2nd Civil 168705

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELATE DISTRICT

DIVISION TWO

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

vs.

TENET HEALTHSYSTEM, ENCINO TARZANA REGIONAL MEDICAL CENTER, A CALIFORNIA CORPORATION, Respondent-Respondent

APPEAL FROM THE SUPERIOR COURT

OF THE COUNTY OF LOS ANGELES

HONORABLE DAIVD P. YAFFE, JUDGE PRESIDING

L.A.S.C. No.BS079131

RESPONDENT'S BRIEF

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INTRODUCTION

This case poses the question of when it is within the sound discretion of a private hospital board to determine that a chronically disruptive physician staff member has waived his right to a hearing. An essential component of this case is the extent to which the board of a private hospital must be deemed to possess authority to interpret its own Medical Staff Bylaws ("Bylaws") and approve actions necessary to enforce the ability of a hearing officer to make rulings and conduct an orderly hearing.

Respondent, a private acute hospital facility ("the Hospital") is obligated to offer hearing and appeal rights to physicians whose clinical privileges are recommended to be terminated or have been suspended. In this case, the Hospital recommended termination of Dr. Mileikowsky's clinical privileges based on Dr. Mileikowsky's long history of obstructing the peer review process; Dr. Mileikowsky's pattern of disruptive and threatening conduct; and following Dr. Mileikowsky's physical and verbal assault on hospital employees.

Before the hearing concerning the recommended termination ("Hearing I") could be completed, the Hospital also summarily suspended Dr. Mileikowsky's privileges based on the earlier infractions plus additional evidence that Dr. Mileikowsky had violated court-sanctioned security provisions imposed in order to control Dr. Mileikowsky's disruptive and abusive behavior; that Dr. Mileikowsky had engaged in bizarre and threatening behavior on the Hospital premises; and that Dr. Mileikowsky had provided dangerous and substandard care to two patients - - the first case involved an assisted infant delivery which resulted in the infant requiring ventilatory support and transfer to the Neonatal Intensive Care Unit; and the second involved a surgical mishap which

occurred when Dr. Mileikowsky appeared to be disoriented while performing a circumcision.

Hearing I was terminated based on Dr. Mileikowsky's continuous disruption of the hearing process and refusal to provide discovery as ordered by the neutral hearing officer. On appeal, the Hospital's Governing Board ("Board") expressly found that Dr. Mileikowsky had indeed disrupted Hearing I and had violated the Bylaws by deliberately delaying and refusing to produce evidence vital to the Medical Executive Committee ("MEC"). Rather than terminate Dr. Mileikowsky's hearing rights, however, the Board remanded the matter for a second hearing with specific discovery sanctions imposed on Dr. Mileikowsky ("Hearing II").

Over the course of 12 months -- 24 sessions --of Hearing II, Dr. Mileikowsky continued his pattern of disruptive, abusive, out of control, noncompliant and subversive behavior. He repeatedly refused to provide discovery ordered by another neutral hearing officer. He repeatedly disrupted hearing sessions with bouts of screaming and ranting. He engaged in threatening and abusive misconduct toward the Hearing Officer, witnesses, the physician representative of the Hospital's MEC and others involved in the hearing process. He repeatedly attempted to mislead the Judicial Review Committee ("JRC") members by false representations regarding litigation between himself and the Hospital.

When the Hearing Officer issued in limine orders designed to prevent Dr. Mileikowsky from lying to the JRC members about his litigation, Dr. Mileikowsky informed the hearing officer that he would intentionally violate the orders. When the Hearing Officer issued orders relating to the questioning of witnesses and maintaining decorum during the hearing, Dr. Mileikowsky threatened the Hearing Officer and stated expressly that he would not comply. When the Hearing Officer finally asked the parties to submit a brief to him addressing whether Dr.

Mileikowsky had waived his right to a hearing through his misconduct, Dr. Mileikowsky then delivered a 35 page document full of false and misleading statements directly to the JRC members (i.e., jurors) outside the hearing process.

Not surprisingly, the Hearing Officer ruled that Dr. Mileikowsky's misconduct was so flagrant, disruptive and subversive that the hearing could not continue in an orderly and non-disruptive, non-prejudicial manner. Consequently, the Hearing Officer concluded that Dr. Mileikowsky had waived his right to a hearing. On appeal, the Board agreed and adopted detailed findings in support of its determination that Dr. Mileikowsky had forfeited his right to a hearing. At about the same time, the Los Angeles County Superior Court similarly dismissed Dr. Mileikowsky's lawsuits against the Hospital based on Dr. Mileikowsky's long history of noncompliance with the Superior Court's discovery orders. Shortly thereafter, the Medical Board of California issued a formal accusation against Dr. Mileikowsky for refusing to submit to a psychiatric examination.

II

STATEMENT OF THE CASE

In late 1998, the Hospital sent Dr. Mileikowsky a reappointment application in the same manner as other Medical Staff members. Despite several reminders, Dr. Mileikowsky failed to submit his application. Thereafter, the Hospital notified Dr. Mileikowsky that he had violated the Bylaws by failing to timely submit his application, thus he was deemed to have voluntarily resigned.[1] Dr. Mileikowsky obtained a preliminary

[1] See Administrative Record lodged with the Court (hereinafter "AR:") consisting of multiple Encino-Tarzana Regional Medical Center binders specifically identified, transcripts and Bate stamped documents. For the

injunction ordering the Hospital to consider his application.[2] In compliance with the preliminary injunction, the Hospital processed Dr. Mileikowsky's application.[3]

On December 17, 1999, Dr. Mileikowsky was involved in a serious altercation in the operating room ("OR"). After being informed by the OR Director that his surgical assistant did not have clinical privileges and could not assist him, Dr. Mileikowsky ignored the OR Director and attempted to begin the surgical procedure with the uncredentialed surgical assistant. When the OR Director attempted to address the issue further, Dr. Mileikowsky flew into an uncontrolled rage – screaming and physically charging the defenseless female OR Director.[4] This was not the first assault on an employee by Dr. Mileikowsky. In early February of 1999, Dr. Mileikowsky appeared in the Medical Staff Office ("MSO") and proceeded to verbally attack and assault two female employees regarding issues surrounding his reappointment application.[5]

On January 11, 2000, the MEC determined that Dr. Mileikowsky's application must be denied based on Dr. Mileikowsky's long history of disruptive, threatening and uncooperative conduct; his interference, obstruction, and refusal to comply with the Medical Staff's mandatory obligation to conduct peer review; recent incidents of abusive and harassing conduct; and his refusal to provide information; and the MEC's inability to otherwise obtain information related to a formal hearing at Cedars Sinai

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Court's ease of reference and in order to minimize disruption of the textual flow, citations to the AR will be placed in footnotes rather than in the text. Exhibit Book (hereinafter "Exhibit"), Vol. I: No. 104 and Vol. II, No. 151: 14-15.

[2] AR: Bate Stamp 6972-6976 and 7196-7197

[3] AR: Exhibit Vol. I, Nos. 106-112 and Vol. II, No. 151, pp.15-18 and Bate Stamp 7196-7197.

[4] AR: Exhibit Vol. I, Nos. 113, 113A, 113B, 116, 117 & 118.

[5] AR: Exhibit Vol: I, Nos. 96, 97, 98 & 99.

Medical Center in which he was charged with substandard and incompetent practice.[6]

Dr. Mileikowsky requested and was granted a hearing (hereinafter "Hearing I"). Despite numerous requests and rulings by Lowell Brown, Esq. ("Mr. Brown"), the Hearing Officer for Hearing I, Dr. Mileikowsky refused to comply with the MEC's discovery requests. The MEC submitted a motion to Mr. Brown for a ruling that Dr. Mileikowsky had failed to participate in good faith in the hearing process, and therefore, he had waived his right to a hearing.[7] The matter was submitted to the JRC and a formal hearing was conducted in October 2000. The JRC concluded that Dr. Mileikowsky had waived his rights to a hearing and that he had failed to comply with the Hospital's Fair Hearing Plan to proceed in the matter.[8] Dr. Mileikowsky appealed this decision to the Board.

On April 26, 2001, the Board found that Dr. Mileikowsky had deliberately delayed the hearing and refused to produce evidence vital to the MEC. The Board imposed evidentiary sanctions and remanded the matter for a new hearing. (Clerk's Transcript filed October 20, 2003, Vol. 1 & 2 (hereinafter "CT"): 114-121.)

During preparation for Hearing I, the Hospital's Administrator learned of Dr. Mileikowsky's history of threatening and disruptive behavior and that although Dr. Mileikowsky's behavioral problems had been reviewed in the past, Dr. Mileikowsky consistently managed to avoid accountability for his misconduct by threatening and intimidating Medical Staff members as well as hospital employees. For example, the Administrator learned that Dr. Mileikowsky had threatened and intimidated the Chair of the Obstetrical and Gynecology Department ("OB/GYN") by

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[6] AR: Exhibit Vol. I, Nos. 1, 107 &112 and Vol. II, Nos. 136 & 137.
[7] AR: Bate Stamp 7908-8006.
[8] AR: Bate Stamp 8797-8808.

stating that he would close down the peer review process and that " . . . he has been cooperative as a European so far but in the future will become more like an Israeli and is prepared to do battle" if the OB/GYN Committee continued to review his medical records;[9] that Dr. Mileikowsky threatened the Chief of Staff with litigation if the Chief of Staff continued to investigate incident reports related to him;[10] that Dr. Mileikowsky had abused two (2) female employees in the Medical Staff Office;[11] and that Dr. Mileikowsky had assaulted the OR Director.[12] In an effort to protect hospital personnel and Medical Staff members, on June 23, 2000, the Administrator implemented security-monitoring provisions ordering Dr. Mileikowsky to inform administration whenever he entered the Hospital's premises.[13]

In response, Dr. Mileikowsky filed a motion for a temporary restraining order ("TRO"). On July 11, 2000, Judge David P. Yaffe ("Judge Yaffe") granted the TRO, in part, acknowledging the Hospital's right to have Dr. Mileikowsky escorted by security while on Hospital campus, but enjoining the Hospital from escorting Dr. Mileikowsky while Dr. Mileikowsky was with, or in view of any patient. (CT: 304:28; 305:1-5.) On September 14, 2000, after reviewing evidence of Dr. Mileikowsky's continued bizarre and frightening conduct at the Hospital, Judge Yaffe denied Dr. Mileikowsky's request for a preliminary injunction and dismissed the TRO.

