S156986

IN THE
SUPREME COURT OF CALIFORNIA

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

vs.

WEST HILLS HOSPITAL MEDICAL CENTER et al.,
Defendants and Respondents.

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION EIGHT
CASE NO. B186238

OPENING BRIEF ON THE MERITS

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Defendants and Respondents.

OPENING BRIEF ON THE MERITS

ISSUE PRESENTED

The issue presented for review in this matter is:

> Does the hearing officer presiding over a medical peer review proceeding under Business and Professions Code sections 809 et seq. have authority to terminate the proceeding for party misconduct, in this case the violation of the hearing officer's discovery orders?

(PFR 1; see Cal. Rules of Court, rule 8.520(b)(2).)

INTRODUCTION

This case concerns the authority of the hearing officer presiding over a medical peer review proceeding to terminate the proceeding where the physician whose medical staff privileges are being reviewed repeatedly disregards the hearing officer's orders requiring him to produce documents relevant to the proceeding. In the present case, the hearing officer terminated a peer review proceeding when plaintiff Dr. Gil Mileikowsky refused to comply with the hearing officer's orders to produce documents detailing another hospital's summary suspension and termination of Dr. Mileikowsky's staff privileges based on incompetence.

The trial court upheld the hearing officer's terminating order, explaining that, "[d]espite numerous warnings, [Dr. Mileikowsky] failed to provide the . . . records [from the other hospital that] were in his possession . . . . In these circumstances, the Hearing Officer was justified in imposing the terminating sanction, in the 'interest of justice.' [¶] Termination was also warranted in the interest of justice to prevent [Dr. Mileikowsky] from benefiting from refusing to produce relevant evidence, and [it] was an appropriate safeguard. A continuance would not remedy [Dr. Mileikowsky's] conduct, but allow it. . . . A [peer review] hearing would be meaningless without the information necessary to make a decision [regarding whether, in light of the summary suspension and termination of Dr. Mileikowsky's privileges at another hospital, Dr. Mileikowsky's privileges should be renewed],

and therefore there was justification to terminate the [peer review] hearing when [Dr. Mileikowsky] failed to supply required information." (CT 3988-3989.)

The trial court's decision was supported by existing law, specifically a Court of Appeal decision involving a different instance of Dr. Mileikowsky's intransigence at a hospital peer review proceeding. (See *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 531, 560-561 (*Mileikowsky II*).) The appellate court there recognized that hearing officers have implicit authority to terminate proceedings under a statutory provision and hospital bylaws requiring the hearing officer to preside over the proceeding, rule on discovery and procedural matters, and take any just measures necessary to protect the peer review process. (*Ibid.*; Bus. & Prof. Code, § 809.2, subd. (d).) The court also held that hearing officers have inherent authority to enforce the discovery orders they are required by statute to make. (See *ibid.*)

The Court of Appeal in this case nevertheless held that hearing officers are not allowed to terminate peer review proceedings. Although no statute expressly precludes the power, the court found such a prohibition implicit in statutory law that bars hearing officers from voting on the merits of a staff privileges issue while authorizing them to continue the hearing due to a participant's noncompliance with discovery orders. (See *Mileikowsky v. West Hills Hospital Medical Center* (2007) 154 Cal.App.4th 752, 763-779 (*Mileikowsky III*), review granted Dec. 12, 2007, No. S156986.)

The Court of Appeal's decision here overlooked the important distinction between procedural and substantive determinations. Hearing officers, like other judicial and administrative officers, can terminate proceedings under the proper circumstances regardless whether they are authorized to decide the merits of the proceeding. In addition, a statute that allows a continuance when document production is delayed, but also authorizes the imposition of safeguards to protect the peer review process, permits termination of the proceeding based on the repeated refusal to comply with discovery orders. The pertinent statute does not require a hearing officer to either perpetually continue the hearing or proceed with the hearing in the face of ongoing discovery abuse. Rather, unless the hearing officer's authority is expressly restricted by statute (and no such express restriction exists here), he or she should have all of the authority normally possessed by judicial and administrative officers, including the authority to terminate proceedings in response to participant misconduct.

STATEMENT OF FACTS

A. West Hills and its medical staff have established procedures for evaluating physician applications for privileges and for appeals from denials of applications.

1. The West Hills medical staff conducts peer review and makes recommendations to the governing body on physician privileges applications.

As a state-licensed acute care hospital, West Hills Hospital Medical Center has a Board of Trustees as its governing body with overall administrative responsibility for the hospital. (CT 1613, 1615, 2329, 3899; see Health & Saf. Code, §§ 1250, subd. (a), 1250.8, subd. (b)(1) & (2); Cal. Code Regs., tit. 22, § 70701.) It also has a medical staff that is the formal organization of all licensed physicians, dentists, podiatrists, and clinical psychologists who are granted privileges to treat patients in the hospital. (CT 1613, 3899; see Health & Saf. Code, § 1250.8, subd. (b)(3); Cal. Code Regs., tit. 22, § 70703.)

Medical staffs in California hospitals are "responsible for 'the adequacy and quality of the medical care rendered to patients in the hospital.'" (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 10.) One of the medical staff's most important duties in this regard is conducting "peer review" to assess the initial and ongoing medical competency of every physician who practices at the hospital. (CT 1616-1617, 1630; see

Cal. Code Regs., tit. 22, §§ 70701(a)(7), 70703, subds. (b), (d) & (e); CT 1253-1254, 1678-1680.) At a minimum, peer review is conducted when a physician applies for medical staff membership—which includes the clinical privileges that allow the physician to practice at the hospital—and when the physician applies for reappointment, which by state law must occur at least every two years. (CT 1621; see Cal. Code Regs., tit. 22, § 70701, subd. (a)(7); CT 1636-1637.)

The West Hills Medical Staff bylaws provide for a Medical Executive Committee (MEC) to make recommendations regarding peer review actions, and for a fair hearing and appellate review mechanism regarding any contested peer review recommendations. (CT 1615-1616, 1633-1634, 1636-1638, 1650-1657, 3899-3900; see Cal. Code Regs., tit. 22, § 70703, subds. (b) & (d); CT 1675, 1678-1682.) But it is West Hill's governing body—the Board of Trustees—that has the final decision whether to accept or reject the MEC's recommendation regarding medical staff membership and clinical privileges. (CT 1634-1635, 1638.) The Board of Trustees, however, must give great weight to the MEC's recommendations. (Bus. & Prof. Code, § 809.05, subd. (a).)

Under the Medical Staff's bylaws, each physician seeking appointment or reappointment to the Medical Staff must complete a written application that reports, among other things, whether any adverse action has been taken against the applicant's privileges at any other hospital. (CT 1630-1631 [bylaw § 6.2-2(e)], 1636-1637, 1640, 2342-2343; see CT 915, 1632, 2101.) Also, by applying for staff privileges, each applicant "consents to Hospital representatives inspecting all

records and documents which may be material to an evaluation of his/her professional qualifications and competence to carry out the clinical privileges, . . . and of his/her professional ethical qualifications . . . ." (CT 1631.)

It is the applicant who has "the burden of producing adequate information for a proper evaluation of his/her experience, health status, background, training and demonstrated ability for clinical privileges and staff category requested, and of resolving any reasonable doubts about these matters, and of satisfying requests for information; and of persuading the medical staff by a preponderance of the evidence of his/her qualifications for staff membership or privileges. The applicant's failure to sustain this burden shall be grounds for denial of the application." (CT 1632 [bylaw § 6.4-1]; see CT 1638, 1656, 2343.)

Before the MEC acts, each medical staff application is initially reviewed by the appropriate clinical department, which makes a recommendation to the Medical Staff's credentials committee. (CT 1633, 1637.) The credentials committee then reviews the application, supporting documents, and the recommendation of the clinical department, conducts any further investigation it chooses to undertake, and transmits to the MEC a written report of its recommendation.[1/] (CT 1633, 1637.) The MEC then conducts its own

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1/ The credentials committee must collect or verify, directly from the source, the references, licensure, and other qualification evidence submitted in support of an application. (CT 1632, 1637; see CT 2243.) The hospital's authorized representative must query the National Practitioner Data Bank regarding the applicant and submit any

review and forwards a written report regarding its recommendation to the hospital's CEO for transmittal to the Board of Trustees. (CT 1633, 1638.)

When the MEC's recommendation is adverse to the applicant, the CEO or medical staff president informs the applicant and provides notice regarding the applicant's administrative fair hearing rights. (CT 1634, 1648, 1650.) If the applicant wishes to contest the MEC's recommended action, he or she must timely request a hearing before a judicial review committee (JRC), or is deemed to accept the recommended action, which becomes effective immediately upon governing board approval. (CT 1634, 1650.) Once a JRC hearing is requested, the applicant's failure "to appear and proceed at such hearing shall be deemed to constitute voluntary acceptance of the recommendation or action involved, which shall become effective

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resulting information to the credentials committee for inclusion in the applicant's credentials file. (CT 1632; see Bus. & Prof. Code, § 805.5; 42 U.S.C.A. § 11133; 45 C.F.R. § 60.10(c) (2007); see also 45 C.F.R. §§ 60.1-60.11 (2007) [National Practitioners Data Bank regulations regarding the collection and dissemination of information relating to the professional competence and conduct of physicians].)

The credentials committee must notify an applicant of any problems with obtaining information, and the applicant then becomes obligated to help obtain the required information. (CT 1633, 1637; see CT 2343.) The credentials committee sends the applicant three requests for information at 30-day intervals. If the requested information is not received within 30 days of the last request, the application is deemed withdrawn. (CT 1633.)

immediately, and his/her waiver of all other rights inuring to him/her" under the bylaws. (CT 1651-1652.)

2. Physicians have a right to an administrative appeal regarding adverse actions on their privileges applications.

Under the West Hills Medical Staff bylaws, the MEC schedules any requested JRC hearing and appoints at least five members of the active staff to serve on the JRC. (CT 1651-1652.) The MEC also may request the Board of Trustees to appoint a hearing officer to preside over the JRC hearing. (CT 1651.) The bylaws impose restrictions on who may serve as the hearing officer: he or she may not be legal counsel to West Hills or the Medical Staff, may not gain direct financial benefit from the outcome, may not act as a prosecuting officer or advocate, and "shall not be entitled to vote." (*Ibid*. [bylaw § 10.1-5].)

