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.

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

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PETITIONER/APPELLANT DR. MILEIKOWSKY'S RESPONSE TO AMICUS BRIEFS

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I. INTRODUCTION

The interested parties that have filed amicus briefs supporting West Hills Hospital in this appeal ("West Hills *amici*") fall into two distinct groups. The first consists of hospitals – the California Hospital Association, Catholic Healthcare West, Tenet Healthcare Corporation, and the Kaiser companies, including Kaiser Foundation Hospitals. The second consists of private attorneys who alternate between representing hospitals and their medical staffs in peer review hearings, and serving as the "neutral" hearing officer in such hearings – the Van Hall Law Office and the Ware Law Group. (Van Hall Br. at 1; Ware Br. at 1.) Not surprisingly, both groups want the hearing officers – attorneys the hospitals and their medical staffs select to oversee peer review hearings – to have free rein to determine the outcome of the hearings (at least so long as that outcome is

unfavorable to the physician[1]), without any participation by the medical experts on the hearing panel.

Just as unsurprising is the fact that physicians – through the *amicus* briefs in support of Dr. Mileikowsky filed or joined by the American Medical Association, the California Medical Association, the Union of American Physicians and Dentists, the Association of American Physicians and Surgeons, the American College of Legal Medicine, and the Semmelweis Society International – express a preference to have dispositive peer review questions decided by licentiates. In this, though, they are in harmony with the Legislature. This view is also espoused through *amicus* briefs or joinders filed by the California Academy of Attorneys for Health Care Professionals, the American Association for Justice, and numerous public interest organizations speaking for patients – including the Consumer Attorneys of California, the E-Accountability Foundation, the

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[1] Although they do not directly address the issue, the West Hills *amici*, like West Hills itself, appear to proceed on the assumption that the hearing officer's powers are asymmetric. Thus, they maintain that it is perfectly acceptable for the hearing officer to make the medical decision that the physician's privileges should be denied, but do not ever suggest that they accept the necessary consequence that the hearing officer would then be empowered to enter a decision in the physician's favor, thereby rendering the medical decision that the physician merits privileges in the hospital.

Government Accountability Project, the Health Administration Responsibility Project, Inc., Health Care Patient Advocates, the Legal Affairs Council, the Liberty Coalition, the National Whistleblower Center, the No Fear Coalition, OSC Watch, and the U.S. Bill of Rights Foundation.

Unquestionably, the relief sought by West Hills and supported by the West Hills *amici* would make it easier for hospitals and hearing officers to purge unwanted physicians – regardless of the merits of the charges against them. It would, however, negate the Legislature's goal of providing a fair forum for physicians by making a neutral panel of licentiates the decision-maker for what is, unavoidably, a medical question – whether the physician merits privileges.

The West Hills *amici* present two types of arguments in favor of giving the hearing officer the power to enter dispositive rulings (at least so long as they are unfavorable to the physician). The first type is legal – that the Court of Appeal misread the applicable statutes. The second is policy-oriented – that peer review proceedings would be improved if hearing officers could terminate them on their own, at least so long as termination is to the physician's disadvantage. Neither set of arguments is correct or persuasive.

II. THE WEST HILLS *AMICI* IDENTIFY NO VALID LEGAL GROUNDS FOR ALLOWING HEARING OFFICERS TO TERMINATE PEER REVIEW HEARINGS

A. The Statute Does Not Permit Hearing Officers to Make Dispositive Decisions

Most of the West Hills *amici* join West Hills in maintaining that the Legislature *sub silentio* gave hearing officers the extraordinary power to enter dispositive decisions.

CHA, for example, argues that "[i]t makes no sense that the California Legislature went to the effort of creating a procedure for peer review hearings more extensive and detailed than that of any other state, only to fail to give the presiding officer the tools to control the process." (CHA Br. at 19.) But no one suggests that the hearing officer has no tools to control the process, up to and including a recommendation to the hearing panel that the proceeding be terminated. The one thing the Legislature did not do, however, is give the hearing officer the power to decide the outcome of the proceeding. That power it reserved to the expert hearing panel.

Van Hall asks this Court to use privately-promulgated guidelines to overrule the Legislature. It makes much of the fact that both the California Hospital Association and the California Medical Association have adopted model bylaws that state: "If the hearing

officer determines that either side in a hearing is not proceeding in an efficient and expeditious manner, the hearing officer may take such discretionary action as seems warranted by the circumstances." (Van Hall Br. at 6-7.) Of course, if a model bylaw actually conflicted with the statutory scheme, the statute would control. But the vague description of the hearing officer's powers contained in these model bylaws does not actually do anything to inform the debate before this Court.

CHW and Tenet invite the Court to endorse an end run around the statute. They maintain that "[a] hearing officer has not usurped the hearing panel's voting function if the governing body upholds the hearing officer's ruling that a proceeding should be terminated based on the doctor's failure to produce documents or other procedural misconduct . . . ." (CHW/Tenet Br. at 12.) The error in that statement is obvious on its face. A hearing officer's decision to terminate a proceeding bypasses the *peer* review function completely by cutting the hearing panel of peers out of the process, and later hospital board review does not restore that function. Both the physician and the peer review body have a statutory right to a written decision of the panel, with findings of fact and a conclusion relating the decision to the

evidence. (Bus. & Prof. Code, § 809.4, subd. (a)(1).) If the hearing officer and the hospital board make the dispositive decision on their own, they have denied that right and usurped the panel's powers.

