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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ASSA WEINBERG, MD,)	CASE NO. BS080287
)	
Petitioner,)	NOTICE OF MOTION AND MOTION
)	FOR PEREMPTORY WRIT OF
v.)	MANDATE; MEMORANDUM OF POINTS
)	AND AUTHORITIES
CEDARS-SINAI MEDICAL CENTER,)	
)	DATE: April 17, 2003
Respondent.)	TIME: 9:30 a.m.
)	DEPT: 85

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 17, 2003, at 9:30 a.m., or as soon thereafter as counsel may be heard, in Department 85 of the above entitled Court, located at 111 North Hill Street, Los Angeles, California, petitioner Assa Weinberg, MD ("Dr. Weinberg") will move the Court for a peremptory writ of mandate commanding respondent Cedars-Sinai Medical Center ("Cedars") to set aside its decision of October 4, 2002, in the administrative proceedings titled In the Matter of Dr. Assa Weinberg. Said Motion will be made on the ground that respondent prejudicially abused its discretion by not proceeding in the manner required by law and/or failed to give Dr. Weinberg a fair trial.

NOTICE OF MOTION AND MOTION FOR
PEREMPTORY WRIT OF MANDATE;
MEMORANDUM OF POINTS AND AUTHORITIES

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Said Motion is based upon this Notice of Motion, the attached Memorandum of Points and Authorities, the verified Petition in this action, the administrative record lodged with the Court, and upon all of the pleadings, papers, and records on file in this action.

DATED: December 20, 2002

SILVER & FIELD

By: Lawrence Silver / MEF
Lawrence Silver, Attorneys for
Petitioner Assa Weinberg, MD

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1 their own judgment for that of the experts and summarily revoked
2 Dr. Weinberg's staff membership and privileges. This arbitrary
3 action by the Cedars Board should be reversed by this Court for
4 four related reasons.

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6 II.

7 THE CEDARS BOARD FAILED TO PROCEED
8 IN THE MANNER REQUIRED BY LAW AND/OR FAILED
9 TO GIVE DR. WEINBERG A FAIR TRIAL

10 A. The Board Failed To Give "Great Weight" To The Decision Of
11 The Peer Review Bodies.

12 California Business and Professions Code Section 809.05
13 states that "It is the policy of this state that peer review be
14 performed by licentiates." The Cedars Board undermined this
15 policy when it substituted its own judgment for that of the
16 medical experts.

17 Section 809.05(a) allows the Board a role in the peer review
18 process. However, that section specifically provides that "in
19 all peer review matters, the governing body [i.e., the Hospital's
20 Board of Directors], shall give great weight to the actions of
21 peer review bodies and, in no event, shall act in an arbitrary or
22 capricious manner." It is readily apparent that the Cedars Board
23 not only failed to give "great weight" to the conclusion of both
24 the Hearing Committee and the Medical Executive Committee, it
25 failed to give those conclusions any weight at all.¹

26
27 ¹ The Board also violated Business & Professions Code
28 §809.05(c) by failing to conduct a full hearing before revoking
Dr. Weinberg's staff privileges and membership. Dr. Weinberg has

1 Dr. Weinberg is not aware of any case authority interpreting
2 this Code Section. However, in order for the statutory language
3 to have any meaning at all, a hospital board which contravenes
4 the expert advice of the medical staff must establish a founda-
5 tion for doing so. In this case, the sole reason given by the
6 Board for its disagreement was the following:

7 "But without substituting the lay board
8 member's [sic] medical judgment for that of
9 the members of Hearing Committee or MEC and
10 even giving great weight to the findings of
11 the Hearing Committee majority, the
12 conclusions and recommendations drawn by the
13 Hearing Committee majority and endorsed by
14 the MEC are not supported by the substantial
15 evidence contained in the record." Ex. 8, p.
16 2 (all cited exhibits are attached to the
17 Writ Petition).

18 The Board then went on to state in conclusory terms findings
19 that contravened the conclusions of the Hearing Committee without
20 providing any rationale or supporting evidence for those
21 conclusions. Such conclusory statements not only fail to give
22 "great weight" to the expert opinion, but constitute an arbitrary
23 and capricious action in violation of the statutory mandate.

