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SECOND APPELLATE DISTRICT

DIVISION 8

COURT OF APPEAL - SECOND DIST.
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Gil N. Mileikowsky, M.D.,

Petitioner/Appellant

v.

West Hills Hospital Medical Center and Medical Staff of West Hills Medical Center, Medical Staff of West Hills Hospital Medical Center, Hospital Corporation of America a/k/a HCA, Inc., John D. Harwell, and James R. Lahana,

Respondents/Respondents.

No. B186238

Los Angeles County Superior Court No. BS091943

Honorable Dzintra Janavs, Judge Presiding

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Business and Professions Code section 809.2 guarantees a fair hearing before an impartial peer review panel to a physician facing adverse action by a hospital. "The days when a hospital could make arbitrary credentialing decisions without affording physicians any recourse are long gone." (Merkel, *Physicians Policing Physicians: the Development of Medical Staff Peer Review Law at California Hospitals* (2004) 38 U.S.F. L. Rev. 301, 301 (hereinafter "Merkel").) Unfortunately, while that is the law, it is still not always the reality. The present case shows how far a hospital will go to terminate an unwanted physician without allowing him a fair hearing before his peers.

Respondent West Hills Hospital wanted very much to remove appellant Dr. Mileikowsky from its Medical Staff. It denied his reappointment on specious grounds and prematurely suspended his privileges. When he demanded his right to a neutral hearing, it appointed a hearing officer with fatal conflicts of interest. It urged its chosen hearing officer to deny Dr. Mileikowsky any hearing at all, on the ground that he had not produced documents it knew he was forbidden to produce. The Hearing Officer agreed and denied Dr. Mileikowsky a hearing, although he had neither authority nor legal

grounds to do so. By this device, West Hills kept Dr. Mileikowsky from ever putting his case before his peers.

For all of these reasons, the Superior Court erred in failing to issue a peremptory writ of mandate.

II. APPEALABILITY OF JUDGMENT

The judgment is appealable pursuant to Code of Civil Procedure section 904.1(a); it finally disposes of all issues between the parties.

III. STATEMENT OF THE CASE

A. Nature of Action and Relief Sought

This is an appeal from the denial of a petition for a writ of administrative mandamus under Code of Civil Procedure section 1094.5, and from judgment in favor of Respondents in related claims for damages, declaratory relief, and injunction.

The underlying administrative proceeding was commenced pursuant to Business and Professions Code section 809.2, to review West Hills' Medical Staff's denial of Dr. Mileikowsky's application for reappointment and for additional privileges. (Petition at 27-30, CT 000034-37.)[1] The writ petition asked the Superior Court to set aside West Hills' decision to uphold the denial of Dr. Mileikowsky's

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[1]"CT" refers to the Clerk's Transcript.

application. (Petition at 36-37, CT 000043-44.) It also stated causes of action for wrongful termination of privileges, unfair competition, interference with business and prospective advantage, and defamation, for which it sought damages and declaratory and injunctive relief. (Petition at 31-33, CT 000038-45.) The Superior Court denied the petition for a writ and entered judgment in favor of Respondents on all of the non-mandate causes of action. (Judgment, CT 004057-59.)

B. Summary of Material Facts

1. Events Prior to 2001

This appeal concerns an administrative proceeding challenging the denial of Dr. Mileikowsky's 2001 application for reappointment to West Hills' Medical Staff. The proceeding was summarily terminated before any hearing was begun, ostensibly because Dr. Mileikowsky did not produce documents related to proceedings at another hospital, Cedar-Sinai Medical Center. To understand how the Cedars-Sinai documents became a pretext for stripping Dr. Mileikowsky of his privileges, it is necessary to examine certain earlier events.

Dr. Mileikowsky was, since 1992, a member in good standing of West Hills' Medical Staff. (AR CH00135.)[2] As of 1999, his privileges covered a full range of gynecological but not obstetrical services. (Delineation of Privileges, AR CH00143-44.)

As part of his 1999 reappointment application, Dr. Mileikowsky disclosed the following about events at Cedars-Sinai:

> On January 22, 1998, without notice or hearing, and without appropriate justification, the Vice President for Medical Affairs of Cedars-Sinai Medical Center summarily suspended Dr. Mileikowsky's privileges. That action is the subject of review/appeal proceedings before a Judicial Review Committee, now in progress.

(Addendum to 1999Application, AR P003230.) On August 11, 1999, Dr. Mileikowsky provided Cedars-Sinai a signed release, authorizing it to disclose any information about him to other hospitals. (8/11/99 release, AR CH00138; 8/13/99 letter, AR CH00141.) Thereafter, West Hills approved Dr. Mileikowsky's 1999 application for reappointment. (Delineation of Privileges at 2, AR CH00144.)

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[2]"AR" refers to the Administrative Record. The petitioner and the respondents each submitted an administrative record to the trial court, which accepted both. (4/15/05 Minute Order, CT003976.) The pages of the Administrative Record submitted by respondents are stamped with sequential numbers preceded by the letters CH. The pages of the Administrative Record submitted by petitioner are stamped with sequential numbers preceded by the letter P.

In late 2000, Dr. Mileikowsky sought temporary obstetrical privileges at West Hills. He was allowed to deliver two patients at about that time, and on November 22, 2000, West Hills recognized his temporary obstetrical privileges in writing. (11/27/00 letter at 4, AR CH00331; 12/3/00 letter at 1, AR CH00504; Application, AR CH00293-94.)

However, on November 29, 2000, the president of West Hills' Medical Staff wrote to Dr. Mileikowsky that his application for temporary obstetrical privileges was not approved, "based upon initial information received concerning disciplinary action taken at other facilities . . . ." (11/29/00 letter at 1, AR CH00365.) The letter directed him to provide complete details, including all supporting documents, concerning actions taken against him at Cedars-Sinai and Encino-Tarzana Hospital. (*Ibid.*) It further instructed him to direct any questions about this requirement to Mr. James Lahana, counsel for West Hills' Medical Staff. (*Id.* at 2, AR CH00366.)

Dr. Mileikowsky responded that he was willing to provide the Medical Staff information any information it required. (11/29/00 letter at 1-2, AR P003234-35.) He further pointed out that the Medical Staff's attorney Mr. Lahana had been the hearing officer in the Cedars-Sinai

proceedings, and therefore had more information about them than he did. (*Id.* at 2, AR P003235.) Dr. Mileikowsky enclosed a copy of the medical records of the patient who had been the subject of the Cedars-Sinai proceedings, and of the reports he and Cedars-Sinai had submitted to the National Practitioner Data Bank, describing the events at Cedars-Sinai. (*Id.* at 2-3, AR P003235-36.)

Dr. Mileikowsky cautioned, though, that Cedars-Sinai would not authorize him to provide the documents from the hearing itself. (*Id.* at 2, AR P003235.) He attached a letter written to his attorney by Gordon Simonds, an attorney representing Cedars-Sinai, which stated:

> [T]his letter is in further response to your letters . . . requesting approval for release by Dr. Mileikowsky to other facilities of . . . records pertaining to the above-referenced proceedings at Cedars-Sinai Medical Center.
>
> . . .
>
> Request for authorization to release records generated by the pending review process at Cedars-Sinai pertaining to Dr. Mileikowsky. The records and proceedings which have been generated pertaining to on-going peer review of Dr. Mileikowsky at Cedars-Sinai are protected by California Evidence Code Section 1157. Dr. Mileikowsky's request to release unspecified documents generated during this process at the Medical Center and protected by Section 1157 is denied for the purpose of avoiding any possible waiver of the Section 1157 privileges *and* in meeting the expectations of Medical Staff

> participants in the process at Cedars-Sinai that all steps will be taken to assure the confidentiality of the proceedings.

(4/16/99 letter at 1-2, AR P003240-41 (emphasis in original.)

On December 2, 2000, Dr. Mileikowsky discussed his dilemma with Mr. Lahana, and he wrote the following confirming letter:

> You told me that you believe that Mr. Gordon Simonds is wrong and does not have the authority to prevent me from providing West Hills Hospital pertinent documents of the proceedings at Cedars-Sinai.
>
> We agreed that you will fax to me this afternoon copy of the applicable law allowing me to provide you the list of documents that you wish West Hills Hospital to review.
>
> Upon receipt of the above law and the list of documents that you wish me to produce, I shall do every effort to comply accordingly.

(12/4/00 letter at 1-2, AR P003245-46.)

Mr. Lahana responded negatively:

> This will acknowledge receipt of your letter dated December 4, 2000. Please be advised that I did not state that Mr. Simonds was "wrong." What I very clearly explained to you was that as an applicant for obstetrical privileges at West Hills Hospital and Medical Center, you must bear the burden of demonstrating that you meet the ethical and clinical standards for those privileges . . . .
>
> [Y]ou have been requested to provide copies of any and all information concerning the matter at Cedars-Sinai Medical Center . . . . You have indicated that you are precluded by Cedars-Sinai Medical Center from producing this

> information. Please be advised that West Hills . . . will not be in a position to consider your application for additional privileges without adequate information being produced. It is not the role of West Hills . . . to determine whether Cedar's request to you is appropriate.

(12/5/00 letter at 1-2, P003255-56.)

Thus, Mr. Lahana, who was both the Cedars-Sinai hearing officer and the attorney for West Hills, would not disagree with the Cedars-Sinai attorney's directive that Dr. Mileikowsky was not allowed to give West Hills the Cedars-Sinai documents. But he simultaneously required Dr. Mileikowsky to give West Hills the Cedars-Sinai documents.

In response, Dr. Mileikowsky reminded Mr. Lahana that he had been the hearing officer in the Cedars-Sinai proceedings, that Dr. Mileikowsky had authorized him to release to West Hills any information it required concerning the proceedings, and that Mr. Lahana had responded that he was precluded from doing so by Evidence Code 1157 – the statute Mr. Simonds had cited in blocking Dr. Mileikowsky from releasing the documents to other hospitals. (12/5/00 letter at 1,4, AR P003259, 62.) Dr. Mileikowsky also enclosed an executed release and noted that, according to Mr. Simonds, Cedars-Sinai would respond directly to other hospitals if Dr. Mileikowsky executed such a release. (*Id.* at 5-6, AR P003263-64; 12/5/00 Authorization, AR P003269.)

