COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| Gil N. Mileikowsky, M.D.,<br><br>Petitioner and Appellant,<br><br>v.<br><br>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<br><br>Defendants and Respondents. | No. B186238<br><br>Los Angeles County Superior Court No. BS091943<br><br>Honorable Dzintra Janavs, Judge Presiding |

# RESPONDENTS' BRIEF

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## I. INTRODUCTION.

Appellant Gil Mileikowsky, M.D. ("Petitioner"), a physician who, in 2002, lost barely-used gynecology privileges at West Hills Hospital Medical Center (the "Hospital") and was denied new obstetric privileges, seeks an "automatic extension" of gynecology privileges and resuscitation of his Judicial Review Committee ("JRC") appeal. The JRC appeal (peer review) hearing was terminated in 2003 because Petitioner prevented peer review of his competence and fitness for requested staff privileges.

Petitioner pursues the same failed strategy he followed in *Mileikowsky v. Tenet Healthsystem*, 128 Cal.App.4th 531 (2005), *cert. denied* at 126 S.Ct. 1166 (2006) ("*Mileikowsky II*"),[1] attempting to bully his way to medical staff privileges by not allowing proper peer review. Whatever sympathy one might have for a physician who has lost his right to practice at other hospitals for medical incompetence and abusive behavior,[2] the judgment in this case must be affirmed because state and federal laws and sound public policy dictate policing of physician quality through peer review to protect patients, hospitals

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[1] Referred to by Petitioner as *Tenet* and not to be confused with *Mileikowsky v. Tenet Healthsystem*, 128 Cal.App.4th 262 (2005) ("*Mileikowsky I*").

[2] At least five cases of incompetent medical care and a number of incidents of disruptive behavior that endangered the safety of patients, including improper delivery of one infant and botched circumcision of another, were reported by two other hospitals. (*See* footnote 6.)

and the public from substandard medical care. Staff privileges may not be granted or extended to a physician like Petitioner who thwarts peer review.

There is no factual basis for Petitioner's claim that the hearing officer, Mr. Harwell (the "Hearing Officer"), must be disqualified for financial bias. Petitioner's JRC appeal hearing was properly terminated for his refusal to produce records for peer review, and Petitioner's challenge is without merit. Moreover, as the trial court found, Petitioner received a fair hearing on these issues, first before the Hearing Officer and a second time before the Hospital's Board of Directors ("Governing Board"). The judgment also must be affirmed because Petitioner failed to challenge other independent bases upon which the trial court ruled against him.

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## II. SUMMARY OF RELEVANT FACTS.[3]

### A. THE HISTORY OF THIS LITIGATION.

More than two years after losing his courtesy[4] gynecology privileges at the Hospital and being denied additional privileges in obstetric, Petitioner filed a mandate petition seeking those privileges on August 19, 2004. (CT1:000008-000046.) This is not the first lawsuit brought by Petitioner to obtain through litigation staff privileges denied to him as a result of adverse peer review. (*See Mileikowsky II*, 128 Cal.App.4th 531.) Respondents answered the petition, denying its allegations and raising various defenses. (CT8:001539-001657.)

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[3] Petitioner's Opening Brief ("POB") offers a truncated, selective and inaccurate summary of events. Because most of Petitioner's discussion of the facts is not relevant to the issues raised by his appeal, Respondents address only some of the inaccuracies. The degree to which Petitioner has distorted the record is troublesome because the misrepresentations are often material and create an unreliable picture. (*See, e.g.*, Sections II, IVB, VB; *see also* footnotes 14, 25, 36, 39, 44 and 47.) A more complete and accurate statement of facts with citation to the administrative record may be found in Respondents' Mandate Brief ("RMB"). (CT8:001539-001657.)

All citations to the Clerk's Transcript ("CT") or Reporter's Transcript ("RT") will appear in the following format: CT[Volume]:[Page] or RT:[MM/DD/YY]:[Page], respectively. A chronologically-ordered administrative record, bearing sequential bates numbers with the prefix "CH" was used in the trial court. The Clerk's Transcript does not contain the CH documents in numeric order. Accordingly, Appendix A provides a chart of CH documents with corresponding CT references for the Court's convenience.

[4] Courtesy privileges are for physicians who use the Hospital only occasionally. (*See* West Hills Medical Staff Bylaws ("Bylaws") §4.3-1, CT4:000664.)

The petition was denied approximately eleven months later, after extensive briefing and argument. (CT19:004057-004060.) Among the several grounds for denial were: (a) Petitioner's two-year acquiescence to the denial of privileges and delay in seeking the requested privileges, (b) federal and state law and accreditation requirements of the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO") prohibiting granting or extending staff privileges without biennial peer review and approval of physician competence, and (c) no peer review of Petitioner's competence since denial of privileges in 2002. (CT19:003986-003989 at 003989.)

The petition was heard on April 15, 2005, and May 27, 2005. The trial court reviewed a multi-volume administrative record compiled and submitted by the parties and took evidence concerning JCAHO and federal and state requirements for granting privileges. Petitioner and Respondents filed extensive briefs (CT1:000008-000046, 7-8:001497-001534, 8:001539-001657, and 18:003858-003884) and oral argument consumed the better part of two days (RT:04/15/05:B1, B-150; RT:05/27/05:C-1, C-43).

Petitioner made four arguments to the trial court. First, Petitioner contended that the termination of his hearing by the Hearing Officer was not authorized by law. Second, Petitioner claimed the decision was unlawful because termination was ordered by a biased hearing officer who should have

been disqualified. Third, Petitioner contended that termination of the JRC hearing for his refusal to produce the documents from his peer review proceedings at Cedars-Sinai Medical Center ("Cedars-Sinai Documents"and "Cedars-Sinai," respectively) was not supported by substantial evidence because he offered to produce, and give his explanation of, certain medical records from Cedars-Sinai. Fourth, Petitioner claimed that if the actions of the Hospital were reversed, his privileges were required to be restored pending a final administrative decision.

The trial court determined that each of Petitioner's arguments lacked merit and also denied the petition on other, independent grounds not addressed by this appeal. (*See* Section VIII and CT19:003986-003989.)[5]

### B. THE MEDICAL STAFF RECOMMENDED THAT PETITIONER'S APPLICATION FOR PRIVILEGES BE DENIED.

When Petitioner lost his staff privileges at two other hospitals for medical incompetence and abusive behavior determined by those institutions to have endangered the health and safety of patients and others, he sought to expand his little-used courtesy gynecology privileges at the Hospital and to add

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[5] The trial court adopted her tentative ruling as a written statement of decision. (CT19:003984-003985.)

obstetric so he could relocate his hospital activity to West Hills.[6] (CT12:002518-002529 at 002519-002522 and 002524-002527.) In conducting the investigation required to consider granting temporary obstetric privileges, in 2000, the Medical Staff obtained an 805 Report filed by Cedars-Sinai with the state Medical Board. That report stated that Petitioner's privileges, which had been suspended, were revoked for medical incompetence that endangered the health and safety of three patients. (CT12:002449-002466 at 002460.) The details of Petitioner's improper medical care were not provided.

To perform peer review, the Medical Staff requested documents concerning Cedars-Sinai's suspension and revocation of Petitioner's privileges including the notice of charges, the written decision and such other documents

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[6] Reports required by Business & Professions Code ("B&P") §805(b) ("805 Report") filed by Cedars-Sinai and Encino-Tarzana Regional Medical Center ("Encino-Tarzana") (CT5:000891-000899) each reported summary suspension, and Cedars-Sinai reported revocation, of Petitioner's medical staff privileges. Collectively the two reports mention at least five cases of incompetent medical care and various incidents of disruptive behavior that endangered patients, including improper delivery of one infant and the botched circumcision of another, and for disruptive behavior. Petitioner had previously advised the Medical Staff only that his privileges at Cedars-Sinai had been suspended and that he was contesting the suspension. Petitioner failed to explain the action against his privileges at Century City Hospital. (CT1:00155-00157.) No mention was made on Petitioner's Application why he no longer held staff privileges at Valley Presbyterian Hospital as he had in 1999. Although Bylaws §6.3(g) required Petitioner to have notified the medical staff of the Hospital ("Medical Staff") of each suspension, revocation or other restriction of his privileges by another healthcare facility within ten days (CT4:000670-000671), Petitioner had not complied.

as may exist, such as the transcript of the proceedings and exhibits. When these were not forthcoming, Petitioner's request for temporary obstetric privileges was denied for failure to produce the Cedars-Sinai Documents.[7] Petitioner was advised in writing of the reason for denial and that any future application for obstetric privileges would not be granted unless the Cedars-Sinai Documents were provided to the Medical Staff for peer review. (CT12:002447-002448 at 002447.)

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[7] Based upon a stale April 1999 letter from Cedars-Sinai refusing to grant Petitioner a *blanket* authorization to release *unspecified documents* (CT14:002970-002971), and without ever making a current request for permission to release specific documents to West Hills Medical Staff for peer review, Petitioner refused to produce the Cedars-Sinai Documents for peer review even though they were in his possession. (CT12:002480-002491.) Petitioner contended that, although he was no longer on Cedars-Sinai's medical staff, he could not produce the documents because Cedars-Sinai had not given him permission.

Petitioner signed a written authorization form for Cedars-Sinai to release the Cedars-Sinai Documents to the West Hills Medical Staff for peer review. (CT12:002491.) The form was delivered to Cedars-Sinai by the Medical Staff but Cedars-Sinai did not respond to it. (CT12:002411, 002512 and CT18:003809-003813 at 003812-003813.) Petitioner was advised in writing that Cedars-Sinai did not respond and that it was Petitioner's responsibility to produce the documents. (CT12:002512.) *There is no evidence that Petitioner thereafter made any effort, at any time, to arrange for Cedars-Sinai to deliver the requested documents to the Medical Staff or to obtain Cedars-Sinai's permission to deliver specific documents in Petitioner's possession to the Medical Staff for peer review.* (*See* Section VB.) Despite numerous requests, the Cedars-Sinai Documents were never provided to the West Hills Medical Staff (or JRC) for peer review.

