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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

GIL NATHAN MILEIKOWSKY, M.D. Petitioner, vs. MEDICAL BOARD OF CALIFORNIA, Respondent	CASE NO: 04CS00969 PETITIONER'S REPLY MEMORANDUM DATE: October 8,2004 TIME: 10:00 A.M. PLACE: Department 25 Judge: Hon. Raymond M, Cadei

I

INTRODUCTION

Petitioner filed his verified petition for writ of administrative mandate on July 23, 2004 to challenge the decision of respondent Medical Board of California ("the Board") filed July 16, 2004. On August 12, 2004 this Court through Judge Cadei granted Petitoner's request for a stay of the revocation pending this hearing.

Again, it should be observed that the petition filed by Dr. Mileikowsky raises issue of first impression under Business &

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Professions Code Sections 820 and 821 with regard to fairness and due process as well as the proper procedures which the Board must follow in order to coercively compel a licensed physician to submit to a psychiatric, neurologic and drug testing based on suspicions engendered by a report to the Board from a hospital. The California Supreme Court has held that the abrogation of a vested right in a professional license ". . . is too important to the individual to relegate it to exclusive administrative extinction." Bixby v. Pierno (1971) 4 Cal.3d 130, 144. The decision of the Board in this case suspends and potentially revokes Dr. Mileikowsky's license to practice medicine for failure to submit to psychiatric, neurological, and drug testing to which he had legitimate objections which have never been addressed by Respondent Medical Board. Dr. Mileikowsky's petition should be granted if this Court agrees that Dr. Mileikowsky had a legitimate basis for Resisting the Board's order for testing.

Although Petitioner is confident that after considering the briefs and reviewing the administrative record that the decision of the Board revoking his license will be vacated, out of an abundance of caution Petitioner respectfully requests this Court to extend the stay for sufficient time days to permit Dr. Mileikowsky to file a petition for writ of mandate with the Court of Appeal in the event of an unfavorable ruling.

II

STATEMENT OF THE CASE

The response of the Board is defective on its face. Instead of referring to factual findings made by the Board as part of the

administrative hearing process, the Board purports to refer to evidence presented at the administrative hearing to support its Statement of Facts. This is improper under the decision of the California Supreme Court in Topanga Association for A Scenic Community v. County of Los Angeles, 11 Cal.3d 506 (1974), which requires administrative agencies to make factual findings and to draw conclusions. The reason for this rule promulgated by the California Supreme Court is to ensure that the administrative agency makes the correct decision. By being forced to come up with factual findings and conclusions the agency is more likely to make the correct decision than if it simply announces the result. The fact finding process is important for the agency because it should lead more often than not to a correct decision. Second, the requirement that the agency make specific factual findings and then draw legal conclusions assists the judiciary in reviewing whatever decision the agency makes. The Court is in a better position to evaluate the decision of the agency if it has specific findings.

Here the Statement of Facts and the Board's response brief cannot refer to factual findings made by the Board at the conclusion of the hearing because the Board did not make essential factual findings. The Board, in its response filed with this Court, simply asserts as facts allegations which have never been established and which are patently false. For example, beginning at page 3, line 4 of its response filed with this Court, the Board states that from February 19, 1999 through November 20, 2000 "Petitioner threatened and assaulted nurses, other physicians and administrative staff at Encino and placed patient care at risk." However a careful reading of the "Factual

Findings" made by Administrative Law Judge Carolyn D. Magnuson, whose "Proposed Decision" was adopted by the Board, contains no factual findings to support the sentence quoted above. The Board states in footnote 1 at page 3, lines 22-23, that its "Statement of Facts" are [sic] based upon the evidence presented at the administrative hearing, the ALJ's Factual and Legal Findings and Conclusions and Decision in this matter." However, the ALJ's decision did not contain any factual findings that Petitioner did threaten and assault nurses, other physicians and administrative staff. There is no finding that he placed any patient care at risk.

Indeed, at the administrative hearing on April 23, 2004 (ALJ H. Stuart Waxman), Deputy Attorney General Amy Fan, speaking on behalf of the Board, stated:

> ". . . We're not saying that Dr. Mileikowsky is dangerous . . . ." (April 23, 2004 transcript, p. 17, lines 12-13).

While it is true that the Business & Professions Code Section 805 Report submitted by Tenet Healthsystem [Tenet] to the Medical Board contained these unsupported allegations, Petitioner refuted each one of these allegations, but the Board never considered Petitioner's responses. Out of an abundance of caution Petitioner will now set forth his responses to these unsupported allegations, but emphasizes that the Court is <u>not</u> in a position to evaluate the evidence and make factual determinations. All this Court can do is determine that none of the facts alleged by the Board in its response have been established and that the Board was obligated to consider Petitioner's factual response <u>before</u> compelling him to submit to a psychiatric examination.

Although the 805 Report was sent by Tenet to the Medical Board on December 5, 2000, the Board did nothing until February 4, 2002 in response to the report. Petitioner did not ignore the Board. Instead, he sent voluminous exculpatory materials to Susan Cady who sent it to investigator Janet M. Seely, none of which made it into the Board's "investigative" file. None of the exculpatory materials was shown to the Board's medical consultant, Dr. Randolph Noble, prior to his "declaration"-opinion/recommendation. At the hearing it was demonstrated that Dr. Noble, who initiated this proceeding by signing a declaration based on Tenet's 805 Report, never had the materials submitted by Petitioner. (See page 62 of the transcript of May 12, 2004.) Ron Joseph, the Board's Executive Director, who signed the Board's petition, and Dr. Ronald Wender, who issued the psychiatric examination order, did not consider any of Petitioner's responses to the false 805 Report.