In fact, Judge Yaffe stated that:

> "[Dr. Mileikowsky] contends that restrictions imposed upon him by the June 23, 2000 letter from defendant

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[9] AR: Exhibit Vol. I, No. 26, p. 2.
[10] AR: Exhibit Vol. I, No. 68.
[11] AR: Exhibit Vol. I, Nos. 96, 97 & 98.
[12] AR: Exhibit Vol. I, No. 113.
[13] AR: Exhibit Vol. I, No. 119.

> [Administrator] are "arbitrary and unduly onerous," thereby raising the issue of whether said restrictions are necessary for the safety and security of hospital personnel, as defendants contend, or are retaliatory measures against [Dr. Mileikowsky] because of his underlying disputes with defendants. Whatever doubts there may have been about the reasonableness of the restriction when they were imposed has been removed by [Dr. Mileikowsky's] bizarre and unexplained conduct on August 29 and September 5, 2000, when [Dr. Mileikowsky] entered the hospital in the middle of the night accompanied by a female companion, locked himself in a room in which narcotics are stored, and took flash pictures of hospital personnel for no discernible reasons."[14]

On November 16, 2000, Dr. Mileikowsky's clinical privileges were summarily suspended due to: 1) two patient care incidents -- the first case involved Dr. Mileikowsky's violation of a Hospital policy related to assisted deliveries which resulted in the infant requiring ventilatory support and transfer to the Neonatal Intensive Care Unit and the second involved a surgical mishap which occurred when Dr. Mileikowsky performed a circumcision while appearing disoriented; 2) multiple complaints of Dr. Mileikowsky's unprofessional conduct, including: a) a late night incident wherein Dr. Mileikowsky arrived on the Labor and Delivery Unit after midnight with a female companion, entered the medication room in which narcotics are stored and began taking pictures. When Dr. Mileikowsky exited the room, he took flash pictures of the female employees without their consent. Later that same night, Dr. Mileikowsky surprised and frightened a female obstetrician when he took flash pictures of her as she exited the building; b) an assault on a Hospital security guard who had been sent to observe Dr. Mileikowsky in accordance with the court-sanctioned

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[14] AR: Medical Executive Committee Correspondence Binder (hereinafter "MEC Corres.") Vol. II, Tab 86, p.3.

security provisions; and 3) his violation of the court-sanctioned security provisions including failing to sign in with security when he arrived on the hospital premises, arguing with and intimidating security guards sent to escort him, and failing to inform administration that he would be on the hospital premises. On November 28, 2000, after an informal meeting with Dr. Mileikowsky, the MEC continued the summary suspension and recommended the termination of Dr. Mileikowsky's Medical Staff membership and clinical privileges.[15] In accordance with California Business & Professions Code section 805, the Hospital reported Dr. Mileikowsky's summary suspension to the Medical Board of California.[16]

Dr. Mileikowsky requested a second hearing. In accordance with the Bylaws, the two hearing proceedings were consolidated into one hearing (hereinafter "Hearing II").[17] On December 22, 2000, Dr. Mileikowsky was provided with a Notice of Hearing and Charges ("Notice").[18] On January 4, 2001, the MEC provided Dr. Mileikowsky with copies of its exhibits.[19]

In accordance with Business & Professions Code section 809.2, subdivision (b) and the Bylaws, David Kayne, M.D. ("Dr. Kayne"), the then Chief of Staff, appointed Daniel Willick, Esq. ("Mr. Willick") to serve as the neutral hearing officer.[20] Mr. Willick's role included maintaining decorum, assuring that all participants had a reasonable opportunity to present relevant oral and documentary evidence, determining the order of

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[15] AR: Exhibit Vol. I, Nos. 2 & 3 and Vol. II, No. 135 and Bate Stamp 7199-7212.
[16] AR: Exhibit Vol. II, No. 138.
[17] AR: Exhibit Vol. II, No. 148, pp. 20-21 and MEC Corres. Vol. I, Tab 54 and Hearing Officer's Correspondence and Ruling Binder (hereinafter "HO") Tab 34, p. 1.
[18] AR: Exhibit Vol. II, No. 139.
[19] AR: MEC Corres. Vol. I, Tab 8.
[20] AR: Exhibit Vol. II, No. 148, p. 21.

the procedure and issuing rulings on matters of procedure and the admissibility of evidence.[21] On January 11, 2001, Dr. Mileikowsky conducted voir dire of Mr. Willick and offered no objections to Mr. Willick serving as the Hearing Officer.[22]

On January 30, 2001, in accordance with Business & Professions Code section 809.2, subdivision (a) and the Bylaws, the hearing commenced with the voir dire of the medical staff members appointed by Dr. Kayne to serve as the JRC (i.e., trier of fact).[23] The JRC's role was limited to determining whether the MEC's decision to summarily suspend and terminate Dr. Mileikowsky's clinical privileges and medical staff membership was reasonable.

Due to the new charges related to the suspension, the Hearing Officer provided Dr. Mileikowsky with a second opportunity to produce discovery documents and to submit copies of his exhibits, notwithstanding the Board's evidentiary sanctions in Hearing I. On April 2, 2001, the MEC produced all relevant discovery documents requested by Dr. Mileikowsky.[24]

Although Dr. Mileikowsky produced many irrelevant documents, including irrelevant court pleadings, over the course of the hearing, despite 14 rulings over 12 months, Dr. Mileikowsky failed to produce documents responsive to the MEC's discovery requests, including documents relevant to the Cedars Sinai Medical Center disciplinary action.[25] Despite eight rulings, Dr. Mileikowsky failed to produce an exhibit list and copies of

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[21] AR: Exhibit Vol. II, No.148, p. 22.
[22] AR: Hearing Transcript (hereinafter "HT") 1/11/01, 12:9-15 and HO Tab 5, p. 1 ¶ 2.
[23] AR: Exhibit Vol. I, No. 148, p. 21.
[24] AR: MEC Corres. Vol. I, Tab 41.
[25] AR: HO Tab 5, p. 3; Tab 8, p. 1; Tab 13, p. 1; Tab 15, pp. 2-10; Tab 21, p. 1 ¶ 2; Tab 23, pp. 4-5; Tab 24; Tab 25, p. 2 ¶ C; Tab 34, pp. 2-4; Tab 42, pp. 2-3; Tab 51, pp. 2-3; Tab 53; Tab 54, pp. 2-3; and Tab 69, p. 1-2.

relevant exhibits to be introduced at the hearing.[26] Dr. Mileikowsky repeatedly arrived late for hearing sessions, and Dr. Mileikowsky was unavailable for an extended amount of time due to vacations and seminars.[27]

The Hearing Officer also issued a ruling instructing both parties to submit briefs outlining their position regarding the MEC's charges that Dr. Mileikowsky failed to cooperate in the Medical Staff's mandatory peer review process. Despite five (5) rulings, Dr. Mileikowsky failed to submit his response brief.[28]

Dr. Mileikowsky repeatedly disrupted the hearing sessions by disobeying the Hearing Officer's rulings related to the questioning of witnesses, the admissibility of exhibits, references to the status of his litigation with the Hospital and by becoming argumentative and loud when he disagreed with the Hearing Officer's rulings. As a result of Dr. Mileikowsky's disruptive behavior, four hearing sessions had to be cut short and/or cancelled by the Hearing Officer.[29]

For example, at the October 29, 2001 hearing session, when the Hearing Officer ruled that Dr. Mileikowsky could not question the witness about a document not admitted into evidence, Dr. Mileikowsky stated to the witness, " . . . I'm sorry we have to delay things in such a ridiculous manner

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[26] AR: HO Tab 5, p. 3; Tab 8, p. 1; Tab 42, p. 1 & 2 ¶ C; Tab 46; Tab 48, p. 2; Tab 51, pp. 2-3; Tab 53;and Tab 54, pp. 2-3.
[27] AR: HO Tab 38, p. 3 ¶ 5; and Tab 63, p. 2 ¶ 2.
[28] AR: HO Tab 23, p. 5 ¶ D; Tab 25, p. 4¶ F; Tab 34, pp. 7 & 8 ¶ b; Tab 51, p. 3 ¶ E; and Tab 54, pp. 2&3 ¶ C.
[29] AR: HT 9/5/01, 736-738; HT 9/5/01(procedural transcript), 15-23; HT 11/29/01, 1833:5-14,1835:15- 25 & 1836-1837; HT 12/3/01, 1951-1953; and HT 12/17/01, 1976:9-17, 1977:17-25, 1978:1-16, 1979:14- 25, 1980-1983 and 2006-2008.