On May 18, 2001, as the two-year period of Petitioner's courtesy gynecology privileges was coming to an end, Petitioner delivered to the Medical Staff an application for extension of his courtesy gynecology privileges for the 2001-2003 term (under the Bylaws, a "reapplication"), and for additional privileges in obstetrics (under the Bylaws, an "application," and collectively for convenience, the "Application").[8] (CT12:002518-002529.) Petitioner lied on his Application and it remained incomplete in a number of respects.[9] (CT1:000155-000125; 2:000426-000428.)

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[8] At a Judicial Review hearing, under Bylaws §10.3-9, on an application for new privileges the applicant bears the burden of proving that he is qualified for the new privileges, while on a reapplication the Medical Staff bears the burden of proving privileges should not be extended. (CT4:000695-000696.)

[9] Petitioner's Application did not provide the explanation required regarding curtailment, suspension or revocation of privileges at other hospitals. (CT12:002518-002529 at 002519-002522 and 002524-002527.) Petitioner misrepresented that his privileges at Encino-Tarzana were voluntarily surrendered, and concealed the fact they were suspended with a recommendation that they be revoked. Petitioner failed to disclose the curtailment of his privileges at Century City Hospital and a recommendation that they be revoked. (CT12:002401-002419.) No information was provided about why Petitioner was no longer on the medical staff of Valley Presbyterian Hospital. (CT12:002400.) Petitioner's failure to disclose these adverse actions to the Medical Staff in writing within ten days violated Bylaws §6.3(g). (CT4:000670-000671; *see also Unterthiner v. Desert Hosp. Dist. of Palm Springs*, 33 Cal.3d 285 (1983) (holding that lying on an application for medical staff privileges is sufficient evidence of untrustworthiness and interference with the peer review process to warrant denial or revocation of medical staff privileges).) Petitioner's application could also be denied because it was incomplete. (*See Oskooi v. Fountain Valley Reg'l Hosp. and Med. Ctr.*, 42 Cal.App.4th 233 (1996) (holding that the omission of

In the Application Petitioner agreed to abide and be governed by the Bylaws. Despite the Medical Staff's written warning that submission of the Cedars-Sinai Documents for Medical Staff peer review was required before privileges would be granted, Petitioner, who had copies of the Cedars-Sinai Documents in his possession, refused to produce them to the Medical Staff and did not make arrangements for Cedars-Sinai to do so. Ultimately, on April 24, 2002, the Medical Staff notified Petitioner of its recommendation that privileges be denied for a number of reasons, including "misrepresentation and/or omissions of information contained in your reapplication for Medical Staff membership, as well as your failure to persuade the Medical Staff by a preponderance of the evidence of your qualifications for these privileges." (CT12:002540-002544, "Notice of Charges.") A number of specific instances of conduct that did not meet professional standards were also identified. Petitioner appealed the decision.

### C. THE APPOINTMENT OF HEARING OFFICER HARWELL AND THE JRC.

Pursuant to Bylaws §10.1-4, physicians were appointed to a JRC to hear Petitioner's challenge to the Medical Staff's adverse recommendation. (CT4:000690.) Pursuant to Bylaws §10.1-5, the Hospital appointed as hearing

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information on an application for privileges justifies denial).)

officer John Harwell. (CT4:000690.) Mr. Harwell testified that he spends approximately 25-30% of his time as a hearing officer and that the balance of his practice was limited to representing physicians in peer review hearings, before the Medical Board and in court proceedings and hearings in connection with Medicare Enforcement entities or other groups. (CT12:002568.) Except for serving as the hearing officer in this one matter, Mr. Harwell had no other relationship of any kind with the Hospital or its Medical Staff. He was not appointed by the Hospital or its Medical Staff as a hearing officer on any prior occasion, and he had no other affiliation of any type with the Hospital or its Medical Staff. Mr. Harwell did not seek out the subject appointment. (CT12-13:002580-002582.)

There was no evidence at the JRC hearing or Governing Board hearing about how the Hospital came to select Mr. Harwell as the JRC Hearing Officer, and there was no evidence of any plan, practice, or intent by the Hospital (or anyone else) to hire Mr. Harwell again. During voir dire, Mr. Harwell stated that he did not know how he came to be appointed and that he did not know anyone at the Hospital, but that he did know Mr. Lahana, who represented the Medical Staff. Based upon that testimony and the provision in the Bylaws that allowed the Medical Staff to recommend hearing officers, the trial court inferred that Mr. Harwell was appointed on Mr. Lahana's recommendation and

so found in its memorandum of decision (CT12:002563-002612 at 002580-002582; 19:003986-003989 at 003989.)

Mr. Harwell stated, and the trial court found, that Mr. Lahana appeared before him on behalf of the medical staffs of other hospitals on six occasions in the prior 15 years. (CT12-13: 002563-002612 at 002568 and 002572; CT19:003986-003989, court's interlineation at 003989 and RT:4/15/05:B-110.) There was no evidence about how Mr. Harwell came to be appointed as the hearing officer in those six matters, except that, on one occasion, he was requested by the physician. (CT12:002572.) There was no evidence that Mr. Lahana had any involvement in the recommendation, selection or appointment of Mr. Harwell on any of those six occasions; the only evidence was that Mr. Lahana appeared before Mr. Harwell on six prior occasions, that twice the cases settled, that Mr. Lahana's client prevailed twice and that the parties opposing Mr. Lahana's client prevailed twice. (CT12-13:002563-002612 at 002572.)

### D. THE JRC HEARING AND ITS TERMINATION.

During the JRC hearing "discovery" process, on July 16, 2002, Hearing Officer Harwell directed "the completion of the exchange of documents" within the next seven weeks. (CT15:003040-003047.) The next day, Petitioner misrepresented to Hearing Officer Harwell that "I have consistently disclosed everything I had to disclose to the [West Hills Hospital Medical Center] and

other Hospitals over the years." (CT13:002730-002745 at 002733-002734.) On July 17, 2002, the Medical Staff responded by letter that Petitioner had not done so and again requested that Petitioner provide the Cedars-Sinai Documents and certain other information Petitioner had failed to provide. (CT13:002746-002747.) The letter also informed Petitioner that failure to comply with the request by July 28, 2002, would result in the Notice of Charges being amended for his failure to cooperate. On July 22, 2002, the Medical Staff sent Petitioner yet another letter demanding the Cedars-Sinai Documents and asking the Hearing Officer to order production by July 28, 2002. (CT17:003526-003642 at 003570.)

On July 29, 2002 Petitioner asked for additional time, until August 5, 2002, to respond. (CT13:002748-002754 at 002748.) The Medical Staff accommodated Petitioner's request and waited until August 21, 2002, before amending the Notice of Charges ("Amended Notice").[10] (CT13:002758-002761.) On September 3, 2002, Petitioner finally responded to, as he stated, "the latest correspondence from West Hills," but only to request until

[10] The Medical Staff agreed to Petitioner's request to allow Petitioner until August 12, 2002, to respond. Meanwhile, the Medical Staff approved amendment of the Notice of Charges in case Petitioner's response was unsatisfactory. (CT17:003526-003642 at 003573; 13:002756-002757.)

September 10, 2002, to address the issues. (CT17:003526-003642 at 003577-003578.)

On October 3, 2002, the Medical Staff informed Mr. Harwell that Petitioner had not produced the required documents and had not delivered his promised response; the Hearing Officer was again requested to order the documents produced. (CT17:003526-003642 at 003579.) On November 27, 2002, the Medical Staff again informed Mr. Harwell that Petitioner had still not produced the Cedars-Sinai Documents and other required information and that no response had been received from Petitioner, this time asking for an order that the hearing be dismissed.[11] (CT13:002762-002764 at 002764.)

In a January 12, 2003, letter to Mr. Harwell requesting he issue "terminating sanctions" in Petitioner's favor, Petitioner claimed he met his obligation by signing an authorization for Cedars-Sinai to produce the documents and that the Medical Staff was responsible for Cedars-Sinai's failure to do so. (CT14:002881-002944 at 002891.) The Medical Staff responded on January 14, 2003, by pointing out "[Petitioner] ignores the fact that he or his counsel have in their possession the very documents being sought and that the burden is on [Petitioner] to produce that information not upon Cedars." (CT17:003526-003642 at 003598-003599.) There followed a further

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[11] Petitioner apparently claimed that he did not receive this letter, but in any event, Mr. Harwell forwarded it to him on December 6, 2002. (CT13:002762-002764.)

interchange of 40 letters,[12] in which Petitioner and the Medical Staff both asked for terminating sanctions.[13] On January 29, 2002, Mr. Harwell ordered that the hearing be continued based on Petitioner's failure to produce the Cedars-Sinai Documents. (CT17:003526-003642 at 003611-003612.) The same day, Petitioner responded stating, "As long as Mr. Harwell does not rule on this matter, I have no obligation to provide you any additional information regarding Cedars-Sinai Medical Center." (CT17:003526-003642 at 003613-003620.)

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[12] Petitioner sent 31 letters, many lengthy. The Medical Staff sent six and the Hearing Officer, three. (CT14:002919-002960, CT14:002961-003013, CT14:003018-003026, CT14-15:003027-003079, CT15:003080-003101, CT15:003102-003120, CT15:003121, CT15:003122, CT15:003123, CT15:003124, CT15:003125, CT15:003126-003182, CT15:003183-003186, CT15:003187-003188, CT15:003189-003227, CT15:003234-003248; CT15-16:003253-003267; CT16:003268-003287, CT16:003288-003292, CT16:003293-003316, CT16:003317, CT16:003318-003323, CT16:003335-003345, CT16:003349-003351, CT16:003352-003364, CT16:003365-003377, CT16:003378, CT16:003381-003386, CT16:003387-003397, CT16:003401-003403, CT16:003404-003411, CT14:003014-003017, CT15:003231-003233, CT15:003249-003252, CT16:003324, CT16:003379-003380, CT16:003398-003400, CT15:003228-003230, CT16:003346-003348, CT16:003412-003426.)

[13] On January 14, 2002, the Medical Staff again requested that Petitioner's appeal be dismissed for his failure and refusal to produce the Cedars-Sinai Documents. (CT17: 003526-003642 at 003598.) On July 15, 2002, and again on January 17, 2003, Petitioner requested that Hearing Officer Harwell issue terminating sanctions for the Medical Staff's alleged failure to provide all of the documents he requested. (CT17:003526-003642 at 002719-002720; 14:002881-002918; 14-15:003027-003079 at 003056-003061.) On July 16, 2002, Mr. Harwell acknowledged that terminating sanctions were available, but not warranted under the circumstance. (CT17:003526-003642 at 003563.)

