Case No. S156986

SUPREME COURT

FOR THE STATE OF CALIFORNIA

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.

After a Decision by the Court of Appeal
Second Appellate District, Division Eight
Case No. B186238

ANSWER BRIEF ON THE MERITS

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I. INTRODUCTION

West Hills Hospital and Dr. Mileikowsky agree that effective medical peer review is vital to public welfare. Dr. Mileikowsky maintains, and the Legislature decrees, that peer review is so important that it must be entrusted to licentiates with expertise in medical matters – that peer review decisions must be made by peers. West Hills maintains, to the contrary, that peer review is so important that it can and often should be kept out of the hands of licentiates and committed to an attorney, with oversight only by the businesspeople responsible for a hospital's economic interests – that peer review decisions should bypass the doctor's peers.

In all administrative adjudications, but particularly in medical peer review matters, the power to decide the outcome resides solely in the expert panel charged with deciding the matter, not in the hearing officer assisting the panel. This is the Legislature's choice, which this Court should respect.

II. STATEMENT OF FACTS

A. Attacks on Dr. Mileikowsky

The thrust of the facts West Hills alleges is that Dr. Mileikowsky is a bad doctor who got what he deserved when it denied him the fair proceeding to which he was legally entitled. These attacks are both misguided and irrelevant.

West Hills emphasizes negative reports submitted about Dr. Mileikowsky by the Cedars-Sinai, Encino-Tarzana, and Century City hospitals, as if they contain established facts. (Opening Brief on the Merits (OBOM) at pp. 10-11 and n. 3.)[1] Three of these reports state the hospitals' pre-hearing accusations. (CT1:69 (Cedars-Sinai); CT5:893-99 (Encino-Tarzana); CT12:2401-19 (Century City).)[2] The post-hearing Cedars-Sinai report that West Hills cites gives no hint of what accusations were upheld. (CT5:891-92.) The California Medical Board reviewed the Cedars-Sinai matter and found no need to take any action against Dr. Mileikowsky. (8/23/00 letter, AR CH00273.)[3] The

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[1]West Hills also exaggerates the extent of these reports by citing multiple copies of the same report and, in one instance, citing a single report (at CT5:894) as coming from two different hospitals.

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

[3]"AR" refers to the Administrative Record. Dr. Mileikowsky (continued...)

Encino-Tarzana accusations never resulted in any factual determinations because the Hearing Officer summarily terminated the proceeding. (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 531, 550 (*Mileikowsky II*).) Century City Hospital closed before there was a resolution of any charges. (Supp. Mileikowsky Decl. at ¶ 5, CT7:1447-48.)

This appeal is not about charges brought by other hospitals. Dr. Mileikowsky would refute these charges, if they were being tried in this forum; some of his evidence is in the administrative record. (See Mileikowsky Decl., AR P002595-2604; Yamini Decl., AR P002668-74; Herbert Decl., AR P002675-88; patient letter, AR P002835-38; patient pictures and notes, AR P002839-42.)

West Hills also tries to suggest some impairment of Dr. Mileikowsky by vaguely alluding to a Medical Board of California accusation petitioning for an order compelling him to submit to physical and mental examinations. (OBOM at p. 20 n. 8.) They neglect to mention that this accusation resulted at least in part from a

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[3](...continued)
and West Hills each submitted an administrative record to the trial court, which accepted both. (4/15/05 Minute Order, CT19:3976.) West Hills' administrative record has the prefix "CH," and Dr. Mileikowsky's has the prefix "P."

complaint West Hills itself filed (7/16/04 letter, AR CH04410); that its genesis was the initiation of the Encino-Tarzana proceeding, later terminated without a hearing (Proposed Decision at p. 3 ¶ 7, AR CH04414); and, most importantly, that the superior court vacated the Medical Board's order because, "as the result of various irregularities in the process that resulted in the order that petitioner submit to a mental examination, no showing of good cause was made or, in fact, could be made . . . ." (Amended Minute Order at p. 2, CT7:1418.)

These efforts to tar Dr. Mileikowsky are misguided and beside the point. He has not been shown to be a bad doctor, but every doctor is entitled to fair peer review. West Hills wants to avoid a peer review hearing because it fears a panel of doctors might not do what the lawyer its Medical Staff picked as a hearing officer was willing to do – remove Dr. Mileikowsky from its medical staff without regard to the merits.

B. Events Prior to 2001

This appeal concerns the denial of Dr. Mileikowsky's 2001 application for reappointment to West Hills' Medical Staff. The hearing officer, an attorney who owed his position to the prosecuting

Medical Staff, summarily decided the matter before any hearing began, ostensibly because Dr. Mileikowsky did not produce documents from a proceeding at another hospital, Cedars-Sinai Medical Center. Understanding how demands for the Cedars-Sinai documents became a pretext for stripping Dr. Mileikowsky of his West Hills privileges requires examination of certain earlier events.

Dr. Mileikowsky was, since 1992, a member in good standing of West Hills' Medical Staff. (AR CH00135.) 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 West Hills reappointment application, Dr. Mileikowsky disclosed the following:

> 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 disclosure of any information about him to other hospitals. (8/11/99 release, AR CH00138.) Thereafter, West Hills approved Dr.

Mileikowsky's 1999 application for reappointment. (Delineation of Privileges at p. 2, AR CH00144.)

In late 2000, Dr. Mileikowsky sought and was granted temporary obstetrical privileges at West Hills, and he successfully delivered two patients. (Application and Approval, AR CH00293-94; 11/27/00 letter at p. 4, AR CH00331; 12/3/00 letter at p. 1, AR CH00504.)

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 p. 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 to Mr. James Lahana, attorney for West Hills' Medical Staff. (*Id.* at p. 2, AR CH00366.)

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

Cedars-Sinai hearing officer, and therefore had more information than he did. (*Id.* at p. 2, AR P003235.) Dr. Mileikowsky enclosed a copy of the medical records of the patient who had been the subject of the Cedars-Sinai proceeding and of the reports he and Cedars-Sinai had submitted to the National Practitioner Data Bank, describing the events at Cedars-Sinai. (*Id.* at p. 2-3, AR P003235-36, P003244.)

Dr. Mileikowsky cautioned, however, that Cedars-Sinai would not authorize him to disclose hearing documents. (*Id.* at p. 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 p. 1-2, AR P003240-41 (emphasis in original.)

On December 2, 2000, Dr. Mileikowsky discussed his dilemma with Mr. Lahana and wrote a 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 p. 1-2, AR P003245-46.)

Mr. Lahana sent Dr. Mileikowsky a confrontational response:

> This will acknowledge receipt of your letter dated December 4, 2000. Please be advised that I did <u>not</u> 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 pp. 1-2, AR P003255-56 (emphasis in original).)

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. And 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 proceeding, that Dr. Mileikowsky had authorized him to release to West Hills any information it required concerning the proceeding, and that Mr. Lahana had responded that he was precluded from doing so by Evidence Code section 1157 – the statute Mr. Simonds had cited in denying Dr. Mileikowsky permission to release the documents to other hospitals. (12/5/00 letter at pp. 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 pp. 5-6, AR P003263-64; 12/5/00 Authorization, AR P003269.) Finally, Dr. Mileikowsky noted that Mr. Simonds did not object to his answering questions about the proceeding. (*Id.* at p. 6, AR P003263.) Thus, far from trying to hide the Cedars-Sinai information, Dr. Mileikowsky (unlike the Cedars-Sinai attorney) authorized anyone with information about the proceeding to disclose it – including Cedars-Sinai.

Nevertheless, 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.) Ultimately, West Hills refused Dr. Mileikowsky's request for temporary obstetrical privileges. (11/2/01 letter, AR P000019.) That decision is not part of the present appeal.

C. The 2001 Application for Reappointment

On May 18, 2001, Dr. Mileikowsky submitted his biannual reappointment application to West Hills. (5/18/01 letter and Application, AR P003273-85.) The application included a new 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 requesting information in support of his application. (2/12/02 letter at p. 1, AR P003290.) The letter did not mention the Cedars-Sinai proceeding. Dr. Mileikowsky responded and answered all questions raised. (3/4/02 letter, AR P003294-3318.)

D. 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, AR P003330-34.)

The denial letter made no mention of the Cedars-Sinai matter. It did make undeniably false accusations against Dr. Mileikowsky. For 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 p. 2, AR P003331.) In fact, 2001 application had no addendum; the quoted addendum was part of his 1999 application for reappointment. (7/17/99 letter and Application, AR P003227-30; 5/18/01 letter and Application, AR P003273-85.) Obviously, the 1999

addendum could 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 West Hills acknowledged, in writing, at the time. (11/27/00 letter, AR P000916.)

The April 24, 2002 denial letter notified Dr. Mileikowsky that he had a right to a "judicial review hearing." (4/24/02 letter at p. 3, AR P003332.) Dr. Mileikowsky requested a hearing. (5/23/02 letter, AR P003335-36.)