Both the physician who is appealing and the Medical Staff have certain discovery rights in advance of the JRC hearing. They can "inspect and copy, at their own expense and as soon as is practicable, any documentary information in the possession or under the control of the other which is relevant to the charge against the member." (CT 1654 [bylaw § 10.3-2(b)].) The bylaws further provide that "[t]he failure by either party to provide access to this information at least thirty (30) days before the hearing shall constitute good cause for continuance." (*Ibid*.) The hearing officer rules on requests for access to

information, and "may impose any safeguards" that the "protection of the peer review process and justice requires." (*Ibid.* [bylaw § 10.3-2(c)]; see CT 1655; accord, Bus. & Prof. Code, § 809.2, subd. (d).)

After the hearing concludes, the JRC prepares a written report and recommendation to the MEC and Board of Trustees. (CT 1652.) If dissatisfied, the physician may appeal the JRC's decision to the Board of Trustees. (*Ibid.*) The Board of Trustees may appoint a hearing officer to preside over its appeal hearing, and may restrict the evidence presented at that hearing. (CT 1653, 1657.) The Board gives deference to JRC decisions that are supported by substantial evidence following a fair procedure. (See Bus. & Prof. Code, § 809.05, subd. (a); CT 1653; see also CT 1634, 1657.)

B. After Dr. Mileikowsky loses his staff privileges at three other hospitals, he applies at West Hills for renewal of his medical staff membership and courtesy gynecological privileges, and for the addition of obstetric privileges.

Dr. Gil Mileikowsky is an obstetrician and gynecologist who specializes in infertility treatment. (CT 9, 698-701.) Dr. Mileikowsky practiced at Cedars-Sinai Medical Center until January 1998, when his staff privileges there were summarily suspended on grounds of medical incompetence and malpractice that endangered the health and

safety of three patients.[2/] (CT 69, 873, 891-892, 894, 2460.) Cedars-Sinai later revoked Dr. Mileikowsky's staff privileges permanently and reported this action to the Medical Board of California as required by Business and Professions Code section 805 (i.e., Cedars-Sinai filed what is known as a "section 805 report" regarding its termination of Dr. Mileikowsky's staff privileges).[3/] (CT 889, 891, 2000, 2002.)

Dr. Mileikowsky also practiced at the Encino-Tarzana Regional Medical Center, until it summarily suspended his staff privileges on November 16, 2000, and then revoked his privileges in 2002, due to incompetent medical care and various incidents of disruptive behavior that endangered patients. (CT 893-899, 2431; see CT 2005, 2824 .) And he practiced at Century City Hospital,[4/] whose medical staff curtailed his privileges and then recommended revoking Dr. Mileikowsky's privileges in 2000. (CT 2401-2419; see CT 148.)

2/ A hospital's peer review or governing body is permitted to summarily suspend a physician's clinical privileges only if "the failure to take that action may result in an imminent danger to the health of any individual . . . ." (Bus. & Prof. Code, § 809.5.)

3/ Each time a hospital took action against Dr. Mileikowsky's staff privileges it filed a section 805 report with the Medical Board of California, the agency responsible for licensing and disciplining physicians. (CT 69, 873, 891-899, 2002, 2401-2419, 2460-2461; see Bus. & Prof. Code, § 805, subds. (a)(7), (b), (c) & (e); CT 873-879.)

4/ Dr. Mileikowsky's litigation against Encino-Tarzana's owner, Tenet Health Systems, stemmed from his loss of privileges at Encino-Tarzana. (See *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262 (*Mileikowsky I*); *Mileikowsky II, supra,* 128 Cal.App.4th at p. 531; CT 147.)

Dr. Mileikowsky became a member of the West Hills' medical staff in 1986. (CT 13.) In 1999, the Medical Staff granted Dr. Mileikowsky's application for renewal of his medical staff membership and, because of his infrequent use of the hospital, courtesy gynecological privileges. (CT 2345; see CT 1625 [defining courtesy privileges].) In November 2000, Dr. Mileikowsky requested temporary obstetrics privileges at West Hills. (CT 2345, 2420-2421.) To evaluate this request for obstetrics privileges, the West Hills Medical Staff sought Encino-Tarzana's peer review documents from both Dr. Mileikowsky and Encino-Tarzana. (CT 2422-2425.)

On November 29, 2000, the president of the West Hills Medical Staff wrote a letter asking Dr. Mileikowsky "to provide complete details including all supporting documents concerning actions taken against you at Cedars-Sinai Medical Center and Encino Tarzana Hospital." (CT 2447.) The next day, Dr. Mileikowsky responded that he was "ready and willing to provide [West Hills with] ANY and ALL information [it wishes]" (CT 2450), but he balked at providing the Cedars-Sinai peer review documents on the ground he was "not authorized" to do so (CT 2451; see CT 2505).[5/] Dr. Mileikowsky referenced an earlier letter by an attorney stating that Cedars-Sinai would not give a blanket release of its peer review documents to other

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5/ Dr. Mileikowsky also stated in his response that the West Hills Medical Staff's counsel, James Lahana, had served as hearing officer in Dr. Mileikowsky's peer review proceedings at Cedars-Sinai and had all pertinent information regarding those proceedings. (CT 2450-2451.)

hospitals because the law required individual patient consent to the release of their private medical information and because Cedars-Sinai wished to avoid waiving its rights under Evidence Code section 1157, a statute that generally makes peer review records immune from discovery. (See CT 65-66, 1220, 1879, 2398, 2451, 2456-2457, 2489, 2970.)

The following week, Dr. Mileikowsky executed a release for Cedars-Sinai and Encino-Tarzana to provide their peer review documents to West Hills. (CT 2481-2491; see CT 628, 2510 [West Hills' letter to Cedars-Sinai requesting its peer review documents based on Dr. Mileikowsky's release].) On December 13, 2000, the Medical Staff's counsel informed Dr. Mileikowsky that he would not be granted temporary obstetrics privileges until the Medical Staff had reviewed the Cedars-Sinai peer review documents. (CT 401, 2511.)

On February 1, 2001, West Hills's Medical Staff informed Dr. Mileikowsky that it still had not received the Cedars-Sinai peer review documents, and that its unsuccessful attempt to secure the documents directly from Cedars-Sinai did not relieve Dr. Mileikowsky of his independent obligation to produce the documents for its review. (CT 2512-2514; see *ante,* fn. 1.)

C. The West Hills Medical Executive Committee (MEC) recommends denial of Dr. Mileikowky's 2001 application for staff privileges, and he requests a hearing before a Judicial Review Committee (JRC).

In May 2001, Dr. Mileikowsky applied for renewal of his staff membership and courtesy gynecology privileges at West Hills, and for additional obstetrical privileges. (CT 98-110, 913-924, 2345, 2518-2527, 3901; see CT 97.) West Hills's Medical Staff and clinical department committees reviewed Dr. Mileikowsky's application and investigated his qualifications for privileges, including obtaining the section 805 reports filed by Cedars-Sinai, Century City, and Encino-Tarzana. (See CT 115, 873-876, 2328.)

In February 2002, the West Hills Medical Staff extended Dr. Mileikowsky's gynecological privileges for 60 days while it continued reviewing his application. (CT 115-117.) It reminded Dr. Mileikowsky that the bylaws required him to inform the Medical Staff within 10 days of any hospital's adverse action regarding his privileges, and asked him to explain the peer review actions at Century City and Encino-Tarzana and his failure to report them. (*Ibid.*)

In his response, Dr. Mileikowsky downplayed the significance of the peer review actions at Century City and Encino-Tarzana, and claimed that his attorney had advised him not to report those peer review actions to West Hills because counsel for its Medical Staff already knew about them. (CT 124-143.) He also estimated that it

would take several more years before he exhausted his administrative and legal remedies regarding the Century City and Encino-Tarzana peer review actions. (CT 124, 136; see CT 111, 126.)

On April 24, 2002, the Medical Staff president informed Dr. Mileikowsky in a Notice of Charges letter that the MEC had recommended the denial of his application for reappointment and for obstetrical privileges based on the "misrepresentation and/or omissions of information contained in [Dr. Mileikowsky's] reapplication for Medical Staff membership, as well as [his] failure to persuade the Medical Staff by a preponderance of the evidence of [his] qualifications for these privileges."[6/] (CT 925-928, 2540-2544; see CT 930.) A month later, Dr. Mileikowsky appealed. (CT 2547-2548, 2722-2723.)

6/ The Medical Staff president's letter informed Dr. Mileikowsky that his application for staff privileges had been denied because: (1) he had failed to notify the Medical Staff that his privileges at Century City had been terminated on November 7, 2000; (2) his application stated that he had voluntarily resigned from Encino-Tarzana while documentation showed that he had been summarily suspended by Encino-Tarzana on November 16, 2000; and (3) he had falsely claimed he had obstetrics privileges and had forced his way into a patient's room at West Hills even though she specifically requested that he not be allowed to see her. (CT 925-928, 2036-2039, 2540-2543.)

The third charge stemmed from a March 2002 incident where nurses filed written reports with West Hills' CEO complaining that Dr. Mileikowsky had disregarded a maternity patient's request that he not attend her, misrepresented the status of his privileges, and had been abusive towards nurses. (CT 2530-2535.) The West Hills CEO's investigation substantiated the nurses' reports. (CT 2536.)

D. After Dr. Mileikowsky repeatedly disregards the hearing officer's orders that he produce requested documents, the hearing officer terminates the JRC hearing.

On June 17, 2002, attorney John Harwell wrote to Dr. Mileikowsky and the West Hills Medical Staff informing them that he had been appointed to serve as the hearing officer for the JRC hearing, describing the fair procedure requirements governing the hearing, and asking the Medical Staff to respond to a request by Dr. Mileikowsky for a continuance. (CT 176-182; see CT 164-166.)

On June 28, Dr. Mileikowsky wrote to the Medical Staff's counsel (sending a copy to Harwell, the Medical Staff president, and the West Hills CEO), complaining that he had not yet received a complete copy of his credentials and administrative files, including all incident reports, which he had requested a month earlier. (CT 3064-3066; see CT 2547-2548.) Harwell responded that same day, stating that "both sides have requested documents which have not yet been produced. . . . We should plan on completing the exchange of documents by mid-July at the latest . . . ." (CT 2553.) At a July 1 hearing, Harwell reiterated that the parties must complete their exchange of documents before the JRC hearing could begin. (CT 2602.)