On February 5, 2003 (to the extent he had not done so before), Mr. Harwell ruled: "ORDERED that Dr. Mileikowsky provide the MEC (or its designated representative) access to inspect and copy (at their cost) documents from Cedars-Sinai relevant to the charge that Cedars-Sinai summarily suspended Dr. Mileikowsky's privileges and membership and further that failing the provision of these documents, terminating sanctions will be imposed." (CT7:003526-003642 at 003621-003636.) On February 14, 2003, the Medical Staff notified Mr. Harwell that the Cedars-Sinai Documents had not been produced and requested the promised termination order be issued if they were not received by February 28, 2003. (CT17:003526-003642 at 003637.)

On March 18, 2003, Mr. Harwell issued another letter to the parties containing orders. (CT17:003526-003642 at 003638-003639.) The letter noted that following the order quoted above, Petitioner "responded by facsimile and telephone message that he was occupied between February 5, 2003 and March 14, 2003 in other matters and would 'respond' to these orders after March 14, 2003. To date no response has been received." (*Id.*) The Hearing Officer ordered Petitioner to produce the Cedars-Sinai Documents:

> within seven days of this letter (e.g., by March 24, 2003) or terminating sanctions will be ordered. 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 [Petitioner's] challenge to the MEC's recommendation to deny his re-application. Please do not hesitate to contact me (in writing only and with a copy to the other party) if I can be of any assistance.

(*Id.*)

Petitioner did not respond. On March 26, 2003, the Medical Staff informed Mr. Harwell that Petitioner had not arranged for the Cedars-Sinai Documents to be produced and requested that Petitioner's appeal of the Medical Staff's recommendation to deny privileges be dismissed. (CT17:003526-003642 at 003640.) Hearing Officer Harwell issued a 12-page (plus an enclosure) order terminating the hearing on March 27, 2003 and delivered it to Petitioner and the Medical Staff.[14] (CT16-17:003488-003508.)

**E. THE GOVERNING BOARD HEARING.**

Petitioner then appealed to the Governing Board, which appointed a committee to hear Petitioner's challenge. (CT17:003509-003520.) During Governing Board hearing held July 22, 2003, Petitioner claimed that Hearing Officer Harwell should be disqualified for financial bias and that the Hearing Officer did not have the power or the right to terminate his appeal for refusing

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[14] Petitioner is disingenuous in suggesting that he never had an opportunity to express his views on terminating sanctions. Petitioner had ample opportunity to express his views on the matter between July 2002 and the Hearing Officer's order in March 2003. (*See* footnote 12 concerning the interchange of 40 letters.)

to produce the Cedars-Sinai Documents. (CT18:003764-003808.)[15] The Governing Board Committee met at least once (on August 19, 2003) and conducted an independent review of argument and evidence, and arrived at the same conclusions as the Hearing Officer regarding termination of the JRC hearing. Petitioner received a written decision from the Governing Board Committee to this effect. (CT18:003814-003817, finding that Petitioner had received the opportunity for a hearing but had prevented a fair hearing by refusing to comply with the Hearing Officer's order to produce the Cedars-Sinai Documents.) The Committee's recommendations were then reviewed, approved and adopted by the Governing Board, which issued its written decision. (*Id.*)

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[15] The record, including documentary evidence, was made available to the Governing Board in advance of the hearing. (CT17:003524-003525.) While Petitioner complains about the Medical Staff's submission of additional evidence, he omits that it was provided at the Governing Board's request. In fact, the Governing Board accepted briefs and evidence from both parties, although Petitioner's submission was untimely. (CT18:003764-003808; 17:003526-003642, 003521-003523, 003524-003525.) The Governing Board hearing was held before a court reporter on July 22, 2003, and August 19, 2003. (CT17-18:003643-003763, 003818-003824.) As the transcript demonstrates, after oral argument by counsel for Petitioner and counsel for the Medical Staff, the Governing Board accepted four boxes of evidence belatedly submitted by Petitioner and evidence provided by the Medical Staff in response to a specific Governing Board request (showing that the Medical Staff requested the Cedars-Sinai Documents directly from Cedars-Sinai and provided Cedars-Sinai with Petitioner's written consent to provide them). (CT18:003818-003824, CT18:003809-003813 at 003812-003813.)

## III. STANDARD OF REVIEW.

Petitioner's appeal is under Code of Civil Procedure section 1094.5 ("§1094.5") which governs judicial review of administrative proceedings. The Court's inquiry includes whether there was a fair trial and whether there was any prejudicial abuse of discretion. (*See* §1094.5(b).) "Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (§1094.5(b).)

Petitioner's appeal addresses neither the hearing he received before the Governing Board nor the Governing Board's decision. Rather, the focus of Petitioner's displeasure lies exclusively with the Hearing Officer and his rulings. Specifically, Petitioner contends that he did not receive a fair hearing, alleging that: (1) the Hearing Officer was biased, (2) the Hearing Officer lacked the authority to issue terminating sanctions, and (3) that the Hearing Officer's termination of the hearing was an abuse of discretion.

Whether the Hearing Officer was biased is a mixed question of fact and law to be independently reviewed. (*Cf. People v. Ault*, 33 Cal.4th 1250, 1263 (2004).) Whether the Hearing Officer lacked the authority to issue terminating sanctions is a question of law. (*See Mileikowsky II*, 128 Cal.App.4th at 554 (holding that the Court would conduct a de novo review of questions of law,

but that the Court was bound by the trial court's factual findings unless they were not supported by substantial evidence.).) Once the Court determines whether the Hearing Officer or Governing Board had the authority to terminate the hearing, the question of whether the terminating sanction should have been imposed is subject to review for abuse of discretion. (*See Mileikowsky II*, 128 Cal.App.4th at 556-557 (stating that the question of whether terminating sanctions should have been imposed is subject to only substantial evidence review of the trial court's findings).)

In cases arising from private hospital boards, "abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (§1094.5(d).) Thus, the factual findings of a private hospital governing board are subject to only a substantial evidence review. (*See* §1094.5(d); *Unterthiner*, 33 Cal.3d at 297 n.6; *Huang v. Bd. of Dirs.*, 220 Cal.App.3d 1286, 1293-1294 (1990); *Anton v. San Antonio Cmty. Hosp.*, 132 Cal.App.3d 638, 649 (1982).) Both the trial court and the Court of Appeal are limited to examining the administrative record to ascertain whether the decision was supported by substantial evidence. Courts must give special deference to the decision because of the decision-maker's expertise in such matters and may not overturn the decision if it is

supported by substantial evidence. (*See Fukuda v. City of Angels*, 20 Cal.4th 805, 812 (1999).)

Moreover, this Court should not overrule the trial court's decision unless Petitioner has shown that all bases for the decision are incorrect. (*See D'Amico v. Bd. of Med. Exam'rs*, 11 Cal.3d 1, 18-19 (1974).)

## IV. PETITIONER FAILED TO ESTABLISH BIAS OF THE HEARING OFFICER.

Petitioner's argument that Hearing Officer Harwell must be disqualified under *Haas v. County of San Bernardino*, 27 Cal.4th 1017 (2002), and *Yaqub v. Salinas Valley Memorial Healthcare System*, 122 Cal.App.4th 474 (2004), is a misguided attempt to extend *Haas* and *Yaqub* by distorting the record.

### A. TO DISQUALIFY A HEARING OFFICER UNDER *HAAS* AND *YAQUB*, PETITIONER MUST PROVE THAT THE HEARING OFFICER WAS APPOINTED BY THE ADVERSE LITIGANT AND THAT THE HEARING OFFICER KNEW OF A PLAN BY THAT LITIGANT TO APPOINT HIM REPEATEDLY.

*Haas* holds that financial bias exists where the hearing officer in an administrative hearing is: (1) appointed by one of the litigants, *and* (2) knows of a plan of that litigant for repetitive appointments. The Supreme Court reasoned that the hearing officer's financial interest in obtaining future appointments may create financial bias in favor of the litigant who hired him.

It is the second element, knowledge of a plan for repetitive appointments, that creates the risk of financial bias.[16]

In *Haas*, the hearing officer was appointed by the County of San Bernardino, one of the litigants. The Supreme Court focused on the County's testimony, *given in the presence of the hearing officer*, "The intent is that we will use [the hearing officer] on assignment, as the occasion suggests, in the future if she's interested in doing it and if the case should arise" and the County's admission that the hearing officer was aware of the County's intention. (*See Haas*, 27 Cal.4th at 1022.)

The Court of Appeal in *Yaqub* applied *Haas* in the context of a medical staff hearing to disqualify Justice Agliano from serving as a hearing officer. Unlike the present case, the Salinas Valley Memorial bylaws provided that the hearing officer be unilaterally appointed by the medical staff. (*See Yaqub*, 122 Cal.App.4th at 484 ("Pursuant to Appendix Section II(G) of the hospital bylaws, the MEC unilaterally appointed Justice Agliano as hearing officer...").) Justice Agliano knew of the Medical Staff's plan for repeated appointments because he had been appointed as a hearing officer by Salinas Valley's medical

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[16] The Hospital's appointment of Mr. Harwell on a single occasion does not create this risk.

staff on at least three prior occasions, including an earlier hearing involving Dr. Yaqub.[17] The facts in *Yaqub* fit squarely within the *Haas* rule.

### B. THE TRIAL COURT PROPERLY FOUND THAT THE EVIDENCE DID NOT SATISFY EITHER ELEMENT OF THE *HAAS* TEST.

It was Petitioner's burden to prove financial bias. (*See Weinberg v. Cedars-Sinai Med. Ctr.*, 119 Cal.App.4th 1098, 1115 (2004).) The trial court determined that Petitioner could not prove bias, finding factually that neither of the two elements of the *Haas* test was present. (CT19:003986-003989.)[18] To reverse the trial court's factual findings under the substantial evidence test, the record must show that the trial court could reach no conclusion from the evidence *except that* both of the elements of the *Haas* test were met. Petitioner cannot meet this heavy burden.