Without waiting for the hearing, West Hills' Medical Staff's attorney Mr. Lahana terminated Dr. Mileikowsky's privileges, without cause. About two months after Dr. Mileikowsky demanded a hearing, he wrote: "Currently, Dr. Mileikowsky does not hold privileges and is not able to practice at West Hills . . . during the pendency of this hearing." (6/17/02 letter, AR P003348.) Dr. Mileikowsky immediately protested the peremptory suspension of his privileges as a violation of law. (6/23/02 letter, AR P 000099-103; 6/26/02 letter, AR P 000107-115; 7/12/02 letter, AR P003390-401.)

E. The Medical Staff's Selection of the Hearing Officer

In June 2002, West Hills hired attorney John Harwell to act as hearing officer for Dr. Mileikowsky's hearing. (6/17/02 letter, AR P003351-58.) Mr. Harwell was, at the same time, also the hearing officer for Century City Hospital's proceeding against Dr. Mileikowsky. (*Id.* at p. 1, AR P003351; 6/23/02 letter at p. 2, AR P003360.) West Hills' denial letter alleged that Dr. Mileikowsky had not immediately notified it of the Century City proceeding. (4/24/02 letter at p. 1, AR P003330.) Nevertheless, Mr. Harwell asserted that he was not disqualified from sitting on Dr. Mileikowsky's West Hills proceeding, because *he had very limited powers as a hearing officer* and because Evidence Code 1157 barred him from disclosing in the West Hills proceeding anything he learned in the Century City proceeding. (*Id*. at pp. 1-5, AR P003351-55.)

West Hills' Medical Staff, which would be prosecuting the case against Dr. Mileikowsky, wrote to Mr. Harwell that it had selected him to be 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 this Court's decision in *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017. *Haas* held that a hearing officer cannot be

selected by the prosecuting body on an *ad hoc* basis with the possibility of future appointments, because of the resulting appearance of a 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 decisions*. (6/27/02 letter, AR P003384-89.) At the subsequent *voir dire* session, Mr. Harwell repeatedly emphasized that 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.)

Following *voir dire*, Mr. Harwell declined to recuse himself, over Dr. Mileikowsky's objections. (RT 7/1/02 53:23-54:6, AR P001610-16.)

F. The Amended Notice of Charges

West Hills granted Dr. Mileikowsky's 1999 reappointment application without regard to the Cedars-Sinai proceeding, although he had disclosed it at the time. (Addendum to Application, AR P003230.) The letter denying Dr. Mileikowsky's 2001 application

for reappointment made no mention of Cedars-Sinai. (4/24/02 letter, AR P003330-34.)

However, *after* West Hills denied Dr. Mileikowsky's reappointment application, and *after* the hearing officer was appointed, Mr. Lahana, the Medical Staff's attorney and the Cedars-Sinai hearing officer, began to press for production of the Cedars-Sinai documents that he knew Cedars-Sinai's attorney would not authorize Dr. Mileikowsky to produce. On July 17, 2002, Mr. Lahana complained that the Medical Staff "still has not received" the documents "despite prior requests for such information." (7/17/02 letter at p. 1, AR P003421.) In reality, the Medical Staff had asked Dr. Mileikowsky to produce the Cedars-Sinai documents only in connection with his lapsed 1999 application for temporary obstetrical privileges. (2/1/01 letter, CT12:2512.) Nevertheless, 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 pp. 1-2, AR P003421-22.)

An escalating succession of letters demanding the Cedars-Sinai documents or dismissal of the proceeding went out to Dr. Mileikowsky

and the hearing officer over the signature of the president of the Medical Staff (which Mr. Lahana continued to represent), although on their face Mr. Lahana is the apparent author.[4] (8/21/02 letter, AR P003431-33; 10/3/02 letter, AR P003435; 1/6/03 letter, AR P003442; 1/14/03 letter, AR P003487; 3/26/03 letter, AR P003507.)

In an August 21, 2002 letter, the Medical Executive Committee notified Dr. Mileikowsky that it "hereby amends the Notice of Charges dated April 24, 2002." (8/21/02 letter at p. 1, AR P003431.) The "Amended Notice of Charges" delineated four allegations. (8/21/02 letter, AR P003431-34.) These included the alleged failure to provide documents from the Cedars-Sinai proceeding and to provide specific information about his summary suspension at Cedars-Sinai. (*Ibid.*) The charges ignored the fact that Dr. Mileikowsky had offered numerous alternative sources for the information.

Thus, the Medical Staff did *not* try to obtain information about the Cedars-Sinai proceeding to assist its peer review decision. The Medical Staff had already completed its peer review function and decided to deny Dr. Mileikowsky's application without asking for

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[4]On each letter, the author/typist designation immediately below the signature block indicates "JRL" as the author.

further information about the Cedars-Sinai proceeding, of which it was fully aware. The Medical Staff first expressed interest in documents concerning Cedars-Sinai *after* Dr. Mileikowsky demanded a hearing on the denial of his application. It demanded those documents knowing full well that Cedars-Sinai had declined Dr. Mileikowsky's request for permission to disclose them.

G. The Hearing Officer's Summary Termination Before the Hearing Could Begin

The Medical Staff exploited Dr. Mileikowsky's inability to produce the Cedars-Sinai documents as a pretext to deny him a hearing. It asked the Hearing Officer to determine that Dr. Mileikowsky had abandoned the proceeding, because of, among other reasons, his alleged failure to provide the Cedars-Sinai documents. (11/27/02 letter, AR P003436.) In a January 6, 2003 letter to the Hearing Officer, the Medical Staff complained 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 – including signed releases authorizing Cedars-Sinai to share the documents with West Hills; disclosure by Mr. Lahana, the Cedars-Sinai hearing officer; and the large number of documents he had provided about the Cedars-Sinai proceeding, including the charts of all of the subject patients. (1/12/03 letter at pp. 5-6, AR P003451-52.) Later-produced evidence showed that, throughout the pendency of Dr. Mileikowsky's 2001 application and administrative proceeding, the Medical Staff did not even attempt to use the releases to obtain from Cedars-Sinai the information it claimed was so vital. (7/24/03 letter, AR P003801; 12/12/00 letter, AR P003802-03.)

Nevertheless, the Hearing Officer ordered Dr. Mileikowsky to produce the demanded Cedars-Sinai documents. (2/5/03 letter at pp. 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 p. 15, AR P003503 (emphasis added).) He later 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 pp. 1-2, AR P003504-05 (emphasis added).)

On March 12, 2003, Dr. Mileikowsky compelled Mr. Harwell to withdraw as hearing officer in the Century City proceeding against him, on the ground that he was serving as hearing officer in the West Hills proceeding. (3/4/03 letter, AR P004080; 3/7/03 letter, AR P004082; 3/8/03 letter, AR P004084; 3/12/03 letter, AR P004087.)

On March 26, 2003, the Medical Staff asked the Hearing Officer to end the West Hills 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 representations that he would consult the parties before choosing a sanction and that he had no power to decide the matter, the Hearing Officer granted the Medical Staff's request and terminated the proceeding. (Order Terminating Hearing, AR P003509-20.) He thereby summarily denied Dr. Mileikowsky his right to a hearing and decided the outcome of the proceeding, without any involvement of the hearing panel.

H. 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 issues:

> 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.)

After the appellate hearing, Mr. Lahana as attorney for the Medical Staff submitted two additional exhibits, which had never been presented to the Hearing Officer, concerning West Hills' efforts to obtain information from Cedars-Sinai. (7/24/03 letter, AR P003801-03.) One exhibit was a letter from the Medical Staff to Cedars-Sinai requesting information regarding Dr. Mileikowsky's proceeding at that hospital, dated 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 to obtain any information from Cedars-Sinai after Dr. Mileikowsky filed his 2001

reappointment application, even though he had given West Hills executed releases. (7/24/03 letter, AR P003801-03.)

The Board of Trustees announced its decision against Dr. Mileikowsky on August 19, 2003. (Findings and Decision, AR P003815.) It found that the Hearing Officer's decision was "reasonable and warranted, and supported by the weight of the evidence," and held that "the adoption of the decision of the Hearing Officer appointed to the Medical Review Committee is the final action of the Governing Board." (*Ibid.*) In reality, no Medical Review Committee had ever been convened, let alone asked to act upon Dr. Mileikowsky's challenge to the denial of his application.

III. ARGUMENT

A. Summary of Argument

The hearing officer did not have the power to determine the outcome of this medical peer review proceeding. Only the hearing panel composed of the doctor's peers had that power. And, no matter who wielded the power, Dr. Mileikowsky's failure to produce documents he was restricted from producing was not a proper ground for denying him privileges.

Generally, hearing officers do not have the power to decide the matter before them. Hearing officers are not like judges; they may assist but not supplant the expert decisionmaking panels they serve. Some hearing officers have the statutory power to make recommended or initial decisions, but even then the expert decisionmakers always have the power to disregard the hearing officer's conclusion. The general prohibition against hearing officers dictating the outcome applies regardless of whether the issue is substantive or procedural, or whether the power is characterized as implicit or explicit, or inherent or conferred.