Petitioner did not want to submit to a psychiatric examination because there was no true factual basis for it and because of the connotation that it has. An order compelling a physician to submit to a psychiatric examination is most damaging to the reputation of that physician. It also invades his privacy. It is a matter of common knowledge that anyone suspected of being psychiatrically unbalanced is to be distrusted. Since we have a Presidential election within 30 days of the hearing on this Writ Petition we are certainly reminded of the 1972 selection by Democratic nominee George McGovern, who selected Missouri Senator Thomas Eagleton to be his Vice Presidential running mate. When it was later disclosed that he had had a psychiatric

problem, Senator McGovern first said he was a thousand percent behind Senator Eagleton, and then replaced Senator Eagleton with Sergeant Shriver.

Before setting forth the so called "facts", the Board first refers to Dr. Noble's opining that Petitioner may be suffering from psychiatric conditions such as mood disorder, paranoid personality disorder and/or schizoaffective disorder. Noble also speculated as to other possible diagnoses of Petitioner "of organic brain disorder" based upon the false statements provided to him without any consideration of Petitioner's responses. We know from the recent decision by the California Court of Appeal in Jennings v. Palomar Pomerado Health Systems, 114 Cal.App.4th 1108 (2003) that doctors cannot speculate. The Court of Appeal stated that " . . . even when the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise. . . ." Id. at 1116.

We will now discuss the alleged incidents and Petitioner's responses, which Noble never considered.

1. February 2, 1999

The Board's memorandum summarizes an alleged incident where Petitioner came to the Tarzana staff office of Tenet to request his reappointment application as he received a notice that his medical staff appointment had expired based upon his failure to submit a timely application for reappointment.

Petitioner submitted a declaration with the Los Angeles Superior Court in the case of Mileikowsky v. Tenet Healthsystem, LASC No. BC

233153, and a copy of that declaration was included in Volume 1 of an exhibit book that was submitted to the State Court of Appeal in the case of Mileikowsky v. Superior Court, B150037.[1] The exhibit book has a red cover and was submitted to the Medical Board in this case. It is part of the administrative record. See Vol. 3. At pages 22 and 23 Petitioner explained the so called February 2, 1999 incident. He stated under penalty of perjury that he had never received the reappointment application because the medical staff office had not sent it via certified mail as required by the By-laws of the hospital. When he went to the medical staff office to get the application, the medical staff office refused to give him the necessary paperwork. Petitioner indicated that he was upset about the treatment and demanded that he be given the application papers. Petitioner denied any misconduct. He stated "he left without incident. . . ." He then filed a lawsuit in April of 1999 against Tenet to compel it to allow him to seek his reappointment. On April 20, 1999 the Los Angeles Superior Court issued a preliminary injunction ordering Tenet to allow him to exercise his privileges and to process his application for reappointment.[2] See writ

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[1] The case of Mileikowsky v. Superior Court, involved a challenge to "Peer Review" conducted by the medical staff at a Tenet hospital. The case drew a number of amici curiae supporting Petitioner including a brief form the California Medical Association. Bate Stamped 01219 to 01303 Vol.8.

[2] For similar circumstances involving the refusal of a bureaucrat to provide an application form for the renewal of a permit please see Night Life Partners, Ltd. v. City of Beverly Hills, 108 Cal.App.4th 81, 84 (2003). If a physician in the instant case is considered to be psychiatrically unstable because of his conduct in attempting to get a form at an office, then the attorney who tried to get the renewal application form at the Beverly Hills City Hall in February 2001 could be

to Court of Appeal Bate stamped 0171 to 0175. Vol. 3.

2. **December 17, 1999**

The Board contends a so called second incident occurred on December 17, 1999 involving Petitioner's attempt to eject Marleen Hafer, who walked into an operating room in street clothes to stop an operation in progress being performed by Petitioner. Petitioner responded to this contention in the same declaration at the bottom of page 23 and the top of page 24 of Vol. 3 which this Court should have since it is part of the administrative record. As explained in his declaration under penalty of perjury, just after Petitioner's patient had been anesthetized and Petitioner was about to make the incision, the operating room supervisor burst into the operating room in street clothes stating that the physician who was serving as Petitioner's assistant did not have privileges and had to leave the operating room immediately. The surgery had been scheduled much earlier and the name of the assistant had been provided at the time the surgery had been scheduled. The assistant had assisted Petitioner on many occasions at the Encino Tarzana Medical Center (facility operated by Tenet) including a five hour surgery that had been conducted just days earlier. The assistant had assisted other surgeons at the hospital and at other Tenet facilities. Petitioner explained in his declaration that he was outraged by the conduct of Ms. Haffer in entering the

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compelled by the State Bar of California to submit to a psychiatric examination. The refusal by a bureaucrat to provide one with the necessary form to renew a permit or staff privileges can certainly cause some concern and frustration. That is not to be equated with a psychiatric disability.

operating room. Petitioner was concerned about the safety and welfare of his patient and objected strongly to the interruption of the surgery. Ultimately Haffer withdrew and the surgery was concluded without further incident. Petitioner submitted declarations by the operating room scrub technician, Kathleen Herbert, a hospital employee and also by the assistant surgeon, Dr. Yamini. See Vol. 3, pp. 91 to 110. Also, see Vol. 5, deposition of Dr. Yamini of January 25, 2002. The declarations confirmed that Petitioner's conduct, while firm, was professional and in the best interest of Petitioner's patient. Dr. Noble never considered Petitioner's sworn response and the sworn declarations of other witnesses before making his outrageous order that Petitioner submit to a psychiatric examination.

3. **June 23, 2000**

The Board states at page 5, lines 12-14, that on June 23, 2000 the Chief Executive Officer of that Tenet facility where Petitioner had staff privileges required that Petitioner "be monitored by security personnel whenever he was on hospital premises." See Vol 3(Bate Stamp 0177). It is noteworthy that the Board does not state the basis for the request that Petitioner be monitored. The request was made four days after Petitioner became a designated expert in a medical malpractice case against that Tenet facility. See Vol. 3, Bate Stamped 0180 to 0183.

