2ND Civil 168705

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GIL N. MILEIKOWSY, M.D. Petitioner-Appellant, vs. TENET HEALTHSYSTEM, ENCINO TARZANA REGIONAL MEDICAL CENTER, A CALIFORNIA CORPORATION, Respondent-Respondent	2nd Civil No. B168705 L.A.S.C. NO. BS079131

APPEAL FROM THE SUPERIOR COURT

OF THE COUNTY OF LOS ANGELES

HONORABLE DAVID P. YAFFE, JUDGE PRESIDING

APPELLANT'S OPENING BRIEF

ROGER JON DIAMOND
2115 Main Street
Santa Monica, Ca 90405
(310)399-3259
(310)932-9029-Fax
State Bar No. 40146
Attorney for Petitioner-Appellant

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I

INTRODUCTION

This is an administrative mandamus proceeding wherein Petitioner-Appellant Dr. Gil N. Mileikowsky (hereinafter "Petitioner") challenged the decisions of Respondent Tenet Healthsystem, Encino-Tarzana Regional Medical Center (hereinafter "Tenet" or "the hospital") summarily suspending his hospital staff privileges and denying his application for reappointment to its hospital staff.

On November 16, 2000 Tenet summarily suspended Petitioner's staff privileges. This decision was made after Tenet had denied on

January 22, 2000 his reappointment application, which denial was under administrative review when the summary suspension was imposed. Petitioner was provided combined administrative hearings which were to be conducted by a Medical Hearing Committee ("MHC") (sometimes referred to as the " Hearing Committee") made up of Petitioner's peers pursuant to Tenet's By-Laws and the Business and Professions Code.

However, contrary to the By-Laws, the Business and Professions Code and due process, the attorney retained by Tenet, Dan Willick, terminated the hearing on March 30, 2002. The MHC never approved the termination of the hearing by Tenet's attorney, Dan Willick. The By-Laws required the MHC to submit a written report at the conclusion of the hearing, which was not done, and authorized an administrative appeal to Tenet's Governing Board (also known as the "Appeal Body") within 14 days of the MHC's written decision.

Although there was no MHC written decision from which to appeal, Petitioner, to avoid the potential argument that he failed to exhaust his administrative remedy, did file an appeal on April 6, 2002, which was within 14 days of Willick's termination order. Petitioner's appeal was heard by Tenet's three member, non physician Governing Board, which "affirmed" Willick's termination order on July 25, 2002.

Petitioner timely filed a Petition for Writ of Administrative Mandamus (Code of Civil Procedure Section 1094.5) and traditional mandamus (C.C.P. Section 1085). Both sides lodged the Administrative Record ("AR") and Supplemental Administrative

("SAR") and the matter was heard on March 14, 2003 by Superior Court Judge David Yaffe pursuant to Petitioner's motion and amended Petition, the AR and SAR, and Tenet's response.

On March 14, 2003 by Minute Order (Clerk's Transcript, pp.346-348 hereinafter "CT") the Superior Court denied Petitioner's Petition. The judgment was entered on April 7, 2003 (CT 352-354). Petitioner timely filed a motion for new trial (CT 355-373), which was heard and denied on June 16, 2003 (CT 477-481).

Petitioner filed a timely Notice of Appeal on July 11, 2003 (CT 482-483).

II

STATEMENT OF THE CASE

Petitioner obtained medical and surgical privileges at the Encino-Tarzana Regional Center in 1986. On September 18, 1987 Petitioner was appointed to the hospital's permanent staff with active member status. Every two years he was reappointed without incident. On February 2, 1999 Petitioner received a letter from the hospital stating that he had not timely filed an application for reappointment and that he would not be reappointed. Petitioner never received the reapplication form from the hospital, which had routinely provided such forms previously. Petitioner filed a lawsuit on April 6, 1999 to compel the hospital to process his reappointment application, Mileikowsky v. Tenet Healthsystem, BS056525 (CT 47-50, 125-128). Petitioner obtained a court order from Judge Robert O'Brien compelling Tarzana to process his

reappointment application (CT 166-170). Petitioner had sued Tenet twice previously. See January 11, 2001 Transcript, p. 6, lines 2-6

After Judge O'Brien issued his order on April 20, 1999 compelling the hospital to process Petitioner's application, Tenet amended its By-Laws to authorize the denial of staff privileges for physicians who are "disruptive" (CT 52-54, 128-129).

On January 11, 2000 the hospital's Medical Executive Committee denied Petitioner's reappointment application. Petitioner appealed the denial to a Medical Hearing Committee which was convened in October of 2000 pursuant to the By-Laws (CT 54-55, 129-130).

On June 28, 2000, the attorneys for the plaintiffs in a medical malpractice case filed against Tenet, Head v. Vermesh, et al., Los Angeles Superior Court No. LC 046932, filed a declaration of petitioner in opposition to Tenet's motion for summary adjudication (CT 468).

After the Medical Hearing Committee began conducting the reapplication hearing to which Petitioner was entitled under the By-Laws, Tarzana Hospital summarily suspended Petitioner's privileges on November 16, 2000 (CT 129, lines 24-26). Petitioner attempted to obtain judicial review of the summary suspension, but the Superior Court denied a Temporary Restraining Order. Instead of seeking a preliminary injunction, Petitioner immediately sought review by this Court by filing a Petition for Writ of Mandate on May 12, 2001, Mileikowsky v. Superior Court, Court of Appeal, Second Appellate District, Division 4, Case No. B150037. The Petition was supported by amici curiae the California Medical

Association, the American Medical Association, and the Union of American Physicians and Dentists. The amici urged this Court to hear the case and decide the important issues presented by the Petition. This Court denied the Petition on procedural grounds without reaching the merits of the issue: whether a physician may have his staff privileges summarily suspended without any evidence that the physician poses an imminent danger.

Until his summary suspension on November 16, 2000, Petitioner was able to exercise staff privileges under the protection of the preliminary injunction issued by Judge O'Brien. Petitioner was provided a hearing by a Medical Hearing Committee ("MHC").

The first hearing afforded Petitioner with respect to his reappointment was deemed to be Hearing-I and was conducted by Tenet's attorney, Lowell Brown (CT 115-121,129-130).

On November 30, 2000, Hearing-I was terminated by a written decision of the MHC (CT 116) (SAR-10,000 to 10,012). Petitioner appealed the MHC's written decision to the Governing Board (i.e. the "Appeal Body"). (SAR, pp. 10,013 to 10,049). The Appeal Body reversed the MHC on April 26, 2001 (CT 115-121).

On remand by the Appeal Body, Petitioner's reappointment denial hearing was combined with Petitioner's summary suspension hearing. Attorney Daniel Willick replaced attorney Lowell Brown as the hearing officer (CT 240, lines 18-22). This "second hearing" ("Hearing No. 2") dealt with two medical cases. The two medical cases were the only cases involving Petitioner's recent treatment of patients (CT 172, line 15) (AR 5185-5186). See also Exhibits

144B and 144C (referred to at pages 73-74 of the August 28, 2001 transcript).

The first case was the allegation that on November 5, 2000 Petitioner performed a circumcision that allegedly resulted in a serious complication requiring additional medical attention of a urologist. This will be referred to as "the circumcision charge."

The second charge was that in delivering a baby on October 24, 2000 Petitioner allegedly deviated from Tarzana Hospital's **guidelines for nurses** by applying a vacuum more than three times and requesting fundal pressure (hereinafter referred to as "the vacuum extraction" charge). The remaining charges related to non medical issues which allegedly occurred over 10 years during which Petitioner was periodically reappointed to the staff (CT 172).