In the California medical peer review statute, the Legislature purposefully further strengthened the powers of the medical expert hearing panel and limited the powers of the hearing officer. It required that peer review be conducted by licentiates, not attorneys or businesspeople, and that the panel of doctors must issue the decision determining the outcome. The hearing officer does not sit alone, does not issue a preliminary, recommended, or initial decision, and does not vote. The hospital's board has a "legitimate role" in the process, but it must in all instances give the decision of the peer review body – not an *ultra vires* decision of the hearing officer – "great weight."

The present case illustrates the wisdom of the Legislature in strengthening the power of the hearing panel and diminishing the power of the hearing officer and the hospital board. Here the prosecuting medical staff let the hearing officer know that he owed his lucrative assignment to them, and then contrived a controversy over specific documents it knew Dr. Mileikowsky was constrained from producing. The hospital had numerous other means for obtaining the same information, which it scrupulously avoided. Instead, it induced its hand-picked hearing officer to dismiss the case before the panel of licentiates could even convene to consider whether West Hills was justified in stripping Dr. Mileikowsky of his privileges.

B. The Hospital Hearing Officer Did Not Have the Power to Terminate the Proceeding

1. Hearing Officers Do Not Have the Power to Make Final Decisions

A hearing officer is subordinate to an expert decisionmaker and therefore has only limited powers. These powers do not include determining the outcome of the hearing.

The essence of administrative adjudication is that the decisionmaker applies its expertise in the subject matter:

> Clearly, in all aspects of the agency's activities, . . . we want the advantages of specialization and expertness to

> the extent that the agency and its staff are able to supply them. . . . We want both understanding and knowledge to influence the exercise of judgment or discretion.

(*Usery v. Tamiami Trail Tours, Inc.* (5th Cir. 1976) 531 F.2d 224, 245 n. 5, quoting Davis, Administrative Law Treatise, Ch. 15, pp. 341-342 (1958).)

The successor to the Davis treatise explains that "[t]he institutional decision often reaches a level that is higher than that attainable by the ablest of administrators or judges who are cut off from sources of expert advice." (1 Pierce, Administrative Law Treatise (4th Ed. 2002), Institutional Decisions versus Individual Decisions, § 8.6, p. 552.) Furthermore,

> [t]he administrative process builds on the principle that is used by a large medical clinic . . . . The institutional mind has insights that are as profound as those of any individual and may be much more comprehensive, for the appropriate specialists collaborate by considering the judgment of each other, each contributing his or her own particular knowledge or skills.

(*Ibid*.)

Although the decisionmakers' expertise is crucial to the outcome, busy administrative agencies commonly use a hearing officer to assist with adjudicative hearings. Under California's Administrative Procedure Act (APA), a hearing takes place 1) before

the agency itself, in which case an administrative law judge (ALJ) sits with and assists the agency, or 2) before an ALJ sitting alone. (Gov. Code, §§ 11517(a)-(c).) An ALJ who sits alone must render a proposed decision, which the agency can accept or reject in whole or in part, or can replace with its own decision. (*Id.* § 11517(c).)

Thus, a hearing officer sits in every APA adjudication, but the agency decisionmakers always make the decision. This scheme results from a deliberate legislative choice to give the agency decisionmakers the exclusive power to decide, because of their expertise. The Judicial Council's original proposal for the APA "provided that the initial decision should be made by the agency if the agency members heard the case and by a hearing officer if he sat alone." (Tenth Biennial Report of the Judicial Council, Part Two, p. 24 (1944) (attached).) However, "[t]he tentative Council proposal met with considerable objection, upon the ground that the full power of decision should remain with the agency in each case." (*Ibid.*; *see also*, *Hohreiter v. Garrison* (1947) 81 Cal.App.2d 384, 394-95.)

Consequently, under the APA, the hearing officer may recommend a result to the agency decisionmakers, but they retain the power to make the decision, so that "the benefits of having the

decision on technical matters made by experts in the field can be retained . . . [¶] [T]he presence of the hearing officer is designed to improve procedure, not to deprive the agency of its authority . . . ." (Tenth Biennial Report, p. 20 (attached).)

The APA also gives agencies the option of establishing procedures for internal administrative appeals. (Gov. Code § 11440.10, subd. (b).) For example, after the Department of Alcoholic Beverage Control conducts an adjudicative proceeding and issues a decision under APA procedures, the Alcoholic Beverage Control Appeals Board can entertain an appeal of the decision. (*Rondon v. Alcoholic Beverage Control Appeals Bd.* (2007) 151 Cal.App.4th 1274, 1281.) Similarly, a decision of the Youthful Offender Parole Board can be appealed to the Chairman or an appeal panel. (Cal. Code Regs., tit. 15, §§ 4935-4940.)

In its brief, West Hills relies mostly on federal authorities to illustrate what it claims are the powers of hearing officers. (See, e.g., OBOM at pp. 43-44, 45-46 n. 17.) The federal APA gives somewhat more power to ALJs than does California's. The default federal procedure is the one rejected in California – that the ALJ render an "initial decision" that becomes the decision of the agency if the agency

does not review it. (5 U.S.C. § 557(b).) Alternatively, a federal agency can follow a procedure like the one adopted in California – that the agency make the decision after receiving a "recommended decision" from the ALJ. (*Ibid.*) In either event, the agency decisionmakers retain the power to overrule the hearing officer.

Most jurisdictions similarly limit a hearing officer's power. "The Board has the power to substitute its judgment for that of the examiner on all issues . . . .". (*Rosales v. Department of Labor and Industries* (Wash. App. 1985) 40 Wash.App. 712, 714 [700 P.2d 748, 750].) Likewise,

> [i]n Tennessee's administrative decision-making hierarchy, like the hierarchy in most states, the agencies remain superior to the hearing officers and administrative judges. An agency's decision-making authority is not circumscribed in any way by an initial order.

(*McEwen v. Tennessee Dept. of Safety* (Tenn. Ct. App. 2005) 173 S.W.3d 815, 822 (citations omitted); accord, *In re Denial of Eller Media Company's Applications for Outdoor Advertising Device Permits in City of Mounds View* (Minn. 2003) 664 N.W.2d 1, 6-7; *Appeal of Dell* (N.H. 1995) 140 N.H. 484, 493 [668 A.2d 1024, 1032].)

2. In Particular, Hearing Officers Do Not Have the Power to Make Dispositive Procedural Rulings

Just as they cannot decide a case on the merits, hearing officers cannot make dispositive procedural rulings. Some hearing officers can *recommend* an outcome-determinative procedural result, but the actual decision always lies in the hands of the decisionmakers appointed to hear the matter.

This restriction is a consequence of the hearing officer's subordinate role. The issue arose when a New Jersey regulation barred agency review of an ALJ's procedural orders, defined as orders which "relate[] solely to the conduct or management of a contested case . . . and which [are] designed to ensure the full, fair and prompt resolution of a matter." (*Matter of Certain Sections of the Uniform Administrative Procedure Rules,* (1982) 90 N.J. 85, 95 [447 A.2d 151].) The Supreme Court of New Jersey found the rule invalid, because it interfered with the agency's power of decision. (*Id.* at 96.) The court specifically noted that a procedural ruling "may have an impact upon the substantive result." (*Id.* at 97.) Thus,

> it is irrelevant that the order serves a "procedural" purpose. Rather, it is the effect of an ALJ's order which is of special significance.

(*Ibid.*) Because procedural orders can determine the outcome of a proceeding, the decisionmakers must always have the power to accept of reject an ALJ's procedural orders.

California hearing officers similarly cannot issue "procedural" decisions that take the decision out of the hands of the designated decisionmakers. For instance, in *Automotive Management Group, Inc. v. New Motor Vehicle Bd.* (1993) 20 Cal.App.4th 1002, a hearing officer summarily dismissed a claim on the procedural ground that, under the undisputed facts, it was untimely. The court of appeal reversed because the administrative panel "never exercised any discretion with regard to [the] motion to dismiss because the motion to dismiss was determined solely by the ALJ." (*Id.* at p. 1015.) The ALJ could not dismiss the proceeding on his own:

> [I]t was not permissible for the ALJ to fail to submit the proposed decision to the Board. . . . It is not possible to label as 'harmless' the Board's failure to review the ALJ's decision.

(*Id.* at p. 1016.)

Likewise, in *Grant v. Board of Medical Examiners* (1965) 232 Cal.App.2d 820, appellant complained that the hearing officer should have dismissed the proceeding for lack of jurisdiction. The court disagreed, noting that "the case was heard by a hearing officer alone

who had no power to dismiss the proceedings, much less to order the board to dismiss them." (*Id.* at p. 828.) Similarly, in *Duarte & Witting, Inc. v. New Motor Vehicle Bd.* (2002) 104 Cal.App.4th 626, the hearing officer recommended dismissal for lack of jurisdiction, but the board overruled the hearing officer and dismissed on a different ground. (*Id.* at p. 631.)