Dr. Noble did not have the benefit of Petitioner's declaration nor did he have the benefit of other evidence regarding this June 23, 2000 request when he made the order that Petitioner submit to a psychiatric examination. Petitioner pointed out in his sworn declaration (p. 25

of Vol. 3) that the purported basis upon which Dale Surowitz (the Chief Executive Officer of Tenet) made his order was based on the December 17, 1999 operating room incident. Mr. Surowitz initiated the action unilaterally without approval of the medical staff **six months after the alleged incident**. Moreover, Dr. Noble never knew (because he did not read Petitioner's papers) that shortly after the June 23, 2000 requested by Chief Executive Officer Surowitz that Petitioner be monitored by security personnel, Petitioner on July 11, 2000 filed a second lawsuit against Tenet and against Mr. Surowitz. On July 11, 2000 the Los Angeles County Superior Court issued a restraining order prohibiting Tenet from escorting Petitioner at the hospital. All this is set forth at p. 25 Vol. 3, which is part of the administrative record in this case, and which was submitted to the California Court of Appeal in the case of Mileikowsky v. Superior Court, B150037. Dr. Noble did not have it in his file when he issued the order directing Petitioner to submit to a psychiatric examination.

Petitioner pointed out in his declaration (p. 24, Vol.3) that the request by Surowitz followed closely Petitioner's questioning of Tenet's Peer Review System at the hospital. Petitioner pointed out in his declaration that he had agreed to be an expert witness in a medical malpractice case wherein Tenet was a defendant (p. 24, Vol. 3).

Also part of the administrative record in this case are the November 4, 2002 faxed exhibits sent by Petitioner to the Medical Board (Vol. 2). This Court can identify the document because it has Petitioner's "Fax Cover Sheet." One of the documents submitted by Petitioner to the Medical Board, which Dr. Noble should have reviewed,

was an advertisement/article published by Tenet Attorney Mark T. Kawa entitled "Taming the Disruptive Physician." (See Vol. 2, Exh.4) In his advertisement/article, Kawa wrote that one tactic is to ". . . assign a security officer to follow the physician throughout the facility. . . ." Kawa stated in his "advertisement/article" that this is a good tactic because it does ". . . not require a fair hearing prior to implementing."

The same packet of material which is part of the administrative record in this case includes a copy of a declaration signed by Petitioner and filed with the Los Angeles Superior Court on June 28, 2000 in the case of Head v. Vermesh, et al, LASC No. LC046932 where the plaintiff's patients had sued Dr. Vermesh and others including that Tenet hospital for malpractice. (See Vol. 9, Exh. 8). It was this willingness to testify against Tenet that unleashed Tenet's attorneys into orchestrating the unrelenting attacks against Petitioner.

4. August 30, 2000

The Board sets forth at the middle of page 5 of its Memorandum an alleged bizarre incident involving Petitioner regarding his taking photographs at the hospital.

Petitioner addressed this particular allegation at the bottom of page 25 and the top of page 26 of the declaration which is Vol. 3. Petitioner stated under penalty of perjury that on August 30, 2000, in preparation for an Order To Show Cause hearing re contempt against Tenet, Petitioner, upon the instructions of his attorney, went to the hospital to take pictures of a bulletin board located in the heart of the labor and delivery nurses' station where Mr. Surowitz had posted a

very public notice stating that security was to be called whenever Petitioner went to the hospital. Petitioner took pictures of various locations in the hospital so that the Los Angeles County Superior Court could get a very clear understanding of how obvious the security surveillance was and how it was damaging Petitioner's reputation. Petitioner explained in his declaration that he went late a night, with a witness, so that he would not interrupt normal hospital operations.

Again, Dr. Noble's file did not include Petitioner's response to the August 30, 2000 accusation.

5. **October 24, 2000**

The Board contends that the October 24, 2000 incident was "the fourth incident" and that he used poor judgment and was possibly negligent and incompetent with respect to the delivery of a baby. There is no allegation here that Petitioner engaged in bizarre behavior but only that he did not comply with Nurses' policy manual. Petitioner responded to this allegation at page 29 of Vol. 3. Petitioner declared that there was no impropriety with respect to the delivery. He disagreed with the nurses' assessment of the baby's position when the vacuum was applied. More important, the father of the baby whom Petitioner delivered on October 24, 2000 sent an unsolicited letter to Tenet condemning the hospital and praising Petitioner. The letter from the father, W. Michael Battle, an attorney, concluded with the following paragraph:

> "My view is that the hospital is too numbers driven and not willing to search for the correct balance between the

> bonding needs of the parents and child, and the medical needs of the baby. Dr. Mileikowsky was outstanding. Most of the nurses were fine with the notable exception of Ms. Chadwa. However, in sum the hospital did not rise to my expectations. In fact, it missed the bar by quite a lot."

This Honorable Court is respectfully requested to review this letter, which is an exhibit at pages 235 and 236 of Vol. 3. Dr. Noble did not consider this letter by the father of the baby whom Petitioner was falsely accused of not delivering properly.

6. **November 5, 2000**

The Board alleges that as a fifth incident on November 5, 2000 Petitioner exhibited bizarre behavior while performing a circumcision.

Petitioner replied to this false allegation in his declaration, pp. 29-30 of Vol. 3 filed with the Court of Appeal in 2001. Petitioner stated that he did wear a radiology vest because no surgical gowns were available as far as he knew. Petitioner acknowledges asking questions about the name and the size of the equipment because they were barely readable and he needed to put that information in the patient record. Petitioner stated that there was no problem with the circumcision itself. He stated there was no problem and he was never asked to check the baby. Petitioner saw the baby and his mother on December 15, 2000 and the baby was having no trouble. See page 29, lines 19-28, and page 30, lines 1-5 of Vol. 3 filed with the Court of appeal. See also Volumes 6 and 7, i.e., Volumes XII and XIII of the transcripts of the Peer Review hearing conducted by Tenet. In particular please see the testimony transcript of Dr. Irani of November

5 and November 7, 2001. See page 1443:5700. Dr. Irani's "expert testimony" is an outrage as he never performed a circumcision in his life and discharged that baby despite alleged bleeding. Dr. Irani's "opinion" violates the law as it is pure speculation[3] and ultimately false as Dr. Shapiro examined that baby the next day. See fax 2-08-02 by Petitioner to Ms. Cady, Vol. 1, Exh. 4.

