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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

GIL NATHAN MILEIKOWSKY, M.D., Petitioner, v. MEDICAL BOARD OF CALIFORNIA, Respondent.	04CS00969 **RESPONDENT'S BRIEF** Date: October 8, 2004 Time: 10:00 a.m. Dept: 25 Judge: Hon. Raymond Cadei

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STATEMENT OF FACTS

The following statement of facts incorporates and sets forth the procedural history, statement of facts, and findings and conclusions from the administrative hearing as set forth in Respondent's Opposition to Application for Stay:

PROCEDURAL HISTORY OF THE DIVISION'S ORDER

Following a Medical Board investigation resulting from an 805 report by the hospital regarding petitioner's suspension, on November 12, 2002, the Division of Medical Quality issued a written order compelling Petitioner to submit to a mental examination and physical examination by physicians designated by the Division or its designee in order to determine whether Petitioner's ability to practice medicine safely and competently was impaired due to mental or physical illness (Order). Petitioner was provided 30 days from the date of service of the order to comply with the

Division's order. (See Exh. 2, pp. 2-3.) The order further noted that the failure of Petitioner to comply with the order shall constitute grounds for disciplinary action suspending or revoking Petitioner's physician and surgeon's certificate.

The order was served on Petitioner by certified mail on November 12, 2002, with a return receipt dated November 14, 2002. (*Id.* at pp. 25-26.)

The Division's order was issued following a Petition to Compel Mental and Physical Examination pursuant to section 820 of the Code, filed on November 6, 2002. (*Id.* at pp. 4-24.)

November 15, 2002, Janet Seely, a Senior Investigator for the Medical Board wrote to Petitioner and informed him that James Rosenberg, M.D., had been selected to perform the ordered psychiatric examination and that Isaac Gorbaty, M.D., had been selected to perform the physical examination. The telephone numbers of both doctors were provided, and Petitioner was instructed to call each of them to arrange appointments. (See Decision at ¶5, p. 2.) The letter was served on Petitioner by certified mail and by fax on November 15, 2002.

Senior Investigator Seely also called Petitioner and spoke with him about the order and the letter. "Respondent (Petitioner herein) [Mileikowsky] made it very clear that he had no intention of ever obeying the order." (See Decision at ¶30.)

On December 2, 12, and 13, 2002, Investigatory Seely checked with the offices of Drs. Rosenberg and Gorbaty to determine if Petitioner had made an appointment with each of the doctors. She was told that he had not don so. By December 12, 2002, Petitioner did not call or avail himself for either examination. He "made no attempt to make the necessary appointments." (See Decision at ¶30.)

On December 13, 2002, the Board filed its original Accusation. On August 7, 2003, the First Amended Accusation was filed. Petitioner has failed to submit to a psychiatric examination and a physical examination by physicians designated by the Division or its designee within 30 days from the date of service of the order. He has therefore failed to comply with the order within the meaning of section 821 of the Code.

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STATEMENT OF FACTS[1]

In December 2000, Encino-Tarzana Regional Medical Center (Encino) provided an "805 Report" to the Medical Board as required by law,[2] after suspending Petitioner's staff privileges for exhibiting a pattern of bizarre, threatening and non-cooperative behavior. (See Exh. 7.) Beginning in February 1999 and through November 28, 2000, Petitioner threatened and assaulted nurses, other physicians and administrative staff at Encino and placed patient care at risk.

The 805 prompted an investigation by the Medical Board, and the incidents were investigated and reviewed by a District Medical Consultant,[3] Dr. Randolph H. Noble, M.D., F.A.C.P. Dr. Noble is a licensed physician with the Board since 1974. He is board certified by the American Board of Internal Medicine for Internal Medicine and the sub-specialty of Pulmonary Diseases. Dr. Noble is also a board certified psychiatrist by the American Board of Psychiatry and Neurology. One of Dr. Noble's duties is to review questionable medical and surgical practices by physicians. He is readily familiar with the standards of practice in the state of California and the statutory provisions of the Medical Practice Act. He is also familiar with the Division's authority under section 820 of the Code where concerns of mental or physical illnesses affect a physician's ability to practice or that affects their conduct. (See Exh. 2.)

Dr. Noble opined that Petitioner may be suffering from psychiatric conditions such as Mood Disorder, Paranoid Personality Disorder and/or Schizoaffective Disorder. Also, possible organic problems with underlying brain dysfunction from neoplastic, degenerative or inflammatory process should be considered. Lastly, Petitioner's behavior may represent drug abuse or dependency.