CHW and Tenet maintain that this usurpation is permissible by analogy to a discovery referee – who might recommend a terminating sanction that, if adopted by the trial judge, would obviate the need for a jury verdict. (CHW/Tenet Br. at 12-13.) The analogy is wholly inapposite.

In a civil trial, either the judge or a lay jury finds facts without exercising any special expertise – indeed, they are forbidden to base their decisions on their own expertise. The judge – the ultimate decision-maker in the trial – incorporates the findings of the lay jury (if one is sitting in the case) into the decision and, in the exceptional case – decides when the jury's fact-finding function is not necessary to the decision and can be dispensed with. Sometimes the judge will use a discovery referee to take on the time-consuming task of hearing discovery matters. The discovery referee never makes a dispositive decision and instead merely recommends such a decision to the judge, who is always the decision-maker.

In a peer review proceeding, a hearing panel of licentiates makes decisions by exercising its special expertise. The hearing panel itself not only finds facts but also renders the decision on the basis of those facts – like a judge sitting without a jury. Sometimes the hearing panel will use a hearing officer to take on the time-consuming task of hearing discovery and other procedural matters, and sometimes a member of the panel takes on this function. The hearing officer, who has no special expertise, can never be allowed to make a dispositive decision and instead must be confined to recommending such a decision to the panel.

CHW and Tenet argue: "A hearing officer has not usurped the hearing panel's voting function if the governing body upholds the hearing officer's ruling that a proceeding should be terminated . . . , any more than a discovery referee who recommends a terminating sanction has usurped the province of jury to decide the case on the merits if the judge agrees and dismisses the case." (CHW/Tenet Br. at 12-13.) But a hearing panel is not a jury and a governing body is not a judge. The correct analogy is: a hearing officer who bypasses the hearing panel and terminates a proceeding on his or her own has unquestionably usurped the voting function of the hearing panel, and

the governing body should be required to overturn such a decision on administrative appeal – just as a discovery referee who bypasses the trial judge and terminates a case on his or her own would usurp the power of the trial judge to decide a matter, and an appellate court would be legally bound to overturn the referee's *ultra vires* act on appeal.

Nevertheless, CHW and Tenet argue that it was "nonsensical" for the Court of Appeal to conclude that allowing the hearing officer to enter a dispositive decision is inconsistent with the statutory provision (Bus. & Prof. Code, § 809.2, subd. (b)) that the hearing officer "shall not be entitled to vote." (CHW/Tenet Br. at 12.) The present case illustrates that the Court of Appeal's conclusion was not only sensible but unassailable. Here there was only one decision – the hearing officer's pronouncement that Dr. Mileikowsky's failure to provide the Cedars-Sinai documents was "grounds for denial of the application." (Order Terminating Hearing at 8, AR P003516.) Only one vote counted in reaching this conclusion – the vote of the hearing officer. No hearing panel member – no licentiate – was permitted to vote, or even to assemble. And this statutory violation – granting to the hearing officer a vote to which he was not entitled – persisted even

though the hospital's Board of Trustees conducted an appellate review "limited to the following concerns":

> 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.) Neither of these issues went to the fundamental question of whether there were grounds for denial of Dr. Mileikowsky's application – understandably, since the yet-to-be-assembled hearing panel was the only actor in the process qualified to make that judgment.

CHW and Tenet's circular argument is that "[t]he opportunity for triers of fact to vote only arises if a case gets that far – and sometimes it does not." (CHW/Tenet Br. at 13.) Obviously, if a hearing officer makes a dispositive decision before a hearing panel is even assembled, the panel will not have the opportunity to vote. But the hearing officer cannot seize the right to vote on the outcome of the proceeding merely by denying that opportunity to the panel. The statute does not say that the hearing officer cannot vote unless he or she beats the panel to the punch; it says quite simply that the hearing officer "shall not be entitled to vote."

CHW and Tenet also repeat the rhetorical argument that, because a hearing officer is said to "preside," he or she must have the absolute power to determine the outcome of the proceeding. (CHW/Tenet Br. at 25-26.) We can only repeat the response we gave in the Answer Brief to the same argument when West Hills pressed it. 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 an administrative peer review 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 . . . have no power to find the facts finally, and . . . 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.)

The Van Hall amicus brief quotes *Rhee v. El Camino Hospital Dist.* (1988) 201 Cal.App.3d 477, 489, to the effect that minimal due process does not "compel adherence to formal proceedings or to any single mode of process." (Van Hall Br. at 3.) This is true enough, but it ignores the fact that just one year after *Rhee* was decided the Legislature enacted Business and Professions Code section 809 *et seq.*, which goes beyond the constitutional constraints of due process to compel formal proceedings within certain parameters and does limit the modes of process by which a physician can be denied privileges.

On a side issue, Kaiser takes on Dr. Mileikowsky for discussing the federal Health Care Quality Improvement Act of 1986 (HCQIA). (42 U.S.C. §§ 11101 *et seq.*) Specifically, Kaiser castigates Dr. Mileikowsky for asserting that "the Legislature 'opted out' of HCQIA, preferring instead to promulgate its own peer review system '[b]ecause of deficiencies in the federal act and the possible adverse interpretations by the courts of the federal act.'" (Kaiser Br. at 10.) Kaiser's umbrage is somewhat difficult to understand, because the quoted language comes directly from a statute the Legislature enacted, not from Dr. Mileikowsky. (Bus. & Prof. Code, § 809, subd. (a)(2).)

Kaiser further questions whether California really did opt out of HCQIA, noting that Congress withdrew the right to opt out shortly after California exercised it. (Kaiser Br. at 10-11.) No one has suggested that California's election to opt out has not survived Congress's decision not to allow future opt-outs, and the question most certainly is not before the Court on this appeal.