Finally, Dr. Mileikowsky observed that Mr. Simonds did not object to his answering questions about the proceedings in writing or orally. (*Id.* at 6, AR P003263.)

On February 1, 2001, the president of West Hills' Medical Staff complained to Dr. Mileikowsky that he had not provided the Cedars-Sinai documents. (2/1/01 letter, AR CH01661.) The letter stated: "Although a direct request was made to Cedars to provide the information, such a request does not relieve your obligation to produce the information in support of your application for additional privileges." (*Ibid.*)

Ultimately, West Hills refused Dr. Mileikowsky's request for temporary obstetrical privileges. (11/2/01 letter, AR P000019.)

2. The 2001 Application for Reappointment

On May 18, 2001, Dr. Mileikowsky submitted to West Hills his biannual Reappointment Application. (5/18/01 letter and Application, AR P003273-85.) The application included a request that he also be granted obstetrical privileges. (*Id.* at P003282.)

On February 12, 2002, the president of West Hills' Medical Staff wrote to Dr. Mileikowsky that it had "serious concerns regarding your request for obstetrical privileges and your application for reappointment

to the Medical Staff . . . ." (2/12/02 letter at 1, AR P003290.) The letter made no mention of the Cedars-Sinai proceedings. Dr. Mileikowsky responded in detail, answering all questions raised. (3/4/02 letter, AR P003294-3318.)

3. Denial of the 2001 Application and Request for Hearing

In a letter dated April 24, 2002, the president of West Hills' Medical Staff reported to Dr. Mileikowsky that the Medical Executive Committee had recommended denial of his 2001 application. (4/24/02 letter, P003330-34.)

The denial letter made various confusing accusations against Dr. Mileikowsky. To give one example, the letter alleged:

> Your addendum [to your application] states a "voluntary resignation" at Encino-Tarzana Medical Center while documentation received state[s] you were "summarily suspended" on November 16, 2000 . . . .

(4/24/02 letter at 2, AR P003331.) In fact, Dr. Mileikowsky had submitted the quoted addendum in 1999 as part of his 1999 application for reappointment; his 2001 application did not even have an addendum. (7/17/99 letter and Application, AR P003227-30; 5/18/01 letter and Application, AR P003273-85.) For obvious reasons, the 1999 addendum did not mention the November 2000 Encino-Tarzana

summary suspension. Contrary to the denial letter's accusatory suggestion, Dr. Mileikowsky had immediately informed West Hills about the Encino-Tarzana summary suspension when it occurred – as it specifically acknowledged at the time. (11/27/00 letter, AR P000916.)

The April 24, 2004 denial letter notified Dr. Mileikowsky that he had a right to a "judicial review hearing." (4/24/02 letter at 3, AR P003332.) Dr. Mileikowsky requested such a hearing. (5/23/02 letter, AR P003335-36.)

4. Selection of the Hearing Officer

On June 17, 2002, an attorney named John Harwell announced that he had been appointed Hearing Officer for Dr. Mileikowsky's West Hills administrative proceeding. (6/17/02 letter, AR P003351-58.) The letter disclosed that Mr. Harwell was, at the same time, also the hearing officer in another matter involving Dr. Mileikowsky. (*Id.* at 1, AR P003351.) One of the accusations in the West Hills denial letter was that Dr. Mileikowsky had not adequately disclosed that matter, the Century City proceedings. (4/24/02 letter at 1, AR P003330.) Nevertheless, Mr. Harwell asserted that he was not disqualified from sitting on Dr. Mileikowsky's West Hills proceeding, largely on the basis that he had very limited powers as a hearing officer and that Evidence

Code 1157 barred him from disclosing in the West Hills proceeding anything he learned in the Century City proceedings. (*Id*. at 1-5, AR P003351-55.)

West Hills' Medical Staff had chosen Mr. Harwell as hearing officer. (RT 7/1/02 25:11-26:11, AR P001582-83.) Dr. Mileikowsky asked Mr. Harwell to reconsider sitting as hearing officer in light of the California Supreme Court decision *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017. *Haas* held that an administrative hearing officer cannot be selected by the prosecuting body on an *ad hoc* basis with the possibility of future appointments, because of the resulting financial conflict of interest. (6/23/02 letter, AR P003359-68.)

Mr. Harwell replied that he had considered *Haas* but had concluded it did not apply because he would not be making any dispositive decisions. (6/27/02 letter, AR P003384-88.) At the subsequent voir dire session, Mr. Harwell repeatedly emphasized that *Haas* did not apply because he had no power to determine the proceeding's outcome. (RT 7/1/02 9:18-21, AR P 001566; RT 7/1/02 20:15-18, AR P 001577; RT 7/1/02 23:10-17, AR P 001580; RT 7/1/02 24:11-13, AR P 001581; RT 7/1/02 25:5-10, AR P 001582 (all attached).)

Following voir dire, over Dr. Mileikowsky's objections, Mr. Harwell declined to recuse himself. (RT 7/1/02 53:23-54:6, AR P001610-11.)

5. Suspension of Clinical Privileges

Without waiting for the conclusion of Dr. Mileikowsky's proceeding, West Hills peremptorily suspended his privileges. On the day the Hearing Officer announced his appointment, Mr. Lahana wrote to him: "Currently, Dr. Mileikowsky does not hold privileges and is not able to practice at West Hills Regional Medical Center during the pendency of this hearing." (6/17/02 letter, AR P 003348.)

This was Dr. Mileikowsky's first notice that his privileges had been suspended, and he immediately protested, in urgent facsimiles to Mr. Lahana and to the Chief of Staff, pointing out that he was legally entitled to retain his privileges at least until the hearing concluded. (6/23/02 letter, AR P 000099-103; 6/26/02 letter, AR P 000107-115.) In response, Mr. Lahana simply asserted, without explanation, that Dr. Mileikowsky's privileges had expired. (6/26/02 letter, AR P 001040-41.) Dr. Mileikowsky then sent a letter to the heads of the Medical Staff and to West Hills' chief executive officer, complaining that they had

violated the law by suspending his privileges pending a hearing on his reappointment application. (7/12/02 letter, AR P003390-401.)

Dr. Mileikowsky also raised the issue of his continuing membership and clinical privileges before the Hearing Officer. (7/16/02 letter at 3, AR P003414.) The Hearing Officer declined to address the issue, "because fact-finding and decision-making would be required." (*Ibid.*)

6. The Amended Notice of Charges

West Hills granted Dr. Mileikowsky's 1999 reappointment application without regard to the Cedars-Sinai proceedings. Likewise, the letter denying Dr. Mileikowsky's 2001 application for reappointment made no mention of Cedars-Sinai at all. (4/24/02 letter, P003330-34.) Soon thereafter, though, West Hills seized on the Cedars-Sinai issue to fend off review of its decision not to reappoint him.

Specifically, after the administrative proceeding commenced, Mr. Lahana began to press for production of the Cedars-Sinai documents that he knew Dr. Mileikowsky could not produce. On July 17, 2002, Mr. Lahana demanded the documents and threatened that, if they were not produced, the Medical Staff would "amend[] its Notice of Charges to include allegations concerning your failure to cooperate . . . ."

(7/17/02 letter at 1-2, AR P003421-22.) Similarly, on July 22, 2002, the president of the Medical Staff (which Mr. Lahana continued to represent) wrote a letter to Dr. Mileikowsky demanding that he provide the Cedars-Sinai documents. (7/29/02 letter, AR P003430.)

On August 21, 2002, the Medical Executive Committee sent Dr. Mileikowsky a notice that it "hereby amends the Notice of Charges dated April 24, 2002." (8/21/02 letter at 1, AR P003431.) This choice of terminology was puzzling and perhaps revealing; there were no charges pending against Dr. Mileikowsky. The April 24, 2002 denial letter was not a disciplinary letter and contained no "charges.". (4/24/02 letter, P003330-34.)

The "Amended Notice of Charges" delineated four allegations against Dr. Mileikowsky. (8/21/02 letter, AR P003431-34.) These included the alleged failure to provide documents from the Cedars-Sinai proceedings and to provide specific information about his summary suspension at Cedars-Sinai. (*Ibid.*)

7. Summary Termination of the Administrative Proceeding Before the Hearing Could Begin

On October 3, 2002, the Medical Staff began to press the Cedars-Sinai's documents as an excuse to block Dr. Mileikowsky's right to a

hearing. It formally asked the Hearing Officer that "Dr. Mileikowsky be ordered to comply with the Hospital's discovery request for the [Cedars-Sinai] documents . . . ." (10/3/02 letter, AR P003435.) It then asked the Hearing Officer to determine that Dr. Mileikowsky had abandoned the proceeding, because of, among other reasons, his alleged refusal to provide the Cedars-Sinai documents. (11/27/02 letter, AR P003436.)

On January 6, 2003, the Medical Staff wrote to the Hearing Officer, acknowledging that Dr. Mileikowsky had provided requested information concerning the Encino-Tarzana proceedings, but complaining that he had still not produced the Cedars-Sinai documents. (1/6/03 letter, AR P003442.) The letter asked the Hearing Officer to set a date for production of the documents and, failing that, to terminate the proceeding. (*Ibid.*)

Dr. Mileikowsky responded a few days later. (1/12/03 letter, AR P003446-86.) Because Cedars-Sinai had never rescinded its attorney's direction that Dr. Mileikowsky was *not* authorized to release the Cedars-Sinai documents to West Hills, Dr. Mileikowsky continued to offer (as he had in the past) alternative means for West Hills to obtain the requested information:

- He gave West Hills signed releases authorizing Cedars-Sinai to share the documents with West Hills (1/12/03 letter at 5, AR P003451), just as Cedars-Sinai's attorney had proposed. (4/16/99 letter at 2, AR P003241.) (The Medical Staff never suggested that it had even attempted to use the releases to secure the information directly from Cedars-Sinai, and subsequently-produced evidence showed that it did not attempt to do so during the pendency of the administrative proceeding. (12/20/00 letter, AR P003802-03; 7/24/03 letter, AR P003800-03.))
- He identified the Medical Staff's attorney Mr. Lahana as an alterative source of information, noting that he had been the hearing officer in the Cedars-Sinai proceedings. (1/12/03 letter at 6, AR P003452.)
- He reiterated that he had provided the charts of all of the patients who had been the subject of the Cedars-Sinai proceedings. (*Ibid.*)

The Hearing Officer rejected Dr. Mileikowsky's contention that he was barred from producing the documents, and he ordered Dr. Mileikowsky to give the Medical Staff access to the documents. (2/5/03 letter at 12-15, AR P003500-03.) He further represented that he would "*seek the position of the parties* on which sanction is appropriate if Dr.