Two weeks later, Dr. Mileikowsky again complained to Harwell about the Medical Staff not producing documents and, in what turned out to be an ironic request, asked Harwell to order the Medical Staff to

produce the documents "or face Terminating Sanctions and dismissal of the adverse findings of the MEC." (CT 3056-3061.)

The next day, Harwell asked Dr. Mileikowsky and the Medical Staff to complete their exchange of documents within the next two months, and again stated that no JRC hearing could be scheduled until discovery was complete. (CT 408-410, 413.) Harwell said that he would review the documents being sought by Dr. Mileikowsky to determine their relevancy and explained that terminating sanctions must be used sparingly and that no egregious behavior warranting terminating sanctions had yet occurred. (CT 408-409, 413-414.)

On July 17, 2002, the Medical Staff's counsel wrote to remind Dr. Mileikowsky that he still had not produced "copies of the Notice of Charges, findings of the Hearing Committee and transcripts and exhibits concerning the summary action . . . at Cedars-Sinai Medical Center despite prior requests for such information" and to request updated information concerning the pending peer review proceedings at Encino-Tarzana and Century City hospitals.[7/] (CT 2746.) The attorney also warned Dr. Mileikowsky that "[a]s a result of your refusal to provide the requested information, your application for reappointment remains incomplete" and that his "continued failure to provide these materials by July 28, 2002 will result in the Medical Staff amending its Notice of Charges to include allegations concerning your

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7/ The Medical Staff had made five prior requests for the Cedars-Sinai peer review documents, starting in November 2000. (CT 115-117, 2447, 2478-2479, 2511, 2512-2514.)

failure to cooperate, as well as including a reference to the Cedars-Sinai Medical Center suspension based upon the limited information contained in the Business and Professions Code Section 805 report and National Practitioner Data Bank report submitted by Cedars-Sinai Medical Center." (CT 2746-2747.) The Medical Staff president made similar complaints and warnings to Dr. Mileikowsky five days later. (CT 253.)

Dr. Mileikowsky sent a fax to the Medical Staff president requesting that the MEC wait until August 5 for his response to the Medical Staff counsel's request for documents before making any decisions. (CT 2748-2749.) In response, the Medical Staff president stated that the MEC would make only a tentative decision that would be communicated to Dr. Mileikowsky in the event he failed "to comply with the request for information by August 12, 2002." (CT 2755.)

On August 21, 2002, after Dr. Mileikowsky had still not produced any of the requested documents, the MEC amended its April 24 Notice of Charges to include charges of, among other things, an incomplete application and the failure to cooperate, because of his failure to produce the requested information. (CT 2758-2759.) The Medical Staff once again requested Dr. Mileikowsky to "immediately provide" the peer review documents concerning Cedars-Sinai's summary suspension of his medical staff membership and privileges. (CT 2758.)

The months passed without Dr. Mileikowsky producing the Cedars-Sinai documents, despite the MEC's efforts to discover them and Dr. Mileikowsky's indications that he would produce them. (See

CT 430-431 [Dr. Mileikowsky's September 3, 2002 letter to Harwell stating that he "shall not be able to respond to the latest correspondence from West-Hills till 9-10" and asking Harwell to "wait for my response before you rule on West-Hills[']requests"], 432 [Medical Staff president's October 3, 2002 letter to Harwell asking him to order Dr. Mileikowsky to immediately comply with the MEC's discovery requests for the Cedars-Sinai documents], 2764 [Medical Staff president's November 27, 2002 letter to Harwell asking for a finding that Dr. Mileikowsky had abandoned his appeal based on his failure to produce the Cedars-Sinai documents].)

On December 6, 2002, now five months after the first date he had set for the completion of the parties' document exchange, Harwell informed Dr. Mileikowsky and the Medical Staff president that, under the bylaws, a physician's failure to "'proceed' constitutes an abandonment of the appeal" and ordered the parties to exchange all requested information and documents by January 10, 2003. (CT 433; see CT 1651-1652 [bylaw 10.1-7].) Harwell also warned that the "[f]ailure of either party to move this matter toward January hearings will invite action from the hearing officer to dismiss the appeal with a decision adverse to whichever party has failed to 'proceed' in a timely manner." (CT 434.)

On January 6, 2003, the Medical Staff president informed Harwell that Dr. Mileikowsky had produced some documents from

Encino-Tarzana, but not any of the Cedars-Sinai documents.[8/] (CT 437.) He asked Harwell to order Dr. Mileikowsky to produce the Cedars-Sinai documents within 10 days or face terminating sanctions. (*Ibid.*) Dr. Mileikowsky responded that he had already provided the Medical Staff with executed releases for the Cedars-Sinai documents and that no more was required, and therefore either the MEC should voluntarily withdraw its charges or Harwell should enter an order dismissing the proceedings. (CT 440-443, 2882-2892.)

Another month went by with numerous exchanges, including a large number of copious faxes from Dr. Mileikowsky, but without the Cedars-Sinai documents being produced. (See CT 2961-2966, 2968-2969, 3017, 3027-3079, 3106, 3191-3227, 3229-3230, 3233, 3239-3248, 3251, 3253-3266, 3268-3286, 3293-3311, 3318-3322, 3335-3343, 3347-3348, 3349-3351, 3352-3359, 3365-3378, 3380, 3404-3410.) Then on February 5, Harwell made a further order: (1) restricting Dr. Mileikowsky's use of faxes; (2) reiterating that the bylaws authorized him to enter terminating sanctions based on a party's failure to proceed; (3) taking official notice of the Encino-Tarzana peer review documents; (4) ruling that the Cedars-Sinai peer review documents were "clearly relevant"

8/ The letter also stated that the Medical Board of California may have filed an accusation against Dr. Mileikowsky, but Dr. Mileikowsky had not provided the Medical Staff with any information about that accusation. (CT 437; see CT 299-303 [December 13, 2002 California Medical Board accusation against Dr. Mileikowsky petitioning for an order compelling him to submit to physical and mental exams to assess his ability to practice medicine].)

to the Notice of Charges pending against Dr. Mileikowsky, and that Dr. Mileikowsky's refusal to produce those documents was unjustified; and (5) ordering Dr. Mileikowsky to produce the Cedars-Sinai peer review documents or face terminating sanctions. (CT 942-956, 2053-2067, 3412-3426.) The following week, Dr. Mileikowsky produced more documents from the Encino-Tarzana proceedings but none of the Cedars-Sinai documents, and stated that he would comment on Harwell's order by February 24, 2003. (CT 957-959, 2068-2070, 3427-3429, 3477-3479.)

On March 18, 2003, Harwell wrote to Dr. Mileikowsky and the MEC, observing that Dr. Mileikowsky had not responded as promised to the order that he produce the Cedars-Sinai documents. (CT 3485-3486.) Harwell ordered that, by March 24, Dr. Mileikowsky must allow the MEC to inspect and copy the Cedars-Sinai peer review documents in Dr. Mileikowsky's possession relevant to Cedars-Sinai's summary suspension and termination of Dr. Mileikowsky's privileges and membership, or "terminating sanctions will be ordered." (*Ibid.*)

On March 26, the MEC notified Harwell that Dr. Mileikowsky had once again disregarded his discovery order and asked him to enter terminating sanctions. (CT 963, 2074.) The next day, Harwell entered a 12-page order terminating the JRC hearing due to Dr. Mileikowsky's discovery abuses. (CT 965-976, 1582-1593, 2076-2087, 3489-3500.) Harwell explained that "[t]his terminating order follows many attempts at gaining Dr. Mileikowsky's compliance with orders to provide documentary information relevant to the charges as requested

by the Medical Staff, specifically regarding a charge involving a purported medical staff disciplinary action at another hospital, Cedars-Sinai Medical Center."[9/] (CT 965, 1582, 2076, 3489.) Harwell also documented the many times that he had warned Dr. Mileikowsky that his discovery abuses could result in terminating sanctions. (CT 967, 1584, 2078, 3491.) Finally, Harwell explained his authority to enter terminating sanctions under California law and the hospital's bylaws, and why it was appropriate to enter such sanctions in this case. (CT 967-975, 1584-1592, 2078-2086, 3491-3499.)

E. Dr. Mileikowsky appeals the hearing officer's order terminating the JRC hearing to the hospital's governing board, which affirms.

Dr. Mileikowsky appealed Harwell's terminating order to the Board of Trustees. (CT 3509-3514.) The West Hills CEO advised

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9/ Harwell's order also explained: "The record reflects that the Medical Staff made many requests for this documentary information and many orders were made by the hearing officer directing Dr. Mileikowsky to produce such documents. Dr. Mileikowsky did not comply with these orders to produce documentary information. Dr. Mileikowsky failed to comply with many orders made by the hearing officer in this matter, involving such disparate issues as improper *ex parte* communications, manner and delivery of notices, motions and briefs and other procedural, substantive and orders seeking civility and courtesy. Dr. Mileikowsky advised the hearing officer on several occasions that he had a right to ignore the hearing officer's orders." (CT 966, 1583, 2077, 3490.)

Dr. Mileikowsky that his appeal was being allowed despite his possible waiver of any further rights under the bylaws, but would be limited to the issues (1) whether Dr. Mileikowsky complied with his discovery obligations, and (2) whether the hearing officer complied with fair procedure requirements. (CT 368-369.)

Both Dr. Mileikowsky and the MEC filed briefs and presented oral argument. (CT 3526-3540, 3643-3749, 3764-3806.) The Board rejected Dr. Mileikowsky's arguments that a hearing officer such as Harwell did not have the power to order terminating sanctions, and instead found that Dr. Mileikowsky was afforded a fair hearing in substantial compliance with the bylaws, that Harwell's terminating order was reasonable and warranted, and that the order was supported by the weight of the evidence. (CT 3814; see CT 3818-3823.)

Harwell's termination order was adopted as the final action of the Board of Trustees on August 19, 2003. (CT 3814; see CT 758-765.)

