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OUR FILE NO. 22002A.04

April 26, 2007

BY HAND DELIVERY

Office of the Clerk
Court of Appeal for the State of California
Second Appellate District
Second Floor, North Tower
300 South Spring Street
Los Angeles, California 90013

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

Your Honors:

The Court has requested letter briefs from the parties to address what effect, if any, the language of Business and Professions Code ("B&P") §809.2(b), stating that the hearing officer "shall not be entitled to vote," has on the power of the hearing officer to terminate a hearing. For the reasons discussed below, Appellees West Hills Hospital & Medical Center and Medical Staff of West Hills Hospital & Medical Center ("Respondents") respectfully submit that the limitation on voting has no effect on the hearing officer's power to terminate the hearing. To hold otherwise would put various sections of the statute in conflict with one another rather than harmonize them, and would require reversal of at least one Court of Appeals decision.

As explained in greater detail below, the statute authorizes the hearing officer to make legal and procedural ***rulings*** and recognizes such decisions to be the province of the hearing officer. In *Mileikowsky v. Tenet Healthsystem*, 128 Cal. App.4th 531, 560 (2005) ("*Mileikowsky II*"), the Court of Appeals recognized that the hearing officer had inherent authority to make legal and procedural rulings that were not expressly authorized by the statute and to terminate the proceeding for repeated disobedience of those rulings. The limitation on ***voting,*** on the other hand, restricts the hearing officer's participation in the deliberations and decision of the panel of physicians who are, according to B&P §809.2(a), the "trier of fact" and make their decision by voting. The statute thus distinguishes between decisions that are to be made by vote of the physician panel, which acts as the trier of fact, and other decisions on which the hearing officer is empowered to make rulings.

To some extent, the statutory scheme under §809 *et seq.* may be analogized to the division of responsibility between judge and jury in a jury trial. The hearing officer, usually a lawyer or retired judge with expertise in these areas, makes procedural and legal decisions, somewhat like a judge. In §809.2, the Legislature refers to hearing officer decisions as "rulings."[1] According to §809.2(a), the hearing panel, consisting of physicians who perform the actual "peer review" of the challenged decision or recommendation, is the "trier of fact." In §809.2, the Legislature recognized that, like a jury, the physicians who collectively are the trier of fact make their decision by "voting." In the words of the statute, triers of fact "vote" while hearing officers issue rulings. The hearing officer is not permitted to vote on matters to be determined by the trier of fact because the hearing officer is not a trier of fact. As further explained below, the limitation on voting thus affects only the decisions to be made by the trier of fact. It has no effect on rulings to be made by the hearing officer or his power to terminate the hearing.

Under §809.2(b), the demarcation of responsibility between the hearing officer and the trier of fact differs to some degree from that of a judge and jury. For sound practical reasons, §809.2(b) permits some hearing officer participation in the activities of the trier of fact, but places a limit on that participation by stating that the hearing officer may not vote. Only the panel members, who are generally physicians, may vote. Thus, while the physician panel may request assistance from the hearing officer, the hearing officer's participation is limited. The hearing officer may give advice about legal issues and help the panel of physicians prepare a written decision that meets the statutory requirements of B&P §809.4, but he cannot vote.[2] The medical decision thus remains within the province of physicians.

As the *Mileikowsky II* Court noted, in rejecting the suggestion that all decisions had to be made by the panel of physicians, this division of responsibility between the hearing officer and the panel of physicians is both reasonable and efficient, and as a practical matter, the participation of the hearing officer may be necessary to enable busy physicians to accomplish peer review and issue the

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[1] *See* §809.2, subdivisions (d) and (e). "The arbitrator or presiding [hearing] 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." §809.2(d) (emphasis added). "When ***ruling*** upon requests for access to information and determining the relevancy thereof, the arbitrator or presiding [hearing] officer shall, among other factors, consider the following...." §809.2(e) (emphasis added).

[2] Given the requirements of §809.4(a)(1), physician panelists will request and need the assistance of the hearing officer in documenting their decision and the reasons for it.

written decisions as mandated by the statute. In the view of the *Mileikowsky II* Court, requiring the physician panel to make procedural decisions is unworkable. *Mileikowsky II* at 560-562.