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26 _____
27 pleaded this as an alternative basis for relief, but has not
28 briefed it in detail because there is no dispute that the Board
failed to conduct such a hearing. See fn. 3 and accompanying
text.

1 One of the Board's statements involves an issue unrelated to
2 the expertise necessary to evaluate the charges against Dr.
3 Weinberg. In paragraph E (Ex. 8, p. 3), the Board stated
4 "that the appropriate standard of review of
5 the nine (9) cases focused upon by the
6 Hearing Committee, should have been the
7 cumulative or aggregate weight of the
8 evidence. That was not the standard used by
9 the Hearing Committee majority."

10 Dr. Weinberg anticipates that Cedars will rely on this point
11 in opposition to this Motion, and therefore will point out the
12 flaws in this statement. First, the Hearing Committee did not
13 state, anywhere in its report (Ex. 4), that the majority reached
14 its conclusion by considering the cases individually rather than
15 cumulatively. The Board's claim that the Hearing Committee did
16 so is unsupported by the record before it, and thus arbitrary.

17 Second, the Board stated that it had "heightened concerns"
18 based on the minority opinion of 2 members of the Hearing
19 Committee. However, that minority opinion criticized Dr.
20 Weinberg on only two of the charges, and its reference to "the
21 totality of many charges" was limited to one sentence. Ex. 4, p.
22 1. The minority opinion therefore does not even support the
23 Board's findings.²

24
25 ² The minority report is mostly devoted to criticizing
26 Dr. Weinberg's personality. This, of course, was an uncharged
27 "offense" and would itself be reason enough to set aside the
28 decision on due process grounds if the Board had adopted it.
Wheeler v. State Bd. of Forestry, 144 Cal.App.3d 522, 527, 192
Cal.Rptr. 693, 696 (1983); Negrete v. State Personnel Board, 213
Cal.App.3d 1160, 1167, 262 Cal.Rptr. 72, 76 (1989).

1 Third, when the Board remanded the case to the Medical
2 Executive Committee for rehearing on July 29, 2002, it
3 specifically asked the Medical Executive Committee to determine
4 "whether based on the cumulative results of the nine case
5 findings contained in the Hearing Committee's April 1, 2002,
6 report" (Ex. 6, p. 2, emphasis added), Dr. Weinberg should remain
7 on the medical staff. The Minutes of the Medical Executive
8 Committee executive session on September 9, 2002, specifically
9 recite that the purpose of the meeting was to reconsider its
10 recommendation based upon the cumulative results of the case
11 findings. Ex. 7, p. 1. A secret poll was conducted to affirm
12 the Medical Executive Committee's previous recommendation, and
13 the vote on that ballot was 22-5 in favor of the previous
14 recommendation (i.e., that Dr. Weinberg's staff privileges not be
15 revoked). Ex. 7, p. 3. Again, therefore, the Board's contrary
16 conclusion constitutes nothing more than a substitution of its
17 own lay judgment for that of the experts on the medical staff.

18
19 **B. The Board Has A Conflict Of Interest And Its Decision**
20 **Violated Dr. Weinberg's Right To Due Process.**

21 The second reason why the revocation should be set aside is
22 closely related to the first reason. It both supports the
23 statutory language requiring deference to the medical staff
24 expertise and constitutes an independent basis for reversal.

25 Under California law regarding peer review proceedings,
26 hospital boards have an inherent conflict of interest which gives
27 them a powerful incentive to rule against the physician notwith-

1 standing the judgment of the medical staff. This incentive
2 arises from a simple fact of California case authority. There
3 are various grounds on which a hospital might be liable to a
4 physician for actions taken during peer review proceedings. See,
5 e.g., Summit Health Ltd. v. Pinhas, 500 U.S. 322, 111 S.Ct. 1842,
6 114 L.Ed.2d 366 (1991). However, by case authority, a physician
7 may not pursue such relief unless and until he/she succeeds in
8 setting aside an adverse determination. Westlake Community
9 Hospital v. Superior Court, 17 Cal.3d 465, 131 Cal.Rptr. 90
10 (1976).