. . . ." to which the Hearing Officer stated: "You're out of order . . . ." Dr. Mileikowsky replied, "Yes, and you're out of touch. We know that."[30]

At the September 5, 2001 hearing session, despite ten (10) prior rulings by the Hearing Officer that the parties were not to refer to pending litigation matters,[31] Dr. Mileikowsky persisted in questioning the witness about litigation matters. When the Hearing Officer sustained the MEC's objection to these questions, Dr. Mileikowsky stated, "It's very important because it's important for this committee to know how I respond to threats. Do I take a pistol and shoot people? Or do I hire an attorney and file a lawsuit? I think it's critical."[32] When Dr. Mileikowsky again attempted to question the witness about pending litigation matters, the Hearing Officer advised Dr. Mileikowsky to abide by his ruling. Dr. Mileikowsky replied, "I will do the best, as long as it makes sense."[33]

Following that hearing session, the Hearing Officer held a procedural hearing. Dr. Mileikowsky insisted that there was a court order forbidding the Hospital from escorting him when he was on the premises. When the Hearing Officer tried to explain why Dr. Mileikowsky's interpretation of the court order was incorrect, the Hearing Officer stated that "[Dr. Mileikowsky] reacted very emotionally to these comments and proceeded to yell in a manner which I believe was heard outside the hearing room."[34] Dr. Mileikowsky stated, "For the record, Mr. Willick has either one of two possibilities. Either he doesn't read what I sent him, or he

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[30] AR: HT 10/29/01, 1103:1-20.
[31] AR: HO Tab 21, 5:20-28 & 6:1-6; Tab 42, p. 1 ¶ B; Tab 46, p. 1; Tab 48, p. 2 ¶ 4; Tab 51, p. 2 ¶ D; Tab 52, p. 1 ¶ B; Tab 53; and HT 9/5/01 (procedural transcript), 3-23); HT 9/24/01, 802:13-25, & 803-805;and HT 11/1/01 (procedural transcript), 11-22.
[32] AR: HT 9/5/01, 715:6-10.
[33] *Id.* at 737 & 738:1.
[34] AR: HO Tab 52, 2:3-6.

pretends that he has not received what I gave him. Both cases, Mr. Willick is negligent."[35]

Following this hearing session, the Hearing Officer admonished Dr. Mileikowsky for his unacceptable behavior and warned him that "Should this behavior recur appropriate sanctions will be imposed or sought."[36] Despite this admonishment, at the November 1, 2001 hearing session, Dr. Mileikowsky asked the witness "Are you aware of the fact that July 11, 2000, Judge Yaffe had very clear orders placed on this hospital administration . . . preventing them from escorting me . . .[37] Are you aware of whether or not [hospital employee] violated court orders on August 30 when she called a security escort in violation of a July 11 court order of Judge Yaffe?"[38]

In an effort to mitigate the effect of the misinformation provided to the JRC, following this session, the Hearing Officer ordered both parties to furnish him with suggestions regarding a statement to made by the Hearing Officer to the JRC disclosing the circumstances and status of Dr. Mileikowsky's litigation.[39] After receipt of both parties' statements, the Hearing Officer drafted a summary of the legal proceedings.[40] Despite this unprecedented accommodation, Dr. Mileikowsky continued to insist that only his understanding of the pending litigation was correct.[41]

At the November 29, 2001 hearing session, Dr. Mileikowsky falsely contended that he had not received copies of exhibits sent to him by the MEC on November 19, 2001. When the MEC's representative

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[35] AR: HT 9/5/01 (procedural transcript), 15:25 & 16:1-3.
[36] AR: HO Tab 52, 2:27 & 3:1-6.
[37] AR: HT 11/1/0, 1252:16-22.
[38] *Id.* at 1355:20-23.
[39] AR: HO Tab 61, 1:¶ 2.
[40] AR: HO Tab. 69, p. 6.
[41] AR: Dr. Mileikowsky's Correspondence (hereinafter "Dr. Mileikowsky Corres.") Vol. II, Tabs 101 & 104, and Vol. III, Tabs 125, 135 & 138.

proceeded to question the witness about the exhibits, Dr. Mileikowsky continually interrupted and stated, "This is a typical example of what the MEC does. They provide all the members of the panel with a copy . . . that has exhibits they mentioned. I don't have it. Then I ask for it . . . and he turns around and blames me for interrupting him."[42] Dr. Mileikowsky's constant disruptions caused the hearing session to be adjourned.[43] The MEC subsequently submitted proof that Dr. Mileikowsky had timely received a copy of the exhibits.[44]

Then at the December 17, 2001 hearing session, Dr. Mileikowsky attempted to question the witness about the alleged inequities in the peer review process. When the Hearing Officer instructed Dr. Mileikowsky to focus his questions on the issues in the hearing, Dr. Mileikowsky became loud and argumentative. When Dr. Mileikowsky was told to calm down, he stated, "You want me to calm down? Give me my privileges back. I'll calm down . . . Welcome to the Spanish Inquisition, Mr. Willick."[45] Dr. Mileikowsky continued to present arguments, despite repeated warnings, causing the Hearing Officer to adjourn the session.[46] In addition, at the same session, despite the Hearing Officer's efforts to restrain Dr. Mileikowsky, Dr. Mileikowsky continued to heap verbal abuse on the witness. Dr. Mileikowsky called the witness "superficial and careless;" stated to the witness " . . . you don't have the knowledge;" and stated that the witness had an ". . . interest to see that my practice goes down tubes. . .."[47]

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[42] AR: HT 11/29/01, 1835:17-24.
[43] AR: HT 11/29/01, 1827, 1828, 1829:1-12, 1833:5-14, 1834-1837 and HO Tab 63, 1:12-21.
[44] AR: MEC Corres. Vol. II, Tab 106.
[45] AR: HT 12/17/01, 1982: 8-9 & 21-22.
[46] *Id.* at 1982-1983 & 2006-2007.
[47] *Id.* at 2003:10-11, 2005:22-23, & 2008:1.

Dr. Mileikowsky's propensity to react violently in stressful situations was evidenced by the testimony of seven of the MEC's witnesses.[48] For example, with regard to Dr. Mileikowsky's encounter with the OR Director, the Director testified that " . . . he started yelling at me to get out of the room . . . . And he just was exploding at me . . . He was extremely loud; he was extremely agitated."[49] " . . . I remember thinking at the time that he was extremely angry; . . . and that he was possibly going to hit me because he was just so in my face and pointing down at me with his hand that - - and I had had surgery on my face, and half my face was a bit numb. So I remember thinking to turn this way if he was going to swing at me . . . ."[50] With regard to Dr. Mileikowsky's encounter with an employee in the Medical Staff Office, the employee testified that, " . . . he asked me what my name was . . . he did not give me the opportunity to answer . . . and grabbed my badge from my lapel and pulled it . . . . And I was really shaken at that time.[51] "He was yelling. He was pacing. He was red . . . and I was really scared."[52] With regard to Dr. Mileikowsky's encounter with the security guard, the security guard testified, "I was afraid because . . . I'm kind of small. He's kind of bigger than me . . . he was screaming on my face . . . ."[53] The Chief Operating Officer testified that following the incident with the security guard, ". . . one of the nurses even said, I'm afraid he could come back like some of these postal workers do and he could shoot us."[54]

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[48] AR: HT 8/28/01, 81-82; HT 8/29/01, 238-240; HT 8/30/01, 310-312; HT 9/4/01, 453-456 & 515-517; HT 9/5/01, 631-637 & 699-703.
[49] AR: HT 8/28/01, 81:7-13
[50] *Id.* at 82:12-21.
[51] AR: HT 8/30/01, 310:24-25, 311:1-4.
[52] *Id.* at 312:15-18.
[53] AR: HT 9/5/01, 636:20-23.
[54] *Id.* at 703:6-8.

In light of Dr. Mileikowsky's disruptive conduct during the hearing sessions which were escalating in frequency and intensity, and with full knowledge of Dr. Mileikowsky's history of obstructive and abusive behavior, on December 21, 2001, the MEC submitted a request for orders related to the procedure for future questioning of witnesses and increased security measures.[55] On December 24, 2001, Dr. Mileikowsky was ordered to respond to the MEC's request.

On January 3, 2002, in an attempt to maintain decorum and control of the hearing, the Hearing Officer issued orders related to the future conduct of the hearing. (CT: 75-83.) Dr. Mileikowsky was again provided an opportunity to submit a written response brief to the Hearing Officer. Dr. Mileikowsky and his then attorneys, the law firm of Mirch and Mirch, repeatedly requested additional time to submit a response brief. [56]

For several months, Dr. Mileikowsky asserted that he had no intention of complying with the Hearing Officer's January 3, 2002 orders.[57] For example Dr. Mileikowsky stated: "If you refuse to keep any hospital security personnel out of our meeting room than, I shall have to come with my own bodyguard in order to protect me and my assistants."[58] "Do you really believe that anyone responsible for my defense would accept such outrageous misrepresentation of Judge Yaffe's proceedings? Do you expect my assistants . . . to remain silent? If that's the case you must suffer from the same delusions as [the MEC's legal counsel]. I suggest you join [the MEC's legal counsel] back in the 20th century and the Spanish

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[55] AR: MEC Corres. Vol. II, Tab. 110.
[56] AR: Dr. Mileikowsky Corres. Vol. III, Tab 119, p. 2; and Tabs 139, 140 and 149.
[57] AR: Dr. Mileikowsky Corres. Vol. III, Tabs 132, 133, 135, 137-139, 141-145, 151, 153, 156C.
[58] AR: Dr. Mileikowsky Corres. Vol. III, Tab 132, pp. 5-6.

Inquisition."[59] "Just because you provoke and create out of the fruit of your imagination . . . a new labyrinth of procedures, that does not relieve you and the MEC from your duty to honor my right to an expedited hearing.[60] "All of your above proposals are most unreasonable. If you fail to reconsider the above rulings, you may want to consider an elegant retreat."[61] "[M]ost of your rulings regarding the conduct of future meetings of my hearing violate my fundamental right to due process. Hence, once again I invite you to remedy that unacceptable situation by setting the conduct of our future meetings within the guidelines set by our bylaws, California and Federal laws."[62]

On March 1, 2002, the Hearing Officer again requested that both parties submit a brief outlining their respective positions regarding whether Dr. Mileikowsky had abandoned his defense of this matter as a result of his refusal to comply with the legal and Medical Staff rules for conduct of the hearing, his violations of the Hearing Officer's rulings and his statement that he would not comply with the Hearing Officer's rulings for procedures to be followed at the future hearing sessions.[63] Despite several warnings from the Hearing Officer forbidding either party to communicate with the JRC outside the hearing room and in direct violation of the Hearing Officer's ruling to submit response briefs to him,[64] Dr. Mileikowsky submitted an unauthorized ex parte communication to the members of the JRC, i.e., his March 15, 2002 response brief.