The whole point for which the Answer Brief noted California's decision to opt out of HCQIA was that the Legislature quite deliberately distanced itself from the federal system, under which the hearing officer was given the power to hear a peer review matter alone and render a recommended decision. (Answer Br. at 32-33.) That assertion remains unchallenged. Kaiser argues that "the hearing panel provision set forth in section 809.2 subdivision (a) does not at all limit membership to licentiates and is strikingly similar to that provided in HCQIA." (Kaiser Br. at 12.) This simply is incorrect. Although section 809.2 subdivision (a) does not speak to the membership of the panel, section 809.05 does codify the state's policy "that peer review be performed by licentiates." A hearing officer is neither a peer nor a licentiate. And HCQIA's procedure under which a hearing panel or a hearing officer sitting alone only gives recommendations, while the

hospital renders the final decision, is the polar opposite of California's procedure under which only the hearing panel makes a decision, to which the hospital governing body must give great weight.

B. The Hospital's Governing Body Is Not a Substitute for a Hearing Panel Whose Power Has Been Usurped by the Hearing Officer

CHW and Tenet argue at length that it makes no difference if the hearing officer displaces the medical hearing panel, because, they maintain, in the end only the hospital's governing body has any real power. (CHW/Tenet Br. at 17-22.) They question the Court of Appeal's core conclusion that "only physicians can decide whether a medical staff member will be terminated," asserting instead that "[a] hospital's governing body must and does have ultimate authority to decide who will practice in the hospital . . . ." (CHW/Tenet Br. at 17.) To these hospitals, peer review is superfluous – just an advisory warm-up to the governing body's ultimate decision.

This case does not present the opportunity for this Court to decide the extent or boundaries of a hospital's governing body's powers. Here, under West Hills' bylaws, 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.) West Hills' Board of Trustees limited its review of the hearing officer's decision to two issues – "[w]hether or not [Dr. Mileikowsky] complied with the discovery request," and "[f]air procedure issues relating to the qualifications of the Hearing Officer." (4/11/03 letter, AR P003542-43.) The Board's decision was in fact limited to these two issues. (Findings and Decision, AR P003815.) Because the hospital's governing board never actually took the place of the hearing panel, the Court has no basis to decide what would happen if it actually had tried to take the place of the medical hearing panel.

But, in any event, the hospital's governing board does not have the expertise to take the place of the hearing panel. The governing board is responsible for the business affairs of the hospital. It is not comprised of medical experts, and peer review performed by a hospital board reviewing a hearing officer's decision would not be "peer review . . . performed by licentiates." (Bus. & Prof. Code, § 809.05.)

The authority on which CHW and Tenet rely in making their argument is ephemeral – it indicates only that the Legislature wanted governing boards to play a limited role in peer review. The

Legislature has declared that governing bodies have a "legitimate function in the peer review process," (Bus. & Prof. Code, § 809.05, subd. (a)), but it simultaneously limited that function: "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." (*Ibid.*)

CHW and Tenet use general corporation law to argue the point, noting that a corporation's board of directors cannot delegate its powers to outside bodies. (CHW/Tenet Br. at 18 n. 10.) It does not follow, however, that a hospital's board of directors is compelled to exercise total control over everything, or even every important thing, that transpires in a hospital. The only restriction corporation law imposes is that a board of directors may not delegate ultimate authority over corporate affairs to outsiders. (Corp. Code, § 300, subd. (a); *Oliphant v. Home Builders* (1917) 34 Cal.App. 720, 722.) Compliance with the statutory requirement that physician hearing panels decide peer review matters does not constitute delegation of corporate powers to outsiders.

Regardless, hospital governing boards have generally chosen to maintain control over peer review matters, largely by exercising

administrative appellate power over hearing panel decisions.[2] No one questions that power on this appeal. But this exercise of power does not negate the Legislature's directive that the medical hearing panel will make the decision in the first instance and that the hearing officer will not vote on the decision.

CHW and Tenet also argue that, where a hospital board performs an administrative appellate review, cases such as *Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center* (1998) 62 Cal.App.4th 1123, 1135-36, hold that courts review the decision of the reviewing board, not of the hearing panel. (CHW/Tenet Br. at 19-20.) This is nothing more than an application of the broader principle that a party to administrative proceedings must exhaust his or her administrative remedies before bringing a mandamus action. (*Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 592 ("a failure to raise an issue in

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[2]However, it does not necessarily follow, as CHW and Tenet assert, that "the hospital's governing body takes the final action on a peer review matter, even if neither party has appealed." (CHW/Tenet Br. at 19.) Under the West Hills bylaws, for example, if no appeal is taken from the decision, "it shall thereupon become effective immediately." (Bylaw 10.2-1, AR P003864.) The exhaustion of remedies doctrine requires a party to exhaust administrative appellate remedies before seeking judicial review, but the law does not generally require that the hospital board weigh in on all peer review matters.

an administrative appeal after raising the issue in the first public or administrative hearing constitutes a failure to exhaust administrative remedies and prevents the issue from being raised in a subsequent judicial action").)

This does not mean that the hospital board can usurp the role of the medical hearing panel. Where there is an administrative appeal to a hospital board and the final administrative decision is then challenged on mandamus, the courts perform the same appellate function as the board:

> [O]ur function in this context is the same as the superior court's, which was the same as the hospital's governing body. 'Like the trial court, we also review the administrative record to determine whether its findings are supported by substantial evidence in light of the whole record, our object being to ascertain whether the trial court ruled correctly as a matter of law.'