No findings were ever made by the Medical Hearing Committee. Petitioner's circumcision was criticized by Dr. G. Irani, who examined the patient but discharged the child immediately after his examination, in spite of alleged excessive bleeding. **Dr. Irani** conceded at the hearing that he had **never performed a circumcision in his life.** His criticism, that Petitioner removed too much skin, was impliedly contradicted by Dr. Shapiro, who examined the circumcision the following day and found Petitioner left too much skin. Dr. Shapiro's examination, which impliedly contradicted Dr. Irani, was withheld from Petitioner and members of the Medical Hearing Committee. Upon its discovery Petitioner submitted the concealed evidence (Shapiro's statement) to the Hearing Officer,

Daniel Willick, in support of Petitioner's motion to dismiss the charge, but Willick denied the motion without consulting with or forwarding the information to the members of the Medical Hearing Committee. Hearing Officer Willick sustained the objection of Tenet's attorneys (AR 5251 - 5252; 5480-5482).

With respect to the vacuum extraction charge, there was no violation of physician care. The mother and the baby were in good health and complimented Petitioner for his outstanding care. (AR 5251, paragraph 26; AR 5476-5478).

The record likewise demonstrates that two members of the nurses' union testified they did not feel threatened by Petitioner. They were not aware of any complaints against him (AR 1757-1758; 1797, lines 22-24). Petitioner had been accused of abusive behavior. Petitioner is an excellent physician. (See Medical Executive Committee's Minutes, Bate No. 11070: "...Dr. Mileikowsky shows outstanding abilities as a clinician and surgeon." Patients have praised him while criticizing Tarzana.[1])

According to Article VIII, Section 4 of the By-Laws (the By-Laws are contained in Volume II of the Exhibit Book, tab 48) Petitioner was not permitted to have an attorney during his hearing over which attorney Willick presided. Dan Willick conducted the hearing pursuant to Article VIII, Section 4 (B) of the By-Laws, which provides as follows:

"The hearing officer shall act to

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[1] Letter from patient Cheryl L. Suarez to Tarzana, Bate No. 13412.

> maintain decorum and to assure that all participants in the hearing have a reasonable opportunity to present relevant oral and documentary evidence. He shall be entitled to determine the order of procedure during the hearing and shall make all rulings on matters of procedure and the admissibility of evidence."

On March 18, 2002 Petitioner sent copies of a responsive, requested brief to the members of the Medical Hearing Committee. The brief related to certain issues that were pending before the Committee. Copies of Petitioner's brief were submitted to all interested parties including Mr. Willick and the Medical Executive Committee representative. (CT 163, 173).

On March 19, 2002, Tenet's attorneys, Christensen and Auer, sent a letter to hearing officer Willick, (also a Tenet attorney) requesting that Willick terminate the hearing. See Tab 120 contained in "Encino-Tarzana Regional Medical Center, Dr. Mileikowsky, Medical Executive Committee correspondence, Volume 11." The letter quotes a recorded messages by one of the members of the MHC Committee, Dr. Larry Pleet. The message was quoted in the letter as follows:

> "Debbie, this is Dr. Pleet calling. My opinion is Mr. Willick's request to deny Gil [Petitioner] from questioning witnesses is outrageous, absolutely outrageous, to change in the middle of the rulings in the procedure and the legal things behind it, I think it is an outrageous thing to do to him. Based on this brief and the information in it, if Mr. Willick has made these requirements, he is out to lunch and should be replaced (CT 242, lines 19-20; CT

243, lines 1-4)."

Dr. Larry Pleet had been the subject of extensive voir dire when he was selected to participate on the Medical Hearing Committee. His voir dire was conducted on January 30, 2001 (see January 30, 2001 Transcript, which is part of the Administrative Record). Dr. Pleet has been on the staff of the Encino-Tarzana Regional Medical Center since 1965 (TR. p. 63). He received his M.D. degree from U.C.L.A. in 1960 and is board certified in otolaryngology. He did not know Petitioner prior to this case (as of January 30, 2001), but knew Dr. Richard Wulfsberg, the representative of the Medical Executive Committee (i.e., the "prosecutor") for 25 years. They referred patients to each other (TR., p.64).

On March 21, 2002 Petitioner sent a letter to Dan Willick complaining about the entire peer review process. (CT 463-466). He titled his letter to Willick, "Rape of the Medical Peer Review Process by Tenet Healthsystem."

Petitioner wrote the following:

> "For Tenet a 'good' physician is a physician that generates 'income' which helps the 'earnings' of the company at large. But, a physician that generates more money is not necessarily a better physician than another physician that generates relatively less income for the hospital. For instance, unnecessary i.e not medically indicated admissions or surgeries will also increase the hospital's income even without any complications.
>
> Thus, the hospital has a vested economic interest to 'protect' the

> reputation of such negligent physicians otherwise any damage to the reputation of those physicians can damage the income of the hospital."

Petitioner continued later in his letter to Willick,

> "I hope that you now understand why I want the members of this hearing committee to be aware of this double standard in these proceedings. According to your statement of 2/19/02: 'appropriate medical staff peer review . . . depends upon the participants abiding by the applicable rules' page 1, line 12 and 13 of your 2/19/02 ruling). In other words, if I do not comply with your ruling I 'compromise' the procedure' (line 16). What if your ruling violates not only my rights, but leads to unacceptable lack of fairness? Not only is your statement narrow minded but extremely dangerous as a matter of public policy."

Petitioner continued in his letter to Willick,

> "At ETRMC physicians who are 'insiders' i.e. significant income providers do not have their negligent acts reviewed at all. That's very dangerous. . . ." (CT 463-466).

On March 30, 2002 Tenet attorney Willick granted Tenet attorney Jay Christensen's request and terminated Petitioner's hearing, which deprived the Medical Hearing Committee of judging the case on its merits and also deprived the Committee of the right to decide whether Petitioner had disrupted the hearing.

A copy of the March 30, 2002 ruling by Hearing Officer Willick is reprinted at CT 62-73. Willick stated that he terminated the hearing because of intentional acts of misconduct by Petitioner.

Willick stated that Petitioner's "repeated acts of misconduct" were deemed by Willick as being a waiver of Petitioner's right to the completion of the hearing. The major point of Willick's order was that Petitioner engaged in unauthorized ex parte communications with each member of the hearing committee. Willick spent a substantial amount of time in his order explaining why the ex parte communication was improper. Willick's order of March 30,2002 made other references to the manner in which Petitioner participated in his hearing. Essentially, Willick contended in his order that Petitioner's arguments are what disrupted the hearing. In the conclusion to his order dated March 30, 2002 Willick referred to Article VIII, Section 4(B) of the By-Laws which authorized him to "maintain decorum and assure that all participants in the hearing have a reasonable opportunity to present oral and documentary evidence." Willick also referred to Article VIII, Section 4(A) of the By-Laws which Willick contended authorized him to rule that a practitioner who fails without good cause to appear and proceed shall be deemed to have his rights waived. Yet, Petitioner never failed to appear. No provision of the By-Laws authorized Willick to do what he did. The ex parte communication to which Willick referred to was not ex parte. Copies were provided to everyone including Willick and the Medical Executive Committee representative. Willick did not allow the Medical Hearing Committee to reach a decision on the merits of the case. In addition, he did not even obtain a written decision from the MHC. The March 30, 2002 decision by Tenet attorney Willick (CT 62-73)

was never signed by any member of the MHC. (CT 62-73)

In his order (and not a written decision of the MHC, as required by the By-Laws), Tenet's attorney, Dan Willick, made a number of misstatements. For example, Willick falsely contended that Petitioner failed to supply discovery during the administrative hearing (CT 69-70). Specifically, Tenet contended Petitioner refused to provide information relative to his staff privileges at Cedars-Sinai.

In fact Petitioner signed an authorization allowing Cedars-Sinai to release any information to the hospital.[2] Because Cedars did not allow Petitioner to release any information to the hospital, the hospital refused to provide discovery regarding its alleged failed attempts to obtain information from Cedars (See Appeal Statement of April 2, 2001 Appeal). Moreover, the hospital stated that Petitioner refused to meet with the Chair of the Well-Being Committee. The very record to which the hospital referred (AR MEC Exhibit Binder, Exh. No. 112) to support its statement actually states,

> "The Credentials Committee required Dr. Mileikowsky to complete his reappointment by completing all of his outstanding medical records and because of behavior issues (not practice issues) to meet with Amnon Wein, M.D., Chair of the Physician's Well Being Committee. This was done in order to see if there was something that could be done to help him control his behavior. The

[2] October 18, 2000 Transcript, Exhibit 6. See Bate Nos. 12218-12223

> response was a letter from his attorney saying that he did not want to meet with Dr. Wein unless there was a court reporter present or unless other members of the Physician's Well Being Committee were present."[3] (Emphasis added).