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[59] *Id.* at Tab 135, p. 3
[60] *Id.* at Tab 137, pp. 1-2
[61] *Id.* at Tab 144, p. 6
[62] *Id.* at Tab 153, pp. 2-4.
[63] AR: HO Tab 84.
[64] AR: HT 1/30/01, 62:5-10; HT 6/20/01, 486:15-25, and 564:13-22 and HO Tab 48, p. 1 ¶ B-1; and Tab 59, p. 1 ¶ B.

Dr. Mileikowsky was acutely aware of the prohibition against such ex parte communications. In a letter dated October 22, 2001, Dr. Mileikowsky wrote "The members of the Hearing Committee are like a jury and it is well known that neither party is supposed to have any ex parte communications with jury members."[65] On November 1, 2001, the Hearing Officer reiterated his prior orders that there be " . . . no communication with the members of the Hearing Committee regarding the substance of these proceedings, except in the hearing room."[66]

Dr. Mileikowsky's ex parte communication contained numerous false and inflammatory statements regarding the Hearing Officer's rulings and conduct in the hearing, the MEC's actions and conduct, and numerous false legal representations. For example, Dr. Mileikowsky's ex parte communication falsely contends that he was denied his right to advice of an attorney, despite the fact that Dr. Mileikowsky had been represented by no less than four attorneys and despite the fact that the Hearing Officer extended several deadlines so that Dr. Mileikowsky's counsel could prepare briefs.[67] Dr. Mileikowsky also falsely contended that he was denied his right to make a record of his disagreements with the Hearing Officer's rulings, despite the fact that the administrative record is replete with hundreds of letters disagreeing with the Hearing Officer. But the most damaging misrepresentation was a falsely dated February 28, 2002 letter to the Hearing Officer from Dr. Mileikowsky's physician representatives, which created the false impression that the Hearing Officer proposed to

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[65] AR: Dr. Mileikowsky Corres. Vol II, Tab 97, p. 3.
[66] AR: HO Tab 59, 1: 20-22.
[67] Dr. Mileikowsky was represented by: Mirch & Mirch; Arthur Chenen of Stephen, Oringher, Richman & Theodora; Paul Hittelman; and Ethan Schulman of Howard, Rice, Nemerovski, Canady, Falk & Rabkin.

have the hearing proceed without anyone being available to ask questions on behalf of Dr. Mileikowsky.[68]

Shortly after receipt of Dr. Mileikowsky's brief, one of the JRC members contacted the Medical Staff Office and stated that: " . . . my opinion is that Mr. Willick's request to deny [Dr. Mileikowsky] from questioning witnesses is outrageous, absolutely outrageous, to change in the middle of the rulings in the middle of 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, if Mr. Willick made these requirements he is out to lunch and should be replaced."[69]

On March 30, 2002, due to Dr. Mileikowsky's intentional misconduct that had so prejudiced the hearing, and his absolute refusal to comply with the Hearing Officer's rulings and orders, the Hearing Officer terminated Hearing II. (CT: 62-112.) The Hearing Officer stated that, "In my over twenty years of experience in participating in peer review, I have never seen a case with physician misconduct regarding the hearing process which matches this one." (CT: 63:5-7.) On July 25, 2002, following an Appellate Hearing in which both parties were represented by legal counsel and both parties tendered written and oral arguments, the Board upheld the Hearing Officer's ruling. (CT: 34-44.)

Dr. Mileikowsky's refusal to comply with rules and orders extends beyond the Hospital's proceeding. In fact, a Superior Court Judge issued terminating sanctions based on Dr. Mileikowsky's long-standing pattern of refusing to comply with the rules and procedures set forth in civil

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[68] AR: Dr. Mileikowsky Corres. Vol II, Tab 162.
[69] AR: MEC Corres. Vol. II, Tab 120, p. 4.

proceedings.[70] Then in December of 2002, the Medical Board filed a formal Accusation against Dr. Mileikowsky.

Dr. Mileikowsky filed a First Amended Petition for Writ of Administrative Mandamus pursuant to Code of Civil Procedure sections 1085 and 1094.5 and thereafter, filed a Motion for Peremptory Writ of Administrative Mandamus; Memorandum of Points and Authorities ("Petition"). (CT: 4-33.) Respondent filed a Memorandum of Points and Authorities in opposition to Dr. Mileikowsky's Petition. (CT: 234-253.) Petitioner filed a Reply Memorandum. (CT: 265-277.) The parties lodged the administrative record and a supplemental administrative record with the Court. (CT: 254-264.) On March 14, 2003, the Court heard oral arguments. (CT: 385-428.)

Dr. Mileikowsky's attorney argued that the hearing was a two-year legal nightmare for Dr. Mileikowsky. Judge Yaffe noted that, "[I]t's a two year nightmare for somebody, but I'm not convinced that it's Dr. Mileikowsky's nightmare. It seems to me that, from the review of the record that I have done, and I've read considerable parts of it, that [Dr. Mileikowsky] was making it a nightmare for everybody else involved." (CT: 398:10-18.). Judge Yaffe also noted that, "There was even one instance that I read in the transcript where the reporter who had been reporting [the hearing] threw up her hands and walked out because [Dr. Mileikowsky] kept interrupting, she could not make any kind of intelligible transcript of what was going on. (CT: 402:2-6.) In addition, Judge Yaffe noted, " . . . [I]n order for there to be peer review, it's necessary that the participants not abuse the process. It's necessary that you have a hearing officer to conduct these hearings properly, that when he makes orders they are complied with . . . . " (CT: 400:10-14.)

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[70] AR: Bates Stamp 6103-6151.

Dr. Mileikowsky's attorney also argued that Dr. Mileikowsky was like a litigant in a civil case and when he failed to produce certain discovery, the remedy should be that he can't produce it at the time of trial and the court should just not throw the whole case out. Judge Yaffe noted that, "But this whole case . . . hasn't been just thrown out. In the first place, it's the second time it's been thrown out. The first time the administrative decider decided that, no, Dr. Mileikowsky should have another opportunity to conduct himself properly in the administrative proceeding. [Dr. Mileikowsky] was given that opportunity, and he seems to have been even worse." (CT: 400:15-25.)

With regard to the ex parte communication with the JRC, when Dr. Mileikowsky's attorney argued that because his brief was delivered to everybody it was not ex parte, Judge Yaffe noted that, "The point is that [Dr. Mileikowsky] was apparently completely disregarding and intentionally disobeying an order by the hearing officer that whatever facts Dr. Mileikowsky had to give to this committee were to be given by putting them in evidence in this proceeding, not by going behind the hearing officer's back and communicating directly with the jury." (CT: 393: 23-28; 394: 1-7.)

With regard to Dr. Mileikowsky's violation of the Hearing Officer's ruling regarding the status of litigation between Dr. Mileikowsky and the Hospital, Judge Yaffe noted that "In the portions of the transcript I read he was shouting at people, [Dr. Mileikowsky] was insisting on reading into the record a review - - a ruling that I had made that was not relevant to any point being discussed at the time . . . in spite of the Hearing Officer's ruling that it was not relevant and should not have been read. [Dr. Mileikowsky] was running the thing himself. [Dr. Mileikowsky] was just totally abusing and making a travesty of this administrative procedure . . . ." (CT: 401: 2-11.)

Following oral arguments, Judge Yaffe issued a Minute Order denying Dr. Mileikowsky's Petition. (CT: 346-348.) Judge Yaffe noted that:

> "The administrative decision was the culmination of a long course of disruptive conduct by [Dr. Mileikowsky] since his application for staff privileges was initially denied on January 11, 2000. The administrative hearings have produced an administrative record that now fills ten cartons . . . [Dr. Mileikowsky] had been given more than an adequate opportunity to oppose administratively respondent's efforts to rid itself of his presence upon the medical staff. He is entitled to no more." (CT: 347: ¶ 3)

III

STANDARD OF APPELLATE REVIEW

In reviewing the decision of a private hospital, like the trial court, the Appellate Court reviews the administrative record to determine whether the hospital board's findings of fact are supported by substantial evidence in light of the entire record with the objective being to ascertain whether the trial court ruled correctly as a matter of law. (Code of Civ. Proc. § 1094.5, subd. (d); *Bonner v. Sisters of Providence Corp.* (1987) 194 Cal.App.3d 437, 444.) "Abuse of discretion is established if the [Board] has not proceeded in a manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code of Civ. Proc. § 1094. 5, subd. (b).); The Appellate Court must uphold administrative findings unless the findings are so lacking in evidentiary support as to render them unreasonable. (*Oskooi v. Fountain Valley Regional Hospital* (1996) 42 Cal.App.4th 233, 243.)

Where the Hospital Board has discretion to formulate procedure, interpret bylaws or establish criteria, the Court defers to the Board and will not overturn its decision unless it is substantially irrational, arbitrary,

capricious, unlawful, contrary to public policy or procedurally unfair. (See, *Redding v. St. Francis Medical Center* (1989) 208 Cal.App.3d 98, 104; *Lewin v. St. Joseph Hospital of Orange* (1978) 82 Cal.App.3d 368, 385; *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 558.) Further, the Court may not limit or control in any way the discretion legally vested in Respondent. (Code of Civ. Proc. § 1094.5 subd. (f).)