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1. The Statement of Facts are based on the evidence presented at the administrative hearing, the ALJ's factual and legal findings and conclusions and Decision in this matter.

2. Section 805 of the Business and Professions Code (or "805 Report") mandates that "(b) The chief of staff of a medical or professional staff or other chief executive officer or administrator of any peer review body and the chief executive officer or administrator of any licensed health care facility or clinic shall file an 805 report with the relevant agency within 15 days after the effective date of any of the following that occur as a result of an action of a peer review body..."

3. Section 2024, subd. (a) of the Code provides that "[t]he board may select and contract with necessary medical consultants who are licensed physicians and surgeons to assist in its programs."

Accordingly, Dr. Noble recommended that Petitioner be compelled to participate in a mental and physical examination to determine whether Petitioner has the ability to practice medicine safely and competently.

Incidents warranting a mental and physical examination

Dr. Noble's declaration and Investigator Seely's investigation report provide summaries of incidents evidencing petitioner's assaultive, threatening and combative behavior towards hospital staff and while patients were present. (See Exhs. 1 and 2.)

February 2, 1999

The first reported instance occurred on February 2, 1999, where Petitioner presented to the Encino's staff office to complain that he received a notice that his medical staff appointment had expired based on his failure to submit a timely application for reappointment. He demanded to see his credential file and was told that this would have to be discussed with a supervisor before rendering him access. Petitioner became angry, loud and aggressive. Employee Pat Jones related that she feared for her safety and moved away from Petitioner. Another employee, Rosie Franco, was physically assaulted by Petitioner as he "roughly grabbed her by the lapel badge." Petitioner then threatened Pat Jones saying that she had "fucked up" and responded to security with, "Don't listen to that bitch; she doesn't know what she is talking about."

Investigator Seely interviewed the Director of Medical Staff Services, Debbie Miller, on May 8, 2002, who was familiar with the incident. She indicated that Rosie Franco was across the hall and heard the commotion. She also stated that Mileikowsky told Pat Jones that he would get her fired. (See Exh. 1, at p. 6.) Rosie Franco was also interviewed and conveyed that "she was afraid he might hurt Pat and went to see if she could help. She described Dr. Mileikowsky as red-faced, pacing up and down the hall with clenched teeth. Security was paged with a code gray, meaning assaultive behavior." (*Id.*)

December 17, 1999

The second incident occurred on December 17, 1999, where Petitioner was scheduled to begin surgery and walked in with a surgical assistant. Marleen Hafer, Director of Surgical Services, was interviewed by Investigator Seely and explained that Petitioner was attempting to use a

Physician Surgical Assistant, who had no privileges at the hospital, although Petitioner tried to assure Ms. Hafer that he did. Ms. Hafer checked with Medical Staff Services and confirmed that he did not have privileges at the hospital. Ms. Hafer attempted to speak to the Assistant Surgeon, however, Petitioner started yelling at the doctor and telling him not to answer any questions and yelled that the administration was out to get him. Petitioner then left his anesthetized patient in surgery and began screaming at the Director and approached Ms. Hafer jabbing his finger at her face and backing her up against the wall. Ms. Hafer reported that his finger was about two inches away from her, which means he was no longer sterile. She also feared physical assault. An anesthesiologist and two other doctors came in when they heard Petitioner shouting. Other staff members believed that Ms. Hafer was in imminent danger of harm. Also, the patient was subject to prolonged anesthesia by Petitioner's inappropriate behavior. (See Exh. 1, at p. 7.)

June 23, 2000

Subsequently and beginning June 23, 2000, the Chief Executive Officer of the hospital required that Petitioner be monitored by security personnel whenever he was on hospital premises.

August 30, 2000

Despite security monitoring, on August 30, 2000, and the third incident, Petitioner phoned the Nursing Supervisor at midnight and requested to drop off prenatal records at the hospital prior to his vacation out of the city. Petitioner arrived at the Labor and Delivery Unit with an unknown companion and entered the medication room and began taking pictures. He attempted to close the door with his foot to keep the Charge Nurse from entering the medication room at which time the Nursing Supervisor was called to intervene. Petitioner was observed taking picture of various nurses on the hospital floor as well as picture of the nursing facility after midnight. He insisted that his non-medical companion be allowed to sit at the nurse's station and security finally escorted both of them out of the Unit and the hospital. Petitioner was later observed outside the emergency room exit taking pictures and a medical staff-member became "startled, frightened, and upset" after her pictures were unexpectedly taken by Petitioner.