With respect to procedural issues, both the statute and *Mileikowsky II* make it clear that the hearing officer is authorized to make rulings on such matters. With respect to the decision of the trier of fact, the hearing officer is permitted to assist the physician panel in complying with §809.4, but his participation is limited to providing the physician panel with necessary assistance to enable the physician panel to carry out its decision-making responsibility as the trier of fact. The statutory prohibition against the hearing officer voting directs both the physician panel and the hearing officer to recognize that the hearing officer is not a member of the hearing panel or a trier of fact. For that reason he cannot vote on what decision should be made by the trier of fact. The hearing officer's role is thus limited to assisting the physician panel in fulfilling their responsibilities as the trier of fact. The limitation on voting thus affects only the decisions within the province of the trier of fact, not the hearing officer's rulings on matters which are within his province of authority.

The foregoing analysis of the voting limitation is consistent not only with the division of responsibility under the statute, but also with the statutory scheme of placing medical decisions in the hands of physicians because of their particular expertise. On the other hand, physicians have no particular expertise in the procedure of hearings or legal issues or the drafting of the hearing panel's written decision "including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached." §809.4(a)(1). The statute therefore allows a hospital to place responsibility for those issues in the hands of a hearing officer, as was the case here.

This division of responsibility also is consistent with the statutory purpose of giving hospitals and their medical staffs broad discretion about how peer review is conducted subject only to certain minimum requirements. *See Mileikowsky II* at 555 (citing *Aguilar v. Association for Retarded Citizens*, 234 Cal.App.3d 21, 28 (1991)). The legislative history also supports this flexibility. Governor Deukmejian vetoed legislation which imposed a series of procedural rules lest peer review be prevented or sidetracked.[3] The Legislature responded by permitting broad discretion to hospitals

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[3] In a letter from Governor Deukmejian accompanying his veto of Senate Bill 2565, he explained, "I am concerned that under this bill it will take longer and be more costly for health facilities and peer review bodies to take action against a licensee's staff privileges. This means an incompetent licensee will be practicing unrestricted that much longer, and it will be longer before a report is made to the appropriate licensing boards under Section 805 of the Business and

and their medical staffs to adopt the processes they found effective through their own bylaws, rules and regulations.

Since *Mileikowsky II* was published in April of 2005, neither the Legislature nor any Court has sought to deprive hearing officers of the power to terminate the proceeding, as surely would be the case if that power were intended to be limited by the prohibition in §809.2(b) against the hearing officer voting.

If the Legislature had intended to limit hearing officers from making procedural and legal rulings, the restriction would not be against "voting" but against making "rulings." Any attempt to judicially expand the prohibition against "voting" into a prohibition against making "rulings" would run afoul of the specific language of §809.2, subdivisions (d) and (e) (quoted at footnote "1" above). Since the hearing officer is expressly authorized by §809 to make "rulings," it is clear that the Legislature did not consider making "rulings" to be the same as, or what the Legislature meant by, "voting."

There is another problem with trying to transform the voting prohibition into a limitation on hearing officer rulings. In order to speed peer review, the discovery process begins and rulings often must be made by the hearing officer, as they were here, before the parties have completed their voir dire and the hearing panel has been impaneled.[4] One of the reasons the Legislature adopted a statutory scheme that expressly authorizes the hearing officer to make rulings in advance of a hearing panel being impaneled was to accelerate the hearing process as Governor Deukmejian requested.[5]

It is thus clear that §809.2(b)'s prohibition against the hearing officer "voting" was not

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Professions Code. This would have an adverse impact on health care consumers." The Governor requested that the Legislature send him a new bill which would address these concerns. A true and correct copy of this letter is annexed hereto as Exhibit "A." The following year, Senator Keene introduced Senate Bill 1211, which contains the present statutory scheme.

[4] Appellant's Opening Brief at 21 n.4 and 23:19; Appellant's Reply Brief at 8:4.