The record further reflects the following note of the MEC.

> ". . . [I]t was felt to be unreasonable to ask that a court reporter be present at a meeting of this kind...."[4]

The hearing before the MHC was governed by various provisions of the By-Laws. The By-Laws are contained in Volume II of the Exhibit Book, tab 48.

Article VIII, Section 2 of the By-Laws (AR number 13455; p. 19 of By-Laws) guaranteed Petitioner the right to a hearing by a committee of his peers to determine whether or not he was properly denied reappointment and whether or not the denial of his privileges was justified.

Article VIII, Section 3C provides as follows:

> "The hearing shall be held before a trier of fact which shall be a hearing committee composed of not less than five individuals."

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[3] AR MEC Exhibit Binder, Exhibit No. 112

[4] AR MEC Exhibit Binder, Exhibit No. 112. It must be emphasized that the statement quoted above was based on the assertion that such a meeting was to be "confidential." There was no contention that a court reporter was not available or that Petitioner would not pay for the reporter. The fact is he would have paid for the reporter. The "confidentiality" reason was bogus. If Petitioner wanted the reporter he did not impliedly waive his alleged right to confidentiality.

It is clear from the By-Laws that hearing officer was to have a very limited role. Article VIII, Section 4B provides as follows:

> "The hearing officer shall act to maintain decorum and to assure that all participants in the hearing have a reasonable opportunity to present relevant oral and documentary evidence. He shall be entitled to determine the order of procedure during the hearing and shall make all rulings on matters of procedure and the admissibility of evidence."

This section did not authorize hearing office, Dan Willick, an attorney paid for by the hospital, to terminate the proceedings. Yet Mr. Willick relied upon this Section and one other provision to justify taking the case from the Medical Hearing Committee and terminating the proceeding without affording Petitioner the right to a completed hearing. Hearing Officer Willick referred also to Article VIII, Section 4A to abort the proceeding. Article VIII, Section 4A provides as follows:

> "The personal presence of the practitioner who requested the hearing shall be required. A practitioner who fails without good cause to appear and proceed at such hearing shall be deemed to have waived his rights in the same manner and with the same consequences as provided in Section 2.E."

Willick inferred from the provision quoted above that he had the authority to terminate the proceedings prior to the decision on the merits by the Medical Hearing Committee. Nothing in Article VIII, Section 4A authorized Willick to terminate the proceeding.

At no time did Petitioner ever fail to attend a hearing. Article VIII, Section 4A simply has no relationship to what occurred in this particular case.

The principle reason given by Dan Willick for terminating the proceeding was that Petitioner provided a trial brief ex parte to the Medical Hearing Committee but the record shows to the contrary - the brief was not given ex parte but rather given to all parties. In addition, Willick contended that Petitioner did not provide discovery but Article VIII, Section 4E provides that if a practitioner does not provide discovery such evidence may not be introduced by the practitioner at the hearing itself. In particular the section provides as follows:

> "The hearing officer may set guidelines for the introduction of evidence and the hearing in order to conduct the hearing in a reasonable period of time given the circumstances. The body whose decision prompted the hearing may object to the introduction of evidence that was not provided by the practitioner during an appointment, reappointment or privilege application or corrective action despite requests for such action. The information shall be barred from the hearing by the hearing officer unless the practitioner can prove he previously acted diligently and could not have submitted the information."

Nothing from the provision quoted above authorized Willick to terminate the proceeding for an alleged failure of Petitioner to provide discovery, which is not true in any event. The record is clear Petitioner did provide discovery but even if he did not the

remedy for the alleged violation was not the termination of the proceeding.

Petitioner did not get a written decision from the MHC as he had done in the first hearing which did result in a written decision by the MHC and also resulted in a reversal by the Appeal Body. This time he had no written decision but was faced with the order of Willick.

As stated earlier throughout all of the proceedings before Willick and the Medical Hearing Committee Petitioner was compelled to proceed without an attorney. Petitioner did appeal Willick's decision to the Appeal Body although it is not clear whether the Appeal Body had jurisdiction to review Willick's order since arguably the Appeal Body only had jurisdiction to review a written decision of the MHC. The decision of the Appellate Review Body of the Governing Body is reprinted at pages 34-44 of the Clerk's Transcript.

Petitioner sought judicial review pursuant to Code of Civil Procedure Sections 1085 and 1094.5. The case was heard on the basis of Petitioner's First Amended Petition (CT 4-20). Tenet filed an Answer to the First Amended Petition wherein many of the allegations were admitted (CT 123-136).

Thereafter Petitioner filed a motion for peremptory writ of administrative mandamus (CT 137-154). Tenet filed a Memorandum of Points & Authorities in opposition to the motion (CT 234-253). Petitioner filed a Reply Memorandum (CT 265-277).

The parties lodged the administrative record and the

supplemental administrative record with the Court (CT 255-264). On March 14, 2003 the Court rendered a tentative decision in the form of Minute Order which became the final order after argument (CT 383-384). A transcript of the oral argument conducted on March 14, 2003 is reprinted in the Clerk's Transcript at pages 385-427.

At the beginning of oral argument Petitioner's attorney reached the heart of the matter - that Tenet's attorneys orchestrated the termination of the proceedings to avoid having the doctors on the Medical Hearing Committee decide the case, which is what the By-Laws require. See Clerk's Transcript, pp. 390-391. Petitioner called to the attention of the trial court the March 19, 2002 letter to Tenet attorney Daniel Willick from Tenet attorney Jay Christensen (CT 391; tab 120 of Medical Executive Committee correspondence Vol. 11).

In response to Petitioner's argument that what Willick did was improper, the trial court stated that what it was reviewing was the decision of the Appeals Body (CT 396, lines 3-4).

The trial court indicated that it did not read the entire record but only "considerable parts . . . ." (CT 398, line 16). The trial court stated that Petitioner made the case "a nightmare. . . ." (CT 398, line 17). However, that was simply a reference to the Points & Authorities submitted by Tenet. That was Tenet's argument. (CT 234-253).

Petitioner pointed out to the trial court that Petitioner kept asking for an attorney but was not given the right to have an attorney and therefore had to do what he thought necessary to

protect his rights (CT 398, lines 19-23).

The trial court stated that from portions of the record it did review that Petitioner read certain things into the record that were not relevant (CT 401, lines 2-7).

The trial court did state that there was no evidence that Petitioner physically assaulted anyone or challenged them (CT 401, lines 17-21).

After Petitioner spoke (through his attorney), the Court questioned attorney Jay Christensen. Attorney Christensen told the trial court that "both parties were represented by legal counsel. . . ." (CT 412, lines 9-10). That was not true.

During the argument before the trial court attorney Jay Christensen referred to attorney Willick, who was also retained by Tenet. Christensen minimized his letter by simply stating that it was argument (CT 414, lines 11-14).

Attorney Jay Christensen acknowledged to the trial court that Petitioner's argument - that Tenet's attorneys orchestrated the proceedings and contrived with the hearing officer to take the matter out of the hands of the Medical Hearing Committee - was made before the Appeals Body (CT 415, lines 11-24).

Attorney Christensen told the trial court that by the middle of March 2002 Petitioner had destroyed the hearing (CT 417, lines 1-12).

Petitioner, through his attorney, asked the trial court to send it back to the Medical Hearing Committee to allow the Committee to complete the hearing (CT 420, lines 11-17).

At the conclusion of argument the trial court stated that it presumed the decision of the Governing Board to be correct (CT 424, lines 12-21).

Petitioner filed a motion for order granting new trial (CT 355), which Tenet opposed (CT 374-381). Petitioner filed a Reply Memorandum in support of his motion for new trial (CT 445-461). The Court denied the motion for new trial on June 16, 2003. The Court directed the administrative record to be released to the parties with instructions to forward the record to the Court of Appeal if an appeal were filed (CT 480).