October 24, 2000

In the fourth incident, Petitioner was also observed on October 24, 2000, to use poor

judgment and possible negligence and incompetence in regards to a vacuum extraction delivery. He ignored the hospital obstetrical policy and unsuccessfully applied vacuum extraction repeatedly against policy. He also asked the nurse to apply fundal pressure, also against hospital policy. The baby was delivered with fetal distress and required emergent intubation. Petitioner's care was below the standard and in violation of express hospital rules.

November 5, 2000

In the fifth incident, on November 5, 2000, Petitioner exhibited bizarre behavior while performing a circumcision. Petitioner wore a radiology vest instead of a surgical gown. He asked whether he should wash his hand for the surgical procedure. He asked the nurse about the types of clamps and techniques required for the surgical procedure. He asked the nurse these questions in a threatening manner which caused her to experience fear. The circumcision resulted in a serious complication where no foreskin was left on the infant's penis and urological consultation and further care was required.

November 16, 2000

On November 16, 2000, the nurses' union at Encino-Tarzana submitted a complaint to the hospital's CEO alleging a non-safe working environment which threatened their physical safety because of Petitioner's inappropriate behavior. Petitioner's privileges were suspended on or about November 16, 2000.

November 25, 2000

On November 25, 2000, Petitioner and a female companion came to the admitting department. When asked to leave, Petitioner went to the nursing office. Despite being informed that he was not entitled to be on hospital premises, he attempted to utilize the photocopying equipment and disrupted the operations of the nursing staff. He was escorted out of the department by security personnel. (See Exh. 7, at p. 5.)

FINDINGS AND CONCLUSIONS FROM THE ADMINISTRATIVE HEARING

On May 12, 2004, an administrative hearing on the First Amended Accusation was held. The Board presented evidence through documents, exhibits and testimony of the validity of the Division's order, and Petitioner's willful refusal and non-compliance with the Division's order.

The Division also addressed various defense claims and defenses which Petitioner also presents in his application for a stay.

The filing was not premature:

First, the Division rejected Petitioner's claim that the Accusation was improperly filed prior to the expiration of 30 days within which to comply with the order, as he believed he had an additional five days to comply with the order pursuant to CCP § 1013(a). The Division found that the Division's order was neither judicial nor quasi-judicial, but rather was an administrative order. Thus, the service requirements of CCP § 1013(a) did not apply. Alternatively, even if CCP § 1013(a) applied, it would be of no help to Petitioner. Application of section 1013(a) is limited to situations where there is a time period prescribed by statute or rule of court, which is not the case with an administrative proceeding. (See Decision at ¶19, p. 5.) Business and Professions Code section 820 does not require a set time limit for compliance. Therefore, if a reasonable amount of time within which to comply is allowed, then due process is satisfied. Here, Petitioner was given 30 days from the date of mailing, or by December 12, 2002. This was reasonable and gave Petitioner ample due process. (See Decision at ¶20, p. 5.)

The Order was not facially defective:

Second, Petitioner's argument that the Division's order was invalid on its face because it did not identify the designated doctors was also rejected by the Division. The Division found that any deficiency by the lack of designation on November 12, 2002, was cured by providing notice to Petitioner on November 15, did not entitle Petitioner to an additional three days to comply. Petitioner did not have a legal or equitable right to a full thirty day period to comply. The 30 day period within which to perform was an outside limit for compliance set by the Division. (See Decision at ¶23.)

There is no conflict or bias with the examiners:

Third, Petitioner's argument that he should be excused from disobeying the Division because the doctors chosen were unlikely to be impartial, since they were alleged to be on the staff at the very institution that had provided the 805 report, was also rejected. Petitioner's unsupported allegation that they were the inappropriate specialities or his allegation that one of them had in the

past been shown to have been careless were also rejected. Moreover, the proper course for Petitioner's objections to the Division's order was to apply to the Superior Court, not to ignore the order. Petitioner provided no authority or rationale for failing to obey the order. (See Decision at ¶25.)

Exhaustion of administrative remedies did not apply to the Division's order:

Fourth, Petitioner's argument that the alleged premature filing of the Accusation ended his ability to appeal to the Superior Court for relief because, with the filing of the Accusation, Petitioner became subject to the requirement that he exhaust his administrative remedies (i.e., have an administrative hearing), was also rejected. The Division correctly found that the exhaustion of remedies does not apply to the issue of the validity of the order itself and the question of the validity of the order is not within the jurisdiction of the instant administrative hearing (or administrative tribunal). The Division also determined that review of a non-adjudicatory administrative act may only be obtained by a Writ of Mandamus before the Superior Court. There is no similar authority vested in an administrative tribunal. Moreover, there is nothing in the language of section 821 of the Business and Professions Code that confers jurisdiction on the trier of fact in a case brought under the provision to decide any issue other than that of Petitioner's disobedience of a section 820 order. (See Decision at ¶27, p. 6.)