[5] B&P §809.2(h) directs the hearing commence, which begins with voir dire of the hearing panel, within 60 days after receipt of a request for a hearing and that the hearing then be completed within a reasonable time. To timely commence and proceed within a reasonable time, the hearing officer must be able to make discovery and procedural "rulings" before and during the hearing.

intended to restrict the hearing officer from making "rulings," only from voting as a trier of fact. For that reason Appellant has never argued that the limitation against "voting" restricted the Hearing Officer from making the rulings that he made in this case. Having recognized that the Hearing Officer was authorized to make procedural rulings by repeatedly requesting the Hearing Officer impose terminating sanctions against the Medical Staff, Appellant has no basis to now claim that the prohibition against "voting" should be expanded to prohibit the type of rulings Appellant himself requested.

For the foregoing reasons, Respondents respectfully submit that the prohibition against the hearing officer voting contained in §809.2(b) has no effect on the power of the hearing officer to make rulings or to terminate the proceeding for repeated and wilful disobedience of the hearing officer's orders, as was done in this case.

Respectfully Submitted,

FENIGSTEIN & KAUFMAN

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

cc: Charles M. Kagay, Esq. (via e-mail and U.S. Mail)
Paul Hittelman, Esq. (via e-mail and U.S. Mail)
Judge of the Los Angeles County Superior Court, c/o Clerk (via U.S. Mail only)
Supreme Court of California (via U.S. Mail only)

EXHIBIT A

GEORGE DEUKMEJIAN
GOVERNOR

State of California
GOVERNOR'S OFFICE
SACRAMENTO 95814

September 30, 1988

To the Members of the California Senate:

I am returning Senate Bill No. 2565 without my signature.

This bill would establish elaborate procedures for the operation of a peer review body to investigate a licentiate's competence or professional conduct relative to the delivery of patient care. These provisions apply to physicians and surgeons, clinical psychologists, podiatrists, and dentists. The bill specifies that the Department of Health Services may exempt any health facility or educational setting from its provisions if the facility has "comparable protection" for the licentiates.

The federal and state laws grant immunity from prosecution to health professionals who review other health professional's conduct for the purpose of determining competence to practice in a hospital. The intent is to encourage the discovery of incompetent medical practitioners in order to improve the quality of medical care. This bill exercises California's option to remove itself from certain immunities contained in the federal Healthcare Quality Improvement Act (Public Law 99-660). It also would mandate legal representation for parties subject to peer review and authorize "discovery" of any documents.

I am concerned that under this bill it will take longer and be more costly for health facilities and peer review bodies to take action against a licensee's staff privileges. This means an incompetent licensee will be practicing unrestricted that much longer, and it will be longer before a report is made to the appropriate licensing boards under Section 805 of the Business and Professions Code. This would have an adverse impact on health care consumers.

This is a very controversial bill. I have been contacted by very reputable professionals and organizations on both sides of this issue. There is obviously a deep division within the medical community regarding the provisions of this bill. Since states have until October 1989, to "opt out" of the federal legislation, I would encourage all of the interested parties to develop a peer review system that is more acceptable to all affected parties.

Cordially,

George Deukmejian

George Deukmejian

PROOF OF SERVICE

I declare that:

I am employed in the County of Los Angeles, State of California. I am over 18 years of age and not a party to the within action. My business address is 1900 Avenue of the Stars, Suite 2300, Los Angeles, CA 90067-4314.

On April 26, 2007, documents described as **RESPONDENTS' LETTER BRIEF** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope, addressed as follows:

Paul Hittelman
12400 Wilshire Boulevard
15th Floor
Los Angeles, CA 90025

Charles M. Kagay
Spiegel Liao & Kagay, LLP
388 Market Street, Suite 900
San Francisco, CA 94105

Supreme Court of California
(5 copies)
300 S. Spring St., 2nd Floor
Los Angles, CA 90013-1233

Judge of the Los Angeles County
Superior Court
c/o Clerk of the Los Angeles
County Superior Court
111 North Hill Street
Los Angeles, CA 90012

On the above date, I caused such envelope(s) to be deposited with postage thereon fully prepaid in the United States Mail at Los Angeles, California, by sealing and placing such envelope(s) for collection and mailing at my place of business, following ordinary business practices. I am readily familiar with the practice of my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Such correspondence is customarily deposited in the United States Mail at Los Angeles, California on that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct and that this Proof of Service is executed on April 26, 2007, at Los Angeles, California.

Marie Ramirez