A leading practice book concludes:

> If . . . the ALJ believes that there are grounds for a dismissal before hearing all the evidence (*e.g.*, the pleadings do not state a cause of action, the agency lacks jurisdiction, or the agency has failed to make a prima facie case), the ALJ may make a proposed order to dismiss. *The agency must make the ultimate decision about whether to dismiss administrative action.*

(Cal. Administrative Hearing Practice (Cont.Ed.Bar. 2nd ed. 2007) § 6.84, p. 307 (citations omitted, emphasis added).)

Another leading practice book explains:

> A motion to dismiss for failure to establish a prima facie case . . . cannot be granted by an ALJ sitting alone. [Citations] [¶] [A] dismissal is a final decision, and the APA gives the agency the power of final decision. [Citations] Thus, the agency would have to hear the motion . . . .

(41A California Forms of Pleading and Practice (Bender 2007) § 473C.13[1], p. 473C-13.)

Under the California APA, the ALJ is even more circumscribed when sitting with the panel (as is always the case with a hospital hearing officer). Then, the ALJ may only "preside at the hearing, rule on the admission and exclusion of evidence, and advise the agency on matters of law." (Gov. Code, § 11512, subd. (b).)

3. The California Legislature Further Limited the Powers of Hospital Hearing Officers

Hearing officers in general may not make dispositive decisions. But a hearing officer in a California peer review proceeding has much less power and more limited responsibilities than hearing officers in general. Hospital hearing officers do not sit without the panel, take evidence, recommend decisions; they merely assist the panel as it hears and decides the case before it. These limitations result from deliberate legislative choices.

In California, administrative procedures governing physician privileges at hospitals grew out of decisional law. This Court has held that a physician cannot be excluded from a medical staff because he or she cannot get along with other doctors or hospital personnel. (*Rosner v. Eden Township Hospital District* (1962) 58 Cal.2d 592, 598-99.) Then, in *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, this Court ruled that a hospital may not curtail a physician's staff

membership without "a hearing and other procedural prerequisites consistent with minimal due process protections." *Id.* at p. 824.

Although the process has been cast in the form of administrative adjudication, the whole point of peer review is for doctors to be reviewed by their peers – not by attorneys, judges, or businesspeople. Referring to *Anton*, one court of appeal noted:

> [T]he purpose of the peer review process is to resolve intraprofessionally matters bearing upon a physician's competency and conduct. . . . [¶] The purpose of the proceeding is to review highly technical documents and medical reports dealing with the doctors' performance in an area where experts in the same field can arrive at a decision . . . .

(*Gill v. Mercy Hospital* (1988) 199 Cal.App.3d 889, 902.)[5]

Since 1986, the federal Health Care Quality Improvement Act of 1986 (HCQIA) (42 U.S.C. §§ 11101 *et seq.*) has established procedures for peer review adjudications. Under the federal scheme, the hearing can take place before a mutually-selected arbitrator, a panel of individuals chosen by the health care entity, or a hearing

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[5]Indeed, immediately after *Anton*, the Legislature amended the administrative mandamus statute (Code Civ. Proc. § 1094.5), adding subsection (d) to bar independent judgment review of medical peer review proceedings – thus taking the power to exercise any medical judgment in peer review matters away from judges and leaving it solely in the hands of the doctor's peers. (*Anton v. San Antonio Community Hospital* (1982) 132 Cal.App.3d 638, 649.)

officer sitting alone. (*Id.* § 11112(b)(3)(A)). The panel or the person hearing the matter renders only a recommendation, after which the entity issues a written decision. (*Id.* § 11112(b)(3)(D).)

However, HCQIA allowed states to opt out, and the California Legislature expressly rejected this federal model, "because the laws of this state provide a more careful articulation of the protections for both those undertaking peer review activity and those subject to review, and better integrate public and private systems of peer review." (Bus. & Prof. Code, § 809, subd. (a)(9).) It specifically found that, "[b]ecause of deficiencies in the federal act and the possible adverse interpretations by the courts of the federal act, it is preferable for California to 'opt-out' of the federal act and design its own peer review system." (*Id.* § 809, subd. (a)(2).)

The Legislature began with a guiding principle not found in the federal statute: "It is the policy of this state that peer review be performed by licentiates." (*Id.* § 809.05.) To accomplish this end, the Legislature curtailed the power of the hearing officer and the hospital, making the expertise of the hearing panel of licentiates the central feature of peer review adjudications.

The Legislature curtailed the power of the hearing officer by rejecting the HCQIA's option of allowing hearing officers to sit alone and recommend decisions. The California statute allows only two alternatives: 1) a hearing panel including, where possible, a practitioner in the subject doctor's specialty, or 2) mutually agreed arbitrators.[6] (*Id.* § 809.2, subd. (a).) In the California scheme, the hearing officer is a purely optional assistant to the hearing panel who "shall not be entitled to vote." (*Id.* § 809.2, subd. (b).)

Furthermore, to enhance the hearing panel's power, and ensure peer review would be performed by licentiates, the Legislature rejected the HCQIA provisions limiting the hearing panel to issuing recommendations and giving the "entity" – i.e., the hospital – the power to issue the decision after receiving the panel's recommendation. The only decision that comes out of a peer review hearing under California law is "[a] written decision of the trier of fact [i.e., the hearing panel], including findings of fact and a conclusion

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[6]The option of mutually agreed arbitrators does not appear to have been used with much frequency, if ever. There is little incentive for a prosecuting medical staff to share the otherwise unilateral power it enjoys to choose the decision maker. In any event, the option was not offered in the proceeding under review here.

articulating the connection between the evidence produced at the hearing and the decision reached." (*Id.* § 809.4, subd. (a)(1).)

The Legislature specified the hospital's role as follows:

> The governing bodies of acute care hospitals have a legitimate function in the peer review process. In all peer review matters, the governing body shall give great weight to the actions of peer review bodies and, in no event, shall act in an arbitrary or capricious manner.

(*Id.* § 809.05, subd. (a).) Thus, the only role assigned to the hospital is to sit in effect as an appellate body, and this appellate mechanism is optional. (*Id.* § 809.4, subd. (a)(2).)

West Hills rewrites this code section to say that the governing body must give great weight to the *recommendations* of the *MEC* – i.e., to the position of the prosecuting body. (OBOM at p. 6.) However, when a hearing is requested, the statute requires the hearing panel to render a decision (Bus. & Prof. Code, § 809.4, subd. (a)(1)), superceding the MEC's recommendation; the governing body must therefore give great weight to the hearing panel's decision.

Thus, the Legislature made the panel of licentiates the crucial administrative decisionmaker, giving it the sole power to hear the matter and to render the decision (in the absence of arbitration to which both the doctor and the hospital agree). The hearing officer, in

contrast, is entirely optional, cannot sit alone, and "shall not be entitled to vote." (*Id.* § 809.2(b).) The hospital's governing body is constrained to give the decision of the panel of licentiates "great weight." (*Id.* § 809.05, subd. (a).)

Consequently, just as in an APA proceeding the agency decisionmakers and not the hearing officer must decide the matter, so in a peer review proceeding the panel of licentiates and not the hearing officer must decide whether the physician will be granted privileges. Moreover, in a peer review proceeding, the hospital board's appellate review of a hearing officer's decision cannot replace the decision of the hearing panel. Under the statute, a physician seeking credentials has a right to the expert decision of a panel of licentiates in the first instance – not just to the decision of an attorney hearing officer, deferentially reviewed by the businesspeople whose first duty is to guard the hospital's bottom line.

The Legislature thereby made clear its intention to limit the power of both the hearing officer and the hospital governing body in a California peer review proceeding, and to enhance the power of the hearing panel. Nevertheless, West Hills insists that the hearing officer in a peer review matter can be given more power than an APA hearing

officer, issuing decisions that determine the outcome, and that the panel can be bypassed altogether.

West Hills touts as one advantage of its proposal that the hearing panel would not have to be bothered to make a decision. (OBOM at p. 51.) Indeed, West Hills' principal argument in favor of giving the hearing officer unfettered power to dismiss a proceeding is that it "would . . . contravene public policy" to impose on the panel of licentiates, which the Legislature has made a mandatory part of the peer review process, the burden of convening. (*Ibid.)*

4. Hospital Hearing Officers and Hearing Panels Are Not Analogous to Trial Judges and Juries

At various points, West Hills tries to draw the incorrect analogy that "[t]he hearing officer is like a judge and the JRC is like a jury . . . ." (OBOM at p. 45; see also OBOM at p. 37.) The subordinate role of the hearing officer belies this strained comparison. There are critical differences between courts and administrative adjudicators, heightened in the peer review setting.

Hearing panels do find facts, but they are not like juries. Juries find facts without regard to their own knowledge or expertise, and they do not decide cases. In contrast, hearing panels view the facts through the lens of an expert in light of broader policy goals, and they

decide the case before them. "Agency members differ from a jury . . . in that they usually have expertise in the professional subject matter of the hearing and have a special commitment to their profession." (41A California Forms of Pleading and Practice (Bender 2007) § 473F.11[2], p. 473F-16.)