Mileikowsky fails to provide the documents requested." (*Id*. at 15, AR P003503 (emphasis added).)

The Hearing Officer later elaborated on the possibility of sanctions against Dr. Mileikowsky for his alleged refusal to produce the Cedars-Sinai documents. He stated: "The nature of those sanctions is still undecided, *and discussion will be sought from the parties*, but at the moment, the hearing officer is inclined to issue terminating sanctions including the dismissal of Dr. Mileikowsky's challenge to the [Medical Staff]'s recommendation to deny his re-application." (3/18/03 letter at 2, AR P003505 (emphasis added).)

On March 26, 2003, the Medical Staff asked the Hearing Officer to end the proceeding because Dr. Mileikowsky had not produced the Cedars-Sinai documents. (3/26/03 letter, AR P003507.) On the very next day, ignoring his earlier promises that he would seek positions and discussion from the parties before choosing a sanction, the Hearing Officer granted the Medical Staff's request and terminated the proceeding – summarily denying Dr. Mileikowsky his right to a hearing. (Order Terminating Hearing, AR P003509-20 (attached in part).) The stated reason for the termination was Dr. Mileikowsky's alleged refusal to produce "documentary information . . . specifically regarding a charge

involving a purported medical staff disciplinary action at another hospital, Cedars-Sinai Medical Center." (*Id.* at 1, AR P003509 (attached).)

8. The Administrative Appeal

Dr. Mileikowsky timely noticed an administrative appeal to West Hills' Board of Trustees. (4/3/03 letter, AR P003530-35.) The Board notified him that the appellate hearing would be limited to two points:

> 1. Whether or not you complied with the discovery request.
>
> 2. Fair procedure issues relating to the qualifications of the Hearing Officer during the course of the Administrative Hearing.

(4/11/03 letter, AR P003542-43.)

On April 18, 2003, an attorney named Ralph Helton identified himself as the officer chosen to preside over the appellate proceeding. (4/18/03 letter, AR P003545-46.) Dr. Mileikowsky objected to Mr. Helton's appointment. (6/24/03 letter, P003870-88.) He pointed out that Mr. Helton's public website gave as references officials of Cedars-Sinai Medical Center and Tenet Health Systems, owner of the Encino-Tarzana Hospital, another hospital where proceedings against Dr.

Mileikowsky were pending[3]. (*Id.* at 2-3 and attachment at 8-9, AR P003871-72, Poo3882-83; 3/6/01 letter, AR P005255.) Referring to the *Haas* decision, the letter requested the immediate rescission of Mr. Helton's appointment. (*Id.* at 4, AR P003873.) Mr. Helton declined to recuse himself. (6/30/03 letter, AR P003631.)

The administrative appellate proceeding commenced on July 22, 2003, before an *Ad Hoc* Committee of the Governing Board. (RT 7/22/03, AR P003679-799.)

Prior to the appellate hearing, Mr. Helton had repeatedly warned both sides that no evidence would be accepted, except upon a showing made five days before the hearing that such evidence could not have been made available to the Hearing Officer in the earlier proceeding. (4/25/03 letter at 2, AR P003549; 6/3/03 letter at 2, AR P003628.) Nevertheless, *after* the appellate hearing, Mr. Lahana as attorney for the Medical Staff submitted two additional exhibits, which had never been presented to Mr. Harwell, concerning West Hills' claimed efforts to obtain information from Cedars-Sinai. (7/24/03 letter, AR P003800-03.) Dr. Mileikowsky objected strongly to the introduction at the appellate

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[3]Encino-Tarzana was owned jointly by Tenet and HCA, Inc., West Hills' corporate parent. (Form 10-K, CT 7:1491-92; California Business Portal, CT 7:1493; Form 10-K, CT 7:1494-96.)

stage of unauthenticated "evidence" that had previously been withheld, but the Committee accepted the documents into evidence. (7/24/03 letter, AR P003804-05; RT 8/19/03, AR P003808-14.)

One exhibit was a letter from the Medical Staff to Cedars-Sinai requesting information regarding Dr. Mileikowsky's proceedings at that hospital, sent in December 2000, well before the May 2001 reappointment application that was the subject of the administrative proceeding. (12/20/00 letter, AR P003802-03.) The other exhibit indicated that the Medical Staff had *not* made any effort at all to obtain any information from Cedars-Sinai after Dr. Mileikowsky filed his 2001 reappointment application, even though he had given West Hills an executed release so it could do so. (7/24/03 letter, AR P003800-03.)

The Governing Board announced its decision against Dr. Mileikowsky on August 19, 2003. (Findings and Decision, AR P003815.) "[T]he adoption of the decision of the Hearing Officer appointed to the Medical Review Committee[4] is the final action of the Governing Board." (*Ibid.*)

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[4]In reality, because the Hearing Officer summarily terminated the proceeding before Dr. Mileikowsky could have his peer review hearing, there never was a "Medical Review Committee."

9. Recapitulation of Overlapping Conflicts

The West Hills administrative decision against Dr. Mileikowsky arose from a morass of interlocking conflicts. A brief recapitulation might aid the subsequent discussion.

The hearing officer in the earlier Cedars-Sinai proceedings against Dr. Mileikowsky, Mr. Lahana, served as the attorney for the prosecuting body at West Hills, the Medical Staff. At the Medical Staff's request, West Hills selected Mr. Harwell as hearing officer – the same hearing officer its attorney, Mr. Lahana, had previously selected for numerous previous hearings in which he represented a party.

Mr. Harwell was simultaneously the hearing officer in proceedings against Dr. Mileikowsky at another hospital – Century City. One of the allegations against Dr. Mileikowsky in the West Hills proceeding was that he had failed to make adequate disclosure of the Century City proceedings.

After Dr. Mileikowsky requested a hearing to challenge West Hills' denial of his reappointment, the Medical Staff served an amended notice of charges to allege that Dr. Mileikowsky had failed to make adequate disclosure of the Cedars-Sinai proceedings – in which the Medical Staff's attorney Mr. Lahana had been the hearing officer. As

Mr. Lahana well knew, Cedars-Sinai would not allow Dr. Mileikowsky to disclose the documents that the Medical Staff demanded he produce. As a result, Mr. Harwell – the Hearing Officer selected by Mr. Lahana's client, the Medical Staff – granted the Medical Staff's request and imposed terminating sanctions against Dr. Mileikowsky, without hearing, for his alleged refusal to turn over the Cedars-Sinai documents.

Ultimately, the matter went on administrative appeal to the Board of Trustees, which appointed another conflicted hearing officer, Mr. Helton – whose website prominently list as professional references officials from Cedars-Sinai and Tenet Health, another hospital system in which charges against Dr. Mileikowsky were pending. The Board of Trustees upheld Mr. Harwell's summary termination of the proceeding.

C. Procedural History and Judgment

1. Administrative Proceeding

The administrative proceeding is described in detail above in the Statement of Facts. Dr. Mileikowsky applied to West Hills Hospital for reappointment to the Medical Staff and for obstetrical privileges. West Hills denied the application, and Dr. Mileikowsky requested a hearing. Before the hearing panel was even appointed, the Hearing Officer unilaterally terminated the proceeding as a sanction for Dr.

Mileikowsky's alleged refusal to produce certain documents. West Hills' Board of Trustees affirmed this disposition.

Dr. Mileikowsky timely filed a mandamus petition pursuant to Code of Civil Procedure section 1094.5 with the Los Angeles County Superior Court. (Petition for Writ, CT 1:8-46.)

2. Superior Court Proceeding

The administrative mandamus proceeding commenced with the filing of Dr. Mileikowsky's Petition for Writ of Mandate, Injunction, Declaratory Relief, and Damages on August 19, 2004. (Petition for Writ, CT 1:8-46.)

On September 3, 2004, the Superior Court issued, at Dr. Mileikowsky's request, an Order to Show Cause re Preliminary Injunction. (Order to Show Cause, CT 4:802-05.) The requested injunction would have permitted Dr. Mileikowsky to have continued practicing at West Hills and required resumption of the administrative proceeding. (*Ibid.*) Following briefing and oral argument, the trial court denied the preliminary injunction. (10/7/04 Minute Order, CT 7:1310-11.)

Following further briefing and oral argument, the trial court denied the petition for writ of mandate. (6/3/05 Minute Order,

CT 19:3984-85.) The court then ruled as a matter of law that all non-mandamus causes of action were dependent on and related to the mandamus cause of action, and it entered a judgment in favor of respondents on all claims. (7/25/05 Minute Order; CT 19:4061-62; Judgment, CT 19:4057-60.)

Dr. Mileikowsky timely appealed the judgment. (Petitioner's Notice of Appeal, CT 19:4080-82.)

D. Relief Requested

Dr. Mileikowsky asks this Court to reverse the judgment and direct the Superior Court to issue a peremptory writ of administrative mandamus. The writ should compel respondents to set aside their decision upholding the rejection of Dr. Mileikowsky's 2001 application for reappointment to the Medical Staff and for the addition of obstetrical privileges, and it should compel respondents to grant him a fair hearing.

Dr. Mileikowsky also asks this Court to instruct the Superior Court to issue a preliminary injunction, directing respondents to allow Dr. Mileikowsky to exercise the gynecological privileges for which he reapplied in 2001, until such time, if any, that these privileges are terminated through a properly-conducted administrative proceeding.

Dr. Mileikowsky also asks this Court to reverse the Superior Court's judgment in favor of respondents on Dr. Mileikowsky's non-mandamus causes of action and to remand the matter to the Superior Court with instructions to allow them to proceed to trial.

IV. ARGUMENT

A. Summary of Argument

West Hills denied Dr. Mileikowsky his staff membership and privileges, and when he asserted his legal right to challenge that denial in a hearing before an unbiased panel of his peers, it used his inability to produce certain documents as a means of keeping him from having that hearing.