PROCEDURAL HISTORY

A. Dr. Mileikowsky unsuccessfully petitions for a writ of administrative mandamus and seeks tort damages.

On August 19, 2004, exactly one year after the governing board took its final action on his medical staff membership and privileges, Dr. Mileikowsky filed a petition for writ of administrative mandate in Superior Court challenging the governing board's decision and seeking reinstatement of his staff privileges at West Hills and other related relief.[10/] (CT 8-46.)

The trial court denied Dr. Mileikowsky's writ petition and entered a statement of decision.[11/] (CT 3984-3989.) Seven weeks later,

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10/ Dr. Mileikowsky's other causes of action sought recovery for unfair competition, tortious interference with business and economic advantage, and defamation. (CT 8-46.) Dr. Mileikowsky named West Hills, HCA Inc. (which owns West Hills), the Medical Staff, Harwell, and the Medical Staff's attorney as respondents. (CT 8-10.) For convenience, we refer to the respondents collectively as West Hills.

11/ In pertinent part, the trial court's statement of decision explained that:

> By repeatedly refusing to comply with the Medical Staff's request and the Hearing Officer's orders to produce the [Cedars-Sinai] documents, [Dr. Mileikowsky] prevented the JRC from properly performing its function of evaluating his fitness to practice. [Dr. Mileikowsky] argues the lack of compliance with discovery should be considered by the JRC during the hearing, but not as a reason to terminate the hearing. That is not so. . . . [¶]

after the parties briefed whether denial of the writ mooted his other causes of action (see *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 469, 478, 484 [requiring litigant to obtain writ relief vacating the final administrative decision before pursuing tort and other remedies]; CT 3990-4005, 4010-4056), the trial court entered judgment against Dr. Mileikowsky on all of his non-mandate causes of action and on his writ petition (CT 4057-4060). Dr. Mileikowsky appealed from both the judgment and the earlier order denying his writ petition. (CT 4080-4081.)

> [Dr. Mileikowsky] has no right to demand that the hearing take place only on his terms and conditions and the JRC consider only the evidence that [Dr. Mileikowsky] felt was relevant.

(CT 3988; see CT 3988-3989 ["Despite numerous warnings, [Dr. Mileikowsky] failed to provide the JRC with the . . . [Cedars-Sinai peer review] records [that] were in his possession . . . . In these circumstances, the Hearing Oficer was justified in imposing the terminating sanction, in the 'interest of justice.' [¶] Termination was also warranted in the interest of justice to prevent [Dr. Mileikowsky] from benefiting from refusing to produce relevant evidence, and [it] was an appropriate safeguard. A continuance would not remedy [Dr. Mileikowsky's] conduct, but allow it. . . . A JRC hearing would be meaningless without the information necessary to make a decision [regarding whether the basis for Cedars-Sinai's summary suspension of Dr. Mileikowsky's privileges compelled the denial of his application for privileges at West Hills], and therefore there was justification to terminate the JRC hearing when [Dr. Mileikowsky] failed to supply the required information"].)

B. The Court of Appeal reverses, holding that the hearing officer had no authority to terminate the hearing, only to continue it.

The Court of Appeal reversed the judgment, holding that Harwell had no power to terminate the JRC hearing and that the only remedy available to him for a party's discovery abuses and/or violation of discovery orders was to further continue the hearing. (*Mileikowsky v. West Hills Hosp. Medical Center* (2007) 151 Cal.App.4th 1249, 1273, rehg. granted July 3, 2007.)

Both West Hills and Dr. Mileikowsky petitioned for rehearing.[12/] The Court of Appeal granted rehearing, and then filed a modified opinion that reached the same result as the first opinion. (See *Mileikowsky III, supra,* 154 Cal.App.4th at pp. 763-779.)

This court granted West Hills' petition for review.

12/ Dr. Mileikowsky's petition argued that the Court of Appeal should have directed the trial court to order reinstatement of his staff privileges pending completion of all peer review proceedings, and should have held that Harwell was disqualified from serving as the hearing officer.

LEGAL ARGUMENT

THE HEARING OFFICER PROPERLY TERMINATED THE PEER REVIEW PROCEEDINGS BASED ON DR. MILEIKOWSKY'S REFUSAL TO COMPLY WITH LAWFUL DISCOVERY ORDERS.

A. The standard of review.

"A hospital's decisions resulting from peer review proceedings are subject to judicial review by administrative mandate." (*Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 200 (*Kibler*), citing Bus. & Prof. Code, § 809.8; see Code Civ. Proc., § 1094.5, subd. (d).) This judicial review has two aspects: "'First, [the court] must determine whether the governing body applied the correct standard in conducting its review of the matter. Second, after determining as a preliminary matter that the correct standard was used, then the superior court must determine whether there was substantial evidence to support the governing body's decision.'" (*Weinberg v. Cedars-Sinai Medical Center* (2004) 119 Cal.App.4th 1098, 1106-1107.)

The first aspect of a court's review — involving whether a hospital has applied the correct standards as prescribed by the Business and Professions Code, hospital bylaws, and common law fair procedure

principles—is de novo. (*Weinberg v. Cedars-Sinai Medical Center, supra,* 119 Cal.App.4th at p. 1107.)

Once it has determined that a hospital has applied the correct standards, however, a court undertaking its substantial evidence review of the final administrative decision "'must view the evidence in the light most favorable to the [hospital board's] findings and indulge all reasonable inferences in support thereof.'" (*Cipriotti v. Board of Directors* (1983) 147 Cal.App.3d 144, 154-155; see also *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 36 ["[E]ven though a vested fundamental right be involved, the determination of the agency on factual issues is entitled to all the deference and respect due a judicial decision"]; *Hongsathavij v. Queen of Angels etc. Medical Center* (1998) 62 Cal.App.4th 1123, 1136 [courts review final governing board decisions, not intermediate JRC decisions].) Specifically regarding review of a hearing officer's decision to impose terminating sanctions, one court has applied the abuse of discretion standard. (*Mileikowsky II, supra,* 128 Cal.App.4th at pp. 556-557 & fn. 16.)

B. The primary goal of medical peer review to protect public health depends on the ability to secure relevant information from physicians seeking privileges, especially information concerning their loss of privileges at other hospitals.

The primary goal of medical peer review is to "'preserv[e] the highest standards of medical practice' throughout California." (*Kibler, supra,* 39 Cal.4th at p. 199, quoting Bus. & Prof. Code, § 809, subd. (a)(3); see *id.* at p. 200 ["peer review procedure plays a significant role in protecting the public against incompetent, impaired, or negligent physicians"]; *Arnett v. Dal Cielo*, *supra*, 14 Cal.4th at pp. 11-12; Bus. & Prof. Code, §§ 805, 809, subd. (a)(6), 809.05, subd. (d).) The Legislature has also expressed its intent that the peer review process be conducted in an efficient manner that is fair to both sides. (See Bus. & Prof. Code, § 809, subd. (a)(3) ["Peer review, fairly conducted, is essential to preserving the highest standards of medical practice"], (a)(7) ["It is the intent of the Legislature that peer review of professional health care services be done efficiently"].)

"[T]he peer review process serves the important social interest in public health and safety by continually scrutinizing medical and health care operations in order to correct any potential problems with procedure or staff which might threaten the individual patient with disproportionate risk of danger." (*People v. Superior Court (Memorial Medical Center)* (1991) 234 Cal.App.3d 363, 373 (*Memorial Medical Center*)

[a medical peer review committee serves "as a quasi-public functionary"]; *Medical Staff of Sharp Memorial Hospital v. Superior Court* (2004) 121 Cal.App.4th 173, 181-182 ["the overriding goal of the state-mandated peer review process is protection of the public and that while important, physicians' due process rights are subordinate to the needs of public safety"].)

To accomplish this goal, state law requires hospitals to have a "formally organized and self-governing *medical staff* responsible for 'the adequacy and quality of the medical care rendered to patients in the hospital.'" (*Arnett v. Dal Cielo, supra,* 14 Cal.4th at p. 10; see *Sahlolbei v. Providence Healthcare, Inc.* (2003) 112 Cal.App.4th 1137, 1143, fn. 1; see also *ante*, pp. 5-9.) The medical staff is thus the legislatively chosen body responsible for conducting peer review in a manner that best protects the public health and welfare. (*Kibler, supra,* 39 Cal.4th at p. 199; see *Clarke v. Hoek* (1985) 174 Cal.App.3d 208, 220-221.) "The medical staff acts primarily through a number of peer review committees" that, among other things, "evaluate physicians applying for staff privileges." (*Arnett*, at p. 10; see Cal. Code Regs., tit. 22, § 70701 [physicians are not permitted to treat patients at hospitals without first securing privileges from the medical staff, and they must reapply for those privileges every two years].)

The quality of the information on which the medical staff's peer review decisions are based is of paramount importance. "The maintenance of high medical standards depends on the effectiveness of the oversight of such committees, and thus on the accuracy of the

information which the committees can obtain concerning the operations of the facility with which they are affiliated." (*Memorial Medical Center, supra,* 234 Cal.App.3d at p. 373.) This is especially true with respect to information regarding why a physician has lost his or her privileges at other hospitals. As required by statute, "[p]rior to granting or renewing staff privileges for any physician . . . the medical staff of the [hospital or other health care] institution shall request a report from the Medical Board of California . . . to determine if any report has been made pursuant to Section 805 indicating that the applying physician . . . has been denied staff privileges, been removed from a medical staff, or had his or her staff privileges restricted as provided in Section 805." (Bus. & Prof. Code, § 805.5, subd. (a).)

Thus, to meet its public obligation of ensuring high medical standards, the medical staff *must* investigate in detail why an applicant's privileges at another hospital were restricted or revoked before extending privileges to that physician. (*Medical Staff of Sharp Memorial Hospital v. Superior Court, supra,* 121 Cal.App.4th at p. 182 [a "'"hospital which closes its eyes to questionable competence and resolves all doubts in favor of the doctor does so at the peril of the public"'"]; accord, *Goodstein v. Cedars-Sinai Medical Center* (1998) 66 Cal.App.4th 1257, 1266; *Webman v. Little Co. of Mary Hospital* (1995) 39 Cal.App.4th 592, 600; *Rhee v. El Camino Hospital Dist.* (1988) 201 Cal.App.3d 477, 489; see also *Bell v. Sharp Cabrillo Hospital* (1989) 212 Cal.App.3d 1034, 1048; *Dorn v. Mendelzon* (1987) 196 Cal.App.3d 933, 944 [a medical staff securing another hospital's peer review

information serves an important public interest].) While such information is always important, its importance is particularly keen where, as here, the hospital evaluating an application for privileges has little or no prior experience with the physician.