Moreover, the Division further elaborated that "to the extent that jurisdiction to make a determination concerning the validity of the order issued by the Division to [Mileikowsky] under Business and Professions Code section 820 is vested in this court (administrative tribunal) it is determined that the order was and is valid. The evidence did not establish that the agency acted beyond is authority to acted in an arbitrary and capricious manner or failed to observe procedural requirements in issuing the order. While it undoubtedly would have been preferable for the Division to have excluded from the case individuals who associated with the institution that reported Petitioner to the Board, the mere fact of such association is not sufficient to establish prejudice or bias. Nor was it established that the conduct by [Mileikowsky] had a condition warranting evaluation. Further [Mileikowsky] failed to establish that either physician chosen to perform an emanation was likely to be willing to act negligently, incompetently or dishonestly or would be

willing to violate the Medical Practice Act in some other manner by falsely finding that [Mileikowsky] was unfit to practice." (See Decision at ¶28, at p. 6.)

Doctrine of Laches:

Lastly, Petitioner's argument that the case was barred by the doctrine of laches also failed. The ALJ found that Petitioner failed to establish the prejudice required before the case will be barred by the doctrine. (See Decision at ¶ 29, p. 6.)

Petitioner's Own Statements of Non-Compliance:

The ALJ found that Petitioner's comment to Investigatory Seely "made it very clear that he had no intention of ever obeying the order."

Following the close of evidence, the ALJ and later adopted by the Division as its Decision, found, by clear and convincing evidence, that (1) Petitioner violated section 820 of the Business and Professions Code in that he continually failed and refused to be examined. Such continued non-compliance and refusal presents a danger to the public health, safety and welfare. The people of the state of California have a compelling interest in ensuring that those who practice medicine in the state are competent mentally and physically to carry out their responsibilities and in preventing those who are not demonstrably competent from continuing to practice. (See Decision at ¶41.)

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ARGUMENT

I

A SECTION 820 ORDER FOR EXAMINATION IS AN INVESTIGATIVE PROCEDURE WHICH CAN BE IMPLEMENTED BY BOARD DESIGNEES

Petitioner argues that his failure to comply with the Board's order for examination is analogous to contempt of court and that the Board improperly delegated the implementation of that order to its designees. Petitioner is mistaken on both counts.

First, this court need not resort to analogy for Petitioner's failure to comply with the exam order when a specific statute exists to address such a failure to comply. Section 821 provides that a failure to comply with an 820 order for exam can result in the suspension or revocation of a practitioner's license. Accordingly, an accusation was filed against Petitioner pursuant to section 821 and he was afforded a hearing in full compliance with the Administrative Procedure Act.

Second, Petitioner's "contempt" analogy further fails due to his fundamental misunderstanding of the nature of an order for an 820 examination and his greater misunderstanding of the statutory scheme which governs investigative and enforcement of the Medical Practice Act.

The law is well-settled that an order for examination pursuant to Business and Professions Code section 820 is "an investigative tool, the results of which may be used by the Board to determine if formal adjudicatory proceedings will be brought." (*Kees v. Board of Medical Quality Assurance* (1992) 7 Cal.App.4th 1801, 1814.) As such, an 820 order for examination "is an investigatory, not an accusatory, procedure." (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 9.)

Furthermore, it is equally well-settled that the "Board delegates its authority to conduct" investigations to an executive director "and its staff of professional investigators." (*Id.* at p. 8).

Both the Administrative Procedures Act (Gov. Code § 11500) and the Medical Practice Act (Bus. and Prof. Code § 2224) provide that "the division [of medical quality] delegates and confers upon the executive director of the Board, the assistant executive director, the program manager for enforcement, or the medical consultant, all functions necessary to the dispatch of business of the division in connection with investigative and administrative proceedings under the jurisdiction of the division." (*Bonnell v. Medical Board of California* (2002) 96 Cal.App.4th 654,

662; quoting title 16, section 1356 of the California Code of Regulations; emphasis added.)

In fact, the statutory scheme of the Medical Practice Act "only prohibits delegation of authority to take final disciplinary action against a licensee..." and "final disciplinary actions, which only may be taken by the Board, consist of the actual punishment to be imposed on the licensee." (*Id.* at pp. 662-663.)

Therefore, because the 820 order for examination in the instant case is an investigative tool and not a final disciplinary action against Petitioner, the Board properly delegated the selection of the actual examiners to the investigative staff including the Board's medical consultant.