IV

ISSUES ON APPEAL

1. Are the Board's findings supported by substantial evidence?

2. Did the Board act in a manner not required by law or not supported by its findings when it concluded that the hearing officer had properly found that Dr. Mileikowsky had waived his right to a hearing?

3. Should the Board be ordered to offer physicians who have been summarily suspended a bifurcated hearing to consider whether the physician constitutes an imminent risk to patients or others, before considering all the evidence?

V

ARGUMENT

I. THE GOVERNING BOARD'S FINDINGS WERE COMPELLED BY THE EVIDENCE.

After the presentation of oral and written arguments and a review of the administrative record, the Board affirmed the decision of the Hearing Officer that Dr. Mileikowsky had waived his right to a hearing and that Dr. Mileikowsky's hearing be terminated. The Board concluded that Dr. Mileikowsky's right to a fair hearing had not been violated by the actions of the Hearing Officer and that the Hearing Officer's decision was

reasonable. (CT: 34-44.) The Board's findings are fully supported by the administrative record. (See, referenced footnotes)

The Board found that:

1. At a hearing established pursuant to California Business and Professions Code Section 809 et. seq. and the Medical Staff Bylaws, the Hearing Officer has the authority to terminate the hearing based on the misconduct of the physician.

2. The Board also found that the Hearing Officer's decision to terminate the Hearing II was reasonable based on the evidence. In particular, the Board found that the administrative record revealed the following instances of misconduct by Dr. Mileikowsky:

> "a. Dr. Mileikowsky repeatedly disrupted hearing sessions and used personal invective and threatening language. The hearing transcript is replete with examples of [Dr. Mileikowsky's] disorderly conduct.[71] Dr. Mileikowsky repeatedly misrepresented whether he received documents and frequently criticized the Hearing Officer's rulings. There are written and transcript examples of abuse of witnesses, MEC representatives, Medical Center administrators and MEC Counsel . . . .[¶]
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> Further, verbally and in writing, [Dr. Mileikowsky] openly defied the Hearing Officer's rulings made to control [Dr. Mileikowsky's] conduct.[72]
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> b. Dr. Mileikowsky repeatedly violated the Hearing Officer's order that he refrain from referencing his two lawsuits brought against the Medical Center's parent company and many Medical Staff physicians. The Hearing Officer concluded that, since such lawsuits were still in process, these pleadings would be prejudicial to either party without final orders. Despite this Dr. Mileikowsky

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[71] AR: HT 9/5/01 and 11/29/01, 12/3/01 and 12/17/01.

[72] See footnote 57, *ante*.

repeatedly, and often falsely, referred to pleadings in the lawsuits.[73]

c. Dr. Mileikowsky refused to comply with Discovery required by Section 809 and the Medical Staff Bylaws. The Record on Appeal indicates clearly that Dr. Mileikowsky refused to provide information requested by the MEC and required by law which directly related to the charges against him and which were specifically ordered by the Hearing Officer. Particularly significant was [Dr. Mileikowsky's] failure to provide documents directly related to his suspension and termination from the Medical Center at Cedars-Sinai Medical Center.[74] This is the same failure which led the Medical Staff to conclude that [Dr. Mileikowsky] had not cooperated with his reapplication in 1999.[75]

In addition, despite orders of the Hearing Officer, Dr. Mileikowsky never produced a full exhibit list as required by law and the Medical Staff Bylaws.[76] This caused disruption to the Hearing process when Dr. Mileikowsky attempted to introduce previously unannounced documents.[77] A similar instance occurred minutes before the current Appellate Review Hearing when Dr. Mileikowsky attempted to introduce an unannounced "reply brief" which was not agreed to or even requested by [Dr. Mileikowsky] during the prehearing procedural discussions.

d. Dr. Mileikowsky entered into unauthorized ex parte communications with the entire Hearing Panel relating to the subject matter of the Hearing. On or about March 18 and 19, 2002, [Dr. Mileikowsky] personally delivered to each member of the Hearing Panel a 35 page typewritten brief, a one page letter from him and his two physician advisors and a copy of a letter to the Hearing Officer from the two physician advisors which was falsely dated. [Dr. Mileikowsky's] brief contained misrepresentations which we conclude were intended to mislead the Hearing Panel. This ex parte

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[73] See footnote 31, *ante*. & AR: HT 9/5/01. 11/29/01, 12/3/01 and 12/17/01
[74] See footnote 25, *ante*.
[75] See footnote 8, *ante*.
[76] See footnote 26, *ante*.
[77] See footnote 30, *ante*.

communication was done by Dr. Mileikowsky despite warnings by the Hearing Officer and a letter from [Dr. Mileikowsky] dated October 22, 2001 alleging such communication had occurred by the MEC.[78] We believe that Dr. Mileikowsky's communication with the Hearing Panel severely prejudiced the MEC. We question whether the Hearing could have continued with this Panel after Dr. Mileikowsky's ex parte action." (CT: 39-42.)

3. The Board further found that the Hearing Officer's actions did not violate Dr. Mileikowsky's right to a fair hearing. In particular, the Board found that:

> "A review of the Hearing transcript illustrates a process in which the Hearing Officer provided Dr. Mileikowsky ample opportunity to comply with the legal process required of him. For instance, the Hearing Officer issued 14 rulings in 12 months and granted seven extensions trying to obtain documents from [Dr. Mileikowsky] as required by law.[79] The Hearing Officer entered an order for both parties to submit briefs regarding Dr. Mileikowsky's failure to cooperate in the Medical Staff peer review process. Despite five warnings by the Hearing Officer, Dr. Mileikowsky failed to submit such a brief.[80] Hearing sessions were scheduled to meet the needs of Dr. Mileikowsky's vacation and seminar schedules.[81]
>
> The most convincing illustration of Dr. Mileikowsky's refusal to cooperate with legal procedures, despite the efforts of others to safeguard his rights, occurred in the past actions of the hearing panels, appellate review and Superior Court actions, all of which are part of the Record on Appeal. In the first Hearing regarding the denial of [Dr. Mileikowsky's] reappointment, the Hearing Panel determined in the middle of the Hearing that [Dr. Mileikowsky] had waived his right to a hearing due to his behavior. While the Governing Board sent

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[78] See footnotes 63, 64, 65 & 68, *ante*.
[79] See footnote 25, *ante*.
[80] See footnote 28, *ante*.
[81] See footnote 27, *ante*.

the matter back for a new hearing, it issued evidentiary sanctions against Dr. Mileikowsky for his failure to produce evidence and delay of the Hearing. (CT: 114-121.)

In the Hearing upon which this appeal is based, the Hearing Officer terminated Dr. Mileikowsky's hearing due to his failure to cooperate with the legal process.

Finally, in Dr. Mileikowsky's Court Case, on April 24, 2002, the Superior Court entered orders for Terminating Sanctions[82] due to the conduct of Dr. Mileikowsky." (CT: 42-44.)

II. IN VIEW OF ITS WELL-SUPPORTED FINDINGS, THE GOVERNING BOARD ACTED AS REQUIRED BY LAW AND DID NOT ABUSE ITS DISCRETION.

A. The Hospital Offered Dr. Mileikowsky a Fair Hearing and Appeal As Required Under California Law And The Bylaws.

A hospital may not deprive a physician of staff privileges without granting him minimal due process of law protection. (*Cipriotti v. Board of Directors of Northridge Hospital Found. Med. Ctr.* (1983) 147 Cal.App.3d 144, 155-156.) This does not, however, compel adherence to formal proceedings with all the embellishments of a court trial or to any single mode of process. Instead, it may be satisfied by any of a variety of procedures. (*Ezekial v. Winkley* (1977) 20 Cal.3d 267, 278; *Pinsker v. Pacific Coast Society of Orthodontists, supra,* 12 Cal.3d at p. 555.) The hospitals themselves have the primary responsibility for providing a fair procedure which ensures that the [physician] receives adequate notice of the charges against him and a reasonable opportunity to respond. (*Ibid.*)

The law is clear in that the administrative decisions made by private hospitals are not "state action," which would trigger the formal

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[82] AR: Bate Stamp 6103-6114.

constitutional guarantees of due process of law as would be required for criminal prosecution. Rather, hospitals must afford the affected physician certain minimum requirements of a "fair procedure." (*Oliver v. Board of Trustees* (1986) 181 Cal.App.3d 824, 827.) That fair procedure is codified in Business & Professions Code, section 809, et seq.

Basic to statutory fair procedure is the right to adequate notice of charges, a reasonable opportunity to respond, disclosure of evidence forming the basis of the charges, and the right to impartial adjudicators. As outlined above, Dr. Mileikowsky was afforded his rights to a fair hearing and appeal. The Hospital is not obligated to continue a hearing where Dr. Mileikowsky refused to comply with lawful and reasonable rulings; refused to produce discovery; refused to conduct himself in a reasonable manner during the hearing sessions; and intentionally presented false and misleading information to the JRC, i.e. jury.

B. The Governing Board's Discretion to Uphold the Hearing Officer's Determination of Waiver May be Inferred by the Hearing Officer's Powers, Under California Law and the Bylaws, to Issue Orders, To Make Rulings on Matters of Procedure, and to Maintain an Orderly Hearing.

It is not necessary for the Bylaws to specifically define all the powers of the Hearing Officer. The courts have determined that, in administrative proceedings, a presiding officer has wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed. (*Fairbank v. Hardin* (9th Cir. 1970) 429 F.2d 264, 267; *Cella v. United States* (7th Cir. 1953) 208 F.2d 783, 789, *cert. den'd*, (1954) 347 U.S. 1016.)

Article VIII, Sections 4A, 4B, and 4E of the Bylaws respectively, further authorize the Hearing Officer to maintain decorum during the

proceedings, to assure that all participants in the hearing have a reasonable opportunity to present relevant oral and documentary evidence, to issue rulings on matters of procedure and the admissibility of evidence, to ensure compliance with state law and the Bylaws so that a fair procedure is conducted, and to rule that a practitioner who fails, without good cause, to appear and proceed at such hearing shall be deemed to have waived his/her rights to a hearing.