First, at the request of the prosecuting Medical Staff, it appointed a hearing officer with fatal conflicts of interest, one who was already sitting in another proceeding against Dr. Mileikowsky. The Medical Staff's attorney had frequently selected the same person to be a hearing officer. Such an *ad hoc* appointment, without any limitations on future appointments, is expressly forbidden by California law and the underlying principles of due process and fair procedure. The Hearing Officer did not deny the conflict; he dismissed it as inconsequential because, he said, he could not make any dispositive rulings. He then

entered a dispositive ruling summarily denying Dr. Mileikowsky his right to a hearing.

The summary denial of the right to a hearing was the product of a calculated strategy. With its hand-picked Hearing Officer in place, the Medical Staff brought new "charges" against Dr. Mileikowsky to support a demand that he produce documents that it knew he was not allowed to produce. When Dr. Mileikowsky was unable to produce the documents, the Medical Staff induced the Hearing Officer it had selected to dismiss the proceeding summarily – notwithstanding his earlier representation that he would solicit the parties' views on the appropriate remedy.

The summary dismissal of the proceeding was legal error. The Hearing Officer had very limited powers, which did not include dismissal of the proceeding – particularly for an alleged discovery default. Even if he had the power to enter the dismissal, the Hearing Officer erred because there was no prejudice to the Medical Staff from Cedars-Sinai's refusal to allow Dr. Mileikowsky to produce certain documents; because Dr. Mileikowsky offered alternative sources for the information the Medical Staff claimed to want; because Dr. Mileikowsky's actions were not wilful; and because lesser sanctions

would have sufficed – as to all of which, the Hearing Officer made no contrary findings.

Finally, West Hills violated the law by depriving Dr. Mileikowsky of the staff membership and privileges he already held, *before* he had the fair hearing to which he was entitled.

B. Standard of Review

This Court independently reviews the fairness of administrative proceedings as a question of law. (*Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1438.) The issue of whether a quasi judicial administrative decision was unlawful or procedurally unfair is a question of law subject to *de novo* review. (*Duncan v. Department of Personnel Admin.* (2000) 77 Cal.App.4th 1166, 1174.)

The trial court dismissed the non-mandamus causes of action solely on the ground that denial of the mandamus action precluded him from pursuing them as a matter of law. (RT 7/25/05 at 37:19-38:15.) Questions of law are reviewed *de novo*. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.)

C. The Hearing Officers' Financial Conflicts of Interest Compel Issuance of the Writ

A fair and impartial proceeding is a fundamental requirement of any administrative adjudication. (*Goldberg v. Kelly* (1970) 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287.) The Hearing Officer's financial conflict of interest precluded the possibility that the proceeding could be fair and requires issuance of a peremptory writ.

1. The *Haas*/*Yaqub* Rule Barred the Hearing Officers from Sitting

West Hills appointed and paid Mr. Harwell as Hearing Officer pursuant to Business and Professions Code section 809.2, at the request of Dr. Mileikowsky's adversary and over his objections. The statutory scheme for the selection of hearing officers is fraught with the peril of conflict of interest. "[A] system placing so much power in the hands of hospital authorities invites abuse." (Merkel, 38 U.S.F. L. Rev. at 307. Specifically,

> [t]he danger of bias . . . surrounds the appointment of the hearing officer. . . . The MEC [Medical Executive Committee] selects the hearing officer, subject to veto by the governing body. If the MEC retains an attorney to act as the hearing officer, the hospital pays the attorney's fee. The physician can challenge the impartiality of the hearing officer, but the bylaws give the hearing officer authority to rule on her own qualifications. This system, whereby the prosecutor has broad power to select the fact finders and

> the judge for the . . . hearing, creates, at the very least, the appearance of impropriety. It should come as no surprise that hospital authorities appoint panel members and hearing officers who are sympathetic to the hospital's position.

(*Id.* at 331 (footnotes omitted).)

The conflicts in this case went far beyond the problems inherent in the statutory scheme. The Medical Staff's attorney had selected the same Hearing Officer repeatedly. The Hearing Officer's future income from presiding over similar hearings depends upon the Medical Staff's election, or the Medical Staff's attorney's election, to hire him again. The California Supreme Court and the Court of Appeal have held that, in these precise circumstances, the resulting administrative decision must be set aside, because the hearing officer has a conflict of interest resulting in an unrebuttable and fatal appearance of bias. (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017; *Yaqub v. Salinas Valley Memorial Healthcare System* (2004) 122 Cal.App.4th 474.)

Dr. Vener, the president of the Medical Staff – the prosecuting body – asked West Hills' Board of Trustees to appoint Mr. Harwell as Hearing Officer. (RT 7/1/02 25:11-26:11, AR P001582-83.) Dr. Vener formally represented the Medical Staff in the proceeding. (RT 7/1/02 at 3, AR P001560.) Dr. Vener signed the Medical Staff's letter denying

Dr. Mileikowsky's 2001 reappointment application and the amended notice of charges. (4/24/02 letter, AR P003330-33; 8/21/02 letter, AR P003431-33.)

In reality, though, the Medical Staff's counsel for the proceeding was Mr. Lahana. The Hearing Officer specifically noted that Mr. Lahana communicated with him on behalf of the Medical Staff; that Mr. Lahana could continue to advise the Medical Staff and communicate with Dr. Mileikowsky throughout the proceeding; and that he (the Hearing Officer) would send Mr. Lahana "courtesy" copies of all of his correspondence with the parties. (*Ibid.*)

Given that Mr. Lahana represented the Medical Staff, Mr. Harwell's selection as Hearing Officer was not surprising. Mr. Harwell indicated that Mr. Lahana had selected him to be the hearing officer in six prior proceedings. (RT 7/1/02 16:13-17:17, AR P001573-74.) Presiding as a hospital hearing officer is a major part of Mr. Harwell's business. (RT 7/1/02 12:2-13:3, AR P001569-70.)

According to the California Supreme Court, these circumstances require issuance of a peremptory writ. Specifically, where an administrative agency has "adopted the practice of selecting temporary administrative hearing officers on an *ad hoc* basis and paying them

according to the duration or amount of work performed," as was done here, such officers have a "direct, personal, substantial, and pecuniary interest" in the outcome that violates due process[5] and requires disqualification. (*Haas,* 27 Cal.4th at 1020-1021, 1024, 1031-1032.)

The Supreme Court in *Haas* summarized the applicable principles as follows:

> [D]ue process requires fair adjudicators in courts and administrative tribunals alike. While the rules governing the disqualification of administrative hearing officers are in some respects more flexible than those governing judges, the rules are not more flexible on the subject of financial interest. Applying those rules, courts have consistently recognized that a judge has a disqualifying financial interest when plaintiffs and prosecutors are free to choose their judge and the judge's income from judging depends on the number of cases handled. No persuasive reason exists to treat administrative hearing officers differently.

(*Id.* at 1024-25.)

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[5]Strictly speaking, if West Hills is not viewed as a governmental entity, Dr. Mileikowsky is seeking to protect his right to fair procedure, not due process. (*Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, 657.) However, the underlying legal principles and requirements are the same. "The distinction between fair procedure and due process rights appears to be one of origin and not of the extent of protection afforded an individual . . . ." (*Ibid.*)

Disqualification is automatic. Hearing officers challenged for any reason going to financial interest are not afforded a presumption of impartiality. (*Id.* at 1025.)

The Sixth District Court of Appeal applied *Haas* to a section 809.2 proceeding in *Yaqub v. Salinas Valley Memorial Healthcare System*, 122 Cal.App.4th 474. There, the Presiding Officer had previously presided over three other physician discipline proceedings at the hospital, including one involving the same physician; had in the past served on the Board of Governors of a charitable foundation raising money for the hospital; and potentially could be engaged to preside over future proceedings. (*Id.* at 484-85.) On these facts, the Court of Appeal had no trouble concluding that:

> [the hospital's] procedures for appointing hearing officers were not consistent with the appearance of impartiality. Appellant's objection on this ground was sound, and his petition for a writ of mandate should therefore have been granted.

(*Id.* at 486.)

Just as in *Haas* and *Yaqub*, West Hills' procedures for appointing hearing officers are not consistent with the appearance of impartiality. Mr. Harwell was chosen by the prosecuting body (the Medical Staff), whose attorney had selected him to be a hearing officer many times

before; he was engaged on an *ad hoc* basis; he derived a major part of his income from such service; and he stood to make future income if the Staff or the attorney would recommend him for selection in the future.

To make matters even worse, Mr. Harwell was at the time serving as hearing officer in proceedings against Dr. Mileikowsky at another hospital, Century City. (6/17/02 letter at 1, AR P003351; RT 7/1/02 8:14-11:4.) Dr. Mileikowsky forced Mr. Harwell to withdraw as the Century City hearing officer on March 12, 2003, on the ground that he was simultaneously serving at West Hills. (3/4/03 letter, P004080; 3/7/03 letter, P004082; 3/8/03 letter, P004084; 3/12/03 letter, P004087.) Just two weeks later, on March 27, 2003, Mr. Harwell reciprocated by terminating Dr. Mileikowsky's West Hills proceeding. (Order Terminating Hearing, AR P003509-20 (attached in part).)

The *Haas/Yaqub* principle also disqualified Mr. Helton, the appellate hearing officer. Mr. Helton listed as references executives from other hospitals with proceedings and litigation against Dr. Mileikowsky. (Printout of website at 8-9, AR P003882-83.) He was hired on an *ad hoc* basis, and he makes his living working for hospitals. (*Id.* at 5-6, AR P003879-80.) He declined to recuse or disqualify himself on Dr. Mileikowsky's timely objection. (6/30/03 letter,

AR P003631.) Consequently, he had a conflict of interest, and his participation in the proceeding requires issuance of a peremptory writ.

2. No Exceptions to the *Haas/Yaqub* Rule Apply in this Case

In the proceedings below, every possible ground for ignoring the *Haas/Yaqub* rule was explored, often with a sympathetic ear from the tribunal. None can withstand scrutiny.

Dr. Mileikowsky strongly objected about the violation of *Haas* to Mr. Harwell. (6/23/02 letter, AR P003359-68.) Mr. Harwell did not deny the conflict of interest. Instead, he declined to recuse himself on the ground that he would not be making any dispositive decisions:

> In medical staff cases, . . . the hearing officer is strictly prohibited from being a decision maker or fact finder. *The hearing officer does not render a decision or vote in any way on the decision* made by the independent members of the peer review panel.
>
> . . .
>
> In sum, the danger of the temptation of making decisions favorable to the lawyer or entity which selected the hearing officer in medical staff cases does not exist, as *no ability to make such decision is within the power of such hearing officers*.