Hearing officers preside over the proceedings before them, but they are not like judges. Judges are in full command of the proceeding and enter the final judgment; they are not subordinate to the jury and do not issue recommended decisions the jury can accept or reject; their participation is never optional. In contrast, hearing officers conduct proceedings as assistants to hearing panels and, at most, recommend decisions; in peer review proceedings, the hearing officer is optional and does not even make recommendations. Unlike a judge, a hearing officer cannot enter a dispositive order, even on a procedural matter. (See discussion above at pages 28 to 31.) "[T]here is a fundamental difference between a judge and a hearing examiner: a judge renders a final judgment; a hearing examiner does not." (*Rosales v. Department of Labor and Industries*, 700 P.2d at p. 750.)

Thus, the hearing panel and hearing officer do not function like a jury and judge. A better analogy is to the roles of a superior court

judge and a discovery referee. A judge, like a peer review hearing panel, renders a decision but can optionally enlist a referee to handle discovery disputes, just as a hearing panel can optionally enlist a hearing officer to handle discovery and other procedural matters. (Code Civ. Proc., § 639, subd. (a)(5).) However, the referee's determination is never the court's order; the court must enter its own order upon considering the referee's recommendation. (*Doyle v. Superior Court* (1996) 50 Cal.App.4th 1878, 1884 n. 1.) Similarly, an APA hearing officer's order is never the decision of the agency decisionmakers, although they can later adopt it.

A hearing officer does not wield the power of a judge, and a hospital hearing officer is even more limited. Neither can determine the outcome of a proceeding, as the Hearing Officer improperly did here.

5. A Hospital Hearing Officer Does Not Have Implicit Power to Terminate the Proceeding

West Hills argues that hearing officers have "implicit" power to terminate peer review proceedings. (OBOM at pp. 37-42.) They do not.

West Hills begins with the semantic argument that because both hearing officers and trial judges "preside" over the proceeding before

them, they must have the same powers. (OBOM at p. 37.) To the contrary, although both oversee a hearing, and therefore "preside" over it, hearing officers and judges have very different powers. (See discussions above at pages 37 to 39, and 28 to 31.) To support its argument, West Wills cites (without quoting) a couple of dictionary definitions, which can never show what a word means in such a specialized legal context. (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.)

The contextual use of the term "presiding officer" shows that the power to "preside" is not the same as the power to enter an outcome-determinative order. In a peer review administrative proceeding, if there is no hearing officer, a member of the panel serves as the "presiding officer," (see Bus. & Prof. Code, § 809.2, subd. (c)), but he or she cannot dismiss a proceeding without a vote of all panel members. In general, "the presence of such presiding officer [does not] deprive the board of the power to make final decision." (*Bartosh v. Board of Osteopathic Examiners of State* (1947) 82 Cal.App.2d 486, 494-495.) "[P]residing officers . . . sometimes are not even called upon to make recommendations to their superiors." (*Nelson v.*

Department of Corrections (1952) 110 Cal.App.2d 331, 339, quoting Gelhorn on Administrative Law at p. 739.)

West Hills also argues the "implicit" power of the hearing officer to dismiss the proceeding citation to *Mileikowsky II.* (OBOM at pp. 37-39.) That decision held that the hearing officer must have a means for coping with disruptive and delaying tactics, and that the hearing officer's supposed power to dismiss the proceeding was "in line with the relevant statutes and the Bylaws as interpreted by the appellate review body." (128 Cal.App.4th at pp. 560-61.)

A hearing officer's unilateral power to dismiss is not "in line with" a statutory scheme that gives the hearing officer no power to decide the matter, because it bypasses the hearing panel that does have the power to decide. If there are disruptive and delaying tactics, the *panel* may decide that the offending party cannot prevail; this determination is no less effective against improper tactics.

The same Court of Appeal considered the question again in the present case and, correctly reached the opposite conclusion. (*Mileikowsky v. West Hills Hospital Medical Center* (2007) 64 Cal.Rptr.3d 888, 902-03 (*Mileikowsky III*), review granted Dec. 12, 2007, No. S156986.) It held that a perceived implicit power to render

a dispositive decision cannot be "square[d] with the express provision of section 809.2(b) that the hearing officer 'shall not be entitled to vote.'" (*Id.* at 903.) This is so because "allowing the hearing officer to prematurely terminate a hearing stands section 809.2(b) on its head since this empowers the hearing officer not only to effectively vote on the merits, it also makes the hearing officer the sole master of that decision." (*Ibid.*)

The present case demonstrates why the hearing panel's expertise is crucial to resolving outcome-determinative questions, even in discovery disputes. The Cedars-Sinai controversy played so minor a part in the allegations against Dr. Mileikowsky that it was not even mentioned in the denial of reappointment and was added only as an afterthought in an amended notice of charges. (4/24/02 letter, AR P003330-34; 8/21/02 letter at p. 1, AR P003431.) However, the Hearing Officer's decision to issue a terminating sanction amounted to a dispositive ruling on the medical question of whether Dr. Mileikowsky merited hospital credentials.

The hearing officer, an attorney, was not competent to make this or any medical judgment – the Legislature reserved it to the panel of licentiates. Only the expert peer review panel can decide whether a

given discovery dispute is sufficiently important to determine the outcome, because only the panel can say what evidence is necessary to decide the medical question of the doctor's fitness to practice. Similarly, under the APA, a hearing officer's evidentiary rulings are merely advisory to the panel, because only the expert panel can say what evidence is important to it. "A ruling of the administrative law judge admitting or excluding evidence is subject to review in the same manner and to the same extent as the administrative law judge's proposed decision in the proceeding." (Gov. Code, § 11512, subd. (b).

Thus, only the hearing panel could say whether a lesser sanction – such as evidence preclusion or claim preclusion, or even no sanction at all – would have been appropriate. Only the panel of licentiates could determine whether it could fulfill its duties without the Cedars-Sinai evidence for which the Mr. Lahana, the Medical Staff's attorney, had belatedly contrived a need. The hearing officer, who has no expertise to say what evidence should be outcome-determinative, and no role in deciding the ultimate issues in the proceeding, is particularly ill-suited to decide whether a discovery dispute threatens the peer review process.

The Hearing Officer's usurpation of the hearing panel's power and duty to make the decision was not remedied when West Hills' Board of Trustees later conducted a deferential review on Dr. Mileikowsky's administrative appeal. The legislature required that Dr. Mileikowsky be reviewed by his peers, and it gave no one but the panel of licentiates – the medical experts qualified to judge what privileges he was entitled to – the power to conduct that review and issue a decision.

In allowing the hospital to act in an appellate capacity, the Legislature required that it "give great weight to the actions of peer review bodies . . . ." (Bus. & Prof. Code, § 809.05, subd. (a).) In the present case, though, West Hills' Board of Trustees never reviewed the decision of *any* peer review body. It found only that "the decision of the *Hearing Officer* . . . was reasonable and warranted, supported by substantial evidence . . . ." (Findings and Decision, AR P003815 (emphasis added).)

West Hills' bylaws are specific in limiting the appellate review that the hospital's Board of Trustees may conduct. The Board must affirm if "the *Judicial Review Committee's* decision is supported by substantial evidence, following a fair procedure." (Bylaws ¶10.2-4(a),

AR P003865.) In this case, however, there never was a Judicial Review Committee decision for the Board to review. The critical issue, which neither the Hearing Officer nor the Trustees were competent to decide, was whether the discovery dispute negated Dr. Mileikowsky's right to privileges.

West Hills also argues that hospital hearing officers can dismiss proceedings simply because the Legislature did not explicitly say they may not. (OBOM at pp. 39-42.) The Legislature did not expressly forbid hospital hearing officers to do anything, except to vote on the decision (Bus. & Prof. Code, § 809.2, subd. (b)), but this does not give them unlimited power. In this case, the termination order *was* the decision, on which the hearing officer cast the sole vote.

West Hills maintains that the Legislature sometimes is more specific about what a hearing officer cannot do. (OBOM at pp. 39-42.) It points to Food and Agriculture Code section 55488(e)(5), which provides that a hearing officer "may not issue sanctions." This is plainly a limitation on the Department of Food and Agriculture, not the hearing officer; the Department chooses to accept or reject the hearing officer's decision. (Food & Agr. Code, § 55488, subd. (d), (g).) But, in any event, there is no reason why the Legislature would expressly

prohibit the hearing officer from wielding a power he or she had never been granted.

Paradoxically, West Hills points to the fact that the Legislature sometimes specifically enumerates some of a hearing officer's powers – which it did not do for the power it wants the Court to infer here. For example, under the APA, an ALJ may certify an order compelling discovery to the superior court for a contempt citation. (Gov. Code, §§ 11455.10-11455.30.) This indicates that, in the extraordinary situation where the Legislature wants to give a hearing officer a specific power to enforce discovery, it does so explicitly. Even then, neither the hearing officer nor the court can make a dispositive decision in the proceeding itself; only the agency decisionmakers can do that. A hospital hearing officer, who has even more limited powers and responsibilities than an ALJ under the APA, cannot have greater "implicit" powers.

