S156986
(2nd Civil No. B186238)

IN THE SUPREME COURT OF CALIFORNIA

GIL N. MILEIKOWSKY, M.D.
Plaintiff/Appellant,

v.

WEST HILLS HOSPITAL MEDICAL CENTER, *et al.*,
Defendants/Respondents.

PROPOSED *AMICUS CURIAE* BRIEF OF CATHOLIC HEALTHCARE WEST AND TENET HEALTHCARE CORPORATION IN SUPPORT OF WEST HILLS HOSPITAL MEDICAL CENTER, *ET AL.*

On Review of a Decision Rendered
By the California Court of Appeal,
Second Appellate District, Division Eight

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

S156986
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I. INTRODUCTION

It has long been the law and public policy of this state to protect the public by promoting and protecting hospital peer review, and reducing burdens (such as fear of liability) that discourage participation in the peer review process. Physician peer reviewers who generously give their time to provide their medical expertise and judgment in hospital peer review proceedings should not be required to take on the additional, unwanted burden of deciding procedural/discovery issues that they are ill-equipped to tackle. Rather, knowledgeable hearing officers can and should make such rulings, subject to the ultimate authority of hospital governing bodies to affirm or reverse hearing officer rulings.

The Court of Appeal's decision here misconstrued the intended roles of physician peer reviewers, non-physician peer review hearing officers, and hospital governing bodies. California's peer review system demands a tremendous commitment of time and effort from doctors whose participation is not only voluntary and typically unpaid, but often unappreciated. A hospital's governing body makes the ultimate decisions about medical staff membership and specific clinical privileges for each practitioner who wants to practice in the hospital, but in most cases the board must do so on the basis of recommendations from the medical staff. Therefore, the medical staff continuously must evaluate and make recommendations about the qualifications of every applicant and medical staff member (existing staff members must be reviewed continuously and considered for reappointment at least every two years). Although state and federal law impose a broad mandate to conduct peer review, there is *no* requirement for *individual* doctors to participate.

The Court of Appeal here imposed a new and unwarranted requirement that is certain to discourage physician participation. According to the Court of Appeal, physician hearing panelists not only must decide medical issues, but also must struggle with legal/procedural rulings that properly ought to be made by hearing officers. Further, unless they take on that task and determine that procedural misconduct warrants termination of the proceedings, they must commit to serving indefinitely, since the only

permissible consequence of failure to produce documents, witness lists, etc. is an endless series of continuances. Under the Court of Appeal's decision, reluctant physicians must make rulings about discovery disobedience and other misconduct that they are powerless to enforce. The decision makes no sense, as a matter of law or policy.

The decision also conflicts with the Second District Court of Appeal's decision involving the same doctor, *Mileikowsky v. Tenet HealthSystem*, 128 Cal. App. 4th 531 (2005), which wisely recognized that the hearing officer in a peer review proceeding *does* have authority to rule that the hearing should be terminated based on the subject physician's repeated misconduct during the hearing process. "In order to ensure that the hearings mandated by the Business and Professions Code proceed in an orderly fashion, ***hearing officers must have the power to control the parties and prevent deliberately disruptive and delaying tactics***. The power to dismiss an action and terminate the proceedings is an important tool that should not be denied them." *Id.* at 561 (emphasis added).

The peer review regime devised by the Court of Appeal in this case also may compromise the fairness of the hearing process. If physician triers of fact are forced to confront and decide issues arising from a party's failure to cooperate in the process – issues from which hearing panel members typically have been shielded by attorney hearing officers – the

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

Moreover, fairness must be a two-way street. Denying peer review hearing officers the power to deal effectively with obstruction and delay by physicians who are the subjects of hearings is unfair to hospitals and their medical executive committees (who typically formulate the actions or recommendations that become the subjects of peer review hearings). How can a medical staff put on its case and keep the physician hearing panel members from jumping ship if the only "sanction" for a physician's refusal to produce relevant documents in his possession is continuance, *i.e.*, delay? As the Court of Appeal in *Mileikowsky v. Tenet HealthSystem* noted, a dispute over whether one party will "allow discovery to be completed result[s] in squandering the resources of the administrative tribunal and unfairness to the other litigants." 128 Cal. App. 4th at 561.