7. **November 16, 2000**

The Board states that on November 16, 2000 the nurses union submitted a complaint to the hospital about Petitioner. What a coincidence ! The same day that Petitioner's privileges were summarily suspended by Tenet for alleged, yet non existing, imminent danger. In defending against this charge Petitioner pointed out that there was not even one incident report in 14 years that Petitioner ever threatened anyone let alone a nurse. The letter was solicited by Tenet from SEIU the nurses union favored by Tenet. The California Nurses Association had sued Tenet because Tenet had prevented its nurses from choosing the California Nursing Association as its union. The November 16, 2000 so called nurses complaint was by SEIU not by any individual nurse, was refuted at the hearing by all nurses. See Vol.6, Nov. 5, 2001 transcript of cross examination of Diane Jocher, RN, pp. 1392:11, and pp. 1398: 19 to 21 and administrative file in Writ v. Tenet, not part of these records.

The November 16, 2000 letter is attached hereto. The Court can take judicial notice of this letter. It is in the Medical Board's

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[3] Decision of California Court of Appeal in Jennings v. Palomar Pomerado Health System, 114 Cal.App. 4th 1108 (2003).

investigative file which Dr. Noble did not review.

8. **November 25,2000**

The Board asserts that on November 25, 2000 Petitioner and a female companion came into the admitting department and attempted to utilize the photocopying machine without permission. Petitioner's response was submitted to the Medical Board. He pointed out that he had gone to the hospital to complete dictations as requested by the Director of Medical Records. See Vol. 4, page 360-361 of administrative record. See also Declaration of Elizabeth Velazquez regarding alleged November 25, 2000 incident at pages 378-339 of Vol. 4, lines 18-25. See also Vol. 6, testimony of Diane Jochen, R.N., Supervisor Nurse, p. 1392 of Transcript of November 5, 2001, Volume XII.

Not only did the ALJ not make findings on these facts in dispute, she made no factual determination as to whether Dr. Noble ever considered Petitioner's responses to the allegations. However, the record itself is clear that Dr. Noble never considered Petitioner's responses.

III

ARGUMENT

THE BOARD'S ORDER COMPELLING THE PSYCHIATRIC EXAMINATION WAS IMPROPER

A. PETITIONER HAD THE RIGHT TO CHALLENGE THE ORDER IN THE ADMINISTRATIVE PROCEEDING

The first case cited by the Board in its Reply Memorandum is Kees v. Board of Medical Quality Assurance, 7 Cal.App.4th 1801 (1992). It

is amazing that the Board would cite the Kees case since it is probably the strongest case for Petitioner.

The major issue before the Court of Appeal in Kees v. Medical Board, was whether an order under Business & Professions Code Section 820 to submit to a mental examination is reviewable at all. It just so happens that what was reviewed by the Court of Appeal in the Kees case was a second order to submit to a mental examination, not the first order. However, in terms of the application of Kees v. Medical Board to the instant case, it does not matter whether the Court of Appeal was reviewing the validity of a second mental examination order or a first order. If the Medical Board were correct in the instant case, no one, neither the Medical Board nor this Court, would have jurisdiction to review the validity of the order issued in this case. We know from Kees v. Medical Board that that is not the law. In the Kees case, the Board issued a second order compelling a psychiatric examination. The Court of Appeal stated at page 1814 that repetitive mental examinations are permissible if there is a showing of good cause. Therefore, it was not the holding of Kees v. Medical Board that the second mental examination ordered was invalid as being beyond the authority of the Medical Board under Business & Professions Code Section 820. In other words, given the right factual scenario, a second or even a third mental examination order under Business & Professions Code Section 820 would be appropriate. The issue in the Kees case was not whether a second order could ever be issued - the Court of Appeals said that it could - but rather whether the order in the particular case was justified.

In other words, if a second order to compel a mental examination is within the jurisdiction of the Medical Board by virtue of Business & Professions Code Section 820, that order still must be supported by a factual showing. The Court of appeal stated at page 1815:

> ". . . The point is that the enforcement officials of the Board, relying on the overbroad nature of the April 8, 1985, order to compel psychiatric examinations, never made a showing of good cause to justify a second psychiatric examination. In this sense, Kees' privacy rights were violated. Therefore, the direction to undergo a second psychiatric examination was not valid, and Kees was not obligated to follow it. . . ."

What we gather from the quotation above at page 1815 of the Kees case is that if an order, whether a first or second order, is not valid, it may be disobeyed. It is not the number of orders issued, because we know from the case that repetitive mental examinations are not prohibited by Business & Professions Code Section 820. The issue is whether a particular order is justified. If not, it may be disobeyed.

Now we come to the order against Petitioner in this case. Was it a valid order? As stated above, we know from the Kees case that this Court may inquire into the validity of the order.

The order clearly was not valid.

Business & Professions Code Section 820 does not give the Medical Board a blank check to order anyone to submit to a mental examination. Some showing must be made to justify the issuance of the order. The order must be validly issued.

Here, it is undisputed that neither Dr. Noble nor the Medical

Board considered the exculpatory evidence submitted by Petitioner in response to the 805 Report submitted by Tenet, a hospital with which Petitioner had been involved in a bitter dispute. It was Tenet's attorney, Anna Suda, who provided the "investigative file" of the MBC. See People v. Eubanks, 14 Cal.4th 580 (1996) (District Attorney disqualified because "victim" controlled prosecution). We know from the Kees case that an improperly issued psychiatric examination order does invade the privacy right of the person subjected to that order.