6. A Hospital Hearing Officer Does Not Have Inherent Power to Terminate a Proceeding

West Hills argues that hearing officers have "inherent" power to terminate peer review proceedings. (OBOM at pp. 42-44.) They do not. West Hills confuses the power of the hearing officer with the power of the hearing panel.

First, contrary to West Hills' contention, Dr. Mileikowsky never "recognized" that "such authority is inherent in the hearing officer position." (OBOM at p. 42.) He did, as an unrepresented party, ask the hearing officer to instruct West Hills that it could face terminating sanctions, but he never stated that the hearing officer acting alone had this power. (7/15/02 letter at pp. 4-5, CT2:230-31.) In any event, Dr. Mileikowsky's lay view of the law cannot be binding on him or this Court at this stage.

More importantly, Dr. Mileikowsky's request highlights West Hills' failure to address the full implications of what it asks for. If, as it contends, the hearing officer has "inherent" power to make a dispositive decision because "it is integral to their ability to preside over and control the proceedings before them" (OBOM at p. 44), this must be true regardless of which side the hearing officer is punishing. If hearing officers have inherent power to make the medical decision that a hospital may exclude a doctor, because of a discovery default, then they have inherent power to make the medical decision that a hospital may not exclude a doctor, because of a discovery default. Indeed, in this case, the Hearing Officer believed he had the reciprocal power to order, unilaterally, Dr. Mileikowsky's termination or his

reinstatement. (2/5/03 letter at pp. 7-9, AR P001501-03.) Does West Hills contend that a hearing officer, acting alone, can order it to grant privileges to a physician, without regard to the merits? This is the "inherent" power it advocates.

West Hills argues that, because courts have the power to uphold their orders, hospital hearing officers should have the same power. (OBOM at p. 42.) This misses the point. Administrative agencies do have the power to uphold their orders, including orders issued by their hearing officers. This is not to say that hearing officers themselves wield the power to terminate proceedings unilaterally.

West Hills' own authorities (OBOM at pp. 43-44) illustrate the distinction. In *Cheguina v. Merit Systems Protection Board* (Fed. Cir. 1995) 69 F.3d 1143, and *Mendoza v. Merit Systems Protection Board* (Fed. Cir. 1992) 966 F.2d 650, the hearing officer dismissed a proceeding before the Merit Systems Protection Board (MSPB), and the Board reviewed but did not negate these rulings. (69 F.3d at p. 1145; 966 F.2d at p. 652.) Under the federal APA (which gives the ALJ more power than the California APA) an ALJ sitting alone hears MSPB proceedings and issues an initial decision; the Board retains full power to accept or reject the judge's decision. (5 C.F.R. §§ 1201.111,

1201.117(b).) "[T]here can be no question but that the [MSPB] has the power to reject a presiding official's decision in a particular case and substitute its own decision, either on the facts or on the law." (*Jackson v. Veterans Admin.* (Fed. Cir. 1985) 768 F.2d 1325, 1330 (emphasis omitted).) In neither *Cheguina* nor *Mendoza* did the ALJ take the decision on whether to terminate the proceeding out of the hands of the panel empowered to decide the matter, as the Hearing Officer did here.

West Hills also cites *Fairbank v. Hardin* (9th Cir. 1970) 429 F.2d 264, 267-268, which holds that a hearing examiner did not abuse his discretion in evidentiary rulings. This does not suggest that a hearing officer has the power, inherent or otherwise, to terminate a proceeding unilaterally.

West Hills summarizes its argument in favor of a hearing officer's "inherent power" by asserting that it "makes little sense" to allow a hearing officer to order production of documents "without giving the hearing officer appropriate means of enforcing such orders." (OBOM at p. 44.) No one disagrees with this naked proposition. But it is not "appropriate" for hearing officers to make procedural orders that bypass the decisionmakers. For example, New

Jersey's Supreme Court voided a rule that barred agency review of an ALJ's procedural orders, rejecting the contention West Hills advances here – that hearing officers "must have the right to decide procedural questions without agency interference if [they are] to carry out [their] statutory responsibility to enhance and expedite the conduct of contested cases." (*Matter of Certain Sections of the Uniform Administrative Procedure Rules*, 90 N.J. at p. 96, 101.)

It is *not* "appropriate," as West Hills contends, for a hearing officer to cut the panel of licentiates out of the decision-making process, when the Legislature has decreed that "[i]t is the policy of this state that peer review be performed by licentiates" and that the hearing officer "shall not be entitled to vote." (Bus. & Prof. Code §§ 809.05, 809.2(b).) Instead, it *is* appropriate for the decision-making panel to have the sole power to decide whether a discovery dispute is of sufficient moment to determine of the outcome of the proceeding.

7. The Asserted Power to Terminate a Peer Review Proceeding Contravenes the Statutory Restriction that the Hearing Officer May Not Vote

West Hills insists that hospital hearing officers may terminate proceedings, even though the statute denies them a vote on the decision, by presuming that hearing officers, like trial court judges, can enter dispositive procedural orders. (OBOM at pp. 45-47.) To the contrary, hearing officers are not analogous to judges, and they cannot enter outcome-determinative procedural orders. (See discussions above at pages 37 to 39, and 28 to 31.)

To make its point, West Hills gives a long string citation that demonstrates that "other types of administrative proceedings . . . can be terminated on procedural grounds before any ruling on the merits." (OBOM at p. 45, n. 17.) However, no one disputes that administrative proceedings can be terminated on procedural grounds before a ruling on the merits; the question is whether a hearing officer alone, particularly one with limited powers, can dismiss while bypassing the decisionmakers.

West Hills points to California Student Aid Commission (CSAC) proceedings, because the hearing officer, who hears the case alone, "may issue a decision without a hearing" against a party who

does not comply with his or her orders. (Cal. Code Regs., tit. 5, § 30310.) This example is instructive, because a CSAC hearing officer, unlike a hospital hearing officer (and unlike an ALJ under the APA) is unusual if not unique in having the express power to issue a decision after hearing. (Cal. Code Regs., tit. 5, § 30311.) Nevertheless, the hearing officer has the power to issue a decision before hearing only because the regulation confers that power explicitly. And, still, any decision by the hearing officer can be reviewed by the appointed experts, the Commission itself, to which the affected respondent need make only "a reasonable showing that a prejudicial procedural error was committed . . . ." (Cal. Code Regs., tit. 5, § 30313.)

West Hills' citations demonstrate that hearing officers with far more authority than hospital hearing officers may not issue orders that determine the outcome of the proceeding; that power is reserved to the panel that makes the decision. Most of the authorities West Hills cites concern decisions of the federal Merit Systems Protection Board (MSPB).[7] In each case, the ALJ made an initial decision to dismiss,

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[7] *White v. Department of Veterans Affairs* (Fed. Cir. 2000) 213 F.3d 1381, 1385; *Timberlake v. U.S. Postal Service* (Dec. 13, 1999, No. 99-3351) 1999 WL 1211901, at page *3 [nonpub. opn.], 230 F.3d (continued...)

which the Board could reject or replace with its own order; the courts reviewed only the Board's decision. (See discussion of MSPB procedures above at page 48.) Indeed, West Hills' authority *White,* 76 M.S.P.R. 303, is just an example of the MSPB choosing to adopt the ALJ's "recommended initial decision" to dismiss the proceeding. (*Id.* at p. 304.)

Similarly, West Hills cites *Metadure Corp. v. United States* (Cl.Ct. 1984) 6 Cl.Ct. 61, 67, the sole authority *Mileikowsky II* cited for the proposition that a hospital hearing officer can dismiss a proceeding. (128 Cal.App.4th at p. 561.) In *Metadure*, the Court of Claims upheld a decision of the Armed Services Board of Contract Appeals (ASBCA), initially entered by an ALJ, dismissing proceedings. The Court of Claims affirmed the decision of the Board, not of the ALJ. (6 Cl.Ct. at p. 62, 65.) The ALJ or hearing examiner can make an initial decision, but "the decision of a majority of a division constitutes the decision of the Board." (Rules of ASBCA,

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[7](...continued)
1373 [table]; *Hicks v. Merit Systems Protection Bd.* (Aug. 11, 1997, No. 97-3179) 1997 WL 459960, at page *1 [nonpub. opn.], 121 F.3d 727 [table]; *Ahlberg v. Department of Health & Human Services* (Fed. Cir. 1986) 804 F.2d 1238, 1242-1243; *Lawson v. Department of Air Force* (2006) 176 Fed.Appx. 111, 113; *White v. Social Sec. Admin.* (M.S.P.B. 1997) 76 M.S.P.R. 303, 307.

Preface II.(c), http://docs.law.gwu.edu/asbca/info/pdf/ASBCA%20RULES%202007.pdf.)

Thus, the power to determine the outcome of an administrative proceeding lies exclusively with the panel empowered by law to decide the matter. The hearing officer can make an initial or recommended decision but cannot bypass the decisionmaker.

