April 25, 2007

To: The Honorable Justices of the Court of Appeal
Second Appellate District, Division 8
Second Floor, North Tower
Los Angeles, California 90013

Re: *Mileikowsky v. West Hills Medical Center*, No. B186238

This letter brief responds to the Court's inquiry of April 12, 2007. That inquiry asked the following question:

> Business and Professions Code section 809.2, subdivision (b) provides that the hearing officer shall not be entitled to vote. What effect, if any, does this provision have on the power of the hearing officer to terminate the hearing convened under Business and Professions Code 809.2?

The short answer to this question is: under California administrative law, section 809.2(b) is a clear expression of the Legislature's intention that the hearing officer would not have the power to enter dispositive rulings. This letter brief will discuss the reasons for this conclusion.

The Legislature's determination that the hearing officer in a section 809.2 proceeding would not be entitled to vote was very much a deliberate choice. The federal Health Care Quality Improvement Act of 1986 (HCQIA) (42 U.S.C. §§ 11101 *et seq.*) establishes the default procedures for peer review that apply in the absence of contrary state law. Under the federal scheme, the hearing can take place before a mutually-selected arbitrator, a panel of individuals, or a hearing officer. (42 U.S.C.

§ 11112(b)(3)(A)). However, the California Legislature opted out of HCQIA "[b]ecause of deficiencies in the federal act and the possible adverse interpretations by the courts of the federal act . . . ." (Bus. & Prof. Code § 809(a)(2)). Instead, the California Legislature delineated a procedure under which the hearings could proceed only before a mutually-agreed arbitrator or a panel of individuals, but not a hearing officer. (Bus. & Prof. Code § 809.2(a).) A hearing officer may be but need not be appointed to assist the panel of individuals; if a hearing officer is appointed for this purpose, he or she "shall not be entitled to vote." (Bus. & Prof. Code § 809.2(b).)

The Legislature's statutory command that the hearing officer "shall not be entitled to vote" is a strong directive that the outcome of a peer review proceeding is to be determined solely by the panel conducting the hearing, and not by the hearing officer. More broadly, it is a key implementation of the statute's central policy: "It is the policy of this state that peer review be performed by licentiates." (Bus. and Prof. Code § 809.05.)

Although California's general administrative law embraces a variety of hearing procedures, adjudicatory schemes in which the hearing officer is entitled to vote appear to be rare. For example, under Education Code section 44944(b)(1), an administrative law judge serves as a voting member of an *ad hoc* Commission on Professional Competence.

Many if not most administrative proceedings in California are conducted pursuant to California's Administrative Procedure Act (APA). (Govt. Code § 11340 *et seq.*) The APA provides that an administrative law judge will preside over all adjudicatory hearings. (Govt. Code § 11517(a)-(c).) Such an administrative law judge has much broader responsibilities than a Business and Professions Code section 809.2 hearing officer. In particular, an APA administrative law judge can hear the case alone, in which case he or she will prepare a proposed decision that the agency may adopt. (Govt. Code § 11517(c)(1).) Alternatively, in a procedure more closely akin to the one outlined in Business and Professions Code section 809.2, the administrative law judge can sit with the agency and "assist and advise the agency in the conduct of the hearing." (Govt. Code § 11517(b)(1).) Regardless, it is the members of the administrative panel who vote on the outcome.

Consequently, even though proceedings under Business and Professions Code section 809 *et seq.* are not conducted under the APA, the APA can provide some insight into the powers that a hearing officer who is not entitled to vote on the outcome might wield. Practice under the APA makes it clear that a hearing officer who is not entitled to vote on the final outcome of a proceeding will likewise be barred from making a dispositive ruling before the proceeding is concluded.

A good analysis of the issue appears in *Automotive Management Group, Inc. v. New Motor Vehicle Bd.* (1993) 20 Cal.App.4th 1002. (This was a protest proceeding under Vehicle Code § 3066, which incorporates the hearing procedures of the APA by reference.) In that case, an administrative law judge dismissed an administrative claim summarily because, under the undisputed facts, the claim was untimely. On a petition for writ of administrative mandamus, the trial court affirmed the dismissal as supported by substantial evidence. (*Id.* at 1009.) On appeal, the court of appeal rejected the petitioner's contention that the agency lacked the power to enter a summary dismissal of an untimely claim. (*Id.* at 1012.)

