Case No.

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

ROBERT EDEN, M.D.

Petitioner,

v.

DESERT REGIONAL MEDICAL CENTER, et al.

Respondents.

From the Court of Appeal
Fourth Appellate District, Division Two
Case No. E035841

From the Superior Court for Riverside County
Superior Court Case No. INC031763
Hon. Christopher Sheldon, Judge

PETITION FOR REVIEW

ISSUES PRESENTED

In an administrative action brought by a hospital to terminate a physician, what are the physician's rights regarding specificity of notice of charges, in order to ensure a fundamentally fair hearing?

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WHY REVIEW SHOULD BE GRANTED

A resolution by this Court of the present case, which involves a physician terminated from a hospital medical staff, would provide much-needed guidance as to what constitutes a fair hearing in administrative disciplinary actions, a matter of deep concern for not only physicians but also other licensed professionals across the State. The fair hearing requirement in administrative mandamus actions under C.C.P. § 1094.5 applies not only to hospital medical staff cases, but also to all administrative actions where there is the right to a hearing, the requirement that evidence be taken, and discretion in the determination of facts vested in the adminstrative entity. *Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802, 814-817. The need for guidance is heightened by the relative dearth of published authority on many very basic and fundamental procedural issues in such administrative hearings. Such issues include the specificity of the notice of charges that must be provided.

In the present case, the vague initial charges, coupled with the hospital's failure to provide copies of documents to be relied upon prior to their introduction at hearing, so profoundly handicapped Dr. Eden's defense of his case as to fatally taint the fairness of those proceedings before the Hospital and any confidence that one could have about the correctness of the result.

BACKGROUND

Via this Petition for Review, Robert Eden, M.D., the Petitioner herein ("Dr. Eden" or "Petitioner"), challenges a decision by the Court of Appeal upholding the trial court's denial of his request for administrative mandamus that he be reappointed to the medical staff of Desert Regional Medical Center. The Respondents herein, Desert Regional Medical Center et al, are collectively referred to hereinafter as "DRMC" or "the Hospital".

The basis for the Hospital's termination of Dr. Eden was that he purportedly had such an offensive personality and was so unable to get along with co-workers at the Hospital, that he endangered patient care and safety. Cases involving termination for personality issues are particularly subject to abuse, in that it is all too easy to use the personality excuse as a pretext for terminating a physician for an impermissible reason. The possibility of such a "subterfuge" has been recognized by this Court. *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 627. In fact, Dr. Eden was merely a dogged and admirable proponent of patient care and safety, and their ongoing improvement at the Hospital. The Court need not reach any factual issues in this case, however, regarding the sufficiency of the evidence, because the failure to provide Dr. Eden with a fair hearing is a question of law. *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1442, 282 Cal.Rptr. 819. Further, such a factual inquiry would not be

appropriate because the absence of fair procedure directly impaired Dr. Eden's ability to adequately rebut the charges used against him.

A. Dr. Eden's conscientiousness led him to act as a "whistleblower" and watchdog for quality of patient care

As stated in the Court of Appeal in its decision, Dr. Eden is a board-certified obstetrician/gynecologist who joined the medical staff of the Hospital in 1992. (Ct. App. Dec., p. 3).[1] Dr. Eden's competence and effectiveness as a physician was well-recognized by the Hospital, which appointed him Director of Maternal Fetal Medicine from 1992 to 1994. (Id.)

Further, Dr. Eden was continually striving to improve the quality of care at the Hospital. Dr. William Phaklaides, another physician at DRMC who is board-certified in NeoNatal Medicne and is the Director of the Desert Regional Medical Center's N.I.C.U. (Neonatal-Intensive Care Unit) as well as Director of the N.I.C.U. at Eisenhower, testified on behalf of Dr. Eden. (Trans., v.4, 01/11/02, pp. 889-893). Dr. Phaklaides testified that Dr. Eden's criticisms of the Hospital were uniformly intended to improve the quality of patient care, and did, in fact, lead to greatly improved outcomes for the mothers and their babies at the Hospital. (Trans., v. 2,

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[1] A copy of the Court of Appeal's Decision is attached hereto, as required by Cal. Rules of Court Rule 28.1(b)(4).

01/11/2002, p. 895). Similarly, Nurse Stephanie Salter testified that the only staff members at DRMC who complained about and disliked Dr. Eden were those whose shortcomings had been pointed out by him. She testified that she did not know of any competent staff that has a problem working with Dr. Eden. (Id., p. 971).