Accordingly, even if the Board's specific order for examination had not explicitly stated that, the examiners would be "designated by the division or its designee "(Exh. 2, p. 3) the law clearly allows such a delegation, and Petitioner's argument to the contrary must therefore be rejected.

II

THE EVIDENCE BELOW ESTABLISHED THAT PETITIONER FAILED TO COMPLY WITH THE ORDER FOR EXAMINATION

Petitioner contends that there was no competent evidence introduced at the administrative hearing to establish that he failed to take the ordered examination. Petitioner is mistaken.

It was established at the hearing below that when informed of the Board's order for examination, Petitioner told the Board's investigator that she "would go to a psychiatric exam before he would." (RT, p. 44.) Upon further questioning regarding what Petitioner said when told that he needed to comply with the Board's order for examination, the investigator stated, "He just told me he was not going." (*Ibid.*)

The investigator further testified that she had contacted the office staffs of both examiners and discovered that Petitioner had failed to contact either office to schedule the examinations (RT, 45.)

Clearly, Petitioner's own statement regarding his intention to disregard the Board's order - which if hearsay, falls within an exception to the hearsay rule as admissions - together with the absence of any indication that Petitioner had actually taken the examinations (or even schedule them) provide competent and sufficient evidence that Petitioner failed to comply with the order. Moreover,

the testimony by the investigator that she checked with the examiner's office and found that Petitioner had not contacted them to schedule an appointment, even if hearsay, was properly admitted "for the purpose of supplementing or explaining other evidence"; specifically, Petitioner's statement of intention not take the examination (Gov. Code § 11513.)

Petitioner's statements, the supplemental information regarding his failures to make an appointment with the examiners, and the absence of any contrary evidence that Petitioner took the examination provided more than sufficient circumstantial evidence of Petitioner's willful failure to comply under the Board's order. (*Bohn v. Watson* (1954) 130 Cal.App.2d 24, 34.)

Accordingly, Petitioner's argument of insufficient evidence must fail.

III

PETITIONER FAILED TO SHOW BIAS

Petitioner contends that the Board (1) failed to consider the alleged bias of the chosen examiner, and (2) erroneously held that the forum to challenge the section 820 order was in the Superior Court by way of writ of mandate. (Pet., pp. 17-23.) Respondent disagrees.

The decision below found that Petitioner's objections to the 820 order should have been brought by writ in the Superior Court because the Board's 820 order was a non-adjudicatory administrative act. (Decision, pp. 5-6.)

In the alternative, the Decision also found that even if the validity of the order could be challenged in the administrative forum, it was found that the Board had not acted in an arbitrary or capricious manner. The tribunal below found that Petitioner failed to demonstrate any bias in the order or selection of examiner by the simple fact that they had some association with the hospital that had filed the 805 report. (Decision, p. 6.) Case law seems to support that decision in both respects.

In *Smith v. Board of Medical Quality Assurance* (1988) 202 Cal.App.3d 316, the court addressed this very issue, in the analogous order for a competency examination, of whether the "reasonable cause" determination required to support an order of examination must afford the licensee a hearing. The court held that it did not. Because the investigative tool of a competency examination is not adjudicative, procedural due process rights need not be conferred. (*Id.* at p. 321.)

The court held that the examination process allows the Board to avoid bringing accusations

that are not warranted and to pursue others that are, while still protecting the physician's rights. (*Id.* at p. 324.) A physician's license is valid until such time as a formal accusation is filed and an examination is not a disciplinary proceeding that puts a physician's license at stake. "Once an accusation is filed, the physician enjoys the protection of a full range of due process rights." (*Id.* at p. 325.)

The court recognized that:

> "If a physician loses his or her license after the Board orders an examination to be conducted, that revocation would be the result of the physician's demonstrated incompetence or his or her refusal to comply with the Board's order - not from a lack of an opportunity to address the Board at the reasonable cause hearing. The procedural safeguards that the statutory scheme requires later in the process are sufficient to protect physicians without imposing additional requirements at this investigative stage." (*Id.* at p. 328.)

Finally, the court found that allowing the sort of adjudication prior to requiring a physician to submit to an order of examination such as Petitioner urges here would completely disrupt the investigative process, making it "interminable." It would "make a shambles of the investigation and stifle the agency in its gathering of facts. [Citations.]" (*Id.* at p. 328-329.)