Petitioner's bias argument hinges upon the factually unsupported contention, made for the first time in this pending appeal, that Mr. Harwell was repeatedly appointed as a hearing officer by Mr. Lahana, the attorney who represented the Medical Staff, in this case and in prior cases at other

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[17] The *Haas* test was met by Justice Agliano's prior appointments by the medical staff, not his appointments by the hospital as a mediator and arbitrator or his work as a fundraiser for the hospital.

[18] The trial court reviewed the evidence using an independent review standard and made its determination based on the weight of the evidence, a higher standard than required under §1094.5(d).

hospitals.[19] Neither the trial court's findings nor the evidence supports this version of events. There is no evidence that Mr. Lahana appointed the Hearing Officer in this or any other case. Indeed, with respect to the present case, the trial court found that Mr. Harwell was appointed by the Hospital, which was not one of the litigants. "The hospital appointed the hearing officer, Mr. Harwell, upon recommendation by the Medical Staff's counsel, Mr. Lahana." (CT19:003986-003989 at 003987.)

The evidence shows, and the trial court found, that on six occasions spanning fifteen years, Mr. Lahana represented medical staffs of various *other* hospitals in proceedings where Mr. Harwell was appointed as the hearing officer. (*Id.* at 003989.) The court did *not* find, and evidence does *not* show, that Mr. Lahana *appointed* Mr. Harwell on any of those six occasions, as Petitioner now contends, nor does it show that Mr. Lahana *recommended* Mr. Harwell on any occasion.[20] There was no evidence presented about who

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[19] Petitioner was forced to change to this approach because undisputed evidence shows only a single occasion on which Mr. Harwell was appointed by the Hospital. Petitioner now claims that "the Medical Staff's Attorney had selected the same Hearing Officer repeatedly." (POB at 30.) "Mr. Harwell indicated that Mr. Lahana had selected him to be the hearing officer in six prior proceedings." (*Id.* at 31.) Neither statement is supported by evidence.

[20] *Haas* and *Yaqub* apply to unilateral appointments, not recommendations, that may or may not result in appointments and, in any event, are subject to the power of a non-litigant third party to unilaterally appoint whomever it pleases.

appointed Mr. Harwell; the only evidence about a recommendation being made in those cases was that, in one case, Mr. Harwell was requested by the physician (the party adverse to Mr. Lahana's client).[21] (CT1:000184-000193, 000176-183; CT12:002572.)

Applying these uncontroverted facts to the two-pronged *Haas* test, it becomes clear that bias was not established because Mr. Harwell was not appointed by one of the litigants, but by the Hospital.[22] Apart from appointing and paying for the Hearing Officer, the Hospital did not participate in the JRC hearing.

Moreover, there is no evidence of repetitive appointments of the Hearing Officer being made, planned or discussed by the Medical Staff or the

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[21] Additionally, *Haas* or *Yaqub* do not allow for disqualification of a hearing officer simply because the physician has appeared or is appearing before the hearing officer, particularly when those proceedings were conducted at a different hospital, and where the record belies any claim of resentment or partiality by the hearing officer. (CT12:002566, Petitioner: "Thank you, Mr. Harwell. And, obviously, this is in good spirits of the duties we both have..." Mr. Harwell: "Doctor, you have not only an absolute right but a complete obligation to completely explore whether you think the hearing officer is fair and impartial, and I will say that you have always been very civil to me about it when you did it last time, and I don't think you won't be civil this time.")

[22] The litigants in the JRC hearing were Petitioner and the Medical Staff. The Hospital is an entity separate and distinct from the Medical Staff, a self-governing organization of physicians. (*See, e.g.*, B&P §2282.5; 22 C.C.R. §§70701(a)(1)(F) and 70703(a); *Hongsathavij v. Queen of Angels/Hollywood Presbyterian Med. Ctr.*, 62 Cal.App.4th 1123, 1130 n.2 (1998).)

Medical Staff's attorney, Mr. Lahana (or by the Hospital), let alone the Hearing Officer's knowledge of such a plan. The evidence only showed that Mr. Lahana appeared before Mr. Harwell in six cases, representing the medical staffs of other hospitals.[23] That is why the trial court found that "Harwell's appointment as a hearing officer, six times in fifteen years in various cases does not, without more, qualify as 'successive' appointments that give rise to an inference of bias and a financial conflict of interest that might prevent him from acting impartially." (CT19:003989.)

Unlike *Haas* and *Yaqub*, the evidence concerning Hearing Officer Harwell's financial interests demonstrated that he would actually be *harmed* if he favored the Medical Staff over Petitioner. This is because Mr. Harwell never represents medical staffs and makes his living principally as an attorney representing physicians in medical staff and Medical Board matters. (CT12:002566-002568.) To preserve his reputation and livelihood, Mr. Harwell could ill afford to favor medical staffs over physician litigants.

The record also contains other evidence that Mr. Harwell was not biased. In the six matters in which Mr. Lahana represented medical staffs of other hospitals at hearings over which Mr. Harwell presided, the decisions

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[23] None of these matters involved Petitioner.

favored physicians twice and medical staffs twice; two others settled prior to decision. (CT12:002557-002715 at 002572.)

Even if Petitioner could identify some evidence to support his version of facts, the Governing Board's determination that Petitioner received a fair hearing and the trial court's decision that the Hearing Officer was not financially biased must be affirmed because they are supported by substantial evidence.

Not only is the two-pronged test of *Haas* not met in the present case, but the reasoning underlying the *Haas* rule does not apply where, as here, the hearing officer is appointed by a non-litigant on a single occasion. Under the statutory scheme, the Hospital is not a litigant in the JRC hearing or Governing Board appeal process.[24] Except for appointing the hearing officer, the Hospital does not participate in the JRC hearing process. On appeal from a hearing officer or JRC decision, the Hospital acts as the neutral decision maker, never as a litigant. Even if a hearing officer were economically motivated to please the Hospital, whose interest is in administering a fair hearing process that will not be subject to attack or reversal, that motivation would not create a bias in favor of or against either litigant.

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[24] The Hospital's role in medical staff hearings differs from that of the administrative agency in *Haas*, which both conducted the hearing and was one of the litigants.

The record establishes that substantial evidence supports the trial court's determination that Petitioner failed to prove financial bias under *Haas* and *Yaqub*. The record also establishes that Petitioner's contention, made for the first time on appeal, that Mr. Harwell was appointed by Mr. Lahana on this and prior occasions, was not proven and is untrue.

## V. THE HEARING OFFICER AND GOVERNING BOARD PROPERLY TERMINATED THE PROCEEDINGS FOR PETITIONER'S REPEATED AND WILLFUL REFUSAL TO PRODUCE CEDARS-SINAI DOCUMENTS AS ORDERED.

### A. THE HEARING OFFICER HAD THE POWER AND AUTHORITY TO TERMINATE THE JRC HEARING.

#### 1. Express Statutory and Bylaws Authority.

Contrary to Petitioner's claim, the Hearing Officer had authority under applicable statutes and case law to terminate the JRC hearing for Petitioner's violation of an order to produce documentary evidence.[25] Petitioner's argument that he was deprived of a right to have his appeal decided by a JRC panel of physicians ignores the Legislature's decision to place certain matters

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[25] Petitioner's insistence that "the Hearing Officer himself correctly acknowledged, repeatedly, that he did not have the power to enter a dispositive ruling" is disingenuous. (POB at 43.) The Hearing Officer only stated that he lacked power to make *substantive* rulings on the merits. Both parties recognized the Hearing Officer's authority to make dispositive procedural decisions. Indeed, Petitioner was the first party to demand terminating sanctions for failure to provide documents, and sought terminating sanctions repeatedly. (CT13:002716-002729, CT19:003986-003989 at 003988.)

in the hands of the hearing officer and to charge the hearing officer with the duty to administer and protect the hearing process. *Both statutory authority and case law authorize the Hearing Officer to terminate the JRC hearing for Petitioner Mileikowsky's refusal to produce documentary evidence.* Indeed, B&P §809.2(d) provides, in pertinent part: "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*." (emphasis added.)

By choosing the words "any safeguards" in 1989 and never limiting these words, the Legislature has made it clear that the power to protect the peer review process includes all actions necessary to prevent misuse or abuse, including termination of a physician's appeal.[26]

The statutory language is repeated in the Bylaws §10.3-2. (CT4:00693-000694.) Long before this dispute arose, Petitioner agreed to be bound by the Bylaws. Petitioner surely understood and agreed that the Hearing Officer had authority to terminate the hearing for misconduct, because Petitioner

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[26] The Legislature was well aware that hearings could be determined and terminated for procedural reasons by a hearing officer because civil litigation is terminated for procedural reasons, including through discovery sanctions.

repeatedly requested that the Hearing Officer grant terminating sanctions in his favor. (CT13:002716-002729 and CT19:003986-003989).[27]

### 2. *Mileikowsky II* Holds That the Hearing Officer Has Power to Terminate the Hearing.

Petitioner made his argument for limiting the power to terminate the hearing to the JRC in *Mileikowsky II*, 128 Cal.App.4th 531, and it was soundly rejected. The Court analyzed the statutes and Bylaws and determined that the hearing officer was well within his authority to impose terminating sanctions for Petitioner's misconduct. The Court's reasoning in that opinion is instructive and applies here with equal force, notwithstanding Petitioner's unpersuasive attempt to distinguish *Metadure Corp. v. United States*, 6 Cl.Ct. 61 (1984).