If the order compelling the psychiatric examination were not subject to any limitation, a person could be compelled to submit to such an examination with no basis.

Petitioner submits in this case that the order was invalidly issued because neither Dr. Noble nor the Medical Board considered Petitioner's exculpatory evidence. He demonstrated quite convincingly in his exculpatory evidence that the 805 Report was false and that it was issued at the instigation of Tenet with whom Petitioner was involved in a lengthy and contentious dispute that was triggered by Petitioner's concern that patients receive quality medical care at Tenet's facilities. When Petitioner became an outspoken critic of Tenet, Tenet retaliated. As repeatedly emphasized, not a single complaint from any patient was brought against Petitioner by any hospital. Tenet wrongfully refused to provide Petitioner with a form so that he could submit an application to renew his staff privileges. That triggered further disputes instigated by Tenet and orchestrated by their attorneys.

Petitioner cannot find any case right on point dealing with the

obligation of the Medical Board to consider the exculpatory materials submitted by a physician in response to an 805 Report. As set forth earlier in this memorandum, the law is clear that a physician may submit exculpatory material in response to the 805 Report and Petitioner did so. Yet, the investigator for the Medical Board, Janet Seely, chose to keep such evidence from Noble. She chose Dr. Noble, even though he was a member of the staff of the very same hospital that reported Petitioner to the Medical Board. The closest case Petitioner can find is Johnson v. Superior Court, 15 Cal.3d 248 (1975), regarding the duty of a District Attorney to provide exculpatory evidence to a grand jury convened for the purpose of deciding whether to indict a person notwithstanding the existence of exculpatory evidence.

In the Johnson case, Mr. Lowell Ray Johnson was suspected of illegally transporting drugs. Prior to submitting the matter to the Grand Jury, the District Attorney filed a complaint, which led to the conducting of a preliminary hearing. At the conclusion of the preliminary hearing, the Magistrate dismissed the Complaint. The drug suspect, Mr. Johnson, actually testified at the preliminary hearing.

The District Attorney decided to pursue mr. Johnson anyway and went to the Grand Jury. However, the District Attorney did not bring the testimony of Mr. Johnson to the attention of the Grand Jury. The Grand Jury indicted Mr. Johnson without the benefit of the testimony he gave at the preliminary hearing. The District Attorney deliberately kept this testimony from the Grand Jury. By analogy, Janet Seely kept Petitioner's exculpatory evidence from Dr. Noble. The District Attorney tried to paint Mr. Johnson in the worst possible light,

relying upon the theory that the Grand Jury proceeding is not an adversarial proceeding. It is, of course, true that the decision to issue an order under Business & Professions Code Section 820 does not arise from an adversarial hearing. Nevertheless, if the investigator with the Medical Board has exculpatory evidence, the investigator, like the District Attorney in Johnson v. Superior Court, must submit that evidence to the Medical Board before the order is issued. Otherwise, we have a one-sided situation. In the instant case, where the decision to issue the order under Business & Professions Code Section 820 is based upon an 805 Report submitted by a hospital with whom the physician has an adversarial relationship, it is incumbent upon the investigator for the Medial Board to provide the exculpatory material. At a minimum, the Board should review the physician's rebuttal to the 805 Report, which the Business & Professions Code expressly authorizes the physician to submit to the Board. Dr. Noble did not have that either. This certainly undercuts any possible contention that Petitioner poses a threat to the public. Investigator Seely admits the 805 Report does not suggest that Petitioner is impaired. See Transcript of OAH hearing May 12, 2004, pp. 51 and 52. Even Deputy Attorney General Amy Fan acknowledged that Petitioner is not dangerous. (See OAH transcript of April 23, 2004, p. 17,lines 12-13).

These safeguards are important to protect privacy rights of physicians who are engaged in disputes with hospitals. That is precisely what occurred here. This is not a hypothetical example. It is undisputed that Tenet and Petitioner herein had an on-going, bitter relationship. This highlights the need for the Medical Board to be

somewhat skeptical of the information provided to it by the hospital pursuant to Section 805.

This is an extremely important case. Petitioner is being supported by various amici curiae. Indeed, in his current battle with Tenet, which is now pending before the Court of Appeal, a number of amici curiae briefs were filed in support of Petitioner by the California Medical Association, American Medical Association, Union of American Physicians & Dentists, California Academy of Attorneys For Health Care Profession. See in Administrative Record here Vol. 8, Bate Stamped 01219 to 01303. As Mark Twain observed "A lie makes it half way around the world before the truth has a chance to put its shoes on." See page 1301.

Not only was the order invalid under Business & Professions Code Section 820 because the Board did not consider exculpatory evidence, it was also invalid because it was issued at the request of Dr. Noble, a "medical director" paid Tenet Agent" and a member of the staff of the reporting institution with whom Petitioner has had an on-going dispute. Clearly, Janet Seely knew this. She was very evasive in her testimony and only reluctantly acknowledged her contact with an attorney for Tenet, Anna Suda. It is clear that Tenet's attorneys have manipulated the system to get back at Petitioner for having the guts to testify against Tenet and Tenet physicians.

It is interesting to note that Dr. Noble asserts that from his review of the case, Petitioner appears to be paranoid. This is boot-strapping at its ultimate. Tenet's attorneys have orchestrated a campaign to harass and intimidate Petitioner, who, when he reveals the

well orchestrated attack by Tenet's attorneys against him, is accused of being paranoid. We have what might appear to be a self-fulfilling prophecy on the part of Tenet. It pursues Petitioner and then accuses Petitioner of being paranoid when Petitioner responds to the attack.