C. **The Hearing Officer Has Implied Powers to Take Reasonable Action Necessary to Enforce His Rulings and Orders.**

When the California legislature enacted statutory provisions regarding peer review, it stated in its preamble that: "Peer review, fairly conducted, is essential to preserving the highest standards of medical practice. Peer review which is not conducted fairly results in harm both to patients and healing arts practitioners by limiting access to care." (Bus. & Prof. Code, § 809, subds. (a) (3) and (4).)

In order for peer review to meet these standards, acute care hospitals are required to include Business & Professions Code sections 809 to 809.8, inclusive, in their medical staff bylaws. As a necessary means for accomplishing the Legislature's intent for efficient peer review, it is up to the Hearing Officer to exercise such implied powers as are reasonable.

Specifically, Business & Professions Code section 809.2 provides that the hearing officer shall consider and rule upon any request for access to information and may impose any safeguards that the protection of the peer review process and justice requires and the hearing officer may grant a continuance on a showing of good cause. Business & Professions Code, section 809.3 provides that both parties shall have the right to present and rebut evidence determined by the hearing officer to be relevant.

Article VIII, Section 4B of the Bylaws provide that "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."

In addition to expressed powers provide by the statute and the Bylaws, Courts have held that powers may be inferred as a necessary means of accomplishing the end sought by the legislation (*Laurelle v. Bush* (1911) 17 Cal. App. 409, 415-416), and as indispensable to the successful functioning of the agency in the manner provided by the statute (*Shoults v. Alderson* (1921) 55 Cal. App. 527, 531).

In *California Drive-In Restaurant Association v. Clark* (1943) 22 Cal.2d. 287, the Court ruled that the Industrial Welfare Commission had not acted in excess of its jurisdiction in enforcing its regulation imposed on the owners of drive-in restaurants. In reaching this decision, the Court noted that "[I]t is true that an administrative agency may not, under the guise of its rule making power, abridge or enlarge its authority or exceed the powers given to it by the statute, the source of its power. [*Citations omitted.*] However, the authority of an administrative board or officer . . . to adopt reasonable rules and regulations which are deemed necessary to the due and efficient exercise of the powers expressly granted cannot be questioned. This authority is implied from the power granted." [*Citations omitted.*] (*Id.* at pp. 302-303.)

Although Business & Professions Code, sections 809 et. seq. and the Bylaws do not expressly grant the Hearing Officer the power to terminate the hearing, as the cases discussed above have determined, the power of the Hearing Officer to issue such a ruling does not depend for existence solely on an express grant. When a physician, such as Dr. Mileikowsky, acts to prevent the process of peer review from taking place, the Hearing Officer has the implied power to issue reasonable rules and orders to ensure

compliance with state law and the Bylaws so that a fair procedure is conducted and the highest standard of medical practice is preserved. As in *California Drive-In*, the Hearing Officer must have the implied power to make his rulings effective.

D. An Individual Otherwise Entitled to a Hearing May Forfeit His Hearing and Appeal Rights If He Fails to Comply With a Hearing Officer's Rulings/Orders

Courts have upheld the obligation of parties to comply with the orders of presiding officers or face dismissal. In *Mendoza v. Merit Systems Protection Board* (Fed.Cir. 1992) 966 F.2d 650, (cited with approval in *Cheguina v. Merit Systems Protection Board* (Fed.Cir. 1995) 69 F.3d 1143) the Office of Personal Management ("OPM") denied a widow's application for an annuity. The widow failed to file a timely appeal. Thereafter, an administrative law judge ("ALJ") ordered the widow to file evidence and argument showing that "good cause existed for the delay." The OPM moved for dismissal because of untimeliness and because no evidence was submitted to establish good cause to waive the time limit. The ALJ then issued a second order. Upon receiving no response within the 30-day period set in the order, the ALJ dismissed the case.

The court found the dismissal proper, noting that, "[a] petitioner who ignores an order of the [presiding officer] does so at his or her peril. Litigants before the Board . . . are obligated to respect the Board, its procedures, including deadlines, and the orders of the Board's judges. The doors of the tribunal are open to all claimants but only on the same terms. This is the essence of due process and equal treatment under the law." (*Id.* at 653.) The court noted that the widow was afforded an opportunity for review of the OPM's decision rejecting her application for annuity, but she was entitled to that review only if she complied with the Board's

regulations and orders. In spite of a specific order from the ALJ, the widow never once thereafter referred to timeliness, waiver or good cause. She ignored the ALJ's directive. (*Ibid.*) The Court also noted that once the OPM put the matter of timeliness to file an appeal at issue, the ALJ had an obligation to pursue the matter further with an order. (*Ibid.*)

The Court held that the ALJ did not abuse her discretion in dismissing the appeal. The court noted that there was nothing mysterious or incomprehensible in the order issued by the ALJ and that when the orders are clear and unambiguous, even pro se litigants are expected to respond to those orders. (*Id.* at pp. 653-654.)

This obligation of petitioners to respond to orders was reiterated in *Cheguina v. Merit Systems Protection Board, supra*, 69 F.3d p. 1143 where, the employee failed to respond to the presiding officer's order to timely show good cause for her delayed appeal submission and the presiding officer issued an initial decision dismissing the appeal as untimely. The employee subsequently filed a petition with the Board to review the presiding officer's decision. The Board found that, despite the fact that the material submitted for their review would have established that her appeal was timely filed, the employee's response was too late, the information could have been timely submitted, and there was no ambiguity about the order. (*Id.* at 1145-1146.) The court upheld the Board's decision, noting that the order clearly and unequivocally informed the employee of the required response, and the presiding officer was justified in dismissing the appeal. (*Id.* at 1147.)

In general, the courts have determined that the presiding officer has wide latitude as to all phases of the conduct of the hearing, provided he does not abuse his discretion. For example, it has been found within the discretion of the presiding officer to determine the manner of taking of testimony (*Cella v. United States, supra* 208 F.2d 783, where for

administrative convenience all witnesses on a particular topic were required to testify on one day), and to determine whether or not to grant continuances (*Freight Consolidators v. US* (S.D.NY 1964) 230 F.Supp 692, where refusal of a request for an indefinite postponement of the hearing was proper when requesting party did not offer any identification of planned witnesses or testimony for rebuttal).

Further, in *Boddie v. Connecticut* (1971) 401 U.S. 371, 378, the Court noted that, "Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance [citation], or who, without justifiable excuse, violates a procedural rule requiring the production of evidence necessary for orderly adjudication [citation]. What the Constitution does require is an 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner' . . [citation]."

In the case at hand, Dr. Mileikowsky was given numerous opportunities to comply with the Hearing Officer's rulings pertaining to orders to produce requested discovery documents, copies of exhibits, submission of briefs and to comply with the expected behavioral standards for such a proceeding. Dr. Mileikowsky repeatedly asserted his entitlement to a fair proceeding, but then not only failed to comply with the rules governing the procedure, but also failed to show good cause for his failure to comply. As in *Mendoza*, the MEC submitted the issue of Dr. Mileikowsky's non-compliance to the Hearing Officer and the Hearing Officer was obligated to pursue the matter further with an order.

On March 1, 2002, the Hearing Officer ordered both parties to submit briefs outlining their respective positions regarding whether Dr. Mileikowsky had abandoned his defense of this matter. On March 15, 2002, contrary to, and in direct violation of, the Hearing Officer's clear and

unambiguous order. Dr. Mileikowsky submitted copies of his brief to the Hearing Officer, the MEC and the JRC (i.e., jurors). Thereafter, upon reading Dr. Mileikowsky's brief, which contained factual inaccuracies and false and misleading legal representations, a JRC member expressed obvious bias.[83]

Neither Business & Professions Code, section 809 et. seq nor California case law give Dr. Mileikowsky the right to ignore the Hearing Officer's rulings, to ignore the rules that govern the hearing, or to disrupt the hearing process. Accordingly, when Dr. Mileikowsky ignored the rules, he did so at his peril.

E. Dr. Mileikowsky is Not Entitled to a Hearing Where He Refused to Provide Relevant Evidence as Ordered.

In *Webman v. Little Company of Mary Hospital* (1995) 39 Cal.App.4th 592, when the physician submitted his application for reappointment, the hospital learned that another facility had suspended his privileges based on patient care issues. In an effort to fulfill its legal obligation to investigate disclosures that raise questions about a staff member's quality of care at another hospital, the hospital asked the physician to produce documents relevant to the action taken at the other facility. The physician refused to comply, and the hospital denied his reappointment application. The court held that the hospital was legally justified in denying the physician's reappointment application, as the physician's failure to produce these relevant documents interfered with the hospital's ability to fulfill its responsibilities under state law and its bylaws. (*Id.* at pp. 602-603.)

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[83] AR: MEC Corres. Vol. II. Tab 120, p. 4.

This Court is confronted with the same situation. Dr. Mileikowsky, on January 22, 1998. was suspended from Cedars Sinai Medical Center for incompetent practice. Thereafter, Dr. Mileikowsky's membership and clinical privileges were terminated. This action was upheld after a formal hearing and appeal.[84] Yet, the MEC has been deprived of important facts regarding the Cedars Sinai Medical Center's disciplinary action because Dr. Mileikowsky refused to comply with state law, the Bylaws, and the rulings of two Hearing Officers. Having failed to submit this vitally important information, Dr. Mileikowsky is not entitled to have his reappointment bid considered.

F. Dr. Mileikowsky's Submission of a Written Argument to the JRC Regarding Procedural Issues Pending Before the Hearing Officer Biased the JRC, Forcing the Hearing Officer to Terminate the Hearing.