Thus, *Smith* supports the decision below that a licensee may not use an administrative tribunal to test or review the propriety of the agency's "reasonable cause" determination.[4] In *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, the Supreme Court reviews and summarizes the law regarding bias and impartiality for fact-finders in the administrative process. It held that in

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4. In fact, Petitioner's claim that "this issue rises to the level of constitutional due process" (Pet., p. 21) was specifically rejected by the court in *Smith*. The court in *Smith* went through the "three distinct factors" balancing test set out by Petitioner here and found that it did not apply because of the investigative, rather than adjudicative nature of the examination process: "The United States Supreme Court has held that due process varies according to specific factual contexts. When government agencies adjudicate or make binding decisions that directly affect the legal rights of individuals, those agencies must use procedures traditionally associate with the judicial process. On the other hand, when government action does not constitute an adjudication, such as when a general fact-finding is being conducted, it is not necessary to use the full panoply of judicial procedures. [Citations.] In the proceeding authorized by section 2292, full judicial process is not constitutionally mandated." (*Id.* at p. 327.) Moreover, in *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017 (cited by Petitioner), the Supreme Court specifically addressed the *Mathews* balancing test proffered here by Petitioner and found that it had "no legitimate application in this context" of an allegedly biased decision maker: " '[a] *Mathews* balancing test...is not the appropriate inquiry when the due process claim involves an allegation of biased decision makers.'" (*Id.* at p. 1035.)

allegations of bias, other than claims of pecuniary interest, those claiming bias "in a state Medical Board had to 'overcome a presumption of honesty and integrity in those serving as adjudicators.'" (*Id.* at p. 1026.) The court also stated that "the contention is accurate" that the courts "have not required the disqualification of administrative hearing officers absent a showing of actual bias" except when that claimed bias is due to financial interests. (*Id.* at p. 1032.)

Thus, other nonpecuniary types of alleged bias, or personal bias of the kind alleged here by Petitioner, is not of constitutional significance. (*Id.* at p. 1033.) While distinguishing financial bias, the court approved earlier holdings regarding allegations of personal bias that "'a party's unilateral perception of an appearance of bias cannot be a ground for disqualification unless we are ready to tolerate a system in which disgruntled or dilatory litigants can wreak havoc with the orderly administration of dispute-resolving tribunals. [Citations.]'" (*Id.* at p. 1034.)

Now, turning to Petitioner's claim of bias here, we see just the sort of unilateral claim of personal bias rejected by the court. Petitioner has not only failed to show actual bias, but he has not even made a colorable showing of potential personal bias. He has shown only that one of the chosen examiners and the medical consultant have staff privileges at the hospital in dispute here.[5]

He has failed to show anything else. Petitioner has no personal knowledge or acquaintance with either physician and no evidence presented indicates that either physician knows Petitioner. No evidence was presented that either physician knew of Petitioner's problems with the hospital, and there is no evidence that the medical consultant had any knowledge of the events other than what he reviewed in the Board's investigation file, which included the 805 report.

Now, without any showing of actual knowledge of the conflict between Petitioner and the hospital in question, nor any knowledge or acquaintance with Petitioner himself or any of the witnesses involved in the case, the alleged bias of the examiner and the medical consultant is just the sort of "unilateral perception of an appearance of bias" that is condemned by the *Haas* court as

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5. "It bears remembering that 'so-called staff physicians should be distinguished from the resident physicians who are employed by the hospital. Staff physicians are private doctors granted medical staff privileges to treat their patients in the hospital setting.'" (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 12.)

an insufficient ground for disqualification.[6/]

The evidence below established that neither the medical consultant nor the challenged examiner even practices in the same department as Petitioner. The evidence further establishes that the medical consultant has staff privileges at at least four or five Southern California hospitals, which means he is "associated" with potentially hundreds of other physicians who also have privileges at those same hospitals. The medical consultant's membership with various medical organizations also puts him in association with countless other physicians. Similarly, the challenged examiner has privileges at 10 area hospitals.

Thus, in the absence of any evidence, other than the bare fact of privileges at the same hospital, to support petitioner's claim of bias, the administrative finding that "the mere fact of such associations is not sufficient to establish prejudice or bias" is the proper conclusion under the applicable law as discussed above. Therefore, Petitioner's argument of bias must be rejected and his failure to take the ordered examination was unjustified.

IV

THE BOARD ACTION AGAINST PETITIONER WAS BROUGHT WITHIN THE APPLICABLE STATUTE OF LIMITATIONS

Petitioner contends that the action against him should be dismissed due to unreasonable delay. (Pet., p. 24.) Petitioner's "laches" claim is misplaced.