(6/27/02 letter at 2-3, AR P003385-86 (emphasis added) (attached.)

At his voir dire, Mr. Harwell's constant theme was that any appearance of conflict or bias was irrelevant because he did not have the power to make dispositive rulings:

> Now, mind you, because the hearing office doesn't make any decisions, as you know, *I cannot rule in your favor or in the hospital's favor*. That's the power only of the judicial review committee.
>
> . . .
>
> *I cannot hand up a decision*, and millions of dollars paid to me cannot sway the five physicians. So I can't make it – *I couldn't hand up a decision for either party, no matter how hard I tried.*
>
> . . .
>
> [T]he perception of conflict is not the test. It's actual conflict under those circumstances. And, unlike the woman in San Bernardino [i.e., the *Haas* decision], I could not – *I cannot hand up a decision to the person who hired me. I do not have the ability to do that.* I'm – as you know, *I'm strictly prohibited from being involved in the decision-making process.* So that's the danger that they were trying to protect against.
>
> . . .
>
> [T]he distinction in the facts are very, very significant. *I cannot render a decision*, and that's what it was all about.
>
> . . .
>
> [Mr. Lahana] recognizes – and everyone who does – all the lawyers who do this recognize that *I can't influence the decision*. That's going to be in the hands of the judicial

> review committee, and that therefore, what I'm looking to do is to make sure the process is fair.

(RT 7/1/02 9:18-21, AR P 001566; RT 7/1/02 20:15-18, AR P 001577; RT 7/1/02 23:10-17, AR P 001580; RT 7/1/02 24:11-13, AR P 001581; RT 7/1/02 25:5-10, AR P 001582 (emphasis added) (all attached).)

In short, Mr. Harwell declined to recuse or disqualify himself – notwithstanding the financial interest forbidden by *Haas* – because he steadfastly denied that he had the power to make a dispositive ruling against Dr. Mileikowsky and in favor of West Hills, which had chosen him and paid him. Then, without the slightest hesitation, he terminated the proceeding with a dispositive ruling against Dr. Mileikowsky and in favor of West Hills. (Order Terminating Hearing, AR P003509-20 (attached in part).)

Even if the Hearing Officer had kept his word and not entered a dispositive ruling against Dr. Mileikowsky, reversal would be required. This issue arose directly in *Yaqub*, where the hearing officer had to be disqualified even though section 809.2 strictly limited his powers. (*Yaqub*, 122 Cal.App.4th at 485.)

The Superior Court, in denying the writ, distinguished *Haas* and *Yaqub* on two other grounds. Neither has any validity.

The trial court first found *Haas* and *Yaqub* inapplicable because it did not believe the Hearing Officer had been engaged enough times to raise an appearance of impropriety:

> Harwell's appointment as a hearing officer, six times in fifteen years in various cases, does not, without more, qualify as "successive" appointments that give rise to an inference of bias and a financial conflict of interest that might prevent him from acting impartially.

(Tentative Decision[6] at 4, CT 19:3989.)

To the contrary, six appointments in 15 years are obviously "successive." Moreover, the only question is whether there is an *appearance* of bias, not actual bias. (*Haas*, 27 Cal.4th at 1032-33; *Yaqub*, 122 Cal.App.4th at 486.) The continuing string of past appointments to Mr. Lahana's cases undoubtedly creates an appearance of bias and financial conflict of interest. In *Yaqub*, the appearance of bias arose after *three* prior engagements as hearing officer; in *Haas*, the appearance arose on the *first* engagement.

Although repeat engagements are certainly indicative of financial interest, and give an appearance of impropriety, the number of

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[6]After the hearing on Dr. Mileikowsky's Petition, the trial court ordered that the previously-issued tentative decision be filed and deemed the Statement of Decision. (6/30/05 Minute Order, CT 19:3984.)

engagements is not dispositive because the ultimate test is forward-looking. The question comes down to whether one party selects the hearing officer on an *ad hoc* basis and has the power to select the same hearing officer in the future. (*Haas*, 27 Cal.4th at 1024; *Yaqub*, 122 Cal.App.4th at 484.) If so, the hearing officer has an incentive to please that party and must be disqualified. (*Ibid.*) In *Yaqub*, one of the facts that created a "'possible temptation' to favor the hospital" was that "there was the potential for further appointments in the future." (122 Cal.App.4th at 485.) The same potential existed here, and the same result – reversal of the administrative determination – must follow.

The second reason the Superior Court gave for ignoring the *Haas/Yaqub* rule is equally erroneous. The court held that the Hearing Officer's conflict of interest was vitiated by subsequent administrative appellate review. Specifically, the court held:

> In any case, the Governing Board, upon independent de novo review, adopted the Hearing Officer's decision as its final decision. . . . [I]t was not a "rubber stamp" of the Hearing Officer's determination that terminating sanctions were proper, but another hearing in which Petitioner had an opportunity to argue his position.

(Tentative Decision at 4, CT 19:3989.)

This conclusion is just plain wrong as a matter of law; the Supreme Court in *Haas* so held:

> The County also contends that any possibility of bias on the part of a hearing officer is cured when the Board independently reviews the administrative record and decides whether to accept or reject the officer's recommendation. The short answer to the contention is that no court has relied on this argument to uphold a decision reached by an adjudicator found to have suffered from a constitutionally significant risk of bias.

(27 Cal.4th at 1034.) Indeed, the Supreme Court explicitly cited, as an example of this principle, a decision concerning a disciplinary proceeding against a physician. (*Id.* at 1035, citing *Hackethal v. California Medical Assn.* (1982) 138 Cal.App.3d 435, 445-446.) Similarly, in *Yaqub*, the hearing officer's conflict required reversal even though the hospital's board of directors, sitting as an appellate review panel like the Board of Trustees here, had reviewed and upheld the hearing panel's decision. (*Yaqub*, 122 Cal.App.4th at 482.)

The trial court also erred in concluding that the Governing Board undertook *de novo* review of the Hearing Officer's decision. The notice West Hills gave to Dr. Mileikowsky of the appellate hearing quoted Business and Profession Code section 809.4(b): "If an appellate mechanism is provided, it need not provide for *de novo* review . . . ."

(6/3/03 letter, AR P003627.) The introductory letter from the appellate hearing officer made the point even more forcefully:

> Since the Appeal Board hearing is in the nature of an appellate review, the role of the Appeal Board shall be to determine if the Decision of the Hearing Officer to terminate the appeal was appropriate and if fair procedure was provided. On that basis, the proceedings shall be similar to those of the state Appellate Courts . . . .

(4/18/03 letter at 2, AR P003546.)

Thus, the Governing Board did not independently determine that Dr. Mileikowsky's proceeding should be terminated; it held that "the decision of the Hearing Officer . . . was reasonable and warranted, supported by the weight of the evidence . . . ." (Findings and Decision of the Governing Board, AR P003815.) An appellate body's determination that a lower body's decision was "reasonable and warranted" is not *de novo* review; it is affirmance on the deferential standard of abuse of discretion. (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355.) As a legal matter, *de novo* review would not have cured the fatal conflict of interest that requires reversal of the administrative determination; as a factual matter, no *de novo* review was undertaken.

It is now black-letter California law that an administrative agency may not engage, on an *ad hoc* basis, a hearing officer who could profit from future engagements. That happened to Mr. Haas, that happened to Dr. Yaqub, and now that has most decidedly happened to Dr. Mileikowsky. The resulting determination against him must therefore be overturned.

D. The Hearing Officer's Unauthorized and Erroneous Summary Termination of the Administrative Proceeding Compels Issuance of the Writ

The Hearing Officer terminated Dr. Mileikowsky's proceeding before the hearing to which he was entitled could even commence. (Order Terminating Hearing, AR P003509-20 (attached in part).) The basis for this ruling was Dr. Mileikowsky's alleged refusal to produce documents from proceedings at Cedars-Sinai Medical Center. (*Id.* at 1, P003509 (attached).) Thus, a central question on this appeal is whether the Hearing Officer erred in terminating the proceeding unilaterally, solely because of an alleged refusal to produce documents.

For multiple reasons, this terminating sanction was an error for which a writ should have been granted.

1. The Hearing Officer Acted Without Authority in Terminating the Administrative Proceeding

The Hearing Officer's powers were strictly limited by statute and by West Hills' bylaws. Indeed, the Hearing Officer himself correctly acknowledged, repeatedly, that he did not have the power to enter a dispositive ruling. (6/27/02 letter at 2-3, AR P003385-86; RT 7/1/02 9:18-21, AR P 001566; RT 7/1/02 20:15-18, AR P 001577; RT 7/1/02 23:10-17, AR P 001580; RT 7/1/02 24:11-13, AR P 001581; RT 7/1/02 25:5-10, AR P 001582 (all attached).) He exceeded his limited powers when he unilaterally terminated the administrative proceeding.

Dr. Mileikowsky recognizes that a similar point of law was decided against him in *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 531 (hereinafter *Tenet*). In that case, the Court of Appeal affirmed the denial of an administrative writ of mandamus for a section 809.2 proceeding that the Hearing Officer had summarily terminated. However, there are several reasons why *Tenet* does not support the Hearing Officer's action in the present case, and in fact requires issuance of a writ.

a. A Hearing Officer Appointed Pursuant to Section 809.2 Should Not Be Granted the Power to Dismiss a Proceeding Summarily

Dr. Mileikowsky respectfully submits that *Tenet* should not be followed here because its conclusion was wrong. Although this Division undoubtedly will view the decision of another Division of this Court with respect, it is not required to follow that decision if it is incorrect. (*In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 409.)

Tenet is wrong because it disregards the basic principle of peer review in California – that a doctor is to be deprived of his privileges only if that is the judgment of an unbiased panel of his peers. "It is the policy of this state that peer review be performed by licentiates." (Bus. and Prof. Code § 809.05.)