The Board cites Arnett v. Dal Cielo, 14 Cal.4th 4 (1996) for the proposition that an order to undergo a psychiatric examination pursuant to Business & Professions Code Section 820 is an investigatory, not an accusatory, procedure. While this statement, in the abstract, is true, it has nothing to do with the holding in the Arnett v. Dal Cielo case. The issue before the Supreme Court in Arnett v. Dal Cielo was whether the Medical Board had jurisdiction to issue a subpoena to a hospital for the production of hospital Peer Review Committee records pertinent to a doctor. The Supreme Court concluded that the Board could obtain the information by subpoena. Cases that do not support a particular legal principle should not be cited by a party in litigation. The Arnett case is such a case.

The Board ridicules Petitioner's "contempt" analogy and contends that Petitioner has fundamentally failed to understand the nature of an order under Business & Professions Code Section 820. To the contrary, Petitioner relies upon Kees v. Board of Medical Quality Assurance, supra, to justify his refusal to obey the psychiatric examination order.

The Board relies upon Smith v. Board of Medical Quality Assurance, 202 Cal.App.3d 316 (1988), but the case is not really on point. The Smith case involved the constitutionality of Business & Professions Code Section 2292, which authorizes the Board of Medical Quality

Assurance to compel a physician to undergo a professional competency examination. The statute in that case contained a number of procedural safeguards including the right of the physician to file opposition to a petition to compel the examination. Only if the Board's Division of Medical Quality determines that a professional competency examination should be given can the physician be compelled to submit to the examination. Only if the Division **"finds that reasonable cause exists"** may it order the physician to undergo a professional competency examination.

To the contrary, in the instant case the Board issued the order to conduct the psychiatric examination without considering Petitioner's response to the underlying allegations contained in the false 805 Report which was generated by Tenet, a major national hospital chain with whom Petitioner was in a heated dispute. The Board contends that the Smith case supports the proposition that a physician may not use an administrative tribunal to test or review the propriety of the agency's "reasonable cause" determination. It is not true that the Smith case supports the decision of the Board. As stated, the basis for compelling the competency examination was reasonable cause. The Board in the instant case seems to be arguing that no justification is necessary to compel a physician to undergo a psychiatric examination and that no vehicle exists for challenging an arbitrary decision. The Smith case does not hold that the Medical Board can act arbitrarily and disregard its own statutory limitations. The Smith case supports Petitioner herein. In particular, the Court of Appeal in the Smith case stated at page 325:

> "We are satisfied that the Board did not abuse its discretion. The Petition and opposition filed in this case clearly established reasonable cause. . . ."

In the instant case, in contrast, the Board did not consider any opposition by Petitioner. It did not consider anything Petitioner submitted. The Medical Board in the instant case went well beyond what the Board did in the Smith case. If the Board were correct in its analysis of the Smith case the Court of Appeal in the Smith case would not have stated that it was satisfied that the Board did not abuse its discretion. Rather, the Court of Appeal would have stated in the Smith case that it was irrelevant whether the Board did or did not abuse its discretion. If it is true, as the Board now insists in this case, that the Board can do whatever it wants because it is simply investigating Petitioner and not adjudicating his competence then why was it necessary for the Court of Appeal to note that the Board in the Smith case "did not abuse its discretion." Why was it important for the Court of Appeal in the Smith case to note that the **Board considered the opposition filed by the physician in that case.**

Most important, the Court of Appeal stated at the bottom of 325 in the Smith case with respect to the papers filed by the doctor in opposition to the petition,

> ". . . The opposition papers did not raise any serious substantive challenge to the accuracy of the petition's allegations." (Emphasis added)

In the instant case, Petitioner Mileikowsky is most definitely challenging "the accuracy" of the allegations.

The Kees case follows along the same lines as the Smith case. It

does not state that a physician has no right at all to challenge any investigative order. Some investigative orders are simply improper and not authorized by law. It is simply not true that an investigative body such as the Medical Board has the authority to issue any investigative order it chooses to issue without regard to any fact.

The Court of Appeal in the Smith case basically held that the full panoply of due process rights do apply in the investigative stage. Petitioner does not disagree with this general proposition of law. However, some consideration of Petitioner's response should have been given and the Board should have made findings on this particular point. Instead the Board totally ignored the issue altogether.

It is also important to note that in the Smith case the Court of Appeal pointed out that certain issues were waived because the attorney for Smith did not present them. For example, in footnote 5 of page 329 the Court of Appeal in the Smith case noted that the right of privacy issue was never presented and therefore the Court of Appeal did not consider it. Here Petitioner is specifically urging this Court to consider the fact that a psychiatric examination does invade privacy in a way that taking a competency examination does not. Also, there is a social stigma attached to a psychiatric examination that does not attach to a different kind of examination. Moreover, the result of a psychiatric examination can be manipulated by the examining doctor, unlike a blood test examination or a general competency examination that may be objective in scope. This brings us to the next major issue, bias.

///

B. **PETITIONER DEMONSTRATED BIAS**

Petitioner has demonstrated substantial bias in this case. Dr. Noble, upon whose declaration the psychiatric order was made, is related to and paid by Tenet that instituted the underlying proceeding by filing the false 805 Report. More important, Dr. Noble referred to an allegation that Petitioner had taken 150 photographs of a particular surgical procedure yet that information was nowhere in any report submitted to Dr. Noble or the MBC. No such allegation exists in any of the charges of Tenet nor supported by any incident report of the Tenet facility that submitted that false 805 Report. The only way Dr. Noble could have learned of this information was through attorney Mark Kawa, who has been manipulating Tenet's attacks against Petitioner. See Petitioner's fax dated November 4, 2002 to the Medical Board (Exh. C). See Kawa's advertisement article entitled "Taming The Disruptive Physician," where he recommends the use of psychiatrists as "expert witnesses." Vol.4, Exh. 4.

