

SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO Civil Unlimited Department, Central Division	Entered by:
TITLE OF CASE: Brenton R. Smith M.D. - vs - Selma Community Hospital	
MINUTE ORDER	Case Number: 05cecg02293

Date: December 20, 2005

Re: Ruling

Department: 73

Judge/Temporary Judge: M. W. Snauffer

Court Clerk: C. Brown

Reporter/Tape: Not Reported

Contested

Appearing Parties:		
Plaintiff:	No Appearances	<input type="checkbox"/> appearing on behalf of Plaintiff
Defendant:		<input type="checkbox"/> appearing on behalf of Defendant

Off Calendar

Continued to _____ at _____ Dept _____ for _____

This matter having been previously taken under submission, is now ruled on.

See attached Statement of Decision.

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3 FILED

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5 FRESNO COUNTY SUPERIOR COURT

6 By _____ DEPUTY

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8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO
9 CENTRAL DIVISION

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17 The Petition for Writ of Administrative Mandamus (the
18 "Petition"), filed by Brenton R. Smith, M.D. ("Petitioner") on
19 July 25, 2005, came on regularly for hearing on September 16,
20 2005, at 10:00 a.m., in Department 73 of the above-entitled court.
21 Barbara Hensleigh, Esq. of Andrews & Hensleigh LLP appeared on
22 behalf of Petitioner. Jerry D. Casheros, Esq. of McCormick,
23 Barstow, Sheppard, Wayte & Carruth LLP appeared on behalf of
24 Respondent Selma Community Hospital ("Selma" or "the hospital").

25 After hearing extensive oral argument, the Court
26 requested that both parties file closing briefs and a proposed
27 Statement of Decision. The matter was taken under advisement on
28 September 28, 2005. The Court, having considered all of the

1 pleadings, points and authorities, declarations, exhibits, and
2 other written materials submitted by the parties, the entire
3 administrative record submitted herein, and having heard the
4 arguments of counsel presented in Court, renders the following
5 Tentative Statement of Decision pursuant to California Code of
6 Civil Procedure section 632 and California Rule of Court rule 232.

7 I. PETITIONER'S CLAIMS

8 1. Petitioner has requested that the Court issue a
9 writ of mandate under section 1094.5 of the California Code of
10 Civil Procedure, compelling Selma to reinstate Petitioner's
11 Medical Staff membership and clinical privileges, which were
12 terminated on July 7, 2005, by Resolution of the Hospital's
13 Governing Board (the "Selma Board").

14 2. Petitioner's request arises from the Selma Board's
15 reversal of the decision of the Judicial Review Committee (the
16 "JRC"), which held that the Medical Executive Committee's
17 recommendation that Petitioner's Medical Staff membership and
18 clinical privileges be terminated was not reasonable and
19 warranted. The effect of the Selma Board's decision was to uphold
20 the recommendation of the Medical Executive Committee (the "Selma
21 MEC"), thereby terminating Petitioner's Medical Staff membership
22 and clinical privileges.

23 3. Petitioner's request is based on the claims that
24 the Selma Board did not apply the correct standard of review of
25 the Selma JRC's decision, and that the Selma Board's decision to
26 terminate Petitioner's privilege was not supported by substantial
27 evidence.

28 / / / / /

1 II. BACKGROUND

2 On September 10, 2002, two hospitals in Hanford
3 summarily suspended Smith's hospital privileges. Petitioner
4 informed respondent of that action the same day. On July 22,
5 2003, while hearing proceedings were being conducted in the
6 Hanford hospitals, respondent reappointed petitioner to its
7 medical staff for two years. On November 15, 2003, the Hanford
8 suspension was upheld by the judicial review committee, which
9 found that petitioner had provided substandard care in 32 of 34
10 cases reviewed and had a pattern of abusive behavior as found in
11 18 of 26 incidents considered. Petitioner appealed that decision
12 to the Hanford governing board. The governing board upheld the
13 decision, and petitioner's privileges at the Hanford hospitals
14 were terminated in January and February, 2004.

15 Petitioner had taken a leave of absence from Selma
16 Community Hospital (SCH) while the Hanford proceedings were
17 pending. On February 27, 2004, petitioner requested reinstatement
18 from his leave of absence at SCH. In March 2004, the medical
19 executive committee (MEC) at SCH notified petitioner that his
20 privileges at SCH were summarily suspended effective March 27,
21 2004, based on the Hanford decision. In April 2004, petitioner
22 requested a hearing and obtained a TRO restraining SCH from
23 restricting petitioner's privileges unless petitioner posed an
24 immediate threat to patient safety. On June 4, 2004, the MEC
25 rescinded its summary suspension, but continued with the process
26 of terminating petitioner's staff privileges.