First, assuming arguendo, that a laches claim is actually cognizable here, it is an "equitable defense which requires both unreasonable delay and prejudice resulting from the delay. The party asserting and seeking to benefit from the laches bar bears the burden of proof on these factors. [Citations.]" (*Fahmy v. Medical Board of California* (1995) 38 Cal.App.4th 810, 816.) "Even inordinately long delays in taking administrative action have been judicially allowed. [Over 10 years from acts to administrative action.]" (*Id.* at p. 816.)

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6. It must also be remembered that the issue in *Haas* was the potential bias of the actual adjudicators, or triers of fact. Here, the alleged bias involves only those gathering facts, not those who will be presiding over any potential adjudication nor the ultimate triers of fact. Accordingly, it follows that an even greater showing of actual bias must be required before the courts would disrupt the investigative process by disqualifying the fact gatherers.

Here, Petitioner makes absolutely no showing of prejudice caused by any alleged delay in bringing the matter to administrative action. In fact, Petitioner's contention that "there was prejudice to (Petitioner)" because "a section 821 Petition was sought only after the Board's investigation apparently found no deviation from the standard of care that would warrant an accusation," shows that any delay caused by the Board's investigation actually benefitted Petitioner as it served to "clear" him of any quality of care issues. He makes no claim that evidence was lost, memories faded, or witnesses unavailable which are the types of concerns addressed in the second prong of the laches analysis.

In any case, a claim of laches is not applicable here because not only has Petitioner failed to establish prejudice due to any delay, but the delay itself is statutorily reasonable given that it is within the statute of limitations governing Medical Board actions recently codified in section 2230.5.[7] That statute of limitations provides that "any accusation filed against a licensee...shall be filed within three years after the Board, or division thereof, discovers the act or omission alleged as the ground for disciplinary action, or within seven years after the act or omission..., whichever occurs first."

Here, the Board reviewed the received the 805 report from Encino-Tarzana Regional Medical Center on or about December 11, 2000, and the earliest act of misconduct alleged in that report occurred in 1999. (Exh.10, p. 6.) The order compelling mental and physical examinations was served on Petitioner in November 2002, and the accusation alleging his failure to comply with the order was filed on December 13, 2002.

Therefore, the instant action against respondent was timely filed within both the three year limit of notification to the Board and seven year limit from the dates of the incidents.

Accordingly, because Petitioner has failed to demonstrate any prejudice pursuant to a laches claim and the instant action was timely filed well within the statute of limitations, his argument fails.

7. Business and Professions Code section 2230.5 was amended in 2001.

V

PETITIONER WAS AFFORDED THE OPPORTUNITY FOR AN INTERVIEW

Petitioner contends that he was not given an "opportunity to present his side of the case at an interview..." (Pet., p. 25.) His contention is not supported by the record below.

The evidence presented at the administrative hearing established that Petitioner was given more than ample opportunity to meet with the Board investigator and medical consultant prior to the preparation of the section 820 Petition, and he declined every time.

He was scheduled for an interview with Board personnel on May 8, 2002, but he cancelled that appointment (Exh. 1, p. 6.)

He was also scheduled for an interview in February 2002, but he cancelled that appointment because his attorney was unavailable. (RT 96). He left it to the attorney to contact the investigator to make an interview date, but his counsel apparently never got that done (RT 96.)

Petitioner also references "materials" that were sent to the Board but were not presented to the medical consultant prior to the preparation of his declaration. (Pet., p. 25)

There is no evidence established at the administrative hearing, and no evidence presented in this court as to what those materials are. At hearing, Petitioner's counsel alluded to these "materials" as being "exculpatory," yet there is no description below or in the briefing in this writ proceeding as to exactly how these materials are "exculpatory" and why their consideration by the medical consultant prior to the preparation of his declaration would have changed that declaration.

"It is fundamental that review of administrative proceedings by section 1094.5...is confined to the issues appearing in the record of that body as made out by the parties to the proceedings, though additional evidence, in a proper case, may be received. [Citation.] It is never contemplated that a party....should withhold any defense then available to him or make only a perfunctory or "skeleton" showing in the hearing and thereafter obtain an unlimited trial de novo on expanded issues in the reviewing court. [citation.] (*Bohn v. Watson, supra*, 130 Cal.App.2d at p. 37.); *Mulligan v. Hearing Aid Dispensers Examining Committee* (1983) 142 Cal.App 3d 1002, 1008.)

Here, Petitioner has made just such a prohibited "skeleton" showing of this unreviewed, "exculpatory" evidence at the administrative hearing and has done nothing to further add flesh to the issue in this court. It is axiomatic that to argue certain evidence (or its exclusion) may have changed the outcome of the matter below, one must describe the nature of that evidence especially regarding whatever "exculpatory" weight it is purported to have. As Petitioner failed to do so below, and equally failed to do so in this proceeding, his argument must fail as well.