As Dr. Mileikowsky points out in his brief, the JRC's role is to determine whether or not Dr. Mileikowsky was properly denied reappointment and whether or not his denial of privileges was justified. Neither state law nor the Bylaws provide that the JRC is to determine the procedural issues related to the rules that govern the hearing procedure or the rules that govern the conduct of the hearing. Rather, Article VIII, Section 4B of the Bylaws provides that the hearing officer shall act to maintain the decorum and 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.

Dr. Mileikowsky asserts that this communication was not ex parte because all parties received the communication. Regardless of how one

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[84] AR: Exhibit Vol. II, Nos. 136 & 137.

labels the communication, the communication was in direct violation of the Hearing Officer's rulings ordering parties not to communicate with the JRC panel outside the hearing and to submit the response brief to him, not the JRC. Dr. Mileikowsky's submission of the communication to the JRC was also in direct violation of the law and the Bylaws which delegate to the hearing officer the authority to resolve issues related to procedural matters and the admissibility of evidence.

In *Mattox v. United States* (1892) 146 U.S. 140, 149, [13 S.Ct. 50], the Supreme Court said: "It is vital that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated."

In *United States v. Harry Barfield Co.* (1966) 359 F.2d 120, the president of the defendant corporation deliberately sought to identify himself with a juror. The Court noted that: " . . . the harm is inherent in the deliberate contact or communication which exists under the facts of this case . . . . the harm here appears to a degree which may not be overcome; and thus prejudice or harm appears as a matter of law. The conduct here was deliberate and intentional as distinguished from a mere inadvertent or accidental contact . . . ." (*Id.* at p. 124.)

The Court held that, "Our system of trial by jury presupposes that the jurors be accorded a virtual vacuum wherein they are exposed only to those matters which the presiding judge deems proper for their consideration. This protection and safeguard must remain inviolate if trial by jury is to remain a viable aspect of our system of jurisprudence." (*Ibid.*) And, " . . . if the [conduct] is such as to be so inherently unfair as to reflect on the jury system . . . a mistrial should be declared . . . ." (*Id.* at p. 123.)

The decision whether to investigate possible jury bias, incompetence, or misconduct, as well the ultimate decision whether to

retain or discharge a juror, rests within the sound discretion of the trial court. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1351.) "If any substantial evidence exists to support the trial court's exercise of discretion . . . the court's action will be upheld on appeal." (*Ibid.*)

Dr. Mileikowsky's brief submitted to the JRC contains a number of misstatements of rulings related to the cross-examination of witnesses, attorney representation, and issues related to disagreements with the Hearing Officer.[85] Dr. Mileikowsky's deliberate and intentional act of communicating with the JRC, despite the Hearing Officer's rulings and despite his own understanding of the jury system and the peer review hearing system, was an obvious effort on Dr. Mileikowsky's part to sabotage the hearing proceedings. The damage done by the false statements and erroneous legal citations caused emotional reactions in the JRC members, as outlined above, which the Hearing Officer determined had so prejudiced the hearing that it was impossible to complete it within the requirements of fair procedure. Thus, even if the Hearing Officer had wanted to submit the procedural issues and the issues related to the future conduct of the hearing to the JRC, Dr. Mileikowsky's own conduct irreparably prejudiced the JRC against the Hearing Officer and the MEC.

III. THE BOARD FAIRLY INTERPRETED THE BYLAWS AND DEALT WITH THE HEARING OFFICER'S RECOMMENDATIONS CONSISTENT WITH ITS ULTIMATE RESPONSIBILITY FOR THE ACTIVITIES OF THE MEDICAL STAFF AND THE HOSPITAL.

In determining whether the Hearing Officer acted within his authority in terminating the hearing proceedings, the Board was required to

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[85] AR: Dr. Mileikowsky's Corres. Vol. III. Tab 162, pp. 3, 4, 6, 7, 10, and 12-18.

decide whether his action, though not expressly permitted under those Bylaws, was within the scope of authority granted by the Bylaws, appropriate under the circumstances, and supported by substantial evidence. Recent case law supports the Board's interpretation of its Bylaws and its ultimate decision. (*Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center* (1998) 62 Cal.App.4th 1123.)

In *Hongsathavij*, Dr. Hongsathavij was removed from the emergency call panel ("panel"). A court-ordered hearing was conducted before a JRC committee composed of physicians from the Medical Center. Since the MEC refused to prosecute the case, the Medical Center's administrative staff, on behalf of the Medical Center's governing body, represented the Medical Center. The JRC found in favor of Dr. Hongsathavij and recommended reinstatement. The Medical Center appealed the matter to its board of directors (acting as an Appeal Board), which determined that the JRC's findings lacked evidentiary support and that Dr. Hongsathavij was properly removed from the panel and should not be reinstated. Dr. Hongsathavij filed a petition for writ of mandate complaining that the Appeal Board acted improperly.

The Court noted that hospital governing body members have fiduciary duties as directors and under certain circumstances have exposure to personal liability. "A hospital itself may be responsible for negligently failing to ensure the competency of its medical staff and the adequacy of medical care rendered to patients at its facility. [Citations.] A hospital has a duty to ensure the competence of the medical staff by appropriately overseeing the peer review process [citations]." (*Id.* at p. 1143.) In the exercise of this duty, the hospital is free to adopt rules and regulations governing discipline and staff membership as long as those rules are not substantively irrational, unlawful, arbitrary, capricious, or discriminatory.

(*Webman v. Little Co. of Mary Hospital, supra,* 39 Cal.App. 4th at pp. 599-600; *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 626-627.)

The Court in *Hongsathavij* recognized that the medical staff bylaws did not include a provision for the Medical Center to appeal to the Board. Thus, the Board created a procedural step not expressly provided for in the bylaws. However, the Court noted that the Medical Center apparently did not envision a situation, as occurred in *Hongsathavij*, where the MEC would not assume a role in the proceedings. The Court found that under the circumstances the hospital's actions were appropriate. The Court held that the Board fairly interpreted the bylaws and dealt with the matter consistent with its ultimate responsibility for the activities of the medical staff and the hospital. *(Id.* at pp. 1143-1144.)

As in *Hongsathavij,* Respondent's Bylaws do not provide a specific right to a Hearing Officer to terminate a hearing or a specific right to the Board to review and uphold the decision of a hearing officer. Respondent could not have envisioned a situation, as occurred here, where a practitioner, after requesting a hearing, would so blatantly and flagrantly refuse to comply with the laws and the Bylaws. The Board did what was appropriate. It reviewed the administrative record. It reviewed the Hearing Officer's findings that Dr. Mileikowsky's intentional acts of misconduct had so prejudiced the hearing that it was impossible to complete it within the requirements of fair procedure and due process, and that Dr. Mileikowsky's repeated acts of misconduct at the hearing created a situation where he waived his right to the completion of the hearing. The Board concluded that the Hearing Officer's findings were supported by substantial evidence. Thus, as in *Hongsathavij,* Respondent's Board fairly interpreted the Bylaws and dealt with the matter consistent with its ultimate responsibility for the activities of the Medical Staff and the Hospital.

IV. THE ADMINISTRATIVE RECORD DOES NOT SUPPORT DR. MILEIKOWSKY'S CONTENTION THAT THE HEARING OFFICER WAS BIASED AGAINST HIM.

Contrary to Dr. Mileikowsky's contention that the neutral Hearing Officer had a conflict of interest because he was paid by the Hospital and because he terminated the hearing, the administrative record, as outlined in the statement of facts above, clearly indicates that Mr. Willick attempted repeatedly and valiantly to accommodate Dr. Mileikowsky and to run an orderly hearing. Mr. Willick granted numerous continuances, multiple extensions of time to comply with rulings, detailed written orders with clear directions, and even offered to issue a summary of the status of the pending litigation, despite a finding that the status of the litigation was irrelevant.

Dr. Mileikowsky conducted an extensive voir dire of Mr. Willick and offered no objections to him acting as the hearing officer. Dr. Mileikowsky only started asserting that Mr. Willick was biased after Mr. Willick issued rulings which Dr. Mileikowsky disagreed with. However, bias in an administrative context can never be implied, and the mere suggestion or appearance of bias is not sufficient. (*Gill v. Mercy Hospital* (1988) 199 Cal.App.3d 889, 911.)

V. DR. MILEIKOWSKY'S REQUEST FOR A BIFURCATED HEARING IS NOT REQUIRED BY THE FAIR HEARING PROCESS ENACTED BY THE LEGISLATURE

Dr. Mileikowsky asks this Court to order that the hearing on the merits resume and that the Court set aside the summary suspension until the hearing is completed and reinstate Dr. Mileikowsky's clinical privileges. In essence, Dr. Mileikowsky asks this Court to find that the fair hearing procedures for which the California Medical Association lobbies should replace those enacted by the Legislature. Further, Dr. Mileikowsky wants

this Court to substitute its medical judgment for that of the physicians on the Hospital's Medical Staff and reinstate Dr. Mileikowsky's medical staff privileges pending the outcome of a hearing. Given the fact that Respondent is the second hospital at which Dr. Mileikowsky's medical staff privileges have been terminated in the past four years, Respondents are left to wonder how many patients Dr. Mileikowsky would harm if this Court were to grant Dr. Mileikowsky the relief he seeks.[86]

Dr. Mileikowsky also seeks to have this Court order a separate hearing to focus on the incidents leading to his summary suspension. As discussed below, such procedure is not provided for by statute, has been rejected by the courts, and would not reflect the totality of the grounds for Dr. Mileikowsky's summary suspension.

In 1989, California enacted the mandatory "fair procedure" requirements which must appear in every California hospital's Medical Staff bylaws. That legislated fair procedure applies to quasi-judicial peer review proceedings such as the hearing which Dr. Mileikowsky was provided. The Hospital's Bylaws accurately reflect that legislated fair procedure, specifically Business & Professions Code section 809.5, which recites the process required when a physician is summarily suspended. The Hospital has complied with that process -- and more.