It is singularly inappropriate for a hearing officer to make an outcome-determinative decision where the statute gives the power of decision only to the hearing panel. (Bus. & Prof. Code, § 809.4, subd. (a)(1).) For example, in *Automotive Management Group,* 20 Cal.App.4th at p. 1014, it was reversible error for a hearing officer to make an outcome-determinative procedural decision where "there is no reference to the hearing officer in the portion of the statute referring to 'decision.'"

Ultimately, West Hills' only reason for giving a hearing officer the extraordinary power to terminate a proceeding is convenience. It says that actually deciding the outcome of a proceeding that the Legislature has committed wholly to licentiates would "unduly consume the time of physicians volunteering to serve on the JRC . . . ." (OBOM at p. 47.) Without denigrating the importance of panel

members' time, we note that this was not the Legislature's central concern when it rejected the HCQIA procedure that would have allowed a hearing officer to sit alone and make a recommended decision to the hospital. (See discussion above at pages 32 to 35.)

More generally, as the Court of Appeal below correctly recognized, it would not "unduly burden the trier of fact to require it to make the decision to terminate a hearing before a final decision on the merits." (*Mileikowsky III*, 154 Cal.App.4th at p. 773.) The court further noted, appropriately, that "a decision to terminate . . . gains in stature and weight if the final decision is made by the party's peers, and not merely by the hearing officer." (*Ibid.*)

8. The Legislature Mandated that a Continuance Would Be the Only Procedural Sanction for a Failure to Make Discovery

West Hills argues that the Legislature could not have meant what is said when it specified only a continuance as the procedural consequence of a failure to make discovery. (OBOM at pp. 48-53.) To the contrary, interpreting the statute as it is written is neither irrational nor undesirable.

The Legislature gave few specifics about procedures for peer review hearings. However, two provisions directly deal with a failure

to make discovery, and both indicate a continuance the only consequence:

> The failure by either party to provide access to this information at least 30 days before the hearing shall constitute good cause for a continuance.
>
> . . .
>
> Failure to disclose the identity of a witness or produce copies of all documents expected to be produced at least 10 days before the commencement of the hearing shall constitute good cause for a continuance.

(Bus. & Prof. Code § 809.2, subd. (d), (f).)

These passages indicate that continuance is the only available procedural response to a failure to make discovery, under the doctrine of *expressio unius est exclusio alterius*. "The expression of some things in a statute necessarily means the exclusion of other things not expressed." (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1105.)

West Hills maintains that the Legislature did contemplate other relief, when it provided that the presiding officer "may impose any safeguards the protection of the peer review process and justice requires." (OBOM at pp. 49-50, quoting Bus. & Prof. Code § 809.2, subd. (d).) In context, this phrase relates only to protecting the confidentiality of documents. The statute says, more fully:

> The failure by either party to provide access to this information at least 30 days before the hearing shall constitute good cause for a continuance. The right to inspect and copy by either party does not extend to confidential information referring solely to individually identifiable licentiates, other than the licentiate under review. The arbitrator or presiding officer shall consider and rule upon any request for access to information, and may impose any safeguards the protection of the peer review process and justice requires.

(*Ibid*.)

Even if the provision does, as West Hills argues, subsume the Legislature's enumeration of actions to be taken for a failure to make discovery, its argument fails. It runs up against the doctrine of *ejusdem generis*: when "specific words follow general words in a statute or vice versa[,] . . . the general term or category is restricted to those things that are similar to those which are enumerated specifically." (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 141.) If the Legislature intended to authorize the presiding officer to take an unlimited range of actions, including the ultimate sanction of dismissal, for a discovery default, it would not have delineated specifically the limited action of continuing the hearing.

West Hills makes the broader policy argument that "practitioners whose privileges may be terminated at the conclusion of

peer review proceedings can benefit from delaying the conclusion of those proceedings as long as possible . . . ." (OBOM at p. 49.) This argument makes no sense here. West Hills had suspended Dr. Mileikowsky's privileges before the proceeding began, albeit illegally[8], and therefore delay only injured him, not West Hills – an injury that continues to this day. (6/17/02 letter, AR P003348; 6/23/02 letter, AR P001033-37; 6/26/02 letter, AR P001039-41.) In other cases, summary suspension procedures are available if necessary to suspend a physician's privileges before the proceeding ends. (Bus. & Prof. Code § 809.5.)

Limiting the presiding officer to ordering a continuance does not mean a hearing will never end. If a discovery default dictates the substantive result that the other party must prevail, the panel charged with deciding the matter can so decide.

Finally, it is true, as West Hills asserts, that the Legislature has relieved members of peer review hearing panels from extraneous burdens, such as discovery in malpractice actions and tort claims. (OBOM at p. 52 n. 18.) The Legislature has not, however, insulated

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[8]A physician with privileges at a hospital has a vested right to continue with those privileges until the conclusion of a proceeding to terminate them. (*Anton,* 19 Cal.3d at pp. 824-25; *accord*, *Sahlolbei v. Providence Healthcare, Inc.* (2003) 112 Cal.App.4th 1137, 1146-47.)

the panel members from the very task they were chosen to perform – deciding the matter before them.

9. The Hearing Officer's Unilateral Termination of the Proceeding Violated Fair Procedure

West Hills argues that the Hearing Officer's exercise of a unilateral power to terminate Dr. Mileikowsky's proceeding comported with "fair procedure." (OBOM at pp. 53-56.) It did not.

Fair procedure is the common law equivalent to due process, in proceedings before private bodies. (*Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 550 n. 7.) Although the concepts arise from different origins (the common law and the Constitution), the protections are essentially the same. (*Golden Day Schools, Inc. v. State Dept. of Educ.* (2000) 83 Cal.App.4th 695, 708; *Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, 657.) This is not surprising, because a peer review proceeding can be characterized as an "official proceeding authorized by law." (*Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192, 198 (emphasis omitted).)

The Legislature has emphasized that fair procedure is vital to protecting the public as well as the doctor. "Peer review, *fairly conducted*, is essential to preserving the highest standards of medical

practice." (Bus. & Prof. Code § 809, subd. (a)(3) (emphasis added).) "Peer review, *fairly conducted*, will aid the appropriate state licensing boards in their responsibility to regulate and discipline errant healing arts practitioners." (*Id.* § 809, subd. (a)(5) (emphasis added).) But, "[p]eer review that is *not conducted fairly* results in harm both to patients and healing arts practitioners by limiting access to care." (*Id.* § 809, subd. (a)(4) (emphasis added).)

The hearing officer's unilateral dismissal of Dr. Mileikowsky's proceeding raised issues of fair procedure, because a hospital hearing officer – an attorney selected by the prosecuting medical staff for his paid engagement – is particularly ill-suited to be the final arbiter of the physician's application. Unlike an ALJ from the Office of Administrative Hearings, this hearing officer is not part of a cadre of professionals whose compensation is untethered to the outcome of the proceeding. Instead, the hospital hearing officer is hand-picked for an individual proceeding by the prosecutor and is dependent on the prosecutor's good will for future income.

Specifically, as one academic commentator has explained:

> The 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.

(Merkel, *Physicians Policing Physicians: the Development of Medical Staff Peer Review Law at California Hospitals* (2004) 38 U.S.F. L. Rev. 301, 331 (footnotes omitted).)

Both *Mileikowsky II* and the present case are extreme examples of the problem that arises when the hearing officer has input (in these cases, dispositive input) in the final decision:

> [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 MEC-selected individual participates in JRC deliberations.

(*Id.* at p. 332.)

Dr. Vener, president of the Medical Staff, asked West Hills' Board of Trustees to appoint Mr. Harwell as Hearing Officer, and he wrote to inform Mr. Harwell that he got his job because the prosecuting Medical Executive Committee recommended him. (RT 7/1/02 25:11-26:11, AR P001582-83.) Dr. Vener had signed the Medical Staff's letter denying Dr. Mileikowsky's 2001 reappointment application and the amended notice of charges, and he formally

represented the Medical Staff in the proceeding. (4/24/02 letter, AR P003330-33; 8/21/02 letter, AR P003431-33; RT 7/1/02 at p. 3, AR P001560.)

In reality, though, the Medical Staff acted through its attorney Mr. Lahana. The Hearing Officer 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. (1/16/02 letter at pp. 3-5, AR P001462-64.)

Given Mr. Lahana's involvement, Mr. Harwell's selection as Hearing Officer was not surprising. Mr. Harwell indicated that he had been selected as the hearing officer in seven prior cases in which Mr. Lahana had represented the prosecuting medical staff, in just one of which the physician had selected him. (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.)

This Court has held that, in these circumstances, a 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.) One Court of Appeal has so held with specific reference to hospital peer review proceedings. (*Yaqub v. Salinas Valley Memorial Healthcare System* (2004) 122 Cal.App.4th 474.)

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

> *The hearing officer does not render a decision* or vote in any way on the decision made by the independent member 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 pp. 2-3, AR P003385-86 (emphasis added).)