27 Petitioner requested a hearing, and a judicial review
28 committee (JRC) heard the matter in February and March 2005. On

1 March 10, 2005, the JRC rendered its decision that the proposed
2 action by the MEC to terminate petitioner's privileges based on
3 the Hanford decision was not reasonable or warranted. The MEC
4 appealed that decision to the SCH governing board. The governing
5 board's appeal committee heard oral argument, then, on July 7,
6 2005, recommended that the JRC decision be reversed. The
7 governing board concurred, reversed the JRC decision, and
8 terminated Smith's medical privileges at SCH. On July 25, 2005,
9 petitioner filed his petition for writ of mandamus with this
10 court, seeking reversal of the governing board's decision.

11 III. DISCUSSION

12 A. Peer Review System.

13 1. Statutes.

14 The chief of staff of a medical staff or other
15 chief executive officer, medical director, or administrator of any
16 peer review body shall file an "805 report" with the licensing
17 agency having regulatory jurisdiction over the licentiate
18 (physician, surgeon, dentist, etc.) within 15 days after the
19 effective date of certain actions taken by a peer review body.
20 (Bus. & Prof. Code, § 805, subd. (a)(2), (a)(3), (b).) Those
21 actions include terminating or revoking a licentiate's membership,
22 staff privileges, or employment for a medical disciplinary cause
23 or reason. (Bus. & Prof. Code, § 805, subd. (b).) An "805
24 report" contains the name and license number of the licentiate
25 involved, a description of the facts and circumstances of the
26 medical disciplinary cause or reason, and other relevant
27 information. (Bus. & Prof. Code, § 805, subd. (f).)

28 It is the policy of this state that peer review be

1 performed by licentiates. (Bus. & Prof. Code, § 809.05.) Under
2 specified circumstances, if the peer review body fails to act, the
3 governing body of an acute care hospital may direct it to act or
4 may take action against the licentiate. (Id.) A licentiate who
5 is the subject of a final proposed action of a peer review body
6 for which a report is required to be filed under section 805 shall
7 be entitled to written notice and may request a hearing on the
8 final proposed action. (Bus. & Prof. Code, § 809.1.) The hearing
9 shall be held before a trier of fact (an arbitrator or arbitrators
10 or a panel of unbiased individuals). (Bus. & Prof. Code, § 809.2,
11 subd. (a).) The peer review body shall have the initial duty to
12 present evidence which supports the charge or recommended action;
13 the peer review body shall bear the burden of persuading the trier
14 of fact by a preponderance of the evidence that the action or
15 recommendation is "reasonable and warranted." (Bus. & Prof. Code,
16 § 809.3, subd. (b).)

17 Upon completion of the hearing, the licentiate and the
18 peer review body have the right to receive:

19 "(1) A written decision of the trier of fact, including
20 findings of fact and a conclusion articulating the connection
21 between the evidence produced at the hearing and the decision
22 reached.

23 "(2) A written explanation of the procedure for
24 appealing the decision, if any appellate mechanism exists."
25 (Bus. & Prof. Code, § 809.4, subd. (a).)

26 If an appellate mechanism is provided, it need not
27 provide for de novo review, but it shall include these minimum
28 rights for both parties: (1) the right to appear and respond; (2)

1 the right to be represented by an attorney or other
2 representative; and (3) the right to receive a written decision of
3 the appellate body. (Bus. & Prof. Code, § 809.4, subd. (b).)

4 Nothing in Business & Professions Code sections 809 to 809.7 shall
5 affect the availability of judicial review under Code of Civil
6 Procedure section 1094.5. (Bus. & Prof. Code, § 809.8.)

7 2. Bylaws.

8 "Hospitals are required by law to have a medical staff
9 association which oversees physicians who are given staff
10 privileges to admit patients and practice medicine in the
11 hospital. A hospital's medical staff is a separate legal entity,
12 an unincorporated association, which is required to be
13 self-governing and independently responsible from the hospital for
14 its own duties and for policing its member physicians. A medical
15 staff and its MEC [medical executive committee] operate under
16 bylaws created by the medical staff." (*Hongsathavij v. Queen of*
17 *Angels/Hollywood Presbyterian Med. Center* (1998) 62 Cal.App.4th
18 1123, 1130, n. 2.)

19 The Bylaws of the medical staff of SCH set out the
20 procedures by which adverse action may be taken against a
21 physician practicing within the hospital. (See petitioner's Ex.
22 A, Bylaws.) Adverse actions requiring a hearing procedure include
23 suspension of staff membership, revocation of medical staff
24 membership, suspension of clinical privileges, and termination of
25 all clinical privileges. (Bylaws, § 8.2.)

26 When the medical staff receives reliable information
27 that indicates a member may have exhibited acts, demeanor, or
28 conduct reasonably likely to be (1) detrimental to patient safety

1 or to the delivery of quality patient care within the hospital,
2 (2) unethical, (3) contrary to the medical staff bylaws and rules
3 or regulations, or (4) below applicable professional standards, a
4 request for investigation or action against the member may be
5 initiated by the chief of staff or the MEC. (Bylaws, § 7.1.1.)
6 The request must be in writing, submitted to the MEC, and
7 supported by reference to specific activities or conduct alleged.
8 (Bylaws, § 7.1.2.) The MEC may investigate, or delegate the
9 investigation to a medical staff officer or committee. (Bylaws, §
10 7.1.3.) At the conclusion of the investigation, the MEC shall
11 take action, which may include determining no corrective action be
12 taken, deferring action, recommending imposition of terms of
13 probation, recommending suspension or revocation of clinical
14 privileges, or recommending suspension, revocation or probation of
15 medical staff membership. (Bylaws, § 7.1.4.) The recommendation
16 of the MEC becomes final unless the member requests a hearing.
17 (Bylaws, § 7.1.5(b).)