### 3. Other Courts Have Recognized the Hearing Officer's Power to Terminate a Hearing.

Even when power to control proceedings is not specifically enumerated in statutes and bylaws, hearing officers have "wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed." (*Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953).) The

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[27] By adopting and agreeing to be bound by the Bylaws, physicians who are or become members of the Medical Staff agree to curtail hearing rights. Public policy does not preclude agreement that hearings be dispensed with in certain circumstances. (*See Abrams v. St. Johns Hosp. & Health Ctr.*, 25 Cal.App.4th 628 (1994) (holding that hearing rights may be waived).)

hearing officer's powers may be inferred as necessary to achieve the mission with which the administrative agency or its hearing officer is charged. (*See California Drive-In Restaurant Ass'n v. Clark*, 22 Cal.2d 287, 302-303 (1943), quoting *Bank of Italy v. Johnson*, 200 Cal.1, 20 (1926) ("This authority is implied from the power granted."); *see also Laurelle v. Bush*, 17 Cal.App. 409, 415-416 (1911); *Shoults v. Alderson*, 55 Cal.App. 527, 531 (1921).)[28]

In upholding dismissal by an administrative law judge ("ALJ") of a widow's annuity claim for failure to abide by the ALJ's orders, one Court noted "[a] petitioner who ignores an order of the [presiding officer] does so at his or her peril. Litigants before the Board...are obligated to respect the Board, its procedures, including deadlines, and the orders of the Board's judges." (*Mendoza v. Merit Sys. Prot. Bd.*, 966 F.2d 650, 653 (Fed. Cir. 1992).)

The Hearing Officer's authority flows not only from the statutes and Bylaws, but also from the "inherent power to control litigation before them," in this case the hearings mandated by B&P §809 *et seq.* (*Rutherford v. Owens-Illinois, Inc.*, 16 Cal.4th 953, 967 (1997).) For this reason,

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[28] *Mileikowsky II*, 128 Cal.App.4th at 560-561, recognized that, like administrative agencies, in establishing hearing procedures, hospitals "are 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" (quoting *Cella*, 208 F.2d at 789, *citing Federal Communications Comm. v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940).)

*Mileikowsky II*, 128 Cal.App.4th at 561, holds that "[t]he power...to terminate the proceedings is an important tool that should not be denied [to hearing officers]." Limiting the power of a hearing officer to procedural matters that statutes and Bylaws place under his control addresses the difference between a hearing officer's powers and those of a federal ALJ who decides both procedural and substantive issues.[29]

Given the express language of the statute and Bylaws, the conduct of the parties and case authority, there can be no argument about the Hearing Officer's authority to order production of the Cedars-Sinai Documents and to terminate the proceeding for Petitioner's refusal to comply.

### B. TERMINATION OF THE JRC HEARING WAS A PROPER EXERCISE OF THE POWER AND RESPONSIBILITY OF THE HEARING OFFICER AND THE GOVERNING BOARD TO ENFORCE DISCOVERY ORDERS AND TO SAFEGUARD THE PEER REVIEW PROCESS.

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[29] The Legislature, through its statutory structure, chose to permit decision-making in peer review hearings to be divided between a hearing officer and a panel of physicians, much like they are divided between judge and jury in a jury trial, with the intention of allowing hospitals latitude to develop the hearing process as they saw fit within the statutory guidelines. Where, as here, the Governing Board has determined that the Medical Staff and the Hospital chose through their Bylaws to grant the Hearing Officer the power to terminate the hearing, that decision must be respected by the courts because it is not clearly erroneous or unreasonable. (*See Mileikowsky II*, 128 Cal.App.4th at 555-556, citing *Aguilar v. Ass'n for Retarded Citizens*, 234 Cal.App.3d 21, 28 (1991).)

The Hearing Officer made factual findings in his "Order Terminating Hearing for Failure of Dr. Mileikowsky to Comply with Discovery Orders," which was adopted by the Governing Board as its final action. (CT18:003814-003817.) These administrative findings were reviewed by the trial court using the independent judgment test and found to be supported by the weight of the evidence. The Hearing Officer and Governing Board's findings of fact may not be overturned because they are supported by substantial evidence.

Petitioner's insistence that he was not obligated to produce the Cedars-Sinai Documents is misplaced; and withholding them caused substantial prejudice to both the Medical Staff and the JRC. When Petitioner repeatedly refused to comply with the Hearing Officer's orders to produce the Cedars-Sinai Documents, termination of the hearing became necessary to: (a) protect the Medical Staff from the prejudice caused by Petitioner's concealment of key evidence, and (b) to safeguard the peer review process from Petitioner's abuse.[30] "Peer review, fairly conducted, is essential to preserving the highest standards of medical practice. Peer review which is not conducted fairly

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[30] The Legislature's delegation of authority to the Hearing Officer imposes on him a responsibility to the public (including patients and prospective patients), the state and the hospital, the medical staff and affected physicians to prevent abuse of the JRC hearing proceedings, including abuse by physicians who, like Petitioner, interfere with the peer review process by refusing to provide evidence necessary to determine their competence.

results in harm both to patients and healing arts practitioners by limiting access to care." (B&P §809(a)(3)-(4).)

The Cedars-Sinai Documents are relevant to the issues in the hearing because they pertain to Petitioner's medical competence, which was from the outset an issue in the JRC hearing. (CT17:003488-003505, CT18:003814-003817, CT19:003986-003989.) Denial of privileges was recommended by the Medical Staff because Petitioner had not established his competence and fitness for the privileges requested. Petitioner's appeal sought to reverse the that recommendation and have the JRC determine through its own peer review that Petitioner was competent and should be granted staff privileges. The Cedars-Sinai Documents were relevant, indeed critical, to this process.

Petitioner is incorrect in suggesting that the Medical Staff and JRC did not need the contents of the Cedars-Sinai Documents for the JRC to conduct a peer review hearing on Petitioner's competence. Petitioner bore the burden of proving his competence for obstetric privileges and the Medical Staff was entitled to obtain and introduce the Cedars-Sinai Documents to prove he was not competent. The Medical Staff bore the burden of showing lack of competence for the extension of gynecology privileges and it was also entitled to obtain and introduce the Cedars-Sinai Documents to meet that burden.[31]

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[31] Petitioner was entitled to produce evidence to the contrary.

Whether what transpired at Cedars-Sinai was medical practice below the standard of care that endangered patient health and safety (as Cedars-Sinai's report stated) or was proper medical practice, as Petitioner contended, was before the JRC throughout Petitioner's appeal.

While the charges added by amendment created additional bases for production of the Cedars-Sinai Documents, Petitioner is mistaken in suggesting that the Medical Staff and the JRC could do their job of protecting the public through a peer review process that did not include reviewing the Cedars-Sinai Documents.[32] (CT002758-002761.) The holding in *Bell v. Sharp Cabrillo Hosp.*, 212 Cal.App.3d 1034, 1048 (1989), dictates that the West Hills Medical Staff conduct peer review of the events leading to Cedars-

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[32] Petitioner's quibble about the timing of the request to produce the documents and the amendment of the Notice of Charges has no bearing on the propriety of sanctions for disobedience of the Hearing Officer's discovery order. Such amendments are not only permitted, they are common. (*See Yaqub*, 122 Cal.App.4th at 480-481 (the September 14, 2001 Notice of Charges was amended to add other charges on October 26, 2001, and again on November 27, 2001); *Weinberg*, 119 Cal.App.4th at 1104 (involving a November 1999 Notice of Charges and December 1999 Amended Notice of Charges).) Petitioner was on notice of the Medical Staff's requirement that he produce the Cedars-Sinai Documents before privileges would be granted, as well as the Medical Staff's determination that he had not demonstrated current competence which was, in part, because he refused to provide the Cedars-Sinai Documents. (*See* Civil Code §19; *Frank Pisano & Assocs. v. Taggart*, 29 Cal.App.3d 1, 16 (1972).) Moreover, Petitioner suffered no prejudice in the JRC hearing even if the challenge to his competence based on what happened at Cedars-Sinai was not raised as a charge until the amendment. (*See id.*)

Sinai's termination of Petitioner's privileges. Such peer review was a mandatory prerequisite to granting Petitioner staff privileges.

Information about the Petitioner's medical care and conduct at Cedars-Sinai and other hospitals was particularly important in assessing Petitioner's current competence and fitness for requested privileges because Petitioner used the Hospital infrequently and provided only gynecology services there. Petitioner's medical care and conduct at Cedars-Sinai and other hospitals was therefore essential to peer review assessment of Petitioner's competence, particularly with respect to new obstetric privileges.

**1. Substantial Evidence Supports the Findings of The Hearing Officer, Governing Board and Trial Court That Petitioner's Refusal to Produce the Cedars-Sinai Documents Was Willful.**

Petitioner argues that he cannot be sanctioned because his disobedience of the order to produce the Cedars-Sinai Documents was not willful. Petitioner claims that his belief that he did not have to produce the documents means that his refusal to produce them was not willful.[33] Petitioner misunderstands the requirement of willfulness. Willful simply means: "deliberate, voluntary, or

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[33] Petitioner unsuccessfully took the same position in his Encino-Tarzana hearing. (CT17:003488-003508 at footnote 5.) If Petitioner believed his position was meritorious, he would have appealed from the Hearing Officer's order, by writ if necessary; he would not have resorted to self-help by deliberately disobeying the order.

intentional"[34]; "said or done on purpose; deliberate."[35] It is undisputed that Petitioner's refusal to produce the Cedars-Sinai Documents was deliberate.

Indeed, as the Hearing Officer recognized in his order, even if Petitioner withheld the Cedars-Sinai Documents based on a good faith belief that the Hearing Officer erred in ordering them produced, Petitioner's disobedience of the order to produce the Cedars-Sinai Documents was still willful because he knew of the order, could have complied with it and made a deliberate decision not to do so. (*See Young v. Rosenthal*, 212 Cal.App.3d 96, 114-115 (1989); *Fred Howland Co. v. Super. Ct.*, 244 Cal.App.2d 605, 610-611 (1966) ("This lack of diligence may be deemed 'willful' in the sense that the party understood its obligation, had the ability to comply, and had failed to comply.").) Thus, even if Petitioner genuinely held a mistaken belief that Evidence Code Section 1157 ("Section 1157") warranted withholding the documents,[36] Petitioner intentional disobedience of the discovery order was

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[34] Dictionary.com, *Dictionary.com Unabridged (v.1.0.1)*, Based on the Random House Unabridged Dictionary, ©Random House, Inc. 2006, http://dictionary.reference.com/browse/
willful (last visited Oct. 24, 2006).

[35] Dictionary.com, *The American Heritage® Dictionary of the English Language, Fourth Edition*, Houghton Mifflin Company 2004, http://dictionary.reference.com/browse/
willful (last visited Oct. 24, 2006).