Because of resistance by management to his efforts, Dr. Eden sometimes had to report DRMC's shortcomings to the California Department of Health Services (DHS). As Nurse Esther Crayton testified, Dr. Eden's reports to the DHS involved such valid concerns as "unsafe staffing, too many patients, [and] not enough nurses." (Trans. v. 8, 02/09/2002, p. 176). DRMC had, in fact, been cited by the DHS for having too many babies, resulting in an insufficient nurse to baby ratio. (Trans., v. 4, 01/11/2002, p. 851, testimony of Nurse Salter). Indeed, contrary to the Court of Appeal's statement that "the California Department of Health Services found that Dr. Eden's complaints to it about hospital operations and care were unsubstantiated" (Ct. App. Dec., p. 10), the DHS had validated his complaints as recently as October 11, 2001, during an unannounced inspection prompted by Dr. Eden, shortly before the filing of charges against him on October 17, 2001, seeking his termination for criticizing the Hospital and its staff. (See Dr. Eden's Exhibit 242 at the Admin. Hearing, p. 1209: March 28, 2002 letter from the DHS; see also

Trans., v. 11, 04/13/2002, pp. 1073-1074).[2]

B. DRMC's administrative action against Dr. Eden, resulting in his termination based on uncharged conduct

In or about October 2001, DRMC sought Dr. Eden's termination, as set forth in the Notice of Charges dated October 17, 2001. (Decision, p. 4; Exhibit 10 to Admin. Hearing). The Notice of Charges included vague allegations of behavioral disruptiveness of Dr. Eden, such as "poor interpersonal relationships" and "harrassment of hospital personnel" without specifying any specific incidents of such alleged behavior except for two very minor incidents, involving Ms. Bojorquez and Ms. Piza. (p. 5 of Notice of Charges).

An administrative hearing was held from December 7, 2001 to April 14, 2002. (Ct App Decision, p. 5). The Hospital ultimately decided to terminate Dr. Eden, effective September 20, 2002. (see CT, p. 54-55, where the Hospital formally adopted, in its entirety, the decision by the DRMC recommending Dr. Eden's termination, at CT, pp. 8-53). The Hospital's decision to terminate was based critically on evidence that had not been specifically charged, particularly letters written by Dr. Eden. Indeed, these

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[2] These numbered exhibits were submitted by Dr. Eden in binders which were sequentially numbered. They were admitted at the administrative hearing. Trans. v. 4, 01/11/2002, pp.842-843

letters had not even been part of the case presented by the Hospital; rather, the letters were submitted by Dr. Eden then unexpectedly turned against him, as discussed further below.

C. Dr. Eden, in fact, raised valid concerns with the intent to improve patient care

DRMC quoted language from the letters written by Dr. Eden to demonstrate that these letters did not represent "a sincere attempt to right the wrongs of the Hospital", which DRMC admitted "is not an inappropriate activity" and "not grounds for termination", but rather, DRMC found that the letters were "efforts at getting employees with whom he disagreed fired." (CT, p. 30).

However, the exact opposite is true: Dr. Eden's letters in fact raised valid criticisms about the Hospital with the intent to improve quality of care, which is "not an inappropriate activity", and did not represent mere efforts by Dr. Eden to "get people fired." For example, Dr. Phaklaides testified as follows:

> "Have I ever seen him treat the staff themselves unkindly or without respect? Not -- not. I haven't seen that. So shouldn't we all be a little disruptive when it comes to quality of care? I certainly don't want to be in a hospital where

people just let things go under the carpet.

(Trans., v.4, 01/11/02, p. 965)

As another example, DRMC quoted language from of one of the letters introduced by Dr. Eden at the hearing, as evidence of his purported offensiveness, as follows: "Mr. Gates has hid behind the nursing apron for years avoiding solving the L + D (Labor and Delivery) problem while placing mothers and their innocent unborn in jeopardy for monetary considerations." (CT, p. 32-33). That letter referred to the fact that Dr. Eden objected to the policies of the Hospital CEO, Mr. Truman Gates, in improperly allowing nurses to admit emergency patients instead of doctors, in violation of federal law, and at the expense of the patients, in order to further cost savings.