Specifically, the statutory scheme for peer review provides that a doctor is to be afforded a hearing before a panel of unbiased individuals, "which shall include, where feasible, an individual practicing the same specialty as the licentiate." (Bus. and Prof. Code § 809.2(a).) The peer review body, not the doctor, has the burden of persuading the panel. (Bus. and Prof. Code § 809.3(b)(3).) At the completion of a hearing, a doctor is entitled to receive "[a] written decision of the trier of fact, including findings of fact and a conclusion articulating the connection

between the evidence produced at the hearing and the decision reached." (Bus. and Prof. Code § 809.4(a)(1).) Throughout this process, "the hearing officer . . . shall not be entitled to vote." (Bus. and Prof. Code § 809.2(b).)[7] Indeed, under the statute, appointment of a hearing officer is optional. (*Ibid.*)

Granting a hearing officer the power to enter a dispositive ruling throws this carefully-wrought statutory scheme out the window. The hearing officer no longer just decides fine points of procedure and admissibility; he can deny the statutorily-required fair hearing altogether. As the present case illustrates, giving a hearing officer the unilateral power to terminate a proceeding takes the peer review process out of the hands of the physician's peers, where the Legislature squarely put it, and places it in the hands of a lawyer selected and paid by the prosecuting body.

This is not to say that a section 809.2 proceeding cannot be terminated in appropriate cases. But the statutory scheme clearly contemplates that the panel of the doctor's peers must make the

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[7]All of these statutory rights are echoed in West Hills' bylaws. (Bylaws at 39-41, AR P003862-64.)

decision, possibly on the hearing officer's recommendation but without the hearing officer's vote.

Both *Tenet* and the present case are extreme examples of the problem one commentator perceptively noted – the Medical Staff's hand-picked hearing officer influencing the outcome of the proceeding:

> [T]he officer's ability to affect outcomes should be checked. . . . The medical professionals on the JRC [Judicial Review Committee] must decide the facts, and the decision should be theirs alone. The hearing officer's neutrality is undermined when the [Medical Executive Committee]-selected individual participates in JRC deliberations.

(Merkel, 38 U.S.F. L. Rev. at 332.)

Significantly, *Tenet* does not identify any authority that justifies transmuting the hearing officer into a judge with life-and-death power over a medical peer review proceeding. The only authority identified in that decision as recognizing such a power in an administrative hearing officer was a Court of Claims decision, *Metadure Corp. v. United States* (1984) 6 Cl.Ct. 61. That decision concerned the powers of a federal administrative law judge acting for the Armed Services Board of Contract Appeals ("ASBCA"). It specifically noted that "the case management authority of the ASBCA's administrative law judges is no different from that of federal trial courts which, by virtue of their case

management authority, are given broad discretion to manage the litigation on their dockets." (6 Cl.Ct. at 67.)

Under the federal Administrative Procedure Act, a federal administrative law judge's powers include the broad authority to make or recommend decisions to the administrative body, and to take other action authorized by agency rule. (5 U.S.C. § 556.) When an administrative law judge presides at a hearing without the administrative body present (as in *Metadure*), he is empowered – unlike a section 809.2(b) hearing officer – to make the initial decision on the disposition of a case. (5 U.S.C. § 557(b).)

Administrative law judges under the California Administrative Procedure Act have some powers similar to those of federal administrative law judges. (Govt. Code secs. 11512(b), 11517(c)(1).) Even so, they do not have the power to terminate proceedings without taking evidence and rendering a decision on it. (*Frost v. State Personnel Bd.* (1961) 190 Cal.App.2d 1, 5-6.) No California authority suggests that an administrative law judge – let alone a section 809.2 hearing officer – has the power to terminate a proceeding summarily, which is why the sole, and precarious, foundation for *Tenet* is a Court of Claims decision

about a federal administrative law judge serving a military administrative agency.

A section 809.2(b) hearing officer does not have anything approaching the powers of a California, let alone a federal, administrative law judge. He cannot make a decision on the merits; he cannot even vote on the outcome of the proceeding. He certainly is given no power to terminate a proceeding on the basis of a discovery dispute. *Tenet* erred when it held to the contrary, and it should not apply here.

b. Even Under *Tenet*, the Hearing Officer Had No Authority to Terminate the Proceeding

Even if *Tenet* is applied, issuance of the writ is required. Although *Tenet* upheld the hearing officer's power to terminate the proceeding unilaterally, the factual setting was completely distinguishable. Indeed, under the actual holding of *Tenet*, the unilateral termination of the proceeding in the present case was an error for which a writ must be granted.

Tenet, like this case, concerned an administrative proceeding following the refusal of a hospital to grant an application for

reappointment. (128 Cal.App.4th at 538.)[8] However, in that case a hearing before a panel of doctors actually commenced – twice. In the first hearing, Dr. Mileikowsky ran into a problem similar to the one he encountered at West Hills – a demand for the Cedars-Sinai documents that Cedars-Sinai forbade him to produce. (*Ibid.*) The hospital moved to terminate the proceeding because Dr. Mileikowsky did not produce the documents, and the hearing officer presented the issue to the hearing panel, which held that Dr. Mileikowsky had waived his right to a hearing. (*Id.* at 539.) Dr. Mileikowsky took the matter to the hospital's appellate review body, which reversed the termination of hearing and instead imposed evidence and issue preclusion sanctions. (*Ibid.*)

A second hearing then commenced. (*Id.* at 540.) Ultimately, the hearing officer unilaterally entered an order terminating the hearing, on the basis of "repeated acts of misconduct at this hearing [that] have created a situation where [Dr. Mileikowsky] has waived his right to the completion of this hearing." (*Id.* at 550.)

The primary basis for the hearing officer's terminating decision was the allegation that Dr. Mileikowsky had written an unauthorized

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[8]Dr. Mileikowsky does not concede that the facts stated in *Tenet* are accurate. However, for the purpose of analyzing the decision, he states them as the Court of Appeal did.

letter to the hearing panel members. (*Ibid.*) Other grounds included his reference to certain lawsuits, in contravention of the hearing officer's orders; failure to produce certain documents (including the Cedars-Sinai documents) in discovery; failure to supply exhibits and briefing; and disruptive behavior. (*Id.* at 551-52.) The appellate review body affirmed this terminating decision; Dr. Mileikowsky sought an administrative writ of mandamus, which was denied; and Dr. Mileikowsky appealed. (*Id.* at 552-54.)

The Court of Appeal concluded that, in the circumstances presented, the Hearing Officer had the power to terminate the hearing. It based this determination on several grounds, all distinguishable from the present case.

The Court noted that the statutory scheme provides that a presiding officer "may impose any safeguards the protection of the peer review process and justice requires." (*Id.* at 560, quoting Bus. and Prof. Code § 809.2(d).) Similarly, the Court pointed out that, under the hospital's bylaws, any failure to comply with the hospital's Fair Hearing Plan could be deemed a waiver of the right to contest the adverse action. (*Ibid.*) (The West Hills bylaws have no comparable provision. (Bylaws Article X, AR P003862-69.)) The Court also held that:

> In order to ensure that the hearings mandated by the Business and Professions Code proceed in an orderly fashion, hearing officers must have the power to control the parties and prevent deliberately disruptive and delaying tactics. The power to dismiss an action and terminate the proceedings is an important tool that should not be denied them.

(*Id.* at 561.)

As these passages make clear, the concern in *Tenet* was the need to protect the peer review process from disruption. Under the facts presumed in that case, the hearing was well under way but could not move to conclusion because of the doctor's alleged actions. Consequently, the court saw the hearing officer's termination decision as a necessary means of preserving the right to effective peer review.

In contrast to this concern about disruption, the unavailability of the Cedars-Sinai documents in the *Tenet* proceeding was *not* viewed as an offense justifying unilateral termination by the hearing officer. To the contrary, the hearing officer submitted the failure to produce Cedars-Sinai documents to the hearing panel (as should have been done here), the panel terminated the proceeding, and the administrative appeal board reinstated it. 128 Cal.App.4th at 539-39.

The situation in the present case is totally different. Here the hearing never began. The proceeding was terminated before a panel of

doctors could even begin to consider whether Dr. Mileikowsky warranted reappointment – even though there were no "disruptive or delaying tactics," no failure to comply with a Fair Hearing Plan, no threat to the peer review process requiring protection or safeguards. There was, at most, a discovery dispute.

In these circumstances, according to *Tenet*, it is the duty of the courts to *protect* a doctor from an overreaching hearing officer:

> *[O]ur recognition of a hearing officer's authority to impose the ultimate sanction does not mean that termination of hearings will be routine or that gratuitous impositions will be upheld.* Hearing officer decisions to terminate proceedings due to the alleged violation of procedural rules will always be reviewable in court. Courts are reluctant to deprive a litigant of the opportunity to have the substantive merits of his or her case be heard except in egregious circumstances. *An extensive record of misbehavior would have to exist to justify a decision to deprive a practitioner of the peer review afforded by statute.*

(*Id.* at 562 (emphasis added).)

The events that prompted the Hearing Officer to terminate the proceeding below were far from "egregious circumstances," and certainly did not amount to "an extensive record of misbehavior." The only "offense" for which the Hearing Officer denied Dr. Mileikowsky his right to present his case to a panel of his peers was that he did not

produce the documents that Cedars-Sinai would not allow him to produce – while he offered again and again to provide the same information by other means. This certainly did not amount to "disruptive tactics."

If the termination is not reversed by issuance of a writ, then the prediction of the *Tenet* court will prove to have been incorrect – termination (or outright denial) of hearings will in fact have become routine, and gratuitous impositions of terminating sanctions will indeed be upheld.

2. Dr. Mileikowsky's Alleged Refusal to Produce Certain Documents Did Not Merit a Terminating Sanction

a. A Terminating Sanction Was Not Available Because the Alleged Failure to Produce Documents Did Not Cause Prejudice

The sweeping language of the Hearing Officer's order, imposing a terminating sanction and denying Dr. Mileikowsky's right to a hearing, belied the limited role the contested Cedars-Sinai documents played in the West Hills proceeding, and it ignored the utility of the information that Dr. Mileikowsky did provide. The Hearing Officer did not identify any prejudice to the Medical Staff from Cedars-Sinai's refusal to allow

Dr. Mileikowsky to produce. The terminating sanction was clearly punitive instead of remedial.

In the terminating order, the Hearing Officer summarily concluded that "the Cedars-Sinai documents requested by the [Medical Staff] are relevant to the charges"; that "[t]he consequences of . . . allowing Dr. Mileikowsky to refuse to produce the requested materials would be to deny the Medical Staff the ability to prosecute its case"; and that "[t]hese issues are central to the Medical Staff's case as demonstrated by the original Notice of Charges and Amended Notice of Charges." (Order Terminating Hearing at 7-8, AR P003515-16.) To the contrary, the content of the Cedars-Sinai documents was never an issue in the denial of Dr. Mileikowsky's application.