11 Under this protection, the board of a hospital can, in
12 effect, immunize itself from civil liability by suspending or
13 revoking the privileges of a physician. The physician must then
14 undertake the effort and expense of setting aside that
15 determination. As a practical matter, setting aside the
16 revocation of staff privileges is very difficult under Section
17 1094.5, so the hospital board has little incentive to rule in the
18 physician's favor (therefore setting itself up for potential
19 civil liability), and every incentive to find against the
20 physician, notwithstanding the conclusions of the actual experts.
21 This conflict of interest reinforces the need for this Court to
22 enforce both the statutory policy that peer review be conducted
23 by licentiates, and the statutory requirement that the Board give
24 "great weight" to the actions of the peer review bodies.

25 Dr. Weinberg also asserts this conflict of interest as
26 independent ground for setting aside the Board's action. There
27 is no doubt that California law requires that due process/fair
28

1 procedure be used in peer review proceedings. Anton, supra, 19
2 Cal.3d at 829, 140 Cal.Rptr. at 458. The procedure by which a
3 hospital board can grant itself immunity by ruling against the
4 physician, while subjecting itself to potential civil liability
5 by ruling in favor of the physician, violates the most funda-
6 mental notions of due process/fair procedure.

7 In Ward v. Village of Monroeville, 409 U.S. 57, 93 S.Ct. 80
8 (1972), the mayor of Monroeville served as a judge for traffic
9 offenses and could impose fines. A major part of the village
10 income (upwards of 35%) was derived from fines and other
11 penalties imposed by the mayor's court. The mayor had general
12 overall responsibility for supervising village affairs, including
13 making annual accounts respecting village finances. The Supreme
14 Court held that the mayor's dual role violated due process
15 because it offered the average person the temptation to convict
16 rather than behave impartially. This rule applies to
17 administrative proceedings no less than criminal. Haas v. County
18 of San Bernardino, 27 Cal.4th 1017, 1024 n. 7, 119 Cal.Rptr.2d
19 341 346 n. 7 (2002). California courts have recognized and
20 applied Ward v. Monroeville. Id., 27 Cal.4th at 1024-8, 119
21 Cal.Rptr. at 346-9; Appelbaum v. Board of Directors of Barton
22 Memorial Hospital, 104 Cal.App.3d 648, 163 Cal.Rptr. 831 (1980).

23 Dr. Weinberg is obligated to inform this Court that the
24 Court of Appeal permitted hospital boards to make such decisions
25 in Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical
26 Center, 62 Cal.App.4th 1123, 1142-3, 73 Cal.Rptr.2d 695, 707
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1 (1998). The Court in Hongsathavij made two points in the course
2 of its discussion.

3 The second point was that

4 "Hospital governing body members have
5 fiduciary duties as directors
6 Hospital assets are on the line, and the
7 hospital's governing body must remain
8 empowered to render a final medical practice
9 decision which could affect those assets."

10 Id., 62 Cal.App.4th at 1143, 73 Cal.Rptr.2d
11 at 707.

12 "Hospital assets are on the line." Precisely -- it is that
13 very fact which creates the conflict of interest here and which
14 renders the Board's action impermissible. And see Haas, supra.

15 Hongsathavij ruled that the hospital board could determine
16 the physician's status under the rule of necessity:

17 "Moreover, where an administrative body has a
18 duty to act, and is the only entity capable
19 of acting, the fact that the body may have an
20 interest in the result does not disqualify it
21 from acting. The rule of necessity precludes
22 a claim of bias from the structure of the
23 process." Id. at 1143, 73 Cal.Rptr.2d at
24 707.

25 Dr. Weinberg respectfully suggests that Hongsathavij erred
26 in applying the rule of necessity. First, the court's citation
27 to Griggs v. Board of Trustees, 61 Cal.2d 93, 37 Cal.Rptr. 194
28

1 (1964) in support of the rule (omitted from the quote above)
2 appears to be an error. Griggs does not mention or discuss the
3 rule of necessity.