A hospital is exposed to potential liability for failing to provide fair procedure if it withholds documents from the physician who is the subject of a hearing,[3] but under the rule at issue here, the physician may face no consequence other than delay. There are no subpoenas or depositions in

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[3] *See Rosenblit v. Superior Ct. (Fountain Valley Reg'l Hosp. and Med. Ctr.)*, 231 Cal. App. 3d 1434 (1991) (hospital's administrative decision overturned because of unfair procedures, including denial of access to relevant patient charts); *Westlake Community Hosp. v. Superior Ct. (Kaiman)*, 17 Cal. 3d 465, 478 (1976) (doctor who is denied required fair procedure can sue for damages).

peer review proceedings, so a doctor who is permitted to play "hide the ball" can deprive the medical staff of its ability to present key aspects of its case adequately.

The California Legislature and courts, including this court, repeatedly have declared that candid, effective hospital peer review is crucial to the public welfare and worthy of protection. "Hospital peer review, in the words of the Legislature, 'is essential to preserving the highest standards of medical practice' throughout California. (Bus. & Prof. Code, § 809, subd. (a)(3))." *Kibler v. Northern Inyo County Local Hospital District*, 39 Cal. 4th 192, 199 (2006). The appellate decision in this case threatens effective peer review without providing any benefit whatever to doctors who are the subjects of peer review hearings, because physician peer reviewers are ill-equipped to assume the additional burden of deciding document disputes, waiver issues, and other procedural matters. Such questions should be decided by hearing officers, who must be empowered to "impose *any* safeguards the protection of the peer review process and justice requires" (Cal. Bus. & Prof. Code § 809.2(d) (emphasis added)) – subject to the ultimate authority of the hospital's governing body to affirm or reverse such rulings on appeal.

This Court should reverse the decision below, and adopt the rule of decision in *Mileikowsky v. Tenet HealthSystem*, to preserve the efficacy of the peer review system.

II. BECAUSE THE PEER REVIEW HEARING PROCESS IS IMPORTANT, COMPLEX, TIME-CONSUMING, AND BURDENSOME TO THE VOLUNTEER PHYSICIANS WHO CONDUCT IT, HEARING OFFICERS MUST HAVE THE POWER TO CONTROL IT.

A hospital's success – indeed, its very survival in these challenging times for hospitals – depends to a great extent on the quality and professionalism of the medical staff doctors who treat their patients in the hospital. *A hospital has no incentive whatsoever to restrict or exclude good doctors.* Indeed, exactly the opposite is true. Every hospital wants to get and keep as many good doctors on its medical staff as its facilities possibly can accommodate, since hospital revenues come from treating the patients whom staff doctors admit for elective procedures, and also in many emergency care situations. Every hospital values the efforts and insights of its physicians, and wants to work in tandem with them to provide high-quality patient care to its community.

To assure that the physicians who practice in hospitals continually meet high standards of competence and professional conduct, their peers must evaluate their behavior and the care they provide on an ongoing basis, and make recommendations to the hospitals' governing bodies about which doctors are qualified to practice there and what specific clinical privileges they should be permitted to exercise. Both federal and state law mandate

that hospitals have organized medical staffs that perform this critical quality oversight function.[4]

Nevertheless, physician participation in peer review is voluntary,[5] and as a general rule physicians receive no compensation for the substantial time and effort that peer review demands. In addition, many physicians find it extremely difficult to sit in judgment of their colleagues. Not only that, but the California peer review process is time-consuming and complicated, as the result of the requirements imposed by, *inter alia*, (1) the federal Health Care Quality Improvement Act, 42 United States Code Section 11112; (2) California Business and Professions Code Section 809 *et seq.*; (3) the standards of the Joint Commission, the organization that surveys and accredits hospitals for participation in the federal Medicare Program (*see* Joint Commission, *Comprehensive Accreditation Manual for Hospitals: The Official Handbook* (2008), at pp. MS-12 – MS-264); and

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[4] *See* 42 Code of Fed. Regs. ("CFR") § 482.22; Cal. Bus. § Prof. ("B&P") Code § 2282; Cal. Health & Safety Code § 1250(a); Cal. Code of Regs. ("CCR") §§ 70701, 70703. California imposes liability on *hospitals* for failing to screen their medical staff physicians adequately and continuously (*Elam v. College Park Hospital*, 132 Cal. App. 3d 332 (1982)), while simultaneously requiring hospitals to bend over backward to protect every physician's right to "fair procedure" in the peer review process. One court of appeal justice noted that sometimes there is so much due process in California's peer review process "that one cannot help tripping on it." *Oskooi v. Fountain Valley Regional Hospital and Medical Center*, 42 Cal. App. 4th 233, 249 (1996) (Sills, J, concurring).

[5] *See University of So. Cal. v. Superior Court*, 45 Cal. App. 4th 1283, 1288 (1996) (acknowledging that physician participation in peer review is voluntary).