(*Hongsathavij*, 62 Cal.App.4th at 1136-37, quoting *Bonner v. Sisters of Providence Corp.* (1987) 194 Cal.App.3d 437, 444.) The hospital board, constrained as it is to accord the hearing panel's decision "great weight" (Bus. & Prof. Code, § 809.05, subd. (a)), is not a substitute for the hearing panel any more than the courts are a substitute for a hearing panel on administrative mandamus.

Nevertheless, CHW and Tenet find support in the deferential review standard of the administrative mandamus statute Code of Civil Procedure section 1094.5, maintaining that it shows that hospital boards should be given free rein to do whatever they want. (CHW/Tenet Br. at 20.) They assert that "like an administrative agency, a hospital governing body is recognized as having the expertise to determine who should practice there and what the scope of each doctor's privileges should be, while judges are untrained and courts ill-equipped for hospital administration." (*Id.* at 20 (internal quotation marks omitted).) For this proposition, they cite *Goodstein v. Cedars-Sinai Medical Center* (1998) 66 Cal. App. 4th 1257, and *Mateo-Woodburn v. Fresno Community Hospital & Medical Center* (1990) 221 Cal. App. 3d 1169, 1185. (CHW/Tenet Br. at 20.) They fail to note, though, that these decisions addressed quasi-legislative business decisions, not quasi-judicial determinations of physician competency. *Goodstein*, although it was an administrative mandamus action following a suspension of hospital privileges, actually reviewed a peer review body's policy of not disclosing sources to physicians accused of substance abuse; *Mateo-Woodburn* reviewed a hospital's decision to allow only staff physicians to perform anesthesia services.

C. The Legislative Alternative of an Arbitrator Does Not Authorize Usurpation of a Hearing Panel's Powers

CHW and Tenet, as well as Kaiser, note that the Legislature has provided the alternative of an arbitrator acting as the fact-finder in peer review proceedings. (Kaiser Br. at 14-16, 23-24; CHW/Tenet Br. at 13-14, 22, 26.) They argue that, in proceedings where the fact-finder is a hearing panel instead of an arbitrator, the existence of this alternative justifies transferring the hearing panel's powers to the hearing officer. The argument, in short, is that an arbitrator is allowed to decide everything, and therefore a hearing officer should be allowed to decide everything.

This argument ignores the crucial differences between a peer review proceeding before an arbitrator and one before a hearing panel and hearing officer. The selection of an arbitrator or arbitrators, unlike the selection of a hearing panel and hearing officer, must be acceptable to both the prosecuting peer review body and the physician. The arbitrator or arbitrators must be "selected by a process mutually acceptable to the licentiate and the peer review body . . . ." (Bus. & Prof. Code, § 809.2, subd. (a).) Thus, whenever either party perceives the need for the decision-maker to have a special expertise, the physician and the peer-review body have an absolute right to insist

upon a process that guarantees the decision-maker will have that expertise.

In particular, in agreeing to a process for selecting arbitrators, both parties are constrained to select persons competent to find facts and to formulate a decision that ties the facts to the outcome. (Bus. and Prof. Code, § 809.4, subd. (a)(1).) Both parties are constrained, therefore, to establish a process that assures that the arbitrators have sufficient medical expertise to determine all issues bearing on the physician's fitness to practice in the hospital.

In contrast, when the hospital elects the alternative of a medical hearing panel (optionally assisted by a hearing officer), it has total control over the process. It selects the panel members and the hearing officer, which as a practical matter means that the prosecuting peer review body selects them. In the present case, for example, the president of the medical staff, who conducted the medical staff's prosecution of Dr. Mileikowsky, hand-picked the hearing officer, and was certain that the hearing officer knew this. (RT 7/1/02 at 3, AR P001560; RT 7/1/02 25:11-26:11, AR P001582-83.) Dr. Mileikowsky objected to the selection of the hearing officer, but the hearing officer was the sole judge of his own qualifications, and he

unsurprisingly declared himself fit to serve. (RT 7/1/02 53:23-54:6, AR P001610-11.)

Consequently, Dr. Mileikowsky's only assurance that his challenge to the denial of his reapplication appointment might be decided on the merits was a panel of physicians who, unlike the hearing officer, could comprehend the medical issues and did not have a financial incentive to rule in the medical staff's favor. But that panel was never constituted.

Dr. Mileikowsky was not offered the alternative of an arbitrator or arbitrators to decide his case, which is why he did not address that alternative at any length in his briefing. Had that alternative been available to him, he might not be before this Court today. He could have insisted upon a process that selected an arbitrator or arbitrators who were both unbiased and sufficiently expert in the medical issues to make a dispositive decision. He would then not have to complain to the courts that his privileges had been terminated by someone who had no basis for deciding whether he merited the privileges he was trying to regain.

Kaiser claims to have adopted the arbitrator alternative wholesale for dealing with some of its captive groups of physicians,

apparently by contract. (Kaiser Br. at 16-17.) But, in most hospitals, it still appears that the arbitrator alterative is rarely if ever offered – at least if the reported case law is any indication. If and when the arbitrator option is offered, both the physician and the peer review body might be well-advised to heed the Legislature's preference that peer review be conducted by licentiates, and insist on a process that results in arbitration by licentiates. But, if both sides elect to put their fate in the hands of non-licentiates, this result will come about as a result of rational choice by the parties, not the *ad hoc* assumption of power by the hospital-appointed hearing officer.

