurance Company*, 64 NY2d 419 (1985).

It is also important to note that the Attorney General's determination is entitled to deference. *See, O'Brien, supra.* While as a general rule courts will not defer to administrative agencies in matters of pure statutory interpretation, deference is appropriate where the question is one of specific application of a broad statutory term. *See, id.* Courts generally defer to the governmental agency charged with the responsibility of administration of a statute in those cases where interpretation or application entails an evaluation of factual data and inferences to be drawn there from and the agency's interpretation is not irrational or unreasonable. *See, New York State Superfund Coalition, supra.* It is for the Attorney General in the first instance to determine whether a petitioner is acting in the scope of his employment and therefore entitled to legal representation; such determination will only be set aside if it is arbitrary and capricious and lacks a factual basis in the record. *See, Kaufman v. Spitzer*, 2007 NY Slip OP 31095(U) Suffolk

County 2007. Therefore, the respondent's denial was based upon the determination of the facts which were so clear cut their reasonable minds could reach no other conclusion. *See, Sharrow v. State of New* York, 216 AD2d 844 (3rd Dept. 1990).

NOW, therefore, for the foregoing reasons, it is

ORDERED, that that the relief sought in the petition is denied.

ENTER

Dated: August 11, 2021
Syracuse, New York

DONALD A. GREENWOOD
Supreme Court Justice

Papers Considered:

1. Petition, dated May 28, 2021, and attached exhibits.
2. Notice of Verified Petition, undated.
3. Amended Notice of Verified Petition, dated June 1, 2021.
4. So Ordered Letter, dated June 7, 2021.
5. Verified Answer and Return, dated July 25, 2021, and attached exhibits.
6. Memorandum of Law in Opposition to the Petition, dated July 26, 2021.
7. Reply Affirmation of Minla Kim, Esq., dated July 29, 2021, and attached exhibits.
8. Letter of Maureen A. MacPherson, Esq., dated August 5, 2021.
9. So Ordered Letter, dated August 11, 2021.