(4) the practical difficulties of assembling numerous busy professionals (including the subject of the hearing, the physician hearing panel members, the percipient and expert witnesses, and either attorneys or physician representatives for the parties) multiple times to get through the evidence and arguments in often complex cases where the physician's livelihood may be at stake. As discussed in detail below, some hearings take two or three years to complete. As a result, recruiting willing participants can pose a tremendous challenge.

Also, hospitals must anticipate that once the internal hearing process is completed, physicians who lose their internal challenges to adverse peer review actions will seek judicial review under Code of Civil Procedure section 1094.5. It can be quite difficult for courts to understand how the peer review process is supposed to work, and how to balance the competing concerns about protecting the public from problem physicians on the one hand, and protecting the fair procedure rights of physicians on the other.

For example, in *Medical Staff of Sharp Memorial Hospital v. Superior Court (Pancoast)*, 121 Cal. App. 4th 173 (2004), a hospital had to seek a writ of mandate (which was granted) after a trial court ordered the hospital to reinstate a physician who had been suspended, even though she had not practiced in the hospital for three years – so the hospital had no

idea of her current competence,[6] and by her own admission she had been emotionally unstable when the hospital suspended her privileges.

Most courts are loath to second-guess hospitals and peer review bodies with respect to their determinations that particular doctors have provided substandard care. Some courts, however, have overturned adverse actions against physicians on procedural grounds. In such a case, too many errant peer review procedures might leave the court with the cumulative sense that the overall hearing process was unfair. For example, in *Rosenblit v. Superior Court (Fountain Valley Regional Hospital and Medical Center)*, 231 Cal. App. 3d 1434 (1991), a hospital's decision to suspend a physician's privileges was overturned by the court of appeal because the physician was denied a fair hearing due to inadequate notice of charges, denial of access to patient charts at issue, "secret" *voir dire* of hearing panel members, etc. The court found the "notable stench of unfairness" too strong for it to uphold the action taken (*id.* at 1445), even under California's "rudimentary" fair procedure scheme for physicians that has evolved over time. *See Potvin v. Metropolitan Life Insurance Company*, 22 Cal. 4th 1060, 1069 (2000) (recounting the history of the fair procedure doctrine), citing *Ezekial v. Winkley*, 20 Cal. 3d 267, 278 (1977) (physician

[6] As noted above, medical staff physicians must be evaluated on an ongoing basis and considered for reappointment at least every two years.

was entitled to "rudimentary procedural and substantive fairness" before being terminated from surgical residency program).

For all these legal and practical reasons, hospitals try their best to engage experienced hearing officers who are very familiar with the applicable law to preside over peer review hearings. Shifting the task of making complex peer review procedural rulings, from the expert hearing officer to the physician hearing panel members – as the Court of Appeal did here – is like reassigning responsibility for ruling on motions to compel and for terminating sanctions from a trial judge or discovery referee to the jury. There is no basis in law or logic to impose such burdens on ill-equipped physician volunteers who are simply supposed to be triers of fact.

The Court of Appeal also ruled that all a hearing officer can do in the face of repeated physician refusal to produce documents or other information as and when required is to order continuances, because only the physician hearing panel can decide that terminating sanctions are warranted. If that is the rule, then a physician who is trying to forestall a final adverse action has every incentive not to fulfill his or her hearing participation obligations in a timely manner. Hearings that take years to complete as it is will become interminable, and medical staff physicians will either refuse to participate in the first place, or drop off of hearing panels in protest of the protracted proceedings. As discussed further below,

it is already extremely difficult to find physicians willing to serve as hearing panel members, and rulings like this only make it harder.

Additionally, physicians who have been terminated for misconduct or incapacity routinely seek reinstatement when they challenge the actions against them. Anything that threatens to stretch out peer review hearings – such as the rule at issue in this case – also increases the danger that hospitals will be forced to fend off demands for reinstatement by physicians who have been off the medical staff for protracted periods, and therefore have not been subject to ongoing evaluation and at least biennial reappointment review. (*See Pancoast, supra.*) This is yet another reason why the rule is inimical to patient safety.

Thus, the Court of Appeal's decision threatens the ability of California hospitals and their medical staffs to conduct effective peer review, and thereby threatens the safety of California hospital patients.

III. THE COURT OF APPEAL'S DECISION RESTS UPON FUNDAMENTAL MISCONCEPTIONS ABOUT THE PEER REVIEW PROCESS AND HOSPITAL GOVERNANCE.

A. The California Business and Professions Code Does Not Purport to Specify All Details of How Peer Review Hearings Are to Be Conducted, Which Are Spelled Out in Each Hospital's Medical Staff Bylaws.