18 When a member requests a hearing, the MEC must set a
19 hearing date and give notice to the member. (Bylaws, § 8.3.3.)
20 The MEC recommends a judicial review committee (JRC) to the
21 Governing Board for appointment and it is deemed appointed unless
22 the Governing Board objects. (Bylaws, § 8.3.5.) Judicial rules
23 of evidence and procedure do not apply to the hearing. (Bylaws,
24 8.4.6.) The MEC has the initial duty to present evidence for each
25 case or issue in support of its action or recommendation; the
26 member is obligated to present evidence in response. (Bylaws, §
27 8.4.7(a).) Throughout the hearing, the MEC bears the burden of
28 persuading the JRC, by a preponderance of the evidence, that its

1 action or recommendation is reasonable and warranted. (Bylaws, §
2 8.4.7.)

3 The decision of the JRC must be based on the evidence
4 introduced at the hearing, including all logical and reasonable
5 inferences from the evidence and testimony. (Bylaws, § 8.4.9.)
6 The JRC must render a decision along with a report in writing to
7 the MEC; a copy must be forwarded to the Hospital President, the
8 Governing Board and the member. (Bylaws, § 8.4.10.) The report
9 must contain a concise statement of the reasons in support of the
10 decision, including findings of fact and a conclusion articulating
11 the connection between the evidence produced at the hearing and
12 the conclusion reached. (*Id.*) The decision of the JRC is subject
13 to rights of appeal provided in the Bylaws, "but shall otherwise
14 be affirmed by the Governing Board as the final action if it is
15 supported by substantial evidence, following a fair procedure."

16 (*Id.*)

17 The member or the MEC may request an appellate review.
18 (Bylaws, § 8.5.1.) The request must identify the grounds for
19 appeal; the grounds for appeal are (1) substantial non-compliance
20 with the procedures required by the Bylaws or applicable law which
21 has created demonstrable prejudice, or (2) the decision was not
22 supported by substantial evidence based upon the hearing record or
23 such additional information as may be permitted by section 8.5.5.
24 (Bylaws, § 8.5.2.) The Governing Board may sit as the appeal
25 board, or it may appoint an appeal board of not less than 3
26 members of the Governing Board. (Bylaws, § 8.5.4.)

27 The proceeding by appeal shall be in the nature of an
28 appellate hearing based upon the record of the hearing before the

1 JRC, provided that the appeal board may accept additional oral or
2 written evidence, subject to a foundational showing that such
3 evidence could not have been made available to the JRC in the
4 exercise of reasonable diligence and subject to the right of
5 cross-examination. (Bylaws, § 8.5.5.) The appeal board shall
6 present to the Governing Board its written recommendations as to
7 whether the Governing Board should affirm, modify, or reverse the
8 JRC decision, or remand the matter to the JRC for further review
9 and decision. (*Id.*)

10 The Governing Board shall render a final decision and
11 shall affirm the decision of the JRC if the JRC's decision is
12 supported by substantial evidence, following a fair procedure.
13 (Bylaws, § 8.5.6(a).) If the Governing Board determines that the
14 JRC decision is not supported by substantial evidence, the board
15 may modify or reverse the decision of the JRC; it may instead, and
16 shall, where a fair procedure has not been afforded, remand to the
17 JRC for reconsideration. (Bylaws, § 8.5.6(b).) The Governing
18 Board's decision shall be in writing and shall specify the reasons
19 for the action taken. (Bylaws, § 8.5.6(c).)

20 B. Writ Procedure and Standard of Review.

21 A writ of mandate may be issued by any court to any
22 inferior tribunal or board, to compel the performance of an act
23 which the law specially enjoins, as a duty resulting from an
24 office, trust or station. (Code Civ. Proc., § 1085.) Where the
25 writ is issued for the purpose of inquiring into the validity of
26 any final administrative order or decision made as the result of a
27 proceeding in which by law a hearing is required to be given,
28 evidence is required to be taken, and discretion in the

1 determination of facts is vested in the inferior tribunal or
2 board, the inquiry shall extend to the questions whether the
3 respondent has proceeded without or in excess of jurisdiction,
4 whether there was a fair trial, and whether there was any
5 prejudicial abuse of discretion. (Code Civ. Proc. § 1094.5, subd.
6 (a), (b).) In cases arising from private hospital boards, abuse
7 of discretion is established if the court determines that the
8 findings are not supported by substantial evidence in the light of
9 the whole record. (Code Civ. Proc., § 1094.5, subd. (d).) The
10 court shall enter judgment either commanding respondent to set
11 aside the order or decision, or denying the writ. (Code Civ.
12 Proc. § 1094.5, subd. (f).)