However, the medical staff is often unable to secure peer review documents directly from another hospital, regardless whether the applicant consents to their release—as happened here. Neither a hospital nor its medical staff may issue a subpoena compelling other hospitals to produce peer review documents (see *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 815, fn. 12; *Ascherman v. Saint Francis Memorial Hosp.* (1975) 45 Cal.App.3d 507, 510), and hospitals are reticent about voluntarily disclosing their confidential peer review documents (see *Bell v. Sharp Cabrillo Hospital, supra,* 212 Cal.App.3d at pp. 1040 & fn. 5, 1043 ["even with an authorization, a hospital generally provides only vague statements in general terms explaining why privileges were removed, guarding the details surrounding the review process"]; *Pick v. Santa Ana-Tustin Community Hospital* (1982) 130 Cal.App.3d 970, 982).

For this reason, when a medical staff seeks information regarding peer review proceedings at another hospital, the physician who was the subject of those proceedings is often the *only* source of that information and *must* provide it.[13/] (See *Alexander v. Superior Court* (1993) 5 Cal.4th

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13/ A physician applying for privileges generally possesses peer review documents and information from the other hospitals since he or she has a statutory right to it. (Bus. & Prof. Code, §§ 809.2,

1218, 1227 ["'it is essential that doctors seeking hospital privileges disclose all pertinent information to the committee'"]; *Pick v. Santa Ana-Tustin Community Hospital, supra,* 130 Cal.App.3d at p. 983 [if a physician applicant "wanted to establish the propriety of his actions at [another hospital], he surely had it within his power to present a transcript of the proceedings there or other persuasive evidence aside from his own self-serving testimony. . . . Hospital does not have subpoena power. It is altogether appropriate, therefore, that the medical staff bylaws placed the burden of establishing his qualifications for admission to medical staff membership upon him"]; *Oskooi v. Fountain Valley Regional Hospital* (1996) 42 Cal.App.4th 233, 244 ["It was [Dr.] Oskooi's obligation to provide the Hospital with the requested information [concerning his previous hospital affiliations]. The Hospital had no duty to search for it, but once it was put on notice, it had a continuing duty to evaluate its physicians for public safety"]; *id*. at pp. 248-249 (conc. opn. of Sills, J.).)

As explained in the following sections, consistent with common law fair procedure principles, peer review statutes, and hospital regulations and bylaws, hearing officers may terminate peer review proceedings where, as here, the physician requesting the hearing repeatedly refuses to comply with the officer's orders compelling him to disclose to the medical staff all peer review documents in his possession concerning his loss of privileges at other hospitals.

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subd. (d), 809.3, subd. (a), 809.4, subd. (a); see *Mileikowsky II, supra,* 128 Cal.App.4th at p. 558.)

C. Peer review and physician rights are governed by common law fair procedure principles, the Business and Professions Code, and hospital regulations and bylaws.

The hospital peer review process starts with a physician's application for medical staff membership and clinical privileges. (See *ante*, p. 6.) That application is reviewed and investigated by the clinical department and the credentials committee, whose recommendations are reviewed by the MEC. (See *ante*, pp. 6-7.) The MEC makes a recommendation to the Board of Trustees regarding final action on the application. (See *ante*, pp. 7-8.) If the MEC's recommendation is adverse, the applicant may seek a hearing before a JRC or arbitration board. (See *ante*, p. 8.) The JRC or arbitration board makes a recommendation regarding the proposed action which the physician, if dissatisfied, may appeal to the Board of Trustees. (See *ante*, pp. 9-10.) The entire peer review process is governed by common-law fair procedure principles, peer review statutes, and hospital regulations and bylaws.

Courts require that medical peer review procedures comply with the common law fair procedure doctrine. (*Ezekial v. Winkley* (1977) 20 Cal.3d 267, 278 [common law fair procedure doctrine requires that hospitals taking adverse action against a physician's privileges "must afford him *rudimentary procedural* and *substantive fairness*" (emphasis added)].) Under the fair procedures doctrine, a hospital "'retains discretion in formalizing [peer review] procedures, [but] the courts

remain available to afford relief in the event of the abuse of such discretion.'" (*Anton v. San Antonio Community Hosp., supra,* 19 Cal.3d at p. 829; see *Bollengier v. Doctors Medical Center* (1990) 222 Cal.App.3d 1115, 1124-1125.) Discretion is abused if the hospital's procedures are inconsistent with the court's assessment of fairness. (See *Goodstein v. Cedars-Sinai Medical Center, supra,* 66 Cal.App.4th at pp. 1265-1266.)

In addition, "the Business and Professions Code sets out a comprehensive scheme that incorporates the peer review process into the overall process for the licensure of California physicians." (*Kibler, supra,* 39 Cal.4th at p. 199.) This statutory scheme is implemented and supplemented by hospital regulations and bylaws that govern the details of the peer review process, and which are binding on the parties unless inconsistent with a peer review statute. (Bus. & Prof. Code, §§ 809, subd. (a)(8), 809.6, subd. (a); Cal. Code Regs., tit. 22, §§ 70701, subd. (a), 70703, subds. (b) & (d); *Mileikowsky II, supra*, 128 Cal.App.4th at p. 558.)

Under these procedures, whenever a medical staff peer review committee recommends adverse action regarding a physician's medical staff application or membership, the "physician is entitled to written notice of the charges and may request a formal hearing." (*Arnett v. Dal Cielo, supra,* 14 Cal.4th at p. 10.) "If a hearing is requested, it must be conducted pursuant to strictly circumscribed procedures" specified in the Business and Professions Code and the hospital's bylaws. (*Ibid.*; see Bus. & Prof. Code, §§ 809.1-809.4, 809.6, subd. (a); see also Bus. & Prof. Code, § 809, subd. (a)(8); *ante*, pp. 9-10.)

By statute, a JRC must be comprised of unbiased individuals who, where feasible, practice the same specialty as the "licentiate" (i.e., the physician requesting the JRC hearing).[14/] (Bus. & Prof. Code, § 809.2, subd. (a).) The hearing officer, if one is used, also must be unbiased, cannot act as an advocate or prosecutor, and "shall not be entitled to vote." (*Id.* § 809.2, subd. (b).) At the completion of the hearing, the parties are entitled to a written decision by the JRC specifying its findings and articulating the connection between the evidence presented and the decision reached, and an explanation of any available appellate mechanism. (*Id.* § 809.4, subd. (a)(1), (2).)

14/ The statute specifies that "[t]he 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, subd. (a).)

D. The hearing officer presiding over a peer review hearing has implicit and inherent authority to terminate the proceeding as a sanction for misconduct.

1. Hearing officers have implicit authority to terminate peer review proceedings.

Business and Professions Code section 809.2, subdivision (b), specifically authorizes hearing officers to "preside" over peer review proceedings. So do the hospital bylaws. (CT 1651 [bylaw 10.1-5].)

Authority to preside means the hearing officer has the right to rule on procedural matters and to otherwise direct, control, or regulate the peer review proceedings in the same manner that a judge presides over a trial. (*Mileikowsky II, supra*, 128 Cal.App.4th at p. 560; Bus. & Prof. Code, § 809.2, subd. (d); see also Black's Law Dict. (8th ed. 2004) p. 1222, col. 2; Webster's 3d New Internat. Dict. (1986) p. 1794, col. 1.) Thus, for example, hospital bylaw 10.3-4 requires the hearing officer to ensure that all participants "have a reasonable opportunity to be heard and to present all oral and documentary evidence and that decorum is maintained." (CT 1655; see *ante*, p. 9.)

In *Mileikowsky II, supra*, 128 Cal.App.4th at page 560, the Court of Appeal interpreted the statutes and hospital bylaws as including within a hearing officer's authority the power to terminate a hearing when necessary. A hearing officer obviously cannot ensure that *all* participants "have a reasonable opportunity to be heard and to present

. . . documentary evidence" when one participate steadfastly refuses to comply with orders that he produce relevant documents. (See CT 1655.) Although section 809.2, subdivision (d), provides that "[t]he failure by either party to provide access to [documentary information relevant to the charges] at least 30 days before the hearing shall constitute good cause for a continuance" it also says that in ruling on requests for access to information, the hearing officer "may impose any safeguards the protection of the peer review process and justice requires." Also, West Hills' bylaws specify that the "[f]ailure of the applicant or member of the Medical Staff requesting the [JRC] hearing to appear and proceed at such hearing shall be deemed to constitute voluntary acceptance of the recommendations or action involved, which shall become effective immediately," and a waiver of all other rights otherwise available under the bylaws. (CT 1651-1652 [bylaw 10.1-7]; see *ante*, p. 8.)

Reviewing that statute and a similar bylaw of another hospital,[15/] the Court of Appeal in *Mileikowsky II* aptly stated, "[t]he hearing officer's conclusion that he had the power to suspend the hearing based on the conduct of the practitioner is in line with the relevant statutes and the Bylaws as interpreted by the appellate review body. His decision that the rules permit termination of a hearing when the practitioner is repeatedly disruptive, disdainful of the hearing officer's

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15/ All hospital bylaws, like the ones at issue here, must track and implement the Business and Professions Code provisions. (See Bus. & Prof. Code, §§ 809, subd. (a)(8), 809.6, subd. (a).)

authority, and flagrantly violates the rules pertaining to discovery and documentary exhibits was not 'clearly erroneous' or 'unreasonable,' and was affirmed by the appellate review body." (*Mileikowsky II, supra,* 128 Cal.App.4th at p. 560; see Bus. & Prof. Code, § 809.2, subd. (d).) The *Mileikowsky II* court further reasoned that, "[i]n 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." (*Mileikowsky II, supra,* 128 Cal.App.4th at p. 561.)