D. Kaiser's Untenable Interpretation of the Court of Appeal Decision Does Not Provide a Reason for Reversal

Kaiser also presents an elaborate argument premised on its own unique interpretation of one aspect of the Court of Appeal's decision. The argument does not appear to be germane to the questions now before this Court. The Court of Appeal's decision has been depublished, the supposed ruling that Kaiser dwells on has not been urged on this Court by either party, and the issue does not appear to be embraced by the questions upon which review was granted. However,

for the sake of completeness, we address Kaiser's argument briefly here.

Specifically, Kaiser posits that a peer review proceeding has two stages, an early one it does not specifically address and a later one it calls the "evidentiary stage of the hearing." (Kaiser Br. at 21-22.) It intimates that the distinction between the two was crucial to the Court of Appeal decision below and apparently wants this Court to decide where the line between the two stages should be drawn. (Kaiser Br. at 25-26.)

One difficulty with Kaiser's argument is that it takes contradictory views of what the court below held. At one point, Kaiser asserts that the Court of Appeal held that a peer review hearing officer can never terminate a proceeding unilaterally:

> The court thus created a requirement that (i) only the trier of fact can terminate a peer review hearing based on a finding that a party has waived its evidentiary hearing rights . . . .

(Kaiser Br. at 22.) Later in the same section of its brief, Kaiser maintains that the Court of Appeal held that once a proceeding reaches a certain point, the hearing officer *does* have the power to terminate it:

> [The] *West Hills* [decision] does not explain why mere passage into the evidentiary stage of the hearing suddenly makes terminating sanctions by the hearing officer appropriate.

(Kaiser Br. at 23.) The former interpretation of the decision below is the only correct one. At no point did the Court of Appeal suggest that it is ever appropriate for the hearing officer to make a dispositive decision in a peer review proceeding, regardless of the stage to which it has progressed.

The Court of Appeal did not draw any bright lines regarding when the hearing panel can enter a dispositive decision, and this case does not raise that issue. The Court of Appeal addressed "premature" termination of the proceeding, which it defined as "one when either one of the parties has not been afforded the opportunity to exercise the rights set forth in [Business and Professions Code] section 809.3(a)." (*Mileikowsky v. West Hills Hospital Medical Center* (2007) 64 Cal.Rptr.3d 888, 896, review granted Dec. 12, 2007, No. S156986.) But section 809.3(a) merely lists everything that a party is entitled to do at a hearing, up to and including "submit[ting] a written statement at the close of the hearing." A "premature" determination, as the Court of Appeal defined it, is simply one that comes before the matter is finally submitted to the hearing panel, and the Court of Appeal's

determination was that "the hearing officer was not empowered to terminate the hearing prematurely." (*Ibid.*)

In this case, the hearing officer entered his dispositive ruling determining the outcome of the controversy before the medical hearing panel had even been appointed let alone convened. But the crucial point decided by the Court of Appeal, and the one that is before this Court, is that the hearing officer is neither empowered nor competent to make such a dispositive decision, regardless of what stage in the proceedings has been reached.

The *hearing panel* is empowered to make a dispositive decision, after it has the information necessary to do so. Usually, this will occur only after all of the evidence has been presented and after the closing statements have been submitted. As the Court of Appeal recognized, there might be rare circumstances in which the hearing panel would need to make a dispositive decision before the end of the proceeding because it had become impossible to proceed to a just determination on the merits. (64 Cal.Rptr.3d at 902.) That circumstance does not create a need for the sort of arbitrary line-drawing that Kaiser asks for.

III. THE WEST HILLS *AMICI* IDENTIFY NO VALID POLICY GROUNDS FOR ALLOWING HEARING OFFICERS TO TERMINATE PEER REVIEW HEARINGS

A. This Court Should Not Allow Hearing Officers to Terminate Peer Review Proceedings to Alleviate "Burden" on Physician Panel Members

A persistent theme in the *amicus* briefs, as it was in West Hills' brief, is that the hearing officer should be allowed to usurp the medical hearing panel's power and duty to decide a matter, because otherwise the hearing panel will be overburdened. The West Hills *amici* purport to be acting out of concern for the physicians who sit on peer review panels, whom they view as overwhelmed by the demands of deciding the matter before them. (See, CHA Br. at 6-7, Ware Law Br. at 2-5, 7, CHW/Tenet Br. at 7-8, 11, 14-15, 16, 22-23 ("Doctors who participate on hearing panels just want to evaluate the medical issues. That role is more than taxing enough, and doctors do not want to assume the added burden of dealing with procedural/legal issues."))

Hospitals, their attorneys, and their hearing officers all have an interest in giving the hearing officer the hospital has selected the power to terminate a peer review proceeding as he or she sees fit. It does not follow that the physicians on the hearing panel want or need to abandon their responsibilities simply to lighten their own workload.

To the contrary, the physician community has also weighed in on this issue, and it has come down squarely in favor of *not* transferring the hearing panel's powers and responsibilities to attorney hearing officers. The American Medical Association and California Medical Association recognize that hearing panel participation is a valuable public service that physicians necessarily perform:

> Peer review is conducted through mostly the volunteer efforts of dedicated professionals. While the activity is unpaid and can present challenges for busy professionals, it nonetheless remains the law that it be performed by "peers" (Business & Professions Code, § 809.05), not hearing officers or other lay entities.

(AMA/CMA Br. at 14.) The fact is that physicians *do not* want this Court to overrule the Legislature and free them from this service:

> Respondents' suggestions that having hearing officers play an enlarged role in a hearing could relieve these physicians of some of the work of a peer review hearing amounts, in this case, to a suggestion for the JRC panel members to abrogate their lawful duty to carry out peer review. . . . Respondents' remedy, resulting in a wholesale abrogation of a duty under the state's required health care quality assurance system, is one for the Legislature, not this Court.