At the hearing on the application for the stay conducted on August 12, 2004, the Court very perceptively picked up something very revealing. The transcript of the August 12, 2004 hearing reflect the following comments made by the Court:

> "The third thing that strikes me is that Dr. Noble's declaration is dated October 10, 2002. It doesn't actually refer to the investigative report which was dated subsequent. It was dated October 11, at the earliest after Dr. Noble' declaration and it leaves the court wondering how Dr. Noble was aware of information and facts that were not in the 805 Report unless he had outside personal knowledge or was getting information directly from the

> investigator which doesn't appear in the report.
>
> In any event, it certainly calls into question Dr. Noble's bias possibly and credibility which seems to have been ignored by the Board.
>
> So, I have serious concerns about the integrity of this process which I would hope the Attorney General would share. It seems to me the integrity of the process is as important as the ultimate outcome here." (August 12, 2004 transcript, p. 4, lines 3-18).

The Board never answered the Court's perceptive question put to the attorneys on August 12, 2004 and has totally ignored the Court's comment in its response filed with this Court. It has no response and therefore has ignored it.

This Court hit the nail right on the head with respect to bias. Bias is important in this context given the fight between Petitioner and Tenet. Moreover, bias is extremely important when one considers that what is at stake here is a psychiatric examination, which is fraught with the danger of subjective bias.

More and more the judiciary is getting involved in the issue of fairness at hearings. See, e.g., Haas v. County of San Bernardino, 27 Cal.4th 1017 (2002, Nightlife Partners, Ltd. v. City of Beverly Hills, 108 Cal.App.4th 81 (2003) and Yaqub v. Salinas Valley Memorial Healthcare System, ___ U.S. ___, 2004 DJDAR 11658 (September 16, 2004). Admittedly these are cases involving the fairness of administrative hearings themselves but the principle should apply to those types of administrative hearings involving the use of psychiatric examinations, where the issues are very subjective and where an improper conclusion

drawn by a biased examiner could destroy a physician's reputation. It would be one thing if a doctor or a lawyer were falsely accused of taking drugs. An objective blood examination could dispel the false accusation. However, in a case like this where we are dealing with a psychiatric examination it is extremely important to make sure that the process is extremely fair. A psychiatric examination is intrusive and is subject to manipulation and abuse.

It is also noteworthy that the allegations in this case are really minimal when it comes to a psychiatric problem. No one, for example, has contended that Petitioner walks down the street talking to himself or tells people that he is receiving radio signals in his teeth. All one need do is compare the allegations (as false as they are) against Petitioner with the facts in the Kees v. Medical Board case. The doctor in the Kees case appeared dirty with rumpled clothing and acted as though he were intoxicated. His office looked as though it had been ransacked with paper and trash on the floor and medication bottles and boxes on the floor. While operating an EKG machine Dr. Kees rambled about the lottery. He was unable to operate his machine.

Here, in contrast, we have at the most a physician raising his voice at office staff for deliberately not giving him the application to renew his staff privileges. If losing one's temper justifies a psychiatric examination then almost any professional is subject to a psychiatric examination order.

IV

CONCLUSION

Perhaps the most compelling argument in favor of Petitioner is the

unbelievable position taken by the Board in this case. This Court reached the heart of the issue on August 12, 2004 when it asked Deputy Attorney General Amy Fan the following question (in the form of a comment)

> "THE COURT: Okay. So, stop there. So, it sounds to me like the Board's position is, however unfounded the underlying charges might be, once it decides that an exam is necessary it can order one.
>
> Ms. Fan: That's correct." (August 12, 2004 transcript, p. 12, lines 17-21).

With all due respect to the Board this cannot be the law. There must be some minimal, factual basis before the order can be issued. Unfortunately, that is not the position of the Board. This Court is respectfully requested to advise the Board that it is wrong.

Respectfully submitted,

Roger Jon Diamond

ROGER JON DIAMOND
Attorney for Petitioner

LOCAL 535
SEIU
SOCIAL SERVICES UNION
AMERICAN FEDERATION
OF NURSES

November 16, 2000

Jerry Clute
Chief Operating Officer
Tarzana Regional Medical Center
18321 Clark Street
Tarzana, CA., 91356

Dear Mr. Clute:

This is to respectfully direct your attention to an issue involving workplace safety which is of great concern to the Union.

As you aware, SEIU Local 535 represents the professional employees at Tarzana Medical Center. Several registered nurses, including the chapter president, have reported to me that they have been subjected to inappropriate behavior by the physician Dr. Miliekowsky. Nurses have stated that they feel harassed and physically threatened by him.

One of the paramount and most fundamental concerns of this or any Union is the safety of its members. I trust that Hospital administration of the same mind and will do whatever is necessary to bring about a safe and harassment free work place.

Please contact me if I can be of any assistance and to let me know how this issue is being addressed.

Sincerely:

Valerie Harragin
Field Representative

cc:

309 So. Raymond Avenue
Pasadena, CA 91105
626-796-0051
Fax 626-796-2335
Organizing Department
626-796-5782
Fax 626-796-5004

Other Offices in
Oakland
Sacramento
San Jose
Fresno
Santa Barbara
San Diego

SERVICE EMPLOYEES
INTERNATIONAL UNION
AFL-CIO, CLC

TheStreet.com

Re: CNA Vs. Seiu

Melissa Davis

Tenet Tussle Shows Dissent Rising in Ranks

By Melissa Davis
Staff Reporter
06/10/2003 02:50 PM EDT
URL: http://www.thestreet.com/stocks/melissadavid/10092669.html

See page 2

The biggest threat to **Tenet** (THC:NYSE - news - commentary) could be festering inside its own walls.

Already ambushed by numerous external probes, the giant hospital operator now must deal with mounting attacks from within its own ranks. During the past week, at least one physician and thousands of registered nurses have taken fresh swings at the ailing hospital chain. Both parties essentially accuse Tenet of violating federal laws.

For Tenet, the doctor's testimony could prove especially troubling. By now, the hospital chain is accustomed to serious allegations from nurses seeking workplace improvements. But the doctor's attack -- which already has triggered one indictment -- appears to be a first.