13 Under section 1094.5, subdivision (a), the role of the
14 superior court in reviewing the decision of a hospital appeal
15 board is to inquire into the validity of any final administrative
16 order or decision. (*Hongsathavij v. Queen of Angels/Hollywood*
17 *Presbyterian Medical Center* (1998) 62 Cal.App.4th 1123, 1135.) In
18 *Hongsathavij*, the court determined that the JRC decision was not
19 the final administrative decision, because the bylaws provided
20 that the JRC decision was subject to appeal, and the final action
21 was that of the Board of Directors. Thus, the superior court was
22 required to review the final decision of the board. (*Id.*)

23 In reviewing the decision of a private hospital board,
24 the superior court essentially must determine two issues. First,
25 it must determine whether the governing body applied the correct
26 standard in conducting its review of the matter. Second, after
27 determining as a preliminary matter that the correct standard was
28 used, it must determine whether there was substantial evidence to

1 support the governing body's decision. (*Id.* at 1136.)
2 Essentially, in the instant case, the court must determine whether
3 there is substantial evidence to support the governing body's
4 decision that the JRC's decision was not supported by substantial
5 evidence. (*See, id.* at 1137.)

6 3. Correct standard of review.

7 In *Huang v. Board of Directors* (1990) 220 Cal.App.3d
8 1286, the court reversed the decision of the hospital's appeal
9 board on the ground it applied an incorrect standard of review.
10 In *Huang*, Nurse Taylor accused Dr. Huang of examining a patient in
11 the hospital lobby. After permitting Huang to respond to the
12 complaint, the MEC summarily suspended Huang's medical staff
13 membership and clinical privileges for six months. Huang
14 requested a hearing. He was given written notice of the charges
15 against him, which included examining a patient in the lobby after
16 warnings not to do so, and verbally abusing Taylor after her
17 report of that improper behavior. The notice of charges asserted
18 that Huang's actions demonstrated a substantial and imminent
19 likelihood of significant impairment of the life, health and
20 safety of patients of the facility and other persons. (*Id.* at
21 1290.)

22 At the JRC hearing, Taylor testified she saw a patient
23 in the lobby with the patient's pants leg rolled up over the knee
24 and Huang bent over the knee. After her report of the incident,
25 Huang telephoned her and came to her office, yelling, calling her
26 a troublemaker, and insisting that she retract her report or
27 something was going to happen to her. (*Id.* at 1291.) Huang
28 testified that he did not examine a patient in the lobby, but

1 merely sat and listened to the patient's complaint; he stated he
2 telephoned Taylor and went to her office and asked that she
3 withdraw her complaint, but he did not threaten her. (*Id.*) The
4 JRC found that Huang did not examine a patient in the lobby, and
5 did not verbally abuse and threaten Taylor. It concluded the MEC
6 had not demonstrated by a preponderance of the evidence that its
7 summary suspension of Huang's medical privileges was reasonable.
8 (*Id.*)

9 The MEC appealed the JRC decision on the ground it was
10 not supported by substantial evidence. The appeal board
11 determined substantial evidence supported the finding that Huang
12 did not examine a patient in the lobby, but there was no
13 substantial evidence to support the finding that he did not
14 verbally abuse and threaten Taylor. It concluded the MEC had a
15 sufficient basis for summarily suspending Huang's medical staff
16 privileges because of his repeated attempts to intimidate and
17 threaten Taylor. (*Id.* at 1292.) The appeal board overruled the
18 JRC decision and affirmed the action of the MEC. (*Id.*)

19 The court concluded:

20 "While the appeal board's decision states
21 that substantial evidence did not support
22 judicial review committee finding No. 3 that ...
23 petitioner did not verbally abuse and threaten
24 Nurse Taylor, it is clear from the decision
25 that the appeal board did not apply the
26 substantial evidence rule but instead
27 impermissibly reweighed the evidence and
28 rejected petitioner's testimony on the ground
he was not credible. Thus, the decision
states: 'We believe it is clear that Dr. Huang
inappropriately attempted to intimidate and
threaten the nurse as was, in part, conceded
by his counsel during oral argument.
Moreover, we are cognizant of Dr. Huang's
repeated denials of statements made to the
investigating committee in 1985 and believe

1 this severely calls into question his
2 credibility when balanced against the
3 credibility of the witnesses presented by the
4 Medical Staff. We also believe that while
5 Dr. Huang had a motive to not tell the truth
6 we find that the nurse who was the subject of
7 the threats had no such motive and therefore
8 do not find Dr. Huang's denials to be
9 credible. Consequently, we have determined
10 that finding no. 3 of the Judicial Review
11 Committee is not supported by substantial
12 evidence and that the MEC proved the charge by
13 a preponderance of the evidence at the
14 hearing.'"

15 (Id. at 1294.)