(*Ibid.*)

Conspicuously absent from the *amicus* briefs supporting West Hills, as it was from West Hills' own briefs, is any consideration of just how physicians on a hearing panel would be "burdened" if they

were required to make the dispositive decision that a discovery default so undermined the proceeding that termination was necessary. Certainly, all discovery disputes should be addressed by the hearing officer in the first instance. Only when the question becomes whether the proceedings can continue at all need the matter even be brought to the attention of the panel. The hearing officer should by then have distilled the controversy down to one question: has the defaulting party so compromised the proceedings that they cannot continue? This question is neither too burdensome for the panel to answer nor so unrelated to its expertise that the hearing officer should step in and take its place.

B. The Question of Whether to Terminate a Peer Review Proceeding Is Neither within the Hearing Officer's Expertise nor Beyond the Panel's Expertise

Some of the West Hills *amici* argue that the decision to terminate Dr. Mileikowsky's peer review hearing was so obvious that the expertise of the hearing panel was unnecessary. Some argue that it was so difficult that the hearing panel was unqualified to participate.

For example, CHW and Tenet urge that this case concerned:

> a reality that . . . no medical expertise is required to see . . . : a hospital and its medical staff cannot possibly determine whether a physician is qualified to practice

> there if they are deprived of access to information about the doctor's practice at other facilities.

(CHW/Tenet Br. at 26.) For this point, they rely on *Oskooi v. Fountain Valley Regional Hospital and Medical Center*, 42 Cal.App.4th 233 (1996) and *Webman v. Little Company of Mary Hospital*, 39 Cal. App. 4th 592 (1995). In reality, these authorities demonstrate that the medical hearing panel must decide these matters.

In *Oskooi*, the doctor falsely omitted any mention of previous hospital affiliations on his application for privileges, a ground for immediate suspension under the hospital's bylaws. (42 Cal.App.4th at 236, 244.) Without knowing all of Oskooi's past affiliations, the hospital was not able to assess his qualifications. (*Id.* at 245.) Nevertheless, the matter was properly decided by a hearing panel – the only body competent to determine whether the doctor's transgression merited suspension of privileges – and not by the hearing officer. (*Id.* at 245 n. 11.)

In *Webman*, the physician "actively interfered with [the hospital's] ability to gather the information necessary to adequately assess his competence . . . ." (39 Cal. App. 4th at 602.) In that regard, he was the diametric opposite of Dr. Mileikowsky, who did what he could to supply West Hills with the information it claimed to want

concerning the Cedars-Sinai proceeding, short of contravening Cedars-Sinai's directive not to disclose the hearing documents. Dr. Webman, unlike Dr. Mileikowsky, refused to give oral information about the other proceedings against him. (39 Cal.App.4th at 597; 12/5/00 letter at 5, AR P003263.) Dr. Webman, unlike Dr. Mileikowsky, refused to provide copies of the medical charts addressed in the other proceedings. (*Ibid.*; 1/12/03 letter at 6, AR P003452.) Dr. Webman, unlike Dr. Mileikowsky, rescinded his authorization to the other hospital to release records concerning the disciplinary proceedings. (*Id.* at 597-98; 1/12/03 letter at 5, AR P003451.) Dr. Webman, unlike Dr. Mileikowsky, was not precluded from giving the requested information by the other hospital; Dr. Webman just refused to do so, asserting, falsely, that the hospital bylaws did not require him to do so. (*Id.* at 602; 4/16/99 letter at 1-2, AR P003240-41.) Dr. Mileikowsky went even further and authorized the attorney for the prosecuting medical staff to disclose any and all information about Dr. Mileikowsky's Cedars-Sinai proceeding that he had, because he had been the hearing officer in the Cedars-Sinai proceeding. (12/5/00 letter at 1,4, AR P003259, 62.) In short, Dr.

Webman lost his privileges because he *wilfully refused to do* precisely what Dr. Mileikowsky *repeatedly agreed to do*.[3]

And, in the *Webman* case, Dr. Webman's hospital actively sought the pertinent documents from the hospital that had previously disciplined him, whereas West Hills never even asked Cedars-Sinai for the pertinent documents while Dr. Mileikowsky's proceeding was pending. (39 Cal.App.4th at 597; 7/24/03 letter, AR P003800-03.)[4]

Nevertheless, Dr. Webman's proceeding was decided not by the hearing officer but by the hearing panel – the only body competent to determine whether his transgression merited denial of privileges. (39 Cal.App.4th at 599.)

Kaiser concedes that when the issue is termination of the proceeding because of a failure to produce discovery, "the ultimate decision *could* be left to the hearing panel members." (Kaiser Br. at 19 (emphasis added).) Nevertheless, it insists that the hearing officer is "better situated" to decide "the legal effect of the absence of

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[3]Notwithstanding its inapplicability, *Webman* was a primary basis on which the hearing officer terminated Dr. Mileikowsky's proceeding. (Order Terminating Hearing at 8-11, P003516-19.)