First of all, it is implausible to assume that Dr. Eden was trying to get the CEO to fire himself by writing this critical letter. Indeed, Nurse Stephanie Salter, who does not know Dr. Eden personally, testified that Dr. Eden's concerns were entirely valid and involved matters of basic patient safety. (Admin. Hearing Trans., vol. 2, 01/11/02, p. 856-858, 861-864, 866). She based her opinion on discussions she had had with the DHS, the California Nursing Association, and from her own practice and the Board of Registered Nursing. (Id., p. 864). Further, the Hospital had been cited three times in the past by the Department of Health Services for having too

many babies and a nurse to baby ratio that was too low. (Id., p. 850-851).

Further, Ms. Salter is the chief nursing representative for the California Nursing Association who handles complaints for and against nurses and has heard most, if not all, of the complaints by nurses against physicians at the Hospital. (Id., p. 845, 855-856). Yet, Ms. Salter testified that she had never heard of a single nurse complaint against Dr. Eden, nor was she was aware of any competent staff that has a problem working with him. (Id., p. 855-856, 971).

This detailed discussion by Ms. Salter occurred because Dr. Eden was attempting to respond to testimony by Nurse Karolee Sowle, that, over a period of years, there had been many nurse complaints against Dr. Eden for needless harassment and bogus complaints. (Trans., v. 4, 01/11/02, p. 842). It is merely coincidental that part of her testimony specifically refutes the quote from the Gates letter, which Dr. Eden had no way of knowing would be used against him as an example of "disruptive behavior". The failure of the Hospital to provide Dr. Eden with specific charges effectively prevented him from refuting the other uncharged conduct relied upon by the DRMC as a basis for termination.[3]

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[3] As previously discussed, the California Department of Health Services (DHS) substantiated his criticisms after an unnanounced visit to the Hospital on October 11, 2001, a mere six days prior to the filing of the Notice of Charges against Dr. Eden seeking his termination. (See Dr.

Furthermore, Dr. Eden, and not the Hospital, introduced the approximately 100 letters by Dr. Eden, for the purposes of responding to testimony of his purported behavioral disruptiveness, none of which had been specified in the Notice of Charges (other than the very aforementioned Bojorquez and Piza incidents). For example, he introduced Ms. Salter's testimony to rebut Ms. Sowles' testimony about nurse complaints against him. Dr. Buss, representing the Hospital, repeatedly objected to attempt by Dr. Eden to explain how his behavior was intended to benefit patient care, when such testimony involved criticism of the Hospital. Dr. Buss objected again and again on relevancy, because such matters had been raised in the Notice of Charges. The Hearing Officer, Mr. Harwell, largely agreed, and usually admitted such testimony only for purposes of responding either to the Notice of Charges "or in response to what any other witness has said." (Trans., 04/11/02, p. 839; and see generally, pp. 837-839, 850-853 for some of Dr. Buss' many relevancy objections).

In its decision, the Hospital expressly recognized that *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434 required that "[Dr. Eden] need

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Eden's Closing Statement, Ex. 242, p. 1209). This case is a good example impermissible "subterfuge" that may be involved in those cases where a hospital terminates a physician based on his or her "personality". *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 627.

only defend those matters raised in the Notice of Charges." (CT p. 29). But astonishingly, later on that same page of the decision, the Hospital then justified its totally unexpected use of those letters against Dr. Eden because, "Once these issues were raised by Dr. Eden, the JRC felt it necessary to make findings regarding many of these issues", emphasis added." (C.T., p. 29). The Hospital's behavior in turning around and using that evidence against Dr. Eden, without the slightest suggestion that it would do so, despite its recognition that Dr. Eden was merely responding to uncharged testimony against him, is yet another example of the grotesquely unfair nature of the hearing against Dr. Eden. It is impossible, and not merely difficult, to respond to the use of one's own rebuttal evidence as evidence against the physician, particularly where, as here,itself was in response to unexpected, uncharged evidence.

LEGAL DISCUSSION

I. FAIR HEARING RIGHTS GENERALLY

In administrative actions generally, and in hospital medical staff cases in particular, a party has the right to a fair hearing; denial of a fair hearing is reversible error. Cal. Civ. Proc. Code section 1094.5(b); *Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802. "Notice of the charges sufficient to provide a reasonable opportunity to respond is basic to the constitutional right to due process and the common law right to a fair

procedure." *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1445, 282 Cal.Rptr. 819; *accord, Applebaum v. Board of Directors of Barton Memorial Hospital* (1980) 104 Cal.App.3d 648, 657.