The Court of Appeal essentially held that unless a particular procedural ruling such as terminating sanctions is specifically mentioned in and allowed by Business & Professions Code Sections 809.2 through 809.4,

it is impermissible. That is wrong, because the statutory scheme expressly contemplates that most of the "flesh" on its very bare bones will be provided by individual hospitals' medical staff bylaws:

> It is the intent of the Legislature that written provisions implementing Sections 809 to 809,8, inclusive, in the acute care hospital setting shall be included in medical staff bylaws that shall be adopted by a vote of the members of the organized medical staff and shall be subject to governing body approval, which approval shall not be withheld unreasonably.

The Legislature further declared that the parties in a peer review hearing would be bound by any additional hearing provisions in the medical staff bylaws, so long as such provisions are consistent with the statutes. Bus. & Prof. Code § 809.6(a) ("The parties are bound by any additional notice and hearing provisions contained in any applicable professional society or medical staff bylaws which are not inconsistent with Section 809.1 to 809.4, inclusive").

The Court of Appeal nonsensically concluded that allowing the hearing officer to issue a terminating order is inconsistent with the statutory provision that says the hearing officer "shall not be entitled to vote." That analysis erroneously conflates procedure with substance. A hearing officer has not usurped the hearing panel's voting function if the governing body upholds the hearing officer's ruling that a proceeding should be terminated based on the doctor's failure to produce documents or other procedural misconduct, any more than a discovery referee who recommends a

terminating sanction for repeated discovery violations has usurped the province of the jury to decide the case on the merits if the judge agrees and dismisses the case. The opportunity for triers of fact to vote only arises if a case gets that far – and sometimes it does not. That result must be permissible in peer review hearings whenever the circumstances warrant.

Mileikowsky and the Court of Appeal also have disregarded the Legislature's decision **not** to mandate that all peer review hearings be held before panels of doctors. To the contrary, California Business and Professions Code Section 809.2(a) expressly provides that hearings to challenge final proposed peer review actions can be held before lay arbitrators, rather than panels of peer physicians:

> The hearing shall be held, as determined by the peer review body, before a trier of fact, which shall be an arbitrator or arbitrators selected by a process mutually acceptable to the licentiate and the peer review body, ***or*** before a panel of unbiased individuals who shall gain no direct financial benefit from the outcome, who have not acted as an accuser, investigator, factfinder, or initial decisionmaker in the same matter, and which shall include, where feasible, an individual practicing the same specialty as the licentiate.

Bus. & Prof. Code § 809.2(a) (emphasis added). Thus, there is no support for the Court of Appeal's pronouncement that "composition of the trier of fact is weighted toward ensuring that medical specialists review the final proposed action." 154 Cal. App. 4th at 764.

The Legislature said no such thing, and if the hearing in this case had been held before a lay arbitrator, the arbitrator plainly would have had

the statutory authority both to make any necessary procedural rulings and to decide the case on its medical merits.[7] As noted above, the Legislature never intended to dictate precisely how hearings must be conducted, and no purpose is served by judicially imposing new requirements that will only make peer review hearings even more difficult and time-consuming. To the contrary, "[i]t is the intent of the Legislature that peer review of professional health care services be done efficiently . . . ." Bus. & Prof. Code § 809(a)(7). That is why the Court of Appeal in *Mileikowsky v. Tenet HealthSystem* concluded that a hearing officer *does* have the authority, based on the statutory power to control the proceedings, to rule that a hearing should be terminated for misconduct. *Mileikowsky v. Tenet HealthSystem*, 128 Cal. App. 4th at 559-562.

B. Voluntary Service on a Peer Reviewing Hearing Panel Is a Substantial Burden and Time Commitment, Which Makes Assembling Panels and Scheduling and Completing Hearings Extremely Challenging. Limiting the Powers of Hearing Officers Will Only Make This Problem Worse.

To begin with, most physicians are extremely reluctant to sit in judgment of their peers (thinking "There, but for the grace of God, go I"), so doctors have a natural inclination to avoid hearing panel service

[7] The Legislature apparently contemplated the participation of hearing officers only in hearings held before panels, probably based on the rationale that a presiding officer is not needed in an arbitrator proceeding. *See* Bus. & Prof. Code § 809.2(b) ("If a hearing officer is selected to preside at a hearing held before a panel, the hearing officer shall gain no direct financial benefit from the outcome, shall not act as a prosecuting officer or advocate, and shall not be entitled to vote").

altogether. This threshold problem is exacerbated by the fact that peer review hearings generally are conducted at night, because doctors are busy treating patients during the day. Of course doctors are people, too, with families and memberships in professional, civic, and social organizations, so they have competing evening commitments as well. For these reasons, and also because of the number of busy professionals involved in a peer review proceeding – the subject of the hearing; panel members and alternates generally numbering between three and seven depending upon the requirements of the medical staff bylaws; the attorney or physician representatives of the parties; the doctor appearing on behalf of the medical staff; and the hearing officer – it may be difficult or impossible to schedule more than a few evening sessions per month.