VI

THE DECISION TO ORDER PETITIONER TO COMPLY WITH THE ORDER FOR EXAMINATION IS PROPER

Petitioner contends that the Board's decision exceeds all bounds of reason. (Pet., pp. 25-26.) Respondent disagrees.

In the Supreme Court case of *Fukuda v. City of Angeles* (1999) 20 Cal.4th 805, the court reviewed and defined the "independent judgment" review given an administrative proceeding by the trial court. The court held that in "exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Id.* at p. 817.)

Furthermore, the determination of penalty by the administrative body will not be disturbed absent a showing of an abuse of discretion. (*Shea v. Board of Medical Examiners* (1978) 81 Cal.App3d 564, 579.)

Here, the penalty imposed by the Decision simply directs Petitioner to comply with the original order and suspends him to protect the public in the meantime. The instant case is remarkably similar to the *Kees* case in which the court's summary of the allegations found "there can be no doubt there was good cause to order *Kees* to undergo a psychiatric examination" because he "exercised questionable medical judgment and displayed extraordinary difficulty in dealing with people..." (*Kees vs. Board of Medical Quality Assurance, supra.*, 7 Cal.App.4th at p.1815.)

Petitioner's "extraordinary difficulty in dealing with people" involved "assaultive,

threatening and combative" behavior toward hospital staff while patients were present, including grabbing a female hospital employee by the lapel and verbally berating other staff members to the point which prompted the hospital's nurses' union to file a complaint for their physical safety due to petitioner's inappropriate behavior.

Regarding Petitioner's questionable medical judgment, the allegations include complications in a vacuum extraction delivery of a baby, a botched circumcision, and leaving a patient under anesthesia longer than necessary due to a verbal confrontation with staff during a surgery.

It is well-settled "that in exercising its disciplinary authority, 'protection of the public shall be the highest priority' of the Board. [citations]" (*Arnett v. Dal Cielo, supra*, 14 Cal.4th at p.9.)

Accordingly, the Board's order to compel petitioner to undergo a psychiatric examination was supported by reasonable cause, and the instant decision is a rational exercise of the Board's discretion to enforce the order which Petitioner chose to violate. Therefore, the judgment should be affirmed.

VII

COSTS WERE PROPERLY IMPOSED

Petitioner contends that the cost recovery order in the Board's decision was punitive and should also be stricken because of a failure of discovery of the total costs prior to hearing.

First, the administrative hearing officer reduced the cost recovery order drastically in accord with Petitioner's argument below that he should not be liable for costs incurred by the Board for investigating quality of care allegations that were not ultimately charged.

As to the issue of discovery of costs prior to the hearing, the statute allows that costs may be assessed up to the time of hearing, which would make disclosure of the total amount sought impossible before the date the hearing actually begins. (Bus. & Prof. Code § 125.3, Subd. (c).)

Second, if Petitioner was actually unable to pursue a defense to the cost recovery due to late notification of the total amount, his remedy would be to seek time from the administrative tribunal to evaluate the late discovery and formulate a defense. He failed to make any such request

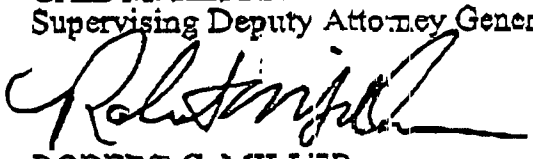
below which waives the issue or review.

Dated: September 14, 2004

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

GAIL M. HEPPELL
Supervising Deputy Attorney General



ROBERT C. MILLER
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY FACSIMILE AND FIRST CLASS MAIL

Case Name: **Mileikowsky v. Medical Board** No.: **04CS00969**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business. My facsimile machine telephone number is (916) 324-2960.

On September 14, 2004, I served the attached **RESPONDENT'S BRIEF** by transmitting a true copy by facsimile machine, pursuant to California Rules of Court, rule 2008. The facsimile machine I used complied with Rule 2003, and no error was reported by the machine. Pursuant to rule 2008(e)(4), I caused the machine to print a record of the transmission, a copy of which is attached to this declaration. In addition, I placed a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

Russell Iungerich
Iungerich & Spackman
28441 Highridge Road
Rolling Hills Estates, CA 90274-4869

Fax No. (310) 69"-0289

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 14, 2004, at Sacramento, California.

M. Solario
Declarant

Signature