The Medical Staff did *not* file a charge against Dr. Mileikowsky going to the substance of the Cedars-Sinai proceedings or to the contents of documents generated in those proceedings. The original letter denying reappointment made no reference to Cedars-Sinai and made no accusation upon which the events at Cedars-Sinai could shed any light. (4/24/02 letter, P003330-34.) The belated amended notice of charges merely alleged that Dr. Mileikowsky had failed to provide documents concerning his Cedars-Sinai summary suspension during the application

process – for the same reason he could not produce them in the administrative proceeding. (8/21/02 letter, AR P003431-34.)

Neither the original denial of privileges nor the amended notice of charges raised issues requiring review of the Cedars-Sinai documents. The fact of and the outcome of the Cedars-Sinai proceedings were known to West Hills; the Notice quotes at length from the report Cedars-Sinai made to the National Practitioner Data Bank. (*Id.* at P003432.) Furthermore, Dr. Mileikowsky did not deny that he had declined to produce the documents concerning the Cedars-Sinai proceeding.

Thus, there was no issue presented under the charges the Medical Staff was pressing that the content of the Cedars-Sinai documents would have illuminated. Whether the uncontested fact that Dr. Mileikowsky was not allowed to provide the Cedars-Sinai documents during the application process was sufficient grounds for denial of the application, and whether the information Dr. Mileikowsky supplied in place of the documents was adequate, were judgment questions that the panel of Dr. Mileikowsky's peers could have determined without actually receiving the documents.

A discovery sanction that denies a party all rights to a hearing for an alleged refusal to produce discovery materials that would not aid his

opponents in making their case is inherently excessive. "The rule that a sanction order cannot go further than is necessary to accomplish the purpose of discovery is some 35 years old in California, and is rooted in constitutional due process." (*Newland v. Superior Court* (1995) 40 Cal.App.4th 608, 613.) A discovery sanction must not exceed what is needed to protect the party seeking discovery. (*McGinty v. Superior Court* (1994) 26 Cal.App.4th 204, 210-211, citing *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 793.)

Although the Hearing Officer did not and could not articulate a reason why the non-production of the Cedars-Sinai documents so prejudiced the Medical Staff that termination was justified, he did clearly indicate that he was irritated with Dr. Mileikowsky and found it necessary to punish him. Indeed, the terminating order expounds at length on alleged actions by Dr. Mileikowsky that upset the Hearing Officer, such as serving overlong facsimiles and appearing to be uncivil and discourteous. (Order Terminating Hearing at 1-2, AR P003509-10 (attached in part).) None of these is the stated reason for the sanctions, but their prominence in a terminating order supposedly based on failure to make discovery that would not advance the complaining party's cause underscores the real underlying reason for the sanctions – to penalize a

party. Not mentioned in the Order is a probably greater source of displeasure – Dr. Mileikowsky had two weeks earlier forced Mr. Harwell to withdraw as hearing officer in the simultaneous proceedings at Century City. (3/4/03 letter, P004080; 3/7/03 letter, P004082; 3/8/03 letter, P004084; 3/12/03 letter, P004087.)

These, however, are not proper bases for terminating sanctions. "[W]hen the rule or order violated concerns discovery, the trial court may impose sanctions that are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he [or she] seeks but the court may not impose sanctions which are designed not to accomplish the objects of the discovery but to impose punishment." (*Electronic Funds Solutions v. Murphy* (2005) 134 Cal.App.4th 1161, 1183.)

The terminating sanction was unjustified because the stated reason (failure to give discovery) was invalid and because the unstated reason (punishment) was improper.

b. A Terminating Sanction Was Not Available Because Dr. Mileikowsky Offered Alternative Sources for the Information Demanded

The Hearing Officer also erred in requiring production of sensitive information, and in terminating the proceeding in the absence of production, when alternative sources for the information were freely available.

Underscoring the fact that he was not trying to hide any unfavorable evidence, Dr. Mileikowsky did everything permitted to him under the restrictive commands of the Cedars-Sinai attorney. He twice signed a release authorizing West Hills to obtain any information it desired from Cedars-Sinai directly. (*Id.* at 5, AR P003451.)[9] He produced the medical records of every patient involved in the Cedars-Sinai proceedings. (1/12/03 letter at 6, AR P003452.) He authorized Mr. Lahana, West Hills' Medical Staff's attorney and the hearing officer in the Cedars-Sinai proceedings, to supply any information he had. (*Id.* at 6, AR P003452.) From the outset, he offered to answer any questions

[9]Dr. Mileikowsky signed a similar release to allow West Hills to obtain information from Century City Hospital, and West Hills used that release to obtain all the information it wanted from that hospital. (Century city documents, AR CH00274-316.)

the Medical Staff had about the Cedars-Sinai proceeding, orally or in writing. (12/5/00 letter at 5, AR P003263.)

Thus, Dr. Mileikowsky did provide more than adequate substitutes for the documents the Medical Staff claimed it wanted, and he did in good faith comply with the requirement that he disclose all relevant information he could about the Cedars-Sinai proceedings.

Courts have repeatedly recognized that, when there are substantial impediments to a party responding to a discovery request, production can be required only after the demanding party has exhausted all other alternative means of obtaining the information. For example, where producing information raises First Amendment concerns, "virtually all cases agree that discovery should be denied unless the plaintiff has exhausted all alternative sources of obtaining the needed information." (*Mitchell v. Superior Court* (1984) 37 Cal.3d 268, 282; *O'Grady v. Superior Court* (2006) — Cal.Rptr.3d —, 2006 WL 1452685.) Similarly, a trial court abused its discretion in allowing discovery of customer lists when the needed information could be obtained from other sources – "[g]ranted that real parties are seeking relevant material, they have other means of obtaining that material . . . ." (*Hofmann Corp. v. Superior Court* (1985) 172 Cal.App.3d 357, 363.)

The Hearing Officer in his termination order opined that the facts before him were "eerily similar" to those in *Webman v. Little Co. of Mary Hospital* (1995) 39 Cal.App.4th 592, which the order quotes at great length. (Order Terminating Hearing at 8-11, P003516-19.) Although *Webman* does concern a physician who lost his privileges because he failed to give the peer review body information it demanded about disciplinary proceedings at another hospital, the differences between that case and the present one are pronounced – and they go largely to the issue of the physician's willingness to provide alternative sources of information.

Dr. Webman, unlike Dr. Mileikowsky, refused to give oral information about the other proceedings against him. (39 Cal.App.4th at 597.) Dr. Webman, unlike Dr. Mileikowsky, refused to provide copies of the medical charts addressed in the other proceedings. (*Ibid.*) Dr. Webman, unlike Dr. Mileikowsky, rescinded his authorization to the other hospital to release records concerning the disciplinary proceedings. (*Id.* at 598.) Dr. Webman, unlike Dr. Mileikowsky, was not precluded from giving the requested information by the other hospital; Dr. Webman simply refused to do so on the ground that he did not think he was required to do so. (*Id.* at 602.) In short, Dr. Webman

lost his privileges because he *wilfully refused to do* precisely what Dr. Mileikowsky *repeatedly agreed to do*.

Here Dr. Mileikowsky offered multiple means for the Medical Staff to obtain the information it said it wanted. But what the Medical Staff really wanted was to prevent a hearing before an unbiased panel of Dr. Mileikowsky's peers, and the Hearing Officer was more than willing to accommodate this desire.

c. A Terminating Sanction Was Not Available Because the Alleged Refusal to Produce Documents Was Not Wilful

Even in a court of law, before a judge with the authority to determine the proceeding's outcome, there are severe limitations on the imposition of terminating sanctions. For one thing, terminating sanctions may not be imposed except in extreme cases where the failure to make discovery is wilful. (*Calvert Fire Ins. Co. v. Cropper* (1983) 141 Cal.App.3d 901, 904; see, *Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1247 (terminating discovery sanction justified by finding that failure to produce was "willful, tactical, egregious and inexcusable").)

Here, the Hearing Officer made a finding of wilfulness that was self-contradictory: "Dr. Mileikowsky's refusal has been wilful, in that

it is deliberate and intentional, *even if taken in error*." (Order Terminating Hearing at 7, P003515 (footnote omitted, emphasis added).)

Even more to the point, though, Dr. Mileikowsky's actions were not wilful because they were a good faith response to the commandment handed down to him by Cedars-Sinai, where he was also embroiled in an effort to restore his privileges. That hospital's attorney forbade him to disclose the Cedars-Sinai documents, while threatening him that he would be in violation of Evidence Code section 1157 if he did make disclosure. (4/16/99 letter at 1-2, AR P003240-41.)

At no point in the proceeding did anyone give Dr. Mileikowsky reason to believe that he would not be subject to sanction or liability if he defied the stern command of the Cedars-Sinai attorney. The Hearing Officer did at one point speak dismissively of the section 1157 problem, when he stated: "California Evidence Code Section 1157 which generally makes such peer review documents immune from discovery contemplates that the affected physician is exempt from those provisions." (2/5/03 letter at 13, AR P003501.) To the contrary, although section 1157 allows a physician to take discovery of proceedings in which he is involved, it nowhere authorizes him to release those documents to others. (Evid. Code, § 1157(c).)

The statute is quite clear, though, that West Hills had no right to take discovery of Dr. Mileikowsky, or anyone else, concerning the Cedars-Sinai peer review proceedings: "Neither the proceedings nor the records . . . of a peer review body . . . shall be subject to discovery." (Evid. Code, § 1157(a).)

Consequently, if (as West Hills seemed to contend and as the Hearing Officer seemed to believe) the documents were not protected from disclosure, notwithstanding Dr. Mileikowsky's good faith belief to the contrary, then West Hills had reasonable alternative sources for them – including Cedars-Sinai itself, or Mr. Lahana. If, on the other hand, Dr. Mileikowsky was correct in his belief that Cedars-Sinai was blocking release of the documents, then West Hills would not be able to get them, but the fault would not be any wilful act on his part.