"Never before has the government been able to get between Tenet and its doctors," said Jim Moriarty, a Houston attorney who scored a huge settlement against Tenet nearly a decade ago. "This could be the linchpin that brings the whole company down."

Tenet has downplayed the indictment as the "unfortunate" result of one doctor's desperate attempts to avoid jail time for his own misconduct. Investors continued to watch warily, sending the stock -- which has lost 69% of its value over the last year -- up a nickel Tuesday to $16.05.

Sunnier Climes

Based largely on the testimony of former internist Paul Ver Hoeve -- described by Tenet as a "disgraced physician" guilty of 64 counts of felony Medicare fraud -- federal authorities last week indicted Alvarado Hospital CEO Barry Weinbaum on charges he broke Medicare laws himself.

Specifically, the feds have accused Weinbaum of paying various physicians more than $10 million in the aggregate to relocate to San Diego and refer Medicare patients to the Tenet-owned hospital Weinbaum has led there for more than a decade.

The indictment also alleges that Weinbaum knew he was breaking rules and attempted to cover his tracks. The government cites testimony from Ver Hoeve -- who confessed to participating in the alleged scam -- as evidence for its case.

"Barry Weinbaum instructed Dr. Paul Ver Hoeve and his accountant not to characterize the money that Alvarado Hospital had paid to Dr. Paul Ver Hoeve through the relocated physicians as 'Alvarado Income,'" the indictment states. So "Dr. Paul Ver Hoeve directed his accountant to change the characterization of the money that he received from Alvarado Hospital from 'Alvarado Income' to 'Other Income.'"

In some underserved areas -- such as rural states and Indian reservations -- hospitals are allowed to pay

relocation expenses for physicians who are willing to practice there. But Moriarty, for one, scoffs at the notion that Tenet needed perks to lure doctors to a Southern California city best known for its mild weather and beautiful beaches.

"That's an outrageous joke," Moriarty said. "When Tenet deliberately intercedes like that, it results in the most egregious violation of a doctor's duties. Now, the doctors are serving Tenet instead of their patients."

Moriarty is representing dozens of patients and survivors who've taken aim at Tenet's most scandalized hospital. Essentially, Moriarty's clients believe that doctors at Tenet's Redding, Calif., hospital performed dangerous -- and unnecessary -- heart procedures on them just to generate huge payments from Medicare. Since the Redding scandal broke last fall, Tenet has slowed down its billing for such procedures and shut down its busy Redding heart center because of a huge slump in admissions. But Redding heart surgeons, the hospital and Tenet itself remain under investigation by federal authorities.

Moriarty estimates that Tenet faces at least $1 billion in legal bills because of its practices at Redding alone. He describes Tenet as a hospital chain that has always viewed patients as nothing more than "billing opportunities." And he insists that Tenet's problems are systemwide.

For its part, Tenet has portrayed the Redding fiasco as an isolated problem that appears to be limited to two contract physicians who no longer practice at the hospital. But the company, which has denied any wrongdoing itself, faces serious patient backlash at other facilities as well. Busy Tenet hospitals on both sides of the country currently stand accused of providing poor or unnecessary medical treatment.

Risk Profile

A former employee of Hilton Head Medical Center, a Tenet hospital in South Carolina, says doctors there regularly took risks -- with management's blessing.

"Because there was no open-heart unit, the hospital's cath [catheterization] lab was only licensed by the state to do emergency heart caths -- not routine caths," the former employee said. "Despite this, the cardiologists regularly scheduled patients for nonemergent cardiac caths.

"Management knew about this, of course. But since the procedures generated enormous profits, they didn't do anything to stop it."

The California Nurses Association -- a vocal critic of Tenet -- predicts that scandals will soon erupt at multiple Tenet facilities. In the meantime, the powerful group is fighting to unionize Tenet's home-state nurses against the company's wishes. Last week, the union explicitly accused Tenet of breaking labor laws by attempting to block nurses from voting to join its ranks and pushing them toward less critical unions instead.

SEIU

Tenet hammered out a deal last month with two CNA competitors -- the Service Employees Union and the American Federation of State, County and Municipal Employees -- that guarantees nurses set raises in exchange for joining the one of the two unions and curtailing the threat of future strikes. Since then, an estimated 2,500 employees at six Tenet hospitals have taken the company up on its offer. But CNA -- perhaps the state's most powerful union -- claims far greater support.

In a statement last week, CNA said that 4,000 registered nurses at 13 Tenet hospitals have signed petitions demanding that CNA be added to the list of union choices.

"Tenet RNs do not want sham elections. They do not want Tenet handpicking a union for them. And they are offended at Tenet's crass efforts to bribe them into voting for" another union, CNA stated last week. "CNA is confident that the elections will go forward, and that the illegal backroom deal will be overturned."

CNA is primarily fighting to improve working conditions for current Tenet nurses and secure healthcare benefits for retired ones. But CNA's powerful voice -- rather than its specific labor demands -- may prove to be the biggest threat for Tenet. The big California union has aggressively sought to expose alleged abuses inside Tenet hospitals and, by now, dedicates an entire section of its Web site to the company's scandals.

Moriarty describes the nurses as "canaries" who are the only true patient advocates throughout the Tenet system. But he now has his ear turned in another direction. Moriarty believes the newly indicted Weinbaum -- currently backed by Tenet as "ethical and admired" -- could soon be singing as well.

"He will tell all," Moriarty predicted. "If I were the top five or 10 Tenet executives, I'd be hiring the best criminal lawyers in America right now."

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

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

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

Bill Lockyer, Attorney General
of the State of California
Amy Fan, Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013

I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at Santa Monica, California on September 23, 2004

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and was executed at Santa Monica, California on the 23 day of September 2004.

Judith A. Burgdorf

JUDITH A. BURGDORF