16 The appeal board's attempt to set aside the JRC's
17 finding that petitioner did not verbally abuse or threaten Taylor
18 was not based on a lack of substantial evidence, but on
19 impermissible application of its independent judgment in reviewing
20 the record. (Id.) The appeal board's determination that Huang's
21 repeated attempts to intimidate and threaten Taylor furnished a
22 sufficient basis for the summary suspension of Huang's staff
23 privileges was likewise invalid. (Id. at 1294-1295.)

24 2. Substantial evidence.

25 The substantial evidence rule provides that, where a
26 finding of fact is attacked on the ground it is not sustained by
27 the evidence, the power of an appellate court begins and ends with
28 a determination whether there is any substantial evidence,
contradicted or uncontradicted, which supports the finding. (Id.)
The court must consider the evidence in the light most favorable
to the prevailing party, giving him the benefit of every
reasonable inference and resolving conflicts in support of the
judgment. (Id. at 1294.) The court is without power to judge the
effect or value of the evidence, weigh the evidence, consider the

1 credibility of witnesses, or resolve conflicts in the evidence or
2 in the reasonable inferences that may be drawn from it. (*Id.*)
3 Unless a finding, viewed in light of the entire record, is so
4 lacking in evidentiary support as to render it unreasonable, it
5 may not be set aside. (*Id.*)

6 In *Hongsathavij v. Queen of Angels/Hollywood*
7 *Presbyterian Medical Center* (1998) 62 Cal.App.4th 1123, the court
8 determined:

9 "A review of the entire record indicates
10 there was sufficient evidence to support the
11 decision of the Appeal Board of the Medical
12 Center, which described the findings of the
13 JRC as so lacking in evidentiary support as to
14 render them unreasonable. ... [S]ubstantial
15 evidence supports the conclusion that in large
16 part the findings of the JRC were simply
17 nonresponsive to the specific charges and thus
18 not supported by the evidence."
19 (*Id.* at 1137.)

20 Thus, the court must determine whether, on the entire
21 record, there was substantial evidence to support the decision of
22 the governing board that there was no substantial evidence to
23 support the decision of the JRC.

24 C. Whether the Governing Board Applied the Correct
25 Standard of Review.

26 SCH asserts the governing board applied the correct
27 standard of review, because it did not review or disagree with the
28 factual findings of the JRC, but instead found that the JRC had
29 applied the wrong legal rules, and therefore reached the wrong
30 conclusions.

31 SCH seems to make three principal arguments:

32 (1) The JRC applied the wrong legal rule, because it
33 concluded that the MEC could never rely on the adverse actions or

1 findings of another hospital as the basis for its own adverse
2 action regarding a doctor's privileges. The correct legal rule is
3 that the findings of the Hanford hospital are final and conclusive
4 and Smith is collaterally estopped from relitigating them.
5 Therefore, the JRC erred in failing to treat them as conclusive
6 proof of Smith's substandard conduct.

7 (2) The only basis for the JRC's conclusion that the
8 MEC's decision could not be based solely on the results of another
9 hospital's peer review proceedings was the testimony of Smith's
10 expert, Rotenberg, and an expert cannot create a new legal
11 standard applicable to Hospital's proceedings.

12 (3) The findings of the JRC were nonresponsive to the
13 charges (citing *Hongsathavij*). The JRC's determination that MEC
14 could "never" base adverse action on "information arising from
15 peer review proceedings at another facility" did not respond to
16 the question whether the MEC's recommendation to revoke
17 petitioner's privileges was reasonable and warranted in light of
18 the deficiencies "detailed" in the Hanford decision.

19 1. Argument that Hanford Hospitals' Findings are
20 Conclusive.

21 Collateral estoppel precludes a party to an action from
22 relitigating in a second proceeding matters litigated and
23 determined in a prior proceeding. (*People v. Sims* (1982) 32
24 Cal.3d 468, 477.) Traditionally, collateral estoppel has been
25 found to bar relitigation of an issue decided at a previous
26 proceeding if (1) the issue necessarily decided at the previous
27 proceeding is identical to the one which is sought to be
28 relitigated; (2) the previous proceeding resulted in a final

1 judgment on the merits; and (3) the party against whom collateral
2 estoppel is asserted was a party or in privity with a party at the
3 prior proceeding. (*Id.* at 484.) Only issues actually litigated
4 in the initial action may be precluded from the second proceeding.
5 (*Id.*) An issue is "actually litigated" when it is properly
6 raised, by the pleadings or otherwise, and is submitted for
7 determination, and is determined. (*Id.*)

8 In *Sims*, Sims was informed by the County's Department of
9 Social Services that she had received overpayments of AFDC and
10 food stamp benefits to which she was not entitled; it claimed she
11 had failed to report that the stepfather of the children for whom
12 the benefits were received was living at home and fully employed
13 while she was receiving public assistance. Sims requested a fair
14 hearing pursuant to statute. Prior to the hearing, a criminal
15 complaint was filed against Sims, based on the same facts. At the
16 hearing, the county declined to present any evidence, because it
17 contended DSS lacked jurisdiction to hear the case because
18 criminal charges were pending. The stepfather testified that he
19 lived at other addresses during the time in question. The hearing
20 officer found the county had failed to meet its burden of proving
21 Sims fraudulently received welfare benefits. The director of the
22 DSS adopted the hearing result. The county did not seek judicial
23 review. (*Id.* at 474.)

