

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO**

DATE/TIME : 12/21/04 nunc pro tunc December 10, 2004
 JUDGE : Raymond M. Cadel
 REPORTER : none

DEPT. NO : 25
 CLERK : Cindy Jo Miller
 BAILIFF : Michelle Luther

GIL N. MILEIKOWSKY, M.D. - RET,
 Petitioner,

PRESENT:

Roger Diamond, Esq. &
 Paul Hittleman, Esq.

VS. Case No.: 04CS00969

Robert C. Miller,
 Deputy Attorney General

MEDICAL BOARD OF CALIFORNIA-RES,
 Respondent.

David B. Parker, Esq. for Applicant
 and Proposed Amicus Curiae - Assoc of
 American Physicians & Surgeons, Inc.

Nature of Proceedings:

**AMENDED MINUTE ORDER
 HEARING RE: PETITION FOR WRIT OF MANDAMUS**

The above-entitled cause came on for hearing this day for which the court issued a tentative ruling the previous day. The court affirmed its tentative ruling in that neither party requested hearing to argue the tentative ruling.

MILEIKOWSKY v. MEDICAL BOARD OF CALIFORNIA, Case No. 04 CS 00969:

The following shall constitute the Court's tentative ruling on the petition for writ of mandate, set for hearing on Friday, December 10, 2004. The tentative ruling shall become the ruling of the Court unless a party desiring to be heard so advises the clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear.

The petition for writ of mandate is granted.

An order for examination under Business and Professions Code section 820 is an investigatory procedure that does not require the full range of procedural due process protections that are available to a licensee in an adjudicatory procedure. (See, *Alexander D. v. Board of Dental Examiners* (1991) 231 Cal. App. 3d 92.)

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BY: Cindy Jo Miller,
 Deputy Clerk

In this case, the Court finds that, as the result of various irregularities in the process that resulted in the order that petitioner submit to a mental examination no showing of good cause was made, or, in fact, could be made under the procedure followed in this case. Those irregularities may be summarized as follows.

The "805 report" on which the order was based does not, by itself, inevitably lead to the conclusion that petitioner suffers from mental or physical illness that renders him unable to practice medicine safely within the meaning of Business and Professions Code section 820. The incidents described in the report do not appear to fit into a neat pattern, and not all of them truly suggest bizarre or unbalanced behavior. Some of the incidents described in the report, in fact, are equivocal in nature and might just as accurately be characterized as incidents of aggressive or unpleasant behavior by petitioner in the context of a confrontation, rather than as evidence of mental illness or impairment. Some of the incidents listed in the report, such as that petitioner was required to be monitored by security personnel while on hospital premises, or that a representative of the nurses' union complained that nurses felt threatened by petitioner, are presented without any specific factual context, are based on hearsay, and (as above) may reflect a confrontational personality rather than mental illness or impairment. Finally, two of the incidents were at least a year old at the time of the report, and all of them were more than two years old at the time of the order. The age of the incidents raises questions about their relevance to determining petitioner's condition at the time of the order.

Petitioner contends that many of the incidents recounted in the report may indeed be explained as arising out of a dispute between himself and the hospital management. Respondent permitted petitioner to submit documentation explaining his side of the matter, but the record indicates that respondent did not forward those materials to the assigned medical reviewer for consideration. Moreover, it does not appear that petitioner's materials were considered in respondent's investigation report, although there is evidence that they had been forwarded to the assigned investigator approximately seven months prior to the date of the report. Similarly, there is no indication in the final order for examination that petitioner's materials were considered by anyone on behalf of respondent.

Finally, and perhaps most significantly, the record shows that the assigned medical reviewer, Dr. Noble, was associated with the institution that had made the "805 report", and that respondent knew of that association at the time he was appointed to review petitioner's case. Such association suggests, at a minimum, the possibility of a conflict of interest that might taint Dr. Noble's ultimate conclusions. As noted, Dr. Noble did not receive the material petitioner submitted to explain his actions. His declaration in support of the petition to compel the examination of petitioner largely mirrors the content of the "805 report", with, however, at least one additional allegation (regarding petitioner taking up to 150 photographs after a hysterectomy) that does not appear in the "805 report", the source of which has never been adequately explained.