Nevertheless, the court of appeal reversed. The problem was that the administrative law judge and not the administrative panel had made the dispositive decision to dismiss the case. The court first noted that only the administrative panel, and not the hearing officer, was entitled to vote on the outcome of the proceeding: "there is no reference to the hearing officer in the portion of the statute referring to 'decision.'" It was therefore reversible error for the hearing officer to dismiss the case. (*Id.* at 1014-15.) Specifically, reversal was required because the administrative panel "never exercised any discretion with regard to [the respondent's] motion to dismiss because the motion to dismiss was determined solely by the ALJ [administrative law judge]." (*Id.* at 1015.)

Thus, a leading practice guide cautions:

> If the matter has already been assigned to the OAH [Office of Administrative Hearings], and the ALJ believes that there are grounds for a dismissal before hearing all the evidence . . ., the ALJ may make

> a proposed order to dismiss. . . . *The agency must make the ultimate decision about whether to dismiss the administrative action.*

(California Administrative Hearing Practice, 2nd Ed. at § 6.84 (CEB 2006).)

West Hills' administrative procedure differs from the APA in that it allows a further administrative appeal to the Board of Trustees after the panel of individuals – the "Judicial Review Committee" – makes its decision. (Bylaws at 41-43, AR P003864-66.) But that distinction makes no difference. The Board of Trustees determined only that the Hearing Officer, who was not entitled to vote on Dr. Mileikowsky's fate, had not abused his discretion – i.e., that his decision was "reasonable and warranted." (Findings and Decision, AR P003815.) The members of the Judicial Review Committee, who should have been entitled to vote, were never appointed, let alone permitted to vote. As in *Automotive Management Group*, reversal is required for the reason that a panel that should have been voted on Dr. Mileikowsky's fate "never exercised any discretion with regard to the [MEC's] motion to dismiss because the motion to dismiss was determined solely by the [Hearing Officer]." (20 Cal.App.4th at 1015.)

Further to the same point, the APA does not allow administrative law judges to determine the outcome of a proceeding when they enforce discovery orders. Prior to 1995, motions to compel discovery in administrative proceedings had to be brought in Superior Court. In that year, the Legislature amended Government Code Section 11507.7 to provide that discovery motions would be brought before administrative law judges. Specifically, the amended statute states: "Any party claiming the party's request for discovery . . . has not been complied with may serve and file with the administrative law judge a motion to compel discovery, naming as respondent the party refusing or failing to comply . . . ." (Govt. Code § 11507.7(a).)

However, in keeping with the principle that the administrative law judge, who cannot vote on the final disposition of the case, may not terminate the case, the Legislature pointedly did not give the administrative law judge the power to enter dispositive discovery rulings. Rather, the Legislature confined the administrative law judge's power to ordering production of the discovery – an order that can only be

enforced in superior court through a contempt motion – and to imposing monetary sanctions. The Law Revision Commission explained the statutory scheme as follows:

> An order of the administrative law judge compelling discovery is enforceable by certification to the superior court of facts to justify the contempt sanction. [Government Code] Sections 11455.10-11455.20. . . . The administrative law judge may also impose monetary sanctions for bad faith tactics, which are reviewable in the same manner as the decision in the proceeding. [Government Code] Section 11455.30.

25 Cal.L.Rev.Comm. Reports 711 (1995).

California administrative law thus carries a clear commandment that directly relates to Business and Professions Code section 809.2(b)'s restriction that the hearing officer is not entitled to vote. That commandment is: a hearing officer who is not entitled to vote on the final outcome of the proceedings is *a fortiori* not empowered to enter a ruling terminating the proceeding, for a discovery fault or for any other reason.

Sincerely yours,

Charles M. Kagay