24 *Sims* moved to dismiss the criminal charges, asserting
25 collateral estoppel. The issue was whether an administrative
26 decision could collaterally estop relitigation of the same issue
27 in a criminal proceeding. The court concluded that collateral
28 estoppel may be applied to administrative decisions when the

1 administrative agency is acting in a judicial capacity and
2 resolves disputed issues of fact properly before it which the
3 parties have had an adequate opportunity to litigate. (*Id.* at
4 479.) It concluded Sims' fair hearing satisfied these
5 requirements. (*Id.* at 482.) The court also concluded the issue
6 actually litigated at the fair hearing was identical to that
7 involved in the criminal proceedings. (*Id.* at 485.)

8 "More difficult to resolve" was whether the fair hearing
9 determination was final for purposes of collateral estoppel.
10 (*Id.*) When the county received notice of the director's decision,
11 it had 30 days to request a rehearing. (*Id.*) After that deadline
12 had passed without rehearing having been requested, the director's
13 decision became final for purposes of judicial review. (*Id.*) The
14 court noted that the fact the director's decision was final for
15 purposes of judicial review did not mean it satisfied the finality
16 requirement for application of collateral estoppel. (*Id.* at 485,
17 n. 15.) The county had one year from the date it received notice
18 of the director's final decision to petition for mandamus review
19 in superior court. (*Id.* at 486.) At the time the trial court
20 dismissed the criminal charges, that time period had not yet
21 elapsed. (*Id.*)

22 It is a well established rule that only judgments which
23 are free from direct attack are final and may not be relitigated.
24 (*Id.*)

25 "For purposes of this case, it is not
26 necessary to determine whether a DSS fair
27 hearing decision becomes final at any point
28 before the time period for seeking mandamus
review lapses. The deadline for the County to
petition for mandamus has long since passed
and the DSS decision is presently free from

1 direct attack. Thus, even assuming arguendo
2 that the fair hearing decision was not final
3 when the trial court dismissed the
information, collateral estoppel would now bar
prosecuting respondent upon remand."

4 (*Id.*)

5 Arguably, the issues resolved in the Hanford proceedings
6 were not identical to those before the SCH JRC, because the issue
7 before the SCH was whether the SCH MEC's disciplinary action
8 against Smith was reasonable and warranted, and the Hanford
9 decision involved whether the disciplinary action taken by their
10 MECs was proper under the bylaws applicable at those hospitals.
11 If the issues were not identical, the Hanford decision would not
12 collaterally estop litigation of the issues raised in the SCH
13 proceedings.

14 More important, it appears the Hanford decision was not
15 a final decision for purposes of collateral estoppel at the time
16 of the SCH JRC hearing. The governing boards of the Hanford
17 hospitals rendered their decisions in January and February, 2004.
18 The SCH JRC hearing took place in February and March 2005. The
19 limitations period for filing a petition for writ of mandamus
20 seeking review of an administrative decision is four years. (Code
21 Civ. Proc., § 343; *Bonner v. Sisters of Providence Corp.* (1987)
22 194 Cal.App.3d 437, 442-443.) Since the statute of limitations on
23 review of the Hanford hospitals' administrative decision had not
24 run at the time of the SCH JRC hearing, applying collateral
25 estoppel effect to the Hanford decision would have been improper.
26 Consequently, it appears the SCH governing board was incorrect in
27 concluding that the Hanford decision should have been given
28 "conclusive" effect by the SCH JRC.

1 Even if collateral estoppel prevented Smith from
2 relitigating the conclusion of the Hanford proceeding, that
3 doctrine did not make the Hanford decision "conclusive" as to
4 whether the MEC's revocation of Smith's privileges was reasonable
5 and warranted, as SCH seems to argue. It did not obligate or
6 permit the MEC to base its disciplinary action solely on the
7 results of the Hanford proceeding. Contrary to SCH's argument,
8 there is nothing in the pertinent statutes or the SCH bylaws that
9 requires that a doctor's privileges at SCH be terminated or
10 revoked whenever another hospital terminates that doctor's
11 privileges or takes other action against him through the peer
12 review process. What SCH can base its decision on is specified in
13 the Bylaws.

14 "Medical staff privileges may be granted, continued,
15 modified or terminated by the governing body of this hospital only
16 upon recommendation of the medical staff, only for reasons
17 directly related to quality of patient care and other provisions
18 of the medical staff bylaws, and only following the procedures
19 outlined in these bylaws."

20 (Bylaws, § 5.1 (emphasis added.))

21 "Requests for clinical privileges shall be
22 evaluated on the basis of the member's
23 education, training, experience, demonstrated
24 professional competence and judgment, clinical
25 performance, and the documented results of
26 patient care and other quality review and
27 monitoring which the medical staff deems
28 appropriate. Privilege determinations may
also be based on pertinent information
concerning clinical performance obtained from
other sources, especially other institutions
and health care settings where a member
exercises clinical privileges."