In any case, Dr. Noble's declaration, which appears to have been the only expert medical opinion in support of the order, does not address the age of the allegations against petitioner or the explanatory factual context in which they arose. Whether this was the reflection of a conflict of interest or of a simple failure to have available and consider all of the relevant facts, the result is that Dr. Noble's declaration fails to establish good cause to order petitioner to submit to an examination.

Based on the foregoing, the Court finds that there was no showing of good cause to support the order that petitioner submit to an examination under Business and Professions Code section 820. Under the principles stated in *Kees v. Medical Board, supra*, 7 Cal. App. 4th at 1815, as a matter of law the finding that petitioner violated section 820 cannot stand. The petition for writ of mandate accordingly is granted to require respondent to vacate the disciplinary order entered against petitioner dated July 16, 2004 as well as the underlying order for examination dated November 12, 2002. The stay previously entered by the Court shall be continued in effect until respondent has complied with the writ. The Court's ruling does not preclude respondent from taking further action on the basis of the "805 report", as opposed to the orders that have been vacated by this ruling, provided that such action is taken in conformity with the views expressed herein regarding full consideration of all relevant factors and available evidence, and the use of a disinterested medical reviewer.

In the event that this tentative ruling becomes the final ruling of the Court, counsel for petitioner is directed to prepare a written order, judgment and writ of mandate in conformity with this ruling, submit them to

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Nevertheless, such an order does require a showing of good cause, and where no such showing has been made the licensee's privacy rights have been violated, the order is not valid, and the licensee cannot be disciplined under Business and Professions Code section 821 for failing to obey it. (See, *Kees v. Medical Board* (1992) 7 Cal. 4th 1801.)

In this case, the Court finds that, as the result of various irregularities in the process that resulted in the order that petitioner submit to a mental examination, no showing of good cause was made, or, in fact, could be made under the procedure followed in this case. Those irregularities may be summarized as follows.

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BY: Cindy Jo Miller,
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In the event that this tentative ruling becomes the final ruling of the Court, counsel for petitioner is directed to prepare a written order, judgment and writ of mandate in conformity with this ruling, submit them to counsel for respondent for approval as to form, and thereafter submit them to the Court pursuant to Rule of Court 391.

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 COUNTY OF SACRAMENTO

BY: Cindy Jo Miller, 
 Deputy Clerk

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13
 14 Attorneys for Petitioner
 15 GIL NATHAN MILEIKOWSKY, M.D.

The annexed instrument is a correct copy of
 the original on file in my office.

Attest:
 Certified: *CJ Miller* DEC 30 2004

Superior Court of California
 By *CJ Miller* Deputy Clerk

10
 11 SUPERIOR COURT OF CALIFORNIA
 12 COUNTY OF SACRAMENTO

13
 14 GIL NATHAN MILEIKOWSKY, M.D.

Petitioner,

15 Department Number: 25

16 vs.

17 MEDICAL BOARD OF CALIFORNIA,
 18 Respondent.

19 PEREMPTORY WRIT OF MANDAMUS

20 PEREMPTORY WRIT OF ADMINISTRATIVE MANDAMUS

Judge: Hon. Raymond M. Cadei

21 TO RESPONDENT MEDICAL BOARD OF THE STATE OF CALIFORNIA:

22 Pursuant to the judgment of the Superior Court of the State of California for the County of
 23 Sacramento, you are hereby commanded to vacate and set aside your order of November
 24 12, 2002 compelling Petitioner to submit to a mental and physical examination and to
 25 vacate and set aside your decision of July 16, 2004 revoking Petitioner's medical license.

26 You are hereby further directed to file a return to this writ within 60 days of service of the
 27 writ.

28 Issued: December 30, 2004

Cindy Jo Miller, Clerk

Date: *12-30-04*

C.J. MILLER