Additionally, the doctor who is the subject of hearing often has a strong incentive to stretch out the proceedings as long as possible, to forestall the adverse consequences of the peer review action. That is, by dragging out the hearing, the physician may delay (1) implementation of corrective action such as a restriction of privileges, if it has only been proposed rather than imposed summarily;[8] and/or (2) issuance of a final decision against the doctor that the hospital must report to the Medical Board of California and the National Practitioner Data Bank, and which the

[8] Under Bus. & Prof. Code § 809.5(a), a doctor's practice may be suspended or restricted summarily, prior to a hearing, if "failure to take that action may result in an imminent danger to the health of any individual."

doctor will be obliged to self-disclose on future applications to other hospitals, health plans, etc.

As a result of these factors, a complex proceeding involving multiple medical issues and patient cases can take several *years* to complete, no matter how hard the presiding officer tries to keep it moving along expeditiously. Doctors who know this may refuse to serve because of the daunting time commitment (it is almost impossible to get anyone to serve on a hearing pane more than once), and doctors who do not realize the extent of that commitment at the outset may quit if the proceedings drag on too long. Sometimes in the midst of a hearing, one of the panel members may decide for unrelated reasons to relocate his or her practice, or may be confronted with a significant personal issue that makes continued service on the panel impossible. The risk of losing panel members this way obviously increases the longer the proceeding lasts.

In addition to being time-consuming, hearings are also hard work. Once doctors overcome their initial hesitation to serve on a hearing panel, they generally take the obligation very seriously and make every effort to do a thorough, thoughtful job. Often they must not only sit through dozens of night-time hearing sessions, but in their deliberations they also must review voluminous patient records and medical literature submitted into evidence by the parties, as well as multi-volume transcripts, and consider how the evidence relates to each of multiple charges. Thus, hearing panel

service frequently is a Herculean task, just with respect to deciding the merits. No more should be asked of panel members.

C. The Hospital Board, Not a Hearing Panel, Is Ultimately Responsible for Determining Who Will Be Permitted to Practice Medicine in the Hospital.

The Court of Appeal's fixation on plenary hearing panel authority in peer review proceedings led it to announce a rule that is problematic on several levels. The Court of Appeal held that only physicians can decide whether a medical staff member will be terminated, and therefore only the physician hearing panel could decide whether Mileikowsky's failure to cooperate in the hearing warranted terminating sanctions.[9] Both the underlying premise for this conclusion and the conclusion itself are wrong.

A hospital's governing body must and does have ultimate authority to decide who will practice in the hospital, because the governing body has ultimate responsibility and liability for what goes on there. *Hongsathavij v. Queen of Angels/Hollywood Presbyterian Hospital*, 62 Cal. App. 4th 1123, 1143 (1998); *Elam v. College Park Hospital*, 132 Cal. App. 3d 332 (1982).

Medical staff physicians make recommendations to the governing body about appointments, clinical privileges, and medical disciplinary actions, because the physicians' medical expertise is needed to guide the governing body's decision-making, but the governing body decides. A

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[9] *Mileikowsky v. West Hills Hospital Medical Center*, 154 Cal. App. 4th at 763-773, 776-777.

hearing panel "decision" is *not* the final action of the hospital unless and until it is adopted by the governing body, because a hearing panel simply does not have that authority. That is why Business and Professions Code Section 809.05 says "In all peer review matters, the governing body shall give great weight to the actions of peer review bodies and, in no event, shall act in an arbitrary or capricious manner." The Legislature recognized that – as a matter of corporate law – the governing body must *act* "in all peer review matters."[10] *See also Kibler*, 39 Cal. 4th at 200 (noting that a hospital must report to the Medical Board of California "any ***hospital action*** that 'restricts or revokes a physician's staff privileges ***as a result of*** a determination by a peer review body.' [Citation omitted; emphasis added]."