[36] It appears that Petitioner's position was an artifice, contrived to disrupt the JRC hearing, not a mistakenly held position. Petitioner never

still willful. (*See In re Ramirez*, 183 B.R. 583, 589 (B.A.P. 9th Cir. 1995) and *In re Sansone*, 99 B.R. 981, 987 (Bkrtcy.C.D.Cal., 1989) ("Not even a 'good faith' mistake of law or a 'legitimate dispute' as to legal rights relieve a willful violator of the consequences of his act."); *Union Naval Stores Co. v. United States*, 240 U.S. 284 (1916) ("He acted with full notice of the facts, and his mistake of law cannot excuse him.").)

Petitioner had a remedy to pursue any legitimate disagreement with the order to produce the Cedars-Sinai Documents. He could immediately appeal to the Governing Board and/or seek a writ of mandate. This course of action

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contacted Cedars-Sinai in 2000, 2001 or thereafter for permission to release the Cedars-Sinai Documents to the West Hills Medical Staff for peer review and did not follow up on the authorization for their release after being advised that Cedars-Sinai had not responded. This would not be the case if Petitioner were truly trying to obtain the Cedars-Sinai Documents for peer review at West Hills. (*See* footnotes 7, 37.)

appears to have been inconsistent with Petitioner's goals[37]; but willful disobedience of the Hearing Officer's order was not.

### 2. Substantial Evidence Supports the Findings of The Hearing Officer, Governing Board and Trial Court That Petitioner's Refusal to Produce the Cedars-Sinai Documents Caused Prejudice to the Medical Staff and the JRC.

Petitioner argues that there was no resulting prejudice from his disobedience of the Hearing Officer's order to produce the Cedars-Sinai

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[37] Delay and disruption of the JRC hearing appears to have been more attractive to Petitioner than a rapid examination of Petitioner's meritless objection.

Evidence Code Section 1157 provides a party who does not wish to disclose peer review information with immunity for refusing to disclose; disclosure cannot be compelled by subpoena or other legal process. But it does not prevent a physician who wishes to disclose peer review information from doing so. (*See* Section 1157(c); *W. Covina Hosp. v. Super. Ct.*, 41 Cal.3d 846, 851-855 (1986) (holding that, by its terms, Section 1157 precludes only compelled testimony, and does not create a bar against voluntary testimony); *Fox v. Kramer*, 22 Cal.4th 531, 538-539 (2000).) "Literally, section 1157 establishes an immunity from discovery but not an evidentiary privilege in the sense that medical staff records are excluded from evidence." (*Matchett v. Super. Ct.*, 40 Cal.App.3d 623, 629 n.3 (1974).) This is because, although Section 1157 is sometimes referred to as a "privilege," it is not a privilege held by a hospital or peer review body whose consent is required to waive the privilege, but rather an immunity which can be asserted or waived by each person in possession of peer review information. (*See id.*) Moreover, because the purpose of Section 1157 is to encourage full and free review of information by hospital peer review committees, (*see University of S. Cal. v. Super. Ct.*, 45 Cal.App.4th 1283, 1289 (1996)), providing the Cedars-Sinai Documents to the Medical Staff for peer review would not have waived the Section 1157 immunity and it would continue to provide protection in other circumstances. (*See* Section 1157(c); *Matchett*, 40 Cal.App.3d at 629 n.3.)

Documents because he offered to provide information he selected about what happened at Cedars-Sinai and the Cedars-Sinai Documents were available from other sources. (POB at 58-61.) Neither argument has merit.

By withholding the Cedars-Sinai Documents, Petitioner impaired the ability of the JRC to conduct a proper peer review because important information regarding Petitioner's medical incompetence was available only to Petitioner, and not to the Medical Staff or the JRC. The medical records and explanation Petitioner offered in lieu of the Cedars-Sinai Documents exacerbated, rather than alleviated, this prejudice. If Petitioner were permitted to proceed without producing the Cedars-Sinai Documents, he would be free to present a misleading or untrue version of events without rebuttal or impeachment by the Medical Staff.[38]

Petitioner's withholding of the Cedars-Sinai Documents also deprived the Medical Staff of its specific statutory and Bylaws rights to obtain evidence and prevented the Medical Staff from exercising its right and obligation under B&P §809.3 to "present and rebut evidence determined by the...[hearing]

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[38] Medical staffs commonly rely on third party records to determine whether an applicant for privileges is truthful about what transpired elsewhere. Important facts or events may have been improperly omitted from the medical records Petitioner offered, the medical records may have been falsified, and testimony of witnesses may have contradicted what Petitioner or others recorded in the medical record.

officer be relevant" regarding Petitioner's fitness to practice obstetrics or gynecology. (Bylaws §10.3-7, CT4:000694-000695.) Petitioner diminished the Medical Staff's ability to rebut evidence offered by Petitioner to meet his burden of proving his competence for obstetric privileges and impaired the Medical Staff's ability to meet its burden of proving that Petitioner's gynecology privileges should not be extended. (Bylaws §10.3-9(a), (b), CT4:000695-000696.)

Petitioner's argument that the Cedars-Sinai Documents were "available" from others misses the mark. Every applicant and reapplicant for medical staff privileges bears the burden of producing the evidence necessary for the peer review committees to evaluate his current competence. (*See* B&P §809.3(b)(3); *Oskooi*, 42 Cal.App.4th 236; Bylaws §§ 6.4-1, 6.5-3 and 10.3-9(a), CT4:000671, 000676, 000695-000696.) Unlike civil litigation, because the Medical Staff does not have subpoena power, the Cedars-Sinai Documents were not available from third parties, only from Petitioner.[39] The authority

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[39] The Cedars-Sinai Documents were available only from Cedars-Sinai and Petitioner. There is no evidence that anyone else had copies of them. Mr. Lahana's decision not to give Petitioner advice or assistance in dealing with Cedars-Sinai was neither inappropriate nor an endorsement of Petitioner's position. Petitioner (or one of his counsel) were capable of dealing with Cedars-Sinai. Mr. Lahana was under no duty to serve as Petitioner's surrogate and Petitioner could not authorize Mr. Lahana to release information that Cedars-Sinai deemed confidential and chose not to release itself.

offered by Petitioner (at POB 58-61) does not apply because the information sought by the Medical Staff was not available by other means. The cases are also inapposite because they deal with balancing issues with respect to conditional privileges, not whether terminating sanctions should be issued for Petitioner's refusal to produce critical evidence when ordered to do so.

### 3. Termination of Petitioner's Appeal Hearing Was Proper To Remedy the Prejudice Petitioner's Misconduct Caused.

The record shows far more prejudice than is necessary to impose terminating sanctions. *Lang v. Hochman*, 77 Cal.App.4th 1225 (2000), discussed and relied upon in *Mileikowsky II*, 128 Cal.App.4th at 565-566, involved a failure to fully comply with three discovery orders for production of various documents over seven months. A substantial number of the documents were produced, but not all of them. The Court issued terminating sanctions for non-compliance because Hochman's deliberate delay and incomplete document production impaired Lang's ability to prepare for trial.

The present case is more egregious than *Lang* because Petitioner did not just delay providing information; *he refused to provide any of the documents ordered*. While Lang was handicapped to some extent by the failure to produce some of the documents ordered, he received a very substantial number of documents to address the issues. Petitioner, on the other hand, prevented

the Medical Staff from obtaining and using very significant documents that went to the heart of a central issue in the JRC hearing – Petitioner's competence. In this regard, the present case is similar to *Petersen v. City of Vallejo*, 259 Cal.App.2d 757 (1968), where terminating sanctions were held to be appropriate because a plaintiff's failure to completely respond to interrogatories on the central issue of the City's negligence warranted precluding plaintiff from establishing liability.

As in *Lang*, Petitioner caused a substantial delay, in this case over the eight months between July 16, 2002, and March 27, 2003, during which time he failed to comply with multiple orders to produce the Cedars-Sinai Documents. (CT15:003039-003047, CT16:003412-003426 and CT17:003484-003487.) In *Lang*, Hochman made his decision not to comply with the last order for document production after the court's consideration and denial of terminating sanctions in its third order. Here, Petitioner made a deliberate decision not to comply with the orders after several requests for terminating sanctions resulted in two orders advising Petitioner that terminating sanctions would be imposed if he failed to produce the documents by a fixed date.

The court's discretion to order terminating sanctions has been held not to be an abuse of discretion in circumstances far less egregious. (*See, e.g., Calvert Fire Ins. Co. v. Cropper*, 141 Cal.App.3d 901 (1983) (violation of a

single order to answer interrogatories and produce documents after previously receiving four extensions totaling 71 days); *Williams v. Travelers Ins. Co.* 49 Cal.App.3d 805 (1975) (partial, but not full compliance with three orders to answer interrogatories and failure to pay monetary sanctions over a period of six months); *Cornwall v. Santa Monica Dairy*, 66 Cal.App.3d 250 (1977) (failure to respond to a single order to answer interrogatories within 30 days).)

**4. Termination of the Hearing Was A Necessary Safeguard to Protect the Peer Review Process.**

The trial court found that Petitioner's refusal to produce the Cedars-Sinai Documents "prevented the JRC from properly performing its function of evaluating his fitness to practice." (CT19:003986-003989 at 003988.) For that reason, the court concluded that termination was an appropriate safeguard under B&P §809.2(d) and Bylaws §10.3-2(c), as well as an appropriate sanction. (CT4:000693-000694.)

**5. Reversal Is Not Required to Consider Lesser Sanctions.**

Petitioner incorrectly contends that termination of the hearing must be reversed because no lesser sanction was considered. (*See* POB at 64-68.) Petitioner waived this argument because he failed to raise it below and it cannot be raised now, for the first time, on appeal. (*See* Section VI.) Petitioner argued only that the Hearing Officer's power to address disobedience of his order to produce the Cedars-Sinai Documents was limited

to continuing the hearing.[40] Petitioner proposed no other sanction to the Hearing Officer, the Governing Board or the trial court. (*See id.)*

The argument is also incorrect on the merits. Lesser sanctions *were* considered. The Hearing Officer's decision considers and rejects issue preclusion because the effect would be the same as termination. (CT17:003488-003508 at 003496.) A determination that Petitioner could not establish medical competence requires that privileges be denied.