The *Mileikowsky II* decision is correct. It furthers the Legislature's intent that parties to peer review proceedings be allowed to discover relevant documents from the other party. (Bus. & Prof. Code, § 809.2, subd. (d); see *People v. Shabazz* (2006) 38 Cal.4th 55, 67-68 [court should construe statutes to further the legislative intent apparent in the statute].)

It is significant that the Legislature has not barred hearing officers in medical peer review proceedings from entering terminating sanction orders because it has expressly done so in other contexts.[16/]

16/ We focus on the hearing officer's authority to terminate the proceedings because that is the issue presented in this case. However, for the same reasons why the hearing officer is authorized to terminate the proceedings under appropriate circumstances, a hearing officer could enter other types of orders, such as evidentiary and issue sanctions, where circumstances do not justify termination of the

(Compare Food & Agr. Code, § 55488, subd. (e)(5) ["The hearing officer [presiding at proceeding regarding whether to deny or revoke a food processor license] may not issue sanctions"].) Nor has the Legislature authorized peer review hearing officers to certify discovery abuse issues to the superior court for contempt sanctions as it has done elsewhere. (See Gov. Code, § 11507.7 ["order of the administrative law judge compelling discovery is enforceable by certification to the superior court of facts to justify the contempt sanction"]; *Lax v. Board of Medical Quality Assurance* (1981) 116 Cal.App.3d 669, 675 [same]; see also *Marcus v. Workmen's Comp. Appeals Bd.* (1973) 35 Cal.App.3d 598, 603.) Similarly, had the Legislature wished to specify precisely what duties the hearing officer can perform, it could have done that, too. (See Ed. Code, § 56505.1; Food & Agr. Code, § 14651, subd. (c); see also Cal. Code Regs., tit. 2, § 617.2; *id*., tit. 8, § 350.1; *id*., tit. 22, §§ 7714, 53666.)

The Legislature did none of these. Instead, it authorized hospitals to fashion their own bylaws governing peer review procedures, provided those bylaws were consistent with the statutory

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proceedings. (See, e.g., Code Civ. Proc., §§ 2025.450, subd. (d), 2025.480, subd. (g), 2030.300, subd. (e), 2031.320, subd. (c), 2032.650, subd. (c), 2033.290, subd. (e).) For example, the governing board at Encino-Tarzana directed the hearing officer to first impose evidentiary and issue sanctions against Dr. Miliekowsky, before upholding the hearing officer's subsequent imposition of terminating sanctions based on his continued pattern of discovery abuses. (CT 899, 2831, 3005.) The hearing officer's authority to impose all of these different types of sanctions should be the same.

requirements. (Bus. & Prof. Code, §§ 809, subd. (a)(8), 809.6, subds. (a) & (b); see Cal. Code Regs., tit. 22, §§ 70701, subd. (a), 70703, subds. (b) & (d); *Mileikowsky II, supra*, 128 Cal.App.4th at p. 558; *Shacket v. Osteopathic Medical Board* (1996) 51 Cal.App.4th 223, 231 ["The Legislature . . . delegated to the private sector the responsibility to provide fairly conducted peer review in accordance with the notice, discovery and hearing rights of due process"].)

The fact the Legislature neither forbade hearing officers from sanctioning parties for disobeying their orders nor provided hearing officers with a procedure for securing judicial contempt citations is strong indication that the Legislature did not intend to prohibit hospital bylaws from authorizing hearing officers to restrict or terminate the proceeding in a manner adverse to a party disregarding the hearing officers' lawful orders. (See Bus. & Prof. Code, § 809.2, subds. (d) & (e).) This is especially true in light of the Legislature's expressed intent that hospitals establish their own efficient and fair peer review procedures. (See *id.* §§ 809, subd. (a)(8), 809.6, subd. (a).) Here, the West Hills bylaws, as interpreted by its governing body, do just that by providing that physicians who fail to appear and proceed at a peer review hearing are deemed to voluntarily accept the recommended adverse action regarding their privileges and waive any further administrative review rights. (CT 368-369, 1651-1652, 3814; see CT 3984-3985, 3989; see also *Mileikowsky II, supra,* 128 Cal.App.4th at p. 555 [courts give deference to an agency's interpretation of its own

regulations]; *Weinberg v. Cedars-Sinai Medical Center, supra,* 119 Cal.App.4th at p. 1108 [same].)

2. Hearing officers have inherent authority to terminate peer review proceedings.

Regardless whether peer review statutes and hospital bylaws implicitly authorize hearing officers to terminate the peer review proceeding, such authority is inherent in the hearing officer position. (*Mileikowsky II, supra,* 128 Cal.App.4th at pp. 560-561.) Significantly, Dr. Mileikowsky himself recognized this authority during the proceedings at issue here. When he thought the Medical Staff was being recalcitrant in complying with his document requests, he asked the hearing officer to grant terminating sanctions against the Medical Staff. (CT 230-231, 3056-3061, 3085.)

Hearing officers should have the authority to enforce their lawful discovery orders for the same reason trial courts have authority to enforce their lawful orders—to uphold the dignity and effectiveness of the proceedings. (See *Hull v. Superior Court* (1960) 54 Cal.2d 139, 153 (conc. opn. of Traynor, J.) ["A court's power to withhold its processes, like its power to punish for contempt, rests on the necessity of upholding the court's dignity and enforcing its orders"]; *Mileikowsky I, supra,* 128 Cal.App.4th at p. 280 ["Here the record is replete with evidence of Dr. Mileikowsky's failures to answer discovery requests despite numerous extensions sought and granted. Time and again, he

refused to respond despite the issuance of court orders and monetary sanctions. Only the threat of terminating sanctions caused responses to be submitted. The court was not required to allow this pattern of abuse to continue ad infinitum. It did not abuse its discretion in ordering terminating sanctions"].)

Indeed, the same rationale has prompted this court and the Court of Appeal to terminate appellate proceedings in response to a litigant's refusal to comply with lawful orders. (*Moffat v. Moffat* (1980) 27 Cal.3d 645, 652 ["We acknowledge the general principle that one who flagrantly and persistently defies a court order is not entitled to maintain an action and to ask the aid and assistance of a court while standing in contempt"]; *MacPherson v. MacPherson* (1939) 13 Cal.2d 271, 277 ["A party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders"]; *Knoob v. Knoob* (1923) 192 Cal. 95, 96-97; *Say & Say v. Castellano* (1994) 22 Cal.App.4th 88, 94; *Kottemann v. Kottemann* (1957) 150 Cal.App.2d 483, 487.)

Under similar circumstances, courts have warned that a "'petitioner who ignores an order of the Administrative Judge does so at his or her peril.'" (*Cheguina v. Merit Systems Protection Board* (Fed. Cir. 1995) 69 F.3d 1143, 1146 ["Litigants before the Board. . . are obligated to respect the Board, its procedures, including deadlines, and the orders of the Board's judges"]; accord, *Mendoza v. Merit Systems Protection Bd.* (Fed. Cir. 1992) 966 F.2d 650, 653 [en banc]; see also *Fairbank v. Hardin* (9th Cir. 1970) 429 F.2d 264, 267 ["We are governed

by the rule that a Hearing Examiner has wide latitude as to all phases of the conduct of the hearing"].)

In sum, hearing officers should be recognized as having inherent authority to enter terminating sanctions because it is integral to their ability to preside over and control the proceedings before them. It makes little sense to authorize hearing officers to order production of relevant documents in a proceeding aimed at protecting the public's health and welfare, without giving the hearing officer appropriate means of enforcing such orders. (See *McClatchy Newspapers v. Superior Court* (1945) 26 Cal.2d 386, 394 ["By refusing to compel a witness to answer proper questions, a trial court may effectively deny a litigant the right to take a deposition, since *a right without means of enforcement, if such can exist, is of little practical value*" (emphasis added)]; *ante*, pp. 9, 30-33.) And it would be poor public policy to allow a physician who has lost privileges at some hospitals to stymie the peer review proceedings at another hospital by refusing to obey the hearing officer's document production orders. As we explain in the following sections, the rationale used by the Court of Appeal in this case for deviating from the above authority does not withstand scrutiny, primarily because whether to impose terminating sanctions is a procedural issue within the peculiar expertise of the hearing officer, not the medical expertise of physicians serving on the JRC.

E. The hearing officer's authority to terminate the hearing for discovery abuses is consistent with the statutory provision that the hearing officer not be a trier of fact.

The Court of Appeal below held that a hearing officer could not terminate peer review proceedings because, under state law, he is not the trier of fact and is not entitled to a vote on the merits of the staff privileges decision. (*Mileikowsky III, supra,* 154 Cal.App.4th at pp. 764-765, 772; see Bus. & Prof. Code, § 809.2, subds. (a) & (b).) That reasoning, however, is faulty because it does not recognize the difference between substantive decisions, which the hearing officer may not make, and procedural matters, which are appropriately within the hearing officer's purview and expertise.

The fact that the hearing officer cannot vote with the JRC does not mean that he or she cannot terminate or restrict the hearing based on a participant's repeated disregard for discovery or other procedural orders. The hearing officer is like a judge and the JRC is like a jury, where the judge can issue terminating sanctions for discovery abuses in a case that would otherwise be decided by a jury. It is also no different than other types of administrative proceedings that can be terminated on procedural grounds before any ruling on the merits.[17/]

17/ See Cal. Code Regs., tit. 5, § 30310 [in student aid commission proceedings, the "Hearing Officer has the authority to treat a party to the hearing, who fails to abide by the orders of the Hearing Officer, as being in non-compliance and may issue a decision without a hearing against the non-complying party"]; *White v. Department of Veterans*

Thus, that the hearing officer is not a trier of fact regarding the merits of the staff privileges application should not disable the officer from responding appropriately to a party's flagrant disregard of lawful procedural orders.

Assessing the appropriate response for a party's misconduct in disobeying lawful discovery and other procedural orders is a *judicial* function; it is not an issue for a jury (or a JRC) to consider. (See, e.g., Code Civ. Proc., §§ 93, subd. (e), 128, subd. (a)(2) & (4), 177, 177.5, 1209, subd. (a)(5), 1211, 2023.010, subd. (g), 2023.030, 2025.450, subd. (d), 2025.480, subd. (g), 2030.300, subd. (e), 2031.320, subd. (c) [if a party "fails to obey an order compelling inspection, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction"], 2032.410, 2032.420, 2032.650, subd. (c), 2033.290, subd. (e).)