[10] A hospital's governing body *cannot* give the medical staff or any medical staff committee such as a hearing panel the power to make final peer review decisions, because the governing body must retain ultimate authority over such decisions. *See Communist Party of the United States v. 522 Valencia, Inc.*, 35 Cal. App. 4th 980, 994-995 (1995) (an arrangement that "purport[s] to delegate ultimate authority and control over a corporation from the board of directors to outside parties with no ownership interest in the corporation is void and unenforceable"); *see also* 9 Witkin, *Summary of California Law* 872, Corp. § 97 ("Invalid Delegation") (10th ed. 2005) ("Directors cannot abandon their duties and functions by an arrangement with . . . outsiders which limits . . . their [*i.e.*, the directors'] discretion to act for the corporation"), citing *Smith v. California Thorn Cordage*, 129 Cal. App. 93, 98 (1933). Basic principles of corporate governance apply to hospital boards. *Weinberg v. Cedars-Sinai Med. Ctr.*, 119 Cal. App. 4th 1098, 1109 (2004) (nonprofit hospital board "is entitled to act in accordance with principles of sound corporate governance").

Therefore, contrary to Mileikowsky's and the Court of Appeal's misapprehension of the applicable law (154 Cal. App. 4th at 773-776), the hospital's governing body takes the final action on a peer review matter, even if neither party has appealed. In that event, the governing body's action may simply be to adopt the outcome of the hearing panel proceeding, but – again contrary to the Court of Appeal's misunderstanding – affirmance and reversal are *not* the governing body's only options. Instead of choosing one of those alternatives, the governing body may remand the matter to the hearing panel or the Medical Executive Committee with directions for further consideration, or in appropriate circumstances the governing body may modify the proposed action in accordance with its determination of what is necessary to protect patients.

The Legislature also recognized in the hospital-specific administrative mandamus provision, Code of Civil Procedure Section 1094.5(d), that hospital peer review decisions come from "private hospital boards or boards of directors of [hospital] districts . . . " – not from hearing panels. Thus, a judge reviewing such a decision reviews *only* the decision of the board, *not* the decision of the hearing panel.[11] *Hongsathavij v. Queen of Angels/Hollywood Presbyterian Hospital*, 62 Cal. App. 4th 1123, 1135-1136 (1998) ("the decision of the JRC is not the final administrative

[11] Mileikowsky gets this wrong, and mischaracterizes the reference to Code Civ. Proc. § 1094.5(d) in *Anton v. San Antonio Community Hosp.*, 132 Cal. App. 3d 638, 649 (1982). *See* Answer Brief at 32, n.5.

decision," and thus a reviewing court "must determine whether there was substantial evidence to support the governing body's decision"); *Kumar v. National Medical Enterprises, Inc.*, 218 Cal. App. 3d 1050, 1055 (1990) (JRC report and recommendation "is not a 'final' decision"). And even when a court decides that a hospital's peer review decision must be set aside on either procedural or substantive grounds, "the judgment shall not limit or control in any way the discretion legally vested in [the hospital]." Code of Civil Procedure Section 1094.5(f).

The Court of Appeal's misconstruction of the peer review scheme also is contradicted by the standard of review under Section 1094.5(d). The issue of whether the doctor received fair procedure is reviewed *de novo* (*see Rosenblit, supra,* 231 Cal. App. 3d at 1442-1444), but the substantive merits of the *hospital's* decision are reviewed under the deferential substantial evidence standard. That is because, like an administrative agency, a hospital governing body is recognized as having the expertise to determine who should practice there and what the scope of each doctor's privileges should be, while "judges are untrained and courts ill-equipped for hospital administration." *Goodstein v. Cedars-Sinai Medical Center*, 66 Cal. App. 4th 1257, (1998), citing *Mateo-Woodburn v. Fresno Community Hospital & Medical Center*, 221 Cal. App. 3d 1169, 1185 (1990).

Hospital governing bodies have the final authority, because they have the ultimate responsibility for what goes on in the hospital (*Elam*,

supra), and they can fulfill their fiduciary duty to protect their institutions only by both protecting patients *and* ensuring that disciplined physicians get fair procedure. A conscientious hospital board would not allow an incompetent or impaired physician to continue practicing there, even if the physician admitted a steady stream of patients. Nor would a board knowingly select a biased hearing officer, or otherwise take action that would invite the overturning of a peer review decision on the ground of unfair procedure – because a reversal represents a tremendous waste of time and money, and further exposes the hospital to a possible damages action by the physician. *See Westlake v. Superior Court (Kaimen)*, 17 Cal. 3d 465 (1976) (if, and only if, a doctor exhausts the internal procedures provided by a hospital and then succeeds in having the hospital's decision set aside via mandamus, the doctor may be entitled to sue for damages). Hospital boards – especially in this post-Enron/Sarbannes-Oxley world – have every incentive to do the right thing.