[4]West Hills did present a document purporting to show that it had requested information from Cedars-Sinai at an earlier time, but apparently had not followed up when no information was forthcoming. (12/20/00 letter, AR P003802-03.)

evidence and the disciplined physician's reasons for failing to produce the evidence – which are essentially legal conclusions." (*Ibid.*) Kaiser neglects the fact that this case concerns an informal administrative peer review proceeding, not a legal proceeding; the point is to determine the doctor's fitness to practice in the hospital, not to sort through "legal effects" or "legal conclusions." It is the expert panel's duty to decide whether the "absence of evidence" and the "reasons for failing to produce the evidence" mean that the physician cannot establish his entitlement to privileges. The same is true in general administrative practice. Although in a court proceeding the undisputed failure to bring a claim in a timely manner would be a legal ground on which a judge could dismiss an action, a hearing officer cannot take it upon him or herself to dismiss an administrative proceeding on this ground (or any other); only the expert panel responsible for resolving the administrative claim on the merits can make this decision. (*Automotive Management Group, Inc. v. New Motor Vehicle Bd.* (1993) 20 Cal.App.4th 1002, 1015-16.)

It might be true, as Van Hall argues, that "medical training provides no insight whatsoever on administrative hearing procedural issues." (Van Hall Br. at 7.) But medical training does give the panel

members a great deal of insight on the question only they can decide – whether the doctor is fit to practice in the hospital, notwithstanding gaps in the evidentiary record.

On a similar note, CHW and Tenet argue that "complex peer review procedural rulings" should be kept away from "ill-equipped physician volunteers who are simply supposed to be triers of fact." (CHW/Tenet Br. at 10.) But here, the "procedural ruling" was the ultimate decision on whether the physician should be granted privileges. The panel of physicians is the trier of fact, but it is also much more: it is the body that decides whether the physician should have privileges, and the reasons for that decision. The statute gives the panel the power and duty not only to find facts but also to issue "[a] written decision . . ., including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached." (Bus. and Prof. Code, § 809.4, subd. (a)(1).)

Ware similarly argues that "[f]airness issues, including those related to document discovery and exchange, are uniquely legal in nature and should not be resolved by a fact-finding lay panel." (Ware Br. at 6.) But the issue that the hearing officer decided – whether Dr.

Mileikowsky could fairly be excluded from the hospital because he followed Cedar-Sinai's directive that he not produce the Cedars-Sinai documents – was not a legal question of "fairness"; it was precisely the type of issue the panel should have been deciding. The Court of Appeal looked at these considerations closely and found it was not in a position to resolve the controversy because the panel of medical experts had never had the chance to apply its expertise:

> It is the balanced judgment of the trier of fact convened under section 809.2 that ensures fairness . . . . [W]e do not have before us the judgment of an expert body reviewing the final proposed action that, *under the circumstances of this case*, the Cedars-Sinai documents were essential to the peer review process. . . . [N]o group of medical professionals, i.e., the trier of fact, has reached such a consensus and made such a decision in reviewing the final proposed action.

(*Mileikowsky v. West Hills Hospital Medical Center,* 64 Cal.Rptr.3d at 906 (emphasis in original).)

The Court of Appeal was correct. Until a hearing panel of licentiates renders its judgment, the peer review proceeding has not reached a point at which non-physician hospital boards or judges sitting in review of the proceeding are authorized to make a judgment within their spheres of expertise.

C. Transferring the Hearing Panel's Powers to the Hearing Officer Would Not Protect the Public

Several of the West Hills *amici* argue that physicians are motivated to prolong peer review hearings and that giving hearing officers the power of summary termination will solve this problem by hastening the physician's loss of privileges. (CHA Br. at 9-15, 17-18; CHW/Tenet Br. at 15-16, Kaiser Br. at 6-8, Ware Br. at 5-6.) Starting as they do from the premise that the public benefit whenever the physician loses clinical privileges, they have no difficulty maintaining that speed in reaching that result is a positive good, regardless of the merits.

In any administrative proceeding, the party that faces a bad result at the end of the proceeding has an incentive not to reach that end, and the opposing party is motivated to reach that end quickly and so advocate summary imposition of that bad result. This does not mean that the established rules for deciding a matter can be suspended. The expert panel, not the hearing officer, is still the only body competent to render a final decision. Where there are grounds for early termination, the hearing officer can submit the matter to the panel, which is free to act or not act on the recommendation. (See

Duarte & Witting, Inc. v. New Motor Vehicle Bd. (2002) 104 Cal.App.4th 626, 631.)

The Legislature crafted the statute precisely to deal with these concerns. The peer review body can summarily suspend the physician's privileges whenever failure to do so "may result in an imminent danger to the health of any individual . . . ." (Bus. & Prof. Code, § 809.5, subd. (a).) The West Hills *amici* presume that physicians who pose a serious risk of harm will not be suspended. They do not explain why this Court should operate from the premise that peer review bodies will not do their job and suspend physicians where danger "may result."

Kaiser, for example, criticizes Dr. Mileikowsky for supposedly failing to recognize that "without imminent danger, no summary action is lawful under section 80[9].5 subdivision (a)." (Kaiser Br. at 8.) To the contrary, summary action is lawful under the statute so long as imminent danger "may result." If this loose standard is not met – if there is no reason why imminent danger "may result" – then the public does not need protection from the physician, and suspension is inappropriate.

Dr. Mileikowsky is fully aware that, legally, a physician can be summarily suspended only on a showing that imminent danger "may result." In this case, his hospital privileges were summarily suspended without such a showing, or any showing at all, in direct contravention of *Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802, 824-25 and *Sahlolbei v. Providence Healthcare, Inc.* (2003) 112 Cal.App.4th 1137, 1146-47. He has protested vigorously, at every opportunity (6/17/02 letter, AR P003348; 6/23/02 letter, AR P001033-37; 6/26/02 letter, AR P001039-41), but today, more than six years later, his privileges are still suspended. Dr. Mileikowsky, like any physician whose privileges are in suspension, has always had a very strong incentive to advance the proceedings as quickly as possible.