However, Dr. Mileikowsky wants this court to judicially legislate -- for him -- a new procedure -- one which will replace the Business & Professions Code section 809.5 process that the Legislature has determined is fair and applicable to all California physicians. Dr. Mileikowsky requests, in effect, that this Court breach the separation of powers doctrine. That is, while a court may determine that a statute is unconstitutional, a

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[86] AR: Exhibit Vol. II, Nos. 136 & 137 & Bate Stamp 7953-7956.

court may not rewrite a statute by adding to it. (*Abelleria v. District Court of Appeal* (1941) 17 Cal.2d 280, 300.)

Importantly too, California courts have already determined that a summary suspension hearing is not limited to events which precipitated the summary suspension. As the court stated in *Cipriotti v. Board of Directors of Northridge Hospital Found. Med. Ctr.*, *supra*, 147 Cal. App.3d at p. 153: "[The two precipitating events] were but only a part of a larger picture and were like the proverbial straw that broke the camel's back. Evidence of the other events relative to petitioner's past conduct was competent and relevant and necessary to determine the significance of petitioner's latest acts as they related to the safety of patients of the hospital and the probable effect of permitting petitioner as a physician treating psychiatric patients . . . There is nothing in the summary suspension provisions of section 2 [of the hospital's bylaws] requiring evidence to be limited only to the precipitating cause for the summary suspension." So, too, in this case, the 37 events alleged against Dr. Mileikowsky demonstrate a pattern of behavior which is escalating in terms of outrageousness, aggression and poor patient care.

Business & Professions Code section 809, subdivision (a)(6) states that " . . . to protect the health and welfare of the people of California, it is the policy of the state of California to exclude, through the peer review mechanism as provided by California law, those healing arts practitioners who provide substantial care or who engage in professional misconduct, regardless of the effect of that exclusion on competition." Respondent is required by Business & Professions Code section 809 et. seq. to do exactly that and to that end, Respondent has determined that it was absolutely necessary to summarily suspend Dr. Mileikowsky's clinical and medical staff privileges.

Respondent urges this Court to reject Dr. Mileikowsky's arguments. He has not demonstrated that the issues he raises here have any

great public importance -- these issues have been addressed and decided by the courts numerous times in the past. Further, changes to the legislated fair hearing process, if any, should be made by the Legislature, after full review in committee and after a public debate on the issues has been had. Moreover, an order for a bifurcated hearing would violate Code of Civil Procedure section 1094.5(f), which provides that, "Where the judgment commands that the order or decision be set aside, [the court] may order the reconsideration of the case . . . and may order respondent to take such further action as is specifically enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent."

A. The Means By Which Dr. Mileikowsky Can Challenge His Summary Suspension Are Provided for by Law, His Present Claim Before This Court Is Not In Compliance with the Law.

A hospital's suspension of a physician's staff privileges in a summary fashion does not intrinsically infringe on the physician's right to fair procedure. (*Bollengier v. Doctors Medical Center* (1990) 222 Cal.App.3d 1115, 1129.) Pursuant to Business & Professions Code section 809.5, a hospital peer review body may summarily suspend a physician's clinical privileges whenever " . . . the failure to take action may result in imminent danger to the health of any individual . . . ." The physician who is summarily suspended is not entitled to an expedited hearing or any type of interim proceeding to determine whether his clinical privileges should be reinstated pending a full hearing of the underlying charges. Rather Business & Professions Code section 809.5 provides that the physician be afforded the notice and hearing rights provided for in Business & Professions Code sections 809.1-809.4. Neither California law nor the Bylaws require the Hospital to provide a bifurcated hearing, nor has the

Legislature seen fit to inject such a process into the existing statutory due process requirement.

In *Kumar v. National Medical Enterprise Inc.* (1990) 218 Cal.App.3d 1050, Dr. Narendra Kumar was summarily suspended. After going through his formal hearing process to a final administrative decision, Dr. Kumar filed a petition for writ of mandate in the superior court. The case was remanded to the MEC for further proceedings in accordance with the Bylaws. Both the superior court and the court of appeal refused to reinstate Dr. Kumar's medical privileges pending such further proceedings, thus continuing the summary suspension in effect for the course of the further administrative proceedings.

In both *Bollengier* and *Kumar*, the courts have addressed the summary suspension issue and been asked to intercede to relieve physicians from summary suspensions. In both cases, the courts refused to insert themselves between the administrative tribunals and the physicians.

Dr. Mileikowsky argues that both *Volpicelli v. Jared Sydney Torrance Memorial Hospital* (1980) 109 Cal.App.3d 242 and *Sahlolbei v. Providence HealthCare, Inc.* (2003) 112 Cal.App.4th 1137, stand for the proposition that he should be reinstated pending the hospital hearing absent a clear showing that his care poses an imminent danger to the health of an individual, as required by Business & Professions Code section 809.5. However, neither *Volpicelli* nor *Sahlolbei* dealt with the summary suspension of a physician's clinical privileges. Rather, in both cases the physicians were terminated from the staff without being provided with a pretermination hearing, thus the court held that the physicians had been denied a fair hearing in accordance with established California law, and thereby ordered the physician reinstated

In the present case, the MEC recommended the denial of Dr. Mileikowsky's application for reappointment and the termination of his

medical staff membership and privileges. Unlike *Volpicelli* or *Sahlolbei*, in accordance with Business & Professions Code section 809.1 through 809.4, Respondent provided Dr. Mileikowsky with notice and a hearing, i.e. Hearing I. Dr. Mileikowsky was permitted to practice at the Hospital pending the resolution of the pretermination hearing. Thereafter, Respondent determined that Dr. Mileikowsky posed an imminent threat of danger to patients and hospital personnel and, as such, in accordance with Business & Professions Code section 809.5, Respondent summarily suspended Dr. Mileikowsky's clinical privileges. Dr. Mileikowsky was again provided with notice and hearing rights, i.e. Hearing II. Clearly, the facts of *Volpicelli* and *Sahlolbei* have no relevance to the facts and circumstances of the present case; thus, neither do their holdings.

B. The Administrative Record Demonstrates Conclusively that Dr. Mileikowsky's Practice at the Hospital Posed an Imminent Danger to Patients and Hospital Employees.

Dr. Mileikowsky attempts to mislead this Court by asserting that there was never a claim by the Hospital that Dr. Mileikowsky posed an imminent danger or threat to any patient. As outlined above, on November 16, 2000, Dr. Mileikowsky's clinical privileges were summarily suspended due to: 1) two patient care incidents; 2) multiple complaints of Dr. Mileikowsky's unprofessional conduct; and 3) consistent violations of the imposed security monitoring provisions.

On November 28, 2000, Dr. Mileikowsky was given an opportunity to respond to these new charges. As in *Cipriotti v. Board of Directors of Northridge Hospital Found. Med. Ctr, supra*, 147 Cal.App.3d 144, following a review of the events which precipitated the summary suspension, combined with a review of the history of Dr. Mileikowsky's practice at the Hospital, the MEC determined that Dr. Mileikowsky posed a

threat of imminent danger to the health, safety, and well being of patients, Medical Staff members and hospital personnel and thus, voted to continue the summary suspension and recommended the termination of Dr. Mileikowsky's Medical Staff membership and clinical privileges.

Dr. Mileikowsky asserts that Respondent realized that Dr. Mileikowsky would win and thus, Respondent requested termination of Hearing II. The administrative record, however, clearly reveals that Respondent had ample evidence, in the form of documentation and witness testimony, that demonstrated that Dr. Mileikowsky posed an imminent danger to health and safety of patients and hospital employees. It was Dr. Mileikowsky who recognized that he was losing his case, and in an effort to avoid this, sabotaged the hearing process.

CONCLUSION

Faced with the substantial evidence presented, the Board made the correct and appropriate decision in upholding the Hearing Officer's ruling to terminate Hearing II. To do anything else would have been a complete abdication of the Board's sworn responsibility. The action of the Board should be sustained. The Appeal should be denied.

CHRISTENSEN & AUER

By: _____

Jay D. Christensen

Anna M. Suda

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELATE DISTRICT

DIVISION TWO

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

CERTIFICATE OF COMPLIANCE

Counsel of Record herby certifies that pursuant to Rule 14 (c) (1) of the California Rules of Court, the enclosed brief of Respondent is produced using 13-point Roman type including footnotes and contains approximately 13,250 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: February 13, 2004

Respectfully submitted,

Jay D. Christensen
Attorneys for Respondent

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 225 South Lake Avenue, Ninth Floor, Pasadena, California, 91101.

On **February 13 2004,** I served the foregoing documents described as: **RESPONDENT'S BRIEF** on the parties in this action as follows:

[X] **(BY MAIL)**:

Roger Jon Diamond, Esq.,
2115 Main Street,
Santa Monica, CA 90405

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

I am "readily familiar" with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Pasadena, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

[X] **(BY PERSONAL DELIVERY)** I caused each envelope to be delivered by hand to the offices listed below.

Court of Appeal
Second Appellate District
Division Two
300 South Spring Street, Second Floor
Los Angeles, California 90013

[ ] **(BY FAX)** I faxed a true copy thereof to the last know facsimile telephone number to the identified addressees above.

[X] **(STATE)** I declare under penalty of perjury, under the laws of the State of California, that the above is true and correct.

Executed this 13th day of February 2004, at Pasadena, California.

Tony Alvarez

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Attorneys for Respondent

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vs.

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2nd Civil No. B168705
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AMENDED PROOF OF SERVICE

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Attached hereto is an AMENDED PROOF OF SERVICE showing service by mail of 5 copies of the RESPONDENT'S BRIEF to the Supreme Court.

DATED: February 13, 2004

CHRISTENSEN & AUER

By: _____
Jay D. Christensen
Attorneys for Respondent

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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