A hospital governing body considers the recommendations of doctors about medical issues, and considers the recommendations of lawyers about legal issues, but ultimately the governing body decides – just as it did in this case when it upheld the hearing officer's recommendation that based upon Mileikowsky's conduct, he should be deemed to have waived his right to a hearing and accepted the Medical Executive Committee's recommendation. The hospital's decision was entirely

consistent with its authority under the law. As discussed further below, no medical expertise was needed to reach that decision, and it was not a decision that a physician hearing panel should be burdened with making.

D. Physician Peer Review Panel Members Are Supposed to Be Expert Fact-Finders; They Are Both Ill-Equipped and Loath to Be Responsible for Policing Participant Conduct in the Proceedings.

Neither California peer review law nor the public policies that underlie it support the notion that physician peer reviewers must or even should be the final decision-makers in hospital medical staff hearings, or that they should make procedural rulings. The purpose of involving physicians is to gain the benefit of their medical expertise as fact-finders, which obviously is helpful – but even that is not indispensable, as evidenced by the Legislature's decision to allow peer review hearings to be held before either physician panels or lay arbitrators. In the vast majority of cases, the action or recommendation at issue in a peer review hearing has come from a group of expert physicians, usually the Medical Executive Committee. Hospital governing bodies – the ultimate decision-makers in peer review matters – often include physicians as well, and hospital board members understand the multiple factors that must be considered in making determinations about hospital personnel and operations.

Doctors who participate on hearing panels just want to evaluate the medical issues. That role is more than taxing enough, and doctors do *not*

want to assume the added burden of dealing with procedural/legal issues. To the contrary, hearing panel members frequently protest having any of their time taken up with such matters during hearing sessions, and hearing officers often take procedural issues such as evidentiary objections under submission so that those issues can be evaluated and decided outside the presence of the panel.

Moreover, efficiency and respect for the hearing panel members' time are not the only reasons to shield them (to the extent possible) from assertions of procedural misconduct by the parties. If hearing panel members must listen to a litany of complaints by one side about obstruction and obfuscation by the other party, that information may make it difficult or impossible for the panel to judge the medical issues purely on their objective merits. Therefore, concern for fairness also militates in favor of having procedural issues considered and decided by the hearing officer (or arbitrator), subject to review and final decision by the governing body.

And contrary to Mileikowsky's contention, there is no reason whatever why hospital boards cannot make final decisions on procedural issues. They can and they do. *See, e.g., Eight Unnamed Physicians v. Medical Executive Committee of the Medical Staff of Washington Township Hospital*, 150 Cal. App. 4th 503, 513-514 (a hospital board has authority to review hearing officers' procedural rulings, and could decide whether denials (by all but one of eight hearing officers) of requested consolidation

of multiple hearings resulted in prejudice to any individual doctor, so the doctors were not entitled to an interim court determination of that issue; "the bylaws plainly provide for Board review of procedural matters").

IV. THE PEER REVIEW PROCESS WILL SUFFER, TO THE PUBLIC'S DETRIMENT, IF PEER REVIEW HEARING OFFICERS ARE DEPRIVED OF THE POWER TO MAKE WHATEVER RULINGS PROTECTION OF THE PROCESS AND JUSTICE REQUIRE.

A. Peer Review Hearing Officers Must Be Empowered to Control the Proceedings, and to Decide On Terminating Sanctions – Subject to Hospital Board Review – In Appropriate Circumstances. The Legislature Never Has Said Otherwise.

The Legislature established in Business and Professions Code Section 809.2(d) that the presiding officer (whether an arbitrator or a hearing officer) "may impose *any* safeguards the protection of the peer review process and justice requires." (Emphasis added.) The Court of Appeal narrowly interpreted that phrase to apply only to determinations about access to documents relating to other doctors,[12] but (apart from the fact that this reading represents a tortured parsing of the relevant provision) that limitation makes no sense.

And as a practical matter, what possible benefit can be derived from tying a presiding officer's hands that way, and condemning the participants to an endless series of continuances as the only remedy for repeated misconduct, just because the Legislature said failure to do certain things

[12] 154 Cal. App. 4th at 767.

constitutes "good cause for a continuance"? The Legislature's express choice to grant presiding officers the power to "impose any safeguards" is vitiated by the Court of Appeal's cramped interpretation, which therefore cannot be a correct reading of the statute. See *Napa Valley Wine Train, Inc. v. Public Utilities Commission*, 50 Cal. 3d 370, 381 (1990) ("In construing the statutory provision a court is not authorized to insert qualifying provisions not included and may not rewrite the statute to conform to an assumed intent which does not appear from its language"). The Court of Appeal in *Mileikowsky v. Tenet HealthSystem* recognized that the relevant statutory provisions to allow peer review hearing officers to rule that hearing should be terminated, because they give hearing officers "the power to control proceedings." 128 Cal. App. 4th at 557-562.