D. Transferring the Hearing Panel's Powers to the Hearing Officer Would Not Make the Proceedings Fairer

Ware, CHA, and CHW and Tenet, make the perverse argument that summary termination is a desirable way of keeping the panel from becoming prejudiced against the physician:

> If physician triers of fact are forced to confront and decide issues arising from a party's failure to cooperate in the process — issues from which hearing panel members typically have been shielded by attorney

> hearing officers — the hearing panel members' exposure to allegations of procedural misconduct may jaundice their views of the merits.

(CHW/Tenet Br. at 3-4 ; see also *id.* at 23; Ware Br. at 8; CHA Br. at 15-16.)

The argument makes no sense. Even if it were true that a panel would become prejudiced against a party that the hearing officer would otherwise sanction, this is scarcely a worse outcome for that party than summary termination. If these *amici* are arguing that the hearing panel is likely to be more *favorably* disposed toward the party that the hearing officer would otherwise sanction, then clearly the panel sees something in the dispute that the hearing officer does not. As the panel members are the experts authorized to make the decision, that point of view should be respected.

CHW and Tenet argue that allowing the hearing panel to make a final decision would somehow be "unfair to hospitals and their medical executive committees." (CHW/Tenet Br. at 4; see also CHA Br. at 5-6.) Their theory seems to be that a physician who withholds documents might be able to sneak the default past the hearing panel, but that a hospital that withholds documents will get caught at the judicial review level. "A hospital is exposed to potential liability for

failing to provide fair procedure if it withholds documents from the physician who is the subject of a hearing, but under the rule at issue here, the physician may face no consequence other than delay." (*Ibid.* (footnote omitted).)

There is, of course, no reason to assume that a hearing panel deciding a dispositive question will treat the hospital unfairly, or for that matter any differently than it would treat the physician. In CHW and Tenet's lone authority, *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1448, the "[h]ospital resisted fair treatment at every crucial step of the proceedings," including denying him copies of documents that were submitted to the hearing panel. Consequently, the decision of the hearing panel was reversed:

> Since Rosenblit was kept in the dark about the specific charges made against him, of his asserted opportunity to obtain copies of the charts, and finally of the basis upon which the hearing panel decided the issues adversely to him, he was denied the basic right to a fair hearing.

(*Ibid.*) This does not indicate that hearing panels are inherently unfair to hospitals. It means that when a proceeding is unfair to the physician, the result will be overturned, just as it would and should be overturned if the proceeding were unfair to the hospital.

CHW and Tenet go even further and urge that a panel decision is unnecessary because there is no possibility that an action taken against a doctor by a hospital or hearing officer could be incorrect or unfair. "A hospital has no incentive whatsoever to restrict or exclude good doctors." (CHW/Tenet Br. at 6.) "Nor would a board knowingly select a biased hearing officer, or otherwise take action that would invite the overturning of a peer review decision on the ground of unfair procedure . . . ." (CHW/Tenet Br. at 21.) Their theory is that good doctors are a marketing tool, and reversal of unfair proceedings is expensive. Carried to its logical conclusion, this argument implies that both hearing panels and courts on administrative mandamus are practically superfluous.

Numerous published decisions show otherwise. For example, in CHW and Tenet's authority, *Rosenblit*, "[t]he record demonstrates Hospital was dedicated to removing Rosenblit rather than providing a physician with a fair opportunity to defend his treatment regimen." (231 Cal.App.3d at 1448. In *Yaqub v. Salinas Valley Memorial Healthcare System* (2004) 122 Cal.App.4th 474, 486, the hospital's "procedures for appointing hearing officers were not consistent with the appearance of impartiality." But this Court should not proceed on

the assumption that peer review proceedings will always be fair, or unfair, to one side or the other. Instead, it should require that the proper procedures are followed and ensure that judicial review is available when they are not. In this case, the proper procedure was to have the medical hearing panel decide whether Dr. Mileikowsky merited reappointment, and the Court of Appeal responded correctly when it held that this procedure was not followed.

E. Kaiser's Choice of Procedures Does Not Dictate Transfer of the Hearing Panel's Powers to the Hearing Officer

Kaiser argues that it does things differently when it holds peer review proceedings, and that therefore it would be peculiarly disadvantaged if the hearing officer were not allowed to usurp the medical hearing panel's responsibility to decide a matter. Since Kaiser controls the health plan, the physician group, and the hospital, it typically combines peer review for all three into one proceeding. (Kaiser Br. at 4-6.)

For reasons that it does not articulate, Kaiser maintains that consolidating such proceedings makes it "uniquely vulnerable to the adverse effects created when physicians engage in delaying tactics." (Kaiser Br. at 7.) Dr. Mileikowsky has not suggested that delaying

tactics should be tolerated; his argument is that, if addressing such tactics results in a dispositive decision, the medical hearing panel must make that decision. If, as Kaiser argues, the hearing officer should be empowered to usurp the hearing panel's power when three proceedings are combined into one, this simply means that three improper decisions will be made simultaneously.

IV. CONCLUSION

The West Hills *amici* are all strongly interested in elevating the hearing officer's powers over the medical hearing panel's, because they want to streamline the path elimination of physicians hospitals have decided – for whatever reason – to rid themselves of. The Legislature wisely enacted legislation that would insure that a doctor's competence to practice would be reviewed by persons with medical

expertise. The Court should not be induced to undermine that scheme by these *amici*'s eagerness to circumvent it.

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