Furthermore, when a participant disregards orders, the hearing officer is in the best position to respond in a manner that ensures the peer review proceedings are conducted *fairly*, as required by Business

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Affairs (Fed. Cir. 2000) 213 F.3d 1381, 1385; *Timberlake v. U.S. Postal Service* (Dec. 13, 1999, No. 99-3351) 1999 WL 1211901, at page *3 [nonpub. opn.], 230 F.3d 1373 [table]; *Hicks v. Merit Systems Protection Bd.* (Aug. 11, 1997, No. 97-3179) 1997 WL 459960, at page *1 [nonpub. opn.], 121 F.3d 727 [table]; *Ahlberg v. Department of Health & Human Services* (Fed. Cir. 1986) 804 F.2d 1238, 1242-1243; *Lawson v. Department of Air Force* (2006) 176 Fed.Appx. 111, 113; *White v. Social Sec. Admin.* (M.S.P.B. 1997) 76 M.S.P.R. 303, 307; *Metadure Corp. v. United States* (Cl.Ct. 1984) 6 Cl.Ct. 61, 66-68; see also *Mileikowsky II, supra,* 128 Cal.App.4th at page 560.

and Professions Code section 809, subdivision (a). It is a judicial function to determine issues regarding "fairness" and "injustice." (See *Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93, 101 ["whether a fair administrative hearing was conducted . . . is [subject] to an independent judicial determination"]; *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1442; *Lewin v. St. Joseph Hospital of Orange* (1978) 82 Cal.App.3d 368, 387.)

Moreover, if only the JRC and not the hearing officer can rule on pre-hearing discovery issues or decide the appropriate response to a participant's violation of hearing officer orders, a panel of physicians would have to be impaneled long before the time to decide substantive medical issues. This could adversely affect the peer review system's efficiency, fairness, and effectiveness. The impartiality of the JRC's determination of the merits could be tainted by its reaction to the party's procedural machinations. Also, as discussed below, such a remedy would unnecessarily prolong peer review proceedings and unduly consume the time of physicians volunteering to serve on the JRC, all to the public's detriment. (See pp. 48-53, *post*.)

For these reasons, the fact that a hearing officer cannot vote on the merits of the MEC's recommendation to deny privileges should not prohibit the hearing officer from terminating the proceeding based on a participant's procedural misconduct, including the disregard of the hearing officer's lawful discovery orders.

F. The hearing officer's authority to enter terminating sanctions for discovery abuses is consistent with the Business and Professions Code provision authorizing a continuance based on withheld discovery.

The Court of Appeal below also reasoned that, under Business and Professions Code section 809.2, subdivision (d), the hearing officer's sole remedy for controlling discovery abuses was to continue the hearing. (*Mileikowsky III, supra,* 154 Cal.App.4th at p. 767.) That statute provides that "[t]he failure by either party to provide access to . . . information [requested by the opposing party] at least 30 days before the hearing shall constitute good cause for a continuance." This reading misinterpreted the statute.

Section 809.2, subdivision (d), establishes that a party's failure to produce relevant evidence to the other side is always "good cause for a continuance." But the statute does *not* provide that a continuance is the hearing officer's *only* remedy, such that the hearing officer is powerless to do anything except repeatedly continue the peer review proceeding when, as here, a party steadfastly refuses to produce relevant documents in his possession.

Restricting the hearing officer to ordering continuances whenever a participant disregards discovery orders is inconsistent with the public policy *against* allowing participants to continue proceedings at their whim. (See *Arnett v. Office of Admin. Hearings* (1996) 49 Cal.App.4th 332, 342-343 ["In exercising the power to grant

continuances an administrative law judge must be guided by the same principles applicable to continuances generally in adjudicative settings. In this respect the litany must be 'that "continuances be granted sparingly, nay grudgingly, and then only on a proper and adequate showing of good cause"'"].) It is also inconsistent with the Legislature's stated goal of having "efficient" peer review proceedings. (Bus. & Prof. Code, § 809, subd. (a)(7).)

Allowing participants to force the hearing officer to continue peer review proceedings also thwarts the Legislature's goal of protecting the public from "those healing arts practitioners who provide substandard care or who engage in professional misconduct." (Bus. & Prof. Code, § 809, subd. (a)(6).) Practitioners typically maintain their staff privileges while peer review proceedings are under way. (See *Anton v. San Antonio Community Hosp., supra,* 19 Cal.3d at pp. 824-825.) Consequently, practitioners whose privileges may be terminated at the conclusion of peer review proceedings can benefit from delaying the conclusion of those proceedings as long as possible, regardless of the threat to the public of substandard care. Hearing officers should be empowered to prevent that result, which is why, in addition to having authority to continue the hearing based on discovery abuses, the code states that hearing officers "*may impose any safeguards the protection of the peer review process and justice requires*." (Bus. & Prof. Code, § 809.2, subd. (d), emphasis added; see *Mileikowsky II, supra,* 128 Cal.App.4th at p. 558.)

The court below held that the provision authorizing the hearing officer to impose safeguards to protect the peer review process merely allowed protective orders to preserve the confidentiality of any private information that was the subject of discovery. (*Mileikowsky III, supra,* 154 Cal.App.4th at pp. 767-768.) A better construction of this provision, however, allows the hearing officer to terminate the proceedings or order a lesser discovery sanction as appropriate under the circumstances. (At least, as explained in a previous section, the statute does not bar such orders.)

By its terms, Business and Professions Code section 809.2, subdivision (d), authorizes the hearing officer to "impose *any safeguards* the protection of the *peer review process* and justice requires." (Emphases added.) The Legislature's choice of this broadly-worded language, coupled with the Legislature's expressed desire for peer review to be conducted *efficiently* in order to protect the public from substandard care and professional misconduct, cannot be reconciled with a narrow construction of the statute. (See *People v. Shabazz, supra,* 38 Cal.4th at pp. 67-68; *Parris v. Zolin* (1996) 12 Cal.4th 839, 845-846; see also *ante*, pp. 37-39.)

"[P]rotection of the peer review process" is not limited to safeguarding privacy rights with respect to medical information. The confidentiality of that information is already protected from public disclosure by a host of state and federal laws. (E.g., Civ. Code, § 56.10, subd. (a); Evid. Code, § 1157; 42 U.S.C.A. § 1320d-2 [HIPPA].) It therefore makes little sense to judicially restrict the scope of the hearing

officer's authority under section 809.2, subdivision (d), to protecting that which is already protected when the Legislature has expansively authorized the hearing officer to safeguard the entire peer review process and to assure the process meets the requirements of justice.

Restricting the hearing officer to ordering a series of continuances or convening a JRC panel of physicians whenever a participant disregards discovery orders would also contravene public policy by unnecessarily burdening the practitioners who volunteer to participate in the peer review process. As this court has recognized, peer review committee members are physicians whose time is precious. (See Bus. & Prof. Code, §§ 805, subd. (a), 809.05; *Fox v. Kramer* (2000) 22 Cal.4th 531, 539-540.) Moreover, "membership on a hospital's peer review committee is voluntary and unpaid, and many physicians are reluctant to join peer review committees so as to avoid sitting in judgment of their peers." (*Kibler, supra,* 39 Cal.4th at p. 201.) But in order for the peer review process to function properly, "it is crucial the committees be made up of health care professionals of the highest possible qualifications." (*Memorial Medical Center, supra,* 234 Cal.App.3d at p. 373.) Peer review therefore should be conducted expeditiously, both to protect the public against incompetent physicians and to avoid placing an undue burden on the physicians who serve on peer review committees. (See *Fox,* at pp. 539-540; *West Covina Hospital v. Superior Court* (1986) 41 Cal.3d 846, 851-852.)

For this reason, both the Legislature and the courts have been sensitive to the need to encourage physicians to participate in the peer

review process by eliminating some of the burdens associated with peer review.[18/] It thus makes little sense to construe section 809.2 in a manner that will needlessly prolong peer review proceedings or force physicians serving on those committees to rule on procedural matters about which they have no expertise, in addition to deciding medical issues. Here, as in *Mileikowsky II*, the "hearing officer could not disregard Dr. Mileikowsky's disdain for his authority forever. Nor could he permit Dr. Mileikowsky to continue to unnecessarily prolong the proceedings." (*Mileikowsky II, supra,* 128 Cal.App.4th at p. 566.) Under these circumstances, the hearing officer properly terminated the proceeding.

The Court of Appeal's contrary conclusion in this case is wrong, reflects poor public policy, and should be reversed. It needlessly

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18/ For example, Evidence Code section 1157 generally immunizes peer review proceedings from discovery, in part, to protect doctors who serve on peer review committees from the "'burdens [that] could consume large portions of the doctors' time to the prejudice of their medical practices or personal endeavors and could cause many doctors to refuse to serve on the committees.'" (*Fox v. Kramer, supra,* 22 Cal.4th at pp. 539-540 ["one purpose of [section 1157] is to protect physicians who participate in peer review from the burden of discovery and court appearances in malpractice actions against their peers"]; see also *Westlake Community Hosp. v. Superior Court, supra,* 17 Cal.3d at pp. 484 [the rule requiring a physician to "first succeed in overturning the quasi-judicial action [by a hospital with respect to the physician's privileges] before pursuing her tort claim . . . [¶] . . . [¶] . . . affords a justified measure of protection to the individuals who take on, often without remuneration, the difficult, time-consuming and socially important task of policing medical personnel"], 486.)

increases the burden on physicians volunteering to serve in peer review proceedings while giving physicians whose conduct is under review the means to disable the peer review process from achieving its primary goal of efficiently protecting the public from substandard care and professional misconduct.

G. The hearing officer's authority to terminate proceedings for discovery abuses is consistent with fair procedure.

Both the West Hills governing board and the Superior Court ruled that the hearing officer complied with fair procedure principles. (CT 3814, 3984-3989.) Correctly so.

The common-law fair procedure doctrine requires that hospitals taking adverse action against a physician's privileges "must afford him *rudimentary procedural* and *substantive fairness*." (*Ezekial v. Winkley, supra,* 20 Cal.3d at p. 278, emphases added.) The touchstone of fair procedure is adequate *notice* of the charges and an *opportunity* for the applicant to present his position. (*Id.* at p. 272; *Miller v. National Medical Hospital* (1981) 124 Cal.App.3d 81, 90; see *Gill v. Mercy Hospital* (1988) 199 Cal.App.3d 889, 897 ["The essence of the concept is that the action cannot be arbitrary or capricious [and] . . . [t]he essence of the right is one of fairness"].)