During the appellate hearing before the Appeal Body on July 2, 2002 attorney Christensen conceded that there is no authority under California law for the hearing officer to terminate a Medical Hearing Committee hearing (Box 3, No. 58, hearing transcript dated July 2, 2002, p. 112; CT 470, lines 6-23).

During argument in the trial court the trial court was of the erroneous opinion that Petitioner was disrupting proceedings to gain an advantage - delay in order to retain staff privileges. The trial court was not aware that his privileges had already been summarily suspended. The record, of course, demonstrated that his privileges had been summarily suspended (CT 14, lines 3-4; CT 129, lines 24-25). Petitioner made it clear to the Medical Hearing Committee a number of times that he was interested in getting expedited review (August 28, 2001 transcript, p. 72, lines 7-25, p. 73, lines 1-7).

In his March 30, 2002 order terminating the proceedings

attorney Willick contended that his rulings regarding certain evidence "were intended to protect Dr. Mileikowsky from prejudice and confusion. . . ." (CT 177). Willick's order referenced certain transcripts of the Medical Hearing Committee that he contended supported his conclusion that Petitioner disrupted the hearings.

Word limitations imposed by the California Rules of Court do not permit Petitioner in this Brief to set forth verbatim the transcripts that Willick claimed revealed disruption by Petitioner. Petitioner respectfully requests this Honorable Court to read the transcripts which Tenet claimed in its filing with the Superior Court revealed disruption by Petitioner. See Clerk's Transcript, pp. 241-242. A review of those transcripts clearly show that nothing Petitioner did during the hearing justified the termination of the hearing. By way of example, Petitioner respectfully refers this Court to the November 29, 2001 transcript which involved the examination of witness Ohad Ben-Yehuda. This transcript and, in particular, pp. 1833, 1835, and 1836, were provided by Tenet as examples of Petitioner's disruption of the hearing. See CT 241, lines 27-28. A reading of the entire November 29, 2001 transcript dispels any notion that Petitioner was disruptive.

Indeed, the transcript affirmatively demonstrates Petitioner's desire to proceed, not to stop, the hearing. It shows the opposite of what Tenet says:

> "THE HEARING OFFICER : (i.e. Willick)
> Wait. Wait. Dr. Mileikowsky, we
> don't have to proceed this evening.

> DR. MILEIKOWSKY: I have the desire and the right for [sic] an expedited hearing." (Transcript of November 29, p. 1834, lines 16-19).

What is revealing is the August 16, 2001 transcript, pp. 38-40, wherein Petitioner demonstrated quite clearly the conflict of interest in that the attorneys involved were all being paid by Tenet (August 16, 2001 transcript, pp. 38-40).

III

ARGUMENT

A. THE STANDARD FOR REVIEW BY THIS COURT IS DE NOVO

The scope of review by this Honorable Court of Appeal is de novo in that the issues presented are primarily legal and involve the interpretation and application of the By-Laws of the hospital. That is, did the hearing officer, Dan Willick, and the Governing Board, act in accordance with the By-Laws? See generally Ocean Park Associates v. Santa Monica Rent Control Board, ____ Cal. App. 4th ____, 2004 DJDAR 233 (January 7, 2004), a decision by Division Four of the Second Appellate District. In particular Petitioner contends that the By-Laws did not authorize hearing officer Willick to terminate the proceeding. This issue is a legal issue for this Court to decide irrespective of the decision of the trial court.

De novo review also is necessary to determine whether the Appeal Body could legally uphold a decision not rendered by the Medical Hearing Committee but rather by the hearing officer. Again, this is a legal issue and therefore de novo review is

justified.

The underlying facts found by hearing officer Willick also should be reviewed by this Court de novo. Some of the issues are factual and some are legal, as for example the question of whether the delivery by Petitioner of his trial brief to members of the Medical Hearing Committee constituted an ex parte communication by Petitioner, which was the primary basis for Willick's termination of the hearing. Whether Petitioner's delivery of his trial brief to the members of the Medical Hearing Committee constituted an ex parte communication is a legal issue because the record is undisputed that copies of the brief were also given to all other interested parties. Therefore, the question of whether the delivery of the brief to the Committee members was an ex parte communication is really a legal issue. Thus, de novo review is justified. Furthermore, Willick's determination that Petitioner was disruptive and engaged in other conduct justifying the termination of the hearing really requires de novo review by this Court of the administrative record. Superior Court Judge David Yaffe did not make specific findings but rather some generalized comments. Thus, it is incumbent upon this Court to review the same record that was before the trial court. The Court of Appeal in Lewin v. St. Joseph Hospital of Orange, 82 Cal.App.3d 368, 386 -387 (1978) expressed the opinion that this type of appellate review requires the Court of Appeal to review the same record reviewed by the trial court. Specifically, the Court of Appeal in Lewin v. St. Joseph Hospital of Orange, supra, stated that "the conclusions of

the trial court are not conclusive on appeal. . . ." Id. at 387.

The Court of Appeal in Rosenblit v. Superior Court, 231 Cal.App.3d 1434 (1991) discussed the scope of appellate review in a case involving a physician who unsuccessfully sought a writ of mandate to compel a hospital to reinstate his medical staff privileges. The trial court had specifically rejected the doctor's claim that he had been denied a fair review hearing. The Court of Appeal reversed the Superior Court and ruled that the Court of Appeal would independently evaluate the physician's claims that he was denied a fair hearing. This case, of course, extends beyond Rosenblit because in this case Petitioner contends that he was deprived of a hearing and, more importantly, a decision by his peers (the Medical Hearing Committee). If the Court of Appeal can utilize its independent judgment of the evidence to determine whether or not a physician has been denied a fair hearing it clearly has the right to examine independently the record to determine whether the physician has been denied a hearing altogether. Essentially that is what Willick did here.

B. THE SUMMARY SUSPENSION OF PETITIONER'S STAFF PRIVILEGES WAS IMPROPER

The summary suspension of Petitioner's staff privileges by Tenet was clearly improper and vindictive. The only justification for summary suspension of medical staff privileges is a case where the doctor poses an imminent threat to patient health or safety. That obviously was not the case here. There never was a claim by

Tenet that Petitioner posed an imminent danger or threat to any patient.

Petitioner attempted to raise this argument before this Court in his Writ Petition filed with this Court, Mileikowsky v. Superior Court, 2nd Civil No. B150037. Unfortunately this Honorable Court avoided the opportunity to decide a major legal issue confronting physicians everywhere by declaring that Petitioner first should have sought a preliminary injunction in the trial court rather than challenging the denial of a temporary restraining order in the Court of Appeal. By denying the Petition without a ruling this Court deprived physicians as well as hospitals of a definitive ruling on a very important subject. Petitioner briefed the issue extensively before this Court and was supported by a number of amici curie. It is well settled under California law and procedure that the summary denial of a writ by a Court of Appeal is not a ruling on the merits. See, e.g., Helena Rubenstein International v. Younger, 71 Cal.App.3d 406, 41-412 (1977). Therefore, this Court may reach the merits.

It is difficult procedurally to get the issue of a summary suspension before a Court of Appeal because in most cases the hearing itself will have been conducted before the Court of Appeal can take action. However, in this particular case the hearing was delayed for so long that this Court was in a position to render a decision that could have benefitted Petitioner and, as stated earlier, would have clearly benefitted the medical community, doctors as well as hospitals. Tenet may argue the issue of the

summary suspension without a hearing was rendered moot after Petitioner was provided the hearing.

There are two answers to this possible contention. First, even if the summary suspension were rendered moot by the conducting of the hearing, the issue is so important to the medical community that this Court should nevertheless reach the issue for future situations. Mootness, of course, will not always result in the refusal of an appellate court to render a decision. If the issue is difficult to preserve on appeal but is still important the appellate court can render a decision. See, e.g., Diamond v. Bland, 3 Cal.3d 653 (1970), cert.den., sub.nom. Homart Development Co. v. Diamond, 402 U.S. 988, 29 L.Ed.2d 153, 91 S.Ct. 1661 (1971).