II. DRMC'S FAILURE TO PROVIDE DR. EDEN WITH NOTICE OF THE SPECIFIC INCIDENTS THAT IT USED AGAINST HIM VIOLATED HIS RIGHT TO A FAIR HEARING

In the present case, Dr. Eden's fair hearing rights were violated because Hospital failed to provide him notice of the specific charges that it ultimately relied upon in terminating him. Absent such notice, Dr. Eden had no effective opportunity to rebut the evidence that was used against him, which he could not have reasonably expected.

Indeed, the Hospital expressly admitted that, except for the very minor Bojorquez and Piza incidents, the Notice of Charges raised only "general allegations of disruptive behavior". (C.T., p. 27). In contrast, in earlier charges by the Hospital, which were consolidated with the October 2001 charges against Dr. Eden, the Hospital had alleged a "vast number of charges alleging specific acts or omissions, forty regarding the 1998 recommended 31 day suspension alone". (CT v. 1 p. 14). Yet, "evidence on these specific issues [raised in 1998] <u>was not offered</u> by the MEC [Medical Executive Committee]". (CT, v.1, p. 27, emphasis added.). The Hospital's subsequent reliance on <u>uncharged</u> specific incidents, despite its decision not to pursue any of the <u>charged</u> conduct, can only be construed as

an "ambush" on Dr. Eden calculated to deprive him of his fair opportunity to respond to charges.

A. Dr. Eden's letters

For example, the Hospital used the letters introduced by Dr. Eden as evidence of his purported behavioral disruptiveness without ever informing him that it would be considering those letters for that purpose. The Hospital itself admitted that such behavior had not been charged as disruptive in its decision, stating, "Notwithstanding frequent orders and warnings that he need defend only those matters raised in the Notices of Charges, Dr. Eden raised many specific instances of his own conduct in an apparent attempt to raise defenses..." (CT p. 29).

B. Other uncharged evidence

The Court of Appeal also cites other evidence against Dr. Eden in the record, but none of that evidence had been specifically charged against him, and so none of that evidence may be relied upon as a basis for his termination. Such evidence included the testimony of Nurse Sowles (see Ct. App. Dec., pp. 7-8, 17), the testimony of Dr. Enrique Jacome (Id., pp. 8-9, 17-18), the testimony of Dr. David Neuman (Id., p. 12, 18), a letter by Dr. Douglas Gilliot, who did not even testify (Id., p. 10, 18), and the written report and testimony of an external "expert" retained by the Hospital, Dr. Gilbert Rodriguez (Id. p. 9, 18). Because none of these incidents had been

charged, they cannot be relied upon as a basis for terminating Dr. Eden. Furthermore, nearly all of these sources constituted hearsay, including hearsay testimony made directly at the hearing.

C. The failure to provide documents in advance of the hearing

Dr. Eden was also denied a fair hearing, in that he had no reasonable opportunity to respond to, or rebut, the charges against him by the Hospital's repeated failure to provide Dr. Eden, prior to hearing, documents that DRMC intended to rely on as evidence of behavioral disruptiveness, Dr. Eden's ability to respond to and rebut these charges was unreasonably impaired. This failure is "inextricably related to" the inadequate Notice of Charges and has particular potent "cumulative impact" that unfairly prejudices Dr. Eden's defense, because he not only did not know what such documents would be specifically introduced for, but he also had no way of making even a reasonable guess as to their intended use, because all he knew, from the Notice of Charges, was that the Hospital intended to introduce evidence that had something to do with behavioral disruptiveness. *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1445, 282 Cal.Rptr. 819.

Not only does common law fair procedure require the production of documents, but also the Cal. B&P Code Sections 809 et. seq. and the Hospital Bylaws also required such pre-production. The Court of Appeal

summarily dismissed this argument, stating "Dr. Eden has not shown that he requested [such documents] at any time before... the hearing." (Ct. App. Dec. p. 21). This is simply untrue. Dr. Eden had requested all documents to be relied on by the Hospital over a year before, by letter to the Hospital dated April 27, 2000 (Ex. 161, p. 841). Because Hospital simply failed to comply with its obligation to do so, Dr. Eden even brought a motion for production of a list of witnesses and evidence to be used by the Hospital on November 30, 2001, prior to the hearing, which was denied. (Ex. 242, p. 1194).

The failure to provide Dr. Eden with a copy of Dr. Rodriguez's report prior to his brief testimony about that report was particularly egregious because of the reliance by both the DRMC, and even the Court of Appeal, on Dr. Rodriguez's opinion. (see e.g. CT p. 15; Ct App Dec p. 9, 18). While this Court is not required to reach factual issues at this time for the reasons already discussed, it is worth noting that Dr. Rodriguez's report and testimony, even taken at face value, are irrelevant and provide no support for Dr. Eden's termination as a matter of law, under *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614.