Like a determination that Petitioner failed to establish his competence, a determination that Petitioner failed to provide information and failed to cooperate in peer review requires an adverse termination of Petitioner's appeal. Issue preclusion eliminates all bases for the JRC to reverse the Medical Staff on these charges, and *Webman v. Little Co. of Mary Hospital*, 39 Cal.App.4th 592 (1995), holds that it is proper to deny privileges for these reasons.[41] Moreover, an applicant is deemed to have accepted the adverse recommendation of the Medical Staff when the basis for the denial recommendation is not challenged. (*See* Bylaws §10.1-1, CT4:000689.)

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[40] A continuance was not a sanction because it would have rewarded Petitioner for his misconduct.

[41] Petitioner argued to the trial court that the issues had to be submitted to the JRC. Such idle acts are not required. (*See* Civil Code §3532.)

A failure to consider a lesser sanction is harmless error unless there was an appropriate lesser sanction which was required to be adopted. In this case, there was no appropriate lesser sanction because none could remedy the harm caused by Petitioner's refusal to produce the Cedars-Sinai Documents. Indeed, Petitioner's failure to propose to the Hearing Officer, the Governing Board or the trial court even a *single* lesser sanction that would remedy the harm caused by Petitioner is telling.[42]

### 6. Whether Petitioner Behaved Less Egregiously Than in *Mileikowsky II* Is Not The Test for Terminating Sanctions.

Petitioner incorrectly argues that terminating sanctions are only appropriate where there have been severe and repetitive incidents of misconduct as in *Mileikowsky II*. Whether Petitioner disobeyed fewer Hearing Officer orders and was less disruptive than he had been in *Mileikowsky II* is not the test.

In *Mileikowsky II*, the Court reviewed several incidents of misconduct which showed both that Petitioner's misconduct was willful, and that it was part of a deliberate effort to prevent fair peer review. (*See Mileikowsky II*, 128 Cal.App.4th at 565-566.) The Court recognized that even if a lesser sanction

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[42] Petitioner was not deprived by the Hearing Officer of the opportunity to address sanctions; he made a strategic decision not to do so. (*See* footnotes 7, 14.)

could adequately remedy a particular incident of misconduct, only termination of the hearing could stop Petitioner from preventing a fair hearing.

Petitioner makes light of the findings of the Hearing Officer and Governing Board about the need for and violation of multiple orders to: (a) prohibit Petitioner from tying up people's telefaxes for hours with lengthy diatribes, (b) deal with Petitioner's repeated refusal to produce the Cedars-Sinai Documents, and (c) address Petitioner's many months of delay. These facts support the determination that Petitioner's disobedience of the Hearing Officer's order was willful and that Petitioner deliberately engaged in misconduct to prevent a fair hearing. No lesser sanction than termination could effectively remedy Petitioner's effort to prevent a fair hearing and proper peer review.[43]

### 7. Petitioner's Claim that He Can Suppress the Cedars-Sinai Documents Under *Webman* Is Dishonest.

Petitioner suggests that the scenario he contrived avoids the rule in *Webman* or is distinguishable from it. The rule in *Webman* is that a physician is required to cooperate in peer review and must provide all requested materials that are available. (*See Webman*, 39 Cal.App.4th 592.) While *Webman* makes it clear that this includes materials in the hands of a third party

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[43] Even the Hearing Officer's threat to terminate the hearing for Petitioner's non-compliance was insufficient to cause Petitioner to produce the records.

which can be obtained by giving a written authorization, nothing in *Webman* suggests that a physician may refuse to deliver documents in his own possession to manipulate what evidence the Medical Staff and JRC may examine.

As the trial court commented, "Petitioner has no right to demand that the hearing take place only on his terms and conditions and the JRC consider only the evidence that Petitioner felt was relevant." (CT19:003986-003989 at CT003988.)

Further, *Webman* does not shift the burden of obtaining third party records from Petitioner to the Medical Staff. (*See id.*) Doing so would place an inordinate burden on the Medical Staff as it processes hundreds of applications for staff privileges. As discussed (at p. 39) above, the burden is on each physician to provide information regarding his own application, information with which the physician is already familiar. Petitioner's criticism of the Medical Staff's pursuit of the records from Cedars-Sinai should be directed to himself. Petitioner made no effort to obtain the records from Cedars-Sinai after he was told that Cedars-Sinai did not respond to his authorization.[44]

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[44] Petitioner's Opening Brief contains yet another factual fallacy. (POB at 17.) The Brief claims that he provided a second signed authorization to release the Cedars-Sinai Documents in January of 2003 and that the Medical Staff did not submit the second authorization to Cedars-Sinai. (CT14:002919-

The *Webman* court's advice about providing alternative sources of information was directed to situations where records were truly unavailable, not to situations like *Webman* and the present case where the unavailability of records was manufactured by the physician.

The Hearing Officer, the Governing Board and the trial court determined that termination of the proceeding was the proper remedy for Petitioner's refusal to produce the Cedars-Sinai Documents. *Webman* supports that decision. (*See also Bell*, 212 Cal.App.3d at 1048 (holding that in evaluating a physician's fitness to practice, a hospital cannot simply ignore another hospital's termination of a physician's privileges).)

## VI. PETITIONER IS PRECLUDED FROM MAKING CHALLENGES NOT RAISED IN THE TRIAL COURT.

Petitioner's Opening Brief contains two challenges to the Governing Board's decision which were not raised in the trial court. Petitioner argues that Mr. Helton, the hearing officer for the Governing Board hearing was biased.[45]

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002960.) No second authorization was ever provided. The letter cited by Petitioner refers only to the authorization given in 2000, which was submitted to Cedars-Sinai, and to which Cedars-Sinai did not respond. The letter also fails to explain why Petitioner took no action to obtain the records from Cedars-Sinai after being told in writing that Cedars-Sinai did not produce them and that privileges would not be granted unless they were produced.

[45] Petitioner's failure to make any cognizable argument or specify any facts to support his contention constitutes a waiver of the issues on appeal. (*See Interinsurance Exch. v. Collins*, 30 Cal.App.4th 1445, 1448 (1994) ("Parties are required to include argument and citation to authority in their

(POB 23, 24.) Petitioner argues that a fair hearing before the Governing Board does not remedy bias of Hearing Officer Harwell. (POB 40-41.) Neither of these arguments were made to the trial court. (CT1:000008-000046, CT18:003858-003884 and RT:4/15/05 RT:5/27/05.)

The case law is clear that Petitioner may not raise new matter for the first time on appeal. (*See, e.g. In re Aaron B.*, 46 Cal.App.4th 843, 846 (1996) ("[A] party is precluded from urging on appeal any point not raised in the trial court."); *Norgart v. Upjohn Co.*, 21 Cal.4th 383 at 403 (1999) (doctrine of invited error).) The portions of Petitioner's Opening Brief devoted to these arguments should be disregarded and Petitioner should not be heard on these arguments at all.

## VII. BECAUSE THE GOVERNING BOARD'S DECISION WAS THE PRODUCT OF A FAIR HEARING, IF THERE WERE ERRORS MADE IN THE SELECTION OF THE HEARING OFFICER OR IN HIS DECISIONS THEY ARE HARMLESS AND DO NOT REQUIRE REVERSAL.

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briefs, and the absence of these necessary elements allows this court to treat appellant[s'] [contentions] as waived"); *Berger v. Cal. Ins. Guar. Ass'n*, 128 Cal.App.4th 989, 1007 (2005); Cal. Rules of Court 14(a)(1)(B).) No evidence at all supports a claim to disqualify Mr. Helton for financial bias under the two-pronged test of *Haas* and *Yaqub*. Reference to a website printout (which does not appear at P003882-3883) in which a hospital executive recommends Mr. Helton is not evidence of Mr. Helton acting adversely to Petitioner or having a reason to do so. The adverse litigants in the peer review hearings where Petitioner lost privileges were not hospital executives or the hospital, but medical staffs which are distinct self-governing organizations of physicians.

Since the Governing Board's decision was based on its own independent review of the facts and circumstances, if there was an error in the selection of the Hearing Officer or in the Hearing Officer's decision, it is harmless error. The Governing Board's decision, based on its independent assessment of the evidence, trumps whatever a JRC or Hearing Officer decided or might decide. (*See Weinberg*, 119 Cal.App.4th at 1109-10; *Hongsathavij*, 62 Cal.App.4th at 1135-7.)

California's statutory decision-making scheme permits the Governing Board to conduct a hearing, make an independent review of the evidence and apply its independent judgment to reach a final decision. (*See* B&P §809.4(b).) Where, as here, the Governing Board conducted such a hearing, Petitioner has received the hearing he is entitled to by statute. This is true even if there was a flaw in the selection of the Hearing Officer or the Hearing Officer's decision to terminate Petitioner's appeal because the later Governing Board's decision supercedes the recommendation of the Hearing Officer. It is the decision of the Governing Board, not the decision of the Hearing Officer, that becomes the final (administrative) decision of the Hospital. (*See* B&P §809 *et seq.*) This is consistent with administrative case law holding that the decision of a superior tribunal that reviews evidence and makes its own judgment is not subject to reversal for an error made by an inferior tribunal. (*See Elnager v. U.S.I.N.S.*, 930 F.2d 784 (1991) (Immigration Law Judge's

decision superceded by BIA *de novo* review); *compare Yepes-Prado v. U.S.I.N.S.*, 10 F.3d 1363 (1993) (Immigration Law Judge's decision not superceded where review by BIA was not *de novo* review).)

Apart from the two challenges raised for the first time on appeal, which must be disregarded for the reasons discussed above (*see* Section VI), Petitioner's appeal does not challenge the actions of the Governing Board.[46] Where, as here, the Governing Board, a superior tribunal, conducts a hearing which complies with statutory requirements and minimum due process, the final decision is a result of a fair administrative hearing. This is true regardless of whether what transpired in an earlier hearing before an inferior administrative tribunal was imperfect or incorrect because the superior tribunal's fair hearing and decision supercedes those of the inferior tribunal.