4 Second, Hongsathavij is the only case to apply the rule of
5 necessity to a private body; all previous decisions stated the
6 rule in terms of public bodies. For example, when the California
7 Supreme Court adopted the rule of necessity in Federal
8 Construction Co. v. Curd, 179 Cal. 489, 494, 177 P. 469, 471
9 (1918), it said:

10 "Where disqualification if permitted to
11 prevail destroys the only tribunal in which
12 relief may be sought, and thus effectively
13 bars the doors of justice, the disqualified
14 judge is bound to hear and decide the cause.'
15 The particular application of this principle
16 has been most frequently made to the class of
17 quasi judicial bodies of which the city
18 council of Porterville is an example, such as
19 boards of supervisors, city councils, boards
20 of trustees, boards of equalization,
21 commissioners of irrigation and drainage
22 districts, and the like."

23 Every other California case since, other than Hongsathavij,
24 has applied the rule of necessity to public bodies. There is a
25 good reason for this -- in a democracy, ultimately, the people
26 collectively are responsible for deciding how to run public
27 affairs. By definition, they have an interest in the outcome. A
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1 rule which barred the participation of those interested in the
2 outcome would ban democracy itself:

3 "Without the rule of necessity, [conflict of
4 interest requirements] would do more than
5 wall off the decision maker; [they] would
6 wall out the decision. Participatory
7 democracy can be destroyed as much by
8 obstructive inaction as by biased action."

9 Kunec v. Brea Redevelopment Agency, 55

10 Cal.App.4th 511, 521, 64 Cal.Rptr.2d 143, 148

11 (1997), footnote omitted.

12 In addition, where a public agency rules on a matter in
13 which the members have an interest in the outcome, those "members
14 are subject to public disapproval; elected members can be turned
15 out of office . . ." E&E Hauling, Inc. v. Pollution Control
16 Ed., 481 N.E.2d 664, 668 (Ill. 1985). No such protection exists
17 in the case of private corporate boards.

18 The third flaw in Hongsathavij involves its interpretation
19 of the word "necessity". Here is the definition:

20 "The general rule adopted in a majority of
21 jurisdictions is called the **rule of**
22 **necessity**. It is thus stated . . . 'By the
23 great weight of authority, a judge or an
24 officer exercising judicial functions may act
25 in a proceeding wherein he is disqualified by
26 interest, relationship, or the like, if his
27 jurisdiction is exclusive and there is no

1 legal provision for calling in a substitute,
2 so that his refusal to act would prevent
3 absolutely a determination of the
4 proceeding.'" Nider v. Homan, 32 Cal.App.2d
5 11, 17, 89 P.2d 136, 140 (1939), emphasis
6 added; Aluisi v. County of Fresno, 178
7 Cal.App.2d 443, 452, 2 Cal.Rptr. 779, 784
8 (1960).

9 Hongsathavij could not and did not establish this level of
10 "necessity". No statute grants to hospital boards the exclusive
11 jurisdiction to make these decisions. In fact, no statute
12 requires that the board make any decision at all. To the
13 contrary, the statutes state a public policy that the medical
14 staff make the decision:

15 "809.05.

16 It is the policy of this state that peer
17 review be performed by licentiates. This
18 policy is subject to the following limita-
19 tions:

20 (a) The governing bodies of acute care
21 hospitals have a legitimate function in the
22 peer review process. In all peer review
23 matters, the governing body shall give great
24 weight to the actions of peer review bodies
25 and, in no event, shall act in an arbitrary
26 or capricious manner.

1 (b) In those instances in which the
2 peer review body's failure to investigate, or
3 initiate disciplinary action, is contrary to
4 the weight of the evidence, the governing
5 body shall have the authority to direct the
6 peer review body to initiate an investigation
7 or a disciplinary action, but only after
8 consultation with the peer review body. No
9 such action shall be taken in an unreasonable
10 manner.