Second, and most important, the issue has not been rendered moot. Because of the peculiar facts of this case Petitioner was never given a final hearing on the summary suspension. The hearing which he was afforded combined the hearing on the summary suspension with the hearing on the denial of his staff privileges renewal application. At first blush one might believe that the hearing on the reappointment application somehow eliminated the summary suspension issue. It did not because the hearing in this case was never completed . The two hearings were combined into one hearing but no final decision was ever rendered by the Medical Hearing Committee nor by the Governing Board on the merits itself. Therefore, if this Court were to reverse the judgment below and rule that Petitioner was not provided a proper hearing on the renewal of his staff privileges , presumably on remand the hearing

would resume. However, the summary suspension would stand until a hearing could be held. Thus, the issue of the summary suspension is very much alive. This Court is respectfully asked to rule that the hearing itself on the merits should resume. In the meantime, this Court is also respectfully asked to rule that the summary suspension must be set aside until the hearing is completed and a decision rendered by the Medical Hearing Committee and perhaps the Governing Board.

This Court is now in a position to reach the issue which it avoided in the writ petition case. Indeed, this is not simply an academic exercise for Petitioner. He very much needs to have the summary suspension set aside so that he can immediately resume practicing medicine while the hearing goes forward on the issue of whether he is entitled to have his staff privileges renewed.

Since there never has been an accusation by Tenet that Petitioner posed an imminent threat to the heath or safety of patients at the hospital there is no need to allow his summary suspension to remain in effect while the hearing on the merits itself goes forward to a final resolution. Indeed, as Petitioner argued in his writ petition filed with this Court and as the amici curie argued in support of the Petition, Petitioner's hearing should proceed on the summary suspension issue first. That is, there ought to be an immediate hearing on remand limited to the question of whether Petitioner poses an imminent threat to the health or safety of patients at the hospital. Petitioner ought to have a bifurcated hearing limited to the summary suspension issue.

That will certainly save a lot of time on remand because the generalized allegations that Petitioner is abusive and disruptive are not appropriate for the summary suspension process.

Business & Professions Code Section 809.5, which became effective on January 1, 1990, provides that a peer review body may immediately suspend the clinical privileges of a licentiate only "where the failure to take that action may result in an imminent danger to the health of any individual . . . ."

Imminent danger cannot be shown with old charts and where the hospital and its medical staff do not act with any sense of immediacy. The facts of Cipriotti v. Board of Directors, 147 Cal.App.3d 144, 150-151 (1983), are instructive as to the "immediacy' required for a summary suspension of a physician's staff membership and clinical privileges. In Cipriotti the first incident occurred on December 7, 1979. The second incident occurred four days later on December 11. The opinion then notes that "immediately following the December 11 incident, Dr. Gross met with Dr. Weiland, the Department Chairman, and recommended that petitioner's privileges be summarily suspended." 147 Cal.App.3d at 151. As regards the "imminent danger" criterion in Business & Professions Code Section 809.5, the dictionary definition of "imminent" means "likely to happen without delay; impending, threatening" as "likely to occur at any moment, impending." Doheny West Homeowner's Association v. American Guarantee & Liability Insurance Co., 60 Cal.App.4th 400, 406 (1997)(,citing dictionary definitions.)

Volpicelli v. Jared Sydney Torrance Memorial Hospital, 109 Cal.App.3d 242, 251-253 (1980), upheld a preliminary injunction reinstating a physician to a hospital medical staff pending a hospital administrative hearing. Dr. Volpicelli had been on that medical staff for 18 years before being terminated without the notice and hearing required by the By-Laws of the hospital. Volpicelli stands for the proposition that Petitioner should be similarly entitled to reinstatement pending his hospital hearing absent a clear showing that his care poses an "imminent danger to the health of any individual . . ." as required by the statute.

It is important for there to be immediate judicial review of any summary suspension and, in this case, it is extremely important for this Court in a published decision to clearly establish that a summary suspension may only be imposed when there is a showing of immediate or imminent danger to the health of any individual. In this connection the recent decision by the Court of Appeal, Fourth Appellate District, Division Two in Sahlolbei v. Providence Health Care, Inc., 112 Cal.App.4th 1137 (2003), is extremely helpful. In the Sahlolbei case a physician whose application for reappointment to a successive term on the medical staff of an acute care hospital was denied filed suit against the hospital seeking reinstatement of his staff privileges and damages. The Board of Directors of the hospital had denied the physician's application for reappointment and terminated his privileges without a pretermination hearing. The Superior Court in Riverside denied his preliminary injunction request, but the Court of Appeal reversed the order and directed

the trial court to grant the preliminary injunction. The Court of Appeal concluded that the physician was entitled to seek an injunction to secure his statutory right to a predetermination hearing without first pursuing the hospital's internal remedy, which was a post termination hearing. The decision of the Court of Appeal in Sahlolbei v. Providence Health Care, Inc., supports Petitioner's contention herein that judicial review should be immediately available to a physician who has been summarily suspended. The Court of Appeal concluded that the physician was not obligated to first exhaust internal administrative remedies by seeking a post termination hearing. The Court of Appeal in Sahlolbei v. Providence Health Care, Inc., distinguished Bollengier v. Doctor's Medical Center, 222 Cal.App.3d 1115 (1990) where the Court of Appeal held that a physician had to exhaust internal remedies even though he did not receive the right to a formal hearing until after his staff privileges were revoked. The Fourth District Court of Appeal in the Sahlolbei case distinguished the Fifth District's Bollengier decision by pointing out the physician in the Bollengier case did not challenge the failure to provide a pretermination hearing. Moreover, as the Fourth Appellate District noted in the Sahlolbei case, the Bollengier decision was not rendered under Business & Professions Code Section 809.1 et.seq.. Tenet in the instant case argued to the Court below that the Bollengier decision required Petitioner to go through the hearing process before challenging any interim ruling by the hearing officer (CT 416, line 11).

The instant case presents this Honorable Court of Appeal with the perfect opportunity to decide whether a physician whose staff privileges have been summarily suspended may seek immediate relief in the Superior Court rather than going through a lengthy administrative process.

The California Supreme Court is beginning to show an extreme interest in abuse by administrative agencies and regulators. On December 1, 2003 the Supreme Court decided Schifando v. City of Los Angeles, ____ Cal.4th ____, 2003 DJDAR 14056 (2003). In this case the Supreme Court ruled that a city employee claiming discrimination under the FEHA need not exhaust administrative remedies in order to bring a court challenge. Later in the month the Supreme Court decided Bonnell v. Medical Board of California, ____ Cal.4th _____, 2003 DJDAR 14091 (2003), where the California Medical Board improperly granted a stay of a decision that had upheld an administrative law judge's decision recommending that the Board's accusation against a physician be dismissed. The Supreme Court ruled that an administrative agency must act within the powers conferred upon it by law and may not act in excess of those powers. Actions exceeding the authority of an administrative agency are void. Just a year earlier the Supreme Court decided Haas v. County of San Bernardino, 27 Cal.4th 1017 (2002) which set aside the decision in an administrative proceeding because the hearing officer had a conflict of interest in that she expected future employment from one side of the dispute.

The Courts of Appeal are also focusing on the fairness of

administrative hearings. For example, recently the Court of Appeal in Nightlife Partners v. City of Beverly Hills, 108 Cal.App.4th 81 (2003) affirmed the trial court's decision in an administrative mandamus case to set aside the decision of the administrative tribunal because the hearing officer was advised by an attorney with a conflict of interest.

A summary suspension is a drastic remedy imposed by a hospital. It immediately and without prior notice severs a physician's ability to care for patients in a hospital, destroys patients' rights to be cared for by the physician of their choice, disrupts established relationships in the most sensitive and most important of personal service, and often devastates the physician's ability to practice medicine. Because of these draconian ramifications, "summary suspensions" must not be utilized routinely to deal with concerns arising from a physician's medical practice or behavior. Summary suspensions should only be imposed as a last resort - in those extreme cases where absolutely necessary to protect patients from real and impending harm.