The Legislature recognized that the purpose of engaging a hearing officer is for that person to "preside" at the hearing (Bus. & Prof. Code § 809.2(b)), and the use of that term demonstrates intent to confer broad authority. To "preside" means "[t]o occupy the place of authority as of president, chairman, moderator, etc. To direct, control or regulate proceedings as a chief officer, moderator, etc. To possess or exercise authority." *Black's Law Dictionary* 1185 (6th Ed. 1990). A person who can do no more than order continuances is not a "presiding officer."

For a peer review hearing to proceed as expeditiously and fairly as possible, the hearing officer must have the full authority of a "presiding

officer" to run the show – subject to the doctor's right of appeal to the governing body, and ultimately to judicial mandamus review, with respect to disputed procedural rulings (*see Eight Unnamed Physicians*, *supra*; *Bollengier v. Doctors Medical Center*, 222 Cal. App. 3d 1115 (1990)).

B. No Medical Expertise Is Required to Recognize That a Hospital Cannot Make an Informed, Responsible Determination About Whether a Doctor Is Qualified to Practice There in the Absence of Full Information About Charges of Misconduct Against the Physician at Other Hospitals.

The Court of Appeal held that only doctors could decide whether Dr. Mileikowsky's failure to produce the documents relating to his suspension at Cedars-Sinai warranted termination of the proceeding. That cannot be correct. To begin with, the court's interpretation disregards the Legislature's decision that a lay arbitrator could make such a determination if there were no hearing panel. More importantly, however, this rule ignores a reality that other California courts have recognized, because no medical expertise is required to see it: a hospital and its medical staff cannot possibly determine whether a physician is qualified to practice there if they are deprived of access to information about the doctor's practice at other facilities. *Oskooi v. Fountain Valley Regional Hospital and Medical Center*, 42 Cal. App. 4th 233 (1996) (upholding a hospital's suspension of a physician who had omitted information about two prior hospital affiliations from his application); *Webman v. Little Company of Mary Hospital*, 39 Cal. App. 4th 592 (1995) (upholding a hospital's denial of reappointment to a

physician because his conduct prevented the hospital from obtaining information about his summary suspension at another hospital). As the *Oskooi* court noted, "[t]he obvious purpose of the requested information was to obtain a basis for determining whether a grant of privileges would adversely affect patient care. [Citations omitted.] It was necessary to know ***all*** of Oskooi's past affiliations to be able to assess his qualifications." 42 Cal. App. 4th at 244-245 (emphasis in original).

The need for such information is especially acute and apparent where, as in this case and *Webman*, the hospital knows that the doctor has been subject to stringent disciplinary action elsewhere. The Court of Appeal's attempted distinction of *Webman* (*i.e.*, in that case the issue was presented to the hearing panel) misses the point. Nothing in *Webman* or any other authority suggests that *only* doctors can decide whether a complete lack of specific information about a physician's serious problems at one hospital prevents another hospital and its medical staff from making an informed decision about that physician's ability to practice there safely. Anyone can see that such information is vital; hearing officers must be and are empowered to act accordingly.

V. CONCLUSION

For all the foregoing reasons, this Court should reverse the Court of Appeal decision in this case and eliminate the conflict with *Mileikowsky v.*

Tenet HealthSystem, so that hospitals and their medical staffs can conduct effective and efficient peer review to protect the public they serve.

Dated: August 28, 2008

Respectfully submitted,

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RULE 8.204(c) CERTIFICATION OF WORD COUNT

I, Terri D. Keville, am a partner in the law firm of Manatt, Phelps & Phillips, LLP, counsel for *Amicus Curiae* Catholic Healthcare West ("CHW"). Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I hereby certify that CHW's *amicus* brief contains 8,677 words (including the caption and this certificate), according to the word count of the computer program used to prepare the brief.

Dated: August 28, 2008

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 11355 West Olympic Boulevard, Los Angeles, California 90064-1614. On August 28, 2008, I served a copy of the within document(s):

Application of Catholic Healthcare West and Tenet Healthcare Corporation to File *Amicus Curiae* Brief in Support of Petitioners West Hills Hospital Medical Center, et al.; Proposed *Amicus* Brief

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Executed on August 28, 2008, at Los Angeles, California.

Regina Coppich

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