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May 23, 2005

The Honorable Chief Justice Ronald M. George
Honorable Associate Justices
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, California 94102-4712

Re: Dr. Gil Mileikowsky v. Tenet Healthsystem,
2d Dist., Div. 4, Case No. B168705
Support for Review or, in the Alternative, Depublication

Dear Chief Justice George and Associate Justices:

The Union of American Physicians & Dentists[1] urges this Court to grant the petition for review being filed in the above-referenced case. This case merits review to settle important questions of law and secure uniformity of decision thereon. (Cal. R. Ct. 29(a).) In the alternative, we request the Court order the appellate opinion in this case decertified from publication. (Cal. R. Ct. 979(a).)

The decision below holds that in so-called "peer review" proceedings in which a physician's professional peers are convened to decide whether he or she may continue having hospital staff privileges, a non-peer (the hospital

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[1]UAPD is an organization comprised of about 3000 members who are primarily physicians licensed in California. UAPD was granted leave to file an amicus brief by the Court of Appeal. It has previously been granted leave to file amicus briefs in American Hospital Association v. NLRB (1991) 499 U.S. 606; 111 S.Ct. 1539; Arnette v. Dal Cielo (1996) 14 Cal.4th 4; Grier v. Kizer (1990) 219 Cal.App.3d 422; Kime v. Bd. of Med. Qual. Assurance (unpub; 3rd Dist. No. 3 Civ. C0065550); Hillsman v. Sutter Mercy General Hospital (unpub. 3rd Dist. No. Civ. C010535); Stuart v. Sullivan U.S.D.C. N.J. No. 92-417; Seymour v. Bd. of Med. Qual. Assur. (unpub; 3rd Dist. No. 2 Civ. C000268) and Providence Hospital (1996) 320 NLRB 717, 717 n.1.

management lawyer appointed as a hearing officer) has the "inherent power" to terminate the physician's appeal for misconduct during the hearing (and thereby to uphold management's decision to terminate such physician). Mileikowsky v. Tenet Healthsystem, 05 CDOS 3247, 3254 (published April 19, 2005).

Such a procedure is no longer in any real sense the statutorily-required "peer review . . . performed by licentiates." Bus. & Prof. Code section 809.05. The non-peer hearing officer is supposed to "not be entitled to vote." Bus. & Prof. Code section 809.2(b). These and other statutory provisions are rendered meaningless if the non-peer hearing officer gets to take the case away from the peer body.[2]

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[2]Allowing a non-physician hearing officer to reject an appeal on his own rather than letting it be decided by physicians on the hearing panel is also contrary to Bus. & Prof. Code section 2282 (requiring "that the medical staff shall be self-governing with respect to the professional work performed in the hospital"). "Given the statutory and regulatory scheme, it is clear that applications for staff privileges are the province of the hospital's medical staff committee. [cites] Although a hospital's administrative governing body makes the ultimate decision about whether to grant or deny staff privileges, it does so based on the recommendation of its medical staff committee.[cites]." Alexander v. Superior Ct. (1993) 5 Cal.4th 1218, 1224-25. Those statutes are supported by several legitimate policy concerns: (1) giving a hospital management attorney control over medical staff privileging decisions could allow a management motivated by profit to exclude physicians concerned about quality of care; and (2) even if a hearing officer's motives were not so mixed, his domination would be contrary to where the expertise lies: see e.g. "Hospital Staff Privileges: The Need for Legislation," 17 Stan. L. Rev. 900, 903-904 (1965)("since hospital governing boards are generally composed of laymen, the only effective method of assuring that only competent practitioners are allowed to use the hospital is to seek the advice of the experienced physicians using the hospital.")

The decision below relies on a single non-California case for its conclusion that an administrative hearing officer has the inherent authority to grant a terminating sanction,[3] while ignoring several California appellate opinions holding that non-judicial hearing officers do not have inherent authority to issue terminating sanctions or contempt sanctions, but rather must derive such authority from an express legislative grant:

> While court commissioners and referees have been authorized in some jurisdictions to punish disobedience of their orders as contempts, it has been held that, in the absence of express authority, such officers have no such power (17 C.J.S. Contempt §53; 17 Am Jur. 2d Contempt §117). It has been held in California that nonjudicial officers have no power to punish for contempt unless specially so authorized by law. (People v. Schwarz, 78 Cal. App. 561, 570, 12 Cal. Jur. 2d Contempt, §39). Our research has disclosed no California case in which a subordinate officer, court commissioner or referee has been permitted to summarily exercise the power of contempt.
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> Marcus v. WCAB (1973) 35 Cal. App.3d 598, 605.

Accord, Morton v. WCAB (1987) 193 Cal. App. 3d 924, 927 ("Generally, administrative agencies are not empowered to adjudge contempt unless such power is expressly conferred by statute. [cite]"); People v. Kainoki (1992) Cal.App. 4th Supp. 8, 12-15.[4]

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[3]Metadure Corp. v. United States (1984) 6 Cl. Ct. 61, 66-67 (concerning the power generally of the Armed Services Board of Contract Appeals, not of a hearing officer separate from the board). The Court of Appeal did cite a California case for the proposition "that judges 'have inherent power to control litigation before them'" – a proposition which begs the question here, whether hearing officers in physician peer review proceedings are tantamount to judges. The statutory scheme makes clear that the real judges here are instead the panel of physicians making up the peer review body, not the non-physician providing ministerial assistance who "shall not be entitled to vote." Bus. & Prof. Code sec. 809.2(b).

[4]Because of this unbroken string of court decisions, the Legislature amended the Administrative Procedures Act to give administrative agencies

Thus the opinion below does not make a significant contribution to the legal literature, making its publication inappropriate under Rule 976(b)(4). In the alternative, this Court should grant review and resolve the inconsistencies in the caselaw for the benefit of the thousands of Californians involved in hearings before non-judicial hearing officers.

Respectfully,

Andrew J. Kahn
Attorney for UAPD

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the power to initiate contempt proceedings, but giving Superior Court judges alone the power to issue contempt sanctions. Gov. Code §§11455.10-11455.20. Only agency heads may initiate such proceedings. Parris v. Zolin (1996) 12 Cal.4th 839. Here, nothing so burdensome would be required: merely that the hearing officer obtain the peer review body's approval of the terminating sanction which he wishes to impose.

PROOF OF SERVICE
STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO

I am employed in the city and county of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is: 595 Market Street, Suite 1400, San Francisco, California 94105.

On May 23, 2005, I served the document(s) described as Letter to Honorable Chief Justice Ronald M. George re: Mileikowsky v. Tenet Healthsystem in this action by placing the true copies thereof enclosed in a sealed envelope addressed as follows:

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

Executed on May 23, 2005, at San Francisco, California.

[X] (STATE) I declare under penalty of perjury, under the laws of the State of California and the United States of America that the foregoing is true and correct.

Joyce A. Archain