Because of the haste in which they are imposed, summary suspensions often lack adequate protections to protect against improper disruptions in care. While the law specifically requires that a summary suspension which lasts 15 days or more is reportable to the Medical Board (Business & Professions Code Section 805(b) (and one which lasts longer than 30 days is reported to the National Practitioner Data Bank) (42 U.S.C. Section 11133 (a)(1)(A)), the notice and hearing rights of Business & Professions

Code Sections 809.1 to 809.4 are only provided to the suspended physician after the suspension takes place and the damage has been done. While the law states that summary suspension may only be imposed "where the failure to take that action may result in an imminent danger to the health of any individual," these suspensions are sometimes imposed, as in this case, on the basis of charges which appear to be too stale to warrant the immediate removal of medical staff privileges. Moreover, while the law requires that the hearing commence within 60 days after receipt of a request and that the process be completed "within a reasonable time" these requirements may also be breached as they were in this case.

To protect physicians (and their patients) from irreparable harm arising from the erroneous imposition of a summary suspension, it is imperative that they be afforded an expedited hearing solely on the issue of whether summary suspension, as opposed to termination of staff privileges following a full hearing, is necessary to protect patients from imminent danger. Following the conclusion of the limited hearing, the physician would still need to defend himself in the underlying peer review proceeding.

This bifurcated approach protects everyone involved. Because such a hearing would be limited in scope, it could and should be handled quickly. If the hearing concludes that the physician poses no imminent danger, then needless disruptions and care are prevented and the physician maintains his ability to practice medicine until the underlying charges can fairly be and fully judged. Regardless of the outcome of the first hearing, the

hospital, medical staff, and patients are protected since the affected physician still must defend himself as to whether the physician's conduct is "reasonably likely to be detrimental to patient or to delivery of patient care," and thus warrants termination of staff privileges. However, if the medical staff fails to act fairly and expeditiously on the first question, that is, whether the physician "represents an imminent danger," a physician's ability to practice medicine will be irreparably injured, even if the physician ultimately succeeds at the hearing, a result which violates every notion of fairness that California courts and legislature have tried so hard for years to protect.

Petitioner respectfully refers this Honorable Court to the amici curie brief of the California Medical Association and the American Medical Association filed in support of Petitioner in Mileikowsky v. Superior Court, B150337. As stated earlier this issue is still alive in this case and must be resolved by this Honorable Court since reversal by this Court of the judgment below should include a directive to the trial court to enjoin the summary suspension. The record in this case as well as the record in B150337 demonstrates conclusively that "imminent danger to the health of any individual" was never shown under Business & Professions Code Section 809.5. Without this remedy a limited reversal would only allow Petitioner to continue with his peer review on issues unrelated to "imminent danger. . . ." Essentially Petitioner should receive the benefit of the preliminary injunction issued by Judge O'Brien in Mileikowsky v.

Tenet Healthsystem, L.A.S.C. No. BS056525, which ordered Tenet to process Petitioner's reappointment application. It is clear without a doubt that the summary suspension was orchestrated by Tenet's attorneys to frustrate the injunctive order. Any objective review of this entire travesty of justice should lead to the conclusion that the failure of Tenet to provide Petitioner with the reappointment application form was not an inadvertent bureaucratic mistake but was a calculated effort to exclude Petitioner from the staff because of his outspoken advocacy for patient's rights and care and because of his involvement in prior litigation against Tenet.

C. THERE WAS NO BASIS FOR TERMINATING THE HEARING

Attorney Dan Willick was retained by Tenet and therefore under its control. See Haas v County of San Bernardino, supra. The law firm of Christensen & Auer was also retained by Tenet. This Court may take judicial notice of recent filings reflecting the criminal activities of Tenet. This Court may take judicial notice of United States v. Tenet Healthcare Corp., U.S.D.C. for the Central District of California No. CV 03-206 GAF (CT 270). In Tenet's eyes, Petitioner was a troublemaker and had been for years. A troublemaker to Tenet is a physician who cares about patient care more than profits and who is willing to challenge Tenet, as Petitioner did.

Conflicts between physicians on the one hand and hospitals on the other are well known to the medical community and also to the

judiciary. In Rosner v. Eden Township Hospital District, 58 Cal.2d 592, 598-599 (1962), the Supreme Court overturned the exclusion of a physician from a hospital who was allegedly "not temperamentally suitable. . . ." In so ruling the Rosner court stated:

> "[A] hospital ... should not be permitted to adopt standards for the exclusion of doctors from the use of its hospital which are so vague and ambiguous as to provide a substantial danger of arbitrary discrimination in their application. **In asserting their views as to proper treatment and hospital practices, many physicians will become involved in a certain amount of dispute and friction,** and a determination that such common occurrences have more than their usual significance and show temperamental unsuitability for hospital practice of one of the doctors is of necessity highly conjectural. **In these circumstances there is a danger that the requirement of temperamental suitability will be applied as a subterfuge where consideration having no relevance to fitness are present.** It may be noted that Dr. Rosner opposed election to the board of directors of a slate of candidates endorsed by members of the medical staff and that **he has apparently testified for plaintiffs in malpractice cases.** (58 Cal.2d at 598-99).

The record in this case demonstrates hostility between Willick and Petitioner. Obviously Petitioner disagreed with some rulings made by Willick but the transcripts do not support the conclusion that Petitioner disrupted the proceedings. There was

reference to a portion of one transcript where the Court Reporter briefly indicated she could not take down two persons speaking at once but the record does not show which person was speaking over the other. At most the record shows that Petitioner attempted to vigorously advocate his position and try to protect the record. It was crucial to his defense to demonstrate improper motivation by Tenet and by certain persons at the hospital. Had he said nothing he would not have been able to preserve the record at all.

It must be kept in mind that Petitioner was not permitted to have an attorney at the hearing. Attorneys were specifically excluded by operation of the By-Laws.

What is extremely outrageous about Willick's ruling is that he purports to summarize transcripts but the transcripts do not show visually what actually occurred. Because of continuing hostility between Petitioner and Willick and Willick's mischaracterization of what was occurring at the hearings Petitioner wanted to bring a videographer to the hearing. Fearing that a video tape of the hearing would prohibit Willick from mischaracterizing Petitioner's conduct, Willick specifically prohibited Petitioner from proving that he, Petitioner, was not disrupting not the proceedings. Willick stated in his January 14, 2002 ruling,

> ". . . Dr. Mileikowsky will not be permitted to bring any video or recording devices to the hearing. . . ." (CT 195, lines 8-9).

Willick stated that Tenet would retain a videographer but this was not done (CT 195). Thus, we are left with Willick's

mischaracterization of the record. What is clear from the record is Willick's dislike for Petitioner. Willick stated in his January 14, 2002 order,

> "Dr. Mileikowsky appears to believe that by engaging statements which personally attack the MEC representatives and me, and by demanding my removal, he will be able to change my rulings or to stop the hearing from proceeding with me as the hearing officer. It would set an improper precedent for a hearing officer to resign because a respondent at a medical staff hearing resorts to personal invective. Such a precedent would encourage a situation where a physician who was the subject of a medical staff hearing could abort the hearing at will. I will continue as the hearing officer and will seek to complete the hearing with appropriate respect for the participants and for the required procedures." (CT 198).

Ironically, Willick himself aborted the hearing after contending that it was Petitioner who was attempting to abort the hearing.

What is abundantly clear is that the Medical Hearing Committee consisting of physicians with college and medical degrees, were beginning to realize that it was Willick who was violating Petitioner's rights. Sometime between March 18 and March 19, 2002 Dr. Larry Pleet, one of the member of the Medical Hearing Committee, who had no knowledge of Petitioner before the hearing began but who knew the "prosecutor", Dr. Richard Wulfsberg for 25 years and who referred patients to Dr. Wulfsberg and who in turn received referrals from Dr. Wulfsberg, made a telephone call and

left a message complaining about Willick. Dr. Pleet was not some dunce or fool. He received his medical degree from UCLA in 1960 and was board certified. It was his complaint about Willick that immediately led Tenet's other attorneys, Christensen & Auer, to request that Willick terminate the proceedings. From Tenet's perspective, things were getting out of hand, i.e., Petitioner was beginning to win, something Tenet could not allow to happen.