Dr. Rodriguez concluded that Dr. Eden's allegedly offensive personality reasonably threatened patient care and safety, thereby justifying his termination by DRMC. His conclusion was based solely on a review of

documents that had been selectively provided to him by the Hospital, mostly consisting of letters Dr. Eden had written critical of various aspects of Hospital functioning or personnel. (Trans., v. 1, 12/07/2001, p. 266). Dr. Rodriguez, who does not work for DRMC and had never even met Dr. Eden, candidly admitted that he had no independent knowledge of what actually happened and lacked any means of evaluating the validity of Dr. Eden's criticisms against the Hospital and its personnel. (Id. at p. 267). Accordingly, the conclusions by Dr. Rodriguez that Dr. Eden's personality posed a realistic threat to patient care is nothing more than a bald presumption on his part based on what he perceives as "offensive personality elements" of Dr. Eden, and even that perception is derived secondhand from letters rather than direct obervation or experience. It is precisely this sort of presumption that is inadequate as a matter of law to justify termination or exclusion of a physician from a medical staff, as discussed in *Miller*.

In *Miller*, this Court stated that they key consideration in determining the pemissibility of the termination of a physician for personality reasons is the hospital's establishment of a "realistic and specific threat to patient care and safety." *Miller*, 27 Cal.3d at 632. The Court further noted that an alleged ability getting along with co-workers cannot be presumed to adversely patient care because it is altogether possible for a

competent physician to have some trouble getting along with others at a hospital, yet still be a valuable contributor to the overall quality of care provided by the hospital, stating,

> An otherwise competent physician, although considered "controversial," outspoken, abrasive, hypercritical, or otherwise personally offensive by some of his hospital colleagues, may nevertheless have the ability to function as a valuable member of the hospital community and should not be denied the opportunity to do so as a result of personal animosities or resentments alone. ... To permit such application of the bylaw in question would... pose a substantial danger of application "as a subterfuge where considerations having no relevance to fitness are present." Rejection on this basis can be permitted, therefore, only when it can be shown that the applicant's ability to work with others in the hospital setting is limited in a manner which would pose a realistic and specific threat to the quality of medical care to be afforded patients at

the institution."

Id. at 632, emphasis added.

Similarly, Dr. Rodriguez was not in a realistic position to allocate the relative responsibilities and/or fault involved in the various matters raised in Dr. Eden's letters, such that his testimony that he was "most troubled" by Dr. Eden's purported inability to take personal responsibility for adverse effects on patient care is a mere conclusion. (Trans., v. 1, p. 268). Dr. Rodriguez merely assumes, without any basis, that Dr. Eden contributed to adverse patient results. The situation is analogous to the view by some in society that all criminal defendants "must" be guilty "or they wouldn't have been charged", and if they deny guilt, they show a disturbing failure to take responsibility for their "actions"; which is all well and good if the defendant actually is guilty. However, Dr. Rodriguez had no way of evaluating Dr. Eden's responsibility; he had conducted no investigation; had interviewed no one and did not get Eden's "side" of the events. This is understandable in that Dr. Rodriguez was, in his own words, just doing his "job, and that's what I was asked [e.g. paid] to do [by the Hospital], and so that's what I did. So I reviewed the [written] material that was sent, organized it so that it would make some sense to me [even though Dr. Rodriguez knew nothing regarding the factual matters raised in any of those letters], and arrived at some conclusion based on what I saw

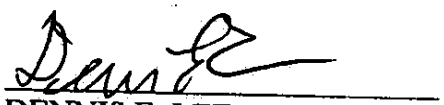
here." (Trans., v.1, 12/07/2001, p. 267, testimony of Dr. Rodriguez). While understandable, Dr. Rodriguez's testimony is simply not relevant under *Miller*. To allow such testimony would freely permit subterfuge: i.e. Dr. Rodriguez simply did not know if Dr Eden's whistleblowing claims had merit, yet the nature of his termination strongly suggests the hidden desire to get rid of conscientious patient advocate and gadfly.

CONCLUSION

Dr. Eden respectfully submits that the Petition for Review should be granted to help protect against such abuses in administrative actions under C.C.P. § 1094.5, and to help clarify the procedures required.

Dated: March 6, 2006

Law Offices of HENRY R. FENTON

By: 

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