On the present record, the Hearing Officer could not have found that Dr. Mileikowsky wilfully deprived the Medical Staff of information it required. To the contrary, the only available inference is that the Medical Staff wilfully amended its "charges" to exploit the known fact that Dr. Mileikowsky could not respond to discovery requests regarding these proceedings. It wilfully declined to use the releases Dr. Mileikowsky executed and the other alternatives he offered to obtain in

the administrative proceeding the information it claimed it wanted. And it wilfully exploited Cedars-Sinai's refusal to allow Dr. Mileikowsky to produce the discovery it demanded as a basis for avoiding a reckoning on the issues in the proceeding – almost all of which had absolutely nothing to do with the documents demanded.

In the absence of any wilful offense on Dr. Mileikowsky's part, terminating sanctions were improper.

d. A Terminating Sanction Was Not Available Because the Hearing Officer Did Not Properly Consider Lesser Sanctions

A terminating sanction was also improper because the Hearing Officer did not explore, let alone attempt, lesser sanctions that could have protected the Medical Staff's rights. A sanction for failure to make discovery should not deprive a party of all right to defend an action, if the discriminating imposition of a lesser sanction will serve to protect the legitimate interests of the party seeking discovery. (*Thomas v. Luong* (1986) 187 Cal.App.3d 76, 81.) Consequently, a terminating sanction is reversible error where an issue preclusion sanction would accomplish the full purpose of the discovery sought. (*Caryl Richards, Inc. v. Superior Court* (1961) 188 Cal.App.2d 300, 305.)

The Hearing Officer promised that he would hear from the parties before he imposed a terminating sanction. (2/5/03 letter at 15, AR P003503; 3/18/03 letter, AR P003504-05.) Had he done so, Dr. Mileikowsky could have proposed such alternative sanctions. But the Hearing Officer did not keep his promise.

The Hearing Officer made no findings that lesser sanctions would not have sufficed. For example, he could have considered an evidence preclusion sanction that limited Dr. Mileikowsky's ability to present facts about what transpired at Cedars-Sinai. Or he could have considered an issue preclusion sanction, under which it was established that Dr. Mileikowsky did not produce the Cedars-Sinai documents in the application process. The parties could then have addressed whether such sanctions were appropriate and, if so, the proceedings could have advanced with the appropriate restrictions.

The Hearing Officer momentarily considered evidence and issue preclusion sanctions, and he just as quickly rejected them. (Order Terminating Hearing at 8, AR P003516.) According to the Hearing Officer, an evidence preclusion sanction "would be to grant Dr. Mileikowsky the effect he appears to desire, the denial of the Medical

Staff information to prosecute its case," and an issue preclusion sanction "would have the same effect as terminating sanctions." (*Ibid.*)

These assumptions violate the fundamental principle that discovery sanctions must be tied to the issues on which discovery is sought and must not preclude a party from defending aspects of an action not closely connected to the alleged dereliction. (*Wilson v. Jefferson* (1985) 163 Cal.App.3d 952, 958-959.) "[T]he sanction should not operate in such a fashion as to put the prevailing party in a better position than he would have had if he had obtained the discovery sought and it had been completely favorable to his cause." (*McGinty v. Superior Court*, 26 Cal.App.4th at 211, quoting *Deyo v. Kilbourne*, 84 Cal.App.3d at 793.)

The Cedars-Sinai matter was only one of several allegations brought against Dr. Mileikowsky, and not a particularly prominent one – it was not part of the original denial of reappointment and was only added as an afterthought in the amended notice of charges. However, the Hearing Officer's decision to issue a terminating sanction amounted to a dispositive ruling against Dr. Mileikowsky on every charge raised, and on every defense he might present.

The second and even more important error in the Hearing Officer's refusal to consider evidence and preclusion sanctions was that he assumed a power forbidden to him by the law and the bylaws. In concluding unilaterally that the hearing panel (which was yet to be selected) would necessarily come to a certain result after it had heard all of the evidence with a lesser sanction in place – i.e., in holding that an issue preclusion sanction "would have the same effect as terminating sanctions" – the Hearing Officer put himself in place of the panel and made the final determination on the merits. This is a power absolutely forbidden to him – the hearing officer "shall not be entitled to vote." (Bus. and Prof. Code § 809.2(b); West Hills Bylaws § 10.1-5, AR P003863.) And he cannot create that power by cloaking his decision as a purely procedural determination.

The problem extends beyond this one statutory scheme to the general principles of administrative adjudication. In foreordaining what the result of the hearing would be under certain scenarios, the Hearing Officer was in effect granting a motion for nonsuit. This is a power forbidden to a hearing officer. Even a California administrative law judge may not stop the presentation of the evidence on the ground that one side is certain to win, precisely because he has no adjudicative

powers – even though he or she (unlike the Hearing Officer in the present case) is empowered to hear the evidence alone and render a recommended decision. (*Frost v. State Personnel Bd.*, 190 Cal.App.2d at 5-6.) Where there is evidence to be presented, the hearing officer "must proceed with the taking of evidence until all of the testimony to be offered by all the parties has been received," regardless of what he thinks the ultimate outcome will be. (*O'Mara v. California State Bd. of Pharmacy* (1966) 246 Cal.App.2d 8, 11; *accord*, *Kramer v. State Bd. of Accountancy* (1962) 200 Cal.App.2d 163, 175-176.)

The Hearing Officer erred in imposing a terminating sanction that denied Dr. Mileikowsky a hearing before his peers, instead of a lesser sanction scaled to the needs of the case. This was error because it gave the Medical Staff more than they would have gained from the discovery they claimed they wanted, and because it gave the Hearing Officer the power to make an ultimate determination that, by law, he was not permitted to make. For this reason, too, a writ of mandate must be granted.

E. West Hills' Improper Termination of Dr. Mileikowsky's Clinical Privileges Before Resolution of the Administrative Proceeding Compels Issuance of a Preliminary Injunction

The Medical Staff was so eager to remove Dr. Mileikowsky that it barred him from exercising clinical privileges that were his legal right until a legitimate administrative determination took them away. The law prohibits the abusive tactic of starving a physician into submission by cutting off his clinical privileges pending hearing, but that is precisely what West Hills did here. The Superior Court's disposition of this case must necessarily include a mandate or injunction to protect Dr. Mileikowsky's right to practice pending hearing, after the case is remanded.

On April 24, 2002, West Hills denied Dr. Mileikowsky's application for reappointment. (4/24/02 letter, AR P003330-34.) However, as the California Supreme Court has declared, because Dr. Mileikowsky already had privileges at West Hills, he had a vested right to continue with those privileges unless and until the hospital revoked them *after* a proper administrative proceeding:

> [T]he previously admitted physician, unlike the normal applicant for a license or franchise, *may not be denied reappointment to the medical staff absent a hearing and other procedural prerequisites* consistent with minimal due

> process protections. . . . In short, the full rights of staff membership vest upon appointment, subject to divestment upon periodic review only *after* a showing of adequate cause for such divestment in a proceeding consistent with minimal due process requirements.

(*Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802, 824-25 (citations and footnotes omitted, emphasis added); *accord*, *Sahlolbei v. Providence Healthcare, Inc.* (2003) 112 Cal.App.4th 1137, 1146-47.)

However, even *before* any proceeding commenced, West Hills acted illegally by peremptorily stripping him of his clinical privileges, denying him his vested right to practice his livelihood and placing on him the burden of winning his clinical privileges back through administrative proceedings.

The Medical Staff's attorney Mr. Lahana threw down this gauntlet in a letter to the Hearing Officer immediately after his appointment, announcing peremptorily that Dr. Mileikowsky no longer held privileges. (6/17/02 letter, AR P 003348.) Dr. Mileikowsky protested to Mr. Lahana, to the Medical Staff, and to the Hearing Officer. (6/23/02 letter, AR P 000099-106; 6/26/02 letter, AR P 000107-121; 7/12/02 letter, AR P003390-401; 7/16/02 letter at 3, AR P003414.) His protests fell on deaf ears. (6/26/02 letter, AR P 001040-41; 7/16/02 letter at 3, AR P003414.)

In effect, West Hills summarily suspended Dr. Mileikowsky's privileges without first prevailing in the proceeding against him. It summarily suspended his privileges, without fulfilling the statutory requirement that such suspension be preceded by a finding that "failure to take that action may result in an imminent danger to the health of any individual." (Bus. and Prof. Code § 809.5(a).) Similarly, the summary suspension of Dr. Mileikowsky violated the exacting requirements of West Hills' bylaws. (Bylaws at 34-35 §§ 8.2 - 8.2-5, AR P003857-58.)

As is discussed in detail above, the trial court must be directed to issue a writ of mandate overturning the administrative determination against Dr. Mileikowsky. However, that relief will be incomplete and deficient unless it also addresses the premature removal of Dr. Mileikowsky's privileges. Specifically, the trial court must be directed to issue a writ or an injunction compelling West Hills to reinstate Dr. Mileikowsky's privileges unless and until it properly terminates them in an administrative proceeding consistent with the principles of fair procedure. Any lesser relief would simply allow West Hills to win its war with Dr. Mileikowsky even if it loses the battle of this appeal.

F. The Non-Mandate Causes of Action Must Be Reinstated

Dr. Mileikowsky pleaded several non-mandate causes of action: wrongful termination of privileges, unfair competition, interference with business and prospective advantage, and defamation. (Petition at 31-35, CT 1:38-42.) The Superior Court dismissed all of these causes of action solely because it found they were related to the mandate causes of action. (7/25/05 Minute Order; CT 19:4061-62; Judgment, CT 19:4057-60.) For all of the reasons stated above why the writ of mandate must issue, the non-mandate causes of action must be reinstated.

V. CONCLUSION

A physician's right to a fair and impartial hearing by his peers before he loses his privileges is firmly established in the law. West Hills did not want Dr. Mileikowsky to have such a hearing, and so it charted a path to rid itself of him without the inconvenience of a neutral hearing. It chose a hearing officer with fatal conflicts of interest, it demanded that Dr. Mileikowsky produce peripheral documents that it knew he was forbidden to produce, and it induced its hand-picked hearing officer to terminate the proceeding summarily, without the hearing before a panel of his peers that the law requires.

This course was convenient for West Hills but violative of Dr. Mileikowsky's essential legal rights. The only appropriate remedy is a writ requiring West Hills to vacate the decision against Dr. Mileikowsky and requiring it to start again from scratch with a proceeding that strictly follows the applicable law.

DATED: June 1, 2006

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