Notwithstanding the clear prohibition against attorneys being involved with the process, Tenet's attorneys, Christensen & Auer, intervened to request Tenet attorney Willick to terminate the proceedings, and he did so.

The record in this case did not justify the termination of the hearing whether the hearing was terminated by Willick or by the Committee. It must be emphasized that Petitioner was proceeding without an attorney. The Court of Appeal in Rosenblit v. Superior Court, 231 Cal.App.3d 1434 (1991) recognized how unfair hospitals can be when they are dedicated to removing a physician from their staffs. In reversing the Orange County Superior Court, the Court of Appeal held that Dr. Rosenblit was not provided a fair hearing. The Court of Appeal stated, 231 Cal.App.3d at 1447:

> ". . . The procedure provided Rosenblit offends even an elementary sense of fairness. We need not decide whether Rosenblit waived his objection to the form or substance of the findings, as Hospital urges, because we are not concerned with the sufficiency of the findings to support the decision of either the

> administrative body or the trial court. Rather, we are concerned with fair play and fair treatment; with the physician's right to practice his profession; with the public's right to a diversity of opinion among competent specialist and a variety of treatment options.
>
> The record demonstrates Hospital was dedicated to removing Rosenblit rather than providing a physician with a fair opportunity to defend his treatment regimen. . . ."

The hospital in the Rosenblit v. Superior Court case argued that Dr. Rosenblit waived certain things by not objecting. Relying upon Hackethal v. California Medical Association, 138 Cal.App.3d 435 (1982), the Court of Appeal in the Rosenblit case stated that the trial court could not find that a lay person, unrepresented by counsel, waived his right to object. This Court, like the Court of Appeal in the Rosenblit case, should consider the fact that Petitioner is not an attorney and therefore does not know all of the protocol and niceties of which an attorney must be aware in handling a case for a client. Essentially Willick treated Petitioner as though he were an attorney expected to know all of the finer rules of courtroom protocol.

It is clear that what prompted Willick to terminate the proceeding was not Petitioner's alleged disruption of the hearings. Rather, Willick acted at the request of Tenet's attorneys, who had requested termination of the hearing when they realized Petitioner would win. Willick then claimed that the communication was ex parte. Obviously the communication by Petitioner to the Medical

Hearing Committee was not ex parte because all parties received the communication.

The termination cannot be justified now on the claim that no communication was permitted because the basis for the termination of the hearing was that the communication was ex parte, not that it was a communication. A communication itself cannot be the basis for the termination of a hearing. Willick had no right to prevent Petitioner from communicating with the Medical Hearing Committee. Petitioner has a free speech right to communicate with anyone. This is not a lay jury but rather medical experts who are Petitioner's peers.

If Petitioner's communication was improper, and it was not, the remedy that Tenet or Willick could have imposed would have been additional communication to the Committee advising the Committee that in their belief Petitioner's communication was irrelevant. Indeed throughout the proceedings Willick seems to have been of the opinion that some of the things said by Petitioner were not accurate. It is not up to Willick to determine the credibility of anyone let alone Petitioner. If Willick thought Petitioner was not telling the truth to the Committee the Medical Executive Committee (the prosecutor) could "correct" any misinformation given by Petitioner.

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D. ASSUMING ARGUENDO THERE WERE GROUNDS FOR TERMINATING THE PROCEEDING, AND THERE WERE NO GROUNDS, IT WAS UP TO THE MEDICAL HEARING COMMITTEE TO MAKE THAT DECISION

Willick exceeded his authority in this case. What Willick did was unprecedented as attorney Christensen conceded at the appellate hearing before the Appeal Body. The simple truth is there is no legal authority for what Willick did in this case.

Article VIII, Section 2 of the By-Laws (bate stamp number 13455) guaranteed Petitioner the right to a hearing by a committee of his peers to determine whether or not he was properly denied reappointment and whether or not his denial of privileges was justified.

Article VIII, Section 3C provides as follows:

> "The hearing shall be held before a trier of fact which shall be a hearing committee composed of not less than five individuals."

It is clear from the By-Laws that hearing officer was to have a very limited role. Article VIII, Section 4B provides as follows:

> "The hearing officer shall act to maintain decorum and to assure that all participants in the hearing have a reasonable opportunity to present relevant oral and documentary evidence. He shall be entitled to determine the order of procedure during the hearing and shall make all rulings on matters of procedure and the admissibility of evidence."

This section did not authorize hearing office, Dan Willick, an

attorney paid for by the hospital, to terminate the proceedings. Yet Mr. Willick relied upon this Section and one other provision to justify taking the case from the Medical Hearing Committee and terminating the proceeding without affording Petitioner the right to a completed hearing. Hearing Officer Willick referred also to Article VIII, Section 4A to abort the proceeding. Article VIII, Section 4A provides as follows:

> "The personal presence of the practitioner who requested the hearing shall be required. A practitioner who fails without good cause to appear and proceed at such hearing shall be deemed to have waived his rights in the same manner and with the same consequences as provided in Section 2.E."

Willick inferred from the provision quoted above that he had the authority to terminate the proceedings prior to the decision on the merits by the Medical Hearing Committee. Nothing in Article VIII, Section 4A authorized Willick to terminate the proceeding. At no time did Petitioner ever fail to attend a hearing. Article VIII, Section 4A simply has no relationship to what occurred in this particular case.

The principle reason given by Dan Willick for terminating the proceeding was that Petitioner provided a trial brief ex parte to the Medical Hearing Committee but the record shows to the contrary - the brief was not given ex parte but rather given to all parties. In addition, Willick contended that Petitioner did not provide discovery but Article VIII, Section 4E provides that if a practitioner does not provide discovery such evidence may not be

introduced by the practitioner at the hearing itself. In particular the section provides as follows:

> "The hearing officer may set guidelines for the introduction of evidence and the hearing in order to conduct the hearing in a reasonable period of time given the circumstances. The body whose decision prompted the hearing may object to the introduction of evidence that was not provided by the practitioner during an appointment, reappointment or privilege application or corrective action despite requests for such action. The information shall be barred from the hearing by the hearing officer unless the practitioner can prove he previously acted diligently and could not have submitted the information."

Nothing from the provision quoted above authorized Willick to terminate the proceeding for an alleged failure of Petitioner to provide discovery, which is not true in any event. The record is clear Petitioner did provide discovery but even if he did not the remedy for the alleged violation was not the termination of the proceeding.

It is significant that the first hearing officer, Lowell Brown, at least knew enough to have the Medical Hearing Committee sign the decision. Here Willick could not gamble that the Committee would agree with him. For this reason he violated the By-Laws and the Business & Professions Code by taking it upon himself to terminate the hearing without allowing the Medical Hearing Committee to decide the matter.

The trial court was of the erroneous belief that it was

irrelevant whether Willick terminated the proceedings or whether the Committee terminated the proceedings since what the trial court was reviewing was the decision of the Appeal Body. But the Appeal Body is not comprised of peers. It is not a peer review committee but rather an administrative appellate tribunal. If the Medical Hearing Committee was required by law and by the By-Laws to approve the termination nothing the Appeal Body could do could correct that defect. By way of analogy only, if a defendant in a criminal case is on trial for murder and the clerk of the court finds the defendant guilty and sentences him to life imprisonment and if the defendant appeals the conviction to the Court of Appeal it is impermissible for the Court of Appeal to affirm the conviction on the ground that there was substantial evidence in the record to support the guilty verdict. If the verdict came from the clerk and not from the jury the issue of substantial evidence in the record is irrelevant. If the wrong tribunal made the decision, as here when Willick made the decision instead of the Medical Hearing Committee, it is irrelevant that the Appeal Body reviewed the matter. What we have here is structural error in the proceedings. Therefore, sufficiency of the evidence is not even important although as Petitioner has demonstrated earlier in this brief there was no substantial evidence to support the finding even if Willick had the authority to make the finding.