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 decisions*:

> Now, mind you, because *the hearing officer 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.
>
> . . .
>
> *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.*
>
> . . .
>
> *I cannot render a decision . . . .*
> . . .
>
> I can't influence the decision. *That's going to be in the hands of the judicial review committee . . . .*

(RT 7/1/02 9:18-21, AR P 001566; RT 7/1/02 20:15-18, AR P 001577; RT 7/1/02 23:10-12, 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).

To make matters worse, Mr. Harwell was simultaneously serving as hearing officer in Century City Hospital's proceeding against Dr. Mileikowsky. (6/17/02 letter at p. 1, AR P003351; RT 7/1/02 8:14-11:4, AR P001565-68.) Dr. Mileikowsky forced Mr.

Harwell to withdraw as the Century City hearing officer on March 12, 2003, because he was serving at West Hills. (3/4/03 letter, AR P004080; 3/7/03 letter, AR P004082; 3/8/03 letter, AR P004084; 3/12/03 letter, AR P004087.) Two weeks later, Mr. Harwell reciprocated by unilaterally terminating Dr. Mileikowsky's West Hills proceeding. (Order Terminating Hearing, AR P003509-20.)

In short, Mr. Harwell declined to recuse or disqualify himself because he steadfastly maintained that he had *no* power to determine the outcome against Dr. Mileikowsky and in favor of the Medical Staff to which he owed his job. Then, without the slightest hesitation, he took the matter out of the hands of the panel, determining the outcome against Dr. Mileikowsky and in favor of the Medical Staff. (Order Terminating Hearing, AR P003509-20.)

Hearing officers are not and should not be empowered to decide the outcome of peer review proceedings. *A fortiori*, fair procedure does not permit allow a hearing officer to dictate the outcome of the proceeding, given that he is selected by the prosecuting body, is paid by the hospital, and knows that he will receive such income in the future only if the prosecuting body continued to select him.

C. Dr. Mileikowsky Did Not Waive His Administrative Hearing Rights

West Hills concludes by arguing that the dismissal was merited. (OBOM at pp. 56-60). This contention is beyond the issue West Hills brought to this court, which was whether the hearing officer had the power to dismiss, and properly should be remanded to the Court of Appeal if the issue becomes dispositive. The contention is also wrong.

West Hills first argues that substantial evidence supported the hearing officer's dismissal order. (OBOM at pp. 56-60.) The argument is beside the point. The *factual* contention that Dr. Mileikowsky did not produce the documents is true. The question West Hills argues – whether Dr. Mileikowsky was justified in withholding the documents – is a legal one.

More broadly, West Hills argues that Dr. Mileikowsky waived his right to a hearing, because his failure to produce the Cedars-Sinai documents supposedly justified dismissal of the proceeding. (OBOM at pp. 56-60.) It did not.

West Hills maintains that "Dr. Mileikowsky asserted below that Evidence Code section 1157 prevented him from complying with orders compelling discovery of the Cedars-Sinai's peer review documents . . . ." (OBOM at p. 58, citing CT12:2481, 2485.) To the

contrary, *Cedars-Sinai's attorney* citing section 1157 in refusing to allow Dr. Mileikowsky to provide the documents to West Hills in support of his credentialing application. (4/16/99 letter, CT12:2456-57.) *Mr. Lahana*, the Cedars-Sinai hearing officer who was also the West Hills Medical Staff's attorney, declined to disagree. (12/5/00 letter at p. 1, AR P003255.) When Dr. Mileikowsky authorized Mr. Lahana to reveal any relevant information about the Cedars-Sinai proceeding to the Medical Staff, *Mr. Lahana* responded that Section 1157 barred him from doing so. (12/5/00 letter at p. 1, CT12:2481.)

Dr. Mileikowsky was unrepresented by counsel, doing his best to participate in what was supposed to be review by his peers. Caught in a tug-of-war between two hospitals, he received the clear message from the tightly-linked group of attorneys serving these hospitals that he was in trouble no matter what he did regarding the Cedars-Sinai documents.

West Hills constructs elaborate arguments that Dr. Mileikowsky should have just defied Cedars-Sinai's directives and submitted to West Hills the documents he was told he could not submit. (OBOM at pp. 58-59.) Such assurances are cold comfort today. At the time, he knew only that he was not eager to have "failure to preserve

medical confidentiality" added to the growing and arbitrary list of "charges" heaped upon him.

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 command of the Cedars-Sinai attorney. The Hearing Officer at one point spoke dismissively of the section 1157 problem, stating: "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 p. 13, AR P003501.) To the contrary, section 1157 allows a physician to take discovery of proceedings in which he is involved but nowhere authorizes him to release those documents to others. (Evid. Code, § 1157(c).)

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

Nevertheless, West Hills insists that a failure to produce discovery is an automatic waiver of the right to a hearing. (OBOM at

pp. 59-60.) The authorities it cites – *Hartbrodt v. Burke* (1996) 42 Cal.App.4th 168, 173-175, and *Fremont Indemnity Co. v. Superior Court* (1982) 137 Cal.App.3d 554, 559 – do not support this proposition. In both cases, private litigants asserted a Fifth Amendment privilege – i.e., that the information might tend to incriminate them – in lawsuits premised on their innocence. Their claims were dismissed as factually inconsistent with the assertion of the privilege. Here, Dr. Mileikowsky's inability to disclose the documents that Cedars-Sinai would not authorize him to disclose was entirely consistent with his contention that he merited hospital privileges.

California courts recognize that "a penalty as severe as dismissal or default is not authorized, where noncompliance with discovery is caused by an inability to comply . . . ." (*Brown v. Superior Court* (1986) 180 Cal.App.3d 701, 707.) Similarly, in *Societe Internationale pour Participations Industrielles et Commerciales, S. A. v. Rogers* (1958) 357 U.S. 197, a party refused to produce documents in its possession because it said to do so would violate Swiss law; terminating sanctions were not appropriate. (*Id.* at p. 212.)

Terminating sanctions are particularly inappropriate where, as here, the party demanding discovery has demonstrated disinterest in the demanded material. If West Hills had really wanted the Cedars-Sinai documents, it would have tried to obtain them from Cedars-Sinai sometime after Dr. Mileikowsky submitted his application, using the releases he signed.

West Hills selectively quotes a few cases to suggest, erroneously, that hospitals "hospitals are reticent about voluntarily disclosing their confidential peer review documents" even if the doctor executes a waiver. (OBOM at 32-33.) To the contrary, in West Hills' authority *Bell v. Sharp Cabrillo Hospital* (1989) 212 Cal.App.3d 1034, testimony indicated that, although the "statements" a hospital made in the face of an inquiry from another hospital could be "vague," there was no problem in gaining access to the other hospitals' records and charts. (*Id.* at 1043.) In West Hills' other authority, *Pick v. Santa Ana-Tustin Community Hospital* (1982) 130 Cal.App.3d 970), the hospital conducting proceedings against the doctor was unable to get a transcript from another hospital, but this was because "he was unwilling to waive any privilege that might be involved." (*Id.* at 982.)

The record in the present case illustrates that hospitals readily share documents if the doctor signs a waiver. Contrast Mr. Lahana's insistence that Dr. Mileikowsky and only Dr. Mileikowsky must produce the Cedars-Sinai documents (knowing full well that he could not do so), with the simple manner in which Mr. Lahana used his signed release to obtain any needed documents from Century City Hospital. (1/10/02 letter, AR CH01980-81; 1/16/02 letter, AR CH01982.) Indeed, Cedars-Sinai's attorney represented that it would respond to hospital representatives if Dr. Mileikowsky executed a release. (4/16/99 letter at p. 2, AR P003241.)

In these circumstances, the Court of Appeal below properly noted:

> [T]here is no reason to make this document production burdensome for either the licentiate or the peer review body. In fact, there is every reason to make it as minimally burdensome as possible, without compromising the peer review process itself.
>
> . . . It . . . follows that if either party is not in possession of the documents but controls them in the sense of being able to authorize their release by a third party, it is sufficient if the release is authorized, leaving it to the requesting party to inspect and copy the documents in the possession of the third party.

(*Mileikowsky III*, 154 Cal.App.4th at pp. 777-78.) This Court should come to the same conclusion, for the same reasons.

The Medical Staff exploited Cedars-Sinai's refusal to allow Dr. Mileikowsky to produce the documents it demanded, to avoid a reckoning on the merits in the proceeding – which had little or nothing to do with the documents demanded. Dr. Mileikowsky fell victim to a carefully-laid trap that gave the hearing officer, chosen by the prosecuting Medical Staff, the opportunity to seize a power that did not belong to him and to deny Dr. Mileikowsky the hearing he deserved.

IV. CONCLUSION

The Legislature created a peer review system with the central tenet that peers should review peers. Even more so than in the usual administrative regime, the expertise of the panel empowered to decide a peer review matter must be applied to determine all dispositive questions. In this case, the hearing officer improperly usurped the panel's power and dictated the outcome of Dr. Mileikowsky's credentialing proceeding.

The Legislature has decreed that effective peer review requires fairly conducted proceedings, undertaken by licentiates, not lawyers and businesspeople. Dr. Mileikowsky asks for no more and no less.

DATED: June 10, 2008

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