B&P §809.4(b) recognizes the Governing Board's jurisdiction to review whatever occurs during a JRC hearing governed by B&P §809.2 *et seq.* Petitioner is incorrect in asserting that this appeal entailed only limited evidentiary review.[47] B&P §809.4(b) provides that the review may be *de novo.*

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[46] Such a challenge may not be raised for the first time in Petitioner's Reply. (*See, e.g., Campos v. Anderson*, 57 Cal.App.4th 784, 794 (1997); *Reichardt v. Hoffman*, 52 Cal.App.4th 754, 764 (1997); *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 78 Cal.App.4th 847, n.10 (2000).)

[47] Petitioner misconstrues Mr. Helton's pre-hearing letter which pointed out that since the entire record of what transpired below was submitted

The Governing Board's written decision states that it is based on the Governing Board Committee's own "review of the information presented, including exhibits, documentation and rough draft hearing transcripts,[48] oral argument and briefs submitted by the parties...."[49] (CT18:003814-003817.)

The Governing Board's decision also shows that it weighed the evidence and applied its own, independent judgment:

> the Committee, using its independent judgment, unanimously found that:
>
> 1. Dr. Mileikowsky was afforded a fair hearing procedure in substantial compliance with the Medical Staff Bylaws;
> 2. Further, the Committee of the Governing Board unanimously found that the decision of the Hearing Officer in dismissing the appeal of Gil Mileikowsky, M.D., was reasonable and warranted and supported by the weight of the evidence....

(CT18:003814-003817.)

There is substantial evidence to support the trial court's finding, "In any case, the Governing Board, upon independent *de novo* review, adopted the

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to the Governing Board as evidence, that evidence need not be taken again before the Governing Board.

[48] The parties submitted draft transcripts as their record rather than pay additional money to the Court Reporter to create a final version.

[49] Petitioner, represented by counsel, submitted evidence and a lengthy brief that the Governing Board Committee accepted and considered despite the fact that they were untimely. (CT18:003764-003808.) The Governing Board asked for and received additional evidence. (CT17-18:003643-003763 at 003748-003749.)

Hearing Officer's decision as its final decision.... [It was not a 'rubber stamp' of the Hearing Officer's determination that terminating sanctions were proper, but another hearing in which Petitioner had an opportunity to argue his position." [emphasis supplied] (CT19:003989.) Petitioner concedes as much by complaining that the Governing Board took additional evidence. (POB at 20-21.) When the Governing Board weighs evidence and applies its independent judgement to evidence which was not limited to the evidence before the hearing officer and includes additional evidence that was *not* before the Hearing Officer, the Governing Board conducts a *de novo* review.

Thus, the Governing Board's decision from this second hearing superceded what transpired before the Hearing Officer in the first hearing and stands on its own as the decision of the Hospital. Because the second hearing was a *de novo* review by an unbiased Governing Board panel, the trial court properly found that, even if there was a flaw in the selection or recommendation of the Hearing Officer, it did not affect, the decision made at the second hearing.

Although Petitioner conceded this point in the trial court, for the first time on appeal Petitioner claims that *Haas* and *Hackethal v. California Medical Ass'n*, 138 Cal.App.3d 435 (1982), require a different conclusion.[50] This is not

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[50] In *Yaqub*, the superceding effect of the Governing Board hearing was not raised by the Respondent, and the Court concluded at least one of the

so. If, contrary to the well-established precedent discussed at Section VI, the Court permits Petitioner to raise new matters for the first time on appeal, review of these cases discloses that the *de novo* fair hearing review which occurred before the West Hills Governing Board did not occur in *Haas* or *Hackethal*. [51]

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challenges Yaqub made to the Governing Board hearing (the Governing Board's use of the attorney who represented the Medical Staff in the JRC proceeding to advise the Governing Board in the second hearing) was meritorious.

[51] The second hearing in *Haas* was before the San Bernardino County Board of Supervisors and there was no showing that the second hearing involved an independent *de novo* review including the taking and weighing of new evidence. For that reason it did not remove the impact of hearing officer bias.

*Hackethal*, which *Haas* relied upon, recognized at 445: "The power of an agency to review lower administrative decisions and to affirm, modify or reverse the decision made at a lower level is supported." The reason the California Medical Association's ("CMA") approval of the San Bernardino County Medical Society's expulsion of Hackethal was held "not to have a curative effect sufficient to sustain petitioner's expulsion" was because the record and second hearing did not meet minimum due process.

The issues in *Hackethal* included over-prescription of medications, ordering unnecessary laboratory tests and overbilling which depended on the credibility and demeanor of witnesses. The record showed that there were a number of private executive sessions at which Hackethal was not present, that he did not know the identity of or have the right to confront his accusers and cross-examination had not been permitted. The record also showed that Hackethal had been denied discovery. The record demonstrated that the evidence was, at best, incomplete because Hackethal had been precluded from obtaining and putting on certain evidence. The CMA hearing consisted of its review of the inadequate record. The CMA did not order the discovery that had been denied and did not take the additional evidence that would have been necessary to cure the errors made in the first hearing. As a result, the failure to meet minimum due process in the first hearing was continued into the second hearing.

No purpose would be served by sending this matter back to another JRC hearing. Reenacting the events that led to termination of the hearing would take time and money and cause further delay, all to the detriment of the parties and the public's confidence in the peer review process and its integrity. The evidence concerning termination of the hearing was all in the form of letters between the parties and the Hearing Officer, evidence which could be as readily reviewed and weighed by the Governing Board as by another Hearing Officer. Petitioner had made it abundantly clear that he would not produce the Cedars-Sinai Documents even if his appeal was dismissed, having pursued that course in this matter and in his Encino-Tarzana hearing. The matter would ultimately had to be decided by the Governing Board because Petitioner challenged the Hearing Officer's authority to terminate the hearing. The Governing Board had ultimate authority to decide these matters even if the Hearing Officer did not.[52]

Under these circumstances, the most expeditious way of reaching a decision through a fair hearing process was for the Governing Board to hear this matter *de novo* by independently reviewing the evidence, taking and independently reviewing additional evidence, allowing briefs and argument by each party's counsel and making a decision based on its own independent judgment. By doing so, the Governing Board produced a decision free of the

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[52] *See Weinberg*, 119 Cal.App.4th at 1109-10.

flaws Petitioner alleged. Thus, there is substantial evidence which supports the trial court's findings that the Governing Board hearing was a second, independent hearing and that the second hearing met statutory requirements and minimum due process and was free of the complaints Petitioner raised.

## VIII. BY FAILING TO CHALLENGE INDEPENDENT BASES FOR THE TRIAL COURT'S DECISION, PETITIONER HAS CONCEDED THAT THE JUDGMENT MUST BE AFFIRMED.

Not only did the trial court determine that Hearing Officer Harwell was not biased and that he acted properly and within his authority in terminating the hearing, it also held for Respondents on other, independent grounds:

> Additionally, it was Petitioner's burden to establish his qualifications in the first instance in May of 2001. He did not provide all information required for adequate review of his application. Although Petitioner was informed his privileges would no longer be extended, he did not file this action until 8/19/04. Thus Petitioner has been without any peer review at West Hills since 2001 and ordering his reinstatement would violate numerous laws and expose patients and the hospital to risks due to Petitioner's fitness to practice and qualifications not having been evaluated as required by law.

(CT19:003986-003989 at 003989.)

The trial court thus found for Respondents on several of the defenses raised,[53] including laches, waiver, acquiescence, illegality, public policy and proper denial of privileges on alternative bases not requiring a hearing

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[53] The defenses were raised below. (RMB, CT8:001539-001580 at CT8:001575-001580.)

(specifically, Petitioner's incomplete application). (*See Oskooi*, 42 Cal.App.4th at 245 (privileges denied for incomplete application); *see also* RMB CT8:001539-001580 at CT8:001573-001580.)

Petitioner has waived any challenge to these bases for the trial court's decision by failing to challenge them in his Opening Brief. (*See* footnote 46.) Accordingly, the trial court's judgment must be affirmed on the unchallenged bases, regardless of whether Petitioner's bias and sanctions arguments have merit.

For sound policy reasons, state and federal laws and JCAHO accreditation rules require that hospitals police physician quality through peer review of each physician's *current* competence at least every two years. By acquiescing to the loss of privileges for two years before beginning his current challenge, Petitioner avoided such peer review. Moreover, Respondents have no information with which to assess Petitioner's *current* medical competence other than information that is more than four years old. Under these circumstances, the Hospital could not comply with federal and state laws and JCAHO accreditation requirements, and the public and the Hospital would not be protected, by resumption of the terminated JRC hearing.

Laches, waiver, illegality and public policy all dictate denial of the Petition because Petitioner prevented peer review for four years. Petitioner's tardy complaints must give way to the policy of protecting the public by

requiring peer review approval of a physician's *current* competence before privileges are granted or extended.

## IX. CONCLUSION

For the foregoing reasons, Petitioner's appeal should be denied.

DATED: October 30, 2006

FENIGSTEIN & KAUFMAN
a Professional Corporation

By RON S. KAUFMAN
NINA B. RIES
for Respondents West Hills Hospital & Medical Center and Medical Staff of West Hills Hospital & Medical Center

**CERTIFICATE OF WORD COUNT**
**(Cal. Rules of Court, rule 14(c)(1))**

The text of this brief consists of 13,546 words as counted by the Corel WordPerfect version 12 word-processing program used to generate the brief.

DATED: October 30, 2006

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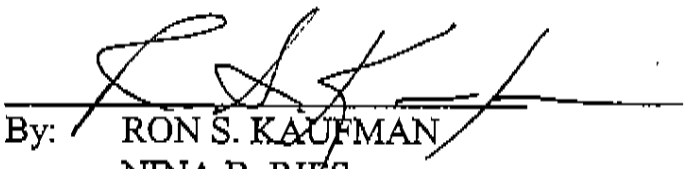

By: RON S. KAUFMAN
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for Respondents West Hills Hospital & Medical Center and Medical Staff of West Hills Hospital & Medical Center

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Exhibit A

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| 03839 | 003637 | 17 |
| 03840 - 03841 | 003638 - 003639 | 17 |
| 03842 | 003640 | 17 |
| 04037 - 04157 | 003643 - 003763 | 17 - 18 |
| 04158 - 04202 | 003764 - 003808 | 18 |
| 04208 - 04212 | 003809 - 003813 | 18 |
| 04269 - 04272 | 003814 - 003817 | 18 |
| 04273 - 04279 | 003818 - 003824 | 18 |