Petitioner was not found to have been physically disruptive at the hearings. It was his language, and pleadings, and exhibits that allegedly constituted the "disruption." But even if he had

been physically disruptive, the only remedy possessed by the hearing officer would have been to exclude Petitioner from the hearing, which then would have proceeded in his absence.

Section 4(L) of Article VIII of the By-Laws specifically covers this point:

> "L. Exclusion: No person shall disrupt any hearing. Any person in attendance who disrupts a hearing after being warned by the Hearing Officer to cease such disruption on penalty of exclusion, shall, at the discretion of the Hearing Officer, leave the hearing. If such excluded person is the affected practitioner or a witness, s/he shall have the right to submit to the Hearing Committee, not later than ten days after such exclusion, a written affidavit of his/her testimony or other evidence, with copies thereof to the other party."

It is clear from the By-Laws that the most extreme sanction the hearing officers may impose is exclusion. By implication termination of the hearing is not an option possessed by the hearing officer. Indeed, it does not even appear to be an option of the Medical Haring Committee. But even if the MHC had that option, i.e. termination of the hearing, the MHC did not exercise that option.

By denying Petitioner an attorney, the hearing officer increased the chances that Petitioner, a non-attorney, might violate some arcane procedural rule or regulation. Whether or not Petitioner was entitled to retain an attorney, his proper status militated in favor of non-attorney physicians deciding his case,

not an attorney retained by his adversary.

This case makes no sense. The whole concept of peer review was to allow physicians to evaluate their peers. Here, Petitioner, a physician, was "reviewed" by a non physician attorney (and one with a conflict of interest). Arguably an attorney hearing officer might be in a position to issue terminating sanctions based on misconduct by a physician represented by an attorney. Here Petitioner had no attorney, which was all the more reason to require Willick, an attorney paid by Tenet, to submit the matter to the MHC.

It is not clear from the record (the trial court transcript of the oral argument of March 14, 2003, CT 386-427) whether the trial court focused on the Appeal Body argument and the procedures it followed or whether it truly reviewed the MHC record which was before the Appeal Body. If the trial court's decision was based upon the fairness of the Appeal Body's proceeding, it is clear the Appeal Body did not proceed fairly.

First, it should be noted that the three member Appeal Body which upheld Willick's termination order was comprised of no physicians and no attorneys (CT 44). Petitioner's request that the Appeal Body include physicians was denied (See transcript of May 23, 2002, p.3, and see Appeal Body transcript of July 2, 2002, p.6 lines 20-25). In contrast, the first Appeal Body had two physicians, Larry May, M.D. and Paul Sogol, M.D. (CT 121). It was this first Appeal Body which reversed the first Medical Hearing Committee's decision. Second, the Appeal Body excluded from the

appellate record the prior appellate record (July 2, 2002 transcript, p.8, lines 20-23). Numerous other documents which would have established Tenet's motivation for its conduct were excluded from the second appellate hearing (July 2 ,2002 transcript, pp.8-14). Although the Appeal Body declined to include the record on appeal the prior record, attorney Jay Christensen during oral argument on July 2, 2002 made extensive references to the prior appeal (July 2, 2002 transcript, pp.78-79). The Appeal Body also refused to allow Petitioner to file a reply brief.

Petitioner is not dwelling on the issue of whether the appeal itself was fair as opposed to the MHC hearing, which clearly was not. It is irrelevant whether Petitioner received a fair administrative appeal, and he did not, if the decision of the Appeal Body was erroneous. By way of analogy again, let us suppose a defendant in a criminal case receives an unfair trial. For example, let us suppose he is compelled to testify over objection; the jury is bribed by the prosecutor, and the trial judge is asleep. Would it matter that the Court of Appeal fairly entertains his appeal from a conviction. What would it matter if the Court of Appeal allowed all of the defendant's briefs to be filed, considered the entire record, and gave the defendant's attorney plenty of time to argue. Suppose the three judge appellate tribunal was extremely courteous and read the entire record. If the Court of Appeal in such a hypothetical case voted to affirm the judgment of conviction, its affirmance would be improper and subject to reversal by the Supreme Court or a federal court on

habeas corpus.

Here we have a three member non-physician, non-attorney lay appellate body affirming Willick. The issue is Willick's decision, not whether the Appeal Body acted fairly. Technically the Appeal Body decision is what is being reviewed. Its decision to affirm is what is erroneous. We do not reach the issue of whether the Appeal Body acted fairly. Its decision was wrong. To the extent the trial court focused on the fairness of the Appeal Body such a focus was irrelevant. It had no authority to approve Willick's order.

Parenthetically, the Appeal Body did precisely what Willick criticized Petitioner for doing – it referred to collateral civil litigation between Petitioner and Tenet. Specifically, the Appeal Body referred to a Superior Court referee's recommendation in a discovery dispute involving Petitioner and Tenet, a recommendation which was not even a final judgment.[5]

Petitioner incorporates by reference the arguments and discussions on this point as well as other points presented by the amicus curiae brief of the Union of American Physicians and Dentists which this Court ordered filed on January 6, 2004.

IV

CONCLUSION

In his Petition Petitioner asked the Superior Court for an order directing Tenet "to set aside its summary suspension of

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[5] As of the filing of this Opening Brief there has been no final judgment in the case. A sanction order is currently pending in this Court, Mileikowsky v. Tenet, B159733.

Petitioner's clinical privileges. . . ." (CT 32, lines 12-15). It is imperative that this Honorable Court reverse the judgment below and grant this relief. In this way Petitioner can regain his medical practice, which has all been ruined by the improper summary suspension. Petitioner has been without his staff privileges for a number of years. He needs to regain his staff privileges immediately while the proceedings are reconvened and they should be reconvened before the same Medical Hearing Committee that was hearing this matter.

If anything Petitioner told the Medical Hearing Committee was untruthful the remedy of Tenet was to tell the Committee "the truth." As Justice Holmes once noted many years ago, the remedy for a lie is the truth, not censorship. Tenet has every right to tell the Committee that what Petitioner has been telling the Committee is not truthful or not accurate.

For the reasons expressed herein and for the reasons expressed by the Union of American Physicians and Dentists in the amicus brief, Petitioner and Appellant Dr. Gil Mileikowsky respectfully asks this Honorable Court to reverse the judgment below with instructions to vacate the summary suspension and to reconvene the Medical Hearing Committee. This Court should also require the hearing officer to allow Petitioner to be represented by an attorney.

Respectfully submitted,
Roger Jon Diamond
ROGER JON DIAMOND
Attorney for Petitioner & Appellant

2ND Civil 168705

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GIL N. MILEIKOWSY, Petitioner and Appellant vs. TENET HEALTHSYSTEM, ENCINO TARZANA REGIONAL MEDICAL CENTER, A CALIFORNIA CORPORATION, Respondent-Respondent	2nd Civil No. B186705 L.A.S.C. BS079131

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 14(c)(1) of the California Rules of Court, the enclosed brief of Appellant is produced using 13-point Roman type including footnotes and contains approximately 11,907 which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: January 14, 2004

Respectfully submitted,

Roger Jon Diamond

ROGER JON DIAMOND
Petitioner - Appellant

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 2115 Main Street, Santa Monica, California 90405.

On the date shown below I served the foregoing document described as: **APPELLANT'S OPENING BRIEF** on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Christensen & Auer
Jay Christensen, Esq.
Stephen Auer, Esq.
225 South Lake Ave., 9th Floor
Pasadena, Ca 91101

Hon. David Yaffe, Judge
Superior Court
Department 86
111 N. Hill Street
Los Angeles, CA 90012

State Supreme Court
300 S. Spring Street, 2nd Floor
Los Angeles, CA 90013
(5 copies)

I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at Santa Monica, California on January 14, 2004

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and was executed at Santa Monica, California on the 14 day of January 2004.

Judith A. Burgdorf

JUDITH A. BURGDORF