(Bylaws, § 5.2.2.)

1 Under section 5.2.2, in determining whether to extend
2 privileges to a particular doctor, the doctor's "demonstrated
3 professional competence and judgment, clinical performance, and
4 the documented results of patient care and other quality review
5 and monitoring," must be considered. Information concerning
6 clinical performance at another hospital "may also," that is,
7 additionally, be considered. This section does not authorize the
8 MEC or the governing board to extend or revoke privileges solely
9 on the basis of information concerning clinical performance at
10 another hospital. Thus, the "legal standard" that the governing
11 body sought to impose on the JRC - that privileges could be
12 revoked or withheld solely on the basis of adverse action by
13 another hospital - was an incorrect standard.

14 Additionally, the cases respondent cites do not require
15 the MEC, JRC, or governing board of one hospital to revoke a
16 physician's or surgeon's privileges whenever his or her privileges
17 have been suspended or revoked at another hospital. They do not
18 indicate that the decision of one hospital is "conclusive" as to
19 the doctor's fitness to continue to practice at another hospital.
20 They do not indicate what weight is to be given the disciplinary
21 action of one hospital in peer review proceedings at another
22 hospital.

23 In *Webman v. Little Co. of Mary Hospital* (1995) 39
24 Cal.App.4th 592, when Dr. Webman applied for reappointment at the
25 Hospital, he disclosed his privileges at another hospital had been
26 suspended, restricted or revoked. The Hospital investigated and
27 found two 805 reports on record; the second concluded the problems
28 described in the first were resolvable by means other than

1 corrective action. (*Id.* at 596.) When the MEC questioned Webman,
2 he referred them to the explanation prepared by his attorney. He
3 declined to describe what had happened at the other hospital in
4 his own words, and refused permission to review the other
5 hospital's charts. (*Id.* at 597.) Webman was advised that his
6 failure to cooperate would justify refusal to reappoint him to the
7 staff. The MEC recommended Webman not be reappointed due to his
8 failure to comply with the reappointment process. (*Id.* at 598.)
9 The JRC found the recommendation to be reasonable and warranted,
10 and the governing board affirmed. (*Id.* at 599.) The court upheld
11 the decision, because Webman had actively interfered with
12 Hospital's ability to gather information necessary to evaluate his
13 competence. (*Id.* at 601-602.) Thus, this case does not stand for
14 the proposition that a doctor's privileges must or may be
15 terminated solely based on the results of peer review proceedings
16 at another hospital.

17 In *Oskooi v. Fountain Valley Regional Hospital* (1996) 42
18 Cal.App.4th 233, when *Oskooi* applied for staff privileges, his
19 application omitted his previous affiliations with hospitals in
20 Hawaii and Illinois. The application warned that any significant
21 omission was cause for summary dismissal. (*Id.* at 236.) He was
22 granted privileges, but they were subsequently suspended because
23 of the omissions from his application. He exhausted his
24 administrative remedies and petitioned for a writ of mandamus.
25 The court first found that Hospital's motion to dismiss had been
26 improperly denied. It also concluded that *Oskooi's* omissions from
27 his application justified his suspension from Hospital. (*Id.* at
28 244.) He was obligated to provide the requested information.

1 (Id.) He was notified exactly why he was suspended and was given
2 a full and fair opportunity to respond and present a defense.

3 (Id. at 245.) This case also does not stand for the proposition
4 that a doctor's privileges must or may be terminated solely based
5 on the results of peer review proceedings at another hospital.

6 Here, the JRC applied the correct standard. It
7 concluded that the evidence presented did not convince it that the
8 MEC's action was reasonable and warranted. It stated its belief
9 that SCH must do its own investigation of Dr. Smith, and the

10 "information from the Hanford hospitals may be
11 used as a part of a reason to monitor Dr.
12 Smith by accepted peer review mechanisms such
13 as case monitoring, proctoring at surgery and
14 a more intensive review of patients admitted
15 to SCH. After doing their own investigation
16 of Dr. Smith's performance at SCH, then the
17 experiences at the Hanford hospitals may be
18 used as additional evidence of his need to be
19 dismissed."

20 (JRC decision, p. 5, second full paragraph (boldface in original;
21 underlining added; Ex. 68, AR 2176-2181, at 2180.)

22 The JRC properly concluded that other factors had to be
23 considered, in addition to the adverse action taken by the Hanford
24 hospitals. Essentially, it concluded that it was unreasonable and
25 unwarranted for the MEC to rely solely on the adverse action taken
26 by another hospital, when there was no evidence of any performance
27 below standard, abusive conduct, or danger to patients at SCH.
28 This is fully consistent with section 5.2.2 of the Bylaws. It
should be noted the evidence showed that Smith had held privileges
at SCH for twenty years, and that the hospital had been made aware
of pending charges at the Hanford hospital on September 10, 2002.
SCH notified Smith of his summary suspension on March 23, 2004,

1 and the JRC hearing began in February 2005. Thus, SCH was on
2 notice of the Hanford pending charges for more than a year prior
3 to taking action, and had the opportunity during that time to
4 observe Smith's conduct and work, yet no evidence of any
5 substandard conduct or services at SCH was presented.