11 (c) In the event the peer review body
12 fails to take action in response to a
13 direction from the governing body, the
14 governing body shall have the authority to
15 take action against a licentiate. *Such*
16 *action shall only be taken after written*
17 *notice to the peer review body and shall*
18 *fully comply with the procedures and rules*
19 *applicable to peer review proceedings*
20 *established by Sections 809.1 to 809.6,*
21 *inclusive." Emphasis added.*³

23 ³ The Board indisputably failed to provide the hearing
24 required by the italicized passage. Ex. 8, p. 1. This provides
25 the third basis for setting aside the Board's decision. More-
26 over, though it failed to conduct a hearing, it received evidence
27 outside the record which was not provided to Dr. Weinberg in the
28 form of oral reports from the Chief of Staff and its general
counsel, and a written report by the Chief of Staff. Ex. 8, pp.
2, 4. This deprived Dr. Weinberg of a fair trial, English v.
Long Beach, 35 Cal.2d 155, 158, 217 P.2d 22, 24 (1950), making
the fourth basis for reversal.

1 The Cedars' Board did not overrule the medical staff in Dr.
2 Weinberg's case because of a statutory duty, but because the
3 hospital by-laws gave it that final authority. Clearly, Cedars
4 cannot enact by-laws giving the Board final approval and then
5 assert those by-laws as establishing a rule of necessity. That
6 would indeed be pulling itself up by its own bootstraps.

7 Remarkably, there is a case arising out of facts strikingly
8 similar in structure to those here. In Mennig v. City Council,
9 86 Cal.App.3d 341, 150 Cal.Rptr. 207 (1978), the City Council of
10 Culver City became embroiled in a personal dispute with Mennig
11 and brought charges against him before the civil service
12 commission requesting his discharge. All members of the Council
13 testified against Mennig at the hearing before the civil service
14 commission. The commission rejected the charges as unfounded and
15 refused to discharge Mennig, though it did suspend him. The City
16 Council disapproved the recommendation of the civil service
17 commission and discharged Mennig.

18 Mennig sought review under CCP §1094.5, the Superior Court
19 issued a writ of mandate, and the Court of Appeal affirmed. The
20 City argued that the rule of necessity allowed it to act in
21 review of the commission recommendation, but the court rejected
22 this:

23 "Whatever may be its applicability generally,
24 the 'rule of necessity' is not pertinent
25 here. The civil service rules here
26 applicable, while denominating the
27 determination of the degree of discipline

1 imposed by the commission a 'recommendation'
2 to the city council, when read in their
3 entirety empower the commission to determine
4 the penalty. Only a unanimous vote by the
5 city council can veto the penalty. Absent
6 that unanimous vote, the degree of discipline
7 imposed by the civil service commission
8 stands. The council is thus not the only
9 decisionmaker capable of acting in the
10 matter." Id. at 351-2, 150 Cal.Rptr. at 214.
11 See also In Re Ross, 656 P.2d 832, 835-8
12 (Nev. 1983).

13 In the present case, the Cedars Board was not the only
14 decision-maker -- the medical staff made its decision. Because
15 of the conflict of interest in the Board, the medical staff
16 decision should stand.

17 Finally, if there were a true conflict in this case between
18 the requirements of due process and the rule of necessity, "the
19 rule of necessity must yield to the requirements of due process."
20 7 Witkin, Summary of California Law, 4th Ed., §529, pp. 732-3.

21
22 III.

23 CONCLUSION

24 California public policy delegates peer review to licen-
25 tiates. The Cedars Board ignored this policy by substituting its
26 own judgment for those of the Hearing Committee and the Medical
27 Executive Committee. The Board failed to give "great weight" to
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the experts; indeed, it failed to give them any weight at all. The Board's failure is all the more egregious because it has a conflict of interest that renders it incapable of reaching an impartial decision. This conflict both reinforces the need for this Court to enforce the required deference to the peer review bodies and provides an independent basis for setting aside the Board's decision, namely, failure to accord Dr. Weinberg due process.

For the foregoing reasons, Dr. Weinberg requests that the decision of the Cedars Board be reversed and the recommendation of the medical staff (Ex. 7, p. 3) be substituted.

DATED: December 20, 2002 SILVER & FIELD

By: Lawrence Silver / MEF
Lawrence Silver, Attorneys for
Petitioner Assa Weinberg, MD