However, "the common law requirement of fair procedure 'may be satisfied by any one of a variety of procedures which afford a fair opportunity for an applicant to present his position.'" (*Miller v.*

Eisenhower Medical Center (1980) 27 Cal.3d 614, 634; *Anton v. San Antonio Community Hospital, supra,* 19 Cal.3d at p. 829; *Kurez v. Federation of P'etanque U.S.A.* (2006) 146 Cal.App.4th 136, 150 [fair procedure is an "elastic" concept].) For this reason, courts "'should not attempt to fix a rigid procedure that must invariably be observed. Instead, the [hospitals] themselves should retain the initial and primary responsibility for devising a method which provides an applicant adequate notice of the "charges" against him and a reasonable opportunity to respond.'" (*Miller,* at p. 634, emphasis omitted; *Ezekial v. Winkley, supra,* 20 Cal.3d at pp. 278-279; *Anton*, at p. 829; *Bollengier v. Doctors Medical Center, supra,* 222 Cal.App.3d at pp. 1128-1129 [because peer review proceedings are conducted "primarily to protect the public served by the licensee employed by a hospital[,] . . . a hospital should not be hampered by formalities not required by its bylaws or by due process considerations in disciplining or suspending those who do not meet its professional standards" so long as a fair hearing is provided]; accord, *Rhee v. El Camino Hospital Dist., supra,* 201 Cal.App.3d at pp. 489, 497.)

Moreover, a hospital may satisfy the fair procedure requirement even if it does not strictly comply with its bylaws. (*Hongsathavij v. Queen of Angels etc. Medical Center, supra,* 62 Cal.App.4th at pp. 1143-1144; *Oskooi v. Fountain Valley Regional Hospital, supra,* 42 Cal.App.4th at p. 250; *Rhee v. El Camino Hospital Dist., supra,* 201 Cal.App.3d at p. 497; *Tiholiz v. Northridge Hospital Foundation* (1984) 151 Cal.App.3d 1197, 1203 ["the concept of 'fair procedure' does not

require rigid adherence to any particular procedure, to bylaws or timetables"].) "The appropriate standard to bring to bear on judicial review of hospital disciplinary procedures is therefore this: courts must not interfere to set aside decisions regarding hospital staff privileges unless it can be shown that a procedure is 'substantively irrational or otherwise unreasonably susceptible of arbitrary or discriminatory application.'" (*Rhee,* at p. 489.)

Giving a physician multiple "opportunities" to comply with lawful discovery demands and hearing officer orders both before and after giving the physician ample notice that failing to comply may result in terminating sanctions more than fully satisfies fair procedure requirements. The fair procedure requirement does not compel a hospital to conduct a "meaningless procedure" such as continuing to enter the same orders that a physician has already repeatedly ignored. (See *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 555, fn. 13.)

Indeed, allowing a hearing officer to enter terminating sanctions based on discovery abuses cannot violate fair procedure principles, because such orders are authorized in other administrative settings and judicial proceedings governed by full due process principles. (See *ante*, pp. 45-46 & fn. 17.) If full due process is not infringed by authorizing a hearing officer or judge to terminate a proceeding before a merits determination under appropriate circumstances, the less rigorous fair procedure principle cannot be violated by extending the same rule to medical peer review proceedings.

Moreover, *both* sides of peer review proceedings are entitled to fair procedure rights. If the hearing officer were not authorized to terminate the proceeding based on a physician's discovery abuses, the medical staff would be forced to engage in peer review while the physician is *unfairly* withholding relevant documents. As the trial court observed, under these circumstances termination of the proceeding was "warranted in the interest of justice . . . ." (CT 3988.)

H. The hearing officer's order terminating the peer review proceedings based on Dr. Mileikowsky's discovery abuses was supported by substantial evidence. In any event, Dr. Mileikowsky waived his administrative hearing rights by withholding the relevant information.

The hearing officer's order terminating the peer review proceedings was plainly supported by substantial evidence that Dr. Mileikowsky: (1) thwarted the MEC's right to inspect and copy relevant documents and to present evidence the JRC needed to determine Dr. Mileikowsky's competence for the privileges he was seeking; and (2) disregarded the hearing officer's discovery and other lawful orders. (See *ante*, pp. 12-22.) Dr. Mileikowsky was given numerous opportunities to fulfill his obligation to produce the Cedars-Sinai peer review documents, and numerous warnings that terminating sanctions could be imposed if he refused to do so. (See *ibid*.) The hearing officer acted well within his discretion by terminating the

hearing based on Dr. Mileikowsky's repeated disregard for the hearing officer's lawful orders. (See *Mileikowsky II, supra,*128 Cal.App.4th at pp. 564-566; *Security Pacific Nat. Bank v. Bradley* (1992) 4 Cal.App.4th 89, 97-98 [wilful violation of orders justifies terminating sanctions]; *Sauer v. Superior Court* (1987) 195 Cal.App.3d 213, 227-228.)

Consistent with the governing statutes and bylaws, West Hills limited Dr. Mileikowsky's administrative appeal to: (1) whether he in fact disobeyed the hearing officer's orders; and (2) whether the hearing officer complied with fair procedure requirements. (CT 368-369.) West Hills determined that Dr. Mileikowsky's failure to proceed in accordance with the hearing officer's repeated orders that he produce Cedars-Sinai's peer review documents in his possession waived his right to appeal any other aspect of the order terminating the proceedings. (See *ibid*.) Both the Board of Trustees and the Superior Court ruled that the hearing officer properly terminated the JRC hearing in response to Dr. Mileikowsky's discovery abuses and his disregard for the hearing officer's orders. (CT 3814, 3984-3989; see CT 758-765, 4057-4060; see also *ante*, pp. 23-25.)[19/]

19/ The Encino-Tarzana governing board similarly ruled that the hearing officer presiding over the JRC hearing there was authorized to enter termination sanctions based on Dr. Mileikowsky's discovery abuses and disregard for lawful hearing officer orders. (CT 874, 894, 899, 2824, 2826, 2831, 2850, 3005.) In *Mileikowsky II*, the Court of Appeal upheld the Encino-Tarzana governing board's ruling, holding that bylaws specifying that a physician waives his/her right to a JRC hearing by refusing to abide by the hearing officers orders authorized the hearing officer to terminate the proceeding based on participant

Dr. Mileikowsky asserted below that Evidence Code section 1157 prevented him from complying with orders compelling discovery of the Cedars-Sinai's peer review documents concerning its summary suspension of his privileges. (E.g., CT 2481, 2485.) However, the hearing officer ruled that Dr. Mileikowsky had no legitimate basis for refusing to comply with the MEC's requests and with the hearing officer's orders that he produce those documents. (CT 965-976.) The hearing officer was correct.

Section 1157 did not prevent Dr. Mileikowsky from producing the Cedars-Sinai documents. By its own terms, the statute's "prohibition relating to discovery or testimony does not apply to the statements made by any person in attendance at a meeting of any of those [medical staff] committees who is a party to an action or proceeding the subject matter of which was reviewed at that meeting, or to any person requesting hospital staff privileges . . . ." (Evid. Code, § 1157, subd. (c).) Nor does it bar the voluntary production of peer review materials by a participant in those proceedings. (See *Fox v. Kramer, supra,* 22 Cal.4th at p. 542; *West Covina Hospital v. Superior Court, supra,* 41 Cal.3d at pp. 851-852.)

Moreover, the Evidence Code section 1157 discovery prohibition should not apply to an administrative proceeding by a peer review body because that entire administrative proceeding is itself subject to section 1157 protection. Indeed, the purpose of the statute is to

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misconduct. (*Mileikowsky II, supra,* 128 Cal.App.4th at pp. 560-561.)

enhance the quality of medical peer review by allowing those involved to act freely and base their decisions on complete information. (*Fox v. Kramer, supra,* 22 Cal.4th at pp. 539-540.) Nothing in section 1157 prevented Dr. Mileikowsky from producing the Cedars-Sinai peer review documents to the peer review body evaluating his fitness for privileges at West Hills. Section 1157 would continue to protect the Cedars-Sinai documents from civil discovery by third parties. Thus, Dr. Mileikowsky's desire to withhold another hospital's adverse assessment of his competence from a peer review body with whom he must share such information under the protection of section 1157 cannot be justified based on the immunity from discovery in litigation contained in that statute.[20/]

In any event, Dr. Mileikowsky had no right to contest the MEC's recommendation to deny his privileges application while withholding information that was clearly so relevant to whether he should be allowed to practice at West Hills. By electing to withhold this relevant information, Dr. Mileikowsky waived his right to contest the MEC's recommendation. (See *ante*, pp. 6-8 & fn. 1 [bylaws stating that an applicant waives his or her hearing rights by refusing to produce

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20/ A hearing officer's discovery order may be analogized to an administrative subpoena, which is not affected by section 1157 because the administrative proceeding is "'distinct from any litigation that may eventually flow from it.'" (See *Arnett v. Dal Cielo, supra,* 14 Cal.4th at p. 23; see also *id.* at pp. 24 ["the term 'discovery' in section 1157 is to be given its well-established legal meaning of a formal exchange of evidentiary information between parties to a pending [lawsuit]"], 27.)

relevant documents to the MEC or by refusing to appear and proceed at such a hearing]; see also *Hartbrodt v. Burke* (1996) 42 Cal.App.4th 168, 173-175 [terminating sanctions are appropriate where a litigant asserts the 5th Amendment privilege against self-incrimination as a basis for refusing to comply with discovery orders]; *Fremont Indemnity Co. v. Superior Court* (1982) 137 Cal.App.3d 554, 559 [a litigant must dismiss his lawsuit in order to assert a privilege to withholding information relevant to the litigation].)

CONCLUSION

For the above reasons, this court should reverse the Court of Appeal's judgment.

Dated: March 26, 2008

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.520(c).)

The text of this brief consists of 13761 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

Dated: March 26, 2008

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H. Thomas Watson