6 It appears that, in insisting that the Hanford findings
7 were "conclusive" and the JRC should have upheld the MEC's
8 decision, the governing board failed to apply the substantial
9 evidence standard, and instead applied its own incorrect "legal
10 standard." That "legal standard" actually appears to be the
11 governing board's own determination of the weight that should have
12 been accorded one particular piece of evidence - the Hanford
13 decision. Consequently, it does not appear the governing board
14 applied the correct standard of review.

15 2. Argument that an expert cannot create a new legal
16 standard.

17 As discussed above, it appears the JRC applied the
18 correct legal standard. The expert's testimony that the MEC
19 should have conducted its own investigation and considered facts
20 other than the action of the Hanford hospitals is consistent with
21 that legal standard.

22 3. Argument that the findings were not responsive to
23 the charges.

24 In *Hongsathavij*, the court concluded that the governing
25 board was correct in concluding that the findings of the JRC were
26 not responsive to the specific charges made, and therefore were
27 not supported by the evidence. (*Hongsathavij*, 62 Cal.App.4th at
28 1137.) Among the charges against the doctor was a charge of

1 violating the COBRA law, which required a hospital emergency room
2 doctor to either transfer a high-risk pregnant woman or provide
3 treatment to stabilize her medical condition. A doctor violates
4 COBRA when he refuses to treat a pregnant woman having
5 contractions (which was by definition an emergency). Evidence and
6 the resulting finding that the woman who was the subject of the
7 COBRA violation charge was not "in a 'dire' emergency" and was
8 stable was irrelevant, because it did not address the COBRA
9 definition of an emergency. (*Id.* at 1139-1140.)

10 Here, SCH argues that the JRC's determination that MEC
11 could "never" base adverse action on "information arising from
12 peer review proceedings at another facility" did not respond to
13 the question whether MEC's recommendation to revoke petitioner's
14 privileges was reasonable and warranted in light of the
15 deficiencies "detailed" in the Hanford decision. It appears the
16 evidence and findings of the JRC related to whether the MEC's
17 decision to terminate Smith's privileges was reasonable and
18 warranted. In light of section 5.2.2 of the bylaws, which
19 requires that requests for clinical privileges be evaluated on the
20 basis of the member's education, training, experience,
21 demonstrated professional competence and judgment, clinical
22 performance, and the documented results of patient care and other
23 quality review and monitoring, in addition to information
24 concerning clinical performance obtained from other hospitals, it
25 appears it was proper and necessary to consider evidence other
26 than the Hanford decision in determining whether the MEC's
27 decision was reasonable and warranted. The JRC cited evidence
28 that the MEC decision was made without any of the facts underlying

1 the Hanford decision, when there was no evidence of substandard
2 care at SCH, when SCH made no effort to monitor Smith's practice,
3 records or behavior while it awaited the outcome of the Hanford
4 proceedings, when the MEC may have had reasons unrelated to
5 patient care for terminating Smith's privileges, and when there
6 was no evidence to support the theory that Smith's behavior at
7 another hospital would be replicated at SCH. (AR, at 2179.)

8 Contrary to SCH's contention, the evidence relied on
9 appears to be responsive to the issues before the JRC.

10 IV. CONCLUSION

11 Based upon a review of the entire administrative record,
12 and for the foregoing reasons, the Court orders issuance of a
13 peremptory writ commanding respondent to set aside the decision of
14 the Appeal Board (Ex. 74, AR 2275-2284) and to reinstate the
15 decision of the JRC.

16 Pursuant to Rule 232, the tentative decision shall be
17 the Statement of Decision unless within ten (10) days either party
18 specifies controverted issues or makes proposals not covered in
19 the tentative decision.

20 DATED this 20th day of December, 2005.

21 

22 _____
23 MARK W. SNAUFFER
24 JUDGE OF THE SUPERIOR COURT
25
26
27
28

<p align="center">SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO Civil Unlimited Department, Central Division 1100 Van Ness Avenue Fresno, California 93724-0002 (559) 488-3352</p>	<p align="center"><i>FOR COURT USE ONLY</i></p>
<p>TITLE OF CASE: Brenton R. Smith M.D. - vs - Selma Community Hospital</p>	
<p align="center">CLERK'S CERTIFICATE OF MAILING</p>	<p>CASE NUMBER: 05cecg02293</p>

I certify that I am not a party to this cause and that a true copy of the **minute order** was mailed first class, postage fully prepaid, in a sealed envelope addressed as shown below, and that the notice was mailed at Fresno, California 93724-0002, California, on:

Date: **December 20, 2005**

Clerk, by C. Brown, Deputy
C. Brown

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 350 South Figueroa Street., Suite 975
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Jerry D. Casheros, Esq.
 P O Box 28912
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Clerk's Certificate of Mailing Additional Address Page Attached